# Dispute Resolution Hotline

March 30, 2018

## ENGLISH COURT FOR THE FIRST TIME SETS ASIDE AN INVESTOR-STATE ARBITRAL AWARD ON JURISDICTION

- English Court held that a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be a form of expropriation in itself;
- English Court opines that each measure need not be an identifiable act of expropriation, and need not in itself have a perceptible impact, as long as each measure results in adverse effect culminating into an expropriation;
- There is no distinction between subject matter and personal jurisdiction in case of a jurisdictional challenge to an arbitration award, and only the construct of the arbitration agreement must be interpreted to determine the jurisdictional challenge.

Recently, the High Court of England and Wales ("**English Court**") has for the first time set aside an investor-state arbitration award on jurisdiction, under Section 67 of the UK Arbitration Act, 1996 ("the **Act**"). It is unusual for an English Court to set aside an arbitral award, more so to consider the scope of protections under an investment treaty arbitration and set aside an award on jurisdiction. The award was rendered on 15 February 2017, and was seated in London, pursuant to 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 of 19 May 1987, but which became binding on 2 August 1991 (the **"BIT"**).

### BACKGROUND:

GPF GP S.a.r.l **("Griffen")**, a company domiciled in Luxembourg, financed a multi-layered investment into a real estate project in Warsaw. Griffen invested to develop a property, comprising of two plots of land and a former military residential building ("**Property**"), into residential apartments with complementary services.

Prior to Griffen's investment, the city of Warsaw had issued a WZ Decision (the "**2005 Decision"**) specifying the conditions for building and land development, and on 11 July 2005 issued a building permit in respect of those works (the **"2005 Building Permit"**). In 2007, a recommendation was obtained from the Warsaw Monuments Conservator **("Conservator")** supporting the proposed adaptation of the existing project in terms of Griffen's investment (the **"April 2007 Recommendation"**). The National Centre of Monument Research and Documentation approved these recommendations. These prior measures formed the basis of Griffen's investment, and as Griffen argues, these recommendations constituted an administrative promise which could not be reversed arbitrarily, which had given rise to legitimate expectations.

However, post-Griffen's investment, the Conservator subsequently reversed the earlier approval and issued two decisions objecting to the development on the ground that it would be adverse to conservation of monuments. The Conservator also directed halting of the demolition work and initiated proceedings so as to enter the Property into the register of historical monuments. In June 2013, the Warsaw Regional Court cancelled Griffen's right to develop the Property on the premise that Griffen had failed to develop the Property within the time limits specified. This was subsequently confirmed by the Warsaw Court of Appeal, and later by the Polish Supreme Court. This formed the basis of Griffen's arbitration proceedings against Republic of Poland **("Poland")**

### THE ARBITRAL PROCEEDINGS:

Griffen commenced arbitration against Poland under Clause 9.1 (b)[1] the BIT. Griffen's claim was premised on violation of the standards for fair and equitable treatment ("**FET**") under clause 3.1[2] of the BIT. Griffen contended that Poland had acted in an unjustified, arbitrary and discriminatory manner, in so far as no company's right to develop a project was ever terminated due to delay in development deadlines. Griffen also maintained that the prior measures combined with the decision of Warsaw Court of Appeal cancelling Griffen's right to develop the Property constituted a series of expropriatory acts (including creeping expropriation)[3] attributable to Poland under the BIT.[4]

### THE ARBITRAL AWARD

The Tribunal accepted jurisdiction over Griffen's claim that there has been expropriation, but however held that it lacked jurisdiction to rule on Griffen's claim for FET and indirect expropriation on the basis that these are disputes which are outside the scope of BIT. The Award held that only direct expropriation claims can be brought under the BIT.

### DECISION OF THE ENGLISH COURT:

***i. Nature of applications under Section 67 of the Act challenging the arbitral award:***

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After review of catena of cases[5], the English Court was of the view that an application under Section 67 of the Act, is a essentially a re-hearing of the case and ought not to be fettered by the reasoning of the arbitrator, or the manner in which arguments were advanced before the arbitral tribunal. The court also opined that there is no difference between a question of jurisdiction *ratione personae* (personal jurisdiction) or *ratione materiae* (subject matter jurisdiction), and both are subject to a re-hearing as jurisdiction is conferred on the true construction of the arbitration agreement.

### *ii. Claims for indirect expropriation*

After careful consideration of the arbitration agreement and in particular the phrase "*or any other similar measures affecting investments*", the English Court opined that the phrase clearly encompasses any other similar measures that affect investments, which will include all forms of indirect expropriation including "*creeping expropriation*". On this basis, it held that the Tribunal is vested with the jurisdiction to decide upon all forms of expropriation: direct or indirect, including creeping expropriation.

The English Court held that a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation. The English Court referred to earlier cases[6] while following that "*expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. This is frequently characterized as a "creeping" or "constructive" expropriation.*"[7] Thus, all the measures, in their entirety, should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own.

The English Court upheld Griffen's submission on indirect expropriation on a prima facie basis, and opined that each matter relied upon, need not be an identifiable act of expropriation and need not in itself have a perceptible impact on the back of it. Therefore, there is no need to isolate single matters as expropriatory, the date precisely on which they occurred, and the precise property right said to be have been expropriated at any particular point in time.

### *iii. FET claim*

The English Court carefully considered the words "…*as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation*…" stipulated in the arbitration agreement, and opined that (a) FET claims which causes consequences similar to expropriation is within the scope of the arbitration agreement; and (b) regulatory measures that breach the FET standard and even though they do not constitute indirect expropriation by themselves, but if they have similar consequences will be under the scope of the arbitration agreement. The English Court held that the Tribunal has the jurisdiction to hear Griffen's FET claim, and left it for the Tribunal to decide the merits of the claim.

## CONCLUSION AND ANALYSIS:

English courts have been consistent in ensuring minimum intervention of courts in challenges made to arbitral awards.[8] This is supported by the narrow scope of Section 67 of the Act with respect to challenges to arbitral awards, more so in cases of bilateral investment treaty arbitrations. However, in this case, the English Court preferred to digress from the standard approach, and rightly so given the text of the arbitration agreement and the facts and circumstances. The interpretation of the arbitration agreement, the discussion on expropriation, and finally the jurisprudence on the nature of challenge under Section 67 of the Act is praiseworthy.

The English Court observed that one of the Tribunal members had opined in an earlier case that creeping expropriation can only exist when none of the challenged measures constitute expropriation[9]. That seemed to be the basis of the Award, as the Tribunals generally tend to stick to a view point that they have opined in an earlier case. The present case involved a BIT with a distinct dispute resolution clause, capable of covering both expropriation and FET violations. However, in the Indian context, such specific dispute resolution clauses are seldom found in BITs.

Generic clauses with wide coverage over disputes arising out of the treaty[10] or relating to investments[11] are prevalent. For instance, the India-United Kingdom BIT the India-Mauritius BIT provides that the tribunal has jurisdiction over "*any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute*."

There are at least fourteen investment treaty arbitration cases pending against India, with Nissan being the latest addition. Most of these cases include a claim for indirect expropriation, and English Court's analysis will provide a helpful guidance to understand the issues involved in these cases.

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[1] Clause 9.1 (b) contained the arbitration agreement which has been assailed in the Section 67 challenge, and reads as follows:*"… 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."*

[2] "…*Each Contracting Party shall accord in its territory to investments by investors of the other Party fair and equitable treatment excluding any unjustified or discriminatory measure that could impede the management, maintenance, use or enjoyment or liquidation thereof*…"

[3] Creeping expropriation" results from a series of measures taken over time that cumulatively have an expropriatory effect

[4] Clause 4.1 of the BIT read with Clause 9.1 (b) of the BIT

[5] *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68, *Dallah Real Estate v. Pakistan* [2010] UKSC 46, *Republic of Ecuador v. Occidental Exploration & Production Co (No 2)* [2006] EWHC 345 (Comm)

[6] *Crystallex International Corporation v Venezuela* ICSID Case No. ARB(AF)/11/2 (Award 4 April 2016); *Roussalis v Romania* ICSID Case No. ARB/06/01, Award 7 December 2011

[7] *Roussalis v Romania* ICSID Case No. ARB/06/01, Award 7 December 2011 (paragraph 329)

[8] For example, *Integral Petroleum SA v Melars Group Limited* [2016] EWCA Civ 108

[9] A viewpoint, expressed by the tribunal chaired by Prof. Gabrielle Kaufmann-Kohler in *Burlington Resources v Republic of Ecuador,* ICSID Case No. ARB/08/05, Decision on Liability 14 December 2012, that "*creeping expropriation only exists when "none" of the challenged measures separately constitutes expropriation*"

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[10] See, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (India-United Kingdom BIT).

[11] See, Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (India-Mauritius BIT).