4A_218/2015[1]

Judgment of October 28, 2015

First Civil Law Court

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

1. A._____,
2. B._____,
3. C._____,
4. D._____,
Appellants

v.

X._____,
Respondent

Facts:
A.
Y._____ passed away in [name of country omitted], leaving as heirs his wife, A._____, his daughter, X._____ and his three sons, B._____, C._____ and D._____. The liquidation of the estate gave rise to a dispute between his daughter on the one hand his four other heirs on the other.

On March 8, 2011, the heirs of the late Y._____ signed an out of court settlement with a view to settle the apportionment of the assets of the deceased. Governed by the law of [name of country omitted], the agreement stated that the disputes in connection with it would be decided by a three-member arbitral tribunal, the seat of the arbitration being in Geneva and the proceedings conducted in French. An amendment to the aforesaid agreement was signed on June 27, 2011.

[1] Translator's Note: Quote as A._____, B._____, C._____, D._____ *v.* X._____, 4A_218/2015. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

By letter of her counsel of January 9, 2012, X._____ cancelled the transaction in part. The four other heirs invalidated it by letter of their new lawyer on March 7, 2012.

B.
On March 6, 2013, A._____, B._____, C._____ and D._____ (hereafter: the A._____ Consorts) initiated arbitral proceedings against X._____ in the Chamber of Commerce, Industry and Services of Geneva (CCIG), which constituted a three-member arbitral tribunal.

In their latest submissions, the A._____ Consorts asked the Arbitral Tribunal to find that they validly terminated the out of court settlement on March 7, 2012, with *ex tunc* effect as of March 8, 2011, to order X._____ to return EUR [amount omitted] to the estate of the late Y._____ and to order the Respondent to pay a total of [amount omitted], according to a distribution key consistent with the law of [name of country omitted]. In the alternative, they asked the Arbitral Tribunal to find that Art. 2, 3, 4, and 11 of the out of court settlement were fully void and to award the same amounts as in their principal submissions. Still further in the alternative, they reiterated their principal and alternate submissions but put their monetary claims in Swiss Francs and not in Euros.

X._____ submitted that the claims of the A._____ Consorts should be rejected entirely. By way of a counterclaim, she invited the Arbitral Tribunal to order them jointly to pay a penalty of EUR [amounts omitted] with interest at 5% from January 9, 2012, to find that the out of court settlement was validly cancelled or invalidated and to order the A._____ Consorts to cease and desist from the proceedings they initiated in a state court on October 24, 2013, subject to a penalty of CHF [amount omitted] daily.

The A._____ Consorts submitted that the counterclaim was inadmissible or should be rejected.

In a final award of March 19, 2015, the Arbitral Tribunal rejected all submissions by the A._____ Consorts. Upholding the counterclaim in part, it ordered the four consorts to pay jointly EUR [amount omitted] to X._____ and rejected all other submissions by this party.

C.
On April 23, 2015, the A._____ Consorts (hereafter: the Appellants) filed a civil law appeal for violation of Art. 190(2)(c) PILA[2] with a view to obtaining the annulment of the March 19, 2015, award.

Upon request of X._____ (hereafter: the Respondent), the Appellants were invited to pay an amount of [amount omitted] as security for costs by decision of the presiding judge of June 17, 2015, which they did in a timely manner.

[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.

In their answer of August 25, 2015, the Respondent submitted that the appeal should be rejected, with costs to be taken from the deposit made with the Office of the Federal Tribunal. The Arbitral Tribunal submitted its file and in its covering letter of July 21, 2015, it disputed the soundness of the grievances expressed in the appeal.

Reasons:

1.
A civil law appeal is admissible against awards concerning international arbitration pursuant to the requirements set at Art. 190 to 192 PILA (Art. 77(1)(a) LTF[3]). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the submissions of the Appellants or the arguments submitted in the appeal brief, none of these admissibility requirements raises any problem in the case at hand. Nothing therefore prevents the matter from being examined.

2.
In a first argument, the Appellants claim that the Arbitral Tribunal failed to decide as to their alternate submissions.

2.1. According to the second hypothesis of Art. 190(2)(c) PILA, an award may be challenged when the arbitral tribunal failed to make findings on one of the heads of claim. A failure to make findings is a formal denial of justice. Federal law here took over the second ground for appeal contained at Art. 36(c) of the Swiss Concordat on Arbitration. By "claims" ("*Rechtsbegehren*", '*determinate conclusioni*", "*chef de la demande*"), one means the claim or the submission of the parties. What is meant here is the incomplete award, namely the case in which the Arbitral Tribunal did not decide one of the submissions made by the parties. When the award rejects any and all other or further submissions, the argument is excluded. Nor can it be claimed that the Arbitral Tribunal failed to decide an issue important to the resolution of the dispute (ATF 128 III 234 at 4a, p. 242 and references; see also judgment 4A_246/2014 of July 15, 2015, at 5.1 and judgment 4A_446/2013 of February 5, 2014, at 6.2.2.2).

2.2. By way of long submissions, the Appellants seek to demonstrate that the Arbitral Tribunal did not decide as to their alternate submission seeking a finding of partial nullity of the out of court settlement of March 8, 2011; more precisely, its Art. 2, 3, 4, and 11. Such an attempt is immediately doomed because it disregards the aforesaid case law.

The Arbitral Tribunal formally rejected all submissions of the Appellants (award p. 66, ch. IV, n. 1), such that the matter is disposed of. In reality, what the Appellants argue is that it did not address the issue they raised as to the partial nullity of the disputed out of court settlement. This is a matter concerning the right to be heard (ATF 133 III 235 at 5.2), an argument that they do not raise in their brief. Moreover, as the Arbitral Tribunal

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

rightly points out, the Appellants themselves concede that in the award under appeal, the Arbitrators implicitly affirmed the validity of clauses 2 to 4 (appeal n. 72). The Arbitral Tribunal also emphasizes rightly that it upheld the validity of clause 11 of the aforesaid agreement, as it relied on this clause to impose a contractual penalty to the Appellants (award n. 170 to 173) and that it would have done so in their favor also if they had presented an *ad hoc* submission (award, n. 174).

Therefore, the argument that the Arbitral Tribunal would have decided *infra petita* is manifestly unfounded.

3.
Secondly, the Appellants claim that the Arbitral Tribunal decided *ultra petita*.

3.1. Art. 190(2)(c), first sentence, PILA allows the challenge of the award when the arbitral tribunal went beyond the submissions for which it was seized. Awards will fall within this provision when they award more than or something else other than what was requested (*ultra* or *extra petita*). However, according to case law, the arbitral tribunal does not go beyond the submissions if, ultimately, it does not award more than the total amount sought by the claimant but assesses certain items of the claim differently from what that party did or, when asked to issue a finding that a right does not exist which it considers unjustified, it finds the existence of the legal relationship in dispute in the operative part of the award, instead of rejecting the claim. The arbitral tribunal also will not violate the principle of *ne eat iudex ultra petita partium* in cases where it applies a different legal characterisation than that presented by the claimant to a claim. The principle *jura novit curia*, which applies to arbitration, asks arbitrators to apply the law *ex officio*, without limiting themselves to the reasons advanced by the parties. They are therefore allowed to sustain means that were not invoked as one is not confronted by a new claim or a different claim but merely with a new characterisation of the facts at hand. However, the arbitral tribunal is bound by the subject and the amount of the submissions, in particular when the party involved qualifies or limits its claims in the very submissions (judgment 4A_709/2014 of May 21, 2015, at 4.1 and the precedent quoted).

3.2. At its Art. 11.1, the out of court settlement of March 8, 2011, stated that in case of failure to perform or imperfect performance of one of its clauses, despite a warning and a time limit to cure the violation, the party in breach should pay to the other the amount of EUR [amount omitted] as contractual penalty, with the creditor being able to seek both the performance of the agreement and the payment of the contractual penalty (Art. 11.2). Moreover, should the Arbitral Tribunal be seized, a claimant who loses, albeit in part, should pay to the respondent the same amount as a penalty.

At n. 1 of the submissions of its counterclaim at page 107 of its post hearing brief of November 11, 2014, the Respondent invited the Arbitral Tribunal to order the Appellants jointly to pay, “a penalty of [amount omitted] with interest at 5% from January 9, 2012.” In the operative part of the award, the Arbitral Tribunal ordered the Appellants jointly to pay EUR [amount omitted] to the Respondent (award p. 66, ch. IV, n. 4). In doing so, it stayed well within the *ad hoc* submission formulated in the counterclaim, as the amount awarded is below the amount sought and moreover carries no interest at all. However, according to the Appellants, as interest should run from January 9, 2012, in the relevant counterclaim, this would mean that it could not be understood

as concerning the two breaches of the out of court settlement as well, which they allegedly committed later, namely the seizure of the state court of [name of country omitted] and the fact that they lost the arbitration. Instead, it should be inferred that the submission was limited to the third breach, which took place before January 9, 2012. Yet, the Arbitral Tribunal refused to uphold it for lack of sufficient evidence. Therefore, still according to the Claimants, it could not rely on the two other breaches without going *ultra petita*. It is not so. On the one hand, the wording of the counterclaim involved does not at all suggest that the Respondent qualified or limited its claims in this very submission. On the other hand, the opposite is to be found in the pertinent passage of the Respondent's last brief, as the Arbitral Tribunal rightly emphasizes, with references, at n. 2 of its answer to the appeal.

Consequently, the Appellants' second argument appears equally devoid of any merit.

4.
The appeal must be rejected on the basis of this review. The Appellants lose and shall be jointly ordered to pay the costs of the federal proceedings (Art. 66(1) and (5) LTF) and to pay costs to the Respondent (Art. 68(1), (2) and (4) LTF). The amount awarded to the Respondent shall be taken from the deposit made by the Appellants.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF [amount omitted] shall be borne jointly by the Appellants.

3.
The Appellants shall jointly pay an amount of CHF [amount omitted] as costs; this amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

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

Lausanne, October 28, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo