

High Court rejects jurisdictional challenge to investment treaty arbitration award

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Introduction

In *The Republic of Korea v Dayyani*,⁽¹⁾ the High Court dismissed a challenge to an investment treaty arbitration award made under Section 67 of the Arbitration Act 1996.

In a rare consideration by the English court of an investment treaty award, Mr Justice Butcher broadly interpreted the meaning of 'investor' and 'investment' in the bilateral investment treaty (BIT) between the governments of South Korea and Iran.

Section 67

Section 67 of the Arbitration Act allows a party to an arbitration seated in England to apply to the courts challenging an award on the basis that the tribunal lacked substantive jurisdiction. A challenge under Section 67 involves a complete rehearing of the case rather than an isolated review of jurisdiction or the tribunal's reasoning.⁽²⁾ An application under Section 67 can result in the court confirming, varying or setting aside in full or in part the tribunal's award.

Facts

The Iranian Dayyani family incorporated a company in Singapore, D&A Holding Co Pte Ltd, for the purpose of acquiring the assets and liabilities of Daewoo Electronics, a South Korean company active in the home appliance sector.

The largest shareholder in Daewoo was the Korea Asset Management Company (KAMCO). Of KAMCO's shares, 42.8% were owned by the South Korean government and a further 28.6% were owned by the state-owned Korea Development Bank.

Under a share and claim purchase agreement (SPA), D&A paid the shareholders in Daewoo a contract deposit of approximately \$50 million. D&A was required to submit letters of confirmation shortly afterwards but these were rejected as unsatisfactory by the sellers, who eventually declared that the contract deposit had been forfeited.

While a mediation decision of the Seoul Central District Court recommended that the contract deposit be returned to D&A, KAMCO declined to refund the amount. Following an unsuccessful attempt to obtain an injunction from the South Korean court, the Dayyanis commenced arbitration proceedings against South Korea pursuant to Article 12 of the BIT. Article 12 provides for the settlement of disputes between a contracting party to the BIT and investors of the other contracting party. The *ad hoc* arbitration was seated in London and conducted pursuant to the United Nations Commission on International Trade Law Arbitration Rules.

In the arbitration, the Dayyanis claimed, among other things, that:

- KAMCO had directed and controlled the sale of Daewoo;
- KAMCO's acts could be attributed to South Korea; and
- South Korea's actions, including failing to negotiate in good faith and provide the Dayyanis with an opportunity to cure the defects in the letters of confirmation, breached the fair and equitable treatment standard in Article 4 of the BIT.

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The tribunal found that South Korea had breached the fair and equitable treatment standard and ordered it to return the contract deposit.

Subsequently, South Korea issued its Section 67 challenge to the tribunal's award. As it had done in the arbitration, South Korea contended in the Section 67 proceedings that, for the purposes of the BIT, the Dayyanis:

- had not made an 'investment';
- did not constitute an 'investor'; and
- were unable to bring a claim under the BIT as their dispute was not with South Korea but instead with a group of sellers party to a commercial transaction.

Decision

Did the SPA before closing and contract deposit amount to an 'investment'?

The judge concluded that both the SPA before closing and the contract deposit constituted an 'investment' for the purposes of Article 1 of the BIT.

Article 1 of the BIT defined an investment as "every kind of property or asset, and in particular, though not exclusively, including the following, invested by the investors of one Contracting Party in the territory of the other Contracting Party".

The categories of investment listed in Article 1 included "shares or any kind of participation in companies" and "money and/or receivables".

South Korea argued that for the purposes of the BIT, the purported investments:

- were not property or assets;
- lacked the characteristics of an investment; and
- had not been invested in the territory of South Korea.

Property or asset?

Focusing on the wording of the BIT, and in particular the words "every kind of property or asset", the judge rejected the argument that an investment was limited by the categories listed in Article 1.

South Korea argued that to construe broadly the definition of 'investment' was inconsistent with the principle of *effet utile* in that the categories set out in Article 1 would become futile. The judge concluded that the categories were illustrative only as to what may constitute an investment.

Turning to whether the purported investment constituted property or assets, the judge did not accept that an 'asset', as defined by the BIT, needed to have a commercial or exchange value. To impose such a requirement would "unjustifiably restrict the meaning of the wide phrase 'every kind of asset'". The judge held that 'property' and 'assets' are owned and do or may not have value.

Further, the judge held that, on the wording of the BIT, an 'investment' may be either:

- property and assets into which the investor commits resources; or
- property or assets put in by the investor.

The judge determined that the SPA was a concluded and binding contract, granting D&A rights under South Korean law. The fact that there was not a vested right to the shares in Daewoo did not mean there were no enforceable rights. While it was the judge's view that it was not a requirement that property or an asset have a value, he found that the SPA did have economic value to D&A.

In addition to the SPA, the judge found that the contract deposit "plainly fell" within the meaning of 'property or asset'.

Lacking characteristics of an investment?

South Korea argued that even if the SPA and contract deposit constituted property or assets, neither constituted an investment. The judge found that there was no basis for reading into the BIT requirements as to what may constitute an investment but which are not specified. He continued that even if that interpretation was wrong, the SPA and contract deposit each had the characteristics of contribution, investment risk and duration, which South Korea had argued were essential.

Invested in territory of South Korea?

The judge rejected South Korea's argument that the putative investments were not invested "in the territory" of South Korea.

Were the Dayyanis investors?

South Korea argued that the Dayyanis did not have standing to bring the claim, as they had not entered into the SPA or paid the contract deposit.

However, the judge considered it irrelevant that the arbitration was brought by the Dayyanis as indirect investors. The judge noted that the BIT did not include any express requirement that the investor own or have a direct legal interest in the property or asset which constitutes the investment.

Having considered decisions of numerous investment treaty tribunals on this issue, the judge concluded that shareholders can, at least if they exercise control over an investment vehicle, be termed 'investors' in accordance with the ordinary meaning and understanding of the word. Further, the assets of the investment company can fairly be described as investments invested by those shareholders. The judge held that to restrict the meaning of 'investor' to require that they own or have a direct legal interest would amount to a rewriting of the BIT.

Attribution

In challenging the award, South Korea denied that the acts of Daewoo or KAMCO were attributable to it and that, as such, the dispute resolution provisions in Article 12 of the BIT could not apply.

The judge considered whether the questions of attribution raised by South Korea were jurisdictional questions within the meaning of Section 67. Based on the meaning of the term 'dispute' in international law, the judge found that the meaning was wide enough to embrace a dispute about whether particular acts are attributable to a host contracting party.

The judge concluded that there was no doubt that South Korea was a contracting party for the purposes of Article 12. The fact that South Korea disagreed that actions could be attributed to it meant that there was a dispute between an investor and a contracting party over which the tribunal was right to find jurisdiction.

As such issues are common in investment arbitrations, in the judge's view, it would be both "surprising and highly inconvenient if issues as to attribution were regarded as jurisdictional".

Comment

The court's broad interpretation of the treaty is noteworthy. The court agreed with the tribunal's investor-friendly analysis of the terms 'investor' and 'investment'. While the judge found that indirect investors were not prevented from bringing claims under the BIT, in reaching the decision, he took account of the specific facts of the case and wording of the treaty.

The court's decision not to read into an investment treaty's additional jurisdictional requirements is consistent with the English courts' supportive approach to arbitration and their lack of appetite for reopening a tribunal's decisions, except in limited circumstances.

The decision is also interesting in its comment that the question of attribution is not a jurisdictional issue.

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Endnotes

(1) *The Republic of Korea v Mohammad Reza Dayyani* [2019] EWHC 3580 (Comm).

(2) *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UK SC 46, [2011] 1 AC 763.

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