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Parties
Claimant, A.
Claimant, B.
Claimant, C.
Claimant, D.
Defendant, République Arabe Syrienne

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Rewriting Investors' Claim Labelled in USD in Near Worthless Syrian Pounds not Extra Petita or Violation of Public Policy: Swiss Supreme Court Decision 4A_516/2020 of 8 April 2021

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(*)

Request to set aside (ICC) award – Extra petita – Public policy

Summary

In its decision 4A_516/2020, the Swiss Supreme Court upheld an ICC award that granted compensation in a different currency than the currency requested by the claimants. The Swiss Supreme Court ruled that the award was not incompatible with substantive public policy or the principle of extra petita.

Introduction

On 8 April 2021, the Swiss Supreme Court ("**Supreme Court**") upheld an award rendered in the context of a dispute arising under the most-favored nation provision of the Syria-Turkey bilateral investment treaty ("**BIT**"). (1)

The Supreme Court ruled that the arbitral tribunal did not violate either substantive public policy or the principle of *extra petita* by ordering the payment of damages in Syrian Pounds ("**SYP**") although the claimants had requested to be compensated in US
P 93 dollars ("**USD**").

Factual Background (2)

In the mid-2000s, three Turkish businesspersons and a Turkish company in which they were shareholders ("**Investors**") set up two cement manufacturing plants in the Syrian Arab Republic.

In 2011, the Syrian Arab Republic became the scene of armed conflict, following which, in April 2012, the Syrian government lost control of the northeastern regions of the country, which Kurdish organizations took over. The Investors lost the use and control of their plants, which Kurdish forces then exploited.

On 5 April 2016, the Investors filed a request for arbitration with the International Chamber of Commerce against the Syrian Arab Republic, relying on the Syria-Turkey BIT. The Investors required compensation for the value of their stakes in the two Syrian companies. Despite the Investors' request formulated in USD, the arbitral tribunal eventually awarded the Investors compensation in SYP, while allowing the Investors to request payment in USD at the official exchange rate on the day of payment.

The Investors then lodged a request to set aside the award to the Supreme Court, seeking the annulment of the compensation order on two grounds. First, they argued that the award was incompatible with substantive public policy (Article 190 al. 2 lit. e of the Swiss Private International Law Act ("**PILA**")). Second, they claimed that the award was rendered in violation of the principle of *extra petita*, thus against Article 190 al. 2 lit. c PILA. The Supreme Court's findings to reject both arguments are separately discussed.

Public Policy

The Investors' first ground to challenge the award is based on Article 190 al. 2 lit. e PILA. In their view, the arbitral tribunal wrongly awarded damages in SYP instead of USD, which had the effect of making them unduly bear the "dizzying" devaluation of the Syrian currency since 2012. (3) According to the Investors, they were awarded a mere 4.6% of the loss suffered in 2012, which constituted a form of "expropriation without adequate compensation" and thus infringed public policy as a matter of Swiss law. (4)

After recalling that an award is only contrary to substantive public policy where it
P 94 violates some fundamental principles of the law applicable to the merits to such an extent that it is no longer consistent with the notions of justice and the system of values (Supreme Court Decisions 144 III 120 (5) para. 5.1; 138 III 322 (6) para. 4.1; 132 III 389 (7) paras. 2.1 and 2.2.1; 4P.208/2004 (8) dated 14 December 2004 para. 6.1; 4P.200/2001 (9) dated 1 March 2002 para. 2a), (10) the Supreme Court concluded that there is no violation of substantive public policy in this case.

The Supreme Court first indicated that there is no established international rule determining the currency of compensation. (11) Arbitrators have a wide discretion when fixing contractual damages and that various methods of compensating for monetary

depreciation exist. The Supreme Court also noted that the Investors had not justified why they should be compensated in USD. (12)

The Supreme Court concluded that even where ordering compensation in SYP rather than USD leads to the Investors bearing the "spectacular inflation" until the day of payment, the overall assessment of the facts at hand ultimately "makes it possible to affirm that the compensation awarded does not shockingly offend the most essential principles of public policy." (13)

First, the Investors chose to invest in Syria and to be remunerated in SYP. They therefore knew and accepted the "inherent risks" that came with their investment, particularly financially. (14)

Second, in the present case, the host state did not bear responsibility for a wrongful act and, therefore, it was not under the obligation to make reparation as extensive as when the state is liable for a wrongful act or a contractual violation committed by one of its agents. (15)

Lastly, given the Syrian Arab Republic's extremely difficult situation following years of
P 95 conflict, paying a significant compensation to the Investors● would have created a considerable impact on its public finances and, *in fine,* its population, thus justifying waiving an integral reparation. (16)

Therefore, the Supreme Court considered that the award did not contravene substantive public policy in its result and thus rejected this ground.

Extra petita

The Investors' second ground to set aside the award is based on Article 190 al. 2 lit. c PILA. According to them, the arbitral tribunal decided *extra petita* by ordering compensation in SYP – convertible into USD at the exchange rate of the Central Bank of Syria on the day of payment – while their monetary claim was labelled in USD. (17)

As a matter of Swiss law, an award can be challenged based on Article 190 al. 2 lit. c PILA "when the arbitral tribunal has ruled beyond the claims that were before it." This includes decisions awarding more (*ultra petita*) or differently (*extra petita*) than what was requested (Supreme Court Decisions 116 II 639 (18) para. 3a; 4A_430/2020 dated 10 February 2021 para. 6.1; 4P.260/2000 dated 11 November 2018 para. 5a). (19)

In the present case, the Supreme Court "concedes" that, "technically speaking" ordering compensation in SYP instead of USD is something different from what had been requested and thus constitutes an "*aliud.*" (20) In a Swiss domestic litigation, a decision that ordered payment in Swiss Francs rather than the currency of the contract would be annulled, as the Supreme Court recalled. (21) In spite of this, however, the Supreme Court did not analyze whether, *in casu*, the award was incompatible with Article 190 al. 2 lit. c PILA. The Supreme Court concluded that the Investors lacked legitimate interest in annulling the award. This, however, is a prerequisite for an annulment request under Article 190 PILA. The Investors had not sufficiently demonstrated that they would obtain a more favorable decision should the award be set aside and the case remanded to the arbitral tribunal. (22)

The Supreme Court assumed that, in such a scenario, the arbitral tribunal would dismiss the Investors' request formulated in USD and maintain compensation in SYP considering
P 96 that the Supreme Court did not rule that● rendering the award in SYP was contrary to public policy. In addition, even assuming that the Investors introduced a new claim in a currency other than USD, "there is no indication that such a solution would be more favorable to them than the one enshrined in the challenged award, however unsatisfactory it may be for the parties concerned." (23)

Therefore, the Supreme Court concluded that "in the light of a very particular situation, the Supreme Court does not see any interest worthy of protection in allowing the grievance and annulling the award" and thus rejected the argument. (24)

Comment

The arguments presented by the Supreme Court to reject the Investors' ground based on the principle of *extra petita* may leave the reader perplexed. The Supreme Court admitted that the award "technically" orders "something else" than what the claimants had claimed. It did not rule, however, that arbitral tribunals are free to order compensation in another currency without violating Article 190 al. 2 lit. c PILA. The annulment request was rejected on a formal ground (lack of interest worthy of protection). (25)

In particular, while noting, *passim*, that the principle of disposal (and thus the parties' right to choose the currency) "does not necessarily have to be applied in international commercial law with the same rigour as in a case governed by Swiss law", (26) it does not elaborate on the issue and therefore leaves this question open. This is unfortunate. Indeed a clarification would have been welcome in view of the importance of this issue in practice.

In any event, the Supreme Court's decision confirms the high threshold one is required to

meet to successfully challenge an award based on Article 190 al. 2 lit. c and e PILA. As the Supreme Court recalled in its decision, the circumstances of the case were very particular. Arbitral tribunals would be ill advised to change the currency of a party's prayers without good explanation, and likewise parties should explain the choice of the currency of their claims.

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References

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1) Supreme Court Decision 4A_516/2020 of 8 April 2021, ASA Bulletin 1/2022, p. 107. See also comments by Matthias Scherer, *Introduction to the Case Law Section*, ASA Bull. 1/2022, p. 97.
2) Paras. A-C.
3) Para. 4.1.
4) *Ibid.*
5) ASA Bull. 2/2018, p. 406. See also Caroline dos Santos, *Swiss Federal Supreme Court Confirms Independence of CAS. Note on Decision 4A_260/2017 of 20 February 2018*, ASA Bull. 2/2018, p. 429.
6) ASA Bull. 3/2012, p. 591.
7) ASA Bull. 2/2006, p. 363.
8) ASA Bull. 2/2005, p. 321.
9) ASA Bull. 2/2009, p. 325.
10) Para. 4.2.1.
11) Para. 4.3.2.
12) Para. 4.6.
13) *Ibid.*
14) *Ibid.*
15) *Ibid.*
16) *Ibid.*
17) Para. 5.1.
18) ASA Bull. 3/1991, p. 262.
19) Para. 5.3.
20) Para. 5.5.
21) Para. 5.4. Confirmed also in Supreme Court Decision 4A_251/2021 of 16 July 2021.
22) Para. 5.5.
23) *Ibid.*
24) *Ibid.*
25) *Ibid.*
26) *Ibid.*