

TRIBUNAL RULES THAT CROATIA v SLOVENIA ARBITRATION PROCEEDINGS MAY CONTINUE DESPITE ARBITRATOR MISCONDUCT

Introduction

In a partial award handed down on 30 June 2016, a tribunal held that while Slovenia, by engaging in ex parte contact with the arbitrator originally appointed by it, acted in violation of provisions of its arbitration agreement with Croatia, the violations were not of such a nature as to entitle Croatia to terminate the Arbitration Agreement, nor did they affect the Tribunal's ability, in its current composition, to render a final award independently and impartially.

Background

The background to the present award is set out in our previous mailing [here](#).

In summary, on 4 November 2009, the Government of the Republic of Croatia and the Government of the Republic of Slovenia signed an agreement to submit their territorial and maritime dispute to arbitration. Oral hearings took place from 2-13 June 2014, and in a press release dated 10 July 2015, the Arbitral Tribunal announced that the award would be promulgated in December 2015.

Following that press release, the arbitration proceedings were seriously disrupted by recent allegations of bias and collusion by the Slovenian-appointed arbitrator and Slovenia's representative following the leaking of private conversations between the two. Transcripts of those conversations appeared to show the arbitrator leaking details of the deliberations of the Arbitral Tribunal, and likely outcome, to the Slovenian representative. The transcripts also appeared to suggest that the two were proposing strategies to influence other members of the Tribunal, including the sharing with other members of the Tribunal of Slovenia's submissions which would be presented as the arbitrator's own notes.

Following multiple resignations of the original arbitrators and replacements, and the purported withdrawal of Croatia from the arbitration, on 25 September 2015, the Tribunal was recomposed with replacement arbitrators appointed by the President of the Tribunal.

On 17 March 2016, a hearing took place focusing on the legal implications for the arbitration proceedings of events reported to have occurred in late-2014 and early-2015 that led Croatia to request the discontinuation of the proceedings. In response to the Tribunal's letter of 1 December 2015 inviting both sides to make further written and oral submissions, Slovenia filed submissions and appeared at the oral hearing; however, Croatia declined to do so.

Decision

The Tribunal (Judge Gilbert Guillaume (President), H.E. Mr. Rolf Einar Fife, Professor Vaughan Lowe, Professor Nicolas Michel and Judge Bruno Simma) handed down its

decision on 30 June 2016.

Having considered the factual background to the present proceedings, the Tribunal observed that the parties had developed opposing arguments relating to the jurisdiction of the Tribunal, its duty and ability to continue the proceedings and the validity of the termination of the Arbitration Agreement by Croatia (although Croatia had not presented formal submissions to the Tribunal, Croatia did communicate its views to the Tribunal and to the general public in no unclear terms notably through two letters from the Minister of Foreign and European Affairs of Croatia, dated 24 July 2015 and 31 July 2015; two notes verbales, dated 30 July 2015 and 16 March 2016; as well as other documentary annexes specifically made available by Croatia on a website dedicated to the present arbitration).

The Tribunal held:

Jurisdiction of the Tribunal

- The Tribunal had jurisdiction under the provisions of the Arbitration Agreement and Article 21, paragraph 1 of the PCA Optional Rules, and in conformity with Article 65 of the Vienna Convention, to decide whether Croatia, acting under Article 60 of the Convention, had validly proposed to Slovenia to terminate the Arbitration Agreement and has validly ceased to apply it.
- The Tribunal also had inherent jurisdiction to decide whether the arbitration process as a whole has been compromised to such an extent that the arbitration process could not continue.

Duty and ability to continue the proceedings

- Slovenia had acted in violation of the Arbitration Agreement through its contact between the arbitrator and Slovenian representative. However, the Tribunal disagreed with Croatia's contention that the breaches had tainted the proceedings in such a way that the proceedings could not go further.
- The Tribunal had both the power and duty to settle the land and maritime dispute between the parties, but also has the duty to safeguard the integrity of the arbitral process and to stop that process if it cannot ensure that integrity. The question was whether the Tribunal was able to preserve that integrity and how.
- With that in mind, the Tribunal noted that two new arbitrators had been appointed to the arbitral panel and no doubt has been expressed on the impartiality or independence of the three remaining arbitrators or of the two new ones. The Tribunal was thus properly recomposed.
- In the circumstances, and contrary to Croatia's submissions, the Slovenian arbitrator had not communicated to the Tribunal new arguments or facts not already contained in the official record of the Tribunal, i.e. in the written and oral pleadings of the Parties.
- It remained to be seen whether there had been any procedural disadvantage to Croatia or advantage to Slovenia; however, the Tribunal stated that it would be ready to consider reopening the oral phase of the case and to give each Party a further opportunity to express its views concerning what it regards as the most important facts and arguments, thus securing the procedural balance between the parties.
- Accordingly, there was no obstacle to the continuation of the proceedings under the Arbitration Agreement.

Validity of the termination of the Arbitration Agreement

- The Tribunal was required to decide whether Croatia has validly expressed its intention to terminate the Arbitration Agreement and has validly ceased to apply it.
- The Tribunal determined that the breaches of the Arbitration Agreement by Slovenia did not render the continuation of the proceedings impossible and, therefore, do not defeat the object and purpose of the Agreement.
- Accordingly, Croatia was not entitled to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention.

Response

Following publication of the partial award, Croatia's Ministry of Foreign and European Affairs issued a press release stating that it "*considers the Arbitral Tribunal's Partial Award as a missed opportunity for the Arbitral Tribunal to restore confidence in independence and impartiality of its own work, as well as confidence in international arbitration as such*". The Ministry added that Croatia is no longer a party to the arbitration process and that it shall not comment on the intentions or decisions of the Arbitral Tribunal, nor shall it consider itself bound by them. The press release can be accessed [here](#).

The Croatian Minister, Kovač, said that "the arbitration procedure is no longer relevant for Croatia" and repeated that Croatia is no longer a party in the procedure and does not comment on the intentions of the Arbitral Tribunal. Croatian News Agency's press release can be accessed [here](#).

9th August 2016