4A_157/2017[1]

Judgment of December 14, 2017

First Civil Law Court

Composition

Federal Judge Kiss (Mrs), Presiding,
Federal Judge Klett (Mrs),
Federal Judge Niquille (Mrs).
Clerk of the Court: Mr Carruzzo.

Parties to the proceedings

Republic of X._____,
Represented by Mr. Homaoon Arfyazadeh,
Appellant,

v.

1. A._____,
2. B _____,
3. C _____,

All three represented by Mr. Paolo Marzolini,
Respondents,

Facts:

A.

A.a.

On September 7, 1992, the Z. _____ and X. _____ governments (hereinafter: X._____) signed an Agreement on the Mutual Encouragement and Protection of Investments (hereinafter: the BIT, for Bilateral Investment Treaty). Each State undertook to accord fair and equitable treatment to the investments of investors of the other contracting party (Art 3(1) "*fair and equitable treatment*"[2]) and to take no measures

[1] Translator's Note: Quote as X._____ *v.* A._____, B._____ and C._____, 4A_157/2017. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, ww.bger.ch

[2] Translator's Note: In English in the text.

that could directly or indirectly deprive these investors of their investments without the specified conditions - legal basis, public interest, non-discrimination and fair compensation - (Art 5). According to Art. 8 of the BIT, any investment dispute between a contracting party and an investor of the other contracting party, which could not be settled amicably, would be submitted to arbitration at the request of the investor.

A.b.

Following its opening up to the market economy in the late 1980s, X._____ took various measures, including tax measures, to regulate gambling and, in particular, the use of slot machines[3].

Initially, the 1992 Gambling Act[4] was limited to prohibiting the operation of high-stake[5] slot machines outside of casinos and bars. Thus, in the absence of ad hoc regulation, nothing came to hinder the use of low-stake[6] slot machines - i.e., 0.07 euros per game for maximum winnings of 15 euros - in public places in xxx's[7] territory.

The 2003 Amendment was meant to overcome this lack of written regulation by explicitly allowing low-stakes betting on slot machines outside of casinos and bars. It has, moreover, ordered the operators of such machines to pay a flat monthly tax (hereinafter: the POG, abbreviation of the expression...[8]) of 50 euros per machine, which was supposed to increase every year by a pre-determined amount to reach a maximum of 125 euros from January 1, 2006. This amendment was supplemented by the 2003 Ordinance, under which the xxx Ministry of Finance (hereinafter: the MoF) delegated to specific bodies the authority to carry out tests on the basis of which each slot machine was or was not admitted to the xxx market.

Between 2003 and 2009, various amendments were made to the 1992 Gambling Act. One of them, adopted on September 7, 2007, increased the amount of the POG from 125 to 180 euros per machine. On February 24, 2009, a new order of the MoF (the 2009 Ordinance) settled the issue of *bank machines*[9].

By this is meant a particular way in which low-stake slot machines work, whereby the winning player accumulates virtual points in the form of credit and bets to continue to play without having to start a new game. As this way of working has the effect of transforming low-stake slot machines into high-stake slot machines, this Ordinance asked the bodies responsible for testing the machines to stop approving bank machines[10].

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[3] Translator's Note: In English in the text.
[4] Translator's Note: In English in the text.
[5] Translator's Note: In English in the text.
[6] Translator's Note: In English in the text.
[7] Translator's Note: Name of country omitted.
[8] Translator's Note: English word omitted.
[9] Translator's Note: In English in the text.
[10] Translator's Note: In English in the text.

A scandal related to the involvement of government members in the gambling industry led to a significant tightening of the regulation in this area under the leadership of the prime minister of the time. Thus, the xxx parliament, sitting from November 17 to 19, 2009, adopted, as part of an accelerated legislative procedure, the 2010 Gambling Act[11], which entered into force on January 1, 2010. In doing so, it prohibited, among other things, the use of slot machines outside of casinos, except that machines that had been licensed under the old legal rules could continue to be operated until the expiry of their respective licenses; it also ruled out the extension of the old licenses and increased from 180 to 487 euros the amount of the POG for those slot machines that would continue to be used until the expiry of their old operating licenses.

A.c.

From 2004, the three zzz[12] companies, A. _____, B. _____ and C. _____ established themselves in the xxx[13] low-stake slot machine market through xxx companies in which they acquired stakes.

After the 2010 Gambling Act came into force, the xxx companies controlled by the three zzz companies continued to operate slot machines on the xxx market on the basis of licenses issued to them before January 1, 2010. However, the new tax increases introduced by this law forced them to remove the majority of machines on this market and to abandon it in January 2015.

B.

On June 9, 2014, after an attempt to settle the dispute was unsuccessful, A._____, B. _____ and C. _____, acting in concert, submitted a claim for arbitration against X. _____. Claiming to be victims of breaches of Art. 3(1) and Art. 5 of the BIT committed by that State, they requested a determination of the facts and sought an order enjoining the latter to pay damages.

The defendant raised preliminary objections which were rejected and are no longer relevant at this stage of the proceedings. For the rest, it argued that the request should be rejected. An arbitral tribunal of three members was constituted, its seat fixed in Geneva and English designated as the language of the proceedings. The hearing was closed on January 17, 2017

By final award of February 16, 2017, the Arbitral Tribunal noted the breach of Art. 3(1) of the BIT by X. _____ and ordered the defendant to pay the plaintiffs the sum of PLN[14] 37'687'561, i.e. some ten million Swiss francs, plus interest. Examining the case first from the point of view of Art. 5 of the BIT, it concluded that the measures taken by the defendant did not constitute an expropriation. However, it ruled, next, that the sharp increase, in 2010, of the POG on slot machines whose use could have continued, notwithstanding

[11] Translator's Note: In English in the text.
[12] Translator's Note: Indication of country omitted.
[13] Translator's Note: Indication of country omitted.
[14] Translator's Note: Indication of currency in the text.

the 2010 Gambling Act, until the date of expiry of licenses issued previously constituted a breach of the fair and equitable treatment standard within the meaning of Art. 3(1) of the BIT.

On this basis, the Arbitral Tribunal then set the amount of damages suffered by the plaintiffs.

C.

On March 20, 2017, X. _____ (hereinafter: the Appellant) filed an appeal in Civil law for breach of Art. 190(2)(e) PILA[15], together with an application for a stay of enforcement, for the purpose of obtaining the annulment of that award.

In their answer of 31 May, 2017, the plaintiffs (hereinafter: the Respondents) argued, mainly, that the matter was not capable of appeal and, in the alternative, that the appeal should be dismissed.

The Arbitral Tribunal declined to submit an answer.

The stay enforcement was granted for the appeal by order of the Presiding Judge on June 6, 2017.

The Appellant, in their reply dated June 22, 2017, and the Respondent, in its rejoinder of July 11, 2017, maintained their respective submissions.

Reasons:

1.

According to Art. 54(1) LTF[16] the Federal Tribunal issues its judgment in an official language[17], as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used English, while, in the appeal briefs sent to the Federal Tribunal, they used French, pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst[18]. (ATF 142 III 521 at 1). According to its practice the Federal Tribunal shall resort to the language of the appeal and so issue its judgment in French.

[15] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

[16] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[17] Translator's Note: The official languages of Switzerland are German, French and Italian

[18] Translator's Note: Cst is the French abbreviation for the Swiss Federal Constitution.

2.

2.1.

In the field of international arbitration, a Civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so or the ground for appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal, subject to the examination of the admissibility of the grievance, which the Respondents question in view of the way in which the Appellant presents its argument.

2.2

An appeal brief for an arbitration award must satisfy the requirement of reasoning that arise from Art. 77(3) LTF in conjunction with Art. 42(2) LTF and the case-law relating to the latter provision (ATF 140 III 86 at 2 and references). This presupposes that the Appellant discusses the reasons for the award and indicates precisely why it considers that the author of the award has infringed the law (judgment 4A_522 /2016 of December 2, 2016, at 3.1). It can only do so, needless to say, within the limits of the admissible grievances against that award, namely with regard to the only grievances listed in Art. 190(2) PILA where the arbitration is international in nature. Moreover, as this reason must be contained in the appeal, the Appellant cannot use the procedure to ask the Federal Tribunal to refer to the allegations, evidence or offers of evidence contained in documents from the arbitration file. Moreover, the Appellant may not rely on pleas that were not submitted in a timely manner, that is, before the expiry of the time-limit for bringing an action (Art. 100(1) LTF in conjunction with Art. 47(1) LTF), or to supplement, beyond the deadline, insufficiently reasoned submissions (judgment 4A_50/2017 of July 11, 2017, at 2).

The Federal Tribunal, it should be recalled, adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). As well, when seized of a Civil law appeal against an international arbitral award, does its mission not consist of deciding with full power of review, like an appellate jurisdiction—but only to consider whether the admissible grievances raised against the award are justified or not? Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file (judgment 4A_386/2010 of January 3, 2011, at 3.2).

However, as was already the case under the federal law of judicial organization (see ATF 129 III 727 at

5.2.2; 128 III 50 at 2(a) and the awards cited), the Federal Tribunal has the power to review the facts underlying the award under appeal if one of the grievances mentioned in Art. 190(2) PILA is raised against this fact or new facts or evidence are exceptionally taken into account in the Civil appeal procedure (ATF 138 III 29 at 2.2.1 and the awards cited).

3.

In the sole ground for appeal, the Appellant claims that the award under appeal is incompatible with substantive public policy within the meaning of Art.190(2)(e) PILA and related case law.

3.1.

An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). Procedural public policy must be distinguished from substantive public policy.

An award is contrary to substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent as it is no longer consistent with the notions of justice and system of values; among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

As the wording “in particular” shows without ambiguity, the list of examples thus set forth by the Federal Tribunal to describe the contents of substantive public policy is not exhaustive despite its permanence in the case law concerning Art. 190(2)(e) PILA. Moreover, it would be a delicate and perhaps even dangerous task to try to list all the fundamental principles that would certainly belong there, at the risk of forgetting one or the other. It is therefore better to leave the list open. Moreover, the Federal Tribunal has already integrated some other fundamental principles there, such as the prohibition of forced labor (judgment 4A_370/20077 of February 21, 2008 at 5.3.2) and this Court would not hesitate to sanction, as a violation of substantive public policy, an award which would infringe upon the cardinal principle of respecting human dignity, even though this principle does not specifically appear in the aforesaid list (138 III 3228 at 4.1 and the cases quoted).

If it is not easy to define substantive public policy positively and to define its contours precisely; it is easier, on the other hand, to exclude one item or another from it. The entire process of interpreting a contract and the legal consequences logically drawn therefrom are excluded in particular; so is the interpretation of the statutory provisions of a private law body by an arbitral tribunal. Furthermore, it is not sufficient to show incompatibility with public policy – a concept more restrictive than arbitrariness – by showing that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated

(judgment 4A_304/2013 of March 3, 2014, at 5.1.1).

Moreover, for a ground retained by the arbitral tribunal to be contrary to substantive public policy is not sufficient; it is the result of the award that must be incompatible with public policy (ATF 138 III 322 at 4.1; 120 II 155 at 6(a) p. 167; 116 II 634 at 4 p. 637).

3.2

The sole ground of appeal, taken from the incompatibility of the award under appeal with material public policy, is divided into three branches, the third being presented in the form of an alternative.

3.2.1.

First, the Appellant submits that the award unjustifiably restricts the intangible prerogatives of the State public authority in fiscal matters protected by customary international public law. Stating the grievance in concrete terms, it emphasizes, with arbitral jurisprudence in support, that apart from the hypothesis - which was not accepted in this case - in which it constitutes an expropriation, a tax measure is only likely to breach an investment agreement, in particular the fair and equitable treatment standard, only in very exceptional circumstances; thus, at most, when the State party to the treaty removes from the investor the benefit of a specific commitment it has made, which may take the form, for example, of a stabilization clause. On the other hand, any other restriction imposed by an arbitral award on the legislative power of the host State in the tax area would undermine the sovereignty of that State and, consequently, render that award incompatible with public policy.

In the present case, the Appellant sees a contradiction in the fact that the Arbitral Tribunal, on the one hand, did not equate the sharp increase in the POG in 2010 with an indirect expropriation falling within the scope of Art. 5 of the BIT, but, on the other hand, considered that this state measure infringed the guarantee of fair and equitable treatment enshrined in Art. 3(1) of the BIT, insofar as it ignored the legitimate expectations of investors.

According to it, such an infringement would not have been verified, contrary to the opinion of the arbitrators, since the Respondents had never received from Appellant the promise that this monthly flat tax would remain stable and knew, on the contrary, that it was going to increase. Moreover, according to the applicant, the Arbitral Tribunal does not invoke any valid argument to disregard its objective of gradually achieving the standardization of the tax rate applicable to slot machines wherever they are and what that is the mode of exploitation, so including for the bank machines.

In conclusion, the Appellant considers that, in so far as it restricts its right to take the tax measures it deems supremely suitable to achieve the objective pursued, the award under appeal infringes public order within

the meaning of Art. 190(2)(e) LDIP[19].

3.2.2.

Second, the Appellant explains that it intends to strengthen its legislative arsenal in order to effectively combat the dangers and misdeeds of gambling, a concern it claims to share with other European countries, such as Switzerland, which prohibit the operation of slot machines outside casinos. It was a matter, for it, of trying to eliminate the addiction to gambling and its related effects or collateral damage that include, among other things, increased crime, the impoverishment of players and the negative repercussions of such addiction on the family and friends of people who have become dependent.

To achieve this, the Appellant claims to have operated a fiscal leverage and used, in doing so, a quite commonplace method chosen by a State wishing to promote a public health policy, whether to fight against this type addiction or to prevent the abuse of alcoholic beverages or tobacco. According to it, thought this tax increase, comparable to a "steering tax", the legislator was implementing a complex measure ultimately intended to prevent any use of slot machines outside casinos and, in the meantime, to subject those who were illegally using in various public places - i.e. low-stake machines used in bank[20] mode - to the same tax regime as that applied to slot machines installed in casinos. Therefore, again according to the Appellant, by increasing the POG, it fulfilled its duty, under public policy, to protect its population against the dangers inherent in gambling.

On the basis of this demonstration, the Appellant submits, by way of conclusion, that the award issued breaches Switzerland's international public order, within the meaning of Art. 190(2)(e) PILA, in its result, since it sanctions it for having exercised a prerogative, but also a duty of public order in the form of measures recognized as being reasonable, adequate and non-discriminatory, and whereas such an exercise is not equivalent, according to the settled and almost unanimous case law of international arbitral tribunals, to breaching the fair and equitable treatment standard guaranteed by Art. 3(1) of the BIT.

3.2.3

Third and finally, the Appellant proposes an alternative, each of which, according to the Appellant, leads to the finding of a breach of substantive public policy attributable to the Arbitral Tribunal.

3.2.3.1

In the first alternative, the premiss of the syllogism leading to the conclusion is the allegedly unlawful character of the Respondents' continued operation of low-stake slot machines in bank[21] mode during the

[19] Translator's Note: LDIP is the French acronym for the Federal Private International Law Act FPILA.
[20] Translator's Note: In English in the text.
[21] Translator's Note: In English in the text.

period 2010-2015. In this regard, the Appellant lays out the history of legislative acts and other orders issued by its organs between the years 1992 and 2010 to demonstrate that operating low-stake slot machines in bank mode was unlawful and that the Respondents were aware of it in 2009 at the latest or, at least, could not ignore it from that point on.

Thus, in the Appellant's view, by awarding the Respondents damages based on the revenue that could be generated from the obviously unlawful use of low-stake slot machines, the Arbitral Tribunal had endorsed a practice obviously unlawful, thus violating concretely and flagrantly the substantive public order referred to in Art. 190(2)(e) LDIP.

3.2.3.2

The second alternative is based on the assumption, retained at least implicitly by the Arbitral Tribunal but rejected by the Appellant, according to which the Respondents were in favor of a transitional regime allowing them to use their low-stake slot machines in bank[22] mode until the expiry of the relevant operating licenses.

On the basis of this assumption, the Appellant argues that the Arbitral Tribunal wrongly forgot that before the entry into force of the 2010 Gambling Act[23], which had aligned the tax regimes of all slot machine models, the revenues of the high-stake slot machines were taxed up to 45% whereas those of low-stake slot machines benefited, through the POG, from a favorable rate of 10.8%. In its view, since the Respondents had collected, via the use of the bank[24] mode, income which should have been taxed at 45%, whereas they were only taxed at 10.8%, their claiming payment of damages was the same as claiming compensation [from it, the State] for the loss of a tax benefit which had been improperly obtained by operating bank machines[25] outside of casinos, a state of affairs which constituted a breach of Art. 107(1) of the Tax Crime Code of the host state.

For the Appellant, the operative part of the award under appeal thus leads to a result contrary to public policy within the meaning of Art. 190(2)(e) PILA, since it endorses or embodies a flagrant breach - in the form of evasion - of its tax regulations.

3.3.

Considered in the light of the aforementioned principles of case law, the argument developed by the Appellant leads to the observations made below.

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[22] Translator's Note: In English in the text.
[23] Translator's Note: In English in the text.
[24] Translator's Note: In English in the text.
[25] Translator's Note: In English in the text.

3.3.1

Art. 99(1) LTF, whose application by analogy in Civil appeal proceedings relating to an arbitral award (judgment 4A_34/2016 of April 25, 2017) Art. 77(2) LTF does not exclude, raises new facts and new evidence.

Under No. 82 of its appeal brief, the Appellant refers to the award issued on February 21, 2017, by the Paris Court of Appeal in the case between the Republic of Kyrgyzstan and V.B., a decision it produces as Exhibit 14 from its list. It reproduces this reference under No.8 of its reply by adding, in footnote 2, a reference to a passage from "Opinion 2/15 of the Court of Justice of the European Union of May 16, 2017", which leads the Respondents to take a position on this subject under Nos. 13 to 17 of their rejoinder. Subsequent to the date of issue of the award under appeal (February 16, 2017), this new evidence is not admissible, nor are the arguments referring to it from wherever they may come.

The same remark can be made with regard to the Law of April 1, 2017, of the Appellant modifying the regulations on gambling, which the Respondents refer to as Amendment[26] 2017, which they produced as Exhibit 24 on their list and from which they draw a series of conclusions under Nos. 67 to 69 of their answer to the appeal.

This remark also includes the comments made by the Appellant under Nos. 19, 27 and 28 of its reply on the same Law and the remarks made in the same context by the Respondents under No. 69 of their rejoinder.

3.3.2.

In support of its theory of the illegality of bank machines[27], the Appellant refers to a decision of the Appeals Prosecutor of N. _____ of October 14, 2015, that it included in the arbitration file as Exhibit C-106 and that it produced before the Federal Tribunal as Exhibit 15. On the sole ground that the arbitrators referred to this award (judgment, No. 180) and that they would not contradict the passages cited by it, the complainant relies heavily on this 75-page document to draw arguments which it submits for the consideration of this Court. This approach is not permissible under the rules reiterated above (see 2.2).

3.3.3.

On a more general level, the Appellant challenges the Respondents' reproaching it with confusing the Federal Tribunal with a Court of Appeal. It is wrong, because the mere reading of its two appeal briefs demonstrates the validity of such a reproach.

Under No. 7 of its rejoinder, the complainant states that "... the Federal Tribunal has, in the examination of grievances based on public order, a free power of cognition in law, but also in matters relating to an

[26] Translator's Note: In English in the text.
[27] Translator's Note: In English in the text.

assessment of the facts as found and established by the Arbitral Tribunal" (term put in italics by the Appellant). Such a statement, wholly unsupported by case law, seriously disregards the nature of the grievance alleging that the award is incompatible with substantive public policy, as clarified by the above-mentioned case law on Art. 190(2)(e) PILA (see 3.1, penultimate §). No doubt it is correct to say that the Federal Tribunal freely examines whether the award is affected by such a defect. However, it is wholly wrong to argue that, to make this judgement, it would be able to reconsider as it pleases the legal assessment of the arbitral tribunal on the basis of the facts found in its award. In fact, the only thing that matters, regarding the decision to be made in terms of Art. 190(2)(e) PILA, is the question of whether the result of this legal assessment made completely independently by the arbitrators is compatible or not with the jurisprudential definition of substantive public policy.

Based on an incorrect premiss, the argument developed by the Appellant was, therefore, doomed to failure since it was intended to demonstrate, first and foremost, that the Arbitral Tribunal had misjudged the facts relevant to the application of the topical provisions of the BIT, or that it should have retained other facts in order to proceed with legal reasoning.

3.3.4.

The Federal Court's authority, when it is called upon to rule on a Civil appeal against a final award in the field of international investment litigation, is not uniform, but, obeying the general rule applicable to all the types of arbitration, depends on the grievances made in the appeal.

Called upon to deal with a grievance of wrongful denial of jurisdiction (Article 190(2)(b) PILA), the First Civil Law Court freely examines the matters of law, including the preliminary matters, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal. Thus, it has been led to define the concepts of contract claims[28], treaty claims[29] and umbrella clauses[30] in the light of certain provisions of the Treaty of December 17, 1994, on the Energy Charter (ATF 141 III 495 at 3.2) or yet to determine the meaning of the term "investment" used in a bilateral investment treaty and whether the activity of the so-called investor was included in the definition of this notion

(judgment 4A_616 / 2015 of September 20, 2016, at 3).

However, if it is invited to verify the compatibility of the award under appeal with substantive public policy (Art.190 (2) (e) PILA), the First Civil Law Court will not, as such, sanction a wrong, even arbitrary, interpretation of a clause in a bilateral investment treaty, nor a determination based on an untenable assumption of the relevant facts in this respect (judgment 4P.200/2001 of March 1, 2002, at 2(c),

[28] Translator's Note: In English in the text.
[29] Translator's Note: In English in the text.
[30] Translator's Note: In English in the text.

KAUFMANN -KOHLER / RIGOZZI, International Arbitration, Law and Practice in Switzerland, 2015, No. 8.199 p.502).

In the present case, it is therefore impossible for this Court to review whether the Arbitral Tribunal rightly or wrongly found that the sharp increase in the POG in 2010 on low-stake slot machines infringed the standard of fair and equitable treatment guaranteed by Art.3 (1) of the BIT, whether it is the arbitrators' definition of the standard or its application to the circumstances of the case in dispute, or, conversely, whether they have rightly or wrongly ruled out the confiscatory character, within the meaning of Art. 5 of the BIT, of this tax measure. The reasons which, according to the arbitrators, compelled the Appellant to take such a measure, were not excluded from the Federal Tribunal's examination, regardless of the denials of the applicant who would like to replace them with other reasons that would be more favorable to its argument, such as the desire to fight effectively against the dangers and misdeeds of gambling. Nor is it the place to decide whether the prerogatives of the State in tax matters, which the Appellant claims to defend, were sufficient or not to justify the adoption of a regulation having the effect of indirectly depriving the Respondents of their investments before the expiry the slot machine operating licenses that had been issued to their local subsidiaries, and without the payment of compensation in return ever having been contemplated. Finally, it is not possible either to examine whether the Arbitral Tribunal rightly or wrongly refused to consider continued operation of low-stake slot machines in bank[31] mode by the Respondents as illegal during the period between 2010 and 2015, nor if it should have upheld the charge of flagrant violation of the tax crime laws of which the Appellant accuses the Respondents.

3.3.5.

In any event, the Appellant does not make the connection between the definition of the breach of the substantive public policy on the basis of which the corresponding grievance, based on Art. 190(2)(e) PILA, must be examined and the arguments that it submits to the Arbitral Tribunal as such, so that it is not clear how the latter, if they were founded, would necessarily imply that the award containing the defects it denounces violated fundamental principles of substantive law to the point of no longer being reconcilable with the legal order and the system of determining values. Its understanding of the very restrictive nature of this notion of public order, which is peculiar to international arbitration, is, moreover, doubtful if we judge by the fact that it uses the broadest definition of the public order, as it appears in the following passage from a work of legal opinion on private-law (PIERRE ENGEL, Treaty of Obligations in Swiss Law, 2nd Edition 1997, p.113): “public order is the sum of the legal prescriptions enacted in the interest of the community” (Reply, no. 22). It follows that the present appeal, which does not satisfy the requirement of reasoning under Art.

[31] Translator’s Note: In English in the text.

77(3) LTF in conjunction with Art. 42(2) LTF, can only be declared not capable of appeal.

4.

The Appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Article 66(1) LTF) and pay costs to the Respondents, who will be joint and several creditors (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 34'000, are to be borne by the Appellant.

3.

The Appellant shall pay the Respondent compensation of CHF 39'000 as costs.

4.

This judgment shall be notified to the parties' representatives and to the President of the Arbitral Tribunal.

Lausanne, December 14, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge: The Clerk of the Court:

Kiss Carruzzo