

Q&A on the ICC's Arbitration Award

Q: Who started the arbitration?

A: Following the judgement of the First Hall Civil Court delivered on 24 February 2023, Steward purported to terminate the concession. Amongst other things, Steward claimed that the judgement constituted a default by Government allegedly justifying termination of the Concession (with damages to be paid to them). Government disagreed and terminated the concession itself, because Steward abandoned the concession and the three hospitals.

On 29 March 2023, Steward initiated Emergency Arbitration Proceedings under the ICC Rules to prevent the Government from taking control of hospital operations. The Emergency Arbitration was ultimately dismissed, and the Government's position was upheld by the emergency arbitrator, who awarded the Government costs. As a result of initiating the Emergency Arbitration, Steward was then required to commence international arbitration proceedings on the merits.

Q: Didn't the Government say it sued Steward?

A: That's correct. The Government did not only raise defences to Steward's claims, but also filed counterclaims against Steward.

Steward was the Claimant in the arbitration and the Government the Counterclaimant. Claims in international arbitration are brought by claimants and (as the case may be) counterclaimants, and both sets of claims are, for all intents and purposes, full claims.

Q: What were the Government's defences and claims?

A: Initially, before the Court of Appeal delivered its judgement in the *Delia* case, the Government's primary defence was that the contracts were null because they constituted State aid under EU law. Consequently, Government argued that, in line with Maltese law, both parties should be restored to the position they were in before signing the contracts. This defence was raised before the Court of Appeal had delivered its judgement in the *Delia* case in October 2023.

In addition to this primary defence, Government also raised contractual counterclaims against Steward. These included:

- Allegations that Steward fraudulently misrepresented its financial position when taking over the concession, thereby acting in bad faith.
- Claims for losses resulting from Steward's failure to invest in the hospitals.
- Claims for losses due to Steward's failure to develop medical tourism.
- Other contractual claims relating to the agreements between the parties.

These claims were eventually quantified at around €760 million (Award, para 391).

Once the Court of Appeal delivered its final judgement in the *Delia* case, Government added a further line of defence that the contracts had been rescinded by the Court of Appeal because they breached the Government Lands Act. This became Government's primary defence. Consequently, Government argued that, in line with Maltese law, both parties should be restored to the position they were in before signing the contracts.

In summary, and by the end of the case, Government had three main lines of defence and counterclaims:

1. **Court of Appeal Judgement:** The contracts were rescinded by the Court of Appeal in the *Delia* case due to violations of the Government Lands Act, warranting restoration to the position the parties were in before signing the contracts in terms of the applicable provisions of Maltese law.
2. **EU State Aid:** The contracts constituted State aid under EU law, also warranting rescission and restoration.
3. **Contractual Liability:** In the event the Tribunal were to find that the contracts were not rescinded, that Steward unlawfully terminated the concession and was liable for damages arising from the Government's contractual counterclaims. Such counterclaims could only arise if the contracts were still valid, as rescission wipes out the contracts altogether and with them any contractual rights or obligations.

Q: What were Steward's claims?

A: Steward raised several claims in the arbitration proceedings:

1. **Termination:** Steward argued that it had the right to terminate the concession agreement, citing—among other reasons—the judgement in the *Delia* case, where the First Hall Civil Court had rescinded the contracts.
2. **Penalty Termination Payment:** Steward claimed it was entitled to a termination payment of €100 million.
3. **Loan Repayment:** Steward also sought reimbursement for its outstanding loan with Bank of Valletta.

These claims were eventually quantified at around €148 million (Award, para 384)).

Throughout the proceedings, Steward resisted Government's argument that the contracts were null and void as pronounced by the Maltese Courts in the *Delia* case. It maintained until the very end that the contracts remained valid and enforceable, and that it was owed a €100 million termination payment.

Q: How was the arbitration structured?

A: The arbitration proceedings followed a typical international commercial arbitration structure:

- **Written Submissions:** Both parties submitted multiple rounds of written pleadings, supported by documentary evidence, witness statements, and expert reports. Steward only put forward one fact witness who subsequently did not appear at the hearing.
- **Document Discovery:** A discovery phase was held, during which each side was required to disclose documents requested by the other party.
- **Final Hearing:** The case culminated in a five-day hearing held in Paris. During this hearing, legal submissions were presented, and both factual and expert witnesses were examined by the parties and questioned by the tribunal.
- **Timeline:**
 - The arbitration commenced in **April 2023**.
 - The hearing took place in **May 2025**.
 - The final award was delivered in **November 2025**.

Q: What did the Tribunal eventually decide?

A: The Tribunal upheld Government's primary claim that the contracts were rescinded by the Court of Appeal judgement because they did not comply with the Government Lands Act, and that under Maltese law, rescission requires that the parties return all benefits they received under the contracts.

The Tribunal also accepted Government's position that claims in contract, including Steward's claim for a €100 million penalty termination payment and any damages, cannot be enforced if the contract has been rescinded and annulled (Award, paras 834 - 838).

On this basis, i.e. accepting the Government's primary defence, the Tribunal rejected Steward's claims in contract (Award, paras 796 and 797), as well as Government's counterclaims in contract (Award, para 800).

In terms of the applicable provisions of Maltese law, the Tribunal then undertook a detailed exercise for the restitution to pre-contractual positions. The Tribunal assessed the benefits that each party received throughout the lifetime of the contracts, and proceeded to set-off respective amounts. In carrying out this exercise the Tribunal was guided by quantum expert reports. Eventually, the Tribunal concluded that the Government had received a net benefit of €4.8 million, and therefore ordered Government to pay this amount to Steward.

The Tribunal ordered each party to bear its own costs (except for the costs pertaining to the Government's unsuccessful security for costs application) and ordered Steward to pay the Government its legal expenses incurred during the Emergency Arbitration.

Q: Did the Tribunal find that there was fraud?

A: No, it did not. The Tribunal did not make any finding of fact on the contracts because it concluded that it was bound by the Court of Appeal's decision to rescind the contracts (Award, para 693). The Tribunal asserted that judgement it did not need to make any finding of fact on this issue because the primary defence was based on Court of Appeal judgement (Award, para 173).

The Tribunal interpreted the Court of Appeal judgement as having found collusion and simulation rather than fraud, and the contracts consequently null for failing to comply with the Government Lands Act (Award, para 629 and 630). The Tribunal added that "*it is undisputed that the Transaction Agreements were not rescinded for fraud or violence, so that the provision of Article 1209(4) MCC does not apply*" (Award, para 832).

Q: However, isn't it obvious that the Tribunal did not find fraud if neither Government nor Steward requested such a finding?

A: This is incorrect. In the arbitration proceedings, the Government actually did assert that Steward had fraudulently misrepresented its financial position to Government when it took over the Concession, and that Steward had acted in bad faith (Award, paras 390, 434, 450-451). This was one of Government's contractual counterclaims. Government also referred to allegations in the press that Steward had engaged in industrial espionage and a smear campaign in connection with the contracts.

The Tribunal disregarded these claims because the Court of Appeal rescinded and annulled the contracts with Steward and hence decided not to revisit the judgements beyond its findings. The Tribunal did not proceed to decide on the Government's contractual claims, because they automatically fell away once the Tribunal found that the contracts had been rescinded and annulled.

In any case, it must be said that the Court of Appeal in the *Delia* case found that Steward was in good faith upon entering into the Concession (Court of Appeal Judgement, para 81).

Q: If Steward did not improve the Hospitals, what was Government paying for? Isn't this fraud?

A: Government did not pay Steward to improve the hospitals (Award, para 956). Government paid Steward to provide health services at the hospitals under the Health Services Delivery Agreement. Government was going to pay *more* under that Agreement once Steward improved the Hospitals, which Steward never did. The Tribunal reached this conclusion (Award, para 953).

Amongst other legal arguments, Government claimed that a discount should be applied to the benefit it received from Steward for health services because the Court of Appeal, found that Steward did not invest in the hospitals, thus failing to meet the Concession Milestones. The Tribunal, concluded that no discount could be applied to the amount paid by Government for the health services delivered by Steward, finding that Steward's failure to meet the Concession Milestones could not serve as a basis for such a reduction (Award, para 954).

Government also claimed that a discount should be applied because Steward's financial statement included unexplained amounts for "*excessive director salaries or questionable expenditures*" and that there was "*misappropriation of funds for spying activities on public figures within [Government]*" (Award, paras 959 and 961). This was also rejected by the Tribunal (Award, para 964).

Q: How come the Government says that it paid €884,644,629 to Steward?

A: A detailed breakdown of the benefits received by Steward totalling €884,644,629, and of the benefits received by Government totalling €889,434,091, is included in the Award (see Award, para 996).

In brief, the majority of payments made by Government to Steward were contractually agreed upon in terms of the Health Services Delivery Agreement for health services, and in terms of the Labour Supply Agreement for employees.

The Tribunal concluded that the payments made by Government to Steward were never intended to cover capital expenditure and investment in the hospitals (Award, para 956). Steward was meant to obtain financing to invest in the hospitals, but it never did so. The Tribunal concluded that the primary reason that Steward was not able to do so was that the concession was not deemed bankable (Award, para 956).

Q: Did the Tribunal include the 100M termination payment demanded by Steward in the rescission formula?

A: No. That claim was rejected. Once the Tribunal agreed with the Government's argument that the contracts were null and void as pronounced by the Maltese Courts in the *Delia* case, it limited itself to an analysis of the amounts to be restored in accordance with Maltese law, which precluded their claim for the contractual termination payment of EUR 100 million.

Q: Why did Government rely on the Court of Appeal judgement in the *Delia* case?

A: The judgment of the Court of Appeal is final and definitive (*res judicata*), and the Government fully respects judgements delivered by the Maltese Courts. This is also consistent with the constitutional principle of separation of powers.

Q: What evidence did the Government submit in the arbitration?

A: Government submitted factual witness statements, expert reports, and voluminous documentary evidence. Government also obtained confidential documentation from Steward during discovery.

Government submitted documents substantiating all costs it incurred and benefits it gave to Steward throughout the contracts for the purposes of the restitution formula. These documents were prepared by the civil service and analysed and opined on by the Government's quantum expert.

Government also submitted all 3 reports published by the National Audit Office, the judgements (including translated copies) of the First Hall Civil Court and Court of Appeal in the *Delia* and the *Bernard Grech* case, as well as documentation on allegations in the press that Steward had engaged in spying activities and smear campaigns in connection with the concession.

Government also submitted evidence of Maltese law, including legislation, decisions of the Maltese Courts on relevant articles of law, and expert opinions.

Q: Is Government going to appeal the award?

A: The award is final and binding and it is not subject to a right of appeal.

Q: Is Government going to pay Steward?

A: Government is still analysing the next steps with its legal team.

It must be noted that the Government of Malta is a garnishee with respect to a number of garnishee orders which were issued by the Malta courts against some of the Steward entities on the request of creditors.

Q: Who were the experts which assisted the Tribunal?

A: There were no less than 10 expert witnesses involved in the arbitration.

Government nominated:

- Anthony Charlton (<https://www.hka.com/expert-post/anthony-charlton/>) of HKA as its quantum expert.
- Dr. Roderick Zammit Pace (<https://www.zammitpace.com.mt/people>) as its expert on Maltese law.
- Conor Quigley KC (<https://www.serlecourt.co.uk/our-people/profile/conor-quigley-kc>) as its legal expert on EU State aid law
- Chris Williams (<https://www.hka.com/expert-post/chris-williams/>) of HKA as its economist expert on EU State aid law.
- Professor Alex Torpiano (<https://tbaperiti.com/studio/>) as its expert on development planning in Malta.

Steward nominated:

- Laura Cozar (<https://www.accuracy.com/team/laura-cozar/>) and Joseph Kirby (<https://www.accuracy.com/team/joseph-kirby/>) of Accuracy as its quantum experts.
- Dr. Tonio Fenech (<https://fff-legal.com/about-us/member/tonio-fenech>) as its expert on Maltese law.
- Professor Jacques Derenne (<http://sheppardmullin.com/jderenne>) of SheppardMullin as its legal expert on EU State aid law
- Nicole Robins (<https://www.oxera.com/people/nicole-robins/>) as its economist expert on EU State aid law.

These experts delivered multiple expert reports on the issues at stake in the arbitration, and all were questioned by the parties and by the Tribunal at the trial hearing.

Q: Who were the factual witnesses heard by the Tribunal?

A: There were 4 factual witnesses in total. Steward put forward Dr. Nadine Delicata, who submitted one witness statement, but she did not attend the hearing for cross examination. Government put forward John Abela, Carmen Ciantar, and Dr. Joseph Zarb Adami.

It must be said that the Tribunal “*appreciated Dr. Zarb Adami at the Hearing as a serious and respected professional*” (Award, para 943).

The Tribunal also commented that “*any additional witness testimony would have been unlikely to alter the outcome of this arbitration*”. (Award, para 172)

Q: Did the Daphne Caruana Galizia Foundation formally intervene in the international arbitration?

A: Amicus briefs in international commercial arbitrations are exceptionally rare, and arbitration tribunals typically do not admit third parties to submit such briefs in commercial arbitrations between two contractual counterparties. We understand that it may in fact have been the first case before the ICC where a third party sought to intervene.

The Foundation did make a submission in the international arbitration. However, the Tribunal did not allow the submission to form part of the record because Steward objected to it. Government did not object to the admission of their submission.

Q: What was the law applicable to the contracts with Steward?

A: The law governing the contract was Maltese law. This is the law which the Tribunal applied to the dispute.

Q: Who were the parties to the arbitration?

A: The arbitration proceedings were initiated by 3 Steward entities:

- Steward Malta Limited
- Steward Malta Management Limited
- Steward Malta Assets Limited

against the Government of the Republic of Malta.

These parties were the direct contractual parties to the Services Concession Agreement, the Health Services Delivery Agreement, and the Labour Supply Agreement.

The Government of Malta sought the joinder of other Steward entities in the arbitration.

The Tribunal found that the arbitration agreement in the contracts exclusively bound the Government of Malta and the three Steward entities who signed the contracts. The Tribunal found that the arbitration agreement could not extend to the additional non-signatory Steward entities that Government brought counterclaims against.

Q: What was the scope of the concession?

A: The concession was an agreement where the Government of Malta gave Steward the responsibility to manage, operate, and redevelop three public hospitals in Malta, namely St. Luke's Hospital, Karen

Grech Rehabilitation Hospital, and Gozo General Hospital. Steward was expected to provide healthcare services, handle day-to-day operations, and improve the hospitals for 30 years.

Q: What is the Government Lands Act?

A: The Government Lands Act is an Act of Parliament which regulates how rights over government land may be granted. It is the Act on which the judgements in the Delia case are founded, as recognised and confirmed by the Tribunal.

Q: What's the International Chamber of Commerce (ICC)?

A: The International Chamber of Commerce (ICC) is a global organization that promotes international trade and commerce. From an arbitration perspective, the ICC International Court of Arbitration is the leading international commercial arbitration institution globally and provides a widely used and trusted forum for resolving international disputes through arbitration.

Q: Why did Government submit to an international arbitration?

A: Government was contractually bound to submit any dispute involving the Services Concession Agreement, the Health Services Delivery Agreement, and the Labour Supply Agreement with Steward to arbitration.

It is possible for disputes arising from contracts signed following a competitive tender process to be submitted to international or domestic arbitration. There is no law prohibiting it. International arbitration in international contracts is indeed the default and preferred dispute resolution mechanism. The ICC deals with a very significant number of commercial and investment arbitrations involving states or state entities every year.

Q: Who were the members of the Tribunal?

- **Michael Bühler** (Chair)
- **David Kavanagh KC** (appointed by Steward)
- **Cecilia Carrara** (appointed by Malta)

Q: Is the arbitral award issued by the ICC tribunal legally binding and enforceable?

A: Yes, the arbitral award issued by the ICC tribunal is legally binding and fully enforceable under both Maltese and international law. Arbitration is a formal dispute resolution method, distinct from informal dispute resolution methods such as mediation or conciliation. It involves independent and impartial arbitrators who hear the case, assess the facts and applicable law, evaluate evidence, and issue a reasoned, final decision that the parties have contractually agreed to accept and be fully bound by at law. Arbitration is a legally binding process which derives its jurisdictional dimension from contract and law. In this case, the proceedings were administered under the robust Rules of Arbitration of the ICC, one of the world's leading arbitral institutions. Tribunals appointed by the ICC following an arbitration agreement operate with the same authority and procedural guarantees as a court of law.

Importantly, this award benefits from the enforcement framework established by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), to which Malta is a party. The Convention obliges courts in over 170 countries to recognise arbitration agreements contained in contracts, and to subsequently recognise and enforce international arbitration awards with very limited grounds for refusal. This makes the enforcement of arbitral awards significantly easier and more effective than that of domestic court judgments, particularly in disputes with cross-border elements.

Thus, the ICC arbitral award is not the result of an informal arrangement – it carries the full weight of an internationally enforceable decision, binds both Steward and the Government in exactly the same way as a final judgement of the court, and ensures certainty, finality, and enforceability globally.