4A_554/2014[1]

Judgment of April 15, 2015

First Civil Law Court

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

A._____,
Represented by Mr. Nicolas Antenen,
Appellant

v.

B._____,
Represented by Mr. Bruno de Preux,
Respondent

Facts:

A.
A.a. A._____ is a leading French law company in the field of special foundations and geotechnology.

B._____ is a company governed by the law of the state of Delaware, offering advisory and support services to companies wishing to participate in large infrastructure projects financed by international institutions based in the United States of America, such as the World Bank.

In a contract signed on July 2, 2007, (hereafter: the Contract) B._____ undertook to assist A._____ in this framework for compensation. The services to be furnished by the American company to the French company consisted on the one hand of a general assistance (Art. 2.1) and on the other hand of specific

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_554/2014.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

support, project by project, going from the preparation of the response to the call for tenders for a specific project financed by an international institution, all the way to the monitoring of the payment of the amounts financed, should the works be awarded to the aforesaid company. This specific support would be given by the American company upon both parties signing a document entitled "Application Form", a sample of which was attached to the Contract (Art. 2.2). Under various conditions, it would authorize the payment of fees corresponding to a certain percentage of the amount financed by the international institution concerned (Art. 3.2). The Contract was governed by French law (Art. 6.1) and stated the following as to its duration at Art. 5:

> "5.1.
> This agreement is entered into for a period of 1 year from July 1, 2007.
>
> It shall expire on June 30, 2008 ("Ultimate Validity Date"), subject to any longer specific durations which may be agreed upon pursuant to the Application Forms which may have been regularized as provided at Article 2.2, it being understood that these specific durations shall not exceed three years from the signature of this Agreement. Should any longer durations be agreed upon, the duration of this Agreement shall be extended accordingly, but only as to the project mentioned in the Application Form, the compensation due in this case being limited to the compensation foreseen at Article 3.2.
>
> Subject to the renegotiation provided at Article 3.1(a) above, the Agreement may be either terminated as of June 30, 2008, upon request of one of the parties, with notice of at least two months, or extended for two years.
>
> 5.2.
> This Agreement may then be extended by written agreement of the parties for a duration to be defined between the parties at the latest three months before its aforesaid expiry.
>
> 5.3.
> …"

An arbitration clause entrusted one or several arbitrators appointed according to the arbitration rules of the International Chamber of Commerce (ICC) and sitting in Geneva with deciding any disputes arising from the Contract pursuant to proceedings conducted in French (Art. 6.2).

A.b. On April 22, 2008, A._____ advised B._____ that it did not wish to renew the Contract when it would expire but that it may call upon its services on a case-by-case basis. In an electronic mail of July 9, 2008, B._____ advised A._____ of the existence of a project concerning extension work for the harbor of Cotonou in Benin and financed by an American institution, asking if the project may be of interest.

The French company answered on the 18th of the same month that it was already following the project and invited it to send a list of the projects that the parties had previously discussed. The American company then sent twelve application forms on August 18, 2008. One of them was for the Cotonou harbor project. An employee of A._____ dated these application forms October 28, 2008, and signed them before sending them back to B._____. The parties then remained in contact, exchanging various emails.

On August 28, 2009, B._____ wrote to A._____ to advise that it had heard that the French company was awarded the works for the construction of a quay in the port of Cotonou and to ask for the payment of the compensation as per the Contract for specific support in connection with the award of these works. At first, A._____ ignored it. Then, the parties met in June 2010, and in March 2011, yet without reaching an agreement as to the compensation claimed by B._____. Finally, in a letter of January 22, 2013, A._____ advised B._____'s counsel that it would not be able to meet the request of that company because the Contract was no longer in force and the conditions justifying the payment of fees were not in any case met.

B.

On May 27, 2013, B._____ relied on the arbitration clause in the Contract and sent a request for arbitration to the ICC against A._____ with a view to obtaining payment of USD 240'910.20, with interest. The Defendant opposed the claim. An attorney at the Brussels bar was appointed by the ICC as Sole Arbitrator (hereafter: the Arbitrator) to decide the case. She and the parties signed the terms of reference on October 14, 2013. At n. XII entitled, "Procedural rules (Art. 23,1,g) of the ICC rules," it contains in particular the following clauses:

> "59.
> The Arbitral Tribunal shall apply the 2012 ICC Rules to the dispute, whilst respecting the public law exceptions of French law…
> 64.
> The parties shall make sure to communicate the references of legal writing and case law quoted and to place a copy in the arbitration file."

In a final award of July 30, 3014, the Arbitrator ordered A._____ to pay the amount of USD 240'910.20 to B._____ with interest at the legal rate and capitalized pursuant to Art. 1154 of the French Civil Code (FCC). The costs of the arbitral proceedings were to be paid by A._____. The award relies of the reasons summarized hereafter.

The Contract expired on June 30, 2008. If A._____ expressed its intent not to renew it in a letter of April 22, 2008, it was because B._____'s services were then limited to general support, paid on a flat fee basis and that it did not wish to pay any further fees for this kind of support, the potential volume of business being relatively weak. However, A._____ advised B._____ in the same letter that it might call upon its services on a case by case basis. French law admits that contracts of a specific duration may be tacitly extended. Tacit renewal relies on the behavior of the parties, by which both must continue to

perform the contract binding them after its expiry. The specific items in the arbitration file undeniably show the existence of the common will of the parties to continue their business relationship under the conditions set in the expired Contract, at least in respect of specific support on a project-by-project basis. Indeed, besides the fact that the opportunity to extend their commitments was not excluded by the text of the Contract and was even specifically considered in the aforesaid letter, sent before the Contract expired, the parties were again in business fifteen days after the Contract expired. A._____ actually asked B._____ to send a list of the current projects and the American company complied by sending several application forms consistent with the sample attached to the expired Contract, whilst the French company not only did not refuse to take them into consideration but even dated, signed, and sent them back to the sender. As to the Cotonou harbor project specifically, some exchanges took place between the parties after June 30, 2008, without any discussions between the parties as to the issue of the modalities of intervention of B._____ and its compensation. Similarly, A._____, which is a company that is no stranger to business and that has its own legal department, did not raise any questions or ask for any information from B._____ as to these issues. Under such conditions, one must therefore conclude that the renewal of the Contract when it expired gave birth to a new contract, however identical to the July 2, 2007, Contract. Consequently, B._____ is entitled to claim compensation, calculated according to the same terms and conditions as in the initial Contract as to the specific support extended to A._____ in the framework of the implementation of the Cotonou harbor project. Moreover, the French company disputes in vain that the conditions are met to which this Contract subjected B._____'s right to a fee for the specific support concerning this project.

C.
On September 15, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal with a request for a stay of enforcement. Arguing that the Arbitrator violated the right to be heard, it asks the Federal Tribunal to annul the final award of July 30, 2014.

In its answer of October 30, 2014, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected. The Arbitrator did not file an answer.

The Appellant confirmed its submissions in its reply of November 17, 2014. The Respondent did not state its position as to this brief.

The request for a stay of enforcement was rejected by decision of the presiding judge of December 18, 2014.

Upon invitation by the Federal Tribunal, the Arbitrator sent a full copy of the text of the Contract on March 16, 2015.

Reasons:

1.
A civil law appeal is admissible against international arbitral awards pursuant to the requirements at Art. 190-192 PILA[2] (Art. 77(1)(a) LTF[3]). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submission or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in the case at hand. There is therefore no reason not to address the appeal.

However, a further point is required as to the reasons in support of the appeal. Pursuant to Art. 77(3) LTF combined with Art. 42(1) and (2) LTF, the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief. Therefore, when a subsequent exchange of briefs was ordered, contrary to the general rule of Art. 102(3) LTF, the appellant cannot use the reply to invoke factual or legal arguments it had not submitted in a timely manner, namely before the non-extendible time limit to appeal expired (Art. 100(1) LTF in connection with Art. 47(1) LTF) or to supplement insufficient arguments after the time limit has expired (judgment 4A_544/2014 of February 24, 2015, at 2.4; 4A_199/2014 of October 8, 2014, at 3.1). In the case at hand, the Appellant hardly complies with this principle of case law because, under the guise of refuting the arguments developed by the Respondent in its answer to the appeal, it actually seizes the opportunity to supplement in its reply – in particular at n. 19 to 38 of that brief – the relatively brief arguments in its appeal. Therefore, its explanations cannot be taken into consideration to that extent.

2.
In its sole argument, the Appellant invokes Art. 190(2)(d) PILA and submits that the Arbitrator based her award on legal ground unforeseeable to the parties, thus violating its right to be heard.

2.1. In Switzerland, the right to be heard primarily concerns factual findings. The right of the parties to present their views on legal issues is acknowledged only in a restrictive manner. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal relevance of the facts and may also decide on the basis of other rules of law than those invoked by the parties. Consequently, provided the arbitration agreement does not limit the arbitral tribunal's mission to the legal arguments raised by the parties only, they do not have to be heard specifically as to the scope of the rules of law. As an exception, they must be asked when the judge or the Arbitral Tribunal considers basing the decision upon a norm or a legal consideration which was not invoked during the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and the references). Furthermore, knowing what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal applies the aforesaid rule restrictively and because the specificity of this type of procedure should be observed to avoid that the

[2] 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.

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

argument of surprise may be used with a view to obtaining substantive review of the award by this Court (judgment 4A_46/2011[4] of May 16, 2011, at 5.1.1 and the cases quoted).

2.2. As to the framework within which the argument must be examined, it must be emphasized that the decisive rules in this respect are those of Swiss private international law concerning international arbitration, as interpreted by the Federal Tribunal, in particular Art. 190(2)(d) PILA and the specific concept of unpredictability drawn from the aforesaid case law. In other words, the issue is not to know whether or not the pertinent rules of French procedure applicable to international arbitration constitute "public law exceptions of French law," compliance with which Art. 59 of the terms of reference imposed on the Arbitrator, or, in the affirmative, whether she breached them. Neither is it to define the scope of the procedural duties given to the parties by the aforesaid Art. 64 of the terms of reference. It must be recalled that a modality in the rules of arbitration, such as those inserted in the terms of reference, does not become a mandatory principle of procedure simply because it was desired by the parties and made mandatory for the arbitral tribunal (ATF 117 II 346 at 1b/aa). Moreover, if the parties had agreed to limit the Arbitrator's mission to the legal arguments they invoked, a derogation of the rule of *jura novit curia* – which is not clearly shown by Art. 59 of the terms of reference – then, the failure to comply with this restriction would have opened the way to an appeal to the Federal Tribunal on grounds not here invoked by the Appellant (see Art. 77(3) LTF), such as lack of jurisdiction of the Arbitrator (Art. 190(2)(b) PILA), or for violation of rule *ne eat judex ultra petita partium* (Art. 190(2)(c) PILA), but not because of an alleged violation of the right to be heard pursuant to Art. 190(2)(d) PILA (ATF 130 III 35 at 5, p. 39). Neither will this review address the manner in which the Arbitrator interpreted and applied to the pertinent facts the concept of tacit renewal of the contract as understood by substantive French law, since disregard of substantive law by an arbitral tribunal or an arbitrator, even if arbitrary, is not among the grounds for appeal on the exhaustive list found at Art. 190(2) PILA. Consequently, the only issue at hand is whether or not the Arbitrator based her award on a legal ground that could not have been predicted by the parties.

2.3.
2.3.1. According to the Appellant, the Respondent took the view that the Contract expired on June 30, 2008, but that, pursuant to its Art. 5.1, some of its clauses survived its expiry, in particular its Art. 3.2.1 concerning the Respondent's compensation for the specific support given in connection with various projects which came to fruition later. For its part, it argued throughout the arbitration that it had validly terminated the Contract by its termination letter of April 22, 2008, and signed the application forms in dispute on October 28, 2008, which could not have reactivated Art. 5.1 of the expired Contract. Moreover, according to the Appellant, no real service was provided by the Respondent in the framework of the Cotonou harbor project and the latter could therefore claim no compensation in this respect.

At the end of the hearing of April 30, 2014, the parties agreed, according to the Appellant, to state that the Contract expired on June 30, 2008; that the compensation sought by the Claimant was based on the

[4] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg

extension of the duration of the agreement to the specific project of the Cotonou harbor, pursuant to Art. 5.1 of the Contract; that their dispute therefore concerned the applicability of that clause despite the fact that the Application Form concerning this project was signed after the Contract expired. In this respect, only two outcomes were possible according to the Appellant: either the Respondent's claim was to be admitted because the parties agreed before the Contract expired to entrust a new mission to the Respondent in connection with the project in question and undertook to abide by the provisions of the Contract beyond its term pursuant to its art. 5.1; or the Respondent's claim must be rejected because the Appellant did not entrust the Respondent before the Contract expired with providing assistance in connection with the aforesaid project, so that Art. 5.1 of the Contract would not apply.

Yet, still according to the Appellant, instead of choosing between one of these two alternatives, the Arbitrator chose a third solution and held that the Contract had been tacitly extended through conclusive acts after June 30, 2008. She thus violated its right to be heard by depriving it of the possibility to submit some solid legal arguments by which it could have countered the thesis of a tacit extension of the Contract, the conditions of French law to accept such an extension of the duration of the contractual relationship not being fulfilled in the case at hand.

2.3.2. The Appellant's detailed argument, as summarized above, appeared only in its reply submitted on November 17, 2014, if that needs to be specified. It came in support of the explanations – sketchy at the very least – on pages 15 to 18 of the appeal brief. Thus, it is doubtful whether they should be taken into account considering the aforesaid case law concerning the content of a reply (see 1, above).

Be this as it may, the Appellant is not credible when it equates the case at hand to a "*textbook example of unpredictability*" (appeal brief n. 85). To the contrary, it must be held that it manifestly argues an element of surprise in vain. The only thing it may be granted, with the Respondent moreover (answer p. 13, §5), is the fact that the words "tacit renewal" do not appear explicitly in any of the submissions of its opponent. As to the rest, the Appellant cannot claim in good faith that it was far from imagining that the Arbitrator could base her award on this legal concept.

The Appellant is a commercial company based in France. Active in numerous markets, both domestic and international, as a general contractor in its area of specialization, it is well aware of the necessities of business and has its own legal department. It goes without saying that concluding contracts is commonly done by such a company and that the conditions for termination are also a recurrent question. In the arbitral procedure, the Appellant was assisted by two members of the Paris bar. The dispute with the Respondent was to be decided in the light of French substantive law. This means that, in such a context, the rules applicable to the resolution of the dispute could not but be familiar to the Appellant or at least to its lawyers.

Moreover, one should bear in mind that the legal issue to be resolved in the case at hand was fairly limited because the Arbitrator was to decide, in the light of French law, whether the effect of the Contract survived its extinction on June 30, 2008. The issue was actually even narrower because the Respondent did not argue that the Contract had survived in its entirety, but only as to its clauses concerning specific support on

a project-by-project basis. The legal grounds on which to base a continuation of the contractual relationship beyond its normal term were therefore few and the hypothesis of tacit renewal of the contractual clause concerning specific support could not be set aside as a starting point by a careful litigant assisted by counsel knowing the applicable law inside out. Such a possibility was doubtlessly not inherent to the arguments developed by the Respondent at the beginning of the trial. Indeed, it argued then that the parties had specifically agreed to continue their contractual relationship concerning specific support to be given to the Appellant and it saw proof of this in the fact that the latter signed the *ad hoc* Application Forms before the Contract expired. Yet, after it appeared that the forms had really been signed afterwards, the Respondent argued that this did not prevent a finding that the contractual relationship continued beyond June 30, 2008, and that the pertinent provisions of the Contract as to the compensation of the services given to the Appellant should be applied as to specific support beyond the expiry of the Contract. Yet, this new argument had to raise questions as to how steps taken after the Contract expired could have revived it *in parte qua*. And, the tacit partial renewal of the Contract was without any doubt one of the legal possibilities which could *a priori* give an answer to this question.

Be this as it may, the fact that the Arbitrator based her award on this legal concept cannot be sanctioned as a violation of the right to be heard and more specifically under the point of view of unpredictability in the – albeit restrictive – meaning that federal case law gives to this concept.

Under such conditions, the Appellant's only argument falls flat, which leads to rejection of the appeal.

3.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and shall pay costs to the Respondent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 6'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 7'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the ICC Sole Arbitrator.

Lausanne, April 15, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo