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German Federal Supreme Court: Procedural Order in Slovakia v. Eureko

Peter Bert (Taylor Wessing) · Wednesday, October 16th, 2013

Investment arbitration under investment treaties between EU member states is a hot topic, in particular given the EU Commission's strong views on the subject: As previously discussed here, the Commission has intervened in arbitrations in support of the position that the arbitral tribunal lacked jurisdiction to hear the dispute. One such matter was Eureko v. Slovakia, apparently the first case where this issue was brought before a state court, when Slovakia challenged an interim award confirming the jurisdiction of the tribunal in the Frankfurt Court of Appeals (*Oberlandesgericht*). The Frankfurt court in May 2012 upheld the award (see here and here for comments).

The matter proceeded to the German Federal Supreme Court (*Bundesgerichtshof*) for judicial review (*Rechtsbeschwerde*). The Federal Supreme court published its order (*Beschluss*) dated September 19, 2013 on its website yesterday. For the time being, the Federal Supreme Court does not take a substantive position, but has issued a procedural order according to which the proceedings currently before it have become redundant.

Let's briefly recap the key facts: Eureko, a Dutch insurer, provided private health insurance in Slovakia. It alleged that changes in the regulatory regime for the private health insurance sector in Slovakia in 2006 violated the bilateral investment treaty between the Netherlands and Slovakia. On that basis, Eureko commenced arbitration proceedings in October 2008. The arbitral tribunal was seated in Frankfurt am Main. On October 26, 2010, it issued an interim award on jurisdiction (available on italaw.com). It found that Slovakia's objections to the applicability of the arbitration clause were unfounded.

Notwithstanding the challenge to the interim award in the German courts, the arbitral tribunal proceeded with the arbitral proceedings. On December 7, 2012 it issued an award in favour of Eureko, granting, inter alia, damages in the amount of EUR 22,100,000. Slovakia has challenged this award in the Court of Appeals in Frankfurt as well. It is because of this final award that the Federal Supreme Court now feels unable to decide on the challenge of the interim award.

In its procedural order (*Hinweisbeschluss*), the Federal Supreme Court set out its position that as a result of the final award having been made, Slovakia no longer can show a need for legal relief (*Rechtsschutzbedürfnis*) and invited the parties' comments. It is somewhat unusual for such an order to be published. As the order discusses an issue on which there is no precedent so far, the court apparently felt that it would offer guidance for similar cases.

In short, the Federal Supreme Court argues as follows: Slovakia's challenge of the interim award pursuant to Sec. 1040 para 3 German Code of Civil Procedure (ZPO) became inadmissible (*unzulässig*), as it could no longer show a need for legal relief. The court states that it cannot extend the scope of the proceedings currently before it to rule explicitly on the setting aside or nullity of the final award (see #9 of the order). If, on the other hand, it were to rule on the interim award and, for whatever reasons, the final award were not to be challenged, this would allow contradicting descisions by a state court on the one hand and the arbitral tribunal on the other hand to co-exist and create legal uncertainty. In addition, this would undermine the function of the setting aside proceedings pursuant to Sec. 1059 ZPO and the time limits prescribed therein. Hence, only formal setting aside proceedings pursuant to Sec. 1059 ZPO for the final award can avoid this outcome, without proceedings pursuant to Sec. 1040 para. 3 ZPO continuing, in parallel, for the interim award.

Finally, the court takes into account that the award must remain capable of recognition in other jurisdictions. In the international context, the indirect effect (*Fernwirkung*) of a court order on the interim award would cause grave concerns. The efforts that went into the Sec. 1040 proceedings would not be wasted, but could be relied upon in subsequent Sec. 1059 proceedings, and therefore, the principles of procedural efficiency do not require a different approach.

Thus, a substantive decision on the underlying question whether intra-EU BIT Arbitration clauses are still operative must wait for Slovakia's challenge of the final award to reach the Federal Supreme Court. The Federal Supreme Court, in turn, arguably is obliged to refer the matter to the ECJ, so expect to hear more in the years to come.

This entry was posted on Wednesday, October 16th, 2013 at 5:30 pm and is filed under BIT, European Law, European Union, Investment Arbitration
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