

PCA Case No. 2015-28

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

THE ITALIAN REPUBLIC

- v. -

THE REPUBLIC OF INDIA

- concerning -

THE “ENRICA LEXIE” INCIDENT

PROCEDURAL ORDER NO. 6
(Remaining Procedural Issues Concerning Witness Examination at the Hearing)

ARBITRAL TRIBUNAL:

H.E. Judge Vladimir Golitsyn (President)
H.E. Judge Jin-Hyun Paik
H.E. Judge Patrick Robinson
Professor Francesco Francioni
H.E. Judge Patibandla Chandrasekhara Rao

REGISTRY:

Permanent Court of Arbitration

WHEREAS on 30 July 2018, the Arbitral Tribunal issued Procedural Order No. 5, in which it called five individuals as witnesses to give evidence at the hearing and addressed various issues concerning the examination of such witnesses;

WHEREAS in Procedural Order No. 5 the Arbitral Tribunal invited the Parties to consult with each other in respect of the implementation of the Order and directed the Parties in particular to “report to the Tribunal, jointly or separately, on progress made in respect of the issues set out in paragraphs 12, 13 and 14 by 31 August 2018”, namely, first, “which Party shall make contact with each of the individuals identified by the Tribunal in paragraph 4, with a view to transmitting to him the Tribunal’s request to testify at the hearing as a Tribunal witness and inviting him to provide an optional supplemental statement for the purposes of the present arbitration”; second, “the sequence of examination of each witness”; and third, “confidentiality arrangements that may be necessary at the hearing in respect of oral witness testimony”;

WHEREAS on 31 August 2018, Italy sent the Tribunal a letter that was “seen and agreed in draft by the Agent and counsel of the Republic of India and [which], save on one issue [...] reflects the agreed position of the Parties on all issues”; and whereas India, on the same date, confirmed that the letter was prepared in consultation, and with the agreement of both Parties;

TAKING THE PARTIES’ VIEWS INTO ACCOUNT, THE ARBITRAL TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

I. CONTACT WITH WITNESSES BEFORE THE HEARING

1. Italy shall make initial contact with Captain Vitelli and Captain Noviello, and India shall make initial contact with Mr Fredy J., Commandant [REDACTED] and Assistant Commandant [REDACTED], to transmit to these individuals the Tribunal’s request to testify at the hearing as Tribunal witnesses.
2. Each Party shall endeavour to contact the relevant witnesses by correspondence (including electronic mail) copied to the other side as well as to the Registrar on the basis of an agreed template. The correspondence shall inform the witnesses of the issues indicated in paragraph 12 of Procedural Order No. 5. Following that initial correspondence, subject to paragraph 3 of this Order, any contact with the witnesses in respect of their attendance of the hearing shall occur through the Registry, without copying the Parties.
3. In the event that a witness seeks the assistance of a Party, or makes further enquiries of a Party, that Party may assist as appropriate, informing the other Party and the Registrar of the exchanges. The Parties shall however refrain from discussing with the witness the positions espoused by Italy or India in the present arbitration in respect of questions of fact or law.

4. The Registry shall provide to each witness, in sufficient time in advance of the hearing, copies of all the statements made by that witness that form part of the record of this case. Witnesses shall not be provided with the pleadings of either Party, nor with any other documentation that is part of the record.

II. EXAMINATION OF WITNESSES AT THE HEARING

5. Each witness shall be briefly introduced by the President of the Arbitral Tribunal.
6. Italy shall then undertake the first examination of Captain Vitelli and Captain Noviello, with India examining these witnesses on the conclusion of the examination by Italy. India shall undertake the first examination of Mr Fredy J., Commandant [REDACTED], and Assistant Commandant [REDACTED], with Italy proceeding to examination thereafter. The Parties may revisit this arrangement if for any reason (such as the unavailability of witnesses) this arrangement appears unbalanced.
7. The Arbitral Tribunal may then put further questions to the witness. Following questions by the Arbitral Tribunal, each Party may re-examine the witness in the sequence adopted for the first round of examination.
8. The Party engaged in the examination of a witness or the Arbitral Tribunal, as the case may be, shall be permitted to present to the witness, for purposes of refreshing his memory or otherwise assisting his testimony, any document that is part of the record of the case (with the exception of the pleadings of the Parties).
9. No witness shall be permitted to be present in the hearing room during the testimony of any other witness. Further, the witnesses shall not discuss their testimony with anybody prior to giving evidence.
10. In accordance with Article 13, paragraph 3, of the Rules of Procedure, the Registry shall make appropriate arrangements for simultaneous interpretation of the testimony of Captain Vitelli, Captain Noviello, and Mr Fredy J.
11. In the interests of procedural efficiency, Commandant [REDACTED] and Assistant Commandant [REDACTED] shall be present in The Hague, the Netherlands and available to testify on Monday, 29 October 2018, in the event that the testimony of Captain Vitelli, Captain Noviello, and Mr Fredy J. does not consume the full hearing day. The remaining schedule of the hearing shall not be affected by any acceleration or delay in the examination of witnesses on 29 and 30 October 2018.

III. CONFIDENTIALITY ARRANGEMENTS

12. The Parties have been unable to reach agreement on confidentiality arrangements in respect of oral witness testimony and the use of this witness testimony “for any purpose in connection with any post-Award criminal proceedings” and have requested the Arbitral Tribunal to “make such Order as it considers appropriate on such matters”.
13. As regards Italy’s request “that the witness testimony should take place in confidential sessions”, the Arbitral Tribunal recalls that, pursuant to Article 23, paragraph 3, of the Rules of Procedure, “[t]he hearings shall in principle be open to the public subject to such arrangements to be prescribed by the Arbitral Tribunal, after consultation with the Parties, for the orderly conduct of the proceedings and the protection of information, including the oral submissions of a Party, designated as confidential.” The Arbitral Tribunal has decided that the portion of the hearing during which witnesses are examined shall not be open to the public.
14. As regards Italy’s request that “the transcript of those sessions be [...] designated as confidential pursuant to an Order of the Tribunal”, the Arbitral Tribunal has decided that it will make any such determination following the completion of the hearing. In making such determination, the Arbitral Tribunal will take into account written submissions to the Arbitral Tribunal that the Parties may make at that time as to whether, and to what extent, the transcript of oral testimony of witnesses should be treated as confidential.
15. The Arbitral Tribunal considers that no further orders are called for at this stage.

For the Arbitral Tribunal:



H.E. Judge Vladimir Golitsyn
President

14 September 2018