4A_490/2016[1]

Judgement of March 6, 2017

First Civil Law Court

Federal Judge Kiss (Mrs), presiding, Federal
Judge Niquille (Mrs),
May Canellas (Mrs),

Clerk of the Court: Leemann.

Parties
1. A._____,
2. B._____, both represented by Dr. Peter Straub
and Mrs. Johanna Henschel,
Appellants,

v

C._____, represented by
Mr. Daniel Hochstrasser
and Mrs. Isabelle Oehri,
Respondent.

Facts:

A.

A.a. C._____ (Claimant, Appellant) is a Libyan stock corporation with its registered office in Tripoli, Libya.

[1] Translator's note : Quote as A.____and B.____ v. C.____ 4a_490/2016. The decision was issued in German. The full text is available on the website of the Federal Tribunal www.bger.ch

A._____ and B._____ (Defendants, Respondents) are likewise Libyan companies, both of which have their registered office in Tripoli, Libya.

A.b. On March 30, 2010, A._____ and C._____ entered into an Agreement for the construction of a mixed-purpose building in exchange for a payment of EUR 31,096,210.26. The Agreement was subject to the Rules of the Fédération Internationale des Ingénieurs Conseils (hereinafter referred to as the FIDIC Contract). That Agreement contained an arbitration clause in favour of an arbitral tribunal constituted in accordance with the Rules of the International Chamber of Commerce (ICC). On May 31, 2010, A._____ and C._____ entered into a second Agreement known as a "Public Works Contract" (hereinafter referred to as the PWC Contract). The PWC Contract contains a clause on jurisdiction and venue in favor of the Libyan State Courts.

At the beginning of 2011, the events referred to as the "Arab Spring" interrupted C._____'s construction works, and its employees left the country. Following this, differences of opinion arose regarding the financial consequences of the ensuing damage to the building.

B.

B.a. On March 20, 2014, C._____ commenced arbitration proceedings under the ICC Rules against both Defendants, in which it primarily applied for an order that the Defendants be ordered to pay EUR 1,128,255.89 and EUR 1,446,028.30. The Defendants disputed the jurisdiction of the Arbitral Tribunal, taking the position that the Parties' dispute should be resolved by the Libyan State Courts.
On June 3, 2014, the Secretary General of the ICC Court of Arbitration confirmed the two party-appointed arbitrators. On August 7, 2014, the Chair of the Arbitral Tribunal was also appointed. At a preparatory meeting, the Parties reached agreement on February 22, 2015 that the Tribunal should first rule on its own jurisdiction and the applicable law. The Parties furthermore reached agreement that the seat of the Arbitral Tribunal should be in Zurich and that English should be the language of arbitration.
Procedural Order No. 1 of February 22, 2015, which was countersigned by all of the Parties, specified the timetable for the Parties' submissions on the above-referenced preliminary issues to be decided. On March 8, 2015, the Terms of Reference were signed.
On April 25, 2015, the Defendants filed their first submission on the issue of jurisdiction, and on May 26, 2015, the Claimant did the same.

On June 14, 2015, there was a second submission by the Defendants, as to which the Claimant commented on June 30, 2015.
Following its receipt of the Parties' submissions, the Arbitral Tribunal, by Letter of August 6, 2015, requested that the Parties comment on the concept of the 'bogus contract' on or before August 27, 2015. The Claimant submitted its relevant comments on August 27, 2015; however, no comments were provided by the Defendants.
On September 20, 2015, the Arbitral Tribunal notified the Parties that no further submissions were required to enable it to decide the question of jurisdiction.
On November 22, 2015, the proceedings were formally closed with respect to the preliminary questions.

B.b. By Interim Award of May 15, 2016, the Arbitral Tribunal, the seat of which was located in Zurich, ruled that it had jurisdiction over the matter.

C.
By Civil law appeal, the Appellants submit that the Federal Tribunal set aside the Interim Award of the ICC Arbitral Tribunal sitting in Zurich of May 15, 2016. The Respondent submits that the matter is not capable of appeal or, in the alternative, that the appeal should be rejected.
The Appellants submitted a Reply to the Federal Tribunal, and the Respondent submitted a Rejoinder.

Reasons:

1.
According to Art. 54 (1) BGG[2] the Federal Tribunal issues its decisions in an official language[3], as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The challenged award is written in English. Because that is not an official language and the Parties made use of German in proceedings before the Federal Tribunal, the judgment of the Federal Tribunal is being issued in German.

[2] 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).
[3] Translator's note: The official languages of Switzerland are German, French and Italian.

2.

In the realm of international arbitration, a Civil law appeal is admissible where the requirements of Arts. 190-192 PILA[4] (SR 291) are met (Art. 77 (1)(a) BGG).

2.1. In the present case, the seat of the arbitral tribunal is in Zurich. At the relevant time, both Parties were domiciled outside Switzerland (Art. 176 (1) PILA). As the Parties did not expressly opt out of the provisions of Chapter 12 PILA, they are applicable (Art. 176 (2) PILA).

2.2. The challenged arbitral award is an Interim Award (BGE 140 III 520 at 2.2). Under Art. 190(3) PILA, such an award may be challenged by Civil law appeal (BGE 130 III 76 at 3.1.3, at 3.2.1, p. 80).
According to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional claims as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 142 III 239 at 3.1; 134 III 565 at 3.1; 133 III 139 at 5, p. 141). Yet also in connection with an Appeal concerning jurisdiction, the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is, exceptionally, taken into account (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1, p. 477; 138 III 29 at 2.2.1; each with references). An appeal against an interim award based on a lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) must be reviewed by the Federal Tribunal on the basis of the findings of fact made by the arbitral tribunal, which withstand these grievances that fundamental rights have been breached. Thus, in connection with an appeal of this kind, the further grievances under Art. 190(2) PILA may likewise be raised if they directly relate to the arbitral tribunal's jurisdiction (BGE 140 III 477 at 3.1, 520 at 2.2.3, p. 525).
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 provide reasons in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 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).

2.3. A Civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, i.e. it may only seek the setting aside of a decision under challenge (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however,

[4] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

there is an exception in this respect that the Federal Tribunal may itself rule on the arbitral tribunal's jurisdiction or lack thereof or on the removal of the arbitrator involved (BGE 136 III 605 at 3.3.4, p. 616 with references).
However, this does not result in any obligation on the part of the Appellant to file an application in this regard. Contrary to the view of the Respondent, the Appellant's submission that the jurisdictional award which is being challenged here should simply be annulled is thus admissible.

2.4. The appeal must be fully submitted within the time limit for appeal, with a fully reasoned Appellate Brief (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use its Reply to supplement or improve its Appeal (*see* BGE 132 I 42 at 3.3.4). The Reply may only be used to comment on the statements made in the answer of another participant in the proceedings (*see* BGE 135 I 19 at 2.2).
To the extent that the Appellants go further in their Reply, their submissions cannot be taken into account.

2.5. 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 upon which the dispute is based and those concerning the course of the first instance proceedings, i.e. the findings as to the content 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 contents of a witness statement or an expert report, or the findings of visual inspections (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 (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 findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against them or when new evidence is, exceptionally, 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). The party who 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 precise reference to the record, that the corresponding factual allegations were already made during 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; *see also* BGE 140 III 86 at 2 p. 90).

2.6. The Appellants disregard these principles where they base their legal arguments on detailed factual allegations in which they describe the background of the dispute and the proceedings from their point of

view, thereby departing in various respects from the factual findings of the Arbitral Tribunal or expanding on them, without claiming any specific exceptions to the rule that factual findings are binding. For example, they describe various assumptions of contract relating to them, including, *inter alia*, in connection with restructuring measures, although the details to which they refer were not found in the challenged award. Such arguments shall not be taken into account.

3.

The Appellants assert the grievance that the Arbitral Tribunal violated their right to be heard (Art. 190(2)(d) PILA) in various ways when ruling on its jurisdiction (Art. 190(2)(b) PILA).

3.1.

3.1.1. Art. 190(2)(d) PILA permits parties to challenge an arbitral award based solely on the mandatory procedural rules set out in Art. 182(3) PILA. Pursuant to that section, arbitral tribunals must, in particular, guarantee the right of the parties to be heard. This essentially corresponds to the constitutional right embodied in Art. 29(2) BV[5]. Case law infers from this, in particular, the right of the parties to state their views as to all facts important to the judgement, with suitable 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, p. 38; 127 III 576 at 2c; each with references).

By contrast, , under well-established case law (BGE 134 III 186 at 6.1, with references), the right to be heard in adversarial proceedings under Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international award. However, there is a minimal duty on the part of arbitrators to review and deal with the issues that are material to their decision. That duty is violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party. However, this does not mean that the arbitral tribunal is compelled to address each and every submission of the parties (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2, with references).

3.2.

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

3.2.1. The Appellants submit that they sought court proceedings against the Respondent in a Libyan court, which, they say, was also expressly referenced in the Terms of Reference. The arbitral award did not mention those proceedings; similarly, they argued, the arbitral award ignored the fact that the Respondent is obviously participating in these proceedings without having raised a jurisdictional defense. By Letter of August 4, 2015, the Appellants had expressly and in no uncertain terms pointed out this contradiction in the position of the Respondent, which constituted an abuse of rights. In addition, the Appellants argue that they attempted multiple times without success to submit documents on the court proceedings which were pending in parallel, which were intended to prove that the Respondent was actively participating in those proceedings without ever having disputed the jurisdiction of the Libyan courts. They argue that the arbitral tribunal failed to accept the evidence in question, but rather dismissed it by Letter dated January 5, 2016.

3.2.2. Contrary to what the Appellants appear to assume, the mere fact that it had been noted in the Terms of Reference that Appellants had initiated State court proceedings against the Respondent did not require the Arbitral Tribunal to deal in detail with those proceedings in the challenged award. In addition, they fail to make clear whether the allegations raised in their Email of August 4, 2015, from which they wish to infer allegedly contradictory conduct by the Respondent, were asserted in proper form and within the proper time limits in the arbitration proceedings. The procedural timetable pursuant to Order No. 1 of February 22, 2015 specified in detail when the Parties were permitted to make which submissions on the issue of jurisdiction. Pursuant to that Order, the Appellants were required to file their submission on the issues of jurisdiction and applicable law (together with evidence) by April 25, 2015; the Respondent, for its part, was required to file its submission, together with evidence supporting it, by May 26, 2015, to which the Appellants were permitted to reply within a brief period, following which the Respondent was allowed to submit a rebuttal. The legal submissions envisaged by the arbitral tribunal were in fact filed by the Appellants on April 25, 2015 and June 14, 2015. Following this, the only documents the Parties were supposed to file were solely comments on the notion of the bogus contract. Against this background, it is not clear or logical how the email sent by the Appellants on August 4, 2015 is supposed to have constituted a submission made in proper form and in good time, and in their appeal they do not in fact submit that it was. The claim that the Appellants' right to be heard was violated is unfounded. The same applies in respect of the Appellants' email letters of November 30, 2015, and January, 4 and 5, 2016, which were only delivered to the arbitral tribunal after the proceedings had been formally closed. By letter of January 5, 2016, the arbitral tribunal then in fact notified the Appellants that the submissions in question had been belatedly filed, noting that the interim award had already been forwarded to the ICC Court of Arbitration. The objection that the Appellants' right to be heard was violated is unfounded. A violation of this kind

cannot be justified by merely submitting that the letter of the arbitral tribunal came as a surprise because the Interim Award was only issued five months later. Furthermore, the Appellants' comments fail to take account of the fact that the incorrect or even arbitrary application of arbitration rules will not, on its own, suffice to justify setting aside an international arbitral award (*see* BGE 129 III 445 at 4.2.1; 126 III 249 at3b with references).

3.3.

3.3.1. The Appellants further submit that they were neither afforded the opportunity to comment on the Respondent's submissions regarding the issue of the bogus contract nor even allowed to express any views on this question at all. The arbitral tribunal, they say, found it to be clear that the Parties regarded the FIDIC Contract as the contract intended by the Parties and the PWC Contract as the bogus contract in order to obtain tax advantages from the Libyan tax authorities. The Appellants argue that at a further point in the award, the arbitral tribunal opined on the question of the bogus contract by referring to Art. 247 of the Libyan Civil Code, commenting very generally on the practice of parties in the commercial world of entering into bogus contracts where this is of benefit to them. Beyond these very general remarks, the arbitral tribunal apparently simply "forgot" to delve into that question, although they had previously advised they would ("as explained below"), or to state which arguments/factual elements it was relying on in its conclusion that it was apparent that the Parties had concluded a second contract in order to obtain tax advantages. In particular, although the arbitral award mentions the Appellants' argument regarding contracts which are partially bogus, it failed to make any comments on this point and/or inferred that the Respondent's view was that the PWC Contract was (entirely) bogus. However, they argue, this was not the case, as is shown by the Respondent's submission on August 27, 2015 on the concept of the bogus contract. Thus, the Appellants say, the challenged award is erroneously based on alleged assertions by the Respondent and fails to provide any specific explanations regarding bogus contracts.

3.3.2. The Appellants are unable to show the Federal Tribunal, in terms of individual allegations, to what extent they would have been unable to put forward their views in the arbitration proceedings. As their submissions themselves make clear, the argument of the partially bogus contract was by no means lost upon the arbitral tribunal; however, the arbitral tribunal did reject it, at least in a sense,
where it subsequently found the contract to have been wholly bogus. To the extent the Appellants accuse the arbitral tribunal of having disregarded the Respondent's submissions, they are not demonstrating that their right to be heard was in any way violated. In addition, it does not appear from their submissions how they are supposed to have been prevented from submitting remarks in response to the Respondent's

submission on the concept of bogus contracts. Similarly, they fail to demonstrate how the arbitral tribunal might have incorrectly applied the law applicable to the arbitration clause as regards the question of bogus contracts. To the extent they are criticizing the arbitral tribunal's reasoning, they fail to take account of the fact that the arbitral tribunal is not required to expressly delve into every individual allegation of the Parties in order to satisfy the requirements of the Parties' right to be heard. The same applies *mutatis mutandis* regarding their remarks as to the allegedly common argument of the Parties that both of the contracts were in parallel with each other and both valid. As one sees from the reasoning of the challenged award (*see e.g.* margin nos. 45-46, 41), it was not lost upon the arbitral tribunal that the Parties to the arbitration were relying (including as an argument in the alternative) on the notion that both contracts were simultaneously valid. The claim that there has been a violation of the right to be heard is unfounded.

3.3.3. The grievance asserted in the same context (that the arbitral tribunal disregarded applications made by the Appellants on the question of bogus contracts) is likewise unfounded. As they themselves set out in their appeal, the arbitral tribunal itself asked the Parties on August 6, 2015 to submit comments on the concept of bogus contracts on or before August 27, 2015. The Respondent's submission was timely made, whereas no submission was made by the Appellants. Their assertion in their appeal that, by their email of August 8, 2015, they had asked the arbitral tribunal to order the Respondent first to submit its comments and then to grant them an extension of time until mid-September 2015 due to their counsel's holiday absence, does not suffice to show that their right to be heard was violated. Even if one took the Appellants' view that the request for an extension of time was made in proper form, they could not simply remain idle and allow the period granted to elapse without any further action. In particular, they did not submit any relevant comments within the extended period which they had allegedly requested before mid-September 2015, although the Respondent's comments on the issue of bogus contracts of August 27, 2015 were indisputably delivered to them on time.
The grievance of a violation of the right to be heard is unfounded.

3.4. Furthermore, the Appellants object to the finding of the arbitral tribunal holding that, in connection with jurisdiction, it limited its remarks to the defense of the validity of the FIDIC Contract and the arbitration clause contained in that contract and Appellant 2 raised no specific objections pertaining to it personally. In their appeal, they themselves admitted that they had not raised any special objections to the jurisdiction of the arbitral tribunal over Appellant 2 in the context of the arbitration proceedings. Their argument that they waived specific objections because they never considered it possible that the arbitral tribunal would hold that the PWC Contract was entirely irrelevant does not justify the fact that they only invoked such arguments for the first time in the appellate proceedings before the Federal Tribunal. As was noted in the

arbitral award, the fact that the two contracts under discussion were concluded with binding effect on all of the Parties is, as a matter of principle, not in dispute. If Appellant 2 had taken the view that, despite the restructuring measures, assumptions of contract and declarations made in the course of the construction project, it had not become a party to the FIDIC Contract, then it would have needed to have alleged this in the arbitration proceedings. Contrary to the view set forth in the appeal, the findings of fact contained in the challenged award – particularly the mere fact that the FIDIC Contract was originally signed by Appellant 1 and the Respondent – do not permit the inference to be drawn that the arbitral tribunal lacked jurisdiction over Appellant 2. Absent concrete objections, the arbitral tribunal had no cause to investigate further reasons that might militate against finding the arbitration clause applicable in respect of individual parties.
The grievance that their right to be heard was violated is likewise unfounded in this regard.

4.
The appeal must be rejected to the extent the matter is capable of appeal. In accordance with the outcome of these proceedings, the Appellants are jointly and severally liable for the court costs and the Respondent's costs (Art. 66(1) and (5) and Art. 68(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 SFR 25,000 are imposed on the Appellants (jointly and severally, and as between them at a rate of one-half each).

3.
The Appellants shall pay the Respondent compensation of SFR 30,000 for the Federal Judicial Proceedings (jointly and severally, and as between them at a rate of one-half each).

4.
This Judgement shall be notified in writing to the Parties and to the ICC arbitral tribunal with its seat in Zurich.

Lausanne, March 6, 2017

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

Presiding Judge: Kiss

Clerk: Leemann