4A 532/2016[1]

Judgement of May 30, 2017

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Klett,
Federal Judge Hohl
Federal Judge Niquille,
Federal Judge May Canellas,
Clerk of the Court: Leemann.

A._____AG,
represented by Dr. Laurent Killias and Dr. Daniela Frenkel,
Appellant,

v.

1. State of Palestine, (also known as the Palestinian Authority), represented by Mr. Harold Frey, Dr. Martin Aebi, and Mr. Fadri Lenggenhager,
2. B._____ Company, represented by Mrs. Mariella Orelli, Mrs. Kirstin Dodge, and Dr. Simon Vorburger,

Respondents

Facts:

A.

A.a. A._____AG (Claimant, Appellant) is a company formed under Liechtenstein law, with its registered office in U., Liechtenstein. Since February 5, 1998, it has been registered as a foreign company in V._____, in the occupied Palestinian territory. The State of Palestine (*aka* the Palestinian Authority) (Defendant 1, Respondent 1) is the Palestinian autonomous authority; by Resolution No. 67/19 of November 29, 2012, the General Assembly of the UN accorded it the status of "*non-member observer state*". B._____ Company (previously B._____ Company) (Defendant 2, Respondent 2) was formed under the 1964 Companies Law applicable in the occupied Palestinian territory. The company is registered on the Commercial Register of W. and is now controlled by the C. Fund, to which the 15% stake in the Claimant originally held by Defendant 2 was transferred. The C. Fund was formed in 2003

[1] Translator's Note: Quote as A._____AG *v.* State of Palestine and B._____ Company, 4A 532/2016. The decision was issued in German. The full text is available on the website of the Federal Tribunal www.bger.ch.

and its purpose is to promote sustained economic growth within the occupied Palestinian territory; its management board members are appointed by the President of Defendant 1.

A.b. This dispute is in connection with a tourism project providing for the construction and operation of a hotel and casino in the city of X._____, in the West Bank. The contracts underlying the project were signed by the Claimant, both Defendants and two further contracting parties. The main contract ("General Agreement") was signed on December 17, 1996. It provides, *inter alia*, as follows:

> PREAMBLE
> Based on the Palestinian Authority's ('PAs') desire to develop a private sector-led economy on the one hand and D._____AG's know-how and reputation on the other hand the parties have entered into the following agreement ('Agreement'):
> [...]
> WHEREAS, investment of A._____AG is in accordance with the Law on the Encouragement of Investment of the PA, Law No. 6/1995, published in the Official Palestinian Gazette, Edition No. 5, of July 5, 1995, thus granting various benefits, in particular tax benefits;
> [...]
> WHEREAS all Parties agree that the performance of their obligations set out in this General Agreements shall not constitute the foundation of a partnership according to Article 530 Swiss Code of Obligations;
> [...]
>
> *II. CONCESSION AGREEMENT*
> B._____Company undertakes to implement the Tourism Project, to organize and procure all necessary permits and concessions for A._____AG in order to build and operate the Tourism Project as described in the Preamble and to enforce the rights granted to A._____AG by all these concessions and permits - see Decrees to be issued by the respective Ministries, Exhibit A hereto - and to keep them valid. B._____Company confirms the rights of A._____AG granted by these concessions as being also part of their obligations towards A._____AG. In case of breach of this provision II. of the Agreement B._____Company agrees to indemnify A._____AG for all damages incurred by A._____AG irrespective of fault or negligence on the side of B._____Company, but excluding any acts of foreign state (s), such as wars, curfews, closures and the like.
> [...]
>
> *IV. PAYMENT BY A._____AG AND TRANSFER OF SHARES*
> 1. After B._____Company contributing a 20% share to the investment for the hotel of the first stage including furniture and equipment [...] B._____Company will hold a 20% joint property share in the hotel buildings of the first stage together with A._____AG. Following this share B._____Company will receive by A._____AG a 20% (twenty percent) payment out of the profit generated by this (these) hotel building (s) erected in this first stage - which will be operated as a separate profit center - upfront qualifying as operating costs [...].
> 2. In consideration of all further services, acts, materials and other performances provided by B._____Company, A._____AG shall pay to B._____Company (for the PA) - additionally to the payment according to IV. supra - 20% (twenty percent) of the net profit generated by A._____AG as the operator of the Tourism Project according to the annual financial statements of A._____AG.
> [...]
> 5. Furthermore, B._____Company acquires 30% (thirty percent) of the shares in A._____AG, held by A._____AG for this purpose, at the conditions valid for all shareholders, in particular with respect to the payment of the price of the shares

and the pro rata contribution of every shareholder to fund the Tourism project according to its stake in the company. B._____Company takes over the shares for itself or Palestine private or public investors notwithstanding its continuing liability with respect to the payment of the price of the shares as well as the contribution of the respective shareholders. Furthermore, these shareholders have to be represented by B._____Company with regard to matters related to A._____AG and/or the Tourism Project.
[...]

V. ARBITRATION [...]

1. The Parties [...] agree that any dispute, controversy or claim arising from or relating to this Agreement including disputes on the valid conclusion or amendment or dissolution of the Agreement shall be resolved only by arbitration, which may be commenced at any time by notice given by either Party and which excludes the competence of any other court. Arbitration shall be conducted pursuant to the Commercial Arbitration Rules of the Zurich Chamber of Commerce applying Swiss law by arbitrators chosen as follows: [...]
2. The venue of the arbitration shall be Zurich, Switzerland. All arbitration proceedings shall be conducted in the English language. [...]

VI. TERM OF THIS AGREEMENT, TERMINATION

1. This Agreement shall enter into force on the date of its signing. The term of the Agreement shall be from the aforementioned date until the expiration of a period of 15 (fifteen) years commencing on the date of the opening of the first casino.
2. B._____Company will initiate and promote the enacting of a gaming law in Palestine and is obliged to organize the Concessions in favor of A._____AG, Exhibit A, to be issued and enter into force within thirty days after signing. If the Concessions have not validly been issued within this time period, A._____AG shall be at liberty to defer the commencement of the construction phase until such time these prerequisites are fulfilled, notwithstanding A._____AG reserving all rights with respect to such a situation. However, the construction phase shall not start earlier than thirty days after signing. [...]
3. Neither Party hereto may terminate this Agreement during its term except if the respective other Party willfully commits a material breach of this Agreement. In such an event the breaching Party shall not derive the fruits of its acts in general, e.g. in case of willful breach by B._____Company any property rights or titles with respect to the constructions and installments shall not pass to B._____Company.
[...]

VII. MISCELLANEOUS

[...]

5. *FORCE MAJEURE*:

The obligations of each Party other than the obligations to make payments of money as provided in this Agreement shall be suspended while such Party is prevented or hindered from complying therewith, in whole or in part, by force majeure, including, but not limited to, strikes, lock-outs, labor and civil disturbances, unavoidable accidents, laws, rules, regulations or orders of any government or of any national, municipal or other governmental agency, whether domestic or foreign, wars or conditions arising out of or attributable to war, or other matters beyond the reasonable control of such Party, whether similar to the matters herein specified or not. It is agreed that A._____AG may invoke significant changes of the political or security status of the area which affect the economic situation of the project (s) through preventing potential guests and patrons from visiting the facilities as force majeure.[2]

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

A.c. The casino "E._____" was the primary objective of the tourism project. The idea of building a casino in the West Bank arose after various treaties were concluded between Israel and the Palestinian Liberation Organisation (PLO) in 1993 and 1995 in connection with the Oslo Accords. For its autonomous administration, Defendant 1 needed state institutions but made only slow progress in setting them up, and this was associated with additional financial expense. In order to develop and promote the Palestinian economy, which had been destroyed by the war, Defendant 1 sought to attract foreign investors. Amongst other projects, a hotel resort with a casino in the West Bank was considered a profitable investment; this was in light of the fact that gambling is prohibited in Israel and efforts at legalising it had failed, despite there apparently being market potential in this sector.

The city of X._____ is one of the territories that has been fully controlled by Defendant 1 since the Oslo Accords. In contrast, Israel contains exclusive control over the borders to the West Bank, so that each time the border is crossed, Israeli immigration regulations must be complied with.

A.d. Immediately after the Oslo Accords were concluded and until the entry into force of Palestine's own statutes, the legal situation in the West Bank was unclear. From 1948, Jordanian law had been applicable, as from 1967, military decrees of the Israeli forces were applied. By Decision No. 1/1994, President Arafat declared the legal system in force up to 1967 to be applicable. In 2002, Defendant 1 promulgated laws of its own and adopted the provisions of the Jordanian Criminal Code as its own criminal law. Article 394 of the Palestinian Criminal Code criminalises gambling (six months of prison and a fine), providing (pursuant to the English translation of Defendant 1, which is incorporated into the Award and which the Claimant has not contested) as follows:

> "Whoever operated a public place for gambling will be imprisoned for six months and fines for fifty dinars."[3]

Under Art. 397(4) of the Palestinian Criminal Code, licenses may only be issued for lotteries, which are otherwise generally prohibited.

A.e. Several months following the signing of the General Agreement, the Claimant began construction on Casino E._____. Defendant 2 took efforts to ensure that the necessary infrastructure (such as for electrical power) was in place for the tourism project, which was being constructed on undeveloped desert land.

On February 26, 1997, Defendant 2's Ministry of Tourism granted its consent to the tourism project, which it, for its part, had assigned all of the rights of operation of the project to the Claimant on June 4, 1997.

Likewise, on June 4, 1997 the Minister of Justice for Defendant 1 issued a Casino License to the Claimant, which provided, in particular, as follows:

> Schedule B – Authorized Games:

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

> Authorized are all gambling including but not limited to the operation of slot machines and excluding lotteries.
>
> Schedule C – Terms and Conditions of the Casino License for A._____AG:
>
> 2. The term of this concession shall be 15 (fifteen) years commencing on the date of the opening of the first casino.
>
> […]
>
> 6. The casino may be operated twenty-four hours a day on seven days a week (including workdays and public holidays)
>
> 7. Palestinians are prohibited from participating in the games of luck.
>
> […]
>
> 10. A._____AG as the operator of the casinos shall not be subject to any specific gaming related taxes or levies or any other duties for the term of ten years commencing on the date of the opening on the tourism project.
>
> This Concession Decree shall not be revoked or altered by any authority by law or decree or similar measures bearing the same effect, in whole or in parts thereof.[4]

The Casino "E._____" commenced operations on September 13, 1998.

In 1998 and 1999, further license and permits (such as construction permits) were issued for the construction of the "Hotel F._____."

The Casino "E._____" was successfully operated between 1998 and 2000. During that period, the casino was open every day and attracted large numbers of patrons, such as in 1999, when it attracted more than 1 million visitors, 95% of whom were Israelis. The tourism project provided nearly 1,800 jobs, primarily for the local population, and during the period of its operation, the casino posted operative earnings totalling more than USD 190 million.

The hotel "E._____" was opened in July 2000. As a result of changes of plans (such as providing for a five-star standard hotel rather than a four-star and for additional rooms), the construction works had been subject to delay.

A.f. Shortly after the outbreak of the second Intifada, a decree was issued by the Israeli armed forces closing off access *inter alia* to the territory in which the city of X._____ is located. This meant that it was prohibited both for Israelis and for foreign visitors to enter this territory or remain there without a permit. Accordingly, it was no longer possible for Israelis or foreign visitors to travel to the casino "E._____" in X._____ without the approval of the Israeli military. This limitation on border crossing has been in force since that time and is still in force today.

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

In tandem with the fact that the casino "E._____" was damaged by the Israeli army, the border closure made it impossible to continue to operate the casino. The Claimant was thus forced to close the casino on October 27, 2000, while operations of the hotel "E._____" were continued.

A.g. Following closure of the Casino, on December 19, 2000 the parties concluded two further agreements ("2000 Agreements"): One was made between Defendant 1 and the Claimant ("PA-A._____AG-Agreement"), this was "with the consent of" Defendant 2. The other was made between Defendant 2 and the Claimant ("B._____ Company-A._____AG-Agreement"), to which Defendant 1 gave its consent. Pursuant to the Preamble to the PA-A._____AG-Agreement, the reason it was concluded was "to safeguard the further developments of the Tourism Project". In addition to providing for rules on tax issues, it covered the extension of the term of the licences, providing as follows:

> WHEREAS the parties have entered into a General Agreement made and entered into force between the parties on December 17, 1996 A.C., corresponding to 1417 A.H. ('Agreement')
>
> […]
>
> 1. PA agrees to amend the term of the concession (casino license) and licenses granted to A._____AG as follows:
>
> The term of this concession shall be 30 (thirty) years commencing on the date of the opening of the first casino, i.e. September 12, 1998.
>
> PA further agrees to amend the term of all other licenses granted by the Agreement or issued separately (according to Exhibits A, B, C, D, E, F of the Agreement) to a term of 30 years.
> […]
>
> 7. Other than as modified by this agreement the Agreement shall remain in full force and effect.
> 8. The parties agree that any dispute, controversy or claim arising from or relating to this agreement including disputes on the valid conclusion or amendment or dissolution shall be resolved only by arbitration according to Article V. of the General Agreement of December 17, 1996.
> […][5]

Sec. I.1 of the B._____Company-A._____ AG-Agreement primarily provides for an extension of the right of use for the land used for the project, and contains provisions regarding tax issues which are, in part, comparable to those in the PA-A._____ AG-Agreement. In addition, just as Sec. 8 of the PA-A._____ AG-Agreement, it provides that the arbitration clause in Article V of the General Agreement is applicable.

A.h. Following the outbreak of the second Intifada, it was uncertain when the territory in question would become accessible again. However, during the years which immediately followed this it became obvious that the Casino "E._____" would not reopen within the foreseeable future. In 2005, the situation became calmer, but the restrictions on entering the country were not lifted. Several years later, the

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

checkpoints at the border to the West Bank were successively abolished. At roughly the end of 2008, the Israeli checkpoints at the entrance to X._____ and other Palestinian towns were removed. Nevertheless, it remained prohibited for Israelis to travel to the territory where X._____ is located.

It was still a contentious issue between the Parties to what extent the restrictions on entering the country have continued to be enforced since 2005.

A.i. By letter dated March 15, 2012, the Claimant, based on the PA-A_____ AG Agreement, made a formal demand on Defendant 1 to issue new licences covering the tourism project. By letter dated July 31, 2012, the Claimant asserted that the failure to issue extensions of the licences constituted a breach of the General Agreement and the 2000 Agreements.

By letter dated September 24, 2013, it reiterated its demand.

These requests were subsequently discussed at informal meetings, but these failed to yield any outcome.

A.j. Over the years, there were reports again and again in the media that the construction and operation of the Casino "E._____" in X._____ had only been possible as a result of corruption. Criminal investigations were opened in the occupied Palestinian Territory, Israel and Austria against various persons with links to the project. Several of them were convicted but only in two cases was there a clear link to the tourism project.

B.
B.a. On December 16, 2013, the Claimant commenced an arbitration under the Swiss Rules of International Arbitration (2012) of the Swiss Chambers' Arbitration Institution against the Defendant, requesting the following relief (which was modified in the course of the proceedings):

> 1.
> (i) That Respondent 1 be ordered to procure a Casino License valid until 13 September 2028 which appoints Claimant as the sole and exclusive operator for casino operations in the territories that are presently or in the future under the jurisdiction of the State of Palestine.
>
> (ii) That Respondent 1 be ordered to amend the term until 13 September 2028 of all other licenses and permits necessary in order to operate the hotel and casino in X._____ as set forth in Exhibit A titled 'Provisions on the Concession' to the General Agreement concluded between G._____Company, H._____ GmbH, Claimant, J._____ AG and the Palestinian Authority on 17 December 1996 ('General Agreement') and granted in favor of Claimant by the General Agreement or issued separately according to Exhibits A, B, C, D, E, F of the General Agreement.
>
> Alternatively:
> (iii) That the Arbitral Tribunal declares that based on clause 1 of the Agreement concluded between the Claimant and Respondent 1 on 19 December 2000 ('PA-A._____ AG-Agreement'), Claimant is entitled to continue the operation of the casino and hotel in X._____ until 13 September 2028.

> 2. That Respondents 1 and 2 be jointly and severally ordered to pay the amount of USD 1'433'229'715 plus interest of 5% p. a. from 16 December 2013 to 19 April 2015 on the amount of USD 1'169'133'267 and as of 20 April 2015 on the amount of USD 1'433'229'715.
>
> 3. That Respondent 1 be ordered to pay USD 35'200'518.99, plus interest of 8% p. a. as of 1 January 2014.
>
> 4. That Respondents 1 and 2 be jointly and severally ordered to bear the costs of the arbitration. 5. That Respondents 1 and 2 be ordered to compensate Claimant for attorney's fees and other expenses incurred in connection with these arbitration proceedings.[6]

Defendant 1 requested that the arbitral tribunal reject the claim for lack of jurisdiction; in the alternative, that it dismiss the claim. Defendant 2 requested dismissal of the claim. On March 17, 2014, the Court of Arbitration of the Swiss Chambers' Arbitration Institution confirmed the arbitrators appointed by the Parties. The arbitrators jointly appointed the chairman, who was confirmed by the Court of Arbitration on April 30, 2014.

From May 18 to 22, 2015 and from May 26 to 29, 2015, oral hearings were held in Zurich. Numerous witnesses were questioned in the course of the hearings.

B.b By its Award of August 2, 2016, the Arbitral Tribunal sitting in Zurich rejected the claim.

It held that the General Agreement, the PA-A._____ AG Agreement and the B._____ Company-A._____ AG Agreement had been validly formed, but stated that Palestinian law, the application of which was compulsory, criminalised gambling, and that this was an obstacle to the assertion of any claim for specific performance (in the form of imposing an obligation to issue licenses), for which reason it had to dismiss the request for relief in para. 1; potentially, the Arbitral Tribunal stated, there might be a claim for damages for breach of contract. The request for relief in para. 2, by which the Claimant asserted a claim for lost profits due to its inability to operate the casino between the end of 2008 and the end of 2014, was dismissed by the Arbitral Tribunal, in particular due to the agreed exclusion of liability and due to the lack of any legally sufficient demonstration of a causal link with the pecuniary losses suffered. The Arbitral Tribunal dismissed the claim for a refund of taxes paid, which was stated in the request for relief in para. 3, reasoning that there was neither any legal basis for a claim of this kind nor had the Claimant sufficiently substantiated the amount it was claiming.

C.
By a civil law appeal, the Claimant requests the Federal Tribunal to set aside the Award of August 2, 2016, and to refer the matter back to the Arbitral Tribunal for re-adjudication.

The Respondents request the Federal Tribunal dismiss the appeal to the extent the matter is capable of appeal. The Arbitral Tribunal essentially requests dismissal of the appeal.
The Appellant has submitted a Reply to the Federal Tribunal, and the Respondents have each submitted one Rejoinder.

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

D.
By decision of the presiding Judge dated October 21, 2016, the Respondents' application for security for costs was upheld and the Appellant was ordered to pay a total of CHF 500'000 as security for costs.

This amount was subsequently received in a timely manner by the Federal Tribunal's payment office.

Reasons:

1.
According to Art. 54(1) BGG[7] the Federal Tribunal issues its decisions in an official language,[8] as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The Award here is in English. Because that is not one of the official languages and the Parties made use of German in the proceedings before the Federal Tribunal, the judgment of the Federal Tribunal will be issued in German.

2.
In the realm of international arbitration, a Civil law appeal is admissible where the requirements of Art. 190-192 PILA[9] (SR 291) are met (Art. 77(1)(a) BGG).

2.1. The seat of the arbitral tribunal in this case is in Zurich. At the relevant time, both Parties had their seat outside of Switzerland (Art. 176(1) PILA). As the Parties did not expressly rule out the application of Chapter 12 PILA, the provisions of that chapter apply (Art. 176(2) PILA).

2.2. Invoking the principle of equality of arms, the Appellant submits the procedural application that the Statement of Appeal should only be served upon the Respondents at the start of the period for submitting the Answer and that they should be given a single, non-extendable deadline for submitting their Answer, equal to the period for submitting the Appeal. However, the period for submitting comments is a court-imposed time limit (Art. 102(1) BGG), the period for filing an appeal (30 days; Art, 100(1) BGG) is a period which is imposed by statute. Court-imposed time limits may be extended for sufficient reason where a timely request for this is made (Art. 47(2) BGG), whereas statutory time limits cannot be extended (Art. 47(1) BGG). The appeal brief does not state how this distinction would violate Art. 29(1) BV[10] or Art. 6(1) ECHR.

2.3. The admissibility of a civil law appeal requires that an appellant is particularly impacted by the decision being challenged and has a legally protected interest in annulment or modification of the decision under appeal (Art. 76(1) (b) BGG).

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[7] Translator's note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).
[8] Translator's note: The official languages of Switzerland are German, French and Italian.
[9] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
[10] Translator's note: BV is the German abbreviation for the Swiss Federal Constitution.

The Respondents incorrectly argue that the matter is not capable of appeal due to a lack of legal interest insofar as the Appellant's grievances relate to the grant of licenses to operate the hotel. The fact argued by them, that the Appellant was granted the licences required to operate the hotel on an annual basis in each case, does not dispense with the Appellant's legally protected interest. The Appellant certainly has an interest in seeking annulment of the Award to the extent that the claim it has asserted for issuance of a hotel license to it valid until 2028 is not being protected. A renewable hotel license, valid for a period of one year in each case, is not equivalent to the issuance of a license valid until 2028. Even if it the Appellant continues to be issued a hotel license each year, it cannot be denied that it has a legally protected interest with respect to its claim for a license with a fixed term running until 2028.

The Appellant is requesting complete annulment of the Award challenged by it; contrary to the apparent assumption of the Respondents, its appeal is also directed against dismissal of its requests for relief in paras. 2 and 3. The question of whether sufficiently justified grievances with respect to the dismissal of these two requests can be found in its appeal brief, which the Respondents deny, is a question for this Court's review in the course of assessing each Party's submissions.

2.4. As a general matter, a civil law appeal within the meaning of Art. 77(1) BGG is of a purely 'cassatory' nature, *i.e.* it may only seek the setting aside of a decision under challenge (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception in this respect that the Federal Tribunal may itself rule on the arbitral tribunal's jurisdiction or lack thereof or on the removal of the arbitrator involved (BGE 136 III 605[11] at 3.3.4, p. 616 with references).

However, it is not possible to rule out the possibility that the Federal Tribunal might help uphold the appeal and refer the matter back to the arbitral tribunal due to a violation of the right of the parties to be heard, particularly as Art. 77(2) BGG only precludes the application of Art. 107(2) BGG to the extent that that section allows the arbitral tribunal to decide the matter itself (Judgments 4A_633/2014[12] of May 29, 2015 at 2.3; 4A_460/2013[13] of February 4, 2014 at 2.3, with references). To that extent, the applications of the Appellant are admissible.

2.5. Only the grievances listed in Art. 190 (2) PILA are admissible (BGE 134 III 186[14] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279[15] at 1a, p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons

[11] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[12] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

[13] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

[14] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[15] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/application-of-the-lis-pendens-principle-to-an-arbitral-tribunal

in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (*e.g.* BGE 134 III 186 at 5, p. 187 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565[16] at 3.1,p. 567; 119 II 380 at 3b, p. 382).

2.6. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). This includes findings as to the facts upon which the dispute is based and those concerning the course of the previous proceedings, i.e. the findings as to the subject of the case, which include, in particular, the submissions of the parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the contents of a witness statement or an expert report, or the findings of visual inspections (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or when new evidence is, exceptionally, taken into consideration (BGE 138 III 29[17] at 2.2.1, p. 34; 134 III 565 at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). The party who wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the factual findings on that basis must show, with reference to the record, that the corresponding factual allegations were already raised during the arbitral proceedings in accordance with the procedural rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references; *see also* BGE 140 III 86 at 2, p. 90).

2.7. The Appeal Brief must be filed with fully developed arguments within the time limit for appeal (Art. 42(1) BGG). If there is a second exchange of briefs, the Appellant may not use the Reply to supplement or improve its Appeal Brief (*see* BGE 132 I 42 at 3.3.4). The Reply may only be used to make points connected to the arguments in the briefs of another participant in the proceedings (*see* BGE 135 I 19 at 2.2).

To the extent that the Appellant goes beyond this in its Reply, its statements will not be taken into consideration.

2.8. The Appellant prefaces its legal submissions with a detailed description of the procedural history and the facts of the case in which it describes, from its own vantage point and referring to the widest variety of documents, the course of the arbitration proceedings and the background to the contracts which were concluded and to the legal dispute, and in various ways departing from the factual findings in the Award or expanding on them without asserting that there are any substantiated exceptions to the rule that findings of fact are binding on the Federal Tribunal. The arguments in question cannot be heard.

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[16] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[17] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

3.
The Appellant asserts the grievance that the challenged Award is incompatible with public policy in various respects (Art. 190(2)(e) PILA).

3.1. The substantive review of an international award by the Federal Tribunal is limited to the issue as to whether the award is consistent with public policy or not (BGE 121 III 331 at 3a, p. 333) The substantive adjudication of a claim only violates public policy when it disregards some fundamental legal principle/s and is utterly inconsistent with the important and widely recognised values which should be the basis of any legal order according to the prevailing opinion in Switzerland. Such principles include the sanctity of contracts *(pacta sunt servanda)*, the prohibition on the abuse of rights, the principle of good faith, the prohibition on expropriation without compensation, the prohibition on discrimination, and the protection of parties lacking legal capacity and the prohibition on excessive contract terms (see Art. 27(2) ZGB[18]) where such excessive terms represent a manifest and serious violation of personality rights. An annulment of the arbitral award is possible only when its result, and not merely its reasons, contradict public policy (BGE 138 III 322[19] at 4.1 and at 4.3.1/4.3.2; 132 III 389[20] at 2.2, p. 392 *et seq*.; each with references).

3.2.
3.2.1. Initially, the Appellant regards it as a violation of the principle of *pacta sunt servanda* that the Arbitral Tribunal confirmed the existence of the agreements between the Parties but "completely disregarded" their consequences. The Arbitral Tribunal confirmed that the General Agreement, the PA-A._____ AG Agreement and the B._____ Company-A. AG Agreement were validly made and were legal contracts; in the Award, it expressly confirmed the existence of these contracts and that they were binding on the Parties. Despite this clear finding, that the PA-A._____ AG Agreement had been validly formed and that there was a contractual obligation to issue a casino license to the Appellant running to September 13, 2028, the Arbitral Tribunal disregarded the consequences of the PA-A._____ AG Agreement and the obligations contained therein. Specifically, the Appellant argued, the Arbitral Tribunal had completely rejected the relief it had requested in para. 1, requiring Respondent 1 to issue the casino license and the further licenses required for the tourism project with a term to run until September 13, 2028. By rejecting the request for relief in para. 1(i) the Arbitral Tribunal had, the Appellant argued, violated the principle of *pacta sunt servanda*, by having undone the consequences which were contractually envisaged by Clause 1 of the PA-A._____ AG Agreement. The consequence of the Award is, the Appellant argued, that the Appellant has no (more) license to operate the casino, although Respondent 1 had entered into these contractual obligations and, pursuant to the practice of *pacta sunt servanda*, would have been required to adhere to them.

The Appellant argues that the fact that the Respondents would have been required to adhere to their contractual obligations and thus to the principle of *pacta sunt servanda* is confirmed by the express agreement of stabilisation clauses. The Appellant argues that the General Agreement explicitly provides

[18] Translator's Note: ZGB is the German abbreviation of the Swiss Civil Code.
[19] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit
[20] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

that all of the licenses for the tourism project were required to impose an obligation on the Respondents to prevent any revocation or alteration by any authority, by any law or decree or similar measures bearing the same effect, whether in whole or in part ("All Concession Decrees have to include the following provision: This Decree, in particular the granted concession[s], shall not be revoked or altered by any authority by law or decree or similar measures bearing the same effect, in whole or in parts thereof."). The Appellant argues that the casino license in fact contained this very stabilisation clause ("This Concession Decree shall not be revoked or altered by any authority by law or decree or similar measures bearing the same effect, in whole or in parts thereof."). The Appellant argues that the Respondents' disregard for *pacta sunt servanda* is particularly offensive and a violation of public policy in the case under consideration because the Parties had expressly provided for stabilisation clauses and these were not contracts between two private parties. In addition, the Respondents had never claimed, prior to the commencement of the arbitration proceedings, that the operation of the casino was illegal; to the contrary, they had supported the tourism project for years and had participated in the earnings from the casino's operations.

The outcome of the Award, holding that Respondent 1 was not required to issue licenses to the Respondent running to September 13, 2028, despite the unambiguous contractual obligation, was, the Appellant argues, also a violation of public policy because it fundamentally departed from the outcome to which the law chosen by the Parties would have led. The Arbitral Tribunal's consideration of Palestinian law leads to a result which fundamentally departs from the application of Swiss law, as agreed by contract; under Swiss law, the Arbitral Tribunal would have been compelled to impose an obligation on Respondent 1 to issue the licenses it had guaranteed by contract.

3.2.2. The principle of the sanctity of contracts (*pacta sunt servanda*), to which Swiss jurisprudence under Art. 190(2)(e) PILA attributes limited significance, will only be violated if an arbitral tribunal refuses to apply a contractual clause even though it has found that the clause binds the parties or, conversely, infers an obligation from a clause although it considers that clause non-binding. Thus, the arbitral tribunal must have applied a contract term or have refused to apply it and thus put itself into conflict with the results of its own interpretation regarding the existence or substance of the contract in dispute. By contrast, the process of interpretation and the legal consequences derived from this are not covered by the principle of the sanctity of contracts, for which reason it is not possible to establish a grievance of a violation of public policy based on such facts. The Federal Tribunal has emphasised at various points that, in practical terms, the entirety of the disputes arising from contract breaches are excluded from the scope of protection of the principle of *pacta sunt servanda* (Judgments 4A_522/2016[21] of December 2, 2016 at 3.2.2; 4A_319/2015 of January 5, 2016 at 4.1; 4A_634/2014[22] of May 21, 2015 at 5.1.1). The Arbitral Tribunal held that both the General Agreement and the 2000 Agreements were bindingly concluded under Swiss law, which was applicable to those agreements, and that there was neither any initial, objective impossibility nor any invalidity under Art. 20 OR[23] which would constitute an obstacle to this. In its Award,

[21] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-522-2016

[22] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-not-pertinent-international-arbitration

[23] Translator's Note: OR is the abbreviation for the Swiss Code of Obligations.

it pointed out that subjective impossibility or unconscionability do not fall within the scope of Art. 20 OR, but rather may constitute a case of *post hoc* impossibility under Art. 97 and Art. 119 OR. It then conducted a review to determine whether, in addition to Swiss law, which was the stated applicable law, it was necessary to also comply with compulsory Palestinian law (as the law of the state/territory in which the grant of the licenses in question and their enforcement was to take place) which might constitute an obstacle to claims for a specific performance (primary liability) on the part of the Appellant. The Arbitral Tribunal found that it was, focusing on the fact that at the time the General Agreement and the 2000 Agreements were concluded, the prohibition on gambling under Art. 393 *et seq* of the Palestinian Criminal Code (and thus, the prohibition on operating a casino) were not yet *de facto* in force whereas the Criminal Code is now being enforced. The Arbitral Tribunal found that the prohibition applicable under compulsory Palestinian law must be adhered to and constituted an obstacle to any claim for a specific performance (in the form of an obligation to issue licenses for the operation of a casino) but did nothing to alter the validity of the contracts that had been made or the consequences of the failure to perform the contractual obligations (secondary liability). This does not mean that the Arbitral Tribunal contradicted the result of its own interpretation as to the existence or substance of the contracts in dispute. Rather, it considered them valid and took account of the choice of law and of compulsory Palestinian law in assessing what concrete claims result from them. Where the Appellant contests the finding in the Award that found that, based on a mandatory provision of the Palestinian Criminal Code, it had no claim for specific performance (primary liability) but that a violation of the contractual obligation to issue licenses would, at best, give rise to a claim for damages (secondary liability) the Appellant likewise fails to demonstrate any disregard for the principle of *pacta sunt servanda.* Its arguments that Swiss law, which is, in its view, solely applicable, would have led to a fundamentally different result, similarly fail to demonstrate a disregard for the principle. Instead, the Appellant impermissibly criticises the Arbitral Tribunal's interpretation of the Contract and its application of the law in respect of the contractual obligations and the concrete legal consequences of their breach.

The grievance that the Arbitral Tribunal violated the principle of *pacta sunt servanda* and disregarded public policy is thus unfounded.

3.3.

3.3.1. The Appellant complains that the Award leads to a result which is contrary to public policy because the it protects actions by the Respondent which are in bad faith and constitute an abuse of law. The Arbitral Tribunal's assumption, the Appellant argues, is that the obligations entered into under the General agreement and the 2000 Agreements are legally valid, and it noted that Respondent 1 had only invoked the criminal prohibition on gambling *after* the arbitration proceedings commenced, thus changing its legal position. Nevertheless, the Appellant argues, the Arbitral Tribunal dismissed its request for relief in para. 1. The General Agreement, the Appellant argues, expressly provided that all of the licenses for the tourism project would contain an obligation on the part of the Respondents not to permit revocation or modification of the licenses by any public authority, whether by law or decree or similar measures; it argues that the casino license also contained this very stabilisation clause. On the basis of that stabilisation clause in particular, the Appellant, as a foreign private party, argues that it has a protectable reliance interest in ensuring that the licenses which the state had guaranteed by contract for the tourism contract would neither be revoked nor modified.

In the present case, the Appellant argues, Respondent 1 utilised its position as the state and legislator and/or as a court in interpreting its own law, and that it did so in bad faith, in order to avoid having to comply with its own contractual obligations to the Appellant to issue the extended license to run to 2028. The obligation undertaken by Respondent 1 in the year 2000 to extend the licenses to 2028 strengthened the Appellant's belief that it could rely on the fact that the Respondents regarded operation of the tourism project as legal. It was, the Appellant argues, only after the Appellant, on multiple occasions in 2012 and 2013, requested the issuance of the extended licenses and commenced the arbitration proceedings that Respondent 1, contrary to its previous action, changed its legal position regarding the legality of gambling and invoked a judgement by the Palestinian Appellate Court from 2015 holding that gambling was contrary to public policy. The Appellant argues that it is contrary to public policy for the Arbitral Tribunal to protect the bad faith conduct by Respondent 1 by having considered the subsequent change of the Respondent's legal position regarding the legality of gambling, despite the Parties' selection of Swiss law, and by having dismissed, by its Award, Respondent 1's obligation to extend an extended casino license.

3.3.2. In its decision, the Arbitral Tribunal reviewed the objection of bad faith under the guise of contradictory conduct (*venire contra factum proprium*) as raised by the Appellant (referring to the fact that the casino had in fact successfully operated for two years) in connection with the impossibility/ unconscionability of specific performance in the form of a grant of extended licenses. It took account of the mandatory provisions of Palestinian law and of the various protectable interests of the Parties, finding that the prohibition on gambling was a justified interest of the State for the protection of the common good, and that enforcement of this criminal prohibition on the territory controlled by Respondent 1 could not be disregarded. At the same time, it took into consideration the circumstances invoked by the Appellant that, at the time the General Agreement was concluded and during the two years the casino was operated until the end of 2000, when the 2000 Agreements were signed, the criminal prohibition on gambling to which the Respondents now refer was not yet being enforced. For this reason, the Arbitral Tribunal considered the objection of the Respondents that the contracts signed had, allegedly, not been validly formed but were void at the time of their conclusion, to be unfounded.

The Arbitral Tribunal subsequently held that the prohibition on gambling, which was subject to criminal sanction under Palestinian law would, at any rate, be taken into account when assessing the type of liability on the part of the Respondents (primary or secondary liability) and pointed out that it enjoys discretion in assessing the legal consequences flowing from its consideration of the mandatory provisions of foreign law. The Arbitral Tribunal noted, in response to the objection raised by the Appellant that the Respondents had been guilty of contradictory conduct, that the Appellant had not had a protectable right to rely on permissibility of casino operations for the long term, particularly as the Appellant knew that, in the absence of legal regulation of gambling, there was a lack of sufficient legal basis for the operation of a casino and even at the time of the 2000 Agreements, there was not yet any relevant legislation on the horizon. It therefore held that it could not order Respondent 1 to issue licenses for the casino operations, but that Respondent 1 would bear contractual liability for any losses suffered, based on the contracts entered into by it.

The Appellant does not delve into the finding by the Arbitral Tribunal that, based on Clause VI.2 of the General Agreement, it had been aware that there was a lack of the requisite statutory regulation for gambling operations, and thus that there had been no secure legal basis for the operation of a casino. By

its arguments, it is unable to demonstrate to what extent a protectable reliance interest was created in its favour, and how any special circumstances might be present that would make it an act of bad faith in this case to rely on mandatory law (*see* BGE 129 III 493 at 5.1; 125 III 257 at 2a). It similarly fails to demonstrate how the prohibition on bad faith is supposed to result in a claim for specific performance of an action which is criminally punishable at the place of that action, let alone how the result of the challenged Award is supposed to incompatible with public policy although the award generally found in favour of a secondary claim, in the form of damages for breach of contract, despite the illegality of the casino's operation.

3.4.

3.4.1. The Appellant goes on to argue that the challenged Award negates its claim for issuance of the licenses needed for the tourism project with terms to run to September 13, 2028, causing it to suffer expropriation without compensation. The Appellant argues that it is neither receiving any consideration for the investments it made and is being deprived of its claim for the extension of the requisite licenses, nor is it receiving any equivalent value to cover the deprivation of its right to be the sole and exclusive operator of casinos in Palestine until 2028. In its request for relief in para. 2, the Appellant demanded compensation in money; however, it argues, the Arbitral Tribunal completely dismissed this claim, reasoning that the prerequisites for damages under Art. 97 OR had not yet been met for the period 2008-2014. However, this is irrelevant to the question of whether the expropriation as a result of the Award was without compensation, because the decision leads, it argues, to an expropriation of licenses from September 2013 to 2028.

3.4.2. Aside from the fact that, contrary to the assertion raised in the Appeal Brief, it is not obviously apparent how the right to the issuance of a license extended to September 13, 2028, granted under the PA-A._____ AG Agreement, is supposed to constitute an acquired right, the grievance of a violation of public policy already fails due to the fact that the Appellant has not asserted any claim for compensation for alleged expropriation at all. It only claims damages for lost profits for the period from the beginning of 2008 to the end of 2014; for the following period up to September 13, 2028, it neither asserts a claim for damages nor for any other compensation. To the extent that the Appellant complains that the Arbitral Tribunal failed to uphold any claim for damages for the period up to the end of 2014, in the absence of a breach of contract or any losses caused by such breach, it is merely impermissibly criticising the Arbitral Tribunal's application of the law.

This grievance of a violation of public policy is thus also shown to be without foundation.

4.

With respect to the Arbitral Tribunal's dismissal of its request for relief in para. 1(ii), the Appellant complains that the Arbitral Tribunal has violated its right to be heard (Art. 190(2)(d) PILA).

4.1. Art. 190(2)(d) PILA only permits an appeal where the mandatory procedural rules under Art. 182(3) PILA are violated. According to the latter provision, an arbitral tribunal must, in particular, guarantee the right of the Parties to be heard. This essentially corresponds to the constitutional right embodied in Art. 29(2) BV. Case law derives from this, in particular, the right of the Parties to state all facts important for the judgment, to submit their legal arguments, to prove their factual allegations important for the

judgement by means of suitable evidence submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 142 III 360 at 4.1.1; 130 III 35 at 5, p. 38; 127 III 576 at 2c; each with references).

The right to be heard in contradictory proceedings within the meaning of Art. 182(3) and 190(2)(d) PILA does not, pursuant to consistent jurisprudence, also entail a requirement that an international arbitral award should be reasoned (BGE 134 III 186[24] at 6.1, with references). However, it imposes on the arbitrators a minimal duty to examine and address the pertinent issues. That duty is breached when inadvertently, or due to a misunderstanding, the arbitral tribunal does not take into account some factual allegations, arguments, evidence, or offers of evidence submitted by one of the parties that are important to the decision to be issued (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2 with references). If the award totally fails to discuss some elements apparently important to the dispute, it behooves the arbitrators or the respondent to justify the omission in their briefs in the appeal. They have to show that the items omitted, contrary to the assertions by the Appellant, were not pertinent to the decision of the case at hand, or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss each and every argument raised by the parties, so that they cannot be found to have violated the right to be heard if they do not expressly or even impliedly refute an argument objectively lacking any pertinence to the decision (BGE 133 III 235 at 5.2, with references).

The Federal Tribunal is not required to examine whether a different result would have actually been reached in an arbitral award if the legally relevant submissions had been taken into account. Based on the formal nature of the right to be heard, a violation of this principle will, instead, lead to the setting aside of the challenged decision, without regard to whether the submissions were substantively justified (Judgments 4A_460/2013[25] of February 4, 2014 at 3.1; 4A_669/2012[26] of April 17, 2013 at 3.1; 4A_360/2011[27] of January 31, 2012 at 5.1; 4A_46/2011 of May 16, 2011[28] at 4.3.2).

4.2. The Appellant submits that the Arbitral Tribunal disregarded legally significant allegations, arguments and evidence with respect to the duty of Respondent 1 to issue the license for the hotel and the further licenses required for the tourism project with a term to run up to September 13, 2028. In its request for relief at para. 1(i), the Appellant requested the imposition of an obligation on Respondent 1 to issue a casino license valid up to September 13, 2028. In addition, in para. 1(ii) of its request for relief, it separately requested the issuance of the further necessary licenses for the tourism project. In its legal briefs, it repeatedly made clear that the tourism project encompassed not only the construction of a casino but also of a hotel resort. It clearly follows from its Statement of Claim dated July 11, 2014, that in the

[24] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[25] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

[26] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-can-be-annulled-only-part

[27] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear

[28] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg

arbitration proceedings, it was seeking not only the issuance of licenses with a term running to 2028 for the operation of the casino, but also for the operation of the hotel, and that the hotel "E._____" had been in operation, without interruption, up to the present date. It demonstrated that the operation of the hotel "E._____" could be continued, independent of the operation of the casino. Thus, it argues, the hotel "E._____" was in uninterrupted operation and continued to be in operation, although the casino "E._____" was closed in the year 2000; in addition, it states that it pointed out in the arbitration proceedings that the Respondents never called the legality of the hotel operations into question. The Respondents, it says, confirmed that the hotel "E._____" was being operated independent of the casino or its customers, and that hotel operations were not illegal.

In paragraph 456 of the Award, the Arbitral Tribunal found, when assessing the request for relief in para. 1, that the Appellant's focus was on the right to operate the casino "E._____" *and* the hotel for the extended term (*i.e*. until 2028) (emphasis added):

> It is obvious that Claimant seeks to protect its interests in obtaining the necessary licenses and permits either by an order for specific performance to procure such licenses or through a declaration that such licences have already been issued (and it is entitled to operate the E._____ Casino *and the Hotel* for the extended term).

In its further assessment of the request for relief in para. 1, the Appellant submits that the Award initially held, at paragraph 694, that the Parties' agreements were valid. However, because gambling is prohibited today, the Arbitral Tribunal had held that an obligation cannot be imposed on Respondent 1 to issue licenses for the operation of casinos. The Appellant argues that the Arbitral Tribunal fails to even so much as write a single word in its Award stating that pursuant to the previous or current legal view in Palestine, the operation of a hotel and the further activities of the tourism project are illegal. The Arbitral Tribunal, the Appellant argues, failed to provide any separate reasoning for its dismissal of the request for relief in para. 1(ii); it argues that the Arbitral Tribunal dismissed that request for relief, together with the one in para. 1(i), by the mere remark that under today's understanding, gambling is illegal. The Appellant argues that in saying this, the Arbitral Tribunal disregarded the Appellant's argument that the tourism project was not merely the operation of the casino but also the independent operation of the hotel resort which is not illegal in Palestine. If the Arbitral Tribunal, in its decision, had taken account of the argument that hotel operations do not depend on the operation of the casino, and that under today's understanding of Palestinian law, the operation of the hotel is not illegal, it would not have dismissed the request for relief in para. 1(ii), but rather would have imposed an obligation on Respondent 1, based on the PA-A._____ AG Agreement, to extend the term of the further licenses required for the tourism project (and in particular for the operation of the hotel) up to September 13, 2028.

4.3. This grievance of a violation of the right to be heard is shown to be well-founded.

In addition to requesting the issuance of an exclusive casino license valid up to September 13, 2028, for the Palestinian controlled territories (Request in para 1(i)), the Appellant expressly requests, in a separate partial request for relief, issuance of the further licenses and permits necessary in order to operate the *hotel and casino* in X._____ ("all other licenses and permits necessary in order to operate *the hotel and casino* in X._____" [emphasis added]) with a term to run until September 13, 2028 (request for

relief, para. 1 (ii)). In the alternative, it requested a finding that it was entitled to operate the casino *and* the hotel in X._____ ("entitled to continue the operation of the *casino and hotel* in X._____" [emphasis added]) up to September 13, 2028 (request for relief, para. 1(iii)). Accordingly, under the heading 'Qualification of Claimant's Claim No 1', the arbitral tribunal apparently regarded it to be obvious that the Appellant was seeking to protect its interests either by a claim for a specific performance requiring an issuance of the necessary licenses and permits or a judgement that found that it was entitled to operate the casino *and* the casino for the extended term ("and it is entitled to operate the E._____ Casino *and the Hotel* for the extended term" [emphasis added]").

Subsequently, the Arbitral Tribunal rejected the request for relief in para. 1(i) and in para. 1(ii), on the basis that the prohibition on gambling under Palestinian Criminal Law prohibited the issuance of licenses for the operation of casinos. Although the Appellant had invoked the permissibility of hotel operations in the arbitration proceedings, one cannot find any reasoning in the Award as to whether and why the licenses to operate the hotel "E._____" should be affected by the criminal prohibition on gambling. In the challenged Award, the Arbitral Tribunal does not delve even so much by a single word into why the request for relief in para. 1(ii), which *inter alia* mentions the licenses and permits required to operate the hotel in X._____ with a term to 2028, could not have been upheld at least in part, *i.e.* with respect to the hotel "E._____", which, unlike the casino, had not been closed according to the findings of fact in the challenged award, but rather stayed open at least until 2014.

Contrary to the view of the Respondents, the reasons given in the challenged Award do not contain any indications that the argument of the permissibility of hotel operations that was raised by the Appellant was even implicitly refuted. In its comments before the Federal Tribunal, the Arbitral Tribunal does not, for example, state that this argument had been implicitly refuted, but rather to the contrary, confirms that it did not review this question, for the reason that the separate grant of a hotel license (independent of the operation of the casino) was, it said, at no point a subject of the Parties' legal dispute. However, contrary to the view of the Arbitral Tribunal, the fact it raises in its comments that the Appellant had confirmed on multiple occasions that it had been operating the hotel from the time of its opening up to the present day, without any limitations, does not rule out the possibility that the Appellant's request for relief in para. 1(ii) was also directed at the grant of a separate hotel license, particularly as the term of the requested license and the necessary permits extended far into the future (*i.e*. until September 13, 2028), and a license with a term of this length had obviously not been granted to date. In particular, the reasoning of the challenged Award does not provide any support for the view espoused now by the Arbitral Tribunal before the Federal Tribunal that the request for relief in para. 1(ii) could only have been understood to mean "that it covered the *entirety* of all other permits and concessions required for the operation of the tourism project, which included the casino, and not *individual* licenses of this kind". However, it would have been made clear hd it provided remarks along these lines in the reasoning of the Award, particularly since the Arbitral Tribunal itself expressed views on how the request for relief should be characterised under the heading "Qualification of Claimant's Claim No. 1".

The grievance that the Arbitral Tribunal disregarded its minimal duty to examine the argument of whether it was permissible to issue a hotel license and the necessary permits for hotel operations is revealed to be well-founded. Dismissal of the request for relief in para. 1(ii) was a violation of the Appellant's right to be heard (Art. 190(2)(d) PILA). After the matter is referred back to the Arbitral Tribunal, the Arbitral

Tribunal will be required to honour the Parties' right to be heard by conducting a review as to whether a claim may potentially exist for the grant of the licenses and permits necessary to operate a hotel in X._____ with a term running to September 13, 2028, notwithstanding the criminal prohibition on gambling, and whether the request for relief in para. 1(ii) should be upheld, at least in part. In view of this outcome, the Federal Tribunal is not required to resolve the question of whether dismissal of the request for relief in para. 1(ii) regarding hotel operations constitutes a violation of substantive public policy (Art. 190(2)(e) PILA), as the Appellant likewise argues.

5.
To the extent that the lower court dismissed the request for relief in para. 1(ii) in its entirety, the Award under appeal does not withstand judicial scrutiny; however, it does not contain further errors in any other respects. Accordingly, it is proper to set aside the Award of the Arbitral Tribunal seated in Zurich dated August 2, 2016, and to refer the matter back to the Arbitral Tribunal for re-adjudication of the request for relief in para. 1(ii). This decision on the merits renders moot the Appellant's request for a grant of suspensory effect.

The assumption of the Appellant – as previously the Arbitral Tribunal – is that the amount in controversy is CHF 1'396'170'000 (corresponding to USD 1'468'430'233). This amount is precisely the total of the two quantified claims for payment under the requests for relief in para. 2 (USD 1'433'229'715) and para. 3 (USD 35'200'518.99). The Appellant does not provide any quantified amount in dispute for its request for relief under para. 1(ii), let alone for the sole claim for the grant of the license and the necessary permits to operate the hotel in X._____. In these circumstances, the assumption is that its interest in obtaining the grant of a hotel license with a fixed term running to 2028 instead of the hotel licenses previously issued on an annual basis is of lesser significance as compared with its other requests for relief. Because the referral for re-adjudication pertains only to a part of the request for relief in para. 1(ii) and the Arbitral Tribunal's dismissal of the Appellant's claim cannot be criticised in other respects, and despite the fact that the appeal is being upheld in part, 95% of the costs and Party compensation are being imposed on the Appellant (Art. 66(1) and Art. 68(1) BGG). In light of the outcome of the case (Art. 66(1) and Art. 68(1) BGG), Respondent 1, who is the sole Party against whom the request for relief in para. 1(ii) is directed, will accordingly bear 5% of the costs of the proceedings. To the extent of the party compensation of CHF 12'500.00 owed by Respondent 1, the amounts of compensation owed by each Party are offset by the amounts owed by each of the other Parties, and thus the party compensation which remains payable by the Appellant comes to CHF 225'000.00 (CHF 237'500 minus CHF 12'500).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is upheld in part, and the Award of the Arbitral Tribunal seated in Zurich dated August 2, 2016 is hereby set aside and the matter is referred back to the arbitral tribunal seated in Zurich for a re-adjudication of the request for relief in para. 1(ii).

2.
The judicial costs set at CHF 200'000.00 are imposed on the Appellant in the amount of CHF 190'000, and on Respondent 1 in the amount of CHF 10'000.

3.
The Appellant shall pay Respondent 1 the amount of CHF 225'000, and Respondent 2 the amount of CHF 250'000.00, for the Federal judicial proceedings. This amount shall be paid from the security for costs deposited with the Federal Tribunal's payment office, and the excess refunded to the Appellant.

4.
This Judgement shall be notified in writing to the Parties and to the arbitral tribunal seated in Zurich.

Lausanne, May 30, 2017

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding judge:	Clerk:
Kiss	Leemann