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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: Mabco Constructions SA v. Republic of Kosovo (ICSID Case No. ARB/17/25) – Award on Jurisdiction – 30 October 2020

Case Report by: Edoardo Mazzoli**, Editor Ignacio Torterola***

Summary: Mabco – a Swiss company brought a claim for relief against Kosovo over a dispute arising out of the privatization and ownership of the Grand Hotel, a major hotel in Pristina (Kosovo) and relating to the *unlawful expropriation of Mabco’s property, denial of fair and equitable treatment and denial of justice*. The claim – concerning the compensation for the investment and the ensuing loss of profit – has been brought before an ICSID Tribunal under (i) the agreement between the Swiss Confederation and the Republic of Kosovo entered into force on 13 June 2012 (“BIT”) and the (ii) Kosovo’s Laws on Foreign Investment. Following Kosovo’s objections to jurisdiction, the Tribunal decided that one phase of the proceedings would deal with the determination of whether the Claimant’s investment in Kosovo qualified it for protection as a “foreign investor”. The outcome was a decision on jurisdiction, whereby a majority found that Claimant had indeed an investment in the form of a claim to shares in the privatized hotel, and that such investment was owned by that legal entity Mabco, to the exclusion of its owner, a Kosovar businessman.

Main Issues: for the purposes of establishing ICSID jurisdiction, (i) qualification as “investment” with respect to the Claimant’s purchase of shares of the Grand Hotel asset in Kosovo, (ii) qualification of the Claimant as both an “investor” and a “foreign investor” under the relevant BIT applicable and the Foreign Investment Law(s) of Kosovo, and the relevant ICSID Rules.

Tribunal: Professor George A. Bermann (President), Mr. Gianrocco Ferraro (Arbitrator) Professor Dr. August Reinisch (Arbitrator)

Claimant’s Counsel: Dr. Christian Schmid, Ms. Liv Bahner Ms. Sandra De Vito Bieri (Bratschi Ltd, Zurich)

Respondent’s Counsel: Dr. Philipp Wagner Dr. Florian Dupuy Mr. Petrit Elshani (WAGNER Arbitration, Berlin)

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Digest:

1. Relevant Facts

Mabco Constructions SA (“Mabco” or “Claimant”) is a company incorporated under the Laws of Switzerland, engaged in the construction and engineering business. Respondent is Republic of Kosovo (“Kosovo” or “Respondent”) (¶¶ 146-148).

The underlying dispute arose out of Mabco’s investment in a luxury hotel in Pristina, Kosovo (“Grand Hotel”). Until the end of the war in Kosovo in June 1999, the Grand Hotel was a “socially-owned property” (“SOEs” held by the Socialist Federal Republic of Yugoslavia until its dissolution in 1992. In 2002, the United Nations Interim Administration Mission in Kosovo entrusted the management of the Grand Hotel to an entity by the name of the Kosovo Trust Agency. After Kosovo’s declaration of independence on 17 February 2008, the Kosovo Privatization Agency (“PAK”, formerly Kosovo Trust Agency) started privatizing SOEs by disposing of their assets and offering them for sale in public tenders (¶¶ 140-145). The formal name of the NewCo holding the Grand Hotel as an asset was the NewCo Grand Hotel L.L.C. The company Unio-Commerce Sh.p.k., incorporated under the laws of the Republic of Kosovo (“UTC”) (¶¶ 153) was the winner of the bid of the Grand Hotel NewCo tender for EUR 8,160,000.00 (¶ 162).

During 2006, Claimant decided to invest in the aforesaid NewCo and following an agreement entered into between Mr. Pacolli (President of Mabetex Group - Mabco), Mr. Zelqif Berisha (owner of the bidding winner UTC) and Mr. Ejupi (founder of NTSH Eurokoha-Reisen – “NTSH” – a mediator), Mabco transferred EUR 4.000.000 to NTSH which forwarded the sum of EUR 4,000,600.00 to UTC (¶ 170). UTC, as winner of the tender, on 10 August 2006 entered into an Agreement for the “Sale of Ordinary Shares in Grand Hotel” (“Purchase Agreement”), for the purchase of the shares of the Grand Hotel (¶¶ 168-172).

Attached to the Purchase Agreement was a Commitment Agreement among Mr. Berisha on behalf of UTC, KTA on behalf of SOE and the Grand Hotel LLC (¶¶ 176-177). On October 13, 2006, the Purchase Agreement was actually executed in favor of UTC and the transfer completed (¶ 178). In January 2007, in order to formalize the prior arrangements among UTC, NTSH and Claimant, Messrs. Pacolli, Ejupi and Berisha signed an “Agreement of Good Understanding” (“AGU”). Under the AGU, UTC would become the formal owner of the shares of Grand Hotel for a period of two years and afterwards, Mabco, NTSH and UTC were to officially become joint owners of the shares, with the shares distributed among the three owners as follows: UTC 40%, NTSH 20% and Claimant 40% (¶¶ 177-180).

Since 2008, UTC ignored Claimant’s and NTSH’s ownership in the Grand Hotel, refused to accept Claimant’s offer of the funds needed to maintain the investment and meet the owners’ commitments under the Purchase Agreement. Claimant testified that UTC went so far as to deny Claimant access to the Grand Hotel, thereby preventing Claimant – *de facto* - from making the required investments. According to Claimant, had its proposal been accepted, the obligations under the Commitment Agreement would have been performed (¶ 185). The

parties exchanged several communications and letters. Claimant further asserts that it later learned that UTC had deliberately taken these acts and omissions in collaboration with the PAK, for the purpose of either extorting Claimant and NTSH or excluding them from the project (¶¶ 203-205).

According to Claimant, some attempts of extortion were made: in a meeting between Mr. Ejupi from NTSH and PAK, it was assured that all the papers were in order, but that a payment of EUR 1m still needed to be paid in order for the shares to be registered and not withdrawn (Messrs. Pacolli and Ejupi declined); another attempt at extortion was made on 25 April 2012, but likewise was unsuccessful. On 31 May 2012, the PAK finally announced its decision to withdraw the shares of the Grand Hotel. According to Claimant, that announcement was made shortly after Claimant and NTSH had refused to pay the above-mentioned bribes (¶¶ 207-208).

Further correspondence occurred between the parties in an effort to discuss the issues. On 17 July 2012, the PAK informed Claimant as follows: [PAK has] *undertaken the necessary legal actions to return the ownership of the Grand Hotel and the same is now returned on the name of the Agency. Therefore, all displeased parties may contact competent bodies*” and then PAK resumed direct administration of the Grand Hotel on 20 July 2012 (¶ 213). While declining to register the shares in Claimant’s name and in fact withdrawing them, the PAK kept the paid purchase price for those shares, including the EUR 4m that Claimant had contributed. Claimant maintains that it received no compensation from the PAK for the loss of its investment (¶ 216).

2. Procedural History

On 15 May 2017, Mabco filed a request for arbitration against Kosovo (the “**Request**”) before the ICSID Centre under the ICSID Convention. On 30 June 2017, the General State Attorney of Kosovo requested that the ICSID Secretary-General refuse the registration of the Request as being manifestly outside the jurisdiction of the Centre (¶¶ 1-7). On 21 July 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. Afterwards, Claimant appointed Mr. Gianrocco Ferraro, a national of Italy, as arbitrator in this case. Respondent appointed Professor Dr. August Reinisch, a national of Austria, as arbitrator in this case. The co-arbitrators appointed Professor George Bermann, a national of the United States, as the presiding arbitrator (¶ 17) (“**Tribunal**”).

On 27 December 2017, the Kosovo filed a pleading for Preliminary Objections under Rule 41 (5) of the Arbitration Rules (¶ 26). On 3 January 2018, Claimant submitted its comments on Respondent’s Application. On 7 February 2018, the Tribunal rendered its decision on the Preliminary Objections stating that said application was belated and untimely (¶ 36).

According to the Procedural Order No. 1 issued on 5 October 2018, and to several extensions, (i) on 5 April 2019, Respondent filed its Memorial on Objections to Jurisdiction and Admissibility (the “**Memorial**”) (¶ 69). On 14 May 2019, Claimant filed its Counter-Memorial on Jurisdiction and Admissibility (the “**Counter-Memorial**”) (¶ 74). The respective Redfern Schedules were submitted and the Tribunal issued Procedural Order No. 2 concerning the production of documents, dated 21 June 2019 (¶ 77). On 23 August 2019, Respondent filed its Reply on Jurisdiction and Admissibility (the “**Reply**”) (¶ 85). On 20

September 2019, the Claimant filed its Rejoinder on Jurisdiction and Admissibility (the “**Rejoinder**”) (¶ 95).

On 8 October 2019, the Tribunal issued Procedural Order No. 3 concerning the organization of the hearing on jurisdiction and admissibility and a hearing was held at the World Bank offices in Paris on 23 January 2020 (“**Hearing**”) (¶ 126). During the Hearing the following persons were examined: Mr. Pacolli (owner of the Mabetex Group), Mr. Remzi Ejupi (owner of NTSH), Ms. Lucina Maesani-Gaiatto (CFO of Mabco) [on behalf of the Claimant]; Mr. Ahmet Shala (Visiting Professor, James Madison University - Virginia, USA) [on behalf of the Claimant] (¶ 127). On 17 February 2020, the Parties filed simultaneous post-hearing briefs and on 19 February 2020 and the relevant submissions on costs (¶¶ 133-135).

3. Positions of the Parties

3.1 Claimant’s Position

Claimant submitted that Kosovo expropriated its investment and denied it fair and equitable treatment in violation of its obligations under (i) Articles 4 and 5 of the BIT, (ii) Articles 3 and 8 of the 2005 Foreign Investment Law, and (iii) Article 3 of the 2014 Foreign Investment Law (¶¶ 225-229). In short, Mabco raised its claims with respect to (1) expropriation, (2) denial of fair and equitable treatment and (3) denial of justice. Below are summarized the main arguments raised by the Claimant for the purposes of establishing jurisdiction.

3.1.1 The claim under the BIT and the meaning of “investment”.

Claimant maintains that it has made a qualifying investment within the meaning of the BIT, the Foreign Investment Law and the ICSID Convention. Article 1(1) of the BIT defines an investment as “*every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*” (¶ 232). Furthermore, provided that the *investment* has been performed in Kosovo, Mabco maintains that the requirements to qualify as a foreign investor under the BIT are met (¶ 235).

3.1.2 The claim under the Foreign Investment Law and the meaning of “investment dispute”.

Claimant further maintains that given the following provisions:

- (i) Article 2(1) of the 2005 Foreign Investment Law defining “investment dispute” as “*any dispute between a foreign investor and a public authority relating (i) to an investment in Kosovo made by such foreign investor ...*”, (¶ 239) and
- (ii) Article 2.1.4 of the 2014 Foreign Investment Law, an investment is “*any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo relating to cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in the Republic of Kosovo [...] claims or rights to money, goods, services, and performance under contract...*” (¶ 241),

its claim to performance by Kosovo of its obligation *to register the shares and refrain from withdrawing them* are assets qualifying as an investment under both the 2005 and 2014 Foreign Investment Laws (¶ 242).

3.1.3 The claim under the ICSID and the meaning of “jurisdiction”.

Claimant maintains that, given that the definition of jurisdiction as set forth under Article 25(1) of ICSID extends to any dispute *arising directly out of an investment* [i.e. the ownership interest in the Grand Hotel] between a Contracting State [Kosovo] and a national of another Contracting State [Mabco], to which the parties to the dispute consented in writing to submit to arbitration, the ICSID jurisdiction shall apply to the dispute at stake (¶¶ 243-246).

3.2 Respondent’s Position

Respondent contests the jurisdiction under Article 25(1) of the ICSID Convention on several grounds, including its lack of consent to arbitration of the claims asserted by Claimant under either the BIT or the Foreign Investment Law (¶¶ 248-249). Below are summarized the main arguments raised by the Respondent for the purpose of alleging the lack of jurisdiction.

3.1.1 Objection regarding the invoked BIT and Foreign Investment Law.

In Respondent’s view, Claimant cannot avail itself of either the BIT or the Foreign Investment Law because:

- (a) *it owns no qualifying asset*, which is necessary, *ratione materiae*, in order for either of those instruments to apply. It never acquired ownership of, or a right or interest in, the asset at issue in this case; furthermore, according to the prevailing view of the jurisprudence, an investment must exhibit the following characteristics, i.e. *substantial capital contribution, a certain risk and a certain duration*, and Claimant fails to satisfy any of these requirements (¶ 249);
- (b) Claimant does not qualify as a foreign investor, since it made no investment. If any investment was made, it would have been actually made by Mabco’s representatives in their personal capacity. Being a national of Kosovo, he does not qualify as a foreign investor. Nor can the Claimant itself be considered a foreign national, in this case a national of Switzerland, due to the absence of any real economic activity on its part in Switzerland (¶ 250).

In short, Respondent’s position is that Claimant made no investment in the Grand Hotel, whether for purposes of the ICSID Convention, the BIT or the Foreign Investment Law. Fundamentally, Claimant made no capital contribution, as required to constitute an investment, under all three instruments. Having made no capital contribution, Claimant neither incurred any risk, nor made an investment of the requisite duration, nor generated a profit or return, nor contributed to Kosovo’s economic development. Thus, the requirements for an investment under the ICSID Convention were unmet (¶ 349).

3.1.2 Objection regarding the lack of consent to arbitration

Respondent did not consent to arbitrate the dispute, as Respondent’s consent to arbitrate was subject under Article 11(2) of the BIT and Article 16(2) of both the 2005 and 2014 Foreign Investment Laws to an “*election of remedies*” requirement. According to these provisions, because Claimant first brought litigation over its claims before the courts of Kosovo, it could no longer resort to arbitration over them. Furthermore, under Article 11(1) of the BIT (although not under the Foreign Investment Law), Respondent’s consent to arbitrate was

conditional upon Claimant’s engaging with the Respondent in an effort to settle their dispute “amicably through consultations,” which Claimant failed to do (¶ 252).

3.1.3 Objection regarding lack of jurisdiction *ratione temporis*.

Respondent maintained that the Tribunal lacked jurisdiction *ratione temporis*, given that the claims raised by the Claimant arose from events occurred prior to the entering into force of the BIT (¶ 253).

5. Tribunal’s analysis

Decision. Having examined each of the jurisdictional objections raised by Respondent with respect to the relevant Claimant’s request, the Tribunal concluded and determined *inter alia* that:

- (a) the claims advanced in this arbitration arise out of or relate to an investment in Kosovo;
- (b) Claimant is a foreign investor,
- (c) Claimant’s alleged ownership interest in shares of Grand Hotel LLC is a protected investment,
- (d) Respondent consented to arbitrate the dispute, insofar as Claimant was not subject to an election of remedies requirement and satisfied the BIT’s requirement of prior consultation;
- (e) the Tribunal has jurisdiction *ratione temporis* over Mabco’s denial of justice claim under the BIT whilst over its claims of expropriation, denial of fair and equitable treatment and denial of justice has jurisdiction *ratione temporis* under the applicable Foreign Investment Law;
- (f) the claims are within the scope and purpose of the ICSID Convention (¶ 504).

There follows a summary of the main arguments and findings laid down by the arbitrators in the Award with respect to the above mentioned conclusions.

5.1 Assuming a claim of entitlement in this case is sufficiently established, whether it is a claim that can be asserted by Claimant.

The Tribunal agrees that in order to establish jurisdiction, it must be ascertained that, in taking their actions, Mabco’s representatives (i.e. for example Mr. Pacolli) acted on behalf of Claimant. The Tribunal concludes affirmatively, inferring this from the documentary evidence submitted and giving less credit to the testimony (¶¶ 337-340). In the great majority of the documents and communications relative to Mr. Pacolli’s engagement either with the KTA or PAK, on the one hand, and with other individuals, on the other, Mr. Pacolli signed and otherwise referred to himself in his own name. That regularity has naturally created some doubt in the Tribunal’s thinking that he was acting on these occasions in the name of Mabco (¶ 341). As a confirmation of the above, the Tribunal ascertained that – *inter alia* – the transfer of the EUR 4M was made out of Mabco’s own bank account (¶ 343). By virtue of the foregoing, the Tribunal concluded that Mr. Pacolli acted in the name of Mabco (¶ 344).

5.2 Whether claimant's payment of Eur 4m constitutes evidence of an investment

With respect to the analysis pertaining to the definition of “investment”, the Tribunal reasoned upon the relevant allegations/objections raised by the parties and answered three questions: (a) *is the payment attributable to the purchase of Grand Hotel shares?* (b) *is the chronology consistent with payment for purchase of the shares?* (c) *is the payment process consistent with purchase of the shares?*

The Tribunal responded these questioned in the affirmative. On the one hand, Respondent casted doubt on the notions that the EUR 4M transfer was made for the purpose of acquiring the Grand Hotel shares and that the chronology of events was inconsistent with Mabco's performance of a payment for the purported purposes (¶¶ 363-364). The Tribunal, *although stating that the evidence of that could have been clearer in this respect*, did not share Respondent's doubts, based on accurate assessment of both testimonies and documentary evidence (¶¶ 365-366). In fact, the Tribunal stated that it could not be inferred that the payment had nothing to do with acquisition of the Grand Hotel shares from the mere fact that said payment preceded the conclusion of the agreement by a considerable amount of time. Finally, according to the Tribunal, some of the potential inconsistencies in the relationship between payment and acquisition were sufficient clarified by a witness, Ms. Maesani-Gaiatto, who took the Tribunal through the precise chronology of the payment, explaining the reasons for the delay in receipt of the funds to the bank account (¶ 368).

5.3 Whether the existence of an “investment” can be disputed for the fact the shares of the Grand Hotel were actually never transferred to Mabco.

According to the Tribunal's view, the mere fact that the shares in question were never in fact transferred to Claimant – and Claimant's ownership of the shares were never publicly recorded – does not constitute a sufficient element to exclude that Mabco completed an investment under the relevant laws applicable to the case at hand. As the Tribunal has indicated, it views as the fairest characterization of Claimant's contention in this proceeding that it has an *entitlement* to share ownership, not ownership as such (¶ 377).

5.4 Whether Claimant is both an investor and a foreign investor

On this issue, the Tribunal confirms that:

- (i) the Respondent is correct that, if Mr. Pacolli [Mabco's representative in the negotiations of the purchase agreement] was acting in a personal capacity, neither the BIT, nor the Foreign Investment Law, nor the ICSID Convention would be applicable to this case [the Tribunal cites, as authority in this sense, the exhibit regarding *Champion Trading Company et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003] as Mr. Pacolli is a national of Kosovo. However, the Tribunal, having concluded that Mr. Pacolli was acting on behalf of Mabco rather than himself, the relevant issue is the nationality of Mabco (¶ 394).
- (ii) Mabco indisputably has the Swiss nationality and is therefore presumably entitled, from a *ratione personae* point of view, to proceed under the ICSID Convention and seek protection under both the BIT and the Foreign Investment Law in connection with an investment in Kosovo (¶ 395);

- (iii) Respondent's allegation pertaining to the fact that the Claimant engages insufficient activity in Switzerland to satisfy the BIT requirement are not persuasive. In this respect, witness evidence confirmed that Claimant conducts all its project planning and management activity in Lugano and, for those purposes, has at all times employed at those headquarters a significant number of employees (¶ 395).

5.5 Whether Respondent has given consent to arbitrate

Respondent maintains that, under both the BIT and the Foreign Investment Law, Claimant could not conclude an agreement to arbitrate with Kosovo without satisfying the conditions to which Kosovo subjected its offer to arbitrate (¶ 416). Assuming that the dispute is ascertained as being an investment dispute (See prior paragraphs above), the Tribunal's findings takes into consideration the two following conditions: (1) whether Claimant failed to comply with the BIT's and Foreign Investment Law's election of remedies clauses; (2) whether Claimant failed to satisfy the BIT's requirement of prior consultation of the Respondent (¶ 417).

Regarding (1) above, the Tribunal considered the BIT Article 11(4) and the provisions of the Foreign Investment Law, and construed them in the sense that a claimant may proceed either in litigation or in arbitration as it is simply given two "avenues of recourse" against an alleged BIT violation (¶ 430). A choice of one does not entail necessarily an irreversible choice. The Tribunal **cannot** comfortably conclude that BIT Article 11(2), as written, operates to bar Claimant from proceeding before the Tribunal under the BIT and the ICSID Convention (¶ 433). Regarding (2) above, the Tribunal finds that a communication sent on 30 March 2016 and submitted as evidence by Mabco could be deemed reasonably adapt to establish that Claimant has satisfied the prior consultation requirement as set out in BIT Article 11(1) (¶¶ 448-450).

5.6 Whether the Tribunal lacked jurisdiction *ratione temporis*

The Tribunal states that:

- (i) The 2005 Foreign Investment Law contains no temporal limitation and it would pose no impediment to the claims in the case at stake, provided that said Law is effective since April 2006, whilst the Claimant's claims arose surely after this date (¶ 460). Therefore, the jurisdiction *ratione temporis* pursuant to the Foreign Investment Law can be established.
- (ii) Unlike most BIT provisions, Article 2 of the BIT in question excluded claims arising out of "events" that occurred **prior** to the BIT's entry into force, rather than "disputes" occurring prior to the BIT's entry into force (**13 June 2012**) and the exclusion from coverage could start at an earlier point than the time at which the dispute emerged. Hence, theoretically, considering Mabco's claims of (1) expropriation (configured – according to the Tribunal – on 31 May 2012) (¶ 467), (2) denial of fair and equitable treatment (configured – according to the Tribunal – during the early months of 2012) and (3) denial of justice (in 2014) (¶ 472), the Tribunal **lacked** jurisdiction *ratione temporis* – under the BIT - on the first two claims, whilst it has jurisdiction with respect to the *denial of justice* (¶ 479).

6. Costs

Pursuant to Article 61(2) of the ICSID Convention, and taking into account that Respondent's jurisdictional objections were rejected and that the proceeding shall continue into a merits phase, the Tribunal deferred a decision on cost allocation to a future date (¶ 513).

7. Separate Opinion of August Reinisch

August Reinisch opined that the case failed on jurisdictional grounds for two main reasons, first because no investment has been made and second because any attempts to make an investment were made by a dual Swiss-Kosovo national and not by the Swiss claimant (¶ 11).

In the arbitrator's view:

- (i) the attempts to acquire shares in the privatization of the Grand Hotel have been unsuccessful, not leading to an "investment" in Kosovo; in this respect, Article 1 of the BIT defines as investment "*every kind of asset*" that *must have been "established" or "acquired"*, and it therefore *does not* include the attempt to acquire an asset (*Clorox v. Venezuela* and *Saba Fakes v. Turkey* are cited as authorities to support the argument) (¶¶ 17-21);
- (ii) in order to be protected under the BIT and/or the Kosovo Foreign Investment Law an "investment" must have been made and, for an ICSID tribunal to exercise jurisdiction *ratione materiae*, the dispute must "directly aris[e] out of an investment" (¶¶ 9-10).

In this respect and taking into account the "Salini test" the only *typical* characteristic of an "investment" that may be recognized in the case at stake is a contribution made in order to acquire assets that could be used for the purpose of producing a profit. The other elements, such as a certain duration and an element of risk are missing as a result of the failure to actually acquire an asset in return for the money contribution (¶¶ 37-40);

- (iii) in order to fall under the Tribunal's jurisdiction *ratione personae*, the Claimant, a company incorporated in Switzerland must have made the investment and not Mr. Pacolli, a dual Swiss and Kosovo national, since his latter nationality would prevent him from bringing an ICSID claim pursuant to Article 25(2)(a) of the ICSID Convention (¶¶ 43-50).

Mr. Reinisch's point is that it is the task of ICSID tribunals to assess whether there is sufficient evidence that the core jurisdictional requirements are fulfilled. He concludes that this is not the case in regard to two crucial *ratione materiae* and *ratione personae* requirements.