School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Kompozit LLC v. Republic of Moldova (SCC Arbitration EA 2016/095) – Emergency Award on Interim Measures – 14 June 2016

Case Report by: Manu Misra**, Editor: Ignacio Torterola***

Summary:

In the Decision rendered on 14 June 2016, the Emergency Arbitrator granted an application for interim relief and ordered Moldova to refrain from conducting and take no further steps relating to a share-cancelling process enacted after Moldovan authorities concluded that a Russian entity improperly acquired its shares in a Moldovan commercial bank. The Emergency Arbitrator concluded that the ensuing harm from the cancellation could not be resolved through monetary compensation and accepted the position of the tribunal in *Sergei Paushok v Mongolia* that the criterion of 'irreparable harm' has a flexible meaning in international law and that the possibility of monetary compensation does not necessarily eliminate the need for interim measures. However, it declined to allow the investor to recover its suspended shareholder rights since the Moldovan National Bank's decision to do so was neither permanent nor irrevocable. Towards doing so, the Emergency Arbitrator also decided that a "cooling-off period" stipulated by the Russia-Moldova bilateral investment treaty, during which the parties are obliged to try to resolve the dispute amicably "as far as possible", did not apply to the request for interim relief in this case since Moldova had refused to engage in settlement discussions once it has received the notice of dispute. Additionally, it decided that the 2010 version of the SCC Arbitration Rules may be applicable to disputes arising out of investment treaties concluded before 2010.

Main issues: Emergency Decision on Interim Relief – Cooling-Off Period, Urgency Test, Substantial/Significant Prejudice, Irreparable Harm

Emergency Arbitrator: Mr. Jose Rosell

Claimants' Counsel: King & Spalding International LLP, London, U.K.

Respondent's Counsel: Ministry of Justice of the Republic of Moldova, Chisinau, Moldova; Ministry of Foreign Affairs and the European Integration of the Republic of Moldova, Chisinau, Moldova

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Digest:

1. Relevant Facts and Procedural Dates

On 17 April 2015, Kompozit LLC ("**the Claimant**"), a legal entity incorporated under Russian law, acquired 10,160 shares ("**the Shares**") in JSC Moldova Agroindbank Commercial Bank ("**the Bank**"), a Moldovan bank. The acquisition was approved by the National Bank of Moldova ("**the National Bank**") (¶¶ 19-20).

On 24 April 2015, the National Bank requested the Claimant to provide various documents and information in order to conduct a review of the Bank's shareholders which the Claimant provided on 6 August 2015 (¶ 20).

The Claimant participated in two shareholders' meetings of the Bank on 24 April and 22 September 2015. The National Bank did not raise any objections or complaints in relation to the Claimants' shareholding in the Bank, nor against the Claimant participating in either of the two shareholders' meetings (¶ 21).

Between 12 January 2016 and 24 February 2016, the National Anti-Corruption Center of Moldova ("**the NAC**") decided to block the Shares for a short period of time. This blocking period was thereafter extended for a longer period by the Buyukan District Court in Chisinau (¶ 22).

On 2 March 2016, the National Bank issued the decision no. 43 ("**the Decision 43**") which came into force on the same date (¶ 23). Under the Decision 43, it was decided that:

1) the Claimant and 19 other shareholders in the Bank ("**the Decision 43 Investors**") were acting in concert and had acquired a "substantial share" in the share capital of the Bank, without the National Bank's permission,

2) most of the shareholders' rights of the Decision 43 Investors were immediately suspended,

3) the Decision 43 investors had to dispose of their shares in the Bank within a 3-month period beginning from the date of the Decision 43, i.e. 2 June 2016, failing which their shares would be cancelled, pursuant to Article 15-6(3) of the Moldovan Law on Financial Institutions No. 550 ("**the Financial Institutions Law**") (¶ 23).

On 16 March 2016, the NAC sent a letter to the Claimant's security broker, requiring the latter to notify the National Bank of any attempts by the Claimant to dispose of the Shares (¶ 24).

On 7 April 2016, the National Bank rejected the Claimant's request to annul the Decision 43 (¶ 25).

Also on 7 April 2016, the National Commission of the Financial Market of Moldova ("**the Commission**") issued the decree no. 15/2 ("**Decree 15/2**") to implement the provisions of the Decision 43. In addition, the Bank's CEO had publicly confirmed that the Bank's management will proceed to cancel the shares belonging to the Decision 43 Investors (¶ 26, 29).

Pursuant to the Financial Institutions Law, the Bank's Management Board was obliged to pass a resolution to cancel the Shares within fifteen days of the sale deadline stipulated by the Decision 43 i.e. 17 June 2016 (¶ 30).

On 9 June 2016, the Claimant filed an Application for the Appointment of an Emergency Arbitrator and for an Emergency Decision on Interim Measures ("**the Application**") with the Arbitration Institute of the Stockholm Chamber of Commerce ("**the SCC**"), pursuant to Appendix II of the 2010 SCC Arbitration Rules ("the SCC Rules") (¶ 4). On the same date, the SCC Secretariat sent the Application and its exhibits to the Respondent. The Respondent received the application but did not respond to the SCC (¶ 6).

On 10 June 2016, the SCC Secretariat informed the parties of the appointment of Mr. Jose Rosell as the Emergency Arbitrator ("**the EA**") and that the seat of the arbitration would be Stockholm (¶ 7). On the same date, the EA, *inter alia*, directed the Respondent to submit an answer to the Claimant's application by 11 June 2016 and invited both parties to inform the EA as to whether the emergency decision should take the form of an order or an award (¶ 10).

On 10 June 2016, the Respondent informed the EA that the decision should take the form of an award as permitted by Article 32(3) of the 2010 SCC Arbitration Rules (¶ 12). It offered no further comments and did not participate in the emergency proceedings. Consequently, the EA referred solely to the positions expressed by the Claimant (¶ 14, 17).

The applicable treaty to the dispute was the Convention between the Government of the Russian Federation and the Government of the Republic of Moldova on Encouragement and Mutual Protection of Investments dated 17 March 1998 ("**the Treaty**") which was ratified by both signatory States (¶ 18). The Claimant had alleged that National Bank is an organ of the Respondent and therefore, the latter is responsible under the Treaty for the actions taken by the National Bank (¶ 19).

The Claimant requested that, pending resolution of the dispute by way of a final award on the merits, the EA order that:

1) the National Bank refrain from taking any further steps concerning the enforcement/implementation of the provisions of Decision 43 and Decree 15/2,

2) the Commission refrain from taking any further steps concerning the enforcement/implementation of the provisions of Decree 15/2 and

3) the Respondent refrain from otherwise interfering with the Claimant's shareholding in the Bank (¶ 31).

2. The Emergency Arbitrator's Analysis

As a preliminary matter, the EA considered and analyzed three jurisdictional issues which were raised by the Claimant in its application (¶ 36).

The first issue pertained to the applicability of the EA Rules, as contained in the 2010 SCC Rules, to the dispute. The Claimant had relied on Article 10 of the Treaty, which includes a reference to the SCC Arbitration Rules, and contended that the dispute should therefore be resolved in accordance with Article 1 of Appendix II of the 2010 version (¶ 37).

In its analysis, the EA first noted that, at the time of the signature of the Treaty, the 1988 version of the SCC Rules were applicable and that during the period between the signature and the ratification of the Treaty by the Russian Federation, the new 1999 version of the SCC Rules came into effect (¶ 38). The EA thus concluded that the contracting parties were aware that, during this period, the SCC Rules referred to in Article 10 of the Treaty had been amended (¶ 38).

It further noted that no specific mention or agreement regarding the version of the SCC Rules that should apply to disputes occurring under the Treaty had been made, despite the contracting parties being free to do so (¶ 38). The EA therefore considered it fair to assume that when the contracting parties had included a reference to the SCC Rules in the Treaty, they had done so while anticipating that the rules would be further amended (¶ 39). It considered this assumption to be consistent with Article 31 of the Vienna Convention on the Law of the Treaties (¶ 40). As a result, it was held that *rationae temporis* the 2010 SCC Arbitration Rules could apply to the dispute while they are in force (¶ 41).

With specific regard to the applicability of the EA Rules, which had not been contemplated in neither the 1988 nor the 1999 versions of the SCC Rules, the EA took particular note of the Preamble of the 2010 version of the SCC Rules which provides that the parties are deemed to have agreed to the EA rules contained therein, in the absence of an opt-out agreement between the contracting parties, as was the case in this dispute (¶ 43-44).

Additionally, the EA noted the opinion of the commentators of the 2010 SCC Rules which confirmed that the EA Rules are available to the parties regardless of the date when the arbitration agreement was made and are thus applicable retroactively to arbitration agreements entered into prior to the effective date of the 2010 SCC Rules (¶ 46). Based on this analysis, the EA held that the EA Rules, as contained in the 2010 SCC Rules, were applicable to the dispute and that consequently it had *prima facie* jurisdiction under the 2010 SCC Rules (¶ 47).

The second jurisdictional issue pertained to the *prima facie* status of the Claimant as an investor having made an investment under Article 1 of the Treaty which the EA affirmed on the basis of the Claimant being a legal entity incorporated in the Russian Federation in accordance with Russian law and having acquired the Shares on or about 17 April 2016 for USD 615,757.58 using its own financial resources (¶ 48-50).

The third and last jurisdictional issue, which the EA dealt with, was in relation to the cooling-off period provided for by Article 10(1) and 10(2) of the Treaty which collectively stipulate that the dispute can be submitted to arbitration only if it is not resolved amicably within six months from the date of written notification which, in the present case, was 2 June 2016 (¶

51-53). On this issue, the EA did not consider the cooling-off period to be a jurisdictional barrier and held that, primarily due to the Respondent's refusal to engage in settlement discussions when it received the notification of dispute, the cooling-off period was inapplicable to EA proceedings for the case at hand (¶ 55-56).

Towards doing so, the EA took note of the wording of Article 10(1) of the Treaty, which included the language "as far as possible", and considered such wording to imply that when the parties are not able to resolve the dispute amicably, the investor is then entitled to submit the dispute to arbitration, pursuant to Article 10(2) of the Treaty (¶ 55). The EA considered the Respondent's refusal to negotiate with the Claimant as a clear sign that an amicable settlement between the parties would be impossible and held that Claimant was entitled to refer the dispute to arbitration without having to wait until the expiration of the six-month cooling-off period (¶ 56).

With respect to the issuance of interim relief, the EA in this case derived its powers from Article 1 of the Appendix II of the 2010 SCC Rules, which refer to Article 32(1) - (3) of these rules (¶ 57). The EA thus noted that its powers were the same as those conferred to arbitral tribunals under the 2010 SCC Rules and that such powers were sufficiently wide in scope to enable the EA to grant the emergency measures sought by the Claimant (¶ 58-59).

With regard to the specific standard to be applied, however, the EA noted that the SCC Rules did not prescribe any such standards and therefore it instead referred to Swedish law, which it considered to be the *lex arbitrii* in this case (¶ 59, 62). This position was consistent with the SCC Board's decision to fix Stockholm as the seat of arbitration (¶ 61). The EA also considered the UNCITRAL Model Law on International Commercial Arbitration 2006 ("**the Model Law**") to be of guiding value for identifying the applicable conditions, in the absence of any specific standards required by the Swedish Arbitration Act (¶ 64).

i. Urgency Test

The EA found it appropriate to first require the Claimant to comply with the urgency test, particularly since Article 7 of Appendix II of the 2010 SCC Rules provide that urgency is inherent in emergency proceedings (¶ 67). The urgency test required that it be established *prima facie* that an imminent harm might be caused to the applicant, if the requested interim measure is not granted by the EA before such measure can be obtained from the arbitral tribunal (¶ 68). To apply this test, the EA first took note of Decision 43, wherein the Claimant was compelled to sell the Shares by 2 June 2016 (¶ 70). Since such a sale was not conducted by the Claimant, the EA then referred to Article 15-6(3) of the Financial Institutions Law, which then required the management board of the Bank to pass resolution to cancel the Shares within fifteen days of that date, i.e. 17 June 2016 (¶ 70). Based on these facts, the EA considered the existence of an imminent risk of harm as being obvious and found that the Claimant had sufficiently established an urgency towards the granting of interim relief (¶ 71). However, the EA restricted this urgency to the imminent harm of the Shares being cancelled and was not convinced of the Claimant's additional submission that there was also an urgency to decide, at that stage, on the restoration of the Claimant's shareholder rights (¶ 71).

ii. Prima Facie Reasonable Possibility to Succeed on the Merits

As a second condition, the EA noted how two previous Emergency Decisions rendered under the auspices of the SCC, which also involved the Republic of Moldova in similar factual

circumstances, had referred to the standard contemplated in Article 17A(1)(a) of the Model Law, which provides that the arbitrator has to be satisfied that there is "*a reasonable possibility that the requesting party will succeed on the merits of the claim*" (¶ 72-73).

Requiring the Claimant in the present case to also satisfy the same standard, the EA found that, *prima facie*, there was a reasonable possibility that the Claimant succeeds on the merits of the dispute before the arbitral tribunal and also found that the actions taken by Respondent may lead the arbitral tribunal to determine that the Respondent has particularly breached Article 3.1 of the Treaty, due to the *prima facie* discriminatory measures that it had undertaken against the Claimant in the form of Decision 43 (¶ 76).

iii. Irreparable Harm – Substantial/Significant Prejudice

The EA took note of the Claimant's submission that instead of the "irreparable harm" test, the "substantial/significant prejudice" test should be applied in this case, as required in Article 17A(1)(a) of the Model Law and also often applied by ICSID Tribunals. It further noted the Claimant's assertion that if the Decision 43 and the Decree 15/2 become effective, the latter would suffer substantial prejudice and that this prejudice would lead to a complete loss of the Claimant's investment and by extension, of its business in Moldova (¶ 77-78).

To that end, the Claimant had also submitted that Respondent's actions bore the risk of indefinitely prohibiting the Claimant from not just purchasing any further shares in the Bank itself but also from making any investments in the Moldovan banking industry. It particularly based this assertion on Article 32(3) and (4) of the National Bank's Regulation on Holding Equity Interest in the Capital of Banks ("the Regulation") which sets forth an "integrity" criteria for obtaining the National Bank's prior approval for acquiring a "substantive stake" in any Moldovan Bank (¶ 80).

The Claimant therefore subsequently requested the EA to preserve the *status quo*, and asserted that, due to the nature of its rights and the actions taken by the Respondent, an award of monetary compensation would be insufficient to remedy the forced sale of the Shares (¶ 81). In support of its request, the Claimant referred to the case of *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* ("PNG") wherein the tribunal ordered the respondent to refrain from transferring any of the claimant's shares to a third party (¶ 82).

Although the EA acknowledged that the above case supported the Claimant's request regarding the preservation of the *status quo*, it considered it more appropriate for the arbitral tribunal to make a determination on the Claimant's additional request to recover its shareholding rights which were suspended by Decision 43 since it found that, *prima facie*, the National Bank's decision to suspend the Claimant's shareholder rights was neither permanent nor irrevocable (¶ 82-83).

In addition to PNG, EA also noted the Claimant's reliance on the UNCITRAL case of *Paushok v. Mongolia* ("Paushok") wherein the tribunal observed that irreparable harm in international law has a flexible meaning and that the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures (¶ 88). The EA shared the view adopted by the Paushok tribunal and, applying it to the instant case, held that even if it is assumed that the Claimant may be monetarily compensated by the Respondent at the

time of the sale of the Shares further to the Decision 43, such compensation would not necessarily reflect the real value of the Shares (¶ 88).

Resultantly, the EA found that the Claimant had sufficiently established that there was a serious likelihood that the latter would suffer a significant prejudice if the Respondent is not prevented from cancelling the Shares (¶ 89). Also, with regard to the proportionality of an order to prevent the cancellation of the Shares, the EA held that the in contrast to the Claimant, the potential harm that such an order may cause to the Respondent would be limited and that therefore, the order would constitute a proportional measure in this emergency arbitration (¶ 90-91).

3. The Emergency Arbitrator's Decision

Based on the above, pending resolution of the dispute by way of a final award on the merits, the EA ordered that:

1) the National Bank refrain from taking any further steps concerning the enforcement/implementation of Decision 43 and of Decree 15/2 and

2) the Respondent refrain from taking any further steps relating to the cancellation of the Shares (¶ 92).

The EA dismissed all other requests submitted by the Claimant (¶ 93).