

4A_324/2020¹

Judgment of September 18, 2020

First Civil Law Court

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

A._____,
Represented by Mr. Pascal Marti,
Appellant,

v.

B._____,
Represented by Mr. Blaise Stucki,
Respondent

Facts:

A.

A.a. B._____ (hereafter: the Claimant) is a Singaporean businessman involved in the oil business. He holds the position of Managing Director of the C._____ Group, which comprises various entities including the Singaporean company C.1._____ Ltd. (hereinafter: C.1._____).

In 2009, the Claimant met with A._____ (hereinafter: the Defendant), an Indonesian national, active in various fields including banking and the oil industry.

In March 2013, the two men established the company C.2_____ SA (hereinafter: C.2._____), which later became C.3._____ SA, headquartered in Geneva. The Claimant held 75% of the share capital (75 registered shares with a nominal value of CHF 1'000 each), while the remaining quarter was owned by the Defendant.

¹ Translator's Note:

Quote as A._____ v. B._____, 4A_324/2020.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Around August 2013, investigations into suspicions of corruption were opened in Singapore against the Claimant and C.1._____. As a result of these investigations, it became difficult for C.2._____ to obtain bank financing.

At the beginning of 2014, the Claimant decided to transfer the shares of C.2._____ to D._____ Ltd, a company registered in the British Virgin Islands and owned by his father-in-law. In April 2014, the Claimant signed a draft deed for the sale of his shares to D._____ Ltd; however, this agreement was not executed, which is why the Claimant decided to transfer his shares to the Defendant.

On May 15, 2014, the Claimant and the Defendant signed a contract, entitled "Sale and Purchase Agreement" (hereinafter: "SPA"), under which the Claimant undertook to sell his shares in C.2._____ to the Defendant, in return for payment by the Defendant of the sum of CHF 75'000 within 36 months of the date of transfer.

At an unknown date, the two men also entered into an agreement, entitled "Declaration of Trust", which stipulated, among other things, that the 75 shares of C.2._____ belonged to the Claimant, and not to the Defendant, and that the Defendant held them as a "nominee" or trustee.

On January 28, 2019, the Claimant requested the Defendant return the 75 C.2._____ shares. The Defendant replied that he did not hold any shares in the name of the Claimant but was willing to discuss a further sale of the shares. The Claimant, through his counsel, served formal notice on the Defendant to return the 75 shares of C.2._____ to him. On February 7, 2019, the Defendant replied that he was the rightful owner of the shares.

B.

On March 8, 2019, the Claimant, relying on the arbitration clause inserted in the SPA, initiated arbitration proceedings against the Defendant and C.2._____.

On March 18, 2019, the Claimant submitted a request for emergency measures. By order of April 5, 2019, lawyer E._____, appointed as emergency arbitrator, *inter alia* ordered the Defendant to deposit with him the original share certificate representing 75% of the share capital of C.2._____ as well as the shareholder register of the said company. The Defendant complied and delivered the share certificate to the emergency arbitrator.

A three-member Arbitral Tribunal was constituted, sitting under the aegis of the Swiss Chamber's Arbitration Institution and applying Swiss law, with its seat in Geneva and English as the language of arbitration.

By partial award of September 11, 2019, the Arbitral Tribunal closed the arbitration proceedings in respect of C.2._____.

The Arbitral Tribunal conducted proceedings in Geneva on January 29, 30, and 31, 2020.

On May 27, 2020, the Arbitral Tribunal issued its final Award, the operative part of which reads as follows:

In view of the foregoing, the Arbitral Tribunal hereby issues the final award:

1. Declares that it has jurisdiction to hear the claims and defenses raised in the arbitration;
2. Declares that the sale and purchase agreement of May 15, 2014 is null and void *ab initio* and that Mr. A. _____ cannot, in any event, rely on it to claim ownership of any of the 75 shares (registered shares with a nominal value of CHF 1'000 each) of C.3. _____ SA (formerly C.2. _____ SA) (the "Company") (representing 75% of the share capital of the Company) referred to in the Declaration of Trust (the "75 shares");
3. Declares that Mr. A. _____ held the 75 shares in trust for Mr. B. _____ in accordance with the Declaration of Trust;
4. Declares that the agency/trustee relationship between Mr. B. _____ and Mr. A. _____ was validly terminated by Mr. B. _____ on January 28, 2019;
5. Declares that Mr. B. _____ is the sole beneficial owner of the 75 shares;
6. Declares that Mr. B. _____ is, and has been since the date of incorporation of the company, the beneficial owner of the 75 shares and the sole person holding the voting rights, economic rights and all benefits including, but not limited to, monetary, financial or economic benefits attached to the 75 shares;
7. Orders that Mr. A. _____ validly and fully transfer the 75 shares to Mr. B. _____ and take all necessary steps to ensure that Mr. B. _____ is validly and fully registered as the owner of the 75 shares (...);
8. Orders that Mr. A. _____ be enjoined to transfer to Mr. B. _____ (or to pay to Mr. B. _____ the monetary equivalent of) any profit that Mr. A. _____ or any third party related to Mr. A. _____ received in connection with Mr. A. _____'s holding of the 75 shares, including, but not limited to dividends, loans, a hidden distribution of profits or any benefit of any kind whatsoever;
9. Reserves the right of Mr. B. _____ to claim damages for Mr. A. _____'s delay in performing the obligation to return the 75 shares to Mr. B. _____ and any other obligations under the Declaration of Trust;
- 10....
- 11....
- 12....²

The reasons relied upon by the Arbitral Tribunal in support of this award will be set out below to the extent necessary.

² Translator's Note:

Excerpt in French in the original, translation provided by the Appellant.

C.

On June 17, 2020, the Defendant (hereinafter: the Appellant) submitted an appeal with the Federal Tribunal, with a request for suspensory effect and provisional measures, in order to obtain the annulment of the Award, alleging it violated public policy (Art. 190(2)(e) PILA³).

The Claimant (hereinafter: the Respondent) argued that the appeal was inadmissible and, in the alternative, that it should be dismissed. The Arbitral Tribunal, through its Chair, submitted observations in which it sought to demonstrate that the Award is not contrary to public policy.

The request for suspensory effect and provisional measures was rejected by an Order of the Presiding Judge dated July 27, 2020.

Reasons:

1.

According to Art. 54(3)(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF⁴; RS 173.110), the Federal Tribunal issues its judgment in an official language⁵, as a rule, in the language of the award under appeal. When the decision was issued in another language, the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used English, while, in the appeal briefs sent to the Federal Tribunal, the Appellant used French, pursuant to the requirements of Art. 42(3)(1) LTF in conjunction with Art. 70(3)(1) Cst⁶. (ATF 142 III 521⁷ at 1).

According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.

The Appellant has an interest worthy of protection in the annulment of the award under appeal. His standing to appeal is thus not disputable (Art. 76(1) LTF. A Civil appeal, submitted in due time (Art. 100(1) LTF) and in the required form (Art. 42(1) and (2) LTF), is therefore in principle admissible in the light of the preceding provisions.

Unless an exception is made, which is not relevant in the present case, the civil action against an arbitral award is generally only of a cassatory nature (Art. 77(3)(2) LTF, ruling out the applicability of Art. 107(3)(2) LTF insofar as the latter provision allows the Federal Tribunal to rule on the merits of the case). The Appellant disregards the fact that an appeal to the Federal Tribunal is of a cassatory or “annulling” nature when it asks the Federal Tribunal not only to annul the award under appeal, but also to reject the

³ Translator’s Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.

⁴ Translator’s Note: LTF is the French abbreviation for 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: CST is the French abbreviation for the Swiss Federal Constitution.

⁷ Translator’s Note: The English Translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

Respondent's submissions "in all other respects (...)" and to order the Respondent to pay the costs and expenses of the proceedings conducted by the Arbitral Tribunal. Insofar as the objective of its submissions goes beyond the annulment of this award, such parts are inadmissible.

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 to 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. At least one of the parties was not domiciled in Switzerland at the relevant time. The provisions of Chapter 12 of the LDIP are therefore applicable (Art. 176(1) PILA.

4.

4.1. 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(3)(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 during an on-site visit (Judgement 4A_322/2015⁸ 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, the Federal Tribunal's 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 circumstances 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 (Judgement 4A_386/2010⁹ of January 3, 2011, at 3.2).

4.2. In a section of his Appeal Brief addressed to the Federal Tribunal (pp. 3-6), entitled "Context of Specific Facts" (pp. 3-6), the Appellant presents his own version of the circumstances of the case at hand. He makes assertions, some of which deviate from the findings of the Arbitral Tribunal. This is inconsistent with the nature of a civil law appeal against an international arbitral award and with the Federal Tribunal's power of review. This pseudo-'reminder' of notable facts should therefore be disregarded.

⁸ Translator's Note:

The English Translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected>

⁹ Translator's Note:

The English Translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de>

5.

It is not in dispute that the Parties entered into two legal acts concerning the 75 shares of C.2._____ then held by the Respondent, namely a contract of sale (SPA) and a declaration of trust (“Declaration of Trust”), and that one of these contracts was simulated.

In the award under appeal, the Arbitral Tribunal noted that a contract is a sham contract within the meaning of Art. 18 CO¹⁰ when the parties agree to make declarations that are not in accordance with their true intentions; the legal effects corresponding to the objective meaning of their declarations must not occur. The true intentions of the parties will tend either to produce no legal effect or to produce an effect other than that of the apparent contract; in the latter case, the parties actually want to conclude a second, ‘hidden’ contract. The sham contract is null and void, while the hidden contract, if any, is valid if the legal provisions to which it is subject as to form and content have been observed. Referring then to the case law of the Federal Tribunal, the Arbitrators point out that a fiduciary contract is an agreement by which one party (the settlor) makes the other (the trustee) the unreserved holder of a right against third parties, while towards the other party (the settlor), the trustee is contractually bound not to exercise the assigned right, to exercise it only partially or to return it to the other party (the settlor) under certain conditions. The fiduciary contract therefore necessarily consists of two legal acts, namely, on the one hand, the unreserved transfer of the right *vis-à-vis* third parties and, on the other hand, the restriction of the trustee's rights in the relationship between the contracting parties.

Having carefully examined the circumstances surrounding the conclusion of the two agreements and the behavior adopted by the parties up to the emergence of the dispute, the Arbitral Tribunal finds that the SPA was a sham. The real and shared intention of the Parties was to enter into a trust agreement. The Arbitral Tribunal considered that contract was valid, that it was terminated on January 28, 2019, and that the Appellant is therefore required to return the 75 shares of C.2._____ to his co-contractor.

6.

The Federal Tribunal is bound by the findings of fact of the Arbitral Tribunal relating to the real and shared intentions of the parties, and to the contracts which have actually been concluded. Indeed, to know whether the parties had the (real) intention to feign an agreement is tantamount to ascertaining their internal desire at the time of the conclusion of the contract, that is, a factual element (Judgment 4A_473/2018 of 5 June 2019 at 4.1.3 and the judgments cited). Consequently, there is no need to revisit the Arbitrators’ analysis that the SPA, a sham contract, is null and void, while the hidden contract, that is, the trust agreement, is valid. Thus, the Appellant unsuccessfully argues, on a purely appellate basis, that the Arbitral Tribunal “invalidated the wrong contract.”

7.

In its only argument, the Appellant claims that the Award is incompatible with substantive public policy within the meaning of Art. 190(3)(2)(e) PILA and the case-law relating thereto.

¹⁰ Translator’s Note:

CO is the French abbreviation for Swiss Code of Obligations.

Art. 18 CO refers to “*simulation*,” and here the decision used “[*contrat*] *simulé*,” which we have chosen to translate as “sham.” However, “fake”, “phony”, or even “spurious” could also be used in this context.

7.1. 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 (ATF 144 III 120¹¹ at 5.1; 132 III 389¹² at 2.2.3). This occurs when an award violates some fundamental principles of the law to such an extent as it is no longer consistent with the notions of justice and the system of determining values (ATF 144 III 120 at 5.1). For there to be incompatibility with public policy, it is not sufficient to show that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated (judgment 4A_116/2016¹³ of December 13, 2016, at 4.1; 4A_304/2013¹⁴ of March 3, 2014 at 5.1.1; 4A_458/2009¹⁵ of June 10, 2010 at 4.1).

In determining whether the award is compatible with public policy, the Federal Tribunal does not freely review the legal assessment of the arbitral tribunal on the basis of the facts found in its award. The only thing that matters regarding the decision to be made in terms of Art. 190(2)(e) PILA is the question of whether the result of this legal assessment made completely independently by the arbitrators is compatible or not with the jurisprudential definition of substantive public policy (Judgment 4A_157/2017¹⁶ of December 14, 2017, at 3.3.3).

It should be borne in mind that even when the Federal Tribunal is called upon to rule on an appeal against an award made by an arbitral tribunal having its seat in Switzerland and applying Swiss law, it is bound to observe the manner in which that law has been implemented, the same distance as it would impose upon itself *vis-à-vis* the application of any other law and it must not give in to the temptation of examining with full power of review whether the specific rules of Swiss law have been correctly interpreted and/or applied, as it would do if it were seized of a civil appeal against a state judgment (judgment 4A_318/2018 of March 4, 2019 at 4.5.1; 4A_312/2017¹⁷ of November 27, 2017 at 3.3.4.2; 4A_32/2016 of December 20, 2016 at 4.3).

7.2. In support of his grievance, the Appellant argues that the trust agreement is null and void (Art. 20(1) CO), as the Respondent had devised a legal construction intended to conceal his status as beneficial owner of C.2._____ from Swiss banking institutions. Insisting that the Form A, the content of which is incorrect with respect to the beneficial owner, constitutes a submission of false document within the

¹¹ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-260-2017>

¹² Translator's Note: The English Translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

¹³ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-116-2016>

¹⁴ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed>

¹⁵ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of>

¹⁶ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-157-2017>

¹⁷ Translator's Note: The English Translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-312-2017>

meaning of Art. 251 of the Swiss Penal Code (CP), the Appellant argues that the trust agreement, concluded with a view to concealing the identity of the true beneficial owner, is also illegal.

8.

It is a general principle that participants in proceedings must comply with the rules of good faith. These rules require, in particular, that an adversarial attitude should not be adopted (ATF 135 III 162 at 3.3.1 p.169 and the judgments cited). It is, however, behavior that can be imputed to the Appellant when, changing his mind, he argues, for the first time before the Federal Tribunal, that the trust agreement is null and void because it is unlawful. This new argument, formulated *a posteriori* by the Appellant's new representation, does not correspond to the legal position adopted by the Appellant before the Arbitral Tribunal. Indeed, during the arbitral proceedings, the Appellant never claimed that the trust agreement was unlawful; on the contrary, it argued that it had been a sham, the real and shared desire of the parties being the desire to conclude a veritable sale. Consequently, the Appellant cannot, in good faith, argue today that the trust agreement was not, in fact, a sham, but is nevertheless unlawful.

In any event, the Appellant is badly placed to disparage the Respondent's conduct, accusing him of having organized a veritable "legal architecture of deception and concealment", since it appears from the findings of the Arbitral Tribunal that neither of the contractual partners intended to conclude a sale in due form, but rather to create the illusion of such a sale with regard to third parties, in particular banks. Whether the Appellant likes it or not, the legal construction devised by the parties was achieved by mutual agreement between them. In these circumstances, the Appellant cannot argue, *a posteriori*, the illegality of the contract.

In any event, even if one were to follow the argument put forward by the Appellant, the result of the Award would remain unchanged and compatible with public policy. Indeed, if the Arbitral Tribunal had come to the conclusion that the hidden contract, *i.e.* the trust agreement, was null and void, it would logically have considered that the Appellant had never become the owner of the 75 shares of C.2._____, the transfer of these having been made without a valid reason. In such a case, the Appellant would therefore also be required to return the said shares to the Respondent.

9.

Under these circumstances, the appeal, in so far as it is admissible, must be rejected.

The Appellant, who is unsuccessful, will have charged to the costs of the federal proceedings (Art. 66(1) LTF) and shall pay the Respondent's costs (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected insofar as the matter is capable of appeal.

2.

The judicial costs, set at CHF 30'000, are to be borne by the Appellant.

3.

The Appellant shall pay the Respondent a compensation of CHF 35'000 as costs.

4.

This judgment shall be communicated to the parties' representatives and to the Arbitral Tribunal sitting in Geneva.

Lausanne, September 18, 2020

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

The Presiding Judge:
Kiss

The Clerk of the Court:
O. Carruzzo