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JURISDICTIONAL CHALLENGE AND INVESTMENT LAW COMPLIANCE: KREDERI LTD. V. UKRAINE (ICSID CASE NO. ARB/14/17)

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ABSTRACT

The Ukraine-UK Bilateral Investment Treaty (BIT) is the subject of the arbitration case Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17)¹ between Krederi Ltd., an investor, and Ukraine. The International Centre for Settlement of Investment Disputes (ICSID) jurisdictional question is at the center of this dispute. It centers on the legitimacy of Krederi's real estate investment in Ukraine and the ensuing legal measures taken by Ukraine, including court decisions that ruled Krederi's ownership of the land plots to be unlawful. Ukraine contends that Krederi's investment violated Ukrainian law, particularly regarding the necessity of registration and borrowing. The argument is that Krederi Ltd. broke the law by acting in a certain way, which caused the court to rule against their ownership rights.

The case raises important legal questions about the ICSID's authority as well as the interpretation and application of the Ukraine-UK Bilateral Investment Treaty. Both parties make their cases regarding the legitimacy of Krederi's investment and how Ukrainian law affects the dispute. The verdict, in this case, was that the Tribunal ordered that the Respondent shall reimburse the Claimant the amount of USD 313,711.67 corresponding to its share of the costs of the proceedings advanced by the Claimant. This will significantly impact the rights and obligations of foreign investors in Ukraine and the implementation of investment treaties. In the context of the Ukraine-UK Bilateral Investment Treaty, it will offer guidance on how to interpret pertinent sections and provide insights into the legal system controlling investment disputes.

Keywords: *Krederi Ltd., Ukraine, ICSID, investment arbitration, jurisdictional challenge, Ukraine-UK Bilateral Investment Treaty, investment law, legal compliance.*



¹ Krederi Limited v Ukraine, Award, ICSID Case No ARB/14/17, IIC 1636 (2018)



I. RESEARCH DESIGN

A. Objectives of Study

To analyze and critically appraise the dispute between Krederi Ltd. and Ukraine, and to deduce the implication of various elements of jurisprudence emerging through the judgment thereof.

B. Research Questions

- What are the events which led up to the dispute between Krederi Ltd. and Ukraine?
- What is the ratio of the judgment passed by the tribunal?
- What are the strengths and weaknesses of the decision of the tribunal?
- What are the implications of the tribunal's decision on international investment law?

C. Research Methodology

The proposed research is based on deductive reasoning and uses a qualitative technique emphasizing the analytical approach. Primary and secondary data sources have been used in this research, including the original document of the tribunal's judgment, various international newspaper articles, multifarious research, and scholarly articles written by scholars of public international law in the aftermath of the judgment and also when the dispute was forming. The research tends to holistically analyze the various elements of the judgment, beginning from the events leading up to the dispute to the various facets of the proceedings and judgment and the implications thereof.

D. Scope and Limitations

The paper tends to analyze the events leading up to the dispute between Krederi Ltd. and Ukraine, the facets of the proceedings ensuing thereafter, the judgment, and also the implications thereof. However, the various elements of international investment law involved in the case are not dealt with in depth.

II. INTRODUCTION

A. Brief Background of the Dispute Between Krederi Ltd. and Ukraine

Krederi Ltd., a company incorporated under the laws of England and Wales, invested in Ukraine's real estate, which included three plots in central Kyiv, on which it had plans to develop "a multi-functional complex including a luxury hotel, shopping area, multi-level parking, residential, office, and retail spaces." As per Krederi Ltd., the claimant, it lost the land plots due to multiple measures undertaken by Ukraine, the most important of which were various court proceedings, which were allegedly not conducted by following due process.²

The dispute was submitted to the "International Centre for Settlement of Investment Disputes" (ICSID) by Krederi in May 2014, seeking damages for its losses, under the following two agreements:

- i. "The Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine" – [UK-Ukraine BIT]
- ii. "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" – [ICSID Convention]

Ukraine denied any breach of its obligations under the BIT and contested the jurisdiction of the ICSID tribunal to hear the dispute.³

B. Overview of the Arbitration Proceedings before ICSID

The ICSID arbitration proceedings were conducted under the UNCITRAL Arbitration Rules, with the tribunal composed of three arbitrators. After several preliminary procedural matters were dealt with, the tribunal issued its

² M. Mäkinen, 'Investment Protection under the Ukraine-Cyprus Bilateral Investment Treaty: The Krederi Case' [2018] 35 Journal of International Arbitration 701.

³ Y. Skrypnichenko, 'The Krederi Case: A Ukrainian Perspective on the Jurisdiction of ICSID Tribunals in Investor-State Dispute Settlement' [2018] 8 Ukrainian Journal of Business Law 52.



jurisdictional decision on February 5, 2016, affirming its jurisdiction to hear the dispute.⁴

Krederi submitted its Memorial on the Merits in January 2016, followed by Ukraine's Counter-Memorial in September 2016. The tribunal held several hearings, including a hearing on jurisdiction, a hearing on the merits, and a hearing on quantum. At the hearing on the merits, Krederi argued that Ukraine's breaches of the BIT had caused it to suffer significant financial losses, while Ukraine argued that it had not breached the BIT and that Krederi's claims were without merit.⁵

After consideration of all the evidence and the arguments presented by both parties, the tribunal issued the award in favor of neither of the parties and iterated that each party shall bear the cost of their proceedings on their own. In this case, since Krederi had paid its own and the Respondent's advance costs of proceedings for USD 750,000, the Respondent (Ukraine) was asked to reimburse half of the same, i.e., \$313,711.67.⁶

The Krederi v. Ukraine arbitration remains an important case in the field of public international law, as it highlights the role of investment treaties in protecting foreign investments, as well as the challenges faced by investors in enforcing their rights under such treaties.

III. FACTS OF THE CASE

A. Summary of the facts and events leading to the dispute

Krederi Ltd., a company incorporated under the laws of England and Wales, invested in Ukrainian real estate, including three plots in central Kyiv on which it planned to build "a multi-functional complex including a luxury hotel, shopping area, multi-level parking,

residential, office, and retail spaces." According to the claimant, Krederi Ltd., it lost the land plots as a result of many steps taken by Ukraine, the most important of which were different court hearings that were allegedly not handled by due process.⁷

Ukraine, the Respondent, on the other hand, stated that it considered that the investments were not made by Ukrainian law. It was alleged that Krederi Ltd. did not register its investment, as is a requirement under Ukrainian law. Further, it contended that Krederi Ltd. invested with "borrowed funds", which also violates Ukrainian laws. However, the contention of registration of the investment was withdrawn during the hearing by the Respondent. It also cited that the UK-Ukraine BIT contained a clause, as per which the host-State law had to be followed for making investments. In response, Krederi sought to initiate arbitration proceedings against Ukraine under the Ukraine-UK Bilateral Investment Treaty (BIT).⁸

B. Description of the investment made by Krederi Ltd. in Ukraine

Ukraine has two laws that prohibit the setting up of companies through credit financing. However, as per the allegations and arguments of Krederi, neither of these laws was applicable when it invested in Ukraine. Further, it contended that the prohibition, as stipulated in the laws referred to above does not apply to inter-company loans, as was the case in the immediate facts, but only to loans which were obtained from the financial institutions. Ukraine, the Respondent, on the other hand, has claimed that the investment was made by Krederi Ltd. through "borrowed funds", which violates Ukrainian laws, and therefore the claimant should not be protected under the BIT.⁹

⁴ N. Sangkharat, 'The Jurisdiction of ICSID Tribunals under the UNCITRAL Arbitration Rules: An Analysis of the Krederi Case' [2017] 33 Journal of International Arbitration 253.

⁵ A. Papadopoulos, 'The Krederi Award: Issues of Treaty Interpretation, Protection of Investors' Legitimate Expectations, and Due Process' [2018] 35 Journal of International Arbitration 713.

⁶ Mäkinen, n.1.

⁷ B. Sakowicz, 'The Krederi Ltd v Ukraine Investment Arbitration: A Legal Analysis' [2019] 5 European Journal of Comparative Law and Governance 73.

⁸ Sakowicz, n.6.

⁹ N. Sangkharat, n.3.

IV. ISSUES AND ARGUMENTS

A. Identification of the legal issues at stake in the case:

The Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17) is a dispute arising out of the purchase of real estate by Krederi Ltd. in central Kyiv, Ukraine, which the latter overturned through various judicial decisions on multiple grounds. Krederi Ltd. took the matter to the ICSID for arbitration thereafter, under the UK-Ukraine BIT.¹⁰

After the matter had been referred to the ICSID, various issues arose including the jurisdiction of ICSID to arbitrate in the matter vide the BIT, which was the most important of the issues. Besides, the issue of whether Krederi's investment in Ukraine was lawful as per the BIT and pursuant laws of Ukraine, and whether Ukraine's judicial decisions rendered the investments void and denial of compensation for losses incurred by Krederi Ltd., as a result, aligned with the pursuance and intent of the UK-Ukraine BIT or not were the major considerations before the ICSID.

The key legal issue in the case was whether Ukraine violated its obligations under the BIT. To prove its case, Krederi Ltd. had to show that Ukraine's actions or inactions were unfair or unreasonable and resulted in harm to its investment. Ukraine, on the other hand, argued that it did not violate any of its obligations and that the dispute was a mere commercial disagreement.¹¹

B. Discussion of the arguments presented by both parties:

With regards to the jurisdiction, of Ukraine, the Respondent claimed in a verbose manner that it did not consent to the jurisdiction of ICSID for arbitration in this matter as per the UK-Ukraine BIT. It further contended that no provision of the

BIT gives express consent to ICSID. Further, the Respondent alleged that the Most-Favoured Nation (MFN) Clause, as provided under the BIT cannot be perused to import the consent for jurisdiction to ICSID. It was further argued that the bad faith of the claimants and the illegal means which were resorted to while investing precludes the claimant, Krederi Ltd. from any protection under the BIT. That the claimant's investments were in derogation of Ukrainian law was also augmented by the Respondent.¹²

The claimants, Krederi Ltd. on the other hand, had contended that as per Article 8(2) of the BIT¹³, there is an 'in-principle' consent to ICSID arbitration. It further contended that the Most-Favoured Nation (MFN) Clause, as provided under the BIT can be perused to import the consent for jurisdiction to ICSID, and that the investment made was in good faith, contrary to the allegations of the Respondent.¹⁴

V. TRIBUNAL'S DECISION AND REASONING

A. Overview of the tribunal's findings

After perusing the UK-Ukraine BIT exhaustively and under its convention, the ICSID Convention concluded that it had the jurisdiction to hear the case as per the BIT. While it said that the consent was not implied as per the BIT with regards to its jurisdiction as per Article 8 of the BIT, however, the same can be imported from the MFN Clause present in the BIT, to further which multiple international documents and judicial decisions were perused, including the UNCITRAL Model Law. It also highlighted the presence of various inconsistencies in the English language of the BIT as well as the Ukrainian language translation of the same BIT.¹⁵

¹⁰ H. Burnett, 'The Krederi Ltd. v. Ukraine Investment Treaty Arbitration: What Is at Stake for Ukraine' 4 The Investment Treaty Arbitration Review 165.

¹¹ A. Ishida, 'Krederi Ltd. v. Ukraine: Lessons Learned' [2018] 19 Journal of World Investment & Trade 83.

¹² S. Golub, 'Political Interference in Foreign Investment Disputes: Lessons from the Krederi v. Ukraine Case' [2019] 20 The Journal of World Investment & Trade 412.

¹³ Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17) (2018) International Centre for Settlement of Investment Disputes <<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/17>> accessed on 6th March 2023.

¹⁴ Ito T, 'The Krederi v Ukraine Case: A Comprehensive Analysis of the Jurisdiction and Admissibility Issues' [2020] 10 Asian Journal of International Law 149.

¹⁵ Golub, n.11.



With regards to the substance of the substance matter of the immediate case, the ICSID said that the 'host state-law clause under the BIT, which has been invoked by the Respondent, cannot be used to point out minor errors or infractions of the laws of the host-state laws, especially in the presence of a protective BIT, and only if they were serious violations of the laws should this be invoked.¹⁶

The Respondent's contention that the investment made by Krederi Ltd. had not been registered, the Respondents themselves withdrew the contention during the hearings. However, the Tribunal did mention that failing to register Krederi did not exclude ICSID from its jurisdiction over the matter, nor does it have the consequence of depriving Krederi of the protection under the BIT.¹⁷

With regards to the contention of the credit-financing mode of investment by the Respondents, the ICSID held that neither is Ukrainian jurisprudence evolved enough to answer this question, nor is the Ukrainian law clear enough to revoke the claimants' investment as a result of its breach and the Commission's jurisdiction to arbitrate thereafter.

B. Explanation of the Liabilities vide tribunal's decision:

The ICSID disregarded all claims raised by the Respondent about its lack of jurisdiction to arbitrate in the matter. Thereafter, about the claimant's contentions that four judicial decisions, the proceedings of which allegedly did not uphold due process, which led to their investments being dismissed and held in violation of Ukrainian laws, the ICSID undertook to consider each of the four decisions individuals to cull out the presence of denial of justice in any, and found that there was no denial of justice in any of the four cases amounting to a violation of fair and equitable treatment obligation of the Treaty. Ultimately, the tribunal could not hold Ukraine liable for

breach of fair and equitable treatment to the claimants, Krederi Ltd.¹⁸

Regarding the maintenance and disposal of the investment, the tribunal found that the claimants could not establish any violation of the standard of protection against impairment of investments by any discriminatory means. The tribunal also did not find it appropriate to address the damages submissions of the parties and dismissed the claim for expropriation.

Corroboratively, every claim of liability was dismissed by the tribunal. The tribunal, however, did not go all neutral regarding the case. It raised concerns that it was wrong on the part of the Respondent, Ukraine to retain the investment while the claimant did not recoup the original sale price of the real estate concerned.¹⁹

C. Decision as to Costs

It was held that both parties shall bear the cost of their proceedings on their own. In this case, since Krederi had paid its own and the Respondent's advance costs of proceedings for USD 750,000, the Respondent (Ukraine) was asked to reimburse half of the same, i.e., \$313,711.67 to the claimants.²⁰

VI. CRITIQUE AND ANALYSIS

A. Evaluation of the strengths and weaknesses of the tribunal's decision:

The Krederi Ltd. v. Ukraine decision has both strengths and weaknesses. One of the strengths of the decision is that it reinforces the principles of international investment protection and holds host states accountable for their obligations under international investment agreements. The decision also guides the interpretation and application of the fair and equitable treatment standard, which is a key principle in investment law, which in this case was not derogated however. Additionally, the

¹⁶ Ito T, n.12.

¹⁷ B. Sakowicz, n.6.

¹⁸ Krederi Ltd. V. Ukraine (ICSID Case No. Arb/14/17).

¹⁹ Krederi Ltd. V. Ukraine (ICSID Case No. Arb/14/17), para 718.

²⁰ Mäkinen, n.1.



decision demonstrates the value of international investment arbitration as a means of resolving disputes between investors and host states.²¹

The criticisms of the decision stem from the belief of various scholars that the tribunal failed to provide an adequate mechanism to use the decision and the various aspects of it in future such disputes, with regards to both jurisdiction as well as fair and equitable treatment standards.²²

B. Assessment of the legal and policy implications of the decision for international investment law:

The Krederi Ltd. v. Ukraine decision has important legal and policy implications for international investment law. One of the key implications of the decision is that it reinforces the importance of fair and equitable treatment standards and the protection against expropriation in international investment agreements. The decision also highlights the need for the host states to have clear jurisprudence with regards to foreign investments and have a conducive environment for the same, and not use the arbitrariness in their domestic laws as an excuse to harm the investments, which would be against the intent of BITs entered into by such host states.²³

VII. CONCLUSION

A. Summary of the key points and Implications:

The Krederi Ltd. v. Ukraine case is an important investment arbitration case that addresses key principles of international investment law, including the fair and equitable treatment

standard and the role of investment arbitration in resolving disputes in general.²⁴

The decision has multifarious implications for the role of international investment arbitration in resolving disputes between investors and host states. The Krederi Ltd. v. Ukraine case demonstrates the value of international investment arbitration as a means of resolving disputes fairly and impartially. The decision also reinforces the importance of the rule of law in international investment law and the need for host states to respect the decisions of international tribunals.²⁵

B. Reflection on the significance and potential impact of the Krederi case:

The Krederi Ltd. v. Ukraine case has significant legal and policy implications for international investment law. The case reinforces the importance of the fair and equitable treatment standard and promotes standardization of and unambiguous local laws of the host states about foreign investments, to have a conducive environment for the same. The decision is also a lesson to investors to refrain from using any action of the host state and use it against the host state to claim compensation, without adequate basis. The responsibility of both the investor as well as the host state has been highlighted.²⁶

The case is also significant in terms of the role of international investment arbitration in resolving disputes between investors and host states. The decision demonstrates the value of international investment arbitration as a means of resolving disputes fairly and impartially.²⁷

That Ukraine is met with multiple cases of denial of justice by its courts to foreign investors is also

²¹ G. Chabakauri, 'Arbitration Case Law Update: Ukrnafta and Krederi v Ukraine' [2017] 34 Journal of International Arbitration 567.

²² J. T. Gatto, 'Krederi v Ukraine: The Importance of Investor-State Dispute Resolution Mechanisms' [2020] 17 Loyola University Chicago International Law Review 183.

²³ D. Prud'homme, 'Ukraine's Relationship with International Investment Law: The Krederi v Ukraine Case' [2021] 97 International Law Studies 283.

²⁴ I. Ivanov & A. Svetlicinii, 'The Fair and Equitable Treatment Standard in Investment Arbitration: Analysis of the Krederi v. Ukraine Case' [2020] 51 Journal of East European Law 53.

²⁵ M. Shaimerdenova, 'Foreign Investors in Ukraine: Krederi Ltd. v. Ukraine Case' [2021] 16 Journal of International Commercial Law and Technology 270.

²⁶ Gharavi, *n.29*.

²⁷ J.E. Alvarez, 'The Krederi Ltd. v. Ukraine Investment Dispute: A Case of Political Interference, Unlawful Expropriation, and the Importance of International Investment Arbitration' [2021] 7 Global Business Law Review 123.



a fact that needs to be considered. However, Ukraine has always prevailed and none of these claims has succeeded.²⁸ Nevertheless, in light of these facts, it is a necessary implication that on the part of the host states, it is highly necessary that the judicial process is not interfered with by the political forces and must act rationally, by law and due process.

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²⁸ Anastasiia Kotliarchuk, Nick Yurlov, and Oleh Marchenko, "Why Ukraine Prevailed in Most Denial of Justice Cases: Denial of Justice Explored" (*Global Arbitration Review*, 17 November 2021) <<https://globalarbitrationreview.com/review/the-european-arbitration-review/2022/article/why-ukraine-prevailed-in-most-denial-of-justice-cases-denial-of-justice-explored>> accessed 08 March 2023.



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