



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Silverton Finance Service Inc. v. República Dominicana, UNCITRAL – Final Award – 15 March 2017

Case Report by: Estuardo Javier Marchena Molina **, Editor Ignacio Torterola ***

Summary: Silverton Finance Service Inc. made a claim under the Dominican Republic – Panama BIT and the UNCITRAL Rules against the Dominican Republic, and proposed the language of the arbitration to be in Spanish. Subsequently, it decided to withdraw its claim, arguing that the decision of the Tribunal that the arbitration should be conducted both in English and Spanish made the process too expensive for itself. In its Award rendered on 15 March 2017, the Tribunal decided to dismiss all of the Claimant’s claims with prejudice, and ordered the Claimant to pay the costs of arbitration as well as Respondent’s expenses.

Main Issues: Withdrawal with Prejudice – Costs; Articles 40 and 42 UNCITRAL Rules

Committee: Mr. Bernardo M. Cremades (President), Prof. Franco Ferrari and Mr. Jose Eloy Anzola.

Applicant’s Counsel: Mr. Alberto Croze and Mr. Guillermo Gómez Herrera (Gomez & Gratareaux)

Respondent’s Counsel: Mr. Pedro J. Martínez-Fraga, Mr. C. Ryan Reetz (Bryan Cave LLP) and Mr. Enrique de Marchena K. (DMK Lawyers)

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Digest

1. Procedural History

On September 2, 2016, Silverton Finance Inc. (the “Claimant”), a company established in accordance with the laws of the Republic of Panama, filed its Notice of Arbitration against the Dominican Republic (the “Respondent”). The Claimant claimed alleged breaches of a Bilateral Investment Treaty signed between the Republic of Panama and the Dominican Republic, which entered into force on September 17, 2006 (hereinafter the “Dominican Republic-Panama BIT”) (¶¶ 2, 8).

In its Notice of Arbitration, the Claimant proposed the application of the UNCITRAL Rules and the appointment of three arbitrators, appointing Mr. Eloy Anzola as its party-appointed arbitrator in accordance with Article 9 of the UNCITRAL Rules. Further, it proposed the language of the arbitration to be Spanish, the seat of arbitration to be in Miami, Florida and the Appointing Authority to be the International Court of Arbitration of the International Chamber of Commerce Court (ICC) (¶ 9).

On October 6, 2016, the Respondent filed its response to the Notice of Arbitration, in which it disagreed with some of the proposals made by the Claimant, and requested a 75-day extension of time to file a memorial on jurisdiction. It also stated that both, English and Spanish should be the languages of the arbitration, and that the Parties adhere to Article 9 of the UNCITRAL Rules as far as the Appointing Authority is concerned. (¶ 10).

On October 11, 2016, the Claimant asked for clarification regarding the Respondent’s posture on the application of UNCITRAL Rules, and agreed that the two party-appointed arbitrators should appoint the third arbitrator. (¶ 11)

On October 17, 2016, the Respondent wrote to the Claimant stating it agrees to the application of UNCITRAL Rules, but insisting that both languages English and Spanish should be the languages of the arbitration. In this communication, the Respondent also designated Prof. Franco Ferrari as its party-appointed arbitrator. (¶ 12)

On October 28, 2016, Mr. Bernardo M. Cremades wrote to the Parties informing them that he had been nominated by the two party-appointed arbitrators to act as the President of the Arbitral Tribunal and made a disclosure statement to the Parties in accordance with Article 11 of the UNCITRAL Rules (which Mr. Anzola and Prof. Ferrari also made on October 28 and 29, 2016, respectively), and instructed the Parties to propose a joint procedural time table. (¶¶ 14-16)

On October 30, 2016, the Claimant wrote to the Arbitral Tribunal requesting a decision concerning the language of arbitration (¶17). On October 31, 2016, the Respondent filed a response to this communication, reiterating that English and Spanish should be the languages of the arbitration, and stating that it was not the proper time to submit any arguments concerning procedural decisions (¶18).

On November 3, 2016, the Claimant stated that it was impossible to make any agreements on a procedural order with the Respondent, given the conflicting proposals about the language of the arbitration. On this account, the Arbitral Tribunal on November 4, 2016, instructed the Parties to submit all of their comments regarding the language of the arbitration (¶¶ 19-20).

On November 9, 2016, both Parties submitted their comments. On November 14, 2016, the Arbitral Tribunal finally decided that the arbitration should be carried in English and Spanish, and that the Parties should design and present the procedures for the translation of the documents in their joint procedural proposal (¶¶ 21-22).

On December 21, 2016, the Claimant stated that the Arbitral Tribunal's decision on the language of the arbitration would increase significantly the costs of the procedure, and in view of the small size of the possible positive outcome it may obtain through the arbitration "(US\$ 1000/1500 K)", proposed to abandon the claim, without prejudice, splitting the arbitration costs incurred between itself and the Respondent. On this same date, the Respondent expressed its disagreement with the Claimants proposal and requested that the claim shall be dismissed with prejudice, and that Respondent should be awarded reasonable fees and costs. (¶ 27)

On January 5, 2017, the Claimant filed its response to the Respondent's application, and stated that it was withdrawing the claim with prejudice. Subsequently, on February 12, 2017, the Claimant submitted its further comments to the Arbitral Tribunal stating that the Arbitral Tribunal should issue an award terminating the procedures with prejudice, dictating each party should bear its own legal costs and sharing the arbitration costs. (¶¶ 30, 36)

On March 9, 2017, the Arbitral Tribunal declared the proceedings to be closed in accordance with Article 31 of the UNCITRAL rules. (¶ 44)

2. Facts of the Case

The Claimant owned a property located in the Municipality of La Romana, in Dominican Republic. In a neighboring property, construction works were initiated, which allegedly were contrary to the local legislation. Through the domestic court system of Dominican Republic, the Claimant obtained a judgment in favor and got the suspension of the construction license that had been granted to the neighboring property. However, the final decision from the court came too late, when the construction at issue was already fully terminated, and there were no more works to be suspended (¶ 45).

The Claimant argued that this delay in the judicial decision was caused, among other things, due to the conspiracy of a domestic lower level judge to deny jurisdiction to hear its claim. Therefore, the Claimant alleged a number of breaches the Dominican Republic - Panama BIT regarding these matters. Furthermore, it stated that rather than money, all it sought was justice from the Respondent, hence the nature of its small monetary claims, and maintained that the Arbitral Tribunal did have jurisdiction to hear its claims (¶ 45).

The Respondent in its response denied the allegations of the breach of any provision of Dominican Republic – Panama BIT. Also, it stated that the Arbitral Tribunal had no jurisdiction to hear the claim because the Claimant only exposed non-observance with contractual obligations, rather than violations to the treaty (¶ 46).

Nevertheless, the Claimant decided to withdraw its claim with prejudice, as a result of the Arbitral Tribunal Decision to carry the arbitration proceedings in English and Spanish. It stated that the action was not initiated in a frivolously or abusive way, nor in bad faith, but that this decision from the Arbitral Tribunal implied too much effort and expenses for a single investor like itself. In view of the small size of the possible positive outcome it may obtain

through the arbitration proceeding (US\$ 1000/1500 K), proposed to abandon the claim, with prejudice, each Party bearing its own costs and splitting the arbitration costs incurred. (¶ 47, 52)

The Respondent acknowledged the statements made by the Claimant about the withdrawal of the claim with prejudice, but argued that only the Claimant should bear all the costs (¶¶ 48, 51).

Finally, the Arbitral Tribunal accepted the withdrawal with prejudice from the Claimant, but ordered the Claimant to pay all the costs of the arbitration (¶¶ 60-61).

3. Legal issues Discussed in the Award

3.1. Arbitration costs under UNCITRAL Rules

The Respondent argued that the Claimant should bear all the costs of the arbitration defined in the Article 40 of the UNCITRAL Rules, according to the Article 42 (1) of the UNCITRAL Rules, since it was not the *prevailing Party*. It pointed out to the case of *Canfor Corporation v. United States of America, Tembec et al. United States of America and Terminal Forest Products Ltd. V. United States of America*, in which, making reference to the Article 42 (1) of the UNCITRAL Rules, the Arbitral Tribunal held that a party that unilaterally withdraws its claim should be considered as the “unsuccessful party” and must bear all the arbitration costs, following the general and guiding principle of this article: “*costs follow the event*”. (¶ 51)

The Claimant, on the other hand, argued that according to the second sentence of the Article 42 (1) of the UNCITRAL Rules¹, it was reasonable, in the case at hand, to split the costs of the arbitration. The Claimant cited the *Romak v. Uzbekistan* decision, where the Arbitral Tribunal acknowledged that there are several arbitral awards in investment arbitration in which, regardless of the outcome of the disputes, the arbitration costs are equally apportioned between the parties, and stated that the shifting of costs against a particular party should be justified by actions made by it that led to an unjustified increase of costs of the proceedings. The Claimant declared that it has not committed any actions that could substantiate the shifting of the arbitration costs, and that the case was neither frivolous nor initiated in bad faith (¶ 52-53).

The Arbitral Tribunal considering Articles 40 and 42 of the UNCITRAL Rules agrees that a party that withdraws with prejudice must be considered as an “unsuccessful party” (¶ 55). Also, it indicated that the argument of the Claimant regarding that its withdrawal was caused by the costs of conducting the arbitration in English and Spanish, was not persuasive. This because such costs did not “*suddenly make this arbitration prohibitively expensive and unworkable*”, and that if the Claimant truly believed in the merits of its Claim, was hard to believe that now it desired to withdraw with prejudice (¶ 56). Finally, the Tribunal held, without making any findings as to the merits or considering the motivations for the withdrawal, and taking into consideration the status of “unsuccessful party” of the Claimant and the legal fees the Respondent had to incur, that it was reasonable, according to the

¹ The second sentence of article 42 (1) of UNCITRAL Rules states 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 on the case.*”

UNCITRAL Rules, that the Claimant should bear all the costs of this arbitration proceeding (¶¶ 54, 57-60).

4. Decision

The Arbitral Tribunal by a majority of its members decided to dismiss all of the Claimant's claims against the Respondent with prejudice, and to order the Claimant to pay the costs of the arbitration, as defined in Article 40 of UNCITRAL Rules (¶ 61).