Ruby Roz Agricol LLP v. Kazakhstan
UNCITRAL, Award on Jurisdiction, 1 August 2013 (Alan Redfern, Bruno Boesch, Joseph Neuhaus)

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Keywords


Ruby Roz Agricol LLP v. Kazakhstan is one of a series of arbitrations arising from the fall-out between Kazakh President Nazarbayev and his former son-in-law Rakhat Aliyev. The Tribunal declined jurisdiction on both of the two bases advanced by the Claimant – the repealed 1994 Kazakh Investment Law and the investment contract between the Claimant and an agent of the Respondent. In doing so, the Tribunal declined to follow the pronouncement of the Rumeli v. Kazakhstan\(^1\) tribunal that a State’s unilateral offer to arbitrate constitutes an accrued right that cannot be abrogated by subsequent legislative repeal. The unusual procedural circumstances of the arbitration and the likely relevance of the Tribunal’s jurisdictional holdings to a newly-launched parallel ICSID arbitration founded on the same jurisdictional basis (Caratube International Oil Company LLP v. Kazakhstan\(^2\)) make this award worthy of notice and comment.

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\(^1\) Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 335.

\(^2\) Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Notice of Arbitration, 28 June 2013.
Facts

The Claimant is a Kazakh corporation founded in 1998 to operate in the poultry industry. On 5 March 1999, the Claimant concluded an investment contract with the Agency on Investments in the Republic of Kazakhstan (the Investment Contract), which was subsequently amended in 2002 to allow for a further injection of capital by the Claimant. Kassem Omar, who originally was a joint claimant in the arbitration, bought the company on 2 September 2004, a sale that the Respondent claims occurred only as a result of threats by Mr. Omar’s brother-in-law, Issam Hourani. The Claimant alleged that the breakdown in relations between President Nazarbayev and his former son-in-law Mr. Aliyev (who, in turn, was the brother-in-law of Mr. Hourani) led to a “campaign of persecution” against the Hourani family and their business interests from May 2007 onwards (para. 45). This allegedly extended to government interference in the management of the business and its forced sale to the President’s daughter, Dariga Nazarbayeva, on 29 June 2007, although the parties to that transaction later purported to rescind it. The primary claim ultimately advanced by the Claimant was one of unlawful expropriation in violation of the 1994 Foreign Investment Law (the FIL) and customary international law.

Procedural History

The procedural history of the arbitration is unique. This is primarily because “the issue of jurisdiction assumed significance ... at a comparatively late stage in the proceedings,” as the Tribunal acknowledged in its Award (para. 37). In fact, the issue of jurisdiction assumed significance only after what the Tribunal described as “a dramatic turn of events” (para. 125).

The Tribunal raised the question of bifurcation at the first procedural meeting on 27 March 2012, presumably after taking note of the Respondent’s multiple jurisdictional and admissibility objections in its Statement of Defence. The Respondent’s position on the subject was equivocal. Despite the potentially dispositive nature of the objections raised, the Respondent did not wish to insist upon bifurcation without an indication that the Tribunal thought it desirable (para. 98). As a result, the issue of jurisdiction remained joined to the merits and quantum of damages, and two two-week hearings were set in February and April 2013 for the Tribunal to hear the extensive factual and expert evidence adduced by both Parties.

Five days before the February hearing was due to begin, the Claimant informed the Tribunal that three of its eleven fact witnesses – Issam Hourani,