

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

STANDARD CHARTERED BANK (Hong
Kong) LIMITED,

Applicant,

v.

TANZANIAN ELECTRIC SUPPLY
COMPANY LIMITED

Respondent.

ICSID Case No.: ARB/10/20

Procedural Order No. 3

I. Background

1. In the Minutes of the First Session of the Tribunal dated 13 July 2011, the Tribunal set the date for filing of motions to compel the production of documents. At the request of the parties the Tribunal modified those dates in Procedural Order No. 1, dated 13 October 2011, and further modified them at the parties request in Procedural Order No. 2 dated 28 October 2011.

2. In Request No. 37 in its Request for Disclosure of Documents dated 19 August 2011, the Respondent asked for the production of “[t]he analyses, reports, memoranda and other documents addressing whether SCB, SCB HK, IPTL, VIP, Danaharta, or Mechmar were required to register the Charge of Shares in Tanzania or elsewhere.”

3. In its statement of the relevancy of these documents, the Respondent said that it sought the documents “relevant to whether SCB HN has the authority to pursue this arbitration. If it failed to register the Charge of Shares, then it has no authority to act as Security Agent, and thus has no standing to bring this arbitration.” In its objection to production, the Claimant stated that the documents were not relevant. Since the Respondent had just repeated the justification it had given for documents in Request No. 36, the Claimant argued, it had failed to demonstrate the relevance of these documents.

4. The parties were unable to resolve this matter through negotiations and on 20 October 2011 the Respondent filed a motion to compel production of these documents. The Claimant filed its response on 28 October 2011 and the Respondent filed its Reply on 3 November 2011.

II. Arguments of the Parties

1. The Respondent's Request

5. In its motion to compel production dated 20 October 2011, the Respondent stated that the Claimant's Request for Arbitration "demonstrates that the charge of shares is directly relevant to claims that SCB HK intends to assert" and went on to argue that "Since SCB HK is relying on this Charge of Shares to assert claims, at least two questions arise under Tanzanian law: (a) whether SCB HK or others were required to register the Charge of Shares and (b) whether they did so in a timely fashion." The documents covered by Request No. 37 were claimed by the Respondent to "directly bear" on the standing of the Claimant to assert claims against the Respondent.

6. The Respondent also argued that since the Claimant had not objected to the production of documents under Request No. 36, which related to documents concerning attempts to register, it could not object to the production of documents relating to whether SCB HK or other companies knew of a requirement to register. There was, according to the Respondent, no rational basis for drawing a line between the two.

2. The Claimant's Response

7. In its response of 28 October 2011, the Claimant argued that the Respondent had misconstrued its Request for Arbitration. SCB HK's claim in this arbitration was based on "the assignment of securities by IPTL, including its rights under the PPA, in the Security Deed" and not on the "assignment of securities by IPTL's shareholders, VIP and Mechmar, under the Share Pledge Agreement." According to the Claimant, the Respondent had not shown why a failure to register a charge it holds over shares in IPTL could invalidate an assignment in a separate contract of IPTL's rights under the PPA.

8. The Claimant also argued that the Request No. 37 was "at the very least premature" since it was possible to make further production requests after 9 December 2011. Further, it claimed that the Respondent should be required to explain why failure to register the Share Pledge Agreement might be relevant to the claims that SCB HK is actually making.

9. In addition, Claimant argued that the question whether the Charge of Shares was required to be registered was a question of law and the documents requested, which are of a factual nature relating to the knowledge of SCB HK about a requirement of registration, are irrelevant to that question.

10. Finally, the Claimant contested the Respondent's argument that failure to object to the production of documents contained in Request No. 36 meant that there was no basis for objecting to the documents included in Request No. 37. In the Claimant's view, the position it had taken in respect of Request No. 36 was simply irrelevant to Request No. 37. The documents to be produced under Request No. 36 concerned whether attempts had been made in fact to register; the documents sought under Request No. 37 threw no light on that factual question.

3. The Respondent's Reply

11. In its reply of 3 November 2011, the Respondent contested the view that the documents in Request No. 37 were not relevant because SCB HK's claim was based on the assignment of securities under the PPA and not under the Charge of Shares. The Respondent expected that SCB HK would be arguing that it is secured notwithstanding a failure to register and thus the requested documents would be relevant. Furthermore, the Respondent would be challenging the validity of the restructured loan and thus the documents in Request No. 37 would be relevant to the Respondent's defence.

12. In addition, the Respondent argued that the requested documents could contain admissions that would be "relevant, material and probative" respecting the Respondent's defences both as a matter of jurisdiction and on the merits as well as any potential counterclaims. More broadly, the Respondent argues, the documents sought in Request No. 37 could be relevant to "the validity of the underlying debt, including whether the Liquidator as opposed to SCB HK has authority over IPTL's claims arising under the PPA; whether such assignment of claims is applicable and valid; and whether SCB HK actually has standing under that assignment to maintain this arbitration."

13. The Respondent further argues that the fact that the claim is brought pursuant to the assignment under the PPA does not diminish the relevance of the documents sought under Request 37. SCBN HK simply stands in the shoes of IPTL and any defence available against IPTL would be available against SCB HK.

14. Finally, the Respondent contests the claim that production is premature. This is not a case of partial production to be followed at a later date by further production. Nothing has been produced under Request No. 37 and there is no reason to delay production. The Respondent also takes the Claimant's argument that the request is premature to be an admission of the potential relevance of the documents.

III. Analysis

15. The Tribunal notes that the Respondent's initial claims that the Charge of Shares is "directly relevant to claims that the SCB HK intends to assert" and that the documents requested "directly bear" on the standing of SCB HK to bring these claims, appears to have less weight in light of the Claimant's clarification that its claim is based on the assignment of securities under the PPA and not on the assignment of securities under the Share Pledge Agreement.

16. At the same time, the Tribunal considers that the Respondent has at least raised a *prima facie* case of the potential broader relevance of the documents requested to its possible defences in this case. The validity of the Charge of Shares might, as the Respondent claims, become relevant and thus both the factual question of whether registration took place and the broader contextual question of why a decision was taken to register or not register as the case may be could also be relevant. Indeed, the Tribunal considers that the Claimant's suggestion that the

request is premature involves some recognition of the potential relevance of the documents requested.

17. The Tribunal also considered whether delaying the request as implicitly suggested by the Claimant might be appropriate. However, it concluded that since in this case there had been no bifurcation of jurisdiction and the merits, it would be more efficient and no greater burden on the Claimant to allow production now, rather than delaying the matter until a later stage when the full arguments of the parties become clearer.

18. Accordingly, the Tribunal concluded that since the Respondent had demonstrated the potential relevance of the documents covered by Request No. 37, it would be appropriate to order their production now.

19. In light of the above, the Tribunal rules as following:

IV. Order

20. The Claimant shall produce the documents sought in Request No. 37 of the Respondent's request for the production of documents and shall do so by 9 December 2011 in accordance with paragraph 14 of the Minutes of the First Session of the Tribunal dated 13 July 2011.

For the Tribunal:

[Signed]

Professor Donald McRae

Date 14 November 2011