Dechert LLP

ON**POINT** / A legal update from Dechert

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Swiss Court affirms parties' right to waive set-aside of arbitration award

In a 17 October 2017 decision with significant implications for arbitration agreements between international parties, the Swiss Supreme Court held that the parties had validly waived their right to challenge an international arbitral tribunal's award in their arbitration agreement.

The decision by the Swiss Supreme Court to reject Croatia's application to set-aside an award rendered in favor of Dechert client, MOL Hungarian Oil and Gas Plc. ("**MOL**"), has significant implications for the enforcement of pre-existing arbitration agreements and should shape future arbitration agreements between international parties. Specifically, the Swiss Supreme Court held that the arbitration clause's provision that "*[t]here shall be no appeal to any court from awards rendered hereunder*" constituted **a valid waiver of the right to seek set-aside of the award**. The Court rejected Croatia's argument that the waiver was limited to full-blown appeals, rather than actions to set aside or annul an arbitral award.

Background: The Underlying Arbitration

The underlying arbitration between the parties, *The Republic of Croatia v. MOL*, PCA Case No. 2014-15 (UNCITRAL), has generated significant media attention – in no small part because of the sensational allegation of bribery that were made by Croatia against MOL, but which were rejected by the Arbitral Tribunal.

The case arose from Croatia's decision in the early 2000s to privatize its state-owned energy company, Industrija Nafte d.d. ("**INA**"). In 2003, MOL – the largest company in Hungary – purchased an initial stake in INA from Croatia, following a competitive bidding process. MOL and Croatia then entered into a Shareholders Agreement (the "**SHA**"), which contained the parties' agreement to arbitrate disputes pursuant to the UNCITRAL Arbitration Rules.

In 2009, MOL increased its stake in INA to become the largest shareholder in INA. MOL and Croatia entered into a "First Amendment" to the SHA (the "**FASHA**") and a Gas Master Agreement (the "**GMA**"). The GMA contains an arbitration clause in the same terms as the one in the SHA. In recognition that MOL was now INA's single largest shareholder, the FASHA gave MOL management control over INA.

In 2011 – more than two years later and with a new government in place – Croatian prosecutors alleged that MOL had procured Croatia's agreement to the FASHA and GMA by offering a 10 million euros bribe to former Prime Minister Ivo Sanader. Croatian prosecutors obtained a conviction against Sanader on these charges in the Zagreb County Court, although the conviction was later quashed by Croatia's Constitutional Court. Croatian prosecutors are currently retrying Sanader on the same charges. They are also conducting a prosecution *in absentia* of MOL's Chairman and CEO, Mr. Zsolt Hernádi, for allegedly offering Sanader the bribe on behalf of MOL. MOL and Hernádi have vigorously denied the allegations – and, as discussed below, the Arbitral Tribunal agreed that there is no evidence to support them.

In January 2014, Croatia commenced the UNCITRAL arbitration against MOL under the arbitration clauses contained in the SHA and GMA. Croatia asked the Arbitral Tribunal to (1) declare that the FASHA and GMA are null *ab initio* as a result of the alleged bribery; (2) declare that the FASHA is null *ab initio* because its corporate governance structure allegedly violates Croatian corporate law; and (3) award Croatia damages for MOL's alleged breaches of the SHA.

In December 2016, the Arbitral Tribunal – composed of Mr. Neil Kaplan (Chairman), Prof. Jaksa Barbić (Croatia's appointment), and Prof. Jan Paulsson (MOL's appointment) – rejected all of Croatia's claims against MOL. Following a multi-year arbitration and based on an extensive evidentiary record, the Tribunal came to the "confident conclusion that Croatia has failed to establish that MOL did in fact bribe Dr Sanader." The Tribunal also ruled that Croatia's corporate governance and breach-of-the-SHA claims had no merit, and indeed, were "no more than makeweight claims instituted on the back of the bribery allegation."

The Proceedings and Decision in the Swiss Supreme Court

In the Swiss Supreme Court, Croatia sought to set aside the arbitral award on several grounds. *First*, Croatia argued that its own party-appointed arbitrator, Prof. Barbić, had improperly failed to disclose that he had been appointed by INA to serve as an arbitrator in an earlier, unrelated arbitration in Croatia. *Second*, Croatia argued that the Arbitral Tribunal had improperly excluded certain evidence that it obtained from Austrian criminal authorities under international treaties providing for mutual legal assistance in criminal matters. *Third*, Croatia argued that the Arbitral Tribunal had failed to consider certain arguments on the credibility of the testimony of Croatia's key witness.

The Swiss Supreme Court declined to reach any of these arguments. Instead, the Court agreed with MOL that the language in the arbitration clauses of both the SHA and GMA – providing that "[t]here shall be no appeal to any court from awards rendered hereunder" – was a valid waiver of the right to seek any recourse against the arbitral award.

Croatia had argued that the term "appeal" did not encompass "set-aside." According to Croatia, the language in arbitral clause simply confirmed the usual rule concerning the challenge of arbitral awards: *i.e.*, parties cannot seek to appeal an arbitral award on the merits, as they can with respect to a court judgment. Rather, parties can only seek to set aside or annul an arbitral award on relatively limited grounds provided for by the arbitral law at the seat of the arbitration (and as proscribed by applicable treaties on the recognition and enforcement of arbitral awards).

The Swiss Supreme Court disagreed. Carefully reviewing other Swiss decisions as well as the language in the SHA and GMA, the Court concluded that both MOL and Croatia had waived their rights to seek set-aside of any arbitral award rendered under the agreements. Accordingly, the Swiss Court dismissed Croatia's set-aside application.

Key Takeaways

The Swiss Court's decision has a number of implications for parties negotiating international arbitration agreements. The decision confirms the Swiss Courts' longstanding deference to the parties' choice to select arbitration as a mechanism to settle their disputes independent of the courts. Notwithstanding that parties typically have the right to challenge arbitral awards based on the grounds set forth in the arbitral law at the seat of the arbitration, parties can waive that right.

The Court's decision also emphasizes the importance of carefully drafting arbitration clauses based on a thorough understanding of the applicable law. Parties who use boilerplate arbitration language – or simply cut and paste arbitration clauses from other agreements – do so at their peril.

A Dechert team led by partners **Arif H. Ali** and **Alexandre de Gramont** represented MOL in the UNCITRAL arbitration. They are currently representing MOL in a related arbitration that MOL commenced against Croatia at the International Centre for Resolution of Investment Disputes ("**ICSID**"). A team at the Swiss law firm of Schellenberg Wittmer, led by partner Nathalie Voser, represented MOL in the Swiss Supreme Court, with support from the Dechert team.

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