4A_188/2013[1]

Judgment of July 15, 2013

First Civil Law Court

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

X._____ SA,
Represented by Mr. Carlo Lombardini and Mr Vincent Solari,
Appellant

v.

A._____,
B._____,
C._____,
D._____,
E._____,
F._____,
G._____,
H._____,
I._____,
Represented by Mr. Charles Poncet, Mr. Daniel Kinzer and Mr. Pierre Ducret,
Respondents

Facts:

A.
In a contract of March 13, 2009, (hereafter: the Contract) A._____, B._____, C._____, D._____, E._____, F._____, G._____ H._____ and I._____ (hereafter; the Sellers) sold the entire share capital of Bank V._____ SA (hereafter: V._____) that they owned to X._____ SA (hereafter: X._____ or the Purchaser) in Geneva, a company under Swiss law, the goal of which is, in particular, to acquire shares of companies in the banking and financial sector. The purchase price of the shares of the Geneva bank, which is active in portfolio management, was composed of the three following elements: a) the net asset value (NAV) of group V._____ at the time of closing (May 15, 2009), plus 90% of the net amount recovered on doubtful debts; b) an amount of CHF 3'200'000 corresponding to the hidden reserves constituted by undervalued assets and overvalued liabilities; c) 100% of the value of the final goodwill, consisting of a percentage of the assets under management of the clients of V._____ (hereafter AuM, for "assets under management") as of December 31, 2010.

At the date of closing, the Purchaser paid CHF 45'542'888, namely CHF 38'235'914 for the NAV, CHF 1'600'000 for the hidden reserves and CHF 5'706'974 for the provisional goodwill. This amount was paid in escrow to a Geneva notary who transferred half to the Seller's account and kept the other half, namely CHF 22'771'444.

B.
On June 7, 2010, X._____ filed an arbitration request against the nine aforesaid Sellers, based on the arbitration clause contained in the Contract. Its last submissions mainly sought an order that they should pay the amount of CHF 17'707'713 with interest, to be taken from the amount in escrow. According to the Claimant, this amount was the cost of the reorganization measures it had to take and the loss suffered because the Sellers intentionally presented the situation of the V._____ in an

[1] Translator's Note: Quote as X._____ SA *v.* A._____ et. al. 4A_188/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

inaccurate manner, including into the AuM for which a goodwill should be paid for some fiduciary deposits that had nothing to do there. Considering, moreover, that the amount it paid at the date of closing corresponded to the purchase price adapted pursuant to the criteria set in the Contract, the Claimant submitted that any counter claim by the Sellers for the payment of a balance of the price should be rejected.

The Respondents submitted that the claim should be rejected. By way of a counter claim, they sought payment of CHF 14'757'782, with interest, namely the difference between the selling price of the shares of V._____, including the goodwill in connection with the fiduciary loans in dispute, namely CHF 60'300'670 according to their computation and the CHF 45'542'888 paid by the Claimant at closing. They also asked the Arbitral Tribunal to invite the latter to order the third party custodian to pay the entire amount deposited with him, except for an amount of CHF 1'000'000.

A three-member arbitral tribunal was constituted under the aegis of the Geneva Chamber of Commerce and Industry (GCCI), the seat of the arbitration being in Geneva. On March 28, 2011, it issued a partial award concerning provisional measures and some procedural issues.

After establishing the facts of the case, the Arbitral Tribunal issued its final award on March 8, 2013. In substance, it ordered the Claimant to pay an amount of CHF 7'659'366, with interest, to the Respondents, ordered the Claimant to invite the third party custodian to transfer the entire amount deposited on the *ad hoc* account to the Respondents with a provisional deduction of CHF 1'000'000, and ordered the Claimant to assign a number of claim to the Respondents, all other or contrary submissions by the parties being rejected. The amount awarded to the Respondents is the addition of the NAV as of May 15, 2009, set at CHF 37'800'961, with the final goodwill – including the one related to the fiduciary loans in dispute – amounting to CHF 12'322'155 with CHF 3'200'000 of latent reserves, an amount of CHF 384'640 as a share of the recovery of doubtful debts, as well as an amount of CHF 655'398 for the goodwill on the accounts blocked, namely a total of CHF 54'363'154 from which the amount of CHF 22'771'444 already received by the Respondents should be deducted, with the same amount going to them by way of the release of the escrow account, as well as damages of CHF 1'161'200 – to be set off – due by the Respondents to the Claimant as a consequence of a breach of contractual warranties. Actually, as a consequence of a *lapsus calami*, the Arbitral Tribunal deducted CHF 22'771'144 instead of CHF 22'771'444 as to the amount deposited with the third party custodian (see award n. 443 and 517) so that the residual amount of CHF 7'659'366 awarded to the Respondents contains a surplus of CHF 300. However, since the Claimant does not raise this mistake in its appeal brief, there is no reason to address it.

C.
On April 11, 2013, the Claimant (hereafter the Appellant) filed a civil law appeal with a request for a stay of enforcement. It seeks a partial annulment of the March 8, 2013, award and the case sent back to the Arbitral Tribunal for a new decision. Specifically, the Appellant criticizes the amount awarded against it and the rejection of most of its damage claim.

In a letter of its chairman dated May 6, 2013, the Arbitral Tribunal stated that it would defer to the decision of the Federal Tribunal while emphasizing that the grievances advanced by the Appellant distorted its reasoning in the award and that, as to the right to be heard, it failed to quote the excerpts establishing that it had been complied with.

In their answer of May 6, 2013, the Respondents submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

On May 27, 2013, the Appellant filed a reply in which it confirmed its previous submissions.

Reasons:

1.
It is not challenged that at the time the arbitration agreement was concluded one of the nine respondents had neither his domicile nor his habitual residence in Switzerland. Hence, the arbitration to be reviewed by this Court is international and therefore falls under Chapter 12 of the Federal Law on International Private Law (PILA; RS 291).

In the field of international arbitration, a civil law appeal is allowed against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[2] (Art. 77(1)(a) LTF[3]). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submissions or grievances raised, none of these admissibility requirements raises any problem in this case. There is therefore no reason not to address the appeal. A review of the admissibility of the various grievances raised in the appeal is reserved as it is disputed by the Respondents.

2.
The Appellant argues a violation of its right to be heard in several respects, contained in one argument divided into five parts.

The right to be heard as guaranteed by Art. 182(3) and 190(2)(d) PILA does not differ in principle from that which is consecrated by constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus, it was held in the field of arbitration that each party had the right to state its views on the facts essential for judgment, to present its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

In Switzerland, the right to be heard concerns mainly the factual findings. The right of the parties to be asked for their views on legal issues is recognized in a limited manner only. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal bearing of the facts and may decide on the basis of rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the task of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically as to the scope to be given to the rules of law. As an exception, they must be asked for their views when the court or the arbitral tribunal considers basing its decision on a rule or legal consideration which has not been invoked during the proceedings and the pertinence of which the parties could not anticipate (ATF130 III 186 at 5 and the references). Moreover, it is a matter of appreciation to know what is unpredictable. Therefore, the Federal Tribunal applies the aforesaid rule restrictively for this reason and because the specificities of this type of procedure must be taken into account to avoid that "surprise" may be claimed with a view to obtaining substantial review of the award by the Court (Judgment 4A_254/2010[4] of August 3, 2010, and the precedents quoted).

The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not require an international arbitral award to be reasoned (ATF 134 III 186 at 6.1[5] and the references). However, it imposes upon the arbitrators a minimum duty to review and to handle the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some factual allegations, arguments, evidence, and offers of evidence presented by one of the parties and important to the decision to be issued. If the award is totally silent as to some apparently important elements to decide the dispute, it behooves the arbitrators or the Respondent to justify this omission in their answer to the appeal. They have to demonstrate that, contrary to the Appellant's argument, the items omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly rejected by the arbitral tribunal. However, the arbitrators are not obliged to discuss all of the arguments raised by the parties, so that they cannot be held in breach of the right to be heard in contradictory proceedings for failing to refute, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

It is in the light of these principles of case law that the five grievances raised in this appeal will be examined successively hereunder.

3.
3.1.

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[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.

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

[4] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-violation-of-due-process-denied-no-unforeseen-legal-arg

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

3.1.1.
The Appellant's first argument concerns the "fiduciary loans Z.". Its understanding does not require a description of the complex transaction in which V._____ granted two fiduciary loans for a total amount of CHF 192'000'000 to a company named S. on December 28, 2005, on behalf and at the risk of two of its clients, P. and E. Companies, in order to enable S. to acquire the shares of a group of companies controlled by Mr. Z., an important French industrialist, who was a client of the bank and wanted to sell his group to his children (for a description of this transaction, see award n. 224 to 242). On December 7, 2009, the fiduciary loans were terminated by V._____, now controlled by the Appellant which considered them irregular and they were taken over by a Luxembourg company.

According to the Appellant, the Arbitral Tribunal violated its right to be heard by failing to take into consideration its argument that, failing any outside contribution, the fiduciary loans in dispute could not be part of the AuM. According to the Appellant, the Arbitral Tribunal erroneously believed that it could disregard this argument because the procedure terminating these loans was not in accordance with the Contract.

3.1.2. According to the Respondents[6] this first argument would be inadmissible because the Appellant failed to draw the attention of the Arbitral Tribunal to the fact that in its view, a legal qualification of the Z. fiduciary loans as AuM was a prerequisite to taking them into account as goodwill to determine the purchase price of the shares of V._____.

The objection is unfounded. It appears indeed from the excerpts of its briefs in the arbitration proceedings to which the Appellant refers in its reply (n. 12 to 14) that the Appellant did indeed submit this issue in dispute to the Arbitral Tribunal.

3.1.3. However, the argument appears obviously unfounded and verges on temerity. As the Respondents demonstrate in their answer (n. 21-27), without being contradicted by the Appellant, the Arbitral Tribunal analyzed with care the issue as to how to qualify the Z. fiduciary loans to which it devoted an entire chapter of its award (n. 4.5). It stated there that the parties, assisted by banking law specialists, did not exclude these fiduciary loans from the AuM, which they would have been free to do, but instead agreed to broaden the concept of AuM to include them. The Arbitral Tribunal reached the following conclusion which deprives the Appellant's argument of any basis; "consequently, the Arbitral Tribunal concludes that in view of the contents of the Contract and the circumstances of the case, the Z. fiduciary loans are part of the AuM" (award n. 276).

As to whether such a conclusion was accurate or not, it is not an issue falling within the right to be heard which could be reviewed by this Court from this point of view.

3.2.
3.2.1. In its second and third arguments, the Appellant claims a double violation of its right to be heard arising from two contradictions allegedly affecting the award under appeal. The first one would be that while admitting that the Respondents had hidden from the Appellant the absence of any external contributions as to the fiduciary loans in dispute, the Arbitral Tribunal nonetheless denied that this was a fraud by the Sellers to the Purchaser's detriment. The second would be because the Arbitrators ordered the Respondents to compensate the Appellant for violating the guarantees concerning compliance as a consequence of the circumstances around the Z. fiduciary loans but denied the victim the right to terminate the business relationships concerning these loans on the very same ground.

3.2.2. The Appellant does not explain how the Arbitral Tribunal deprived it of the opportunity to present its point of view. In reality, it argues that the Arbitrators drew some contradictory and therefore legally inadmissible conclusions from their factual findings as to the existence of an alleged fraud by the Sellers to its detriment and also as to its right to close the accounts concerned by the Z. fiduciary loans. Its argument does not take into account the case law of the Federal Tribunal requiring that a grievance based on the violation of the right to be heard should not be used to provoke in this manner a review of the application of substantive law (Judgment 4P.202/2003 of November 4, 2003, at 2.2 and the references; see also Judgment 4A_576/2012 of February 28, 2012[7] at 4.2.3). The same principle of case law also prevents the argument that the reasons of an award would be contradictory should be

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[6] Translator's Note: The French text has a typo here.
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/chain-custody-evidentiary-item-not-part-public-policy

raised from the point of view of substantive public policy within the meaning of Art 190(2)(e) PILA (Judgment 4A_150/2012[8] of July 12, 2012, at 5.2.1).

Hence, this double argument is doomed, even if admissible.
3.3.
3.3.1. Fourthly, the Appellant argues that the Arbitrators based their award on a legal argument raised by none of the parties without asking for their views in advance when they made its right to close the accounts connected to the Z. fiduciary loans subject to the principle of proportionality.

The Respondents dispute the admissibility and the pertinence of the argument.

3.3.2. No matter what the Respondents say, the argument appears sufficiently substantiated to be admissible. However, they are right to submit that it lacks any pertinence. The Appellant argues in vain the element of surprise. At most, it may be conceded that the word "proportionality" is not specifically contained in the briefs of the parties included in the arbitration file. However, it is impossible to conclude from this that the parties could not at all envisage that the Arbitral Tribunal would resort to the aforesaid principle in its award.

The issue as to whether or not the Appellant was entitled to terminate the Z. fiduciary loans without their amount being included into the AuM is decisive to the computation of the final goodwill and consequently to the determination of the final purchase price of the shares of V._____; it was at the heart of the dispute. Consequently, it was self-evident that all problems concerning the conditions and the modalities of such termination naturally fell within the scope of the analysis by the Arbitrators. The Appellant was assisted by specialists of banking law and could not exclude at the outset that the Arbitral Tribunal would make the exercise of the right to terminate the fiduciary loans subject to certain conditions in view of the Contract and in particular to compliance with the principle of proportionality in exercising their right to influence a legal relationship. It should especially take this into consideration because the right it was thus granted gave it some considerable privileges which could cause a potential conflict of interest to the extent that it was entitled to modify the purchase price of the shares unilaterally and reduce it on this basis. Therefore, the Appellant should at the very least have assumed that the Arbitrators would verify from all perspectives the manner in which it used this right of termination and even more so because the Respondents disputed that it had done so regularly. Moreover, the principle of proportionality did not appear as a *deus ex machina* in the award under appeal. To the contrary, the Arbitral Tribunal considered it as one of the two substantive sub-conditions resulting from the very interpretation of article 3.7 of the Contract (award n. 284). The award contains a lengthy explanation in this respect (n. 294 to 311) and the reasons adopted by the Arbitral Tribunal in this respect were not at all unpredictable within the restrictive meaning of case law as to this issue.

Under the disguise of an alleged violation of its right to be heard, the Appellant really seeks to obtain a substantive review of the award by the Federal Tribunal, which is not admissible.

3.4. In a fifth and last argument, the Appellant raises the invitation sent by the Arbitral Tribunal to the third party custodian to pay to the Respondents the entire amount deposited into the *ad hoc* account with the provisional deduction of an amount of CHF 1'000'000. According to the Appellant, the Arbitrators violated its right to be heard in doing so, by failing to take into account two objections it had raised against the release of the aforesaid account. It is not so.

First, the Appellant argues that it had expressly reserved its rights as to other pending disputes (Appeal n. 142) adding that it stated in the arbitral proceedings that the escrow account was there to guarantee these disputes as well (Reply n. 25). However, the excerpts of its briefs in the aforesaid procedure that it quotes merely contained a reservation of its right due to the existence of other pending disputes, but established no connection between them and the escrow account and certainly did not contain the least objection as to the release of the funds deposited into that account.

Secondly, the Appellant states that it had argued that the time limits to pay would be stayed automatically in case of a dispute between the parties on the basis of Art. 4 of the escrow agreement.

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

According to the Appellant, the Arbitral Tribunal did not address this objection, thus violating its right to be heard (Appeal n. 143 and 145). It is manifestly not so. As the Respondents rightly point out, the Appellant applied for the escrow account to be blocked until the end of the arbitral proceedings, without ever claiming that it should be blocked beyond the date at which the final award would be issued (Answer n. 61).

Be this as it may, the Arbitrators specifically held that the requirements for a release of the escrow account were met (Award n. 521 p. 183). Consequently, the Appellant argues in vain that they did not examine this issue.

4.
The rejection of the appeal renders moot the request for a stay of enforcement.

5.
The Appellant loses and must pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondents as creditors *in solido* for the costs of the federal proceedings (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 30'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents severally an amount of CHF 50'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the chairman of the Arbitral Tribunal.

Lausanne. July 15, 2013.

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Carruzzo