

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AS Norvik Banka and others

v.

Republic of Latvia

(ICSID Case No. ARB/17/47)

Ruling on Power of Tribunal to Issue Provisional Measures Whilst Proceedings are Suspended

Rendered by:

James Spigelman QC, President
HE Judge Peter Tomka, Arbitrator

Secretary of the Tribunal

Francisco Abriani

24 September 2018

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1. The Tribunal refers to the Claimants' submission, by letter of 16 September 2018, that the two members of the Tribunal not subject to a challenge, should proceed to determine that part of their Application for Provisional Measures for which the fully constituted Tribunal had ordered an accelerated timetable. The matter is one of urgency in the context of these proceedings and we will not set out our reasons at length.
2. On 12 September 2018, the Respondent sought to disqualify Professor Stanimir Alexandrov, a member of this Tribunal. Pursuant to ICSID Arbitration Rule 9(6), the effect of such a challenge is that the proceedings are suspended.
3. The Claimants submit, in the alternative:
 - a. On the proper interpretation of the ICSID Convention (the "Convention") and the ICSID Arbitration Rules (the "Arbitration Rules"), the word "suspended" does not apply to an application for provisional measures.
 - b. In any event the Tribunal has "an inherent power" to make such orders.
4. The first submission, in part, relies on the analysis in Coleman and Innes:¹

“We consider that the appropriate balance is as follows: the tribunal must take action in relation to the request prior to the suspension ending and the most appropriate action will often be to issue an interim order requiring the parties to maintain the status quo pending the determination of the request [for provisional measures] following the filling of the vacancy. Although there is no express power under the ICSID Convention and the ICSID Arbitration Rules to issue such interim orders, the practice of ICSID tribunals indicates that they are nevertheless empowered to make them.

[...]

[I]n practice the most appropriate course of action will often be to issue an interim order pending the decision on the disqualification request and the filling of any vacancy that may arise as a result of it. The arguments in favour of such action being taken will be particularly strong where there is any suggestion that the proposal to disqualify the arbitrator was made to frustrate an existing (or contemplated) request for provisional measures.”

¹ M Coleman and T Innes, 'Provisional Measures During Suspension of ICSID Proceedings', *ICSID Review*, Vol. 30, No. 3 (2015) 713, **CL-97**, at pp. 726-727.

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5. It is noteworthy that neither the article, nor the Claimants' submissions refer to critical provisions of the Convention:
 - A Tribunal "shall consist of an uneven number of arbitrators" and, unless otherwise agreed, "shall consist of three arbitrators" (Convention, Article 37(2)).
 - Questions shall be decided by a majority of votes (Convention, Article 48(1)).
 - There is no provision for deadlock, unlike the case of the unchallenged arbitrators deciding an application for disqualification (Convention, Article 58).
 - "Any arbitration proceedings shall be conducted [...] in accordance with the Arbitration Rules [...]" (Convention, Article 44).

6. The authors and the Claimants' submissions also fail to refer to Arbitration Rule 10(2). It provides that, in the case of a vacancy on the Tribunal, "the proceeding shall be or remain suspended until the vacancy has been filled". The word "remain" is a clear reference to Arbitration Rule 9(6).

7. The language of Arbitration Rule 9(6) contains no ambiguity. In our opinion, it is principally designed to implement the requirements of Articles 37(2) and 48(1) of the Convention. The Tribunal is prevented from taking any steps until the challenge has been decided.

8. In the face of such clear language, we are unable to accept that the power to recommend provisional measures is not also suspended. We accept, as submitted, that the Tribunal "remains in existence". We accept that the power in Article 47 of the Convention is an important power to be exercised in the interests of justice. This is reinforced by the requirement in Arbitration Rule 39(2) that the Tribunal "give priority" to such an application. These provisions show the desirability of having a mechanism for deciding urgent issues. Unlike other institutions, ICSID does not have an emergency arbitrator provision. However, the word "suspended" is too clear to permit such a facility to be established by inference.

9. The Claimants also invoked Arbitration Rule 39(5), which applies when a party makes an application for provisional measures before the Tribunal is constituted. However, that Arbitration Rule authorises the Secretary-General to set down a timetable for submissions. No order can be made until the Tribunal is constituted.

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10. The alternative argument is that a Tribunal appointed under the Convention has “an inherent power” to recommend provisional measures. An ICSID Tribunal is not an institution. An ICSID Tribunal may have implied, rather than inherent, powers. In either event, such powers cannot be exercised contrary to the express provisions of the Arbitration Rules.
11. The Claimants’ application is thus dismissed.

[Signed]

James Spigelman QC
President

[Signed]

HE Judge Peter Tomka
Arbitrator