Kluwer Arbitration Blog

Arbitration No Matter What?

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The first weeks of 2017 have again seen an exchange between Croatia and Slovenia about the continued work of the Arbitral Tribunal expected to decide this year on the course of the boundary between the two states. The Tribunal – formed under the 2009 Arbitration Agreement – will do so despite Croatia's decision to terminate the treaty and withdraw from the process because of Slovenia's serious violation of the Agreement in mid-2015. Kluwer Arbitration Blog has previously published a story about this scandal.

During the annual conference of Slovenia's ambassadors, for example, the country's officials called for a strategy to implement the prospective decision despite Croatia's repeated statements that it will not consider itself bound by it, no matter the contents. Only a few days later, the Slovenian Foreign Minister said that Croatia-bound tourists would encounter difficulties when travelling through Slovenia if Croatia did not respect the Tribunal's award. Croatian officials perceived this as a threat to the tourism industry which makes up 20% of the country's GDP, prompting swift reactions from the Foreign Minister, as well as MEPs who stated that such moves would be contrary to "the four freedoms" of the EU.

The continued work of the Arbitral Tribunal is evidently a source of great tension between the two countries, which is why – at this point – it is worth looking more closely at the Tribunal's Partial Award which allowed for the arbitration to continue. It did so despite "[a] severe breach[…] of duty of confidentiality and impartiality" thus only deepening the differences between Croatia and Slovenia instead of providing them with an opportunity to move forward with their bilateral dispute. What the Tribunal did in its Partial Award is establish that Slovenia did in fact violate the Arbitration Agreement, but that nevertheless, "[it] remains in force" (at para. 225) and that the Tribunal, as recomposed in late 2015, following a series of resignations, including that by Judge Abraham, President of the International Court of Justice, has the capacity and, moreover, the duty to continue the proceedings. Leaving several other considerations aside for reasons of brevity, what merits special attention in this decision is the distorted presentation of the most crucial facts of the case that then led the Tribunal to erroneous legal conclusions, all well to the prejudice of Croatia.

The most striking error is the Tribunal's claim – repeated three times – that after Dr. Sekolec resigned and the Tribunal was recomposed "[n]o doubt has been expressed on the impartiality or independence of the three remaining arbitrators or of the two new ones" (at paras. 186, 195 and 224), whereas Croatia could not have been more vocal about it. In its letters to the Tribunal of 24 July and 31 July 2015, it said, e.g., that it "ha[d] difficulty understanding how it would be possible

[…] for the other members of the Tribunal […] to distinguish between the arguments and 'facts' presented by Slovenia through Arbitrator Sekolec, and those developed solely by Arbitrator Sekolec on his own". Croatia also said that "no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process". This was repeated in Croatia's *note verbale* of 16 March 2016, which was also at the disposal of the Tribunal, as were all other documents that Croatia made available on its Foreign Ministry's website. The Tribunal chose not only to ignore Croatia's arguments, but explicitly stated the opposite, i.e. that no objections were made about anyone else on the Tribunal but Dr. Sekolec. By doing so, the Tribunal sought to exonerate itself from the duty to examine the shattering impact that Slovenia's actions had on the Tribunal as a collective body and on its members as individuals. This duty would have been inherent to its existence even if Croatia had not complained, which it obviously did. Instead, the Tribunal simply opted for the easy, but ultimately wrong way out and examined the issue of independence and impartiality very narrowly and solely from the perspective of two documents that Dr. Sekolec circulated to his co-arbitrators and oral interventions he made in the plenary meetings (at para. 123). The Tribunal ignored recorded conversations which reveal that Slovenian officials prepared these documents and that Dr. Sekolec only edited them to look like his own (at pp. 7-8 of Excerpts from Recordings). The Tribunal did not refer at all to the fact that Dr. Sekolec provided Slovenia with the draft of the "[final] award" (at p. 11 of Excerpts from Recordings) for comments and edits, which he then intended to give to the Tribunal's Registrar for further distribution.

The Tribunal also asserted that no new arguments or facts were presented to the Tribunal (at para. 195) whereas Dr. Sekolec was caught on tape as discussing the list of disputed areas in order of importance (at pp. 3-4 of Excerpts from Recordings) and textual descriptions of the boundary (at p. 9 of Excerpts from Recordings) as evidence which Slovenia – by explicit admission of Dr. Sekolec and the Slovenian official – had not presented to the Tribunal hitherto, and that he commits to discuss privately with President Guillaume and Judge Simma as his co-arbitrators.

It is logically and legally untenable not to appreciate the full extent of what Slovenia did through Dr. Sekolec, extending well beyond the contents and destiny of the two documents that the Tribunal mentions. It is equally unsustainable not to acknowledge the devastating impact of these actions on the arbitrators' states of mind at a time when their views were being formed. Notwithstanding their professional integrity and admirable record, in this specific case they were caught in a spider web of Slovenia's unscrupulous misconduct and manipulation making them manifestly incapacitated to continue to arbitrate independently and impartially.

In addition to affirming its capacity to arbitrate, the Tribunal also finds that it has the duty to do so because of an alleged unbreakable link between the conduct of arbitration and Croatia's EU accession. However, in fact – no such link exists. The Arbitration Agreement does not provide for Croatia's immediate and unconditional accession to the EU. It merely takes note of Slovenia's lifting of reservations to Croatia's accession negotiations, which in reality happened two months before the Agreement was even signed as the two states openly and actively sought to de-link the border issue from EU accession. That is witnessed by – for example – the explanation of the three principles that the two states' leaders agreed to on 31 July 2009 (see the Slovenian Government's website), as well as the Swedish Prime Minister's letter confirming the EU's understanding that accession talks would continue and that it is up to Croatia and Slovenia to decide how to resolve the border issue (see the Croatian Government's website). In that sense, the Tribunal's statement that "[f]ollowing [the Agreement's] entry into force […] Slovenia lifted its reservations to Croatia's accession to the [EU]" (at para. 15) and conclusions derived from that statement are as

wrong as they are disappointing. They show the Tribunal's inability to comprehend the facts of the situation or even merely copy and paste the facts that the two states themselves do not dispute.

The Tribunal's conclusion that it has the capacity (because its independence and impartiality were not challenged) and duty (because of the alleged unbreakable link between the arbitration and EU accession) to continue its work led it to two erroneous legal conclusions:

First, the Tribunal accepted to be a judge in its own right and *proprio motu* assess the merits of Croatia's claim that the independence and impartiality of that very same Tribunal were destroyed beyond repair. An appropriate appreciation of the extent of damage inflicted on this arbitration would have led the Tribunal to exclude itself from assessing the validity of Croatia's treaty termination. As Croatia requested and as it should happen in all similar cases when procedural provisions of the treaty in question suffered violation, it should have directed the two parties to follow the procedure envisaged in the Vienna Convention, including the conciliation mechanism at the UN (see, for example, Villiger's *Commentary on the 1969 Vienna Convention on the Law of Treaties*, at p. 746).

Second, the Tribunal establishes that Slovenia's violation of the Agreement did not amount to "material breach", which the Vienna Convention describes as a "violation of a provision essential to the accomplishment of the object and purpose of the treaty". Thus, Croatia was not entitled to treaty termination. The Tribunal failed to acknowledge as essential – and as violated – the manner in which arbitration is conducted, i.e. by an independent and impartial body. It also remained silent on the fact – nevertheless recognized by one of its members, Judge Simma – that what is essential to a treaty, and what brings about material breach, is primarily what the parties themselves consider a key to effective treaty implementation (see, for example, Simma and Tams's *Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach in the commentary of the Vienna Convention*, edited by Corten and Klein). It follows that, had the Tribunal appropriately assessed the extent of harm that Slovenia's actions inflicted on its independence and impartiality as key components of any arbitration, and had it taken the views of the parties into account, it would have found that Slovenia's behavior destroyed an essential element of the treaty relation, which in the ICJ's jurisprudence (paras. 216 et infra) amounts to material breach, giving rise to the right to terminate.

The fact that the Tribunal's legal conclusions are based on evidently false premises is alarming. It shows a panel either disinterested in facts or unwilling to establish them and apply law. Whatever the true background, the end result is a troubling reality of a tribunal determined to continue to arbitrate even if it means conflating facts, ignoring procedural standards and propelling the parties to an interminable dispute. By deciding to continue its work, the Tribunal missed an opportunity to leave this arbitration process aside and bring Croatia and Slovenia closer to resolving their bilateral dispute through other means. Even more importantly, as an international judicial body, it failed to lead by example by reaffirming the fundamental legal and ethical standards in international arbitration, crucial to all states contemplating third-party dispute settlement mechanisms.

The views expressed herein are those of the authors and do not necessarily represent the views of the Ministry of Foreign and European Affairs of the Republic of Croatia.

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