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The End of a Saga: Swiss Federal Supreme Court Upholds Clorox v. Venezuela Final Award

Nicole Cleis (Walder Wyss) · Wednesday, July 3rd, 2024

On 26 April 2024, the Swiss Federal Supreme Court ("SFSC**"**) rendered decision 4A_486/2023, upholding the unpublished Final Award in *Clorox Spain S.L. v. Bolivarian Republic of Venezuela* ("*Clorox v. Venezuela*") (PCA Case No. 2015-30).

In the underlying investment treaty arbitration, Clorox sought compensation for the alleged expropriation and unfair treatment of its investment by Venezuela, through the enactment of price controls and currency exchange restrictions, and the nationalization of its assets.

The Geneva seated *ad hoc* arbitration tribunal consisting of Yves Derains, Raúl Vinuesa, and Bernard R. Hanotiau found a creeping indirect expropriation of Clorox's investment by Venezuela without adequate compensation under article V of the bilateral investment treaty between Venezuela and Spain (the "BIT") and awarded Clorox roughly USD 104 million.

This post summarizes the SFSC's decision on the set-aside action against this award and puts it into context.

The SFSC's Decision

In its decision of 26 April 2024, the SFSC sets out the strict procedural requirements for a set-aside of international arbitration awards in Switzerland:

Only requests based on the specific grounds listed in article 190(2) of the Swiss Private International Law Act ("PILA") are admissible (para. 4.1). The appellant must demonstrate with precise arguments why the invoked grounds justify a set-aside of the arbitration award, and must do so directly in its brief, instead of referencing any pleadings or evidence contained in the arbitration file. So-called appellatory criticism ("*critiques appellatoires*," "*appellatorische Kritik*") of the award, i.e., insufficiently specific complaints about the award, are inadmissible (para. 4.1).

The SFSC is bound by the facts (including the course of the proceeding) as set out in the arbitration award. Unlike an appellate court, it may not fully re-examine the case and correct or supplement the facts established by the arbitral tribunal, even if these facts are manifestly inaccurate or even violate the law (para. 4.2).

In the case at hand, the SFSC held that Venezuela's set-aside action at least partially failed to live up to the strict procedural requirements set out above: In a facts section of its motion, Venezuela apparently attempted to rewrite the facts of the case, inviting the SFSC to refer to the pleadings and exhibits in the arbitration file. Venezuela did not, however, raise any specific objection against the facts as set out in the contested award. The SFSC held that under these circumstances, it did not need to take the alleged facts into account (para. 4.3).

The SFSC then considered Venezuela's claim that the award was contrary to public policy (article 190(2)(e) PILA), recalling its long-standing definition of public policy as essential and widely recognized values that, according to prevailing Swiss notions, should form the foundation of any legal order ("*les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique*").

An arbitration award violates substantive public policy if it violates fundamental principles of substantive law to such an extent that it is incompatible with the legal order and the underlying value system ("*lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants*"). An annulment on such grounds is extremely rare, as it requires that the outcome of the award (and not merely its reasoning) be inconsistent with public policy. Misappraisals of the evidence, manifestly erroneous findings of fact, clear violations of law or arbitrariness of the award do not suffice (para. 5.1.1).

An arbitration award violates procedural public policy if it disregards fundamental procedural principles to such an extent that it appears incompatible with the values recognized in a state governed by the rule of law (para. 5.1.2).

In the case at hand, the arbitral tribunal had held that various measures taken by Venezuela amounted to a creeping indirect expropriation: As a result of price controls set by Venezuela, Clorox had been forced to sell at least 70% of its products at prices below production costs; Clorox's ability to import raw materials was limited because of currency constraints; and finally, Venezuela had unlawfully withheld VAT credits from Clorox, thereby aggravating its economic situation (para. 5.2).

The SFSC noted that in its set-aside action, Venezuela presented its own version of the facts and substituted its evaluation of the evidence for that of the tribunal. Venezuela maintained that contrary to the facts set out in the award, Clorox's loss of control over its investment was not established, and essentially asked the SFSC to freely review the matter, *de novo*. The SFSC held that by doing so, Venezuela clearly confused the SFSC for an appellate court which could freely review the case, including the arbitral tribunal's application of substantive law. Thus, the SFSC questioned whether Venezuela's set-aside action based on public policy grounds was even admissible. In any event, the request would have to be rejected as Venezuela merely questioned the arbitration award's compliance with the applicable law, attacked the arbitrators' findings of fact, and their assessment of evidence and reasoning. This criticism, even if it were true, would not reach the high threshold for a violation of public policy, in any event (para. 5.3).

The SFSC therefore dismissed the appeal to the extent it was admissible, ordering Venezuela to bear the costs of the proceeding and to compensate Clorox for its legal costs.

Discussion

During the more than nine-year long course of the Clorox v. Venezuela arbitration, the SFSC dealt with no less than three set-aside actions in the matter:

First, the negative jurisdictional award of 20 May 2019 was challenged by the investor Clorox, resulting in the first-ever (partial) set-aside of an investment treaty award by the SFSC in decision 4A_306/2019 of 25 March 2020 (published in part in DFC 146 III 142). The SFSC overruled the arbitral tribunal's finding that there was no investment pursuant to the BIT, for lack of Clorox's active investment of assets, and remanded the case to the arbitral tribunal to decide on any other potential jurisdictional objections, such as an abuse of rights because of illegitimate nationality planning (para. 4).

Then, the arbitral tribunal's new jurisdictional award of 17 June 2021, which now accepted the tribunal's jurisdiction by a majority of votes (with the arbitrator appointed by Venezuela, Raúl Vinuesa, dissenting), was challenged before the SFSC by the host state, Venezuela. The arbitral tribunal had dismissed Venezuela's remaining objections, including its claim that the restructuring (which gave rise to the investor's protection under the BIT) constituted an abuse of process. In its decision 4A_398/2021 of 20 May 2022, the SFSC rejected the set-aside action, finding that Venezuela had failed to show that the restructuring was abusive. In particular, the SFSC held that, at the time of the restructuring, the specific dispute between the parties was not yet foreseeable. By thus confirming the arbitral tribunal's jurisdiction, the SFSC opened the door for an award on the merits.

Finally, in the latest decision summarized above (4A_486/2023 of 26 April 2024), Venezuela sought to have the SFSC set aside the arbitral tribunal's Final Award of 9 August 2023, based (*inter alia*) on public policy grounds. The SFSC rejected the application and confirmed the validity and enforceability of the Final Award.

Of all three SFSC decisions in the Clorox v. Venezuela matter, the latest decision was the least surprising. The SFSC has a broader power of review in the context of challenges to an arbitral tribunal's jurisdiction (article 190 (2)(b) PILA), where it can freely examine whether the arbitral tribunal's findings violate the law. This includes preliminary questions of substance affecting the decision on jurisdiction (cf. decision 4A_306/2019 of 25 March 2020, para. 3.4.1.; decision 4A_398/2021 of 20 May 2022, para. 5.1.). The SFSC made rather bold use of this power of review in the first action for set-aside, thus (in hindsight) paving the way to the now upheld USD 104 million award.

Its rejection of Venezuela's latest set-aside action, in contrast, was to be expected, as the threshold for an award to be set aside by the SFSC on the merits is notoriously high: According to statistical data, the already low likelihood of a set-aside (7.56% for non-sports related arbitration awards) is even lower when it comes to actions for set-aside based on an alleged violation of public policy (0.9%, with no set-aside in non-sports related cases, between 1989 and 2019). In the SFSC's own words, a set-aside based on a violation of public policy is an extremely rare occurrence (a "*chose rarissime*", cf. decision 4A_486/2023, para. 5.1.1).

Conclusion

Decision 4A_486/2023 marks the end of the Clorox saga before the SFSC and unsurprisingly confirms the Final Award in the matter. While this latest decision underscores the SFSC's restraint

in reviewing international arbitration awards on the merits, confirming its pro-arbitration stance, the SFSC's handling of all three set-aside actions is a testament to the SFSC's reliability, competence and efficiency, thereby reinforcing Switzerland's position as a leading arbitration jurisdiction.

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