

CROATIA v. SLOVENIA ARBITRATION- ARBITRATOR CALLS TAPPED

Introduction

Arbitration proceedings between Croatia and Slovenia to resolve maritime and land boundary disputes between the two countries have been seriously disrupted by recent allegations of bias and collusion by the Slovenian-appointed arbitrator and Slovenia's representative. Following a series of resignations by arbitrators and replacement arbitrators, and a purported withdrawal and termination of the arbitration agreement by Croatia, the arbitration proceedings (which have been ongoing for over three years) have been thrown into jeopardy.

Background and Arbitral Proceedings

Background and Arbitration Agreement

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 (that dispute concerning an area of approximately 13 square kilometres of land in the northern Adriatic). The Permanent Court of Arbitration acts as Registry in the arbitration.

Pursuant to Article 3(1) of the Arbitration Agreement, the Arbitral Tribunal was to determine:

“(a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia;

(b) Slovenia's junction to the High Sea;

(c) the regime for the use of the relevant maritime areas.”

Arbitral proceedings

The Arbitral Tribunal was composed of the following members:

- Judge Gilbert Guillaume (Chairman);
- Professor Vaughan Lowe QC;
- Judge Bruno Simma;
- Dr. Jernej Sekolec (Slovenian appointment);
- Professor Budislav Vukas (Croatian appointment).

A first round of pleadings were submitted on 11 February 2013, with a second round being submitted on 11 November 2013. According to the Tribunal's press release dated 10 July 2015, the parties included nearly 1,500 documentary exhibits and legal authorities, along with over 250 figures and maps.

Oral hearings took place from 2-13 June 2014. Pursuant to Article 6(5) of the Arbitration Agreement, the hearing was not open to the public. A summary of the arguments presented by the Parties in the course of the hearing was issued in the form of a PCA Press Release on 17 June 2014 after the closure of the hearing.

By way of a press release dated 10 July 2015, the Arbitral Tribunal announced that the award would be promulgated in December 2015.

Allegations of bias

Publication of letter from the Tribunal dated 5 May 2015

Following statements by the Slovenian Foreign Minister, on 30 April 2015, Croatia wrote to the Tribunal raising concerns as to the confidentiality of information in the arbitral process. In particular, Croatia raised concerns that the statements “*could be construed as implying that one of the Parties to the proceedings may have an informal channel of communication with the Tribunal that may compromise the arbitration procedure and its outcome.*”

On 5 May 2015, the Arbitral Tribunal wrote to the parties in a letter which was disclosed publically (with the consent of the parties) responding to suggestions that confidential information relating to the arbitration had been disclosed. In that letter:

- The Tribunal noted that it was “seriously concerned” by the suggestion that one Party would have been privy to confidential information related to the Tribunal’s deliberations.
- It was observed that such suggestions could be attributed to statements such as those made by the Slovenian Foreign Minister, which were considered to be unhelpful for resolution of the dispute.
- The parties were reminded of their obligations under Article 10 of the Arbitration Agreement, and the Tribunal reiterated the duty of both parties and arbitrators pursuant to Section 9.1 of the Terms of Appointment of the arbitrators, which provided, “[t]he Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal *ex parte* in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings.”
- The Tribunal noted Slovenia’s assurances that it had not received any information whatsoever as to any aspect of the outcome of the arbitration, but examined – and requested that the PCA examine – the processes in place to safeguard confidential information.
- The Tribunal concluded that it was confident that no information about the likely outcome of any aspect of the arbitration had been disclosed.

Publication of allegations in national press

On 22 July 2015, the Croatian daily newspaper Večernji list (apparently acting on information published in the Serbian newspaper Kurir) published transcripts of audio recordings between arbitrator Dr. Jernej Sekolec (Slovenian appointment) and the Slovenian party representative, Simona Drenik (Minister Plenipotentiary, Legal Advisor, Cabinet of the Minister, Ministry of Foreign Affairs).

Transcripts of those conversations (which were allegedly obtained as a result of illegal wiretapping by Croatian intelligence) appeared to show Dr Sekeloc 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 Dr Sekolec's own notes.

On 23 July, Dr Sekolec and Simona Drenik resigned. In a press release dated 23 July 2015 issued by the PCA on Dr Sekloec's resignation, it was noted that "*once reconstituted, the Tribunal intends to resume its deliberations in the present arbitration without delay.*"

Recent developments

Following the publication of the allegations and recordings, and subsequent resignation of the involved parties, the arbitral process has been severely – and potentially fatally - disrupted:

- 24 July 2015: Slovenian Prime Minister, Miro Cerar, stated that he had demanded the resignation of both Slovenian participants and that the Slovenian government had not been aware of the communications between the two.
- 24 July 2015: the Croatian government called for a meeting of the Sabor to discuss exiting arbitration over the reported breaches in the arbitration tribunal.
- 27 July 2015: Prime Minister Zoran Milanović announced the withdrawal of Croatia from arbitration after a meeting with the leaders of parliamentary groups.
- 28 July 2015: Slovenia appointed Judge Ronny Abraham, president of the International Court of Justice, as their choice on arbitration panel.
- 28 July 2015: PCA announces in a press release that a hearing on the issue would be arranged in the "coming days".
- 29 July 2015: the Croatian parliament unanimously decided to cancel the arbitration due to the allegations of significant breaches of arbitration rules by Slovenia.
- 30 July 2015: Budislav Vukas, Member of the Arbitral Tribunal appointed by Croatia, resigned, stating in a letter that the resignation of Dr Sekolec and Simona Drenik could not "*rectify the detriment they have caused to the arbitration proceeding*", and citing the "*numerous acts of Mr Jernej Sekolec, the arbitrator appointed by Slovenia, and Ms Simona Drenik, the Agent of Slovenia, which have violated the basic principles of a fair arbitration proceeding*" as the basis for his resignation.
- 30 July 2015: Croatian government announced that it was commencing the procedure to terminate the arbitration agreement. The Ministry of Foreign and European Affairs of Croatia sent a note verbale to Slovenia notifying it that, because of the gravity of Slovenia's material breach of the provisions of the Arbitration Agreement, requirements had been met for its termination. Slovenia was also notified that from the date of the note Croatia ceased to apply the Arbitration Agreement.
- 31 July 2015: In a letter dated 31 July 2015, Croatia informed the Tribunal that it intended to terminate the Arbitration Agreement. It stated that "*the arbitration process has been totally and irreversibly compromised... The official record of the entire arbitration has been contaminated... There is no tool available for repairing the damage that has been occasioned to the proceedings and the Arbitration Agreement. The official records appear to have been corrupted by unlawful and unethical submissions by one of the Parties after the close of written proceedings and hearings, and no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration*"

process. The arbitration process as a whole has been compromised to such an extent that Croatia is confident that the arbitration process cannot continue in this or any similar form.”

- 5 August 2015: Judge Abraham resigned. In a press release dated 5 August 2015, the PCA stated, “*Judge Abraham informed the Tribunal that he had agreed to his appointment in the hope that this “would help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally, with the consent of both Parties.” Having realized that “the current situation cannot meet that expectation,” Judge Abraham considered that it was “no longer appropriate” for him to serve as arbitrator in the present proceedings.*”
- 13 August 2015: Slovenia writes to the Tribunal objecting to Croatia’s purported unilateral termination of the Arbitration Agreement, and stating that Slovenia believes that the Tribunal “*has the power and the duty to continue the proceedings*” as it would otherwise be open to any party wishing to delay or prevent the making of an arbitral award to frustrate an arbitration agreement.
- 19 August 2015: The Arbitral Tribunal published a press release in which it stated that the President of the Tribunal would appoint the remaining two members of the Tribunal to replace the two that have resigned. Once that happens, the Tribunal intends to consider the Parties’ positions and actions carefully.

Concluding Observations

As we have pointed out in recent bulletins on litigation and arbitration, parties are resorting to ever increasing aggressive (legally or ethically questionable?) tactics in support of their positions.

In this case, if the taped conversations are accurate, serious questions are raised as to the conduct of the Slovenian arbitrator and Slovenian Government agent.

There are some who say that informal communications between arbitrator and Counsel are unfortunately all too commonplace. Perhaps this stark situation will serve as a lesson for all that independence and impartiality cannot always be taken for granted.

Arbitrators, parties and Counsel beware!

1 September 2015