4A_42/2016[1]

Judgment of May 3, 2016

First Civil Law Court

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

A.X._____ Sàrl,
Represented by Mr. Christophe Wilhelm,
Appellant

v.

1. Y._____,
2. Z._____,
Both represented by Mr. Micha Bühler and Mr. Fabian Meier,
Respondent

Facts:

A.

A.X._____ Sàrl (hereafter: A.X._____), at [name of city omitted] is a Swiss law company. It belongs to the X._____ group whose activities consist, in particular, of providing speculative financial products (hedge funds) to private and institutional investors worldwide. To discover and attract potential investors, it uses the services of intermediaries that it compensates.

On March 18, 2003, B.X._____ Limited (hereafter: B.X._____), another company of the group concerned based in Bermuda, and Y._____ entered into a brokerage agreement entitled Investor

[1] Translator's Note: Quote as A.X_____ Sàrl *v.* Y._____ and Z._____ SA, 4A_42/2016.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Referral Agreement (hereafter: the Contract) and governed by Swiss law, pursuant to which the latter undertook to look for potential investors and the former to pay commission.

By way of an addendum of December 1, 2003, Z._____ entered into this contractual relationship alongside Y._____.

Around the end of the year 2005, the relationship between the parties deteriorated because, among other reasons, the two brokers did not accept A.X._____'s proposal to limit the list of potential investors. The Swiss company put an end to it by terminating the Contract in a letter of May 15, 2006, taking effect 30 days after receipt of the letter.

In November 2006, A.X._____ took over the financial obligations of B.X._____ under the Contract.

B.

B.a. On November 9, 2007, Y._____ and Z._____ (hereafter: the Claimants) invoked the arbitration clause in the Contract and jointly filed a request for arbitration against A.X._____ (hereafter: the Respondent). A sole arbitrator was appointed by agreement between the parties. In accordance with the arbitration clause, the procedure was governed by the Swiss Rules of International Arbitration; Lausanne was selected as the seat of the arbitration and English as the language of the arbitral proceedings.

The Claimants and the Defendant set out their respective arguments in a Statement of Claim of May 29, 2008, and a Statement of Defense of July 31, 2008. The sole arbitrator then issued three preliminary awards on August 21, 2009, March 31, 2011, and May 8, 2012, in which he mainly undertook to interpret certain contractual terms in order to determine the conditions under which the Claimants would be entitled to receive the commission they sought.

On June 7, 2013, the Swiss Chambers' Arbitration Institution appointed a new arbitrator (hereafter: the Arbitrator) upon joint proposal of the parties, as a conflict of interest arose during the arbitration that had prevented the first arbitrator from continuing his mission.

B.b. In a meeting held on August 27, 2013, the Arbitrator discussed the next steps in the arbitration with the parties and summarized the discussion in a letter of the following day. In short, the Defendant was to furnish precise data as to the investments which may fall within the Contract as interpreted in the aforesaid preliminary awards. On this basis, the Claimants would submit a brief in which they would cost out the commission to which they believed they were entitled; whereupon the Defendant, in turn, would submit a brief in which it would propose its own computation of the commission in dispute and, as the case may be, point out the commission it would challenge.

On December 24, 2013, the Arbitrator issued a Procedural Order No. 4 in which he decided in agreement with the parties to bifurcate the Claimants' claims concerning the direct and indirect investments from those

concerning the commissions on the structured products and the retrocessions, the issues concerning the latter claims being addressed at a later stage in the proceedings. On June 11, 2014, the Claimants submitted their First Submission on Quantum and Related Issues and attached to the brief a detailed calculation of the commission they considered to be due. They sought payment of USD 3'359'174 with interest at 5% from June 30, 2014, namely USD 1'064'475.

On August 25, 2014, the Defendant submitted the Respondent's First Statement of Reply on Quantum and Related Issues in which it challenged the existence of any debt owed to the Claimants.

In a letter of October 3, 2014, following a meeting in Zürich on September 30, 2014, and a phone conference of October 2, 2014, the Arbitrator invited the parties to submit a second brief concerning the amount of compensation related to the direct investments only. As to the indirect investments, they would be addressed later, just like the commission on the structured products and fees. The Claimants and the Defendant thus filed a Claimants' Second Submission on Quantum and Related Issues on January 16, 2015, and a Respondent's Second Statement of Reply on Quantum and Related Issues on February 27, 2015, in which both reiterated their positions.

A hearing took place in Zürich on April 30, 2015. The Claimants and a representative of the Respondent were heard as witnesses. In a registered letter sent to the Arbitrator on May 18, 2015, the Respondent expressed in writing an objection it had already raised during the hearing, claiming that it was not practicable for the moment, namely before the Arbitrator issued a preliminary decision on the investments which could be considered the basis necessary to compute the commissions, to issue an award containing a figure as to the claims in dispute. In its view, such a preliminary decision was indeed indispensable for it to be able to produce a calculation based on its own methods. It added that failing this, its right to be heard would be violated.

At the hearing, the Claimants asked that the objection be rejected and in a letter of June 1, 2015, as well.

On December 7, 2015, the Arbitrator sent an email to the parties which contained the following passage:

> The Sole Arbitrator is in the process of completing the award on Claimants' fees on direct investments...
>
> By this message, the Sole Arbitrator directs the Respondent to comment on the following questions - and only the two questions:
>
> (1) If the Sole Arbitrator were to find, upon review and consideration of the Parties' respective positions on the disputed investments and other disputed issues, that he is in a position to compute the amount of fees owed to Claimants without the need to revert to Parties in order to arrive at a determined amount, would the Respondent have any objections not already raised in its submission of 18 May 2015 with respect to the issuance of an award setting out a determined figure?

(2) If the answer to question (1) is "yes", what are those additional objections (if any)?

Respondent is hereby directed to provide its answers, as succinctly as possible, by Friday, 11 December 2015, end of the day. [2]

In the absence of any answer within the prescribed time limit, the Arbitrator wrote to the Respondent on December 13, 2015, and gave it a new time limit. In an email of the same day, the Respondent advised him that it had no further comments to make and that it maintained the reservations contained in its letter of May 18, 2015, in their entirety.

On December 14, 2015, the Arbitrator closed the proceedings.

On December 21, 2015, the Arbitrator issued a partial award, the operative part of which ordered the Respondent to pay to the Claimants an amount of USD 3'359'174 – with interest and costs added – as commission due under the contract in connection with the investments listed in exhibit C-116 for the period until June 30, 2013. On March 7, 2016, the Arbitrator issued an additional award addressing the costs awarded to the Claimants.

C.

On January 21, 2016, the Defendant sent a petition to the Federal Tribunal for a stay of enforcement, adding that it would file a civil law appeal against the December 21, 2015, award within the time limit to do so, which had not yet passed.

The Defendant (hereafter: the Appellant) filed a new request for a stay of enforcement slightly amended on February 1, 2016, together with a civil law appeal with a view to obtaining the annulment of the aforesaid partial award. Invoking Art. 190(2)(d) PILA,[3] it argues that the Arbitrator violated the rule of equal treatment with the Claimants and did not comply with its right to be heard in contradictory proceedings.

The Arbitrator submitted the file of the arbitration and waived the right to express his position as to the appeal.

In their answer of March 16, 2016, the Claimants (hereafter: the Respondents) mainly submitted that the matter was not capable of appeal and, in the alternative, that the appeal should be rejected.

The Appellant did not file a reply.

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

Reasons:

1.
According to Art. 54(1) LTF,[4] the Federal Tribunal issues its judgment in an official language,[5] as a rule in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Before this Court they used French (the Appellant) and German (the Respondents). This judgment shall therefore be issued in the language of the appeal, in accordance with the practice of the Federal Tribunal.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1) LTF). Whether as to the subject of the appeal (a partial award; see judgment 4A_222/2015[6] of January 28, 2016, at 3.1.1), the standing to appeal, the time limit to appeal, the Appellant's submissions or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The merits of the appeal may therefore be addressed.

3.
The Federal Tribunal issues its decision on the basis of the facts found in the award under appeal (Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal judicial organization law (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the power to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against the aforesaid factual findings or if some new facts or evidence must exceptionally be taken into consideration in the framework of the civil law appeal proceedings (judgment 4A_124/2014[7] of July 7, 2014, at 2.3).

It must be pointed out that the findings of the arbitral tribunal as to the unfolding of the procedure also bind the Federal Tribunal with the same reservations, whether they concern the submissions of the parties, the facts they stated or their legal arguments, the statements made during the case, the submissions of evidence, or even the content of a witness statement, an expert report, or the information gathered during an on-site inspection (judgment 4A_54/2015[8] of August 17, 2015, at 2.3, citing ATF 140 III 16 at 1.3.1).

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

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

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements

[8] Translator's Note: The English translation of this decision is available here:

4.
The Appellant argues that the Arbitrator violated the principle of equal treatment of the parties and its right to be heard in contradictory proceedings.

4.1. The right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) PILA, is not different in principle from that which is available in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus, it was held in the field of arbitration that each party has the right to express its views on the facts essential to the decision, to present its legal arguments, to proffer evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c, p. 643).

The principle of contradiction, guaranteed by Art. 182(3) and 190(2)(d) PILA, requires that each party is able to state its views as to its opponent's arguments, to review and discuss the evidence the opponent submits and to refute them by its own evidence (judgment 117 II 346 at 1a). Equal treatment of the parties is also guaranteed by the same provisions and implies that the procedure be regulated and conducted so that each party has the same opportunities to submit its arguments.

4.2. Considered in the light of these principles of jurisprudence and taking into account the arguments submitted by the Respondents, the Appellant's criticism concerning the violation of its right to be heard in contradictory proceedings and the failure to treat the parties equally fall for the following remarks.

4.2.1. At Chapter IV, "*LEGAL CONSIDERATIONS*," of its brief entitled "*A. The arbitral proceedings and the various interlocutory awards previously issued*" (p. 8 to 15), the Appellant describes the unfolding of the arbitral proceedings without limiting itself to the factual findings of the two arbitrators who implemented it and it enhances this description with some subjective comments distorting it. In doing so, it disregards the fact that the Federal Tribunal is bound by procedural factual findings within the meaning indicated above (see 3, 2nd §). Therefore, this Court shall limit itself to the factual findings of the award under appeal and of the interlocutory awards that preceded it in order to assess the soundness of the grievances raised in the appeal brief.

4.2.2. The lengthy argument development by the Appellant in its brief is really a mere set of variations, if not repetitions, based on a recurrent theme which is its *leitmotif*. In summary, the Appellant argues that having always submitted that the Respondents' claims should be entirely rejected, it had no obligation to provide a hypothetical conclusion in connection with their submissions which, moreover, were from erroneous figures. In its view, it would have behooved the Arbitrator to state beforehand in an interlocutory award which investments among those invoked by the Respondents would generate commissions pursuant to the Contract and the decisions taken in the three interlocutory awards issued previously. On this basis, it would then have produced a calculation devoid of errors, a task that was its own exclusively pursuant to the

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http://www.swissarbitrationdecisions.com/no-duty-arbitral-tribunal-expressly-address-any-and-all-points-raised

Contract. Instead, the Arbitrator ignored the repeated requests it submitted for this purpose and merely adopted the calculation produced by the Respondents without seeking to rectify the errors impacting it. In doing so, he disregarded the fundamental principle of equal treatment of the parties and their right to be heard in contradictory proceedings. It is not so for the reasons indicated hereafter.

4.2.2.1. From the point of view of the equality of arms, the Appellant cannot complain to have been harmed as compared to the Respondents. Indeed, the summary of the arbitral proceedings at the outset of this judgment shows that both parties had the opportunity to file the same number of briefs and that they made use of it. Moreover, the Appellant does not demonstrate or even claim that the Respondents would have been given an opportunity during the proceedings that the Arbitrator refused to extend to the Appellant. Therefore nothing justifies claiming that the parties have not been formally treated on equal footing in the case at hand.

4.2.2.2. It does not behoove one of the parties to the case to dictate to the Arbitrator the manner in which he must conduct the case. Yet, this is what the Appellant seems to wish to do *a posteriori* when holding against the Arbitrator his non-compliance with the unilateral instructions it had given to him. Moreover, and no matter what he says, the latter instructions did not correspond to those which it claims today were received by the Arbitrator. Instead, the latter holds at n. 890, 893, and 894 of the award that, during the discussions concerning the following steps of the proceedings, the Appellant never requested that it be able to produce its own calculations of the amount of the commissions in dispute after the Arbitrator decided the issue of which commissions should be taken into account pursuant to the Contract, but rather that it invoked this way of proceeding only hypothetically and conditioned its offer on an order from the Arbitrator. This is a finding concerning a procedural fact, which binds the Federal Tribunal and which the Appellant criticizes in vain with arguments that, moreover, are essentially appellate in nature (see appeal brief n. 83).

Furthermore and after reviewing them in view of the arguments raised against them in the appeal brief, this Court adopts the reasons that the Arbitrator advanced at Chapter 14.2 of his award to reject the Appellant's objections at the hearing of April 30, 2015, and in his letter of May 18, 2015, (n. 861 to 901). This particularly applies to the argument concerning the following remark made by the Arbitrator at n. 3.3.2 of his letter of August 29, 2013: "*Once again, the Parties are reminded that at this stage these calculations are not binding and are without prejudice to the Parties' claims*."[9] (award nn. 884 to 887).

4.2.2.3. Be this as it may, the grievances raised by the Appellant today are questionable in view of the rules of good faith.

Claiming as it does that the Arbitrator "*issued his decision hostilely*" (appeal n. 84), appears debatable if one bears in mind on the one hand that the Contract obliged the Appellant to provide the Respondents with the information necessary to calculate their commissions and on the other hand that the arbitral proceedings were already eight years old when the award under appeal was issued. Moreover, the

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

Appellant adopts an unusual position when claiming that it was not in a position to make its own calculation of the commissions in dispute, when it was the one who had the necessary elements to do so, the Respondents had already issued theirs precisely, the arbitral proceedings were at a stage where only the quantum of the claims in dispute had to be determined and it was limited *ratione materiae* to the commissions concerning the direct investments (with two exceptions), and that the Appellant was demonstrably able to deliver the results of its calculations at this stage in the proceedings. In reality and with the benefit of hindsight, it is not unreasonable to think that the Appellant attempted to delay the issuance of an award ordering payment in this manner, as it claims in support of its application for a stay of enforcement that its liquidity is insufficient to pay the amounts the Respondents were awarded.

Be this as it may, there is no indication, *in casu,* of a violation of the right to be heard of that party or of any disregard of the principle of equal treatment of the parties.

4.2.3. This being so, the appeal shall be rejected. The Appellant's application for a stay of enforcement thus becomes moot.

5.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and it shall pay costs to the Respondents as several creditors (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal holds:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 23'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents as several creditors an amount of CHF 25'000 for the federal proceedings.

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

Lausanne, May 3, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo