

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

STANDARD CHARTERED BANK (Hong Kong))
LIMITED,)
)
Applicant,)
) ICSID Case No. ARB/10/20
v.)
)
TANZANIAN ELECTRIC SUPPLY COMPANY)
LIMITED)
)
Respondent.)

Procedural Order No 5

I Background

1. On July 6, 2011, the Respondent, Tanzania Electric Supply Company Limited (“TANESCO”), advised the Tribunal that it intended to make at least five jurisdictional objections and that it would request bifurcation between jurisdiction and the merits. In a letter of the same date, the Claimant, Standard Chartered Bank (Hong Kong) (“SCB HK”), indicated that it was opposed to bifurcation, as the jurisdictional questions and the merits questions, all rooted in contractual undertakings, would involve consideration of the same documents during the two phases. In the Minutes of its First Session held on July 7, 2011, the Tribunal decided that it was not in a position to decide on the question of bifurcation at that time, and invited the Parties to confer and revert with a schedule that contemplated two possible scenarios, bifurcation and non-bifurcation.¹ In light of this, a timetable was agreed under which if the Respondent wished to request bifurcation it would do so by April 13, 2012. If it did request bifurcation, the Claimant could file its Opposition by May 2, 2012 and the Respondent a Reply by May 9, 2012. A hearing on bifurcation would then be held on May 14, 2012.

2. On April 13, 2012, the Respondent filed an application for bifurcation (“Application”). On May 2, 2012, the Claimant filed its Opposition to bifurcation (“Opposition”) and on May 9,

¹ Minutes of the First Session, para. 14.

2012, the Respondent filed its Reply (“Reply”). In accordance with the agreed timetable, a hearing on the question of bifurcation was held in London on May 14, 2012 in the presence of the Tribunal and the Parties’ counsel.

II The Arguments of the Parties

1. The Respondent’s Application for Bifurcation

3. In its letter of July 6, 2012, the Respondent had listed the following five objections to jurisdiction:

- First, the restructured Term Loans 1 and 2 that SCB HK claimed to acquire in 2005 from Danaharta and which are the basis for its claims in this arbitration, were not the valid debt of IPTL.
- Second, Danaharta and SCB HK were also aware that the restructuring (including altering the waterfall of payments under the 1977 Facility Loan) was a violation of the Power Purchase Agreement (“PPA”) and the incorporated financial model.
- Third, SCB HK knew or was on notice that the 1977 Facility Loan and related facility documents, including the Mortgage Deed, the Security Deed and Charge of Shares, were never properly registered in Tanzania.
- Fourth, as acknowledged by Danaharta’s solicitors, whatever rights SCB HK claimed to acquire would be void if the winding up order is made as the restructured loan it acquired was finalized after the winding up suit was filed.
- Fifth, because the provisional liquidator assumed control over the assets of Independent Power Tanzania Limited (“IPTL”) in 2008 (before SCB HK claims it was even appointed as Security Agent) the provisional liquidator has superior standing to SCB HK with respect to IPTL and its assets.

4. In its application for bifurcation, however, the Respondent asserted only a single challenge to jurisdiction, based on the third and fifth objections in its July 6, 2011 letter. The subject of the challenge, the Respondent claimed, is entirely separate from the merits.² According to the Respondent, SCB HK’s claim is based on its acquisition of a security interest in the PPA between IPTL and TANESCO, but that security interest has never been registered in

² Application, para. 2.

accordance with Tanzanian law. Thus, SCB HK's security interest is void against the liquidator appointed by the Tanzanian courts in the winding up of IPTL. As a result, SCB HK has no standing to bring this claim. In the Respondent's view, the matter is a straightforward question of Tanzanian law.

5. On the basis of expert testimony, the Respondent argued that the security interest, which SCB HK claimed it had acquired by assignment from IPTL, was a "charge on book debts" or alternatively a floating charge within the meaning of the Tanzanian Companies Ordinance. Since that security interest was never registered against IPTL's assets, it was void against the liquidator for IPTL.³

6. In TANESCO's view, bifurcation would result in "procedural economy" since in order to decide the jurisdictional claim, the Tribunal would not have to sift through thousands of pages of exhibits, and it would avoid the preparation of witness statements and expert testimony on accounting and financial modeling in order to address the "invoice dispute".⁴ The Respondent also argued that in order to consider the "invoice dispute", it would also be necessary to "rehash" the testimony, exhibits and briefs in the first ICSID arbitration between IPTL and TANESCO.⁵ By contrast, the Respondent argued, the jurisdictional issue it had raised presented a "narrow issue of law" relating to the standing of SCB HK to pursue these claims.⁶

2. The Claimant's Opposition to Bifurcation

7. The Claimant argued, in opposition to the request for bifurcation, that its claim in the present case rests not on a charge over book debts or a floating charge, but rather on the separate assignment under the Security Deed of the PPA to the Security Agent, which is now SCB HK.⁷ This assignment, the Claimant argued, does not constitute a charge over book debts or a floating charge.

8. The Claimant further argued that the merits are not as complicated as the Respondent claims and in any event in order to decide the jurisdictional issue the Tribunal will have to

³ Reply, paras 8-11.

⁴ Application, paras 5 and 6.

⁵ Application, para. 6

⁶ Application, para. 8.

⁷ Opposition, para. 11.

consider the same documents and issues relevant to the dispute on the merits.⁸ In the view of the Claimant, the jurisdictional and merits issues can be heard together in accordance with the combined timetable and that this will prevent further delay in hearing the merits issues.

III Analysis

9. In considering this matter, the Tribunal took account of three issues:

- First, was the objection being asserted a matter of jurisdiction, or did it really go to the merits of the case?
- Second, was the matter discrete and separable from the merits of the dispute?
- Third, would bifurcation be likely to promote “procedural economy”, resulting in savings in time, effort and expense?

1. Jurisdiction or Merits

10. In the oral hearing, the Tribunal questioned the Respondent about the nature of the preliminary objection it was asserting. The Respondent confirmed that it was not challenging the validity of the assignment of the arbitration clause in the PPA to the Claimant in accordance with the Security Deed. It is this arbitration clause that is invoked by the Claimant as the basis for the Tribunal’s jurisdiction in this case. The Respondent thus conceded that its preliminary objection was not of a jurisdictional nature. The essence of the Respondent’s objection was instead that the failure to register the charge on book debts and the floating charge under the Security Deed rendered any security interest void against the Liquidator of IPTL.⁹ The Respondent took the view that this objection could be characterized as pertaining to the standing of the Claimant and on that basis could be considered as a matter relating to the “competence” of the Tribunal¹⁰ such that it could be raised under Article 41 of the ICSID Convention.¹¹

11. In any event, both Parties took the view that even if this were not a jurisdictional matter under Article 41 of the ICSID Convention, the power of the Tribunal under Article 44 to manage the case would include a power to separate out this issue and treat it as a preliminary issue

⁸ Opposition, paras 16 and 17.

⁹ Transcript, pages 13ff.

¹⁰ Transcript, pages 16-17.

¹¹ Transcript, page 107.

separate from the merits.¹² In light of the Parties' agreement on the power of the Tribunal under Article 44 to bifurcate in the circumstances of this case, the Tribunal has decided not to consider the issue of the applicability of Article 41 any further.

2. The Discrete Nature of the Issue

12. The Respondent had argued that its preliminary objection gives rise to a discrete and straightforward issue that could be decided largely on the basis of Tanzanian law without consideration of the broader factual matrix of the dispute and the Respondent's substantive defences on the merits. The Claimant argued that the matter raised by the Respondent as a preliminary objection was more complicated than the Respondent represented because it was connected with the broader issue of what was actually assigned to the Claimant under the Security Deed. This, according to the Claimant, would require an analysis of the same documents and evidence that were relevant to the merits. Further, the Claimant argued that the substance of its claim - which it labeled the "invoice dispute"- was not as complicated as had been portrayed by the Respondent.

12. In the Tribunal's view, the preliminary objection raised by the Respondent gives rise to issues of contractual interpretation in respect of the Security Deed as well as questions relating to the perfection of security interests under Tanzanian law. There is no doubt that this would involve some analysis of other documentation in the case relating to the merits. Nevertheless, the objection raised by the Respondent is sufficiently discrete that it could in principle be separated from the merits.

3. The Procedural Economy of Bifurcation

13. The Respondent argued that there would be "procedural economy" in bifurcation. In its view,

"The Tribunal should in the interests of efficiency and cost savings, bifurcate this proceeding to first determine whether SCB HK has standing. In the likely event that the Tribunal finds that SCB HK does not have standing, the arbitration will be dismissed, and

¹² Transcript, pages 106-107.

a substantial burden on both the Parties and the Tribunal will be lifted”.¹³

In short, the Respondent was weighing the likelihood of success at the preliminary phase against the cost of proceeding to the merits phase.

14. The Claimant by contrast doubted the cost savings of bifurcation in part because the same issues and evidence would have to be considered at both the preliminary and merits phases, and in part because the basis of Respondent’s objection was not properly characterized as one of jurisdiction.

15. In short, the question for the Tribunal was whether, even if the Respondent were to be successful in its objection relating to the lack of registration of the Claimant’s security interest, this would dispose of the entire case. If not, then the claims to cost savings and procedural economy would appear less compelling.

16. In its Application, the Respondent asserted that the effect of the failure of SCB HK to register its security interest meant that it was “void against the liquidator”.¹⁴ In its Reply, the Respondent referred to the expert opinion of Professor Luitfried Xavier Mbunda that under Tanzanian law the effect of non-registration of the security interest was that SCB HK’s interest was “void against IPTL’s liquidators and creditors”.¹⁵

17. The Claimant argued, however, that the security interest created under Section 3.1 of the Security Deed was separate from the assignment of the PPA to the Security Agent under Section 3.2 of the Security Deed. The right to arbitrate arose under that assignment and was independent of the security interest established under Section 3.1. It was the assignment under Section 3.2 on which the Claimant argued that the jurisdiction of the Tribunal rested.

18. In seeking to explain to the Tribunal how failure to register the security interest could affect SCB HK’s *in personam* right to pursue a claim against TANESCO, the Respondent argued that if SCB HK lost its security interest, through failure to register it, “then the asset belongs to

¹³ Application, para. 8.

¹⁴ Application, para. 3.

¹⁵ Reply, para. 11 and Statement of Prof. Mbunda, para. 14 (Appendix D to the Reply).

IPTL under the control of the liquidator, and our view is they can't really proceed with this arbitration. Only the liquidator could proceed with this arbitration".¹⁶ According to the Claimant, however, the failure to register has an impact on the priority of a claim against the liquidator, but this affects only what can be done with any monies recovered in this arbitration; it does not affect the right to bring a claim. Under this view, the Claimant can bring this claim, but it might be only an unsecured creditor in respect of access to the monies that would result from any award in its favor.¹⁷

19. In the view of the Tribunal, the Respondent had the burden of establishing the likelihood of "procedural economy" and this included establishing that its preliminary objection would, if successful, dispose of the claims advanced by the Claimant in their entirety. In the event, the Tribunal is not convinced that even if the Respondent were to be successful in its basic contention that the failure of SCB UK to register its security interest rendered it void against the liquidator that this would in fact dispose of the case.

20. While the Respondent does not contend that the Claimant was required to register the assignment of the interest in the PPA to the Security Agent under Section 3.2 of the Security Deed, it appears to argue that the effect of non-registration of an interest under 3.1 of the Security Deed nullifies the right to pursue an *in personam* claim by SCB HK against TANESCO – a right that had been assigned to it under Section 3.2 of the Security Deed. Yet the argument that the right to sue is in the sole hands of the liquidator did not appear to be supported in the communication of the liquidator to SCB HK of May 8, 2012, which was placed before the Tribunal at the May 14 hearing with the consent of both Parties. The liquidator had been given the opportunity to assert that SCB HK could not pursue these claims because they were within his sole province, but he refrained from making such an assertion.

21. In addition, the claim made in the Claimant's Memorial is not just to order payment of the sums of money allegedly owed to IPTL by TANESCO, it also involves a declaration that TANESCO was in breach of its contract with IPTL and a declaration that moneys are owing to IPTL. It is not clear to the Tribunal how the Respondent's preliminary objection to the effect that the Claimant failed to register its security interest would affect the right to request those declarations.

¹⁶ Transcript, page 109, lines 6-9.

¹⁷ Transcript, pages 91-94.

22. The Tribunal has not, for the purposes of this decision on bifurcation, come to a definitive view as to whether the Respondent's preliminary objection, if upheld, would have the effect of disposing of the entire case. The Tribunal has simply resolved that the Respondent has not discharged its burden of establishing that the separate adjudication of its preliminary objection would achieve the efficiency and cost savings that the Respondent claims.

23. Accordingly, the Tribunal does not consider that the case for bifurcation of the present dispute has been made out by the Respondent.

24. In the course of the May 14, 2012 hearing, the Claimant introduced 52 documents, which it had provided to the Respondent the previous evening. The Respondent challenged the production of a number of these documents and subsequently confirmed that challenge in writing by letter of May 21, 2012. The Claimant responded by letter of May 28, 2012. At the present stage, the Tribunal observes that it did not rely on any of the documents challenged in reaching its decision on the issue of bifurcation. It will rule on the Respondent's challenge to the production of those documents when it rules on the Parties' motions to compel the production of documents (Claimant's Motion of May 2, 2012; Respondent's Motion of May 9, 2012) that were the subject of separate submissions at the May 14, 2012 hearing.

IV Order

25. The Tribunal rejects the Respondent's application to bifurcate the proceedings and directs that the proceedings continue in accordance with Track B set out in the Minutes of the First Session of the Tribunal dated July 13, 2012.

On Behalf of the Arbitral Tribunal

[Signed]

Professor Donald McRae

Date May 29, 2012