

ICC award set aside due to irregularities in arbitrator's appointment

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Facts

Decisions

Comment

Cases in which an arbitrator must be appointed on behalf of a party have long been problematic. The French Supreme Court in *Siemens v Dutco* underlined that each party should have the same rights in the appointment process.⁽¹⁾ A recent Polish Court of Appeals decision invoked similar reasoning in setting aside an International Chamber of Commerce (ICC) award due to the fact that, among other things, one party's rights had allegedly been infringed when the sole arbitrator was selected in the course of the proceedings.⁽²⁾

Facts

The claimant filed a request for arbitration against a Polish municipality (ie, a unit of local government) demanding the payment of certain sums under different titles, all of which stemmed from a construction project. Polish was agreed as the language of arbitration; however the claimant requested that the arbitrator be German or French.

In response to the request for arbitration, the municipality motioned for all claims to be dismissed. It also objected to the proposal regarding the nationality of the arbitrator and underlined that the agreed language of arbitration was Polish.

In response, the claimant upheld its position and invoked Article 13(4)(a) of the ICC Rules of Arbitration, under which the court may directly appoint any person that it regards as suitable to act as arbitrator in the event that one or more of the parties is a state or may be considered to be a state entity.

The parties failed to agree and nominate the arbitrator jointly. Therefore, the ICC Court proposed a candidate to be appointed. The claimant disagreed with this proposal and, as it claimed that there was a risk of partiality, upheld its request for a German or French arbitrator and motioned for a person not connected to the Polish state or state entities.

The ICC Court appointed a sole arbitrator that met the criteria specified by the claimant. The municipality objected, claiming that it was not part of the state and could not be considered a state entity. The court, invoking Article 11(4) of the ICC rules, replied that its decision regarding the appointment was final.

The proceedings were initiated with the appointed sole arbitrator. One of the points of the dispute was whether the municipality had already paid a certain sum to the claimant. The arbitrator did not allow the municipality to make a submission in this regard after the proceedings has been closed despite the fact that the municipality had stated that after closing there would be a state court judgment relevant to the issue at hand.

However, the arbitrator informed the parties that "the evidence... [was] insufficient" to establish the value of one of the claims. Therefore, it reopened the proceedings and requested submissions in this

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regard.

Decisions

The tribunal allowed a significant part of the claim in the partial award of February 2 2017. It allowed, among other things, the claim that had previously not been proven and the claim to which the municipality had objected as already being extinguished due to a prior payment.

The municipality motioned a state court to set the award aside. The claimant objected to the municipality's motion; however, it acknowledged that the municipality's rights may have been infringed regarding the appointment of an arbitrator. In its August 31 2017 judgment, the Wrocław Court of Appeals set aside the award in its entirety.

The court of appeals found that the arbitral procedure contravened the basic rules agreed on by the parties (Article 1206(1)(4) of the Code of Civil Procedure based on Article (34)(2)(a)(iv) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law). The court of appeals invoked Article 12(3) of the ICC rules, under which the sole arbitrator is appointed by the ICC Court if the parties fail to nominate a sole arbitrator within 30 days. In such cases, the arbitrator should be appointed under Article 13(3) on proposal of an ICC national committee or group or directly by the court if the prerequisites in Article 13(4) are met (eg, where one or more of the parties is a state or may be considered to be a state entity).

The court of appeals underlined that the municipality was neither a state nor a state entity. Consequently, the ICC Court should have consulted the national committee first and should not have made an independent appointment. This was all the more so, as the circumstances invoked by the claimant against the first candidate that the state court had proposed were unconvincing. Consequently, as only the claimant's criteria were considered in the appointment of an arbitrator, the parties had not been treated equally.

The inequality was also perceived by the state court during the course of the proceedings. The state court had found that the arbitrator had reopened proceedings in a way that favoured the claimant, as it had asked it to prove its claim in more detail. However, the respondent's evidentiary motions had been rejected in a similar context. If they had been allowed, one of the claims would likely have been dismissed. Consequently, the court of appeals found that the award had violated the equal treatment principle and the agreement's basic procedural rules (Article 1206(1)(2) and (4) of the Code of Civil Procedure based on Articles (34)(2)(a)(ii) and (iv) of the UNCITRAL Model Law).

Finally, the court of appeals found that the award violated Polish public policy (Article 1206(2)(2) of the Code of Civil Procedure based on Article (34)(2)(b)(ii) of the UNCITRAL Model Law). The award included a claim that had been extinguished. This is because the claimant's claim was attached due to a separate claim of a third party against the claimant. Under Polish law, in such a situation, the municipality must pay the claim to a court enforcement officer, which it did. As a result, the claim had been extinguished and the municipality was free from its obligations in that regard.

Comment

Cases involving allegations against the appointment, impartiality or independence of arbitrators are usually complicated. It is difficult to make any firm statements, save for obvious cases of bias. Therefore, without knowing all of the circumstances of the case, it is difficult to assess whether the state court's decision was correct and the arbitrator did indeed disturb the equilibrium regarding the equal treatment of the parties.

It should be underlined that under Polish law, units of local self-government are separate from the state. This does not change the fact that under investment law, the Polish state is responsible for the actions of its self-government units.⁽³⁾

However, this was not the reason why Article 13(4) of the ICC Rules, which allows the courts to appoint an arbitrator without referring to the national committee, was introduced. This article's aim was to respond to the "perception that ICC National Committees lacked neutrality owing to the fact that they are often composed of leading companies and business associations in their respective

countries". (4) There appears to be little risk of bias when a national committee appoints an arbitrator in a case involving a single unit of a local government, especially because, as in the case at hand, there are almost 2,500 municipalities in Poland.

Nevertheless, under Article 13(5) of the ICC Rules, a sole arbitrator will in principle be of a nationality other than those of the parties. Therefore, in the case at hand, it is difficult to find an alleged violation of the parties' equality in the appointment process. The fact that the court of appeals acknowledged the claimant's objections towards the first candidate proposed by the state court hardly seems to provide enough proof of such a violation. The facts of the case – at least as demonstrated in the court of appeals judgment – do not show that the municipality's position was severely impaired and that an alternative outcome would have been achieved if the national committee had been consulted before the appointment, especially as there are not many foreign arbitrators who speak Polish.

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Endnotes

(1) French Supreme Court, 18 YB Com Arb 140 (1993).

(2) Wroclaw Court of Appeals, August 31 2017, File Ref I ACa 536/17, available in Polish [here](#).

(3) See R Dolzer and C Schreuer, *Principles of International Investment Law*, Second Edition, Oxford University Press 2012, p 218-219.

(4) ICC Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, Section 38, available [here](#).

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