

Before the
**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES (ICSID)**

**BRIDGESTONE LICENSING SERVICES, INC.,
BRIDGESTONE AMERICAS, INC.,**
Claimants,

v.

REPUBLIC OF PANAMA,
Respondent.

ICSID CASE NO. ARB/16/34

**PANAMA'S REJOINDER ON CLAIMANTS' APPLICATION
TO REMOVE JORGE LEE AS EXPERT WITNESS**

27 November 2018

Arnold & Porter

1. For more than a month, Claimants Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. (“**Claimants**”) have been peddling the story that Panama’s expert, Mr. Lee, received confidential information from Claimants, and that this situation gives rise to a disqualifying “conflict of interest.” But as the weeks have gone by, Claimants’ story has rapidly crumbled, to a point reminiscent of the proverbial boy who once cried “Wolf!”

2. In its original form, Claimants’ narrative alleged that “Mr. Lee was engaged in discussions with the Claimants[’] legal advisers from 3 November 2017 to 6 March 2018,”¹ which “were confidential,”² “were privileged,”³ and “involved the provision to Mr. Lee of confidential information”⁴ Then, when challenged, this story was reduced to an allegation that Mr. Lee had received “confidential and privileged”⁵ information from Claimants’ counsel during a single phone call that took place on 7 February 2018. And then, when challenged *again*, Claimants’ counsel revealed that the information that they had disclosed to Mr. Lee during the 7 February 2018 call⁶ was (1) an alleged comment by the Panamanian ambassador⁷

¹ **Letter from Claimants to Panama**, 9 October 2018, p. 1.

² **Letter from Claimants to Panama**, 9 October 2018, p. 1.

³ **Letter from Claimants to Panama**, 9 October 2018, p. 1.

⁴ **Letter from Claimants to Panama**, 9 October 2018, p. 1.

⁵ **Claimants’ Application for Disqualification of Mr. Lee**, 30 October 2018, ¶ 2 (“Claimants’ Application”).

⁶ As the Tribunal will have seen, Claimants now concede that “there was no exchange of confidential information via email.” **Claimants’ Reply on Application for Disqualification**, 16 November 2018, ¶ 7 (“Claimants’ Reply”) (“The Respondent further notes that there was no exchange of confidential information via email, and the Claimants do not dispute this”).

⁷ **Claimants’ Reply**, ¶¶ 12.1, 12.2.

during a March 2015 meeting,⁸ and (2) “the weight placed on certain documentary evidence by the Supreme Court in the case under consideration in this arbitration.”⁹

3. These items cannot by any stretch be considered “confidential” to Claimants. This conclusion follows both from logic and from law. The first item is an alleged comment that Claimants themselves attribute to *Panama*,¹⁰ and the second — an action of the *Panamanian* Supreme Court — could be gleaned from a facial review of the relevant (and publicly-available) Supreme Court decision.¹¹ These items, on their face, plainly are not “confidential.” And even if, in theory, they somehow could be construed as such, the rules that apply to Claimants’ counsel provide that the items would have lost any “confidential” status the moment that they were disclosed to Mr. Lee, a third party.¹² As a practical matter, this means that Claimants’ request for Mr. Lee’s removal is moot, since the Reply of 6 November 2018 (“**Reply**”) makes it clear that such request is contingent on a finding that “confidential information was . . . disclosed by the Claimants[’] counsel to Mr. Lee”¹³

⁸ Compare **Claimants’ Reply**, ¶ 13 (explaining that “[f]ollowing the 7 February 2018 phone call, the Claimants have pleaded the [comment] made by the Panamanian Ambassador and have put in witness evidence accordingly”) with **Claimants’ Memorial**, 11 May 2018, ¶ 8 (contending that the Panamanian ambassador to the United States made certain comments in a March 2015 meeting).

⁹ **Claimants’ Reply**, ¶ 20.

¹⁰ See **Claimants’ Memorial**, ¶¶ 8, 115 (asserting that the alleged comment by the Panamanian ambassador “is Panama’s admission”).

¹¹ See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014).

¹² See **Claimants’ Reply**, ¶¶ 12.1, 12.2, 20 (asserting that Claimants’ attorney Katie Hyman was the one to disclose the information to Mr. Lee); **Second Witness Statement of K. Hyman**, ¶ 1 (explaining that Ms. Hyman is a “member of the New York bar”); **RLA-0171**, *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (explaining that, under New York law, “disclosure to a third party . . . eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege”); **RLA-0170**, *Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 2017 N.Y. Slip Op. 31216[U], 4 [Sup Ct, New York County 2017] (“The principle is well settled that communications between an attorney and a client that are subsequently disclosed to third parties are not protected by the attorney-client privilege”).

¹³ **Claimants’ Reply**, ¶ 24; see also *id.*, ¶ 4 (“If there is a finding that no confidential information was provided to Mr. Lee, the Claimants accept that Mr. Lee’s failure to disclose his prior communications with the Claimants’ counsel, though unusual, would not by itself require Mr. Lee’s removal as the Respondent’s expert witness”).

4. In theory, the discussion could (and should) have ended here. However, because Claimants seem to have lost the forest through the trees, it seems useful to make the following observations.

5. *First*, although Claimants have stated multiple times that “the key issue” for present purposes is “[w]hether or not any confidential information was in fact disclosed by Claimants counsel to Mr. Lee,”¹⁴ their pleadings contain a litany of assertions that have nothing whatsoever to do with this key issue. In the Reply, for example, Claimants argue with considerable fanfare that, during the 7 February 2018 call, *Mr. Lee* provided information on “one of his *own* cases”¹⁵ that Claimants’ counsel improperly¹⁶ “assumed to be confidential”¹⁷ This argument, however, is simply a red herring, and Panama trusts that the Tribunal will recognize the other distractions like it.

6. *Second*, Panama appreciates that a party might be concerned if its own privileged or confidential information were to improperly find its way to the opponent. However, Claimants have failed to establish that such a situation could obtain from Mr. Lee’s continued appearance as expert. To have any chance of making the requisite showing, Claimants — at the very least — would need to demonstrate that they had disclosed information to Mr. Lee that (1) belonged to Claimants, and (2) was not available to Panama (and/or to third parties). As

¹⁴ **Claimants’ Reply**, ¶ 24 (emphasis added); *see also id.*, ¶ 4; **Claimants’ Application**, ¶ 14 (encouraging the Tribunal to adopt the approach used in the ICSID case of *Flughafen v. Venezuela*, where “the tribunal . . . focused on what the information was and whether it had been *received* by the potential expert witness,” but ultimately “concluded that the documents (which were not marked confidential) were not confidential or privileged, and that in any case, the expert did not have knowledge of their contents because he had affirmed that he had not read any of them”) (emphasis added).

¹⁵ **Claimants’ Reply**, ¶ 18 (emphasis added).

¹⁶ As Mr. Lee has explained, under Panamanian law, none of the information that he provided to Claimants’ counsel would be considered to be confidential. *See First Lee Statement*, ¶ 28; *Second Lee Statement*, ¶¶ 4, 9, 17. Claimants have not cited any Panamanian norm that says otherwise.

¹⁷ **Claimants’ Reply**, ¶ 18.

discussed above, however, the information that Claimants claim to have disclosed to Mr. Lee consists of an alleged comment and alleged conduct that Claimants attribute *to Panama*.¹⁸

Claimants fail to explain how these items could possibly be construed as information that was “unavailable” to Panama — especially by the time that Panama retained Mr. Lee on 26 July 2018 (which was a full 76 days *after* Claimants discussed the information in their 11 May 2018 Memorial, which then became widely available on the internet).

7. **Third**, Claimants’ allegations of “confidentiality” are an inherently unreliable basis for disqualification. This is not just because Claimants are alleging (illogically) that Panama’s own purported conduct somehow is “confidential” *vis-à-vis* Panama, but also because Claimants’ allegations rest on what Claimants themselves concede are mere assumptions about the applicable rules on confidentiality.¹⁹ Relying on such assumptions would be inadvisable in any context, as different attorneys can have different views about the relevant rules. (In this proceeding, for example, Panama’s US-based counsel were extremely surprised to learn that Claimants’ counsel — who likewise operate in the United States — consider conflicts checks by law firms to be mere “formalit[ies]” that are unnecessary if information such as the identities of the parties and related entities is either “publicly available,” or mentioned to an individual attorney.)²⁰ Here, however, assumptions are even more problematic, given that the fact pattern at

¹⁸ See **Claimants’ Memorial**, ¶¶ 8, 115 (asserting that the alleged comment by the Panamanian ambassador “is Panama’s admission”); see also **Request for Arbitration**, ¶¶ 41, 43 (seeking damages from Panama in part on the purported basis that “the Supreme Court’s decision . . . considered evidence that was improperly admitted . . . and gave overwhelming credit to Muresa’s and TGFL’s expert report . . . Moreover, the Supreme Court gave no weight to the substantial evidence submitted by Bridgestone”).

¹⁹ See **Claimants’ Reply**, ¶ 18 (asserting that Mr. Lee’s discussion of a prior case involving one of his own clients “must be *assumed* to be confidential) (emphasis added); see also **Claimants’ Application**, ¶ 10 (asserting that “although [Ms. Hyman] may not have expressly stated that the [February 2018] conversation was confidential,” because Mr. Lee is “a lawyer and judge of 42 years,” there should be “no doubt that this was the common understanding and intent”).

²⁰ See **Claimants’ Reply**, ¶¶ 21–22.

issue involves attorneys from different countries, and different jurisdictions apply different rules and regulations regarding privilege and confidentiality.

8. **Fourth**, among the many distractions that occupy Claimants’ pleadings are certain rumblings that are clothed in “conflict of interest” jargon, and take the form of (1) an allegation that Mr. Lee had “a relationship [with Claimants’ counsel,] which should have been disclosed,”²¹ and (2) an assertion that Mr. Lee engaged in a situation akin to one where an “arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties”²² Yet again, these assertions do not shed any light upon what Claimants themselves describe as the “key issue” — *i.e.*, whether or not Claimants’ counsel provided confidential information to Mr. Lee.²³ Nevertheless, it seems useful to address the assertions briefly.

9. On the “relationship” issue, Claimants’ argument is that “there were thirty emails between Claimants’ counsel and Mr. Lee, and these, together with the telephone conversation on 7 February 2018 were sufficient to establish a relationship which should have been disclosed.”²⁴ However, 22 of these emails (between Mr. Lee and Morgan & Morgan, a law firm that is *not* Claimants’ counsel of record in the present ICSID proceedings) were solely about scheduling the phone call,²⁵ and the remaining eight emails consisted of: (1) emails from Claimants’ counsel to

²¹ Claimants’ Reply, ¶ 26.

²² Claimants’ Reply, ¶ 29 (internal citation omitted).

²³ See Claimants’ Reply, ¶ 24.

²⁴ Claimants’ Reply, ¶ 26.

²⁵ See Ex. R-0087, Email Thread (30 October 2017 to 7 February 2018), pp. 4-5; see also Ex. R-0088, Email From Jorge Federico Lee to Mariam Abulaila (20 November 2017); Ex. R-0089, Email From Jorge Federico Lee to Mariam Abulaila (3 January 2018); Ex. R-0090, Email Exchange Between Jorge Federico Lee and Mariam Abulaila (7 February 2018).

Mr. Lee, providing conflicts check information,²⁶ and inquiring whether Mr. Lee was available to serve as expert,²⁷ and (2) Mr. Lee's response declining to act as Claimants' expert.²⁸

10. In their Reply, Claimants assert that *none* of these emails contained confidential information.²⁹ And, as explained, Claimants have not established that their attorneys disclosed any confidential information to Mr. Lee on the 7 February 2018 phone call. Accordingly, it would seem that Claimants' position is that *every* email and telephone conversation between an attorney for one of the parties and a person who subsequently appears as an expert necessarily gives rise to a "relationship" that requires disclosure. That position, however, is simply untenable — as is illustrated by Claimants' assertion that experts have the same disclosure obligations as arbitrators. If Claimants' theory about disclosures were correct, then one would expect the IBA Guidelines on Conflicts of Interest to state that an arbitrator must disclose *every* interaction with counsel for one of the parties. To the contrary, however, the IBA Guidelines identify a variety of "contacts" and interactions between attorneys and arbitrators that do not require disclosure (including "membership in the same professional association, or social or charitable organisation,"³⁰ joint participation in seminars and conferences,³¹ and even "initial contact with a party, or an affiliate of a party (or their counsel), [so long as] this contact is limited to the arbitrator's availability and qualifications to serve").³²

²⁶ See **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018), pp. 2-3.

²⁷ See **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018), pp. 2.

²⁸ See **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018), p. 1.

²⁹ **Claimants' Reply**, ¶ 7 ("The Respondent further notes that there was no exchange of confidential information via email, and the Claimants do not dispute this").

³⁰ **CLA-0134**, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (23 Oct 2014) ("**IBA GUIDELINES**"), Green List, ¶ 4.3.1.

³¹ **CLA-0134**, IBA GUIDELINES, Green List, ¶ 4.3.4.

³² **CLA-0134**, IBA GUIDELINES, Green List, ¶ 4.4.1.

11. On the “prior opinion” issue, Claimants’ theory seems to be that Mr. Lee gave an opinion on the substance of Claimants’ claims in this proceeding, and that this would somehow be disqualifying for an independent expert. As discussed below, however, this theory is misguided.

12. By way of background, and as the Tribunal will recall, in their initial request for Mr. Lee’s disqualification, Claimants argued (1) that Mr. Lee “express[ed] his opinion on the merits of the case during the telephone call on 7 February 2018,”³³ and (2) that this situation would be considered disqualifying under Article 760(5) of the Panamanian Judicial Code, which provides that one of the “causes for conflict” of a “Magistrate or Judge” is the situation where the judge has “*made determinations by writing regarding the facts that gave standing to the process.*”³⁴ In response, Panama explained that even if Mr. Lee had expressed an opinion on the call regarding “the merits of the Claimants’ claims in the present arbitration”³⁵ — which Mr. Lee disputed that he had done³⁶ — Claimants’ argument still suffered from a rather obvious flaw: the Panamanian norm that Claimants had invoked referred to “determinations *by writing*,”³⁷ and Claimants’ theory was that Mr. Lee had “express[ed] his opinion on the merits of the case *during the telephone call* on 7 February 2018.”³⁸

13. In their Reply, Claimants do not venture to make any further mention of Article 760(5) of the Panamanian Judicial Code. They *do* continue to argue, however, that Mr. Lee gave an opinion on the merits of their claims. Specifically, they contend that, during the 7 February

³³ Claimants’ Application, ¶ 15.

³⁴ Ex. C-0264, Article 760 of the Panamanian Judicial Code, ¶ 5 (emphasis added).

³⁵ Claimants’ Application, ¶ 9.3.

³⁶ See First Lee Statement, ¶¶ 7, 19.

³⁷ Ex. C-0264, Article 760 of the Panamanian Judicial Code, ¶ 5 (emphasis added).

³⁸ Claimants’ Application, ¶ 15 (emphasis added).

2018 phone call, Claimants’ attorney, Ms. Hyman, provided a brief narration of Muresa’s tort case, and then asked Mr. Lee for “[his] view” on this narrative.³⁹ Mr. Lee himself does not recall this exchange,⁴⁰ but Claimants assert in their Reply that he responded as follows: “Based on what you described, it sounds like” a flaw in the process.⁴¹ Claimants then invoke the IBA Guidelines on Conflicts of Interest, arguing that Mr. Lee’s alleged statement is similar to one in which an “‘arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.’”⁴²

14. One problem, however, is that Mr. Lee is not an arbitrator, and his role as an expert is different from that of decision-maker. As an expert, Mr. Lee’s role is to provide evidence *to* the decision-maker, in the form of an opinion that accords “with [his] sincere belief.”⁴³ There is no reason why a prior expert opinion on the merits (assuming that one existed) would stand in the way of accomplishing this task. In this case, however, no such opinion exists, since — even on the face of Claimants’ own assertions — the most that could be said is that, during an initial phone call, Mr. Lee reacted to Ms. Hyman’s brief narrative. Unless it were accepted that a person could properly formulate an “expert opinion” in a matter of seconds, solely on the basis of one party’s characterizations, and without analyzing any source

³⁹ Claimants’ Reply, ¶ 20.

⁴⁰ See Second Lee Statement, ¶ 13.

⁴¹ Claimants’ Reply, ¶ 20.

⁴² Claimants’ Reply, ¶ 29 (quoting CLA-0134, IBA GUIDELINES, Waivable Red List, ¶ 2.1). In the same section of the Reply (titled “Duty of Disclosure”), Claimants also assert — bizarrely — that the situation is also akin to one in which an “arbitrator had a prior involvement of the dispute.” See *id.* However, Claimants never explain or unpack this assertion. Because Claimants bear the burden of establishing that Mr. Lee must be disqualified — and have even stated that “[i]f there is a finding that no confidential information was provided to Mr. Lee, the Claimants accept that *Mr. Lee’s failure to disclose his prior communications with the Claimants’ counsel*, though unusual, *would not by itself require Mr. Lee’s removal* as the Respondent’s expert witness” — Panama trusts that this issue need not be addressed further. *Id.*, ¶ 4 (emphasis added).

⁴³ ICSID Arbitration Rule 35(3) (explaining that “[e]ach expert shall make the following declaration before making his statement: ‘I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief’”).

materials — which, as Mr. Lee confirms, is simply not how he operates⁴⁴ — this reaction cannot constitute an “expert opinion.”

15. If Claimants believe that Mr. Lee’s testimony in this proceeding is contradicted by something that he has stated previously (whether during the 7 February 2018 call or otherwise), they are free to try to make an argument to that effect. However, the argument would plainly go to the “probative value” of Mr. Lee’s testimony, and not to its admissibility,⁴⁵ and accordingly would need to be made in the pleadings or on cross-examination.

* * *

16. As the foregoing amply demonstrates, Claimants have not come anywhere close to justifying their request for Mr. Lee’s removal as Panama’s expert. Their attempt to claim “confidentiality” of Panama’s alleged actions and comments is manifestly baseless and unconvincing — especially when considered in the light of Claimants’ disclosures of tax filings,⁴⁶ attorney invoices with matter descriptions,⁴⁷ and even the contents of discussions with

⁴⁴ See **Second Lee Statement**, ¶ 15 (“To formulate an opinion on the merits of the Bridgestone Case, I would have had to previously analyze the Muresa tort case, in particular the cassation judgment issued by the Civil Chamber of the Supreme Court of Justice, carefully examining the corresponding documentation. Without having carried out this analysis, it would be impossible and irresponsible to formulate a legal opinion on the merits of any case, especially if the opinion was to be based exclusively on a general and brief narrative made by an interested party in the course of a telephone conversation”) (unofficial translation from Spanish; the original Spanish text states as follows: “Para formular una opinión sobre el mérito del Caso Bridgestone, yo habría tenido que analizar previamente el proceso de responsabilidad extracontractual iniciado por Muresa, en particular la sentencia de casación emitida por la Sala Civil de la Corte Suprema de Justicia, examinando minuciosamente la documentación correspondiente. Sin haber llevado a cabo ese análisis, sería imposible e irresponsable formular una opinión legal sobre el mérito de cualquier caso, especialmente si la opinión se sustentara exclusivamente en una breve narrativa de carácter general hecha por parte interesada en el curso de una conversación telefónica”).

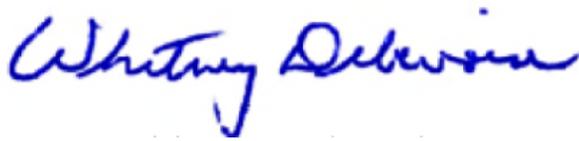
⁴⁵ See ICSID Arbitration Rule 34(1) (confirming, by authorizing the Tribunal to decide *both* the “admissibility” *and* the “probative value” of evidence, that “admissibility” and “probative value” are two different concepts).

⁴⁶ As the Tribunal will recall, during the expedited objections phase of this case, Claimants submitted three tax returns of Bridgestone Licensing, which they later (extemporaneously) tried to claim were confidential. See **Ex. C-0121**, Form 1120 (2013) (Bridgestone Licensing’s tax return for the year 2013); see also, **Ex. C-0122**, Form 1120 (2014) (Bridgestone Licensing’s tax return for the year 2014); **Ex. C-0123**, Form 1120 (2015) (Bridgestone Licensing’s tax return for the year 2015); **Expedited Objections Hearing Transcript (Day 3)** 475:09-476:14.

⁴⁷ See **Ex. C-0088**, Ladas & Parry Payment Documentation, pp. 4–6.

their attorneys in this proceeding.⁴⁸ These tactics should not be tolerated by the Tribunal, and Panama therefore respectfully requests that the Tribunal (1) dismiss Claimants' Application in its entirety, and (2) award full costs and attorney's fees to Panama for the time and resources it expended in defending against Claimants' allegations since the receipt of Claimants' 9 October 2018 letter.

Respectfully submitted,



E. Whitney Debevoise
Gaela Gehring Flores
Mallory Silberman
Katelyn Horne
Michael Rodríguez*

Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001
+1 202 942-5000 (office)
+1 202 942-5999 (fax)

*Admitted only in Florida; practicing law in the District of Columbia during the pendency of his application for admission to the D.C. Bar and under the supervision of lawyers of the firm who are members in good standing of the D.C. Bar.

⁴⁸ See **Expedited Objections Hearing Transcript** (Day 3) 483:20-484:06 (Kingsbury) (confirming that Claimants' counsel in this proceeding told the Bridgestone group that if Bridgestone Corporation paid the 2014 damages award, Bridgestone Licensing would not have a case under the TPA).