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ENGLISH COMMERCIAL COURT FINDS BIT TRIBUNAL INTERPRETED ITS JURISDICTION WRONGLY IN INVESTOR-STATE DISPUTE

GPF GP Sarl v Poland [2018] EWHC 409 (Comm)

Introduction

By a decision handed down on 2 March 2018 in *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm), the English Commercial Court allowed a challenge under Section 67 of the Arbitration Act 1996 against an Award on Jurisdiction rendered by a three-member arbitral tribunal on the basis that the tribunal's determination of its jurisdiction had been too narrow.

Background

The claimant was a Luxembourgian company that provided financing to allow a real estate group operating in Poland to acquire a 100% shareholding in a company that held usufructuary rights in respect of land in central Warsaw. The claimant commenced a Stockholm Chamber of Commerce arbitration (seated in London) against Poland seeking compensation on the basis that Poland had committed an expropriation of their usufruct rights through a series of acts including a decision by the Polish courts terminating the underlying Perpetual Usufruct Agreement ("PUA"). The arbitration arose out of the Bilateral Investment Treaty between the Belgium-Luxembourg Economic Union and Poland signed in 1987 ("the BIT").

Article 9.1(b) of the BIT provided for a reference to arbitration for "*disputes relating to expropriation, nationalisation or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation*".

By an Award on Jurisdiction handed down on 15 February 2017, the Tribunal (Professor Gabrielle Kaufmann-Kohler, President; Professor David A.R. Williams QC; Professor Philippe Sands QC) ruled that, whilst it had jurisdiction to rule on whether a judgment from the Polish courts terminating the PUA amounted to an expropriation, it did not have jurisdiction to rule on any other measures alleged by the claimant to be violative of the BIT, including the claimant's claim for breach of the Fair and Equitable Treatment ("FET") standard.

The claimant filed a challenge to the substantive jurisdiction of the Tribunal under Section 67 of the Arbitration Act 1996 contending that Tribunal had erred in interpreting Article 9.1(b) of the BIT in such a manner as to exclude the FET claim and in interpreting their jurisdiction over the indirect expropriation claim in such a manner as to limit it to the decision of the Polish courts (to the exclusion of any of the series of measures leading up to that judicial decision).

Decision

The Commercial Court (Bryan J) allowed the challenge.

Bryan J first considered whether a hearing in a challenge to an arbitral tribunal's substantive jurisdiction was by way of a re-hearing and considered that it was. This was so regardless of whether the challenge involved a question of jurisdiction *ratione personae* or *ratione materiae*. On a hearing to decide whether an arbitral tribunal has substantive jurisdiction, the court must make that consideration "*unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators*". Notwithstanding that conclusion, Bryan J also held that the court could still control the evidence adduced in the challenge proceedings.

On a review of investment treaty cases, Bryan J affirmed that a FET claim based upon measures involving a deprivation or restriction of property rights that caused consequences similar to an expropriation would fall within the scope of disputes that could be submitted to arbitration in accordance with the language in Article 9.1(b) of the BIT. On the facts of the instant case, the Tribunal had accepted that the FET claim was premised on an interference by Poland with the claimant's property rights leading to the termination of the PUA by the Polish courts that deprived the claimant of their property rights. Accordingly, the Tribunal should have held that it had jurisdiction to determine the FET claim.

Bryan J held that the language of Article 9.1(b) of the BIT covered all forms of expropriation, including creeping expropriation. The Tribunal had failed to give meaning and effect to all of the words used in Article 9.1(b) of the BIT when making its decision on jurisdiction.

Bryan J therefore set aside the relevant operative parts of the Award on Jurisdiction and replaced them with a declaration that the Tribunal had jurisdiction over all factual matters relied upon in support of the claimant's direct and/or indirect expropriation claim and all factual matters relied upon in support of the claimant's FET claim.

Concluding Remarks

This judgment is thought to be the first occasion on which an English court has set aside an investment treaty dispute award. Nevertheless, the judgment evidences the pro-arbitration approach of the English courts and arbitration framework – allowing a full re-hearing of jurisdictional issues in the face of an arbitral jurisdiction award rendered on the basis of too narrow an approach.