

PARTIAL DISSENTING OPINION

Professor Zachary Douglas QC

A INTRODUCTION

1. This case has generated a host of fiendishly complex issues of contractual interpretation. This is due, in no small measure, to the unfortunate lack of clarity and precision that the parties applied to the drafting of their contracts. Among the large number of issues that have been decided in the Partial Award, there is happily only one that has divided the Tribunal, [REDACTED].
[REDACTED].
[REDACTED].
[REDACTED].
2. The decision to commit to a dissenting opinion is rarely an easy one and it is made particularly acute in this case by the very high esteem in which I hold my colleagues on the Tribunal. That esteem has only been reinforced by the care and patience with which they have considered my views on the issue that divides us throughout our long and intense deliberation process.
3. Despite addressing a single issue, this dissenting opinion is necessarily long because the key to unlocking the meaning of the text of [REDACTED] the 2013 Memorandum is the context both for that specific clause and the agreement as a whole. I have attempted to address this issue in a systematic fashion and hence my opinion is structured to deal with the following points:
 - 3.1. Applicable rules of interpretation under Georgian law;
 - 3.2. Background to the 2011 Memorandum;
 - 3.3. Interpretation of the 2013 Memorandum: (1) evidence of the parties' intent during the negotiations leading to the 2013 Memorandum; (2) evidence of the parties' intent from a comparison of the texts of the 2011 Memorandum and the 2013 Memorandum; (3) the relevance of [REDACTED] as evidence of the parties' intent; (4) the balance of interests under the 2013 Memorandum;

3.4. The majority's reasons for their interpretation [REDACTED] the 2013 Memorandum;

3.5. [REDACTED]
[REDACTED]

3.6. Conclusion.

B **APPLICABLE RULES OF INTERPRETATION UNDER GEORGIAN LAW**

4. The Claimants' have cited the Georgian Supreme Court's Decision in Case No AS-110-103-2015 as the leading statement on the applicable principles of interpretation. In that case, the Supreme Court endorsed the following passage from the Court of Appeal's decision:

Article 52 of GCC provides the rule for interpretation of the intent: "In interpreting the declaration of intent, the intention shall be ascertained as a result of reasonable deliberation, and not only from the literal meaning of its wording". The intent shall be interpreted based on the legal-dogmatic methodology (i.e. principles of contractual interpretation). There are "subjective" (based on intent) and "objective" (based on expression) theories of interpretation. When a subjective approach is applied, the common intent shall be interpreted according to the analysis of the provisions of the contract in each case. The aim is to determine what parties' actual intentions were at the moment in time when the contract was concluded and how to understand them when the dispute arises. An objective theory focuses on expression of the will of a party, explaining that this is crucial for legal certainty and stability in legal relationships. However, it is complicated when parties have agreed on some terms but have attributed different meanings to it, or one of them changes its mind later. In cases like this it is impossible to talk about "common intent". The vital criterion in such cases is the meaning that a reasonable person would have attributed to the particular statement/expression taking into account the particular and important circumstances of the case. The wording "reasonable deliberation" means establishing the meaning of a disputed term by the reasonable person under the analogous circumstances.

The Chamber noted that pursuant to Article 338 of GCC, in case of mutually exclusive and ambiguous expressions in a contract, preference shall be given to the expression that most closely accords with the overall content of the contract. Therefore, when engaged in interpretation, the Court shall give preference to expressions which correspond the most to the content of the contract, the purposes enshrined in other provisions of the contract.¹

¹ CL-97.

5. In addition, it was common ground between the parties that the 2013 Memorandum is a public law contract as defined by Article 2(1)(g) of the General Administrative Code of Georgia:² it was concluded by a public entity (the Government of Georgia); its object is to fulfill a public purpose (the determination of electricity tariffs for end consumers as well as for the Khrami Companies and Telasi); and, it was approved by a Government Resolution.³
6. Although different views were expressed about the relevance of public law principles to the interpretation of the 2013 Memorandum, the Tribunal has found that it is obliged to take into account that it is a public law contract and thus needs to balance the public and private interests of the parties.⁴

C BACKGROUND TO THE 2011 MEMORANDUM

7. Inter RAO acquired Telasi in 2003.⁵ In the initial period after its investment, the Telasi SPA of 1998⁶ applied and set the Distribution Tariff [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

8. The parties signed the 2007 Memorandum in June 2007. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

² Claimants' Reply, §96; Respondents' Counter-Memorial, §244.
³ R-27. See First Legal Opinion of Turava, §14.
⁴ Partial Award, §§404, 510.
⁵ C-3.
⁶

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[REDACTED]

D INTERPRETATION OF THE 2013 MEMORANDUM

D1 Evidence of the parties' intent during the negotiations leading to the 2013 Memorandum

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D2 Evidence of the parties' intent from a comparison of the texts of the 2011 Memorandum and the 2013 Memorandum

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D3 The relevance of [REDACTED] as evidence of the parties' intent

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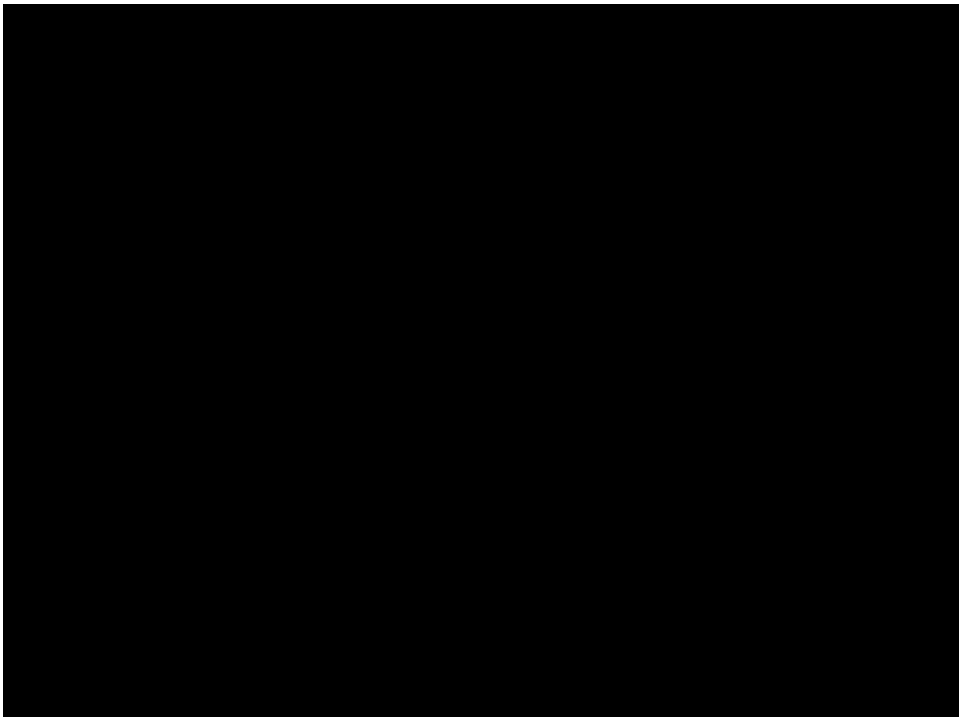
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D4 The balance of interests under the 2013 Memorandum

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E THE MAJORITY’S REASONS FOR THEIR INTERPRETATION [REDACTED] OF THE 2013 MEMORANDUM

108. The majority’s reasoning for upholding the Claimants’ interpretation is set out in paragraphs 503-515 and 526-534 of the Partial Award. With the greatest respect to my colleagues, it is not possible to ascertain from a review of this reasoning how they have weighed the evidence that I have set out above that is relevant to the interpretative exercise. It is accepted that this evidence is relevant and indeed it is reproduced in great detail in the summaries of the parties’ positions in the Partial Award.

109. For instance, the majority’s reasoning begins with the following statement at paragraph 503:

[REDACTED]

[REDACTED]

110. The various elements in this statement, however, are not analysed by reference to the evidence,

[REDACTED]

[REDACTED] That

is certainly an important factor to take into account but one that cannot possibly be conclusive for the reasons I have set out above. Notably absent from this statement is an analysis of the critical documents exchanged between the parties setting out the fundamental premises of their new agreement as well as Inter RAO's internal presentations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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G CONCLUSION

124. It cannot be said that the text of [REDACTED] the 2013 Memorandum unequivocally supports either party's position: there is no doubt that it could have been drafted differently, [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

But at the end of the day, the various inputs for the interpretative process that can be derived from the record of this arbitration stack up almost entirely in favour of the Respondent's position.

125. This is the essence of my disagreement with the majority's analysis: the Claimants have the burden of persuasion in respect of their own interpretation [REDACTED] and that burden is not satisfied merely by demonstrating that the Respondent's rival interpretation is not completely watertight. It cannot be a matter of defaulting to the Claimants' position in case of doubt; there must be positive reasons to justify upholding that position. And yet there is no contemporaneous evidence during the negotiation process supporting the Claimants' interpretation but there are numerous elements from Inter RAO's own documents that support the Respondent's position. An analysis of the difference in the wording between the 2011 Memorandum and the 2013 Memorandum [REDACTED] also supports the Respondent's position, as does the existence of [REDACTED] as evidence of the parties' intention. Finally, the Respondent's position is more consistent with the idea of a fair balance of the public and private interests under the 2013 Memorandum. There is nothing that can be mobilized in favour of the Claimants' interpretation that might serve to counteract the weight that must be accorded to these various elements.

Place of Arbitration: Stockholm, Sweden



Professor Zachary Douglas QC
Arbitrator

19 APR 2021
Date