

PCA Case No. 2014-15

IN THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES 1976
("UNCITRAL RULES")
AND
SHAREHOLDERS AGREEMENT
RELATING TO INA-INDUSTRIJA NAFTE D.D.
DATED 12 JULY 2003 AS AMENDED ON 30 JANUARY 2009
("SHAREHOLDERS AGREEMENT" OR "SHA")

-between-

THE REPUBLIC OF CROATIA

(the "Claimant")

-and-

MOL HUNGARIAN OIL AND GAS PLC.

(the "Respondent", and together with the Claimant, the "Parties")

DECISION ON THE CLAIMANT'S APPLICATION FOR INTERIM
MEASURES ("DECISION")

Tribunal

Neil Kaplan CBE QC SBS (Presiding Arbitrator)
Professor Emeritus Jakša Barbić
Professor Jan Paulsson

Administrative Secretary to the Tribunal
Ms Olga Boltenko

Registry
Permanent Court of Arbitration

16 August 2014

This is an application by the Claimant that the Tribunal:

- (i) Issue a Temporary Restraining Order (the “**TRO**”) to freeze the Respondent’s shareholding and to prohibit the Respondent from exercising its management control to reduce or close INA’s refineries or reduce INA’s workforce, or otherwise act against INA’s business interests;¹ and
- (ii) Issue an order freezing the Respondent’s shareholding in INA and prohibiting the Respondent from exercising its management control to reduce or close INA’s refineries or reduce INA’s workforce, or otherwise act against INA’s business interests until the Tribunal has rendered its final decision in this matter.

I. Procedural History

1. The procedural history of this arbitration is a matter of record. For the purposes of this Decision, several significant procedural events are set out below. The recitals of the procedural events provided below do not purport to be complete.
2. On 17 January 2014, the Claimant commenced this arbitration by serving a Notice of Arbitration on the Respondent. In its Notice of Arbitration, the Claimant alleged that the Respondent had bribed Croatia’s former Prime Minister Mr. Ivo Sanader to gain management control over INA, Croatia’s largest oil company, through amending the Shareholders Agreement and signing other agreements relating to INA’s management and operations. The Claimant requests that the Tribunal:
 - (i) Issue a binding declaration nullifying the Gas Master Agreement and the First Amendment to the Shareholders Agreement;
 - (ii) Order that the Respondent pay damages caused by its conduct;
 - (iii) Order that the Respondent account to the Claimant for INA’s conduct since 30 January 2009;
 - (iv) Award to the Claimant all other compensatory damages.

¹ INA is defined in the Notice of Arbitration.

3. On 14 May 2014, the Respondent served on the Claimant its Response to the Notice of Arbitration in which it denied all claims put forward by the Claimant and requested that the Tribunal:
 - (i) Dismiss with prejudice all Claimant's claims;
 - (ii) Award the Respondent all costs of these proceedings.
4. On 7 May 2014, the Parties served on the Tribunal their respective case summaries.
5. On 15 May 2014, a procedural conference call was held by the Presiding Arbitrator at which the Parties discussed the Tribunal's Terms of Appointment and other administrative and procedural matters.
6. On 3 June 2014, the Parties and the Tribunal signed the Tribunal's Terms of Appointment.
7. On 5 June 2014, the Parties signed the Tribunal's Secretary's Terms of Appointment, by which they appointed Ms. Olga Boltenko as the Tribunal's Secretary.
8. On 23 June 2014, the Parties and the Tribunal signed the Terms of Reference, which included, *inter alia*, an agreement that the PCA act as Registry.
9. On 24 June 2014, the PCA requested that the Parties make an initial deposit in the amount of EUR 200,000 by 15 July 2014 (EUR 100,000 from each Party).
10. On 30 June 2014, the Claimant served on the Respondent and the Tribunal its Application for Interim Protective Measures and Temporary Restraining Order under UNCITRAL Rules 15 and 26 (the "**Interim Measures Application**"). In its Interim Measures Application, the Claimant alleged that the Respondent was said to have plans to dispose of its shares in INA, as well as to dispose of several refineries and to dismiss INA's personnel, among other alleged steps. In that regard, the Claimant sought the relief set out above.
11. The Tribunal agreed to hear the Claimant's Interim Measures Application on 11 August 2014 in Paris.

12. Further correspondence ensued between the Parties with respect to the Claimant's Interim Measures Application.
13. By letter dated 9 July 2014, the PCA acknowledged receipt of the Respondent's share of the deposit. The Claimant paid its share of the deposit shortly thereafter.
14. On 12 July 2014, the Tribunal issued an Order on Claimant's Interim Measures Application (the "**Order**"). In its Order, the Tribunal directed as follows:

"6. The Tribunal assumes that there would be no objection on the part of the Respondent to agree not to take any of the steps allegedly threatened in the Application between now and 11 August 2014 without giving the Claimant and the Tribunal not less than seven (7) calendar days notice before taking of any of these steps. The Tribunal requests the Respondent to respond immediately to this suggestion.

7. Without prejudice to the general issue of confidentiality of these proceedings, the Tribunal orders that all and any correspondence between the Parties and the Tribunal, or between the Parties themselves, relating to this Application, including this Order, must be treated as strictly confidential and no mention of this should be made to the press or through any other media, publication, letter, or otherwise.

8. If the Parties wish to make further written submissions prior to the hearing on 11 August 2014:

(a) the Respondent may file written submissions in opposition to the Application on or before 23 July 2014;

(b) the Claimant may reply thereto on or before 30 July 2014, and

(c) the Respondent may file a rejoinder, if so advised, on or before 6 August 2014.

(d) These submissions should not be lengthy, and copies of all documents relevant to the Application shall be supplied to each member of the Tribunal at the hearing on 11 August 2014.

9. The hearing of the Application will commence at 9.30 am on 11 August 2014 at the ICC hearing centre."

15. By email dated 12 July 2014, the Respondent confirmed that it “*has no objection agreeing not to take any of the steps allegedly threatened in the Application between now and 11 August 2014 without giving the Claimant and the Tribunal not less than seven (7) calendar days notice before taking of any of these steps.*”
16. On 23 July 2014, the Respondent served its Opposition to the Claimant's Interim Measures request in which it denied the Claimant's allegations that the Respondent was in the process of undertaking the steps with respect to INA which were listed in the Claimant's Interim Measures Application and requested that the Tribunal deny all relief sought.
17. On 30 July 2014, the Claimant served on the Respondent and the Tribunal its Reply in which it set out its arguments relating to the Respondent's alleged bribery of Mr. Sanader and further developed its arguments with respect to the Respondent's allegedly improper control over INA and the necessity of the requested Interim Measures.
18. On 6 August 2014, the Respondent served on the Claimant and the Tribunal its Rejoinder in which it set out its position with respect to the relevance of the Croatian court proceedings in relation to Mr. Sanader and in which it further developed its arguments as to why the requested Interim Measures are not warranted at this stage.
19. The hearing in this matter was held before the full Tribunal at the ICC Hearing Centre in Paris on 11 August 2014.
20. In attendance at the hearing were:

Claimant:

Counsel:

Mr. Read McCaffrey, Squire Patton Boggs

Mr. Stephen Anway, Squire Patton Boggs

Mr. Luka Misetić, Squire Patton Boggs

Mr. Rotislav Pekar, Squire Patton Boggs

Decision on the Claimant's Application for Interim Measures

Ms. Kristen Johnson, Squire Patton Boggs

Representatives of the Republic of Croatia:

Mr. Ivan Vrdoljak, Minister of Economy of Croatia

Mr. Alen Leveric, Deputy Minister of Economy

Respondent:

Counsel:

Mr. Arif H. Ali, Weil, Gotshal & Manges

Mr. Alexandre de Gramont, Weil, Gotshal & Manges

Ms. Samaa A. Haridi, Weil, Gotshal & Manges

Mr. Daniel Dozsa, Weil, Gotshal & Manges

Mr. Justicn Bart, Weil, Gotshal & Manges

Mr. Nathaniel G. Morales, Weil, Gotshal & Manges

Mr. Dalibor Valincic, Wolf Theiss

Representative of MOL Hungarian Oil & Gas Plc:

Dr. Pal Kara

Administrative Secretary to the Tribunal:

Ms. Olga Boltenko

PCA Registry:

Ms. Fedelma C. Smith

21. No witnesses were heard at the hearing.

II. The Parties' Positions

22. What follows below is a brief summary of the Parties' respective positions with respect to the applicable interim measures criteria. The summary does not purport to be complete.

A. Prima Facie Jurisdiction

23. It is common ground between the Parties that the Tribunal must be able to find that it possesses at least *prima facie* jurisdiction over the dispute to decide the Claimant's Interim Measures Application.

24. The Claimant relies on Clause 15 of the Shareholders Agreement to assert that the Tribunal has jurisdiction over this dispute.

25. Clause 15 of the Shareholders Agreement provides, in relevant parts, as follows:

All disputes which may arise between the Parties out of or in relation to or in connection with this Agreement, which are not settled as provided in Clause 15.1 shall be finally settled by arbitration in accordance with UNCITRAL. The number of arbitrators appointed in accordance with the said rules shall be three. One arbitrator shall be appointed by each Party and the two arbitrators so appointed will agree on the third arbitrator, who shall act as the chairman of the arbitral tribunal. The language of the arbitral proceedings shall be English or such alternate language as the Parties may agree. The place of arbitration shall be Geneva, Switzerland. Awards rendered in any arbitration hereunder shall be final and conclusive and judgement thereon may be entered into in any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards thereunder.

26. The above-referenced arbitration clause is mirrored in the Gas Master Agreement concluded by the Parties on 30 January 2009 as amended.

27. On the Claimant's case, given the wording of the arbitration clause and the fact that the present dispute "*arise[s] between the Parties out of or in relation to or in connection with this Agreement*", the Tribunal has *prima facie* jurisdiction sufficient to decide the Claimant's Interim Measures Application.

28. The Respondent does not dispute that the Tribunal has *prima facie* jurisdiction in this matter.

B. Prima Facie Establishment of Case

29. It is common ground between the Parties that a party requesting interim measures must establish a *prima facie* case.
30. The Claimant asserts that it met its burden to establish *prima facie* evidence of the case.² The Claimant submits that “*at its core, Croatia’s complaint is that MOL procured the 2009 First Amendment and Gas Master Agreement by bribing former Prime Minister Sanader.*”³ The Claimant then relies on the final conviction of Mr. Sanader by the Croatian Supreme Court to meet its burden of proof on the bribery issue.⁴
31. In response, the Respondent asserts that the Claimant “*has offered no support*” that the Sanader judgment “*should be given automatic legal effect in an international arbitration.*”⁵ The Respondent’s position is that the Sanader judgment is of no relevance to the validity of the disputed agreements.
32. The Respondent criticizes the propriety of Mr. Sanader’s trial in Croatia and points to several alleged violations of due process and fair trial, on which it relies to support its proposition that the Tribunal should not give weight to the Sanader judgment.⁶
33. The Respondent submits that the Claimant’s requested Interim Measures have nothing to do with the Claimant’s core claim in this arbitration that “*the 2009 Agreement should be nullified.*”⁷
34. In that regard, the Claimant argues that “*all that must be shown at this stage is that Croatia has asserted facts that, if found to be true, would establish its basic case.*”⁸ It is the Claimant’s case that the Sanader judgment does not stand alone as evidence but adds credence to the Claimant’s other factual assertions. The

² Claimant’s Interim Measures Application, para 40.

³ Ibid.

⁴ CLA-0002, Sanader Judgment; See also, CLA-0025, Croatian Criminal Procedure Act, Art. 450 and Art. 455.

⁵ Respondent’s Opposition, para 33.

⁶ Respondent’s Opposition, para 34.

⁷ Respondent’s Opposition, para 35.

⁸ Claimant’s Reply, para 99.

Claimant denies the Respondent's allegations that its Interim Measures relief "has nothing to do" with its core case. The Claimant notes that "*an order of interim protective measures here protects Croatia's remedy of reversion of INA's composition to before the 2009 Amendment was signed.*"⁹

C. Urgency and Necessity

35. It is common ground between the Parties that one of the universally accepted criteria when it comes to granting interim measures in international arbitration is the requirement to prove both urgency and necessity.
36. The Claimant's case is that "*MOL has threatened to sabotage its investment in INA to divest itself of the only assets against which Croatia may levy a damages award*". The Claimant further contends that "*only the issuance of a TRO enjoining MOL from disposing of its shares and an interim order enjoining MOL from abusing its management control of INA will maintain the status quo between the Parties while this dispute is adjudicated.*"¹⁰
37. The Claimant relies on Professor Born's latest treatise in support of its proposition that the urgency criterion is not to be "*interpreted literally or mechanically, but instead be based upon pragmatic assessments of likelihood and risks*".¹¹ The Claimant further relies on several public announcements allegedly made by the Respondent regarding its intent to sell its shareholding in INA and shut down certain refineries. The Claimant also relies on the Respondent's refusal to commit to refraining from any such actions until after this arbitration has come to its end.¹²
38. The Respondent relies on the ICSID Case *Phoenix Action v The Czech Republic* that interim measures should be granted "*only where the actions of a [non-moving] party are capable of causing or of threatening irreparable prejudice to the rights invoked by the applicant.*"¹³

⁹ Claimant's Reply, para 102.

¹⁰ Claimant's Interim Measures Application, para 45.

¹¹ CLA-0020, Born at 2427.

¹² Claimant's Interim Measures Application, para 47.

¹³ Respondent's Opposition, para 40.

39. The Respondent does not deny that it has plans to sell INA's refineries, but it alleges that "*the future of the refineries has been under discussion since shortly after MOL assumed management control over INA*".¹⁴ The Respondent confesses that "*although the discussions have accelerated recently, it remains unclear as to when and how the issue will be resolved*."¹⁵ In that regard, the Respondent notes that "*it would be far from appropriate for the Tribunal to order the interim injunctive relief that the Government has requested*."¹⁶
40. The Respondent further argues that the Claimant is not entitled to interfere with the Respondent's shareholding in INA, and that Article 9.3 of the Shareholders' Agreement excuses it from the general undertaking not to dispose of refineries with respect to the Rijeka and the Sisak refineries, which are the subject matter of the Claimants' Interim Measures Application.¹⁷
41. The Claimant does not address the Respondent's "*exclusion*" issue in its Reply, but it alleges that the Respondent's sale of its shareholding in INA and the sale of refineries "*would have disastrous effects and would place Croatia at the mercy of imported refined products from MOL and its subsidiaries in neighboring countries*."¹⁸
42. To justify the urgency of its Interim Measures Application, the Claimant further relies on the fact that "*until June 2014, MOL had declared that its Board of Directors had authorized its Executive Board to sell its stake in INA*."¹⁹ The Claimant relies on press reports on a recent visit to Croatia of Mr. Alexei Miller, the Chairman of Gazprom, which was said to have concluded MOL's and Gazprom's negotiations relating to the sale of INA's refineries.²⁰
43. The Respondent does not deny that it may sell its shares in INA and that it may sell the Rijeka and Sisak refineries, but it argues that the Claimant has not

¹⁴ Respondent's Opposition, para 51.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Respondent's Opposition, para 52.

¹⁸ Claimant's Reply, para 107.

¹⁹ Claimant's Reply, para 113.

²⁰ CLA-0044, *Gazprom CEO Zagreb Visit Intensifies Talk of Possible MOL Exit from INA*, See News Wire, 27 July 2014.

demonstrated what harm might come to Croatia in its capacity as INA's shareholder through these processes if this in fact occurs.²¹

D. Proportionality: Balance of Prejudices

44. As with the other interim measures criteria, it is common ground between the Parties that the requested interim measures must be proportionate on the balance of prejudices.
45. The Claimant's case is that should the Tribunal grant the Claimant's Interim Measures Application, "*MOL would not be disproportionately injured*" and that "*the measure would simply preserve the relative status quo, leaving the Parties neither better nor worse off than before.*"²² At the same time, the Claimant alleges that were the Respondent to dispose of its shares in INA, "*Croatia would be hindered from recovering damages from MOL within Croatia, recognizing that MOL has no other assets in Croatia and that MOL would strenuously resist foreign enforcement actions.*"²³
46. The Respondent's case with respect to proportionality is that "*in asking the Tribunal to freeze MOL's shareholding in INA, the Government is asking the Tribunal to provide it with a right that it does not have*".²⁴ The Respondent submits that the Claimant will have to enforce any possible damages award outside of Croatia *only* if MOL refuses to comply with the award voluntarily and if MOL does indeed sell its shares in INA – two highly hypothetical events which do not justify the Tribunal's granting of the Claimant's Interim Measures Application.²⁵
47. By contrast, the Respondent asserts that, should the Tribunal grant the Claimant's Interim Measures Application, "*the harm to MOL from commercial, financial and reputational standpoints far outweighs any alleged harm to the Government associated with having to seek enforcement of an eventual (and*

²¹ Respondent's Rejoinder, paras 76-80.

²² Claimant's Interim Measures Application, para 57.

²³ Ibid, para 58.

²⁴ Respondent's Opposition, para 46.

²⁵ Ibid.

highly unlikely) award outside of Croatia's borders" as it will severely affect its share price.²⁶

48. With respect to the sale of the Rijeka and Sisak refineries, the Claimant counters the Respondent's contractual argument by saying that the Shareholders Agreement did not allow the Respondent to merely close the refineries at a loss, which the Respondent is allegedly planning to do.²⁷

III. Tribunal's Analysis and decision

49. As with all applications for interim relief, the Tribunal considers it prudent to say no more than absolutely necessary concerning the merits of the dispute.
50. The Tribunal is quite satisfied that it has *prima facie* jurisdiction to hear the Claimant's Interim Measures Application, and the contrary has not been contended.
51. The Tribunal is also satisfied that the Claimant has discharged the burden of stating a *prima facie* case on the merits.
52. As to urgency, whilst it is true that the issue of the sale of MOL's shares in INA has been discussed for some months, the Tribunal was told that MOL is in the process of setting up a virtual data room in respect of the sale of its shares in INA.
53. It is true that the Claimant could have sought this interim relief somewhat sooner, but the Tribunal is not satisfied that this short period of delay should disentitle the Claimant to the relief they are seeking.
54. The Tribunal has considered the relief sought with some care and has been assisted in its consideration by the helpful written and oral submissions of both teams of counsel.
55. The Tribunal is reluctant to make orders that unduly interfere with the day-to-day running of a company, let alone a high profile public company like INA.

²⁶ Ibid, para 47.

²⁷ Claimant's Reply, para 128.

56. On the other hand, the Tribunal is concerned to ensure that MOL runs INA with INA's best commercial interests in mind. Mr. Ali on behalf of MOL readily agreed that such was MOL's intention.
57. Further, the Tribunal is concerned that there is a danger that the ultimate relief sought by the Claimant, if successful, may be rendered partly nugatory by the sale of MOL's shares prior to any award in this matter.
58. Accordingly, the Tribunal accepts MOL's statement that it will conduct its affairs in INA in accordance with INA's best commercial interests, and the Tribunal will so order.
59. The Tribunal is not prepared to restrict the sale of MOL's shares in INA, nor is it prepared to prohibit the closure of refineries and the laying off of staff, both of which are quintessentially management decisions which have to be taken in the best interests of INA.
60. However, in order to maintain the effectiveness of remedies sought to be awarded, the Tribunal considers it fair and expedient to make the following order below which it hopes will achieve some protection for the Claimant.

IV. Dispositif

61. Having reviewed the Parties' written arguments with respect to the Claimant's Interim Measures Application and having heard the Parties through counsel at a hearing in Paris on 11 August 2014, the Tribunal therefore **O R D E R S** and **D I R E C T S** as follows:
 - (i) That MOL must so exercise its various rights including relating to its shares in INA so as to ensure at all times that it acts in the best commercial interests of INA;
 - (ii) That MOL ensure that in the event of any sale of its shareholding in INA it will procure that the purchaser undertake that as a shareholder of INA it will stand in the shoes of MOL and therefore bear the consequence of the present Tribunal's rulings with respect to the validity of agreements relevant to shareholder relations within INA.

- (iii) That the Tribunal remains seized with respect to any issue of compliance with the present decision.

- (iv) Costs reserved.

Place of Arbitration: Geneva, Switzerland



Mr. Neil Kaplan CBE QC SBS
(Presiding Arbitrator)

On behalf of the Tribunal