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Jurisdiction of Emergency Arbitrator in Investment Treaty Arbitration

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The use of Emergency Arbitrator ("**EA**") procedure is not frequently deployed in investment treaty arbitration, compared to its success in the commercial space. Despite calls for caution, three sets of major arbitration rules have promulgated EA procedure for investment disputes, *i.e.*, Arbitration Rules of Stockholm Chamber of Commerce ("**SCC Rules**"), SIAC Investment Arbitration Rules ("**SIAC IA Rules**"), and China International Economic and Trade Arbitration Commission International Investment Arbitration Rules ("**CIETAC IA Rules**").

To date, all reported EA investment arbitration cases were conducted under the SCC Rules. Four EA decisions have been published: *TSIKInvest v. Moldova* (Russia-Moldova BIT), *Evrobalt v. Moldova* (Russia-Moldova BIT), *Kompozit LLC v. Moldova* (Russia-Moldova BIT) and *Munshi v. Mongolia* (Energy Charter Treaty ("**ECT**")). At least four EA decisions have been rendered which remain confidential: *JKX Oil v. Ukraine* (ECT and UK-Ukraine BIT), *Griffin v. Poland* (Luxembourg-Poland BIT) *Puma v. Benin* (Belgium/Luxembourg-Benin BIT), and *Okuashvili v. Georgia* (Belgium/Luxembourg-Georgia BIT, UK-Georgia BIT).

This post submits that the urgency of an EA application should not override the fundamental requirement that the EA must have jurisdiction. This requirement is far from a moot point given that the interpretation of state consent is at stake, and the impact of the EA decision might be significant.

The Jurisdiction of EA

A. Compétence de la Compétence of EA

The EA's jurisdiction, just like that of an arbitral tribunal, derives from the parties' consent to arbitrate, namely, the underlying investment treaty (and the applicable arbitration rules). As explained in *Evrobalt*, the EA "*steps in where a tribunal is yet to be constituted*" (para. 17). Only if the EA is "*satisfied 'prima facie' that an arbitral tribunal duly constituted under the arbitration agreement relied on by the applicant may have (or perhaps would have) jurisdiction to hear the merits*" could the EA consider the relief requested[1].

As a further step, an EA is treated as equivalent to an arbitral tribunal under the Singapore

International Arbitration Act (Cap. 143A) ("**IAA**"). The IAA provides, "'*arbitral tribunal'…includes an emergency arbitrator appointed pursuant to the rules of arbitration …*". Corresponding to the IAA provision, paragraph 7 of Schedule 1 of the SIAC IA Rules stipulates that the EA shall have the powers vested in the arbitral tribunal, "*including the authority to rule on its own jurisdiction, without prejudice to the Tribunal's determination*".

By assuming such role, the EA should have *compétence de la compétence* to define the boundaries of its own jurisdiction and conduct independent review to safeguard the consensual nature of arbitration.[2)] Yet the EA's *compétence de la compétence* should be distinguished from that of an arbitral tribunal due to lack of exclusivity effect: Article 37(5) of the SCC Rules, Rule 27.2 of the SIAC IA Rules and Article 5(4) of Appendix II of the CIETAC IA Rules entitle a party to apply for interim relief from a judicial authority before the constitution of the arbitral tribunal.

B. Consent to EA Procedure

1. Construed Consent

The Russia-Moldova BIT and ECT designate SCC as the arbitral institution. Both came into force before the introduction of EA procedure into the SCC Rules 2010. The issue is whether there is state consent to EA procedure.

The *Evrobalt* EA stated that, by virtue of the provision defining the temporal application in SCC Rules 1999 (effective at the time of ratification of Russia-Moldova BIT), the Contracting States should have contemplated that SCC Rules effective at the time an arbitration commences would be applicable. Alternatively, the standing offer to arbitrate (*i.e.*, valid for 15 years as defined in the BIT) "*should be construed as a dynamic reference to the version of the SCC Rules in effect at the time of the commencement of the arbitration*" (para. 30).

That the Contracting States' "contemplat[ed]" amendment of the SCC Rules was found by the *Kompozit* EA through (i) signature and ratification of the Russia-Moldova BIT (as the SCC Rules 1988 had been amended and the SCC Rules 1999 were in effect); yet (ii) no specific mention or agreement was made regarding the applicable version.

The CIETAC IA Rules, although worded differently from the SCC Rules, similarly afford room for interpretation of state consent. Article 1 of Appendix II provides that a party could apply for EA "*based upon the applicable law or the agreement of the parties*". Article 46 defines "applicable law" as:

- law or rules of law designated by the parties as applicable to the substance of the dispute; failing such designation, or such designation is in conflict with a mandatory provision of law; or
- law or rules of law that the arbitral tribunal considers appropriate, including the domestic laws of any relevant State, any applicable rules of international law and trade custom.

Whether the designation of substantive law could manifest the consent to EA procedure could be debated.

The potential need for interpretation of state consent calls for clarification of the standard to be applied. In this regard, the *Evrobalt* EA emphasized the *prima facie* basis it adopted when

upholding the applicability of SCC Rules 2010. The *Kompozit* EA "*assume*[d]" that the amendment of SCC Rules 2010 should be within the Contracting States' expectation and sustained the deemed consent argument.

2. Express Consent

The SIAC IA Rules require a distinctive agreement to EA procedure. Only if "*the Parties have expressly agreed on the application of the emergency arbitrator provisions*", a party would be entitled to invoke the EA procedure under the SIAC IA Rules.

It appears that the "*express agreement*" does not tolerate any query to state consent. Consequently, if there is any doubt on the existence of the consent, it is likely that (i) an EA application would be rejected by the SIAC Court of Arbitration; or (ii) the EA appointed may decline its jurisdiction. The formulation tends to suggest that such consent should technically be from the disputing parties, *i.e.*, the investor and the host state. Nevertheless, in the context of investment arbitration, it is accepted that any agreed mechanism provided in the treaty should be deemed to be chosen directly by the parties to the arbitration.

Another conceivable form of consent could be a special agreement between the investor and the host state. However, it was noted by the OECD that the government opt-in to allow investor access to EA procedure is possible but unlikely.

C. Ratione Materiae and Ratione Personae

These requirements have been frequently argued with various tests employed and significant time devoted. Unsurprisingly, EAs have established that the only the *prima facie* existence of *ratione materiae* and *ratione personae* is sufficient.

In reaching its finding, the EA "*based on the submissions made by Claimant*" (*TSIKInvest*, para. 61). Specifically, the *Evrobalt* EA, referring to Moldova's response to notice of dispute, noted that "*Moldova has not disputed the Claimant's status as 'investor' or its qualifying 'investment' in Moldova*" and swiftly concluded that Evrobalt had demonstrated, *prima facie*, that it meets the requirements.

It is worth mentioning that none of the host states in the four cases mentioned above participated in the EA proceedings. EAs accepted investor's claimed basis for jurisdiction as true and did not conduct separate examination.

D. Cooling-off Period

The cooling-off period provision in the Russia-Moldova BIT was unanimously held inapplicable to the appointment of EA. As held by the *TSIKInvest* EA:

- It would be procedurally unfair to TSIKInvest and contrary to the purpose of EA procedure; and
- TSIKInvest seemed to be facing a serious risk of suffering irreparable harm before the expiry of

the cooling-off period if interim measures are not granted.

The *Kompozit* EA highlighted the treaty language that the parties "*will try, as far as possible, to resolve such dispute amicably*", noting Moldova's refusal to engage in settlement discussions, and found that such language does not mandate the exhaustion of 6-month period.

However, such findings may not be conclusive on the issue as the applicability of the cooling-off period is essentially a question of treaty interpretation.[3)]

E. Impact of Institutional Appointment of EA on EA's Jurisdiction

Under Article 4(2) of Appendix II to the SCC Rules, "[a]*n Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute*".

In *Munshi*, on the heels of its finding that *ratione personae*, *ratione materiae* and state consent to EA procedure had been met, the EA stated that "[t]*he Board has therefore already decided that the Emergency Arbitrator does not manifestly lack jurisdiction*", and concluded that the "*Claimant has prima facie established jurisdiction …*" (para. 33). Some opine that since EA application requires an immediate decision, the EA cannot defer its decision until a final determination on jurisdiction is made – therefore the registration of the application by the institution serves to satisfy this *prima facie* jurisdiction.[4)]

Others however view the SCC Board's screening function comparable to that of the ICSID Secretary General when deciding to register an ICSID case, and that it could not ground the EA's jurisdiction.

In comparison, the SIAC IA Rules aim at avoiding possible confusion or inference as to the jurisdiction of SIAC or EA. They do not set out the threshold for appointing the EA or confer express power to the institution to decide jurisdiction through the vehicle of the EA. Paragraph 3 of Schedule 1 stipulates "[t]*he Court shall, if it determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator within one day…".*

F. Admissibility

Significantly, the *Evrobalt* EA noted that the EA relief request would be inadmissible if the measure sought is "*with effect equivalent to (still less superior than) the definitive relief sought in the main proceedings*" which "*would amount to disposing of the claim on the merits*" (*Evrobalt*, paras. 37-38). Yet, the relief in EA and that in the main arbitration proceeding must be closely related and the putative rights must "*be actionable rights in the main arbitration proceedings*" (*Evrobalt*, para. 43).

Jurisdictional Objection Pending EA Proceedings

There are obvious challenges for host states to mount a robust defence in EA proceedings due to

factors such as the lack of developed institutional capacity to respond quickly and the potential complex analysis of state consent to EA procedure.

In the four decisions discussed, the host states did not participate in the EA proceedings. In one reported case, *Griffin v. Poland*, the Polish government challenged the jurisdiction of the EA on the basis that it had not consented to the application of SCC Rules 2010.

It is difficult to object to the EA jurisdiction on the grounds of *ratione personae* or *ratione materiae* as the threshold bar is low and largely fact-based. As indicated above, the EAs tend not to make an independent inquiry on the evidence proving such requirements and instead accept the Claimant's factual assertions.

Accordingly, unless the underlying treaty has envisaged consent to EA, the host state's first reference should be to the applicable arbitration rules. For instance, under the SIAC IA Rules, in order to apply for the EA relief, express consent is a must. Therefore, arguing the absence of express agreement is an option. The EA, if so appointed, shall examine the consent to EA procedure *thoroughly* while balancing the urgency of the matter and the imperative requirement to establish express state consent.

The host state may also consider raising an objection, thanks to Rule 25.1 of the SIAC IA Rules, to the existence or validity of the arbitration clause, the applicability of the SIAC IA Rules, or the competence of SIAC to administer the arbitration, and request the objection be referred to the SIAC Court of Arbitration. However, the claimant may well contend that the deliberations of the SIAC Court of Arbitration has no bearing on the pending EA proceeding unless the objection is upheld by the SIAC Court of Arbitration, because Rule 25.1 prescribes only that "[t]*he arbitration shall be terminated if the Court is not so satisfied* [*prima facie* that the arbitration shall proceed]".

Concluding Remarks

The emerging application of EA in investment treaty arbitration has afforded effective emergency relief to investors, but at the same time, pose challenges to host states. The published EA decisions discussed above will play leading role in enhancing the understanding of the EA proceedings against sovereign states and their rights and options thereunder.

As potential guidance for both investors and host states, the urgency of the matter will not necessarily expose host states to EA measures if they properly raise a jurisdictional objection at the appropriate time. In this regard, the timeline for the EA procedure under the SIAC IA Rules is 14 days from the appointment of the EA unless extended by the Registrar. The SCC, for its part, allows 5 days from the date of the EA application unless extended by the SCC Board. In this way, both the SCC Rules and the SIAC IA Rules leave room for jurisdictional objection during the EA proceedings, although with different paths and timelines to respond. It shall remain to be seen how these jurisdictional objections play out as the body of EA jurisprudence continues to develop.

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