4A_530/2013[1]

Judgment of May 2, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Niquille (Mrs.)
Substitute Federal Judge Ramelli
Clerk of the Court: Hurni

1. A._____,
2. B._____,
Both represented by Mr. Peter Heinrich,
Appellants

v.

C._____ SA,
Represented by Mr. Andrea Molino,
Respondent

Facts:

A.
A._____ and B._____, both clients of C._____ SA, made various investments in D._____ Ltd., a company incorporated in the British Virgin Islands, managed by the bank. The contractual relationship between the Clients and the bank were somewhat complex. The facts concerning the case brought to the Federal Tribunal are, however, well defined. A._____ and B._____, who had the right to swap shares of D._____ Ltd. with shares of the Chilean E._____ SA, argue that C._____ SA did not allow them to exercise the option and discriminated against them as compared to other shareholders, thus causing them significant prejudice.

[1] Translator's Note: Quote as A._____ and B._____ *v.* C._____ SA, 4A_530/2013.
The original decision is in Italian. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.
On May 18, 2009, A._____ and B._____ initiated arbitral proceedings against C._____ SA in the Ticino Chamber of Commerce, Industry, Trades, and Services, which appointed F._____, a lawyer in X._____, as sole arbitrator. In short and insofar as it is relevant to the dispute before the Federal Tribunal, the Claimants asked the Arbitrator to find that the Respondent breached its contractual obligations by giving the option to swap the D._____ Ltd. shares with E._____ SA shares to another shareholder but not to them; to find that this caused them damage amounting to USD 1'679'495 to A._____ and USD 644'717 to D._____; to order the Respondent to pay USD 1'216'495 to A._____ and USD 471'990 to D._____. The Respondent submitted that all claims should be rejected.

The Sole Arbitrator issued his award on September 23, 2013, rejecting the claims at §1/4.2 and 2 of the operative part of the award and at §3 ordered the Claimants to pay the costs.

C.
A._____ and D._____ filed a civil law appeal with the Federal Tribunal on October 23, 2013. They seek the annulment of §1/4.2, 2, and 3 of the award and submit that the case should be sent back to the Arbitrator for a new decision granting in substance the claims submitted in the framework of the arbitration and revisiting the decision as to the costs. The Respondent submits that the appeal should be rejected in its answer of January 20, 2014. The parties affirmed their respective positions in a reply of February 6, 2014, and a rejoinder of March 31, 2014.

The Arbitrator waived the opportunity to submit comments.

D.
On November 4, 2013, the Appellants sought a stay of enforcement; the application was rejected by the presiding judge in a decision of December 10, 2013. The Appellants submitted a new application for a stay of enforcement on December 14, 2013.

On November 20, 2013, the Respondent asked that A._____ should be ordered to provide security for costs, a request that the presiding judge rejected on January 10, 2014.

Reasons:

1.
According to Art. 54(1) LTF,[2] the proceedings in the Federal Tribunal take place in an official language,[3] as a rule in the language of the decision under appeal. In the case at hand, the award was written in Italian.

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

Consequently, although the appeal is in German and a significant part of the federal proceedings took place in German, there is no reason to depart from past practice; the Federal Tribunal will consequently issue its decision in Italian.

2.
In the field of international arbitration, a civil law appeal is admissible pursuant to the requirements of Art. 190 to 192 PILA[4] (Art. 77(1) LTF).

The seat of the Arbitral Tribunal was Lugano and one of the parties, in the case at hand one of the Appellants, was not domiciled in Switzerland at the time the arbitration agreement was entered into. The provisions of Chapter 12 PILA are consequently applicable (Art. 176(1) PILA).

The Appellants are particularly affected by the arbitral award under appeal as the latter rejected their claims. The Appellants therefore have an interest meriting protection in the annulment or the modification of the Arbitrator's decision, which gives them standing to appeal (Art. 76(1) LTF).

The appeal was filed in a timely manner (Art. 100(1) LTF), in the legally prescribed format (Art. 42(1) LTF).

Considering the amount in dispute, there is no need to examine here the as yet unresolved issue of the necessity of there being a minimum amount in dispute in international arbitration cases. From this point of view, the appeal is therefore admissible.

3.
The grounds for appeal in the field of international arbitration are exhaustively listed at Art. 190(2) PILA. The Federal Tribunal reviews only the grievances raised and reasoned by the Appellant (Art. 77(3) LTF). The reasons must meet the requirements of Art. 106(2) LTF, which are analogous to the ones previously in force as to public law appeals; this means that the Appellant must indicate clearly the legal provisions he considers violated and sate precisely what the breach consists of (DTF 134 III 186[5] at 5).

As to the facts, the Federal Tribunal is bound by the findings in the award under appeal (Art. 105(1) LTF), which cannot be rectified even if they are blatantly inaccurate (Art. 77(2) LTF which rules out the applicability of Art. 105(2) LTF; judgment 4A_146/2012[6] of January 10, 2013, at 2.6). This also means that new exhibits are inadmissible before the Federal Tribunal. Recourse concerning arbitral jurisdiction may

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

[4] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

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

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-will-not-review-decision-foreign-court-appointing-arbitrator-when-party-failed-do

only seek the annulment of the decision (Art. 77(2) with reference to Art. 107(2) LTF) thus the request that the matter be sent back to the arbitrator for a new decision is therefore inadmissible.

4.
The Appellants first invoke the ground for appeal of Art. 190(2)(e) PILA. When the legislature adopted this provision, it limited the grounds for appeal intentionally with the view to improving the effectiveness and the expeditiousness of arbitral jurisdiction (DTF 127 III 576 at 2b; 119 II 380 at 3c). The public policy exception, from a substantive point of view, does not permit requests that the Federal Tribunal re-examine the facts and the assessment of the evidence, not even from the point of view of arbitrariness. It is more restrictive than the notion of arbitrariness. It steps in only when the arbitral award is irreconcilable with the fundamental principles of any legal order as understood in Switzerland (judgment 4A_93/2013[7] of October 29, 2013, at 4.2 and references).

Similarly, procedural public policy requires compliance with the fundamental rules deduced from Art. 29 and 30 CF[8] and 6 ECHR, in particular as to the right to be heard and to a fair trial. This is violated when these generally acknowledged principles are breached in a manner inconsistent with notions of justice and with the values of a state of laws (judgment 4A_145/2010 of October 5, 2010, at 5.2 and references).

5.
According to the Appellants, the award violates public policy on various grounds. Their arguments (which are set forth in a somewhat complex way) all revolve around the Arbitrator's assessments as to the failure to exercise the option to swap the shares of D._____ Ltd.. The Appellants first argue that such assessments are based on Exhibit A-AH, which is not at all germane to proving the facts and was mentioned by mistake; this was conceded by the Arbitrator in an email sent to counsel for the Appellants on October 16, 2013, a transcription of which is submitted. In their view, the Arbitrator, in doing so, decided an important issue in dispute on the basis of "phantom evidence" and therefore breached Swiss public policy.

While stating correctly the scope of the substantive and procedural public policy reservation, the Appellants do not specify which of the two components was violated. This does not matter because Exhibit A-AH (irrespective of its contents) was not invoked by the Arbitrator at all in any assessment unfavorable to the Appellants, which immediately rules out that it could be incompatible with public policy. The exhibit is mentioned at footnote 170 at §134.6.ii of the award. The passage to which the footnote refers is inserted in Chapter IV and entitled "The Facts- Chronology," which is preceded by the following notice: "The following description is based exclusively on documents contemporaneous to the facts of the case with a view to facilitate immediate understanding of the facts of the case therefore, without entering into the discussion of the specific points in dispute, which will be addressed hereunder in a more specified context." In other words, this chapter contains a chronological and uncritical exposition of the case reconstructed on the basis

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/narrow-interpretation-rule-pacta-sunt-servanda

[8] Translator's Note: CF is the Italian abbreviation for the Swiss Federal Constitution

of the documents in the record, in which the Arbitrator specifically stated that he did not intend to decide any disputed facts.

The first argument in the appeal is therefore manifestly unfounded.

6.
The substantive reasons follow at Chapter V of the award, indeed under the caption "Merits", in particular at section V.2 "As to the Individual Claims". The assessments in dispute are reviewed at §188-194 of the award.

On the basis of the statements of the parties and the documents in the record, among which he does not mention Exhibit A-AH (as the Appellants concede), the Arbitrator ascertained in substance that the Appellants admitted receiving the option to swap the D._____ Ltd. shares and that the Respondent actually gave the investors the facility to swap the shares. He then found that the Respondent objected to the Appellants' argument that they were discriminated against, as it had actually given the option to all investors, some of whom exercised it while the Appellants decided not to do so. Finally, on the basis of these facts, the Arbitrator concluded that "the Claimants having conceded that they received the option should have demonstrated that they tried to exercise the option and that the Respondent obstructed such a swap. No proof of that was raised in this jurisdiction."

6.1. In summarizing these reasons, (in a manner not altogether accurate) the Appellants comment upon and contest them in several ways, submitting on the one hand that the assessment, according to which they did not exercise the option or waived it, was "absurd"; on the other hand, they argue that if at all it was for the Respondent to prove the contrary of such facts, which is why the Arbitrator violated the rule "*negativa non sunt probanda*," which in their view is part of public policy.

This argument concerns the assessment of the evidence. The Appellants forget that the Federal Tribunal is bound by the factual findings in the award, which may not be rectified even if they were blatantly inaccurate (See 3, above) and that the public policy exception does not permit the Federal Tribunal to go beyond this limit (See 4, above). As to the proof of negative facts, it suffices to recall that case law does not recognize the absolute principle that the Appellants invoke; at most it sets forth a duty to collaborate for the party in a position to furnish positive proof of the contrary fact. This matter needs not be pursued as in any case it concerns the assessment of the evidence and is therefore of no benefit to the Appellants in this case (See judgment 4A_474/2013 of March 10, 2014, at 5.1, or 4A_256/2013 of October 17, 2013, at 2.2).

The aforesaid grievances are therefore inadmissible.

6.2. As an alternative, the Arbitrator found that the Appellants' claim that they could not exercise the option to swap the D._____ Ltd. shares, besides being unproved, was "clearly incompatible with the role and the statements of their representative, Mr. G._____." While mentioning public policy several times, the Appellants oppose their own assessment concerning Mr. G._____'s role and the weight of a

memorandum of understanding he signed to this assessment and they do so in an inadmissible, appellate manner.

6.3. The Appellants argue in the reply that the award under appeal violates the public policy exception for lack of reasons. The grievance is inadmissible because it should have been made in the appeal itself (DTF 135 I 19 at 2.2; 132 I 42 at 3.3.4, p. 47).

7.
The Appellant's second argument is the violation of the principle of equal treatment of the parties and the denial of justice (Art. 190(2)(d) PILA). The argument again concerns the assessment of the exercise of the option to swap the shares. The violation of the principle of equal treatment arises from the Arbitrator basing his decision on a statement from the Respondent without demanding proof. Moreover, as certain documents of the case show that, contrary to what the Arbitrator found, the Appellants had organized and asked to swap the D._____ Ltd. shares and that the Respondent denied the necessary assistance to conclude the operation, asking them to prove the negative fact that they did not waive the exercise of the option would be a denial of justice.

7.1. It is obvious that this argument also exclusively concerns the assessment of the facts: it does not touch the formal aspect of the right to produce evidence but rather its assessment, in particular the weight – contested by the Appellants – that the Arbitrator gave to the elements at hand to assess the decisive facts.

As to the issue of proving a negative fact, it is sufficient to refer to 6.1., above.

7.2. In support of the argument, the Appellants cite to DTF 121 III 333. However, there is no analogy with that case. The Federal Tribunal had essentially restated the fundamental rule that a finding blatantly inaccurate or contrary to the record does not lead to the annulment of the award as a matter of principle, as the substantive review is limited to compliance with public policy (see 3.a). There are exceptions when the deficient assessment derives from a denial of formal justice, which is the case in particular when the arbitrator ignores or misunderstands the statements of the parties as a consequence of oversight. In that case, the arbitrator – who admitted to the oversight in his observations – had indeed assessed a decisive fact (a date) contrary to the concurring statements of both parties (see 3.b).

In the case at hand, the Appellants do not argue that the Arbitrator misunderstood or ignored any allegations. To the contrary, as already said, they argue that he based his decision on a statement from the Respondent without demanding proof. The criticism is again in the realm of assessment of the evidence. Moreover, it is not true that the award was reasoned in this manner (see the summary of the reasons in the award above at 6).

7.3. The arguments based on Art. 190(2)(d) PILA are therefore also unfounded, even to the limited extent that the matter is capable of appeal in this respect.

8.
The rejection of the arguments of the Appellants renders moot their request that the award, on costs, should be modified, a request which is nonetheless inadmissible as the only recourse which may be sought is the annulment of the decision (see 3, above) and they shall therefore pay the costs of the federal proceedings (Art. 66(1) and (5) and Art. 68(1) and (4) LTF).

The rejection of the appeal also renders moot the application for a stay of enforcement re-submitted on December 14, 2013.

Therefore the Federal Tribunal pronounces:

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

2.
The judicial costs set at CHF 12'000 shall be borne by the Appellants severally and they shall pay to the Respondent CHF 14'000 for the federal judicial proceedings, also severally.

3.
This judgment shall be notified to the representatives of the parties and to the Arbitral Tribunal seated in Lugano.

Lausanne, May 2, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Hurni