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Court of Appeal Ruling on Arbitrator's Impartiality and Mandate

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As in a previous case involving a challenge against an arbitral award (for further details please see "[Court of Appeal Rules on Arbitrator's Impartiality](#)"), the Svea Court of Appeal has recently held that it would have been appropriate for an arbitrator to disclose certain circumstances, but that non-disclosure did not affect the arbitrator's impartiality. The court also considered whether the arbitrators had examined certain facts upon which the challenging party relied during the arbitration, and found that it could not be concluded from the circumstances that the arbitrators had failed to consider these facts. Thus, the court did not set aside the award. Leave to appeal was not granted.

Background

Sections 8 and 9 of the Arbitration Act contain provisions on arbitrators' impartiality and disclosure obligations. Such provisions are also found in Article 17 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and in Article 14 of the 2007 rules. Sections 33 and 34 of the act contain provisions for setting aside awards that are similar to those found in Article 34 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985. The act does not require that arbitral awards contain reasons. However, such requirement is provided under Article 32 of the 1999 rules and Article 36 of the 2007 rules.

Facts

In August 2002 TNK Trade Ltd (Cyprus) requested arbitration under the 1999 rules against Rapla Invest AB (Sweden), at the time Swonco Swedish Oil AB. In an award dated March 2004 the three arbitrators directed Rapla to pay TNK for oil supplies. Rapla challenged the award before the Svea Court of Appeal, claiming that the award should be set aside on the grounds, among others, that (i) a party-appointed arbitrator lacked impartiality, or (ii) the arbitrators had not considered certain facts upon which Rapla had relied during the arbitration.

With respect to the issue of impartiality, Rapla submitted that it had become aware after the award was made that the arbitrator appointed by TNK had been an arbitrator in an arbitration under the 1999 rules in which an award had been made in May 2002 and to which TNK Ukraina (a subsidiary of the TNK Group) was an indirect party. In addition, Rapla submitted that the arbitrator had represented TNK Ukraina in insolvency court proceedings. Rapla also submitted that the arbitrator had made a statement of independence without disclosing these circumstances, which affected his impartiality. TNK argued, among other things, that an arbitrator or prospective arbitrator is not obliged to disclose that he or she is or has been an arbitrator in another arbitration to which a company within the same group of companies as one of the parties is or was a party.

With regard to the second issue, Rapla submitted, among other things, that it transpired from the award that the arbitral tribunal had failed to consider certain facts, as these were not accounted for in the award or commented upon in the reasons. TNK submitted, among other things, that it followed from the content of the award that the arbitral tribunal had considered the facts at issue.

Decision

On December 7 2006 the Svea Court of Appeal rejected Rapla's challenge.⁽¹⁾ With respect to the issue of impartiality, referring to Sections 8 and 9 of the act, the court stated that it would have been "appropriate" for the arbitrator to disclose the circumstances in question. However, the award was not set aside as (i) this failure to disclose was not of such a nature as to affect the arbitrator's impartiality, and (ii) the other circumstances submitted by Rapla did not lead to the conclusion that the arbitrator was partial.

As regards the arbitral tribunal's alleged failure to consider facts submitted by Rapla, the court found that the facts in question or the arguments related thereto were not explicitly mentioned in the part of the award where the tribunal accounted for the parties' respective arguments. The court then assessed whether the facts relied upon by Rapla were contained in other parts of the award, as alleged by TNK. The court found that parts of the award might be understood as summing up several facts relied upon, including the facts at issue. The court also quoted other parts of the award; without drawing explicit conclusions from their content, it probably found that these might contain allusions to the facts at issue.

Moreover, the court noted, among other things, that Article 32 of the 1999 rules requires that the award contain reasons; according to literature, the award must make clear to the losing party that its submissions have been considered and that the determination of the arbitrators is based on arguments that the losing party has had an opportunity to comment upon. Where it does not follow clearly from the award that facts relied upon have been considered, there should be a presumption that the arbitrators have considered facts which were not expected to be accounted for in the award; however, this presumption is reversed with regard to facts which should have been accounted for in the award. The court found that the examination of the case did not justify the conclusion that the arbitral tribunal had failed to consider the facts relied upon by Rapla; thus, Rapla failed to demonstrate that the arbitral tribunal had committed a procedural error.

Comment

With regard to the issue of the arbitrator's alleged partiality, it may be asked why the court based its decision only on the content of Sections 8 and 9 of the act, and not also on the content of Article 17 of the 1999 rules. The outcome may not have been different had the court expressly considered Article 17. However, there are slight differences in wording: Article 17 provides that an arbitrator must be impartial and independent, whereas Section 8 provides only that an arbitrator must be impartial. Article 14 of the 2007 rules retained the double requirement of independence and impartiality. However, lack of independence without partiality is arguably also irrelevant under the 1999 and 2007 rules (which is why the English legislature, like the Swedish legislature, did not add 'lack of independence' to 'partiality' as the other grounds for removing an arbitrator under Section 24 of the English act). In certain cases Section 8 of the act should be considered (even where it has been agreed upon that the 1999 or 2007 rules would apply), as this section is more elaborate than the corresponding articles of the 1999 and 2007 rules.

The issue of whether the arbitrators had failed to consider certain facts falling within their mandate raised a question of fact rather than a question of law, and the court dealt with this issue on the basis of presumptions. Taking these presumptions into account, as well as the content of the award (which could be understood as meaning that the arbitrators had considered the facts at issue), the court requested that Rapla present evidence that the latter was unable to submit. The case was determined on the basis of documents only - that is, the content of the award and the written submissions made during the arbitration. It does not transpire from the judgment whether any of the parties invited - or required - the arbitrators to give oral testimony. Rapla did not base its challenge on an alternative argument regarding the lack of reasons under Article 32 of the 1999 rules, which would have raised a question of law rather than a question of fact. However, the court probably took the reasoning requirement under Article 32 into account when considering which elements should be accounted for in an award.

The case did not address any jurisdictional issues. In a nutshell, intentional failure to consider facts relied upon by the parties as a result of a negative determination of jurisdiction does not fall within the scope of Sections 33 or 34 of the act. Such a determination - which must take the form of an award under Section 27 - falls under the scope of Section 36 of the act. Sweden is one of the few jurisdictions to have an explicit provision on the negative determination of jurisdiction; there is no such provision in the UNCITRAL Model Law.

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Endnotes


(1) Case T 5044-04 9.

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