4A_676/2014[1]

Judgment of June 3, 2015

First Civil Law Court

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

A._____,
Represented by Mr. Pierre Schifferli,
Appellant

v.

1. B._____,
2. C._____,
Respondents

Facts:

A.
In July 2001, the foundation under Dutch law, A._____, the company under American law, B._____ and a third company by the name of D._____ Ltd (hereafter: D._____) entered into an investment agreement pursuant to which A._____ made available to B._____ an amount of USD 10 million against D._____'s promise to reimburse this amount and to pay a profit of USD 100 million.

Having failed to recover its investment or to receive the profit promised, A._____ seized a state court in California of a claim for payment against the two aforesaid companies and several individuals, including C._____, the CEO of B._____, domiciled in the United States of America. The defendants did not appear in court and on March 16, 2007, a default judgment was entered against them severally, ordering

[1] Translator's Note: Quote as A._____ *v.* B._____ and C._____, 4A_676/2014.
The original text of the decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

them to pay to A._____ a total of USD 43'954'524.22 including the amount invested (USD 10 million), punitive damages (USD 30 million) and interest between July 19, 2001, and March 12, 2007, (USD 3'954'524.22).

On August 26, 2009, A._____, B._____, and C._____ entered into an agreement entitled Settlement Agreement and Release (hereafter: the Agreement). Stating that the default judgment had not been enforced, the three parties wished to liquidate in this way all disputes arising from the initial investment agreement and from subsequent covenants. For this purpose, B._____ and C._____ undertook to pay to A._____ through a trustee the amount of USD 65 million. As a counterpart, A._____ would release them and other individuals sued of any liability and would assign to them its claims against D._____ and its CEO arising from the aforesaid default judgment.

Under the caption *Miscellaneous*, Clause 6(4) of the agreement states the following:

> This agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zürich, Switzerland and subsidiarily by the laws of Germany.[2]

B.

B.a. On December 14, 2012, A._____ relied on Clause 6(4) of the Agreement to file a notice of arbitration with the Secretariat of the Arbitration Court of the Swiss Chamber's Arbitration Institution. A three-member Arbitral Tribunal was constituted by the Arbitration Court and its seat set in Zürich. It decided to conduct its proceedings in English.

In its arbitration request of February 14, 2014, A._____ submitted that B._____ and C._____ should be ordered to pay severally an amount of USD 65 million with interest. The Defendants did not take a position as to the notice of arbitration or the arbitration request and were held to be defaulting within the meaning of Art. 28(1) of the Swiss Rules of International Arbitration (hereafter: the Rules).

B.b. In a final award of October 28, 2014, the Arbitral Tribunal denied jurisdiction to address A._____'s claim. The reasons leading to the denial of jurisdiction may be summarized as follows.

According to Art. 186(1) PILA[3] (RS 291) and Art. 21(2) of the Rules, the arbitral tribunal decides its own jurisdiction. Contrary to the general rule of Art. 186(2) PILA (jurisdictional defense), it must do so *ex officio* when the defendant fails to appear. It must therefore examine if Clause 6(4) of the Agreement is a valid arbitration agreement which could form the basis of its jurisdiction. In the affirmative, it will issue an interlocutory decision (Art. 186(3) PILA); if not, it will issue a final award.

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

[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.

Clause 6(4) of the Agreement meets the formal requirements of Art. 178(1) PILA. In the absence of a specific choice of law by the parties, its substantive validity must be examined according to Art. 178(2) PILA either under German law, deemed to govern the substance of the dispute, or under Swiss law. The Arbitral Tribunal shall first deal with the issue in dispute in the light of the law with which it is most familiar, namely Swiss law, before solving it in the light of German law if necessary.

In order to be valid according to Swiss law, the arbitration clause must at least include the essential elements that are the concurring will of the parties to submit their dispute to an arbitral tribunal to the exclusion of a state court and the description of the dispute(s) covered by the agreement. Moreover, it must be possible to determine the arbitral tribunal upon which the parties agreed. To that effect, the general rules of interpretation of contracts must be applied, as amended by case law, to take into account the specificities of arbitration. This approach leads to a first finding that no real and common intent of the parties to have recourse to arbitration was established, as there was no evidence supporting this. As to the objective interpretation of the Agreement, it too does not show a concurring will of the parties to waive the jurisdiction of state courts as to their possible differences. This is the case of the text of Clause 6(4) of the Agreement. None of the terms generally used in arbitration agreements to express the intent of the parties to submit to private jurisdiction are to be found there. Moreover, the words in the clause in dispute should in all likelihood lead a reasonable good-faith reader to consider it as a mere choice-of-law clause. This is also the case for the ambiguous expression *International Chamber of Commerce in Zürich, Switzerland*, the only one which theoretically could indicate a possible intent of the parties to resort to arbitration. Moreover, there are no other circumstances that would invalidate this conclusion.

The interpretation of the clause in dispute in the light of German law also leads to the exclusion of the jurisdiction of the Arbitral Tribunal on the same grounds.

C.
On November 27, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal for violation of Art. 190(2)(b) PILA. It submits that the Federal Tribunal should annul the award of October 28, 2014, and find that the Arbitral Tribunal has jurisdiction or otherwise send the case back to the Arbitral Tribunal for a new decision on its jurisdiction within the meaning of the reasons of the judgment of the Federal Tribunal.

B._____ and C._____ (hereafter: the Respondents) could not be reached.

The Arbitral Tribunal, which produced its file, was not invited to submit an answer.

Reasons.

1.

According to Art. 54(1) LTF,[4] the Federal Tribunal issues its decision in an official language,[5] as a rule in the language of the decision under appeal. When it is in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal, the Appellant used English and the Respondents failed to appear. The appeal brief sent to the Federal Tribunal was written in French. Consequently, this judgment shall be issued in French.

2.
A civil law appeal is admissible against international awards, pursuant to the requirements of Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions – including the submission seeking a finding by the Federal Tribunal itself that the Arbitral Tribunal has jurisdiction (ATF 136 III 605[6] at 3.3.4, p. 616) – or as to the argument in the appeal brief, none of these admissibility requirements raises any problem in the case at hand. The matter is therefore capable of appeal.

3.
In a sole argument based on Art. 190(2)(b) PILA, the Appellant submits that the Arbitral Tribunal wrongly denied jurisdiction as to the claim it was seized of.

3.1. As to jurisdiction, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal. Yet, this does not turn it into an appeal court. Therefore, it does not behoove it to search the award under appeal for the legal arguments that could justify upholding an argument based on Art. 190(2)(b) PILA. Instead, it behooves the party appealing to point them out in order to meet the requirements of Art. 77(3) LTF (ATF 134 III 565[7] at 3.1 and the cases quoted).

However, the Federal Tribunal reviews the factual findings only within the usual limits, even when it decides on the alleged lack of jurisdiction of the arbitral tribunal (judgment 4A_90/2014 of July 9, 2014, at 3.1).

3.2.
3.2.1. The arbitration agreement must meet the requirements of Art. 178 PILA. It is not disputed and neither is it disputable that Clause 6(4) of the Agreement meets the formal requirements of Art. 178(1) PILA.

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[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.

[6] 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

[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

Pursuant to Art. 178(2) PILA, the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties, or the law governing the dispute and in particular the law applicable to the main contract, or also Swiss law. The provision quoted includes three alternate legal ties *in favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the dispute (*lex causae*) and Swiss law as the law of the seat of the arbitration (ATF 129 III 727 at 5.3.2, p. 736). Failing a choice of law concerning Clause 6(4) of the Agreement, the Arbitral Tribunal reviewed its substantive validity in the light of both Swiss and German law. The Appellant does not criticize the interpretation given by the Arbitrators of the latter law and the manner in which it was applied to the circumstances of the case at hand. This Court shall consequently limit its review to the issue of a possible disregard of Swiss law by the Arbitral Tribunal when it denied jurisdiction (see Art. 77(3) LTF).

3.2.2. The arbitration agreement is a covenant by which two or several parties determined or determinable agree to entrust an arbitral tribunal or a sole arbitrator – instead of the state court that would have jurisdiction – with the task of issuing a binding award as to one or several dispute(s) existing (arbitration agreement) or future (arbitration clause) arising from a specific legal relationship (judgment 4A_515/2012 of April 17, 2013, at 5.2 and references). It is important for the will of the parties to waive the state court normally having jurisdiction in favor of the private jurisdiction, which is an arbitral tribunal, to be shown. As to the arbitral tribunal called upon to decide the dispute, it must be determined or at least determinable (ATF 138 III 29[8] at 2.2.3, p. 35).

The provisions of the arbitration agreements that are incomplete, unclear or contradictory are considered as pathological (as to the various types of pathological clauses, see among others Lukas Wyss, *Aktuelle Zuständigkeitsfragen im Zusammenhang mit internationalen kommerziellen Schiedsgerichten mit Sitz in der Schweiz*, Jusletter of June 25, 2012, n. 96 to 107). As long as they do not concern any mandatory items in an arbitration agreement, particularly the obligation to submit a dispute to a private arbitral tribunal, such clauses do not necessarily cause the arbitration agreements they are in to become void. Instead, one must use interpretation and, as the case may be, supplement the contract in accordance with the general rules of contract law to seek a solution consistent with the fundamental will of the parties to submit to arbitral jurisdiction (last case quoted, *ibid*.).

In Swiss law, the interpretation of an arbitration agreement takes place according to the general rules of contract interpretation. The court shall first seek to bring to light the real and common intent of the parties, empirically as the case may be, on the basis of clues without regard to the inaccurate expressions or designations they may have used. Failing this, it shall then apply the principle of reliance and seek the meaning that the parties could and should give according to the rules of good faith to their reciprocal expressions of will considering all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted). Should the application of this principle fail to bring to a conclusive result, some alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses, pursuant to

[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

which the contract must be interpreted against its drafter in case of doubt (*Unklarheitsrege I, in dubio contra stipulatorem* or *proferentem*; ATF 124 III 155 at 1b, p. 158 and the cases quoted). Moreover, if the interpretation leads to the conclusion that the parties wanted to waive the state jurisdiction in their dispute to submit it to an arbitral tribunal, but with some discrepancies as to how the arbitral proceedings should be conducted, the principle of utility (*Utilitätsgedanke*) must be resorted to, namely to give the pathological clause a meaning which makes it possible to uphold the arbitration agreement (ATF 138 III 29[9] at 2.3.3 [condition met]; 4A_388/2012 of March 18, 2013, at 3.4.3 and 4A_244/2012 of January 17, 2013, at 4.4 [condition not met]). Therefore, an imprecise or erroneous designation of the arbitral tribunal does not necessarily cause the arbitration agreement to be void (ATF 138 III 29[10] at 2.3.3, p. 36 and the cases quoted).

3.2.3.
3.2.3.1. In the case at hand, the Arbitral Tribunal analyzed the evidence in the file to find that the Appellant failed to establish the existence of a real and common intent of the parties to remove their possible disputes from the state court having jurisdiction in favor of an arbitral tribunal (award n. 69 to 75).

This finding is in the realm of facts and consequently binds the Federal Tribunal seized of a civil law appeal against an international arbitral award. Therefore, the Appellant seeks in vain to question it by proposing a different assessment of the clues in the arbitration file or by advocating a lighter burden of proof on the basis of Art. 2(1) and (8) CC[11] or Art. 153(2) CPC[12]. Its argument overlooks that if the Federal Tribunal does retain the power to review the factual findings on which the award is based, it is only if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (judgment 4A_682/2012[13] of June 20, 2013, at 3.1). Yet, one seeks in vain an argument of this kind in the appeal brief, which would have been duly invoked and reasoned. The mere reference to the violation of the right to be heard of the Appellant at n. 39 of the brief, without any further explanations, and the reference to a witness whose appearance would have been offered (appeal brief n. 68) appear manifestly insufficient in this respect.

Moreover, alleviating the burden of proof to take into account the fact that the Respondents did not participate in the proceedings on the one hand and more generally that the arbitration would have become the common law justice of international trade on the other hand, as the Appellant submits, would go against

[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/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[11] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.

[12] Translator's Note: CPC is the French abbreviation for the Swiss Code of Civil Procedure.

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-requirement-exhaust-extraordinary-legal-remedies-seizing-court-arbitration-sport

solidly established case law, which requires the arbitral tribunal to examine jurisdiction *ex officio* in the light of the information available when the defendant fails to appear (judgment 4A_682/2012[14] of June 20, 2013, at 4.4.2.1) and which requires strict verification as to whether or not the parties wanted to waive state jurisdiction for the disputes that may arise between them (see aforesaid judgment 4A_90/2014 of July 9, 2014, at 3.2.2, §2).

3.2.3.2. No matter what the Appellant says, the objective interpretation of Clause 6(4) of the Agreement that the Arbitral Tribunal conducted at n. 76 to 93 of the award to reach the conclusion that it was not an arbitration agreement, is not open to criticism.

Indeed, one hardly sees when reading the text of the aforesaid Clause that the parties could and should have inferred the existence of such an agreement according to the rules of good faith. The failure to use words such as "arbitration," "arbitral tribunal," "arbitrator," "arbitration clause," or other similar wording is not decisive to determine the objective meaning of the will expressed by the parties to the contract (ATF 138 III 29[15] at 2.3.1, p. 36). Yet, the absence of any reference, albeit indirect, to a dispute to be solved, a disagreement to be resolved, or a legal dispute to be decided, is much more significant as these various terms emphasize the jurisdictional nature of arbitration, the purpose of which is to dispose of a dispute by way of a binding award. Yet, the Clause in dispute only refers to the interpretation of the agreement and the rules applicable to do so, without the slightest allusion to the settlement of a dispute. And, as the Arbitral Tribunal emphasizes, it is not obvious that the mere reference to the *International Chamber of Commerce in Zürich, Switzerland* would speak in favor of the existence of an arbitration clause, as it is not established that the parties knew that conducting arbitral proceedings is among the many services offered by this private institution. It is even less credible because the Clause in dispute uses the adverb *subsidiarily*, establishing a connection between the aforesaid institution and German law (*laws of Germany*). It is therefore quite possible to see there a choice of law clause with a view to the interpretation of the agreement and in this assumption, the parties, all alien to Switzerland, would have wrongly assumed that the provisions and statutes of the Zürich institution are rules of substantive law. Be this as it may, nothing substantiates the Appellant's assertion that the parties, by the subsidiary reference to German law, wanted to state that the Zürich Chamber of Commerce would have jurisdiction to arbitrate any dispute according to its own rules of procedure and that it would do so by applying Swiss substantive law and, in the alternative, German substantive law as to the merits. Equally questionable is the argument in which the Appellant submits that, to the extent that parties domiciled in the United States would regard a substantive choice of law clause as generally carrying the jurisdiction of the courts of that state and *vice versa*, the reference to the Zürich Chamber of Commerce as the legal framework of substantive law would necessarily imply the

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-requirement-exhaust-extraordinary-legal-remedies-seizing-court-arbitration-sport

[15] 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

will of these parties to submit to the arbitration rules of this institution. The former assumption and the latter argument are indeed artificial if compared to the very text of the Clause uoon which they rely.

Moreover, the Appellant has to face the sovereign findings of the Arbitral Tribunal when it argues that the Clause in dispute merely expresses the concurrent will of the parties to settle the possible disputes concerning the agreement outside the state courts. Finally, the other circumstances advanced by the Appellant to support its reasoning – namely, in particular, the German citizenship of Counsel appearing on its behalf in the Arbitral Tribunal, the fact that Respondent C._____ speaks German fluently and travels frequently to Germany, the execution of the agreement in Salzburg or the reputation of Switzerland and Zürich in particular as an arbitration center – are obviously not able to challenge the right conclusions drawn by the Arbitral Tribunal from its objective interpretation of Clause 6(4) of the Agreement.

It hardly needs to be emphasized that the clause is not only pathological because it does not mention with sufficient precision the institution to be called upon to appoint the Arbitral Tribunal allegedly chosen by the parties (*i.e.* the Zürich Chamber of Commerce or the International Chamber of Commerce [ICC/CCI] with Zürich as seat of the arbitration). Furthermore, it is not a valid arbitration agreement because it does not express in a sufficiently clear manner the objective will of the parties to waive the jurisdiction of the state courts for their possible disputes. That the real meaning of the clause at hand may remain relatively obscure, ultimately, does not change this. The Appellant must live with this as the parties cannot be sent to an arbitral jurisdiction when it is not established – as is the case here – that a mandatory item of the arbitration agreement – in the case at hand, the duty to submit the dispute to a private arbitral tribunal – was included.

The argument based on a violation of Art. 190(2)(b) PILA is therefore unfounded.

4.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF). As to the Respondents, which were not invited to submit an answer, they are not entitled to costs.

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.

This judgment shall be notified to the parties and to the President of the Arbitral Tribunal.

Lausanne, June 3, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo