4A_520/2015[1]

Judgment of December 16, 2015

First Civil Law Court

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

A._____ Bank,
Represented by Mr. Sébastien Besson and Mr. Fabrice Robert-Tissot,
Appellant

v.

B._____ SA,
Represented by Mr. Elliott Geisinger, Sebastiano Mr. Nessi and Ms. Elena Trabaldo-de Mestral,
Respondent

Facts:
A.
At the beginning of 2012, B._____ SA (hereafter: B._____), a company under [name of country omitted] and part of the eponymous banking group, decided to divest its subsidiary, X._____ SA (hereafter: X._____).

The sale of X._____ was preceded by a tender in which three [name of country omitted] banks participated, including A._____ Bank (hereafter: A._____), the candidature of which was accepted. However, the Bank of Y._____ (hereafter: Y._____) and Z._____, whose previous agreement was necessary, subjected their approval of this transaction to the condition that B._____ would recapitalize X._____ up to EUR 3 billion before closing the transaction. The contractual negotiations chiefly concerned the insertion of an adjustment mechanism into the future sales contract, should the recapitalization done by B._____ go beyond the requirements of Y._____, particularly if at the date

[1] Translator's Note: Quote as A._____ Bank *v.* B._____ SA, 4A_520/2015.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

of closing, the *Core Tier 1 Ratio* (or CT1 Ratio) – *i.e.* the ratio the assessment of the solvency of a bank is based on by comparing its equity with its risk-weighted assets – was below the 10% ratio anticipated in the negotiations.

On October 16, 2012, B._____ and A._____ signed a Share Purchase Agreement (hereafter: the SPA) by which the former sold to the latter the entire capital of X._____ for one Euro. One of the clauses of the aforesaid contract states the following:

> 4.4 CT1 Ratio Adjustment
> If, on or prior to 30 June 2013, the Bank of Y._____ officially sets the CT1 Ratio in effect on 30 June 2013 below 10% (or, as the case may be, does not officially set a CT1 Ratio in effect on 30 June 2013), the Purchaser shall, subject to the occurrence of the Closing, pay to B._____ the CT1 Ratio Adjustment, by wire transfer in immediately available funds to B._____'s Bank Account within fifteen (15) Business Days after 30 June 2013. For the avoidance of doubt, no CT1 Ratio Adjustment will be due by the Purchaser to B._____ if the official CT1 Ratio in effect on 30 June 2013 is 10% or more."[2]

This informally translates as follows:

> [Translation into French omitted]

On March 28, 2013, the executive committee of Y._____ set the CT1 Ratio at 9% as of March 31, 2013.

In June 2013, X._____ and A._____ merged, the former being absorbed by the latter.

B.
On September 3, 2013, B._____ invoked the arbitration clause in the SPA and filed a request for arbitration against A._____ with a view to obtaining payment of EUR 160'913'514, with interest, pursuant to Art. 4.4 of the SPA.

Pursuant to its submissions, A._____ requested in substance that the claim be rejected because Art. 4.4 of the SPA, which required interpretation, was not applicable to the circumstances of the case at hand as it reserved an adjustment in B._____'s favor only if, contrary to the case at hand, Y._____ reduced its equity requirements for X._____. Should this interpretation be rejected by the arbitral tribunal, the Defendant asked for a finding that the clause in question was void. A three-member arbitral tribunal was constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC). In accordance with the arbitration clause in the SPA, its seat was set in Geneva and English was the language of arbitration. In a final award of August 31, 2015, after investigating the matter, the Arbitrators upheld B._____'s claim entirely.

[2] Translator's Note: In English in the original text.

C.
On September 24, 2015, A._____ (hereafter: the Appellant), arguing a violation of its right to be heard (Art. 190(2)(d) PILA[3]), filed a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the aforesaid award. In a separate motion filed on the same day, it sought a stay of enforcement *ex parte* at first and then according to the ordinary rules. The first request was admitted by the presiding judge on September 29, 2015; the second is still pending.

In a letter of October 12, 2015, the Arbitral Tribunal stated that it did not wish to submit observations as to the appeal.

At the beginning of its answer of October 29, 2015, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected insofar as the matter is capable of appeal.

The Appellant, in its reply of November 17, 2015, and the Respondent in its rejoinder of December 4, 2015, maintained their previous submissions.

Reasons:

1.
According to Art. 54(1) LTF,[4] the Federal Tribunal issues its judgment in an official language,[5] as a rule in the language of the decision under appeal. When the decision was issued in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal, they used English, whilst in the briefs submitted to the Federal Tribunal, they used French. In accordance with its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1)(a) LTF). Whether as to the subject of the appeal – a final award – the standing to appeal, the time limit to appeal, the Appellant's submission, or the ground for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The matter is therefore capable of appeal.

3.

[3] 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.
[4] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[5] Translator's Note: The official languages of Switzerland are German, French and Italian.

3.1. Examining Art. 4.4 of the SPA, the Arbitral Tribunal reached the conclusion that its clear text did not require interpretation and consequently, entitled the Respondent to claim from the Appellant the payment of the undisputed amount calculated pursuant to this clause. Indeed, Y._____ set the CT1 Ratio as of June 30, 2013, below 10% and the closing of the transaction took place (Award n. 154 to 260).

The Arbitrators then examined the second question raised by the Appellant, namely the validity of Art. 4.4 SPA, which it challenged in the light of the mandatory rules – mandatory laws or public policy – of the law of [name of country omitted] (award n. 261 to 307). In this respect, they stated the following after reviewing the arguments of the parties (award n. 279):

> The issues of whether the Arbitral Tribunal should consider the validity of Clause 4.4 under... [law] because the Z._____ guidelines are to be considered "*lois de police*", or because it is warranted by Article... of the... Code, are irrelevant in view of the approvals by the Z._____, the Y._____ (and other institutions) of the Transaction, as will be demonstrated below. The Arbitral Tribunal will thus focus on these approvals rather than proceed to a complex analysis of the law applicable to the validity of Clause 4.4, which in the instant case is not determinant to its decisions.[6]

This translates freely as follows:

> [French translation omitted]

Having made this remark, the Arbitral Tribunal then sought to demonstrate that Z._____ did not just approve the transaction broadly speaking, but endorsed the clause in dispute in its very wording (Award n. 280 to 297, particularly n. 290). It also found that Y._____ endorsed the transaction (Award n. 298 to 306), which led it to reject the Appellant's submission requesting a finding of nullity of Art. 4.4 of the SPA (award n. 307).

3.2. The Appellant argues that the Arbitral Tribunal violated its right to be heard within the meaning of Art. 190(2)(d) PILA, and specifically that it disregarded its minimum duty to examine and address the pertinent issues.

In its view, the Arbitrators resorted to "a dodge" to spare themselves the admittedly delicate review of the arguments it had "hammered" from the beginning and throughout the arbitration to demonstrate that Art. 4.4 of the SPA was not valid in the light of the mandatory rules of the law of [name of country omitted], which constituted mandatory or public policy laws. They disregarded the issue that the approval of the transaction by the competent bodies of [name of country omitted] (Z._____ and Y._____) was different from that of the compatibility of the clause in dispute with the latter rules. Similarly, they overlooked the fact that no authorization can heal a public policy defect (appeal n. 62 to 71).

3.3.

[6] Translator's Note: In English in the original text.

3.3.1. The right to be heard in contradictory proceedings according to Art. 190(2)(d) PILA certainly does not require an international arbitral award to be reasoned (ATF 134 III 186[7] at 6.1 and references). However, it imposes upon the arbitrators a minimal duty to examine and 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 statements, arguments, evidence and offers of evidence presented by one of the parties and important to the decision to be issued. If the award totally overlooks some items apparently important to resolve the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. It similarly behooves them to demonstrate that, contrary to the appellant's claims, the items omitted were not relevant to resolve the case at hand, or if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all arguments invoked by the parties, so that they cannot be held in violation 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).

Moreover, the Federal Tribunal has held that it does not behoove this Court to decide whether or not the arbitrators should have upheld the argument they overlooked, had they handled it. Indeed, this would disregard the formal nature of the right to be heard and the necessity of annulling the decision under appeal in case of violation of this right, irrespective of the appellant's chances of obtaining a different result (judgment 4A_69/2015 of October 26, 2015, at 3.1).

In its reply, the Appellant supplements its reasons as to the scope that should be given to the principles established by the Federal Tribunal as to this aspect of the guarantee of the right to be heard according to Art. 190(2)(d) PILA (n. 72/73). In particular, the Appellant believes it has brought to light a loosening of this case law in the sense of the Federal Tribunal wanting "…*to broaden the review based on a formal denial of justice in connection with the failure to address an argument in the award*" (n. 72). Besides the fact that the reply may not be used to supplement the appeal brief (judgment 4A_709/2014 of May 21, 2015, at 2.1), the Appellant's statement is erroneous as case law in this respect has not changed one iota since the Ca ñas judgment (ATF 133 III 235 at 5.2). Broadening the review is not on the agenda, moreover, particularly because the Federal Tribunal is faced with an ever-growing tendency of Appellants invoking this aspect of the guarantee of the right to be heard in the hope of indirectly obtaining the review of the merits of the award under appeal. It must be recalled that the Federal Tribunal is not a court of appeal and the legislators consciously and deliberately limited the Court's power of review when deciding appeals concerning international arbitration.

3.3.2. The Arbitral Tribunal did not '*dodge*' the issue of the possible impact of the violation of preemptory rules of [name of country omitted] as to the validity of Art. 4.4 of the SPA. It simply held that the issue was not relevant (award n. 279: irrelevant … not determinant) to the decision to be issued in the case at hand (*ibid*: in the instant case) because Z._____ and Y._____ had approved the transaction between the

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

parties to the dispute. The Arbitrators thus clearly indicated why they felt entitled to dispense with an examination as to whether or not the clause in dispute was compatible with the mandatory rules of the law of [name of country omitted] coming in to consideration. The Appellant's attempt to dissociate the two questions that the Arbitral Tribunal purposefully joined is therefore is therefore in vain. The fact that it handled this issue by explaining why it could dispense with answering it in one way or the other is sufficient from the point of view of the guarantee of the right to be heard, pursuant to Art. 190(2)(d) PILA and the related case law.

It does not behoove the Federal Tribunal to verify the pertinence of the reasons why the Arbitral Tribunal considered that it could dispense with the examination sought by the Appellant. In other words, this Court shall not research whether the Arbitrators were right or wrong to hold, at least implicitly, that the authorization issued by the [name of country omitted] bodies competent for banking supervision healed a possible violation of mandatory or public policy laws of [name of country omitted] by the parties to the contract, or to use the Appellant's words, if such a defect could not be remedied by any authorization. To follow the Appellant in this direction would indeed lead to substantive review, or at least to extend the scope of review that the Federal Tribunal allows itself in this field. Similarly, and to take a more striking example, if an arbitral tribunal seized of a contractual claim holds in its final award that it may dispense with examining the conditions of liability (breach of contract, fault, damage and causality) because the claim is time barred, the claimant may not apply to the Federal Tribunal in an appeal in which it would argue a violation of its right to be heard for failing to review these requirements by way of a finding that the arbitral tribunal was wrong to uphold the defendant's objection that the claim was time barred. With a view to obtaining the annulment of the award, and contrary to what the Appellant did in this case, it will be able to submit no more than an argument that the reason upheld by the Arbitral Tribunal to dispense with addressing this issue – in the latter, prescription; in the former, the healing effect of ratification – took place in violation of one of the various grievances mentioned at Art. 190(2) PILA.

The solution is admittedly fairly rigorous to a party that will have to live with a hypothetically unjustified refusal to address the arguments it validly submitted to the Arbitral Tribunal. This, however, is an inherent consequence of the recourse system established in the field of international arbitration, which is characterized by the desire to substantially limit the intervention of the state court. Moreover, *in fine*, that party's fate will not be less enviable than that which would have transpired for the party if the arguments, duly examined, were rejected by the arbitral tribunal on unsustainable grounds because arbitrariness is not a grievance included in the exhaustive list of Art. 190(2) PILA.

This being so, the appeal must be rejected. The Appellant's motion for a stay of enforcement granted *ex parte* becomes moot as a consequence.

4.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs set at CHF 100'000 shall be borne by the Appellant.

3.
The Appellant shall pay CHF 150'000 to the Respondent for the federal proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the president of the ICC Tribunal.

Lausanne, December 16, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo