

INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

In the Matter of an Arbitration
Between:

GAMA GÜÇ SİSTEMLERİ MÜHENDİSLİK VE TAAHHÜT (“GAMA” or “Claimant”)
AND
THE REPUBLIC OF NORTH MACEDONIA (“MACEDONIA” or “Respondent”)
(The Claimant and the Respondent hereinafter collectively referred to as “Parties”)

ICC Arbitration No. 26696/HBH

Procedural Order No. 3

I. The Parties’ Positions

A. The Claimant’s Requests

1. On 14 November 2023, the Claimant submitted two requests to the Tribunal by separate letter of the same date. The first letter, styled “Claimant’s Introduction of New Evidence”, introduced or, in the alternative, sought leave to introduce three documents (hereinafter referred to as the “**Court Proceedings Documents**”):

- (a) The Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (“Dismissal Judgment”), rendered in the debt enforcement proceedings between GAMA and the Company for Production of Electricity and Heat TE-TO Skopje (“TE-TO”);
- (b) GAMA’s appeal dated 4 October 2023 against the Dismissal Judgment; and
- (c) TE-TO’s reply dated 25 October 2023 to GAMA’s appeal against the Dismissal Judgment.

2. The Claimant’s second letter of 14 November requested leave to introduce into evidence eight new documents, which it had secured on 25 September 2023 in response to a request submitted in late June 2023 to the Respondent’s authorities under the Macedonian Law on Free Access to Public Information (“FOI”). These documents (hereinafter referred to as the “**FOI Documents**”) are as follows:

- (a) The criminal complaint of the Financial Police dated 19 June 2019 submitted to the Public Prosecution Office for Organized Crime and Corruption against (i) TE-TO, for the criminal offence “false Insolvency”;

(ii) Vadim Mihailov, the President of the Management Board of TE-TO, for the criminal offences “abuse of official position” and “false Insolvency”; (iii) Sashka Trajkovska, the bankruptcy judge who approved the Reorganisation Plan dated 6 June 2018 for the criminal offence “abuse of official Position”; (iv) Snezana Sardzovska, the notary who certified the annexes to the loan agreements and the Loan acceleration agreements for the criminal offence “abuse of official position; (v) Ivica Sekovanovikj, former President of the Management Board of TE-TO, for the criminal offence “money laundering”; (vi) Dmitry Dmytrenko, former President of the Management Board of TE-TO, for the criminal offence “money laundering”; and (vii) Mihail Scobioala, former President of the Management Board of TE-TO, for the criminal offence “money laundering”.

- (b) The letter by the Public Prosecution Office dated 2 January 2020 in response to the request for information from the Anticorruption Commission.
- (c) The letter of request for information by the Anticorruption Commission no. 12-5267/7 dated 30 December 2019 to the bankruptcy judge who approved TE-TO’s reorganization and the letter of response by the bankruptcy judge dated 2 January 2020 in response to the request from the Anticorruption Commission.
- (d) The letter of request for information by the Anticorruption Commission no. 12-120/29 dated 13 October 2020 to the bankruptcy judge who approved TE-TO’s reorganization and the letter of response by the bankruptcy judge dated 16 October 2020 in response to the request from the Anticorruption Commission.
- (e) The letter of request by the Directorate for Large Taxpayers – Unit for Debt Collection at the Public Revenue Office (“PRO Debt Collection Unit”) no. 28-559 dated 4 February 2020 to the Director of the Public Revenue Office; and
- (f) The letter by the PRO Debt Collection Unit no. 28-3820/1 dated 16 October 2020 to the Anticorruption Commission.

3. The Claimant noted that the FOI Documents are responsive to its requests to produce documents in this arbitration, specifically Requests Nos. 1,2, and 5, but argued that Macedonia’s objections to production were no longer justified, and that it had taken immediate steps to obtain them after its requests for production were denied in Procedural Order No. 2, but only received the documents after filing its Reply. It also argued the relevance and materiality of each of the requested documents.

B. The Respondent's Observations

4. On 20 November 2023, the Respondent, at the invitation of the Tribunal, provided its observations on the Claimant's requests. It indicated in that letter that it did not object to the introduction of the Criminal Proceedings Documents, but detailed three independent grounds on which it submitted the admission of the FOI Documents should be rejected.

5. First, the Respondent argued that the request was unjustified. Citing to the Secretariat's Guide to ICC Arbitration of 2012 (RL-127), it suggested that exceptional circumstances needed to be shown by Claimant in order for the documents to be introduced which, it said, Claimant had failed to do. It also noted Claimant's acknowledgement that the FOI Documents were responsive to three production requests made the Claimant which the Tribunal denied in Procedural Order No. 2. Respondent noted its objection to the earlier requests on grounds of relevance and materiality, and argued that Claimant had shown no basis for the Tribunal to change its decision. (p.2)

6. Second, the Respondent argued admission of the documents would constitute an "impermissible end run" around the agreed procedure for this arbitration. (p.h2)

7. Third and finally, the Respondent argued the request was untimely, noting that Claimant had received the documents on 25 September 2023, but had only requested leave to introduce them into evidence on 14 November. Respondent expressed concern that the admission of the documents at this time would prejudice its preparation of its Rejoinder, currently due 11 December, and potentially jeopardize the hearing dates set for late January 2024. (p.3) Respondent also noted that the Claimant had not shared the documents with it in advance of its request to have them introduced into the record. (p.2)

C. Further Observations from the Parties

8. On 27 November 2023, the Tribunal invited the Claimant to provide its reasons for a) not sharing such documents with the Respondent in advance, and b) the lapse of time between its receipt of the documents on 25 September 2023 and its 14 November request that they be admitted into evidence.

9. On 29 November 2023, the Claimant provided its observations on the points raised by the Tribunal. In summary, the Claimant indicated it did not share the FOI Documents whose admission is sought because it considered they were already in the possession of the Respondent, and filed the request to introduce the FOI Documents as soon as was practicable following their receipt.

10. On 30 November 2023, the Respondent, having received leave from the Tribunal, provided its response to the Claimant's observations. The Respondent disputed the Claimant's submission that the FOI Documents were in its possession, and continued to criticize its delay in requesting their admission.

II. The Tribunal's Analysis

11. As communicated to the parties in its email of 27 November, 2023, the Tribunal has no difficulty with the admission of the Court Proceedings Documents. Their admission is therefore confirmed.

12. The FOI documents present a more difficult issue. The Tribunal does not consider that the second ground put forward by the Respondent in its submission of 20 November, that the request constitutes an “impermissible end-run” on the agreed procedure, justifies rejection of the request. First, while the FOI Documents are, as Claimant rightly acknowledges, responsive to three requests rejected by the Tribunal and opposed by the Respondent, Requests Nos. 1, 2 and 5 were far more sweeping in their terms. Their rejection by the Tribunal after Respondent raised multiple grounds of objection did not preclude the Claimant from pursuing other lawful routes under municipal law to secure at least some of the requested documents. At no point in this process has the Claimant waived its domestic rights under the Respondent's law in relation to transparency and disclosure. The fact that the Respondent cannot formulate a parallel request does not create a situation of inequality of arms as both parties have had an opportunity to make disclosure requests within this proceeding.

13. Nor does the Tribunal's earlier rejection of the three disclosure requests to which these documents are responsive preclude this application. As noted already, those disclosure requests were framed in broad terms, and resulted in multiple objections from Respondent. Of those raised earlier, only the objection of a lack of relevance and materiality continues to pertain here. As noted by both parties, however, the Tribunal did not specifically reject the earlier requests on the grounds of a lack of relevance or materiality. It is therefore open to the Claimant to show the relevance and materiality of the FOI Documents at this time, which it has sought to do in its 14 November Letter in relation to each of the documents.

14. The Respondent argues that only exceptional circumstances can justify the introduction of this evidence at this stage of the proceedings. This position ties in with the third objection, on grounds of timeliness. In the Tribunal's view, the later the stage of the proceedings, the stronger the case needs to be for the admission of new evidence, given the potential impact on the proceedings if the documents are in fact relevant and material and the need to avoid prejudicing the position of a party by their admission.

15. These are, of course, documents from or to governmental authorities of North Macedonia, not third-party documents. And their relevance is to issues that have already been raised by the Claimant's submissions—indeed, it appears to the Tribunal from the face of the Claimant's submissions (the Tribunal has not reviewed the documents themselves pending a decision on their admission), that they are related to central issues in Claimant's case. This strongly suggests their relevance and potential materiality. and reduces the risk of potential prejudice from their introduction at this stage.

16. Nonetheless, the Tribunal is troubled by the proximity of the FOI Documents request to the filing date of the Respondent's Rejoinder and to the hearing. For that reason, it asked the Claimant to provide further explanation in relation to this issue.

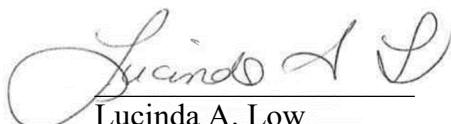
17. The Tribunal's accepts that it would have taken some time following receipt of the FOI Documents, especially if they were part of a larger set of documents produced to the Claimant, to review them and determine whether an application should be made to introduce any of them into the record. However, the Claimant was well aware of the approaching deadline for Respondent to submit its Rejoinder. Moreover, the Claimant was aware from the prior interactions of the parties with respect to its disclosure requests that the Respondent took the position that it did not have access to the documents of independent agencies of the government of North Macedonia, either by virtue of those agencies' independence from the executive branch, or by virtue of their classification as secret. The Tribunal has difficulty with the fact that the Claimant chose not to raise the admission of the FOI Documents with the Respondent and did not share those documents with the Respondent prior to seeking to have them introduced into evidence, especially given its awareness of the Rejoinder deadline.

18. For these reasons, the admission of the FOI Documents is denied at this time without prejudice to a later application of the Claimant, if it continues to consider the Documents to be relevant and material, for their introduction. The Tribunal encourages the Claimant to share the FOI Documents with the Respondent in advance and for the parties to endeavor to reach agreement on their admission. If the parties are unable to reach agreement in whole or in part, the Claimant may make a new application for their introduction into the record.

III. Decision and Order

19. For the foregoing reasons, the Claimant's request to introduce the Court Proceedings Documents is granted and Exhibits C-202, C-203 and C-204 are now admitted to the record. The request to introduce the FOI Documents is denied, without prejudice as set forth above.

Issued on behalf of the Tribunal, on 4 December 2023.



Lucinda A. Low
President of the Tribunal