



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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Award Name and Date:

Evrobalt LLC v. The Republic of Moldova, SCC Emergency Arbitration (EA 2016/082) – Award on Emergency Measures, 30 May 2016

Case Report by:

Ilektra Athanasiou-Ioannou**, Editor: Diego Luis Alonso Massa***

Summary:

In the Award rendered on May 30, 2016, the Emergency Arbitrator Mr. Petrochilos appointed under the Arbitration Rules of the Stockholm Chamber of Commerce (2010) declined to grant Claimant the interim relief sought, in particular to suspend the decrees issued by the Moldovan government institutions that threatened to impair Claimant’s investment in the country. The Emergency Arbitrator was satisfied that there was *prima facie* jurisdictional basis to hear the dispute, even though the cooling-off period stipulated in the Russia-Moldova investment treaty had not expired; according to the Emergency Arbitrator the cooling-off period constituted a mere procedural requirement, which did not affect the tribunal’s jurisdiction in a case where negotiations would be manifestly futile. Finally, the Emergency Arbitrator rejected the investor’s request for interim measures, because it failed to satisfy the non-compensable harm requirement; more precisely, it was held that any harm the investor might suffer due to the breach of Respondent’s treaty obligations could be compensated by a final award for damages that would be rendered by the tribunal that will hear the main proceedings, once it has been constituted. Likewise, there was no indication that the investor’s harm would lead to financial ruin or that monetary compensation could not fully compensate any damage suffered.

Main issues: SCC Emergency Arbitrator – Jurisdiction; *Prima facie* qualification: “investment”, “investor”; Cooling-off period; Applicability of 2010 SCC Rules – Emergency Interim Measures; Requirements – Standard of Non-Compensable/Irreparable Harm.

Emergency Arbitrator: Mr. Georgios Petrochilos

Claimant’s Counsel: Mr. Egishe Dzhazoyan and Ms. Aisling Billington (King & Spalding International LLP, London, U.K.)

Respondent’s Counsel: Although invited, did not participate in the proceedings.

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Digest:

1. Relevant Facts and Procedural Dates

The dispute arose between Evrobalt LLC (“Claimant”), a Russian shareholder in a Moldovan financial institution (Moldova Agroindbank, “MAIB”) and the Republic of Moldova under the 1998 Russia-Moldova bilateral investment treaty (“the BIT”), following two decrees issued by Moldova’s central bank, the National Bank of Moldova (“NBM”) (¶¶ 9-10). The decrees found that Evrobalt along with other MAIB shareholders acted in concert and acquired a “substantial share” in MAIB without NBM’s prior permission, suspended Claimant’s shareholder rights and required a forced sale of the shares within three months; should the sale fail, the shares would be cancelled (¶¶ 11-13). Following Claimant’s unsuccessful attempt to annul the decrees, Claimant pursued arbitration against Moldova under Article 10 of the Russia-Moldova BIT that provided for the Stockholm Chamber of Commerce (“SCC”) as one of the available *fora* (¶ 14).

Claimant alleged that the decrees’ measures i) constituted a denial of fair and equitable treatment, ii) an impairment by arbitrary and discriminatory measures of the management and use of its investment, and iii) amounted to unlawful expropriation (¶¶ 14–15). The investor submitted a Notice of Dispute under the BIT on May 16, 2016, triggering the six-month cooling-off period that expired on November 15, 2016. The Moldovan Ministry of Justice replied by stating that it was not authorized to engage in any negotiations (¶ 14). On May 24, 2016, Claimant filed an application seeking the appointment of an emergency arbitrator (“EA”) and an emergency decision on interim measures in the form of a suspension of the two decrees pending the arbitration¹ (¶¶ 2, 14). The EA was appointed by the SCC Board the following day (¶ 3); for want of the parties’ agreement on a seat of arbitration, the Board designated Stockholm as the seat of the emergency proceedings (¶ 4). As the Award records, despite the EA’s repeated efforts to ensure that the Moldovan government was served with notice of the application, it did not participate in the proceedings (¶ 5).

¹ Article 1(1), Appendix II, SCC Rules 2010

2. The EA's Analysis

I. Jurisdiction

As a preliminary matter, it was first noted that the issuance of emergency measures requires the EA to be satisfied that the jurisdictional basis invoked is *prima facie* sound (¶ 17). Thus, the EA needed to be satisfied that there was “a good prospect for a finding” that (i) Claimant was an “investor” with an “investment” protected under the Treaty, (ii) Claimant could institute arbitration proceedings notwithstanding the pendency of the six-month period set out in the BIT, and (iii) the parties had agreed on the emergency interim measures procedure as laid down in Appendix II of the 2010 SCC Rules (¶ 18).

i. Claimant was an “investor” with an “investment” protected by the BIT

The EA noted that since the Moldovan Ministry of Justice did not contest that Evrobalt LLC was an investor with a protected investment under the BIT in its response to the Notice of Dispute, Claimant had demonstrated, *prima facie*, that its investment fell under the protective scope of the BIT (¶ 19).

ii. Claimant could initiate arbitration proceedings notwithstanding the pendency of the six-month period stipulated in the BIT

The EA held that the investor was not prevented from making this application by the six-month cooling-off period established in the BIT, even though it had not yet expired. Irrespective of this requirement's qualification as a procedural issue or as one of admissibility, given that the Moldovan Ministry of Justice had indicated in its first response to the Notice of Dispute that it did not intend to suspend the decrees, it would be “futile” to insist on it (¶¶ 20-23); consequently, the futility exception was met.

iii. The parties had agreed on the emergency interim measures process set out in Appendix II of the 2010 SCC Rules

The last issue concerned the applicability of the 2010 SCC Rules, as the BIT was signed in 1998, when the 1998 version of the SCC Rules was in force; neither those rules nor any of the subsequent versions² –other than the 2010 Rules- contained emergency arbitrator provisions. The EA found that the 2010 Rules were applicable for two reasons: first, the text of both the 1999 and 2010 SCC Rules encompasses effectiveness provisions providing for replacement of the previous rules and application to arbitrations commenced after their entry into force; hence, it was within the parties' reasonable contemplation that arbitration pursuant to the SCC Rules meant arbitration pursuant to the Rules extant at the time the arbitration was commenced (¶¶ 24-29). Secondly, in a standing offer to arbitrate set out in a treaty, given that the offer may be acted upon throughout the life of the treaty, it was reasonable that the reference to the rules was construed as a “dynamic” one. Besides, the contracting parties did not exclude any subsequent applicable version of the SCC Rules in the BIT (¶ 30).

² Namely, the 1999 SCC Rules and the 2007 SCC Rules that could apply, since the treaty came into force in 2001

II. Requirements to be met for the injunctions sought

The EA, taking into consideration that the SCC Rules 2010 are silent on the matter and having observed that the requirements for granting interim measures are uncontroversial³, referred to the UNCITRAL Model Law⁴ and UNCITRAL Rules⁵ that codified those requirements (¶¶ 31-33). Thus, the EA examined (i) the admissibility of the measures sought, (ii) whether the standard of the non-compensable harm was met, and (iii) the *prima facie* reasonable prospects of the investor's success on the merits.

i. Admissibility of the measures sought

First, the EA noted that Claimant's request was admissible, as the measures sought were of provisional nature given that they would be granted for a period pending the final adjudication of the claim in the main proceedings. Moreover, since the relief requested was for the purpose of preserving the *status quo* and restoring the *status quo ante*, the nature and purpose requirement of the measures was satisfied (¶¶ 35-38).

ii. The non-fulfillment of the standard of non-compensable harm

The EA found that since the harm suffered by the investor was "purely economic in nature and confined in its scope", the investor's application ought to be dismissed, as a final award in the main proceedings would be adequate reparation for the investor (¶ 48). The case was distinguished from other cases where awarding non-monetary relief was necessary, since Evrobalt's harm – whether actual or imminent – in case of a suspension of shareholder rights and/or a share divestiture, could be made good by an award granting monetary compensation (¶¶ 50-52). Further, the EA observed that there was no suggestion that any damage suffered would financially ruin the investor (as in *Paushok v. Mongolia*) or that financial compensation could not fully remedy the damage suffered (as in *Chevron v. Ecuador*) (¶53).

As regards the alleged threat to a subsequent tribunal's ability to render an enforceable award, the EA reasoned that granting the interim measures sought were not necessary to enforce any final award in future main proceedings; in fact, it would likely be more difficult to enforce interim measures than a final award for damages (¶ 54). The EA added that any potential loss or under-compensation suffered due to the measures could be compensated in a final award; that, although arbitral tribunals carry out assessments on a routine basis about the economic value of assets involving uncertain future events, such assessments are based on recognized valuation methodologies (¶¶ 55-56). Finally, the EA did not see any suggestions that requested measures "would serve to avoid aggravation or expansion of the parties' existing dispute" (¶ 58).

iii. The prima facie reasonable prospects of the investor's success on the merits

In light of the foregoing, the EA did not need to consider the requirement of a *prima facie* reasonable prospect of the investor's success on the merits of its case (¶ 60). Nonetheless, due to a previous ruling by another EA under the same treaty (*see TSIKinvest v. Moldova*), the EA considered that it was useful to distinguish the Evrobalt case from an earlier case, as in

³ either under Swedish law - as the law of the seat of the arbitration - or under international law

⁴ Articles 17-17A

⁵ Article 26

the instant case the seemingly like measures were not as “unmotivated” as in the previous case (¶ 60), reaching this conclusion without prejudging Respondent’s treaty obligations (¶ 62).

3. The Emergency Arbitrator’s Decision

The EA ultimately declined to grant the interim relief sought by Claimant; Nonetheless, the EA did urge the parties to “bear in mind their general duty as litigants to refrain from conduct that could aggravate or extend the dispute” (¶ 64). Pursuant to the SCC Rules 2010, the EA was not permitted to apportion the costs between the parties; rather, the Claimant as the party applying for the appointment of the EA is required to pay the costs. However, Claimant reserved its right to seek costs from the tribunal in a final award according to the applicable rules (¶ 65).

***Notes:** **1.** The present emergency award ceases to be binding if i) the arbitration is not commenced within 30 days from the date of the award or ii) if the case is not referred to an arbitral tribunal within 90 days from the date of the award⁶. **2.** The importance of the case lies in the application for an emergency arbitrator application and the ensuing procedure. The outcome is remarkable, taking into account the opposite result reached by another emergency arbitrator (Mr. José Rosell) in the framework of another SCC case (*Kompozit LLC v. Republic of Moldova*, SCC EA 2016/095), despite being based on similar factual and legal background. **3.** This case illustrates the effectiveness of the emergency arbitrator procedure given that the award was rendered within five days of the file’s submission to the EA and within six days of the Claimant’s application to the SCC.

⁶ Article 9, Appendix II, SCC Arbitration Rules 2010, p. 26