

Supreme Court partially annuls award for violation of right to be heard

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Facts

Decision

Comment

In a recently published decision, the Supreme Court partially annulled an award on the grounds that the arbitral tribunal had failed to take into account the claimant's argument in support of one of its prayers for relief. [\(1\)](#)

Facts

The dispute arose in connection with a tourism project regarding the construction and operation of a hotel and casino in the West Bank involving a Liechtenstein company (A), the State of Palestine and a Palestinian company (B). The general agreement entered into by the parties in 1996 provided, among other things, that B was "to organise and procure all necessary permits and licences for A. ___ AG in order to build and operate the Tourism Project", failing which it had to "to indemnify A. ___ AG for all damages". The agreement was governed by Swiss law and provided for arbitration in Zurich "pursuant to the Commercial Arbitration Rules of the Zurich Chamber of Commerce".

In July 1997 A obtained a 15-year licence for the operation of the casino, which began operations in September 1998. The hotel opened in July 2000.

In October 2000, further to a decree of the Israeli military forces that made it impossible for visitors to enter into the territory encompassing the casino and the hotel without authorisation, A was forced to close the casino. The operation of the hotel continued.

In December 2000 the parties entered into two further agreements "to safeguard the further developments of the Tourism Project" and to prolong the term of the licences for 30 years. These agreements also provided that the arbitration clause contained in the general agreement was applicable.

In 2002 the State of Palestine issued its criminal code, which provided that "whoever operated a public place for gambling will be imprisoned for six months and fined for fifty dinars".

In March 2002, although it appears that the access to the territory remained restricted, A requested the State of Palestine to issue new licences for the tourism project. This request (renewed in 2013) remained unsuccessful.

In December 2013 A started arbitration proceedings under the Swiss Rules of International Arbitration against the State of Palestine and B seeking, *inter alia*:

- an order that the State of Palestine issue a casino licence valid until September 13 2028 and prolong the term of other licences and permits until that date;
- a declaration that A was entitled to continue the operation of the casino and the hotel until September 13 2028; and
- an order that the State of Palestine and B jointly and severally pay approximately \$1.4 billion

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in damages plus interest.

In 2016 the arbitral tribunal rejected the relief sought by A because mandatory Palestinian law prohibited gambling and thus prevented the specific performance of the agreements, and A had not established that the requirements for damages were met.

A challenged the award before the Supreme Court.

Decision

The Supreme Court first recalled that the 30-day deadline to file a challenge against an arbitral award is a statutory deadline and thus cannot be extended, whereas the deadline to submit the answer to the challenge is set by the Supreme Court and may be postponed at the parties' request.⁽²⁾ It also recalled that a challenge must be fully reasoned and that the applicant cannot use the reply, if any, to complete or improve its challenge.⁽³⁾

The Supreme Court rejected A's public policy arguments as follows:

- There was no violation of the *pacta sunt servanda* principle⁽⁴⁾ because the arbitral tribunal had not contradicted its own interpretation regarding the existence and content of the disputed agreements on the basis of the chosen law and mandatory Palestinian law.⁽⁵⁾
- It was not abusive for the arbitral tribunal, despite the choice of Swiss law, to rely on mandatory Palestinian law, which prohibited gambling.⁽⁶⁾
- A had not sought any compensation on the basis of an expropriation.⁽⁷⁾

Finally, the Supreme Court dealt with A's arguments that the arbitral tribunal had violated its right to be heard by rejecting A's prayer for relief regarding the hotel without taking into account its argument that the operation of a hotel was not illegal in Palestine. It found that the arbitral tribunal had committed such a violation because it had not made any findings as to why the prohibition of gambling provided by Palestinian criminal law would also apply to the operation of a hotel in Palestine. There were no indications that the arbitral tribunal had at least implicitly dealt with this issue and, in its submission to the Supreme Court, the arbitral tribunal confirmed that it had not specifically examined the issue of the hotel licence.⁽⁸⁾

Comment

This decision does not add anything new to the Supreme Court's well-established line of decisions on the right to be heard.

Although its argument that the right to be heard had been violated was upheld, A had to bear 95% of the Supreme Court costs and the legal costs because the Supreme Court considered that the annulled part of the award, which had no monetary value, was much less significant than A's other prayers for relief.

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Endnotes

(1) Supreme Court, 4A_532/2016, May 30 2017 (in German).

(2) Ground 2.2.

(3) Ground 2.7.

(4) This principle is violated if the arbitral tribunal refuses to apply a contractual clause although it considers that such a clause is binding on the parties or, conversely, if it applies such a clause although it considers that it is not binding on the parties (ground 3.2.2).

(5) Grounds 3.2.1 and 3.2.2.

(6) Grounds 3.3.1 and 3.3.2.

(7) Grounds 3.4.1 and 3.4.2.

(8) Grounds 4.2 and 4.3.

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