Swiss Supreme Court declares Croatia's petition inadmissible for setting aside and revision of award in alleged bribery case

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In *decision 4A_53/2017*, the Swiss Supreme Court considered whether the parties had validly waived their right to apply for the setting aside of an award and also considered its revision.

Speedread

In a French-language decision dated 17 October 2017, and slated for publication in the official court report, the Swiss Supreme Court declared inadmissible Croatia's application for the setting aside and revision of an UNCITRAL award. In the award, the arbitral tribunal, seated in Geneva, had dismissed Croatia's request to nullify an amendment to the 2003 Shareholders Agreement between Croatia and Hungary's largest oil company, MOL Hungarian Oil and Gas Company Plc (MOL) in relation to INA Industrija Nafte (INA), Croatia's largest oil company.

In the arbitration, Croatia alleged that MOL had obtained controlling management rights in INA by bribing Croatia's former prime minister. The arbitral tribunal determined that Croatia had failed to establish the existence of the alleged bribe and dismissed all of Croatia's claims.

Croatia filed a petition before the Swiss Supreme Court requesting that the award be set aside, or in the alternative, that the court order revision of the award, on the ground of its alleged discovery, after the issuance of the award, that its own nominated arbitrator had failed to disclose an alleged conflict of interest. Further, Croatia argued violations of its right to be heard and procedural public policy.

The key issue was whether Croatia's petition was admissible or whether, by providing in the underlying arbitration agreement that "there shall be no appeal to any court from awards rendered hereunder", the parties had validly waived their right to apply for the setting aside of the award, and if so, whether such waiver extended to an application for revision of the award where a ground to challenge an arbitrator is discovered after the issuance of the award, but within the time limit to file setting aside proceedings.

The Supreme Court held that the parties had validly waived the right to challenge the award and, consequently, Croatia's petitions for setting aside and revision of the award were both declared inadmissible. (*Decision 4A_53/2017.*)

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Background

Article 190(2) of the Private International Law Act (PILA) allows setting aside proceedings to be initiated where:

- The arbitral tribunal has been improperly constituted (*Article 190(2)(a)*).
- The principle of equal treatment of the parties or the parties' right to be heard is violated (*Article 190(2)(d)*).
- The award is incompatible with public policy (*Article 190(2)(e)*).

Article 192(1) of the PILA provides that, where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement, or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190(2) of the PILA.

The PILA does not contain any express provision on the revision of arbitral awards. However, in a landmark decision dated 11 March 1992 (*Decision 118 II 199*), the Swiss Supreme Court held that certain statutory grounds for revision of the Supreme Court's decisions were applicable by analogy to international arbitral awards rendered in Switzerland, namely when either:

- The award was obtained or influenced by a criminal offence (*Article 123(1), Swiss Federal Supreme Court Act (*FSCA*)*).
- When a fact or evidence, that existed at the time the award was rendered but was discovered thereafter, would have likely had an influence on the outcome of the proceedings (*Article 123(2)(a), FSCA*).

There has been some debate as to whether the discovery of circumstances justifying the removal of an arbitrator because of his or her lack of independency and impartiality (albeit constituting a ground for setting aside) would entitle a party to request the revision of the award (after the time limit for setting aside has lapsed), either:

- Under Article 121(a) of the FSCA (which provides that revision may be requested if the provisions governing the composition of the tribunal or recusal were not observed).
- As a "new fact" within the meaning of the Article 123(2)(a) of the FSCA.

However, the Supreme Court had left this question expressly open.

Facts

In 2003, upon Croatia's initiative, MOL Hungarian Oil and Gas Company Plc (MOL), Hungary's largest oil company, became a 25% shareholder of INA Industrija Nafte (INA), Croatia's largest oil company. Thereafter, Croatia and MOL entered into a shareholders agreement in relation to INA. Following further steps in the privatisation of INA under the INA Privatisation Act, MOL became the largest shareholder in INA. In 2009, Croatia and MOL concluded a gas master agreement and an amendment to the shareholders agreement (the latter granting MOL controlling management rights in INA).

In 2014, Croatia filed UNCITRAL arbitration proceedings against MOL, based on the arbitration agreement contained in the shareholders agreement, requesting the annulment of the gas master agreement and an amendment to the shareholders agreement, on the ground that these agreements had allegedly been obtained by payment of a

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EUR10 million bribe to Croatia's former Prime Minister, Dr Ivo Sanader. The arbitral tribunal found that Croatia had failed to establish the existence of the alleged bribe and dismissed all of Croatia's claims.

After the award was rendered, but within the statutory time limit to request the setting aside of the award, Croatia allegedly discovered that its own nominated arbitrator had failed to disclose a conflict of interest (that, when he was appointed in the UNCITRAL arbitration, he was already sitting as co-arbitrator in another arbitration in which he had been appointed by INA's management, controlled by MOL). On this ground, Croatia filed a petition before the Swiss Supreme Court requesting the court to set aside the award or, in the alternative, to order its revision in accordance with Article 123(2)(a) of the FSCA. Croatia also relied on alleged violations of its right to be heard and procedural public policy as additional grounds for setting aside the award.

MOL objected that Croatia's petition was inadmissible on the ground that the parties had validly waived their right to challenge the award as the arbitration agreement provided:

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

MOL argued that such a waiver encompassed not only setting aside proceedings, but also the right to request the revision of an award. Further, MOL argued that, in any event, such allegations could not constitute a ground for revision and that Croatia's petition was devoid of any merits.

Decision

The Swiss Supreme Court held that Croatia's application for setting aside and for revision of the award were both inadmissible.

Setting aside the award

The Supreme Court, confirming its longstanding case law, held that that the validity of waivers must be admitted restrictively. Although the provision does not need to refer specifically to Articles 190 and/or 192 of the PILA, it must however show clearly and unambiguously the parties' intention to waive all judicial recourse.

The court referred to its landmark decision of 4 February 2005 (*Decision 131 III 173*), in which it made a thorough analysis of the English term "appeal", which may have two meanings. In the broad sense, "appeal" is a generic term which encompasses all judicial recourses on any ground and corresponds to the French "*recours*" or the German "*Rechtsmittel*". In a much narrower sense, "appeal" designates the specific proceedings allowing the appellate review of a decision on the merits with full power of review of facts and law.

As underlined in its 2005 decision, and further confirmed and developed in its subsequent decisions, to which the Supreme Court refers in detail, the "appeal", in such a narrow sense, of an arbitral award is an exceptional recourse in comparative international arbitration law.

Therefore, when parties waive their right to "appeal" an award, it must be understood as meaning the ordinary recourse they have against an award, namely the setting aside proceedings, not the right to appeal the award on the merits (in the narrow sense), which is exceptional and does not exist under Swiss arbitration law.

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The Supreme Court held that the clause at issue undeniably constituted a valid waiver since it clearly showed the parties' common intent to waive any right to challenge any award of the arbitral tribunal before any state court. This intention was further confirmed by the previous sentence, which provides that any award shall be final and that enforcement proceedings may be filed before any court having jurisdiction.

The court considered that the term "appeal" must be understood in its broad, generic sense because:

- The applicable UNCITRAL arbitral rules do not provide for any right to appeal an award before an appellate arbitral tribunal.
- None of the relevant laws involved, be it the Swiss *lex arbitri*, the Croatian *lex causae* or Hungarian law, provide for the right to appeal an award on the merits before a state court.

Therefore, there was no point for the parties, who had been legally advised during their negotiations, to expressly exclude in their arbitration agreement, a recourse that did not exist under any of these laws and, in particular, under the Swiss law of the seat of the arbitration. Accordingly, in accordance with the principle of effectiveness ("*principe de l'effet utile*"), the parties' intention must necessarily have been to waive the only recourse they had against an award under Swiss law, that is, the setting aside proceedings.

The Supreme Court also distinguished the present clause from its earlier decisions in which the wording of the clause was considered insufficient to constitute a valid waiver (for example, that the award shall be "*sans appel*" or "*définitive et insusceptible d'appel*").

For these reasons, the Supreme Court declared Croatia's petition for setting aside the award inadmissible.

Revision of the award

As regards Croatia's alternative application for revision of the award, based on the alleged discovery of a ground for removal of its own appointed arbitrator, the Supreme Court referred to its earlier decision of 7 September 2016 (see *Decision 4A_386/2015*, discussed in *Legal update, No conflict and no grounds for revision of Bosch Rexroth v Piacentini award (Swiss Supreme Court)*).

In this decision, the court had deliberately left open the issue of whether the discovery, **after** the expiry of the time limit to apply for the setting aside of the award, of a ground for recusal of an arbitrator, may or may not, constitute a ground for revision of the award. This was because the court considered that, in any event, the request for revision was devoid of any merit. The court also noted that the issue should be dealt with by the legislator in the upcoming revision of Chapter 12 of the PILA on international arbitration.

In the present case, the court again left the issue open because the ground for recusal was allegedly discovered by Croatia **before** the expiry of the time limit to apply for the setting aside of the award. The court underlined that, due to the subsidiary nature of revision proceedings compared with setting aside proceedings, it would be contrary to the principle of good faith for a party (who has expressly waived its right to challenge an award for improper constitution of the arbitral tribunal under Article 190(2)(a) of the PILA) to nonetheless be allowed to request the revision of the award, based on the very same ground for recusal that it had agreed not to raise as a ground for setting aside.

For this reason, the court considered that the application for revision was also inadmissible.

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Comment

This decision confirms and consolidates the existing case law on the interpretation to be given to the English term "appeal". Unless there are good reasons to believe that the parties had in mind the narrow meaning of a full review of the award both in fact and law (which is an exceptional recourse in international arbitration), the exclusion of any "appeal" must be understood as referring to the only ordinary recourse the parties have against an award under Swiss arbitration law: setting aside proceedings.

With respect to revision of arbitral awards, the Supreme Court's reasoning is relatively short. It confirms a decision of 2008 where, as a non-decisive point, the Supreme Court found it difficult to accept that a party could, on the one hand, waive setting aside but, on the other hand, request revision of a point, also a ground for setting aside and discovered within the time-limit for setting aside. The issue of a revision based on a ground for recusal will most probably be addressed by the Swiss legislator in its upcoming revision of Chapter 12 of the PILA.

Case

Decision 4A_53/2017 (Swiss Supreme Court).

**Both authors were Counsel on record for MOL before the Swiss Supreme Court.*

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