4A_277/2017[1]

Judgment of August 28, 2017

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Niquille
Federal Judge May Canellas
Clerk of the Court: Carruzzo (Mr.)

Company X._____,
Represented by Mr. Christophe Imhoos,
Appellant,

v.

Z._____,
Represented by Mr. Elias Haddad and by Mr. Aboud Al-Sarraj,
Respondent.

Facts:

A.
On June 6, 2008, Company X._____ (plaintiff, Appellant), whose seat is in [name of country omitted], relying on an arbitration clause inserted into Art. 10 of the contract that it had entered into on May 21, 1977, with Z._____ (defendant, Respondent) governed by the law of [name of country omitted], for the purpose of carrying out four tourist projects in [name of country omitted], submitted a claim for arbitration against this State with the International Chamber of Commerce (ICC). An arbitral tribunal with three members was constituted, its seat fixed in Geneva and Arabic designated as the language of arbitration.

On November 12, 2011, the Arbitral Tribunal issued a partial award rejecting various submissions raised by the defendant, including a challenge to the Tribunal's jurisdiction.

The Arbitral Tribunal first restricted its examination of the merits of the case to the question of the responsibility of the parties in the failure to implement the projects mentioned in the contract of May 21, 1977, postponing the possible discussion of the monetary claims raised on this subject on both sides. On February 12, 2013, it issued an interlocutory award, the operative part of which states, inter alia, that the

[1] Translator's Note: Quote as Company X._____ *v.* Z._____, 4A_277/2017.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

defendant breached the contract and is consequently liable for the non-execution of two of the four planned projects.

The examination of the case then turned to the amount of the respective quantum claims of the parties. Hearings were held in [name of country omitted] from May 23 to 25, 2016. The President of the Arbitral Tribunal closed the proceedings on June 19, 2016. The Arbitral Tribunal issued its final Award on April 16, 2017.

In accordance with Art. 25(1) of the ICC Rules of Arbitration (1998 edition), the President of the Arbitral Tribunal ruled alone, in the absence of a majority, and each of the two co-arbitrators formulated a dissenting opinion. For the most part, he rejected the requests of both parties.

The references to the Award here below are references to the French translation of the original Arabic text, provided by the Appellant.

B.
On May 22, 2017, the plaintiff (hereinafter, the Appellant) submitted a civil law appeal. Claiming a violation of its right to be heard (Art. 190(2)(d) PILA[2]), it sought an annulment of the Award of April 16, 2017.

The defendant (hereafter, the Respondent) and the Arbitral Tribunal were not invited to submit an Answer.

Reasons:

1.
According to Art. 54(1) LTF[3] the Federal Tribunal issues its judgment in an official language,[4] as a rule, in the language of the award under appeal. When the award was issued in another language (here, Arabic), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal they used Arabic, while in the appeal brief sent to the Federal Tribunal, the Appellant used French, pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst.[5] (ATF 142 III 521[6] at 1). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA (Art. 77(1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission or the ground for appeal raised in

[2] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.
[3] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[4] Translator's Note: The official languages of Switzerland are German, French and Italian.
[5] Translator's Note: Cst is the French abbreviation for the Swiss Federal Constitution.
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal. The Appellant claims that the Arbitral Tribunal violated its right to be heard by refusing to order an independent expert's report for the assessment of the loss of earnings claimed by it as damages for the non-performance of two of the four projects under the contract of May 21, 1977, a loss of earnings estimated by it to be more than USD 300'000'000.

3.1
According to Art. 190(2)(d) PILA, an arbitral award may be challenged where the equal treatment of the parties or their right to be heard in adversarial proceedings has not been respected. This ground of appeal sanctions the only imperative principles of procedure reserved by Art. 182(3) PILA, including the right to be heard properly, the content of which is not different from that of Art. 29(2) Cst. This provision guarantees the parties, among other rights, the right to have the relevant evidence provided in a timely manner and in the form required. In the field of international arbitration, in particular in ICC arbitration, the Federal Tribunal has recognized, even before the entry into force of the Federal Law on Private International Law, on January 1, 1989, the right to have an expert appointed under certain conditions (ATF 102 Ia 493, unpublished, at 8a). It confirmed several times, under this law, the existence of such a guarantee, attached to the right to evidence and, more generally, the right to be heard within the meaning of Art. 182(3) PILA (Judgment 4P.203/1995 of June 10, 1996, at 2a, at 2, unpublished, ATF 121 III 331; ATF 119 II 386 at 1b p.389, Judgment 4P.23/1991 25 May, 1992, (5b), at 6c, unpublished, of ATF 116 II 373).

The conditions that the case-law subjects the right to appoint an expert in international arbitral proceedings have been examined further by Jean-François Poudret (*Expertise et droit d'être entendu dans l'arbitrage international*, in: *Etudes de droit international en l'honneur de Pierre Lalive*, pp. 608 ff, 614 to 616). First, the party who intends to avail itself of this right must have specifically requested the appointment of an expert. Second, the *ad hoc* request must then be submitted in an appropriate and timely manner, and the party must agree to advance the costs. Lastly, the expert's report must relate to relevant facts, that is to say, be likely to bear on the outcome of the award, be able to prove the facts and appear necessary. That will only be the case if, on the one hand, it concerns facts of a technical nature or in any way uses special knowledge, such that the information contained in the report cannot be proved in another way, and if, on the other hand, the arbitrators do not themselves have this knowledge.

As rightly pointed out by Jean-François Poudret (p. 615 *in fine*/616), by establishing the relevance of the fact to be proved on the condition of its right to present evidence in support of its case one deprives it of the purely formal character that is in principle the right to be heard. In other words, the violation of this right cannot be assessed for itself but in relation to the resolution of the dispute. The judge hearing an application for annulment for a rejection of a request to appoint an expert will therefore have to determine whether allowing this evidence could have led to a different award, thus addressing issues both subjective and substantive. However, as under Art. 190(2)(e) PILA, the Court can only assess the weighing of evidence, the application of the law and the solution given to the dispute by the arbitral tribunal from the narrow angle of public policy, it can, most often, exercise only very limited control over the violation of the right to present

evidence in support of a case, even though the law makes it a ground of appeal in its own right (Judgment 4P.115/2003[7] of October 16, 2003, at 4.2, unpublished in ATF 129 III 727 at 1 and 5).

Moreover, the arbitral tribunal may refuse to allow evidence, without violating the right to be heard, if the evidence is inadequate to satisfy the tribunal of the existence of a given fact, if the fact to be proven is already established, if it is irrelevant or if the court, by proceeding with an advance assessment of the evidence, reaches the conclusion that it is already satisfied and that further evidence based on the advance assessment sought by a party can no longer modify its views. The Federal Tribunal cannot review an advance assessment of evidence, except from the extremely narrow angle of public policy (ATF 142 III 360, 4.1.1, p. 361).

3.2
In Chapter 18 of the Award under appeal (pp.102-111, Nos. 377-401), the Arbitral Tribunal sets out the reasons that led it to reject Claim No. 9, in which the Appellant sought compensation for the loss of earnings that had allegedly been caused by the non-performance, attributable to the Respondent, of two of the four projects that the contracting parties had agreed to carry out in [name of country omitted].

It is necessary to give a brief account of these reasons before examining the Appellant's arguments. The Arbitral Tribunal notes that the Appellant submitted to it, on September 12, 2013, its statement concerning the amounts claimed by it in compensation for its loss of earnings, which was accompanied by the following four documents: *first*, a report by A._____ Bank dated November 17, 2006; *second*, an economic feasibility study of May 20, 2008, from a private expert named B._____; *third*, an update, undated, of this study; *fourth*, an undated report by C._____. Regarding the first of these four documents, the Arbitral Tribunal notes that the A._____ Bank study does not constitute an assessment of the loss of earnings, but an investment and prospecting bulletin. With regard to the following two, it notes that Mr. B._____ disavows the authorship of the alleged update of his feasibility study, the latter document containing fundamental modifications compared to the basic study, modifications which were made by the Appellant who, in the update of this study, inserted whole passages taken from the report of the A._____ Bank, in order to amplify the determining elements for the calculation of its loss of earnings and, consequently, to increase the amount of this head of damage. The Arbitral Tribunal also points out that the documents in question were prepared for the case in hand, at a time when the Appellant had indicated its intention to begin arbitration proceedings, so much so that they must be totally disregarded as they constitute an attempt by the party concerned to influence the Arbitral Tribunal and to divert its attention from the facts.

The Arbitral Tribunal then seeks to demonstrate, based on procedural steps taken by the Appellant in support, that this party has not adopted a clear position with respect to the appointment of an expert, sometimes calling for it to go ahead but at other times strongly inviting the Arbitral Tribunal to decide on the matter as it was and to wind up a case that had been pending for many years. In its opinion, in such a situation, it is up to it to use the discretionary power conferred on it by Art. 20(4) of the ICC Rules to order an expert opinion if it deems it necessary or to reject the idea if it does not.

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory

Finally, the Arbitral Tribunal highlights the absence, in this case, of sufficient financial data on which an expert could rely to calculate the loss of earnings alleged by the Appellant. It points out, in this regard, that [name of country omitted] law instructs the plaintiff to prove the facts it alleges to support its claims for damages. Noting that the Appellant has not produced any direct and credible documents concerning the financial situation of its projects forming the subject of the arbitration, it concludes that it is not possible to appoint an expert since the expert will not have any financial data with which to calculate the Appellant's loss of earnings, even by applying the discounted cash flow method recommended by the interested party. In addition, the Arbitral Tribunal indicates the evidence necessary for the application of this method of calculation, only to find that all the essential data for this exercise is missing in the present case, which led it to reject the claim raised by the Appellant in respect of the loss of earnings.

3.3
In its appeal brief, the Appellant points out the conditions under which the case law relating to the right to be heard subordinates the ability of a party to require the appointment of an expert. On the other hand, its demonstration that such a guarantee was not granted in the present case is much more succinct. First, the Appellant argues that, contrary to the Arbitral Tribunal's assertions, it has repeatedly asked for the appointment of an expert. However, it is obliged to admit that it has also, on a few occasions, demanded that the case be decided as it was. At most, it can be conceded that, in its final brief of July 19, 2016, as well as in its claims submitted in November and December of the same year, it stated unequivocally that it was maintaining its request for an expert to be appointed. According to it, it would appear, moreover, that the Respondent had supported this approach.

To follow the Appellant's assertion that the Arbitral Tribunal could not do otherwise than to follow the common approach of the parties along these lines, except by violating the autonomy of the latter, there is a line that the cannot be crossed. This would be to forget that the case-law on the subject, as has been pointed out above, sets out even more requirements for the appointment of an expert. The principle of procedural economy would, moreover, be ignored if an arbitral tribunal were required to allow such evidence solely on the ground that the parties asked it to do so hand in hand, even if one or other of the other conditions justifying its use had not been met in the pending arbitration proceedings.

The Appellant passes – like a cat on a hot tin roof – over the question of the relevance of the facts to be proven, which it limits to speaking of a "loss of earnings" without providing any further details. It is hardly more loquacious with regard to the scope of the purported expert report, merely noting that it "involved technical considerations of an economic and financial nature" in respect of which the Arbitral Tribunal seemed to lack sufficient skills and knowledge.

Last but not least, the Appellant, even if it puts words in the mouth of the President of the Arbitral Tribunal and invokes a simple practice of international arbitration in matters of expertise that would allow the parties to wait for the appointment of an expert before providing all documents and information necessary for the appointment of such an expert, attacks what it calls "an advance assessment of the evidence" which it describes as "gross, incorrect and arbitrary" but whose incompatibility with public policy within the meaning of Art. 190(2)(e) PILA it fails to demonstrate.

In any event, the Arbitral Tribunal did not assess in advance the evidentiary weight of the requested expertise, on the basis of which it would have reached the conclusion that it was already satisfied and that further evidence based on the advance assessment sought by a party could no longer modify its views. It merely found that the request for the appointment of an expert had not been made according in the "manner" required, in the sense that it was not accompanied by the exhibits and accounting documents required by an expert for the performance of the task of assessing the Appellant's loss of earnings and, of course, that there was no longer time for the Appellant to remedy such a defect. Instead, the latter leaves such evidence unchallenged, in particular the considerations set out in the Award under appeal as to the impossibility of applying the discounted cash flow method in the present case for lack of sufficient data.

Under these circumstances, this appeal must be rejected.

4.
The Appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Art. 66(1) LTF).

The Appellant will not have to pay costs to the Respondent, as the Respondent was not invited to submit an answer.

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is dismissed.

2.
The judicial costs, set at CHF 200'000, are to be borne by the Appellant.

3.
This judgment shall be notified to the parties' representatives and to the ICC Arbitral Tribunal.

Lausanne, August 28, 2017

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

The Presiding Judge: The Clerk of the Court:

Kiss Carruzzo