4A_572/2015[1]

Judgment of January 6, 2016

First Civil Law Court

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

A._____,
Represented by Mr. Dragan Zeljic,
Appellant

v.

B._____ SA,
Represented by Mr. Elliott Geisinger and Mrs. Anne-Carole Cremades,
Respondent

Facts:

A.
A._____, of [name of city omitted], is a risk investment mutual fund under French law, the management of which is carried out by the French law company, C._____ (previously: D._____).

B._____ SA, of [name of city omitted], is a Spanish law company managing more than 23'000 parking spaces in Spain.

On March 1, 2013, A._____, represented by D._____, and B._____ entered into an Investment Agreement purporting to create a Spanish common law company with a capital of EUR 3 million, each party providing half this amount. The aforesaid company was to be a management and investment vehicle with a

[1] Translator's Note: Quote as A._____ *v.* B._____ SA, 4A_572/2015.
The original text of the decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

view in particular to the acquisition of new parking spaces in Spain from 2013 to 2016 for a total amount of some EUR 151.1 million.

However, the Investment Agreement could not be carried out because A._____ failed to abide by the obligations the Agreement imposed upon it, in particular that of bringing in its share of the capital of the Spanish company to be constituted.

B.
On September 13, 2013, B._____ relied on the arbitration clause contained in the Investment Agreement to file an arbitration request against A._____ and D._____. In its final submission in the arbitration, it sought, in particular, an order that the two Defendants should pay an amount of EUR 18'052'109, with interest, at compensation for lost profits.

A three-member Arbitral Tribunal was constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC). According to the arbitration clause, Spanish law was chosen to resolve the dispute, Geneva selected as the seat of the arbitration, and English designated as the language of the arbitral proceedings.

In an award of September 11, 2015, the ICC Tribunal rejected jurisdiction as to C._____ (previously: D._____), found that the Investment Agreement was extinguished, held that A._____ breached it in gross negligence, and ordered that Defendant to compensate B._____'s loss, set at EUR 17'946'936 with interest.

As to the computation of damages – the only issue in dispute at this stage in the proceedings – the Arbitral Tribunal set forth the arguments submitted by the Claimant in this respect (award n. 465 to 478) and by the Respondents (award n. 479 to 513) and adopted the reasons summarized hereafter (award n. 514 to 527).

According to Art. 1101 of the Spanish Civil Code, B._____ may seek compensation for the damage caused by the breach of the Investment Agreement by A._____. In the case at hand, as authorized by Art. 1106 of the same Code, it claims consequential damages and, more precisely, compensation of its *lucrum cessans*, claiming the interest it had in regular performance of the aforesaid agreement. Its initial claim in this respect was based on a first report issued by Group E._____ on June 6, 2014, at EUR 27.3 million. Subsequently, this was reduced to EUR 18'052'109 on the basis of a second report issued by the same group on October 24, 2014, and taking into account a loan of EUR 100 million granted by a third party in the interim. A._____ does not deny breaching the Investment Agreement but firmly disputes the quantum of the damages sought by the Spanish company, considering that it should be near zero. In international arbitration, parties frequently seek compensation for the lost profit they could have obtained, sometimes over a long period, if its counterpart had performed its obligation. The assessment of such damages is delicate and most parties call upon financial experts to assist them in this exercise. From a procedural point of view, an expert report is the equivalent of a witness statement. Therefore, an arbitral tribunal may not set aside such evidence *a priori* but must freely assess its evidentiary value. It may depart

from the conclusions of the report if it has sufficient reasons to do so, whether they relate to the expert's creditability, or because of submissions made by the other party, particularly by way of a counter-report. In the case at hand, B._____ hired a company – Group E._____ – which produced two substantial reports emanating from respected professionals and, moreover, they gave clear and convincing explanations at the hearing. For its part, A._____ did not produce an expert report challenging the conclusions of the two reports. Initially, it did rely on a short report by Fiduciary F._____ but this evidence had to be removed from the arbitration file because the aforesaid company did not agree to the author of the report being heard by the Arbitral Tribunal. Failing any other evidence adduced by the Defendant, the consequence is that A._____'s defense essentially relies on unsubstantiated allegations, hypotheses and other speculations. However, while a party is free to disagree with the conclusions of the expert of the other party, the mere fact that it says so is not sufficient to justify that the arbitral tribunal set aside the expert report. In the case at hand, as to the six investment opportunities considered by the experts for E._____, their feasibility in view of the criteria in the Investment Agreement was not disproved by A._____, which adduced no evidence in this respect. The examination of the file therefore shows that the conclusions of the E._____ reports must be admitted as none of the arguments advanced by A._____ casts doubt as to their evidentiary value and the lost profit sought by B._____ must be set at EUR 17'946'936 plus interest.

C.
On October 16, 2015, A._____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the award of September 11, 2015. The Arbitral Tribunal submitted the file of the case and waived any further determination.

In its answer of December 4, 2015, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected insofar as the matter is capable of appeal.

On December 22, 2015, the Appellant submitted a reply in which it reiterated the submissions in its appeal brief. Moreover, it informed the Arbitral Tribunal that "*it is now in liquidation and represented by its management company and by its liquidator, company G._____.*"

By way of a decision of the presiding judge of December 24, 2015, a copy of this submission was sent to the Respondent and to the Arbitral Tribunal, with a request that they submit any observations in this respect by January 8, 2016.

Still on December 24, 2015, the Respondent referred to the aforesaid information contained in the reply, which was copied to its counsel directly by counsel for the Appellant, applied for security for costs according to Art. 62(2) LTF.[2] In a letter of December 28, 2015, it reminded the Federal Tribunal of its

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

request in this context to postpone any time limit for a possible rejoinder until a decision as to security for costs.

Whereupon, the presiding judge of this Court rescinded its orders of December 24, 2015, on December 29, 2015.

Reasons:

1.
According to Art. 54(1) LTF, the Federal Tribunal issues its judgment in an official language,[3] as a rule in the language of the decision under appeal. When the decision is issued in another language, (here English) the Federal Tribunal resorts to the official language chosen by the parties. Both used French before this Court. Therefore, the judgment shall be issued in French.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[4] (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The merits of the appeal may therefore be addressed.

3.
The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal judicial organization law (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the capacity to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against the aforesaid factual findings or when some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal (see Art. 99(1) LTF).

4.
In a single argument, the Appellant claims a violation of its right to be heard. In its view, the Arbitral Tribunal failed to take into consideration a number of arguments important to resolving the dispute that it had properly submitted.

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

4.1. The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not indeed require an international arbitral award to be reasoned (ATF 134 III 186[5] at 6.1 and references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2 and the cases quoted). This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some submissions, arguments, evidence and offers of evidence presented by one of the parties and important to the decision to be issued. If the award totally overlooks some items apparently important to the resolution of the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations in the appeal. It falls to them to demonstrate that, contrary to the appellant's claims, the items omitted were not pertinent to resolve the case at hand or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all arguments invoked by the parties, so they cannot be held in violation of the right to be heard in contradictory proceedings for failing to refute, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

Moreover, it was held that it does not behoove the Federal Tribunal to decide whether or not the arbitrators should have upheld the argument they overlooked if they had examined it. Indeed, this would disregard the formal nature of the right to be heard and the necessity to annul the decision under appeal in case of violation of this right, irrespective of the appellant's chances to secure a different outcome (judgment 4A_69/2015 of October 26, 2015, at 3.1 and the precedent quoted).

4.2.
4.2.1. The Appellant argues that the Arbitral Tribunal was wrong to set aside the F._____ Report on the one hand and to uphold the conclusions of the two E._____ Reports in their entirety on the other hand, addressing none of the arguments it had developed in its briefs, thus putting the Appellant in the same situation as if it had not had the opportunity to submit them at all. According to the Appellant, the authors of the E._____ Reports themselves conceded that its arguments were sound economically and had the impact it calculated on the quantum of damages. Moreover, the randomness of a profit forecast over seven years will be a matter of experience and would in itself render very fragile the assumptions on which the E._____ Reports are based. Thus, the Arbitral Tribunal should have been more critical towards the conclusions of these Reports, particularly because they were private expert reports purporting to support the views of the party ordering them.

4.2.2. The admissibility of this single argument appears more than doubtful as the Respondent convincingly demonstrates in its answer, irrespective of the explanations in the reply. It does not matter because the grievance in question is baseless anyway.

First, the Appellant mistakes the Federal Tribunal for a court of appeal when going back to the statements of the authors of the E._____ Reports at the hearing with quotes from the minutes of the December 5,

[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

2014, hearing (appeal brief n. 23 to 27) to draw the conclusion – unsupported by any finding in the award under appeal – that the individuals heard would have conceded that their hypotheses were "*questionable variable and not intangible values*" (appeal brief n. 42; reply n. 7 to 17). In doing so, it disregards the specific nature of an appeal against an international arbitral award (see section 3, above).

Furthermore, the setting-aside of the F._____ Report by the Arbitral Tribunal is not the object of any criticism worthy of the name by the Appellant. It does not challenge it as incompatible with its right to adduce evidence as part and parcel of the right to be heard (Art. 190(2)(d) PILA; judgment 4A_246/2014 of July 15, 2015, at 6.1 and the precedents quoted); in particular, it does not claim that the procedural reason allegedly justifying the setting aside was not admissible. It therefore invokes this evidence in vain to substantiate its argument.

Moreover, when claiming that the Arbitral Tribunal did not address any of its arguments, the Appellant merely refers the Federal Tribunal to various passages in its briefs in the arbitration file (appeal n. 40), which is an inadmissible argument as such a reference cannot constitute sufficient reasons (judgment 4A_606/2013 of September 2, 2014, at 1.1).

Finally, it must be pointed out that, under the cloak of an alleged violation of its right to be heard, the Appellant really seeks to challenge the assessment of the evidentiary value of the E._____ Reports, yet in an inadmissible manner. This is evinced by its argument that the Arbitral Tribunal failed to be more critical of these reports (appeal brief n. 49).

4.3. This being so, the appeal cannot but be rejected insofar as the matter is capable of appeal. Consequently, there is no need to give a new time limit for the Respondent to submit its observations as to the reply, an option that was reserved in the order of the presiding judge of December 29, 2015, rescinding the time limit initially given to the same party to file its rejoinder.

5.
The Appellant loses and shall pay the costs of the federal judicial proceedings (Art. 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

According to case law concerning Art. 62(2) LTF, a respondent wishing to obtain security for costs must apply for such before proceeding in the Federal Tribunal (judgment 4A_261/2012 of August 20, 2012, at 2 and the precedents quoted). In the case at hand, the Respondent is no longer entitled to apply for security for costs as it has already stated its views with regard to the appeal. That it learned after filing its brief that the Appellant is now in liquidation does not change the matter: on the one hand, the liquidation of a risk investment mutual fund under French law is not necessarily synonymous with insolvency until proof of the contrary, no matter what the Respondent says (see request for security for costs of December 24, 2015, p. 2, §3); on the other hand, and above all, it behooves the Respondent to worry about the financial situation of the Appellant throughout the federal proceedings and to apply for security for costs as a precaution before filing its answer if it does not know the situation or has doubts in this respect. Moreover, the

Respondent cannot demand that the Appellant guarantees its costs with a view to the upcoming filing of a rejoinder, as the appeal at hand is decided without requesting such a rejoinder (see 4.3, above).

Therefore the Federal Tribunal pronounces:

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

2.
The application for security for costs is rejected.

3.
The judicial costs set at CHF 50'000 shall be borne by the Appellant.

4.
The Appellant shall pay an amount of CHF 60'000 to the Respondent for the federal judicial proceedings.

5.
This judgment shall be notified to the representatives of the parties and to the chairman of the ICC Arbitral Tribunal.

Lausanne, January 6, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo