4A_156/2020[1]

Judgment of October 1, 2020

First Civil Law Court

Federal Judge Kiss (Ms.), Presiding,
Federal Judge Niquille (Ms.),
Federal Judge Rüedi (Mr.).
Clerk of the Court: Mr. O. Carruzzo.

1. A._____, c/o X._____
2. B._____, c/o X._____
represented by Ms. Aurélie Conrad Hari and Ms. Nathalie Aymon,
Appellants

v.

The Republic of C._____
represented by Ms. Vanessa Liborio Garrido de Sousa,
Respondent

Facts:

A.
As of August 3, 2017, Indian nationals A._____ and B._____, represented by Serbian lawyers and Indian counsel, filed a request for arbitration against the Republic of C._____, following a dispute that arose between the parties concerning an investment covered by an Agreement signed on March 17, 2008, between the Republic of D._____ and the Republic of C._____.

A three-member Arbitral Tribunal was established pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) under the auspices of the Permanent Court of Arbitration (PCA) and its seat was fixed in Geneva. English was designated as the language of arbitration.

On June 29, 2018, the Defendant submitted a preliminary Answer to the Request for Arbitration.

[1] Translator's Note: Quote as A._____ and B._____ v. Republic of C._____, 4A_4A_156/2020. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

By notice dated October 12, 2018, the parties were asked to make an initial advance on costs of USD 50'000 each. On November 23, 2018, the Defendant paid the amount of USD 50,000. The Claimants paid USD 20'000 on December 4, 2018.

The Arbitral Tribunal held a first procedural hearing on December 5, 2018, at which the Claimants indicated that they would pay the balance of the required advance on costs by January 7, 2019.

On December 5, 2018, the Arbitral Tribunal issued Procedural Order No. 1, in which it set the procedural timetable and gave the Claimants a deadline of April 1, 2019, to file their claim ("Statement of Claim").

By e-mail dated January 11, 2019, the Claimants informed the Arbitral Tribunal that they would pay the balance of the advance on costs by January 22, 2019.

On February 27, 2019, the Arbitral Tribunal notified the parties that no additional payment had been made and requested that the balance be paid as soon as possible.

On March 25, 2019, the Claimants requested a sixty-day extension of time to submit their statement of claim, citing "unforeseen and unexpected events".

On March 30, 2019, the Arbitral Tribunal granted the Claimants a three-week extension of time to submit their request. It also reminded them that they were still required to pay the balance of the advance on costs.

On April 16, 2019, the Claimants requested a further sixty-day extension of time to lodge their submission with the Arbitral Tribunal, pointing out that the relationship with their counsel had been significantly disrupted due to medical problems affecting one of the Claimants.

By Procedural Order No. 2 of May 14, 2019, the Arbitral Tribunal extended the time-limit for submitting the request to July 15, 2019, and indicated to the parties that if payment of the balance of the advance of costs was not made in a timely manner, it would inform the parties so that one of them could pay the amount due, failing which the proceedings would be terminated.

On July 1, 2019, the Arbitral Tribunal ordered the Claimants to pay the balance of the advance of costs by July 15, 2019.

On July 12, 2019, the Claimants' son, X._____, requested, on behalf of his father, a further extension of the deadline for submitting the request and paying the balance of the advance of costs, stating that his father's state of health did not permit him to meet the deadline.

By letter dated July 17, 2019, the Arbitral Tribunal indicated that the facts alleged in support of the request for extension and the medical certificates attached thereto did not prevent the Claimants from complying with their procedural obligations. It therefore set a deadline of July 31, 2019, for the parties to make the required advance of costs, failing which it would close the proceedings.

On July 31, 2019, the Defendant filed a Costs Application with the Arbitral Tribunal, requesting a three-week period within which to submit and justify its application for costs incurred in the arbitral proceedings. It stated that it did not intend to pay the amount of the outstanding advance of costs.

By notice dated August 9, 2019, the Claimants were invited to provide their answer to the Costs Application by September 6, 2019.

By letter dated August 13, 2019, Indian counsel advised the Arbitral Tribunal that they no longer represented the Claimants.

On August 20, 2019, the Claimants' son requested an extension of the September 6, 2019 deadline to allow the Claimants time to retain another lawyer.

Notwithstanding the Defendant's objection, the Arbitral Tribunal extended the deadline for responding to the Costs Application to September 30, 2019.

On September 27, 2019, the Claimants' son requested a further extension of the deadline, stating that the Claimants were no longer represented by their Serbian counsel and were therefore unable to meet the deadline expiring on September 30, 2019.

On October 4, 2019, the Arbitral Tribunal denied the request for an extension and invited the Defendant to submit its Costs Submission by October 25, 2019, with the Claimants' response by November 15, 2019.

On October 18, 2019, the Claimants requested the Arbitral Tribunal to suspend rather than terminate the proceedings. The Tribunal decided not to grant this request.

On October 25, 2019, the Defendant delivered its Appeal Brief on costs to the Arbitral Tribunal.

On November 14, 2019, the Claimants requested an extension of the time limit for submitting their response to the Appeal Brief on costs. The following day, November 15, 2019, the Arbitral Tribunal sought the Defendant's views on this request. On the same day, the Claimants' son submitted an Answer to the Appeal Brief on costs to the Arbitral Tribunal.

On December 4, 2019, the Defendant voluntarily submitted a Reply.

By Closing Order and Award on Costs of February 17, 2020, the Arbitral Tribunal closed the proceedings (letter A of the operative part), ordered the Claimants to pay the Defendant the sum of EUR 653'089.31 as costs (B) and the amount of USD 132'502.67 as reimbursement of arbitration costs (C), with the amounts awarded to the Defendant bearing interest at 2.25% per annum from the date of the Award (D).

B.
On March 18, 2020, the Claimants (hereafter, the Appellants) submitted a civil law appeal together with an application for a stay of enforcement, for the purposes of obtaining the annulment of the letter B of the operative part of the award under appeal.

The Defendant (hereinafter: the Respondent) submitted that the appeal should be rejected.

The Appellants voluntarily submitted an Answer which led to the submission of a Rejoinder. The Arbitral Tribunal did not submit a reply within the time limit set for that purpose. A stay of enforcement was granted for the appeal by Order of the Presiding Judge on June 11, 2020.

Reasons:

1.
According to Art. 54(1) LTF[2] the Federal Tribunal issues its judgment in an official language[3], as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used English. In the Appeal Brief sent to the Federal Tribunal, the Appellants used French. According to its practice the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.
In the challenged Award, the Arbitral Tribunal, with the failure to pay the required advance on costs, closed the Arbitral proceedings, fixed the costs of the arbitration, and ruled on costs. In so doing, the Arbitral Tribunal, for a reason based on the rules of procedure, terminated the pending arbitration proceedings and made a final award (Judgment 4A_314/2012[4] of October 10, 2012, at 2 and the judgments cited). The Award is therefore subject to a civil law appeal, within the meaning of Art. 77(1)(a) for all the reasons set out in Art. 190(2) PILA[5] (ATF 130 755 at.1.2.2 p. 762).

Submitted in due time (Art. 100(1) LTF), in the form prescribed by the law (Art. 176 ff. PILA), this appeal, in which only grievances restrictively set out in Art. 190(2) PILA may be raised, is admissible in light of these various requests. The Appellants are also entitled to appeal (Art. 76(1) LTF). The civil appeal is therefore admissible in the light of the preceding provisions.

[2] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[3] Translator's Note: The official languages of Switzerland are German, French and Italian.
[4] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/award-costs-only-appealable
[5] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

3.
In the field of international arbitration, civil appeals are admissible against the decisions of arbitral tribunals under the conditions set out in Art. 190-192 of the Federal Law on Private International Law of December 18,1987, (PILA; RS 291), in accordance with Art. 77(3)(1) LTF.

The seat of the Arbitral Tribunal is in Geneva. Neither party was domiciled in Switzerland at the relevant time. The provisions of Chapter 12 PILA are therefore applicable (Art. 176(1) PILA).

4.
The Federal Tribunal adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). The findings of the arbitral tribunal as to the course of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, the statements made in the course of the proceedings as well as to the contents of a testimony or an expert opinion or the information gathered at an on-site visit (Judgment 4A_322/2015[6] of June 27, 2016, at 3 and the case law cited).

As such, when a civil law appeal against an international arbitral award is submitted' its mission does not consist of deciding with full power of review, like an appellate jurisdiction—but only to consider whether the admissible grievances raised against the award are justified or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file (Judgment 4A_386/2010[7] of January 3, 2011 at 3.2). 3.2).

5.
In their first plea, the Appellants, relying on Art. 190(2)(d) PILA argue that the Arbitral Tribunal violated their right to be heard and the principle of equality of the parties.

5.1. The right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) PILA, in principle does not have a different content from that enshrined in constitutional law (ATF 127 III 576 at (2)(c); 119 III 386 at 1b 117 346 820 1a p. 347). Thus it was held in the field of arbitration that each party had the right to express its views on the facts essential for the decision, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal (ATF 127 576 at (2)(c) 116 639 at (4)(c) p.643). The right to be heard is a constitutional guarantee of a formal character, the breach of which leads in principle to the annulment of the award under appeal, irrespective of the chances of success of the appeal on the merits. The right to be heard, however, is not an end in itself; it is a means of preventing

[6] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

[7] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

a judicial proceeding from leading to a flawed judgment because of the violation of the right of the parties to participate in the proceedings. When it is not clear how the violation of the right to be heard may have affected the proceedings, there is no need to annul the award under appeal (4A_491/2017 of May 24, 2018, at 4.1.2 and 4A_247/2017 of April 18, 2018 at. 5.1.3).

The equality of the parties, guaranteed by Art. 182(3) and 190(2)(d) PILA, implies that the procedure be settled and conducted in such a way that each party has the same opportunity to assert its case (ATF 117 III 346 at 1a). An appellant who claims to be the victim of unequal treatment in relation to its adverse party or who claims that the Arbitral Tribunal has disregarded the principle of fair hearing must, at the very least, attempt to demonstrate in what way the outcome could have been different if the alleged violations of its right to be heard had not been committed (Judgment 4A_592/2017 of December 5, 2017 at 4.1.2).

There is need here to recall that the party claiming to be the victim of a procedural error must raise it immediately in the arbitral proceedings under penalty of forfeiture. Indeed, it is contrary to good faith to invoke a procedural error only in the framework of an appeal against the arbitral tribunal when the error could have been signaled during the proceedings (Judgment 4A_70/2015[8] of April 29, 2015 at 3.2.1).

5.2. In the first branch of the grievance in question, the Appellants argue that they did not have sufficient time to respond to the Respondent's Costs Application submitted on July 31, 2019, pointing out that their Indian and Serbian counsel ceased to represent them on August 13 and October 2, 2019, respectively.

This is not the case. Having regard to the chronological sequence of the proceedings set out in the Award, it appears that the Appellants were initially given a deadline of September 6, 2019, to comment on the request submitted by the Respondent. At the request of the Appellants and despite the opposition of the Respondent, the Arbitral Tribunal extended said deadline to September 30, 2019. Consequently, the interested parties were given more than a month and a half to comment on the Respondent's request. On September 27, 2019, the son of the Appellants requested a further extension of the deadline, on the grounds that the Appellants were no longer represented by their Serbian lawyers. However, the Appellants themselves conceded in their Appeal Brief (Appeal, no. 86) that said counsel had terminated their mandate on October 2, 2019, the date corresponding to the date indicated in the Award under appeal (Award, no. 1), *i.e.*, after the expiry of the time limit set by the Arbitral Tribunal (September 30, 2019). In these circumstances, it must be admitted that the interested parties, assisted by professional representatives, had the necessary time to comment on the request submitted by their opposite party.

5.3. In the second branch of this grievance, the Appellants argue that the Arbitral Tribunal denied their request for an extension dated November 14, 2019, thus forcing them to submit an urgent response to the costs brief on the last day of the deadline (November 15, 2019).

[8] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/counsel-failure-inform-his-client-not-excusable

Such a statement does not stand up to scrutiny. Indeed, it appears from the Award that the Arbitral Tribunal, by notice of November 15, 2019, invited the Respondent to comment on the request for extension submitted the day before. Even before the Respondent had had the opportunity to comment on the said request, the Appellants submitted, on the same day, an Answer to the Costs Application, thus rendering their request for an extension of time moot. In these circumstances, the Arbitral Tribunal cannot be criticized for having refused any request for an extension. In any event, it is difficult to see how the mere circumstance alleged by the Appellants can be such as to justify the setting aside of the Award on its own, as they do not really show that they have suffered any prejudice as a result of the fact that they did not benefit from the extension of time requested by them.

5.4. In the third and last branch of the grievance in question, the Appellants argue that they did not have the opportunity to submit comments on the Reply submitted on December 4, 2019, by the Respondent. They argue that the Arbitral Tribunal did not give them the opportunity to submit a rejoinder by setting a time limit for this purpose.

As presented, the grievance is unfounded. It should be recalled at the outset that the guarantee of the right to be heard does not in principle imply, in arbitration matters, an absolute right to two rounds of written submissions, provided that the claimant has the opportunity to submit comments in one form or another on the arguments put forward by the Defendant (ATF 142 III 360[9] at 4.1.2). In this case, the Respondent states, without being contradicted by the Appellants, that it had voluntarily submitted a reply, that is, without having been invited to do so. Consequently, the Arbitral Tribunal did not order a second round of written submissions in this case. In these circumstances, the Appellants cannot argue that the Arbitral Tribunal did not set a time limit for them to submit a rejoinder. Indeed, it was open to them to, like the opposing party, make use of their right to submit comments voluntarily on the submissions of the opposing party. In this respect, the fact that they were no longer assisted by a professional representative does not change this. In any event, it should be noted that more than two months elapsed between the submission of the reply and the issuance of the Award, without the Appellants having taken any steps with the Arbitral Tribunal to request the setting of a possible time limit for submitting a rejoinder or to argue that they were not given the opportunity to submit a rejoinder. Accordingly, the Appellants are acting contrary to good faith by invoking an alleged procedural defect that they could and should have pointed out during the Arbitral proceedings.

6.
In a second grievance, the Appellants argue that the Award under appeal is contrary to public policy, as the amount due for costs is exorbitant and out of proportion to the stage of the arbitral proceedings.

6.1. An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should constitute the basis of any legal order

[9] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

(ATF 144 III 120[10] at 5.1; 132 III 389[11] at 2.2.3). This is the case when the award violates some fundamental principles of the law to such an extent as it is no longer consistent with the notions of justice and system of determining values (ATF 144 III 120 at 5.1). Accordingly, for the reasoning of the arbitral tribunal to be contrary to substantive public policy is not sufficient; it is the result of the award that must be incompatible with public policy (ATF 138 III 322[12] at 4.1; 120 III 155 at 6a p 167; 116 634 at 4 p. 637).

In theory, it is not inconceivable that a decision made by an arbitral tribunal on the amount of costs could contravene substantive public policy. However, in an area (costs and expenses) where the Federal Tribunal only intervenes with the utmost deference when it is asked to decide on a grievance of arbitrariness, it must use even greater restraint when this question is asked of it in international arbitration. Thus, it is not sufficient that the amount of costs fixed by the arbitral tribunal may be considered excessive for the Federal Tribunal to intervene in respect of the violation of substantive public policy. However, at the very least, in order to justify such intervention, the costs awarded by the arbitral tribunal to the party entitled thereto must be out of all proportion to the necessary costs incurred by that party in defending its rights, having regard to all the circumstances of the specific case, to such an extent as to offend in a shocking manner the most essential principles of the relevant legal system (judgments 4A_524/2009[13] of March 5, 2010, at 5.2.6.1; 4P.280/2005 of January 9, 2006 at 2.2.2).

6.2. In the Award under appeal, the Arbitrators conclude that the Appellants shall bear the full costs of the Arbitration proceedings and pay their opposite party EUR 653'089.31 as costs, an amount corresponding to that requested by the Respondent. They note that the Respondent had chosen its counsel following a call for tenders and that the fees agreed upon were reasonable. The Arbitral Tribunal then pointed out that the successful bidder engaged the services of Macedonian counsel to assist it, which is a common practice in disputes of an international nature. It also considers that the disparity between the legal fees of the different parties does not mean that a party's higher defense costs are unreasonable. It also notes that the Respondent indicated that it had to consider the solvency issues raised in the Request for Arbitration and notes that the Request for Arbitration was a very comprehensive document with 46 appendixes. In these circumstances, the Arbitrators are of the opinion that the amount claimed by the Respondent for its defense costs is reasonable, even if the Appellants had not yet submitted their statement of claim.

6.3. The Appellants do not contest the apportionment of costs and expenses. They argue, however, that the costs incurred by the Respondent are unreasonable and disproportionate. In their view, a Defendant who decides to waive arbitration at an early stage should be able to do so without incurring significant costs. They argue that the amount awarded to the Respondent for costs is disproportionate to the stage

---

[10] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-260-2017

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

[12] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[13] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/claim-of-issues-omitted-by-arbitral-award-rejected-award-not-inf

of the Arbitral proceedings. According to them, the defense costs claimed by the Respondent relate to the “defense on the merits” as well as transactions unrelated to these proceedings. Therefore, the Appellants argue that the Respondent was wrong for having wanted to “anticipate the preparation of its answer on the merits” even though they had not yet submitted their statement of claim.

6.4. Such arguments do not convince the Court. Indeed, the Appellants should not be able to take advantage of their procrastination and the numerous requests for extensions of time required by them by arguing now that the Respondent should have realized that the Arbitration proceedings might not continue and should have thus refrained from preparing its defense on the merits. In any event, the reasons given by the Arbitral Tribunal as it sought to demonstrate the reasonableness of the costs requested by the Respondent and the outcome reached by the Arbitrators do not appear to be inconsistent with the essential and widely recognized values which, according to the prevailing Swiss conceptions, should form the basis of any legal system. The detailed explanations provided by the Respondent to justify the amount of the defense costs in dispute make it possible to exclude the hypothesis that there was no relation between the costs awarded to the Respondent, on the one hand, and the services provided by its counsel and the importance of the case, on the other.

Consequently, the argument alleging a breach of public policy is unfounded. Under these circumstances, this appeal must be rejected.

The Appellants, who are unsuccessful, shall pay the costs of the federal proceedings (Art. 66(1) and (5) LTF) and pay costs to the Respondent (Art. 68(1), (2), and (4) LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 9’000, are to be borne by the Appellants, jointly and severally.

3.
The Appellants are jointly and severally ordered to pay an indemnity of CHF 10’000 in costs to the Respondent.

4.
This judgment shall be communicated to the parties’ and the interested third party’s representatives and to the Court of Arbitration for Sport.

Lausanne, October 1, 2020

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Carruzzo