DURABLE AS GOLD: CANADA'S 1989 INVESTMENT TREATY WITH THE USSR IS BINDING ON KAZAKHSTAN

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

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I. OVERVIEW

In a rare case on state succession to treaties, the English Commercial Court recently had to consider a challenge by a Canadian investor arguing that an arbitral tribunal had wrongly ruled Canada's 1989 bilateral investment treaty with the USSR was not binding on Kazakhstan (and had therefore wrongly upheld Kazakhstan's jurisdiction challenge). The judgment of Andrew Baker J makes for interesting reading, particularly at a time when former USSR republics might have their conduct increasingly scrutinized for adverse impacts on foreign investors, including Canadians.

II. BACKGROUND

In March 2016, Gold Pool JV Limited ("Gold Pool") commenced arbitration against Kazakhstan due to the latter's revocation of Gold Pool's contractual rights in relation to a local gold mining company. The relevant events took place between 1996 and 1997, and Gold Pool claimed that its losses exceeded US$900 million.

The claim was brought under the Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the USSR dated 20 November 1989 (the "Treaty").

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Kazakhstan argued that it was not bound by the Treaty and that the tribunal lacked jurisdiction *ratione voluntatis*. Following a full hearing on jurisdiction and merits, the tribunal issued an award on 30 July 2020 finding that it lacked jurisdiction *ratione voluntatis*. Gold Pool challenged the award before the English Court under section 67 of the English Arbitration Act 1996, which pertains to challenges to tribunals' jurisdiction awards.

An interesting element of the backdrop to this case was that a few years before Gold Pool initiated arbitration, another Canadian investor, World Wide Minerals Limited, had brought a claim against Kazakhstan under the same Treaty, and in 2015 had obtained a diametrically opposite jurisdiction award from a different tribunal. On that occasion, Kazakhstan did not challenge the jurisdiction award within the 28-day period allowed under the statute, but (after the Gold Pool arbitration had started) the State belatedly sought to bring a section 67 challenge in 2018 (959 days late). The Court rejected that challenge for being out of time.[1]

In both cases, the controversy stemmed from the fact that the Treaty was signed between Canada and the USSR in 1989, when Kazakhstan did not exist as a separate person in public international law. Following the dissolution of the USSR, it was widely accepted that the Russian Federation constituted the continuation of the USSR for public international law purposes. Kazakhstan was, as Baker J put it, "a successor to, but not the continuation of, the USSR". The question was whether it was bound by the Treaty as such a successor, in circumstances where Kazakhstan had not formally adopted or acceded to it.

[1] *State Party A v Party B*, [2019] EWHC 799 (Comm).

III. KEY FACTUAL FINDINGS AND DECISION

The Court made clear that a challenge under section 67 to a tribunal's jurisdiction does not involve review of the tribunal's decision, but rather requires the Court to consider the question *de novo*. (The same issue is currently under consideration by the Ontario Court of Appeal in the *Electek* and *Luxtona* cases, in connection with analogous provisions of Canadian arbitration statutes.) The Court noted that two experienced tribunals had issued jurisdiction awards which considered whether Kazakhstan was bound by the Treaty, but made clear that it was deciding the question *de novo*, and therefore attached "no legal or evidential weight" to their reasoning. In this regard, Baker J signalled (respectful) disagreement with Lord Saville, who had said in *Dallah Real Estate v Pakistan* that "[t]he findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question".[3] Baker J suggested that any such usefulness could be considered by counsel for the parties and adopted as submissions to the Court, if they wished.[4]

The Court had to consider the test for succession to a treaty in circumstances such as the break-up of the USSR. Both parties agreed that the test had been formulated correctly by the tribunal in the following terms: "States may agree to continue a pre-existing treaty relationship following the emergence of one of them as a new State and such agreement may be either explicit or tacit and may lack the ordinary formalities associated with the conclusion of a new treaty." The question, then, was

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[3] [2010] UKSC 46, at para 160.

[4] Baker J added that he "found unhelpful submissions by [Gold Pool's counsel] seeking to compare the experience and expertise of the two sets of arbitrators as if the awards were expert evidence on the question I have to decide and my task was or included a choice as to which expert opinion to prefer."

whether the evidence showed that Kazakhstan and Canada had reached an agreement (of whatever formality) that the Treaty should continue in force between them.[5]

In applying that test, the Court made clear that it was focusing "only on facts that were *inter partes* between Canada and Kazakhstan, or that were public acts or statements by either of them intended, looking at the matter objectively, for consumption by the other". Accordingly, any opinions, views, or statements that were privately expressed on one side but not made known to the other would not be relevant.

The Court's approach might have been different if there had been some material dispute about what statements had actually been made as between the States (in which case internal comments might have been relevant evidence to show what must have been said between the parties). However, in this case Gold Pool relied upon three statements that had indisputably been made, and the dispute turned on the objective meaning of those statements.

The first of these three statements was a Declaration of Economic Co-operation jointly made by Canada and Kazakhstan on 10 July 1992 (the "1992 Declaration"). It contained forward-looking statements of intent about the two States' intentions to work together on trade and economic matters, including a statement that the two States were "resolved to facilitate

[5] It appears from the disclosures that Canada's internally-expressed view (in 1994) was that "a successor state is bound by agreements and treaties entered into by the former state. Thus, Kazakhstan, as a successor state to the USSR, is bound by treaties entered into by Canada and the USSR", apparently irrespective of whether or not it had agreed to be so bound after it came into existence. The judgment does not give any encouragement to this view of state succession and neither party pursued it as a correct statement of the law. The Court also noted that the wording of Kazakhstan's 1993 transitional constitution showed that it did not accept any doctrine of automatic succession.

sustained efforts to consolidate, develop and diversify their economic co-operation in accordance with" the Treaty.

Prior to issuance of this document, Kazakhstan had made a number of public statements confirming its intentions to meet obligations arising from treaties and agreements entered into by the USSR. As these statements did not constitute any kind of agreement with Canada specifically, Gold Pool did not say that Kazakhstan was bound by the Treaty merely by these statements. However, it did argue that they were relevant context when construing the 1992 Declaration. The Court considered that the language in the 1992 Declaration did constitute confirmation by Canada and Kazakhstan that the Treaty continued to apply as between them. For completeness, however, the Court went on to deal with the other two statements relied upon by Gold Pool.

The next such statement was contained in an exchange of messages between Canada and Kazakhstan in April 1994 (the "1994 Exchange"). The context was that the parties had been in negotiations toward a new trade agreement since 1993. During those negotiations, a Kazakh official indicated a view that treaties signed by the USSR were null and void, and not binding on Kazakhstan. However, that assertion was inconsistent with other statements made by Kazakh representatives; in particular, a Kazakh draft of a declaration on principles of mutual relations, paragraph 9 of which stated that "International treaties which had been concluded between the USSR and Canada remain in force until the sides make different provisions". This led to the 1994 Exchange, in which the Canadian Embassy in Kazakhstan presented a formal note asking for clarification of Kazakhstan's position, and the Kazakh Foreign Ministry responded a few days later, confirming that its position was as stated in paragraph 9 of the draft mutual relations declaration.

In the Court's view, this was unambiguous. If there had been any doubt about the effect of the 1992 Declaration, the 1994

Exchange would have been sufficient to establish that the Treaty continued to apply.

The third key communication relied upon by Gold Pool was the preamble to the new trade agreement, signed on 29 March 1995 (the "1995 Agreement"). The preamble contained a reference to the Treaty, although some reconciliation between the (equally authoritative) English and Kazakh texts was required. The Court read the preamble as "TAKING INTO ACCOUNT" the Treaty, and considered that this was "reasonably capable of having conveyed *inter partes* only one message", namely that the Treaty was in force and effective.

For its part, Kazakhstan relied upon a number of other indications that (it said) showed that Canada and Kazakhstan did not consider the Treaty binding upon them, including a letter from the Canadian Minister for International Trade to Gold Pool's parent company, stating that the Treaty had "no application" in Kazakhstan, and various statements to the effect that a new bilateral investment treaty being negotiated years later would "fill a void". The Court noted that these statements were made after the 1992 Declaration and therefore could not affect how it was to be construed; moreover, once the conclusion had been reached that the Treaty was binding, expressions of any contrary view would be of no effect. Only a formal termination of the Treaty would change the position.

Finally, while the Court did not place any weight on the tribunal's decision or reasoning, Baker J expressed a view that the tribunal had reached a different conclusion because the arbitrators "were distracted by a substantial body of irrelevant material", and because they described the 1992 Declaration as "ambiguous" without identifying what other meanings it might have conveyed.

The Court remitted the matter back to the tribunal to determine the claims on their merits.

IV. **COMMENT**

The issue of state succession to treaties may be considered a niche topic, of limited practical application. However, at a time when geopolitics is more in flux than it has been in decades, these principles may become decisive more often in the coming years. There are also many more investment protection treaties in place than there have been in the past, so there is greater scope for commercial actors to take an interest in treaty succession.

Current events in former Soviet territory make this case even more relevant. Canadian (and other) investors who suffer losses that they may trace to the actions of a USSR successor state may wish to explore the scope of the Treaty's application. The doctrine of automatic succession was not seriously argued in this case, meaning that (on this authority, at least) application of the Treaty to other post-Soviet States will need to be established on a case-by-case basis, on the particular facts of their post-independence interactions with Canada. This will not always be straightforward, but Baker J's analysis in this judgment provides a useful road map for parties considering succession issues elsewhere.