

GPF GP S.à.r.l. -v- Republic of Poland

[2018] EWHC 409 (Comm)

Challenge to a jurisdictional award in investment treaty arbitration pursuant to section 67 of the Arbitration Act 1996. On a proper construction of the treaty the tribunal had had jurisdiction to determine claims by an investor for breach of the fair and equitable treatment standard and for creeping expropriation.

The matter arose out of the development of a site in Warsaw (“the Property”). In 2001, a company acquired rights over the Property under the terms of a Perpetual Usufruct Agreement (“the PUA”). The PUA envisaged the development of the property into residential flats and provided deadlines for commencement and completion of the project.

In 2007, the development was recommended by the Warsaw Monuments Conservator and the National Centre of Monument Research and Documentation. In 2008, Griffin financed the purchase of shares in the company with rights over the Property. In 2009, however, the Conservator reversed its earlier decision on the grounds that the development was not acceptable. The following year the Conservator ordered that the development works be halted. In December 2011, the City of Warsaw sought termination of the PUA, this being ordered by the Warsaw Regional Court in June 2013 on the grounds that there had been a failure to develop the Property within the time limits set out in the PUA.

Griffin alleged that there had been various breaches by Poland of the bilateral investment treaty between Poland and Belgium (“the BIT”), including a claim of indirect expropriation, and commenced arbitration proceedings against Poland.

The Tribunal ruled that it did not have jurisdiction over most of the claims brought by Griffin alleging breach of the Fair and Equitable Treatment standard set out in Article 3.1 of the the BIT. Such claims were not considered to be within the scope of the arbitration agreement in Article 9.1 of the BIT, that being limited to claims for expropriation. The tribunal further ruled that its jurisdiction in respect of Griffin’s claim of indirect expropriation was limited to considering whether the decision of the Warsaw Regional Court had effects similar to expropriation (and not the measures prior to that decision).

Griffin’s challenge to the jurisdictional award, pursuant to section 67 of the Arbitration Act 1996, succeeded before the Commercial Court.

Bryan J held that the terms of the BIT, properly considered, did confer jurisdiction upon the Tribunal. As established by the authorities on section 67, the challenge proceeded by way of rehearing with the parties being unfettered by how arguments had been advanced before the Tribunal. Having considered the terms of the bilateral investment treaty and the proper approach to construing such treaties at some length, the Court ruled that the tribunal did have jurisdiction over all of the claims.

As to Griffin’s claim of indirect expropriation, Bryan J considered the relevant authorities and was held that a claim for creeping expropriation is not ruled out where there is a specific event which may itself be ultimately found to be a form expropriation.