4A_173/2016[1]

Judgment of June 20, 2016

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Clerk of the Court: Leemann

A._____,
Represented by Prof. Dr. David Dürr and Mr. István Bojt,
Appellant

v.

1. B._____,
2. C._____,
Both represented by Mr. Simon Brun and Mr. Andreas Forrer,
Respondents

Facts:

A.
B._____ (Claimant 1, Respondent 1) and C._____ (Claimant 2, Respondent 2), both domiciled in [name of country omitted] each entered into an agreement with A._____ (Defendant, Appellant) on November 7, 2012, and August 29, 2012. The Defendant (as "Trustee") was entrusted with acquiring shares of the D._____ Fund for the Claimants. Any contact between the Claimants and the Defendant would take place exclusively through E._____ and F._____, who managed together G._____ S.L.

Paragraph 1 of the aforesaid agreements contained the following (emphasis supplied):

[1] Translator's Note: Quote as A._____ *v.* B._____ and C._____, 4A_173/2016.
The decision was issued in German. The original text is available on the website of the Federal Tribunal, www.bger.ch.

> On a best efforts basis the CLIENT shall receive a yield from such private placement Shares which is estimated at 0.9% (zero point nine percent) per month. The Shares dispose of a capital guarantee by the Fund's Custodial Bank.

Paragraph 6.4 of the agreements contain an arbitration clause, each with provision for a sole arbitrator sitting in Basel and choice of law in favor of Swiss law.

After the aforesaid agreements were entered into, Claimant 2 sent EUR 180'000 on July 27, 2012, and EUR 72'000 on November 30, 2012, to the Defendant; Claimant 1 transferred EUR 40'000 on October 25, 2012, and EUR 170'340 on November 7, 2012. The D._____ Fund was thus completely invested in shares of the H._____ Fund. Whilst the expected return was paid to the Claimants in each of the first months, the D._____ Fund stopped payments in February 2013. It turned out that there was no guarantee of the depository bank, which should have protected the Claimants' capital, and an additional guarantee was worthless. A Ponzi scheme had obviously been operated by the H._____ Fund.

B.
On June 17, 2015, the Claimants initiated arbitration proceedings with the Basel Chamber of Commerce against the Defendant and submitted that he should be ordered to pay EUR 40'000 with interest at 5% from October 26, 2012, and EUR 170'340 with interest at 5% from November 8, 2012, to Claimant 1 and EUR 180'000 with interest at 5% from July 30, 2012, and EUR 72'000 with interest at 5% from December 3, 2012, to Claimant 2. The Defendant essentially submitted that the claim should be rejected to the extent that it was capable of arbitration. The parties could not agree on a sole arbitrator and the Court of the Swiss Chambers' Arbitration Institution informed them of the appointment of the Arbitrator on August 21, 2015.

On January 19, 2016, settlement talks were conducted with the involvement of the Arbitrator with no result. Subsequently, a hearing took place on January 19 and 20, 2016.

In a final award of February 23, 2016, the Arbitrator ordered the Defendant to pay EUR 40'000 with interest at 5% from October 26, 2012, and EUR 167'627.71 with interest at 5% from November 8, 2012, to Claimant 1 (operative part §1b) and to pay EUR 180'000 with interest at 5% from July 30, 2012, and EUR 66'519.97 with interest at 5% from December 3, 2012, to Claimant 2 (operative part §1a). Costs were awarded (operative part § 2 and 3) and all other submissions of the parties were rejected (operative part §4).

The arbitral tribunal found the Defendant in breach of contractual duties of care in connection with the guarantee of the capital and hence held him liable, according to Art. 398(2) OR[2] for the damage sustained.

[2] Translator's Note: OR is the German abbreviation for the Swiss Code of Obligations.

C.
In a civil law appeal (supplemented by further supportive arguments within the time limit), the Defendant asked the Federal Tribunal to annul the arbitral award of the Arbitral Tribunal of the Swiss Chambers' Arbitration Institution sitting in Basel of February 23, 2016, "*and to send the matter back to the Arbitral Tribunal for a decision that the matter is not capable of arbitration or instead that the claim must be rejected*." In the alternative, the Federal Tribunal should find itself that the Arbitral Tribunal has no jurisdiction to adjudicate the matter.

The Respondents submit that the appeal should be rejected insofar that the matter is capable of appeal.

The Sole Arbitrator waived his right to state his position.

The Appellant submitted a reply to the Federal Tribunal and the Respondents a rejoinder.

Reasons:

1.
In the field of international arbitration, a civil law appeal is available in international arbitration matters pursuant to the requirements of Art. 190 – 192 PILA[3] (SR 291) (Art. 77(1)(a) BGG[4]).

1.1. The seat of the Arbitral Tribunal is in Basel in the case at hand. Both Respondents had their seat outside Switzerland at the decisive time (Art. 176(1) PILA). As the parties did not expressly waive the applicability of Chapter 12 PILA, its provisions are therefore applicable (Art. 176(2) PILA).

1.2. The only admissible grievances are those exhaustively listed at Art. 190(2) PILA (BGE 134 III 186[5] 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 grievances that are raised and reasoned in the appeal briefs; this corresponds to the duty to provide reasons at Art. 106(2) BGG for the violation of constitutional rights and of cantonal or intercantonal law (BGE 134 III 186[6] at 5, p. 187 with reference). Criticism of an appellate nature is not permitted (134 III 565[7] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

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[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: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

[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

[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/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

1.3. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These encompass both the findings as to the facts upon which the dispute is based and also the facts concerning how the proceedings unfolded, such as the findings as to the content of the case: the submissions of the parties, their factual allegations, legal arguments, statements in the case and the evidence adduced, the content of a witness statement, expert report or the findings made during an on-site visit (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate 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 that of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the 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[8] at 2.2.1, p. 34; 134 III 565[9] at 3.1, p. 567; 133 II 139 at 5, p. 141, each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitrators and seeks to rectify or supplement the facts must show, with reference to the record, that the corresponding factual allegations were first raised during in the arbitral proceedings, in accordance with the procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

1.4. A civil law appeal within the meaning of Art. 77(1) BGG may only seek the annulment of the award (see Art. 77(2) BGG, excluding the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to decide the matter itself). Insofar as the dispute concerns the jurisdiction of the arbitral tribunal, an exception to this applies and the Federal Tribunal may itself decide the jurisdiction or the lack of jurisdiction of the arbitral tribunal, or whether to remove the arbitrator involved (BGE 136 III 605[10] at 3.3.2, p. 616 with references).

The submission requesting the return of the matter to the Arbitral Tribunal with instructions to reject the claim is therefore inadmissible. However, the submission that the arbitral award should be annulled and a finding issued that the Arbitral Tribunal has no jurisdiction is fundamentally admissible.

2.
The Appellant argues that the Sole Arbitrator violated the provisions concerning jurisdiction (Art. 190(2)(b) PILA) and lacked independence and impartiality (Art. 190(2)(a) PILA).

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[8] 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

[9] 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

[10] 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

2.1. The party seeking to challenge an arbitrator (see Art. 180(2) 2nd phrase PILA), or arguing that the arbitral tribunal has no jurisdiction (see Art. 186(2) PILA), or that feels disadvantaged as a consequence of another relevant procedural deficiency according to Art. 190(2) PILA forfeits its grievances if it does not raise them in the arbitration in a timely manner and does not undertake all reasonable efforts to remedy the deficiency insofar as possible (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 contrary to good faith to raise a procedural deficiency only in the framework of appeal proceedings even though it would have been possible to give the arbitral tribunal an opportunity to remedy the alleged deficiency during the course of the arbitration (BGE 119 II 386 at 1a, p. 388). A party therefore acts contrary to good faith and abuses its rights when it holds the grievance in reserve, only to raise it when case unfolds unfavorably and a loss can be anticipated (BGE 136 III 605[11] 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 challenging the composition or the jurisdiction of the arbitral tribunal even though the issue could have been clarified before the award was issued, it is barred from raising the corresponding grievance in the appeal proceedings before the Federal Tribunal (BGE 130 III 66 at 4.2 with references).

2.2.
2.2.1. To the extent that the Appellant takes the view before the Federal Tribunal that the Arbitral Tribunal did not have jurisdiction to decide the matter because the arbitration clause was invalid, his submissions shall be disregarded. During the arbitration, he did not challenge the jurisdiction of the Arbitrator to decide the claims based on the two agreements concluded with the Claimants on November 7, 2012, and August 29, 2012, but rather exclusively took the view that all non-contractual claims were not covered by the arbitration clause. His answer of December 21, 2015, to which he refers in his appeal brief, shows that he expressly acknowledged the jurisdiction of the Arbitral Tribunal to adjudicate the contractual claims. The Appellant is therefore barred from raising the invalidity of the arbitration clause in the appeal proceedings in the Federal Tribunal.

2.2.2. Insofar as the Appellant argues that the Arbitrator wrongly left his jurisdictional defense in connection with non-contractual claims undecided, his arguments are unfounded. After convincing himself that the Appellant was liable to the Respondents under Art. 398(2) OR, pursuant to the agreements entered into on November 7, 2012, and August 29, 2012, the Arbitrator rightly waived reviewing the issue of his possible jurisdiction as to non-contractual claims. Furthermore, the rule of *Kompetenz-Kompetenz* invoked (see Art. 186(1) PILA) does not require findings as to legally irrelevant questions with regard to jurisdiction.

Insofar as the Appellant takes the view before the Federal Tribunal that the submissions of the Respondents in the arbitration proceedings – in particular the invalidity of the contracts concluded, which was raised – would, if rightly assessed, lead to the conclusion that there were no contractual claims remaining at all, he exercises inadmissible criticism as to the substantive assessment of the claims. In doing so, he disregards

[11] 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

that, according to the statutory provisions, the substantive review of an international arbitral award by the Federal Tribunal is limited to the issue of the compatibility of an arbitral award with public policy (Art. 190(2)(e) PILA; BGE 127 III 576 at 2b, p. 578; 121 III 331 at 3a, p. 333).

2.3.
2.3.1. The Appellant sees a violation of the requirement of independence of the arbitrator because before hearing the parties and the witnesses, he undertook an assessment of the case in which he "*adopted with the utmost clarity the point of view of the Claimants and could not depart from that in the later proceedings*." The expectation agreed upon by the parties as to the anticipated provisional assessment consisted of the Arbitrator expressing a relatively open and intentionally blurry opinion as to where he saw opportunities and risks for each party and, if need be, he would point to more explicit risks to one party in the absence of the other. Yet, what took place was "*a short and dryly-presented set of reasons of the decision, precise in each point, clearly subsumed, and everything else, as a more or less balanced assessment of the chances and risks*." Any margin for the expressly agreed-upon settlement talks would thus have become illusory. The 'settlement proposal' assumed that the Appellant would pay 98% of the claim and something like an intermediate solution could be attempted only as to costs and interest. It was particularly striking that in this 'assessment', the Arbitrator made no mention at all of the main objections raised by the Appellant in his answer to the claims.

Insofar as the Appellant seeks to imply a lack of independence and impartiality of the Arbitrator from the provisional assessment of the dispute during the hearing of January 19, 2016, (Art. 190(2)(a) PILA), his grievance is raised too late. Contrary to what he claims, he did not at all raise the alleged bias immediately after the assessment of the Arbitrator took place during the hearing, but rather waited for the outcome of the case. The excerpt from the record submitted as Exhibit 19 to the appeal brief shows that on January 19, 2016, the Appellant confirmed that the preliminary assessment would not be used for a subsequent challenge of the Arbitrator and merely expressed his expectation that, by interrogating the parties and deepening the additional written submissions, which were not yet provided for, the Arbitrator, "*could, as the case may be, reach another opinion*." There can be no question of a timely challenge. This grievance has been forfeited.

2.3.2. To the extent that the Appellant submits that the bias of the Arbitrator after his preliminary assessment of January 19, 2016, is evident from the reasons of the award of February 23, 2016, he cannot be followed. From the mere circumstance that the award was issued after witnesses were heard and further submissions of the parties within the meaning of the preliminary assessment, no conclusion can be drawn that the Arbitrator would have lacked independence or impartiality. Furthermore, there is no showing of a bias from the grievance that the reasons of the award concerning the role of Mr. F._____ and Mr. E._____ or the qualification of the "Capital Guarantee" would have been merely short, casual, and superficial.

The circumstance also invoked by the Appellant that his request for security for costs in view of a possible cost award was only decided in the award under appeal, does not show any lack of independence or impartiality of the Arbitrator, which should lead to the annulment of the award. He claims, wrongly, to have expressly asked in an email of January 12, 2016, that the security "*should be carried out before the beginning*

of the hearing of the parties and witnesses." Instead, according to that document, he asked for a decision "*following the hearings*." The argument that the Arbitrator obviously did not decide as to security for costs because, "*at that point in time 'Assessment-Settlement' and Hearings*" it was already clear that he would reject the claim, is meaningless.

2.3.3. Under the heading "Assessment of the Witnesses" the Appellant submits arguments of an appellate nature to criticize the assessment of the evidence by the Arbitral Tribunal insofar as he describes the statements of E._____ and F._____ as unreliable – as opposed to the award under appeal – and claims that the statements of Witness I._____ concerning the collateral of the investment were much more credible. The Appellant does not succeed in showing a bias of the Arbitrator, which would be evident from the reasons in the award under appeal in this context as well.

Neither is it apparent to what extent a bias of the Arbitrator would result from the granting of the request for interest or from the reference in the reasons in the award to the fact that the computation of interest in the claim was not commented upon by the Appellant in his answer.

3.
Invoking Art. 190(2)(c) PILA, the Appellant claims that one submission remained undecided.

3.1. He submits that the Arbitrator would not have decided as to a submission because, in the award under the heading "(c) Defendant's Claim for Fees", he came to the conclusion that the Appellant's counterclaim, raised as a set-off of CHF 61'261.70 was not justified although at least half of that amount was not claimed as a fee but as the payment of a loan.

3.2. According to Art. 190(2)(c) PILA, an award may be appealed when the arbitral tribunal decided on claims that were not submitted to it or when it left some submissions undecided. The failure to decide as to a submission mentioned in the second part of the sentence is a formal denial of justice. This grievance relates to an award that is incomplete because the arbitral tribunal left some submissions undecided, though they were presented by the parties. When all other claims are rejected in the arbitral award, this argument is excluded. Neither can it be claimed in this way that the arbitral tribunal would not have addressed an issue important to the dispute (BGE 128 III 234 at 4a, p. 242; judgment 4A_635/2012[12] of December 10, 2012, at 4.2; 4A_524/2009[13] of March 5, 2010, at 3.1).

The award under appeal upheld most of the claim (operative part, §1) and rejected all other submissions of the parties (operative part, §4). Contrary to the Appellant's view, this does not show that the Arbitral Tribunal left one of his submissions undecided. Be this as it may, his set-off defense was not a legal submission but

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-award-ultra-petita-when-all-further-claims-are-rejected

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-issues-omitted-by-arbitral-award-rejected-award-not-inf

a substantive argument in defense to be raised against the claim. The grievance that one of the Appellant's submissions was left undecided (Art. 190(2)(c) PILA) is therefore unfounded.

4.
The Appellant argues a violation of the right to be heard by the Arbitrator (Art. 190(2)(d) PILA).

4.1. Art. 190(2)(d) PILA only permits an appeal on the basis of mandatory procedural rules, according to Art. 182(3) PILA. According to this, the arbitral tribunal must preserve the right of the parties to be heard. With the exception of the right to obtain reasons, this parallels the constitutional right guaranteed by 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 therefrom, in particular, the right of the parties to state their views as to all facts important for the judgment, to submit their legal arguments, to prove their factual allegations important to the decision with 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 according to constant case law the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include an entitlement to reasons of an international arbitral award (BGE 134 III 186[15] at 6.1 with references), there is a minimum duty of the arbitrators to review and decide the issues important to the award. The arbitral tribunal violates this duty when, due to oversight or misunderstanding, it disregards some legally relevant claims, arguments, evidence, or offered evidence of a party. Yet, this does not mean that the arbitral tribunal must deal with each and all submissions of the parties (BGE 133 III 235 at 5.2 with references).

4.2. The Appellant argues that in the arbitration he pointed out that an investor could not realistically expect a return of 10.8% yearly in addition to a bank guarantee covering any risk of his investment. Moreover, he set out that the "Capital Guarantee of the Custodial Bank" could not be a bank guarantee, legally speaking. Yet, he fails to show that the Arbitral Tribunal disregarded this submission due to oversight or misunderstanding. Instead he criticizes, in an inadmissible manner, the reasons of the award under appeal according to which the agreements of November 7, 2012, and August 29, 2012, contained a guarantee by the Appellant that the capital invested would be covered by a bank guarantee. Insofar as he questions the legal qualification of the "capital guarantee of the Fund's Custodial Bank" and claims contrary to the reasons in the award under appeal that, rightly considered, this was not a bank guarantee but a contract of guarantee, he disregards that the right to be heard does not entail any entitlement to a substantively accurate decision (BGE 127 III 576 at 2b, p. 578).

The argument of a violation of the right to be heard is therefore unfounded.

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[14] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[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

5.
The appeal proves unfounded and must be rejected insofar as the matter is capable of appeal. The Appellant's motion for a stay of enforcement becomes moot with the decision of the case.

In view of the outcome of the proceedings, the Appellant must pay costs and compensate the other party (Art. 66(1) as well as Art. 68(2) BGG).

Therefore, the Federal Tribunal rules:

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

2.
The judicial costs set at CHF 8'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents an amount of CHF 9'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the Arbitral Tribunal in Basel.

Lausanne, June 20, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leemann