

Arbitration - Netherlands

Court rules on annulment of arbitration proceedings

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Introduction

On February 12 2014 the District Court of The Hague rendered a decision in proceedings regarding the annulment of an arbitral award.⁽¹⁾ The proceedings had been initiated by Bursa Buyuksehir Belediyesi (BBB), a public entity of the municipality of Bursa, Turkey, against a consortium of four construction companies, including Güris Insaat VE Muhendislik AS. BBB and the consortium had various disputes arising out of their 1996 agreement for the construction of a light rail system for Bursa. These disputes were settled in several International Chamber of Commerce (ICC) arbitrations, all of which led to annulment proceedings. As the arbitration agreement in the construction agreement provided for the seat of arbitration to be The Hague, each annulment proceeding was brought before the District Court of The Hague.

In the case at hand, BBB sought annulment of a 2011 arbitral award which ordered it to pay in excess of €5.7 million (plus interest of more than €1 million) in damages to the consortium. The main ground on which BBB sought annulment was the lack of independence and impartiality of one of the arbitrators. In its defence the consortium raised a procedural point, as it deemed BBB's claim to have been made after the time limit for annulment applications had lapsed. This update discusses the two issues ruled on by the district court – the admissibility of the annulment claim and the lack of impartiality of one of the arbitrators.

Admissibility

The consortium pointed out that BBB had initiated annulment proceedings more than three months after the arbitral award had been deposited with the district court. The consortium referred to Article 1064(3) of the Code of Civil Procedure, which states that a party can initiate annulment proceedings within three months of the deposit of the arbitral award. The district court acknowledged that the annulment proceedings had been initiated long after the expiry of the three-month time limit. However, the court referred to the second time limit contained in Article 1064(3) of the code – the third sentence of that article states that if the arbitral award, together with leave of execution, is served on the other party, that party can initiate annulment proceedings within three months of service, notwithstanding the expiry of the three-month period that started to run when the award was deposited. The district court held that while it was obvious that more than three months had passed since deposit of the award, the consortium had insufficiently argued and substantiated that it had served the award and leave of execution on BBB, and the date on which it had done so. The court thus accepted jurisdiction to hear BBB's claim.

It is remarkable that the court accepted jurisdiction while considering that it had been insufficiently argued and substantiated that the award and leave of execution had been served. After all, BBB could have validly brought the claim after the lapse of the three-month period following deposit only if it had been served the award and the leave for execution. Otherwise, the second period would not have started to run and the court would have had to dismiss the claim for lack of cause of action *ex officio*. Thus, BBB must have substantiated that it had been served the award and leave. The consortium subsequently failed to prove when the arbitral award and the leave of execution had been served on BBB in order to substantiate that three months had lapsed between service and the date on which BBB initiated the annulment proceedings. Thus, the court accepted jurisdiction because there was insufficient evidence of when service had taken place. Had there been insufficient evidence that the award and leave of execution

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had been served on BBB, the court should have ruled that BBB had no cause of action.

From earlier case law – notably, the Supreme Court decision in *Eco Swiss China Time v Benetton International*⁽²⁾ – it is clear that annulment proceedings must be brought either within three months of deposit of the award or within three months of service. In the case at hand, the district court confirmed that the burden of proof with regard to the lapsed time period rested on the party relying on the legal consequences of the rule set out in Article 1064(3) of the code (ie, the consortium). This is in line with the general rule of Dutch law regarding the allocation of the burden of proof (Article 150 of the code), assuming that the consortium invoked the lapse of the second three-month period. Therefore, the district court's decision strengthens legal certainty as to what a party relying on Article 1064(3) must argue and substantiate.

Lack of impartiality

BBB contended that the Turkish arbitrator appointed by the consortium was not independent and impartial because he had breached his duty to disclose relevant facts, as referred to in the ICC Arbitration Rules (Article 7(2) of the 1998 rules)⁽³⁾ and Article 1034 of the code. According to BBB, the arbitrator should have disclosed that:

- between 1986 and 1989 or 1990 he had acted as counsel in an ICC arbitration for another construction consortium of which Güris was part; and
- in different ICC arbitral proceedings, he was removed in April 2008 as arbitrator in an arbitration to which Güris was a party (as a member of a construction consortium).

The court sided with the consortium on the merits and denied BBB's claim for annulment. In line with previous Dutch case law, the district court was strict in its application of the grounds for annulment of an arbitral award. The district court stated that the grounds for annulment of an arbitral award are limited under Dutch law, and that the court must exercise restraint when determining whether there are grounds for annulment; annulment proceedings may not be used as a disguised appeal.

In line with an earlier Supreme Court decision,⁽⁴⁾ the district court confirmed that the criteria for annulment of an arbitral award for lack of impartiality are stricter than those that apply when challenging an arbitrator. Annulment for lack of impartiality can take place only if facts and circumstances have come to light that provide sufficient grounds to establish that:

- an arbitrator was partial or dependent when rendering the decision; or
- the impartiality or independence of an arbitrator could be questioned to such an extent that, taking all circumstances into account, it would be unacceptable for the losing party in the arbitration to accept the tribunal's decision.

A claim based on a lack of impartiality cannot succeed if the facts and circumstances were or could reasonably have been known during the arbitration. If that is the case, the party should have challenged the arbitrator during the proceedings.

In assessing whether such circumstances applied, the court noted that the arbitrator's behaviour in not disclosing the facts put forward by BBB was not to his credit. However, in general terms the court agreed with the consortium that international arbitrators (eg, the arbitrator involved in this case) often have had long and varied careers and participate in various capacities in the relatively closed circle of international construction arbitrations. As a result, arbitrators need not and cannot disclose all possible grounds for challenge. Doing so would undermine the desire of an effective international arbitral system in the specific context, such as the case at hand.

The court took a practical approach in this regard. However, under the 1988 and the current ICC Arbitration Rules, an arbitrator must disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties".⁽⁵⁾ This is also what the ICC asks prospective arbitrators to disclose in their statement of independence. The Dutch court thus set its own standard of disclosure, which was not in line with the ICC rules applicable to the arbitration.

However, the court held that in assessing the annulment claim, it was irrelevant whether the arbitrator did or did not timely disclose these facts. Rather, the relevant question was whether the non-disclosed facts led to the conclusion that the arbitrator, when giving the decision, was not independent and impartial, or that there were such serious doubts about his impartiality and independence that BBB could not be expected to accept the award. The court held that the facts as submitted by BBB were insufficiently concrete and convincing, and denied BBB's claim to annul the arbitral award.

Comment

The district court's judgment serves as a reminder to counsel to put forward and substantiate sufficiently their arguments and present them in accordance with established case law. In regard to the consortium, it had been clear since *Eco Swiss*

China Time v Benetton International that annulment proceedings must be instigated within either three months of deposit of the award with the court or three months of service of the award. Thus, a party claiming inadmissibility of the annulment application on the grounds that the prescribed time limits were exceeded must state and substantiate that both time limits contained in Article 1064(3) of the code have expired. For this, there must be evidence of when the period started to run.

Similarly, with regard to annulment based on impartiality, the criteria set out by the Supreme Court in *Nordström*⁽⁶⁾ should be taken as the benchmark for counsel when formulating grounds for annulment. Such (serious) claims must be sufficiently substantiated for a court to review them. Otherwise, an application can easily be thrown out based on a lack of substantiation, as illustrated by this judgment.

The parties probably chose The Hague as the seat of arbitration due to its perceived neutrality and acclaim as the global legal capital. The contract and the parties appeared to have no links to the Netherlands. Instead, the contract and dispute were almost exclusively linked to Turkey. The choice of The Hague, however, meant that annulment proceedings would be open to appeal and appeal in cassation. BBB and the consortium indeed went all the way to the Supreme Court in relation to at least two of their disputes regarding the annulment of arbitral awards.

The Dutch arbitration community has recognised this perceived disadvantage. Under the proposed new Dutch Arbitration Act, annulment applications would be brought at first instance before the Court of Appeal of The Hague. Although in principle appeal to the Supreme Court is possible thereafter, parties may exclude this possibility and thereby limit the annulment proceedings to a single instance.⁽⁷⁾ The proposed act has not yet been adopted.

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Endnotes

- (1) District Court (The Hague), February 12 2014, ECLI:NL:RBDHA:2014:1752.
- (2) March 21 1997, published in *NJ* 1998/207.
- (3) Article 11 (2) of the 2012 rules.
- (4) Dutch Supreme Court, February 18 1994, *NJ* 1994, 765 (*Nordström/Nievelt Goudriaan & Co*).
- (5) Articles 7(2) and (3) of the 1988 rules and Articles 11(2) and (3) of the 2012 rules.
- (6) Dutch Supreme Court, February 18 1994, *NJ* 1994, 765 (*Nordström/Nievelt Goudriaan & Co*).
- (7) This does not apply to arbitration agreements where one of the parties is a natural person who is not acting in a professional capacity (proposed Article 1064a(5) of the code).

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