SWEDISH COURT OF APPEAL FINDS YUKOS INVESTMENT TRIBUNAL LACKED JURISDICTION

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Summary

A Court of Appeal in Sweden has held that a Stockholm Chamber of Commerce arbitral tribunal had no jurisdiction to hear an expropriation claim brought by four Spanish companies against Russia. The judgment, which overturned a 2014 ruling of the Stockholm District Court, turned on the interpretation of a narrowly drafted dispute resolution clause and a most-favoured-nation clause in the 1990 bilateral investment treaty (BIT) between Spain and the then USSR. The decision is significant because there is no unified approach in international investment law to the interpretation of narrow dispute resolution clauses, common to Soviet-era BITs, that purport to limit arbitration to disputes relating to the amount or method of payment of compensation for expropriation. The Court's analysis might be applied in future cases concerning BITs containing similar provisions, although, as discussed below, not necessarily with the same result.

Background

The four claimants were Spanish investment funds which held American Depository Receipts in respect of Yukos Oil Company (Yukos) - once the largest company in Russia. The claimants alleged that Yukos' bankruptcy in the mid-2000s amounted to an expropriation by Russia of their investments without compensation. They filed a request for arbitration in March 2007, claiming that the measures adopted by Russia constituted a violation by Russia of the Spain-USSR BIT.

In 2009, a tribunal issued an award on jurisdiction in the claimants' favour, finding that it had jurisdiction under the dispute resolution clause of the BIT to decide whether compensation was due. In 2012, the tribunal then unanimously found that there had been an expropriation. Russia challenged the award on jurisdiction before the Stockholm District Court without success and then appealed to the Svea Court of Appeal.

Dispute Resolution Clause

Article 10 of the BIT provides that investment disputes relating to "the amount or method of payment the compensation due under article 6" [the expropriation clause] may be referred to arbitration. Russia argued that the scope of this clause confined the tribunal's jurisdiction to disputes concerning thequantum of compensation, and that the assessment as to whether the criticised measures were in fact expropriatory was reserved for another forum, such as Russia's national courts. The Claimants disagreed, arguing that the scope of the clause extends to disputes over the entitlement to compensation in the first place. The arbitral tribunal (and District Court) agreed with the claimants, finding that the tribunal had jurisdiction to decide whether compensation was "due" to the claimants under international law by reason of Russia's conduct (and if so in what amount).

In a rare and significant decision, the Court of Appeal held that the tribunal in fact lacked jurisdiction. The Court construed article 10 in light of article 31 of the Vienna Convention on the Law of Treaties, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the treaty's object and purpose. The Court observed that the BIT's dispute resolution clause clearly contained a limitation concerning the substantive matters eligible for arbitration. As regards the specific limitation, the Court looked to article 6 of the BIT, which governs (i) the conditions under which expropriation may be carried out; and (ii) the investors' right to compensation in cases of expropriation. The Court concluded that the dispute resolution clause was concerned only with compensation and that the wording of article 6 does not support an interpretation that jurisdiction extends also to a finding of an expropriation.

Most Favoured Nation Clause

The claimants also argued that the most-favoured-nation (MFN) clause in article 5(2) of the BIT granted the arbitral tribunal jurisdiction to decide expropriation, by importing into the BIT a broader, more 'favourable' dispute resolution clause from a BIT between Russia and a third state. The tribunal had rejected this argument in their award on jurisdiction but the claimants sought to rely on it again in responding to Russia's challenge. The Court considered investment arbitration practice on this point and concluded that there is nothing in principle to prevent this type of 'import', noting that it depends on the particular wording of the MFN clause in question.

The Court observed that the reference to 'treatment' in article 5(2) was a "clear and unambiguous" reference to the guarantee of 'fair and equitable treatment' (FET) in article 5(1). The Court held that the FET standard cannot be deemed to include an unconditional right for investors to have their cases decided by an international arbitral tribunal. Therefore, the tribunal would not have been entitled to base its jurisdiction on the dispute resolution clauses of other BITs.

Accordingly, the arbitral tribunal did not have jurisdiction to decide whether an expropriation had occurred, either under article 10 or article 5(2) of the BIT.

Comment

There has been a varied approach in previous arbitral decisions to dispute resolution clauses similar to that in the Spain-Russia BIT. Some tribunals have accepted jurisdiction to determine not only the amount of compensation payable, but also the existence and legality of the expropriation itself. In one such case, RosInvestCo UK Ltd. v. The Russian Federation (SCC Case No. V079/2005), the Svea Court of Appeal subsequently held that the tribunal had lacked jurisdiction.

The claimants have appealed the Court of Appeal's recent decision to the Supreme Court of Sweden. Consequently, Russia's proceedings to set aside the arbitral tribunal's merits award have been stayed pending the outcome of that appeal. Until the Supreme Court rules on the appeal, no firm conclusions can be drawn from this jurisprudence. Nevertheless, the decision serves as a reminder that the starting-point for interpretation of dispute resolution clauses should be the specific wording of the relevant BIT, given its "ordinary meaning", in accordance with the Vienna Convention. The BIT's "object and purpose" must also be taken into account. It must be noted in this context that a BIT's negotiating record revealing the intentions of the treaty partners is not always available or helpful.

The Court of Appeal's analysis confirms that the scope of a tribunal's jurisdiction will depend on which BIT governs the dispute, and there is not a 'one size fits all' approach to jurisdiction or even certain types of clauses. On the contrary, the Court emphasised that the scope of a dispute resolution clause will turn on its own wording; a common interpretation cannot be applied to all dispute resolution clauses in Russia's

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Soviet-era BITs, for example.

It is therefore important to carry out a detailed analysis of the applicable dispute resolution clauses, in light of the requirements of the Vienna Convention and available case law, prior to submitting disputes to international investment arbitration.

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