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Investment Arbitration and Legal Protection Under European Law – Frankfurt Court Strengthens the Efficiency of Arbitration Agreements

Maximilian Clasmeier (White & Case LLP) · Wednesday, March 11th, 2015

The Higher Regional Court Frankfurt (OLG Frankfurt) has recently strengthened the efficiency of parties' wills embodied in arbitration agreements. In a crucial decision (OLG Frankfurt am Main, 26 Sch 3/13, Ruling, 18 December 2014), the judges have added clarity to the practical problem of how to resolve friction between an increasingly dense net of treaty obligations of member states of the European Union and international investment protection. Specifically, the court looked at arbitration agreements and their compatibility with the legal protection requirements envisaged by European law. The answers provided by the OLG Frankfurt are both, a convincing step towards greater clarity in the resolution of intra-EU investment disputes and a powerful expression of trust in the sophistication of international investment arbitration.

The initial investment dispute arose between the Dutch insurance company Achmea, the claimant, and the Slovak Republic, the applicant. The claimant invested in the applicant's health insurance sector after a liberalization of the state's respective market in 2004. After a change in government in 2006, however, the climate for the investment of the claimant changed drastically as reforms were introduced by the Fico government. The activities of insurance companies became strongly restricted, in stark contrast to the reform previously introduced. Based upon the bilateral investment treaty (BIT) between the Netherlands and the Slovak Republic, the claimant initiated arbitral proceedings on 1 October 2008 pursuant to the UNCITRAL Arbitration Rules. The parties designated the Permanent Court of Arbitration in The Hague as registry and chose Frankfurt, Germany as the seat of the arbitration.

On 26 October 2010, the arbitral tribunal ruled that it had jurisdiction to hear the case. Pursuant to § 1040(3)(2) of the German Civil Procedure Code (*Zivilprozessordnung* – ZPO), the applicant unsuccessfully addressed the OLG Frankfurt, seeking for the court to set aside the award on jurisdiction of the arbitral tribunal. In the following, the applicant turned to the German Federal Supreme Court (BGH) while at the same time, the arbitral tribunal proceeded with the investment dispute, rendering its final award on 7 December 2012. The tribunal found a violation of the fair and equitable treatment standard (Art. 3(1) BIT) and the free transfer of payments guarantee (Art. 4 BIT), awarding damages to the claimant in the amount of € 22.1 million. The BGH considered the application by the applicant inadmissible as its need for legal relief on the matter had vanished due to the final award that was rendered (BGH, III ZB 37/12, Ruling, 19 September 2013, para 8). Nevertheless, the applicant addressed the OLG Frankfurt once more, now seeking to have the final

award set aside pursuant to § 1059(1) ZPO.

The applicant based its application on a number of alleged conflicts between the provisions of the BIT and principles of German and ultimately, European law. Of particular interest here is the applicant's reliance on § 1059(1) ZPO. It provides that an arbitral award may be set aside only on the limited grounds contained in the following § 1059(2) ZPO. § 1059(2)(1)(a) ZPO then specifies that an arbitral award may be set aside, if the arbitration agreement is invalid pursuant to German law. Such reference includes provisions of European law and thus the preliminary rulings procedure of the Court of Justice of the European Union (CJEU, former European Court of Justice), Art. 267 TFEU. The applicant based the alleged invalidity on the fact that arbitral tribunals are not entitled to submit questions on the interpretation of European law to the CJEU pursuant to Art. 267 TFEU. Where a dispute concerns – even if only partially – questions of European law, the applicant argued, it would be contrary to the *ordre public* of each member state, if arbitral awards were recognized or enforced, without an arbitral tribunal being able to address the CJEU in the process. In essence, the applicant thereby implied that the legal protection so granted would be insufficient and thus incompatible with that envisaged by European law. Furthermore, the applicant argued that the arbitration agreement violated Art. 344 TFEU, pursuant to which disputes between member states may only be resolved on the basis of the treaties forming the European Union. Also, the applicant turned against the arbitral tribunal's assessment of damages, alleging that its due process rights were violated.

The OLG Frankfurt dismissed the arguments and highlighted the autonomy of the parties' arbitration agreement. First, it stressed that it does not see a general incompatibility between arbitration agreements and the legal protection mechanisms within the European Union. Second, the court pointed out that arbitral proceedings are admissible, even if they concern questions on the interpretation of European law, relying on respective rulings by the CJEU in *Nordsee* and *Eco Swiss*. Most interestingly, the court then explained that parties to an arbitration in which European law is relevant are granted sufficient legal protection by the possibility of later addressing national courts of member states, which may then request the CJEU's ruling on interpretation, if necessary. In other words, recourse to the CJEU via national courts strikes the appropriate balance between legal protection under European law and the efficiency of arbitration. The fact that a member state of the European Union, being under an obligation to comply with European law, is part of such investment arbitration, the court ruled, is of no relevance when compared to arbitrations between private parties. In both cases, the goal is the uniform interpretation of European law.

As regards the alleged violation of Art. 344 TFEU, the OLG Frankfurt similarly rejected the argument. The treaties of the European Union do not provide for a specific procedure for the resolution of disputes between member states and private persons. Therefore, the court argued, the arbitration agreement did not alter the dispute resolution mechanisms available within the European Union. Furthermore, the arbitral tribunal did not violate due process rights of the applicant, the judges found, as the assessment of damages was transparent and the arguments of the applicant relating to the assessment were sufficiently taken into consideration.

The applicant may now still turn against the decision of the OLG Frankfurt by way of appeal to the BGH. In any case, however, the ruling of the OLG Frankfurt is convincing and in line with the arguments previously provided by the CJEU. It is clear support for the autonomy of arbitration agreements and representative of an arbitration friendly attitude of German courts. Furthermore, the ruling rejects the notion that investment tribunals are barred from considering and applying European law. As with all other substantively applicable laws, tribunals – like national courts –

may rather be *required* to consider and apply it. It is then, as the arbitral tribunal had already stated – the CJEU's role to serve as the ultimate and final, not the only, authority on questions of interpretation. If the argument of the respondent had prevailed, it would have had a striking consequence: whenever investment tribunals are confronted with matters of European law, they would lack jurisdiction, given their inability to directly address the CJEU pursuant to Art. 267 TFEU. Only a hostile attitude towards arbitration could explain such result. However, the CJEU is quite clear in its support of arbitration, highlighting that even in disputes involving the interpretation and application of European law, efficiency is critical and must limit possible recourse to courts to a minimum. The ruling of the OLG Frankfurt is in this sense highly consequent: where parties voluntarily free a dispute from a domestic legal system by way of an arbitration agreement, their recourse to such legal system must accordingly remain limited. In practice, parties to an arbitration are therefore to address a national court, which would then be entitled to address the CJEU. This twofold approach may be an inconvenient consequence. However, it is the consequence of a deliberate choice for arbitration.

The ruling of the OLG Frankfurt comes at a time, in which an increasing number of questions concerning the relationship between investment treaties and obligations of member states of the European Union are surfacing. It comes at a time, in which investment arbitration is facing extensive public criticism based on curious allegations of arbitration operating behind the legality of domestic courts. It is unfortunate that broad public attention to the ruling of the OLG Frankfurt is unlikely. National judges strengthening investment arbitration is manifest evidence of trust in the sophistication of the discipline. Apart from the decision's political potential, however, it sheds more light on the, at times, still nebulous coexistence of legal protection under European law and that of international investment law. Rulings like the one at hand provide valuable guidance in answering intriguing practical questions on the interplay of both disciplines.

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