4A_636/2014[1]

Judgment of March 16, 2015

First Civil Law Court

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

A._____ Corporation,
Represented by Mr. Daniele Favalli and Mrs. Barbara Badertscher,
Appellant

v.

B._____ SA,
Represented by Mr. Philippe Schweizer and Mr. François Knoepfler,
Respondent

Facts:

A.
A.a. A._____ Corporation (the Defendant, the Appellant) is a Russian company involved in the implementation of major construction projects.

B._____ SA (the Claimant, the Respondent) is a Luxembourg company and part of the C._____ Group, which is heavily involved in the international sea-dredging business.

A.b. On October 4, 2010, the parties entered into Agreement No. 4/2010/4. The Claimant undertook to deliver 2 million cubic meters of a mixture of sea sand and gravel.

[1] Translator's Note: Quote as A._____ Corporation *v.* B._____ SA., 4A_636/2014.
The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

The contract contains an arbitration clause in favor of an arbitral tribunal sitting in Geneva. English law was declared the applicable law.

The agreement provided certain conditions that had to be met before the Claimant's work could begin. Differences of opinion then arose as to whether the Claimant met the corresponding conditions or not. The Claimant then terminated the contract on October 25, 2010, and sought damages according to Art. 12.2 of the October 4, 2010, contract, which reads as follows:

> "Clause 12.2
> [...]
> Notwithstanding any other provision in this Contract, if all of the conditions precedent set out in Appendix 1.1.8 related to the Commencement Date have not been fulfilled within 15 calendar days from the effective date of the Agreement, the Provider shall be entitled to immediately terminate the Contract and the Provider shall be entitled to a sum payable by the Employer equivalent to 20% of the total Contract value [EUR 18 Mio.] stated in the BOQ[2] [Bill of Quantities according to Annex 5]."

The Defendant rejected the termination and the claim for damages.

B.
The Claimant then made a request for arbitration according to the rules of the International Chamber of Commerce (ICC) against the Defendant and asked, in particular, that the Defendant be ordered to pay damages in the amount of EUR 3.6 million and financing fees amounting to 0.0137% per day from November 21, 2010.

On April 28, 2010, the two party-appointed Arbitrators were confirmed by the ICC Court of Arbitration and the Chairman on May 12, 2011.

In a partial award of November 30, 2012, the Arbitral Tribunal found that it had jurisdiction.

On December 16, 2013, a hearing took place in Geneva.

In an award of September 15, 2014, the ICC Arbitral Tribunal sitting in Geneva ordered the Defendant to pay EUR 3.6 million with interest at 5% from November 21, 2010. The costs of the arbitration were to be paid by the Defendant and the Claimant in shares of 80% and 20%, respectively; moreover, the Defendant was ordered to pay party costs of EUR 283'135.36. All other submissions were rejected by the Arbitral Tribunal.

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

C.
In a civil law appeal, the Defendant submits that the Federal Tribunal should annul the arbitral award of the ICC Arbitral Tribunal sitting in Geneva of September 15, 2014.

The Respondent submits that the appeal should be rejected insofar as the matter is capable of appeal. The Arbitral Tribunal did not state a position.

D.
In a decision of December 18, 2014, the Federal Tribunal rejected the Appellant's request for a stay of enforcement.

Reasons:

1.
According to Art. 54(1) BGG,[3] the judgment of the Federal Tribunal is issued in an official language,[4] as a rule in the language of the decision under appeal. When the decision at issue is in a different language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As this is not an official language and the parties used different languages before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in the language of the appeal, in accordance with past practice.

2.
In the field of international arbitration, a civil law appeal is permitted, pursuant to the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Geneva in this case. Both parties had their seat outside Switzerland at the decisive time (Art. 176(1) PILA). As the parties did not expressly opt out of Chapter 12 PILA, the provisions of this chapter are applicable (Art. 176(2) PILA).

2.2. The only grievances admissible are exhaustively listed in Art. 190(2) PILA (see BGE 134 III 186[6] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are raised and reasoned in the appeal; this corresponds to the duty to submit reasons contained in Art. 106(2) BGG as to the violation of constitutional rights and of cantonal and

[3] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[5] 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.
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

intercantonal law (BGE 134 III 186[7] at 5, p. 187 with references). Criticism of an appellate nature is not admissible (BGE 134 III 565[8] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the facts found by the arbitral tribunal (Art. 105(1) BGG). The factual findings as to the essential facts of the matter on which the dispute is based fall within this and so does the course of the proceedings, namely the findings as to the facts of the case, to which belong, especially, the submissions of the parties, their factual allegations, their legal arguments, their statements in the case, and their evidence and offers of evidence, the contents of a witness statement, an expert opinion or the findings on the occasion of a visual inspection (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are obviously inaccurate or rely upon 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 the award under appeal when some admissible grounds for appeal are invoked against such factual findings within the meaning of Art. 190(2) PILA or when new evidence is exceptionally taken into consideration (BGE 138 III 29[9] at 2.2.1, p. 34; 134 III 565[10] 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 factual findings of the arbitral tribunal bind the Federal Tribunal and seeks to rectify or supplement the factual findings of the arbitral tribunal on this basis must show, with reference to the record of the arbitration, that the corresponding factual allegations were raised during in the arbitral proceedings in conformity with applicable procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

3.
The Appellant argues that the Arbitral Tribunal violated its right to be heard (Art. 190(2)(d) PILA).

3.1. It submits that the Respondent claimed, among other things, the payment of compensation for the early termination of the contract in the amount of EUR 3.6 million on the basis of §12.2 of the October 4, 2010, contract, corresponding to 20% of the contractually set total value of the contract of EUR 18 million. It raised various defenses and objections against this claim. Besides the defense that the requirements for compensation according to §12.2 of the contract were not met, it also submitted that the compensation agreed at §12.2 would not be enforceable according to English law because it was a prohibited penalty.

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

[8] 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

[9] 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

[10] 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 Arbitral Tribunal found that a clause pursuant to which a sum of money must be paid in case of breach or non-performance of a contract would be enforceable according to English law when the amount is a serious attempt at estimating the probable loss, and that it is enforceable irrespective of the factual damage sustained – insofar as it is not an unlawful contractual penalty. On this basis, the Arbitral Tribunal explained that it had to determine whether or not the amount of EUR 3.6 million sought did correspond objectively to a serious attempt to assess the damage that the Respondent may have suffered as a consequence of the termination. It decided that, due to the early termination of the contract, the Respondent suffered damages in the amount of the missed earnings and an amount to cover the costs of owning and maintaining the dredging boat "D._____," which was planned for the operation.

On this basis, the Arbitral Tribunal assessed the heads of claim in terms of an *ex ante* consideration. It estimated the missed earnings at EUR 1.6 million and relied in this respect upon the indications in the second written witness statement of E._____. The latter would have stated that normally, the Respondent made a profit of 10% in its contracts and he expected a margin of profit of 10% for this contract above the costs related to performance and therefore a profit of approximately 9% of the entire value of the contract. The Arbitral Tribunal would have assumed a loss of profit of EUR 1.6 million on this basis only – without any critical review – which represents approximately 9% of the value of the contract of EUR 18 million.

In the next step, the Arbitral Tribunal concluded that the agreed-upon amount of EUR 3.6 million would go above a serious attempt at assessing the probable damage and thereby become unenforceable should the amount meant to cover the costs of owning and maintaining the planned dredging boat "D._____" be estimated at less than EUR 2 million. By way of a lapidary and sweeping reference to E._____'s witness statement without any examination or mention of figures, the arbitral tribunal would have decided that the costs for processing and maintaining would be well over EUR 2 million, according to a reasonable estimate. Correspondingly, the Arbitral Tribunal assumed a total loss in excess of EUR 3.6 million as expected as a consequence of the termination of the contract and thereby confirmed the compatibility of the penalty according to English law.

Yet, according to the Appellant, its defenses in this respect were not considered at all. The Arbitral Tribunal based its assessment of the defense of a prohibited penalty payment on the written witness statement of E._____, without taking into account its objections. Thus, in its rejoinder, it substantiated its objections and challenges to the Claimant's figures of the missed earnings as follows:

> "B._____ SA claim for loss of profit, quantified at EUR1'694'565, is also wildly speculative. The mere fact that B._____ SA now claims to make a profit of around 10% on its operations has no bearing on the profitability of the contract in dispute."[11]

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

In doing so, it objected that the determination of a profit margin of 10% in the contract, which was the basis of the arbitration, was not appropriate; it correspondingly argued that this general value could not be used because it did not take into account the specificities of the contract. Moreover, it objected that the corresponding written witness statement was not suitable to provide the necessary evidence; on the contrary, its opponent should have produced an expert report of a forensic accounting expert, which did not happen. The Arbitral Tribunal entirely disregarded this argument in the award.

Also in respect of the disputed contribution amount to cover the fixed costs, the Appellant argues the Arbitral Tribunal failed to hear it. Thus, the Arbitral Tribunal relied – sweepingly – on the written witness statements of E._____ and held they showed that the costs were well in excess of the amount of EUR 2 million and pointed out that, "*we had detailed and unchallenged witness evidence from Mr. E._____ concerning the costs of owning and maintaining 'D._____'*"[12]. The Appellant, however, deeply disputed E._____'s witness statement and did so, in a substantiated manner, in many respects. Thus, in its rejoinder, it objected that the Claimant's data was inflated and "*puffed up*." Furthermore, it submitted that E._____'s witness statement was in fact a party statement and pointed out that the Respondent failed to offer to prove the figures by an independent expert, so that the substantiation of the amount claimed remained in doubt. In the rejoinder, it described, in particular, the amortization components used by the witness as arbitrary and raised specific challenges against the computation of the maintenance and repair costs. The Arbitral Tribunal did not take these submissions into consideration in the award and even explicitly held – wrongly – that the Appellant left E._____'s evidence unchallenged, which is a violation of the right to be heard.

3.2. Art. 190(2)(d) PILA permits an appeal when the mandatory procedural rules according to Art. 182(3) PILA are violated. According to the latter provision, the Arbitral Tribunal must, in particular, guarantee the right of the parties to be heard. This essentially corresponds to the constitutional right embodied at Art. 29(2) BV[13] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law derives from this, in particular, the right of the parties to state their views as to all facts important to the judgment, to submit their legal arguments, to prove their factual allegations important for the judgment with suitable evidence submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

Although the right to be heard is contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not encompass the right to obtain reasons of an international arbitral award according to well-established case law (BGE 134 III 186[14] at 6.1 with references), this does entail a minimal duty of the arbitrators to examine and handle the issues relevant to the decision. The arbitral tribunal violates this duty when, due to oversight or misunderstanding, it disregards some legally relevant assertions, arguments,

[12] Translator's Note: In English in the original text.
[13] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

evidence, or evidentiary submissions of a party. Yet, this does not mean that the arbitral tribunal must expressly deal with each argument submitted by the parties (BGE 133 III 235 at 5.2 with references).

The principle of equal treatment requires, moreover, that the parties must be treated in the same manner throughout the entire arbitration (see BGE 133 III 139 at 6.1, p. 143).

3.3 To start with – and contrary to the Appellant's opinion – there is no violation of the right to be heard discernible in the fact that the award under appeal does not specifically mention that the Appellant questioned the applicability of the general profit margin of 10%. Had the Arbitral Tribunal actually disregarded that the Appellant challenged the Claimant's allegation of a 10% profit margin, it would indeed not have felt compelled to hear evidence as to this. Contrary to what the Appellant seems to assume, it did not escape the Arbitral Tribunal that the lost profit in the specific contract concluded was to be assessed and that the specificities of the contract had to therefore be taken into consideration. Insofar as the Arbitral Tribunal held, on the basis of the Respondent's habitual margin of 10% in similar contracts, a loss of profit as a consequence of the termination, it found the determining facts of the case by assessing the evidence before it. Therefore, the Appellant merely criticizes the assessment of the evidence by the Arbitral Tribunal in an inadmissible manner when it questions its acceptance of a profit margin of 10% or a share of 9% of the value of the contract. It rightly does not claim that any evidence it submitted in support of a smaller profit margin was disregarded.

As to the assessment of the costs of owning and maintaining the dredging vessel "D._____", the Appellant also fails to show that it was impossible for it to submit its point of view in the proceedings. The Arbitral Tribunal did not, for example, overlook that the Appellant challenged the allegations of the Respondent as to the costs mentioned or that the assessment of the corresponding evidence was superfluous. While the Respondent submitted the questionable witness statement of E._____ in evidence, the Appellant evidently waived its own evidentiary submissions. It also rightly does not argue that that the Arbitral Tribunal disregarded, in violation of the right to be heard, its *own* evidentiary submission in when it argues that during the arbitration, it criticized the Respondent for failing to offer a report of a forensic accounting expert. Furthermore, the award under appeal holds that, in the arbitration, the Appellant waived the right to cross-examine witness E._____. Moreover, the Arbitral Tribunal did not overlook the relationship of the questionable witness to the Respondent, indeed it specifically mentioned that he was responsible for North and Southeast Asia for the C._____ Group. The argument that the Arbitral Tribunal would have overlooked the Appellant's submissions as to the evidentiary value of Phillippe E._____ is not valid.

The argument of a violation of the right to be heard is unfounded.

4.
The Appellant argues that the Arbitral Tribunal violated the principle of equal treatment of the parties (Art. 190(2)(d) PILA).

4.1. It sees unequal treatment in the fact that the Arbitral Tribunal took into consideration the Respondent's bill of costs even though it was submitted on January 17, 2014, and thus four days after the time limit of January 13, 2014, anticipated in the mutually agreed time schedule. The Chairman drew the Respondent's attention to the expiry of the time limit in an email of January 16, 2014, and requested it submit its bill of costs.

The Appellant raised the late submission by the Respondent promptly in the arbitration and emphasized that there was a violation of the rules of procedure. Yet, the Arbitral Tribunal accepted the late bill of costs and relied on it in its decision as to the amount of the award of costs and compelled the Appellant to pay compensation to the other party. The unequal treatment can be seen in the fact that the Arbitral Tribunal disregarded the mutually agreed time schedule and even requested, on its own initiative, that the Respondent submit the bill of costs after the time limit.

4.2. The Appellant did not show in its argument to what extent the parties were not treated equally in all phases of the proceedings (BGE 133 III 139 at 6.1, p. 143). It does not argue either that it disregarded the time limit for the submission of the bill of costs and that its submission was disregarded for this reason as opposed to that of the Respondent (see judgment 4A_468/2007[15] of January 22, 2008, at 7.1, not published in BGE 134 III 186[16] *ff.*). Instead, it argues that the Arbitral Tribunal was not authorized by the procedural rules to allow the Respondent to submit the bill of costs later and that, by applying the relevant procedural rules correctly, the Arbitral Tribunal should have disregarded the late bill of costs. In doing so, it does not claim that the other party obtained something that was denied to the Appellant in the arbitral proceedings, but instead it argues that the Arbitral Tribunal did not correctly apply the applicable specific procedural rules. A wrong or even arbitrary application of the arbitration rules is not sufficient *per se*, however, to annul an international arbitral award (see BGE 126 III 249 at 3b with references).

Furthermore, the commentary partially quoted in the appeal brief does not take the view that the Arbitral Tribunal must, in every case, disregard procedural moves made too late, pursuant to the procedural principles mentioned in Art. 190(2)(d) PILA. Instead, it is specifically mentioned there that the Arbitral Tribunal is not "compelled to disregard" (Michael E. Schneider and Matthias Scherer, *Basler Kommentar, Internationales Privatrecht, 3rd ed.* 2013, n. 87 and Art. 182 PILA).

There is no violation of the principle of equal treatment.

5.
The appeal proves to be unfounded and must be rejected insofar as the matter is capable of appeal. In such an outcome of the proceedings, the judicial costs shall be borne by the Appellant and it shall pay the costs of the Respondent (Art. 66(1) and Art. 68(2) BGG).

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

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

Therefore the Federal Tribunal Pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs of CHF 25'000 shall be borne by the Appellant.

3.
The Appellant shall pay an amount CHF 30'000 to the Respondent for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the ICC Arbitral Tribunal in Geneva.

Lausanne, March 16, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leemann