Swiss Supreme Court finds that challenge to Yukos Capital jurisdictional award is premature

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In *decision 4A_98/2017*, the Swiss Supreme Court considered whether a challenge brought by the Russian Federation against an interim award on jurisdiction rendered in a dispute with Yukos Capital was premature, as the arbitral tribunal had ruled on only three of five jurisdictional objections, reserving its decision on the two remaining objections for the final award.

Speedread

The Swiss Supreme Court has dismissed a motion to set aside an interim award on jurisdiction rendered by an arbitral tribunal in a dispute between Yukos Capital and the Russian Federation, in which the former is bringing claims against the latter under the Energy Charter Treaty (ECT). The Russian Federation had raised five jurisdictional objections, but the arbitral tribunal decided on only three of those objections in a preliminary phase, reserving its decision on the remaining two objections for the merits phase. One of the three objections rejected by the arbitral tribunal related to the provisional application of the ECT by the Russian Federation, an issue that has ramifications in a number of other pending Yukos-related arbitration and state court proceedings.

The Supreme Court examined whether the arbitral tribunal's "partial" interim award on jurisdiction was open to an immediate challenge under Swiss law. It found that this was not the case, as according to the relevant provision of the Swiss Private International Law Act, a party may only challenge a decision in which the arbitral tribunal "wrongly accepted or declined jurisdiction", which implies that the decision on the issue of jurisdiction must be final. The ruling makes sense from both a legal and practical perspective, as the main advantage of an immediate challenge against an award on jurisdiction is to definitively resolve that issue.

In the present case, the parties will be entitled to challenge the arbitral tribunal's interim award together with the final award. Therefore, the Supreme Court may yet be called upon to examine the issue of the provisional application of the ECT, should the arbitral tribunal choose to affirm its jurisdiction in the final award. (*Decision 4A_98/2017.*)

Background

Article 186(2) of the Private International Law Act (PILA) provides that jurisdictional objections must be raised prior to any defence on the merits and according to Article 186(3) of the PILA, the arbitral tribunal shall, as a rule, decide on its jurisdiction in a preliminary award.

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Under Article 190(3) of the PILA, preliminary awards on jurisdiction can be set aside only on two grounds, namely that the arbitral tribunal:

- Was not properly constituted (*Article 190(2)(a), PILA*).
- Wrongly accepted or declined jurisdiction (*Article 190(2)(b), PILA*).

Facts

In the wake of the bankruptcy of Yukos Oil Company OSJ (Yukos Oil) in Russia, Yukos Capital Sàrl (Yukos Capital), a company incorporated in Luxembourg which had granted loans to Yukos Oil, initiated arbitration proceedings against the Russian Federation, relying on Article 26(4)(b) of the *Energy Charter Treaty* (ETC). Yukos Capital alleged, in essence, that the Russian Federation had expropriated its investments (that is, the loans) by purportedly illegally causing Yukos Oil's bankruptcy.

The arbitration proceedings are being conducted under the UNCITRAL Arbitration Rules 1976 and are administered by the Permanent Court of Arbitration. The seat of the arbitration is Geneva. At the start of the proceedings, the Russian Federation raised five independent objections to the arbitral tribunal's jurisdiction. The tribunal, after having consulted the parties, decided to bifurcate the proceedings and examine three of those five objections in a preliminary stage, reserving the two remaining objections, which are closely linked to the merits of the dispute, for a later stage. One of the three objections that were examined as a preliminary matter pertained to the issue of the provisional application of the ECT.

On 18 January 2017, the arbitral tribunal rendered an interim award on jurisdiction rejecting all three objections, with one arbitrator dissenting on the issue of the provisional application of the ECT.

The Russian Federation petitioned the Swiss Supreme Court to set aside the interim award and declare that the arbitral tribunal lacks jurisdiction. In its petition, the Russian Federation indicated that it deferred to the Supreme Court as to whether the interim award was in fact open to challenge at this stage.

Decision

The Swiss Supreme Court found that the petition was premature and therefore inadmissible.

Under Article 186(3) of the PILA, arbitral tribunals are encouraged to decide on their jurisdiction in a preliminary award. They may derogate from this rule in cases where the jurisdictional objection is too closely linked to the merits to be decided separately. When the arbitral tribunal does render a preliminary award on jurisdiction, the party that wishes to challenge that award must do so immediately; it may not wait until the final award has been rendered..

The Russian Federation relied on Article 190(2)(b) of the PILA in its petition. Therefore, the issue before the Supreme Court was whether the arbitral tribunal, in deciding on only three of five jurisdictional objections, had in fact "accepted or declined jurisdiction".

The Supreme Court first examined the nature of jurisdictional decisions that are open to challenge under the relevant provisions of the PILA. The common denominator is that, as a rule, the arbitral tribunal's decision on the issue of jurisdiction is final, whether it is positive or negative.

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Considerations of procedural efficiency justify requiring that parties challenge such decisions immediately, rather than allowing them wait until the tribunal has rendered a final award. Indeed, it is not in the parties' or the arbitral tribunal's interest to proceed with the arbitration when the issue of jurisdiction could be reversed in setting aside proceedings. On the other hand, the Supreme Court should not, as a rule, have to examine a case multiple times, in relation to issues raised or dealt with at various stages of the arbitration. According to the Supreme Court, there is a risk that defendants in large-scale arbitrations could, for tactical reasons, seek to raise jurisdictional objections successively (so-called "salami-slicing") in an attempt to obtain separate awards that could then be challenged individually, thus derailing the arbitration proceedings. Moreover, the advantages of an immediate challenge in terms of procedural efficiency are often tempered by the delays that can occur in practice in setting aside proceedings, for example following a request for security for costs or due to court recess periods.

Practical considerations aside, the wording of Article 190(2)(b) of the PILA requires that the arbitral tribunal has "accepted or rejected jurisdiction", which implies that there must have been a final decision in that respect. To the extent that the arbitral tribunal in this case has ruled on some, but not all jurisdictional objections, it has neither definitively accepted nor definitively rejected jurisdiction.

The Supreme Court further considered the parallels between state court proceedings and international arbitration proceedings. It held that there should not be a "prioritisation" of procedural efficiency in the latter type of proceedings over the former. According to the Supreme Court, its efforts would in any event be wasted if it were to examine, then reject the motion to set aside the interim award, and the arbitral tribunal were in its final award to decline jurisdiction on one of the other two grounds raised by the Russian Federation.

Finally, the Supreme Court confirmed that, once the arbitral tribunal has rendered its final award, the Russian Federation will not be barred from challenging the tribunal's decision in relation to the three jurisdictional objections dealt with in the interim award.

Comment

This is the first case in which the Supreme Court has had to decide whether a "partial" interim decision on jurisdiction can (and therefore must) be immediately challenged under Articles 190(2)(b) and 190(3) of the PILA. There was previously no guidance on this question either in legal literature or in case law. The solution adopted by the court is in line with the wording of that provision and makes sense from a practical perspective. Indeed, an immediate challenge against a preliminary award on jurisdiction is only truly warranted if it allows the issue to be decided once and for all. Therefore, this decision has resolved any uncertainty in that regard.

However, the court's reasoning in relation to procedural efficiency is slightly less persuasive, especially when it points to the risk that defendants might raise successive jurisdictional objections in an effort to derail the arbitration. Indeed, many arbitration rules require that jurisdictional objections be raised (together) at the earliest possible stage in the proceedings and, even where the rules are silent in this respect, arbitral tribunals have wide discretion when it comes to the conduct of the proceedings, meaning that they are unlikely to agree to split the proceedings multiple times. This in itself ought to be sufficient to prevent what the Supreme Court termed "salami-slicing" tactics.

It is in any event uncommon for arbitral tribunals, if they bifurcate the issue of jurisdiction, not to deal with all jurisdictional objections together, and in light of this decision, tribunals seated in Switzerland should in future be even less inclined to proceed in that manner. That the tribunal chose to do so in this case is nevertheless understandable when considering that the objection related to the provisional application of the ECT, in particular is highly controversial and, if admitted, would have immediately put an end to the proceedings. The tribunal's decision on that issue was also likely to have a bearing on other pending Yukos-related proceedings. As things stand, the

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Supreme Court was not called upon to provide any guidance on this issue, although it may yet be required to do so, should the arbitral tribunal choose to affirm its jurisdiction in the final award.

Case

Decision 4A_98/2017 (Swiss Supreme Court).

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