

PAO Tatneft -v- Ukraine
[2018] EWHC 1797 (Comm)

Ukraine’s application to set aside an order enforcing an arbitration award made pursuant to the arbitration procedure in a bilateral investment treaty. The disputes raised by Tatneft had been disputes which Ukraine had agreed to submit to such arbitration and therefore Ukraine had no state immunity by reason of s. 9 State Immunity Act 1978.

The underlying dispute in *Tatneft v Ukraine* related to shares in Ukratnafta, a Ukrainian oil company established in 1995. Ukratnafta owned and operated the Kremenchug Refinery (“the Refinery”) in Ukraine. Tatneft was one of the original major shareholders in Ukratnafta. In 1999 two other entities, Seagroup International Inc and AmRuz Trading AG acquired shareholdings in Ukratnafta. In May 2007, the Ukrainian courts ruled that the process by which Seagroup and AmRuz acquired their shareholdings was invalid, with those shares being returned to Ukratnafta and then sold on to a third party. Subsequently, on Tatneft’s case, the Refinery was seized by force with Ukrainian involvement in October 2007. In December 2007, Tatneft purchased shareholdings in Seagroup and AmRuz. Subsequently, the Ukrainian courts invalidated the agreements by which Tatneft had acquired its own shareholding in Ukratnafta, those shares being returned and sold to a third party.

The Russian Federation and Ukraine are party to a bilateral investment treaty (“BIT”). The BIT does not contain a fair and equitable treatment clause but does include a most favoured nation provision. In May 2008, Tatneft invoked the arbitration clause within the BIT. The Tribunal dismissed Ukraine’s jurisdictional objections in September 2010 and issued an award on the merits in July 2014 (“the Award”). The Tribunal found that the Ukraine had breached an obligation to treat Tatneft fairly and equitably and ordered the payment of US\$112 million plus interest.

Tatneft obtained permission to enforce the Award pursuant to section 101(3) of the Arbitration Act and for judgment to be entered for the award sum plus interest (“the Order”). Ukraine applied to set aside the Order on two grounds. First, that it was entitled to assert state immunity as, on its interpretation of the arbitration agreement, it had not agreed in writing to submit the relevant disputes (or some of those disputes) to arbitration for the purposes of section 9 of the State Immunity Act 1978. Second, that Tatneft failed to comply with its duty of full and frank disclosure in obtaining the Order and thereafter.

Butcher J dismissed Tatneft’s initial objection to the challenge. Although Ukraine had failed to raise all its arguments as jurisdictional points before the Tribunal, it was not precluded from advancing these points before the Court. Butcher J, however, held that Ukraine had lost the protection of state immunity. Having summarised the principles governing the construction of bilateral investment treaties, as set out in the judgment of Bryan J in *GPF GP S.à.r.l. v Republic of Poland* [2018] EWHC 409 (Comm), the Court held that:

- 1) The issue of whether or not the BIT incorporated a duty of fair and equitable treatment was not jurisdictional. An ordinary meaning was to be given to the broad terms of the arbitration agreement which conferred jurisdiction upon the Tribunal to determine whether or not Ukraine was subject to that duty.
- 2) Tatneft’s shareholdings in AmRuz and Seagroup were investments for the purposes of the arbitration agreement. There was no requirement of an active process of committing resources on the part of the investor.

- 3) Although the arbitration agreement was subject to a temporal restriction, the critical date on which the disputed measures were adopted was subsequent to Tatneft's acquisition of the shareholdings in AmRuz and Seagroup.
- 4) Whether or not the bringing of the claim in arbitration amount to an abuse of rights was not a jurisdictional issue, it was a matter of admissibility for the Tribunal to determine.
- 5) There had been no substantial breach by Tatneft of its duty of full and frank disclosure.