4A_74/2019[1]

Judgment of July 31, 2019

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Hohl,
Federal Judge Niquille
Clerk of the Court: Mr. Hug

1. A._____ Ltd.,
2. B._____ Corp.,
both represented by Dr. Claudius Triebold and Dr. Michel Verde,
*Appellants*,

*v.*

C._____ Ltd.,
represented by Laurent Isenegger,
*Respondent*

Facts:

A.
A.a. A._____ Limited (Defendant 1, Appellant 1), a company established under the laws of U._____, and the Chinese company B._____ Corp. (Defendant 2, Appellant 2) are subsidiaries of D._____ Corporation.

C._____ Limited is a company established under the law of U._____ (Claimant, Respondent). By the Cooperation Agreement of July 30, 2012, which was subject to Swiss law, it undertook to support D._____ Corporation in expanding its petrochemical business on the V._____ market by, in particular, acting as an intermediary with the aim of reaching an agreement on various disputed points with V._____'s state petroleum company E._____.

[1] Translator's Note: Quote as 1.A._____ Ltd. and 2.B._____ Corp. v. C._____ Ltd., 4A_74/2019. The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

After an agreement was reached with E._____, C._____ Limited, on the basis of the Cooperation Agreement, demanded a percentage of the total settlement proceeds as a fee. A._____ Ltd. and B._____ Corp. objected to this. Essentially, they argued that C._____ Ltd. had not exerted any effort – or certainly not any sufficient effort – to achieve said settlement, but rather if anything, its activities had tended to be counterproductive, for which reason it should not be entitled to any fee.

B.
B.a. On November 3, 2016, C._____ Ltd. initiated arbitration proceedings under the Swiss Rules of International Arbitration (2012) of the Swiss Chambers Arbitration Institution against A._____ Ltd and B._____ Corp., and demanded a fee of over USD 95 million, reducing that claim to just under USD 89 million as the proceedings progressed.

The Defendants requested that the claim be dismissed.

The hearing took place in Geneva from June 11-13, 2018. At the hearing, various witnesses were also examined.

B.b. On January 7, 2019, the Geneva-based Arbitral Tribunal, consisting of three arbitrators, upheld the claim in part, and ordered the Defendants to pay the Claimant just under USD 40 million.

The Arbitral Tribunal characterized the portion of the Cooperation Agreement relating to the present dispute as a brokerage agreement within the meaning of Art. 312 *et seq* of the Swiss Code of Obligations, ("OR")[2] and concluded that the settlement with E._____ was concluded "through efforts" of the Claimant, and that the Claimant was thus entitled to its contractually agreed share of the settlement amount as a broker's fee.

C.
By civil law appeal, the Defendants seek to set aside the Geneva-based Arbitral Tribunal's Award of August 2, 2016, together with corresponding costs and compensation. The Respondent requests dismissal of the appeal, to the extent the matter is capable of appeal. The Arbitral Tribunal has waived its right to submit comments.

The Parties have submitted a Reply Brief and a Rebuttal Brief to the Federal Tribunal.

D.
As requested, by Order of the Presiding Judge of March 14, 2019, the appeal was afforded suspensive effect.

Reasons:

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

1.
Pursuant to Art. 54(1) BGG,[3] the Federal Tribunal issues its decisions in an official language,[4] as a rule in the language of the decision under appeal. The Award challenged here is in English. Because English is not an official language and the parties have submitted their written submissions to the Federal Tribunal in accordance with Art. 42(1) BGG in conjunction with Art. 70(1) BV[5] in German (Appellants) and in French (Respondent), the judgement of the Federal Tribunal is being issued in the language of the appeal brief, in accordance with past practice (BGE 142 III 521 at 1).

2.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[6] (SR 291)(Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case was Geneva. At the time in question, all of the parties had their registered offices outside Switzerland (Art. 176(1) PILA). As the Parties did not expressly opt-out of the provisions of Chapter 12 PILA, they are therefore applicable (Art. 176(2) PILA).

2.2. The Appellants only partially prevailed in the proceedings before the Arbitral Tribunal, which means that they are specifically impacted by the challenged Award and have an interest meriting legal protection in having the Award set aside or amended (Art. 76(1) BGG). Their appeal has been submitted within the prescribed time limits (Art. 100(1) BGG), for which reason it is appropriate for the Federal Tribunal to deal with the appeal, subject to any legally sufficient grievances which may be asserted.

2.3. The decision may only be challenged on one of the grounds which are exhaustively enumerated in Art. 190(2) PILA (BGE 134 III 186 at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p.282). Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appellate brief; this corresponds to the duty to raise grievances in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p187, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565 at 3.1, p.567; 119 II 380 at 3b, p.382).

2.4. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings as to the facts which are the basis of the dispute and those as to the course of the proceedings, *i.e.* the findings as to the subject matter of the case, which include, in particular, the submissions of the Parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the content of a witness statement, an expert report, or the findings as to a visual inspection (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 where 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 Art. 105(2) BGG). However, the Federal Tribunal may review the factual

[3] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005, organising the Federal Tribunal (RS 173.110).
[4] Translator's Note: The official languages of Switzerland are German, French and Italian.
[5] Translator's Note: BV: Swiss Federal Constitution.
[6] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or, exceptionally, when new evidence is taken into consideration (BGE 138 III 29 at 2.2.1, p. 34; 134 III 565 at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). Whoever wishes to claim 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 the factual findings on that basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with the usual rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; both with references; *see also* BGE 140 III 86 at 2, p. 90).

3.
The Appellants allege that the Arbitral Tribunal has violated their right to be heard in various respects and has violated the principle of equal treatment of the Parties (Art. 190(2)(d) PILA).

3.1. Art. 190(2)(d) PILA permits a challenge only where the mandatory procedural rules of Art. 182(3) PILA are violated. According to that latter provision, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. This essentially corresponds (with the exception of the right to have reasons given) to the constitutional right embodied in Art. 29(2) BV. Case law infers from this, in particular, the right of parties to state their views as to all facts important to the judgement, to submit their legal arguments, to prove their factual allegations material to the judgement by sufficient evidence submitted in a timely manner and in the proper format, to participate in the hearings and to access the record (BGE 142 III 360 at 4.1.1; 130 III 35 at 5 S. 38; 127 III 576 at 2c; each with references). Whilst the right to be heard in adversarial proceedings pursuant to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international arbitral award, pursuant to well-established case law (BGE 134 III 186 at 6.1 with references), it does imply a minimal duty of the arbitrators to review and deal with the matters important to the award. This duty will be violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally relevant allegations, arguments, evidence or offers of evidence from a party (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2 with references).

The principle of equal treatment requires that parties be treated in the same manner throughout all phases of an arbitration (including any oral hearings, but excluding the deliberations on the award; *see* Judgment 4A_360/2011 dated January 31, 2012, at 4.1; BGE 133 III 139 at 6.1 S. 143) and that the tribunal not grant one party something that it denies to the other (Judgments 4A_80/2017 dated July 25, 2017 at 3.1.2; 4A_636/2014 dated March 16, 2015, at 4.2). Both parties must be afforded the same opportunity to argue their positions in the proceedings (BGE 142 III 360 at 4.1.1 S. 361).

3.2.
3.2.1. The Appellants first allege a violation of their right to be heard. The Appellants argue that the Arbitral Tribunal accepted a letter from F._____, who was once Chief Executive Officer (CEO) of E._____, as a part of ordinary documentary evidence, instead of requiring a written witness statement and subsequently calling him as a witness. Without an examination of the witness, they were not able to cross-examine F._____. The Appellants allege information contained in the letter submitted to be manifestly false and misleading and they complain that the Arbitral Tribunal relied, as a central point of its Award, on this letter.

3.2.2. As the Respondent rightly submits in its Reply, the Appellants essentially are asserting the grievance that the Arbitral Tribunal failed to examine F._____ as a witness. However, it is neither apparent nor is any explanation given as to why the Arbitral Tribunal should have been required to do so. Nor do the Appellants show in what manner the Arbitral Tribunal violated a mandatory procedural right within the meaning of Art. 182(3) and Art. 190(2)(d) PILA (*see supra* at 3.1). If the Appellants, as asserted in their Reply Brief to the Federal Tribunal, objected that the Respondent bears the burden of proof to show it acted as a broker in line with the parties' contract, this may be true. However, this objection misses the point, and the result of this is that, when viewed in the proper light, the Appellants are, instead, asserting objections to the assessment of evidence or the determination of the evidence from that assessment. Similarly, by further asserting the objection that the Arbitral Tribunal accepted the letter of F._____ as documentary evidence instead of dismissing it out of hand, they are objecting to the Arbitral Tribunal's assessment of the evidence. In so doing, they disregard the fact that the Federal Tribunal is unable either to correct or to supplement an arbitral tribunal's findings of fact, even where they are manifestly incorrect or based on a violation of rights within the meaning of Art. 95 BGG (*see supra* at 2.4).

As may be seen from the extract from the Award quoted by the Appellants themselves, the Arbitral Tribunal did deal with the arguments put forward by the Appellants, and to such extent in fact respected their right to be heard. The Arbitral Tribunal specifically stated that the allegation that F._____ had been paid by the Respondent to prepare the letter was unsubstantiated and that it was aware

> …that the Respondents did not have an opportunity to cross-examine Mr. F._____, it [the Arbitral Tribunal] also notes that it has not been presented with any significant reasons to conclude that the overall message of the letter is manifestly false or misleading. On this basis, the Tribunal sees no need to reject the letter outright, but will refer to it where necessary, taking these circumstances into account.[7]

Against this background, to the extent that it would be appropriate for the Federal Tribunal to give consideration to this grievance, it is unfounded.

3.3. The Appellants then assert the grievance that the Arbitral Tribunal violated both their right to be heard and the principle of equal treatment of the parties (Art. 190(2)(d) PILA) by calling G._____ to the oral hearing of the witnesses. In support of their position, the Appellants essentially argue that G._____, who had been called by the Respondent as a witness, was, in contrast to F._____, questioned as a witness despite the fact that he had not previously submitted any written witness statement.

Section 35 of Procedural Order No. 1 states, as the Appellants themselves quote, as follows: "*[T]he Arbitral Tribunal may order a witness to give testimony at the hearing if such testimony is relevant to the case and material to its outcome.*" Where the Appellants submit that there had been no reason to apply the exception under Sec. 35 of Procedural Order No. 1, they are implicitly admitting that the Arbitral Tribunal was, in principle, empowered to summon witnesses without a Party's request to do so and without their having submitted any written witness statements in advance. Their criticism relates solely to the application of the exception itself. Where they further complain that the Arbitral Tribunal improperly

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

considered the period of 24 days to be too short to take account of a written witness statement, they fail to see that, in so doing, they are again criticising the application of the Arbitral Tribunal's procedural rules, which the Federal Tribunal is unable to review in light of its limited jurisdiction in international arbitration matters (*see supra* at 2.3). The appeal does not show to how the Arbitral Tribunal's choice to hear G._____ as a witness without any corresponding request of the Parties, while not applying the same exception to hear F._____ as a witness, was tantamount to unequal treatment of the Parties or to preferential treatment of the Respondent, in violation of Art. 190(2)(d) PILA.

The Appellants' assertion that they were unable to adequately prepare themselves for cross-examination of G._____ due to a lack of a written witness statement obtained beforehand is rebutted by the fact that they themselves do not claim to have maintained the objection that they had notified to the Arbitral Tribunal or that they renewed their objection at the oral hearing of June 11-13, 2018. In their Reply brief, they also leave unchallenged the Respondent's assertion in its Statement of Defence to the appeal that all they had requested at the oral hearing was a short break after the questioning by the Arbitral Tribunal in order to be able to prepare for the cross-examination. At the very least, in light of the break granted by the Arbitral Tribunal for preparing for cross-examination following the questioning of the witness, as requested, there can be no question of any violation of their right to be heard. The Respondent likewise had to make do with said break in order to prepare for its examination. Thus, the Parties were given equal opportunity in this respect to argue their positions in the proceedings.

3.4. The Appellants further submit that one may discern a clear preference on the part of the Arbitral Tribunal for the statements of witnesses called by the Respondent. They argue that at times the statements in question were even afforded greater value than the documentary evidence, which can neither be justified nor explained, and which constitutes a violation of the principle of equal treatment of the Parties (Art. 190(2)(d) PILA).

By their critiques, where considered correctly, the Appellants are again making complaints about the Arbitral Tribunal's assessment of the evidence or, under the guise of a complaint regarding unequal treatment of the Parties, they are trying to bring about a review of the evidentiary findings in the challenged award. However, such a review of the challenged award is not the task of the Federal Tribunal where, as in the present case, it is called upon to hear an appeal in a civil matter regarding an international arbitral award (*see* supra at 2.3-2.4 and, in particular, BGE 142 III 360 at 4.1.2 and Judgement 4A_220/2017 dated January 8, 2018, at 3.1-3.2). It is not apparent to this Court to what extent the Arbitral Tribunal would not have granted both Parties the same opportunity to present their viewpoints in the proceedings. Rather, the Appellants content themselves with making longer remarks relating to the Arbitral Tribunal's assessment of individual items of evidence. In so doing, they are not even in a position to demonstrate arbitrariness in terms of the assessment of the evidence which, in international arbitration, is in any event not capable of being reviewed by the Federal Tribunal (*see supra* at 2.3-2.4). Merely for the sake of good order, it should, finally, be noted that contrary to what one might infer from the Appellants' appeal brief, the Arbitral Tribunal was not bound by any rigid hierarchy of evidence but was supposed to assess it freely (*see* Art. 24(2) of the Swiss Rules: "The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence").

3.5. Similarly, to the extent that the Appellants attempt to show a further violation of their legal right to be heard in the Arbitral Tribunal's alleged disregard of the text of the Agreement with regard to quantification of the broker's fee and violated the Rule of Interpretation "*in dubio contra stipulatorem,*" what they are in fact trying to do (as is already apparent from the wording of their grievances and *a fortiori* from the reasoning accompanying those grievances) is to obtain a review of the arbitral tribunal's application of the law by the Federal Tribunal. In so doing, they again fail to recognise the jurisdiction of the Federal Tribunal which, in international arbitral proceedings, is limited to the grievances exhaustively listed in Art. 190(2) PILA (*see supra* at 2.3), for which reason the Federal Tribunal cannot give any consideration to their criticisms. The Appellants do not demonstrate in what way the minimum duty of the Arbitral Tribunal to examine and to deal with the issues relevant to a decision (*see supra* at 3.1) arising out of the right to be heard in international arbitration proceedings may have been violated.

4.
The Appeal should be dismissed, to the extent the matter is capable of appeal. Accordingly, the judicial costs will be jointly imposed on the Appellants, who have been unsuccessful, in equal shares and jointly and severally (Art. 66(1) and (5) BGG). They must also compensate the Respondent (who addressed the Federal Tribunal through its counsel) for the Federal Court proceedings, again in equal shares and jointly and severally (Art. 68(1), (2) and (4) BGG).

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs of CHF 100'000 shall be paid by the Appellants.

3.
The Appellants shall pay party compensation to the Respondent of CHF 120'000 for the Federal proceedings.

4.
This Decision shall be notified in writing to the Parties and to the arbitral tribunal with its seat in Geneva.

Lausanne, July 31, 2019

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

Presiding judge: Kiss (Mrs)

Clerk of the Court: Hug