4A_526/2011[1]

Judgment of January 23, 2012

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs.),
Clerk of the Court: Leemann.

1. U._____,
2. V._____,
3. W._____,
4. X._____ SA,
Represented by Dr. Stefan J. Schmid,
Appellants

v.

1. Y._____,
2. Z._____,
Represented by Dr. Peter C. Schaufelberger and Mrs. Barbara Spagno-Fritsche,
Respondents

Facts:

A.
A.a U._____ (Appellant 1), V._____ (Appellant 2) and W._____ (Appellant 3) are lawyers in the same offices in A._____ [name of place omitted]. X._____ SA (Appellant 4) is a company incorporated under the law of the British Virgin Islands (hereafter together: the Appellants).Y._____, B._____, (Respondent 1) is a Latvian citizen active as an investor and businessman; he controls Z._____ (Respondent 2) which acts as trustee of C._____.

A.b In 1990 the whole infrastructure of the Baltic harbor B._____ was still owned by state controlled companies. Subsequently they were mainly privatized step by step. In 1993 the Latvian company D._____ was founded. It operates the harbor of B._____ [name of place omitted] from which in particular oil and other raw materials are shipped. Respondent 1 is the beneficial

[1] Translator's note: Quote as U._____ *et al* v. Y._____ and Z._____, 4A_526/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

owner of 6'984 shares of D._____ (corresponding to approximately 14.54% of the entire share capital).

In 1998 the Irish company E._____, in which Respondent 1 was a shareholder, held 69% of the shares of D._____.

Approximately at the same time E._____ approached the law offices of Appellants 1-3 with a view to substituting company E._____ with a holding company. The purpose of the restructuring was to let five investors participate in the new structure. It was eventually agreed that the new holding should consist of F._____ and its Dutch subsidiary G._____. It was agreed that the shares of F._____ would thus be held by H._____ on behalf of the beneficial owners. Company G._____ thereupon held the shares of D._____ for the benefit of H._____ and therefore ultimately for the beneficial owners.

In this construction H._____ held 100% of F._____ which in its turn held 100% of G._____, to which the shares of D._____ belonged. On that basis the shares of D._____ were indirectly held by I._____, J._____, K._____, Y._____ and Appellant 1 with 20% each.

K._____ was sold subsequently whereby the share of the other beneficial owners was increased to 25% each. In 2005-2006 I._____ acquired the shares of J._____ and brought his share to 50%.

In 2005 there were disagreements between I._____ and the other beneficial owners. This led to a situation in which 50% of the voting rights were on each side, which made impossible a majority decision of the beneficial owners as to D._____. Consequently no common instructions with regard to company G._____, to which the shares of D._____ belonged, could be given to the law offices of Appellants 1-3.

A.c In 2006 the beneficial owners of D._____ discussed the possibility of selling their shares to an Austrian investor. For this purpose the legal representative of the Respondents negotiated with Appellant 1 as to the preparation of the corresponding documents relating to the property rights.

On April 21, 2006 the law offices of Appellants 1-3 made a report on the aforesaid companies with various enclosures available to the legal representative of the Respondents.

On May 20, 2006 the Respondents and the Appellants entered into a Mandate Agreement[2]. On the same day H._____ submitted to the Respondents a document described as "Confirmation of Fiduciary Holdings[3]".

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

[3] Translator's note: In English in the original text.

On January 11, 2007 companies H._____, F._____, G._____ and the newly created company L._____ entered into an agreement pursuant to which G._____ assigned 13'968 shares of D._____ to L._____.

In a letter of April 9, 2010 the Respondents terminated the "Mandate Agreement" of May 20, 2006 without notice and demanded a full rendering of accounts as to the activity of the Appellants in the framework of the Mandate Agreement.

B.

B.a On August 31st, 2010 the Respondents initiated arbitration proceedings against the Respondents based on the Swiss Rules of International Arbitration. On November 15, 2010 the Zurich Chamber of Commerce appointed a sole arbitrator. The Respondents submitted various detailed requests for information in connection with the Mandate Agreement of May 20, 2006, in particular with regard to companies H._____, F._____, L._____ and D._____ and as to the 13'968 D._____ shares previously held by L._____.

The Appellants essentially submitted that the request should be rejected. Alternatively and by way of a counterclaim they submitted that the Respondent should be ordered to pay the outstanding fees.

B.b In an award of June 30, 2011 the Arbitrator did not address the Appellants' counterclaim relating to their fee due to the lack of payment of the advance on costs (award § 1). He upheld most of the detailed requests for information submitted by the Respondents (award § 2-7). The Arbitrator rejected all other submissions (award § 8). The costs of the proceedings amounting to CHF 56'800 were to be taken from the deposit paid by Respondent 1 up to CHF 55'400 and the other CHF 1'400 were to be paid by the Appellants (award § 9). Furthermore the Appellants were ordered to pay CHF 53'776 to Respondent 1 as compensation for the procedural costs and CHF 100'972.20 for its costs (award § 10).

C.

In a Civil law appeal the Appellants ask the Federal Tribunal to annul the arbitral award of the Zurich Chamber of Commerce of June 30, 2011. Alternatively they submit that the award should be annulled as to Appellants 2 and 3 and even more in the alternative only as to Appellant 2.

The Respondents and the Arbitrator submit that the appeal should be rejected.

D.

On October 3, 2011 the Federal Tribunal stayed the enforcement of the award.

Reasons:

1.
In the field of international arbitration a Civil law appeal is allowed under the requirements of Art. 190-192 PILA[4] (SR 291) (Art. 77 (1) (a) BGG[5]).

1.1
The seat of the Arbitral tribunal is in Zurich in this case. Appellant 4 and the Respondents did not have their domicile or headquarters or their habitual residence in Switzerland at the decisive time. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

1.2
The only admissible grievances are those limitatively spelled out in Art. 190 (2) PILA (BGE 134 III 186 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 brought forward and reasoned in the appeal; this corresponds to the duty to submit reasons contained in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law. Criticism of an appellate nature is not allowed (BGE 134 III 186 at. 5 p. 187 with references).

1.3
The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). The Court may not correct or supplement the factual findings of the arbitral tribunal even when they are obviously inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art 77 (2) BGG which rules out the application of Art. 97 BGG and of Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought forward against such factual findings or when new evidence is exceptionally taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). A party wishing to claim an exception from the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeking to have the factual findings corrected or supplemented on that basis must show with reference to the record that the corresponding factual allegations were made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

2.
The Appellants argue that the hearing of attorney M._____ as a witness was refused in violation of the right to be heard (Art. 190 (2) (d) PILA).

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[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.

[5] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

2.1

Art. 190 (2) (d) PILA allows an appeal only as to the mandatory procedural rules according to Art. 182 (3) PILA. According to that the arbitral tribunal must in particular abide by the right of the parties to be heard. With the exception of a right to obtain reasons, this corresponds to the constitutional right embodied at Art. 29 (2) BV[6] (BGE 130 III 35 at 5 p. 37 ff; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 578 ff). Case law deducted from this in particular the right of the parties to express their views on all facts important for the decision, to submit their legal arguments, to prove their factual allegations important for the decision with pertinent evidence produced timely and according to the rules applicable, to participate in the hearing and to have access to the record (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c p. 578 ff; with references). In arbitral proceedings too the right to be heard is not unlimited. Thus the arbitral tribunal is not barred from finding the facts only on the basis of the evidence it considers as pertinent and relevant (BGE 119 II 386 at 1b p. 389; 116 II 639 at 4c p. 644). The arbitral tribunal may therefore dispense with hearing evidence when the corresponding submission of evidence concerns an irrelevant fact, when the proof offered is obviously impractical or when the arbitral tribunal has already established its opinion on the basis of the evidence already gathered and may conclude by way of an anticipated assessment of the evidence that it would not change with additional evidence (see in this respect BGE 134 I 140 at 5.3; 130 II 425 at 2.1 p. 429; 124 I 208 at 4a). An anticipated assessment of the evidence by an international arbitral tribunal may be reviewed in annulment proceedings only from the limited point of view of a violation of public policy (judgment 4A_600/2010[7] of March 17, 2011 at 4.1; 4P.23/2006 of March 27, 2006 at 3.1; 4P.114/2003 of July 14, 2003 at 2.2).

2.2

The Appellants disregard these principles when they describe the hearing of witness M._____ through judicial assistance as pertinent, contrary to what was held in the award and when they criticize the reasons advanced by the Arbitral tribunal to refuse hearing the witness as though these were ordinary appeal proceedings. After the hearing on May 13, 2011 the Arbitrator, by way of Procedural order nr. 5 of June 6, 2011 referred to the applicable procedural rules and held that the Appellants failed to produce witness statements[8] from M._____ with their reply at the latest. Moreover it appeared from the Appellants' very arguments that the witness would have been ready to testify, thus it would have been possible for them either to file witness statements or at least to indicate within the time limit for their reply that despite their efforts it was not possible to file such exhibits timely. Furthermore the Arbitrator had justified in the same Procedural order his refusal to hear the witness through judiciary channels because the evidence was not pertinent and the witness had not been involved as a party or as a representative of one of the Parties with regard to the mandate in dispute whilst the meaning and the mechanism of the shared rights were documented in the Confirmation of Fiduciary Holdings form. In a further Procedural order nr. 6 of June 14, 2011 in which the Appellants' request for reconsideration was rejected, the Arbitrator confirmed his view that the evidence proposed was not pertinent and pointed out that the Appellants had not substantiated to what extent M._____ would have participated in the contractual

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

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/cas-award-allocating-fees-and-costs-in-violation-of-the-right-to/

[8] Translator's note: In English in the original text.

negotiations and why his testimony should be pertinent in view of the contractual agreements in discussion.

The Appellants show no violation of the right to be heard when they merely put forward criticism of an appellate nature as to the reasons for the refusal of the hearing of the witness through judicial assistance and merely oppose their own view of the matter and their legal view with regard to the (allegedly joint) use of the right to information to the reasons in the arbitral award. They show even less of any of the legal grounds for annulment (Art. 190 (2) PILA) when they argue that the Arbitral tribunal made fact findings arbitrarily or in contradiction with the record. Their arguments must be rejected out of hand to the extent that they argue in front of the Federal Tribunal – in contradiction with the factual findings of the Arbitrator – (see Art. 99 (1) BGG) that the witness would have participated in the negotiations for the conclusion of the mandate agreements with the four beneficial owners. The Appellants do not argue that the anticipated evaluation of the evidence by the Arbitrator would be in breach of public policy (Art. 190 (2) (e) PILA).

The Argument that the right to be heard was breached (Art. 190 (2) (d) PILA) in connection with the proposed hearing of witness M._____ through judicial channels is not justified.

3.
3.1
Under the caption “violation of third party’s protected positions” the Appellants claim that the Arbitral tribunal did not have jurisdiction (Art. 190 (2) (b) PILA) and argue a violation of public policy (Art. 190 (2) (e) PILA).

However the Appellants do not explain in any way to what extent there would be a ground for appeal according to Art. 190 (2) (b) and (e) PILA. In doing so they fail to meet the legal requirement for reasons (Art. 77 (3) BGG). They show neither a violation of the jurisdictional rules nor of public policy when they argue that the Arbitrator, by way of his holding as to the limitation of the duty to provide information pursuant to the mandate as a consequence of the attorney-client privilege, would have stated reasons that “are no longer comprehensible or plainly illegal and arbitrary”. Irrespective of the fact that the Appellants rely at length on alleged facts which cannot be found in the award under appeal (see Art. 105 (1) BGG) or that took place after the award (see Art. 99 (1) BGG) in reality they merely criticize in an admissible way the reasons of the award under appeal pursuant to which the Arbitrator rejected their objections based on the attorney-client privilege with regard to their contractual duty to provide information. The Appellants’ arguments are unfounded.

3.2
The Appellants show no violation of public policy when they claim that the factual findings in the award as to Appellant’s nr. 2 functions would be wrong and contrary to the record. They show even less of a ground for annulment as provided by the law when they argue that the award under appeal would be devoid of any reasons as to why the Appellants 1-3 should be under a duty to provide information. According to case law of the Federal Tribunal there is no right to reasons afforded by Art. 190 (2) (d) PILA (BGE 134 III 186 at 6.1 p. 187 ff with references).

3.3

The requirements for reasons in a Civil law appeal (Art. 77 (3) BGG) are also overlooked by the arguments in the appeal under the caption “no relevant activities by Appellants 2 and 3”. The Appellants merely put forward criticism of an appellate nature against the award under appeal by reference to various exhibits in the arbitral proceedings.

4.
The Appellants argue that the Arbitral tribunal would have left one submission undecided (Art. 190 (2) (c) PILA).

4.1
They argue that the Respondents had originally sought the production of the shares L._____ held in D._____. In their reply the Respondents would have changed their submissions and requested only the delivery of copies of the shares certificates, which would be tantamount to a partial withdrawal of the claim and should accordingly have been taken into consideration to the Appellants’ benefit – as a consequence of the significant value of the shares – when the costs were decided.

4.2
The argument is unfounded. The Appellants themselves claim that the Respondents modified their original submission and that the final submission did not contain any request for the production of shares even according to the presentation in the appeal. That submission was assessed by the Arbitrator and there can be no claim that he would have failed to adjudicate some submissions. Whether the amendment of the original submissions by the Respondents was acceptable or not, whether it should be assessed as an amendment of the claim or as a withdrawal of the claim, as the Appellants argue, and what consequences this would have as to the costs was to be decided according to the rules applicable to the arbitration. To the extent that the Appellants argue that the change should have led to a different assessment of the costs, they merely argue an inadequate application of procedural rules, without showing any of the grounds for annulment contained in Art. 190 (2) PILA.

Irrespective of the foregoing the Appellants’ argument that the Respondents then sought the production of the shares in D._____ held by L._____ is unfounded. Instead the Respondents had already made clear in their request for arbitration of August 31st, 2011, to which they rightly refer in their answer to the appeal, that the arbitral proceedings concerned only the rendering of accounts by the Appellants whilst the transfer of the D._____ shares was not the object of the arbitration. Thus the corresponding arguments as to the consequences on the costs lose any pertinence they may have found in the alleged withdrawal of the submission requesting the production of the shares. The Appellants show no violation of the right to be heard once again when they argue that the Arbitral tribunal would have insufficiently justified its assessment of the value of the claim (see BGE 134 III 186 at 6.1 .p 187 ff with references) and claim on that basis that the amount in dispute should be higher.

The argument that the Arbitral tribunal would have failed to adjudicate some submissions is unfounded.

No sufficiently argued ground for annulment is to be found in the other developments in the appeal as to the costs. In this respect as well the Appellants merely criticize in an inacceptable manner the assessment of the value of the claim by the Arbitrator and the decision on costs, claiming that the Arbitrator acted arbitrarily without showing any admissible ground for annulment.

5.
The appeal proves to be unfounded and must be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Appellant shall severally pay the costs and compensate the Respondents for the federal proceedings (Art. 66 (1) and (5) as well as Art. 68 (2) and (4) BGG).

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 10'000 shall be borne by the Appellants severally and in equal shares internally.

3.
The Appellants shall pay the Respondents a total of CHF 12'000 for the federal judicial proceedings, severally and in equal shares internally.

4.
This judgment shall be notified in writing to the Parties and to the Arbitral tribunal of the Zurich Chamber of Commerce.

Lausanne January 23, 2012

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge: The Clerk:

KLETT (Mrs.) LEEMANN