

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

**Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic
(ICSID Case No. ARB/13/8)**

PROCEDURAL ORDER NO. 6

Eduardo Zuleta, President of the Tribunal
Brigitte Stern, Arbitrator
John M. Townsend, Arbitrator

Secretary of the Tribunal
Martina Polasek

PROCEDURAL BACKGROUND

1. The Tribunal fixed the procedural schedule for these proceedings on jurisdiction in Section 14 of Procedural Order No. 1, dated December 20, 2013. This schedule considered the Parties' discussion during the Tribunal's First Session on December 17, 2013. On March 5, 2014 the Parties submitted a joint proposal of an amended procedural calendar, which was adopted by the Tribunal in Procedural Order No. 4, dated March 6, 2014.
2. This calendar allowed for two rounds of document production. The first round was scheduled to take place prior to the filing of Respondent's Memorial on Jurisdiction and the second round would take place after Claimants filed their Memorial on the Merits and Counter-Memorial on Jurisdiction.
3. On the eve of the date of filing of Respondent's Memorial on Jurisdiction,

Claimants requested the Tribunal's immediate assistance in resolving what Claimants considered an urgent document production dispute between the Parties.¹ Considering the existence of this dispute between the Parties, Respondent refrained from submitting or relying upon the disputed documents in its Memorial on Jurisdiction².

4. The Parties presented subsequent submissions on the issues involved in the document production dispute³.
5. The document production dispute concerns basically two types of documents: (i) The [REDACTED] and (ii) communications of Mr. Jan Nosko and Mr. Matus Sura, in-house counsel to Poštová banka, a.s, which Claimants included in their privilege log and have withheld alleging they are covered by attorney-client privilege⁴.
6. Based on the submissions of the Parties, the Tribunal issued Procedural Order No. 5, dated May 27, 2014, whereby it decided to defer a decision on the disputed documents until after the filing of Claimants' Memorial on the Merits and Counter-Memorial on Jurisdiction, if and when Respondent insisted on the disclosure of the disputed documents during the second request for document production⁵.
7. On July 1, 2014, Respondent renewed its request that the Tribunal order the production of the two categories of documents involved in the document production dispute (i.e., [REDACTED] and certain documents with respect to which Claimants allege attorney-client privilege). Specifically, Respondent requested the Tribunal to:

“1) write to [REDACTED] seeking clarification as to whether it would object to the disclosure in these proceedings of [REDACTED] if the Tribunal were to issue an order in a form suitable to the Bank to treat the information confidentially; 2) direct Claimants to produce (i) [REDACTED] and (ii) [REDACTED]

¹ Letter from Debevoise & Plimpton LLP to the Tribunal, dated April 30 2014

² Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated May 1, 2014

³ Procedural Order No. 5, dated May 27, 2014, ¶1-3

⁴ Respondent identified these communications according to their numbers in Claimant's Privilege Log in its May 14, 2014 Letter. See: Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated May 14, 2014, p. 4

⁵ Procedural Order No. 5, dated May 27, 2014, ¶7

[REDACTED] and 3) direct Claimants to produce all communications that they have withheld on purported grounds of attorney-client privilege because they involved Jan Nosko and/or Matus Sura.”⁶

8. In the aforesaid letter, Respondent also informed the Tribunal that it had separately submitted a list of supplementary document requests to Claimants for the Second Round of Document Production⁷.
9. On July 8, 2014, Claimants responded to Respondent’s renewed request for document production and requested the Tribunal to reject this renewed application in its entirety. In its communication, Claimants asserted, *inter alia*, that Respondent’s request for the production of [REDACTED] [REDACTED] “*should be denied because it did not meet its burden on relevance, much less materiality (...)*”⁸ and that disclosure of attorney-client privileged communications would be contrary to considerations of equity and fairness in determining issues of privilege⁹. Claimants added that, in the event the Tribunal found that a [REDACTED] should be requested to permit disclosure of [REDACTED] Postova reiterated its offer to submit said request to [REDACTED]¹⁰
10. In addition, with their July 8, 2014 communication, Claimants submitted the Redfern Schedule that was being discussed by the Parties at the time and requested the Tribunal to uphold its objections to Respondent’s requests. Claimants noted that they had no objection to Respondent having the opportunity to respond to its objections in the Redfern Schedule.
11. On July 11, 2014, Respondent presented further arguments on the document production dispute and submitted a new version of the Redfern Schedule that included its responses to Claimants’ objection.
12. On July 17, 2014, Claimants replied to Respondent’s July 11, 2014 letter.¹¹
13. The Tribunal has carefully reviewed all of the above submissions by the Parties and the Redfern Schedule, in light of Respondent’s Memorial on Jurisdiction as well as Claimants’ Memorial on the Merits and Counter Memorial on Jurisdiction, and is now prepared to issue a decision on the production of the disputed documents.

⁶ Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated July 1, 2014, p. 10

⁷ Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated July 1, 2014, p. 2, FN 1

⁸ Letter from Debevoise & Plimpton LLP to the Tribunal, dated July 8, 2014, p. 2

⁹ Letter from Debevoise & Plimpton LLP to the Tribunal, dated July 8, 2014, p. 2

¹⁰ Letter from Debevoise & Plimpton LLP to the Tribunal, dated July 8, 2014, p. 8

¹¹ Letter from Debevoise & Plimpton LLP to the Tribunal, dated July 17, 2014

THE TRIBUNAL'S ANALYSIS

1. The Tribunal recalls that, as stated in Procedural Order No. 3, dated January 22, 2014 this arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (hereinafter the "Arbitration Rules"), and (iii) the Procedural Rules as set out in Procedural Order No. 1. Paragraph 15.1 of Procedural Order No. 1 states that: "*Production of documents shall be governed by Article 3 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)*" (hereinafter the "*IBA Evidence Rules*"), *except where inconsistent with this Procedural Order or any later order of the Tribunal, in which case the orders of this Tribunal shall prevail.*"¹²
2. As stated in Procedural Order No. 3, "*according to Article 3 of the IBA Evidence Rules, the Tribunal shall order the production of documents whenever (i) the issues that the Party wishes to prove are relevant to the case and material to its outcome; (ii) the reasons for objections set forth in Article 9.2 of the IBA Evidence Rules do not apply and (iii) the Request to Produce was made in conformity with the requirements of Article 3.3 of the IBA Evidence Rules.*"¹³
3. At the outset, the Tribunal must stress that, in accordance with the procedural calendars for the phase on jurisdiction as agreed by the Parties and approved by the Tribunal, the Second Round of Document Production is a request for documentation related to the response by Claimants to Respondent's jurisdictional objections. The Second Round of Document Production is not an opportunity to reopen and revisit the requests of the First Round of Production of Documents.
4. Therefore, with respect to the First Round of Production of Documents, the Tribunal will not, at this stage of the proceedings, order additional categories of documents or additional documents included in a given category, but will request Claimants, with respect to certain categories of documents now in dispute, to confirm that they have completed the request for documentation corresponding to the First Round of Production of Documents, as per Procedural Order No. 3 and in the Redfern Scheduled attached thereto.

THE FIRST CATEGORY OF DOCUMENTS IN DISPUTE: [REDACTED]

5. With respect to the first category of documents in dispute for this Second Round of Production of Documents, that is, [REDACTED] the Tribunal observes that it cannot, at this stage, decide the request for documentation by deciding whether or not the investment was speculative, as claimed by Respondent, and the consequences, if any, thereto.

¹² Procedural Order No. 3, dated January 22, 2014, ¶12

¹³ Procedural Order No. 3, dated January 22, 2014, ¶15

6. The Tribunal considers, however, that there are two categories of documents that may be relevant to the issues on jurisdiction raised by the Respondent: (a) the classification or reclassification of the bonds made by Claimants (available-for-sale (“AFS”), held-to-maturity (“HTM”) or held-for-trading (“HFT”)), and (b) [REDACTED]. Therefore, the Tribunal will order a limited production of documents in this Second Round for Production of Documents.
7. With respect to the request for production of [REDACTED] and the specific request by Respondent for the Tribunal to make an inquiry with [REDACTED] on the scope of the confidentiality of such [REDACTED] the Tribunal considers that requesting [REDACTED] is unnecessary.
8. On the one hand, the Tribunal has carefully reviewed [REDACTED] and the other submissions by the Parties on the matter and found it clear that [REDACTED] is confidential.¹⁴ However, such confidentiality would cover [REDACTED] but would not prevent Claimants from producing, without producing the entire [REDACTED] certain specific documents in their files that may be relevant and material and that were provided to [REDACTED]. Hence the Tribunal will order the production of certain documents, if any, provided by Claimants to [REDACTED] strictly limited to the matters mentioned under 6 above, i.e., (a) the classification or reclassification of the bonds made by Claimants (available-for-sale (“AFS”), held-to-maturity (“HTM”) or held-for-trading (“HFT”)), and (ii) [REDACTED].
9. As regards the remaining documents related to [REDACTED] (category 8 of the Redfern Schedule provided by Respondent), the Tribunal has identified certain documents that may be relevant and material to its decision on jurisdiction and that should therefore be produced.
10. These rulings have been included in the Redfern Schedule that is attached to this Procedural Order as Annex A.

THE SECOND CATEGORY OF DOCUMENTS IN DISPUTE: COMMUNICATIONS THAT CLAIMANTS HAVE WITHHELD ON THE GROUNDS OF ATTORNEY-CLIENT PRIVILEGE

11. Article 9(2)(b) of the IBA Evidence Rules provides that the Tribunal shall, at the request of either Party or on its own motion, exclude from evidence or production documents because of “*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*”.
12. Further, article 9(3) provides certain criteria that can be taken into account by the Arbitral Tribunal in order to consider issues of legal impediment or privilege. These criteria include:

¹⁴ Letter from Debevoise & Plimpton LLP to the Tribunal, dated May 21, 2014, Exhibit A

“(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; [...]
(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; and [...]
(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules”

13. In their submissions to the Tribunal, the Parties have signaled that two different legal standards on the attorney client-privilege are applicable in the Hellenic Republic and in the Slovak Republic, specifically in regards to the scope of application of the attorney-client privilege for lawyers that are not members of each country’s Bar Association (which includes in-house lawyers and Government lawyers).¹⁵
14. The Commentary on the IBA Evidence Rules suggests that the need to protect fairness and equality among the parties may arise when the approach to privilege in their home jurisdictions differs, and quotes as a specific example the difference between applying the attorney-client privilege to in house counsel or not. The Commentary states that in such cases “*applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other*”.¹⁶
15. The Tribunal notes that the laws of the Hellenic Republic offer a broader protection than those of the Slovak Republic in regards to the attorney-client privilege as applied to in-house counsel and that there is not certainty, and the Parties debate, as to the treatment that the communications between client and in house should be treated under Slovak law.
16. The Tribunal is concerned that applying different standards on the matters of privilege could affect the balance and equality of treatment of parties in international arbitration. In this particular case, such difference in treatment could result in Claimants having to produce documents originating from in house counsel while the same type of documents would not have to be produced by Respondent, creating a clear imbalance in the treatment of the parties in the proceedings. Therefore, the Tribunal concludes that the Parties should be bound by the standard that affords the broadest protection and that protects the expectations of both parties in international arbitration.

¹⁵ Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated July 11, 2014, pp 7-8; Letter from Cleary Gottlieb Steen & Hamilton LLP to the Tribunal, dated July 1, 2014, p.9; Letter from Debevoise & Plimpton LLP to the Tribunal, dated July 8, 2014, p. 11

¹⁶ Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 25.

17. For the foregoing reasons, Respondent's request to direct Claimants to produce all communications that they have withheld on purported grounds of attorney-client privilege cannot be upheld.
18. Finally, the Tribunal recalls that in accordance with Article 43(a) of the ICSID Convention and Arbitration Rule 34(2)(a), it may at any stage of the proceedings order the disclosure of any documents it considers relevant and material.

ORDER

For the reasons set out above and those contained in the Redfern Schedule attached to this Procedural Order as Annex A, the Tribunal:

- A. Denies Respondent's requests 1, 4, 5, 6 in the Redfern Schedule attached hereto and requests Claimants' confirmation as regards to the delivery of the categories of documents of the First Round of Document Production, as stated in Procedural Order No. 3 and reflected in the Redfern Schedule attached hereto.
- B. Grants Respondent's requests 2, 7 and 8 as narrowed in the Redfern Schedule attached hereto.
- C. Denies Respondent's request to direct Claimants to produce all communications that they have withheld on purported grounds of attorney-client privilege.

[signed]

Eduardo Zuleta

President of the Tribunal

Date: July 20, 2014

Annex: Redfern Schedule