Commentary

The Netherlands' Supreme Court Confirms Annulment Of ICC Arbitral Award For Failure To Comply With Mandatory Signing Requirements

By
Annet J. van Hooft

[Editor's Note: Annet J. van Hooft is a senior associate with Jones Day Paris. She specializes in international commercial arbitration and is a member of the ICC Commission on Arbitration. Prior to joining Jones Day, she worked as a counsel at the Secretariat of the ICC International Court of Arbitration in Paris. The views expressed in this commentary are those of the author alone. *Replies to this commentary are welcome.]*

On December 5, 2008, the Netherlands Supreme Court (*Hoge Raad*) confirmed the annulment of ICC award 11380, pursuant to Articles 1057 and 1065 of the Dutch Code of Civil Procedure ("DCCP").[1] Article 1057(2) DCCP requires that arbitral awards be signed by all arbitrators. Article 1057(3) DCCP then stipulates:

> If a minority of the arbitrators refuses to sign, the other arbitrators shall make mention thereof beneath the award signed by them. This statement shall be signed by them. A similar statement shall be made if a minority is incapable of signing and it is unlikely that this impediment will cease to exist within a reasonable time.

Article 1065 DCCP provides, in part, that an award may be annulled if it has not been signed in accordance with Article 1057 DCCP.

ICC case no. 11380 concerned a dispute between a consortium of Turkish and German companies (the "Consortium") and the Turkish city of Bursa ("Bursa") and related to the construction by the Consortium of a light rail system for Bursa.[2] In January 2001, Güris Inşaat ve Mühendislik A.Ş. ("Güris"), one of the members of the Consortium, commenced ICC arbitration proceedings against Bursa on behalf of the Consortium, and claimed approximately 40 million Euros in damages.

The arbitral tribunal consisted of three Turkish arbitrators, Mr. Ayar, Mr. Hoca, and Mr. Ortan, the chairman nominated by the co-arbitrators. The place of arbitration was The Hague, The Netherlands.

In early January 2002, Mr. Ortan invited the co-arbitrators to a meeting in Istanbul on January 9, 2002 to discuss the draft final award that he had prepared. Mr. Ayar, the co-arbitrator nominated by Güris, was unable to attend this meeting, as he was scheduled to be hospitalized elsewhere in Turkey the following day.[3] Messrs. Ortan and Hoca nevertheless proceeded with their meeting and sent a copy of the draft final award to the ICC Secretariat for scrutiny immediately following their meeting. On January 10, 2002 Mr. Ayar informed the ICC Secretariat that no deliberations had taken place among the arbitral tribunal. On January 14, 2002, Mr. Ayar informed the ICC Secretariat that he would not sign the final award and that he would send a dissenting opinion after having received a copy of the final award.

On February 22, 2002, the ICC Court approved the draft final award, which was subsequently signed and dated February 23, 2002 by Messrs. Hoca and Ortan.

Mr. Ayar did not sign the final award and sent the Secretariat a dissenting opinion on March 25, 2002. Three days later, the ICC Secretariat sent the parties the original award together with a copy of the dissenting opinion. The award did not contain a signed statement by Messrs. Hoca and Ortan that Mr. Ayar refused to sign or an explanation why this was the case. On August 19, 2003, Messrs. Hoca and Ortan deposited the award with the District Court of The Hague (*Rechtbank Den Haag*), in accordance with Article 1058 DCCP. They also filed a separate, signed, declaration in Turkish (with a translation in English), explaining that Mr. Ayar had not signed the award.

As the majority decision was unfavorable to the Consortium, it commenced annulment proceedings before the District Court of The Hague in December 2002 on the ground, among others, that the award had not been signed in accordance with Article 1057 DCCP.[4] Bursa asserted that the dissenting opinion formed part of the final award, so that the requirements of Article 1057 DCCP had been met. In the alternative, Bursa argued that the separate declaration which Messrs. Hoca and Ortan had filed in the meantime with the District Court of The Hague validly rectified any defective signing.

The District Court rejected Bursa's first argument because the dissenting opinion was made after the rendering of the final award, and for that reason alone could not form part of the award. It also rejected Bursa's second argument as it considered that the filing of the declaration did not qualify as a rectification within the meaning of Article 1060 DCCP, which in any event does not permit the correction of signing defects.[5]

Bursa's assertion that the District Court should anticipate an amendment to the Netherlands Arbitration Act proposed by the *Commissie van den Berg*, which would permit the correction of this particular signing defect, was also rejected.[6] First, because the proposals of that commission are private proposals which have not yet resulted in draft government legislation. Second, because unlike the *Commissie van den Berg*, the District Court considered that the signing requirements of Article 1057(3) DCCP are not mere formalities but are essential requirements for the validity of an arbitral award.[7] Indeed, according to the District Court, the purpose of Article 1057 DCCP is to remind the arbitral tribunal that it should decide jointly and at a minimum requires that the majority understand why the minority refuses to sign. Article 1057 DCCP thus encourages discussion among the arbitral tribunal. If the majority were allowed simply to deposit a separate declaration after signing the award, this purpose would not be achieved.

The District Court therefore annulled the award. The Court of Appeals of The Hague (*Hof Den Haag*) and the Supreme Court subsequently upheld this decision, agreeing with the District Court that the requirement of Article 1057(3) DCCP is an essential requirement, the purpose of which is to guarantee joint decision making.[8]

While the decision is certainly in accordance with Dutch law as it presently stands, the argument that Article 1057(3) DCCP guarantees joint decision making is not entirely convincing. A majority of the arbitral tribunal may just as easily file a separate statement explaining that the minority had not signed the award, as it can put such a statement under the majority award; neither act requires any involvement from the minority.[9]

Indeed, the perception of the District Court and Court of Appeals that one of the co-arbitrators did not participate in the deliberations regarding the final award seems to have played an important role in the outcome of the case.[10] This would violate the principle that the arbitral tribunal must take its decisions jointly. While this principle is not explicitly mentioned in the Netherlands Arbitration Act, it is recognized in Dutch law. It thus appears that the Dutch courts used the failure to fulfill a formal requirement (*i.e.* the adding of a statement by the majority that the minority refused to sign under the award) to sanction the perceived failure to comply with a substantive one (*i.e*. the requirement that arbitral tribunals decide jointly).

In the meantime, arbitral tribunals sitting in The Netherlands may wish to take note of the above decision.[11] In case the tribunal does not decide unanimously, the majority should comply with the signing requirements of Article 1057(3) DCCP, as not doing so may have dire consequences.

More generally, arbitrators, in particular when coming from foreign jurisdictions, should always familiarize themselves with the *lex arbitri*, to guarantee

compliance with the rules that need to be respected in order to render a valid award. This includes provisions on the signing of majority awards, as the ICC Rules do not contain any provisions in this regard.[12]

Endnotes

1. Bursa/Güris *c.s.*, Supreme Court (*Hoge Raad)*, December 5, 2008, http://www.rechtspraak.nl, LJN: BF3799.

2. The Consortium consisted of Güris Inşaat ve Mühendislik A.Ş., Siemens A.G., Siemens Sanayi ve Ticaret A.Ş., and Tüvasaş Türkiye Sanayi A.Ş.

3. It appears that the parties disagreed on whether the other arbitrators, when they agreed to meet on January 9, 2002, knew that Mr. Ayar was to be hospitalized elsewhere in Turkey on January 10, 2002, or whether they were unaware of Mr. Ayar's pending hospitalization. While the District Court concluded that the majority was aware, the Court of Appeals left this factual issue undecided. The Supreme Court does not deal with the issue as it may only address issues of law.

4. Güris *c.s.*/Bursa, District Court of The Hague (*Rechtbank Den Haag)*, August 25, 2004. Not published.

5. Article 1060 DCCP provides for the correction of clerical and computation errors as well as the correction or completion of (1) the names and domiciles of the arbitrators; (2) the names and domiciles of the parties; (3) the date of the award; and (4) the place of arbitration which pursuant to Article 1057(4) DCCP must be included in the award.

6. The *Commissie van den Berg*, is a commission created by Professor Albert Jan van den Berg, which reviewed the current Netherlands Arbitration Act (dating from 1986) and proposed a revised draft Arbitration Act in 2005, which was further revised in December 2006. See: http://www.arbitragewet.nl.

7. The *Commissie van den Berg* proposed to amend Article 1057(3) DCCP so that the majority would only have to state the fact that the minority refuses to sign, either in the award itself or under the signed award, without having to sign this statement. It proposed to amend Article 1060 DCCP to also allow the correction of a failure to comply with Article 1057(3) DCCP (as amended) within three months from the day following the date of receipt of the award. The purpose of the proposed amendment to Article 1057(3) DCCP is deformalization of arbitral proceedings.

8 Bursa/Güris c.s., Court of Appeals of The Hague (*Hof Den Haag*), November 29, 2006, http://www.rechtspraak.nl, LJN: AZN3177. Bursa/Güris c.s., Supreme Court (*Hoge Raad*), December 5, 2008, http://www.rechtspraak.nl, LJN: BF3799.

9. An argument in favor of a signed statement under the majority award, rather than a signed separate statement filed with the District Court of the seat of the arbitration, would be that a signed statement under the award would reach the parties automatically, whereas the parties would not necessarily be informed of the filing by the arbitral tribunal of the signed separate statement.

10. The Court of Appeals mentions explicitly that although the parties and the arbitrators disagree on the facts surrounding the making of the final award, from the documents and facts submitted by the parties, it appeared that the three arbitrators did not jointly discuss the draft award.

11. Note that in other major centers of international arbitration, such as France and Switzerland, it is not required that the majority sign a statement that the minority did not sign the award.

12 Had the ICC Rules contained specific provisions on the signing of majority awards and had these been less stringent than Article 1057(3) DCCP, the outcome of the present case would probably still have been the same as Article 1057(3) concerns a mandatory requirement from which the parties cannot deviate. ■