



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Decision Name and Date: Poštová Banka, A.S. and ISTROKAPITAL SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 – Annulment Proceeding – 29 September 2016

Case Report by: Ilektra Athanasiou-Ioannou**, Editor Ignacio Torterola***

Summary: In the Decision rendered on September 29, 2016, an ICSID *ad hoc* Committee dismissed Slovak Poštová Banka A.S.’s request for partial annulment of an arbitration award issued on April 9, 2015. In the aforementioned award, the ICSID Tribunal had unanimously dismissed the Slovak Bank’s claims due to lack of jurisdiction over the claims against the Hellenic Republic; in particular, according to the Tribunal, Poštová Banka’s Greek Government Bonds did not qualify as “investments” protected under the 1991 Slovakia-Greece bilateral investment treaty. In the award, declining jurisdiction, the Tribunal had also ruled that Istrokapital SE – a Cypriot company, shareholder of Poštová Banka and one of the two original claimants in the ICSID claim against Greece– did not have itself an investment, thus it did not have standing as an investor under the 1992 Cyprus-Greece bilateral investment treaty. Poštová Banka’s request was brought under Articles 48(3) and 52(1)(e) of the ICSID Convention. The Committee, however, rejected the argument that ICSID’s Tribunal had not properly explained its reasoning; specifically, the Committee ruled that i) it had no difficulty in following the Tribunal’s reasoning in the award and that ii) the Tribunal’s reasoning was not contradictory.

Main issues: Annulment – ICSID Convention: annulment grounds – Failure to state reasons; the legal standard – Narrow scope of annulment grounds – Jurisdiction *ratione materiae*; definition of “investment”.

Ad hoc Committee: Professor Azzedine Kettani (President) – Sir David Edward, KCMG QC – Professor Hi-Taek Shin

Applicant’s Counsel: Mr. David W. Rivkin, Ms. Samantha Rowe & Ms. Z. J. Jennifer Lim (Debevoise & Plimpton LLP, New York, New York, U.S.A.) – Mr. Filip Lukáč & Mr. Jan Nosko (Poštová Banka, A.S., Bratislava, Slovakia)

Respondent’s Counsel: Dr. Claudia Annacker (Cleary Gottlieb Steen & Hamilton LLP, Paris, France) & Mr. Christopher Moore (Cleary Gottlieb Steen & Hamilton LLP, London, U.K.) – Ms. Styliani Charitaki & Ms. Emmanouela Panopoulou (Legal Council of the State, Athens, Greece)

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Digest:

1. Relevant Facts and Procedural Dates

The dispute arose between the Hellenic Republic (“Greece” or “Respondent”) and two private companies - namely, the Slovak Bank Poštová Banka A.S. (“Poštová Banka”, or “Applicant”) and a Cypriot company holding shares in the Bank, Istrokapital SE (“Istrokapital”) - over the Bank’s alleged ownership of Greek Government Bonds (“GGBs”) (¶¶ 1-3). Poštová Banka had acquired a total of €504 million in GGBs through several transactions in 2010 (¶ 20). In the aftermath of Greece’s debt crisis, Greece submitted a three-year stability program to the European Commission to reduce its fiscal deficit (¶ 19). Greece paid the interest due on bonds during 2010 and the first half of 2011, but as of July 2011, due to the country’s financial deterioration, the International Monetary Fund determined that private holders of Greek government debt would be required to accept some reduction in the amount due on the debt to close the funding gap - the “Private Sector Involvement”, or (“PSI”) (¶ 23). The sovereign debt restructuring was to be implemented via an exchange of outstanding GGBs for new titles - Poštová received the new securities in March 2012 (¶ 27). This bailout required Greece to pass a bondholder act retroactively reducing the nominal value of GGBs, €504 million-worth of which was owned by Poštová Banka (¶ 25). In May 2013, the Slovak Bank and its Cypriot shareholder brought an investment arbitration claim under the Slovakia-Greece BIT¹ (“the BIT” or “the Treaty”) and the Cyprus-Greece BIT² respectively, for the losses they incurred following the 2012 “haircut” on GGBs claiming compensation.

Greece objected to jurisdiction arguing (i) that ICSID’s Tribunal (“the Tribunal”) lacked jurisdiction *ratione materiae* as the Bank’s interests in the GGBs were not protected investments under the Slovakia-Greece BIT and the ICSID Convention, and (ii) that Istrokapital did not make an investment protected under the Cyprus-Greece BIT. Further, Respondent argued that the claims should be dismissed for abuse of process and that the Tribunal lacked jurisdiction over Istrokapital because the latter was not “National of Another Contracting State” under Article 25(1) of the ICSID Convention, nor a protected investor under the Cyprus-Greece BIT. Greece also argued that the Tribunal lacked jurisdiction over the Claimants’ umbrella clause claims (¶ 34). Claimants argued that the Tribunal had

¹ Namely, the 1991 “Agreement between the Government of the Hellenic Republic and the Government of the Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investments”.

² Namely, the 1992 “Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion and Protection of Investments”.

jurisdiction *ratione materiae* pursuant to the broad definitions of investment in the Slovakia-Greece BIT and in the Cyprus-Greece BIT because the GGBs were assets that comprised a loan to the Greek government. According to the Claimants, there was no relevant difference between a bond and a loan, and Respondent's interpretation of "investment" was inconsistent with the purpose of the BITs (¶¶ 43-44); *ergo*, Claimants' GGB interests constituted an investment.

On April 13, 2015, the Tribunal composed by Eduardo Zuleta, Brigitte Stern and John Townsend refused jurisdiction over the claims on the following grounds:

As to Istrokapital, considering that the latter had sought jurisdiction on its indirect investment, but failed to establish that it had any rights to Poštová Banka's assets protected by the BIT, the Tribunal dismissed all of Istrokapital's claims for lack of jurisdiction (¶ 53). As to Poštová Banka, while the definition of "investment" under the BIT was broad ("every kind of asset"), this meant neither that all categories qualified as an "investment" nor that the only way to exclude a category would be an express exclusion (¶ 58, ¶ 66); the Tribunal then noted that neither Article 1(1) of the Slovakia-Greece BIT nor other provisions of the treaty referred in any way to sovereign debt, public titles, public securities, public obligations or the like, whereas the only reference to bonds was limited to bonds issued by private companies ("debentures") (¶¶ 68-70). At the same time, while the BIT also referred to "loans", the Tribunal was unwilling to equate that term with government bonds that do not entail contractual privity, i.e. a direct relationship between lender and debtor (¶ 72). Equally, the Tribunal decided that "claims to money", if they were to qualify as a covered investment, should arise under a contractual relationship (¶ 73); Greece's sale of debt on the primary market and the Claimant's purchase of debt interests in the secondary market did not provide for such a clear-cut contractual relationship since, in that way, Poštová Banka did not have a contract with Greece. Finally, per the Tribunal, a majority of the panel would also have dismissed the claim on the basis that it did not concern an investment protected under Article 25 of the ICSID Convention, if the Tribunal were to follow the objective approach. More precisely, the majority was of the view that the element of contribution to an economic venture and the existence of the specific operational risk were not present (¶¶ 81-82).

On July 31, 2015, Poštová Banka filed an application requesting the partial annulment of the 2015 Award (¶ 4) on the basis that the Award "failed to state the reasons on which it is based" pursuant to Articles 48(3) and 52(1)(e) of the ICSID Convention (¶ 86). The Parties were notified on 2 September 2015 that an *ad hoc* Committee ("the Committee") had been constituted and that the annulment proceeding was deemed to have begun on the same date as per Rule 52(2) of the Arbitration Rules³ (¶ 6). According to Committee's Procedural No.1, issued on November 4, 2015, the Parties agreed (i) that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of 10 April 2006, (ii) that London would be the place of the proceedings and (iii) that English would be the procedural language (¶ 8). Applicant's Memorial on Annulment was filed on November 20, 2015, while Respondent's Counter-Memorial on Annulment on February 5, 2016 (¶¶ 9-10). Applicant filed a Reply on Annulment on March 18, 2016 and Respondent filed its Rejoinder on Annulment on April 28, 2016 (¶¶ 11-12). The hearing on annulment was held on June 1, 2016 at the International

³ Rule 52: Annulment: Further Procedures: [...] (2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

Dispute Resolution Center in London and the proceedings were declared closed on August 23, 2016 (¶ 13, ¶ 15).

As to the basis for its request, Applicant claimed that the Tribunal failed to state reasons for its conclusion that it had no qualifying “investments” under the Slovakia-Greece BIT; more precisely, according to Applicant, the Tribunal did not explain why Applicant’s contractual and property rights, which it had specifically found to exist, did not fall within the Treaty’s wide definition of “investments”. Furthermore, Applicant claimed that there was a contradiction in the Tribunal’s findings that while Poštová Banka held contractual and property rights within the BIT’s definition of “investments”, nonetheless it did not have an investment under the BIT (¶¶ 86-87). Applicant’s main arguments were (i) that the Tribunal failed to provide reasons that enable the reader to follow how the Tribunal proceeded from Point A to Point B, (ii) that the reasoning provided by the Tribunal was so contradictory so as to amount to no reasons at all, and (iii) that the Tribunal’s errors were outcome-determinative (¶ 88).

2. The *ad hoc* Committee’s Analysis

2.1. General Annulment Principles and the Legal Standard pursuant to Article 52(1)(e)

2.1.1. General Annulment Principles

The Committee after clarifying as to its role that it is bound to apply the provisions of Article 52 of the ICSID Convention and the ICSID Arbitration Rules, guided by the paragraphs 41-43 of the Report of the Executive Directors on the Washington Convention⁴, it noted that decisions of ICSID tribunals are not binding on the Parties or the Committee (¶ 126). The Committee additionally stipulated that, as it is well established in arbitration case law, the annulment proceeding is an “extraordinary remedy with a high threshold”, thus it is not to be considered an appeal or a retrial, but rather a narrow form of review (¶¶ 127-129). Furthermore, an annulment proceeding cannot be used by a Party to complete, develop or amend argument(s) which it could and should have made during the arbitral proceeding (¶ 130).

2.1.2. The Legal Standard pursuant to Article 52(1)(e) – Failure to State Reasons

Upon examining the appropriate threshold of the legal standard stipulated in Article 52(1)(e)⁵, the Committee mentioned that in order to find a failure in the reasoning of the Tribunal, it must find that the award did not “state the reasons upon which it is based”, thus connecting Article 52(1)(e) with Article 48(3)⁶ of the ICSID Convention (¶ 133). Nonetheless, the Committee reiterated the *ad hoc* Committee’s ruling in *Tulip v. Turkey*: it is not necessary for a tribunal to restate all the parties’ arguments and evidence, or arguments without impact on the award (¶ 134). Further, the Committee repeated the formula spelled out in the *MINE v. Guinea* decision: the adequacy of the reasoning is not an appropriate standard of review, since it might tempt an *ad hoc* Committee to examine the substance of a tribunal’s

⁴ Namely the articles on Recognition and Enforcement of Arbitral Awards.

⁵ Article 52(1): Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: [...] (e) that the award has failed to state the reasons on which it is based. [...]

⁶ Article 48(3): The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

decision as if the available remedy were an appeal; the appropriate legal standard is the “minimum requirement” of whether the award enables the reader to follow how the tribunal proceeded from Point A to Point B (¶ 135). Hence, the standard relates to the existence of reasons and not their validity (¶ 136). As to contradictory reasons, the appropriate standard per the Committee is “whether the reasons are incapable of standing together on any reasonable reading of the decision”, and not whether there is a contradiction of inconsistency in the reasoning (¶ 137). Furthermore, implicit reasons may be read into an award only if they can be reasonably inferred by a reader (¶ 141); however, an *ad hoc* Committee cannot construct reasons in order to justify a tribunal’s decision (¶ 142). Finally, even in the case of absence of reasons, in order for an *ad hoc* Committee to annul an award, the error must relate to an outcome-determinative issue (¶ 143).

2.2. The *ad hoc* Committee’s Findings

The *ad hoc* Committee upon vitiating one by one the Applicant’s arguments ruled as follows:

2.2.1. The alleged absence of reasons

First, the Committee noted that the question presented was “whether the Award includes sufficient reasons to enable the reader to understand how the Tribunal got from Point A (the finding that the Applicant possessed property and contractual rights associated with the Bank’s GGB interests) to Point B (the conclusion that the Tribunal lacked jurisdiction because there was no “investment” under the Slovakia-Greece BIT) (¶ 144). The Committee though, ruled that it had no difficulty in following the Tribunal’s reasoning in the award: “The Tribunal recognized that the definition of investment contained in Article 1(1) of the Slovakia-Greece BIT is broad. But the Tribunal found that the definition is not limitless and does not include sovereign debt”. Further, the Committee observed that the Tribunal had also provided a “detailed description” of sovereign debt and securities that placed the bonds outside the definition (¶ 153). Finally, the Committee noted that according to the text of the award and the Parties’ arguments, there were no arguments submitted by the Applicant during the arbitration – while they were advanced during the annulment hearing (¶ 155) – that rights associated with the GGBs independently constituted an investment under the BIT. Consequently, it was not surprising according to the Committee that the Tribunal did not separately address the issue of whether ancillary rights connected to sovereign debt constitute an investment under the Treaty (¶ 156).

2.2.2. The alleged contradictory reasons

The Committee rejected the Applicant’s argument that the Tribunal had contradicted itself by holding that Poštová Banka had no investment and no rights arising out of its government bond holdings and, on the other hand, concluding that Poštová Banka had property and contractual rights arising out of its GGB holdings: per the Committee’s decision, “there is no inconsistency between the tribunal’s finding that, as a matter of interpretation, sovereign bonds were not intended to fall within the broad definition of investment included in the treaty and the finding that, in this case, certain specific rights related to sovereign bonds fell outside the intended scope of that definition” (¶¶ 157-158)

2.2.3. *Whether the alleged errors were outcome-determinative*

In light of the above and given that the Committee had not found an absence in reasoning that could justify an annulment decision, the Committee did not consider necessary to examine this part of Applicant's arguments (¶ 159).

3. The *ad hoc* Committee's Decision

The *ad hoc* Committee ultimately dismissed Applicant's claims for annulment in their entirety since the high threshold required under Article 52(1)(e) was not satisfied (¶ 160). The Committee further ordered the Applicant to pay the costs and expenses incurred by ICSID in the annulment proceeding in accordance with Articles 61(2), 52(4) of the ICSID Convention, Rules 47(1)(j), 53 of the Arbitration Rules and Regulation 14(3)(e) (¶ 167-170), though both parties were ordered to bear their own costs for legal representation (¶ 172).