

**IN THE MATTER OF AN ARBITRATION UNDER THE
NORTH AMERICAN FREE TRADE AGREEMENT**

- and -

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

- between -

**JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL MÉXICO,
S.A. DE C.V.**

(“Claimant”)

and

THE UNITED MEXICAN STATES

(“Respondent”)

ICSID Case No. UNCT/17/1

PROCEDURAL ORDER NO. 15

Tribunal

Dr. Eduardo Zuleta (President)
Mr. V.V. Veeder, QC (Arbitrator)
Mr. Mariano Gomezperalta Casali (Arbitrator)

Secretary of the Tribunal

Ms. Sara Marzal Yetano

9 July 2019

1. On 1 July 2019, by letter, Claimant informed the Tribunal about a disagreement between the Parties regarding the procedure and timing of the post-hearing submissions related to the bankruptcy issues concerning Mr. Jorge Blanco, a former claimant in this proceeding.

I. Position of Claimants

2. In the communication to the Tribunal dated 1 July 2019, Claimant indicated that on 29 May 2019, a Judge for the United States Bankruptcy Court for the Southern District of Florida issued an order restoring Mr. Blanco's ownership of his shares in Tele Fácil *nunc pro tunc* ("Bankruptcy Order"). The Bankruptcy Order, according to Claimant, became publicly available on 30 May 2019. Respondent's Objection to Jurisdiction ("Objection") was filed on 13 June 2019 and according to Claimant, the Objection should have addressed the legal effects of the Court Order. However, rather than addressing the Court Order, Respondent made the following reservation: "Mexico reserves the right to request leave from the Tribunal to address any new evidence filed by Claimant in response to this submission."
3. Claimant indicated that he provided Respondent with a copy of the Bankruptcy Order on 23 June 2019 at the request of Respondent. Claimant also argues that Respondent should have taken steps to monitor developments in Mr. Blanco's bankruptcy proceeding and the fact that it did not do so should not unduly delay the completion of post-hearing submissions. The arguments of Claimant regarding the *nunc pro tunc* were known by Respondent since March 2019 and Claimant responded to a series of questions on 29 March 2019 identifying key information about Mr. Blanco's bankruptcy. Considering that in this arbitration there is a single round of post-hearing submissions —where Respondent has one chance to defend its objection— it is Respondent's responsibility to undertake all necessary due diligence and to address all reasonably foreseeable defenses, especially those that it knew were coming and even identified in open discussion at the recent oral hearing. Respondent should not be permitted to delay the agreed timetable for post-hearing submissions.
4. Claimant request the Tribunal to determine whether the procedures in § 19.3 of Procedural Order No. 1 regarding the submission of new evidence or any other restrictive procedures apply with respect to the post-hearing briefs on the bankruptcy issues. According to Claimant, his understanding is that the Tribunal anticipated new evidence could be introduced because the impact of the bankruptcy on the ability of Claimant to claim on behalf of Tele Fácil had not yet been fully briefed in the proceedings. Claimant further claims that Respondent has introduced new evidence with the Objection without following the procedures of § 19.3. Therefore, Claimant asks the Tribunal to confirm that he will be afforded equal treatment and be allowed to rely on new evidence, as Respondent has done, to argue the legal significance of Mr. Blanco's bankruptcy. Claimant also requests that the Tribunal determine whether Respondent has a right to object to or to respond to any new evidence, including the Bankruptcy Order, that Claimant introduces in their response to the Objection; and, if so, whether the Tribunal will order updated briefing promptly so that Claimant's 15 August 2019 deadline can be met. Given that the Tribunal granted one round of post-hearing submissions on the bankruptcy issues, and because Respondent is the moving party Claimant should have the last opportunity to address the issues. To allow Respondent to respond after Claimant's response on 15 August 2019, would inappropriately extend the period of post-hearing submissions beyond the deadline established by the Tribunal.
5. Finally, Claimant indicates that in order to allow Respondent to address the Bankruptcy Order, he is amenable to provide Respondent until 22 July 2019 to update its submissions and expert reports. This will permit Claimant sufficient time to respond on 15 August 2019, as the Parties agreed.

II. Position of Respondent

6. On 3 July 2019 Respondent replied to Claimant's request.
7. Respondent asserted that Mr. Blanco's Stipulation and Settlement Agreement was executed on 25 April 2019, that is to say, on the second to last day of the recent oral hearing. However, Claimant did not disclose the existence of the Stipulation and Settlement Agreement to Respondent or the Tribunal. On 2 May 2019, the Trustee filed a Motion to Approve Stipulation to Compromise Controversy. This was disclosed neither to the Respondent nor to the Tribunal.
8. On 7 May 2019 the Tribunal issued Procedural Order No. 14 setting out the jurisdiction-related questions to be addressed by the Parties. Procedural Order No. 14 did not direct the parties to address the impact, if any, of a potential *nunc pro tunc* order by a U.S. Bankruptcy Court at an unknown future date. Moreover, Claimant did not request leave to address such an order in its post-hearing submissions.
9. Respondent filed its Objection 13 June 2019 addressing the two questions posed by the Tribunal in Procedural Order No. 14 on the basis of the existing evidential record, with the exception of a third expert witness report that addresses the first question in Procedural Order No. 14 as a matter of Mexican law.
10. On 18 June 2019, Claimant advised Respondent, for the first time, about the Bankruptcy Order. Before that date, Respondent had no knowledge of the Bankruptcy Order. Claimant decided to withhold disclosure of the Bankruptcy Order until after Respondent had submitted its Objection which was prepared in accordance with the instructions set out in Procedural Order No. 14. The fact that Claimant advised that Mr. Blanco would be seeking a *nunc pro tunc* order at an unknown future date did not impose an obligation on Respondent to address a hypothetical future occurrence without the benefit of concrete evidence on the record.
11. Respondent submits that, in any event, the *nunc pro tunc* issue is irrelevant to the Tribunal's determination on jurisdiction. During the course of this arbitration Mr. Blanco's bankruptcy had not yet been addressed and that is the reason why he withdrew as a claimant on 26 March 2019. Moreover, the *nunc pro tunc* order does not address one key issue: whether the transfer of shares of Tele Fácil to Mr. Joshua Dean Nelson on 29 March 2016 was valid as a matter of Mexican law. However, should the Tribunal wish to receive submissions on the bankruptcy issues, Respondent is entitled to know all of the evidence that Claimant intends adduce prior to addressing the issues created by Claimant himself. If Claimant intends to adduce any evidence other than the Bankruptcy Order, procedural fairness demands that Respondent be afforded the opportunity to respond to that evidence.
12. Respondent is not in a position to determine whether it will require additional expert witness reports or will require more time to respond properly until it receives all the evidence and submissions of Claimant on the implications of such evidence. The deadline of 22 July 2019 suggested by Claimant is clearly insufficient to analyze the evidence presented by Claimant, prepare expert witness reports and prepare the corresponding submissions.

III. Considerations of the Tribunal

13. The Tribunal recalls that the issue of the bankruptcy of Mr. Blanco was presented to the Tribunal on 26 March 2019, shortly before the oral hearing on jurisdiction and the merits. The Tribunal further

recalls that such issue was known or should have been known by Mr. Blanco and the Claimant long before the hearing and very early in this arbitration.

14. On 26 March 2019, and as a result of the aforesaid bankruptcy, Mr. Blanco withdrew as a party from this arbitration and was later presented in the hearing as a witness but not a claimant. The hearing, Procedural Order No. 14 and the questions therein submitted by the Tribunal were based on the premise that Mr. Blanco was still in bankruptcy and was not a party to this arbitration.
15. It is true that in the hearing Claimant referred to the eventuality of the termination of the bankruptcy of Mr. Blanco. However, it was Claimant who created the issue by their delayed submission of information on such bankruptcy to the Tribunal. If Claimant had information or evidence on the bankruptcy of Mr. Blanco during the hearings or thereafter and intended to submit such information and evidence in the post-hearing briefs, it was for Claimant to perform the necessary due diligence to properly and timely inform Respondent and the Tribunal about the progress of the bankruptcy and particularly the application to obtain the Bankruptcy Order and the issuance of the Bankruptcy Order. Claimant cannot refrain from disclosing information that it had before the submission of the Objection by Respondent and then claim that it was for Respondent to have found such evidence or to have guessed the possible allegations of Claimant regarding the Bankruptcy Order.
16. Respondent submitted its Objection based on the evidence in the record and the allegations of Claimant up to the end of the hearing and responded to the specific questions of the Tribunal in Procedural Order No. 14, which were also based on such evidence and evidential record. Therefore, if Claimant simply intends to submit the Bankruptcy Order but no other evidence or new allegations related thereto, the present calendar for post-hearing briefs could be maintained. However, if Claimant intends to present further additional evidence or new allegations based totally or partially on the Bankruptcy Order or other documents related thereto, the calendar would have to be amended so that Claimant submits such evidence and allegations in the first place to allow Respondent to amend its objection as required and present the necessary evidence and Claimant to respond to the Objection as amended.

IV. Decision of the Tribunal

17. Based on the above the Tribunal decides:
 - a. If Claimant intends to submit arguments and evidence on Mr. Blanco's bankruptcy not in the evidential record at the time of issuance of Procedural Order No. 14, including arguments and evidence related to the Bankruptcy Order, the Parties must confer and agree on a new procedural calendar for (i) Claimant to present the arguments and evidence on Mr. Blanco's bankruptcy not in the evidential record at the time of issuance of Procedural Order No. 14; (ii) Respondent to amend its Objection accordingly and to present evidence in response to the new allegations and evidence submitted by Claimant; and (iii) Claimant to reply to Respondent's Objection as amended. If no agreement is reached by 22 July 2019, the Tribunal will determine the new procedural calendar.
 - b. If Claimant does not intend to submit arguments and evidence on Mr. Blanco's bankruptcy not in the evidential record at the time of issuance of Procedural Order No. 14, including arguments and evidence related to the Bankruptcy Order, the present procedural calendar will be maintained; but Claimant cannot submit in its response to the Objection arguments or evidence, including arguments and evidence related to the Bankruptcy Order, not in the evidential record at the time of issuance of Procedural Order No. 14. If Claimant does not

intend to submit arguments and evidence as described in this paragraph, it shall inform the Tribunal accordingly on or before 15 July 2019.

On behalf of the Tribunal,

[*Signed*]

Dr. Eduardo Zuleta
Presiding Arbitrator
Date: 9 July 2019