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Plama Consortium Limited v. Republic of Bulgaria – the Best and Most Surprising Award of 2008

Jonathan Hamilton (White & Case LLP) · Wednesday, February 11th, 2009 · White & Case

Global Arbitration Review recently reported that the August 27, 2008 Award in *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) was selected as the Best Award and the Most Surprising Award of 2008 in a survey of participants in the international arbitration on line discussion forum OGEMID. The 120-day period to apply for annulment of the Award under the ICSID Convention expired at the end of December 2008 without any such application having been filed.

The Award is the first ICSID award on the merits under the ECT from among more than 10 ECT cases registered with ICSID to date, and it reaches many interesting conclusions. It was issued by a tribunal composed of Carl F. Salans (President – appointed by ICSID), Albert Jan van den Berg (claimant's appointee) and V.V. Veeder (Bulgaria's appointee).

Claimant Plama Consortium Limited (PCL), a Cypriot company, acquired shares of Plama AD, a privatized Bulgarian oil refinery. In late 2002, PCL filed claims for approximately US$300 million against Bulgaria pursuant to the Bulgaria-Cyprus bilateral investment treaty and the ECT. Bulgaria obtained dismissal of the claims arising under the Bulgaria-Cyprus bilateral investment treaty for lack of jurisdiction in a frequently cited decision on the jurisdictional implications of a most-favored-nation (MFN) clause. The case then proceeded to the merits under the ECT. Importantly, the tribunal found that the alleged investment was premised on the fraudulent misrepresentation of the identity and qualification of the investors, which were material to Bulgaria's decision to grant an authorization for the admission of the investment under Bulgarian law.

The tribunal went on to rule that even if the claimant were entitled to the protections of the ECT, the claims would still fail. Specifically, the tribunal concluded that each of PCL's substantive claims lacked merit. The claimant's claims centered on allegations relating to the environmental liability of privatized entities, the actions of bankruptcy trustees, an alleged riot at the oil refinery, the taxation of entities exiting from bankruptcy, the privatization of a Bulgarian port facility, the privatization of a formerly state-owned bank, and a variety of alleged conduct of Bulgarian authorities and state-owned entities. The tribunal considered the claims in view of the ECT obligations with respect to fair and equitable treatment, constant protection and security, unreasonable and discriminatory measures, expropriation and other obligations and concluded that even if the claimant had been entitled to the substantive protections of the ECT, the claims were entirely lacking in merit.

The tribunal found the claimant failed to support its allegations with evidence. It also made a number of notable observations regarding the ECT's substantive protections. Among other things, it held that, as a general matter, a "balanced interpretation which takes into account the totality of the [ECT]'s purpose is appropriate." The tribunal also held that the acts of bankruptcy trustees are not attributable to the State, and that tax claims are excluded from coverage under the ECT's tax-related provisions.

The tribunal issued an award of costs in favor of the respondent, ordering the claimant to pay Bulgaria US$7.4 million. The factors that likely influenced the tribunal's decision to award Bulgaria costs included, in addition to the claimant's fraud, various instances of procedural misconduct by the claimant, such as its refusal to timely disclose relevant documents and failure to comply with filing deadlines.

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