THOUVENIN rechtsanwälte

Thouvenin Rechtsanwälte KLG
Klausstrasse 33
CH - 8024 Zurich
www.thouvenin.com

Arbitration Newsletter Switzerland

Croatia's Waiver of its Right to Challenge an Award - Can it still request a Revision?

On 27 October 2017, the Swiss Federal Supreme Court (the "**Court**") published on its website a new decision in the field of international arbitration (the "**Decision**").[1] The Decision was rendered by all five members of the First Civil Chamber and, in addition, it will be included in Court's publication of leading cases, thereby adding particular weight to this case.

In the Decision, the Court summarizes the requirements to validly waive the right to challenge an award with the Court and addresses the question whether a party can - despite such a waiver - still request a revision.

1 Facts[2]

In 1990, the Croatian state-owned energy company INA Industrija Nafte ("**INA**") was privatized and Croatia became its major shareholder. In 2003, the Hungarian petroleum and gas company MOL acquired 25% of the shares of INA and concluded a shareholders' agreement with Croatia. In 2008, MOL became INA's largest shareholder and, in 2009, Croatia and MOL concluded two agreements resulting in MOL assuming control over INA.

On 17 January 2014, Croatia initiated arbitration proceedings against MOL alleging that the two agreements concluded in 2009 would be null and void *ab initio* due to the fact that the agreements were obtained only by a 10-million-euro bribe to Ivo Sanader, the former prime minister of Croatia.

The arbitration proceedings were conducted under the UNCITRAL arbitration rules and Geneva was fixed as the seat of the arbitral tribunal. The arbitral tribunal was composed of three members, Neil Kaplan QC, chair, Jan Paulsson, appointed by MOL and a Croatian law professor, Jakša Barbić, appointed by Croatia. On 23 December 2016, the arbitral tribunal rendered its final award and dismissed the requests of Croatia.

On 1 February 2017, Croatia filed an action for annulment with the Court and, subsidiary, a request for a revision[3] of the award.

Croatia alleged, *inter alia*, that its arbitrator, law professor Jakša Barbić, should have recused himself as arbitrator given that he had been designated by INA as arbitrator in another arbitration around 3 October 2013, at a time when INA was already under the control of MOL. These circumstances should have been disclosed to the parties as they would raise justifiable doubts as to the independence and impartiality of the Croatian law professor.

MOL's principal position was not to enter into the matter at all, given that this action for annulment was inadmissible due to the following contractual waiver of the right to challenge the award:

> "*Awards rendered in any arbitration hereunder shall be final and conclusive and judgement thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.*"

2 Considerations

2.1 Inadmissibility of the Action for Annulment

The Court first stated that one of the requirements for the admissibility of an action for annulment is that the

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1 BGE 4A_53/2017 of 17 October 2017, in French.

2 The decision was, as most of the time, published in an anonymized form only. But the identities of the parties, the arbitrators and the prime minister in question have been revealed in GAR article "Croatia fails to annul award in bribery case" of 27 October 2017.

3 A revision is an extraordinary appeal.

right to raise an action for annulment had not been validly waived by the parties.

This is based on article 192(1) Swiss Private International Law Act ("**PILA**") stipulating the following:

> "*(1) If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement, or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in article 190(2).*"

The Court then summarized its case law regarding the requirements for a waiver of the right to an action for annulment, stating *inter alia*:

a) The waiver of the action for annulment is admitted only restrictively and an indirect renunciation is not sufficient;

b) an explicit declaration of the parties' clear and unambiguous intention to waive "*tout recours*" is sufficient - it is not required that the waiver mentions the provisions of articles 190 or 192 PILA in particular;

c) the Court then stated that the following clauses had been held as sufficient and valid waivers of the right to an action for annulment: (i) exclusion of "*all and any rights of appeal from all and any awards insofar as such exclusion can be validly made*", (ii) "*Neither party shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.*", (iii) "*neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision*" as well as (iv) "*The decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded*".

Based on this case law, the Court held that the waiver of the action for annulment in the agreement between Croatia and MOL was valid and binding.

The Court then continued by stating that a waiver of an action for annulment in the sense of article 190 PILA applies to all grounds stipulated in article 190(2) PILA that would otherwise allow for an action for annulment, *i.e.* also the improper constitution of the arbitral tribunal, unless the parties limit their waiver to one or several of the grounds stipulated in article 190(2) PILA.

Croatia's action for annulment was therefore declared inadmissible.

2.2 Inadmissibility of the Request for Revision

The Court then turned to Croatia's request for revision of the award that had been raised subsidiary to the action for annulment.

Croatia argued that - apart from the fact that a part of the doctrine rejects the application of article 192 PILA to the revision - the waiver in the agreement in question would not include a waiver of the right to request a revision.

The Court first referred to a recent decision[4] wherein it dealt with the question whether the discovery of grounds for recusal of an arbitrator, after the deadline to submit an action for annulment to the Court had lapsed, would allow to request a revision of the award. The Court noted that the question had been left unanswered in the previous decision, and held that it would not have to be decided in the present case either.

In casu Croatia discovered the alleged ground for the arbitrator's recusal within the deadline to submit its action for annulment and even submitted an action for annulment in this respect.

The Court then noted that the revision is subsidiary to the action for annulment. Therefore, the Court considered it rather difficult to accept that a party, which has expressly waived its right to raise a potential action for annulment and therewith its right to attack *e.g.* an improper constitution of the arbitral tribunal, could raise this very same reason, discovered prior to the lapsing of the deadline to submit an action for annulment, as a ground for revision. If this would be possible, article 192 PILA would become "*lettre morte*". According to the Court, it would amount to a clear violation of the principle of good faith if a party could request a revision under such circumstances.

[4] BGE 142 III 521.

The Court then referred to two of its previous decisions[5] wherein it had held that a revision cannot be requested if the ground invoked had been discovered prior to the lapsing of the deadline to submit an action for annulment. The Court then confirmed this principle and applied it to the case at hand, with the consequence that it did not enter into the matter of the request for revision as well.

3 Conclusions

The Decision is straightforward in as much as it covers the waiver for an action for annulment. In addition, it makes clear that a party cannot request, as a subsidiary issue and within the same 30-day period, a revision, thus trying to bypass its waiver of an action for annulment.

Although not explicitly stated in the Decision, this conclusion should continue to stand if the grounds for revision are detected only at a later stage. It makes no sense to deprive a party from invoking a revision based on grounds detected within the 30 days period after the award was rendered but to still grant access to a revision of the award if the underlying grounds are detected only at a later stage.

But the question remains: why should a party waive its right to annulment at all? Given the proven efficiency of the Court, which regularly produces its judgment in annulment proceedings within 6-8 months after the filing of proceedings, there is simply no convincing reason why a party should waive such right to annulment in advance. When signing such waiver, a party does not know yet in which direction a potential case is going to move. Therefore, a party should - by all means - preserve its rights and abstain from signing a waiver pursuant to article 192 PILA.

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Hansjörg Stutzer
Michael Bösch
Simon Hohler

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This newsletter is available on our website www.thouvenin.com.

For further information, please contact Hansjörg Stutzer, Michael Bösch or Simon Hohler.

Dr. Hansjörg Stutzer
Partner, Attorney at Law
h.stutzer@thouvenin.com

Michael Bösch, LL.M., FCIArb
Partner, Attorney at Law
m.boesch@thouvenin.com

Simon M. Hohler, LL.M., ArbP
Associate, Attorney at Law
s.hohler@thouvenin.com

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[5] Decisions 4A_570/2011 and 4A_247/2014.