Tribunal's refusal to revisit jurisdiction after Achmea not a violation of right to be heard or procedural public policy (Swiss Supreme Court)

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

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In *Decision 4A_187/2020*, the Swiss Supreme Court rejected Spain's application to set aside a final award rendered under the Energy Charter Treaty (ECT). It dismissed Spain's arguments that the arbitral tribunal had violated its right to be heard and procedural public policy when it refused to revisit a 2014 preliminary award on jurisdiction after the Court of Justice of the European Union's 2018 ruling in *Achmea*.

Speedread

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In a recently published French-language decision, the Swiss Supreme Court rejected Spain's application to set aside a final award rendered under the Energy Charter Treaty (ECT) in which the arbitral tribunal had denied Spain's request to revisit a preliminary award on jurisdiction rendered in 2014 after the Court of Justice of the European Union (ECJ) issued its ruling in *Slowakische Republik v Achmea BV (C-284/16)* (Achmea) in 2018.

The dispute involved renewable energy investments made by 26 EU investors in Spain. During the arbitration, Spain argued that intra-EU investment arbitration under the ECT was incompatible with EU law. In 2014, the tribunal dismissed that argument in a preliminary award on jurisdiction, which was not challenged before the Swiss Supreme Court.

After the *Achmea* ruling, Spain requested that the tribunal reopen the jurisdictional phase to examine a "new jurisdictional objection" on the basis of the ECJ decision. In 2018, the tribunal denied Spain's request in a procedural order, observing that Spain had failed to challenge the preliminary award on jurisdiction, which was therefore binding on the tribunal.

In 2019, Spain reiterated its request that the tribunal reconsider its jurisdiction in light of the declaration of 22 EU member states on the legal consequences of *Achmea*, which was rejected in the final award.

Spain applied to the Supreme Court to set aside the final award, arguing that, by refusing to reopen the jurisdictional phase and by refusing to take into account the *Achmea* decision and related documents as new facts, both in the procedural order and final award, the tribunal had violated Spain's right to be heard. Spain also argued that in considering itself bound by its earlier jurisdictional award, the tribunal had incorrectly applied the *res judicata* principle, thereby violating Swiss procedural public policy. However, Spain did not raise any plea of lack of jurisdiction, whether on the basis of *Achmea* or on any other ground.

The Supreme Court rejected all of Spain's arguments.

The decision is a useful reminder that it is not the denomination but the contents of a tribunal's decision that is decisive in determining whether it can be challenged before the Supreme Court. If a tribunal addresses jurisdictional issues in a decision labelled "procedural order", this decision nonetheless qualifies as a preliminary award on jurisdiction under Swiss law and is open to challenge within thirty days of its notification. (*Decision 4A_187/2020 (23 February 2021)*.)

Background

Swiss Private International Law Act (PILA)

Article 190 of the PILA provides that:

"(1) The award is final from its notification.
(2) The award may only be challenged:
[...]
(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.
(3) Interim awards may be challenged on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the interim award."
For further information on arbitration in Switzerland, see *Practice note, Arbitration in Switzerland*.

Achmea

On 6 March 2018, in *Slowakische Republik v Achmea BV (C-284/16)* (Achmea), the Court of Justice of the European Union (ECJ) held that articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) must

be interpreted as precluding investor-state dispute settlement (ISDS) provisions in intra-EU bilateral investment treaties (BITs), such as the one contained in article 8 of the Dutch-Slovak BIT (see *Legal update, ECJ: Arbitration clause in intra-EU BIT incompatible with EU law*).

The European Commission communication

On 19 July 2018, the European Commission (EC) issued a communication inviting EU member states to draw all legal consequences from the *Achmea* ruling as well as a fact sheet (EC Communication) underlining that intra-EU investor-state arbitration based on BITs concluded between EU member states was incompatible with EU law, as was the arbitration provision in the Energy Charter Treaty (ECT) in so far as intra-EU disputes were concerned (see *Legal update, European Commission says Achmea applies to ECT as well as intra-EU BITs*).

EU member states' declarations

On 15 and 16 January 2019, EU member states issued declarations recognising the legal consequences of *Achmea* (Member States' Declarations) (see *Legal update, EU member states issue declaration recognising consequences of Achmea*). Twenty-two member states considered that the consequences of *Achmea* are that all ISDS provisions in intra-EU BITs are incompatible with EU law (21 member states considered that *Achmea* also applied to the ECT). All member states undertook to terminate all intra-EU BITs by 6 December 2019, which they did by an agreement signed on 6 May 2020, that came into force on 29 August 2020 (see *Legal update, Agreement to terminate intra-EU BITs signed by 23 EU member states)*.

To follow developments related to intra-EU BITs, see *Intra-EU bilateral investment treaties: tracker*.

Facts

In 2007, Spain implemented several regulatory measures to incentivize investment in renewable energy. From 2010 onward, Spain retracted some features of the original regulations.

In 2011, a group of 26 EU investors who had invested in photovoltaic production in Spain initiated ad hoc arbitration proceedings under the UNCITRAL Rules against Spain, seeking, among other things, damages for breach of article 10(1) of the ECT. The proceedings were carried out under the aegis of the Permanent Court or Arbitration (PCA) and the seat of the arbitration was Geneva, Switzerland.

At the beginning of the arbitral proceedings, Spain raised several jurisdictional objections. In particular it argued that, under EU law, a dispute between an EU investor and another EU member state in relation to an investment covered by the ECT cannot be adjudicated by way of arbitration under the ECT (the intra-EU objection).

By way of a preliminary award on jurisdiction dated 13 October 2014, the arbitral tribunal found that it had jurisdiction under article 26 of the ECT. In particular, it dismissed Spain's intra EU-objection on the ground among other things, that the EU, which is itself a party to the ECT, had not made any reservation in relation to the submission of intra-EU investment disputes to arbitration under article 26 of the ECT. Further, it noted that the ECT does not contain any "disconnection clause" that would exclude the application of the ECT in intra-EU relations.

Spain did not challenge the award on jurisdiction within the deadline under Swiss law.

In August 2018, while the arbitration was proceeding on the merits, Spain requested that the tribunal reopen the jurisdictional phase to examine a "new jurisdictional objection" based on "new facts", namely:

- The ECJ's decision in *Achmea*
- The EC Communication.

Spain argued that the reasoning in the *Achmea* decision was not limited to intra-EU BITs but extended to the intra-EU application of the arbitration clause in article 26 of the ECT.

After authorising two written exchanges by the parties on Spain's request, the tribunal issued a procedural order on 15 October 2018 (PO 19) denying Spain's request. The tribunal observed that, in accordance with Swiss arbitration law, the 2014 preliminary award on jurisdiction had *res judicata* effect, or conclusive and preclusive effects comparable to *res judicata*. It considered that Spain was attempting to re-litigate the same intra-EU objection, which had already been rejected, by referring to the *Achmea* decision and the subsequent EC documents. None of these documents changed the nature of the intra-EU objection, but simply added possible legal arguments in support thereof. Hence, Spain's purported "new" objection was the same intra-EU jurisdictional objection raised at the outset of the proceedings and the tribunal was therefore bound by its own findings in the preliminary award on jurisdiction.

Spain did not challenge PO 19 directly before the Swiss Supreme Court.

In February 2019, Spain sought leave from the arbitral tribunal to submit the Member States' Declarations and requested that the tribunal reconsider *ex officio* (by virtue of its office) its jurisdiction on that basis. The tribunal ordered an exchange of submissions on this issue.

By final award dated 28 February 2020, the tribunal denied Spain's request to reconsider its jurisdiction. It restated its position that the preliminary award on jurisdiction had *res judicata* effect, or conclusive and preclusive effects comparable to *res judicata*. The tribunal considered that the Member States' Declarations, like the *Achmea* decision and subsequent EC Communication, did not alter the intra-EU objection previously raised by Spain and dismissed in the preliminary award on jurisdiction, but simply added possible legal arguments in support thereof. Therefore, the tribunal concluded that it remained bound by the findings in its preliminary award. The tribunal further noted that this conclusion was consistent with the accepted principle that the relevant time for determining jurisdiction was the date of the initiation of the proceedings. On the merits, the tribunal found that Spain had breached article 10(1) of the ECT and awarded more than EUR91 million to some of the claimants.

Within the thirty-day time limit under Swiss law, Spain challenged the final award before the Supreme Court arguing that, by refusing to reopen the jurisdictional phase and by refusing to take into account the *Achmea* decision and related documents as new facts, both in PO 19 and in the final award, the arbitral tribunal had violated Spain's right to be heard under article 190(2)(d) of the PILA. Spain also argued that by considering itself bound by its earlier jurisdictional award, the tribunal had incorrectly applied the *res judicata* principle, thereby violating Swiss procedural public policy under article 190(2)(e) of the PILA. Notably, Spain did not raise any ground of annulment related to the lack of jurisdiction under article 190(2)(b) of the PILA based on the *Achmea* ruling.

Decision

The Swiss Supreme Court rejected Spain's application.

The tribunal's refusal to reopen the jurisdictional phase in PO 19

The Supreme Court first noted that in the preliminary award on jurisdiction of 2014, the tribunal rejected Spain's jurisdictional objection in its entirety, including the intra-EU objection. Since Spain had failed to challenge this

preliminary award on jurisdiction under article 190(3) of the PILA within the statutory 30-day deadline, the award could not be called into question at this stage.

The Supreme Court then analysed the legal nature of PO 19, observing that the tribunal correctly refused to examine Spain's "new" jurisdictional objection by considering that Spain was seeking to resubmit the same intra-EU objection that had been already dismissed in the preliminary award on jurisdiction of 2014. Accordingly, despite being given the title of a "procedural order", this decision dealt with jurisdictional issues and therefore qualified as a preliminary award on jurisdiction. As such, Spain could and should have challenged it within 30 days on the ground that the tribunal wrongfully accepted jurisdiction (articles 190(3) and 190(2)(b) of the PILA).

The Supreme Court further noted that Spain's arguments based on alleged violations of its right to be heard and of procedural public policy were intrinsically related to the arbitral tribunal's jurisdiction. Spain should have raised these arguments immediately by challenging PO 19 directly. Having failed to do so, Spain was precluded from raising them in a challenge against the final award.

The tribunal's refusal to revisit jurisdiction in its final award

The Supreme Court noted that, in the final award, the tribunal had denied Spain's request to re-examine its jurisdiction after the Member States' Declarations for the same reasons it had previously refused to examine Spain's "new" jurisdictional objection in PO 19. Therefore, it could have been challenged on jurisdictional grounds under article 190(2)(b) of the PILA. The Supreme Court went on to question whether, having failed to challenge the jurisdictional decision in time, Spain could validly criticise the tribunal's decision on jurisdiction indirectly by alleging a violation of its right to be heard and of public policy. The Supreme Court expressed doubts as to the legitimacy of such an indirect challenge but considered that, in any event, the two annulment grounds lacked merit for the following reasons.

With regards to the alleged violation of its right to be heard, the Supreme Court underlined that the tribunal had ordered an exchange of submissions on Spain's request to reconsider its jurisdictional decision in light of the Member States' Declarations and that the tribunal had given reasons in the final award for denying such request. Therefore, the tribunal could not be accused of having violated Spain's right to be heard or of a "denial of justice".

As for Spain's argument that the tribunal violated procedural public policy by relying incorrectly on the *res judicata* principle, the Supreme Court first reiterated its longstanding definition of procedural public policy within the meaning of Swiss law. An award is contrary to procedural public policy if it infringes fundamental and generally recognised principles of procedure, the disregard of which is intolerably contrary to the sense of justice so that the award seems incompatible with the values applying in a state of law. A tribunal violates procedural public policy if it disregards the *res judicata* effect of a previous decision, or if it deviates in its final award from a preliminary award on a substantive issue rendered in the same arbitration.

The Supreme Court further reiterated its practice according to which preliminary awards (also called interim awards) that determine a preliminary procedural or substantive issue without disposing of any claims do not have *res judicata* effect as such, but they are nevertheless binding on the arbitral tribunal that rendered them.

In light of these principles, the Supreme Court found that Spain had failed to demonstrate that the tribunal ruled without considering the *res judicata* effect of a previous decision, or that it deviated in its final award from a prior preliminary award, which are the relevant criteria to establish a violation of procedural public policy under Swiss law.

Under cover of an alleged violation of the *res judicata* principle, the Supreme Court considered that Spain's criticism in fact related to the reasons underlying the arbitral tribunal's refusal to revisit its jurisdiction, without actually

challenging the tribunal's jurisdiction. Since the arbitral tribunal considered itself bound by its preliminary award on jurisdiction, there was no question of a violation of procedural public policy, whatever the reasons underlying the decision.

Finally, the Supreme Court refused to address Spain's argument that the tribunal should have examined its jurisdiction when rendering the award, and not at the time of the commencement of the arbitration, given that this argument relates to jurisdiction and not to the *res judicata* principle.

Comment

Although the issue of the legal consequences of *Achmea* on the jurisdiction of arbitral tribunals in ECT disputes between an EU investor and another EU member state was discussed at length in the underlying arbitration proceedings, Spain did not seek the annulment of the final award on the ground of lack of jurisdiction based on *Achmea*. As a result, the Supreme Court's decision does not address the impact of *Achmea* on ECT disputes.

The decision is a useful reminder that it is not the denomination but the contents of a tribunal's decision that is decisive in determining whether it can be challenged before the Supreme Court. If a tribunal addresses jurisdictional issues in a decision labelled "procedural order", this decision nonetheless qualifies as a preliminary award on jurisdiction under Swiss law and is open to challenge within 30 days of its notification.

The decision also illustrates the difference, under Swiss law, between final awards, partial awards and preliminary or interim awards as regards *res judicata* effects. Final awards (which dispose of all claims in full) as well as partial awards (in which the arbitral tribunal disposes finally of certain claims, the remainder being reserved for a subsequent award) have *res judicata* effect. By contrast, preliminary or interim awards, which determine a discrete procedural issue (such as jurisdiction or admissibility) or a substantive issue (such as the issue of liability) without disposing of any claims, are not vested with *res judicata* effect. They nevertheless have conclusive and preclusive effects akin to *res judicata* and are binding on the arbitral tribunal, compared to procedural orders that can be modified or revoked over the course of the proceedings.

This means that an arbitral tribunal violates procedural public policy within the meaning of Swiss law not only if it rules without taking into account the *res judicata* effect of a previous decision, but also if it departs in its final award from findings made in a preliminary award.

Case

Decision 4A_187/2020 (23 February 2021).

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