SVEA COURT OF APPEAL	**JUDGMENT**	Case No
Division 02	2008-11-28	T 745-06
Chamber 0203	Stockholm	

CLAIMANT
The Republic of Moldova
The Government
MD-2012
1 Piata Marei Adunari Nationale
Chisinau
Moldova

Counsel: Ion Paduraru, *advokat*
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RESPONDENT
1. Agurdino-Chimia JSC
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Moldova

2. Agurdino-Invest Ltd
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Moldova

3. I.B.
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Counsel for 1-3: Isai Chibac, *advokat*
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SUBJECT MATTER
Challenge to arbitral award

AWARD CHALLENGED
Arbitral award made on 22 September 2005, with a correction made on 13 October of the same year, in the Arbitration Institute of the Stockholm Chamber of Commerce's Case No V (093/2004), see appendix.

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THE COURT OF APPEAL'S JUDGMENT

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1. The Court of Appeal dismisses the Republic of Moldova's action against Agurdino-Chimia JSC and Agurdino-Invest Ltd without prejudice to the merits thereof.

2. The action is rejected in all other respects.

BACKGROUND

The following appears from the challenged award.

I.B., who is a Russian citizen, founded the company Agurdino-Invest Ltd (Agurdino-Invest, formerly Agurdino-MLD Ltd) in Moldova. After placing the highest bid in a bidding announced by the Ministry of Privatisation (the Ministry), Agurdino-Invest acquired, in April of 1999, the majority of the shares in the publicly owned company Faprochim JSC, which subsequently changed its name to Agurdino-Chimia JSC. I.B. and the two companies will in the following be referred to as I.B. *et al*.

The conditions for the acquisition were confirmed in "Contract No. 23" (the Contract), which provided, among other things, that Agurdino-Invest should transfer some of Agurdino-Chimia's assets to the Moldovan State in exchange for shares in publically owned companies (Compensation Shares). Agurdino-Invest fulfilled its obligation by transferring the assets in question, which were two real properties. However, Agurdino-Chimia did never receive any Compensation Shares, despite enquires on 19 November 2001 and 17 October 2002, as regards a certain share, and on 31 July and 12 November 2003, as regards two other shares. The first time the Ministry rejected the request by stating that the requested shares were not listed on "the List of Eligible Compensation Shares" (the list). Pursuant to a decision made by the Ministry on 17 December 2001, the list only contained shares in companies in which the Moldovan State owned less than 30% (a further limitation to 25% was decided on 4 February 2003). The second time, the Ministry stated that the requested shares had been removed from the list on the request of another public authority and the third time it was submitted that the value of the State's ownership of the requested shares did not correspond to the value of the transferred assets.

I.B. *et al*. subsequently requested arbitration against the Moldovan State, through its Government (Moldova). On the first page of the request for arbitration filed with the Arbitration Institute of the Stockholm Chamber of Commerce in April of 2005, I.B. is specified as the party requesting arbitration, "executing rights as director general in the name and interests of; Foreign Capital Enterprise Agurdino-Invest Ltd [and] Joint Stock Company Agurdino-Chimia." In the request for arbitration it is requested, in a

part captioned “Petition”, that Moldova shall compensate Agurdino-Chimia for the value of the assets transferred and pay damages (“material damage” and “moral damage”) and interest. Only the quantum relating to the assets is specified in the request for arbitration submitted to the Court of Appeal. This amounts to 621,024 Moldovan Lei. Moldova has, in its summons application, submitted that the total quantum of the relief requested was 4,906,140 Moldovan Lei.

All documents were served upon Moldova, but it did not participate in the arbitration.

I.B. *et al*. based its assertion of jurisdiction on a Bilateral Investment Treaty concluded by Russia and Moldova (the Investment Agreement). The arbitral tribunal began by concluding that the dispute at hand was covered by the Investment Agreement. The arbitral tribunal held that neither Agurdino-Invest nor Agurdino-Chimia could be investors in the meaning of the Investment Agreement since the companies had not made any investment in another country, insofar as the dispute at hand was concerned. I.B. himself was, however, held to be an investor under the Investment Agreement. The arbitral tribunal thus considered itself to only have jurisdiction over the physical person I.B.’s action. In this respect, the arbitral tribunal noted that I.B., in the notice of arbitration, request for arbitration and in the other materials is specified as the party requesting arbitration as a representative for the two companies, but not in his own name. The arbitral tribunal interpreted this as being the result of a clerical error since the request for monetary relief in the request for arbitration to I.B. himself appeared to be meaningless if he did not act also in his own name.

A consequence of this jurisdictional finding was that the claim was corrected, in that the relief sought was to be considered requested only by I.B. and pertaining to indirect damages instead of payment of a sum of money as a substitute of Compensation Shares. The arbitral tribunal referred to the principle *iura novit curia* and emphasised that it was not a question of introducing a new legal source but applying the legal sources invoked by a party in a different way than pleaded by that party.

The arbitral tribunal then concluded that the cap of State ownership deprived the compensation mechanism for the assets transferred of its substance, as the list came to comprise of Compensation Shares with a significantly lower market value than the nominal value. The basis for I.B.'s claim was that the Ministry, by implementing the decisions on cap on State ownership had circumvented Moldovan law's ban on retroactive legislation. The arbitral tribunal found, however, that no circumvention of the ban on retroactivity had occurred. The arbitral tribunal then examined whether Moldova had breached certain other provisions of the Investment Agreement and found that Moldova had acted in breach of the principle of fair and equitable treatment, as it had been expressed in Article 3. The principle entails, among other things, that no one shall be treated disadvantaged due to their nationality. Moldova was considered to have created a system for the compensation of the transferred assets, which was open to an unfair application thereof. Such application did subsequently occur.

Upon the determination of the quantum of damages, the arbitral tribunal referred to practice in investment arbitration that shareholders can be awarded compensation for indirect damages. The indirect damage in the case at hand was considered to correspond to the nominal value of the assets transferred. Moldova was, however, not to bear the entire liability for the loss. In its award, the arbitral tribunal ordered Moldova to pay I.B. 310,000 Moldovan Lei plus interest, 694,896 Lei in total and ordered Moldova to bear the costs of the arbitration, which – according to the correction dated 13 October 2005 – were EUR 23,200 and NOK 2,207.

According to documents submitted by I.B. *et al.*, the arbitral award has been enforced pursuant to a ruling of Moldova's Supreme Court.

RELIEF REQUESTED FROM THE COURT OF APPEAL

Moldova has requested the Court of Appeal, by virtue of Section 34(1),(2) and (6) of the Arbitration Act (the Act), to set aside the award.

I.B. *et al*. has opposed the relief requested by Moldova.

The case has been resolved without a hearing, pursuant to Chapter 53, Section 1 and Chapter 42, Section 18 paragraph one (5) of the Code of Judicial Procedure.

THE PARTIES' CASES BEFORE THE COURT OF APPEAL

Moldova

I.B. has not requested any relief in his own name nor has he intended to do so. It follows unambiguously from the notice of arbitration, as well as from the request for arbitration, that the relief sought only relates to the two companies Agurdino-Invest and Agurdino-Chima. I.B. has thus only acted as a representative for the companies. It is obvious that the arbitral tribunal has exceeded its mandate under Section 34(1)(2) of the Act by arbitrarily deciding that I.B. was to be considered having an interest of his own in the arbitration and by awarding him compensation for indirect damages despite no such relief having been requested.

The arbitral tribunal has furthermore erroneously referred to and applied the *iura novit curia* principle, which cannot be used to reformulate requests for relief and award a party relief not requested. This application made it impossible for Moldova to defend its interests and probably surprised I.B. as well, considering that he at no stage of the proceedings had requested relief for himself.

By its actions, the arbitral tribunal has disregarded Sections 8, 21 and 23 of the Act, among other, as well as Article 17 of the Arbitration Rules of the Stockholm Chamber of Commerce. There are therefore reasons for setting aside the award under Section 34(1) (6) of the Act at hand, as the failures have affected the outcome of the arbitration.

The conduct of the proceedings shows that there is reason to call the impartiality of the arbitral tribunal in this case into question. The arbitral tribunal has furthermore construed relevant provisions in the contract in an erroneous manner, or at least neglected to control the correctness of the interpretation alleged by I.B.

I.B.

The arbitral tribunal has correctly evaluated all documentary evidence and made a correct arbitral award. There have been no procedural faults made by the arbitral tribunal. I.B. signed the request for arbitration primarily on his own behalf but also as a representative for Agurdino-Invest and Agurdino-Chima. I.B.'s request for payment of the damages to the benefit of Agurdino-Invest and Agurdino-Chima was only a way of securing his own interests in conformity with the internal legislation of the Republic of Moldova. The arbitral tribunal has, in full conformity with Swedish arbitration practice, applied a legal source invoked by I.B. *et al.* in a way, which to some extent differs from how it was pleaded by the parties.

Moldova has chosen not to participate in the arbitration and thus bears the responsibility for detrimental consequences of this default.

THE COURT OF APPEAL'S REASONS

The parties have relied on certain documentary evidence.

The Court of Appeal notes initially that Moldova has not been unsuccessful in the award as relates to Agurdino-Chima and Agurdino-Invest, since the arbitral tribunal has not examined their claims in the arbitral award. Moldova's action against Agurdino-Chima and Agurdino-Invest before the Court of Appeal shall therefore be dismissed without prejudice to the merits thereof.

Under Section 34(1)(2) of the Act an arbitral award shall, upon a challenge action, be set aside if the arbitrators have made their award after the expiry of the period agreed by the parties or where they otherwise have exceeded their mandate. According to statements made in the *travaux préparatoires*, such an excess can occur by the arbitrators' award of relief in excess of the parties' requests or where they found their award on facts not invoked by a party, see Government Bill 1998/99:35 p. 145.

In this case, it is primarily the arbitral tribunal's decision on jurisdiction *ratione personae* that shall be examined in light of the provision on excess of mandate. It can

here be considered to pertain to the inner scope of the arbitral tribunal's competence, namely the scope which follows from the fact that the arbitral tribunal's competence is limited to the parties' pleadings, whereas the outer scope of the mandate is determined by the arbitration agreement (see for example Lindskog, *Skiljeförfarande, En kommentar*, 2005, p 928). According to the facts on the record, I.B. owns all shares in Agurdino-Invest, which in turn owns the majority of the shares in Agurdino-Chima. In addition thereto, he is the chief executive officer of both companies and was the person who signed the request for arbitration. There is thus no doubt that the financial interests of the two companies largely overlap those of I.B. Against this background, the arbitral tribunal's decision cannot be considered to exceed the procedural scope drawn up by I.B. *et al.* Moldova has not pleaded its case in the arbitration and has thus not participated in the drawing up of the frame therefor. The Court of Appeal thus holds that no excess of mandate has occurred, insofar the issue of jurisdiction *ratione personae* is concerned.

A consequence of the arbitral tribunal's decision to only assert jurisdiction over I.B.'s action was that the compensation requested pertained to indirect damages, something which I.B. himself had not pleaded. As the request for relief nevertheless came to comprise financial compensation for a certain conduct which was alleged to having caused certain damages, and considering that the amount awarded did not exceed the amount requested, the Court of Appeal does not find that the arbitral tribunal has exceeded the request for relief. Nor has the arbitral tribunal based its award on facts not pleaded but merely made a legal qualification of facts, which I.B. pleaded, based on a source of law he relied on. In the Court of Appeal's opinion the principle *iura novit curia* has not been misapplied in these aspects. Moldava has thus not proven that the arbitral tribunal has exceeded its mandate in any aspect.

Moldava's case does not support the allegation of challengeable misconduct under Section 34(1)(6) of the Act.

In conclusion, it is not proven that the arbitral tribunal has made any faults, which may entail that the award shall be set aside. The relief requested in relation to I.B. shall therefore be rejected.

APPEAL

Under Section 43 of the Arbitration Act the Court of Appeal's judgment may only be appealed where the Court considers that it is in the interest of the evolution of case law that the Supreme Court hears the appeal. The Court of Appeal does not consider that such interest is at hand and accordingly does not grant leave to appeal.

Senior appellate court judge KB and the appellate court judges IP and RH, rapporteur has participated in the judgment. Unanimous.