

International Chamber of Commerce (ICC)
International Court of Arbitration
ICC Arbitration No. 26696/HBH

GAMA GÜÇ SİSTEMLERİ MÜHENDİSLİK VE TAAHHÜT A.Ş.

Claimant

– vs –

THE REPUBLIC OF NORTH MACEDONIA (MACEDONIA)

Respondent

CLAIMANT'S INTRODUCTION OF NEW EVIDENCE

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I. INTRODUCTION

1. In accordance with Part II, Section (B)(i)(o) of the Tribunal's Procedural Order No. 1 dated 28 July 2022,¹ GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**Claimant**" or "**GAMA**") introduces into the record of the present arbitration new documentary evidence:
 - (i) the Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 ("**Dismissal Judgment**"),² rendered in the debt enforcement proceedings between GAMA and TE-TO ("**Debt Enforcement Proceedings**");
 - (ii) GAMA's appeal dated 4 October 2023 against the Dismissal Judgment;³ and
 - (iii) TE-TO's reply dated 25 October 2023 to GAMA's appeal against the Dismissal Judgment.⁴
2. The Dismissal Judgment was served to GAMA on 27 September 2023, after the filing of GAMA's Reply on 10 August 2023. The Dismissal Judgment, GAMA's appeal against the Dismissal Judgment, and TE-TO's reply to GAMA's appeal represent new facts that occurred after the filing of GAMA's last written submission within the meaning of the above-cited provision of the Tribunal's Procedural Order No. 1.
3. For reasons of procedural economy and considering that the new evidence is already in Macedonia's possession, GAMA provides below a short description and legal argument regarding new evidence in order to allow Macedonia to address this in its Rejoinder and to avoid a separate round of pleadings with respect to that. To the extent that the Tribunal considers that the argument on the basis of new evidence requests a prior leave from the Tribunal, GAMA respectfully requests so.

II. DISMISSAL JUDGMENT

4. The Dismissal Judgment represents the latest in a sequence of arbitrary and profoundly unjust decisions of the Macedonian courts, which taken together with the previous decisions of Macedonian courts in TE-TO's reorganization proceedings and in Debt Enforcement Proceedings, constitute a breach of the Treaty and customary international law by Macedonia.

¹ Procedural Order No. 1, Part II, Section (B)(i)(o) ("No production of new documentary evidence shall be allowed or accepted after the filing of the last written submission, except (i) by agreement of the Parties; (ii) if the new document reflects or relates to a fact that occurred after the filing of the last written submissions or (iii) unless the Party wishing to introduce the new document requests leave from the Tribunal and leave is granted after consulting the other Party. For these purposes, documentary evidence means evidence of any kind, whether recorded, on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information.") [emphasis added]

² Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**)

³ GAMA's appeal dated 4 October 2023 against the Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-203**)

⁴ TE-TO's reply dated 25 October 2023 to GAMA's appeal dated 4 October 2023 against the Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-204**)

5. After more than a decade of adjudicating GAMA's claim and five years after GAMA's claim was acknowledged by a final decision of the bankruptcy division of the same court ("**Plan Approval Decision**"),⁵ the Civil Court Skopje dismissed GAMA's claim on the grounds of *res judicata* and ordered GAMA to cover TE-TO's legal costs totalling MKD 690,315.00 (approximately EUR 11,160).⁶ As explained below, the Dismissal Judgment is in manifest breach of Macedonian law, in contradiction with the Plan Approval Decision and additionally eliminates GAMA's chance of any recovery of its residual claim against TE-TO.

6. **First**, following two remanded appeals,⁷ the Civil Court Skopje in the Dismissal Judgment finally acknowledged the existence of the Plan Approval Decision acknowledging GAMA's claim. In 2021, the Civil Court Skopje, in retrial, denied GAMA's claim without so much as a nod to this decision.⁸ In stark contrast, the Civil Court Skopje now relies on the "[...] indisputable fact that by the decision of the Basic Court Skopje 2 Skopje [Civil Court Skopje] ST no.124/18 and 160/18 dated 14.06.2018 the Reorganization Plan of the now defendant [TE-TO] was accepted and approved.", in which "[...] the claimant [GAMA] has a determined claim in the amount of MKD 307,453,500.00 [EUR 5 million]."⁹ Despite conceding to this "indisputable fact", the Civil Court Skopje paradoxically dismissed GAMA's claim on the grounds of *res judicata* "[...] [c]onsidering that the claimant's [GAMA's] claim subject to the[se] proceedings has been determined in other [TE-TO's reorganization] proceedings [...]" and, that it "[...] cannot decide on the same [GAMA's] claim that has already been decided upon once with a final decision [...]"¹⁰ This reasoning is fundamentally flawed.

7. Under the doctrine of *res judicata* under Macedonian law, a final judgment rendered by a competent court constitutes an absolute procedural bar to subsequent litigation involving the same claim or cause of action between the same parties.¹¹ *Res judicata* applies if there is a final judgment on the merits in a prior litigation involving the same parties and a subsequent suit based on the same cause of action. A final decision approving a plan for reorganization in bankruptcy proceedings is indeed considered to have *res judicata* effect.¹² However, the scope of the *res judicata* effect of a final decision approving a plan for reorganization is contingent on any reservations made in the decision itself. This is the case here.

⁵ Decision of the Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 14 June 2018 (**C-015**); Decision for amendment of the Decision of the First Instance Civil Court Skopje no. 3 ST-124/18 and 160/18 dated 17 July 2018 (**C-016**); Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)

⁶ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.1

⁷ Reply, ¶ 85-88, 91. See also Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**) and Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**)

⁸ See Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**). For GAMA's arguments on the recognition of its claim in TE-TO's reorganization proceedings, see Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-070**)

⁹ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.9

¹⁰ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.10

¹¹ Law on Litigation Procedure (Official Journal of the Republic of Macedonia no. 79/2005), (**C-039 Resubmitted**), Article 322

¹² Bankruptcy Law (**C-075**), Article 239(2) ("After the court decision for approving the proposed plan for reorganization becomes effective [final], the provisions of the contents of the plan shall become binding on all participants. The statements given in accordance with article 224 paragraphs (2), (3) and (4) of this Law become enforceable.")

8. As explained in GAMA's Reply,¹³ the bankruptcy judge approved TE-TO's reorganization plan where GAMA's principal claim (without interest) was acknowledged but erroneously ordered the Debt Enforcement Proceedings *to continue* until the decision on the merits and unequivocally made TE-TO's obligation to pay GAMA's residual claim of EUR 500,000 (10% of the principal) conditional on GAMA prevailing on the merits.¹⁴ Despite the manifest illegality of this order of the bankruptcy judge,¹⁵ GAMA's right to recover its residual claim from TE-TO is conditional on prevailing on the merits in the Debt Enforcement Proceedings, as ordered by the judge in the Plan Approval Decision. The Civil Court Skopje, in blatant disregard of this order, reasoned that "[...] *the creditors who properly reported their claims during the proceedings in relation to reorganization of the defendant [TE-TO], retain the right to have this claim determined, that is, they do not need to report the claim again.*"¹⁶ It is entirely unclear how this could justify a decision dismissing GAMA's claim on grounds of *res judicata*. It is also wrong – in TE-TO's reorganization, creditors, including GAMA, were not required to report their claims at all since TE-TO acknowledged them in its reorganization plan.
9. Instead of dismissing GAMA's claim, the Civil Court Skopje should have decided on the merits by rejecting TE-TO's objection and upholding the notary decision for enforcement of GAMA's claim against TE-TO since GAMA's claim had been confirmed in the Plan Approval Decision. This would not have affected the implementation of the reorganization plan, it would not have altered any of the terms of the reorganization plan and would not have modified the Plan Approval Decision in any way.¹⁷ But most importantly, it would have allowed GAMA to recover its residual claim from TE-TO under the terms set by the bankruptcy judge.

¹³ Claimant's Reply, ¶¶ 48, 97-99

¹⁴ Decision of the Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 14 June 2018 (**C-015**), p. 32 ("In terms of the creditor's [GAMA's] claim, a court proceeding is in progress and until the lawsuit is over, its status is uncertain[,] and indisputable according to the law the creditors from the same payment lines are settled the same but this claim shall be settled when the procedure is final, if the period for payment of these claims comes and the court procedure is not completed, the debtor [TE-TO] in accordance with the law has an obligation to keep a reservation and to continue with the realization of the plan and in the end the debtor's shareholders are settled.") [emphasis added]

¹⁵ Reply, ¶¶ 48, 97-99, 157(h), 168-169, 280-281. For the legal effect of effective court decisions under Macedonian law see Law on Courts (**C-165**), Article 13(2) ("The legally valid court decision shall have undisputed legal effect."); and Article 13(5) ("Everyone shall be obliged to obey the legally valid and enforceable court decision under threat of legal sanctions.")

¹⁶ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.10

¹⁷ Decision of the Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 14 June 2018 (**C-015**), p. 2 ("UNTIL THE EFFECTIVENESS AND AFTER THE VALIDITY of the decision for approval of the reorganization plan, the creditors for the amount of claims determined by this reorganization plan for which they have obtained an executive document, as well as third parties, may not perform enforced collection of established receivables by blocking the company's account, as well as for already issued enforcement orders in enforcement proceedings.") [emphasis added] see also Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 23 ("If any of the creditors receives a claim based on a final and enforceable verdict [judgment], adopted after the day of entry into force of the reorganization plan, that claim will be settled in the same way and under the same conditions as the claims of the other creditors of their class."); Bankruptcy Law (**C-075**), Article 242(1) ("The bankruptcy creditors whose claims have been determined and have not been disputed by the debtor at the verification hearing may be executed against the debtor as an executive decision for settlement of their claims registered in the table (chart) of submitted claims in the legally approved reorganization plan. The disputed claims that have become enforceable later shall be treated as they have never been disputed. Article 204 of this Law shall be applied accordingly in this case.")

10. By dismissing GAMA's claim, the Civil Court Skopje has effectively released TE-TO of its obligation to pay anything to GAMA and additionally expropriated GAMA's residual claim of EUR 500,000, in contradiction with the Plan Approval Decision.
11. **Second**, the Civil Court Skopje's reasoning that "[...] *the claimant [GAMA] has already been determined with a claim in the amount of EUR 5,000,000.00, on which interest has been calculated as of the initial application, so there is no possibility for the principal amount to become time barred,*"¹⁸ is manifestly wrong. Even if the dismissal of GAMA's claim does not release TE-TO of its obligation to pay GAMA's residual claim of EUR 500,000 (which it does, due to the egregious order of the bankruptcy judge making the repayment of GAMA's residual claim conditional on GAMA prevailing on the merits in the Debt Enforcement Proceedings), the residual claim became time-barred by Macedonia's retroactive shortening of the statute of limitations for enforcement of claims based on effective court decisions from 10 to 5 years, which on its own and in addition to the unlawful taking of GAMA's claim in TE-TO's reorganization constitutes a denial of justice and a breach of the Treaty.¹⁹ As of 30 August 2023,²⁰ GAMA cannot enforce its residual claim against TE-TO on the basis of the Plan Approval Decision.²¹ The same holds true if GAMA prevailed on the merits in the Debt Enforcement Proceedings.²²
12. **Third**, in a decision that defies comprehension, the Civil Court Skopje has inexplicably ordered GAMA to bear the costs of the proceedings since it "*failed in the dispute*".²³ This is flawed and in egregious breach of Macedonian law. GAMA did not lose the case on the merits. As explained above, the Civil Court Skopje wrongfully dismissed GAMA's claim on grounds of *res judicata* in contradiction with the Plan Approval Decision. Under Macedonian law, the starting point for the award of costs in litigation is that the "*losing*" party pays the "*winning*" party's costs, but the court has the discretion to apportion the costs proportionally should a party only partially succeed in its claims.²⁴ This discretion also extends to instances where a party or the circumstances surrounding that party were

¹⁸ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.10

¹⁹ Reply, ¶¶ 155-156, 204. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶¶ 126, 128 (finding breach of the treaty due to a retroactive application of the law).

²⁰ The Decision of the Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 14 June 2018 (**C-015**) became effective on 30 August 2018 on the basis of the Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**) and thus the statute of limitations for its enforcement elapsed on 30 August 2023

²¹ Bankruptcy Law (**C-075**), Article 242(1) ("The bankruptcy creditors whose claims have been determined and have not been disputed by the debtor at the verification hearing may be executed against the debtor as an executive decision for settlement of their claims registered in the table (chart) of submitted claims in the legally approved reorganization plan. The disputed claims that have become enforceable later shall be treated as they have never been disputed. Article 204 of this Law shall be applied accordingly in this case.") [emphasis added]

²² Bankruptcy Law (**C-075**), Article 242(1) ("The bankruptcy creditors whose claims have been determined and have not been disputed by the debtor at the verification hearing may be executed against the debtor as an executive decision for settlement of their claims registered in the table (chart) of submitted claims in the legally approved reorganization plan. The disputed claims that have become enforceable later shall be treated as they have never been disputed. Article 204 of this Law shall be applied accordingly in this case.") [emphasis added]

²³ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.11

²⁴ Law on Litigation Procedure (Official Journal of the Republic of Macedonia no. 79/2005), (**C-039 Resubmitted**), Article 148(1) and (2)

the driving force for the costs to be incurred.²⁵ In such case, the court must order that party to cover the costs of the litigation.

13. The Civil Court Skopje disregarded the fact that TE-TO's actions precipitated the costs incurred in the Debt Enforcement Proceedings. TE-TO's active challenge to GAMA's claim—both prior to and subsequent to the Plan Approval Decision—directly led to the accrual of these costs. TE-TO's conduct alongside the compelling evidence presented in the proceedings, including the acknowledgment of TE-TO's own expert witness that it had recorded "*in its accounting records its liability to the Claimant [GAMA] on grounds of the relevant invoice number A 028 in the amount of EUR 5,000,000.00 under Supplement no. 9 and Settlement Agreement*"²⁶ as it was acknowledged by TE-TO to the same effect in its reply to GAMA's appeal,²⁷ made it entirely justifiable for TE-TO to cover the costs of the proceedings.
14. Remarkably, the Civil Court Skopje has nevertheless seen fit to blame GAMA for failing in the Debt Enforcement Proceedings despite that its claim was acknowledged by the same court in the Plan Approval Decision five years earlier, as the Civil Court Skopje was made aware of. Such a ruling unjustly penalizes GAMA for pursuing its rightful claim - a claim that TE-TO itself did not contest in the reorganization proceedings and which, moreover, the bankruptcy judge (albeit wrongfully) directed GAMA to further pursue until a final decision on the merits. This contradictory action by the Civil Court Skopje is not only baffling, but it is outrageous.
15. GAMA filed an appeal against the Dismissal Judgment. The pendency of this appeal has no effect on GAMA's claim in the present arbitration. Debt Enforcement Proceedings are obsolete, considering the effects of the 2018 Plan Approval Decision, which wrote off 90% of GAMA's claim with all interests and unlawfully suspended the repayment of the residual 10% of GAMA's claim beyond 2028 in breach of the Treaty and customary international law, which is at the heart of this case.²⁸ Paradoxically, the obsolescence of Debt Enforcement Proceedings now also seems to be the stance of the Civil Court Skopje,²⁹

²⁵ Law on Litigation Procedure (Official Journal of the Republic of Macedonia no. 79/2005), (**C-039 Resubmitted**), Article 150(1)

²⁶ Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-202**), p.10 ("From the inspection of the written evidence attached to the case file explained by an expert witness Goran Markovski, economy graduate, from Expert Witness Company - Expert Witness DOO, Skopje VNM II 91/2013, and in specific the expert witness opinion submitted in the case files by the defendant, it is indisputable that the defendant TE-TO in his accounting records, has presented an obligation towards the claimant arising out of the invoice at question in the amount of EUR 5,000,000 based on appendix no. 9 and a settlement agreement.") see also Brief providing an expert report by TE-TO dated 11 December 2013 enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p.4 [5]

²⁷ TE-TO's reply dated 25 October 2023 to GAMA's appeal dated 4 October 2023 against the Judgment of the Civil Court Skopje no. 50 PL1-TS-1198/22 dated 13 April 2023 (**C-204**), p. 2 ("It is an indisputable fact that the claimant [GAMA] for this same claim of 5,000,000 euros, which is the object of these court proceedings heard under TS-1198/2022 previously to the defendant [TE-TO], has submitted the same authentic document - invoice No. A028 dated 30.03.2012, the invoice was duly received by the defendant [TE-TO], it was not objected against nor returned back to the creditor [GAMA], and it is recorded in the accounting records of the claimant [defendant i.e. TE-TO] as an overdue obligation. (this indisputable fact has also been established by the first instance court in the explanation of the judgment on page 5 paragraph 2).") [emphasis added]

²⁸ Reply, ¶¶ 45-49, 96-99

²⁹ Judgment for dismissal of GAMA's claim (**C-202**), p.10 ("Considering that the claimant's claim subject to the proceedings has been determined in other proceedings, the claimant's claim is obsolete.")

which, however, erred in dismissing GAMA's claim. The Dismissal Judgment represents yet another manifestly wrongful decision of the Civil Court Skopje 11 years after the filing of GAMA's claim against TE-TO and attests to a serious miscarriage of justice, which "shocks [...] a sense of judicial propriety",³⁰ has additional expropriatory effects in breach of Article III(1) of the Treaty,³¹ represents yet another inconsistent action of Macedonian courts in breach of the FET standard³² and further contributes to the undue delay of the Debt Enforcement proceedings in breach of the effective means clause,³³ FET standard and customary international law, as explained in detail in GAMA's Reply and Statement of Claim.³⁴

³⁰ *Elektronica Sicula S.p.A. (ELSI)* (United States of America v. Italy.), Judgment, 20 July 1989 ICJ 15 (**CL-028**), ¶ 128; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146; Reply, ¶ 35

³¹ GAMA's position is that the writing-off of 90% of GAMA's claim with interests and unlawful suspension of 10% of GAMA's residual claim beyond 2028 on the basis of the Plan Approval Decision constitute on itself an illegal expropriation in breach of Article III(1) of the Treaty (see Reply, ¶¶ 201-204). In addition, the acts of Macedonian courts in Debt Enforcement Proceedings before and after the 2018 Plan Approval Decision, including the recent Dismissal Judgment, which eliminated any chance of GAMA's recovery of the residual 10% claim against TE-TO, constitute, in combination with the acts of Macedonian courts and executive organs in relation to the Plan Approval Decision, and retroactive shortening of the statute of limitations, acts of a creeping illegal expropriation in breach of Article III(1) of the Treaty (see Reply, ¶¶ 204, 215-217)

³² GAMA is by virtue of the MFN clause in the Treaty entitled to the fair and equitable treatment (FET) pursuant to Article 3(1) of the Lithuania Macedonia BIT, Article 3(1) of the Austria-Macedonia BIT and Article 2(2) of the Slovakia-Macedonia BIT (see Reply, ¶ 254). Case law confirms that the inconsistent and arbitrary action of state organs amounts to the breach of the FET (see Reply, ¶¶ 262, 272 and Statement of Claim, ¶¶ 243-244)

³³ GAMA is by virtue of the MFN clause in the Treaty entitled to be afforded by Macedonian courts effective means of asserting claims and enforcing rights (see Reply, ¶ 309)

³⁴ Reply, ¶¶ 92-95, 273-275, 316-318; Statement of Claim, ¶¶ 245-254, 291-293, 298

Respectfully submitted,

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A handwritten signature in blue ink, appearing to read 'Esra Berktaş', is written over a blue ink stamp that includes the word 'GAMA' and a stylized logo.

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