4A_628/2018[1]

Judgement of June 19, 2019

First Civil Law Court

Federal Judge Kiss, presiding
Federal Judge Klett,
Federal Judge Hohl,
Clerk of the Court: Leeman (Mr.).

A._____ A.S.,
represented by Mrs. Sandra De Vito Bieri and Mrs. Silvia Renninger,
Appellant

v.

1. B._____ S.L.,
represented by Clifford J. Hendel,

2. C.C._____,
3. D.C._____,
Community of heirs of the Descendant:
4.1. C.C._____,
4.2. D.C._____,
4.3. Potential further heirs
represented by Mr. Tamir Livschitz and Mr. Lukas Beeler,
Respondents

Facts:

A.
A.a. A._____ A.S. (Claimant, Appellant) is a company established under Turkish law with its registered office in Istanbul. It is part of the F._____ group and conducts business in the field of power generation.

[1] Translator's Note: Quote as A._____ v. 1.B._____ *et al*, 4A_628/2018.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B._____ S.L. (Defendant 1, Respondent 1) is a company established under Spanish law with its seat in Madrid.

A.b. The Claimant entered into a joint venture partnership with Defendant 1 to pursue the construction, development, and operation of a total of seven hydropower plants ("G._____ Projects") in Turkey, as their common purpose. In the aggregate, they either hold 100% or a majority of the interest in three management companies, which in turn (directly or indirectly) hold the assets in the G._____ Projects.

The Joint Venture Partnership is governed in detail by a series of agreements between the Parties. The Parties concluded, *inter alia*, a Share Purchase Agreement (SPA) on January 12, 2010, which was supplemented by two Shareholder Pooling Agreements. Based on the SPA, the Claimant acquired shareholdings in different amounts in the three management companies from Defendant 1. That Agreement governed, *inter alia*, how the future costs for development of the G._____ Projects were to be borne by the Parties. Article 3.1.3 of the SPA provides as follows:

> [...] The Seller shall be obliged to fund 100% of any amounts in excess of the Investment Cap. If the actual amount Invested ('Invested Amount') is greater than the Investment Cap, the Seller shall pay the difference between the Investment Cap and the Invested Amount ('Overrun Payment') according to the following mechanism:
>
> Within 14 days of the end of each calendar month following the time of the first overrun, the Seller and Purchaser shall calculate the amount of the Overrun Payment due and the means by which they shall contribute the next Investment amount. Within 21 days of the end of the calendar month, the Seller shall pay to the Purchaser 50 % of the Overrun Payment and the Parties shall then contribute the additional Investment. If the Parties do not agree on the mechanism for Investment within the 14-day period, they shall adopt the last method used by them to contribute the Investment.[2]

The SPA also contains an arbitration clause providing for an arbitral tribunal seated in Zurich. Differences of opinion subsequently arose between the Parties.

A.c. In June 2011, the Claimant initiated arbitration proceedings in accordance with the provisions of the International Chamber of Commerce (ICC) against Defendant 1 and other natural persons associated with it (Defendants 2-4; here, Respondents 2-4).

By its Award of June 30, 2014, the ICC arbitral tribunal seated in Zurich upheld the arbitration claim against Defendant 1 in part, ordering it to pay several million euros.

By Judgement 4A_486/2014[3] of February 25, 2015, the Federal Tribunal dismissed an Appeal filed by Defendant 1, challenging the Award of June 30, 2014.

---

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

[3] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/allegedly-inaccurate-interpretation-contract-does-not-violate-right-be-heard

B.
On August 31, 2015, the Claimant submitted a second Request for Arbitration against the Defendants by which it asserted further claims. In that Request for arbitration, it requested *inter alia* that the Tribunal adjudge Defendant 1 liable to pay EUR 19,654,800 plus interest:

> Investment Cap Claim
> 1(a) Order [Beklagte 1] to pay [*Klägerin*], at least EUR 19,654,800 plus interest at 24% (in the alternative 5 %) from the start date (column B) for each single payment (column F) as per the updated Annex A until full and final payment;
>
> Excess Amount Claim
> (b) In the alternative to PfR 1(a): Order [*Beklagte 1*] to pay [*Klägerin*], at least EUR 8,642,535 plus interest at 24% (in the alternative 5%) from the start date (column B) for each single payment (column L) as per Annex B until full and final payment; [...][4]

By its Award of October 23, 2018, the ICC Arbitral Tribunal, seated in Zurich, *inter alia* upheld claim 1(a) in part, adjudging Defendant 1 liable to pay EUR 8,660,423.34 to the Claimant (Operative Ruling (a)) and to reimburse its costs in the amount of USD 171,000 (Operative Ruling (g)).

C.
By civil law appeal, the Claimant has asked the Federal Tribunal to set aside the provisions in operative rulings (a) and (g) of the Award of the ICC Arbitral Tribunal seated in Zurich dated October 23, 2018, and to remand the case to the Arbitral Tribunal for re-adjudication. In the alternative, the Claimant argues that the challenged Award should be fully set aside and remanded to the arbitral tribunal for re-adjudication.

On March 7, 2019, the Arbitral Tribunal submitted its written comments on the Appeal and, in essence, requested dismissal of the Appeal. On March 11, 2019 – *i.e.* the last day of the period set for filing – Respondent 1 submitted a written submission to the Federal Tribunal by email.

The Appellant submitted a Reply to the Federal Tribunal.

D.
By Order of December 4, 2018, the Federal Tribunal rejected the Appellant's Request for a grant of suspensory effect. In addition, it ordered that the further Appeal proceedings be continued for the time being only with Respondent 1, without participation of Respondents 2-4.

Reasons:

1.
According to Art. 54(1) BGG[5] the Federal Tribunal issues its decisions in an official language,[6] as a rule in the language of the decision under appeal. When that decision is in another language, the Federal

---

[4] Translator's Note: In English in the original text.
[5] 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).
[6] Translator's Note: The official languages of Switzerland are German, French, and Italian.

Tribunal resorts to the official language chosen by the parties. The award being challenged here is in English. Because this is not one of the official languages, the judgment of the Federal Tribunal is being issued in the language of the appeal brief, as is standard practice (*see* BGE 142 III 521[7] at 1).

2.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[8] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case is located in Zurich. At the time in question, 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 applicable (Art. 176(2) PILA).

2.2. 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 the challenged decision (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, there is an exception in this respect that the Federal Tribunal itself may rule on the arbitral tribunal's jurisdiction or lack thereof or on the removal of the arbitrator involved (BGE 136 III 605[9] at 3.3.4 p. 616 with references).

However, this does not rule out the possibility that, if the appeal is upheld based on a violation of the Claimant's right to be heard, the Federal Tribunal may remand the matter to the arbitral tribunal, particularly since Art. 77(2) BGG only excludes the applicability of Art. 107(2) BGG to the extent that it permits the Federal Tribunal to decide the matter itself (Judgements 4A_580/2017 of April 4, 2018, at 1.3; 4A_532/2016[10] of May 30, 2017 at 2.4; 4A_460/2013[11] of February 4, 2014 at 2.3 with references).

The primary relief sought by the Appellant is the setting aside of Operative Rulings (a) and (g) of the challenged Arbitral Award and a remand of the matter to the Arbitral Tribunal. This application is admissible (regarding applications for partial setting aside, *see* Judgement 4A_360/2011[12] of January 31, 2012, at 6.1).

---

[7] Translator's Note: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

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

[9] 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

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-532-2016

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear

2.3. All grievances that are exhaustively listed in Art. 190(2) PILA are admissible (BGE 134 III 186[13] at 5 p. 187; BGE 128 III 50 at 1a p. 53; BGE 127 III 279 at 1a p. 282). Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are 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 out 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[14] at 3.1 p. 567; 119 II 380 at 3b p. 382).

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 rejoinder to supplement or improve its Appeal (*see* BGE 132 I 42 at 3.3.4). The Reply brief 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 Appellant goes further than this in its Reply, its submissions cannot be taken into account. Thus, it is not proper for the Federal Tribunal to take account of the claim asserted for the first time in the Reply Brief that the Arbitral Tribunal had completely failed to provide any adjudication of one of its claims and had thus violated Art. 190(2)(c) PILA.

In addition, written submissions to the Federal Tribunal may only be submitted in the forms proscribed by law, *i.e*. by physical delivery to the Federal Tribunal or to Swiss Post (Art. 48(1) BGG), or electronically with a verified electronic signature (Art. 42(4) and Art. 48(2) BGG). Other electronic submissions are not valid because – as the Respondent must have been aware – they do not bear any original signatures and thus cannot have the effect of meeting the deadlines set by the Court. It is not possible to cure a defect consisting of the submission of an electronic written submission without a verified electronic signature after the time limit has already expired (judgements 4A_596/2015 of December 9, 2015; 9C_739/2007 of November 28, 2007 at 1.1 with reference; *see* BGE 121 II 252 at 4a p. 255).

The written submission of Respondent 1 dated March 11, 2019, which was submitted on the last day of the time period by simple email (without a qualified electronic signature) must thus be disregarded by the Tribunal.

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 '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, an expert report, or the findings as to a visual inspections (BGE 140 III 16 at 1.3.1 with references).

---

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[14] 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

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 (*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 findings of an 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[15] at 2.2.1 p. 34; 134 III 565[16] at 3.1 p. 567; 133 III 139 at 5 p. 141; each with references). A party wishing to claim an exception to the rule of the Federal Tribunal being bound by the factual findings of the arbitral tribunal and seeking 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).

3.
In various respects, the Appellant charges the Arbitral Tribunal with a violation of its right to be heard (Art. 190(2) PILA).

3.1.
3.1.1. Art. 190(2) PILA permits a challenge only when the mandatory procedural rules according to Art. 182(3) PILA are violated. Pursuant 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 the Parties to state their views as to all facts important to the judgement, to submit their legal arguments, to prove their factual allegations relevant to the judgement with such suitable evidence submitted in a timely manner and in the proper format, to attend the hearings and to access the record (BGE 142 III 360[17] at 4.1.1; 130 III 35 at 5 p. 37 f.; 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 obtain the reasons in an international arbitral award under well-established case law (BGE 134 III 186 at 6.1 with references), it does imply a minimal duty on the part of the arbitrators to review and address the issues important to the decision. The arbitral tribunal violates this duty when, due to an oversight or misunderstanding, it fails to address some legally relevant claims, arguments, evidence or evidentiary submissions of a party (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2 with references). If an arbitral award is issued without even addressing the elements which were manifestly relevant to the outcome of the dispute, it is incumbent upon the arbitrators or on the other party to provide a justification for this failure to do so in their respective written comments on the appeal either by showing that, contrary to the assertions of the Appellant, the points in question were not relevant to a concrete resolution of the case, or that the arbitral tribunal had in fact implicitly rebutted

---

[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

[16] 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

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

them. By contrast, an arbitral tribunal is not required to deal with each individual argument of the parties, for which reason an arbitral tribunal cannot be charged with having violated a party's right to be heard if it did not either expressly or implicitly reject a point which was not material to its decision (BGE 133 III 235 at 5.2 with references; Judgements 4A_308/2018 of November 3, 2018 at 3.2; 4A_532/2016[18] of May 30, 2017 at 4.1; *see also* BGE 142 III 360 at 4.1.1).

3.1.2. Pursuant to the jurisprudence of the Federal Tribunal, there is no constitutional right of the parties to be specifically heard as to the legal assessment of the facts they introduce in the case. Neither does the right to be heard entitle the parties to be advised in advance as to which facts the arbitral tribunal considers important to the decision. There is, notably, an exception where a tribunal intends to base its decision on a legal ground which the parties did not invoke and the relevance of which they could not reasonably have anticipated. In assessing whether the arbitral tribunal's application of the law constitutes a 'surprise' to the parties, the Federal Tribunal exercises restraint in the realm of international arbitration (BGE 130 III 35 at 5 with references; *see also* judgements 4A_301/2018 of November 19, 2018 at 4.2; 4A_525/2017 of August 9, 2018 at 3.1, with a summary of the more recent jurisprudence).

3.2.
3.2.1. The Arbitral Tribunal initially noted, pursuant to Art. 3.1.3 SPA, that the seller (Respondent 1) was required to finance all amounts exceeding the so-called 'investment cap'. At the same time, it took account of the fact that the Parties had agreed on a specific mechanism in the above-referenced contract term specifying how they were to proceed in such cases. Pursuant to that mechanism, the Appellant, as the buyer, could only reclaim its share in the so-called "Overrun Payments" ("50% of the Overrun Payment") which corresponded to its share in the respective project companies. The Arbitral Tribunal considered this interpretation of Art. 3.1.3 SPA, which had already been applied in the first arbitration, to be convincing, for various reasons. It pointed out, *inter alia*, that the Appellant had failed to provide any reason for why the interpretation in the first arbitral award could not be followed, although this question had been put to it by the Arbitral Tribunal specifically for comment. It merely mentioned that the mechanism in Art. 3.1.3 SPA had not been applied during the relevant period, but failed to indicate how it had attempted to apply the mechanism *inter alia* by requesting Respondent 1 to pay its share of the Overrun Payment ("*The Claimant however fails to explain how it tried to apply the mechanism, including by asking the First Respondent to pay its share of the Overrun Payment to the Claimant*"). The Appellant had likewise failed to explain why the Arbitral Tribunal should disregard the specific contract term in Art. 3.1.3 SPA, which specifically provided only for reimbursement of a share, based on the mere allegation that the mechanism had not been applied.

3.2.2. We are unable to concur with the Appellant where it accuses the Arbitral Tribunal of having clearly failed to take account – for no objective reason whatsoever – of the considerations set out in para. 394 of the Award. In particular, the Appellant is not in a position to demonstrate any violation of its right to be heard by its Submission, based on its Request for Arbitration, that on September 16, 2012, it had expressly requested Respondent 1 to pay the "Overrun Payments" for the months of September and

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-532-2016

October, 2012. The statements made by it in the Request for Arbitration do not indicate how the mechanism in Art. 3.1.3 SPA should be applied in practice. Rather, the Appellant contented itself with a reference to a variety of enclosures to its Statement of Claim in the arbitration proceedings. Thus, the Appellant is unable to show that it would not have been possible for it to introduce its views into the arbitral proceedings with regard to interpretation of Art. 3.1.3 SPA. The claim is not well-founded.

The remarks in its brief by which the Appellant, based on various witness testimony given by its former Chief Financial Officer (CFO) H._____, dated June 3, 2016, April 6, 2017 and September 18, 2017, submits that the Parties agreed on the amount of Respondent 1's reimbursement obligation under Art. 3.1.3 SPA, miss the point. The Appellant initially does not demonstrate, by reference to the file, that it had made the corresponding assertions regarding the allegedly concurrent actual intent of the Parties during the arbitration proceedings. By raising the grievance that the Arbitral Tribunal mentioned H._____'s statements solely in connection with the amount of the "Overrun Payments" asserted, but not in the finding regarding the share of those payments owing under contract which immediately followed those references, it also fails to see that the Arbitral Tribunal was not required to deal with each and every submission of the Parties, and expressly address each and every statement by a witness. There is also no violation of its right to be heard in this respect. To the extent that the Appellant submits its views on the allegedly correct interpretation of Art. 3.1.3 SPA to the Federal Tribunal in the same context, it is merely criticising the interpretation of the Contract by the Arbitral Tribunal in an inadmissible manner.

3.3. There is likewise no basis for the grievance that the Arbitral Tribunal, in its assessment of the quantum of the claim for reimbursement of the "Overrun Payment", applied the calculation method that had been applied in the first arbitral proceedings in an unforeseeable way, constituting a 'surprising' application of the law within the meaning of Art. 190(2)(d) PILA. As the Appellant itself states, it was specifically requested, by letter of the Arbitral Tribunal dated October 18, 2017, to comment on the interpretation of the term "Overrun Payment" under Art. 3.1.3 of the SPA and on the question of what portion of the "Overrun Payments" it might claim on that basis. The fact that, in interpreting Art. 3.1.3 of the SPA, the Arbitral Tribunal referred to the findings of the previous arbitration between the Parties – in which that contractual term had also been discussed – could not have come as a surprise but rather was an obvious point. By arguing that the method of calculation was no longer controversial and that the Arbitral Tribunal had not recognised that the factual situation of the first arbitral proceedings was completely different from that in the present proceedings, the Appellant criticises the substance of the contested arbitral award in an inadmissible manner.

3.4. Insofar as the Appellant criticises the Arbitral Tribunal for rejecting its Claim in the alternative 1(b) relating to the "Excess Amount Claim", its submissions missed the mark form the very outset, particularly as, in its Appeal, it does not contest Operative Paragraph (j) of the Award rejecting that alterative Claim, but merely demands the setting aside of Operative paras. (a) and (g) of the Award. Quite apart from this, the Arbitral Tribunal assumed in the challenged Award that the "Excess Amount Claim" could only be considered if the "Investment Cap Guarantee" under Art. 3.1.3 SPA was not applicable. Accordingly, the "Investment Cap Claim" which the Appellant applied for in its alternative claim in section 1(b) should be dismissed. By submitting to the Federal Tribunal its own view of the alleged true relationship between the "Excess Amount Claim" and the "Investment Cap Claim", or between claim 1(a) and the alternative

claim 1(b), the Appellant fails to demonstrate any violation of its right to be heard, but rather is criticising the application of the law by the Arbitral Tribunal, which is inadmissible in the context of a challenge to an arbitral award. It is therefore not necessary for us to deal with the statements in the appeal which are directed against the alternative reasons given by the Arbitral Tribunal, pursuant to which claim 1(b) was dismissed even in the event that the "Excess Amount Claim" was applicable to the extent that the "Investment Cap Claim" was not awarded to the extent requested in claim 1(a).

4.
The appeal is rejected to the extent the matter is capable of appeal. In accordance with the outcome of the case, the Appellant shall be liable to pay costs (Art. 66(1) BGG). Respondent 1, which failed to submit a formally valid Reply to the appeal within the period set there for, and Respondents 2-4, who were not party to these proceedings, are not entitled to any party compensation (Art. 68(2) 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 40'000 are to be borne by the Appellant.

3.
No party compensation is awarded.

4.
This decision shall be notified in writing to the Parties, and to the Arbitral Tribunal with its seat in Zurich.

Lausanne, June 19, 2019

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

Presiding judge:	Clerk of the Court:
Kiss	Leeman (Mr.)