

4A_335/2012¹

Judgment of January 30, 2013

First Civil Law Court

Federal Judge Klett (Mrs), Presiding

Federal Judge Corboz,

Federal Judge Kolly,

Clerk of the Court: Piatti

A. _____,

Represented by Mr. Stefano Pizzola and Mrs. Valentina Vigezzi Colombo,

Appellant,

v.

1. B. _____,

2. C. _____,

Represented by Dr. Goran Mazzuchelli,

Respondents,

Facts:

A.

A.a

A. _____, C. _____ and B. _____ acquired D. _____ SA to invest in the mining sector. They had agreed to make contributions in proportion to their shares in order to allow the aforesaid company to subscribe a large number of shares of company E. _____. C. _____ and B. _____ thus paid a total amount of GBP 2'099'206.80 to D. _____ SA. A. _____ did not respect the commitment to contribute GBP 1'947'503 and 3'020'000 shares of company E. _____, stating that his contribution would instead be made by way of capitalizing the expenses he had already undertaken, the goodwill and the know-how.

On February 28, 2008, A. _____ entered into a contract with D. _____ SA in the sense that the latter advanced the payment of his contribution by obtaining financing from Bank F. _____, which he was to reimburse by May 31, 2008. On February 29,

¹ Translator's note: Quote as A. _____ *v.* B. _____ and C. _____, 4A_335/2012. The original decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch

2008, D. _____ SA acquired shares of E. _____ for a total amount of GBP 2'554'350.13. A. _____ did not pay the amount of GBP 1'947'503 lent to him to D. _____ within the time limit to do so. In the fall of 2008 Bank F. _____ first sold the assets pledged by A. _____ and then, on January 26, 2010, the shares of E. _____ it had received as collateral for the aforesaid financing, obtaining only GBP 70'450.

A.b

B. _____ and C. _____ began arbitration proceedings under the Swiss Rules of International Arbitration of the Chambers of Commerce against A. _____, seeking an order to pay several amounts as damages. In a decision of December 1, 2011, the sole Arbitrator refused to hear witness G. _____, by way of an application to a State Court, as the witness had failed to appear and refused to order "an expert report as to the value of the Defendant's contributions." In an award of May 4, 2012, the Arbitrator rejected a request to reopen the evidentiary proceedings as to the aforesaid two proofs, ordered A. _____ to pay GBP 824'236.93 to C. _____ and GBP 412'118.46 to B. _____ as their respective shares of the damages caused by D. _____ and interest. He also ordered the Defendant to pay the costs of the judicial and enforcement proceedings borne by the Claimants as well as the costs of the arbitration. The Arbitrator held that A. _____ breached his contractual obligations and thereby caused damage to the Claimants arising from his failure to make his contributions (in cash and in E. _____ shares) as well as from the forced sale of E. _____ shares by Bank F. _____ which held them as collateral.

B.

In a civil law appeal of June 6, 2012, A. _____ seeks a stay of enforcement and submits that the arbitral award should be annulled. He argues that the Arbitrator violated his right to be heard guaranteed by Art. 190 (2) (d) PILA² for failing to hear the aforesaid witness through the state courts at the seat of the arbitral tribunal (Art. 184 (1) PILA) and by refusing to order the expert report requested.

In their answer of June 18, 2012, B. _____ and C. _____ submit that the appeal should be rejected.

The Presiding Judge of this Court rejected the request for a stay of enforcement in a decision of July 3, 2012.

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.

Reasons:

1.

1.1

Art. 77 (1) LTF³ allows a civil law appeal against arbitral decisions pursuant to the requirements of Art. 190 to 192 of the December 18, 1987, Private International Law Act (PILA). This law is applicable because the seat of the arbitration is in Lugano and the Claimant did not have a domicile or a habitual residence in Switzerland at the time the arbitration agreement was concluded (Art. 176 (1) PILA).

1.2

The appeal has been filed timely (Art. 100 (1) LTF) against the Arbitrator's final decision (Art. 90 LTF) in a Civil matter (Art. 72 (1) LTF). The Appellant has standing to appeal as he was defeated in the arbitral proceedings (Art. 76 (1) LTF).

1.3

The grounds for appeal in an international arbitration matter are listed exhaustively at Art. 192 (2) PILA. The Federal Tribunal reviews only the grievances that the Appellant brings forward with reasons (Art. 77 (3) LTF). The reasons must meet the requirements of Art. 106 (2) LTF that are similar to those formerly applicable to a public law appeal; from this point of view the entry into force of the LTF has not changed anything (DTF⁴ 134 III 186 at 5). The Appellant must consequently clearly indicate the legal provisions he considers violated and state precisely what the violation consists of (DTF 128 III 50 at 1c).

2.

The right to be heard guaranteed by Art. 182 (3) and 190 (2) (d) PILA has the same contents as the constitutional right guaranteed by Art. 29 (2) Cost,⁵ with the exception of the duty to provide reasons in the decision (DTF 130 III 35 at 5; 128 III 234 at 4b; 127 III 576 at 2c). Case law has deduced from this that every party has the right to express its views on the facts that are essential for the judgment, to present its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (DTF 133 III 139 at 6.1). The right to adduce evidence presupposes that it will be exercised in a timely manner and according to the procedural rules applicable (DTF 119 II 386 at 1b). The arbitral tribunal may refuse to adduce evidence without violating the right to be heard if it considers the evidence improper to demonstrate the relevant facts or because on the basis of an anticipated assessment of

³ Translator's note: LTF is the Italian and French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

⁴ Translator's note: DTF is the Italian abbreviation for the Official Report of the judgments of the Swiss Federal Tribunal.

⁵ Translator's note: Cost is the Italian abbreviation for the Swiss Federal Constitution.

the evidence, it considers that the additional adducing of evidence will not alter its opinion based on the evidence already adduced (DTF 134 I 140 at 5.3). The Federal Tribunal reviews the advance assessment of the evidence by an international arbitral tribunal only from the limited point of view of a violation of public policy (judgment 4A_528/2011⁶ of January 23, 2012, at 2.1; 4A_600/2010⁷ of March 17, 2011, at 4.1).

2.1

In his decision of December 1, 2011, the Arbitrator rejected the Defendant's request to hear witness G. _____ through the intervention of the Court of Appeal of the Canton of Tessin because the witness had failed to appear at the hearing of September 9, 2011. He did so because he held that in the light of the evidence already adduced his testimony was not relevant to decide the case. Indeed, according to the Defendant's indications, the witness could have testified as to the negotiations conducted to find a way to manage D. _____ SA after the dispute arose and the testimony already adduced would not make it possible to consider that the missing witness could have played a role in the dispute. The Arbitrator then refused to order an expert report as to the value of the Defendant's contributions because there was no document in the record that could justify an expert report, exhibit C24 being merely a table containing a summary with banking documents but none which substantiated the figures and the activities indicated therein and containing – according to the witnesses heard – some contradictory elements, which would also be an obstacle to an expert report. In the final award, the Arbitrator rejected a request to reopen the evidentiary phase as to the aforesaid witness and the request for an expert report because there were no exceptional circumstances as required by Art. 29 (2) of the Swiss Rules of International Arbitration, considering that the Defendant had merely repeated the reasons in support already rejected in the decision of December 1, 2011.

2.2

The Appellant argues that by refusing to hear witness G. _____ and refusing to order an expert report, the Arbitrator breached his right to be heard. He points out that the aforesaid witness would have been able to testify on the propositions made to safeguard, to the extent possible, the activity of D. _____ SA and to prevent or at least to delay the forced sale of the shares of E. _____, which Bank F. _____ carried out at a time their price was very low. He argues furthermore that the Arbitrator disregarded the importance of an expert report to quantify the goodwill and the know-how contributed.

⁶ Translator's note: Full English translation at <http://www.swissarbitrationdecisions.com/node/382>

⁷ Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/cas-award-allocating-fees-and-costs-in-violation-of-the-right-to?search=%224A_600%2F2010%22

2.3

The aforesaid argument – in which the Appellant merely indicates in an appellate manner the reasons for which he considers that the two aforesaid means of evidence should have been adduced with the assistance of a state court – is inappropriate from the point of view of Art. 190 (2) (d) PILA. Indeed the Appellant himself, arguing that the missing witness could have testified as to his alleged attempts to avoid or delay the forced sale of the shares of E. _____ by the creditor holding the collateral, acknowledges that, as stated by the Arbitrator, the testimony would have concerned only the phase subsequent to the initiation of the arbitral proceedings, which the award considered irrelevant to decide the matter. As to the second element, it must be pointed out that the Appellant appears to forget that irrespective of the impossibility to set up an expert report mentioned in the December 1, 2011, decision, the Arbitrator expressly refuted in the award the opportunity to make the contribution into D. _____ SA by way of capitalizing the goodwill and the expenses incurred, thereby making an expert report dealing with that contention irrelevant for the purposes of the arbitral award. To the extent that the Appellant intended to criticize the assessment of the evidence by the Arbitrator (in advance), it must be pointed out that he fails to mention any violation of public policy that could be reviewed by the Federal Tribunal (judgment 4A_584/2009⁸ of March 18, 2010, at 3.3).

3.

The foregoing shows that the appeal proves to be unfounded and must be rejected. In such an outcome of the proceedings the judicial costs and compensation for the other party must be paid by the Appellant (Art. 66 (1) and 68 (1) LTF).

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 18'000 shall be borne by the Appellant, who shall pay CHF 20'000 to the Respondents for the federal judicial proceedings.

3.

Notification to Counsel for the Parties and to the sole Arbitrator.

⁸ Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/alleged-violation-of-due-process-rejected-no-review-of-the-arbit?search=%224A_584%2F2009%22

Lausanne, January 30, 2013.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Piatti