Award against Tanzanian state-run company upheld

24 August 2018

Alison Ross

Tanzanian sunset

UPDATED.An ICSID ad hoc committee has upheld a US$150 million award won by Standard Chartered Bank Hong Kong against a Tanzanian state-run electricity supply company, rejecting several grounds of annulment and paying special attention to whether the tribunal should have reconsidered jurisdiction in its final award.

In a decision dispatched to the parties on 22 August, the committee presided over by Mexican arbitrator **Claus von Wobeser** and including Austrian **Christoph Schreuer** and Bahamian **Bertha Cooper-Rousseau** unanimously rejected the annulment application by Tanzania Electric Supply Company Limited (Tanesco).

It said that Tanesco should bear the entire costs of the annulment proceeding, including the fees and expenses of the committee members, and both sides should bear their own legal costs.

Tanesco was represented in the proceeding by a team from Clyde & Co led by partner **David Hesse** in London as well as two firms in Dar Es Salaam, while Standard Chartered was represented by **Matthew Weiniger QC** of Linklaters in London and a team from his former firm, Herbert Smith Freehills. In the arbitration, Tanesco's team was slightly different, including Kellerhalls in Zurich as well as the Tanzanian lawyers.

The case originates from a dispute over a power purchase purchase agreement entered in 1995 by Tanesco and Independent Power Tanzania Limited (IPTL). The claimant in the arbitration was the Hong Kong subsidiary of UK-registered Standard Chartered Bank, which brought the claim in 2010 as the assignee of the rights of the near-bankrupt IPTL, seeking outstanding payments from Tanesco and repayment of a loan.

The tribunal made up of **Donald McRae** of Canada, **Zachary Douglas** of Australia and **Brigitte Stern** of France issued a preliminary decision on jurisdiction and liability in 2014, deciding that IPTL's rights under the power purchase agreement had been validly assigned to Standard Chartered and that it had jurisdiction over the dispute.

The tribunal specified, however, that it lacked jurisdiction with regard to a separate loan facility agreement entered by Tanesco and IPTL in 1997.

In light of IPTL's likely liquidation, it ruled that it could only make a declaration of the amount owed to Tanesco by Standard Chartered under the power purchase agreement. It did not order payment of the amount – leaving it to the Tanzanian courts to decide who among IPTL's creditors should take priority.

Two years later, in 2016, the tribunal issued a final award in which it held it had the power to reopen its decision on jurisdiction. This was in light of information that had emerged that IPTL had received substantial funds from escrow as a result of a 2013 agreement with Tanesco to settle a tariff dispute. It was therefore unlikely to go into liquidation.

In addition to declaring the amount owed by Tanzania to Standard Chartered Bank, the committee said it would now make an order for payment of the sum – US$148 million plus interest.

In its request for annulment filed in January last year, Tanesco invoked three of the five grounds for annulment in the ICSID Convention, claiming that the tribunal had manifestly exceeded its powers, made a serious departure from fundamental rules of procedure and failed to state the reasons on which its decision was based. In support of each ground, it cited the tribunal's reconsideration of its jurisdiction, which it argued was unjustified under the ICSID Convention or rules as the original decision was *res judicata*.

Preliminary findings on reconsideration

The committee tackled the reconsideration of the decision as a preliminary matter, saying its conclusions would assist its later analysis of the annulment grounds.

It agreed with the tribunal that neither the ICSID Convention or rules explicitly allow or disallow reconsideration of jurisdictional decisions. It also agreed that, though interlocutory decisions are binding on the parties, this does not make them *res judicata* – decisions on procedure and provisional measures, for example, may be revisited until they are incorporated into a final award.

The committee went on to find that the tribunal had upheld its power to reconsider jurisdictional decisions based on the competence-competence principle in article 41 of the ICSID Convention and its power under article 44 to decide "any question of procedure".

It noted that article 41(2) of the convention allows a tribunal to consider jurisdictional objections "at any stage of the proceedings", and suggested that this was implied in the tribunal's reasoning as it is a more detailed articulation of the competence-competence power.

Even if interlocutory decisions did have *res judicata* status, the committee accepted the tribunal's finding that it would be possible to reopen them in circumstances analogous with those set out in article 51 of the ICSID Convention in relation to the revision of awards.

In this case, it said it was justified because the tribunal had made a factual finding (with which it would not interfere) that the original decision was erroneous, having been reached without knowledge of key facts that

were deliberately withheld by Tanesco.

In this situation, reconsideration was "most apt to safeguard both the efficiency and integrity of the arbitration proceeding", the committee said. It warned, however, that such findings should be made cautiously given the potential for parties to seek to reopen decisions as a guerrilla tactic.

The committee noted that the tribunal's finding that it could reconsider the jurisdiction decision was in line with the dissenting opinion of Egyptian arbitrator **Georges Abi-Saab** in a 2015 decision in *ConocoPhillips v Venezuela* and with a decision in *Perenco v Ecuador*, the only other ICSID case which deals with this point, the year before. Both these involved reconsideration requests by the respondent state.

It said that the case law shows "reasonable minds" differ as to whether reconsideration of decisions is permitted at ICSID, meaning there was nothing obviously wrong about the view the tribunal reached.

Tanesco also relied on the *ConocoPhillips* and *Perenco* cases in support of its arguments that the reconsideration should not have been permitted.

Through the prism of the annulment grounds

Looking at the reconsideration of jurisdiction through the prism of the specific annulment grounds raised by Tanesco, the committee found that the tribunal did not manifestly exceed its power by disregarding the *res judicata* character of its first decision and attempting to apply article 51 by analogy when there was no basis for doing so.

In fact, it said the tribunal had thoroughly condidered res *judicata* and taken into account what precedents exist, using article 51 only as guidance.

Nor had the tribunal departed from a fundamental rule of procedure as it had given the parties ample opportunity to plead their position, the committee said. It noted that Tanesco had sought no extra time to make submissions, thus waiving its right to complain later.

The committee also refused to annul the award on the basis of what Standard Chartered said was the tribunal's wrong assumption of jurisdiction over the loan facility agreement, allowing the bank to step into IPTL's shoes and gain standing.

In fact, the committee said it was not persuaded that the tribunal had assumed jurisdiction over the facility agreement at all, as in both in the decision on jurisdiction and the final award it had concluded that the money owed by Tanesco was under the power purchase agreement.

What the tribunal *had* reconsidered was its jurisdiction to order payment of the money, it said.

The committee held the reasons for that finding were sufficiently set out in the award and were related to the reasons the tribunal initially gave for not ordering payment, resting on the likelihood of IPTL being liquidated.

Succinct reasons are not a lack of reasons, it said.

Other annulment grounds and costs

The committee dismissed various other annulment arguments raised by Tanesco that were not related to the reconsideration of jurisdiction. These included arguments that the tribunal had wrongly taken on the case even though Standard Chartered had made no investment in Tanesco under article 25 of the ICSID Convention, and that it had failed to apply the law of Tanzania to specific questions relating to the assignment of ITPL's rights when it was contractually obliged to do so.

The committee disagreed with Tanesco that the tribunal had ruled that an investment existed on "purely formalistic" grounds and that it had disregarded relevant evidence suggesting that Standard Chartered knew

about the money in escrow for IPTL, among other things.

In relation to costs, the committee applied the "costs follow the event" principle, saying that Tanesco should pay for the annulment proceeding. Despite arguments by Standard Chartered that the company had sought to mislead, the committee said it had a "reasonable case" and each side should bear their own costs.

Related cases

The Hong Kong branch of Standard Chartered is currently fighting another contractual claim at ICSID, which was registered in 2015, the year before the award against Tanesco came out. In that case, the respondent is Tanzania.

The case involves the same counsel and is being heard by Singaporean arbitrator **Lawrence Boo,** South African **David Unterhalter** (who took over from British arbitrator **Stanley Burnton** after he resigned in the wake of a challenge) and Bangladeshi **Kamal Hossein**. A week-long hearing on jurisdiction and the merits took place in July.

Standard Chartered in the UK also brought a claim against Tanzania in 2010, which was heard by US arbitrators **William W Park** and **Barton Legum** and **Michael Pryles** of Singapore. Brought under the 1994 UK-Tanzania bilateral investment treaty, the case featured Herbert Smith Freehills on the side of the bank and Hunton & Williams and a firm in Dar Es Salaam on the side of the state. It ended in settlement in 2012 and a later annulment proceeding by Standard Chartered was suspended by party agreement.

Tanesco brought its own claim against IPTL in 1998, resulting in an award three years later issued by **Kenneth Rokison** of the UK, **Charles Brower** of the US and **Andrew Rogers** of Australia. An interpretation proceeding began by IPTL was discontinued in 2010.

Those proceedings featured Hunton & Williams for Tanesco and Nixon Peabody for IPTL. Brower resigned during the course of the interpretation proceeding and was replaced by Pakistani arbitrator **Makhdoom Ali Khan**.

Of counsel in the latest annulment proceeding, Weiniger, for Standard Chartered Bank, declined a request to comment. On behalf of Tanesco, Hesse says: "We are obviously disappointed by the decision. It appears to contradict previous decisions of other ICSID tribunals considering the issues of *res judicata* and the reconsideration of interlocutory decisions. The decision could have significant ramifications for the process and efficiency of ICSID arbitration in the future."

Ad hoc annulment committee

- **Claus von Wobeser** (Mexico)
- **Christoph Schreuer** (Austria)
- **Bertha Cooper-Rousseau** (Bahamas)

Counsel to Tanesco

- Clyde & Co

David Hesse, **Devika Khanna**, **Tom Roberts**, **Nefeli Lamprou** and **Paul Baker**

- Crux Law Partners in association with RK Rweyongeza Co

Bonaventure Rutinwa, **Beredy Malegesi, Richard Rweyongeza**

Counsel to Standard Chartered Bank Hong Kong

- Linklaters

Matthew Weiniger QC

- Herbert Smith Freehills

Iain Maxwell, **Aaron McDonald, Harry Ornsby** and **Gavin Creelman**