

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**CMC Muratori Cementisti CMC Di Ravenna SOC. Coop.; CMC Muratori Cementisti
CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA**

v.

Republic of Mozambique

(ICSID Case No. ARB/17/23)

PROCEDURAL ORDER NO. 7

Members of the Tribunal

Mr. John M. Townsend, President of the Tribunal

Mr. J. Brian Casey, Arbitrator

Mr. Peter Rees QC, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

April 18, 2019

Background

- 1) In the course of the second pre-hearing conference on April 11, 2019, counsel for the Claimants informed the Tribunal that Mr. Gridella, the sole fact witness for the Claimants whom the Respondent had requested to cross examine, would in all likelihood be unable to attend the hearing on the merits scheduled to commence on April 29, 2019.
- 2) In Procedural Order No. 6, issued on April 12, 2019, the Tribunal directed:
 - a) That the Claimants were to inform the Tribunal and the Respondent, no later than April 22, 2019, whether they have been able to arrange for Mr. Gridella to attend the hearing.
 - b) That, if Mr. Gridella does not attend the hearing, the Respondent would be allowed to make an application to the Tribunal concerning what consequence, if any, should follow from Mr. Gridella's failure to attend, such application to be made orally, during the time period reserved for Mr. Gridella's testimony.
- 3) On Sunday, April 14, 2019, the Secretary forwarded an email from each party to the Tribunal.
 - a) The Claimants' email stated:

In accordance with Section 18.1 of Procedural Order No. 1 and 14 of Procedural No. 4 and given the uncertainty surrounding the attendance of Mr. Gridella, the Claimants would like to add Enrico Alicandri to its witness list. Mr. Alicandri will be available to testify at the Hearing if, for example, issues within his knowledge arise during cross examination of the Respondent's witnesses, and, if necessary, also to speak about the non-attendance of Mr. Gridella.

- b) The Respondent's email stated, in relevant part:

What we have here is an obvious prior failure by the Claimants' counsel to secure Mr. Gridella's commitment to appear at the hearing, not any allegedly "new" concern by Mr. Gridella. * * * If Mr. Gridella does not appear to testify at the hearing, both of Mr. Gridella's witness statements, and all references in the memorials to him, must be stricken from the record.

Second, Respondent strongly objects to the request by the Claimants to now call *their own witness*. The Tribunal will recall that, during the first pre-hearing conference, the Claimants objected when the Respondent sought to call its own witness to testify at the hearing. Claimants said that this was not allowed under the Procedural Orders – that a

party cannot call its own witness to testify. As a result, the Respondent did not call its own witness and this agreement was reflected in the list of witnesses jointly provided by the parties. Respondent has not called Mr. Alicandri to testify, he was not included in the jointly-agreed list of witnesses for the hearing agenda, and therefore the Claimants cannot unilaterally call him as a witness because they have previously taken the position that a party cannot call its own witnesses and the Respondent accepted that position to its prejudice.

Mr. Alicandri also has not provided a witness statement on the new issues on which the Claimants now seek to call him, and therefore that also would render his testimony improper, because the Respondent would lack prior knowledge of his testimony which creates a Due Process problem. A witness cannot testify on new matters, and therefore there is nothing that he could say at the hearing, if the Respondent does not want to call him to testify. In addition, he clearly cannot testify about Mr. Gridella's alleged "concerns," because that is inadmissible hearsay.

Further, the Tribunal's most recent procedural order indicates that it will decide the motion to strike Mr. Gridella's witness statements *after* it hears argument on the motion at the hearing. Therefore, there will be uncertainty when the hearing starts as to whether Mr. Gridella's witness statements will even be considered. If Mr. Gridella's witness statements remain part of the record, that renders the Claimants' current request moot. This alone has introduced sufficient uncertainty into the opening statements – the Respondent does not believe that there can be any reference to Mr. Gridella's witness statements in the opening statement if he is not present to testify, but we will not have a ruling from the Tribunal when the hearing starts. It is very difficult to prepare for a merits hearing not knowing whether the testimony of a key witness like Mr. Gridella will be part of the record or not – this is a very serious problem caused by the Claimants. The preferred approach would have been that the witness statements of Mr. Gridella are stricken prior to the start of the hearing, as they should be.

The addition of Mr. Alicandri would create further difficulties, and forces the parties to have to argue in the alternative in a totally unworkable way. Again, these problems are all the creation of the Claimants' prior failure to secure Mr. Gridella's attendance at the hearing, and the addition of Mr. Alicandri would simply complicate things further. Any sympathy that the Tribunal may have initially had for the Claimants' own predicament, should be disregarded given the misrepresentations about Mr. Gridella's employment status. At this late stage in the proceedings, and certainly during the hearing, the Respondent cannot be left guessing which Claimants' witness will be considered by the Tribunal. How can the Respondent prepare for a hearing under those circumstances?

Therefore, the Tribunal must stay the course with the decision it has made in the most recent procedural order – it will hear the motion to strike Mr. Gridella's testimony at the hearing, and it must deny the Claimants' request to unilaterally call Mr. Alicandri because that is not allowed as previously argued by the Claimants themselves and because the Respondent cannot be left guessing regarding what new testimony Mr. Alicandri will provide.

In the alternative, if the Tribunal is inclined to depart from the procedural orders and allow the Claimants to unilaterally call Mr. Alicandri (which the Tribunal should not do), then it must be on the strict condition that Mr. Gridella's two witness statements, and all references in the memorials to them, are stricken from the record immediately – that is, now before the hearing. Respondent must have clarity as to what evidence is going to be part of the record at the hearing. Due process demands that.

- 4) On April 17, 2019, the Secretary forwarded to the Tribunal an additional email from each party responding to the emails of the other.
- 5) Also on April 17, as directed in paragraph 13 of Procedural Order No. 6, the Claimants submitted red-lined versions of the amended translations they had previously submitted.
- 6) Later on April 17, the Respondent sent a further email to the Tribunal, via the Secretary, in which it argued: (a) based on Article 4(7) of the *IBA Rules on the Taking of Evidence in International Arbitration* (2010), that Mr. Gridella's witness statements should be stricken from the record; (b) that no new witness statement of Mr. Alicandri should be accepted; and (c) that the new translations submitted by the Claimants should be stricken from the record.
- 7) Both parties sent further observations by email on April 18, 2019, which the Tribunal acknowledges. The Tribunal does not require further submissions on these questions.

Witness Statement of Mr. Gridella

- 8) The Tribunal has noted the importance attached by the Respondent to knowing whether or not Mr. Gridella's witness statements will remain part of the record in this arbitration before it makes its opening statement at the hearing. The Tribunal accepts the Respondent's concerns as reasonable. Moreover, the Tribunal has concluded that there is no reason to wait until after the April 22 deadline set in paragraph 6(a) of Procedural Order No. 6 to rule on the status of Mr. Gridella's witness statements, and issues the present order today in order to permit the parties the maximum time possible to prepare for the hearing.
- 9) The Tribunal therefore revises its previous ruling (in Procedural Order No. 6, paragraph 6(b)) that it would consider the status of Mr. Gridella's witness statement after hearing argument at

the hearing. Such argument was to have taken place at the point in the schedule when Mr. Gridella's testimony would have been heard if he had been present.

- 10) The Tribunal is not convinced that the witness statements of Mr. Gridella should be stricken. That is an extreme remedy. Even if the *IBA Rules* applied to this proceeding (and the Tribunal has heretofore referred to those rules only insofar as they provided assistance in ruling on disputes concerning documents), Article 4(7) provides that the witness statement of a witness should be disregarded if the witness "fails without a valid reason to appear for testimony at an Evidentiary Hearing." The Tribunal considers that it would be an unnecessary distraction from the approaching hearing to conduct an inquiry into the validity of the reason for Mr. Gridella's failure to attend.
- 11) The Tribunal therefore now rules that Mr. Gridella's two witness statements will remain part of the record, and that they may be discussed by both parties in their opening statements. However, the Tribunal reserves for determination in its award the question of what weight, if any, should be given to Mr. Gridella's witness statements, or any part of them. The parties are free to present their arguments on that subject in their opening statements at the hearing, in their closing arguments at the hearing, or in their post-hearing briefs, as each party may elect.

Testimony of Mr. Alicandri

- 12) The Tribunal recalls that its procedural orders have previously addressed whether a party may call its own witness at a hearing. Specifically:

- a) Procedural Order No. 1, at paragraph 18.1, provides:

Witnesses and Experts shall be examined at hearings in accordance with Arbitration Rules 35 and 36. Witness statements and reports submitted by witnesses and experts shall constitute their direct testimony. Any party shall have the right to call any witness or expert submitting a witness statement or report to testify at the hearing.

- b) Procedural Order No. 5, at paragraphs 14 and 15, provides:

14. Section 18.1 of Procedural Order No. 1 provides that both parties have the right to call any witness or expert who has submitted a witness statement or report in accordance with Section 17.2 of Procedural Order No. 1 to testify at the hearing. The Tribunal understands that provision to include a party's own witnesses or

experts even if they have not been designated for cross-examination by the adverse party.

15. The Tribunal asked the parties to confer and agree, prior to the second pre-hearing organizational meeting on April 11, 2019, on: (1) the order in which witnesses will be called at the hearing, and (2) the morning or afternoon to which each witness or expert should be assigned, with the understanding that each witness may be called up to half a day earlier or later than the time agreed. The parties should communicate this information to the Secretary no later than April 5, 2019.

13) The Tribunal considers that the difficulty in securing the attendance of Mr. Gridella is a new development that excuses the Claimants' failure to state earlier that they intend to call Mr. Alicandri. Mr. Alicandri will accordingly be permitted to attend the hearing. However, any direct examination of Mr. Alicandri will be limited, like that of any other fact witness, to the information contained in his witness statement and to ten minutes. The Respondent may cross examine Mr. Alicandri or not, as it chooses. If the Respondent cross examines Mr. Alicandri, the Tribunal will allow re-direct examination, limited to the scope of the cross examination.

14) No new witness statement of Mr. Alicandri is needed or will be accepted.

Additional Submissions

15) After the pre-hearing conference, the Claimants applied to submit two additional declarations made by E.U. member states that did not join in the joint declaration of E.U. member states concerning the effect of the *Achmea* decision submitted by the Respondent. The Respondent submitted an objection to the submission of these statements by email on April 15, 2019.

16) Upon consideration of the Respondent's objection, the two additional declarations made by E.U. member states are accepted into the record of this arbitration.

Amended Translations

17) The Respondent has objected to the amended translations submitted by the Claimants but has not articulated any basis for that objection other than the Claimants have submitted no explanation "for again waiting until now to submit those fourteen translations modifications." A brief review of a random sample of the red-lined versions of the amended translations by the

Tribunal suggests that the amendments to the previously submitted translations are neither extensive nor particularly substantial.

18) The Tribunal prefers accurate translations to inaccurate translations. Based on the Claimants' representation in their email to the Secretary of April 11, 2019 that these are "small amendments," and in the absence of any showing by the Respondent that the amendments would result in the translations being inaccurate or in prejudice to the Respondent, the amended translations are accepted into the record.

For the Arbitral Tribunal:

[Signed]

John M. Townsend
President
Date: April 18, 2019