Swiss Supreme Court upholds intra-EU ECT arbitration award and rejects ECJ's Komstroy ruling

by ***Practical Law Arbitration***

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In *Decision 4A_244/2023*, the Swiss Supreme Court gave a landmark ruling, which confirmed the jurisdiction of a Swiss-seated arbitral tribunal over an intra-EU investment dispute. The Swiss Supreme Court found that it was not bound by the ECJ decision in *Republic of Moldova v Komstroy LLC (successor in law of Energoalians) (Case C-741/19) EU:C:2021:655* and was, in any event, "not convinced" by the ECJ's reasoning.

Speedread

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In a recently published French-language decision, the Swiss Supreme Court rejected all challenges raised by Spain to an arbitration award rendered by a Swiss tribunal in favour of French investor EDF under the Energy Charter Treaty (ECT) and affirmed the tribunal's jurisdiction.

The Supreme Court held that, as a Swiss court called upon to examine the jurisdiction of a Swiss-seated arbitral tribunal, it was not bound by the ECJ judgment in *Republic of Moldova v Komstroy*, which held that the ECT did not apply to intra-EU disputes. In matters where there was a controversy as to the interpretation of foreign law, the Swiss courts will usually defer to the highest court of the country that enacted that law. However, that did not make sense where, as here, the court determining whether EU law prevailed over the ECT was an EU institution, which may be tempted to affirm the primacy of its own law over the international treaty and, effectively, render a decision in its own cause.

In any case, the Supreme Court was not convinced by the ECJ's reasoning in *Komstroy*, which was based exclusively on the specific nature of EU law and failed to take into account international law or the rules on treaty interpretation.

After a thorough analysis of several ECT provisions, EU and international law, and applying the Vienna Convention on the Law of Treaties, the Supreme Court concluded that there were no grounds to consider that the unconditional consent to arbitrate given by Spain in article 26 of the ECT excluded intra-EU disputes.

The Supreme Court also deemed Spain's argument that intra-EU disputes are inarbitrable in the wake of the *Komstroy* ruling to be inadmissible, as its challenge was improperly framed under the Swiss Private International Law Act.

The Supreme Court dismissed Spain's further argument that the arbitral tribunal had failed to deliberate on the award in *Green Power v Spain* and held that Spain was precluded from raising the alleged lack of impartiality of the presiding arbitrator as a ground for annulment of the award, given that it had never raised any objection regarding his impartiality during the arbitration.

The decision is notable for its thoroughness, rejecting on the merits several grounds that the court also ruled inadmissible, and also for the unusually strong terms in which the reasoning in *Komstroy* was rejected. (*Decision 4A_244/2023 (3 April 2024)*.)

Background

Swiss Private International Law Act (PILA)

Article 190(2) of the PILA provides that arbitration awards may be challenged on grounds including:

> "(a) where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted;
>
> (b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
>
> …
>
> (d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
>
> (e) if the award is incompatible with public policy."

For further discussion, see *Practice note, Arbitration in Switzerland*.

Vienna Convention on the Law of Treaties (VCLT)

Article 31 of the VCLT sets out the general rule for interpretation of treaties, which includes that they shall be interpreted in good faith, in accordance with the ordinary meaning of their terms of the treaty in their context and in the light of the treaty's object and purpose (*article 31(1)*). Account is also to be taken of the context and any subsequent agreements or practices of the parties to the treaty (*article 31(2) and (3)*). See further, *Practice note, How to read a bilateral investment treaty: commentary*.

Energy Charter Treaty (ECT)

Article 26 of the ECT provides for the arbitration of investment disputes, while article 16 provides that no other international agreement shall be construed as derogating from, among other things, article 26, unless the terms of that other agreement are more favourable to investors.

Article 1(3) of the ECT defines a "Regional Economic Integration Organisation" as an "organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty".

See further, *Practice note, Investment arbitration under the Energy Charter Treaty*.

European Communities (EC)'s declaration of 17 November 1997 pursuant to article 26(3)(b)(ii), ECT (EC 1997 Declaration)

On 17 November 1997, the EC issued a declaration pursuant to article 26(3)(b)(ii) of the ECT, which, among other things, provided that:

> "[a]ny case brought before the CJEU by an investor or another contracting party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) ECT. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation."

Achmea

In *Slowakische Republik v Achmea BV (Case C-284/16) EU:C:2018:158* (Achmea), the ECJ held that Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) must be interpreted as precluding investment arbitration provisions contained in intra-EU bilateral investment treaties (BITs), such as the one contained in the Dutch-Slovak BIT (see *Legal update, ECJ: Arbitration clause in intra-EU BIT incompatible with EU law*).

EU member states' declarations

In January 2019, EU member states issued declarations recognising the legal consequences of *Achmea* (see *Legal update, EU member states issue declaration recognising consequences of Achmea*). Altogether, 22 member states declared that, as a result of *Achmea*, intra-EU disputes under the ECT were incompatible with EU law and article 26 of the ECT should be disapplied in intra-EU disputes (2019 Declaration).

Komstroy

In *Republic of Moldova v Komstroy LLC (successor in law of Energoalians) (Case C-741/19) EU:C:2021:655* (Komstroy), the ECJ held that, in order to preserve the autonomy and the particular nature of EU law, article 26(2)(c) of the ECT must be interpreted as not applying to intra-EU disputes (see *Legal update, Investor-state arbitration clause in ECT incompatible with EU law when applied to intra-EU disputes (ECJ) (Full update)*).

Green Power

In *Green Power Partners K/S and another v Kingdom of Spain (SCC Arb No V2016/135)* (Green Power), the tribunal rejected jurisdiction over the dispute under the ECT on the basis that it was an intra-EU dispute. This is the only known instance of an arbitral tribunal applying the *Achmea* line of cases and accepting the intra-EU objection. See *Legal update, ECT arbitral tribunal declines jurisdiction by accepting Achmea objection raised by Spain for first time*.

Facts

In 2007, Spain implemented various regulatory measures to incentivise foreign investment in renewable energy. Beginning in 2010, Spain retracted features of the relevant regulations.

In 2016, French company EDF, which had invested in a Spanish renewable energy project, brought a claim against Spain under the ECT. The arbitral tribunal was seated in Switzerland.

Spain raised several jurisdictional objections, including that, under EU law, a claim brought by an investor of one EU member state against another EU member state under the ECT cannot be determined by arbitration (the "intra-EU objection").

In April 2023, the tribunal issued its final award (Award), unanimously upholding jurisdiction and finding, by a majority, that Spain was liable for breaching the ECT, with the dissenting arbitrator issuing a dissenting opinion (Dissenting Opinion). Spain challenged the award before the Swiss Supreme Court, which dismissed all four grounds for annulment raised by Spain.

Decision

The Swiss Supreme Court rejected all of Spain's challenges.

First ground for annulment: failure to deliberate on Green Power

The Dissenting Opinion mentioned in passing that the tribunal had not deliberated on the *Green Power* award. Spain argued that this meant that the Award should be annulled under one or more of article 190(2)(a), (b) or (e) of the PILA.

The Supreme Court disagreed, noting that the PILA does not mandate any specific form for deliberations. For example, circulating a draft award amongst the arbitrators amounts to deliberations. It is sufficient that each arbitrator has had the opportunity to express their views and take a position on the views of their co-arbitrators, which was the case here.

The Award expressly stated that the tribunal was not persuaded by the reasoning in *Green Power*, which confirmed that that award was necessarily addressed by the tribunal during its deliberations.

Further, all three arbitrators signed the Award, which indicated that they had completed their deliberations. Although the dissenting arbitrator would have preferred that *Green Power* be addressed in more detail in the award, he was able to read the reasoning of the majority in the draft award on this point and expressed his views in the Dissenting Opinion, which was what mattered.

The court underlined that the fact that the Dissenting Opinion mentioned that the tribunal had not deliberated on *Green Power* was, in itself, irrelevant, as the Dissenting Opinion is not part of the Award.

Spain was inadmissibly challenging the reasoning of the Award, under cover of an alleged failure to deliberate.

The Supreme Court finally pointed out that, in any event, the alleged failure to deliberate on *Green Power* had no bearing on the outcome of the case, as Spain's intra-EU objection was unanimously dismissed by the tribunal.

Second ground for annulment: presiding arbitrator's lack of impartiality

In its second ground for annulment, Spain challenged the presiding arbitrator's impartiality because, on the intra-EU objection, the Award repeated *verbatim* the reasoning of the tribunal in *Triodos v Spain (SCC)*, which the president had also chaired. Spain argued that this proved that the presiding arbitrator had made up his mind already on the intra-EU objection.

The Supreme Court held that Spain was precluded from making this objection because it was not raised before the tribunal itself, after the *Triodos* award was rendered. Spain knew that the presiding arbitrator was chairing both tribunals and that Spain had raised the intra-EU objection in both arbitrations. Spain should have raised its objection that the presiding arbitrator lacked impartiality immediately after the *Triodos* award was rendered, instead of "keeping it in reserve" for a potential challenge to the Award.

Further, it was not credible for Spain to argue that it could not have anticipated that two tribunals, chaired by the same arbitrator and examining the same jurisdictional objection raised by the same party, would decide the point in the same way.

Third ground for annulment: lack of consent to arbitrate intra-EU ECT disputes

The Supreme Court rejected the argument that, following the judgment in *Komstroy* and a separate analysis of the ECT by Spain, either the ECT's dispute resolution provisions (*article 26, ECT*) do not apply to intra-EU disputes or EU law takes precedence over the ECT.

Komstroy irrelevant

The Supreme Court observed that the EU had been conducting a "crusade" against intra-EU investment arbitrations for many years but that it was not convinced by the reasoning adopted by the ECJ in *Achmea* and *Komstroy*. That reasoning was based exclusively on the specific nature of EU law and the requirement to preserve the autonomy of EU law, without considering international law or the rules on treaty interpretation. This was why those decisions have been heavily criticised by legal commentators.

While according to the ECJ, an arbitral seat in an EU member state entails the application of EU law and an obligation of the courts of the seat to ensure compliance with EU law, the Supreme Court held that no such obligation arises for courts of non-EU member states, such as Switzerland. For them, EU law is *res inter alios acta*, meaning that a Swiss court considering the jurisdiction of a Swiss-seated arbitral tribunal is not bound by *Komstroy*.

Although in matters where there is a controversy as to the interpretation of foreign law, the Supreme Court indicated that it will usually follow the opinion of the highest court of the jurisdiction that enacted the relevant law, here this did not make sense because the question was to determine whether rules adopted by the EU prevailed over an international treaty like the ECT. In the Supreme Court's view, the court put in place by the EU may be tempted to affirm the primacy of its own laws over the international treaty, and render a decision that is more like a "pleading *pro domo*" (pleading its own case), as happened in *Komstroy*.

Therefore, the Supreme Court did not give any specific weight to *Komstroy* and instead conducted its own analysis of article 26 of the ECT, applying the relevant rules on treaty interpretation, to determine whether intra-EU disputes fall within its scope and, if so, whether EU law could invalidate Spain's consent to arbitration given in article 26.

Intra-EU disputes are within the scope of article 26, ECT

Following a thorough analysis of several ECT provisions, as well as of contemporaneous and subsequent instruments, applying the rules on treaty interpretation in article 31 of the VCLT, the Supreme Court concluded that there were no grounds on which it could be said that Spain's unconditional consent to arbitration did not include intra-EU disputes.

If the unconditional consent had been intended to apply only to "extra-EU" disputes, this could, and should, have been expressed in the ECT by way of a disconnection clause. The Supreme Court observed that, before it signed the ECT, the EU had inserted such clauses in other multilateral treaties, allowing its member states to disapply certain treaty provisions in their relations with each other. The court found that the fact that the EU had unsuccessfully attempted to include a disconnection clause in the ECT was another reason to find that intra-EU disputes were within the scope of article 26.

In rejecting Spain's arguments, the Supreme Court held, among other things, that:

- Articles 1(3), 10 and 25 of the ECT, read together, did not transfer competences to the EU, such that EU member states were no longer bound by the ECT in their relations with each other. Article 1(3) of the ECT does no more than define a "Regional Economic Integration Organisation".
- The EC 1997 Declaration was limited in effect to the ECT's fork-in-the-road clause (*article 26(3)(b)(i)*) and applied only to the EC itself, not to its member states. Further, it drew no distinction between intra-EU disputes under the ECT and those brought by an investor from a non-member state. Indeed, the EC 1997 Declaration expressly mentions the possibility of referring disputes to arbitration but does not exclude intra-EU disputes.
- As the 2019 Declaration was adopted by only 22 EU member states, as opposed to by all ECT contracting parties, it cannot qualify as a subsequent agreement or practice "of the parties", within the meaning of article 31(3) of the VCLT. Further, the purpose of the 2019 Declaration was not to interpret the ECT, but rather to specify the legal consequences of *Achmea*, which in any case did not pertain to the ECT. It was a political declaration of intent, made to give a new meaning to the unconditional consent to arbitrate provided in the ECT going forward and it did not mean that those 22 member states had never given their consent to arbitrate intra-EU disputes in the first place. Even if it were wrong on that, the Supreme Court held that the 2019 Declaration could not retroactively deprive an investor of the right to pursue an arbitration commenced three years earlier. Jurisdiction under article 26 of the ECT must be assessed based on the legal situation at the time of the request for arbitration.

EU law does not prevail over the ECT

After considering the Lisbon Treaty, as well as Articles 267 and 344 of the TFEU, the Supreme Court concluded that, contrary to Spain's assertion, there was no conflict between article 26 of the ECT and EU law.

However, even if article 26 of the ECT were incompatible with EU law, there were no grounds to consider, under public international law, that EU law should prevail over the ECT. In particular, the Supreme Court pointed out that the conditions for the application of article 41 of the VCLT (on agreements to modify multilateral treaties between certain parties only) were not fulfilled, as any alleged agreement to modify article 26 of the ECT would be prohibited by article 16, which provides that no agreement shall be construed so as to derogate from the right for an investor to resort to arbitration under article 26.

Fourth ground for annulment: inarbitrability of the dispute

The Supreme Court ruled that Spain's argument that the dispute was inarbitrable in the wake of *Komstroy* was inadmissible, because the argument was based expressly and exclusively on article 190(2)(e) of the PILA (incompatibility of the award with public policy), as opposed to article 190(2)(b) (incorrect ruling on jurisdiction). Arbitrability is a condition of validity of the arbitration agreement and, therefore, goes exclusively to the tribunal's jurisdiction under article 190(2)(b) of the PILA. The Supreme Court has previously held that, although it may be necessary as a matter of public policy to take account of mandatory foreign law provisions said to make a dispute inarbitrable, this does not bring an award challenge based on the arbitrability of a dispute within the scope of article 190(2)(e) of the PILA.

Comment

This is the first time that the Swiss Supreme Court has ruled on the highly controversial question of the jurisdiction of arbitral tribunals over intra-EU investment disputes. While the outcome of the decision was not necessarily unexpected, given that it is in line with the overwhelming majority of ECT awards and Switzerland is not bound by ECJ rulings, the Supreme Court rejected the reasoning in *Komstroy* in unusually strong terms. Further, it carried out a particularly thorough analysis of the issue under public international law, likely anticipating the close scrutiny that its judgment would attract from all sides of the intra-EU objection debate.

However, the Supreme Court rejected Spain's inarbitrability challenge as inadmissible without, as it had for other inadmissible arguments, going on to examine the merits of the argument. Theoretically, this leaves the door open for the inarbitrability argument to be raised in a future case under article 190(2)(b) of the PILA.

Overall, the decision stands out as a bold example of rigorous application of the law and will likely give rise to much discussion and analysis in the coming months.

Case

Decision 4A_244/2023 (3 April 2024) (French language).

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