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Arbitration - Austria

Costly decision: court refuses to set aside arbitral award

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The Vienna Commercial Court recently refused to set aside an arbitral award issued by a United Nations Commission on International Trade Law (UNCITRAL) tribunal seated in Vienna that had awarded Danish-Polish Telecommunications Group I/S (DPTG) €400 million against Telekomunikacja Polska SA (TP).

Facts

DPTG initiated arbitration proceedings against TP under a contract for the delivery and installation of telecommunications equipment in Poland as part of the so-called North-South Link, an important element of Poland's telecommunications infrastructure. DPTG claimed that, under the agreement with TP, it was (in addition to an initial compensation already received) entitled to a share of TP's revenue from use of the entire capacity of the link for a duration of 15 years. The arbitral tribunal recognised DPTG's claim and, in a (partial) award, ordered TP to pay Dkr2,998,422,812 in damages, plus interest. TP initiated an annulment proceeding against the partial award based on several grounds, all of which were ultimately rejected by the commercial court.

Decision

TP first argued that its right to be heard had been violated because the tribunal had not addressed all of its arguments in the award. This annulment ground faces an extremely high threshold of proof under Austrian case law. The Supreme Court has repeatedly held that there is a violation of the right to be heard only if the tribunal entirely or substantially denies a party the opportunity to present its case. This is not the case if an arbitral tribunal dismisses or ignores requests for evidence, or if the tribunal fails to establish all facts relevant to the case. In the present case, the commercial court noted that the arbitral tribunal had discussed DTPG's argument, but had rejected that argument outright.

The second annulment ground was violation of Austrian public order, which the Austrian courts also interpret very narrowly. In more than 100 years of case law, only a handful of awards have been set aside for such reasons. In the present case, TP had argued that the contract interpretation made by the arbitral tribunal was incorrect and the award amount exceeded the value of DPTG's investments twelvefold. TP further alleged that mandatory rules of Polish law should have been taken into account. Quoting a long line of case law, the court rejected these arguments.

TP also sought, as a third argument, annulment on the ground that the arbitral tribunal used an estimated figure when determining the damages awarded. The arbitral tribunal had thereby relied by analogy on Section 273 of the Civil Procedure Code, which permits a court to estimate the amount of the claim if an exact determination is impossible or would require unreasonable difficulties. TP argued that each party had submitted an expert opinion and the arbitral tribunal had inadmissibly and arbitrarily determined the amount awarded as the arithmetic mean of both opinions. Furthermore, TP alleged that the arbitral tribunal had surprised the parties by adopting a

calculation method (the tribunal's own estimation) that the parties had not anticipated. In its reasoning, the court remarked that the UNCITRAL Arbitration Rules grant a high degree of discretion to the arbitral tribunal, including the discretion to estimate the amount of the claim in an analogous application of Section 273 of the code. Such a process therefore does not violate the right to be heard; nor can it be seen as arbitrary.

TP finally argued that annulment was warranted because of the improper composition of the arbitral tribunal. TP challenged two of the three arbitrators (and repeated this objection after it received the award). These challenges were rejected by the president of the Federal Economic Chamber, the appointing authority under the UNCITRAL arbitration rules. The court noted that it did not have the power to scrutinise challenge decisions in course of annulment proceedings.

Comment

The first two annulment grounds were raised against a longstanding line of Austrian Supreme Court decisions – a hurdle almost impossible to overcome. However, the third annulment ground touches on a sensitive issue - the distinction between a permissible estimate by the arbitral tribunal and an impermissible (unless expressly authorised) application of equity. Given that the tribunal could rely on expert opinions, and given the value of the dispute, it is debatable whether it was really impossible or unreasonable to expect the tribunal accurately to determine the amount of damages. The court remarked that certain measurements had not been made between 1994 and 2000 and full measurements were made only after 2005; the court concluded that the relevant data thus could only be estimated. Although the court acknowledged the importance of that delimitation, it failed to discuss in more detail whether the lack of measurements amounted to impossibility within the meaning of Section 273 of the code, and whether rules governing burden of proof for damages should have been invoked.

This annulment ground raises a further issue - does a surprise decision violate procedural principles under Austrian law? Austrian civil procedural law generally requires courts to base their decision only on the grounds raised by the parties. However, it is questionable whether the so-called prohibition of surprise decisions ('*Überraschungsverbot*') is such a fundamental procedural part of Austrian law that it is also binding on arbitral tribunals. The (overly) narrow view of Austrian courts on due process makes this a difficult argument, and consequently TP was unable to convince the court in that respect.

With regards to the last annulment ground (ie, challenge of an arbitrator) the opinion expressed by the Commercial Court has meanwhile been enshrined in law and supplemented by the opportunity to file a separate and distinct remedy against (institutional) challenge decisions before Austrian courts.

Overall, the Vienna Commercial Court's decision is in line with the trend of Austrian case law to uphold arbitral awards. However, independent of the proceedings to set aside, DPTG may face another legal hurdle - namely, to obtain recognition and enforcement of the award in Poland. At that stage it may be possible to raise other arguments. As other cases demonstrate, the Polish recognition procedure can turn into a real obstacle.

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