

INTRODUCTORY NOTE TO DAN CAKE (PORTUGAL) S.A. V. HUNGARY (ICSID)
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[August 24, 2015]
+ Cite as 55 ILM 496 (2016)+

Introduction

In *Dan Cake v. Hungary*, an arbitral tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) issued a rare finding of denial of justice in its adjudication of the claims by Portuguese investor Dan Cake, alleging that the Hungarian court's actions during the liquidation proceedings of its subsidiary were a violation of the fair and equitable treatment provision of the Hungary-Portugal Bilateral Investment Treaty (BIT). The decision adds an example of the factual circumstances that lead to a finding of denial of justice and reaffirms the stringent requirements that need to be satisfied in order to succeed on such a claim.

Background

In 1996, Dan Cake, a Portuguese company in the business of manufacturing cakes, decided to enter the Eastern European market and acquired the majority of shares in a Hungarian company, which it renamed Danesita. After the business did not develop as successfully as anticipated, Danesita was forced to downsize its operation and prepare a re-launch in 2006. Over the course of its involvement with Danesita, Dan Cake lent considerable sums to its subsidiary, which also depended on multiple bank loans to keep operating. After Danesita failed to repay its debt to one of its providers, that supplier and several other creditors initiated bankruptcy proceedings, which led to a court order declaring the company insolvent in January 2007. By November 2007, the liquidation order had become final and was published in the Companies Gazette.

In order to avoid the sale of their assets, Dan Cake and Danesita attempted to negotiate an agreement with Danesita's creditors, which was the only way to avoid the sale of the debtor company's (Danesita's) assets. Under Hungarian law, the debtor company has the option to petition the bankruptcy court to convene a composition hearing, at which the creditors have the opportunity to vote on an agreement with the debtor. If a qualified majority votes in favor of the composition agreement, and the court approves it, the sale of assets may be avoided. Without such a composition hearing, the liquidator is required to proceed with the sale of the assets within 120 days from the date of the liquidation order.

On April 10, 2008, Danesita filed its request for the convening of a composition hearing with the Metropolitan Court of Budapest, sitting as bankruptcy court in this case, and attached all three documents required by the Hungarian Bankruptcy Act: a composition proposal, a list of creditors compiled by the liquidator, and a program for the restoration of solvency. On April 22, 2008, the Court issued an order, sent to both Danesita and the liquidator, refusing the request for a composition hearing and ruling that Danesita's submission "in its current form and with its current content is not suitable to be served on the creditors and to convene a composition hearing."¹ The order contained a strongly worded reminder to the liquidator referring to his legal duty to proceed with the sale within 120 days from publication of the liquidation proceedings. The Court further ordered Danesita to make several supplementary filings and listed seven requirements that needed to be fulfilled before a composition agreement could be convened. No appeal was possible against this decision. On May 29, 2008, the liquidator announced the public tender for the sale of the factory, which was eventually sold in 2008.

Denial of Justice Doctrine—Why is it Rarely Successful?

The doctrine of denial of justice has developed as a customary international law norm, which requires states to maintain their judicial systems in compliance with international minimum standards. The focus is on states' legal systems in their entirety, which must include procedures for the correction of errors. For this reason, the exhaustion of local remedies is a material element needed to establish a denial of justice claim. The doctrine encompasses several notions of international due process, such as the recognition of *res judicata*, compliance with notice and jurisdiction requirements, an independent and impartial judiciary, as well as the absence of bribery and fraud. Thus, it sets out a stringent standard, which is difficult to satisfy precisely because it requires states to meet only a *minimum* international standard.

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In addition, arbitral tribunals do not serve as courts of appeal, reviewing domestic court decisions for errors.² The mere fact that a tribunal believes it would have applied the domestic law differently is not enough to establish denial of justice.³ Rather, tribunals have found various formulations describing denial of justice, including: a “clearly improper and discreditable” decision,⁴ “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety,”⁵ “administer[ing] justice in a seriously inadequate way,”⁶ “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety,”⁷ and a “clear and malicious misapplication of the law.”⁸ As one tribunal describes it: “The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind . . . that international tribunals are not courts of appeal.”⁹

Finally, the adjudication of a denial of justice claim “tends to be a matter of considerable sensitivity.”¹⁰ Tribunals are aware of the national sensitivities that come into play when an international tribunal reviews local courts for compliance with domestic law: “There is something exceptionally emotive about the challenges to national justice. They seem to strike at the heart of national pride.”¹¹ Coupled with the deferential standard of review, this reality contributes to the challenges of establishing a denial of justice claim.

The Tribunal’s Findings in *Dan Cake v. Hungary*

Addressing the paragraph in the Court’s order that reminded the liquidator of his duty to sell Danesita’s assets, the Tribunal noted that “[t]he presence in a decision, the subject of which was the convening of a composition hearing, of a paragraph strongly insisting on the liquidator’s duty to sell the debtor’s assets within 120 days of the date of publication of the liquidation proceedings, is surprising to say the least.”¹² The Tribunal acknowledged that it was “impossible to tell” whether the Court had in fact intended to ensure the liquidator would proceed with the sale as soon as possible, but found that “the *effect* of the decision was that the liquidator published without delay” tender for the sale of the assets.¹³

The Tribunal highlighted that the convening of the composition hearing was the only way for Danesita to avoid the sale of its assets and for Dan Cake to avoid the loss of its investment in Hungary. It stressed that time had been of the essence, noting that according to Hungarian bankruptcy law, the liquidator was required to start the public sale of the assets within 120 days from the publication of the order, whereas once a composition hearing has been convened, he must abstain from selling the assets.¹⁴ The Tribunal also noted that the Hungarian Bankruptcy Act grants a right to the debtor to request a composition hearing, which the court is required to convene within sixty days as long as the request is submitted with the documentation required by law, pointing out that in the present case “[i]t is not disputed that the documents required by the Bankruptcy Act were submitted with the request.”¹⁵ Thus, the analysis turned to whether the Court had the power to order additional documents.¹⁶ Examining evidence, including a decision from a Hungarian court and commentaries by legal writers, the Tribunal concluded that “there is some authority for the proposition that a bankruptcy court has the power to require the submission of documents or information not mentioned in the Bankruptcy Act, provided they are ‘necessary.’”¹⁷ The Tribunal noted that because it is not a court of appeal, it was not its task “to determine whether it agrees, or disagrees, with the Metropolitan Court of Budapest as to whether the items required were indeed necessary.”¹⁸ It then described the test for whether the order was unfair or inequitable: “[I]f . . . some of the requirements were *obviously unnecessary* or *impossible to satisfy*, or in *breach of a fundamental right*, having in mind . . . that unnecessarily postponing the convening could but ruin the possibility of a successful hearing, thereby dooming the investment to disappear (emphasis in original).”¹⁹

The Tribunal found that the Court’s refusal to convene a composition hearing in the sixty-day period required by law destroyed Danesita’s chance to avoid the sale of its assets and Dan Cake’s chance to save its investment in Hungary.²⁰ Addressing the seven requirements imposed by the Court’s order one by one, the Tribunal found “all of [them] unnecessary”; “two . . . in direct violation of Dan Cake’s creditor rights; . . . and at least one [that] was impossible to satisfy within a reasonable time.”²¹ It found that the order was given “in flagrant violation of the Bankruptcy Act” and noted that, taken together with the passage reminding the liquidator of his duty to sell Danesita’s assets, “is in the Tribunal’s considered view a manifest sign that the Court simply did not *want*, for whatever reason, to do what was mandatory (emphasis in original).”²²

The Tribunal found that “Danesita had the right to the convening of a composition hearing,” and that “the Metropolitan Court of Budapest, on its part, had the obligation to convene the composition hearing.”²³ The Hungarian Court refused to order said hearing, “ordering instead Danesita to submit a number of documents which were not required by law and were obviously unnecessary.”²⁴ Thus, the Tribunal found, it “rendered inevitable the sale of Danesita’s assets and its demise as a legal person.”²⁵ The Tribunal pointed towards several definitions of denial of justice, quoted above, and stressed that they “perfectly fit the Metropolitan Court of Budapest’s 22 April 2008 decision.”²⁶ It further found that there had not been any reasonably available remedy against the decision, and thus ruled that “in the circumstances of this case, the breakdown must be treated as ‘systemic.’”²⁷

Conclusion

Through this rare finding of denial of justice, the Tribunal has reinforced some of the elements that need to be proven in order to succeed on the claim. Because there was no further recourse available, the “breakdown” of the judicial system was treated as “systemic.” This finding complies with well-established precedent that exhaustion of reasonably available local remedies is a material element of denial of justice. Additionally, the Tribunal relies on established formulations of the doctrine, while stressing that tribunals do not sit as courts of appeal when reviewing domestic judicial conduct.

ENDNOTES

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| <p>1 Dan Cake (Portugal) S.A. v. Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, ¶ 99 (Aug. 25, 2015) (quoting the April 22, 2008, order from the Budapest Metropolitan Court in full).</p> <p>2 See <i>Azinian v. Mexico</i>, ICSID Case No. ARB(AF)/97/2, Award, ¶ 99 (Nov. 1, 1999) (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction.”).</p> <p>3 JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 89 (2005).</p> <p>4 <i>Mondev International Ltd. v. USA</i>, ICSID Case No. ARB/01/7, Award, ¶ 127 (Oct. 11, 2002).</p> <p>5 <i>Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)</i>, Judgment, 1989 I.C.J. Rep. 15, ¶ 128 (July 20).</p> <p>6 <i>Azinian</i>, ICSID Case No. ARB(AF)/97/2, ¶ 102.</p> <p>7 <i>Loewen v. United States</i>, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003).</p> <p>8 <i>Azinian</i>, <i>supra</i> note 2, ¶ 103.</p> <p>9 <i>Mondev</i>, <i>supra</i> note 4, ¶ 127.</p> <p>10 PAULSSON, <i>supra</i> note 3, at 228.</p> <p>11 <i>Id.</i></p> | <p>12 <i>Dan Cake (Portugal) S.A. v. Hungary</i>, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, ¶ 103 (Aug. 25, 2015).</p> <p>13 <i>Id.</i> ¶¶ 104–05.</p> <p>14 <i>Id.</i> ¶ 92(b).</p> <p>15 <i>Id.</i> ¶¶ 94, 98. See also cite to legal commentary at ¶ 96, noting that “[i]t is the duty of the court to schedule the settlement (composition) hearing within 60 days.”</p> <p>16 <i>Id.</i> ¶¶ 109–18.</p> <p>17 <i>Id.</i> ¶ 113.</p> <p>18 <i>Id.</i> ¶ 117.</p> <p>19 <i>Id.</i></p> <p>20 <i>See id.</i> ¶ 142.</p> <p>21 <i>Id.</i></p> <p>22 <i>Id.</i></p> <p>23 <i>Id.</i> ¶ 145.</p> <p>24 <i>Id.</i></p> <p>25 <i>Id.</i></p> <p>26 <i>Id.</i> ¶ 146.</p> <p>27 <i>Id.</i> ¶ 154.</p> |
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DAN CAKE (PORTUGAL) S.A. V. HUNGARY (ICSID)*

[August 24, 2015]

+ Cite as 55 ILM 499 (2016)+

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceedings between

DAN CAKE (PORTUGAL) S.A.

(Claimant)

and

HUNGARY

(Respondent)

ICSID Case No. ARB/12/9

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal

Professor Pierre Mayer

Professor Jan Paulsson

Mr. Toby Landau QC

Secretary of the Tribunal

Ms. Aïssatou Diop

Date of dispatch to the Parties: August 24, 2015

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REPRESENTATION OF THE PARTIES

Representing Dan Cake (Portugal) S.A.

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Mr. Jorge Bastos Leitão
Andrade de Matos & Associados
Lisboa, Portugal

Representing Hungary

Mr. Eric Ordway
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and

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Ms. Marguerite Walter (*until March 2015*)
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and

Mr. László Nagy
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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March, 1965
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID or the Centre	International Centre for Settlement of Investment Disputes
BIT	Agreement Between the Portuguese Republic and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments
Request	Request for Arbitration
Cl. Mem.	Claimant's Memorial, 1 July, 2013
Resp. C-Mem.	Respondent's Counter-Memorial, 25 Nov. 2013
Cl. Rep.	Claimant's Reply, 24 Mar. 2014
Resp. Rej.	Respondent's Rejoinder, 25 June 2014
CE	Claimant's Exhibit
RE	Respondent's Exhibit
CLA	Claimant's Legal Authority
RLA	Respondent's Legal
Authority WS	Witness Statement
Amended Tr.	Amended Hearing Transcript

DRAMATIS PERSONAE

Ralf Beckmann	Managing Director of Aldente GmbH
Carlos Custódio	Held managerial functions at both Dan Cake and Danesita. Joined Dan Cake in October 2009 and left the company in 2011.
Patrique Fernandes	Claimant's expert
Kissné Mária Hornyák	Worked at MKB Bank until 2009. Became head of Work Out Division and supervisor of Katalin Ott in January 2008.
Kantilal Jamnadas	Managing Director of Dan Cake
Gabór Juhaz	Partner at Bogsch and Partners, legal representative of Dan Cake and Danesita in the liquidation proceedings
Peter Kindler	Respondent's expert
Katalin Ott	Worked at MKB Bank between 2006 and 2009 as deputy head of Work Out Division, responsible for day-to-day collection management in the Danesita liquidation matter.

Csongor Palotás	Associate at Bogsch and Partners, legal representative of Dan Cake and Danesita in the liquidation proceedings
Gyula Sóvágó	Danesita's liquidator
Henrik Thulesen	Managing Director of Royal Biscuit Nordic A/S
Iacube Vali	Held various positions in Dan Cake from 1979 to 1997. Returned to the company from September 2002 to November 2006 as Exports Director and Business Manager for the Hungarian operation.

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement Between the Republic of Portugal and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments (the “BIT” or “Treaty”), which entered into force on 8 October 1997, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “ICSID Convention”).

2. In 1996, the Portuguese company Dan Cake acquired a majority of the shares in a Hungarian company, later renamed Danesita, whose business consists in supplying biscuits and cookies to Eastern European, Southern European, and Scandinavian countries. In 2006, Danesita's creditors pursued the company for unpaid debts, and the liquidation of the company was ordered. With the help of Dan Cake, Danesita reached agreements with various creditors to settle its debts, and was in the process of concluding agreements with other creditors, including MKB Bank, whose loan was secured by a lien. Danesita requested that the Metropolitan Court of Budapest convene a “composition hearing,” during which it hoped that its creditors would vote in its favour. The Metropolitan Court of Budapest, however, instead ordered it to satisfy several conditions. Danesita did not satisfy these conditions. Shortly thereafter, the liquidator announced the sale of Danesita's factory. Dan Cake thus lost its investment.

3. Dan Cake claims that Hungary violated the BIT's provisions on fair and equitable treatment, full protection and security, arbitrary and discriminatory measures impairing investment, and expropriation without compensation. Dan Cake claims € 47,869,000 in damages, plus pre- and post-award interest.

II. THE PARTIES

4. Claimant is Dan Cake (Portugal) S.A. and is hereinafter referred to as “Dan Cake” or as “Claimant.” Claimant is a company incorporated under the laws of Portugal.

5. Claimant is represented by Messrs. António Andrade de Matos and Jorge Bastos Leitão of Andrade de Matos & Associados, Lisbon, Portugal.

6. Respondent is Hungary and is hereinafter referred to as such or as “Respondent.” Respondent is represented by the law firm Weil, Gotshal & Manges LLP, in particular Messrs. Eric Ordway (New York, U.S.A.), Chip Roh (Washington, D.C., U.S.A., until January 2015), and László Nagy (Budapest, Hungary).

7. Claimant and Respondent are hereinafter collectively referred to as the “Parties.”

III. PROCEDURAL HISTORY

A. Registration of the Request for Arbitration and Constitution of the Tribunal

8. On 27 March 2012, ICSID received a request for arbitration dated 22 March 2012, from Dan Cake against Hungary (the “Request”).

9. On 19 April 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible, in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

10. On 25 June 2012, in the absence of an agreement between the Parties, Claimant invoked Article 37(2)(b) of the ICSID Convention as the method for constituting the Tribunal. Thus, the Tribunal would consist of three arbitrators; one arbitrator appointed by each Party, and the third arbitrator appointed by agreement of the Parties. That same day, Claimant appointed Professor Jan Paulsson, a national of France, Sweden and Bahrain, as arbitrator.
11. On 17 July 2012, the Parties agreed to extend until 15 September 2012, the 90-day period following the dispatch of the notice of registration for appointing arbitrators not yet appointed.
12. On 11 September 2012, the Parties agreed to extend by an additional 30 days, until 15 October 2012, the period for appointing the President of the Tribunal. That same day, Respondent appointed Mr. Toby Landau QC, a national of Great Britain, as arbitrator.
13. On 9 October 2012, the Parties agreed to extend until 15 November 2012, the period for appointing the President of the Tribunal.
14. On 9 November 2012, the Parties agreed to extend by a further 30 days, until 15 December 2012, the period for appointing the President of the Tribunal.
15. On 12 December 2012, the Parties agreed to extend by 30 more days, until 15 January 2013, the period for appointing the President of the Tribunal.
16. On 9 January 2013, Respondent notified ICSID that the Parties had agreed to appoint Professor Pierre Mayer, a national of France, as President of the Tribunal, based on a proposal made by the co-arbitrators Professor Paulsson and Mr. Landau QC. Claimant confirmed the Parties' agreement on 10 January 2013.
17. On 17 January 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules") notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. First Session

18. On 12 March 2013, the Tribunal held a first session by telephone conference with the Parties, after which the Tribunal issued Procedural Order No. 1 on 2 May 2013 ("P.O. No.1"). P.O. No.1 noted the Parties' agreements and the Tribunal's decisions on several aspects of the procedure, as follows. The Parties confirmed that the Members of the Tribunal had been validly appointed and agreed, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; that the procedural language would be English; and that the proceedings would take place in Paris, France. The Parties also agreed on a schedule for the production of documents.
19. In addition, the Tribunal decided to bifurcate the proceedings, and to hear issues of jurisdiction and liability separately from damages. The Parties' pleadings were to be filed according to the following schedule: Claimant's Memorial was to be filed on 21 June 2013; Respondent's Counter-Memorial on 15 November 2013; Claimant's Reply on 14 March 2014; and Respondent's Rejoinder on 14 June 2014. The Tribunal reserved the issue of whether there would be a last filing on jurisdiction by Claimant, and the issue was to be decided during a conference call to be held within three weeks of the submission of Respondent's Counter-Memorial.

C. The Jurisdiction and Liability Phase

20. On 3 June 2013, the Parties notified the Tribunal of their agreement that Claimant would have a 10-day extension of time until 1 July 2013, to submit its Memorial, and that Respondent could have a similar extension of time. The Tribunal approved the Parties' agreement. Respondent filed its Counter-Memorial on 25 November 2013.
21. In advance of the conference call to be held within three weeks of receipt of the Respondent's Counter-Memorial, the Parties indicated to the Tribunal by separate emails of 29 November 2013, that they had consulted and agreed that there would be no need to discuss the issue of a last filing on jurisdiction. On 6 December 2013,

the Tribunal held the planned conference call with the Parties to discuss certain remaining procedural questions, including dates for the hearing on jurisdiction and liability.

22. On 19 February 2014, the Parties agreed, and the Tribunal approved, a further extension of time for the Claimant to submit its Reply, to 24 March and for the Respondent to submit its Rejoinder, to 24 June 2014. The hearing dates would remain unaffected.

23. On 24 July 2014, the Parties submitted their notifications of the witnesses that they each wished to cross-examine at the hearing.

24. On 29 September 2014, the President of the Tribunal held, on behalf of the Tribunal, a pre-hearing organizational meeting with the Parties to discuss certain logistical and procedural matters relating to the hearing.

25. From 20 to 22 October 2014, the Tribunal held a hearing on jurisdiction and liability in Paris. In addition to the Members of the Tribunal, the Secretary of the Tribunal, and the Assistant to the Tribunal, present at the hearing were:

For Claimant: Mr. António Andrade de Matos and Mr. Jorge Bastos Leitão.

For Respondent: Mr. Eric Ordway, Ms. Marguerite Walter, Mr. László Nanyista, Mr. Tamás Simon, and Ms. Szandra Wolf.

26. The following witnesses were examined:

On behalf of Claimant: Mr. Carlos Custódio, Mr. Iacube Vali, Mr. Csongór Palotás, and Mr. Henrik Thulesen.

On behalf of Respondent: Bánszeginé Dr. Katalin Ott and Dr. Gyula Sóvágó.

27. On November 3, 2014, following an agreement by the Parties, the Tribunal invited the Respondent to address in a post-hearing brief an issue raised by the Claimant during the hearing. The Respondent did so on November 5, 2014, and the Claimant replied on November 12, 2014.

28. On November 7, 2014, each Party filed its submission on costs.

29. On January 30, 2015, the Tribunal addressed questions to the Parties on points that had not been covered in their respective written and oral submissions. On March 3, 2015, each Party submitted its answers to the Tribunal's questions followed, on March 31, 2015, by each Party's reply to the other Party's answers.

IV. FACTUAL BACKGROUND

30. In 1996, Dan Cake took the strategic decision to enter the market and develop its industrial and commercial activities in Eastern European countries. The reason for this was that it exported to Russia significant quantities of Swiss rolls, but because of the distance between Portugal and Russia the goods took too long to reach their destination. In addition, the cost of the necessary logistics had increased considerably. Furthermore, Hungary has common borders with countries such as Austria and Ukraine, which were also important potential markets. Other Eastern European countries also seemed to be promising markets.

31. Dan Cake acquired the shares of a Hungarian company named RELO, and subsequently renamed it Danesita Hungária Édesipari Kft ("Danesita"). Dan Cake held 86.67% of Danesita's registered shares, and a company named New Century Investments Ltd held the remaining 13.33%. This structure remained until the liquidation of Danesita in 2008.

32. According to Dan Cake's own witnesses, Mr. Carlos Custodio and Mr. Iacube Vali, the markets soon showed that they were not as promising as they had first seemed. In 1998, the Russian market crashed. Other countries were not prepared, at that time, to pay a premium for Danesita quality products. That led, in particular, to the withdrawal of the contract between Danone and Danesita, concerning distribution in the Czech Republic and in Slovenia. Danesita had to downsize its factory and prepare a re-launch, which was initiated in 2006.

33. Dan Cake's position in this dispute is that in 2007, Danesita, through the experience it had acquired, had built up the capability to become a profitable company, and had signed or was on the verge of signing contracts

with strategic partners for the distribution of Danesita products in Greece, Romania, Denmark, Germany, and Italy. For instance, Mr. Henrik Thulesen, shareholder and managing director of Royal Biscuit Nordic A/S, a company incorporated in Denmark, testified that Royal Biscuit had started commercial relations with Danesita in 2007; had purchased, between January and April 2008, Danesita products worth a total of € 216,000; and had the intention to invest in Danesita, based on Mr. Thulesen's favourable impression of his visit to Danesita's factory and on his belief in the growth of the Scandinavian markets. Mr. Thulesen was cross-examined during the October hearing and confirmed his witness statement.

34. Dan Cake submitted another witness statement from Mr. Ralf Beckmann, shareholder and managing director of Aldente GmbH, a German distributor, who testified that after a visit to Danesita's factory in Budapest, Aldente chose Danesita to supply it with Luxury Cakes, expecting to buy € 2 to 3 million worth of cakes from Danesita in two years. Mr. Beckmann was not called to be cross-examined.

35. Hungary's position is that these prospects did not in fact exist.

36. However, at this stage of the proceedings, as will become apparent in the course of the Tribunal's analysis of the events, it is not necessary for the Tribunal to assess Danesita's future chances of commercial success.

37. Throughout the life of Danesita, Dan Cake had to lend to its subsidiary significant sums of money. Danesita also took out several bank loans (reaching a total of more than € 5 million in 2007).

38. Before the end of October 2006, Danesita incurred a debt towards its supplier of sunflower oil, Florena Termelő ("Florena"). Florena sent Danesita two payment reminders, one on 28 October 2005 and another on 19 December 2005. These reminders explicitly warned Danesita that failure to pay the debt would result in Danesita's liquidation. An agreement was entered into in April 2006, pursuant to which the debt would be paid in three instalments by 30 May 2006. However, Danesita did not repay the entirety of its debt within the agreed time-limit. Florena submitted a request for liquidation on 7 August 2006.

39. Danesita had other creditors, and several of them initiated liquidation procedures against it.

40. On 29 August 2006, the Metropolitan Court of Budapest, sitting as a bankruptcy court, issued a decision by which it served Danesita a copy of Florena's request for liquidation and ordered it to declare, within 8 days, whether it admitted the contents of the request. It warned Danesita that if it failed to make the declaration by the above deadline, its insolvency would be presumed, based on Section 24(3) of the Hungarian Bankruptcy Act.

41. Danesita did not respond to the Court's order. Consequently, on 18 January 2007, the Court issued an order declaring Danesita insolvent and appointing a liquidator, Mr. Gyula Sóvágó, a representative of the liquidating company PK-ECONO Pénzügyi Tanácsadó Kft.

42. Danesita sent the Court several letters, one of which was considered as an appeal by the Court. However the appeal was dismissed on 21 March 2007 on the ground that Danesita had neither appointed counsel nor paid the stamp duty of HUF 7,000 (€ 30), as required by Hungarian law.

43. On 27 October 2007, the High Court of Appeal, seized by Danesita, ruled that the dismissal of its appeal was justified and that Danesita had not explained why it had not complied with the statutory requirements.

44. Dan Cake acknowledges that although it eventually paid its debt to Florena, it did not inform the Bankruptcy Court. The liquidation order became final. On 29 November 2007, the official statement on Danesita's liquidation was published in the Companies Gazette.

45. In the context of liquidation proceedings (as opposed to bankruptcy proceedings) the only way for the debtor company to avoid the sale of its assets is to enter into an agreement with its creditors. The liquidator is under the obligation to proceed with the public sale of the debtor company's assets within 120 days from the date of the liquidation order, unless a creditors' committee is formed and decides to postpone the commencement of the sale process. No creditors' committee was formed. The conditions for a public tender were published on 7 February 2008. However, by 21 March 2007, which was the deadline for potential purchasers to submit bids, no bids had been submitted.

46. Danesita and Dan Cake tried to enter into an agreement with Danesita's creditors. The Bankruptcy Act provides the possibility for the debtor company to request from the Bankruptcy Court, under certain conditions, the convening of a composition hearing during which the creditors may vote on and approve, by a qualified majority, an agreement with the debtor. If the agreement is approved by the Court, the sale of the assets will be avoided.

47. Pursuant to Section 44(1) of the Bankruptcy Act, "a composition agreement shall be deemed valid upon the consent of at least half of the creditors with proper entitlement to conclude a composition agreement in all groups, provided that their claims account for two-thirds of the total claims of those entitled to conclude the composition agreement."

48. Among the creditors which vote are those whose claims are "secured by a lien prior to the time of the opening of liquidation proceedings" (Section 57(1), category b). In Danesita's case there was such a creditor, MKB Bank, whose claim was particularly large.

49. On 10 April 2008, Danesita's lawyers filed a request for the convening of a composition hearing with the Metropolitan Court of Budapest (Exh. C-026). Along with the request, in accordance with Section 41(5) of the Bankruptcy Act, Danesita served three other documents: a composition proposal (the "Agreement on the termination of liquidation procedure," Exh. C-021); the list of creditors drawn up by the liquidator; and an appropriate program for the restoration of solvency.

50. To the draft "Agreement on the termination of the liquidation procedure" Danesita and Dan Cake attached agreements, in summary form, each of them signed by the relevant creditor. Thirty-two of them are attached to Claimant's Memorial as Exh. C-027. In its request to the Bankruptcy Court, Danesita noted that the number of creditors which had signed was "significant," and stated that "our contact with creditors is continual, during which signatory documents from creditors continually arrive at our office." In its Memorial, Dan Cake claims that "[b]y the end of March, [sic] 2008 and beginning of April of the same year the majority of the creditors had already provided their consent to such agreement" (para. 102), and that "by April 2008 Dan Cake had engaged more than the creditors it needed to have the composition agreement approved" (para. 105). Respondent neither accepts nor denies these statements.

51. It cannot be denied that MKB Bank was in favour of a settlement of Danesita's debt. On 20 March 2008, MKB Bank had submitted to Dr. Palotás, the lawyer representing Danesita and Dan Cake, a settlement proposal (Exh. C-020). On the same day MKB Bank had written to the liquidator, mentioning in particular: "we are pleased to inform you that our Bank supports the proposed liquidation agreement by the debtor, that is its Portuguese owner. We request, as much as it is possible, to delay making judgment on tender propositions appearing on February 07 2008 in the Company Gazette. . ." (Exh. C-023).

52. Among the conditions of the settlement proposal was the issuance by the Portuguese bank Banco Esperito Santo of a standby letter of credit in favour of MKB Bank. Dan Cake submitted a draft, however MKB Bank considered that its wording was not in accordance with the terms required by the Bank. A surety in the form of a notarial deed by Dan Cake was also missing. Dr. Ott and Ms. Hornyák, two employees of MKB Bank who were involved in the negotiations with Dan Cake, wrote witness statements strongly denying that an agreement had been found (Dr. Ott was heard in cross-examination and confirmed her witness statement). It is a fact that no document containing a settlement agreement was produced by Dan Cake in these proceedings, although it had been part of Hungary's request for production of documents.

53. However, as will be explained, the existence of an agreement between the debtor and its creditors is not a prerequisite to the convening of a composition hearing. Such agreement is only required to be present during the composition hearing, and is expressed by way of a vote. Even after the refusal by the Bankruptcy Court, on 22 April 2008, to convene a composition hearing, MKB Bank was still in favour of a settlement, and had not lost hope that the conditions could still be met, as shown by its letter of 9 May 2008 (Exh. C-003 attached to the Reply).

54. On 22 April 2008, the Metropolitan Court of Budapest declined to convene a composition hearing. It considered that Danesita's request in its current form was not suitable to be served on the creditors and to convene a composition hearing, and ordered Danesita to make several supplementary filings. At the same time it insisted

that the liquidator was obliged to proceed to the sale of the assets within 120 days from the publication of the liquidation proceedings. The decision (Exh. C-033) will be reproduced in its entirety in Part VII, Section B, of the present Decision. It was notified to the Parties and the liquidator on 5 May 2008.

55. Both Parties agree that no appeal against this decision was possible.

56. On 27 May 2008, the Metropolitan Court of Budapest dismissed Danesita's request to invalidate the first tender, which had proved unsuccessful (Exh. C-031). The decision was notified to Danesita on 17 June 2008.

57. On 29 May 2008, the liquidator announced the public tender for the sale of Danesita's factory (Exh. C-036). The purchase price was fixed at HUF 730,000,000 plus VAT.

58. On 23 June 2008, MKB Bank sent a letter to the liquidator, expressly supporting the sale (Exh. R-027).

59. The date for the opening of the bids was 17 June 2008. The sale was later confirmed for a total amount of HUF 370,000,000 plus VAT.

V. SUMMARY OF THE PARTIES' CLAIMS AND RELIEFS

60. In its Request, Dan Cake summarised its position in the following terms:

The liquidation of Danesita was only possible because the Court and the Liquidator [. . .] committed several shocking omissions and decisions that show total lack of interest in restructuring Danesita and safeguarding Dan Cake's investment (para. 70).

61. Dan Cake complains that Hungary has "violated the due process rule contemplated in four standards mentioned in the Portugal-Hungary BIT":

- the fair and equitable treatment standard (Article 3.1);
- the full protection and security standard (Article 5.1);
- the prohibition of arbitrary or discriminatory measures impairing the use, enjoyment, management, disposal or liquidation of the investments (Article 3.2); and
- the prohibition of expropriation without compensation (Article 5.2).

62. As a result of these violations, according to Claimant, it has suffered a loss of *circa* €47,869,000. Implicitly, but clearly, it claims damages of the same amount, plus (explicitly) "pre-award and post-award interest at a rate to be determined by the Arbitral Tribunal"; it also requests that Respondent bear "all costs, arbitrators' fees, attorneys' fees and all relevant disbursements."

63. It is to be noted that the relief thus requested was not mentioned in the relevant parts of the Memorial and of the Reply. There is, however, no reason to believe that Dan Cake did not maintain its requests for this relief.

64. In its Memorial (para. 224) and in its Reply (para. 133), Dan Cake expressed its prayers for relief in identical terms:

Dan Cake hereby requests that the Tribunal finds that:

(a) Hungary has violated article 5.2 of the Treaty by unlawfully expropriating Dan Cake's investment in Danesita as (i) it did not serve any legitimate public purpose and failed to observe the due process of law and (ii) was not followed by the payment of a fair compensation;

(b) Hungary has violated article 5.1 of the Treaty as it failed to ensure that Dan Cake's investment would enjoy full protection and security;

(c) Hungary has violated article 3.1 of the Treaty as it failed to ensure that Dan Cake's investment would be accorded a fair and equitable treatment and,

(d) Hungary has violated article 3.2 of the Treaty as it failed to ensure that Dan Cake's investment would not be impaired by unjust or discriminatory measures.

65. There has however been a distinct evolution in the way Dan Cake criticizes Hungary's behaviour. The Tribunal will have to determine, therefore, in Part VII of this Decision, the exact scope of its task.

66. In its Counter-Memorial (para. 180) and in its Rejoinder (para. 60), Hungary requested that the Tribunal reject all of Dan Cake's claims and issue an award (expressed in identical terms in both memorials) as follows:

- *Declaring that all of Dan Cake's claims are dismissed on the merits;*
- *Assessing the full costs of this proceeding, including attorneys' fees and costs, against Dan Cake; and*
- *Granting such other relief as the Tribunal may deem appropriate under the circumstances, or as Hungary may request from the Tribunal.*

VI. JURISDICTION

67. The jurisdiction of the Arbitral Tribunal has not been challenged by Respondent.

68. Claimant relies on Articles 3.1, 3.2, 5.1 and 5.2 of the Agreement between the Republic of Portugal and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments ("the Treaty").

69. The quotations from the Treaty below are taken from the English translation provided by Claimant.

70. Pursuant to Article 1, a, of the Treaty, the term "investor" means:

"Each Party's nationals, as they are defined in the law in force in their countries. . . ."

71. Pursuant to Article 3 of the Portuguese Companies' Code, Dan Cake being a national of Portugal, in which it is incorporated and where it has its head offices, is an investor entitled to the protection offered by the Treaty.

72. Pursuant to Article 1, b, of the Treaty:

"the term 'investment' means every kind of asset or right connected to direct investment in accordance with the law in force in the territory of the Contracting Party where it is made. . . ."

73. Although neither the Treaty nor the ICSID Convention defines "direct investment," there is no doubt that Dan Cake's shares in Danesita are a direct investment in Hungary. It has not been contended that this investment was not made in conformity with Hungarian law. The liquidation of Danesita therefore affects Dan Cake's direct investment in Hungary, and Dan Cake has a right to the protection offered by the Treaty in relation to it.

74. Pursuant to Article 10, the Treaty applies to investments made after 1 January 1973. Dan Cake purchased shares of RELO, later renamed Danesita, in 1996. The Treaty is therefore applicable *ratione temporis*.

75. Pursuant to Article 8.2 of the Treaty:

[i]f a dispute cannot be settled amicably within six months following the beginning of conversations to the effect, it shall upon request of either litigant be submitted to the jurisdiction of the International Centre for Settlement of Investment Disputes referred to in the Washington Convention of 18 March 1965.

76. This provision constitutes an offer to arbitrate. Dan Cake accepted the offer by filing a request with ICSID. Dan Cake's Notice of Arbitration was served upon Hungary on 30 June 2009. In the absence of any agreement between the Parties to resolve the dispute, the Request for Arbitration was only filed on 22 March 2012.

77. Pursuant to Article 8.3 of the Treaty:

[s]uch disputes shall be submitted to the competent legal proceedings of the Contracting Party where the investment was made, except for cases of expropriation, nationalization or measures having the equivalent effect. If within 18 months following the date of the filing of the lawsuit final judgment has not been passed, the dispute shall be settled in accordance with the provisions of the previous paragraph.

78. This requirement does not apply in the present case. First, the measures of which Claimant complains had the effect of depriving it of the ownership of its investment, and can therefore be considered to be measures "having the equivalent effect" to an expropriation, even if it has not been established that they constitute an expropriation *stricto sensu*. Second, by not objecting to the filing of the Request for Arbitration, Hungary at any rate implicitly waived any right to require that a Hungarian court be first seized.

79. As an ICSID Tribunal, the Arbitral Tribunal has jurisdiction over the present case since both the host State, Hungary, and the State of which Claimant is a national, the Republic of Portugal, are Parties to the ICSID Convention, and the dispute relates to an investment.

VII. LIABILITY

A. The scope of the Tribunal's task

80. In its Memorial (para. 224) and in its Reply (para. 133) on the merits, Dan Cake has listed the legal grounds on which it rests its case. These grounds are the following:

- (a) *Hungary has violated article 5.2 of Treaty by unlawfully expropriating Dan Cake's investment in Danesita as (i) it did not serve any legitimate public purpose and failed to observe the due process of law and (ii) was not followed by the payment of a fair compensation;*
- (b) *Hungary has violated article 5.1 of the Treaty as it failed to ensure that Dan Cake's investments would enjoy full protection and security;*
- (c) *Hungary has violated article 3.1 of the Treaty as it failed to ensure that Dan Cake's investment would be accorded a fair and equitable treatment and,*
- (d) *Hungary has violated article 3.2 of the Treaty as it failed to ensure that Dan Cake's investment would not be impaired by unjust or discriminatory measures.*

81. However, when one reads the arguments which Claimant develops in its Reply, it appears that neither expropriation nor full protection and security are mentioned, and that the particular acts of which Dan Cake complains are characterised as being in breach only of the BIT's provisions on fair and equitable treatment (Article 3.1) and unfair or discriminatory measures (Article 3.2).

82. In its Memorial, Dan Cake had severely criticised the Hungarian law on bankruptcy, quoting *inter alia* authors according to whom "bankruptcy law has become, in effect to some settlement (*sic*), legal extortion to get debts paid" (Akos Eros, Csara Vari and Thomas Salerno, "Hungary's proposed insolvency law reforms – hope for the future?;" 2005/2006, p. 93 – Exh. CLA-015). It had concluded that "Hungary's failure to provide a decent and workable legal framework regarding insolvency procedures is a clear violation of Hungary's obligation to provide full protection and security of reorganising its business [and] has been widely recognised and duly criticized" (para. 200). However, neither in its Reply on the merits, nor in its opening and closing submissions at the hearing did Dan Cake mention this criticism again. Although Dan Cake has never formally abandoned this aspect of its claims, the Tribunal understands that its case is now that Hungarian law has been *violated* by the Metropolitan Court of Budapest and by the liquidator. Should the Tribunal consider that there was indeed a violation of the law, the question of whether the law did or did not, in itself, provide full protection and security will become moot: the cause of the harm suffered will not be the law, whether good or bad, but its violation. The Tribunal will therefore deal with the alleged breach of Article 5.1 of the Treaty only in the event that it considers that Hungarian law has been applied in conformity with the terms of this Article.

83. In the summary of Section 3 of the Reply, entitled "Merits of the Claim," Dan Cake mentions that "[t]he main cause of action in this arbitration is the breach of the fair and equitable treatment standard . . . as well as the breach of the obligation not to impair investment by unfair or discriminatory measures . . ." (para. 101).

84. The same Section 3 of the Reply describes the acts said to be attributable to Hungary. These comprise, first, a breach of the fair and equitable treatment standard (Article 3.1) and, second, a breach of the obligation not to impair investment by unjust or discriminatory measures (Article 3.2). Only one act is in fact described, and said to fall under both Article 3.1 and 3.2 of the BIT: the decision of 22 April 2008, by which the Metropolitan Court of Budapest ordered Danesita to submit supplementary filings to complete its request for the convening of a composition hearing, and refused to convene a hearing until its orders had been complied with, at the same time recalling that under the Bankruptcy Act the liquidator must proceed with the sale of the debtor's assets within 120 days from the publication of the debtor's liquidation.

85. In his closing statement on the last day of the hearing, Dan Cake's Counsel presented his arguments, focusing principally upon an analysis of this decision of the Metropolitan Court of Budapest, and on the liquidator's decision to proceed with the sale of the assets, which followed the Court's decision.

86. In its Memorial, Dan Cake had argued that the liquidator's actions were attributable to Hungary. However in its Reply it only criticised the Metropolitan Court of Budapest's decision of 22 April 2008, which is undeniably attributable to Hungary.

87. At the hearing, in the course of closing arguments, Dan Cake's Counsel made reference to the relationship between the Court's decision and the liquidator's action, in the following terms:

by answering the questions that the Tribunal raised, Danesita almost answered one of the other two topics, which is the attribution of the liquidator's decision to the judge –

Mr. ORDWAY: To the judge??

Mr. ANDRADE DE MATOS: - and consequently to the Hungarian Republic.¹

And:

In a nutshell, the reason why Dan Cake believes that the launch of the second tender and the sale of the assets is attributable to the Hungarian Court, and consequently to the Hungarian Republic, is that the judge gave directions, gave a clear permission; more than that, gave an indication to the liquidator that that is how he should proceed.²

88. The Respondent's Counsel understood these statements to imply that the liquidator's action, as such, was directly attributable to the Respondent, and requested the right to file a brief on this issue: "there have been some new issues raised for the first time today, namely the defence of the liquidator as a State actor issue, which was not addressed previously; we had not anticipated that being addressed."³ The request was granted.

89. The Tribunal does not share the Respondent's understanding of Dan Cake's statements quoted above. It understands them to mean that the Republic of Hungary was internationally liable vis-à-vis Dan Cake because the Court gave an indication to the liquidator to do something detrimental to Dan Cake (selling Danesita's assets), which the liquidator duly followed. The Respondent's organ whose conduct is impugned by Dan Cake is the Court, not the liquidator. Be that as it may, the Respondent filed a brief on 5 November 2014, in which it insisted that Dr. Sóvágó, the liquidator, was a private actor, not a State actor or agent, and that he had not acted on the instructions of, or under the control of Hungary when he initiated the second sale tender of Danesita's assets in May 2008. Dan Cake replied on 12 November 2014. In the last section of its brief ("Attribution") it took the position that the actions of the liquidator were attributable to Hungary pursuant to Article 5 of the International Law Commission's Draft Articles on State Responsibility,⁴ because the liquidator was empowered by the law of the State to exercise elements of governmental authority. It insisted that the Court's decision was, in fact, an instruction to the liquidator to carry on with the ongoing tender.

90. As a consequence of the above, the scope of the Tribunal's task comprises the following three components (subject to the observation in para. 79 above):

- as to the *acts* allegedly attributable to Hungary and rendering it liable under international law:
 - the Metropolitan Court of Budapest's decision of 22 April 2008,
 - the sale of Danesita's assets by the liquidator;
- as to the *provisions* of the Portugal-Hungary BIT relied upon by Dan Cake:
 - Articles 3.1 and 3.2 of the BIT, which the above-mentioned acts may have violated;
 - formally, Articles 5.1 and 5.2 of the BIT, it being observed that although they are mentioned in Dan Cake's prayer for relief, no act attributable to Hungary is referred to in connection with these provisions;

- as to the *persons or organs* whose acts may be attributable to Hungary:
 - the Metropolitan Court of Budapest,
 - the liquidator.

91. The Tribunal will first examine whether the decision by the Metropolitan Court of Budapest not to convene a composition hearing constitutes a violation of the BIT, attributable to Hungary. It will then turn to the question whether the sale of Danesita's assets by the liquidator constitutes a breach of the BIT, attributable to Hungary.

B. The Metropolitan Court of Budapest's refusal to convene a composition hearing

92. It appears that time for convening a composition hearing was of the essence for two reasons:
- (a) The first reason, invoked by Danesita in its request to convene a composition hearing, was that the production of Danesita's factory was affected by the liquidator's decision to dismiss employees.
 - (b) The second reason is that, in the absence of a creditors' committee, which could have objected to a sale of assets, and in the absence of the convening of a composition hearing, the liquidator was under an obligation to start the public sale of the debtor's assets within 120 days of the date of publication of the liquidation proceedings. It is obvious that, after the assets are sold, no composition hearing can succeed (even if it can still be convened). This was confirmed by Dr. Ott in the course of her cross-examination.⁵ Conversely, once a composition hearing has been convened – even if it has not yet taken place – the liquidator must abstain from selling the assets. The latter point was confirmed by Dr. Sóvágó in the course of his cross-examination.⁶

93. The prompt convening of a composition hearing was therefore the only way for Danesita and Dan Cake to avoid the sale of Danesita's assets and the disappearance of Danesita, Dan Cake's investment in Hungary.

94. Under Hungarian bankruptcy law, there is no hierarchy between a composition hearing and the sale of assets. Although the normal course of liquidation proceedings is that it ends with the sale of the assets, the possibility for the debtor to request the convening of a composition hearing is specifically mentioned in the Code. The composition hearing may fail because it gives rise to negotiations between the creditors and ends with a vote, which can be negative, but the debtor has a right that it be at least convened by the court, provided the request is accompanied by the documents required by law, or deemed necessary. This is expressed in the part of the Bankruptcy Act entitled "Composition Agreement in Liquidation," which contains 5 sections (41 to 45). Section 41(5) leaves no choice to the court seized of such a request:

"Upon the debtor's request, the court shall hold composition negotiations within 60 days following receipt of the petition . . ." (emphasis added).⁷

95. Three documents must be submitted with the request: a program for restoring solvency, a composition proposal, and a list of creditors.

96. The *Explanations on insolvency law* make the following comment on Section 41(5) of the Bankruptcy Act:

*It is the duty of the court to schedule the settlement (composition) hearing within 60 days as of the receipt of the relevant petition request and the business plan aimed at restoration of the debtor's solvency (in short: reorganization plan). It is essential that a hearing shall be held within the above deadline by all means if the subject petition has been filed adequately.*⁸

97. In its written and oral submissions, Hungary, citing authorities, insisted that the purpose of insolvency law in any country, including Hungary, is to protect the creditors' interests, not the debtor's, and that – quoting a decision of the Szeged High Court of Appeal of 1 September 2004 (Exh. R-077) – "the main goal of the liquidation proceeding is not the reorganization." What this means is that the creditors' interests should not be jeopardised for the sake of the reorganisation of the debtor company. However, if a composition satisfies both the interests of the debtor and those of the creditors – who would only be bound if a qualified majority of them voted in favour of its adoption,

thus expressing their preference for such outcome rather than for a sale of assets – there is no reason to refuse to convene a composition hearing.

98. On 10 April 2008, Danesita submitted to the Budapest Metropolitan Court (sitting as bankruptcy court) its request that the Court convene a composition hearing. It is not disputed that the documents required by the Bankruptcy Act were submitted with the request. However the Court, by its Order of 22 April 2008 (Exh. C-033), declared that “the request to convene a composition hearing in its current form and with its current content is not suitable to be served on the creditors and to convene a composition hearing.” Instead, the Court ordered the debtor to make supplementary filings, and listed seven requirements to be fulfilled before a composition hearing could be convened. The Court also insisted on how much time would lapse *after* the convening, before a hearing could take place.

99. The decision deserves being quoted in its entirety:

*Metropolitan Court of Budapest
Economic Department Liquidation Group
Bp. II. Varsányi I. u. 40–44.
1535 Budapest, Pf. 887
25. Fpk. 01-06-004545/27.*

The Metropolitan Court of Budapest in the liquidation proceedings of Danesita Hungaria Edesipari Kft. “ja.” (1151 Budapest, Károlyi Sándor u. 156.), the debtor, represented by PK-ECONO Kft. (1134 Budapest, Klapka u. 6.), the liquidator, has issued the following order

Under the burden of refusing the request to convene a composition hearing submitted by the legal representative of the debtor /Dr. Juhász Gábor Ügyvedi Iroda, 1068 Budapest, Benczúr u. 10. II/10., acting attorney-at-law: Dr. Juhász Gábor/, taking into consideration Section 124(3) of Act III of 1952 on the Code of Civil Procedure applicable in accordance with Section 6(3) of Act XLIX of 1991 (Bankruptcy Code), the court orders the debtor to make the following supplementary filing:

- *Submit a company registry extract of the foreign shareholder not older than three months and a certified Hungarian translation thereof, or a document from which the right of the shareholder’s representative to represent the shareholder can be established - Section 50(1) of the Code of Civil Procedure.*
- *Creditors with claims listed under Section 57(a) and (c) of the Bankruptcy Code may not participate in the composition agreement, since such “privileged” creditor claims shall be (and should have been) satisfied upon accrual. It cannot be established from the documents submitted in the proceeding that this has happened.*
- *The court informs the debtor that the court approves the composition agreement based on the consenting declarations of the representatives of the debtor and the creditors present, and the court will not expect any documents signed at the composition hearing. Such documents, as letters of intent of the debtor and the creditors to enter into a composition agreement, may be submitted to the court if they have previously been signed by individual creditors, in order for the court to be able to get an understanding whether the ratio necessary for the composition agreement is likely to be achieved. This is particularly necessary in the instant case, because there are a large number of creditors including foreign companies.*
- *The composition agreement may not depend on any conditions other than the court’s approval. The court may only approve a composition agreement and only a composition agreement satisfies the creditors’ interest if the enforceability of such a composition agreement is conditional solely upon the court approval becoming final and unappealable; the uncertainty of the existence of the bank guarantee as a condition of the composition agreement cannot be approved by the court.*
- *The composition agreement may only be entered into among entities which can be deemed as parties to this procedure, thus neither a financing bank nor the debtor’s shareholder is party to*

the procedure or can participate in the composition agreement. The composition agreement concluded in liquidation proceedings is a special settlement agreement, which is entered into between the debtor and the creditors, and this court may not establish any obligations for persons performing obligations as third parties.

- *Taking into consideration the high number and value of creditor claims, it appears necessary that coverage of payment obligations undertaken in the composition be provided for all creditors, even as to those creditors that may not be present at the composition hearing (Section 44(1) of the Bankruptcy Code). For this reason, the court hereby orders the debtor to prove within 15 days that the coverage necessary for the satisfaction of the creditors is available in its bank account, or is held in an escrow accepted by the creditors, the release of which depends only on the court order approving the composition agreement becoming final and unappealable. The court notes that the unsigned chart submitted in the procedure does not qualify as a certificate of escrow and does not contain the amounts necessary for the satisfaction of all creditors. When proving the coverage, please consider the amounts of category (a) and (c) liabilities, the liquidation costs that have arisen to date, and the fact that the liquidator's fee shall be borne by the debtor. The liquidator may provide information in order to specify the costs.*
- *Based on consistent judicial practice, there may be no ongoing proceedings regarding the adjudication of disputed creditor claims or objections at the time of the conclusion of the composition agreement. In the present case, there are such ongoing proceedings.*
- *Section 40(5) of the Bankruptcy Code undoubtedly sets a 60-day deadline for the court to convene the (first) composition hearing. However, this deadline starts running from the date when the court receives a request to convene a composition hearing which is clearly proper for scheduling such a composition hearing. For procedural matters not regulated in the Bankruptcy Code, the provisions of the Code of Civil Procedure and its supplementing regulations, as well as respective EU-regulations shall apply. The Bankruptcy Code does not contain any provisions regarding the service of official documents. Therefore, Section 27 of the informative paper No. 8001/2001. (IK.4.) of the Ministry of Justice on the treatment of matters containing international elements shall be taken into consideration, which sets forth that when convening a hearing, the time foreseen for the international service of documents (the time necessary for returning the return receipt) shall be taken into consideration. According to Section 27/a of the informative paper, in case of service by direct mail this period is, in general, four months.*
- *According to EC Regulation No. 1348/2000, delivery by direct mail is not excluded with respect to the Italian and Slovak creditors.*
- *If the documents to be delivered need to be translated, the above deadlines are extended by the time period necessary for the translation. According to the EC Regulation, the (official) translation of documents to be delivered to Italy is indispensable in case of direct service to Italy. This requirement is also mandatory in case of service to Slovakia, except if the addressee understands the Hungarian language. (Obviously, if the creditors are represented by a Hungarian legal representative, the above time shall not be taken into consideration when scheduling the composition hearing.)*

The court notes that by initiating the sale of the debtor's assets, the liquidator has complied with its statutory obligations set out in the Bankruptcy Code. According to Section 48(1) of the Bankruptcy Code, the liquidator shall collect and enforce the debtor's due claims and sell the debtor's assets. According to Section 49(1) of the Bankruptcy Code, the liquidator shall sell the debtor's assets on a public sale for the highest market price achievable. The asset sale may take the form of a sale tender or an auction. The liquidator may only deviate from such procedure if the creditors' committee agrees thereto, or if the expected income would not cover the costs of the sale, or if the difference between the expected income and the foreseeable costs of the asset sale is less than 100,000 forints. Paragraph (2) provides that — unless the creditors' committee resolves otherwise — the liquidator shall initiate the sale of assets within 120 days of the date of publication of the liquidation proceedings.

Taking into consideration the above, the request to convene a composition hearing in its current form and with its current content is not suitable to be served on the creditors and to convene a composition hearing.

For information purposes, the court serves this order on the liquidator.

Budapest, April 22, 2008

Dr. Modrovich Ágota (sgd.)

judge

In witness thereof

Lászlóné⁹

(1) Analysis of the 22 April 2008 Decision of the Metropolitan Court of Budapest

100. *The Penultimate Paragraph:* Before examining the Court's directions, it is necessary to quote the second to last paragraph of the Order, which calls for some comments.

101. The said paragraph reads:

The court notes that by initiating the sale of the debtor's assets, the liquidator has complied with its statutory obligations set out in the Bankruptcy Code. According to Section 48(1) of the Bankruptcy Code, the liquidator shall collect and enforce the debtor's due claims and sell the debtor's assets. According to Section 49(1) of the Bankruptcy Code, the liquidator shall sell the debtor's assets in a public sale for the highest market price achievable. The asset sale may take the form of a sale tender or an auction. The liquidator may only deviate from such procedure if the creditors' committee agrees thereto, or if the expected income would not cover the costs of the sale, or if the difference between the expected income and the foreseeable costs of the asset sale is less than 100,000 forints. Paragraph (2) provides that – unless the creditors' committee resolves otherwise – the liquidator shall initiate the sale of assets within 120 days of the date of publication of the liquidation proceedings.¹⁰

102. After refusing in the last paragraph of the Order to convene a composition hearing, the Court added: "*For information purposes, the Court serves this order on the liquidator.*"¹¹

103. The presence in a decision, the subject of which was the convening of a composition hearing, of a paragraph strongly insisting on the liquidator's duty to sell the debtor's assets within 120 days of the date of publication of the liquidation proceedings, is surprising to say the least. It is all the more puzzling that in points 8 to 10 of the decision, the Court insisted that even after the debtor's completion of the request for convening a composition hearing in accordance with the Court's requirements, a long period of time might still have to be observed (four months, in principle) for the return receipt of the foreign creditors after the date of notification of the decision to them. In addition, time was necessary to translate the decision into the foreign creditors' languages (the notifications being incumbent on the Court, not on the debtor, pursuant to Article 41(5) of the Bankruptcy Act). The brevity of the time-period in which the liquidator was to sell the assets, of which the Court reminds the persons on whom the decision is served, is thus to be contrasted with what was an alleged impossibility to abide by the law and hold a composition hearing within a 60-day period.

104. For Claimant, the presence of the paragraph reminding everyone – including the liquidator, on whom the Court took care to serve the decision – of the liquidator's duty to sell the assets, was an invitation to the liquidator to proceed with the sale as quickly as possible, thus making the convening of a composition hearing impossible. Whether such was the *intent* of the Court is impossible to tell, although no compelling alternative explanation has been suggested for this part of the Court's Order.

105. Be that as it may, the *effect* of the decision was that the liquidator published without delay the second tender for the sale of the assets (the first tender, although not annulled, had been unsuccessful).

106. In his Witness Statement, the liquidator – Dr. Sóvágó – declared (para. 38) that he was informed by the Bankruptcy Court at the beginning of May 2008 that Dan Cake had been asked by the Bankruptcy Court to provide

additional information to support its request, and that it had failed to provide such information. That would explain, according to his testimony, why he proceeded with the second tender, which was published in the Hungarian official gazette (Exh. C-036) on 29 May 2008. However, this explanation cannot be correct. As Dr. Sóvágó admitted in the course of his cross-examination, he must have requested the publication on 14, 15 or 16 May.¹² At that time Danesita, on which the decision was served on 5 May, was still within the time-limit set by the Court – 15 days – to comply with its decision. A different explanation given by Dr. Sóvágó in his Supplemental Witness Statement (para. 17), was that MKB Bank had told him that no settlement agreement had been reached. This second version is not credible either, since it appears from the testimony of Dr. Ott, and from the letter of 9 May 2008 which she sent to Mr. Palotás, Danesita’s attorney (Exh. C-00 3 attached to the Reply), that MKB Bank was still willing to enter into a settlement and thought it was still possible. It is much more likely that Dr. Sóvágó realised that there would be no composition hearing and that he understood the Court’s decision to be inviting him to proceed with the sale of the assets.

107. While the penultimate paragraph of the decision is devoted to the liquidator’s obligation to proceed with the sale of assets within a rather short time-limit, the first seven paragraphs of the decision set out the reasons why the Court refused to convene a composition hearing, and by the same token ordered Danesita to make the corresponding supplemental filings.

108. *The Court’s Power to Order Additional Documents:* Before examining one by one the various alleged deficiencies in Danesita’s request, an initial legal issue must be resolved.

109. Danesita having submitted the three documents required by law, the Parties are in disagreement as to whether the Court had the right to order the submission of additional documents. While Claimant denies that such a right exists, Respondent invokes the abovementioned decision of the Szeged High Court of Appeal, the writings of two authors and the *Explanation of the Bankruptcy Code*.

110. The Szeged High Court of Appeal blamed the lower court for having convened a composition hearing in spite of the fact that the plan necessary for restoring the company’s solvency was missing. In addition, it noted, *obiter*, that the lower court had ordered the submission of the board resolution regarding the conclusion of a composition agreement and that such documents had been submitted. It neither disapproved nor approved the lower court’s decision to order the production of the latter document, which the law does not expressly require. The Respondent construes the High Court’s lack of comment as an implicit admission that the order was not in contradiction with the law.

111. In his *Commentary to Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings*, at p. 205, Andrea Csöke notes: “[i]n the case the request lacks some necessary information, the court shall issue a supplementation order which can request a broad range of additional information or documents, for example, a power of attorney, the composition offer in sufficient copies, etc.” (Exh. RLA-059).

112. The Arbitral Tribunal notes that although the author refers to a “broad range” of additional information or documents that could be “necessary,” he only mentions two examples, and one of them is in fact a document required by the law.

113. Although the Tribunal does not find the other quotations included in footnotes 56 to 63 of the Rejoinder to be relevant, it can but conclude that there is some authority for the proposition that a bankruptcy court has the power to require the submission of documents or information not mentioned in the Bankruptcy Act, provided they are “necessary.” This may be said to be the case for a power of attorney (mentioned by Andrea Csöke) and for a resolution of the board of the debtor company (mentioned in the Szeged decision), both establishing that the request is made by a person duly empowered to submit it.

114. As to what document or information can more generally be considered “necessary,” one must take into account the specific nature of the requested measure. Respondent relies on the general reference made in Section 6(3) of the Bankruptcy Act to the provisions of the Code of Civil Procedure, and more specifically to its Section 124, which permits a court to request additional information before convening a hearing. However Section 6(3) itself mentions that the Code of Civil Procedure shall only apply “*mutatis mutandis*,” and reserves “the derogations arising from the characteristics of non-litigious civil proceedings.” The proceedings for the examination of a request to

convene a composition hearing obviously call for a derogation since they are non-contentious, they do not provide the opportunity for the requesting Party to make any arguments before the court and, above all, they are subject to time constraints imposed by the law.

115. One must also distinguish between the documents and information that will be required on the day of the composition hearing, and those which should already have been submitted with the request, in the absence of which a composition hearing cannot be convened. It is obvious that, on the day (or days) of the composition hearing, numerous documents must be present, and a lot of information available. However the law does not require, and it would be absurd to require, that everything be in place on the day of the order convening the hearing. The weeks, or months, that extend between the convening and the hearing can be used to gather that which has to be gathered, which may require a lot of time. In addition, since things change with time, particularly when the debtor company is still active, any documents submitted prematurely may be out of date when they are used. Last but not least, the result of unnecessarily postponing the convening of the hearing may be that the conditions for a successful hearing will have simply disappeared.

116. The Arbitral Tribunal will now examine each category of information or documents, the absence of which justified, in the opinion of the Court, its refusal to convene a hearing. None of the requirements formulated by the Court has any basis in a specific provision of the law; they were simply deemed “necessary” by the Court.

117. It is not the task of this Tribunal to determine whether it agrees, or disagrees, with the Metropolitan Court of Budapest as to whether the items required were indeed necessary. The Tribunal is not a court of appeal. A mere disagreement with what the Metropolitan Court of Budapest decided on one or another point would not establish that the decision was unfair or inequitable. However, the Tribunal might regard the decision to be unfair or inequitable if it found that some of the requirements were *obviously unnecessary* or *impossible to satisfy*, or in *breach of a fundamental right*, having in mind that since many employees had been laid off by the liquidator, the factory was not running at full capacity, as underlined in the request, so that unnecessarily postponing the convening could but ruin the possibility of a successful hearing, thereby dooming the investment to disappear.

118. *First Requirement:* The first supplementary filing ordered by the Court was the following:

Submit a company registry extract of the foreign shareholder not older than three months and a certified Hungarian translation thereof, or a document from which the right of the shareholder’s representative to represent the shareholder can be established – Section 50(1) of the Code of Civil Procedure.

119. As much as it is understandable to require a power of attorney of the person requesting the convening of a composition hearing on behalf of the *debtor company*, it is not understandable to request, long before the moment the person will have to participate in the hearing, the power of attorney of the representative *of the shareholder*. And as Claimant pointed out in its closing arguments, what if, between the filing of the company registry extract “not older than three months” required by the Court to complete the request, there was a change in the board of directors of the shareholder company? Postponing the convening of the composition hearing as a result of such a requirement, in the Tribunal’s view, defeats common sense.

120. *Second and Sixth Requirements:* The second and the sixth requirements must be examined together.

121. The second supplementary filing required by the Court was as follows:

Creditors with claims listed under Section 57(a) and (c) of the Bankruptcy Code may not participate in the composition agreement, since such “privileged” creditor claims shall be (and should have been) satisfied upon accrual. It cannot be established from the documents submitted in the proceeding that this has happened.

122. The sixth supplementary filing required by the Court was as follows:

Taking into consideration the high number and value of creditor claims, it appears necessary that coverage of payment obligations undertaken in the composition be provided for all creditors, even as to those creditors that may not be present at the composition hearing (Section 44(1) of the Bankruptcy Code). For this reason, the court hereby orders the debtor to prove within 15 days that the

coverage necessary for the satisfaction of the creditors is available in its bank account, or is held in an escrow accepted by the creditors, the release of which depends only on the court order approving the composition agreement becoming final and unappealable. The court notes that the unsigned chart submitted in the procedure does not qualify as a certificate of escrow and does not contain the amounts necessary for the satisfaction of all creditors. When proving the coverage, please consider the amounts of category (a) and (c) liabilities, the liquidation costs that have arisen to date, and the fact that the liquidator's fee shall be borne by the debtor. The liquidator may provide information in order to specify the costs.

123. The necessity of having the funds necessary in an escrow account to satisfy the payment obligations undertaken in the composition is natural. Whether the funds should already have been placed in escrow at the time of the request is less obvious, given that new creditors may appear after the convening, and that it is not required by the law.

124. When it comes to the creditors belonging to classes (a) and (c), the requirement to prove that they have already received payment, or that the funds necessary for payment are placed in escrow, appears almost impossible to satisfy within 15 days, since they comprise numerous items, such as “severance pay due upon the termination of employment and other benefits”; “employers health-care contributions and membership fees paid to private pension funds”; “costs of cleanup of any environmental damage and contamination”; “verified costs in connection with the sale of the assets and the enforcement of claims”; “court costs paid by the economic operator under liquidation”; etc. It is a huge task, which the law does not mention as a prerequisite to the convening, and which it would be more logical to perform during the period between the convening and the hearing. This is all the more so, given that many of the costs enumerated will continue to accrue during that period.

125. *Third Requirement:* The third supplementary filing ordered by the Court was the following:

The court informs the debtor that the court approves the composition agreement based on the consenting declarations of the representatives of the debtor and the creditors present, and the court will not expect any documents signed at the composition hearing. Such documents, as letters of intent of the debtor and the creditors to enter into a composition agreement, may be submitted to the court if they have previously been signed by individual creditors, in order for the court to be able to get an understanding whether the ratio necessary for the composition agreement is likely to be achieved. This is particularly necessary in the instant case, because there are a large number of creditors including foreign companies.

126. It appears that the Court required documents that would allow it to determine whether it was “likely” that the legal conditions for a composition agreement would be met on the day of the hearing. In other words, if in the Court’s opinion it was not likely, it would refuse to convene a hearing.

127. If the legislator had meant to grant the Court the power to refuse to convene the composition hearing on the basis of its assessment of the likelihood that the required percentages of favourable votes will be met, it would certainly have said so. On the contrary, it stated that upon the debtor’s request, the Court *shall* convene a composition hearing within 60 days. The *Explanation on insolvency law* makes it clear that “the settlement petition cannot be refused with a view to foreseeable/predictable shortcomings on the merit even if the experienced judge is well aware that the submitted material will not surely be suitable for concluding a composition agreement.”¹³ In addition, first, the time between the convening and the hearing may be used to convince some creditors to accept a proposal and second, a composition agreement is not the mere gathering of consents previously given: it involves a process of negotiations during the hearing and a vote at the end of it (see Section 41(5) of the Bankruptcy Act). The Court’s opinion as to the likelihood of success would therefore, at the stage of convening the hearing, be premature.

128. *Fourth Requirement:* The fourth supplementary filing ordered by the Court was the following:

The composition agreement may not depend on any conditions other than the court’s approval. The court may only approve a composition agreement and only a composition agreement satisfies the creditors’ interest if the enforceability of such a composition agreement is conditional solely upon the court approval becoming final and unappealable; the uncertainty of the existence of the bank guarantee as a condition of the composition agreement cannot be approved by the court.

129. This paragraph shows a lack of understanding by the Court of the nature of the settlement agreement contemplated by Danesita, Dan Cake and MKB Bank. The existence of a bank guarantee was not a condition for the settlement, and even less a condition for the composition agreement. It was a requirement of MKB Bank for entering into a settlement agreement, which would only be conditioned upon the approval of a composition agreement (the exact opposite of the Court's understanding). This was confirmed by Dr. Ott during her cross-examination.¹⁴ In addition, as explained by Dr. Ott, once the composition agreement had been approved, the bank would release its mortgage on Danesita's assets: that was an obligation which would have been performed after the approval of the composition agreement upon which it was conditional, just as the settlement agreement, including the bank guarantee, was conditional upon the approval of the composition agreement.¹⁵

130. The fact is that, at the time of the Court's decision, no agreement had been entered into between MKB Bank and Danesita. Without an agreement between them there could be no composition hearing. But it was not necessary that the agreement be finalised at the time of the request, and the Court did not say otherwise. Even after the Court's decision of 22 April 2008, MKB Bank was still willing to enter into a settlement, as confirmed by Dr. Ott during her cross-examination.

131. *Fifth Requirement:* The fifth supplementary filing ordered by the Court was the following:

The composition agreement may only be entered into among entities which can be deemed as parties to this procedure, thus neither a financing bank nor the debtor's shareholder is party to the procedure or can participate in the composition agreement. The composition agreement concluded in liquidation proceedings is a special settlement agreement, which is entered into between the debtor and the creditors, and this court may not establish any obligations for persons performing obligations as third parties.

132. The statement that "neither a financing bank nor the debtor's shareholder is Party to the procedure or can participate in the composition agreement" is more than surprising. As far as the shareholder, Dan Cake, is concerned, it is a creditor of Danesita, and the law, while distinguishing various classes of creditors, does not exclude shareholders of the debtor company. Moreover, since the amounts lent by Dan Cake to Danesita are part of its investment in Hungary, the refusal to accept Dan Cake, a Portuguese company, as a participant in a composition agreement, might in itself be construed as an expropriation of a foreign investment. However, the issue – which was not raised by Dan Cake – is moot since no composition agreement was concluded.

133. *Seventh Requirement:* The seventh supplementary filing ordered by the Court was the following:

Based on consistent judicial practice, there may be no ongoing proceedings regarding the adjudication of disputed creditor claims or objections at the time of the conclusion of the composition agreement. In the present case, there are such ongoing proceedings.

134. Both Parties agree that two objections raised by Dan Cake were pending at that time. First, Dan Cake was arguing that the liquidator had wrongfully assessed its creditor's claims as late-filed. Second, Dan Cake and Danesita had submitted an objection to the Bankruptcy Court against the liquidator for allegedly wrongfully initiating the first sale tender, and on that basis had requested a stay of the tender.

135. This common view was expressed by the Parties in their answers to questions asked by the Tribunal in the course of its deliberation, on 30 January 2015. On 3 March 2015, Claimant and Respondent submitted their answers to the Tribunal's questions, and on 31 March 2015 they submitted their replies to the other Party's answers.

136. Since the Court referred to "consistent judicial practice," both Parties make reference to a judgment of the Metropolitan High Court of Appeal rendered in 2007 (Annex 4 to Claimant's letter of 31 March 2015). Although Respondent's interpretation of said decision is different, the Arbitral Tribunal's understanding is that it excludes the possibility for a bankruptcy court to refuse to convene a composition hearing on the ground that creditors' claims or objections, raised after liquidation proceedings have commenced, are pending. This results clearly from the following quotations from the judgment:

In liquidation proceedings, the adjudication of disputed claims or objections is not a preliminary question from the perspective of scheduling the composition hearing since the courts does not have to summon to the composition hearing those creditors who are not entitled to conclude while

there are any pending proceedings. Therefore, in such cases, the composition hearing shall be suspended until a final and binding decision is made in the proceedings pending in connection with such objections or disputed creditor claims (emphasis added).

*in accordance with the order published by the Metropolitan Table Court of Appeal and referenced by the first instance court, a final decision regarding the creditor claims disputed within the frame of the liquidation proceedings is indeed a preliminary question to the conclusion of the composition agreement. Therefore, **after scheduling the composition hearing**, the first instance court has to examine whether the disputed claims or objections have been decided upon by way of a final and binding order not subject to an appeal.* (emphasis added).

137. In addition it was clear at the time of the Bankruptcy Court's decision that the pending objections would not constitute an obstacle to the approval of a composition agreement, if one were reached.

138. First, in its draft "Agreement on the termination of liquidation procedure" submitted to the Court with the request for the convening of a composition hearing (Exh. C-021), Dan Cake had undertaken to "resign from its claims" provided certain conditions were fulfilled at the relevant time (Clause 4.2). Those conditions, listed under Clause 6.1, consisted essentially in the approval by the Court of a composition agreement, in accordance with the provisions of the Bankruptcy Act. In other words, Dan Cake's pending claims would automatically cease to exist and would not be an obstacle to the approval of a composition hearing.

139. Second, as to the request made by Dan Cake on 15 February 2008 to stop the first sale tender, the Bankruptcy Court did not have to wait until 27 May 2008, as it did, to realise that this request was moot since there had been no bids before the deadline of 21 March 2008, on the first tender. As the Court decided on 27 May 2008: "the sale tender was unsuccessful, and the Court therefore has no reasons to adjudicate this issue" (Exh. R-032). That had already become obvious on 22 April 2008.

140. It is common ground between the Parties that no appeal was possible against the Bankruptcy Court's decision of 22 April 2008. However Respondent contends that Claimant was not without a remedy, since Danesita could, at any time, have re-filed an adequate petition that complied with the law – or, rather, with the Court's decision.

141. The Tribunal disagrees. It results from the above analysis of the 22 April 2008 decision, first, that satisfying certain requirements would have taken a considerable time, while the operation of the factory with reduced personnel caused ever increasing losses. Second, among the obstacles raised by the Court was the existence of Dan Cake's objection to the assessment by the liquidator of its creditor's claims as late-filed. In his closing statement, Counsel for Hungary said: "This is something that Dan Cake could easily have resolved by simply withdrawing the claim, but they didn't."¹⁶ However Dan Cake could not be certain that, even if a composition hearing were convened, a composition agreement would be reached and would be approved, which was the condition precedent to the voluntary withdrawal of creditor's claim. It was perfectly legitimate for Dan Cake not to withdraw its claim in the event of a judicial sale of Danesita's assets.

142. It is impossible, at this stage, for the Tribunal to determine whether a composition agreement would have been reached if a composition hearing had been convened. However one thing is certain: whatever the chance of a successful composition hearing, it was destroyed by the Bankruptcy Court's decision to refuse to convene a hearing within 60 days, as required by the law. It also results from the above analysis of the decision that it was rendered in flagrant violation of the Bankruptcy Act and that it purported to condition the mandatory convening of the hearing upon several requirements, all of which were unnecessary; two of which were in direct violation of Dan Cake's creditor rights; and at least one of which was impossible to satisfy within a reasonable time. Moreover, the accumulation of seven unjustified obstacles, coupled with the reminder of the liquidator's obligation to proceed with the sale of Danesita's assets, is in the Tribunal's considered view a manifest sign that the Court simply did not *want*, for whatever reason, to do what was mandatory.

(2) The 22 April 2008 Decision of the Metropolitan Court of Budapest constitutes a violation of the Bilateral Investment Treaty between the Portuguese Republic and the Republic of Hungary

143. There is no dispute as to the fact that the act of a State court is attributable, under international law, to the State itself.

144. In the Section of its Reply entitled “Merits of the Claim” Claimant focused on the refusal by the Metropolitan Court of Budapest to convene a composition hearing, and in relation to this refusal it invoked:

- the breach of the obligation to accord fair and equitable treatment, in the form of a denial of justice (Article 3.1 of the Treaty);
- the breach of the obligation not to impair the use, enjoyment, management, disposal or liquidation of the investment by unfair or discriminatory measures (Article 3.2 of the Treaty).

a) *Breach of the obligation to accord fair and equitable treatment*

145. By rendering its 22 April 2008 decision, the Metropolitan Court of Budapest deprived Danesita of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person. Hungarian law provides for the possibility of an agreement between the debtor and its creditors. Danesita had the right to the convening of a composition hearing, under certain conditions which it met; the Metropolitan Court of Budapest, for its part, had the obligation to convene the composition hearing. It refused to do so, ordering instead Danesita to submit a number of documents which were not required by the law and were obviously unnecessary. At the same time it imposed changes in the draft composition agreement – such as the elimination of Dan Cake as a creditor having the right to participate in the composition hearing – as well as the withdrawal of pending objections to certain decisions of the liquidator, both of which were in themselves unfair and inequitable. By so doing, it rendered inevitable the sale of Danesita’s assets and its demise as a legal person. This is a clear violation by the Hungarian State – of which the Metropolitan Court of Budapest is an organ – of its obligation to treat Portuguese investors in a fair and equitable manner.

146. The violation of the obligation to treat the investor in a fair and equitable manner took the form of a denial of justice. Arbitral Tribunals have used, in order to characterize judicial decisions as denials of justice, various expressions which all perfectly fit the Metropolitan Court of Budapest’s 22 April 2008 decision: “administer[ing] justice in a seriously inadequate way,”¹⁷ “clearly improper and discreditable,”¹⁸ “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety. . . .”¹⁹ The International Court of Justice defined denial of justice as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”²⁰ The decision of the Metropolitan Court of Budapest does shock a sense of juridical propriety.

147. Respondent has objected that, even if there was a denial of justice – which it denies – Dan Cake has not satisfied the requirement of exhaustion of local remedies.

148. In its opening statement, Respondent listed the actions which Dan Cake and Danesita could have attempted in order to avoid the sale of its assets:

*Dan Cake and Danesita consistently failed to avail themselves of remedies afforded by the framework. They did not respond to the initial notice of liquidation; they did not file appeals on time or in proper form, or in some cases at all; they did not take advantage of the opportunity to reorganise through agreement with Danesita’s creditors; and they did not respond to the court’s request for documentation in order to convene a hearing.*²¹

149. The Arbitral Tribunal, however, considers that none of the actions mentioned by Respondent constitutes a remedy which ought to have been exhausted.

150. Some of the suggested courses of action would have had to take place *before* the 22 April 2008 decision: *e.g.* filing for bankruptcy protection; responding to the Bankruptcy Court’s notice of the liquidation request in time to prevent the insolvency order; correcting the faulty appeal of the insolvency order. These failures to act certainly played a causal role in the situation from which Danesita tried to extricate itself by entering into an agreement with its creditors. Nevertheless, being in that situation, it had a right to the convening by the Court, on its request, of a composition hearing. That right was denied by the Court’s decision, which the Tribunal has analysed as a denial of justice. The failure to act *prior* to the decision cannot be equated to a failure to exhaust a remedy against the

decision. Only an appeal against the decision would have constituted a remedy, but it is common ground between the Parties that no such appeal was possible under Hungarian law.

151. Respondent also mentioned, in its opening statement, the fact that Claimant could have appealed the decision of 29 May 2008, which dismissed its request to suspend the first tender.²² But in itself that dismissal caused no harm, since there had been no bidders (which was the reason for the dismissal). What caused harm was the second tender, but there was no way to prevent it or to put an end to the process of the sale, precisely because no composition hearing had been convened.

152. The other two alleged failures mentioned by Respondent – failure to reorganise through agreement with Danesita’s creditors, and failure to respond to the Court’s request for documentation – presuppose an analysis of the Court’s decision which the Tribunal does not share (see sub-section B.1 above).

153. Lastly, Respondent invokes the fact that “Dan Cake still could have preserved its investment by bidding on Danesita’s assets itself. . . .”²³ However bidding on Danesita’s assets cannot be considered as a remedy to the direct consequence of the Court’s decision, which is the sale of the assets; Dan Cake legitimately wanted to avoid such sale through an agreement with Danesita’s creditors. Moreover it has not been established that bidding on Danesita’s assets would have served Dan Cake’s interests.

154. The absence of any reasonably available further recourse against the Court order is such that, in the circumstances of this case, the breakdown must be treated as << systemic >>.

b) ***Breach of the obligation not to impair the use, enjoyment, management, disposal or liquidation of the investment by unfair or discriminatory measures***

155. Pursuant to Article 3.2 of the Treaty:

Neither of the Contracting Parties shall impair by unfair or discriminatory measures the use, enjoyment, management, disposal or liquidation of the investments in its territory of investors of the other Contracting Party.

156. Unlike some treaties, the Treaty does not require that the measure be at the same time unfair *and* discriminatory.

157. It has already been established (para. 142 above) that the 22 April 2008 judgment of the Metropolitan Court of Budapest was a measure tainted by unfairness, impairing Dan Cake’s rights in connection with the liquidation of its investment in Hungary.

C. The sale of the factory by the liquidator

158. There have been lengthy discussions, both orally and in writing, as to whether the liquidator, when it published the second tender, was doing so because he had been, implicitly but clearly, ordered to do so by the Metropolitan Court of Budapest’s decision of 22 April 2008. The discussion may be relevant to the question whether the *Court* misbehaved when it inserted, at the end of its decision, the surprising reminder that the liquidator was under a duty to proceed rapidly with the public sale of the factory. But it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, “a person or entity . . . which is empowered by the law of [the] State to exercise elements of the governmental authority,” the conduct of which “shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” The liquidator does not need to be empowered by a court to proceed with the sale of the debtor’s assets in the context of liquidation proceedings; it is not even certain that a court could confer such a power. The power to proceed to the sale results from the law, more precisely from Section 49 (1) and (2) of the Bankruptcy Act.

159. The Parties also discussed whether the power to proceed to the forced sale of the debtor’s assets is an element of governmental authority. Contrary to what Hungary has pleaded,²⁴ it is not an act which any private person, even representing creditors, could accomplish; it rests on a power specifically conferred by the law to the liquidator, and it is an act which deprives, under constraint, the debtor of the ownership of its assets. It certainly

involves an element of public authority. Can it be said to constitute an element of *governmental* authority? The Parties did not discuss this point.

160. Nor is it necessary to resolve it, since the liquidator's action, even if it were attributed to the Hungarian State, did not constitute a violation of international law. What was shocking was the refusal by the Court, in violation of Hungarian law, to convene a composition hearing, which was the only way to prevent the sale of the factory. The liquidator did not take any part in that decision. From the moment the Court refused to convene a composition hearing, the liquidator, who did not have the power to challenge the decision, could but accept that he was not relieved from his duty to proceed to the sale – even if, as Claimant remarks, he should have waited a few days more. Proceeding with the sale of the debtor's assets, as the final act of liquidation proceedings, is not a specific feature of Hungarian law; it is the normal outcome of liquidation proceedings under any law.

D. Consequences of Breach

161. Having concluded that, by virtue of the conduct of the Metropolitan Court of Budapest, Hungary breached its obligations under the Treaty, there is then a question as to the consequences of this breach. In particular, there remains an issue as to the extent (if at all) that the breach caused any loss to the Claimant, which in turn will depend *inter alia* upon whether the Court's decision was the operative factor that prevented the conclusion of a settlement with all creditors; and whether, had a composition hearing been convened, a composition agreement would have been concluded. Further, assuming the establishment of a causal link, there remains the issue as to the quantification of any damages. All of these matters are reserved for subsequent determination.

VIII. DECISION ON JURISDICTION AND LIABILITY

162. For the reasons set forth above, the Arbitral Tribunal:

- Declares that it has jurisdiction over the claims of Dan Cake;
- Decides that Hungary has breached its obligation to ensure that Dan Cake's investment be accorded fair and equitable treatment;
- Declares that Hungary has breached its obligation not to impair by unfair measures the liquidation of Dan Cake's investment;
- Will take the necessary steps for the continuation of the proceedings toward the next phase by way of a procedural order to be issued after consultation with the Parties;
- Reserves any decision on costs.

[signed]

Prof. Jan Paulsson
Arbitrator

[signed]

Toby Landau QC
Arbitrator

[signed]

Prof. Pierre Mayer
President of the Tribunal

Date: August 24, 2015

ENDNOTES

- 1 Amended Tr., Day 3, 46:5–11
- 2 Amended Tr., Day 3, 60:4–10
- 3 Amended Tr., Day 3, 124:19–23
- 4 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001).
- 5 “*Question*: Have they [Dan Cake] told you that for them it was important that the assets weren’t sold?
Answer: Well, I do believe it was in the interest of any creditor supporting a composition agreement because Danesita would only then have been able to meet its undertakings vis-à-vis the creditors, if the company continues its operation as a going concern.” (Amended Tr., Day 2, p. 148:10–17).
- 6 “*Question*: Would you have initiated the second tender if a composition hearing had been scheduled by the court?
Answer: No.” (Amended Tr., Day 2, p. 212:4–6).
- 7 Exh. RLA-055.
- 8 Exh. CLA-002 attached to the Reply. Claimant notes, at footnote 23 of the Reply, that “the English version is a summary of the [sic] Hungary’s original prepared by Mr. Csongór Palotás.” The accuracy of this version has not been challenged by the Respondent.
- 9 Metropolitan Court of Budapest, Order, April 22, 2008, Exh. C-033.
- 10 *Id.*
- 11 *Id.*
- 12 Amended Tr., Day 2, 206:14–17.
- 13 Exh. CLA-002 attached to the Reply. See above, footnote 6, the Claimant’s comment on the translation into English.
- 14 [After checking the contents of MKB Bank’s letter of 20 March 2008 to Dr. Palotás, Exh. R-025 or C-020]: “On page 2, paragraphs 3 and 5 suggest, I believe, that until the signing of the tripartite agreement between Dan Cake, MKB and Danesita, we had to fine-tune the text. But the agreement could only enter into force once we receive the signed bank guarantee. I believe that this should have happened before the court approval of the competition (sic) agreement” (Amended Tr., Day 2, 140:12–18).
- 15 Dr. Ott’s cross-examination: “Prior to the court’s approval we requested a surety in a notarised document and we requested a bank guarantee to be submitted to us, and in return we issued a conditional release of the mortgage in which we undertook responsibility and we stated that provided that the final approval of the composition agreement by the court and provided that all the bank guarantee and the surety documents are available, then MKB would have no other option but to issue the final release of the mortgage” (Amended Tr., Day 2, 122:12–21).
- 16 Amended Tr., Day 3, 81:13–15.
- 17 *Robert Azinian et al. v. United States of Mexico*, ICSID case n° ARB(AF)/97/2, Award of 1 November 1999 (para. 102); 5 *ICSID Rep.* 269, 290; CLA-022. October 2002 (para. 127); 6 *ICSID Rep.* 192, 226; CLA-025.
- 18 *Mondev International Ltd v. United States of America*, ICSID case ARB(AF)/99/2, Award of 11
- 19 *The Loewen Group and Raymond L. Loewen v. United States of America*, ICSID case n° ARB(AF)/98/3, Award of 26 June 2003 (para. 132); 7 *ICSID Rep.* 442, 467; RLA-021.
- 20 *Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy*, 1989 *ICJ* 15 (para. 128); CLA-024.
- 21 Amended Tr., Day 1, 60:10–18.
- 22 Amended Tr., Day 1, 61:3–5. Respondent mistakenly referred to it as the “May 29th 2008 decision.”
- 23 Amended Tr., Day 1, 61:7–9.
- 24 Amended Tr., Day 3, 85:1 - 87:4.