Gold Pool JV Limited v The Republic of Kazakhstan [2021] EWHC 3422 (Comm)

Summary

Andrew Baker J held that an arbitral award dated 30 July 2020, which had rejected the claimant's claims for compensation against the Republic of Kazakhstan on the grounds that the arbitrators did not have jurisdiction, should be set aside pursuant to s.67 Arbitration Act 1996; the arbitrators did have jurisdiction *ratione voluntatis* to hear the claims, and the case was remitted to the arbitrators to deal with the substantive claims on the merits.

Background

The claimant ("Gold Pool") claimed that in or about August 1997 it was deprived of a valuable investment in Kazakhstan causing it a loss which it claimed amounted to over US$900 million, and that the circumstances of the case would entitle it to compensation from Kazakhstan if a particular international treaty was binding between Canada and Kazakhstan at the material time.

The relevant treaty was the Agreement for the Promotion and Reciprocal Protection of Investments concluded between Canada and the USSR in Moscow on 20 November 1989 that entered into force on 27 June 1991 ("the FIPA"). Gold Pool alleged that upon the dissolution of the USSR, Kazakhstan had impliedly succeeded to the FIPA such that that treaty was binding as between Canada and Kazakhstan.

The FIPA contained an arbitration agreement providing investors of either contracting state with a right to refer to arbitration, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, any dispute with the other contracting state relating to the effects of a measure taken by that state on the management, use, enjoyment or disposal of qualifying investments.

In March 2016, Gold Pool commenced arbitration against Kazakhstan in respect of its asserted investor protection claim purportedly pursuant to that arbitration agreement.

By an award dated 30 July 2020, the arbitrators rejected Gold Pool's claim on the basis that the arbitrators lacked jurisdiction *ratione voluntatis* because, in their view, Gold Pool had failed to establish an implied succession agreement between Canada and Kazakhstan in respect of the FIPA.

Gold Pool applied to the High Court seeking the setting aside or variation of parts of the award under s.67 Arbitration Act 1996. The issue for the court was whether the legal rule that states, following the emergence of one of them as a new state, may agree either explicitly or tacitly to continue a pre-existing treaty relationship applied in the case of the FIPA, such that there was an implied succession agreement between Canada and Kazakhstan that the FIPA should continue between them and accordingly that Gold Pool could bring arbitration proceedings in accordance with that treaty.

Principal Issue

Gold Pool's case was that Canada and Kazakhstan had impliedly agreed that Kazakhstan had succeeded to the FIPA in three alternative ways:

1. by paragraph 3 of a Declaration of Economic Co-operation between Canada and Kazakhstan signed between the two countries on 10 July 1992 ("the 1992 Declaration");

2. by Note 43/94 dated 13 April 1994 from the Canadian Embassy in Almaty to the Kazakhstan foreign ministry, unsigned but stamped by the Embassy, and the latter's signed reply ("the 1994 Exchange"); and
3. by a recital referring to the FIPA in a Trade Agreement between the Government of Canada and the Government of the Republic of Kazakhstan, signed between the two governments on 29 March 1995 ("the 1995 Recital" and "the Trade Agreement").

Kazakhstan's position was that no such agreement had been formulated. The parties were agreed that no formality was required for there to be a binding succession agreement so long as there was a meeting of minds between Kazakhstan and Canada on the point. However, the defendant submitted that succeeding to the FIPA would be a serious legal commitment for Kazakhstan, granting to private parties in a bespoke way both substantive rights and a binding procedural process whereby to seek to enforce them on neutral ground, viz. in international arbitration. Since the treaty was concluded for the benefit of private investors, it was not to be expected that states would keep such an agreement secret, and moreover, had the parties meant to articulate an agreement that Kazakhstan was succeeding to the FIPA, it would have been easy for them to have said so in terms.

Judgment

For the purpose of considering the meaning and effect of the express consensus ad idem contained in the 1992 Declaration, the 1994 Exchange or the 1995 Recital respectively, Andrew Baker J agreed with Gold Pool that what mattered was the purport and effect of those express, documentary accords; uncommunicated opinions or understandings on either side were irrelevant.

He also noted that where, as in this case, what was relied on is bilateral communication using written words, the words as used in their context must not be reasonably and sensibly capable of having conveyed *inter partes* a meaning other than that the parties were agreed on succession, as otherwise they are properly to be regarded as ambiguous, and ambiguous exchanges do not amount to an agreement.

Accordingly, he considered the chronology and detail of the interactions between Canada and Kazakhstan public officials following the creation of the state as well as public statements made by either of them that were intended for consumption by the other (and potentially amongst many others), which may reflect their intention to continue the application of the FIPA to Kazakhstan as a successor to the USSR. A range of materials referred to by the defendant that came after the fact of the agreements were not part of any articulated consensus created at the time, and so were not persuasive.

In his judgment, Andrew Baker J found that:

1. By paragraph 3 of the 1992 Declaration, Canada and Kazakhstan did impliedly confirm that the FIPA applied as between them. Taking into account the context of the 1992 Declaration (a public joint declaration of intent in writing by the ministers of the two governments) and its various statements as to the joint interests to be promoted by the parties acting in accordance with it in the future, the way in which paragraph 3 of the Declaration was expressed appeared to take it as a given that for the time being the FIPA (and a 1985 Double Taxation Agreement) applied between Canada and Kazakhstan, as a successor state to the USSR. This was the only sensible reading of

the parties' choice of language, to resolve as they did to facilitate efforts to expand from what they had (i.e. the FIPA and the 1985 DTA), all "*in accordance with*" those agreements.

2. The two alternative events, namely the 1994 Exchange and the 1995 Recital, were each reasonably capable of having conveyed *inter partes* only one message, that the FIPA (as well as another treaty of 1976) were agreed to be in force and effective between them. Therefore, had the 1992 Declaration not amounted to a succession agreement, either of those exchanges would have done.

Disposal

Therefore, Gold Pool's s.67 application succeeded; Canada and Kazakhstan had impliedly agreed to the succession of Kazakhstan to the FIPA as successor state of the USSR for its territory (both by the 1992 Declaration, and also as reconfirmed by the 1994 Exchange and the 1995 Recital). The arbitrators were bound to proceed on the basis that they did have jurisdiction *ratione voluntatis* over Gold Pool's substantive claims and the case was remitted to them for consideration.