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International Arbitration Case Law
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Award Name and Date: Grenada Private Power Limited and WRB Enterprises, INC v. Grenada (ICSID Case No. ARB/17/13) – Award – 19 March 2020

Case Report by: Dhanya T Mallar**, Editor Ignacio Torterola***

Summary: In 1994, Government of Grenada privatised Grenada Electricity Services Company Limited (GRENLEC) and sold a controlling interest in GRENLEC to the claimants, Grenada Private Power Ltd. (GPP) and WRB Enterprises Inc. (WRB). The privatization package included a Share Purchase Agreement (SPA) signed between the Respondent and the Claimants which provided that upon the happening of one of the "Repurchase Events", the Claimants would have the right to "put" their shares to the Government of Grenada (GoG), and the GoG would be obliged to repurchase them at a price calculated in accordance with the Second Schedule of the 1994 ESA (Second Schedule). Twenty-two years later, the incoming New National Party (NNP) Government decided to restructure the electricity sector through sweeping changes to its regulation, production and distribution. The result, the Claimants say, was to trigger an obligation on the part of GoG to repurchase the Claimants' shares in GRENLEC. The Respondent claimed that the provisions of the ESA were void and of no legal effect as they fettered Government action in contravention of fundamental principles enshrined in the Constitution of Grenada. The Tribunal held that SPA was constitutionally compliant. Consequently the Tribunal ordered Grenada to pay Grenada Private a compensation at USD 58,427.962 plus pre- and post-Award interest from 3 May 2017 until payment of the Award. Finally, Grenada's counterclaim was dismissed.

Main Issues: Occurrence of "Repurchase Event" – Breach of Share Purchase Agreement by Government of Grenada – Quantum of Compensation

Tribunal: Hon. Ian Binnie, C.C., Q.C., President of the Tribunal; Ms. Olufunke Adekoya SAN, Arbitrator; Mr. Richard Boulton, Q.C., Arbitrator

Claimant's Counsel: Mr. Paul Friedland, Mr. Damien Nyer, Ms. Preeti Bhagnani, Mr. Cam Brewer.

Respondent's Counsel: Mr. Donald Francis Donovan, Ms. Natalie L. Reid, Ms. Akima Paul Lambert, Mr. Conway Blake, Mr. Romain Zamour, Dr. The Hon. Sir Lawrence Joseph, Ms. Leslie-Ann Seon, Ms. Linda Dolland

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** Dhanya T Mallar is a Senior Associate at V.J Mathew & Co. She holds an LLB degree from the Symbiosis Law School, Pune. IACL´s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of VJ Mathew & Co. Ms Mallar can be contacted at dhanya.mallar@gmail.com

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Digest:

1. Relevant Facts

GRENLEC is a private company which was incorporated in 1960 and was nationalised in 1979 when the People's revolutionary Government came into power. The Revolutionary Government fell in 1983 [¶50] and the National Democratic Congress (NDC) Government sold a controlling interest in GRENLEC to Grenada Private Power Ltd. (GPP), a Grenadian company in which WRB Enterprises Inc. (WRB), a closely held company in United States of America hold 75% of the Shares (GPP and WRB, jointly, called, the Claimants) [¶3] The Government of Grenada (GoG) and the Claimants concluded the Share Purchase Agreement (SPA) as part of privatisation package with the 1994 Electricity Supply Act and Public Utilities Commission Act [¶3]. The SPA specifically provided that upon the happening of any of the "Repurchasing events", the Claimants would have the right to "put" their shares to the GoG, and the GoG would be obliged to repurchase them at a price calculated in accordance with the Second Schedule of the 1994 ESA [¶3]. There were fifteen designated "Repurchase events" provided in Section 7.9 of the SPA [¶69].

In 2016, the NNP Government decided to restructure the electricity Sector [¶4]. The Senate of Grenada passed the Electricity Supply Act (2016 ESA) and Public Utilities Regulatory Commission Act (2016 PURCA) (collectively, the 2016 Acts) which came into force on 1 August 2016. The legislation restructured electricity sector. The 2016 Acts modified GRENLEC's exclusive license on the generation of electricity and cancelled its monopoly on permitting or refusing self-generators, abolished the statutory rate-setting mechanism, and replaced it with a more discretionary procedure before the PURC as well as eliminating GRENLEC's import duty and tax concessions. GRENLEC no longer had authorization to harness potential wind and water power without making payment to the Government. The guarantee of compensation for revocation of the license contained in Sections 28, 29, and the Second Schedule to the 1994 ESA was removed [¶97].

The claimants alleged that the 2016 laws constituted three separate repurchase events as per Section 7.9, namely, the amendment to the rate setting mechanism under 1994 ESA, the elimination of GRENLEC's exemption from customs and other duties on imported materials, which allegedly increased operating costs, the modification of the term of GRENLEC's license and abrogation of its exclusivity [¶98].

Consequently, on 22 March 2017, the claimants wrote to the Government stating that the 2016 Acts triggered to a number of Repurchase Events and demanded the purchase price according to the Second Schedule, which the Claimants calculated at USD $65,428,963 payable within 30 days [¶99]. On 2 May 2017, the Government responded that there was a

good-faith dispute as to whether the passage of the 2016 Acts gave rise to any obligation to repurchase the GRENLEC shares from WRB and requested negotiations to resolve the disputes [¶100].

Three days later, on 5 May 2017, the Claimants filed a **Request for Arbitration** with ICSID, which gave rise to the present proceedings [¶101]

2. Procedural History

The Claimant filed a request for Arbitration from the Claimants on 5 May 2017 against Grenada [¶13]. On 15 May 2017, the Request was registered and the Parties were notified [¶14]. On 9 November 2017 the Tribunal was constituted [¶17]. The first session was held by means of teleconference on 5 January 2018 [¶18]. On 24 January 2018, Procedural Order No.1 was issued and accordingly, Claimants filed a memorial on Merits dated 1 March 2018 [¶¶19-20]. There are 6 Procedural orders in the proceeding. The proceeding was closed on 31 December 2019 [¶46].

The Respondent had not raised any issue with regard to the Jurisdiction [¶106]. The Tribunal concluded that it has jurisdiction over this dispute [¶111].

The Share Purchase Agreement provided that it is to be governed by and construed in accordance with the law of Grenada [¶112]. The parties disagreed on whether there is inconsistency between Section 7.9 of Share Purchase Agreement and if so, whether Section 7.9 which states “notwithstanding inconsistent provisions of Grenadian Law” is effective [¶112].

3. Liability Issues and Tribunal’s Finding

3.1 The Respondent’s Allegation that the Terms of the 1994 Privatization Were Oppressive to Grenada

The Respondent alleged that the terms of the 1994 Privatization were oppressive to Grenada and alleged that the 1994 package of laws and agreements made by the prior NDC government as extravagantly improvident [¶113]. According to the Respondent, GoG had no experience of GRENLEC’s operation or energy. [¶115] However, the Claimants attempted to discredit the allegation by pointing out that the negotiations were led by senior ministers on advise of Price Waterhouse and other consultants. [¶116] The Tribunal held that there is no victimization in the negotiation of the SPA. [¶119] The Respondent also challenged the 1994 privatisation by arguing that the monopoly granted to GRENLEC fettered the Government’s ability to intervene in the energy sector in the public interest [¶120], and characterized the establishment of Public Utilities Commission under the 1994 regime as inefficient and the rate setting mechanism under the 1994 ESA as unusual. However, the Tribunal did not accept these contentions. [¶121, ¶127, ¶130].

The Claimant and the Respondent insisted that efforts were taken by both to promote reliance on renewable energy but that was thwarted by the other party [¶134-¶139]]. The Tribunal found that the Respondent failed to identify any obligation on the part of GRENLEC or Claimants to promote renewable energy [¶140].

3.2 One or More elements of 2016 legislation constituted a "Repurchase event"

The 1994 Privatisation package had offered an 80-year old monopoly and associated rights to GRENLEC. The 2016 legislation terminated the monopoly and substituted a shorter and narrower period of exclusivity. The Claimants contended that such an action made GRENLEC shares a fundamentally different investment than in 1994 and thus, constitutes a 'repurchase event' as per Section 7.9 of the Share Purchase Agreement. [¶141-¶142] The Respondent conceded that even though the 2016 restructuring package constitutes a 'repurchase event', the Claimants have "committed extreme or willful malfeasance" in management of GRENLEC of such nature that Government action is permitted as per Section 7.9(a) (iv). [¶143] Hence, the issue before the Tribunal was the definition of "Extreme or Willful Malfeasance" and whether the instances cited by Respondent amount to "Extreme or Willful Malfeasance justifying the actions of the Respondent".

The Respondent contended that malfeasance need not be "extreme" but merely "willful" as the disjuncture "or" is used [¶147]. The Claimant argued that the presence of terms "extreme" and "willful" signal a requirement for intentional acts of egregious mismanagement. [¶148] The Tribunal held that the key to the interpretation is not the difference between "willful misconduct" and "egregious mismanagement" but is the requirement of proportionality, (*i.e.* "so serious as to justify the correspondingly grave consequence"). [¶149]

3.3 Do any of the particulars of the alleged malfeasance cited by the respondent individually or collectively justify the denial of the repurchase obligation?

The respondents alleged that the following acts constituted extreme or willful malfeasance:

a) The Purchase of Two Caterpillar Mak Generators
b) Excessive Dividend Payments
c) Refusal to promote development of Renewable energy
d) GRENLEC's payment of Fees of Legal and Forensic Accounting Consultant benefitted the Claimants not GRENLEC
e) GRENLEC's Constitutional claim against the Government
f) The Management Agreement Fees

The Tribunal held that none of these incidents amounted to extreme or willful malfeasance to justify the denial of second schedule compensation.

The claimant argued that in order to rely on the "willful malfeasance" exception, the Respondent must show that the willful malfeasance caused the Respondent must show that the willful malfeasance caused the GoG to abrogate of the GRENLEC monopoly. The Tribunal held that even though the Claimants' determination to manage the GRENLEC monopoly to advantage of the WRB shareholders caused dissatisfaction to the Government, it does not amount to willful malfeasance. The 2016 restructuring package was motivated by NNP Government's public policy objectives which differed from those of the prior NDC government, not any malfeasance on the part of Claimants [¶179].

Another issue raised by the Claimant was that the text of Share Purchase Agreement clearly required an ICSID determination with regard to willful malfeasance prior to license abrogation and not after [¶185, ¶187]. The respondent contended that it is not commercially

sensible practice [¶182]. The Tribunal held that the procedural inadmissibility raised by the Claimant is fatal to the "willful malfeasance" defence of the Respondent [¶188].

The Tribunal concluded that the Claimants have established a "Repurchase Event" by the GoG's abrogation of GRENLEC's 80-year monopoly. The abrogation was not caused by "willful malfeasance". These conclusions were deemed sufficient to dispose of the issue of liability. Accordingly, the Claimants were entitled to "put" their GRENLEC shares to the Respondent for repurchase and the payment of compensation [¶190].

4. Issues of Compensation and Tribunal's Findings

The issue whether the Claimants are entitled to Second Schedule Compensation and whether they are entitled to pre-award and post-award interest were put before the Tribunal along with issues of Costs and Quantum.

4.1 Whether the Claimants are entitled to Second Schedule Compensation

The Respondent contended that the purchase price must be assessed by reference to the fair market value of the shares as per the 2016 ESA [¶194]. The Claimant relied on Section 7.9(b) of the SPA which stated that upon occurrence of a repurchase event, the GoG shall acquire all shares on the basis specified in the Second Schedule to the ESA [¶193].

The Parties contested the application of Grenadian law and the Tribunal held that the rules of international law applicable to the Tribunal respects Party Autonomy and International law permits the parties' choice of "rule of law" including the carve out of such rules as the parties agree, including the rules against penalties[¶215]. However, the Tribunal held that the Repurchase provisions of Section 7.9 are not in violation of any rules against penalties or is an unconstitutional fetter on the regulatory authority of Government of Grenada [¶217] and hence, the question of applicable laws is not of much relevance.

4.1.1 Validity of Second Schedule as per Contract Law

The Respondent contended that Second Schedule is legally ineffective and unenforceable as the provisions constitute an unlawful and unenforceable penalty as per contract law [¶194]. The Claimants argued that the GoG is estopped under international law from contesting the SPA repurchase obligation. It relied on the case of *ADC v. Hungary.* The Tribunal held that the Respondent is not estopped from denying liability for Second Schedule Compensation even though the agreement has stood for over two decades [¶206-¶210].

The Respondent contended that Second Schedule Compensation is extravagantly disproportionate to the true value of the Claimants' investment and constitutes a penalty. Both parties relied on the case of *Cavendish Square Holding BV v. Pozzoni* [¶232]. Respondent relied on it to emphasize that the key consideration is whether there is an extravagant disproportion between the stipulated sum and highest level of damages that could possibly arise from the beach. The Claimant relied on it to emphasize that disproportionate compensation only comes within the rule against penalties if the clause or clauses in question arise in the context of "a secondary obligation" – typically, a remedy in the form of payment of a sum of money – "which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation, which is the secondary obligation test [¶232]. The claimants contended that the Second

schedule methodology protected their "legitimate interest" in accordance with Cavendish [¶238]. In order to arrive at a conclusion, the tribunal considered whether the second schedule protection was "out of all proportion" to the claimants' legitimate interests. The Tribunal observed that the Second Schedule Compensation is substantially in excess but the pertinent question is whether the "extravagantly disproportionate" test applies at all to this case, bearing in mind the *dictum* of Lords Neuberger and Sumption in *Cavendish* that the rule against enforcement of penalties provides no basis for the courts to review primary obligations[¶253]. The Tribunal also considered the question whether Claimant is enforcing a primary or secondary obligation and held that the GoG cannot convert its primary obligation to repurchase the GRENLEC shares at an agreed price into a secondary obligation to pay damages. The Claimants have framed this case as a claim in specific performance of the SPA [¶253-¶259].

4.1.2 Validity of Second Schedule as per Constitution of Grenada

The Respondent claimed that the provisions are void and of no legal effect as they fetter Government action in contravention of fundamental principles enshrined in the Constitution of Grenada [¶194]. The Respondent contended that a contractual obligation in contravention to Constitution of Grenada is beyond the powers of GoG. Section 7.9(b) imposes unconstitutional constraints on the Government's freedom of action contrary to "principles of executive necessity". It also imposes an exorbitant cost as the price for the exercise of Government's lawful executive and legislative actions. [¶220] The Claimant argued that the maxim *pacta sunt servanda* must apply [¶227] and that GoG was not deterred from precipitating repurchase events. The compensation is the consequences of that action under Parties' Contract [¶228]. The Tribunal held that SPA is constitutionally compliant as the SPA itself provides that if a provision can be construed in a way that is constitutionally compliant of the Constitution, then it must be so construed. Thirteen of the fifteen Repurchase Events in Section 7.9(a) specify actions which the Government was free to take but which would give rise, at the Claimants' election, to a right under Section 7.9(b) to require the GoG to repurchase GPP's shares. Almost all the Repurchase Events expressly contemplate the Government's freedom of action to modify or abrogate the rights and privileges of GRENLEC. There is no evidence that the Government was deterred from legislating in the public interest [¶229].

The Tribunal considered the valuation proposed by the Respondents and Claimants on various components in Second Schedule and assessed the compensation at USD 58,427.962 [¶260-¶324].

4.2 The Claimants Request for Pre-award and post-award interest

The Claimants sought an interest on the Award from 3 May 2017, the day GoG ought to have completed repurchase of share, until payment at the Grenadian Prime Lending Rate of 6%, compounded semi-annually [¶325]. The claimants requested the same rate and compounding period in respect of post-award interest. The Claimants argued that international law applies to ICSID Tribunal [¶328-¶329]; whereas, the respondents relied on *West Indies Supreme Court Act* and *Sempra Metals* to prove that only simple interest can be awarded while granting specific performance [¶330]. The Tribunal held that the award of interest and the compounding period, if any, is a matter for the Tribunal's discretion. The source of the Tribunal's remedial authority is the ICSID Convention and Rules of Procedure not the *West Indies Supreme Court Act* [¶332-¶334].

The Respondent argued that the SPA relieves the GoG of any obligation to pay pre-award interest because of Section 7.9(c) of the SPA as it states that in the event of any good-faith dispute between the Parties concerning whether a Repurchase Event has occurred, the GoG shall be entitled to withhold its payment in respect thereof until the arbitration proceedings with respect thereto have been completed. The question was whether the Respondent is entitled to a presumption of good faith and whether the documentary record confirms or denies the good faith of the "malfeasance" allegation. The Tribunal held that any presumption of good faith is a rebuttable presumption. The Claimants alleged that the "malfeasance" issue is a lawyer's litigation strategy [¶340].

The Tribunal concluded that if the Respondent seriously considered the Claimants guilty of "extreme or willful malfeasance" before this dispute, then GoG would have applied to an ICSID tribunal for a Section 7.9 (c) declaration of "extreme or willful malfeasance" prior to abrogating the 80-year monopoly, thereby, avoiding the triggering of a Repurchase Event and the risk of Second Schedule Compensation [¶349].

Accordingly, the Tribunal ordered pre and post Award interest from 3 May 2017 until payment of the Award (including interest and cost) at the rate fixed from time to time for Grenada 91-day Treasury Bills compounded annually [¶350].

5. Counterclaim

The Respondent's counterclaim alleged "unfair prejudice and oppression" under Section 241 of the *Companies Act of Grenada* which specifically prohibits companies and their directors from taking any action that is "oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any shareholder [[¶353]. However, the Counterclaim was dismissed without costs upon finding that even though, the Respondent indicated that its quantification of the Counterclaim would emerge in the course of proceedings, it never did emerge. [¶361] and the facts alleged in supporting the Counterclaim were not been established [¶362].

6. Costs

The Tribunal ordered the Respondent to reimburse advances to ICSID, attorney fees and disbursements with 20% reduction to the Claimants. The Tribunal also directed the Claimants to reimburse GRENLEC for USD $522,353.15 for legal and accounting services that ought to have been paid by the Claimants in the first place [¶363-¶379].

7. Disposition

The Tribunal held that the dispute is within the Jurisdiction and Competence of the Centre. It declared that a Repurchase Event occurred within the meaning of the Share Purchase Agreement (SPA) dated 14 September 1994, namely the 2016 legislative termination of the 80-year monopoly and the substitution of a shorter and narrower period of exclusivity which made the GRENLEC shares a fundamentally different investment than in 1994 and declared that compensation for the repurchase of the Claimants' shares in GRENLEC is to be calculated in accordance with the Second Schedule of the SPA. The Respondent was directed to pay the Claimants Second Schedule Compensation assessed at USD $58,427,962 with Costs and pre-Award and post-Award interest on the Second Scheduled Compensation and post award interest on Costs [¶380].

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