

Swiss Supreme Court dismisses further challenge in long-running Palestinian casino project dispute

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_446/2022*, the Swiss Supreme Court refused to set aside an award in a long-running dispute regarding a casino project in Palestine, finding that the arbitral tribunal did not disregard the res judicata effect of a prior award and therefore did not violate procedural public policy.

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In a recently published decision, the Swiss Supreme Court has dismissed a challenge to an award in a long-running dispute relating to a tourism project involving the Palestinian Authority and a Palestinian company (A), on the one hand, and a company incorporated in Liechtenstein (B) on the other. The parties had entered into an agreement for the development and operation of a casino and hotel in Palestine and agreed on a monthly rental fee to be paid by B to A for using the land.

In a first arbitration, B requested that the Palestinian Authority be ordered to grant licences for the operation of the casino and hotel. The tribunal rejected B's request in a first award that was set aside by the Swiss Supreme Court (see *Legal update, Swiss Supreme Court sets award aside for violation of right to be heard*), then issued a second award that was also set aside (see *Legal update, Swiss Supreme Court sets aside renewed award due to non-compliance with earlier decision rendered in same arbitral proceedings*) and finally a third award ordering the Palestinian Authority to grant the hotel licence.

In a second arbitration, A sought payment from B of the rent for use of the land. The arbitral tribunal granted the claim only in part. A challenged the award for alleged violation of procedural public policy (*article 190(2)(e) PILA*). According to the Swiss Supreme Court, procedural public policy is violated when a tribunal disregards the res judicata effect of a prior award. This effect prevents tribunals from making new decisions on claims that were decided in a prior award or from basing their awards on a premise that departs from the operative part of a prior award.

In the present case, the Supreme Court dismissed A's allegation that the tribunal in the second arbitration had disregarded the res judicata effect of the awards in the first arbitration. A argued that the tribunal's decision was premised on whether B was entitled to a casino licence and that this question had been finally decided in the first arbitration. The Supreme Court rejected the challenge, finding that the tribunal had based its decision on the factual premise that the parties had a common expectation when entering into the contract that a casino licence would be granted, not on the legal question of whether B was entitled to receive the licence.

This latest decision in the dispute highlights that issues to be decided in a second arbitration must be identical to those decided in the first arbitration in order for the preclusive effect of res judicata to apply.

Case: *Decision 4A 446/2022 (Swiss Supreme Court) (15 May 2023)*.

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