

Tribunal's jurisdiction to hear claims arising out of settlement agreement between Libya and Turkish company upheld (Swiss Supreme Court)

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

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In *Decision 4A_461/2019*, the Swiss Supreme Court upheld the award of an arbitral tribunal in which it found that it had jurisdiction based on a bilateral investment treaty (BIT) to hear a claim arising out of a settlement agreement entered into between the State of Libya and a Turkish company.

Anya George (Partner) and Leticia Morais (Associate), Schellenberg Wittmer Ltd

The Swiss Supreme Court has rejected an application to set aside a final award in which the arbitral tribunal accepted jurisdiction over a claim based on a settlement agreement between the State of Libya and a Turkish company (A).

Since 1980, A had participated in several public construction projects in Libya. It stopped construction in the early 1990s after invoices went unpaid. Between 1994 and 2005, A attempted to obtain payment of the outstanding amounts from Libya.

In December 2013, the parties entered into a settlement agreement in which Libya agreed to pay approximately LYD5.4 million. The agreement did not contain an arbitration clause.

After Libya failed to honour the settlement agreement, A filed a request for arbitration with the ICC in August 2016, based on the Turkish-Libyan Investment Protection Agreement (BIT). In its award of July 2019, the tribunal held that the settlement agreement was valid under Libyan law and that A's claim arising out of it qualified as a protected investment within the meaning of the BIT. It also found that the dispute arose after the entry into force of the BIT and that it therefore had jurisdiction to hear the dispute. It awarded A approximately USD 22 million in damages.

In March 2018, while the arbitration proceedings were pending, Libya filed for declaratory relief against A before a court in Tripoli, Libya, challenging the validity of the settlement agreement. The Tripoli court ruled that the settlement agreement was invalid.

Libya applied to the Swiss Supreme Court to set aside the ICC award on the basis that the tribunal lacked jurisdiction. Libya claimed, among other things, that the tribunal had wrongly applied the principle of *kompetenz-kompetenz* by failing to consider the Tripoli decision. It also denied the tribunal's jurisdiction *ratione materiae*, arguing that there was no "investment" within the meaning of the BIT as the settlement agreement was invalid. Finally, Libya argued that A's claim fell outside the temporal scope of the BIT, which only entered into force in 2011.

The Swiss Supreme Court dismissed all three arguments and upheld the tribunal's reasoning. According to the court, a dispute as to the validity of the settlement agreement undoubtedly fell under article 10 of the BIT.

This decision confirms that a party cannot torpedo ongoing arbitration proceedings seated in Switzerland by initiating foreign proceedings and that the principle of *kompetenz-kompetenz* is well protected.

Case: *Decision 4A_461/2019 (2 November 2020)*.

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