Svea Court of Appeal annuls another intra-EU award because of incompatibility with Swedish public policy

by ***Practical Law Arbitration***, with ***Westerberg & Partners***

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In *Republic of Italy v Athena Investments A/S and others (Case T-3229-19)*, the Svea Court of Appeal annulled another intra-EU investment arbitration award based on incompatibility with Swedish public policy.

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The Svea Court of Appeal (COA) has declared an Energy Charter Treaty (ECT) award invalid because it was manifestly incompatible with Swedish public policy. The award was rendered in a Swedish-seated arbitration between Italy and three investors from two EU member states (respondents).

Italy argued that the award should be set aside on several grounds, including that the award was invalid because it included a determination of issues which, under Swedish law, may not be decided by arbitrators. Alternatively, the award was invalid because it, and how it arose, was manifestly incompatible with fundamental principles of the Swedish legal system. Further, the award should be set aside since it was not covered by a valid arbitration agreement between the parties.

The respondents disputed that the award should be set aside.

The COA first examined if it followed from the ECJ and Swedish Supreme Court jurisprudence on intra-EU awards (see, for example, *Legal update, Swedish Court of Appeal consistent in declaring intra-EU investment treaty award invalid on grounds of public policy*) that the award was invalid due to Swedish public policy, and found that it was. The award at issue had been rendered in an investment dispute between a member state and investors from other member states based on Article 26 of the ECT. Therefore, upholding the award would be manifestly incompatible with Swedish public policy.

There were two dissenting opinions. One dissenting judge stated that the award could be held invalid on several grounds. That judge argued that it would be most appropriate to declare the award invalid based directly on Articles 267 and 344 of the Treaty on the Functioning of the European Union.

Another dissenting opinion concerned the costs for work performed by Italy's own legal staff. While the majority of the COA rejected all of Italy's claim for compensation in this part, finding that it had not shown that the work was reasonably necessary for the action, in addition to the work performed by external counsel, the dissenting judge argued that the claimant should be awarded EUR10,000 for loss of time of its own legal staff.

The COA granted leave to appeal the judgment to the Swedish Supreme Court. While it is clear that intra-EU investment awards are invalid under Swedish law, it will be interesting to see if the Supreme Court grants leave to appeal to closer examine the legal basis of the invalidity.

Case: Republic of Italy v Athena Investments A/S and others (Case T-3229-19) (Svea Court of Appeal) (17 June 2024).

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