EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MARCO GAVAZZI AND STEFANO GAVAZZI

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/12/25

DISSENTING OPINION WITH REGARD TO QUANTUM

Members of the Tribunal

Hans van Houtte, President

V.V. Veeder, Arbitrator

Mauro Rubino-Sammartano, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

DISSENTING OPINION

of

Arbitrator Mauro Rubino-Sammartano

Summary of the proceedings

1. These proceedings were introduced by a Request for Arbitration filed by the Claimants with ICSID on 23 July 2012.
2. The above Arbitral Tribunal was constituted.
3. An evidentiary hearing was held on jurisdiction, liability and counter-claim.
4. The parties exchanged pleadings before the hearing.
5. The Tribunal decided on jurisdiction, admissibility and liability on 17 April 2015, upholding jurisdiction and liability by majority, with a dissent from an arbitrator.
6. The proceedings have continued on the merits, more specifically on quantum.
7. A hearing on quantum was held and the parties exchanged pleadings prior to that hearing.
8. The Claimants subsequently challenged the authenticity of two documents filed by the Respondent as Exhibits R-158 and R-177.
9. The Respondent requested that the Tribunal order a graphological examination of such exhibits in order to establish their authenticity.
10. The Claimants opposed such a request, arguing that the documents are irrelevant.
11. The parties exchanged post-hearing pleadings.
12. The Tribunal issued a procedural order denying the requested graphological examination, subject to a review when deciding on the quantum, with a dissent by an arbitrator.
13. The Tribunal is now deciding the quantum of the damages.
14. I confirm herewith the views which I have expressed during the discussion which has led to this final decision and I express my dissent on the issues set out below, since in my opinion they involve matters of principle.

Reasons of the dissent

On loans treated as investments

15. The majority decision treats various amounts, which the Claimants allege to have paid to or for the company which they had purchased, as investments.
16. The Claimants are entitled to reimbursement of moneys paid to or for another entity, unless this has been expressly excluded.

17. However, loans to another entity must be distinguished from investments.
18. In my opinion, loans (which – as in these proceedings – have been provided without any mention that they were to be converted into investments) may not be treated as investments, i.e. as "a form of participation in the Company", since the lender keeps his right to be repaid and in this respect he is a creditor, not an investor.
19. The Claimants could have stated that such moneys lent were intended to be (or could be converted into) investments. They did not do so and the lack of such statement is significant.
20. This must be viewed in the context where the Claimants made very few investments after the purchase of the shares of Socomet. Even their 2002-2008 "business plan" did not foresee investments from them, but from third parties. One wonders whether by making these investments (and even accelerating them, in view of the existing difficulties) the Claimants might have avoided the collapse of Socomet.
21. In my opinion, on the one hand the loans may not be treated as investments, but on the other hand, the Respondent's behaviour has deprived the Claimants of the right to recover such amounts. The Claimants are thus entitled to recover their loans to Socomet due to the Respondent's breach of the Fair and Equitable Treatment standard in the BIT.
22. While the alleged loans may not be treated as investments, the amounts which were actually lent to the company could nevertheless be awarded to Claimants under the heading of damages for breach of the FET.
23. I do not consequently agree with the majority that the loans be used as a basis for the determination of the compensation for the loss of an opportunity.

<u>On Claimants' claim for reimbursement of payments to Italian Expert Technicians</u>

24. I concur with the majority's conclusion that this claim must be dismissed.
25. As to the grounds for such conclusion, in my opinion, the admitted illegality of the alleged payments to at least some of these technicians may not be tempered by the fact that Respondent was in breach under the BIT. A contractual breach by a party may not in my opinion justify or mitigate a breach of the law by the other party, even if it helps that party to remedy its need for cash.
26. Furthermore, this claim in my opinion must be dismissed on the ground of breaches of the applicable Romanian law (likely both tax laws and labour laws in this case).

On the decision not to order the graphological examination of documents challenged by Claimants

27. I cannot share the final view of the majority that the above-mentioned documents submitted by the Respondent, allegedly originating from the Claimants and their counsel, would be irrelevant because they concern a settlement proposal which has not been confirmed by a settlement.
28. While of course a settlement proposal may in no way be evidence of the amount due to the other party, unless the parties have settled for such amount, it is in my opinion a document to be taken into some account in establishing claimed damages.
29. Since, even from this limited point of view the documents were not irrelevant to me, in my opinion a party cannot be deprived of the right to prove that a document – which is challenged – is authentic.
30. Furthermore, the clarification of this challenge is in my view a further element to be considered in establishing the probative value of other evidence adduced in this proceeding.

On interest

31. The interest rate has to be stated, since interest rates vary, depending on the duration of time involved (a six months Libor rate is different from a one year Libor rate). The actual rate, the six months Libor rate, has therefore been stated in the BIT. In my opinion, Art. 4(2) of the BIT (by referring to Libor) states only the rate of interest and does not provide, either expressly or impliedly, for compound interest.
32. In the absence of a provision on compound interest in the BIT, it cannot in my opinion be considered as due *ipso jure* and, in my view, arbitral awards cannot rewrite the contents of an international treaty.
33. Furthermore, compound interest is not viewed favorably in the Italian legal system and is frequently looked at (even if perhaps this is in many cases exaggerated) as closed to usury. The attitude of civil law jurisdictions is generally not in favor of compound interest and I anticipate this to be true of the Romanian legal system.
34. Generally speaking, compound interest may apply to loans in financial and banking transactions. In fact, in such transactions, if the money lent had been repaid, the lender could have invested it and earned interest on it. The amount of interest paid at the end of each given period would in turn produce interest.
35. However, a distinction is to be made between a claim for late repayment of a loan and a claim for damages due (as in these proceedings) for a breach of a commitment. Compound interest is a head of damages which in my view does not apply to such other claims.

36. In any event, compound interest may be computed, in my view, only on an amount that has been established. In disputes about road or other accidents, for example, interest is calculated only from the time the amount of the damage is assessed. The amount of the disputed damages is determined then only when the precise amount of the damages is established, i.e. when the case is decided, provided the claim is not affected by any time bar.
37. As a result, if compound interest should be applied in this case, it could only be granted for the period of time after the award is rendered and until compliance with the award. In any event, compound interest can only be granted for the period of time from when it was claimed, in these proceedings on 7 July 2015. Granting compound interest for a period of time before it was claimed would in fact amount to deciding *ultra petita*. Therefore, no compound interest could be granted for the time period before that date.

On costs

38. I agree with the majority that the costs for the jurisdiction and liability phase of proceedings must follow the event.
39. As to the quantum phase, the arguments of the experts of both parties as to the amount of the damages caused by a breach of the BIT have failed and the Tribunal has based its decision on a different basis (on which it invited the parties' comments and on which the parties' submissions were not helpful). As a result, I am of the view that neither party should be entitled to payment of the costs for its experts or for their legal fees and expenses regarding this phase of the proceeding.
40. Each party should then in my opinion bear all its own costs and fees for the quantum phase.

Milan Chambers, __ March 2017

[signed]

Mauro Rubino-Sammartano