Swiss Supreme Court sets award aside for violation of right to be heard

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In *decision 4A_532/2016*, the Swiss Supreme Court considered whether to partially annul and remand an award to an arbitral tribunal for a violation of the right to be heard because the tribunal failed to address the petitioner's arguments regarding a part of the requests for relief.

Speedread

The Swiss Supreme Court has partially annulled and remanded an award back to the tribunal.

The award concerned contracts and relevant licences for the operation of a casino and a hotel in the West Bank, in the Middle East. The arbitral tribunal had to assess the relevance of Palestinian criminal law, rendering gambling illegal, on contracts entered into between the Palestinian Authority, a Palestinian company and the claimant investor (a Liechtenstein company). The tribunal found that while the underlying agreements were validly concluded, the specific performance of these contracts was not possible, since this would be in violation of Palestinian law. However, the tribunal held that the claimant could possibly claim for damages resulting from the non-performance of the contracts, but that it had not established the requirements for such damages.

The Supreme Court held that the arbitral tribunal violated the petitioner's right to be heard because it applied the same reasoning for denying the renewal of the casino licence also to the hotel licence, without addressing the petitioner's specific arguments relating to the hotel licence in the award.

This case shows that the parties' right to be heard is protected even in cases where the arbitral tribunal has misunderstood the parties' requests and/or submissions. From a practical point of view, parties should always make sure that submissions and requests for relief are correctly and fully understood by the arbitral tribunal during the proceedings to avoid a significant loss of time and money. (*Decision 4A_532/2016.*)

Background

Article 190(2) of the Private International Law Act (PILA) provides that an award may be set aside if:

- The principle of equal treatment of the parties or the right of the parties to be heard was violated (*Article 190(2)(d)*).

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- Public policy was violated (*Article 1902(e)*).

Facts

After the Oslo agreements of 1993 and 1995 between the Palestine Liberation Organisation (PLO) and Israel, the Palestinian Authority pursued several projects in order to further the local economy and to attract investors including the construction and operation of a hotel resort and casino. Against this background, in December 1996, a Liechtenstein company (A) entered into several agreements with the Palestinian Authority (PA) and a Palestinian company (B) to develop a tourism project, with the operation of a casino as its main pillar.

After the signing of the main agreement, A started to build the hotel and casino and B provided the necessary permits and infrastructure. A received the casino licence from the Department of Justice of the PA. As a consequence of the second intifada, Israel closed the access to the territory in which the casino was situated. This, coupled with damage to the casino during the intifada, led to the closure of the casino in October 2000. However, the hotel was kept open. In December 2000, the parties entered into several further agreements, which, in essence, prolonged the casino and all other licences until the year 2028.

In March 2012, after several failed attempts to receive renewed licences for the tourism project from the PA, A commenced arbitration in accordance with the Swiss Rules of International Arbitration (2012) and demanded, among other things, that the PA be ordered to procure a casino licence valid until 2028 and to amend the term of all other licences necessary to operate the hotel and the casino for the same period. In addition, A requested that the arbitral tribunal order PA and B jointly and severally to pay damages in the amount of approximately $1.5 billion.

The arbitral tribunal denied A's request on the basis that the issuance of a casino licence, and hence, the performance of the main agreement between the parties, was impossible for the PA, given that under Palestinian law, gambling is illegal. However, the arbitral tribunal acknowledged that the main agreement was validly concluded and that A could possibly therefore claim damages for non-performance. However, it ultimately rejected A's claim for damages, in essence because A had failed to establish the required causal link between the alleged breach of contract and the alleged damage.

A petitioned the Supreme Court to set aside the award for for violations of public policy and for a violation of its right to be heard.

Decision

The Swiss Supreme Court set the award aside in part.

Violation of public policy

The Supreme Court first turned to A's challenge on the ground of a violation of public policy. A argued that the arbitral tribunal rendered its decision in violation of the principle of *pacta sunt servanda* (contracts must be kept) in that it acknowledged the valid conclusion of the main agreement, but refused to enforce its legal consequences. Moreover, the arbitral tribunal violated public policy, by not sanctioning the PA's contradictory and abusive behaviour of invoking the illegality of gambling for the first time only after A's renewed application for the licences in 2012. The Supreme Court rejected both arguments, reiterating that the principle of *pacta sunt servanda* is only violated if a tribunal acknowledges the validity of a contract, but fails to apply it. The principle does not extend to the process

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of contract interpretation and the legal consequences drawn therefrom. As a result, in the case at hand, where the arbitral tribunal found that the contract did not provide A with the right to request specific performance, there could be no violation of the *pacta sunt servanda* principle. Moreover, the Supreme Court explained that the tribunal did not protect contradictory behaviour of the PA, because the arbitral tribunal took the Palestinian law on gambling into account when deciding on the type of liability (specific performance against the damages claim).

Violation of the right to be heard
The Supreme Court upheld A's arguments in this regard.

A argued that the tribunal violated its right to be heard in that it did not consider the arguments brought forward with regard to the hotel licence, but rather rejected the extension of all licences on the ground that the operation of a casino is illegal. Given that the illegality does not affect the PA's ability to issue a licence for the operation of the hotel, the Supreme Court held that the arbitral tribunal should have dealt with this (separate) request in its award.

The court rejected the PA and B's argument that the arbitral tribunal implicitly rejected A's request for a hotel licence. In fact, the arbitral tribunal itself confirmed in its submission to the Supreme Court that it did not examine the hotel licence, given that the separate issuance of a hotel licence was never argued in the proceedings. Furthermore, the Supreme Court rejected the arbitral tribunal's view that the request for issuance of "all other licences necessary to operate the hotel and the casino" could only be understood as to refer to the entirety of all licences rather than to single licences and therefore held that that the tribunal should have dealt with the separate issuance of the hotel licence in its award.

In consequence, the Supreme Court while confirming the main part of the award, annulled the award in this respect and remanded the award to the arbitral tribunal for a renewed decision on the limited matter of the hotel licence.

Comment
This case shows that the parties' right to be heard is protected even in cases where the arbitral tribunal has misunderstood the parties' requests and/or submissions. The tribunal in the present case was, according to its submission to the court, convinced that the petitioner did not intend to claim the issuance of singular licences, but rather the entirety of all licences needed for the operation of the casino and the hotel. This misunderstanding notwithstanding, the Supreme Court rightly safeguarded the petitioner's right to be heard.

From a practical point of view, parties should always make sure that submissions and requests for relief are being correctly and fully understood by the tribunal to avoid a significant loss of time and money. In the present case, although A prevailed in one point, it had to bear 95% of the court fees and party costs which were, once again, very high, due to the amount in dispute. In order to avoid any misunderstanding between parties and the tribunal, parties should avoid combining prayers for different issues in one heading as the tribunal will routinely check if all prayers are dealt with in the award. Also, it helps to summarise the issues in dispute in the final submissions, in particular if certain issues (because less relevant) have not been argued extensively.

Case
Decision 4A_532/2016 (Swiss Supreme Court).

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