Anticipatory Renunciation to Challenge Arbitral Awards Under Swiss Law – An Update

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On 17 October 2017, the Swiss Federal Tribunal (Switzerland's highest jurisdiction) rendered a decision (4A_53/2017) on the challenge of an award rendered in the context of an international arbitration where the arbitration clauses of the disputed contracts both contained a wording whereby the parties renounced challenging any possible future arbitral award.

I. Relevant Facts

In 2003, a State which until then had been the sole shareholder of a company (the "Company") let the main gas company of another State take a stake (apparently minor) in the Company.
This led to the conclusion of a shareholders' agreement.

In 2008, the gas company became the majority shareholder of the Company.

In 2009, the shareholders entered into a "GAS Master Agreement" and amended their shareholders' agreement, thereby granting the gas company exclusive managing powers on the Company.

Both agreements contained the same dispute resolution clause, which reads as follows:

> "[a]wards 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".

In 2014, the State initiated arbitration proceedings under the UNCITRAL Rules against the gas company claiming that the conclusion of the "GAS Master Agreement" and amended shareholders' agreement was tainted with corruption. The arbitral tribunal comprised three members, including a well-renowned Professor designated by the State.

On 23 December 2016, the arbitral tribunal decided against the State.

On 1 February 2017, the State challenged the award before the Federal Tribunal by means mainly of a civil recourse (*"recours en matière civile"*) and in the alternative, of a request for revision (*"demande de révision"*). The former is the **ordinary** means of challenge of international arbitration awards mentioned in article 191 of the Swiss Private International Law Act ("SPILA"). The latter is an

extraordinary means which is currently not referred to in the SPILA (see however first author's article of 18 May 2017 on this blog) but which the Federal Tribunal has reckoned admissible in the context of international arbitration.

The grounds on which the civil recourse and request for revision were based were that the State had learnt in January 2017 that the arbitrator it had appointed had already acted in such capacity in an arbitration where he had been appointed (in 2013) by a company controlled by the defendant. This fact, which the arbitrator had not disclosed in the frame of the 2014-2016 arbitration, allegedly cast doubts as to his independence and impartiality. On this basis, the State aimed at having the award set aside and the arbitrator it had initially appointed recuse himself.

The gas company's prayers for relief were to dismiss the recourse and request primarily for lack of admissibility, alternatively for lack of merits.

II. Anticipatory Renunciation to Challenge an Arbitral Award

A. Validity

The Federal Tribunal started by examining the validity of an anticipatory renunciation to challenge arbitral awards.

It first referred to article 192 (1) SPILA which provides that *"[w]here none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2"*. As neither party had any such link to Switzerland, they were as a matter of principle entitled to renounce their right to challenge the award.

The Federal Tribunal then (re)affirmed that an indirect renunciation was not sufficient.
The renunciation must be direct, without however having to explicitly refer to articles 190 and/or 192 SPILA. For a renunciation to be valid, the parties must univocally express their common renunciation (*"de manière claire et nette"*), which is notably not the case of the sole mention *"sans appel"* (no appeal). Determining the parties' intent is a matter of interpretation.

In the case at hand, the Federal Tribunal was of the view that the wording of the disputed clauses showed the parties' clear and common intent that the arbitral award could not be "appealed" against. Not only was the last sentence of the dispute resolution clause univocal but the parties' common intent also derived from the use of the words "*final*" and "*conclusive*" and the fact that the parties limited a recourse to a State court only for enforcement purposes. The questioned remained however what "*appeal*" actually meant.

B. Extent of the Renunciation

1. Overview of Previous Decisions

To support its reasoning, the Federal Tribunal referred to previous decisions where it had interpreted the notion of "appeal" within the same context.

In one decision, it had highlighted two possible interpretations of the word "appeal", i.e. one wide, the other narrow. The former encompasses any means to challenge a decision (recourse *lato sensu*) whereas the latter solely designates the ordinary means of challenging a decision which is generally suspensive, devolutive and reformatory (recourse *stricto sensu*) and is not admissible before the Federal Tribunal in relation to international arbitration. The Federal Tribunal then interpreted the

wording of the arbitration clause which read "*all and any rights of appeal from all and any awards insofar as such exclusion can validly be made*" and held that the use of the words "rights of appeal" and "all and any" clearly ruled out any appeal *lato sensu*, such that the renunciation was valid and the "appeal" inadmissible.

In two other cases, both involving the same parties and the same dispute resolution clause, the Federal Tribunal had to examine the validity and extent of a renunciation to challenge an award where the disputed agreement provided that *"[n]either party shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law"*. It held that the word "appeal" had to be interpreted widely and that such clause clearly showed the parties' common intent to exclude any challenge of the awards. Accordingly, the renunciation was held to be valid and the civil recourses inadmissible.

In a later decision, the Federal Tribunal took the view that the sentence *"neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision"* could not be understood in good faith otherwise than the parties' clear common intent to exclude any right to challenge the arbitral award. The civil recourse was thus regarded as inadmissible.

Lastly, in a decision rendered in January 2017, the Federal Tribunal considered the sentence *"[t]he decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded [...]"* as a valid renunciation making the civil recourse lodged inadmissible.

2. The Case at Hand

a. The Civil Recourse

The Federal Tribunal held that the word "appeal" ought to be understood in its broad meaning in the case at hand (supra, II. B. 1.). Firstly, this resulted from the fact that no challenge of the award before an arbitral tribunal was possible under the UNCITRAL Arbitration Rules, which the parties had chosen (art. 32 (2) of the 1976 Rules). Secondly, the parties could not have wanted to solely renounce an appeal *stricto sensu* for none of the *lex arbitri* (Swiss law), the *lex causae* and the law of the seat of the gas company provided for such a means of recourse. Thirdly, the dispute resolution clauses which provided that the seat of the arbitral tribunal would be in Switzerland had been drafted by lawyers. Accordingly, one could only understand that the parties had renounced the only (ordinary) available means of recourse to challenge an award, i.e. the civil recourse.

As a result, the State's civil recourse was held inadmissible.

b. The Request for Revision

The State argued that irrespective of a possibly valid renunciation to the **ordinary** means of challenging an award, i.e. the civil recourse, such renunciation did not encompass the **extraordinary** means of challenging of an award that is the request for revision (supra, I.).

The Federal Tribunal pointed out that the request for revision had been lodged within the time limit applicable to the civil recourse and that it was as a matter of principle, due to its extraordinary character, secondary in nature to the civil recourse. It then expressed the view that it was difficult to admit that a party having validly renounced the challenge of an award on the ground that the sole

arbitrator was improperly appointed or the arbitral tribunal was improperly constituted (art. 190 (2) SPILA) could nonetheless invoke the same ground to challenge the award but through a request for revision. It confirmed the view it had already expressed, i.e. that deciding otherwise would deplete article 192 SPILA of its bearing. Arguing the contrary would *"breach good faith to the highest degree"*.

Accordingly, the request for revision was considered inadmissible as well.

III. Remarks and Conclusion

The herein commented decision, due to be published in the Federal Tribunal's collection of its most important decisions, is interesting for arbitration practitioners in several respects.

It serves as a useful reminder on how parties located outside Switzerland may validly renounce their right to challenge arbitral awards, an option which all *leges arbitrii* do not feature, and is practical insofar as it summarises past decisions where the Federal Tribunal has upheld renunciation clauses. It is also enlightening in terms of the possibly unexpected consequences when agreeing on a renunciation clause, the scope of which is not limited to certain grounds for challenges (art. 190 (2) SPILA), as the renunciation may then affect not only the **ordinary** civil recourse – which may often be the only challenge contemplated by the parties – but also the **extraordinary** request for revision – which the parties may not have in mind at that time – whenever the ground asserted can be invoked within both contexts. Accordingly, parties to contracts must be careful what they wish for in terms of dispute resolution as they may just get it… and more.

Also noteworthy are the very significant costs of the decision: the State was ordered to pay the Federal Tribunal no less than CHF 200'000 of legal costs and the gas company CHF 250'000 to cover attorney fees. The fees of the Federal Tribunal are in principle capped to CHF 100'000 when the value at stake exceeds CHF 10 million. However, by way of exception, fees may go beyond that amount and up to CHF 200'000 in particular circumstances not specified in the law. The high fees *in casu* may certainly be attributed, at least partially, to the three exchanges of submissions.

Lastly and amusingly, the Federal Tribunal, in line with its practice, blanked out the names of the parties. It did however not blank out the dates of enactment of the arbitration laws of the *lex causae* (the law of the State challenging the award) and of the seat of the gas company which it referred to, thereby undermining the relevance of blank outs.