Case No: CL-2013-001028

Neutral Citation Number: [2017] EWHC 439 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2017

Before :

MR JUSTICE KNOWLES CBE

- -

Between :

RUBY ROZ AGRICOL LLP	**Claimant**
- and –	
THE REPUBLIC OF KAZAKHSTAN	**Defendant**

- -
- -

Zachary Douglas QC and James Evans (instructed by Gresham Legal) for the **Claimant**
Paul Key QC and Siddharth Dhar (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) for the **Defendant**

Hearing dates: 20, 21, 22, 23 and 27 February 2017

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Judgment

Mr Justice Knowles :

Introduction

1. In 2010 Ruby Roz Agricol LLP ("Ruby Roz") gave notice to commence an arbitration against the Republic of Kazakhstan ("the Republic").

2. The arbitration panel has ruled that it has no jurisdiction. At the suggestion of the arbitrators the parties agreed to treat London as the seat of the arbitration. Ruby Roz, appearing by Professor Zachary Douglas QC and Mr James Evans, now brings a challenge under section 67 of the Arbitration Act 1996 to the award of the arbitrators. By that means it asks the Commercial Court for a ruling on jurisdiction.

The Contract

3. Ruby Roz and the Republic (by the Agency of Investments for the Republic, referred to as "the Agency") were parties to a written contract ("the Contract"). The Contract was referred to as a "contract on the provision of investment incentives and government support of investment activities in the Republic". The provisions below are given in English translation from the original Russian.

4. The opening recitals included the following provisions:

> "a) The legislation of the Republic of Kazakhstan on state support for direct investments based on the Constitution of the Republic of Kazakhstan, is aimed at creating a favourable investment climate to ensure the accelerated development of the production of goods, work and services in the priority sectors of the economy;
>
> …
>
> c) The Agency and the Investor have agreed that this contract will regulate their mutual rights and responsibilities during performance of the investment activities;"

5. The Contract defined Ruby Roz as "Investor". "Investment Activities" were defined as "entrepreneurial activities connected to the investment process".

6. By Clause 2 of the Contract ("Purpose of the Contract"):

> "This Contract establishes the legal framework in the relations between the Agency and the Investor under the laws of the Republic of Kazakhstan with the aim of providing various incentives and government support for the implementation of investment activities in the sphere of agricultural production."

7. Clause 3 of the Contract was headed "Subjects of Investment Activity" and is in these terms:

> "3.1 The subject of investment activity under this Contact is the organisation of production of broiler incubation, rearing and slaughter in the village of Balgabek Kadyrbek-uly, Dzhambulsky District, Almaty Region, including:

Reconstruction of poultry-houses	300,000 USD
Purchase of auxiliary equipment	113,000 USD
Purchase of land lots	75,000 USD
Purchase of real estate	10,400 USD
Purchase of equipment	4,229,300 USD
Total:	4,727,700 USD

> Capital Investments:
>
> Current capital – 4,284,170 USD
>
> 3.2 Total volume of direct investments (fixed capital investments): 4,727,700 (four million seven hundred twenty-seven thousand and seven hundred) USD."

8. The "Subject of the Contract" was described as follows by Clause 4:

> "4.1 The subject of the present Contract is the exemption procedure that is extended to the Investor by the Agency under the legislation of the Republic of Kazakhstan on government support for direct investments within the framework of the investment project.
>
> 4.2 As per the ruling of the State Committee on Investments of the Republic of Kazakhstan dated 7 August 1998 No.131 "On improvements to the procedure for the granting of tax exemptions" the following exemptions and preferences shall be granted to the Investor:
>
> - lowering of the income tax rate for legal entities by 100% from the standard rate until 1 March 2004 and by 50% from the standard rate from 1 March 2004 until 1

March 2005 on income received as a result of investment activities under this Contract.

- lowering of the property tax rate by 100% from the standard rate until 1 March 2004 and by 50% from the standard rate from 1 March 2004 until 1 March 2007 on property, equipment and other capital assets during the implementation of investment activities under this Contract.

- lowering of the land tax rate by 100% from the standard rate until 1 March 2004 and by 50 % from the standard rate from 1 March 2004 until 1 March 2009 on the land resources used to carry out investment activities under this Contract."

9. The Contract further provided, by Clauses 5.2, 6.2 (first bullet point), 7.1 and 20.1:

"5.2. The Investor shall have the right to:

- take any actions that do not contravene the terms of this Contact and the existing legislation of the Republic of Kazakhstan for the implementation of the agreed investment project;

- import and export assets, equipment and other materials necessary to carry out investment activities within the limits allowed by the legislation of the Republic of Kazakhstan.

- the Investor has the right to make changes to the types of works in the Work Programme within the limits of the approved amounts;

- the Investor may be granted additional rights as agreed with and within the competence of the Agency.

…

6.2. The Investor shall

- make the investments specified in paragraph 3.1 of Chapter 3 as per the Work Programme;

…

7.1. Any assets or equipment purchased by the Investor for the implementation of its investment activities as well as any information shall be the property of the Investor except as otherwise provided by this Contact.

…

20.1. The Investor shall perform investment activities as per the Work Programme that has been approved by the Agency."

10. Clause 14 was in these terms:

"14. Arbitration

14.1. The Parties shall make every effort to resolve all disputes and differences connected with investment activities or arising out of the performance or interpretation of any of the provisions of this Contract by means of negotiations.

14.2. In case the Parties do not reach an agreement within two months from the date of a written request by one Party to another Party, the dispute shall be referred:

a) to the judicial bodies of the Republic of Kazakhstan authorised by the laws of the Republic of Kazakhstan to hear such disputes;

b) or to various foreign arbitral bodies, if the interests of a foreign Investor are affected and there is a written objection by such foreign Investor to the dispute being heard in Kazakhstani courts.

The procedure for the consideration of disputes with the Investor arising out of the Contract shall be determined in accordance with the laws of the Republic of Kazakhstan.

14.3. The Parties shall not be released from performing their obligations under the Contract until the disputes and differences that have arisen have been resolved in full."

11. By Clause 16 the laws of the Republic were agreed to apply "unless otherwise provided for by International Treaties to which [the Republic] is a party."

12. It is convenient to bring out two points from the Contract at this stage. First, a major incentive for investment, provided by the Contract, was in the form of favourable tax treatment. Second, whilst the Contract concerned investment it was not confined to foreign investment.

Agreement by the Contract

13. Did the parties agree to arbitration with the Contract? In my view they did not.

14. The Claimant is a Limited Liability Partnership (or LLP) established under the Laws of the Republic. By Clause 14.2 of the Contract a dispute is to be referred to arbitration rather than to the courts of the Republic "if the interests of a foreign Investor are affected". "Investor" is, as noted above, a defined term in the Contract, and is defined as meaning Ruby Roz.

15. Ruby Roz is not "foreign". It is established under the Laws of the Republic. It was registered from 1998 as an LLP with foreign participation. This literal approach is consistent with the Laws of the Republic dealing with the interpretation of contracts. The experts on the Law of the Republic called by the parties were agreed that the rules for interpreting a contract are contained in Article 392 of the Civil Code. That Article includes a requirement that in interpreting a contract the Court take into account the literal meaning of the words and expressions contained in it.

16. Ruby Roz urges that the word "foreign" should not be taken in isolation, but the approach just described does not take the word in isolation. It then develops a more sophisticated argument. It says regard should be had to a draft Framework Agreement on which the Contract is said to be based, and to the Foreign Investments Law of the Republic that existed at the time.

17. Having listened closely to the experts on the question of the principles of contractual interpretation under the Laws of the Republic, I am reluctant to look beyond the Contract because the Contract is in my view plain in its meaning in the respects under consideration.

18. In any event, I do not consider that the draft Framework Agreement assists. It was offered in accordance with Article 12 of the 1997 Law of the Republic entitled "On State Support of Direct Investment", and not under the Foreign Investments Law. It does not provide a special meaning for the word "foreign", whether alone or whilst defining "Investor". It applies to investors that are national as well as to investors that are foreign, and that limits any guide it can give to the resolution of the present question.

19. Ruby Roz characterises the Framework Agreement as "an integral component" of a policy to encourage foreign investments into the Republic, but although it served in that connection, the policy it served was to encourage foreign and non-foreign investments alike into particular sectors.

20. Indeed, as Mr Paul Key QC (appearing with Mr Siddharth Dhar for the Republic) points out, the draft Framework Agreement contemplates that for a "foreign investor" a contract will be drawn up in the English language as well as in the Kazakh or Russian language. The Contract between Ruby Roz and the Republic was drawn up in Russian only.

21. Ruby Roz argues that it would be impossible "as a practical matter" to have carried out the investment contemplated by the Contract without Ruby Roz being established under the Laws of the Republic, so that (for example) it could employ the necessary labour. Even if that is correct, it does not advance Ruby Roz's claim to be a "foreign Investor" (rather than an Investor that was not "foreign" under the Contract).

22. The Foreign Investments Law of the Republic was introduced in 1994 and repealed in 2003. Its terms changed materially during that lifespan. It offered a definition of "Foreign investor" but at the time the Contract was entered into Ruby Roz would not have fallen within the definition that then applied. Rather, on the evidence before me Ruby Roz would have fallen within the (separate) definition of "enterprise with foreign participation". The Law, in its then form, defined an "enterprise with foreign participation" as "a legal entity, established in accordance with the laws of the

Republic … and acting as a foreign enterprise". (All quotations from the Foreign Investments Law in this judgment are in English translation from the original Russian.)

23. That is significant, argues Ruby Roz, because by the date of the Contract Article 4.5 of the Foreign Investments Law provided:

> "Guarantees to foreign investors established by Articles 6 [and] 27 of this Law also apply to the protection of interests of enterprises with foreign participation, in the statutory fund of which the share of foreign investors is not less than 35 percent, or the cash equivalent of at least 1 million US Dollars."

I do not see that this argument can assist Ruby Roz. Whilst confirming that some "interests of enterprises with foreign participation" will enjoy guarantees enjoyed by "foreign investors", it reinforces the point that these are not one and the same.

24. Ruby Roz also referred to amendments to the Foreign Investments Law later in 1999 (and after the Contract was entered into). The amendments should be seen as reflecting thinking some months before, argues Ruby Roz. The expert evidence I have read and heard does not satisfy me that I should or could accept that approach as an available approach to interpretation of the Contract; and the available factual evidence is insufficient to bear it out.

25. Mr Omar acquired Ruby Roz in 2004. He was accorded an investor visa because, on his evidence, of "my [sic] status as a Foreign Investor" and vehicles owned by Ruby Roz carried yellow number plates "the use of which was strictly limited to companies with foreign participation". Ruby Roz relies on these facts. However they do not assist with the question of the meaning of the Contract, as the evidence about them postdates the commencement of the Contract by a number of years. Nor do they support the proposition that Ruby Roz was a "foreign Investor" under the Contract, rather than an LLP established under the law of the Republic and in which there was foreign investment. Here as elsewhere it is valuable to keep in mind the distinction between investment in Ruby Roz and investment by Ruby Roz.

26. The conclusions reached do not "discourage foreign investments being channelled through locally incorporated entities" as Ruby Roz maintained in argument. The encouragement in question is of investment, and the incentives include the favourable tax treatment that a locally incorporated entity could as well enjoy, and for which the Contract provided in terms.

Invoking the Foreign Investments Law

27. Ruby Roz has an alternative case built not on the Contract but on the Foreign Investments Law alone. It argues that this provides a mechanism to engage arbitration in the event of a dispute.

28. For this alternative case Ruby Roz frames its argument by reference to the Foreign Investments Law after that Law had undergone further amendments since the date of the Contract, and before the Law was repealed in 2003.

29. In its last iteration Article 27 of the Foreign Investments Law provided:

> "1. Investment disputes are resolved, if possible, by negotiations.
>
> 2. If such disputes cannot be resolved through negotiations within three months from the date of a written request of any party to the other, then either party to the dispute may, with the written consent of the foreign investor, refer the dispute for resolution to:
>
> 1) to the judicial bodies of the Republic of Kazakhstan;
>
> 2) in accordance with the agreed procedure for settling disputes, including those set out in the contract or any other agreement between the parties to the dispute, to one of the following arbitral bodies:
>
> a) International Centre for Settlement of Investment Disputes (hereafter – the Centre), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965 (ICSID Convention), if the state of the investor is party to this Convention;
>
> b) Additional Body of the Centre (functioning under Additional Body Rules), if the state of the investor is not a party to the ICSID Convention;
>
> c) arbitration bodies established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);
>
> d) arbitration at the Arbitration Institute of the Chamber of Commerce in Stockholm;
>
> e) arbitration commission at the Chamber of Commerce and Industry of the Republic of Kazakhstan.
>
> 3. If a foreign investor selects the dispute settlement procedure set forth by subparagraph 2) of paragraph 2 of this article, the consent of the Republic of Kazakhstan is assumed to be received. The consent of a foreign investor may be given at any time by written request to the authorized state body or at the time of the recourse to arbitration.
>
> 4. If the initiator of the dispute resolution is an authorized state body and the foreign investor evades the choice of a procedure

> for dispute resolution, the authorized body may refer the dispute to judicial authorities of the Republic of Kazakhstan upon the expiration of a three-month period from the date of the first written request from the authorized state body to the foreign investor to amicably settle the dispute.
>
> The court hearing the case shall dismiss it if the foreign investor submits a written request to choose a different dispute resolution procedure under paragraph 2 of this article.
>
> 5. Any arbitration in accordance with the present article must be held in a state that is a party to the Convention on the Recognition and Enforcement of Arbitral Decisions, signed in New York on 10 June 1958 (New York Convention), unless otherwise provided by agreement between the foreign investor and the authorized state body.
>
> 6. Any arbitration decision rendered in accordance with the present article shall be final and binding on the parties to the investment dispute. Such a decision is executed in the Republic of Kazakhstan in the same manner as the decisions of judicial authorities of the Republic of Kazakhstan.
>
> 7. Disputes between foreign investors and citizens or legal entities of the Republic of Kazakhstan, including with state bodies of the Republic of Kazakhstan, that are not included in the category of investment disputes shall be settled by the judicial authorities of the Republic of Kazakhstan under the laws of the Republic of Kazakhstan, unless otherwise provided for by legislative acts or the parties' agreement."

30. Article 6 preserved or stabilised the effect of some parts of the Foreign Investments Law beyond the date of repeal. It was in these terms:

> "1. In case of the deterioration of a foreign investor's position resulting from the changes in legislation and (or) [from] the entry into force and (or) change of the provisions of international treaties, the legislation which was in effect at the moment of the realization of the investments shall apply to foreign investments for 10 years and with regard to investments being made under long-term (over 10 years) contracts with an authorized state body [such legislation shall apply] until the end of the period of validity of the contract, unless otherwise provided by the contract.
>
> In case of the improvement of a foreign investor's position resulting from changes in legislation and (or) [from] the entry into force and (or) change of the provisions of international treaties, certain terms of contracts between a foreign investor and an authorized state body representing the Republic may be changed by mutual agreement of the parties for the purpose of

> achieving a balance of the economic interests of the participants.
>
> 2. When carrying out investment activities under license, the guarantee provided by the first paragraph of this Article remains in force within the time limits established by the first paragraph until the license is terminated, and in the event that it is extended- until the end of the period for which the license is renewed.
>
> 3. These requirements do not apply to changes to the legislation of the Republic of Kazakhstan in the field of defence, national security, in the sphere of environmental safety and health, and morality. When the changes in legislation result in the deterioration of the foreign investor's position in these areas, the foreign investor must receive immediate, adequate and effective compensation in the currency of the investment or the foreign currency as established by the agreement between the foreign investor and the Republic of Kazakhstan.
>
> 4. The guarantees established by paragraph 1 of this Article shall not apply to changes in the legislation of the Republic of Kazakhstan and (or) the entry into effect and (or) changes in international treaties with the participation of the Republic of Kazakhstan which change the terms and conditions (including taxation issues and other government regulation measures) of import and (or) production and (or) sale of excisable goods, as well as imports of goods intended for sale without processing."

31. Ruby Roz argues that the loss of Article 27 on the repeal of the Foreign Investments Law in 2003 was a "deterioration of a foreign investor's position" within the meaning of that phrase in Article 6.1. The 10 year period there provided was engaged, it is argued, because (a) an amendment to the Contract in 2002 was a "moment of the realization of the investment" and (b) the Notice of Arbitration was in 2010.

32. The definition of "foreign investor" in the Foreign Investments Law had been expanded since the date of the Contract and by the time of the repeal of the Law. The expansion of the definition now at least arguably brought Ruby Roz within the definition as a "legal entity of the Republic … in relation to which foreign investors have the right to determine the decisions made by such legal entities".

33. But as Mr Key QC highlights, just as the definition of "foreign investor" in the Law expanded, so the definition of "foreign investments" narrowed.

34. Up until 2000, "foreign investments" had been defined as:

> "investments made by a foreign investor"

Then, by two stages, in 1999 and 2000, foreign investments" were redefined as:

> "investments made in the form of participation in the authorized capital of legal entities of the Republic of Kazakhstan, and the provision of loans (credit facilities) to legal entities of the Republic of Kazakhstan, in relation to which foreign investors have the right to determine the decisions made by such legal entities, and the provision of leased assets under the conditions provided for by the laws of the Republic of Kazakhstan on leasing."

The first stage referred to authorised capital and loans; the second stage added reference to leased assets.

35. "Investments" were defined in the Law as at 2000 and until its repeal as:

> "all kinds of property and intellectual valuables that investors invest in the objects of entrepreneurial activities to generate income, including:
>
> - movable and immovable property and property rights, liens, and others, except goods that are imported and intended to be sold without processing;
>
> - shares and other forms of participation in commercial organizations;
>
> - bonds and other debt obligations;
>
> - claims to money, goods, services, and any other execution of contracts relating to investments;
>
> - intellectual property rights, including copyrights, patents, trademarks, industrial designs, technological processes, know-how, normative and technical, architectural, engineering and technological design documentation;
>
> - any right to operate based on a license or in any other form granted by a state body. "

36. Article 6.1 stabilises (where there has been a deterioration of a foreign investor's position resulting from the repeal) by continuing to apply the repealed Law "to foreign investments".

37. It will be noted that the definition of "investments" includes a wide range of forms of "investment". Its terms may even seek to extend both (for example) to property which may represent the use of invested funds by the business and (for example) to shares and bonds which represent the form in which funds are invested by the investor in the business. However not all "investments", or even investments by a foreign investor, are "foreign investments" from 2000. The only forms of investment that are "foreign investments" are those "made in the form of participation in the authorized capital of

legal entities of the Republic of Kazakhstan", "the provision of loans (credit facilities) to legal entities of the Republic of Kazakhstan" and "the provision of leased assets". The latter two of the three are subject to further qualification in accordance with the further terms of the definition.

38. The investment by Ruby Roz the subject of the Contract is not a "foreign investment" within that definition. This short point is fatal to Ruby Roz' case. Ruby Roz committed to "make the investments specified in paragraph 3.1 of Chapter 3 as per the Work Programme" Those investments comprised reconstruction of buildings and purchase of land and equipment.

39. Again, I consider the language clear enough. The experts called by the parties were agreed that the interpretation of the Foreign Investment Law is governed by Article 6 of the Civil Code of the Republic. Paragraph 1 of this Article provides for interpretation in accordance with the literal meaning of the words used. Where there is ambiguity there is additional provision by Article 6, but I do not consider there is ambiguity here. Paragraph 2 of Article 6 adds that "[in] clarifying the exact meaning of a rule of civil legislation it is necessary to consider the historical circumstances under which it was put into effect, and its interpretation in judicial practice if this does not violate the requirements set forth in Paragraph 1 of the present Article". The historical circumstance that stands out in the present case is the decision of the legislature to amend the definition of "foreign investments".

40. Ruby Roz seeks to meet the point in a number of ways. It argues that the focus, and object of protection, of Article 6.1 is on the "foreign investor's position". It is true that it is, but within that position the focus and object of protection is confined to "foreign investments". Ruby Roz says that the proper interpretation is "foreign investments made by or into the entity whose position is to be protected" but whilst that might be a tenable interpretation when (before 1999 and 2000) "foreign investments" were defined simply as "investments made by a foreign investor", it is not tenable when there has (as here) been a redefinition that lists the forms of investment to which it extends.

41. Professor Douglas QC points out that when Article 6.1 goes on to deal with improvements in the "foreign investor's position" there is no reference to "foreign investments". But that in my view is simply the consequence of the very much less prescriptive course that the Article contemplates where there have been improvements ("certain terms of contracts between a foreign investor and an authorized state body representing the Republic may be changed by mutual agreement of the parties for the purpose of achieving a balance of the economic interests of the participants").

42. Ruby Roz argues that Article 6.1 should be read with Article 4.5. I do not consider that helps with understanding the compass of the "guarantee to foreign investors established by Article 6".

43. A further argument by Ruby Roz is to the effect that the purpose of the reference to "investment contracts" is to distinguish the length of contracts of 10 years and less from those over 10 years. However the wording that follows ("and with regard to investments being made under long term (over 10 years) contracts") confirms, to my mind, that contract length was not indicated by the word "investment".

44. Ruby Roz also urges that Article 6.1 of the Foreign Investments Law is concerned with "investments on the ground". I understand the commercial thrust of that submission. As a proposition it cannot, however, supplant the words of the legislation which are plain enough.

Conclusion

45. In the circumstances, and although our reasons are not identical, I agree with the conclusion reached by the arbitrators that they do not have jurisdiction.

46. A considerable number of further points were argued, with great forensic ability and with the assistance of distinguished expert contributions drawn from a number of expert fields. In the result these points have not proved material to the outcome. Many involve further questions of the Laws of the Republic and I consider this Court should be slow to answer those questions where they are not essential to the outcome of the case in hand.