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THE VIEW FROM EUROPE
WHAT'S NEW IN EUROPEAN ARBITRATION?

Stephan Wilske, Todd J. Fox and Rafał Kos[*]

Recent Decisions by National Courts

GERMANY

In a judgment of the Regional Court of Dortmund dated September 13, 2017 (Docket No 8 O 30/16 (Kart)) but only recently published, the court held that if a cartel damages claim is brought on the basis of a contract subject to an arbitration agreement, that claim is subject to arbitration. This holding came somewhat as a surprise as it is contrary to the prevailing view in legal literature.

Background

In 2003 the plaintiff (a consortium established for the construction of a railway project) had procured rails and related services from the defendant (the legal successor of a member of the so-called "rail cartel" in Germany) under two separate contracts. The contracts provided for arbitration under the "Rules of Arbitration for the Building Industry" issued by the German Concrete Association (*Deutscher Betonverein e.V.*) and the German Society for Construction Law (*Deutsche Gesellschaft für Baurecht e.V.*).

The plaintiff filed a claim before the Dortmund Regional Court seeking damages for allegedly having paid excessive prices under the two contracts due to the existence of a cartel. The defendant objected to the jurisdiction of the Regional Court of Dortmund on the basis of the arbitration clauses in the contracts. Relying on the judgment of the

[*] **Stephan Wilske** is a Partner in the dispute resolution division of Gleiss Lutz in Stuttgart, Germany and heads the firm's International Arbitration Focus Group. He regularly acts as counsel and as arbitrator in national and international arbitration proceedings. **Todd J. Fox** is an Associated Partner in the dispute resolution division of Gleiss Lutz in Stuttgart, Germany and regularly acts as counsel in international arbitration proceedings. **Rafał Kos** is the Managing Partner of Kubas Kos Gałkowski, a Polish independent law firm. He is regularly involved in complex arbitration proceedings, both as counsel and arbitrator. He has recently been reappointed as the Vice-President of the Confederation Lewiatan Court of Arbitration in Warsaw, and is a guest contributor to this issue.

Court of Justice of the European Union (ECJ) in *CDC v Evonik (C-352/13)*,[1] which dealt with jurisdiction clauses, the plaintiff argued that the cartel damages claims fell outside the scope of the arbitration clauses since the parties did not foresee any such claims when they agreed to the arbitration clauses.

Decision

The Regional Court of Dortmund found that in light of the arbitration clauses it lacked jurisdiction to hear the case, and dismissed the claim as inadmissible according to section 1032(1) of the German Code of Civil Procedure.

The court noted that antitrust claims and related cartel damages claims are generally arbitrable under German law. The court held that even though the arbitration agreements entered into between the parties do not explicitly reference antitrust violations or cartel damages claims, arbitration agreements are to be interpreted broadly. The court went on to interpret the arbitration agreements by explaining that:

- It is generally accepted that claims for unjust enrichment and tort claims are claims "arising out of" a contract and are therefore covered by an arbitration agreement in that contract;
- Cartel damages claims are tort claims and there is no reason to treat these claims differently from other tort claims because the facts underlying a tort claim are typically the mirror image of facts underlying a breach of contract, and, therefore, the tort claim "arises out of" the contract;
- It would be unreasonable to split jurisdiction between contractual claims and tort claims, and this cannot be assumed to be the intent of the parties;
- In this specific case there is a contractual damages claim arising out of the same facts as the cartel tort damages claim.

The court went on to explain that the cartel damages claims were to be qualified as "arising out of" the contract, despite the fact that the activities leading up to those claims occurred prior to the contracts

[1] In *CDC v Evonik (C-352/13)*, judgment dated May 21, 2015, the ECJ held that cartel damages claims are not covered by a jurisdiction clause agreed on by the parties unless the harmed party was in a position to reasonably foresee a cartel damages action when it agreed to the jurisdiction clause.

having been concluded between the plaintiff and defendant. According to the court, to hold otherwise would lead to an unreasonable and unwarranted differentiation between measures taken by so-called hard-core cartels prior to concluding contracts with customers, and abusive measures taken by a company with a market-dominating position in the course of concluding the actual contracts.

The court then went on to deal with some older German case law as well as the English decision in *Roche Products Ltd v. Provimi Ltd [2003] EWHC 961 (Comm)*, which differentiated according to the level of fault of the defendant and held that claims based on willful intent cannot be arbitrated. The court rejected this approach, explaining that it did not make sense to differentiate according to the severity of intent, which is a matter to be dealt with not on the procedural level of jurisdiction, but on the substantive level.

Finally, the court held that *CDC v Evonik (C-352/13)* did not warrant a different result. The court noted that there is no general principle whereby aspects applicable to jurisdiction clauses automatically apply to arbitration agreements. Emphasizing that the ECJ ruling expressly extended only to jurisdiction clauses, the Regional Court of Dortmund took the view that foreseeability of the claim does not constitute a sensible criterion for determining whether or not the claim falls within the scope of an arbitration clause. On the one hand, both contractual and non-contractual claims are typically not foreseeable by the parties when concluding the contract. On the other hand, it is the purpose of arbitration clauses to define with certainty the forum for the resolution of an unforeseen disagreement between the parties.

The Regional Court of Dortmund therefore confirmed the applicability of the arbitration clauses and declined jurisdiction to hear the case.

Comment

In light of the growing number of cartel damages claims being brought in follow-on litigation, this decision by the Regional Court of Dortmund is highly relevant. The decision comes as somewhat of a surprise given the decision in *CDC v Evonik*, in which the ECJ held that jurisdiction clauses generally do not apply to cartel damages claims unless specifically agreed. While the ECJ did not deal with the specific question of the applicability of arbitration agreements in that case, the prevailing view in legal literature is that the reasoning applied by the ECJ to jurisdiction clauses would eventually also be

applied to arbitration agreements. The Regional Court of Dortmund has now rejected this approach. It remains to be seen whether the reasoning of the Regional Court of Dortmund will be confirmed on appeal.

POLAND

In its judgment of August 31, 2017, the Wroclaw Court of Appeals (Docket No. I ACa 536/17) set aside an arbitral award rendered by a sole arbitrator in an ICC arbitration seated in Poland. The court found that the rights of the respondent, a Polish municipality, were infringed in the ICC appointment process of the sole arbitrator, who, additionally, was allegedly not impartial in the course of the arbitration.[2]

Background

A Polish consortium of three companies (of unknown nationality) entered into a construction agreement with a Polish municipality (a unit of local government). The contract contained an ICC arbitration clause providing for arbitration in Polish. A complex dispute emerged between the parties. Finally, the consortium leader initiated arbitration against the municipality requesting payment of outstanding invoices. The claimant requested the ICC Court to appoint a sole arbitrator of German or French nationality pursuant to Articles 12(3) and 13(4)(a) of the 2012 ICC Rules of Arbitration. It therefore wanted the ICC to appoint the sole arbitrator directly and not to consult a National Committee under Article 13(3) of the ICC Rules, as the respondent allegedly was or might have been considered a state entity.

The respondent objected to all of the claims. It underlined that under Polish law units of the local government are separate and independent from the state. The Secretariat proposed a Czech arbitrator to which the claimant objected, *inter alia*, due to the fact that this arbitrator candidate had previously "worked" for the Polish Foreign Ministry. The claimant upheld its request for a German or French arbitrator and requested the appointment of a sole arbitrator not connected to the Polish state or state entities. The ICC Court finally appointed an arbitrator who met the nationality criteria proposed by the claimant.

[2] In the court's opinion, there was yet another reason to set the award aside, *i.e.* the violation of public policy due to the misapplication of the basic principles of Polish contract law. This issue, for the sake of clarity, will not be discussed below, but it gave a separate ground to vacate the award.

The respondent protested, but with no result, as the ICC Court decision in this regard was final.

The proceedings were conducted by the sole arbitrator appointed by the ICC and closed. The sole arbitrator granted the vast majority of the claims brought against the respondent. The disgruntled municipality filed an action with the Court of Appeals of Wrocław to set aside the award. It argued, inter alia, that the sole arbitrator was appointed by the ICC Court in violation of the municipality's rights. Furthermore, the sole arbitrator also allegedly lacked impartiality in the course of the proceedings.

Decision

In its judgment of August 31, 2017 the Court of Appeals of Wrocław set aside the arbitral award in its entirety. The court found that the ICC Court had violated the respondent's rights in appointing the sole arbitrator. In the Polish court's opinion, the ICC Court had no right to assume that the municipality is a state entity and, consequently, to appoint an arbitrator directly under Article 13(4)(a) of the ICC Rules. This is because the Polish court found that units of the local government in Poland are separate and independent from the state. Consequently, the Polish court found that the ICC Court should have relied on Article 13(3) of the ICC Rules and consulted the National Committee beforehand.

In the Polish court's view, the Czech arbitrator candidate initially proposed by the ICC was impartial even though she had been appointed as an arbitrator by the Polish state in another arbitration (the Polish court argued that this appointment was effected by the Polish state and not the municipality). Consequently, the Polish court held that the claimant's objections to her appointment lacked merit. The Polish court concluded that the ICC Court did not treat the parties equally, as it appointed as sole arbitrator another candidate that met the criteria proposed solely by the claimant, and set aside the award.

Comment

The Court of Appeal's decision is strange. Practically, it reviews a procedural decision by the ICC Court and finds that the ICC Court's application of the ICC Arbitration Rules is erroneous and must be replaced by its own decision to the detriment of the integrity of the arbitral award. There is international consensus that a national court

may not conduct a *révision au fond*, thereby replacing an arbitral tribunal's decision on the merits by its own decision. The same is true with procedural decisions of an arbitral institution unless these decisions are clearly discriminatory, which is certainly not an issue in this case. There are many countries where it is in dispute whether units of the local government or municipalities should be treated like government entities or like private entities. It would have been helpful if this decision had reached the Polish Supreme Court, but unfortunately it did not. Thus, practitioners should be aware of the risk that in Poland, the ICC Court does not necessarily have the last word on the interpretation of its own rules and procedures.

SWITZERLAND

In its decision dated October 17, 2017 (Docket No. 4A 53/2017) the Swiss Supreme Court confirmed and consolidated its interpretation of the term "appeal". It held that a waiver of the right to appeal an international arbitral award generally includes not only ordinary means of challenging an arbitral award, but also extraordinary ones, such as the revision of an award.

Background

In 2003 Hungary's largest oil company, MOL Hungarian Oil and Gas Company Plc ("**MOL**") became a 25% shareholder of INA Industrija Nafte ("**INA**"), Croatia's largest oil company. In the course of the further privatization of INA Croatia and MOL concluded a master agreement and a shareholder agreement in 2009, whereby MOL was granted controlling management rights in INA.

In 2014 Croatia initiated arbitration proceedings against MOL under the UNCITRAL rules, seeking annulment of the master agreement and the shareholder agreement. Croatia asserted that the agreements were obtained by way of a EUR 10 million bribe offered to the former Croatian Prime Minister.

In December 2016 the arbitral tribunal dismissed Croatia's claims in their entirety. It held that the applicant had failed to produce sufficient evidence of the existence of a bribe.

Croatia then filed a petition before the Swiss Supreme Court in February 2017 requesting the setting aside of the arbitral award ("*recourse en matière civile*"), or alternatively, that the Court order a revision ("*demande de revision*") of the award. The former constitutes

the ordinary means of challenging an arbitral award as envisaged by article 190(2) of the Swiss Private International Law Act ("**PILA**") (setting out the grounds for annulment of an award, including that "*the arbitral tribunal was not properly constituted*"). However, the PILA does not provide for the revision of an arbitral award (an extraordinary recourse allowing re-examination of an award in light of new elements). This gap was filled by the Swiss Supreme Court in a landmark decision in 1992 (Decision 118 II 199), where it held that the analogous application of certain statutory rules allowed the Supreme Court to order the revision of an international arbitral award.

Croatia's petition to the Supreme Court was based on the grounds that the arbitral tribunal was not properly constituted: Croatia claimed it had learned of facts that allegedly cast doubts as to the independence and impartiality of its party-appointed arbitrator.

MOL objected that Croatia's petition was inadmissible because the parties had included a waiver of the right to challenge an arbitral award in the dispute resolution clauses of their agreements. These clauses stated:

> *"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."*

Pursuant to article 192 PILA, parties may waive the action for annulment by express statement in the arbitration agreement or subsequent written agreement if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland.

The waiver in question, MOL submitted, does not only include the (ordinary) right to set aside an award under article 190(2) PILA, but also the (extraordinary) right to request a revision of an arbitral award before the Supreme Court.

Decision

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

First, the Court dealt with the question of whether the parties had validly waived the ordinary right to set aside an arbitral award.

For this purpose, the Court referred to its landmark decision from 2005 (Decision 131 III 173) where it had conducted an in-depth analysis of possible interpretations of the term "*appeal*". In that decision, the Court found that a broad interpretation would encompass all judicial recourses (*recours* in French and *Rechtsmittel* in German) whereas a narrow interpretation would only include the appellate review of the facts and the law of an arbitral award (*appel* in French and *Berufung* in German). It also remarked that an appeal of an arbitral award in the narrow sense is generally not permitted in international arbitration law. Accordingly, the term "*appeal*" is generally to be interpreted in a broad sense. Therefore, the waiver of the right to appeal is in principal understood to waive the right to set aside an award, not the right to appeal an award on the merits in the narrow sense.

In accordance with earlier decisions, the Court further reaffirmed that a waiver must be direct ("*manière claire et nette*"). Thus, it is necessary for the parties to univocally express their renunciation, without however needing to explicitly refer to articles 190 and/or 192 PILA.

In the case at hand, the Supreme Court held that the parties had undoubtedly agreed on a valid waiver and that the term "appeal" in the clause in question had to be interpreted in a broad sense. It found that the wording of the clause ("*final*", "*conclusive*") showed the clear and common intent of the parties that no challenge of the arbitral award should be possible before a state court. This was supported by the fact that the applicable UNCITRAL rules do not provide for any right to appeal an arbitral award. Therefore, the Court concluded that the parties' intention must have been to waive this ordinary recourse they had against the arbitral award under article 190(2) PILA.

Subsequently, the Court ruled that the waiver must be interpreted as also including the extraordinary recourse of a request for revision of the arbitral award. It found that it would be difficult, particularly given its subsidiary nature, to accept that a party which expressly waives its right to challenge the proper constitution of the arbitral tribunal (article 190(2) PILA) could nonetheless request a revision of the award invoking the very same reason. Since this would render the possibility to waive annulment proceedings meaningless, the Court took the view that a different interpretation of the waiver would violate the principle of good faith.

Comment

The decision is a useful reminder of the Swiss Supreme Court's jurisprudence regarding the ability to waive any right to challenge an international arbitral award. It shows that parties must be careful when waiving the right to appeal an arbitral award since a waiver generally also includes extraordinary means such as a revision of the award, at least when the ground asserted can be invoked within both contexts. Thus, parties that do not have a presence in Switzerland may (possibly unexpectedly) lose any possibility to challenge the award at the seat of arbitration. The Swiss Supreme Court, however, implicitly reserved the possibility that requests for revision on other grounds might still be possible. It is expected that this issue will be addressed by the Swiss legislature in the upcoming revision of the international arbitration chapter in the PILA.

Institutional Developments

German Institution of Arbitration (DIS)

The German Institution for Arbitration (DIS), which is the premier arbitral institution in Germany, has issued new Arbitration Rules that enter into force on March 1, 2018. The prior version of its Arbitration Rules dated from 20 years ago: 1998.

The DIS wants to bring its Arbitration Rules up to speed with international best practice. The focus is to ensure transparency, predictability, efficiency and quality. An overall theme of the new rules is an attempt to increase procedural efficiency. Examples of this can be seen, e.g., in shorting the time for nomination of an arbitrator by the respondent to no later than 21 days after the receipt of the request for arbitration (Art. 7.1), shortening the time for the nomination of the president from 30 to 21 days (Art. 12.2), and foreseeing a case management conference within 21 days after the constitution of the arbitral tribunal (Art. 27).

Another focus of the new DIS Rules is the reduction of costs. The Rules therefore attempt to help parties resolve their dispute as early in the proceedings as possible. Similar to the prior version of the Rules, the arbitral tribunal is to encourage an amicable settlement of the dispute or of individual disputed issues at every stage of the arbitration (Art. 26). Also, the parties can jointly request the DIS to appoint a Dispute Manager to advise and assist them in selecting the dispute

resolution mechanism best suited for resolving their dispute – also in the course of an arbitration (Art. 2.2).

Vienna International Arbitral Centre (VIAC)

The premier arbitral institution in Austria, the Vienna International Arbitral Centre (VIAC), has also issued new rules. The new VIAC Rules of Arbitration and Mediation entered into force on January 1, 2018. The last version of the Rules was from July 2013. The revised Rules also stress time and cost efficiency, spelling out that the tribunal shall conduct the arbitration in an efficient and cost-effective manner (Art. 28.1). In addition, similar to recent revisions of other leading arbitration rules, the VIAC Secretary General is now given more flexibility to increase or decrease the arbitrators' fees where appropriate (Art. 44.7).

The new VIAC Rules have also made changes with respect to fees and costs, which is presumably part of the overall goal of providing a viable and cost-efficient dispute resolution alternative.