Kluwer Arbitration Blog

Can an Arbitral Tribunal Award a Claim in a Different Currency Than Requested? – The Case of Switzerland

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Swiss substantive law allows a debtor to pay a debt in the national currency of the place of payment even though the debt is actually owed in a foreign currency, except for cases where the contract expressly requires fulfillment of the debt in "actual currency" by using the term "actual" or words to that effect (Article 84(2) of the Swiss Code of Obligations). A creditor has to accept fulfillment of a monetary debt payable in Switzerland by means of payment in Swiss francs even if the debt is owed in a foreign currency. In contrast, a creditor cannot claim compensation in a currency other than the currency owed (*see, e.g.,* the decision of the Federal Supreme Court, ATF 134 III 151, consid. 2.2). Thus, a Swiss court cannot award a claim in the national currency of the place of payment if the compensation is actually owed in a foreign currency but has to dismiss such claim (*see,* the decision of the Federal Supreme Court, ATF 134 III 151, consid. 2.4). Likewise, a Swiss court may not award a claim in the currency owed if the creditor has wrongly claimed compensation in a different currency – by doing so, the Swiss court would violate the Swiss procedural law principle of *ne extra petita*which forbids a court to award "something else than what has been claimed" as set out in Article 58(1) of the Swiss Civil Procedure Code (*see, e.g.,* the decision of the Federal Supreme Court, dated 1 October 2015, Case no. 4A_319/2015, consid. 3). This blog post will shed light on this issue in the context of international arbitration against the background of a recent decision rendered by the Swiss Federal Supreme Court.

Swiss *Lex Arbitri*: Enshrining the Principle of *Ne Extra Petita*

In international arbitration proceedings, the *lex arbitri* of Switzerland, as set out in Chapter 12 of the Swiss Private International Law Act ("**PILA**"), also requires an arbitral tribunals to adhere to the principle of *ne extra petita*. An arbitral award that disregards this principle may be set aside on the ground as set out in Article 190(2)(c) PILA. Article 190(2)(c) PILA reads as follows:

> An arbitral award may be set aside only:

> […]
>
> c. where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;
>
> […]

An arbitral award can thus be set aside if it grants a party more than it has claimed (*ultra petita*), if it grants a party something else than it has claimed (*extra petita*), or if it fails to decide on one or more claims (*infra petita*).

In the context of the topic at hand, the question one must ask is whether an award can be set aside in which the arbitral tribunal has awarded payment of a claim in a different currency than the currency claimed, as would be the case under Swiss substantive and procedural law as described above. In a recent decision rendered on 8 April 2021 in French, the Federal Supreme Court was presented with the opportunity to assess this question (Case no. 4A_516/2020, no English translation yet available at the time of this posting).

What Does the Federal Supreme Court Have to Say?

The background of the Federal Supreme Court's decision was an international investment arbitration proceeding under the ICC Rules. The dispute concerned the investment of several Turkish investors in cement plants in Syria. In the course of the Syrian war, in April 2012, the Syrian government lost control over the region where the plants were located. As a consequence, the investors had to abandon their plants. In order to obtain compensation for the value of their investment in the plants, the investors commenced arbitration against Syria and requested payment of damages in USD. In its award rendered on 31 August 2020, the Arbitral Tribunal awarded the investors compensation of their claim in Syrian pounds (SYP) but allowed the investors to request payment in USD at the official exchange rate of the Syrian Central Bank on the day of payment. However, because of the Syrian pound's significant currency devaluation between 2012 (when the investors lost control over the plants) and 2020 (when the award was rendered), the USD value of the amount awarded in SYP in 2020 was considerably lower than USD value of the amount of damages suffered by the investors in 2012.

The investors commenced setting aside proceedings before the Federal Supreme Court arguing, among others things, that the Arbitral Tribunal had violated the principle of *ne extra petita* by awarding the investors compensation in SYP rather than in USD.[1)]

The Federal Supreme Court considered that the compensation in SYP was "technically" something else than what the investors had claimed (in the words of the Court, an *aliud*) but nonetheless refused to set aside the award. Rather, the Court considered the investors to lack a legitimate interest in having the award set aside (as required by Article 76(1)(b) of the Swiss Federal Supreme

Court Act). According to the Federal Supreme Court, it was uncertain whether a setting aside of the award and a remand to the Arbitral Tribunal for a new decision would be more favorable to the investors. The Court assumed that the Arbitral Tribunal in such case would reject the investors' claim in USD. Although the investors could commence new proceedings claiming compensation in a currency other than USD, the Court considered that there was nothing to suggest that such a solution would be more favorable for the investors (Case no. 4A_516/2020, consid. 5.5).

Eventually, the Federal Supreme Court left open the question whether an arbitral tribunal can award a claim in a different currency than the currency claimed by the plaintiff. Instead, the Court submitted that the principle of *ne ultra/extra petita* may be less rigorously applied in a case concerning international commercial law than in a case governed by Swiss law (Case no. 4A_516/2020, consid. 5.5).

Federal Supreme Court's Reasoning Leaves One Unsatisfied

The Court did not answer the question whether an arbitral tribunal can award payment of a claim in a different currency than the currency claimed, although the Court considered that in this case the Arbitral Tribunal awarded something else than what had been claimed. Rather, the Court noted that the principle of *ne infra petita* might be applied less strictly in an international commercial setting, without however defining what this means.

Moreover, the Federal Supreme Court simply assumed that the Arbitral Tribunal would reject the investor's USD claim if the case were remanded without detailing the basis of this assumption. The Court's conclusion that the investors lack a legitimate interest in having the award set aside ignores the fact that the award of a sum in a currency other than the one claimed resulted in a significant loss for the investors because of that currency's devaluation.

In any case, this decision confirms the high threshold to be met to successfully set aside an award in Switzerland.

Key Takeaways

Parties to international arbitration proceedings seated in Switzerland involving different currencies are well advised to assess the correct currency of their claim and, in case the claim is for a currency other than the apparent currency, to show the arbitral tribunal why a different currency is claimed.

In commercial arbitration proceedings, parties should also consider to designate in their contract the currency for all claims arising out of or in connection with the contract. Absent such a clause,

under Swiss substantive law, the contractually agreed currency designates the currency of a claim for performance. In case of a claim for damages, the correct currency is usually the currency of the state where the damages occurred (*see, e.g.*, the decision of the Federal Supreme Court, dated 10 February 2017, Case no. 4A_341/2016, consid. 2.2).

In investment arbitration proceedings, the bilateral investment treaty may designate a specific currency for compensation claims, e.g. the currency of the investor's state of domicile or the currency of the state where the investment is made. In the case at hand, the bilateral investment treaty in question did not designate the currency and the Federal Supreme Court considered that there was no established international rule determining the currency for compensation in investment arbitration (Case no. 4A_516/2020, consid. 4.3.2). In such a case, it is up to the claimant to convince the arbitral tribunal that the claimed currency is the correct one.

References

The investors also claimed that the award was against substantive public policy as the investors
?1 were only awarded a fraction of their loss on investment incurred. This argument was rejected by the Federal Supreme Court.

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