

# Dispute Resolution Hotline

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## IN A FIRST, ENGLISH HIGH COURT SETS ASIDE INVESTMENT TREATY AWARD AGAINST POLAND

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On March 2, 2018, the England & Wales High Court (Court) for the first time set aside an investor-state arbitration award on jurisdiction (Award on Jurisdiction) passed against the Claimant in GPF GP S.a.r.l. v. Republic of Poland<sup>1</sup>. The Court ruled that:

- A specific event in a series of creeping expropriation did not preclude the tribunal from assuming jurisdiction over other measures in the series;
- Fair and equitable treatment (FET) claims fell within a dispute resolution clause covering expropriation 'as well' as other measures 'leading to consequences similar to expropriation'
- Effet utile principle assured that effect and meaning be given to every word in a clause

### BACKGROUND

In 2008, the Claimant (a Luxembourg Company) made an investment in White Star Property Group (WSG, a Polish entity) to enable it to acquire shares in 29 Listopada. 29 Listopada held usufructuary rights in a property in Warsaw pursuant to a Perpetual Usufruct Agreement (PUA) for 99 years.

WSG sought recommendations from Warsaw officials on development of property held by 29 Listopada. Based on recommendations and permits granted by Warsaw authorities, the Claimant provided finance to WSG's acquisition of shares in 29 Listopada.

Subsequently, Warsaw officials reversed their recommendations and permits. After recourse to local remedies, in 2013, the Warsaw Regional Court terminated the PUA. This decision stood confirmed by the Warsaw Court of Appeal in 2014. Appeal against the same was rejected by the Supreme Court.

The Claimant initiated claim under Article 9 of the Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, which became binding on 2 August 1991 (BIT).

### KEY ISSUES

The Claimant raised two claims in the arbitration: (a) that the series of measures adopted by Poland culminating into the Warsaw Court of Appeal decision constituted indirect expropriation in the form of creeping expropriation; and (b) the measures adopted by Poland violated the FET standard under the BIT. The Claimant averred that the arbitral tribunal (Tribunal) had jurisdiction over all claims under Article 9.1(b) of the BIT.

Article 9.1(b) covered:

*disputes relating to expropriation, nationalization 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.*

With respect to (a) above, the Tribunal ruled that it only had jurisdiction to determine whether the Warsaw Court of Appeal decision constituted expropriation; and not whether other measures constituted indirect expropriation. With respect to (b), the Tribunal held that its jurisdiction under Article 9(2) read with Article 9.1(b) was restricted to expropriation and did not cover FET.

The Claimant challenged the Award on Jurisdiction before the Court under Section 67 of the English Arbitration & Conciliation Act, 1996 ("A&C Act").

### ANALYSIS OF THE DECISION

At the outset, the Court ruled that the hearing under Section 67<sup>2</sup> is in the nature of a re-hearing, and that a party can challenge an award of the tribunal as to its substantive jurisdiction.

The Court held that the Tribunal had erred on both aspects on its substantive jurisdiction. With respect to (a), the Court held that under creeping expropriation,<sup>3</sup> each act in the series was essential to determine a claim for creeping expropriation. The identification of a specific event as expropriation did not foreclose consideration of other acts in

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the series to have an effect similar to expropriation. Therefore, the Tribunal had erred in assuming jurisdiction only on the Warsaw Court of Appeal decision leading to termination of the PUA whilst denying jurisdiction on prior measures alleged to constitute creeping expropriation.

With respect to (b), the Court held that FET claims were covered under Article 9.1(b). The Court segregated Article 9.1(b) into two parts. The first part included *‘disputes relating to expropriation, inter alia placing it under public supervision’* (*‘Part 1’*). The second part included *‘as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation’* (*‘Part 2’*).

It held that Part 1 considered all measures relating to expropriation. The Court meticulously employed the principles of interpretation under the Vienna Convention on the Law of Treaties (VCLT) and stated that the use of the words *‘as well as’* in Article 9.1(b) formed a different category of disputes – not in continuation but in addition to Part 1. Moreover, the two parts envisaged separate category of disputes. The ordinary meaning of *‘deprivation or restriction’* in Part 2 entailed a lesser threshold of interference than *‘an expropriation’* in Part 1. In addition, the words *‘leads to’* and *‘consequences similar to expropriation’* in Part 2 envisaged something distinct from expropriation.

Additionally, the Court used the *‘effet utile’* principle to give effect and meaning to words in Part 2, as opposed to discarding the same as a *‘mere tautology’* as claimed by the Respondent.

## COMMENT

The Court’s ruling on creeping expropriation is laudable. It assures that once a Tribunal assumes jurisdiction over expropriation claims, it would be inappropriate for the Tribunal to pick and choose select State acts especially in an alleged series, at the preliminary stage and narrow the scope of adjudication. This is a matter best judged by the Tribunal at the merits stage.

However, with respect to coverage of FET, the Court has granted jurisdiction based on interpretation of language of Part 1 and 2. Under prevalent interpretations adopted by tribunals to *‘measures leading to consequences similar to expropriation’*, a claim for FET violation is distinct from expropriation. It is seldom considered hand-in-hand with a clause relating to expropriation.

Further, the distinction is based on detailed interpretation of the language of a French version of the BIT – agreed by the parties to be translated in English. It is pertinent to note that two of the Tribunal members are French speakers. It is unclear whether the Court considered this aspect while deciphering the ordinary meaning of words in the translated BIT.

While it is desirable that national courts adopt a slow pace in *‘over-ruling’* decisions of international arbitral tribunals, more particularly in the context of investor-State disputes, the present decision closely scrutinizes the award on jurisdiction on principles of interpretation and recognized concept in international investment treaty law. This power is derived from Section 67 of the A&C Act which offers wide latitude to re-consider facts and arguments placed before the tribunal, as also consider new arguments and evidence. This practice is prevalent in France and Switzerland which permit a wider scope of review to national courts.

The present case is unique in as much as it is the first instance where an English Court has rejected an arbitral award on substantive jurisdiction under an investor-state dispute. It is also a classic example of the interplay or conflict between interpretations adopted by specialized international law tribunals and national courts.

We will wait to see whether leave will be granted to Republic of Poland and if so, whether the decision of the Court would be confirmed, modified or over-ruled by the English Court of Appeal. In the absence of a specific leave to appeal, the case would move to the stage of merits. A deeper conflict may arise then since the Tribunal, having harbored a decision on denying jurisdiction on majority claims, will be compelled to adjudicate upon merits of the claims.

– Vyapak Desai & Kshama A. Loya

You can direct your queries or comments to the authors

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<sup>1</sup> [2018] EWHC 409 (Comm)

<sup>2</sup> Section 67. *Challenging the award: substantive jurisdiction.*

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

<sup>3</sup> As *‘a series of acts or measures that did not individually constitute expropriation but cumulatively had the effect of expropriation’*.

The Court also quoted the oft-used lines in this context, stating that *‘the last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back’*.

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