

Swiss Supreme Court refuses request for revision of arbitration award that dismissed corruption allegations

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

Legal update: case report | Published on 28-Oct-2022 | Switzerland

In *Decision 4A_69/2022*, the Swiss Supreme Court rejected a request based on Article 190a of the Private International Law Act for revision of an arbitral award, in which the tribunal had dismissed allegations of corruption.

Speedread

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In a French-language decision of 23 September 2022, the Swiss Supreme Court rejected a request for the revision of an arbitral award rendered in a Swiss-seated arbitration under the UNCITRAL Rules.

The underlying dispute arose out of several agreements transferring management control of a Croatian energy company, INA, from the Croatian state to MOL, a Hungarian oil and gas company. Croatia sought a declaration from the arbitral tribunal that the agreements were invalid, alleging that they had been obtained through bribery. The tribunal rejected Croatia's claims.

Croatia subsequently filed a revision request before the Swiss Supreme Court pursuant to Article 190a(1)(a) and (b) of the Private International Law Act (PILA), claiming that it had discovered new evidence and that the award had been influenced by a criminal act. Croatia relied on a recent criminal conviction in Croatia relating to the alleged bribery.

The court declared the request inadmissible on the first ground and rejected it on the second ground, making several key findings, namely:

- The broad waiver of appeal included in the arbitration agreement precluded Croatia from requesting revision on the first ground.
- As per the letter of the law, a party may not rely on evidence that postdates the award to request revision.
- A tribunal that must decide on allegations of corruption is not bound by the findings of a criminal court in that regard.
- The criminal conviction for bribery in Croatia did not demonstrate that the award had been influenced by a criminal act.

The decision provides an important addition to the case law of the Swiss Supreme Court on requests for revision. It clarifies that a broadly worded waiver clause may be read to exclude the extraordinary remedy of revision, even

if it makes no reference to Article 190a of the PILA or was drafted before the revised PILA came into force on 1 January 2021. (*Decision 4A_69/2022 (23 September 2022)*.)

Background

Private International Law Act

Article 190a(1) of the Private International Law Act (PILA) provides a narrow list of grounds on which the Swiss Supreme Court can review an international arbitration award. The grounds include:

- The discovery of new material facts or evidence (*Article 190a(1)(a)*).
- Where criminal proceedings have established that the award was influenced by a criminal act to the detriment of the party requesting revision (*Article 190a(1)(b)*).

Revision of awards is an extraordinary remedy under Swiss law. A successful request leads to the annulment of the award by the Swiss Supreme Court and the case being remitted to the arbitral tribunal.

According to Article 190a(2) of the PILA, the application for revision must be made within 90 days of discovery of the ground.

Article 192(1) of the PILA, a provision in force since 1 January 2021, provides that if neither of the parties has its domicile, seat or habitual residence in Switzerland, the parties may exclude any recourse against arbitral awards, except for the right to request revision under Article 190a(1)(b), which may not be waived.

Facts

In the 1990s, Croatia privatised its state-owned energy company, INA. In 2008, the Hungarian oil and gas company MOL became INA's majority shareholder, making the Croatian state its second-biggest shareholder.

In 2009, Croatia and MOL concluded agreements transferring INA's control and management to MOL. In the same year, shortly after the resignation of Croatia's then Prime minister, Ivo Sanader, investigations were launched to determine, amongst other things, whether the agreements had been detrimental to the interests of Croatia.

In 2012, the Zagreb county court found Sanader guilty of corruption and sentenced him to ten years in prison. In 2015, however, this conviction was quashed by the Croatian Constitutional Court and a retrial was ordered.

In 2013, MOL initiated investment arbitration proceedings at ICSID, alleging Croatia had violated the Energy Charter Treaty and seeking damages. MOL claimed that Croatia had failed to take over INA's loss-making gas distribution business, causing financial losses to INA and, indirectly, to MOL. At the beginning of 2014, Croatia initiated a Swiss-seated arbitration under the UNCITRAL Rules against MOL, under the agreements transferring control of INA. Croatia alleged that MOL had acquired management control of INA through a bribe paid by MOL's chief executive and chairman, Zsolt Hernádi, to Sanader. Croatia argued that the agreements should consequently be declared null and void. In both arbitrations, Croatia relied heavily on the testimony of a Croatian businessman in support of its allegations of bribery.

On 23 December 2016, the UNCITRAL tribunal rendered its final award (UNCITRAL Award), rejecting Croatia's claim. The tribunal found Croatia's key witness to be "wholly unreliable" and, after examining the remainder of the evidence, came to the "confident conclusion that Croatia had failed to establish that MOL did in fact bribe Dr Sanader".

In February 2017, Croatia submitted an application for annulment of the UNCITRAL Award to the Swiss Supreme Court, with an alternative request for revision. The annulment request was dismissed the same year on the basis that the parties had, in their agreements, expressly waived the possibility of challenging an award.

On 27 December 2019, following his retrial, Sanader was again convicted of bribery by the Zagreb county court. Hernádi was convicted in the same proceedings. In a decision published on 25 October 2021, those verdicts were upheld by the Croatian Supreme Court.

On 8 February 2022, Croatia submitted a request to the Swiss Supreme Court under Article 190a of the PILA, seeking the revision of the UNCITRAL Award. Croatia claimed that the 2021 Croatian Supreme Court decision, which confirmed the bribery conviction, amounted to new material evidence (*Article 190a(1)(a) PILA*) and established that the award had been influenced by a criminal act (*Article 190a(1)(b) PILA*).

Decision

On 23 September 2022, the Swiss Supreme Court rejected Croatia's revision request. The judgment is also noteworthy due to the speed with which the Swiss Supreme Court reached its decision, in particular given it related to an arbitration involving a state and allegations of corruption.

First ground: new material evidence

As to the first ground relied on by Croatia (discovery of new material evidence, Article 190a(1)(a) PILA), the court declared Croatia's request inadmissible. The court then noted that even if the request had been admissible, it would have been rejected in any event.

First, the court held that the request had not been filed within 90 days of the alleged new evidence coming to light, as required in Article 190a(2) of the PILA. While Croatia argued that it became aware of the Croatian Supreme Court decision only when it was published in October 2021, the Swiss Supreme Court pointed out that all relevant evidence had been submitted during the proceedings before the Zagreb county court, which had concluded in 2019. Therefore, the evidence was known to Croatia long before October 2021.

Second, the court held that the parties' agreement to arbitrate contained a waiver of appeal pursuant to Article 192(1) of the PILA. As such, Croatia was precluded from requesting revision on this ground. This issue was of particular importance as the arbitration clause predated the entry into force of the revised PILA. Until this decision, the Swiss Supreme Court had yet to confirm how the revised PILA would apply to an existing arbitration agreement. The court observed that the waiver clause was broadly worded and that, absent an express indication to the contrary, it is "difficult to hold that such agreement does not imply an exclusion of revision requests". The court also noted that it was "questionable" to seek to limit the scope of such agreements based on the mere fact that the signatories of the agreements are from different backgrounds and lack territorial attachments to Switzerland. The Swiss Supreme Court also recalled its past case law, in which it has taken a broad view of the generic term "appeal".

Third, the Swiss Supreme Court held that, even if the revision request were admissible, it would fail in any event. It is clear, the court added, from the wording of Article 190a(1)(a) of the PILA that a party cannot base its revision request on facts

or evidence which post-date the disputed award. As Croatia was relying on the 2021 Croatian Supreme Court decision and evidence contained within it, its request was based exclusively on elements postdating the UNCITRAL Award.

Second ground: award influenced by a criminal act

The court also rejected the request with regard to this ground. Croatia had argued that the decisions of the Croatian courts convicting Sanader and Hernádi of corruption were final and binding, and that this was capable of influencing the outcome of the dispute. Croatia claimed that the UNCITRAL Award "validates agreements tainted by corruption" and must be annulled. Croatia had also argued that because the two men had been convicted of bribery in Croatia, they had perjured themselves in the UNCITRAL Arbitration when they claimed that there had not been any bribe.

First, the court confirmed that it was irrelevant:

- That the criminal proceedings had taken place abroad when it came to the application of Article 190a(1)(b) of the PILA, provided those proceedings complied with the basic procedural guarantees prescribed by the ECHR and the International Covenant on Civil and Political Rights.
- Whether the crime was committed by a party to the arbitration or a third party.

According to the court, it is the existence of a causal link, whether direct or indirect, between the crime and the outcome of the arbitration, which matters.

Second, the court examined the evidence on which the tribunal had relied in the UNCITRAL Award, in particular, the testimony of Croatia's key witness, and the fact that Croatia had failed to establish two "missing links" in the alleged money trail of the bribe. The court pointed out that the tribunal had, in essence, assessed the evidence differently from the Croatian courts, the main point of divergence being the credibility of Croatia's key witness. While the arbitral tribunal considered him to be "wholly unreliable", the Croatian courts held him to be credible. This difference of opinion between the arbitral tribunal and the Croatian courts was considered insufficient to show that the award was influenced by a criminal act under Article 190a(1)(b) of the PILA. The court also added that the tribunal was not, and would not, be bound by the criminal authorities' decisions, and could reach its own conclusions on the allegations of bribery.

Third, the court noted that the finding of bribery by the Croatian courts is not a "material truth" that must be followed by other judicial authorities when considering whether the relevant contracts were obtained by bribery. The court considered that the mere fact that Sanader and Hernádi were found guilty of corruption by the Croatian courts does not automatically mean that they perjured themselves before the UNCITRAL tribunal. The court held that, in any event, their statements were not material to the outcome of the arbitration as the tribunal did not base the UNCITRAL Award on them.

In an aside, the court highlighted that the ICSID tribunal, which rendered its award in July 2022, after the Croatian Supreme Court decision had been published, also considered that:

- The allegations of bribery had not been established.
- The allegations rested entirely on the testimony of Croatia's key witness.
- The testimony of that key witness suffered "numerous incoherences and contradictions".

Lastly, in light of the above, the court deemed it unnecessary to rule on MOL's argument that the Croatian courts had not given Sanader and Hernádi a fair trial under international legal standards.

Comment

The decision provides an important addition to the case law of the Swiss Supreme Court on requests for revision.

It clarifies that a broadly worded waiver clause may be read to exclude the extraordinary remedy of revision, even if it makes no reference to Article 190a of the PILA or was drafted before the revised PILA came into force on 1 January 2021.

The decision also highlights that a tribunal that must decide on allegations of corruption is not bound by the findings of a criminal court that has examined those same allegations.

Case

Decision 4A_69/2022 (23 September 2022) (Swiss Supreme Court).

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