

Before the
**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID)**

**BRIDGESTONE LICENSING SERVICES, INC.,
BRIDGESTONE AMERICAS, INC.,**

Claimants

V

REPUBLIC OF PANAMA,

Respondent

**REPLY TO RESPONDENT'S RESPONSE TO CLAIMANTS' APPLICATION TO
REMOVE THE RESPONDENT'S EXPERT WITNESS AS TO PANAMANIAN LAW**

Akin Gump

STRAUSS HAUER & FELD LLP

Eighth Floor

Ten Bishops Square

London E1 6EG

United Kingdom

Telephone: 44.20.7012.9600

Facsimile: 44.20.7012.9601

Exhibit List

File Reference	Full Citation
Exhibit C-0265 (ENG)	Handwritten notes of teleconference dated 7 November 2018 (redacted)
Exhibit C-0266 (ENG)	Email from Johann Strauss to Johann Strauss dated 7 November 2018 (redacted)
Exhibit C-0267 (ENG)	Email from Katie Hyman to Stephen Kho and Justin Williams dated 7 November 2018 (redacted)

Introduction and Summary

1. This is the Claimants' reply submission in respect of its application for the removal of Mr. Lee as the Respondent's expert witness as to Panamanian law dated 29 October 2018 (the "**Application**").
2. The Application was not made lightly. The Claimants raised their concerns as to Mr. Lee with Respondent's counsel in correspondence and expressly invited an explanation in order that the matter could be resolved by agreement and without troubling the Tribunal.¹ A degree of cooperation between the parties is to be expected in international arbitration, but instead Respondent's counsel responded on 16 October 2018 as follows: "*After conducting its due diligence, Panama has concluded that the allegations and insinuations made in Claimants' 9 October letter are misleading or false and do not support the relief Claimants seek. The 9 October letter is thus but another example of the unprofessional behavior that has come to characterize Claimants' approach to these proceedings.*"² No explanation was given by the Respondent as to what it contended was false and what was said to be misleading, or what it understood the facts to be. Regrettably, the Claimants were therefore left with no option but to seek the Tribunal's assistance.
3. Faced with the present Application, the Respondent has belatedly now explained its position. Its Response dated 9 November 2018 (the "**Response**") now accepts that there were multiple communications between Mr. Lee and the Claimants' counsel in relation to the case, both by phone and by email,³ but the Respondent opposes the Application on three grounds: (a) the Respondent contends there was no exchange of confidential information between Claimants' counsel and Mr. Lee;⁴ (b) the communications between Mr. Lee and the Claimants' counsel did not amount to or give rise to a relationship between them, and hence his non-disclosure of those communications in his report and (after the issue had been raised) in Respondent's counsel's letter of 16

¹ **Exhibit C-0262 (ENG)** - Letter from Akin Gump to Arnold & Porter dated 9 October 2018.

² **Exhibit C-0263 (ENG)** - Letter from Arnold & Porter to Akin Gump dated 16 October 2018.

³ **Response**, ¶ 4 and **Appendix A** – Chronological Email Compilation, containing 30 individual emails between Mr. Lee and Claimants' counsel.

⁴ **Response**, ¶ 50, and **Lee 1**, ¶ 8-10.

October 2018 did not breach the duty to disclose any such relationship;⁵ and (c) Mr. Lee was not aware of his obligation to certify the absence of a relationship between himself and Claimants' counsel, and the Respondent's counsel failed to notice the omission.⁶

4. If there is a finding that no confidential information was provided to Mr. Lee, the Claimants accept that Mr. Lee's failure to disclose his prior communications with the Claimants' counsel, though unusual, would not by itself require Mr. Lee's removal as the Respondent's expert witness. Therefore, the key issue for the Tribunal is to determine whether or not there was any exchange of confidential information between Claimants' counsel and Mr. Lee. If there was not, then Mr. Lee may remain. If there was, then the Tribunal must consider whether that exchange of confidential information gives rise to a conflict of interest, and in making that determination the Tribunal should take account of Mr. Lee's non-disclosure.
5. The Claimants explained in their Application the nature of the difficulty they faced in making the Application: balancing the need to say enough about the communications with Mr. Lee in order that the Tribunal would be able to deal with the Application, with the concern that by providing too much information, the very confidentiality and privilege which the Claimants were endeavouring to protect would be lost.⁷ For that reason, the Claimants explained that they had limited the information and evidence given in their Application and in the witness statement of Katie Hyman. No contemporaneous documentation was exhibited to support their position.
6. Mr. Lee has now provided a witness statement in which he goes further. He sets out what he says was the substance of what was said in the telephone conversation of 7 February 2018, and he exhibits all the email communications between Mr. Lee and Claimants' counsel. Importantly, for the first time Mr. Lee makes a number of positive assertions as to matters that he says were not discussed during the 7 February 2018 phone call, and in so doing he directly contradicts the recollection of the telephone

⁵ Response, ¶ 50.

⁶ Response, ¶ 39, and Lee 1, ¶ 31.

⁷ Application, ¶ 6.

conversation provided by Katie Hyman of Claimants' counsel.⁸ The Claimants therefore now have no option but to engage with Mr. Lee's positive assertions and to provide evidence showing (we say) that he is mistaken. Therefore accompanying this Reply is the Second Witness Statement of Katie Hyman, which exhibits contemporaneous written records of the 7 February 2018 phone call. These show that there *was* an exchange of confidential information between Claimants' counsel and Mr. Lee. The written records have been redacted insofar as they contain information that is not directly responsive to what Mr. Lee says in his witness statement. No waiver of confidentiality or privilege is intended or made, save to the extent unredacted text of the contemporaneous records is disclosed.

Exchange of confidential information between Mr. Lee and Claimants' Counsel

7. The Respondent argues that "*no confidential information was ever exchanged between Mr. Lee and Claimants' counsel.*"⁹ The Respondent further notes that there was no exchange of confidential information via email, and the Claimants do not dispute this. The exchange of confidential information took place during the telephone conversation of 7 February 2018, as set out in the Witness Statement of Katie Hyman dated 29 October 2018.
8. The Respondent relies on two matters in support of its position that no exchange of confidential information took place on 7 February 2018: first, the evidence of Mr. Lee that there was no such exchange; second, the fact that Mr. Lee had not undertaken a conflict check at the time of the phone call, but only did so afterwards. We deal with each of these matters in turn below.

Witness and Documentary Evidence

9. It is common ground that the 7 February 2018 phone call with Mr. Lee took place, and that "*Katie Hyman and Johan Strauss from Akin Gump, and José Carrizo from Morgan & Morgan participated.*"¹⁰
10. As indicated in Ms. Hyman's Second Witness Statement, both Ms. Hyman and Mr.

⁸ Lee 1, ¶ 4.

⁹ Response, ¶ 13.

¹⁰ Lee 1, ¶ 14.

Strauss took notes during the telephone conversation of 7 February 2018. Ms. Hyman’s notes were handwritten, and Mr. Strauss’s notes were typed in an email which he sent to himself at the conclusion of the call by way of a record.¹¹ Ms. Hyman also wrote an email to other members of Claimants’ counsel team directly after the call.¹² These documents have been redacted and only the parts of those emails which are directly responsive to what Mr. Lee says in his witness statement are being disclosed. No general waiver of privilege or confidentiality is made or intended by disclosure of these emails.

11. Mr. Lee says in his witness statement that there were no discussions specific to this case and that there was no discussion of corruption in the context of the claim by Muresa Intertrade S.A. against Bridgestone Corporation and BSLS in Panama: *“I must categorically point out that the issue of possible corruption in the tort litigation of which the Bridgestone companies were a part was never discussed in the telephone conversation.”*¹³

12. This contention is inconsistent both with the recollection of the Claimants’ counsel that attended the telephone call,¹⁴ and with the account of that telephone call recorded by Claimants’ counsel.

12.1 Mr. Strauss’s notes recorded that Ms. Hyman specifically referred to the meeting with the Panamanian Ambassador in which (we say) the Panamanian Ambassador acknowledged that there was corruption in this case: *“KH: Also have comments from embassy that this is corruption. Martenilli related.”*¹⁵

¹¹ **Hyman 2**, ¶ 6 -7, and **Exhibit C-0265 (ENG)** – Handwritten notes of teleconference dated 7 November 2018 (redacted); **Exhibit C-0266 (ENG)** – Email from Johann Strauss to Johann Strauss dated 7 November 2018 (redacted).

¹² **Exhibit C-0267 (ENG)** – Email from Katie Hyman to Stephen Kho and Justin Williams dated 7 November 2018 (redacted).

¹³ **Lee 1**, ¶18.

¹⁴ **Hyman 1**, ¶ 9-10.

¹⁵ **Exhibit C-0266 (ENG)** – Email from Johann Strauss to Johann Strauss dated 7 November 2018 (redacted).

- 12.2 Ms. Hyman’s email recorded “*I also told him about Panamanian Ambassador’s comments about corruption to get his take on that.*”¹⁶
13. Following the 7 February 2018 phone call, the Claimants have pleaded the admission made by the Panamanian Ambassador and have put in witness evidence accordingly. However, at the time of the phone call with Mr. Lee this had not been alleged by the Claimants in these proceedings and was confidential.
14. Mr. Lee says that the views he expressed as to corruption in the Panamanian courts were limited to saying that in his experience, “*the courts and judges acted properly, but that allegations had been made about the existence of specific cases of corruption.*”¹⁷ To put this in context, paragraph 17 of his statement says this:
- “In the last part of the telephone conversation, we conversed informally about the administration of justice in Panama. As I recall, Miss Hyman asked me in a general manner about the administration of justice in Panama. I told her that in my experience the courts and judges acted properly, but that allegations had been made about the existence of specific cases of corruption. She asked me if I was acquainted with the judgment issued in the Ludcom case by the Civil Chamber of the Supreme Court of Justice. I replied that news about the judgment had been published in Panamanian social media.”*
15. But this is inconsistent with the Claimants’ counsels’ contemporaneous notes.
16. Mr. Strauss’s contemporaneous email recorded Mr. Lee saying this:
- “He [Ortega] had a bad reputation. He’s a well known political figure. When he was appointed he had a good public image. But in the last 4-5 years. It was widely known that his son was trafficking influence and offering himself to obtain judgments. It may or may not be true. I had a case where our clients heard that opponents they went to the son of Ortega and was able to get a judgment in their favor. It was a bitter dispute – my client acting on his own put a detective on the opposing party and found that they*

¹⁶ **Exhibit C-0267 (ENG)** – Email from Katie Hyman to Stephen Kho and Justin Williams dated 7 November 2018 (redacted).

¹⁷ **Lee 1**, ¶ 17.

went to go see Mr. Ortega's son and everything came against us."¹⁸

17. Similarly, Ms. Hyman's contemporaneous handwritten note recorded Mr. Lee saying this:

*"Bad reputation. Well-known political figure. When he was appointed, good public image. But in last 4-5 years, it is widely known that his son was trafficking influence & offering himself to obtain judgment. Public gossip v strong. Case in which our client that other party went to son of Ortega and then the judgment came down. Client put detective, found that he went to see Ortega's son."*¹⁹

18. Mr. Ortega is a Supreme Court justice and was a member of the Supreme Court tribunal that gave the impugned judgment that is the subject of the present arbitration. The information given by Mr. Lee as to one of his own cases and his client hiring a detective who obtained evidence of apparent corruption involving Mr. Ortega and his son is not public and, since it relates to Mr. Lee's conduct of litigation, must be assumed to be confidential, as referred to in paragraph 9 of the Witness Statement of Katie Hyman dated 29 October 2018.

19. Mr. Lee says at paragraph 19 of his witness statement: *"Given the extremely general nature of the telephone conversation, I did not give, and could not have given, an opinion on the merits of the Bridgestone Case."*

20. However, Mr. Strauss's contemporaneous email records the following exchange between Ms. Hyman and Mr. Lee in relation to the weight placed on certain documentary evidence by the Supreme Court in the case under consideration in this arbitration:

"KH: It was presented in the earlier court, but no consideration of counterevidence. In your view, is this is an odd decision, or so strange or so wrong. OR something like Ortega's son.

*FL: Based on what you described, it sounds like there was a flaw in process, denial of justice, no ability to defend ourselves."*²⁰

¹⁸ **Exhibit C-0266 (ENG)** – Email from Johann Strauss to Johann Strauss dated 7 November 2018 (redacted).

¹⁹ **Exhibit C-0265 (ENG)** – Handwritten notes of teleconference dated 7 November 2018 (redacted);

²⁰ **Exhibit C-0266 (ENG)** – Email from Johann Strauss to Johann Strauss dated 7 November 2018 (redacted).

Conflict check

21. The Respondent further argues that the discussions could not have been confidential or privileged because “*at the time of the call, Claimants’ counsel had not even given Mr. Lee the information that he would need in order to check for conflicts.*”²¹ Although it is true that Claimants’ counsel sent Mr. Lee an email after the call containing a list of the parties that Mr. Lee’s firm would need to clear for conflicts, there is no question that Mr. Lee was fully aware of the identity of the parties to this Arbitration, the parties to the Panamanian litigation, and the Supreme Court justices involved, because all of that information is publicly available (as the Respondent notes²²), and was discussed in the telephone conversation of 7 February 2018. The subject of the email of 16 November 2017 received by Mr. Lee from Claimants’ Panamanian counsel, Morgan & Morgan, was “*Bridgestone Case – Experts in Panama*”.²³
22. Mr. Lee is an individual. It is to be expected that he is likely to recall who he has acted for or against, and therefore whether he has a conflict. The conflict check after the 7 February 2018 phone call was therefore a formality. It cannot be said this establishes that the phone call itself was not confidential.
23. Mr. Lee did not specifically state that the information he gave Claimants’ counsel about the case he was involved in regarding Justice Ortega was confidential, but Claimants’ counsel understood that it was.²⁴ The fact that Mr. Lee openly discussed matters of this nature was one of the reasons why Claimants’ counsel considered that the conversation was confidential, and that Mr. Lee had the same understanding.²⁵

Conflicts of interest

24. In their Application, the Claimants relied on the Decision in the *Flughafen* case,²⁶ in

²¹ **Response**, ¶ 8.

²² **Response**, ¶ 24.

²³ **Appendix A** – Chronological Email Compilation.

²⁴ **Hyman 1**, ¶ 9.

²⁵ **Hyman 1**, ¶ 11,

²⁶ **Application**, ¶ 14, 29, and **CLA-0133 (ENG/SPA) - Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela** (ICSID Case No. ARB/10/19), Decisión sobre la inhabilitación del Sr. Ricover como

which the tribunal did not remove the expert in question, because the information that the applicants alleged was confidential was contained in documents attached to emails, that were not marked confidential and that the expert had not read. The Respondent naturally chooses to focus on the fact that here, in contrast to the situation in *Flughafen*, no emails containing confidential information were sent to Mr. Lee. But the Claimants have never contended that they were: in fact, the Claimants have been clear from the beginning that such confidential information consisted of matters discussed in the telephone call of 7 February 2018.²⁷ The factual similarities with *Flughafen* are that the claimants had had communications with an expert before the expert was then appointed by the respondent, and that the claimants asserted that confidential information had been provided to the expert. The relevance of *Flughafen* is that the tribunal found that the fact that the respondent's expert had had communications with the claimant before then being appointed by the respondent was unusual and was worthy of consideration by it.²⁸ Whether or not any confidential information was in fact disclosed by the Claimants counsel to Mr. Lee, such that he has a conflict of interest, is the key issue in dispute here, and is discussed above.

Duty of disclosure

25. The Respondent dismisses the Claimants concerns as to Mr. Lee's non-disclosure of his prior relationship with Claimants' counsel.
26. First, the Respondent says that there was no relationship at all, that the discussions Mr. Lee had with Claimants' counsel did not amount to a "relationship" and therefore there was nothing to disclose.²⁹ But there were thirty emails between Claimants' counsel and Mr. Lee, and these, together with the telephone conversation on 7 February 2018 were sufficient to establish a relationship which should have been disclosed.

expert en este procedimiento, sobre la exclusión del Informe Rícover-Winograd y sobre la Petición Documental, 29 August 2012.

²⁷ **Application**, ¶ 30.

²⁸ **CLA-0133 (ENG/SPA) - Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela** (ICSID Case No. ARB/10/19), Decisión sobre la inhabilitación del Sr. Rícover como expert en este procedimiento, sobre la exclusión del Informe Rícover-Winograd y sobre la Petición Documental, 29 August 2012, ¶ 30.

²⁹ **Response**, ¶ 36-38.

27. Second, and somewhat at odds with the first, the Respondent says that Mr. Lee drafted his own report and did not include the required language from the IBA Rules because he was not aware of them, and the Respondent's counsel did not notice the discrepancy.³⁰ This suggests that there was a failure of communication and that the omission to certify the absence of a relationship between Mr. Lee and Claimants' counsel was a mistake. But if so, then once the Claimants drew this to their attention the mistake should have been rectified in the 16 October 2018 letter from the Respondent's counsel. Instead, the Respondent's counsel responded with aggression, accusing Claimants' counsel of unprofessional conduct for even raising the point.³¹
28. The Respondent further complains that the Claimants have taken the “*nuclear option*” in seeking to disqualify Mr. Lee when if they had only asked Mr. Lee and the Respondent, their concerns would have been addressed.³² But the Claimants *did* ask this very question of the Respondent in its letter dated 9 October 2018.³³ The Respondent's counsel's response could have explained that Mr. Lee did not realise that he was required to include the statement at Article 5(2)(a) of the IBA Rules in his report, and that the Respondent's counsel did not notice that he had not. But instead the Respondent's counsel's letter took the view that nothing had gone wrong and no disclosure even at that stage need be given.³⁴
29. The Respondent contends that the IBA Guidelines cannot apply to Mr. Lee because they do not apply to experts, and even if they did, he would not have been required to disclose his communications with Claimants' counsel because they did not amount to more than “initial contact”, a Green List item.³⁵ As described above, the Claimants dispute Mr. Lee's characterization of the contents of the telephone call, and the contemporaneous emails of Mr. Strauss and Ms. Hyman support their position that the conversation was not “*limited to the [expert's] availability and qualifications to*

³⁰ **Response**, ¶ 39.

³¹ **Exhibit C-0263 (ENG)** - Letter from Arnold & Porter to Akin Gump dated 16 October 2018.

³² **Response**, ¶ 39.

³³ **Exhibit C-0262 (ENG)** - Letter from Akin Gump to Arnold & Porter dated 9 October 2018.

³⁴ **Exhibit C-0263 (ENG)** - Letter from Arnold & Porter to Akin Gump dated 16 October 2018.

³⁵ **Response**, ¶ 40-44.

serve”.³⁶ If any specific example in the IBA Guidelines were to apply here, the Claimants submit that the situation is closer to that in the Waivable Red List – “*The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties... [or] The arbitrator had a prior involvement in the dispute.*”³⁷

30. The Respondent dismisses the decision in the *Hrvatska* case because it concerns a situation found on the IBA Guidelines Orange List, and contrasts with the situation here which, in its view, did not give rise to any disclosure obligation.³⁸ As described above, the Claimants consider that there *was* an obligation to disclose and therefore the relevance of the *Hrvatska* case is that Mr. Lee’s failure to disclose his previous communications with the Claimants’ counsel could give rise to a “*justifiable doubt*” as to his independence.³⁹

Conclusion

31. Unfortunately, it is clear that confidential information was exchanged between Mr. Lee and Claimants’ counsel and that Mr. Lee has a conflict. That conflict is exacerbated by Mr. Lee’s non-disclosure of his relationship with Claimants’ counsel in his expert report and, after the problem was highlighted in correspondence, by the Respondent’s decision not to try to remedy the non-disclosure but instead to respond with aggression and to suggest that nothing had gone wrong.
32. For the reasons set out above, the Claimants reiterate their request made in the Application that the Tribunal order pursuant to Rule 34(1) of the ICSID Rules, Article 44 of the ICSID Convention and Article 9.2(b) of the IBA Rules: (a) that Mr. Lee be removed as the Respondent’s expert in Panamanian law; (b) that the Respondent be permitted to file a report from a replacement independent expert in Panamanian law within 30 days of the Tribunal’s order; and (c) that the procedural calendar be adjusted

³⁶ **CLA-0134**, IBA Guidelines, Green List, ¶ 4.4.1

³⁷ **CLA-0134**, IBA Guidelines, Waivable Red List, ¶ 2.1.

³⁸ **Response**, ¶ 45-46.

³⁹ **CLA-0135 (ENG)** - *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal’s ruling regarding the participation of David Milton QC in further stages of the proceedings, 6 May 2008 ¶ 30.

accordingly.

33. The Claimants further request that the Tribunal award all costs and fees to the Claimants for the time and resources expended in the Application since receipt of the Expert Report of Mr. Lee.