

4A_462/2018¹

Judgement of July 4, 2019

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 (Mr.)

A._____AG,
represented by Dr. Laurent Killias and Dr. Christine Möhler,
Appellant

v.

1. State of Palestine, (also referred to as ‘the Palestinian Authority’),
represented by Mr. Harold Frey, Dr. Martin Aebi, and Mr. Fadri Lenggenhager,
2. B._____Company,
represented by Ms. Mariella Orelli, Ms. Kirstin Dodge, and Dr. Pierre-Yves Marro,
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 (also referred to as ‘the Palestinian Authority’) (Defendant 1, Respondent 1) is the Palestinian autonomous authority.

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. The C._____ Fund was formed in 2003 and its purpose is to promote sustained economic growth

¹ Translator’s Note:

Quote as A._____ A.G. v. State of Palestine and B._____, 4A_462/2018.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

within the occupied Palestinian territory; its management board members are appointed by the President of Defendant 1.

A.b. This dispute is connected to 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.

[...]

V. ARBITRATION [...]

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:

[...]

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

A.c. The casino "E. _____" was the primary object 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

² Translator's Note:

In English in the original text.

was in light of the fact that gambling is prohibited in Israel and efforts at legalising it had failed but there was apparently 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. By 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). Under Art. 397(4) of the Palestinian Criminal Code, licenses may only be issued for lotteries, which are also 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 Defendant 1. 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.

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, whereas 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.

A.h. 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. [...]³

Sec. I.2 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.

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

A.i. 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 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.j. 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 licenses covering the tourism project. By letter dated July 31, 2012, the Claimant asserted that the failure to issue extensions of the licenses 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.

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.⁴

By 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, criminalized 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.

B.b. By civil law appeal, the Claimant challenged the Award of August 2, 2016, before the Federal Tribunal. By Judgement 4A_532/2016⁵ of May 30, 2017, the Federal Tribunal set aside the Award of August 2, 2016, partially upholding the appeal and remanding the case to the Arbitral Tribunal with its seat in Zurich for the re-adjudication of Claim 1(ii). The Court found the dismissal of this claim had breached the Claimant's right to be heard; however, in further and other respects, there were no objections to the arbitral award.

With regard to the violation of the right to be heard (Art. 190(2)(d) PILA⁶), the Federal Tribunal stated the following in its decision, at 4.3:

The grievance that the Claimant's right to be heard was violated is proven to be well-founded. In addition to the issuance of an exclusive casino license for the Palestinian-controlled territories valid until September 13, 2028 (Application 1 [i]), the Appellant expressly applied by way of a separate sub-claim for the issuance of all other licenses and permits necessary in order to operate *the hotel and casino* in X. _____ [emphasis added] with a term running to September 13, 2028 (Application No. 1 [ii]). In the alternative, it has requested that it be "entitled to continue the operation of *the casino and hotel* in X. _____" [emphasis added] until September 13, 2028 (Application No. 1 [iii]). Accordingly, under the heading of "Qualification of Claimant's Claim No. 1", the Arbitral Tribunal considered it obvious that the Appellant was seeking to protect its interests either by a judgement for specific performance

⁴ Translator's Note:

In English in the original text.

⁵ Translator's Note:

The English translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/atf-4a-532-2016>

⁶ Translator's Note:

PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

directed towards to the grant of the requisite licence and permits or to obtain protection by a judgement finding that “it is entitled to operate the E._____ Casino and the Hotel for the extended term”. [emphasis added]

Subsequently, the Arbitral Tribunal dismissed the claims No. 1(i) and 1(ii) on the grounds that the ban on gambling under Palestinian Criminal law prohibited the issuance of licenses to operate casinos. Although the Appellant had relied on the permissibility of hotel operations in the arbitration proceedings, the Award does not provide any justification as to whether and why the requested licenses to operate the hotel “E._____” should also be affected by the criminal ban on gambling. The Arbitral Tribunal fails in the challenged Award to delve by even so much as a single word into the question of why Claim No. 1(ii), mentioning *inter alia* the licenses and authorizations required to operate the hotel in X._____ with the term running until 2028 could not have been approved at least in part – *i.e.* in respect of the hotel “E._____” – which, according to the findings of fact in the contested award, was not closed, in contrast with the Casino, but remained open at least until 2014.

Contrary to the view of the initial Respondents, the reasons given in the challenged Award do not provide any indication that the argument put forward by the Appellant that hotel operations were permissible had been refuted by implication. In its comments before the Federal Tribunal, the Arbitral Tribunal itself does not, for example, argue that the argument had been essentially refuted, but rather confirmed that it failed to examine this question, stating as its justification for this that the separate grant of a hotel license (independent from casino operations) had at no time been a subject of the parties’ dispute. Contrary to the view of the Arbitral Tribunal, the fact that the Appellant had confirmed multiple times that it was operating the hotel without limitations since the time of its opening and up to the present day, which was noted in the course of its comments, does not exclude the possibility that the Appellant’s Claim No. 1(ii) was also directed to the grant of a separate hotel license, particularly as the term of the requested license and the requisite permits runs far into the future (*i.e.* up to September 13, 2028) and a license with a term of this scope apparently has not, to-date, been granted. In particular, the Court finds no support for the view now espoused before the Federal Tribunal that the Claimant’s Application No. 1(ii) could only have been understood to mean “that it [was directed] to obtaining the *totality* of all other permits and concessions which would have been required to operate the tourism project which included the casino, and not to *individual* licenses of this kind”, in its reasoning for the challenged Award. However, comments along these lines in the reasoning of the judgment were manifestly relevant, particularly as the Arbitral Tribunal specifically gave its view regarding the categorization of its Claim No. 1 under the heading “Qualification of Claimant’s Claim No. 1”.

The complaint that the Arbitral Tribunal disregarded its minimum duty to examine the argument of the admissibility of issuing a hotel license and the requisite permits for hotel operations proved to be well-founded. The Arbitral Tribunal’s rejection of Claim No. 1(ii) was in violation of the Appellant’s right to be heard (Art. 190(2)(d) PILA). Following the Federal Tribunal’s remand of this dispute, the Arbitral Tribunal was called upon to honour the Appellant’s right to be heard when examining whether, notwithstanding the ban on gambling under criminal law, the Appellant might potentially have a claim to the grant of the necessary permits and licences for hotel operations in X._____, with a term running to September 13, 2028, and Claim No. 1(ii) should be approved, at least in part. In light of this outcome, the Court left

open the question of whether dismissal of Claim 1(ii) with respect to hotel operations constitutes a violation of substantive public policy (Art. 190(2)(e) PILA), which the Appellant has likewise asserted.

B.c. On July 3, 2017, the Zurich-based Arbitral Tribunal, referring to Federal Tribunal Judgment 4A_532/2016⁷ of May 30, 2017, informed the Parties that it would be issuing a new arbitral award, and gave them an opportunity to comment on the planned proceedings. The Parties submitted their comments on July 12 and 21, 2017, respectively.

On July 26, 2017, the Arbitral Tribunal invited the Parties to submit their comments on the Federal Tribunal Decision of May 30, 2017, to the extent that Decision related to Claim No. 1(ii). It also stated that no new facts or evidence were permitted at this stage of the proceedings.

On August 30, 2017, the Claimant commented on the Federal Tribunal Decision of May 30, 2017. In addition, it renamed its claim No. 1(ii), calling it Claim No. 1(a), and in 1(b) it asserted a claim in the alternative. In addition, the Claimant submitted new requests for a declaratory judgement in Sec. 2(a), (b) and (c). Also on August 30, 2017, the Defendants submitted their comments to the Arbitral Tribunal. By written submission of August 31, 2017, Defendant 1 requested the Arbitral Tribunal disregard certain portions of the Claimant's written submission of August 30, 2017. Defendant 2 joined these objections by written submission of September 4, 2017. On September 5, 2017, the Claimant commented on these written submissions.

By letter dated September 13, 2017, the Arbitral Tribunal gave the Parties *inter alia* the opportunity to state their positions with regard to the original claims under No. 1(ii), and in particular on the question of what the Claimant was requesting by this claim and whether it should be understood that the issuance of the necessary permits to operate the hotel "E._____" was being demanded separately or only in tandem with the casino license.

On October 4, 2017, the Claimant filed its written comments, and confirmed the claims asserted in its written submission of August 30, 2017.

By written submission of October 25, 2017, the Defendants commented on the Arbitral Tribunal's letter of September 13, 2017, and on the Claimant's comments of October 4, 2017.

B.d. By Award of July 5, 2018 ("New Final Award"), the Arbitral Tribunal rejected the Claimant's claims under Nos. 1(b), 2(a), (b) and (c) (operative part, para. 1) and dismissed the action in its entirety (operative part, para. 2). In addition, it made orders regarding the cost and compensation consequences (operative part, paras. 3-6). The Arbitral Tribunal rejected all of the further claims (operative part, para. 7).

The Arbitral Tribunal considered, in particular, that the Claimant's procedural submissions should be understood as a whole to mean that the Claim 1(ii) did not also encompass the issuance of a separate hotel license. Accordingly, the Award of August 2, 2016, and the content of the Arbitral Tribunal's

⁷ Translator's Note:

The English translation of this decision is available here:
<https://www.swissarbitrationdecisions.com/atf-4a-532-2016>

comments of November 28, 2016, in the Appeal proceedings before the Federal Tribunal should be confirmed.

C.

By civil law appeal, the Claimant requests the Federal Tribunal set aside the Award of the Arbitral Tribunal seated in Zurich dated August 5, 2018, and to remand the case to the Arbitral Tribunal for re-adjudication.

The Respondents requested the Federal Tribunal dismiss the appeal to the extent the matter was capable of appeal. The Arbitral Tribunal waived its right to submit comments.

The parties have submitted Reply briefs and Rejoinder briefs.

D.

By Order of November 14, 2018, the Federal Tribunal approved the Respondents' applications for security and directed the Claimant to deposit the amount of CHF 400'000 in cash with the Treasury of the Federal Tribunal as security for any party compensation which may be payable. That amount was subsequently received by the Treasury.

By Order of March 25, 2019, the Federal Tribunal accorded suspensive effect to the Appeal.

Reasons:

1.

According to Art. 54(1) BGG⁸ the Federal Tribunal issues its decisions in an official language,⁹ 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 being challenged here is in English. Because that is not one of the official languages, the judgment of the Federal Tribunal is being issued in the language of the Appeal, as per regular practice (see BGE 142 III 521¹⁰ at 1).

2.

In the realm of international arbitration, a Civil law appeal is admissible where the requirements of Arts. 190-192 PILA (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, the parties had their seats outside 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).

⁸ 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).

⁹ Translator's Note:

The official languages of Switzerland are German, French, and Italian.

¹⁰ Translator's Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

2.2. 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 to set aside the 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 605¹¹ at 3.3.4, p. 616 with references).

However, it is not possible to rule out the possibility that the Federal Tribunal may 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 (see judgements 4A_580/2017 of April 4, 2018 at 1.3; 4A_532/2016¹² of May 30, 2017 at 2.4; 4A_633/2014¹³ of May 29, 2015 at 2.3; 4A_460/2013¹⁴ of February 4, 2014 at 2.3, with references). To such extent, the application of the Appellant is admissible.

2.3. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186¹⁵ at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 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 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 permitted (BGE 134 III 565 at 3.1, p. 567; 119 II 380 at 3b, p. 382).

3.

The Appellant accuses the Arbitral Tribunal of having disregarded the decision of the Federal Tribunal of May 30, 2017, by stating that it was not examining the claim for the issuing of a hotel license; thus, the violation of the Appellant’s right to be heard as found by the Federal Tribunal was not cured after the matter was remanded by the Federal Tribunal; rather the Arbitral Tribunal had once again committed a violation of the Appellant’s right to be heard (Art. 190(2)(e) PILA).

3.1. The Appellant argues that the Federal Tribunal found that the Arbitral Tribunal had violated the Appellant’s right to be heard with regard to the duty of Respondent 1 to issue the licenses and permits required to operate the hotel “E. _____” for a term running to September 13, 2028. In Section 4.3, the Federal Tribunal first stated that the Appellant had indeed also expressly requested the issuance of a hotel license by the assertion of a separate claim. It argues that the Federal Tribunal had, in that same

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: <https://www.swissarbitrationdecisions.com/atf-4a-532-2016>

¹³ Translator’s Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/res-judicata-revisited>

¹⁴ Translator’s Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal>

¹⁵ Translator’s Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

section, reiterated that Claim 1(ii) also contained an application for the issuance of a separate hotel license. It also argued that the Federal Tribunal found the arbitral tribunal had infringed its right to be heard because it had failed to examine the legally relevant argument that hotel operations were permissible and legal. Furthermore, in Section 2.3, the Appellant argues, the Federal Tribunal affirmed the Appellant's interest in legal protection to issue a separate hotel license (i.e. independent of the casino license) for a term running until 2028.

The Appellant argued that the Federal Tribunal had rejected the explanation given in the Arbitral Tribunal's statement in the Appellate proceedings that the Appellant had not requested a separate hotel license (i.e., independent of the casino license) by means of a separate legal Claim No. 1(ii), since the separate issue of a hotel license had supposedly never been the subject of a legal dispute. It argued that it is clear from the Federal Tribunal's considerations that the Arbitral Tribunal violated the Appellant's right to be heard because it failed to examine the "permissibility of hotel operations" or "the permissibility of issuing a hotel license and the necessary permits for operations". The Federal Tribunal had, it said, instructed the Arbitral Tribunal to examine the question of "*whether there was [...] a claim for the grant of the licenses and permits required for hotel operations in X. _____ with a term running to September 13, 2028 and whether Claim No.1(ii) should be approved at least in part*". It stated that the Arbitral Tribunal had an obligation to examine on the merits the question of whether the Appellant had a claim for a license to operate the hotel until September 13, 2028. In clear disregard of the Federal Tribunal decision of May 30, 2017, however, the Arbitral Tribunal had, the Appellant said, stated in the New Arbitral Award that it would not examine the claim for the issuance of a hotel license, because it should be assumed, on the basis of a narrow interpretation of Claim 1(ii), that no application had been made for the issuance of a separate hotel license running until September 13, 2028 (i.e., independent of the casino license).

3.2.

3.2.1. Where the Federal Tribunal remands a matter to a lower court, the point in dispute covered by the remand cannot be expanded or placed on a new legal footing (BGE 143 IV 214 at 5.3.3, p. 522; 135 III 334 at 2 and 2.1, pp. 335-336; 131 III 91 at 5.2, p. 94; each with references). Rather, the court dealing with the re-adjudication must instead base its decision on the legal assessment on which the remand of the case was based. That assessment is likewise binding on the Federal Tribunal (BGE 135 III 334 at 2 and 2.1, p. 335; 133 III 201 at 4.2 p. 208; 125 III 421 at 2a, p. 423). Because of this binding effect on the courts, they and the parties (apart from any permissible new matter) are barred from considering circumstances other than the previous ones in assessing the legal dispute or from examining the matter from a legal point of view that had been expressly rejected in the decision to remand the case or that had not even been considered at all (BGE 143 IV 214 at 5.3.3, p. 222; 135 III 334 at 2 and 2.1, pp. 335-336; 133 III 201 at 4.2; each with references). The fact that the courts are bound by the considerations contained in the decision to remand the case is a procedural principle applying to all decisions of the Federal Tribunal to remand a case and applies likewise in the realm of arbitration (judgements 4A_426/2015 of April 11, 2016 at 3.1; 4A_54/2012¹⁶ of June 27, 2012 at 2.2.3 with references; see, e.g., BGE 112 Ia 166 at 3e).

¹⁶ Translator's Note:

The English translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/federal-tribunal-recalls-that-procedural-mistakes-or-a-decision->

3.2.2. The grievance that the Arbitral Tribunal disregarded the binding effect of the Federal Tribunal's Decision to remand the case and that it has once again violated the Appellant's right to be heard is well-founded. The Federal Tribunal does not adopt the argument made in the Arbitral Tribunal's comments of November 28, 2016, stating that Legal Claim 1(ii) should be understood in the restrictive sense, to say that it related only to the totality of the permits and license required for the tourism project, but not to the granting of a separate hotel license. The Federal Tribunal had expressly rejected the Arbitral Tribunal's argument in its comments that the separate grant of a hotel license (independent of casino operations) had at no point been a subject of the parties' legal dispute. Contrary to the view expressed by the Respondents, it is thus not the case that the Federal Tribunal merely criticized the lack of reasons for the Arbitral Tribunal's (narrow) interpretation of Claim 1(ii). Nor can the Federal Tribunal accept those arguments where the Respondents wish to infer from the mere word "potentially" used in the decision to remand that a claim could only have been examined if the Arbitral Tribunal had reached the conclusion that a corresponding application had been made (at 4.3, 4th paragraph: "the Arbitral Tribunal will be required to [...] [conduct] 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, [...] [emphasis added]). This merely highlighted the fact that the question of whether such a claim existed had remained open and required clarification. Accordingly, the Court's decision to remand had expressly criticized the Arbitral Tribunal's failure in its Award to make clear any reasons as to whether and why the requested license to operate the hotel "E._____" should be affected by a ban on gambling under criminal law, even though the Appellant had referred to the permissibility of hotel operations in the arbitral proceedings.

Following the decision to remand the case for re-adjudication, the only question remaining to be answered was the Appellant's argument, which was ignored by the Arbitral Tribunal in the first arbitration, that, regardless of the criminal ban on gambling, it was entitled to the grant of the license and permits required for hotel operations in X._____ until September 13, 2028. By expressly leaving open once again the question of whether the Appellant was entitled to assert a claim to a separate grant of the hotel license and permits, and justifying this by stating that such a license had not been applied for at all and thus had never been the subject of arbitration, the Arbitral Tribunal disregarded the decision of the Federal Tribunal to remand the case for re-adjudication by examining the matter from a legal perspective which had been expressly rejected by the Federal Tribunal in its decision to remand the matter.

By raising the objection that the Federal Tribunal could not have imposed an obligation on the Arbitral Tribunal to (substantively) examine the alleged claim for the grant of a separated hotel license, the Respondents impermissibly criticize the Federal Tribunal's decision to remand the case and themselves fail to recognise that the decision to remand *also* binds the Federal Tribunal. A review of the substance of the contested Award was not otherwise carried out.

For this reason alone, the challenged Award must be set aside and the case must once again be remanded to the Arbitral Tribunal with its seat in Zurich to preserve the Appellant's right to be heard. It is thus not necessary to deal with the further grievances raised by the Appellant.

4.

The Federal Tribunal upholds the appeal, sets aside the challenged Award, and remands the matter to the Zurich-based Arbitral Tribunal for re-adjudication. In accordance with the outcome of the proceedings, the Respondents are jointly and severally liable to pay compensation for costs and Party compensation (Art. 66(1) and (5) and Art. 68(2) and (4) BGG).

Therefore the Federal Tribunal pronounces:

1.

The Appeal is upheld and the New Arbitral Award of the Arbitral Tribunal seated in Zurich dated July 5, 2018, is set aside and the matter is referred back to the Arbitral Tribunal seated in Zurich for re-adjudication.

2.

The judicial costs set at CHF 160'000 are imposed on the Respondents jointly and severally.

3.

The Respondents shall pay the Appellant the amount of CHF 200'000 for the federal judicial proceedings.

4.

The security for costs deposited by the Appellant with the Treasury in the amount of CHF 400'000 shall be refunded to the Appellant.

5.

This Judgement shall be notified in writing to the Parties and to the arbitral tribunal seated in Zurich.
Lausanne, July 4, 2019

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

Presiding judge:

Kiss

Clerk:

Leemann (Mr.)