

International Centre for Settlement of Investment
Disputes
(Additional Facility)

AWARD

Rendered by the Arbitral Tribunal in the Case of

Joseph Charles Lemire

v.

Ukraine

(ICSID Case No. ARB(AF)/98/1)

Date of dispatch to the parties: September 18, 2000

I. THE ARBITRAL PROCEEDINGS

Procedural Matters

1. By Consent to Arbitrate and Request for Approval dated November 14, 1997, Mr. Joseph Charles Lemire, a national of the United States of America, requested the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) to approve and register his request for access to arbitration against Ukraine under the ICSID Additional Facility Rules and the 1994 Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment.
2. By letter dated December 10, 1997, the Secretary-General of ICSID informed the Parties that the requirements of Article 4(2) of the ICSID Additional Facility Rules had been fulfilled and that the Claimant’s application for access to the Additional Facility had been approved and registered.
3. By Notice to Institute Arbitration Proceedings dated December 29, 1997, the Claimant requested the Secretary-General of ICSID to register the Notice and dispatch to the parties a certificate of registration according to the Arbitration (Additional Facility) Rules.
4. By letter dated January 16, 1998, the Secretary-General of ICSID informed the Parties that the Notice had been registered in the Arbitration Register, and issued and dispatched to the Parties a Certificate of Registration of the case.
5. Pursuant to Article 10(1) of the Arbitration (Additional Facility) Rules, Mr. Lemire appointed as arbitrator Mr. Jan Paulsson (a French national) and Ukraine appointed as arbitrator Dr. Jürgen Voss (a German national). By agreement of the Parties, Professor Sir Elihu Lauterpacht, C.B.E., Q.C. (a British national) was appointed President of the Tribunal. The Tribunal was constituted on August 13, 1998.
6. On October 6, 1998, Ukraine filed its Objection to the Tribunal’s Competence. On October 13, 1998 the Claimant filed Ancillary Claims.

7. The first session of the Arbitral Tribunal was held, with the Parties' agreement, in London on November 11, 1998. During the course of the first session, the President recalled that the Respondent had filed objections to jurisdiction and the proceedings on the merits were suspended in accordance with Article 46(4) of the Arbitration (Additional Facility) Rules. The Tribunal proposed, and the Parties agreed to, a schedule for the filing of observations on Ukraine's Objection to the Tribunal's Competence.

Settlement of the Dispute on Agreed Terms

8. On September 24, 1999, the Tribunal issued its Decision on Ukraine's Objection to the Tribunal's Competence, joining the jurisdictional objections to the merits of the dispute. After consultations with the Parties, the schedule for the further filings on the merits was fixed.

9. On March 20, 2000 the Parties concluded an agreement for the final settlement of all the claims, complaints and requests contained in the Consent to Arbitrate, Notice for Registration, Ancillary Claims and all other letters of the Claimant to the Respondent or ICSID as well as other correspondence of the Claimant addressed to third parties.

10. In accordance with Article 50 of the Arbitration (Additional Facility) Rules, the Parties agreed to request the Tribunal to record the settlement in the form of an award of the Tribunal. The Parties further agreed that the proceedings would thereby be discontinued.

11. The Tribunal is willing to meet the request of the Parties to record the settlement between them in the form of an award.

II. THE AWARD

13. Accordingly, the Tribunal *orders* unanimously that the said agreement between the Parties as set forth below shall be recorded verbatim as an award on agreed terms:

“AGREEMENT ON THE DISPUTE SETTLEMENT

Joseph Charles Lemire v. Ukraine

(ICSID Case No. ARB(AF)/98/1)

MARCH 20, 2000

This Agreement on the Dispute Settlement (hereinafter called “*this Agreement*”) is entered into by and between:

Joseph Charles Lemire, the US national (hereinafter called as “*the Claimant*”);

and

The Government of Ukraine (hereinafter called as “*the Respondent*”), represented by the Minister of Economy S.L. Tihipko.

The Claimant and the Respondent are hereinafter collectively referred to from time to time as the “*Parties*” and individually as a “*Party*”.

WHEREAS, the Parties desire to reach a settlement of the International Center for Settlement of Investment Disputes (hereinafter referred to as “the ICSID”) Case # ARB (AF)/98/1 upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, the Parties agree as follows:

I. BACKGROUND

1. On January 16, 1998 the Secretary-General of the ICSID registered in the Arbitration Register the December 29, 1997 Notice to Institute Arbitration Proceedings with the use of the Additional Facility of ICSID (hereinafter called “the Notice for Arbitration”) addressed by the U.S. national Mr. Jozeph Charles Lemire (hereinafter called “the Claimant”) in relation to an investment dispute between him and Ukraine (hereinafter referred to as “the Respondent”).

2. On page 5 of the Consent to Arbitrate and Request for Approval for use of the Additional Facility of the ICSID dated November 14, 1997 (hereinafter referred to as “the Consent to Arbitrate”) the Claimant stated that he wished to arbitrate his investment dispute with Ukraine in accordance with the provisions of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (hereafter called “the Bilateral Investment Treaty”). The Claimant also stated that his investment dispute with Ukraine existed at the time the Bilateral Investment Treaty entered into force and is of a continuing nature. The Claimant expressed his consent to the submission of that dispute to binding arbitration under the Additional Facility of the ICSID in accordance with Article VI(3)(a)(ii) of the Bilateral Investment Treaty.

3. The Bilateral Investment Treaty was signed on March 4, 1994, entered into force on November 16, 1996 and remains in force at present.

4. At the time when the Notice for Arbitration was filed with the Secretary-General of the ICSID and registered in the Arbitration Register, Ukraine was not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The consent of Ukraine to the submission of any investment dispute for settlement by binding arbitration to the Additional Facility of the ICSID, provided there is a written consent of the national or company of the United States of America, was given in Article VI(4) of the Bilateral Investment Treaty.

5. In the letter addressed to the Secretary-General of the ICSID of March 12, 1998 signed by the Acting Chairman of the National Agency of Ukraine for Reconstruction and Development Mr. Vladimir Ignaschenko, it was stated that the National Agency was authorized by the President of Ukraine to represent Ukraine in this dispute and is prepared to cooperate closely with ICSID in settlement of the issue.

6. In accordance with Article 14 of the ICSID Additional Facility Arbitration Rules, the Tribunal was constituted of three members Professor Sir Elihu Lauterpacht, Mr. Jan Paulsson and Dr. Juergen Voss, and the proceedings began on August 13, 1998.

7. On October 5, 1998 in accordance with Article 46 of the ICSID Additional Facility Arbitration Rules, the Respondent filed the Objection to

the Tribunal's Competence with the Secretary-General of the ICSID. In its Decision of September 24, 1999 the Tribunal joined the Respondent's Objection to the Tribunal's Competence to the merits of the case and resumed the suspended proceedings on the merits.

8. On October 13, 1998 the Claimant addressed to the Tribunal its Ancillary Claims (hereinafter referred to as the "Ancillary Claims") to which the Respondent extended its Objection to the Tribunal's Competence.

9. On October 15, 1999 the Claimant addressed a formal invitation to the Vice-Prime Minister of Ukraine Mr. Sergiy Tihipko to reach an amicable resolution of the dispute. Based on the Claimant's request of February 16, 2000, and the Respondent's consent to it, the Tribunal suspended the proceedings till June 1, 2000 in order to allow the parties to finalize the peaceful settlement.

II. SETTLEMENT OF THE DISPUTE

10. The Parties agree and confirm that all the claims, complaints and requests contained in the Consent to Arbitrate, Notice for Arbitration, Ancillary Claims and all other official letters of the Claimant to the Respondent or ICSID, as well as other correspondence of the Claimant addressed to third parties are hereby finally settled.

11. By such settlement the Parties, in the event of compliance with this Agreement, exclude all of the claims referred to in item 10 of Section II "Settlement of the Dispute" from any further judicial or arbitration settlement.

12. The Parties acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement.

13. As a good-will gesture, the Respondent agrees to fulfill the following additional conditions of the Claimant for the purpose of this settlement under the schedule below.

- (a) By April 15, 2000 the Commission of experts, appointed by the Respondent, shall examine the quality of broadcasting within the radio frequencies band of FM 100-108. Based on the conclusions of the Commission, the Respondent will take

necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 in Kiev by June 1, 2000.

- (b) By May 15, 2000 the Respondent, in person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licenses for radio frequencies (provided there are free frequencies bands) in the following cities: Kharkiv, Lviv, Donetsk, Zaporizhya, Lugansk, Simpheropol, Dniepropetrovsk, Odessa, Vynnitsa, Kryviy Rog, Uzhgorod.

The Claimant can apply for the radio channels in the above cities to the National Council for TV and Radio Broadcasting (hereinafter called “the National Council”) in a due course in accordance with the current legislation after the National Council has been fully personally formed under the existing law of Ukraine. The Respondent, within the limits of its powers, will assist for the positive consideration of this issue at the National Council.

The granting of licenses for radio frequencies and broadcasting channels will be made in accordance with the requirements of Ukrainian legislation upon payment of the license fees.

- (c) By April 10, 2000 the Respondent will propose for the Claimant’s consideration three locations for the beauty salon on the terms of rent.

14. In the event that the Respondent appears to be unable to follow the above schedule for the objective reasons, it will promptly inform the Claimant and agree with it the revised schedule.

15. The Parties shall refrain from any demands at present or in the future in any judicial or arbitration forum on compensation of material and/or moral damages with regard to the issues included into this settlement.

16. The Agreement shall not be treated as a document granting any rights, benefits or privileges which are different or additional to the ordinary

rights and obligations of a foreign investor in Ukraine in accordance with the Ukrainian laws and international treaties to which Ukraine is a party.

17. In accordance with Article 50 of the ICSID Additional Facility Arbitration Rules, the Parties agree to request the Tribunal to record the settlement in the form of the Tribunal's award. Such record will mean the discontinuance of the proceedings.

18. The Parties agree that the Tribunal's award containing this Agreement as a part of it can be published in the ICSID Review.

19. The Parties agree that each of them bears its own fees and expenses in connection with the proceedings under the ICSID Case # ARB(AF)/98/1.

III. PRINCIPLES OF INTERPRETATION AND IMPLEMENTATION OF THE AGREEMENT

20. Each Party shall act in accordance with good faith and fair dealing in the international business. The Parties shall not exclude or restrict this duty.

21. The mere fact that at the moment of the conclusion of this Agreement the performance of the obligation assumed by a Party was not possible shall not adversely affect the validity of this Agreement.

22. This Agreement shall be interpreted according to the common intent of the Parties. If such an intention cannot be established, the Agreement shall be interpreted according to the meaning that reasonable persons of the same kind as the Parties would give to it in the same circumstances.

The Statement and other actions of a Party shall be interpreted according to that Party's intention if the other Party was aware of, or should have been aware of that intention.

If the preceding paragraph is not applicable, such statements and other actions of a Party shall be interpreted according to the meaning that a reasonable person of the same kind as the other Party would give to it in the same circumstances.

23. For interpreting this Agreement all the circumstances shall be taken into consideration, including the following:

- (a) preliminary negotiations between the Parties;
- (b) the practices which the Parties have established in their relations;
- (c) the conduct of the parties following the conclusion of the Agreement;
- (d) the nature and purpose of the Agreement;
- (e) the meanings commonly given to the terms and expressions in the business concerned;
- (f) usages.

Terms and conditions of the present Agreement shall be interpreted in such a way that all of such terms are deemed effective without making void any of them.

24. Each Party shall cooperate with the other Party when such cooperation may be reasonably expected for the performance of that Party's obligations under the present Agreement.

To the extent that an obligation of the Party involves a duty to achieve a certain result, this Party is to attain it.

25. Where the performance of the Agreement becomes more onerous for one of the Parties, that Party is nevertheless bound to perform its obligations subject to the following provisions of this Agreement on hardship.

There is hardship where the occurrence of the events fundamentally alters the equilibrium of the Agreement either because the cost of the Party's performance has increased or the value of the performance a Party receives has diminished, and

- (a) the events occur or become known to the disadvantaged Party after the conclusion of the Agreement;
- (b) the events could not have been reasonably taken into account by the disadvantaged Party at the time of the conclusion of the Agreement;
- (c) the events are beyond control of the disadvantaged Party; and
- (d) the risk of occurrence of the events was not assumed by the disadvantaged Party.

In case of hardship the disadvantaged Party is entitled to request a revision of the Agreement. The request shall be made without undue delay and shall indicate the grounds on which it is based.

The request for revision of the Agreement does not in itself entitle the disadvantaged Party to withhold performance hereunder.

Upon failure to reach agreement within a reasonable time either Party may resort to the arbitration court, according to Article 31, (Section IV) of the present Agreement.

26. Non-performance shall mean the failure by a Party to perform any of its obligations under the present Agreement, including improper performance or late performance.

The non-performing Party may, at its own expense, remedy any non-performance, provided that

- (a) without undue delay, it gives notice indicating the proposed manner and time period of such cure;
- (b) the cure is appropriate in the given circumstances;
- (c) the aggrieved Party has no legitimate interest in refusing such cure;

In the event of non-performance the aggrieved Party may by notice to the other Party allow an additional period of time for performance of the cure.

During the additional period the aggrieved Party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other legal remedy. If it receives notice from the other Party that the latter will not perform its obligations under the present Agreement within that period, or if upon expiration of that period due performance has not been made, the aggrieved Party may resort to any of the legal remedies that may be available under this Agreement.

Where in case of delay in performance, which is not fundamental, the aggrieved Party has given notice allowing an additional period of time of reasonable length, it may terminate the Agreement upon the expiry of that period. If the additional period allowed is not of reasonable length it shall be

extended up to a reasonable length. The aggrieved Party may in its notice provide that if the other Party fails to perform within the period allowed by the notice the Agreement shall automatically terminate.

IV. MISCELLANEOUS

27. This Agreement constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings between them with respect to the matters covered herein.

28. This Agreement shall be binding on the respective legal successors of the Parties. Neither of the Parties may assign or otherwise transfer all or any part of their rights or obligations under this Agreement to any third party.

29. If any provision of this Agreement is held by a court or arbitration tribunal of competent jurisdiction to be invalid, unenforceable or violative of any applicable law, such circumstance shall not have the effect of rendering any other provision or provisions hereinafter contained invalid, inoperative or unenforceable.

30. This Agreement shall be governed by the applicable law as determined by Art. 55 of the ICSID Additional Facility Arbitration Rules.

31. All the disputes arising from or in connection with this Agreement shall be settled by negotiations. In the event no solution is achieved within 60 days from the date of beginning of negotiations, either party may address to the ICSID its application for settlement under the ICSID Additional Facility Arbitration Rules.

32. This Agreement shall be executed in the Ukrainian and English languages. In the event of dispute between the two texts, the Ukrainian language shall prevail.

33. This Agreement shall be executed in three counterparts, one for each party and one for the Tribunal, each of which shall be deemed the original.

34. This Agreement enters into force on the date of signing by the Parties and shall not be limited in time.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on March 20, 2000.

(signed by)

S. L. Tihipko
Minister of Economy

(signed by)

Joseph Charles Lemire”

14. The Tribunal notes the Parties’ agreement, set forth in Article 19 of the “Agreement on the Dispute Settlement,” that each side bears its own fees and expenses. The Tribunal *orders* unanimously that the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of ICSID, which have been covered by the equal advance deposits by both parties, shall be borne by the parties in equal shares.

Sir Elihu Lauterpacht, CBE QC

Jan Paulsson

Jürgen Voss