

**UNITED NATIONS COMMISSION
ON
INTERNATIONAL TRADE LAW**

FINAL AWARD

SILVERTON FINANCE SERVICE, INC.

Claimant

vs.

REPÚBLICA DOMINICANA

Respondent

Arbitral Tribunal

Mr. Bernardo M. Cremades
President

Professor Franco Ferrari
Co-Arbitrator

Mr. Jose Eloy Anzola
Co-Arbitrator

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1. Pursuant to the United Nations Commission on International Trade Law Arbitration Rules (adopted on December 16, 2013) (hereinafter the “**UNCITRAL Rules**”), the Tribunal hereby issues the following Final Award:

- I. INTRODUCTION**

2. SILVERTON FINANCE INC. (“**Silverton**” or the “**Claimant**”) is a company established in accordance with the laws of the Republic of Panama. The Claimant has instituted this arbitration against REPÚBLICA DOMINICANA (“**Dominican Republic**” or the “**Respondent**”), a sovereign nation, in accordance with the UNCITRAL Rules. The Claimant claims breaches of a Bilateral Investment Treaty between the Republic of Panama and the Dominican Republic, with date of signature February 6, 2003 and entry into force September 17, 2006 (hereinafter the “**Dominican Republic-Panama BIT**”) The Claimant and the Respondent may be referred to, individually, as a “**Party**,” and, jointly, as the “**Parties**.”

3. The Claimant’s address for the purposes of this arbitration is:

Republic National Bank no. 15
Vía España
Calle Colombia
Panamá
República de Panamá

4. The Respondent’s address for the purposes of this arbitration is:

Bryan Cave LLP
200 S. Biscayne Boulevard, Suite 400
Miami, Florida 33131
United States of America
Tel: (786) 322-7500
Fax: (786) 322-7501

5. The Claimant is represented by:

Alberto Croze (acroze@crozelaw.com)
Guillermo Gómez Herrera (guillermogh@gglawrd.com)
Gómez & Grateaux
Federico Geraldino No. 6, Edificio JZ, Primer Nivel, local 2
Santo Domingo
Dominican Republic
Tel: (809) 331-2600

6. The Respondent is represented by:

Pedro J. Martinez-Fraga (pedro.martinezfraga@bryancave.com)

C. Ryan Reetz (ryan.reetz@bryancave.com)

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Santo Domingo

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Tel: (809) 549-3446

Fax: (809) 566-5075

7. The members of the Arbitral Tribunal are:

Bernardo M. Cremades

B. Cremades & Asociados

Goya 18, 2º

28001, Madrid

Spain

Jose Eloy Anzola

3625 Bougainvillea Road

Miami, Florida 33133

United States of America

Prof. Franco Ferrari

NYU School of Law

40 Washington Square South

Room 409B

New York, NY 10012

United States of America

II. PROCEDURAL HISTORY

8. The Claimant filed its “Demanda Arbitral” or Notice of Arbitration on September 2, 2016, and served it on the Respondent on September 5, 2016.

9. In its Notice of Arbitration, the Claimant proposed the use of the UNCITRAL Rules and also the appointment of three arbitrators and appointed Mr. Eloy Anzola as its party-appointed arbitrator, in accordance with Article 9 of the UNCITRAL Rules. The Claimant also proposed the language of the arbitration to be Spanish, the seat of the arbitration to be Miami, Florida, and the Appointing Authority to be the International Court of Arbitration of the International Chamber of Commerce Court (“ICC”).
10. On October 6, 2016, the Respondent provided its response to the Claimant’s Notice of Arbitration, in which it agreed with the Claimant’s proposal to appoint three arbitrators and that the seat of the arbitration should be Miami, Florida. The Respondent disagreed with the Claimant’s further proposals and stated that both English and Spanish should be the languages of the arbitration, and that the Parties adhere to Article IX of the UNCITRAL Rules concerning the Appointing Authority. The Respondent requested a 75-day extension of time to file a memorial on jurisdiction.
11. On October 11, 2016, the Claimant asked for clarification regarding the Respondent’s stance on the use of the UNCITRAL Rules as opposed to the 1976 version of the rules. The Claimant further agreed with the Respondent concerning the potential mootness of an Appointing Authority should the two party-appointed arbitrators agree on the appointment of a third arbitrator.
12. On October 17, 2016, the Respondent wrote to the Claimant reiterating its argument that both English and Spanish should be the languages of the arbitration. The respondent further appointed Prof. Franco Ferrari as its party-appointed arbitrator in accordance with Article 9 of the UNCITRAL Rules. The Respondent clarified that it agrees to the application of the UNCITRAL Rules.
13. By letter dated October 17, 2016, the Respondent wrote to Mr. Eloy Anzola and Prof. Franco Ferrari notifying them that the Parties had elected them as arbitrators in this matter in accordance with Article IX of the UNCITRAL Rules. The letter included the Claimant’s Notice of Arbitration, dated September 2, 2016, the Respondent’s Response dated October 6, 2016, the Claimant’s letter dated October 11, 2016 and the Respondent’s letter dated October 17, 2016.
14. On October 28, 2016, Mr. Bernardo M. Cremades wrote to the Parties informing them that he had been nominated by the co-arbitrators to act as President of the Arbitral Tribunal in accordance with the UNCITRAL Rules. In accordance with Article 11 of the UNCITRAL Rules, Mr. Cremades made a disclosure statement to the Parties. Mr. Cremades further instructed the Parties to attempt to propose a joint procedural timetable no later than November 18, 2016.

15. On October 28, 2016, Mr. Anzola made a disclosure statement to the Parties in accordance with Article 11 of the UNCITRAL Rules.
16. On October 29, 2016, Prof. Ferrari made a disclosure statement to the Parties in accordance with Article 11 of the UNCITRAL Rules.
17. On October 30, 2016, the Claimant wrote to the Arbitral Tribunal requesting a decision as to the language of the arbitration before the drafting of any memorials.
18. On October 31, 2016, the Respondent provided a response to the Claimant's communication dated October 30, 2016 reiterating its arguments concerning the language of the arbitration and stating that it was not yet the "proper procedural juncture" to submit party arguments concerning procedural decisions.
19. On November 3, 2016, the Claimant stated that it was not possible to agree on a procedural order with the Respondent given the Parties' conflicting proposals concerning the language of the arbitration.
20. On November 4, 2016, the Arbitral Tribunal instructed the Parties to submit their comments on the language of the arbitration no later than November 9, 2016.
21. On November 9, 2016, both Parties submitted their comments on the language of the arbitration to the Arbitral Tribunal.
22. On November 14, 2016, the Arbitral Tribunal decided that the languages of the arbitration shall be both English and Spanish, and that the Parties should lay out procedures for the translation of documents in their joint procedural proposal.
23. In its communication dated November 14, 2016, the Arbitral Tribunal further stated that it shall apply a rate of US \$600 per hour for its fees. Neither Party has ever disagreed with this decision by the Arbitral Tribunal.
24. On December 12, 2016, the Arbitral Tribunal requested the Parties to provide an update as to the Parties' joint proposal for a procedural order and timetable.
25. On December 17, 2016, the Respondent wrote to the Arbitral Tribunal indicating that it had not had communications with the Claimant regarding the procedural order and timetable and attached a draft proposal previously prepared by the Respondent.
26. On December 19, 2016, the Arbitral Tribunal requested the Claimant to provide its comments on the Respondent's December 17 communication, no later than December 21, 2016.
27. On December 21, 2016, the Claimant stated that the Arbitral Tribunal's decision concerning the languages of the arbitration would greatly increase the costs of the

arbitration and that “[i]n view of the small size of a possible positive outcome of these proceedings for the Claimant (US\$ 1000/1500 K) going through the whole exercise appears to be disproportionate in relation to the costs of the same.” The Claimant continued that “we hereby propose to abandon the claim, without prejudice, each [P]arty bearing its own costs (or "spese compensata" since we have an Italian co-arbitrator) splitting the arbitration costs incurred up to now between the [P]arties.”

28. On December 21, 2016, the Respondent expressed its disagreement with Claimant’s proposal and requested that the Claimant’s claim be dismissed with prejudice and that the Respondent should be awarded reasonable fees and costs.
29. On December 21, 2016, the Arbitral Tribunal requested the Claimant to provide further comments no later than December 31, 2016. In response to a request for an extension of time from the Claimant on December 28, 2016, the Arbitral Tribunal extended the Claimant’s deadline until January 5, 2017.
30. On January 5, 2017, the Claimant submitted its response to the Respondent’s application for a dismissal with prejudice and an award of fees and costs, in which it stated that it was withdrawing the claim “with prejudice.”
31. On January 7, 2017, the Arbitral Tribunal granted the Respondent until January 26, 2017 to submit a further formal reply.
32. On January 26, 2017, the Respondent submitted its Reply to Claimant’s Submission.
33. On January 28, 2017, the Claimant requested the right to file a further short response. The Arbitral Tribunal granted this request giving the Claimant until February 13, 2017 to file its submission.
34. On February 1, 2017, the Respondent files its Amended Reply to Claimant’s Submission “in an effort to correct typographical errors.”
35. On February 2, 2017, the Respondent wrote to the Arbitral Tribunal stating that “the case styled: *Bolner View Corp., y Silverton Finance Service, Inc. v. Ministerio de Obras Públicas y Comunicaciones, Falkland Trading LTD y el Arquitecto Arturo Vásquez*, case No. 030-14-01479, technically remains open and pending.”
36. On February 12, 2017, the Claimant submitted its further comments to the Arbitral Tribunal stating that the Arbitral Tribunal “should issue [an] award terminating these proceedings with prejudice, dictating that each party should bear its legal costs and sharing the arbitration costs.”
37. On February 13, 2017, the Arbitral Tribunal instructed the Parties to submit their costs and expenses no later than February 17, 2017.

38. On February 17, 2017, the Parties submitted their costs and expenses to the Arbitral Tribunal.
39. On March 2, 2017, the Arbitral Tribunal requested the Parties to provide comments on the costs submissions no later than March 4, 2017.
40. On March 3 and March 4, 2017, respectively, the Respondent and the Claimant provided further comments on the issue of costs.
41. On March 6, 2017, the Arbitral Tribunal requested the Parties to provide a detailed breakdown of their costs no later than March 9, 2017.
42. On March 6, 2017, the Claimant wrote to the Arbitral Tribunal requesting the Respondent to produce its invoice to or fee arrangement with the client.
43. On March 8 and March 9, 2017, respectively, both Parties submitted a detailed breakdown of their costs.
44. On March 9, 2017, the Arbitral Tribunal declared the proceedings to be closed in accordance with Article 31 of the UNCITRAL Rules.

III. THE CLAIMANT'S WITHDRAWAL OF ITS CLAIM

45. The Claimant's claim related to the ownership of property in the municipality of La Romana in the Dominican Republic. The Claimant states that it commenced a series of proceedings when a neighboring property began construction works which were allegedly contrary to local legislation. Moving through the court system of the Dominican Republic, the Claimant eventually secured a judgment in its favor suspending the construction license that had been granted to the neighboring property. The Claimant argued that despite this, the final decision from the Dominican Republic courts came too late, i.e. when the illegal construction was fully terminated and there were no more works to suspend. The Claimant argues that this was caused, by among other things, the conspiracy of a lower level judge to deny jurisdiction to hear the Claimant's claim. The Claimant therefore argued that there were various breaches of the Dominican Republic-Panama BIT regarding these matters that occurred in the Dominican Republic court system. The Claimant states that it has been seeking justice, rather than money, from the Respondent, hence the nature of its relatively small monetary claims. The Claimant maintains that the Arbitral Tribunal does have jurisdiction to hear the merits of this dispute.

46. The Respondent has denied each of the Claimant's allegations of a breach of any of the provisions of the Dominican Republic-Panama BIT. The Respondent argues that there is no jurisdiction for the Claimant's claim to be brought under the Dominican Republic-Panama BIT. The Respondent argues that the Claimant's claims set forth non-compliance with contractual obligations rather than cognizable violations of treaty protection standards contained in the Dominican Republic-Panama BIT. The Respondent also disputes the merits of the Claimant's claim and argues that there has not been a breach of any provision of the Dominican Republic-Panama BIT.
47. Despite the Claimant's above contentions which have been set out more fully in its Notice of Arbitration, the Claimant has decided to withdraw its claim with prejudice as a result of the Arbitral Tribunal's decision to conduct these arbitration proceedings in both English and Spanish. The Claimant states that "[t]here is no bad faith or abuse of process and this action is in no way frivolous; Silverton suffered and is suffering a great injustice in the Dominican Republic and hoped to find justice in arbitration. But the decision of dual language with the translation of the memorials and the important documents from Spanish to English rendered this effort much too expensive for a single investor like Silverton."¹ The Claimant continues that "[a]s we stated earlier the Tribunal's decision on the language makes it impossible to continue for the Claimant since investing the necessary funds in a fully bilingual arbitration (see draft of Procedural Order of Bryan Cave) entails a financial effort completely disproportionate with the possible positive result or in the extreme a claim for damages (if and when it would be made), which was of a maximum of \$ 1000/1.,500 K. We are therefore obliged to offer to withdraw the claim, with prejudice, each party bearing its legal and arbitration costs incurred up to now."²
48. Thus, the Claimant accepts that its claim should be withdrawn with prejudice, though it argues that each Party should cover its own costs. The Respondent acknowledges the Claimant's statement that it intends to withdraw its claim with prejudice, though questions whether this the Claimant only does so by qualifying a dismissal with prejudice where each Party bears its own costs and fees.³ The Tribunal accepts that the Claimant wishes to withdraw its claim with prejudice, but decides that this is not conditioned by a favorable costs order from this Arbitral Tribunal. Therefore, the Tribunal will dismiss the Claimant's claim with prejudice and shall decide on the issue of costs and expenses separately.

¹ Claimant's email to the Arbitral Tribunal dated January 5, 2017.

² *Id.*

³ Amended Respondent's Reply to Claimant's Submission, dated February 1, 2017, p. 9.

IV. COSTS

49. Article 40 of the UNCITRAL Rules contains provisions regarding costs. Article 40 provides:

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

50. Article 42 of the UNCITRAL Rules, entitled "Allocation of Costs," provides:

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

51. The Respondent argues that the Claimant should bear the costs of this arbitration since it is not the "prevailing party."⁴ The Respondent refers to the case of *Canfor Corporation v. United States of America, Tembec et al. v. United States of America*

⁴ Amended Respondent's Reply to Claimant's Submission, dated February 1, 2017, p. 9.

and *Terminal Forest Products Ltd. v. United States of America*, in which, referring to now Article 42 of the UNCITRAL Rules, the Tribunal held that:

“The UNCITRAL Arbitration Rules do not address expressly the issue of a unilateral withdrawal by a claimant. However, the issue can be resolved on the basis of an interpretation of the UNCITRAL Rules. Accordingly, the Tribunal interprets the reference to ‘the unsuccessful party’ in Article 40(1) of the UNCITRAL Rules to include a party that unilaterally withdraws its claim. It triggers also the general principle of ‘costs follow the event,’ which, according to this Tribunal, is the guiding principle for the application of [Article 42(1)] of the Rules.”

52. The Claimant makes reference to the second sentence in Article 42(1) of the UNCITRAL Rules stating that “the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” The Claimant denies the Respondent’s contention that this case is frivolous and has been brought in bad faith. The Claimant states that “in investment arbitration there is a general trend to split the legal and arbitration costs between the parties even if one of them fully succeeded.”⁵ The Claimant refers to the case of *Romak v. Uzbekistan*, where the Tribunal held that:

*“The Arbitral Tribunal has reviewed a number of arbitral awards in investment treaty disputes. These awards indicate that, in this field, a general trend has developed that arbitration costs should be equally apportioned between the Parties, irrespective of the outcome of the dispute. One of the reasons for this, as stated in several awards, is that investment treaty tribunals are called upon to apply a novel mechanism and substantive law to the resolution of these disputes (see, for example, *Azinian v. Mexico*, 194 *Tradex v. Albania*, 195 and *Berschader v. Russia*196). Thus, the initiation of a claim that is ultimately unsuccessful is more understandable than would be the case in commercial arbitration, where municipal law applies. With respect to the present dispute, to the Tribunal’s knowledge, there has never been an investment treaty claim decided outside the ICSID system in relation to the enforcement of an arbitral award. Other cases, such as *Saipem*, share similar factual elements with the present dispute, but offered no direct analogy.*

Clearly, the general practice in investment treaty arbitration disfavoring the shifting of arbitration costs against the losing party does not always apply. In particular, deficiencies in the presentation of a case or obstructive behavior, which lead to an unjustified increase of the costs of the

⁵ Claimant’s email to the Arbitral Tribunal dated January 5, 2017.

proceedings, not infrequently justify apportioning the arbitration costs in another way.

In the present case, neither of the Parties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both Parties worked ably, diligently and efficiently in defense of their clients' respective interests. Nor are there any other reasons that support such apportionment. Each of the Parties shall therefore be liable to pay half of the arbitration costs. Each Party shall also bear its own costs for legal representation and other costs incurred in connection with presenting its case."

53. The Claimant argues that it has not committed any of the actions identified in the *Romak* case that would warrant the shifting of arbitration costs. The Claimant argues that very little work has been done by the Parties to date, and that the case is not frivolous and has not been instituted in bad faith. In this regard, the Claimant reiterates that the Arbitral Tribunal has jurisdiction to hear this dispute, and that the Claimant has brought a strong claim on the merits as "there is no doubt that the Claimant suffered a profound injustice in its attempts to stop the construction of the illegitimate building affecting and damaging its property."⁶
54. The Parties have made extensive arguments concerning the merits of the dispute, despite the fact that the Claimant has accepted the withdrawal of its claim with prejudice. The Arbitral Tribunal has had regard to these arguments only in so far as they assist the Arbitral Tribunal in making a determination as to costs. It is not for this Arbitral Tribunal, now or ever, to decide on the merits of this matter.
55. The Arbitral Tribunal is bound to act in accordance with Articles 40 and 42 of the UNCITRAL Rules. Article 42 clearly states that in principle the costs should be borne by the unsuccessful party. Thus, despite what any other UNCITRAL tribunal has stated, this Arbitral Tribunal must have regard first and foremost to the actual text of the UNCITRAL Rules. This Arbitral Tribunal agrees that a party withdrawing its claim with prejudice comes within the definition of an "unsuccessful party" within the meaning of Article 42 of the UNCITRAL Rules.
56. The Claimant has sought to argue that its sole purpose for withdrawing its claim is related to translation costs while would follow from the Arbitral Tribunal's decision to conduct this arbitration in both English and Spanish. This argument is not persuasive, and does not warrant the Respondent having to bear significant expenses and fees in defending itself to date.

⁶ *Id.*

57. Without making any finding on the merits, the Arbitral Tribunal recognizes that the Claimant was faced with defending significant jurisdictional objections as well as eventually proving the merits of its claims. This arbitration was never going to be a simple straight forward arbitration based on the facts and the law that the Arbitral tribunal has already seen. Thus, the decision regarding the language of the proceedings did not suddenly make this arbitration prohibitively expensive and unworkable. If the Claimant genuinely believed in the merits of its claim, the Arbitral Tribunal finds it difficult to believe that the Claimant would now wish to withdraw such claim with prejudice to itself.
58. Regardless of the Claimant's motivations for now withdrawing its claim with prejudice, it is a fact the Claimant is the unsuccessful party in this arbitration, and the general rule is therefore that the Claimant should bear the costs of the arbitration, as detailed in Article 40(2) of the UNCITRAL Rules. The Arbitral Tribunal believes that this approach is reasonable given the circumstances of the case, whereby the Claimant has instituted an arbitration against the Respondent, causing the Respondent to incur significant legal fees, and where this Claimant now seeks to walk away from the arbitration that it commenced without any consequences.
59. In summary, the Arbitral Tribunal finds the Claimant to be the unsuccessful party, in accordance with Article 42(1) of the UNCITRAL Rules, and the Arbitral Tribunal believes that it is reasonable in the circumstances of the case (where the Claimant withdraws its claim with prejudice) that the Claimant should bear all of the costs of this arbitration.
60. Furthermore, the Tribunal has examined the Parties' fees and costs and considers them to be reasonable in light of the amount of work that was done by both Parties in this arbitration. This decision is adopted by a majority of the members of the Arbitral Tribunal.

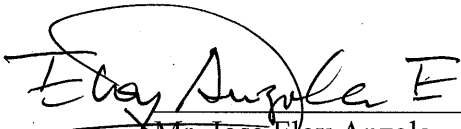
V. DECISION

61. The undersigned Arbitrators, having been designated in accordance with the UNCITRAL Rules, and having been duly sworn and having duly heard the proofs and allegations of the Parties, as indicated above, do hereby:
 - 61.1. DISMISS all of the Claimant's claims against the Respondent with prejudice;
 - 61.2. ORDER the Claimant to pay the costs of this arbitration, as defined in Article 40 of the UNCITRAL Rules, in the following sums:
 - 61.2.1. US \$380,596.83 to the Respondent. This decision is adopted by a majority of the members of the Arbitral Tribunal.
 - 61.2.2. US \$12,000.00 to Arbitrator Bernardo M. Cremades.

61.2.3. US \$8,400.00 to Arbitrator Jose Eloy Anzola.

61.2.4. US \$6,600.00 to Arbitrator Franco Ferrari.

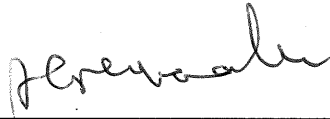
Place of Arbitration: Miami, Florida, United States of America



Mr. Jose Eloy Anzola

Co-Arbitrator

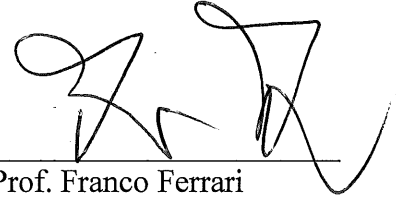
Date: 3/13/2017



Mr. Bernardo M. Cremades

President

Date: 3/15/2017



Prof. Franco Ferrari

Co-Arbitrator

Date: 3/10/2017