4A_392/2015[1]

Judgment of December 10, 2015

First Civil Law Court

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

A._____,
Represented by Mr. Nicolas C. Ulmer and Mrs. Sylvie Horowitz-Challande,
Appellant

*v.*

B._____,
Represented by Mr. Franz X. Stirnimann and Mrs. Vanessa Alarcón Duvanel,
Respondent

Facts:

A.
A._____ and B._____, two experienced businessmen domiciled in Switzerland and Israel, respectively, became friends in 1973 when they were both studying at the European Institute of Business Management (INSEAD) in Fontainebleau (France). They remained in contact until 1976 then lost touch with each other until the latter got in contact with the former in 1991. Since then, and until 1996, the two men entered into contractual relationships and developed joint activities. Their nature and terms are not decisive as to the solution of the case submitted to this Court.

B.
Long after the contractual relationships were extinguished, a dispute arose between the former partners. Upon A._____'s initiative, they decided to submit the dispute to a sole arbitrator (hereafter: the Arbitrator), namely a Geneva lawyer who had represented B._____'s interests in matters unrelated to the dispute. For this purpose, each signed a power of attorney on the letterhead of the Geneva Bar Association on March 14, 2006, pursuant to which, the lawyer was entrusted with acting as a sole arbitrator in the dispute against the former partner.

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_392/2015.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

On the same day, the Arbitrator sent the same letter to each party, defining the outline of his mission. On the basis of their respective explanations, he then produced a document entitled "Preliminary Statement of Facts" dated September 20, 2006.

On September 22, 2006, the parties signed an "Arbitration Agreement" (*compromis arbitral*), the preamble of which referred to the aforesaid document. Among other provisions, they outlined the seat and the language of the arbitration (Geneva and French, respectively), confirmed the Arbitrator's appointment, chose the substantive law applicable (substantive Swiss law), authorized the Arbitrator to decide *ex aequo et bono* and set the procedural rules. Furthermore, they waived a defense that the claim was time-barred, opted out of provisional measures and of any additional or counter claim, giving the future arbitral award a "final and enforceable character, not subject to appeal." The arbitration agreement states and takes notice, moreover, that the parties declared before signing it that they waived the appointment or the assistance of a lawyer; however, it points out that each shall retain the right to be assisted by any counsel he may choose, which may or may participate in the hearings until the arbitral award is issued.

On August 15, 2008, B._____ filed a "Statement of Claim." Its submissions, subsequently amended, ultimately sought an order that A._____ should pay an amount of USD 7'318'728.90 with interest.

In a short and single brief of January 26, 2011, which he did not consider supplementing despite the Arbitrator's urging to do so, the Defendant submitted that the claim should be rejected. He failed to appear at the in-person hearings of November 11, and 13, 2013.

In a final award of June 10, 2015, the Arbitrator ordered A._____ to pay a total amount of USD 2'322'759.50 to B._____ on various counts and an amount of USD 132'397.30 as interest for late payment since July 1, 1996.

C.
On August 14, 2015, A._____ (hereafter: the Appellant) filed a civil law appeal for a violation of Art. 190(2)(b) and (e) PILA[2] with a view to obtaining the annulment of the June 10, 2015, award.

In a letter of September 21, 2015, the Arbitrator stated that he saw no basis for the appeal. On October 10, 2015, he submitted the arbitration file.

In his answer of September 22, 2015, B._____ mainly submitted that the matter is not capable of appeal and in the alternative, that the appeal should be rejected.

The Appellant did not submit a reply.

Reasons:

1.

[2] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

A civil law appeal is admissible against international arbitral awards pursuant to the requirements at Art. 190 to 192 PILA (Art. 77(1)(a) LTF[3]). Whether as to the subject matter of the appeal, the standing to appeal, the Appellant's submissions or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in the case at hand.

2.
Compliance with the time limit is, however, disputed by the Respondent.

2.1. According to Art. 100(1) LTF, a provision that also applies to appeals in the field of international arbitration (Art. 77(2) LTF *a contrario*), the appeal must be filed with the Federal Tribunal within 30 days after the award is notified. In the case at hand, the registered letter containing the award under appeal was mailed by the Arbitrator on June 10, 2015, and returned to him as "unclaimed" after the seven-day retention period expiring on June 18, 2015. According to constant case law, a registered letter is deemed notified on the date at which the addressee effectively receives it. When he cannot be reached and a notice to pick up the letter is deposited in his mailbox or in his P.O. Box, the date of withdrawal is decisive; if the letter is not picked up within the seven-day retention period, it is deemed to have been communicated on the last day of that period (judgment 4A_215/2015 of October 2, 2015, at 3.2, with reference to Art. 138(3)(a) CPC as to Swiss procedural law). Pursuant to this case law and to Art. 44(2) LTF, the arbitral award is deemed to have been communicated to the Appellant on June 18, 2015. The time limit to appeal started the next day (Art. 44(1) LTF) and therefore expired on August 19, 2015, taking into account the suspension between July 15, and August 15, 2015, (see Art. 46(1)(b) LTF). Deposited with a post office on August 14, 2015, the appeal was therefore filed in a timely manner.

2.2. According to the Respondent, the Appellant employs a domestic helper entrusted, in particular, with picking up the mail, who should have picked up the registered letter immediately after the unsuccessful attempt to deliver it on June 11, 2015. Instead, acting in a manner contrary to the rules of good faith, he instead refrained from picking it up before the retention period expired so he could benefit from the one-month extension of the time limit to appeal due to its suspension during the summer recess. Moreover, still according to the Respondent, a communication must be deemed validly notified as soon as it reaches the sphere of influence (*Machtbereich*) of its addressee (judgment 4A_525/2009 of March 15, 2010, at 7), whilst the latter must not wrongfully prevent its notification (ATF 122 III 316 at 4b). Therefore in the case at hand, one should hold that the award in dispute was notified on June 13, 2015, at the latest, namely two days after the postal notice was deposited in the Appellant's mailbox. Therefore, the time limit to appeal expired before the summer recess.

The Respondent's argument rests on statements that do not correspond with any factual findings of the Arbitrator and on a mixture of various legal theories and cannot be followed. In particular, the reference to the aforesaid unpublished judgment is misplaced, as the passage of this precedent quoted relates to the issue as to when the termination of a lease is deemed to reach its addressee, a specific issue which case law resolves by applying the theory of absolute receipt (on this concept, see ATF 140 III 244 at 5.1 and judgment 4A_350/2014 of September 16, 2014, at 2.2). As to the aforesaid published judgment invoked by the Respondent, it is also devoid of pertinence to the resolution of the case at hand because

[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

it merely emphasizes that the decisive circumstance to determine the *dies a quo* of a time limit to act or appeal is not the delivery to the post office but instead the actual receipt of the decision. Moreover, one does not see that a party could be considered as acting wrongfully for failing to pick up a registered letter before the retention period expired, as this would challenge the very system of constructive notification by opening the door to interminable discussions as to compliance with judicial time limits, thus jeopardizing certainty as to the law in this field. Moreover, the Respondent does not quote any precedent that adopted the principle he advocates.

This being so, it must be accepted that the appeal brief was filed within the legal time limit and consequently that all admissibility requirements of a civil law appeal are met in the case at hand.

3.
In a first argument based on Art. 190(2)(b) PILA, the Appellant submits that the Arbitrator wrongly accepted jurisdiction as to the claim submitted to him. According to the Appellant, the matter in dispute was neither determined nor determinable on the basis of the declarations of intent made by the parties in the powers of attorney exchanged on March 14, 2006, and in the arbitration agreement of September 22, 2006. This essential element of any arbitration agreement would therefore fail in the case at hand, thus rendering the agreement in dispute void.

3.1. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction – or the lack thereof – of the arbitral tribunal. Yet, this does not turn this Court into a court of appeal. Therefore, it does not behoove this Court to search the award under appeal for the legal arguments which may justify upholding an argument based on Art. 190(2)(b) PILA. Instead, it behooves the appellant to draw the Court's attention to them, in order to comply with the requirements of Art. 77(3) LTF (ATF 134 III 565[4] at 3.1 and the cases quoted).

The Federal Tribunal reviews the factual findings only within the usual limits, even when assessing an argument that the arbitral tribunal had no jurisdiction (judgment 4A_676/2014[5] of June 3, 2015, at 3.1).

3.2.
3.2.1. The appeal based on Art. 190(2)(b) PILA is available when the arbitral tribunal decided claims that it had no jurisdiction to examine, whether because there was no arbitration agreement or because it was limited to certain issues that did not include those at hand (*extra potestatem*) (ATF 116 II 639 at 3, *in fine,* p. 642). Among other conditions indeed, an arbitral tribunal only has jurisdiction if the dispute falls within the scope of the arbitration agreement and the tribunal does not go beyond the limits set by the arbitration request and, as the case may be, the terms of reference (judgment 4A_396/2010 of January 3, 2011, at 5.2).

[4] 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

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-must-clearly-express-intent-submit-arbitration

Pursuant to Art. 186(2) PILA, the jurisdictional defense must be raised before any defense on the merits. This applies the principle of good faith embodied at Art. 2(1) CC,[6] which governs the law in its entirety, including civil procedure. Stated differently, the rule at Art. 186(2) PILA indicates that an arbitral tribunal in which the defendant proceeds to the merits without reservation acquires jurisdiction by this very fact. Therefore, whoever addresses the merits without reservation in contradictory arbitration proceedings concerning an arbitrable matter acknowledges by this conclusive act the jurisdiction of the arbitral tribunal and definitively loses the right to challenge the jurisdiction of the aforesaid tribunal. However, the respondent may state his position on the merits only in the alternative, should the jurisdictional defense be rejected without thereby tacitly accepting the jurisdiction of the arbitral tribunal (ATF 128 III 50 at 2c/aa, p. 57 *f.* and references).

3.2.2. In the case at hand, although he denies it, the Appellant has forfeited the right to challenge the jurisdiction of the Arbitrator. He should have raised the jurisdictional defense at the latest in his brief of January 26, 2011, entitled, "*Position Statement*," in which he developed his arguments on the merits to oppose the Respondent's claim. Yet, he did not do so. Consequently, the merits of his defense based on Art. 190(2)(b) PILA cannot be examined.

4.
4.1. Second, the Appellant invokes Art. 190(2)(e) PILA and argues that the Arbitrator violated procedural public policy, not only by arrogating to himself jurisdiction that he did not possess, but also for adopting procedural rules that did not correspond to the usual rules in international arbitrations and – moreover – for departing from them.

4.2. The argument based on procedural public policy is a blatant duplicate of the jurisdictional argument and procedural public policy is only a subsidiary guarantee (ATF 138 III 270[7] at 2.3). To this extent, it shall share the fate of the former.

Moreover, any violation of a procedural rule agreed upon by the parties does not constitute a violation of procedural public policy, even if it is arbitrary (ATF 126 III 249 at 3b). It must be a rule essential to ensure the fairness of the proceedings (ATF 129 III 445 at 4.2.1). Yet, in the Appellant's criticism at pages 38 and 39 of his brief, one cannot identify the existence of such a rule, particularly as both parties were aware of the atypical character of the arbitration to which they committed, from the signature of the arbitration agreement in September 2006.

Be this as it may, it must also be emphasized here, that the party claiming to be the victim of a violation of its right to be heard or another procedural deficiency must immediately invoke it in the arbitration under penalty of forfeiture. Indeed, it is contrary to good faith to invoke a procedural deficiency only in the appeal against an arbitration award when the deficiency could have been raised in the arbitration (judgment 4A_70/2015[8] of April 29, 2015, at 3.2.1). Yet, it goes without saying that the Appellant could easily

---

[6] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen
[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/counsel-failure-inform-his-client-not-excusable

complain of the alleged procedural irregularities *pendente lite* so that the Arbitrator would rectify them in due time instead of waiting more than nine years to criticize them once the outcome of the dispute was known.

The second argument he raises is therefore doomed as well.

5.
The Appellant loses and shall pay the costs of the federal judicial proceedings (Art. 66(1) LTF) and compensate the Respondent for the federal judicial proceedings (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 18'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount CHF 20'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives in writing to the parties and to the Sole Arbitrator.

Lausanne, December 10, 2015

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

| Presiding Judge: | Clerk: |
| --- | --- |
| Kiss (Mrs.) | Carruzzo |