Award granting compensation in currency other than one claimed upheld (Swiss Supreme Court)

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

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In *Decision 4A_516/2020*, the Swiss Supreme Court upheld an ICC award that ordered payment of damages in Syrian lira (SYP), whereas the claimants had requested payment in USD. Due to the devaluation of the SYP, the value of the damages was significantly lower than if they had been granted in USD. The claimants challenged the award on the grounds of a violation of the principle of *extra petita* and of public policy. The Supreme Court dismissed the challenges on both grounds.

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In a recent French-language decision, the Swiss Supreme Court upheld an ICC award in which the tribunal had awarded Turkish investors compensation in Syrian lira (SYP) although the investors had requested relief in USD. The dispute involved investors of two cement plants in Northeastern Syria. The region fell under Kurdish control in 2012 and the operation of the plants had to be abandoned by the investors.

The investors commenced ICC arbitration against Syria to obtain compensation for the value of their stake in the plants and requested payment of damages in USD. The tribunal ordered Syria to pay the investors approximately SYP2 billion plus interest and allowed the investors to demand payment in USD at the official exchange rate of the Syrian Central Bank on the day of payment. However, due to the devaluation of the SYP, the amount awarded in SYP was worth only approximately 21% of the 2012 USD value of the award (down to approximately USD9 million from approximately USD42 million).

The investors challenged the award based on a violation of the principle of *extra petita* and on public policy grounds. The Swiss Supreme Court rejected both grounds.

The court found that what is relevant from a public policy perspective is whether the amount awarded is so out of proportion to the loss incurred that it "shockingly contradicts" fundamental principles of the legal order. While the tribunal's refusal to convert the award into USD meant that the investors had to bear the consequences of the "spectacular inflation" of the SYP and the value of the investment in SYP

was approximately 79% lower than if in USD, the court found it was necessary to consider the entirety of the circumstances, including that the investors had chosen to invest in Syria and, therefore, accepted the risks inherent to the host state.

Regarding the *extra petita* challenge, the court conceded that payment in SYP was technically something "other than what had been claimed", but found that the investors lacked a legitimate interest in having the award set aside, because they had not sufficiently demonstrated that they would obtain a more favourable decision if the award were set aside on that basis and the case remanded to the tribunal.

The decision again confirms the very high threshold for an award to be set aside, particularly on substantive public policy and *extra petita* grounds. (*Decision 4A_516/2020 (Swiss Supreme Court) (8 April 2021)*.)

Background

Article 190(2) of the Swiss Private International Law Act (PILA) provides an exhaustive list of grounds to set aside a final award. Specifically, an award can be set aside if the arbitral tribunal awards more or something other than what was claimed (*ultra* or *extra petita*) (*article 190(2)(c), PILA*) or if the award is incompatible with public policy (*article 190(2)(e), PILA*).

Article 3 of the Syria-Turkey bilateral investment treaty (BIT) requires the host state to accord investments treatment no less favourable than that accorded in similar situations to investments of its investors or of any third country, whichever is the most favourable. Article 4 of the Syria-Italy BIT requires the host state to adequately compensate investors for losses due to war or similar events, irrespective of the host state's responsibility.

Facts

The dispute arose under the most favoured nation provision of the Syria-Turkey BIT, in conjunction with article 4 of the Syria-Italy BIT.

The claimants, three Turkish businessmen and a Turkish company in which they were the shareholders, set up two cement manufacturing plants in Northeastern Syria. When the Syrian government lost control of the region in April 2012, the operation of the plants had to be abandoned by the investors and they fell under Kurdish control.

The investors commenced ICC arbitration against Syria to obtain compensation for the value of their stake in the plants. They requested payment of damages in USD. In its August 2020 award, the arbitral tribunal ordered Syria to pay the investors approximately SYP2 billion plus interest. The award allowed the investors to demand payment in USD at the official exchange rate of the Syrian Central Bank on the day of payment. Due to the Syrian lira's (SYP) significant depreciation against the USD between 2012 and 2020, the amount awarded in SYP was worth only approximately 21% of the 2012 USD value of the award (down to approximately USD9 million from approximately USD42 million).

The investors applied to have the award set aside based on article 190(2)(c) and (e) of PILA, claiming that:

- The tribunal had awarded something other than what had been claimed (*extra petita*) by ordering payment in SYP rather than in USD.

- The award violated substantive public policy because the compensation awarded was worth only a fraction of the loss incurred.

Decision

The Swiss Supreme Court rejected both arguments and refused to set aside the award.

Examining first the public policy issue, the court considered that there was no established international rule determining the currency for compensation under a BIT and that awarding damages in SYP was not objectionable as such. The court also stated that the investors had failed to justify why they should be compensated in USD. More generally, the court questioned whether the principles governing expropriation (on which the investors had relied) were applicable to a strict liability BIT claim that is based on the loss of an asset due to war.

The court found that what is relevant from the public policy perspective is whether the amount awarded is so out of proportion to the loss incurred that it "shockingly contradicts" fundamental principles of the legal order. The court found that, while the tribunal's refusal to convert the award into USD meant that the investors were left to bear the consequences of the "spectacular inflation" of the SYP and that the value of the investment in SYP was approximately 79% lower than if it had been determined in USD, it was necessary to consider the entirety of the circumstances. Those circumstances included the fact that:

- The investors had chosen to invest in Syria and therefore accepted the risks inherent to the host state.
- Syria was not being held responsible for a wrongdoing, but bore a strict liability for the exceptional situation of an armed conflict.
- Syria was in an extremely difficult situation due to the ongoing conflict over the last decade and being required to pay a substantial sum to the investors would have a significant impact on its public finances.

The court held that in those circumstances, the award of disproportionately low compensation did not "shockingly contradict" public policy.

The court then dealt with the *extra petita* challenge. The court conceded that payment in SYP was technically something "other than what had been claimed". However, it held that the investors lacked a legitimate interest in having the award set aside on that ground because they had not sufficiently demonstrated that they would obtain a more favourable decision if the award were set aside on that basis and the case remanded to the tribunal. The court assumed that, in such a scenario, the tribunal would dismiss the dollar-based request in its entirety and maintain the award in SYP, given that the court had not deemed such an award to be incompatible with public policy. Even if the investors were to submit a new claim in a different currency, the court saw no indication that they would receive a more favourable award, particularly because the tribunal might attribute the currency risk to the investors rather than to the state.

The court noted, obiter, that the *extra petita* principle may not apply as strictly in international arbitration proceedings as it applies in Swiss court proceedings. International tribunals may have more leeway than a Swiss court in determining the currency of an award, in particular in cases in which there is no specific rule of law governing that point.

Comment

The Supreme Court found that the award was "technically" *extra petita*, but, surprisingly, considered that the investors had no legitimate interest in having it set aside, despite the fact that the value of the compensation awarded was significantly lower than if it had been granted in the currency claimed. The court based this finding on the assumption that the arbitral tribunal would, in any event, reject the investors' claim if the case were remanded to it after a finding of *extra petita*. The basis for that assumption is not entirely clear.

The decision again confirms the very high threshold that needs to be met for an award to be set aside, most particularly on the grounds of substantive public policy and *ultra/extra petita*.

Case

Case: *Decision 4A_516/2020 (Swiss Supreme Court) (8 April 2021)*.

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