4A_54/2015[1]

Judgment of August 17, 2015

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Leemann

A._____ AS,
Represented by Mr. Daniel Hochstrasser and Mrs. Simone Fuchs,
Appellant

v.

B._____ SAL,
Represented by Mrs. Dominique Brown-Berset and Mrs. Béatrice Castellane,
Respondent

Facts:

A.
A._____ AS, seated in [name of country omitted] (Defendant, Appellant) entered into an agreement described as "Consultancy Services Agreement" (hereafter: CSA) with B._____ SAL in [name of country omitted] (Claimant, Respondent) on February 16, 2011.

At the time of conclusion of the contract, the Defendant had already been entrusted with the construction of a phosphate-sludge-pipeline and the works on the project had been ongoing since October 29, 2010. Moreover, the parties entered into two consultancy agreements on October 26, 2010; both were terminated by a termination agreement of February 16, 2011, and substituted with the CSA of the same day.

[1] Translator's Note: Quote as A._____ AS *v.* B._____ SAL, 4A_54/2015.
The original text of the decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

The Claimant undertook in the CSA to provide various services in connection with the construction project. As to the compensation due by the Defendant, §4.1 CSA provides the following:

> In compensation for all SERVICES rendered and for all costs and expenses incurred by the CONSULTANT, A._____ shall pay the CONSULTANT a fee (hereinafter the "Fee") of 2% (two percent) of the CONTRACT price.
>
> The Fee will be paid in the following manner:
>
> - 50% (fifty percent) of the Fee shall be paid as follows:
>   - 30% (thirty percent) of this portion as will be calculated based on the CONTRACT Price [i.e. an amount equal to 0.3% (zero point three percent) of the CONTRACT Price] shall be paid after A._____ actually receives 10% Advance Payment from the Client.
>   - 70% (seventy percent) of this portion shall be paid pro-rata to the payments actually received by A._____ under the CONTRACT [i.e. 0.7% (zero point seven percent) of each payment received].
>   - The subject payments will be made in the same currency that A._____ shall be paid by the CLIENT and within 30 (thirty) days from the date A._____ actually receives all the relevant payments from the OWNER, and against eligible invoices of the CONSULTANT.
>
> - Remaining 50% (fifty percent) of the Fee shall be due by way of "quarterly" installments to be calculated pro-rata to the payments actually received by A._____ under the CONTRACT [i.e. 1% (one percent) of each quarterly payments received] and after all pending issues or problems with the PROJECT as of end of such quarterly period are resolved. The subject payments will be made in the same currency that A._____ shall have been paid by the owner, after A._____ having resolved all pending issues or problems with the PROJECT and actually having received all the relevant payments under the CONTRACT as of end of the respective installment period, then within 30 (thirty) days and against eligible invoices of the CONSULTANT.
>
> - The CONTRACT Price referred to above shall be the Contract Price as signed by A._____ excluding any VAT (Value Added Tax) corresponding thereto as the case may be.[2]

The invoice amounting to EUR 980'454 (Invoice A-1) sent by the Claimant on May 23, 2011, was paid by the Defendant on June 25, 2011. The six other invoices (A-2 to A-7) remained outstanding, however, as the Defendant took the view that the amounts mentioned there were not due under the CSA.

The CSA contains an arbitration clause in favor of an arbitral tribunal sitting in Zürich. Swiss law was declared applicable to the matter.

B.

The Claimant eventually introduced arbitration proceedings based on the rules of the International Chamber of Commerce (ICC) against the Defendant, essentially with the submission, supplemented during the arbitration, that the Defendant should be ordered to pay a total of EUR 5'632'549.67 (corresponding to

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

the unpaid invoices n. A-2 to A-7 of EUR 866'651, EUR 1'683'772, EUR 1'573'584, EUR 943'855.45, EUR 448'017 and EUR 116'670.22) with interest at 5%.

The Defendant submitted that the Claim should be rejected and counterclaimed for the restitution of the first amount paid for the first invoice of EUR 980'454, with interest.

On June 13, 2013, the ICC Court of Arbitration appointed a Sole Arbitrator.

A hearing took place in Geneva on July 9 and 10, 2014, during which several witnesses were heard among other things.

In an arbitral award of December 8, 2014, the Arbitrator mainly upheld the claim and ordered the Defendant to pay the following amounts to the Claimant (dispositive part of the award, §1):

- EUR 866'651 with interest at 5% from March 18, 2012;
- EUR 1'683'772 with interest at 5% from January 10, 2013;
- EUR 1'573'584 with interest at 5% from September 1, 2013;
- EUR 943'855.45 with interest at 5% from April 7, 2014;
- EUR 448'017 with interest at 5% from August 14, 2014.

As to the amount of EUR 116'570.22 (Invoice A-7), the Arbitrator rejected the claim; the counterclaim and any other submissions of the parties were also rejected (dispositive part of the award, § V).

C.
In a civil law appeal, the Defendant submits that the Federal Tribunal should annul the arbitral award of the ICC Arbitral Tribunal, seated in Zürich of December 18, 2014, and send the matter back to the Arbitral Tribunal for a new decision.

The Respondent submits that the matter is not capable of appeal; alternatively, the appeal should be rejected. The Arbitrator submits that the appeal should be correspondingly rejected.

The Appellant submitted to the Federal Tribunal its comments as to the Arbitrator's brief and a reply which the Respondent commented in a rejoinder.

D.
On March 24, 2015, the Federal Tribunal granted a stay of enforcement.

Reasons:

1. According to Art. 54(1) BGG,[3] the judgment of the Federal Tribunal is issued in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As this is not an official language and the parties used different languages before the Federal Tribunal, the decision of the Federal Tribunal shall be issued in the language of the appeal brief in accordance with practice.

2.
In the field of international arbitration, a civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Zürich in this case. Both parties had their seat outside Switzerland at the decisive time (Art. 176(1) PILA). As the parties did not expressly opt out of the provisions of Chapter 12 PILA, the provisions of this chapter are applicable (Art. 176(2) PILA).

2.2. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[6] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the arguments raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons contained in Art. 106(2) BGG as to the violation of constitutional rights and of cantonal and intercantonal law (134 III 186[7] at 5, p. 187 with reference). Criticism of an appellate nature is not allowed (134 III 565[8] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These contain both the findings as to the facts upon which the dispute is based and those concerning the course of the proceedings, namely the findings as to the factual content of the case as well as the submissions of the parties, their factual allegations, legal arguments, statements in the proceedings and offers of evidence, the content of a witness statement, an expert report, or the findings on the occasion of a visual inspection (BGE 140 III 16 at 1.3.1 with references).

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[3] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[4] Translator's Note: The official languages of Switzerland are German, French and Italian.

[5] 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.

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

[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

[8] 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

The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly wrong or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[9] at 2.2.1, p. 34; 134 III 565[10] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). Whoever wants to rely on an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement them on this basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings according to applicable procedural rules (see BGE 140 III 86[11] at 2, p. 90 with references).

3.
The Appellant argues that the Arbitrator violated the right to an independent and impartial arbitrator (Art. 190(2)(a) PILA and the right to be heard and to equal treatment (Art. 190(2)(d) PILA) due to the manner in which he conducted the hearing.

3.1. The party wishing to challenge an arbitrator (see Art. 180(2), 2nd phrase, PILA) or holding that the arbitral tribunal has no jurisdiction (see Art. 186(2) PILA) or considers they are being harmed by another procedural violation according to Art. 190(2) PILA forfeits its argument if it does not raise it in the arbitration in a timely manner and does not undertake all reasonable efforts to remedy the violation (BGE 130 III 66 at 4.3, p. 75; 126 III 249 at 3c, p. 253 *f.*; 119 II 386 at 1a, p. 388; each with references). It is a violation of the principle of good faith to raise a procedural violation merely in the framework of an appeal even though there was an opportunity in the arbitration to give the arbitral tribunal the chance to correct the alleged violation (BGE 119 II 386 at 1a, p. 388). In particular, a party does not act in good faith and abuses its right when it keeps the grievance in reserve in order to use it in the event the case unfolds unfavorably and could conceivably be lost (BGE 136 III 605[12] at 3.2.2, p. 609; 129 III 445 at 3.1, p. 449; 126 III 249 at 3c, p. 254). When a party participates in an arbitration without questioning the composition or the jurisdiction of the arbitral tribunal even though it has the opportunity to clarify this issue before the arbitral award is issued, it is no longer able to raise the corresponding argument in the federal appeal proceedings (BGE 130 III 66 at 4.3 with references).

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[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[10] 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

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

3.2.

3.2.1. The Appellant argues that the manner in which the hearing was conducted shows that the Arbitrator was not independent and impartial. It argues the Arbitrator was against it as he did not give it the opportunity to state its views as to issues relevant to the case or "*came to the assistance*" of the Respondent by repeatedly interrogating its witnesses as though he had been counsel to the Respondent and by giving its witnesses several alternative possible answers and/or interpreting or repeating the statements of the Respondent's witnesses without being asked.

3.2.2. The Appellant did not question the independence or the impartiality of the Arbitrator in the arbitration. Nor was it able to show in the appeal brief how it objected to the manner in which the arbitral hearing was conducted and giving the Arbitrator the opportunity to correct the alleged violation. Neither by its mere reference that it protested against the questions a witness was asked ("*I Object to this question*") or with the two isolated quotes it cites ("*With all due respect, Mr. [Arbitrator]*" or "*Mr. [Arbitrator], I am really surprised* […]"[13]) does it show that it raised a sufficiently clear objection in the arbitration claiming that the arbitration suffered from a procedural violation within the meaning of Art. 190(2)(a) and (d) PILA because the Arbitrator did not behave neutrally and treated both parties unequally (see judgment 4A_407/2012 of February 20, 2013, at 3.4).

In this manner, the Appellant forfeited the right to raise the alleged violations it now claims in the federal appeal proceedings.

4.

The Appellant argues that the reasons of the award show that the Arbitrator violated the right to be heard and the principle of equal treatment of the parties in several respects (Art. 190(2)(d) PILA).

4.1. Art. 190(2)(d) PILA allows an appeal only on the basis of the mandatory procedural rules according to Art. 182(3) PILA. According to this, the arbitral tribunal shall in particular protect the right of the parties to be heard. With the exception of the right to reasons, this corresponds to the constitutional guarantee in Art. 29(2) BV[14] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law infers from this, in particular, the right of the parties to state their views as to all facts important to the judgment, to submit their legal arguments, to prove their factual allegations important to the decision by appropriate means submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

Whilst the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to obtain the reasons of an international arbitral award according to well-

[13] Translator's Note: In English in the original text.
[14] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

established case law (BGE 134 III 186[15] at 6.1 with references), it implies a minimal duty of the arbitrators to review and to address the issues important to the decision. The arbitral tribunal violates this duty when, due to oversight or by misunderstanding, it fails to address some legally relevant claims, arguments, evidence or evidentiary submissions of a party. Yet, this does not mean that the arbitral tribunal must specifically address every single submission of the parties (BGE 133 III 235 at 5.2 with references).

The principle of equal treatment demands, furthermore, that the parties be treated equally throughout the arbitral proceedings (BGE 133 III 139 at 6.1, p. 143).

4.2.
4.2.1. During the hearing, the Respondent sought compensation of 2% of the Appellant's total liability based upon the CSA in connection with the payments received by its client in connection with the construction of the pipeline, thus not only 2% of the original contractual price but also a corresponding share of the extra payments based on changes in the order.

The Appellant took the view that, according to §4.1 of the CSA, the Respondent had no claim to 2% of any additional payments following changes in the orders and refused to have this issue debated at the hearing as it had never been at issue so far. However, the Arbitrator gave the Respondent the opportunity at the hearing to state its views as to the new allegations in connection with the additional payments at issue and interrogated the witnesses in this respect; this even though he only decided at the end of the hearing to allow the new submissions. There was a violation of the right to be heard and of the principle of equal treatment to be found in this approach of the Arbitrator.

4.2.2. The Appellant cannot be followed. It concedes itself in the appeal brief that the Arbitrator shared its view that the Respondent had no claim to compensation of 2% of any possible additional payments based on changes in the orders. Accordingly, he rejected the claim in so far as the Respondent claimed a payment of EUR 116'670.22 based on possible additional payments (Invoice A-7) (dispositive part I and V). As the Respondent correctly points out in its answer, there is therefore no legally protected interest to obtain the annulment of the award under appeal (Art. 76(1) BGG).

Be this as it may, one does not see how the Arbitrator's conduct would entail a violation of the right to be heard or unequal treatment. The Appellant does not show how the conduct of the arbitration hearing would have made it impossible to state its view in the proceedings, neither does it show that the Arbitrator granted something to the other party that it was denied.

4.3.
4.3.1. Furthermore, the Appellant submits that, "the manner in which the Arbitrator assessed the scope of the Respondent's contractual duties under the CSA" violates Art. 190(2)(d) PILA.

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

In the award under appeal, the Arbitrator reached, with the Respondent, the conclusion that the CSA was principally concluded with a view to services to be provided by the Respondent during the "tender phase": the compensation provided in the CSA would therefore be due principally for services provided by the Respondent during that phase and in case the Appellant was then awarded the additional work. Furthermore, according to the Appellant, the CSA was concluded on February 16, 2011, only; however, it had already received the supplement for the project in October 2010, which is why, "for purely logical reasons" it remains incomprehensible how the Arbitrator could have seen the main purpose of the CSA in securing the supplement to the project.

The Arbitrator based his reasons principally on the two consulting agreements of October 26, 2010, before the CSA was executed, which were entered into at a time in which the supplement for the project had not yet been successful and which were terminated on February 16, 2011. The interpretation of a contract in force principally with the help of old terminated contracts would have been unlawful in the case at hand. Moreover, the Arbitrator disregarded the Appellant's extensive arguments (in particular, in the answer to the claim), explaining why the two consulting agreements of October 26, 2010, could not be resorted to as to the scope of the contractual obligations under the CSA. The Arbitrator's reasons as to the scope of the Respondent's contractual obligations lead to the conclusion that the Arbitrator decided on his own first that the CSA concluded principally for the time before the supplement to the project and then sought reasons to justify his view. This would be particularly clear from the fact that the Arbitrator drew untenable and arbitrary conclusions from various clear statements of witnesses as would be clear from the statements of Witness Birgili.

4.3.2. The Appellant's arguments show neither a violation of the right to be heard nor unequal treatment but are mere inadmissible criticism of the arbitral award. The Arbitrator was aware of the time sequence of the conclusion of the contracts and did not overlook that the two Consulting Agreements of October 26, 2010, were substituted by the CSA on February 16, 2011. With reference to Art. 18 OR[16] and the case law of the Federal Tribunal he determined that actual will of the parties and took into account in this respect the two consulting agreements of October 26, 2010, among others, the A-1 Invoice already paid and various witness statements. By doing so, he reached the conclusion that the parties entered into this CSA principally with a view to the supplementary work, whilst they intended the Respondent to provide certain services after the submission phase as well. Insofar as the Appellant takes the view before the Federal Tribunal that the Arbitrator drew false or arbitrary conclusions from the two Consulting Agreements and the witness statements, it criticizes the assessment of the evidence in the arbitration in an unlawful manner. Moreover, it disregards that, according to Art. 190(2)(d) PILA, the right to be heard does not encompass the right to obtain reasons of an international arbitral award, according to well-established case law (BGE 134 III 186[17] with references); contrary to what it seems to assume, the Arbitrator did not have to deal explicitly

[16] Translator's Note: OR is the German abbreviation for the Swiss Code of Obligations
[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

with each of its submissions. The Appellant does not explain in what way the Arbitrator violated his minimal duty to examine and handle the issues important to the decision (BGE 133 235 at 5.2 with references).

The Appellant fails to show to what extent it was prevented from presenting its point of view as to the scope of the Respondent's contractual obligations under the CSA let alone how the Arbitrator treated it unequally in this respect in the proceedings.

4.4. In connection with the issues it raised in the arbitration concerning Access to Site, Security Issues, and Subcontractors, the Appellant disregards that the right to be heard does not encompass a right to substantive accuracy of the award, which is why it does not behoove the Federal Tribunal to examine whether or not the Arbitral Tribunal took the whole record into consideration and understood it correctly. According to the law, the substantive review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether or not an award is compatible with public policy (Art. 190(2)(e) PILA; BGE 127 III 576 at 2b, p. 578; 121 III 331 at 3a, p. 333).

The Appellant exercises inadmissible criticism of the content of the arbitral award under review when it argues that, in its opinion, the Arbitrator to recognize some legally relevant issues, displayed "*an arbitrary line of argument*" or "*his own peculiar handling* […] *of witness statements and legal issues at hand*" or that his reasons were "*completely beside the point*." Neither does it present a ground for appeal according to Art. 190(2)(d) PILA by submitting that the Arbitrator would have arbitrarily assessed various documents and witness statements. It rightly does not submit that the award under appeal would be incompatible with public policy (Art. 190(2)(e) PILA).

4.5. In its submissions as to the key requirements of compensation according to §4.1 CSA in its view, the Appellant does not show any procedural violation according to Art. 190(2)(d) PILA either. It merely submits to the Federal Tribunal its view of the correct interpretation with reference to the wording of the contractual provision and criticizes the Arbitrator for drawing inaccurate conclusions from the September 27, 2010, email he took into consideration. The view contained in the appeal brief, according to which the Arbitrator should have expressly explained why the email in connection with the two consulting agreements of October 26, 2010, would be relevant to the interpretation of §4.1 CSA, cannot be followed. The Arbitrator took into consideration in his award that the Appellant took the view in the arbitration that compensation according to §4.1 CSA was due when two conditions were met (actual receipt of payment by the Appellant and correction of all problems in connection with the project). That he took into consideration the two Consulting Agreements of October 26, 2010, and accompanying documents such as the email of September 27, 2010, to determine the reciprocal agreement of the parties, as he did in another context, is clear from the award under appeal and did not require a specific explanation from the point of view of the right to be heard. Whether or not the Arbitrator drew the right conclusions from the email at issue with a view to the interpretation of §4.1 CSA cannot be examine d by the Federal Tribunal in the framework of an appeal against the award.

Moreover, the Appellant disregards that reasons have to be submitted in the appeal brief itself and that a mere reference to the record is not sufficient when, without further reasons, it submits that the Arbitrator would have, "plain and simple overlooked" its arguments as to the interpretation of §4.1 CSA in the answer to the claim (BGE 140 III 115 at 2, p. 116; 133 II 396 at 3.1, p. 399 *f.*; 131 III 384 at 2.3, p. 387 *f.*; each with references).

In connection with the interpretation of §4.1 CSA, there is also no violation of the right to be heard.

5.
The appeal proves unfounded and must be rejected insofar as the matter is capable of appeal. In such an outcome of the proceedings, the Appellant must pay the costs and compensate its opponent (Art. 66(1) and Art. 68(2) BGG).

Therefore the Federal Tribunal Pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs, set at CHF 25'000, shall be paid by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 30'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the ICC Arbitral Tribunal sitting in Zürich.

Lausanne, August 17, 2015

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann