4A_530/2020[1]

Judgment of June 15, 2021

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Rüedi (Mr.),
Federal Judge May Cannelas,
Clerk of the Court: Mr. Monti.

1. A._____,
2. Company B._____,
Represented by Mr. Antonio Rigozzi and Mrs. Silja Schaffstein,
Defendants and Appellants,

v.

Z._____ Ltd,
Represented by Mrs. Alexandra Johnson and Mrs. Nadia Smahi,
Claimant and Respondent,

Facts:

A.
The G._____ group, which originated from a business founded by A._____'s grandfather, is a major producer and distributor active mainly in India, the Middle East and Africa.

The group is headed by a holding company called [*name omitted*] Holdings. A._____ and his family own 59.83% of its share capital through the Mauritian company B._____.

The Mauritian company Z._____ Ltd invested in the group. It now holds 40.17% of the shares of the holding company, plus a significant claim on the group.

The group is governed through a Subscription and Shareholders' Deed, subject to English law, which has been amended several times. This agreement contains an arbitration clause binding, *inter alia*, the group holding company, A._____, Company B._____ and Z._____ Ltd.

[1] Translator's Note: Quote as A._____ and Company B._____ *v.* Z._____ Ltd., 4A_530/2020. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

It sets out a list of acts that fall within the reserved area. The "A._____ parties" (including A._____ and Company B._____) agree that no company in the group will undertake such acts without the written consent of Z._____ Ltd.

The agreement contains clauses allowing Z._____ Ltd. to liquidate its investment and exit the group. As a last resort, Z._____ Ltd can request the sale of 100% of the shareholdings in the companies concerned by requiring the other shareholders to sell at the same price as Z._____ Ltd ("Drag Sale"[2]).

Finally, clause 16.4 gives Z._____ Ltd a direct right of action against the "A._____ parties", on its own behalf or on behalf of a group company. The "A._____ parties" shall jointly and severally indemnify Z._____ Ltd for any loss resulting from the breach of contractual obligations.

On April 1, 2011, A._____ became an executive director of the holding company, with an "employment contract" with the latter (Employment Contract or Service Contract, depending on the expression used in the award under appeal).

In August 2014, P._____ was appointed Chief Executive Officer of the group (hereinafter "CEO").

The group recorded poor financial results, generating tensions between shareholders which began to crystallize around the person of the CEO. On December 18, 2016, A._____ decided to suspend the CEO and to assume this function himself *ad interim*, without having obtained the consent of Z._____ Ltd.

On December 20, 2016, the group's holding company, represented by the directors of Z._____ Ltd, obtained an injunction from the High Court of Justice of England and Wales ordering A._____ to cease his actions. The High Court of Justice of England and Wales subsequently extended the injunction, in particular by a decision of March 26, 2018 ("Final Relief Judgment"[3], see at 6.4 below).

B.

B.a. On December 22, 2016, Z._____ Ltd submitted a request for arbitration with the London Court of International Arbitration (LCIA) against A._____ and Company B._____. It was based on the arbitration clause inserted in the shareholders' agreement.

The request contained three types of submissions:

- Legal submissions relating to the suspension of the CEO P._____ and the assumption of this function *ad interim* by A._____. These acts were to be declared invalid on the grounds that they were within the reserved area, had been carried out without the consent of Z._____ Ltd and were therefore in breach of the shareholders' agreement;
- Submissions that A._____ should cease its behavior and that the two Defendants should ensure that no company of the group acted in the reserved area, and

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

- Lastly, submissions for the payment of damages.

The Defendants submitted an Answer on January 17, 2017.

Under the auspices of the LCIA, a Tribunal composed of three arbitrators was formed. In accordance with the arbitration clause, its seat was set in Geneva, Switzerland, while English was designated as the language of the proceedings. The LCIA Arbitration Rules ("LCIA Arbitration Rules", as they read on October 1, 2014) were declared applicable.

B.b. On March 16, 2017, the Claimant proposed to the Defendants the parties suspend the arbitration due to the proceedings initiated by the group holding company in the English High Court of Justice, before which it, as well as A._____, was being sued. It also suggested that the Defendants agree to be bound by any decision that the High Court of Justice might issue, in particular with respect to the interpretation of the shareholders' agreement.

On March 17, 2017, the Defendants stated that they consented to the proposal to suspend the arbitration, without prejudice to any claims they might make against Z._____ Ltd in the English proceedings. The Arbitral Tribunal stayed the proceedings by order dated April 19, 2017.

The High Court of Justice, in the person of Judge J._____, issued a judgment on December 13, 2017, ("Liability Judgment"[4], according to the expression used by the arbitrators; see in addition at 6.4 below). The Claimant submitted it in the arbitration on December 29, 2017, together with a draft "Consent Award"[5]. This reflected certain parts of the High Court's judgment as well as the injunctions issued by that authority.

On January 3, 2018, the Defendants confirmed to the Arbitrators that they approved this letter of December 29, 2017, and its appendixes, containing the aforementioned draft award.

B.c. On February 27, 2018, the Claimant requested leave to amend its submission on the grounds that two new disputes had arisen in connection with the shareholders' agreement: the first concerned its right to implement a forced sale of the shares ("Drag Sale"[6]); the second resided in the commencement of a liquidation action in Dubai ("Winding Up Claim"[7]). Considering that the English High Court had decided many of the issues raised in its original submission, it sought a "partial final award" reflecting the terms of the English judgment and furthermore maintained its submission for damages.

The interested party submitted an amended request on April 9, 2018.

B.d. On May 9, 2018, the Arbitral Tribunal issued an Award containing findings of law and injunctions by which it resolved part of the Claimant's submissions.

---

[4] Translator's Note: In English in the original text.
[5] Translator's Note: In English in the original text.
[6] Translator's Note: In English in the original text.
[7] Translator's Note: In English in the original text.

In its discussion, the Tribunal explained in substance that the parties' express agreement to the findings made in the draft "Consent Award" relieved it from considering the merits of the submissions concerned. This settlement was to be recorded in accordance with Art. 26.9 of the LCIA Arbitration Rules.

This decision was confirmed on September 6, 2018, after the Arbitral Tribunal changed its president. The nationality of the previous president had caused an incident that led to their resignation. However, the new Arbitral Tribunal saw no reason to annul the award of May 9, 2018, as the Defendants had given their consent and the Arbitrators had made changes on minor points only.

B.e. On November 15, 2018, the Arbitral Tribunal issued a partial award finding that the Claimant was entitled to implement a forced sale of the shares ("Drag Sale"[8]) as of January 1, 2018. A._____ and Company B._____ submitted an appeal to the Swiss Federal Tribunal, which they subsequently withdrew; the case was removed from the list (4A_3/2019, order of April 11, 2019).

B.f. On February 28 and April 23, 2020, Z._____ Ltd submitted a request and restated their submissions. The Defendants did not submit an answer.

B.g. On May 21, 2020, the Arbitrators held a hearing by video conference after denying the Defendants' request for a postponement (see at 5.3 below).

B.h. The Arbitral Tribunal issued its final Award on September 15, 2020. In the operative part of the Award, it made the following four findings (n. 135):

1) A._____ breached his employment contract and the shareholders' agreement by:
   i) suspending P._____, by installing himself as CEO of the group on December 18, 2016, and by dismissing four senior employees,
   ii) conducting a sustained campaign of aggressive abuse and obstruction against the group's management,
   iii) inciting or encouraging the union to exclude management from the U._____ (in India), and
   iv) setting up a parallel management structure.

The aforementioned party continued his conduct after his employment contract was terminated, as found in the Final Relief Judgment [issued on March 26, 2018, by the English High Court of Justice, ed.]

2) A._____ further breached the shareholders' agreement by submitting a winding-up claim in Dubai on January 20, 2018, to place a group company (Q._____ Ltd) without having obtained the prior consent of Z._____ Ltd.

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

3) In doing so, he also violated his obligation to cooperate and not to hinder the forced sale of shares ("Drag Sale"[9]), arising from the same shareholders' agreement.

4) Both Defendants A._____ and Company B._____ are jointly and severally liable to indemnify the Claimant for any loss suffered by a group company as a result of the Claimant's breach of the shareholders' agreement and the employment contract.

The Arbitral Tribunal also awarded the Claimant damages of USD 8'167'399, with interest at 5% per annum from the date of the Award (operative part, n.136-137 of the Award).

In the discussion preceding this operative part, the Arbitral Tribunal explained that a large part of the alleged contractual breaches had been established by the judgments of the English High Court, whose analysis should be reproduced as it stands (see at 6.5 below).

The Arbitral Tribunal then dealt in detail with the various items of damage caused by A._____'s conduct, including in substance:

- a loss of profit on retail sales in India,
- the postponement or cancellation of cost-saving projects,
- the delay or cancellation of product design innovations and updates intended to increase sales salary costs due to the refusal to lay off underperforming employees,
- lost time for management forced to manage disruptions caused by the aforementioned party wage increases to retain employees adversely affected by the conflict
- costs resulting from the blockade of the U._____ plant,
- the costs of various civil and criminal proceedings instituted by A._____ and his supporters,
- the costs incurred by instituting the proceedings in Dubai

On October 2, 2020, at the initiative of the Claimant, the Arbitral Tribunal corrected its Award on the basis of Art. 27 of the LCIA Arbitration Rules. It increased the amount of the Award to USD 9'366'603.

Finally, the Arbitral Tribunal fully accepted the amended submission on April 23, 2020.

C.
On October 14, 2020, A._____ and Company B._____ submitted a civil appeal with the Swiss Federal Tribunal seeking to annul the final Award.

At the request of the Respondent Z._____ Ltd., the Appellants were ordered to provide CHF 35'000 as security for possible costs (order of December 10, 2020). This was done in a timely manner.

The Respondent submitted an Answer, concluding that the appeal was inadmissible or that it should be rejected on the merits.

---

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

The Appellants replied, prompting a rejoinder from their opposite party.

The President of the Arbitral Tribunal referred to its Award. While he had been invited to produce the case file, he indicated that he had asked the parties to consult and produce the relevant documents.

In fact, the parties attached various documents in support of the appeal, the request for security for costs, the Reply, and the Rejoinder.

Reasons:

1.
According to Art. 54(1) LTF,[10] the Federal Tribunal issues its judgments in one of the four official languages, as a general rule, in the language of the award under appeal. When the decision is issued in another language (here English), the Federal Tribunal uses the official language[11] used in the appeal, which in this case is French (ATF 142 III 521[12] at 1; Judgment 4A_54/2019 of April 11, 2019, at 1).

2.
2.1. In the field of international arbitration, a civil appeal is admissible under the conditions of Art. 190-192 PILA[13] (Art. 77(1)(a) LTF). The arbitral award can only be challenged on the legal considerations exhaustively set out in Art. 190(2) PILA.

The admission of the appeal leads to the annulment of the award and not to its revision, except in cases relating to the jurisdiction of the arbitral tribunal (see Art. 77(2) LTF which restricts the scope of Art. 107(2) LTF; ATF 136 III 605[14] at 3.3. 4; Judgment 4A_476/2020 of January 5, 2021, at 2.2).

In casu, the international nature of the arbitration and the applicability of Chapter 12 PILA (see Art. 176(1) PILA) are not in dispute.

Whether as to the subject of the appeal, the nature of the appeal, or the time limit to appeal, none of these admissibility requirements raises any problems in this case. At this stage, the admissibility of the various arguments raised will be examined in the light of the requirements set out below.

---

[10] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

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

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

[13] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

2.2. The Federal Tribunal examines only the grievances that have been raised and substantiated by the Appellant (Art. 77 (3) LTF). This must satisfy the same strict requirements for the statement of reasons applicable to the grievance of breach of constitutional rights (see Art. 106(2) LTF; judgment – cited above – 4A_476/2020 at 2.3; Judgment 4A_600/2020[15] of January 27, 2021, at 5.1).

2.3. The Federal Tribunal decides on the basis of the facts contained in the award under appeal (see Art. 105(1) LTF). It is also bound by the findings on the course of the proceedings, whether they concern the alleged facts, the parties' submissions, the legal explanations given by the parties or the statements made during the proceedings (Judgment 4A_346/2020[16] of January 6, 2021, at 5.2; aforementioned Judgment 4A_476/2020 at 2.4).

3.
The Appellants raise two grounds for annulment provided for in Art. 190(2) PILA, namely, *first*, the breach of the right to be heard in adversarial proceedings and of the principle of equality of the parties (letter d) and, *second*, the incompatibility with public policy (letter e). They target two distinct issues:

- the refusal to postpone the hearing of May 21, 2020;
- the fact of having given *res judicata* effect to the English judgments and, more generally, of having retained without factual or legal discussion the principle of contractual liability of the Defendants.

These two branches of the grievance will be examined in turn. First, however, a remark must be made concerning the drafting technique adopted by the Arbitral Tribunal.

4.
This dispute, which was submitted in December 2016, has undergone many procedural twists and turns. It represents only one aspect of the serious disagreements that divide shareholders, who are now at loggerheads. The Arbitral Tribunal has refrained from presenting the overall situation and tracing the full course of the proceedings, instead referring to previous decisions issued on November 15, 2018, and September 6, 2018, (the latter of which further redirects the reader to an earlier award of May 9, 2018), or to its order handed down from the bench on May 21, 2020. Furthermore, the Arbitrators attributed binding effect to the English High Court's judgments, which they "incorporated" into their Award. This "nesting dolls" technique does not make the dispute any easier to understand, to put it mildly. This being said, although the Appellants argue against the "minimalism" of the Award under appeal, they do not argue that it contravenes the rules of form adopted by the parties or, in the alternative, the minimum requirements applicable (on this question, see Art. 189 PILA; Wirth/Magliana, in *Basler Kommentar*, 4th ed. 2020, no. 36 *ad art.* 189 PILA; Christian Oetiker, in *Zürcher II*, 3rd ed. 2018, nos. 54-56 to Art. 189 PILA; Andreas Bucher, in *Commentaire romand*, 2011, nos. 7-9 to Art. 189 PILA).

---

[15] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-600-2020

[16] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-346-2020

This Court will simply point out that a reading of the various arbitration awards and the English judgments will finally make it possible to reconstitute the puzzle and to find the elements necessary to respond to the grievances. The summary of facts presented above incorporates elements gathered from the decisions referred to in the final Award.

I. Refusal to postpone the hearing of May 21, 2020

5.

5.1. The Appellants argue that the Arbitral Tribunal wrongly rejected their request to postpone the hearing by a few weeks, thus depriving them of the opportunity to present a defense, to cross-examine witnesses and to present their arguments. Their request, which was repeated on several occasions, was based on exceptional circumstances, namely the crisis related to the COVID-19 coronavirus. The Arbitrators also allegedly treated the parties unequally by granting a deferral to the Respondent.

5.2. As guaranteed by Art. 182(3) and 190(2)(d) PILA, the right to be heard gives the parties the right to present all their arguments of fact and law on the subject of the dispute, to propose their means of proof on the relevant facts, to participate in the hearings and to be represented or assisted before the arbitrators. As for the principle of contradiction, it guarantees to each party the right to pronounce on the arguments of its adversary, to examine and discuss the evidence brought forward by the latter and to refute it by its own evidence. Finally, in accordance with the principle of equality, the arbitral tribunal must treat the parties in a similar manner at all stages of the proceedings. The proceedings must be regulated and conducted in such a way that each party has the same opportunity to present its case (BGE 142 III 360[17] at 4.1.1; 133 III 139 at 6.1 p 143).

5.3. It is appropriate to first relate the facts relating to the organization of the hearing at issue, in a somewhat summarized form.

After the Defendants/Appellants had withdrawn their appeal against the Partial Award of November 15, 2018 (B(e), above) the Arbitral Tribunal questioned the parties on the further proceedings. The Claimant/Respondent suggested a hearing in March 2020 and proposed a procedural schedule. The Defendants, through a law firm (M._____), argued that there were logistical difficulties in dealing with the present arbitration and a parallel arbitration involving eight parties (including the parties to this dispute, Ed) and that there was no urgency in resolving the remaining issues in dispute, which were limited. They suggested waiting for an award in the parallel arbitration, which would have started the procedural calendar in April 2020 at the earliest.

In a December 6, 2019, conference call, A._____ renewed his opposition to the opposing party's proposed schedule, citing the possibility of adding evidence on UAE law.

On December 11, 2019, a new law firm (N._____) informed the Arbitral Tribunal that it was now representing the Defendants with the assistance of Mr. O._____, an Indian lawyer who had worked

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

with the previous firm. On December 16, 2019, the new representative cited logistical difficulties in other unrelated cases and suggested a hearing in September 2020. The Arbitral Tribunal considered this date too far in the future and proposed a hearing in June 2020.

On February 4, 2020, the Defendants' Representative requested that the arbitration be terminated on the grounds that the Claimant's claims had been substantially resolved by the partial decisions of the Arbitral Tribunal and the High Court of Justice; to the extent that any issues remained outstanding, they should be addressed either in a new arbitration or in the eight-party arbitration. The Tribunal denied this request by order dated March 2, 2020.

In the meantime, the firm N._____ announced that it was no longer representing the Defendants and that Mr. O._____ was also withdrawing.

On February 28, 2020, the Claimant submitted an updated request and statements from three witnesses. The Defendants did not submit an answer.

On March 25, 2020, the Arbitral Tribunal invited the Parties to indicate whether the hearing scheduled for June 2020 could be held by video conference, given the COVID-19 crisis.

The Claimant responded in the affirmative. On April 9, 2020, A._____ renewed the request to terminate the arbitration, claiming that they were unable to hire a law firm due to the pandemic and objecting to any schedule suggested by the opposing party or the Tribunal.

The Tribunal refused to reconsider its decision, arguing that the Defendant had failed to demonstrate the impossibility of hiring new counsel. It proposed a video conference hearing on May 7, 2020, while inviting the Parties to promptly indicate whether they wished to adjust that date due to the pandemic. The Claimant cited logistical difficulties, and the Tribunal rescheduled the hearing to May 21, 2020, although it recommended that the Parties promptly indicate whether this date was problematic. There was no response from the Defendants.

The Arbitral Tribunal and Claimant's counsel then exchanged emails regarding, among other things, a test of the video conferencing facility. The Defendants did not participate in the test.

Noting that the Defendants had not provided any responses or witness statements within the time limits, the Tribunal asked A._____ three times to indicate whether the Defendants intended to participate in the May 21, 2020, hearing. A._____ did not respond.

On May 20, 2020, shortly after 5:00 p.m., A._____ indicated that it would be 2:00 a.m. for him when the hearing scheduled for the following day at 10:00 a.m. English time began. Later that evening, Mr. O._____ announced that he was again representing the Defendants, requested a face-to-face hearing rather than a video conference and asked for a postponement to the end of August 2020, given the difficulties inherent in the COVID-19 crisis.

The hearing was held by video conference on May 21, 2020. Appearing for the Defendants, Mr. O._____ requested a postponement to July on the grounds that he was not prepared to deal with the issues raised by the Claimant. He explained that he had been briefed the previous evening and had not received any instructions.

The Arbitral Tribunal rejected the postponement. In its decision from the bench, it emphasized in substance that Art. 14 of the LCIA Arbitration Rules required it to conduct the proceedings expeditiously. The issues remaining after the partial award had been outstanding for a considerable period of time, and the Tribunal had endeavored to move the proceedings forward in order to resolve them expeditiously, which was apparent to the Respondents. Their repeated changes of counsel had caused delays; even though they were entitled to do that, the Defendants should cooperate with the Tribunal. After the Tribunal refused to terminate the proceedings, the Defendants could have indicated if they had any difficulties with the procedural timetable, but they did not. Nor had they reacted when the Arbitral Tribunal had agreed to postpone the hearing date on the Claimant's request. Moreover, the Defendants did not dispute that they had been assisted by lawyers before the High Court of Justice between February and April 2020, sometimes even by Mr. O._____; they did not explain why they had not been able to do the same in the present proceedings. In short, the Defendants had had every opportunity to participate in the proceedings by providing evidence, making written and oral submissions, and announcing well in advance of the hearing if they were prevented from participating. However, such an impediment was not invoked until 11 p.m. the day before the hearing.

Faced with the refusal of the postponement of the hearing, Mr. O._____ declined the offer to participate in the hearing or to attend it and withdrew after reserving his clients' rights.

The Tribunal heard three witnesses (including P._____) who had also been heard by the English judge. At the end of the hearing, it gave the Parties 14 days to make written submissions in relation to the costs and declared the Arbitration closed, except for this issue and the issuing of the final Award.

5.4. The Appellants waited until after the final Award was notified to challenge the rejection to postpone the hearing. Can they be faulted for not having categorically opposed the making of the Award and for not having insisted on a new hearing?

The principle of good faith requires the litigant to point out possible procedural defects in time to try to obtain their remedy *pendente lite*, rather than keeping such an argument in reserve and only raising it in the event of an unfavorable outcome of the arbitration proceedings. Failure to comply with this obligation is usually sanctioned by the lapse of time (Judgments 4A_40/2018 of September 26, 2018, at 3.3.1 and 3.3.3; 4A_70/2015[18] of April 29, 2015, at 3.2.1; ATF 119 II 386 at (1)(a) p.388; see the reservation made for serious defects that must be remedied ex officio: judgment 4P.282/2001 of April 3, 2002, at 8).

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

In this case, the breach of the rules of good faith is not obvious, given that the Tribunal had declared the proceedings closed except for the question of costs. In any case, the Appellants are faced with another stumbling block than possibly forfeiting their right to sue.

5.5. The Appellants do not contest the age of the dispute, nor the need to expedite. Nor do they dispute the delays due to their change of lawyers and their duty to cooperate with the Tribunal.

According to their argument, the pandemic placed them in an exceptional situation that justified a delay of a few weeks. It appears, however, that even before the COVID-19 crisis, the Appellants were already seeking to postpone a final award, even expressly acknowledging the lack of urgency in resolving the issues still in dispute. They twice raised logistical difficulties, first using the argument of a parallel arbitration without its relevance being demonstrated, and then that of a representative who was allegedly busy with other matters when she had just been appointed. They also raised the possibility of adding evidence on a foreign law without it being known whether they did so. They first requested the termination of the proceedings on the grounds that the disputed points should be dealt with in another proceeding. After their new representative announced the end of her engagement on February 28, 2020, they did not react until April 9, 2020, when they again requested the termination of the proceedings, this time arguing that they were unable to find a law firm in the context of the pandemic. They did not react when the Tribunal argued that had not demonstrated such an impediment and did not respond to its requests, refraining from participating in the technical preparations for the video conference. They appeared only the day before the hearing, represented by the Indian lawyer who had already participated in their defense.

The Appellants were paradoxical in demanding a face-to-face hearing rather than a video conference in the middle of the COVID virus. Moreover, they wrongly minimize the fact that at the same time, they managed to be represented in the English proceedings, notably by Mr. O._____. In this light, the argument that it was not possible to find a lawyer because of the COVID crisis appears specious. As for the argument that it was difficult to gather counter-witnesses and experts in the midst of a pandemic, it might have been successful if it had not been formulated in such a vague and imprecise manner, and if it had been expressed before this appeal, which the Award does not note. The Appellants were careful not to indicate, even briefly, which witnesses and experts they proposed to call and on which questions. The credibility of this argument is irremediably compromised.

The Appellants do not establish that they were actually prevented from submitting an answer and witness statements. Nor do they explain what prevented them from coming forward and setting out their alleged difficulties when the Arbitral Tribunal invited them to do so. Furthermore, in their appeal, they do not attempt in any way, even summarily, to demonstrate what evidence, what relevant factual or legal arguments they could have presented if they had benefited from the requested postponement in order to allegedly prepare their defense in the necessary way (see above-mentioned Judgment 4A_70/2015 at 3.2 (2 i.f.).

However, if the right to be heard is a formal constitutional guarantee, the breach of which in principle leads to the annulment of the decision under appeal, regardless of the chances of success of the appeal

on the merits, the litigant is expected to explain what influence the alleged defect may have had on the procedure when it is not immediately perceptible (Judgement 4A_198/2020 of December 1, 2020, at 4.2 and references cited; ATF 143 IV 380, at 1.4.1). The silence of the Appellants on this point only reinforces the conviction that the alleged difficulties in finding a lawyer and in gathering evidence in the middle of COVID were only a pretext.

In this context, the Arbitrators could refuse to postpone the hearing without breaching the Appellants' right to be heard.

5.6. The Appellants also argue that there was a breach of the principle of equal treatment. They argue that the Arbitral Tribunal wrongly granted the request of the other party by agreeing to postpone the hearing date from May 7 to 21, 2020, under the pretext of logistical problems.

The Award does not state what those logistical issues were ("certain logistical issues for the hearing"). It appears, however, that the Claimant/Respondent worked with the Arbitrators to advance the proceedings and find a timetable, attempting to obtain a hearing as early as March 2020.

In the context of COVID, the Arbitral Tribunal proposed a video conference in lieu of the hearing scheduled for June 2020, which it set for May 7, 2020. Mindful of the difficulties caused by the pandemic, the Tribunal invited the Parties to indicate whether they wished to propose an adjustment to this date, stating that it would endeavor to accommodate reasonable requests. It was in this context that the Claimant cited logistical problems. The Tribunal then extended the date to May 21, 2020, without consulting the Defendants/Appellants, but recommending that the parties report any difficulties with the date as soon as possible. However, the interested parties did not react (except on the eve of the hearing).

The Arbitral Tribunal cannot be accused of having treated two similar situations in an unequal manner, since they were clearly not similar.

5.7. In short, the reasons under Art. 190(2)(d) of the PILA prove to be inconsistent insofar as they are aimed at the refusal to postpone the hearing.

II. Res judicata of the judgments of the High Court of Justice and the right to be heard

6.

6.1. In a second, twofold grievance, the Appellants allege a simultaneous breach of procedural public policy and of their right to be heard. The Arbitral Tribunal wrongly attributed the authority of *res judicata* to the decisions of the High Court of Justice, in disregard of the Swiss concept of *res judicata*. It allegedly disregarded the fact that only the operative part of a decision can be given such authority, to the exclusion of the discussions. Moreover, the English and arbitration proceedings did not have the same subject, and Company B._____ was not a party to the former. Finally, the Tribunal allegedly breached its minimal duty to consider the relevant issues by holding them contractually liable without further consideration.

6.2. The argument relating to procedural public policy will be dealt with first. In order to examine it, it is necessary to recall the outline of the concept of *res judicata* (at 6.3). The content of the English judgments will then be summarized (see 6.4), before presenting the Arbitrators' reasoning (at 6.5) and to decide on this first branch of the grievance (at 6.6). It will then be the moment to deal with the argument based on the right to be heard (at 6.7).

6.3. Public policy within the meaning of Art. 190(2)(e) of the PILA has a procedural aspect (ATF 141 III 229[19], at 3.2.1).

According to the case law, an arbitral tribunal breaches procedural public policy if it rules without taking into account the *res judicata* effect of a previous decision or if it departs in its final award from the opinion it had expressed in a preliminary ruling on a preliminary question of substance (BGE 140 III 278[20], at 3.1. p 279; 136 III 345[21] at 2.1 p 348). In an obiter dictum, the Court specified that such an infringement may also result from the fact that an arbitral tribunal wrongly attributes *res judicata* status to a previous arbitral award and refrains from examining an issue when the claim at issue is not identical to the one already decided (ATF 141 III 229, at 3.2.6 p 239 i.f.). This analysis is approved by Bernhard Berger. This author points out that in this situation, there is no risk of seeing two contradictory decisions simultaneously enforceable; however, it is precisely this element that is considered to be contrary to public policy (see ATF 127 III 279 at 2b). This being the case, a court that wrongly considers itself bound by an earlier judgment would be committing a denial of justice and would be breaching the right to a fair trial, which is also a matter of procedural public policy (Bernhard Berger, *No Force of Res Judicata for an Award's Underlying Reasoning*, in Bulletin ASA 2015 p. 656 f.).

In the Swiss conception, only the operative part of the decision is *res judicata*, to the exclusion of the reasoning, even though the analysis of the reasoning is sometimes necessary for the understanding of the operative part (ATF 141 III 229 at 3.2.6 p 238; 128 III 191 at 4a p 195).

Some countries (in particular common law countries) have a broader definition of *res judicata* and know of issue estoppel or issue preclusion: questions of fact and/or law constituting the necessary and essential basis of a final decision taken by an appropriate authority cannot be judged again in a subsequent proceeding between the same parties or their successors, even if the action is based on another cause (see Edith Charbonneau, *Préclusion, Res Judicata et Préclusion découlant d'une question déjà tranchée: Clarification is needed!* in Canadian Bar Review 2015, vol. 93 No. 2, pp. 373-375 and 386 ff [available at www.canlii.org]; Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals*, 2016, n. 1.24-1.25 and 6.75).

---

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

According to Swiss case law, *res judicata* also applies internationally, provided that the foreign decision (issued by a state court or an arbitral tribunal) can be recognized in Switzerland (ATF 141 III 229 at 3.2.2; 127 III 279 at 2b p. 283). However, a recognized foreign judgment can only have the authority in Switzerland that it would have if it had been issued by a Swiss state court or an arbitral tribunal located in Switzerland. Thus, even if, according to the law of the State of origin (*lex loci decisionis*), the authority extends to the legal considerations underlying the said judgment, it will only be admitted in Switzerland for the main points of its operative part (BGE 141 III 229, at 3.2.3; 140 III 278 at 3.2).

An arbitral tribunal based in Switzerland must therefore determine the authority of a previous decision in accordance with the *lex fori*, *i.e*., the principles developed by the Federal Tribunal in matters of *res judicata*, unless an international treaty provides otherwise (Berger, *op. cit*., Bulletin ASA 2015 p. 645).

One part of the legal commentary, following the example of the International Law Association, would like to impose a broader notion of *res judicata* in international commercial arbitration cases, sometimes distinguishing according to the jurisdiction (state or arbitral) from which the first decision emanates and according to the nature of the question already decided (principal or preliminary) (Schaffstein, *op. cit*. 6.73 ff; see Recommendation No. 4 of the ILA [International Law Association], reproduced in the aforementioned work at No. 6.195, which does not, however, regulate the relationship between state courts and arbitral tribunals). The Federal Tribunal has refused to do so (ATF 141 III 229, at 3.2.5). Some commentators disagree with this, while conceding that the ILA Recommendations and the doctrine of issue preclusion have not really taken hold in international practice (see Voser/Raneda, *Recent Developments on the Doctrine of Res Judicata in International Arbitration* [...], in Bulletin ASA 2015 p. 764-766, 774 and 776-778, who argue for a greater autonomy of arbitrators; Xavier Favre-Bulle, in *SRIEL 2016* 682; Schaffstein, *op. cit*, n. 6.75 ff.). Others consider this position to be consistent with the definition of public policy (Berger, *op. cit*., Bulletin ASA 2015 p. 653 f.; the same author, in RSJB 2017 p. 291 i.f. - 292; cf. also Luca Beffa, in *New Developments in International Commercial Arbitration 2015*, pp. 277-278).

6.4. In its Judgment of December 13, 2017, the English High Court of Justice (under Judge J._____) made the following considerations, among others:

- The main issue in the proceedings was to determine whether A._____'s employment contract had been validly terminated.

  A._____ had breached the employment contract and the shareholders' agreement in several ways:
  i) he had engineered a “coup” by removing the CEO P._____ and serving in that capacity himself, only to fire four senior executives and place a man from his inner circle in a senior position;
  ii) he had undertaken a sustained campaign of aggressive abuse and intimidation of P._____ and management

iii) he had induced or encouraged the union to exclude management from the U._____ plant premises in India, in order to consolidate his own power and impose his strategy on the business;
iv) even after the CEO and the four dismissed managers were reinstated, he continued to maintain a parallel management structure.

- The seriousness of these breaches justified the termination of the employment contract on February 10, 2017, which was therefore valid. The Parties still needed to be heard on the appropriate form of relief. A._____'s counterclaim was to be rejected.

The High Court issued a further decision on March 26, 2018 ("Final Relief Judgment"[22]), extending the scope of the injunctions that had previously been issued. This very concise decision held, among other things, that the conduct found in the December 13, 2017, judgment continued; A._____ remained determined to bring the group under his own control or, alternatively, to destroy the business and compete with it.

6.5. The Arbitral Tribunal considered whether, as argued by the Claimant, it was bound by the English judge's analysis of various contractual breaches committed by A._____.

In support of this legal commentary reference, he specified that the Defendants' failure to appear at certain stages of the proceedings, in particular at the hearing of May 21, 2020, did not exempt the Claimant from proving the facts underlying its submission, the merits of which he had to examine (Gunter/Marinkovich, *Default Proceedings, in Arbitration in Switzerland: The Practitioner's Guide*, vol. II, 2nd ed. 2018, p. 2667 n. 10 and p. 2668 f. n. 17 f.; see also Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, p. 410 n. 1177).

The Tribunal then noted that the vast majority of the contractual breaches alleged by the Claimant had been established by the English High Court of Justice after a very thorough evidentiary process, following the hearing of eleven witnesses (including the CEO P._____ and A. _____.)

It ultimately found itself bound by the findings of fact and legal analysis made in the English judgments of December 13, 2017, and March 26, 2018, for the following reasons:

- With regard to Z._____ Ltd and A._____, who were both parties to the English proceedings, these judgments were *res judicata*. The same contractual breaches were at issue in both proceedings.
- To put it slightly differently, although with the same effect, one could speak of a form of issue estoppel. As long as an issue had been finally decided in one court proceeding, the parties could not lead another court to make a different analysis.
- A third way was to treat English judgments as evidence. In the absence of evidence to the contrary, it was highly persuasive.

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

- Even if Company B._____ had not participated in the English proceedings, it was inconceivable that the Arbitral Tribunal would adopt the English judge's analysis of the relationship between the Claimant and A._____ as it stood, and then adopt a different solution in the relationship between the Claimant and the aforementioned company. This consideration was valid even in the event that the Tribunal had evidence to justify a different decision, which was not the case here.
- In 2017, the Parties agreed to suspend the arbitration to allow the English High Court to rule on the issues before it. The exchange of letters of March 16 and 17, 2017, [see B.b supra, Ed] may not have been a clear indication of a willingness to be bound by the discussions in those proceedings, but it was certainly one possible reading. In any event, the Defendants had requested that the arbitration be terminated by letter dated February 4, 2020, on the basis that the High Court had already decided the majority of the claims raised in the amended arbitration petition on December 13, 2017. Therefore, the arbitrators could rely on the English judge's analysis without doing injustice to the Defendants, given the credence they themselves had given to his judgments.

6.6. The foregoing summary reveals that the Arbitrators provided several reasons for "incorporating" Judge J._____'s decisions into their Award. When confronted with several independent reasons, each of which is sufficient to determine the fate of the case, the Appellant must address each of them, on pain of inadmissibility (ATF 142 III 364 at 2.4 p 368). The grievance could run into this first pitfall, insofar as it focuses on the question of *res judicata* and estoppel. In any case, it is unfounded.

The Appellants rightly point out that, according to Swiss case law, the Arbitral Tribunal should have examined whether the conditions for recognition had been fulfilled and, if so, should have applied the Swiss concept of *res judicata*, which excludes the issue of estoppel. In this case, the precise outline of the action brought before the English court is unknown, except that the central issue was the validity of the termination of A._____'s employment contract (see 6.4 above). The plaintiff (group holding company) had apparently made submissions for damages that are not addressed in the judgment of December 13, 2017. The mere fact that the same contractual breaches are discussed in the English and arbitration proceedings is not sufficient to infer that the subject matter of the dispute is the same, which is a necessary condition for the granting of *res judicata* (see, for example, BGE 140 III 278, at 3.3 p 281). The Appellants also rightly insist on the fact that Company B._____ was not a party to the English proceedings. This being the case, to find, as the Appellants suggest, that the Arbitrators could not invoke either the authority of *res judicata* or the preclusive effect of the discussions of the English judgments does not exhaust the discussion.

In a letter dated February 4, 2020, the Appellants stated that the English High Court of Justice had already ruled on the majority of the claims made by the Respondent. The reason that motivated them at the time, namely the termination of the arbitration, cannot be ignored. They nevertheless showed the reliance they placed on the English judgments ("*the reliance which they themselves have placed on those*

judgments"[23]). This "reliance" came after they had already recognized the authority of the Judgment of December 13, 2017.

On January 3, 2018, they had in fact consented to the draft decision prepared by the opposing party (B.b above), reproduced in the Award of May 9, 2018. In substance, the latter invited the Arbitral Tribunal to affirm the conclusions of law and the injunctions formulated in the request, due to the judgment issued on December 13, 2017, of which §58-64 were devoted to the suspension of the CEO P._____ and the assumption of this function *ad interim* by A._____. The Arbitral Tribunal was asked to find that these acts relating to the reserved area were in breach of the shareholders' agreement as they had not been approved by Z._____ Ltd, or that the aforementioned party had no authority to exercise the powers of the CEO.

On May 9, 2018, the Arbitral Tribunal granted the request, recording what it considered to be a settlement of the Parties, while specifying that their express agreement entitled it to adopt the findings formulated in the request without having to examine their merits. This decision was confirmed by the new Arbitral Tribunal on September 6, 2018.

The Appellants thus themselves attributed authority to the English judgment of December 13, 2017, admitting that A._____'s appropriation *ad interim* of the position of CEO constituted a breach of the Shareholders' Agreement. The final Award admittedly did not rely on this agreement. However, it referred to the Award of September 6, 2018, which itself confirmed the earlier decision of May 9, 2018. In its answer, the Respondent relied on these elements without eliciting any criticism from them.

It must be conceded that the Respondent then made further submissions on February 28 and April 23, 2020, which repeated elements retained in §65 *ff* of the English judgment issued on December 13, 2017. These findings are the subject of finding 1) ii-iv in the operative part of the final Award (B.h above). The Appellants did not expressly agree to these findings. However, they have shown that they give credence to the English judgments, without disputing the analysis according to which they constitute convincing evidence; in this respect, it should be remembered that even an arbitrary assessment of the evidence is not in itself contrary to public policy (see, for example, ATF 144 III 120[24] at 5.1 p 130). The Arbitrators heard three of the eleven witnesses called by the English judge, and their discussion of the various items of damage shows that these witnesses confirmed several of the facts underlying these findings, in particular the blockade of the U._____ plant by the union. As a matter of law, once one accepts that A._____ was in breach of the shareholders' agreement for appropriating the position of CEO, it is difficult to see how one can deny such breaches with respect to the acts set forth in operative finding 1) ii-iv. Moreover, the Arbitrators dealt in detail with the losses caused by A._____'s conduct without really relying on these findings, except for the one relating to the blockade of the U._____ plant.

In these circumstances, the Arbitrators cannot be accused of breaching public policy by repeating without discussion the findings made in the English judgment of December 13, 2017.

---

[23] Translator's Note: In English in the original text.
[24] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-260-2017

It is appropriate at this stage to deal with the grievance concerning the right to be heard.

6.7.
6.7.1. The right to be heard, within the meaning of Art. 190(2)(d) PILA, does not require an international arbitral award to be reasoned (ATF 142 III 360[25] at 4.1.2; 116 II 373 at 7b). However, case law has inferred a minimum duty for the arbitral tribunal to consider and deal with the relevant issues. Arbitrators breach this duty when, inadvertently or with misunderstanding, the arbitral tribunal does not take into consideration the allegations, arguments, evidence and offers of proof submitted by one of the parties and of importance to the award to be issued. In such a case, the right of the party concerned to present its point of view to the arbitrators is infringed: it is in the same situation as if it had not had the opportunity to present its arguments to the arbitrators (BGE 133 III 235, at 5.2; 121 IIII 331 at 3b).

It is incumbent on the alleged wronged party to demonstrate how an oversight of the arbitrators prevented it from being heard on an important issue. It must establish, first, that the arbitral tribunal did not examine certain factual, evidentiary, or legal elements that it had validly raised in support of its submissions and, second, that these elements were of such a nature as to affect the outcome of the dispute (BGE 142 III 360, at 4.1. 1 4.1. 4.1; 133 III 235 at 5.2).

6.7.2. The Appellants argue that a breach of this minimal duty occurred in various respects.

First of all, the Arbitral Tribunal improperly granted the English decisions the authority of *res judicata* without discussing the conditions laid down by Swiss case law, and without mentioning the operative part of these decisions, the questions they dealt with and the claims that were raised.

It is true that the Arbitral Tribunal failed to examine whether the conditions set out in Swiss case law - in particular the one relating to the recognition of foreign decisions - had been met. At most, its previous awards contain the information that the Defendants in the English state proceedings had waived the arbitration clause (Award of September 6, 2018, n. 17 and Award of May 9, 2018, n. 12; see in this respect ATF 140 III 278 at 3.1 p. 279 i.f. -280).

However, it must be borne in mind that the right to be heard, as understood by Art. 190(2)(d) PILA, does not confer the right to a reasoned award, nor does it guarantee the substantive accuracy of the arbitral award. It is violated when a party has been deprived of the possibility of participating effectively in the proceedings, of influencing them and of expressing its point of view (BGE 127 III 576 at 2d p. 579). However, it does not appear that such a case has arisen. The Appellants do not indicate which relevant argument was raised in this respect and neglected or disregarded by the Arbitrators. This part of the grievance is unfounded.

6.7.3. The Appellants also argue that the Arbitrators wrongly retained without discussion their contractual liability in principle, without having made any findings of fact or developed any legal analysis.

---

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

Most of the alleged contractual breaches had already been established by the English judgment of December 13, 2017. For the reasons set out above, such a procedure is not open to criticism from a public policy perspective. Nor is there a breach of the right to be heard within the meaning of Art. 190(2)(d) PILA. On this point too, the Appellants do not explain which arguments they put forward and which were neglected or disregarded by the Arbitrators.

It is true that the English judgments did not address some of the alleged breaches. This is the case with the instituting legal proceedings in Dubai in January 2018 (Winding Up Claim[26]). The final Award refers to this case in 97 ff. It finds a breach of clauses 22.6.4 (c), 23.1.2 and 41.13 of the shareholders' agreement and concludes that the Defendants/Appellants are liable for the defense costs incurred by these proceedings

The Arbitrators then dealt in detail with the various items of damage caused by A._____'s actions (see B.h above), based on the three witness statements and the documents provided by the witnesses. They also discussed clause 16.4 of the shareholders' agreement (see A above). They decided that Z._____ Ltd. was entitled to institute proceedings against the two Defendants/Appellants, who were jointly and severally liable for the damage.

The Appellants still do not explain which arguments were presented in connection with all these issues and ignored by the Arbitrators. At most, they argue that the minimal duty to examine the relevant issues would prevail *a fortior* in the event of a default by one of the Parties. The criticism that emerges seems to be of a different order: after having recalled the precepts applicable in the event of a party's default, the Arbitral Tribunal allegedly disregarded them in practice, accepting without discussion the allegations of the Claimant and its legal analysis. A reading of the Award shows that such a grievance is unjustified, regardless of whether it is related to one of the legal considerations provided for in Art. 190(2) PILA.

In short, the part of the grievance relating to the right to be heard must also be rejected.

III. Finding 7

In view of the foregoing, the appeal must be rejected to the extent that it is admissible. The authors of the appeal, who are unsuccessful, will jointly and severally bear the costs of the federal proceedings (Art. 66(1) and (5) LTF) and pay the costs of the Respondent's attorney's fees (Art. 68(1), (2) and (4) LTF). The compensation granted to the latter will be taken from the security for costs provided by the Appellants.

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

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, shall be borne by the Appellants, jointly and severally.

3.
The Appellants are jointly and severally ordered to pay CHF 35'000 in costs to the Respondent. This amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

4.
This judgment shall be communicated to the parties' and to the Arbitral Tribunal located in Geneva.

Lausanne, June 15, 2021

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

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