

**IN THE MATTER OF AN ARBITRATION UNDER
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BELARUS
AND THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA ON THE PROMOTION AND
PROTECTION OF INVESTMENTS**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW 1976**

- between -

OPEN JOINT STOCK COMPANY “BELARUSKALI”

(the “Claimant”)

and

THE REPUBLIC OF LITHUANIA

(the “Respondent” and, together with the Claimant, the “Parties”)

(PCA Case No. 2024-03)

PROCEDURAL ORDER NO. 3

Suspension of the proceedings

Tribunal

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Professor Azzedine Kettani (Arbitrator)

Professor Zachary Douglas KC (Arbitrator)

Tribunal Secretary: Dr Johannes Fahner

Registry: Permanent Court of Arbitration

24 June 2024

1. INTRODUCTION

- 1.1 By email of 5 June 2024, the Claimant requested the suspension of the proceedings. By letter of 10 June 2024, the Respondent asked the Tribunal to terminate the proceedings.
- 1.2 This Procedural Order contains the Tribunal's decision on the respective requests for suspension and termination.

2. PROCEDURAL BACKGROUND

- 2.1 By letter of 31 January 2024, the Claimant informed the Tribunal that its financial resources and economic assets were frozen pursuant to EU, US, UK, Swiss, Canadian, Ukrainian and other sanction regimes.
- 2.2 During the procedural conference held on 8 February 2024, the Claimant mentioned that it would need a license in order to be able to make payments to the PCA in its capacity as fund holder for this arbitration. It was agreed that the Claimant and the PCA would jointly explore how to resolve this issue.
- 2.3 On 20 February 2024, the Tribunal requested the Parties to make a payment of EUR 300,000 each as an advance for costs in accordance with Article 41(1) of the UNCITRAL Arbitration Rules 1976. The Tribunal requested the Parties to make the payment by 22 April 2024.
- 2.4 By email of 23 March 2024, the Claimant wrote that “[a]s *Claimant’s discussions with its bank have advanced, it became clear that the bank requires a licence from the Dutch regulator to enable it to make payments into the account held by the PCA*”.
- 2.5 On 10 April 2024, the PCA confirmed receipt of the Respondent’s payment of EUR 300,000.
- 2.6 On 15 April 2024, the Claimant confirmed that it had applied for a license from the Dutch Ministry of Finance on 25 March 2024. It expected that the license would be issued on or around 20 May 2024, and asserted that it would execute the payment of EUR 300,000 upon receipt of the license.
- 2.7 On 23 April 2024, the Respondent noted that the Claimant had not paid its share of the advance of costs within the Tribunal’s deadline of 22 April 2024 and “*reserve[d] all its rights in this regard, including its right to seek a suspension of the proceedings*”. The Respondent also noted its expectation that the Claimant would comply with the upcoming deadlines as set out in Procedural Order No. 1.
- 2.8 On 25 April 2024, the Claimant wrote that it was “*prepared to discuss a temporary suspension of the proceedings (and corresponding changes to the procedural calendar)*” until the Dutch Ministry of Finance would have issued the license or, if the request for the

license would be denied, the Claimant would have found an alternative way to make the payment.

- 2.9 On 30 April 2024, the Respondent wrote that the Claimant should “*immediately pay its share of the initial advance on costs upon receiving the license with no further delay and before 5 July 2024*” and that, if the Claimant would remain unable to pay, the Respondent reserved its right to seek a suspension or termination of the proceedings.
- 2.10 On 5 June 2024, the Claimant wrote that by letter of 27 March 2024, the Dutch Ministry of Finance had extended the term for its decision until 23 July 2024. The Claimant further noted that after obtaining the license, it would also need “*to obtain the consent of the receiving bank*”. For these reasons, the Claimant proposed a “*temporary suspension of all work in the proceedings*”. It also proposed to “*jointly discuss other options for the financing the arbitration without the PCA with the Tribunal and with Respondent in case the Dutch regulator should deny a licence or the receiving bank should refuse to accept Claimant’s payment*”.
- 2.11 By letter of 10 June 2024, the Respondent requested the termination of the proceedings.
- 2.12 By letter of 18 June 2024, the Claimant requested the Tribunal to dismiss the Respondent’s request for termination.

3. POSITION OF THE PARTIES

The Claimant

- 3.1 In its email of 5 June 2024, the Claimant requested the suspension of the proceedings:
- Bearing in mind the reasons beyond Claimant's control that have caused the delay with the payment of Claimant’s funds into the PCA’s account, with due respect for the interests of all participants in the arbitration, and taking into account Counsel for Respondent’s suggestion in the letter of 30 April 2024, Claimant proposes a temporary suspension of all work in the proceedings with a corresponding adaptation of the procedural timetable, until Claimant has received all documentation it requires to enable it to pay, and the funds have been received by the PCA’s bank.
- 3.2 The Claimant noted that the requested license was required under Regulation (EC) No. 765/2006.
- 3.3 In respect of the Respondent’s request for termination, the Claimant disputed the Respondent’s allegations of “*delay tactics*”, as it had been “*consistently undertaking constructive efforts aimed at fulfilling its obligations to finance the continuation of the arbitration proceedings*”. The delay in the payment of the deposit was “*exclusively due to circumstances beyond its control*”.

The Respondent

- 3.4 In its letter of 10 June 2024, the Respondent wrote that “*an indefinite suspension of the proceedings would not be appropriate and the Tribunal should instead issue an order terminating the arbitration*” pursuant to Article 41(4) of the 1976 UNCITRAL Arbitration Rules.
- 3.5 In Lithuania’s view, the arbitration should be terminated due to the Claimant’s failure to prosecute its claims. The Respondent accused the Claimant of “*unacceptable delay tactics*”, including “*multiple attempts to provide belated revisions*” of the draft Terms of Appointment, “*last-minute unsolicited submissions*” on sanctions issues and the seat of arbitration, an unjustifiable challenge of the Respondent’s party-appointed arbitrator, and a failure to pay the initial advance on costs.
- 3.6 According to the Respondent, it would be “*neither fair nor efficient for these proceedings to continue indefinitely, and for Respondent to continue to incur substantial expenditure in defending itself*”.
- 3.7 In the alternative, if the Tribunal were to suspend the proceedings, the Respondent requested the Tribunal to limit the suspension to a period of three months, and to state that it would terminate the proceedings if the Claimant were to fail to pay its share of the advance of costs within this period.

4. ANALYSIS

The Respondent’s request for termination

- 4.1 For purposes of this analysis, the Tribunal deems it preferable to start with the review of the Respondent’s request for termination of the proceedings. The Respondent justifies its request in reference to Article 41(4) of the 1976 UNCITRAL Arbitration Rules, which provides:

If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

- 4.2 It is not in dispute that the Claimant has not paid its share of the initial advance on costs within the deadline of 22 April 2024 set by the Tribunal on 20 February 2024.
- 4.3 From Lithuania’s request for termination, it is clear that the Respondent is not willing to pay the Claimant’s share of the initial advance. Consequently, the Tribunal has the discretion to order the suspension or termination of the proceedings pursuant to Article 41(4).

- 4.4 Article 41(4) serves to prevent a party from derailing the arbitration by failing to pay the initial advance on costs. In addition, Article 41(4) acknowledges that the tribunal cannot be obliged to perform its tasks without the deposit being paid.¹
- 4.5 In the Tribunal's view, Article 41(4) does not justify the termination of the proceedings in a situation where a party claims, on plausible grounds, that it is temporarily unable to pay the deposit but where it makes all reasonable efforts to overcome this inability within the near future.
- 4.6 The Respondent does not contest that the Claimant requires a license from the Dutch authorities in order to be able to pay its share of the deposit to the bank account of the PCA. The Claimant has raised this issue proactively and has made reasonable efforts, since the start of the arbitration, to resolve it. It has also provided the Tribunal and the Respondent with reasonably frequent updates on its efforts.
- 4.7 Currently, the Claimant's request for a license is pending with the Dutch Ministry of Finance, which has indicated that it will respond by 23 July 2024. The Claimant has expressed its willingness to explore other solutions if the Dutch authorities were to deny its request.
- 4.8 Accordingly, the present situation cannot be compared to the one at issue in *Centurion v. Canada*, on which the Respondent seeks to rely. In that case, the tribunal took into account that the claimants had not indicated any intention to make the required deposit.²
- 4.9 In the current circumstances, by contrast, the Tribunal expects that the Claimant will continue to make its utmost efforts to resolve the impediments preventing it from paying its share of the deposit.
- 4.10 Accordingly, the Tribunal denies the Respondent's request for the termination of the proceedings pursuant to Article 41(4).

The Claimant's request for suspension

- 4.11 The Claimant has requested a suspension until "*until all documentation necessary to make the payment to the PCA and for the PCA to receive the payment into its bank account has been obtained, or until an alternative route of financing the arbitration proceedings has been found (other than through PCA)*".
- 4.12 The Tribunal understands that the Respondent, while it favours termination of the proceedings, does not oppose suspension. Indeed, the Respondent itself has repeatedly referred to the possibility of suspension in the event that the Claimant could not pay its share of the deposit. Moreover, in its letter of 10 June 2024, the Respondent has not

¹ See David Caron and Lee Caplan (eds), *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2nd ed. 2013) p. 899-900.

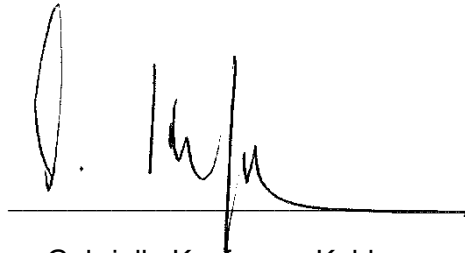
² *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Canada*, PCA Case No. 2009-21, Order for the Termination of the Proceedings and Award on Costs dated 2 August 2010, para. 42.

provided any substantiated objections to a suspension, on the condition that the latter be limited to three months and that the Tribunal confirm its intention to terminate the proceedings if the Claimant's share of the deposit is not paid within that period.

- 4.13 The Tribunal agrees with the Respondent that an "*indefinite suspension*" of the proceedings would be inappropriate, as this would interfere with the Parties' legitimate interest in having the dispute resolved in a timely and expeditious manner, as well as with the Tribunal's duty of efficiency.
- 4.14 The Tribunal notes that the Dutch Ministry of Finance has stated its intention to issue a decision on the Claimant's request for a license by 23 July 2024. The Claimant has not provided any substantiated reasons why it would be unable to process the payment once the Dutch authorities have issued the license. During the procedural conference held on 8 February 2024, the Claimant noted that it would need two weeks to make a payment to the account of the PCA once in possession of the necessary license.
- 4.15 In these circumstances, the Tribunal considers that a suspension of a little more than two months should give the Claimant sufficient time to effect the payment if the license is granted or to find an alternative solution if the request were to be refused. Accordingly, the proceedings are suspended until **30 August 2024**, it being specified that the following terms and conditions apply to the suspension:
- a. All time limits and dates in the procedural calendar which fall due during the suspension (*i.e.*, the time limit for the Statement of Claim and the Request for Bifurcation, if any) shall be deferred by 70 days;
 - b. The Claimant shall inform the Tribunal and the Respondent without delay of any material development in respect of its efforts to pay its share of the deposit, including any decision of the Dutch authorities on its request for a license;
 - c. Subject to para. (d) below, the Tribunal shall consider the proceedings resumed as of Monday 2 September 2024 and will issue a revised calendar;
 - d. If by 24 August 2024, it has transpired that the Claimant is still unable to pay its share by the end of the suspension, the Claimant shall report to the Tribunal, which will consult with the Parties about the appropriate further course.

5. ORDER

- 5.1 The request for termination of the arbitration is denied.
- 5.2 The arbitration is suspended until 30 August 2024 under the terms and conditions set out in this Order.

A handwritten signature in black ink, appearing to read 'G. Kaufmann-Kohler', written over a horizontal line.

Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)

On behalf of the Tribunal