4A_636/2018[1]

Judgment of September 24, 2019

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Klett,
Federal Judge Niquille
Clerk of the Court: Mr. Curchod

1. A._____ Joint Venture,
2. B._____ A.S.,
3. C._____ A.S.,
represented by Daniel Hochstrasser and Julia Jung, solicitor-advocates,
Appellants,

v.

1. D._____,
represented by lawyer Mark Roe, Pinsent Masons LLP, United Kingdom,

2. State of Libya,
Represented by Phillipe Bärtsch, Sebastiano Nessi, Anne-Carole Cremades and Elena Trabaldo-de Mestral, solicitor-advocates,
Respondents

Facts:

A.
A.a. A._____ Joint Venture (Claimant 1, Appellant 1) is a Joint Venture organised under Turkish law between the two entities incorporated under Turkish law B._____ A.S. (Claimant 2, Appellant 2), holding a 67% interest, and C._____ A.S. (Claimant 3, Appellant 3) holding a 33% interest in A._____.

D._____ (Defendant 1) is an independent organization organized under Libyan law, which was established by Act No. 11 of 1983 on the Establishment of an Executive and Administrative Organization (Authority) for the Great Man-Made River. It was formed in order to carry out a large infrastructure project

[1] Translator's Note: Quote as A._____, B._____, C._____, *v.* D._____ and State of Libya, 4A_636/2018.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

("Man-Made River"), by which the fresh water from the south of the country is transported to the more heavily populated areas of the north along the Mediterranean. The Libyan State is Defendant 2 and Respondent 2 in the present proceedings.

A.b. In April 2005, the Claimants were awarded a tender in connection with Phase III of the infrastructure project. On June 6, 2006, they concluded a contract with D._____, in which they essentially undertook to construct a 383km-long water pipeline, in other words to excavate the channel to a depth of 7 metres and 6.5 metres breadth and to fit it with more than 50,000 prefabricated elements of concrete pipeline, which the Claimants were to collect and transport to the placement site. Art. 8.3 of the contract of June 6, 2006, contained an arbitration clause providing that three arbitrators would resolve any dispute under the contract pursuant to the ICC Rules; the language of arbitration was designated as English, and the seat of the arbitral tribunal was designated as Geneva.

A.c. After an uprising in Benghazi began in 2011, and extended across the entire country, A._____ discontinued its works. At this point, roughly 70% of the project had been completed. Since that time, D._____ and A._____ have held discussions on recommencing the works, but to date, these have been to no avail.

B.
B.a. On June 16, 2015, the Claimants filed a request for arbitration. The Defendants filed an Answer on November 19, 2015 and filed a Counterclaim. Defendant 2 disputed the jurisdiction of the Arbitral Tribunal in respect of potential claims against it. A parallel investment treaty arbitration is pending.

B.b. By partial award of October 22, 2018, the Arbitral Tribunal upheld the claim against Defendant 1 (D._____) in part and awarded the Claimants an immediately payable sum of USD 40'134'129, after setting-off a counter-claim of USD 354'520. The Arbitral Tribunal declined to deal with the claim asserted by the Claimants against Defendant 2 due to a lack of jurisdiction (Ruling No.12.2). The decision to dismiss the claim was issued by the Arbitral Tribunal by majority decision. The non-prevailing arbitrator issued a dissenting opinion.

C.
By civil law appeal, the Claimants have submitted an application to the Federal Tribunal to set aside Ruling 12.2 of the partial award of October 22, 2018 and to rule that the Arbitral Tribunal has jurisdiction to adjudicate on the claims asserted against Respondent 2, and to remand the matter to the Arbitral Tribunal for adjudication of that Claim.

Respondent 2, in its Answer, applies to the Federal Tribunal to dismiss the Appeal to the extent the matter is capable of appeal. The Arbitral Tribunal has submitted the case files in electronic form without submitting any comments.

The parties have submitted reply and rejoinder briefs without being requested to do so. In its reply brief, the Appellant made clear that it was not submitting its appeal against Defendant 1.

Reasons:

1.
According to Art. 54(1) BGG[2] the Federal Tribunal issues its decisions in an official language,[3] as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award being challenged here is in English. As that is not one of the official languages, the decision of the Federal Tribunal will be issued in the language of the Appeal Brief, as is standard practice (BGE 142 III 521[4] at 1). In the present case the appeal brief is drafted in German.

2.
2.1. In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77(1)(a) BGG). The seat of the Arbitral Tribunal in the present case is located in Geneva. At the time in question, the parties had their registered offices outside Switzerland (Art. 176(1) PILA). As they have not expressly excluded the application of the Chapter 12 PILA, the provisions of that chapter are applicable (Art. 176(1) and (2) PILA).

2.2. An appeal within the meaning of Art. 77(1)(b) BGG in conjunction with Art. 190-192 PILA is admissible against final awards and partial awards within the meaning of Art. 90(f) BGG (BGE 144 III 462 at 2.1, with references). In this case, it is directed against the partial award (Art. 91(b) BGG), by which the Arbitral Tribunal dismissed the claim against Defendant 2.

2.3. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek the setting aside of the decision under challenge (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception, providing that the Federal Tribunal may itself rule upon the arbitral tribunal's jurisdiction or the lack thereof, or on the removal of an arbitrator (BGE 136 III 605[6] at 3.3.4, p.616 with references). The application of the Appellants is admissible.

2.4. The preconditions to the Federal Tribunal's ability to deal with the appeal do not give cause for any further discussion. It is appropriate for us to deal with the appeal, providing that sufficient grounds of appeal have been stated (Art. 77(3) BGG).

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[2] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organising the Federal Tribunal (RS 173.110).

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

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

[5] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

[6] 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

3.
3.1. The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even where they are blatantly inaccurate or in violation of the law within the meaning of Art. 95 BGG (*see* Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). Even in the context of an objection that the arbitral tribunal lacked jurisdiction, the Federal Tribunal may only review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against it or, exceptionally, when new evidence (Art. 99 BGG) is taken into consideration (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477[7] at 3.1, p. 477; 138 III 29[8] at 2.2.1; each with references). Whoever claims an exception to the rule that the factual findings of the arbitral tribunal bind the Federal Tribunal and wishes to rectify or supplement the facts must show, with precise references to the record, that the corresponding factual allegations were raised during the arbitral proceedings, in accordance procedural rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references; *see also* BGE 140 III 86 at 2, p. 90).

The Appellants do not raise any admissible grievances against the Arbitral Tribunal's findings of fact. They cannot be heard to the extent they base their grievances on facts which deviate from the findings of the Arbitral Tribunal.

3.2. Only those grievances that are exhaustively listed in Art. 190(2) PILA are admissible (BGE 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (*see* BGE 133 II 249 at 1.4.2, p. 254). The strict requirements in terms of reasoned grounds of appeal continue to apply; the Federal Tribunal deems Art. 90(1)(b) OG to be the applicable standard for these requirements (*see* BGE 128 III 50 at 1c, p. 53), in view of the fact that the new law did not purport to make any changes in this respect (BGE 134 III 186[9] at 5, p. 187). Thus, Appellants must not only set out in their appeal brief what legal principles are alleged to have been violated, but also *how* this should be the case. If the grounds of the appeal do not meet these requirements, then it should be dismissed. Furthermore, the purpose of the reply brief is not to submit further or improved grievances outside the period for appeal (BGE 135 I 19 at 2.2, 132 I 42 at 3.3.4). The Appellants cannot be heard to the extent they seek to amend or improve the grounds of their appeal in their reply brief.

4.
The Appellants assert as a grievance the violation of Art. 190(2)(b) PILA, that the Arbitral Tribunal found that it lacks jurisdiction to adjudicate their claim against the Libyan State.

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

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

4.1. Pursuant to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including preliminary substantive issues upon which determination of jurisdiction depends (BGE 144 III 559[10] at 4.1; 142 III 239[11] at 3.1; 140 III 520[12] at 3.1; 134 III 565[13] at 3.1; 133 III 139 at 5, p. 141). In the context of the jurisdictional objection, as well, the Federal Tribunal reviews the application of foreign law freely and takes full cognizance of it; in doing so, it follows the clear prevailing view in the applicable foreign legal system, and in controversial cases, between jurisprudence and scholarly views, It follows the jurisprudence of the highest courts (BGE 138 III 714[14] at 3.2, with references). Pursuant to Art. 178(2) PILA, the Federal Tribunal reviews the validity in substantive terms and the objective scope of an arbitral agreement pursuant to the law chosen by the parties for the matter in dispute, particularly under the law applicable to the main contract or under Swiss law (BGE 140 III 134[15] at 3.1; 138 III 29 at 2.2.2). The subjective scope of an arbitration clause is likewise assessed under Art. 178(2) PILA (BGE 129 III 727 at 5.3.1, p. 736; 128 III 50 at 3a, p. 62; 117 II 94 at 5b, p. 98, see also judgment 4A_450/2013[16] of April 7, 2014 at 3.2). As a basic principle, it is possible for a third party to be bound by an arbitration clause which that party did not sign (BGE 134 III 565 at 3.2, p. 567; 129 III 727 at 5.3, p.734, each with references).

4.2. The Arbitral Tribunal (by majority decision) rejected the notion that the Respondent was bound by the arbitration clause. It also found that Defendant 1 is an independent legal entity under Libyan law and, pursuant to Art. 178(2) PILA as well as under Libyan and Swiss law, it rejected the position of the Claimants, with detailed Grounds of Decision, where they had alleged that Defendant 1 was an organ of the State or an auxiliary of the State and thus was identical to the State or that the State had intervened in the contract negotiations or in the performance of the contract in such a way that the Claimants were entitled, in good faith, to consider it to be a party to the contract and bound by the arbitration clause.

The Appellants assert the grievance of improper application of Swiss law with regard to the question of extending the arbitration clause to a sovereign state. They assert that the 'Westland' Judgement (judgement P 1675/1987 of July 19, 1988), in which the Court declined to extend the arbitration clause from a legal entity formed by the states to the states that had formed it, was outdated, a fact which, they allege, the Arbitral Tribunal had failed to acknowledge. They argue that "as potential bases for extending arbitration clauses to a state", there were various grounds of imputation which could be considered, which, in a further evolution of Swiss jurisprudential practice, might serve as the basis here for binding the Respondent. In addition, they assert the grievance that the Arbitral Tribunal wrongly declined to find

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[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-can-be-different-each-joint-defendant

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/portuguese-partial-reversal-of-vivendi-on-capacity-to-be-a-party

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-survives-termination-its-scope-be-interpreted-liberally

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitral-clause-good-faith-grounds

that they were entitled in good faith to regard the Libyan State as their counter-party under the contract. Under the heading of erroneous application of Libyan Law, they persist in the view that the decisions put forward by them show that the State is liable for acts in breach of contract by Public law organisations which are exclusively and solely imputed to the State, based on its oversight role.

4.3. The Arbitral Tribunal has appended facts to its legal discussion, both in regards to the identity of D._____ with the Respondent, as asserted by the Appellants, as well as in regards to the alleged interference by the Respondent in the contract.

4.3.1. As to the alleged identity of Defendant 1 with the Respondent state, the Arbitral Tribunal notes that Defendant 1 was not exclusively financed by the State, but rather, and in particular, also derived financial income from the sale of water; in addition, the "General People's Committee" did not interfere with the organization of invitations to tender and the conclusion of contracts, contrary to the assertions of the Appellants, but rather it left this to the "People's Committee" that had jurisdiction over Defendant 1, and whose resolutions it simply adopted ("rubber-stamped"). Pursuant to the findings of the Arbitral Tribunal, the Appellants exaggerated the sovereign authority that had allegedly been delegated to Defendant 1. Pursuant to the findings of the Arbitral Tribunal, it was the orders and directions of the "General People's Committee" and not of Defendant 1, that were directed to municipalities and government representatives and were able to furnish troops etc., such that it was not apparent how Defendant 1 could have exercised sovereign authority. In addition, it was necessary to involve the Minister for Water in settlement discussions, because it was envisaged that the State should provide compensation for the loss of the machines and facilities which had been destroyed in the Revolution. Finally, the power of attorney given to the public prosecutor in the parallel Investment Treaty proceedings does not prove anything, because Defendant 1 is not a Party to those proceedings.

4.3.2. As regards the alleged interference of the State, the Arbitral Tribunal noted in the challenged award that, contrary to the assertions of the Appellants, the State by no means stipulated the terms of the contract largely in advance through the Administrative Contracts Regulations ("ACR"), because the ACR are not applicable to the contract in dispute at all. Because Defendant 1 is a public law entity and receives public funds, the State "Audit Bureau" was to monitor the contract during the tender phase, but there are no indications by way of evidence that this authority interfered in any way in the contract negotiations beyond this. Primarily, the purpose of the supervision was to prevent corruption, whereas there are no evidentiary indications of any substantive amendments and Defendant 1 was able to agree with the Claimants on consensual contract amendments following the review. The Arbitral Tribunal then rejected the allegation of the Appellants where they had said that the contract was reviewed and approved by the "General People's Committee" and by the Prime Minister. With regards to the performance of the Contract, it is true that the Central Bank organized letters of credit in EUR and USD for payments to Claimant 1, which was typical at that time for payment in hard currency; there were no indications of it playing any role beyond this; its role more resembled that of a commercial bank. Here, again, the review by the Financial Controller was of a formal nature. It is true that the contract had authorized Defendant 1 to apply offsets against State receivables and to terminate the contract for reasons of the public good, but Defendant 1 did not avail itself of this power. Ultimately, the remaining evidentiary points raised by the Appellants were likewise insufficient to prove that the State had interfered in the performance of the contract to such an extent that the Appellants were entitled to infer that the State participated in the contract. The Federal Tribunal is bound by these findings of fact.

4.4. The Appellants raise the grievance that the Arbitral Tribunal wrongly found that it lacked jurisdiction to adjudicate their claims against the State, based on the Libyan legal system.

4.4.1. The Arbitral Tribunal rejected the view that Defendant 1 is a part of the Libyan State organization or is identical to the State of Libya. It did not interpret the legal fundamentals in the sense that legal entities under public law generally form part of the State, despite their legal independence, or that Defendant 1 is legally constituted in such a way that it constitutes a mere administrative unit; it also rejected the prior rulings of the Supreme Court of Libya from 1978, 2000, 2003, and 2012 cited by the Appellants as not relevant to the present case.

The Appellants do not raise any grievances against the Arbitral Tribunal's interpretation of the legal norms. Instead they assert that, pursuant to the three judgements of the Supreme Court of Libya in 2000, 2003 and 2012, the Respondent's obligation under the Contract, and in particular its obligation to be bound by the arbitration clause, must be affirmed.

4.4.2. The Appellants do not dispute that the Supreme Court of Libya never held that the State of Libya is bound by an arbitration clause which, although not validly signed by its legal representatives, is contained in a contract concluded by a legal entity under public law which is controlled by it. To the contrary: they infer from the cited judgements a general principle according to which "supervision by the State… is the sole precondition to the imputability of contractual conduct by the public entity to the State". Whether a general principle in accordance with the intentions of the Appellants might be inferred from these few cases appears questionable, particularly as they do not deal with the specific circumstances of the three cases. In any event, the Arbitral Tribunal rightly rejected the relevance of these prior decisions to the question of extending the arbitration clause to the Respondent as sought by the Appellants. It correctly pointed out that none of the cited judgements relates to the extension of an arbitration clause to the State and that the first two judgements are especially irrelevant because they do not relate to contract obligations. The fact that there are cases in which the State or a State administrative unit, by virtue of the supervisory duties entrusted to it, becomes liable for damages or is jointly liable for damages for incorrect conduct or conduct in breach of the contract on the part of the person supervised does not mean that the State is also submitting to arbitration where, through its State instrumentalities, it supervises a public law body which, for its part, concludes an arbitration clause in a contract with its counter-parties to cover disputes arising out of the contract. The Arbitral Tribunal correctly holds that nothing can be deduced from a substantive principle of extending liability with regard to the jurisdiction of the courts, and in particular, with regard to derogation from the jurisdiction of the state courts.

4.5. The Appellants adhere to the argument that the State of Libya is, under Swiss law, bound by the arbitration clause concluded by the legal entity D._____.

4.5.1. Defendant 1 is an independent legal entity that alone signed the arbitration clause. The Arbitral Tribunal correctly concludes from the "Westland" decision (Judgement 4P 1675/1987 of July 19, 1988) that Swiss law also recognizes the legal independence of legal entities constituted under Public law and legal entities created by the State, and that arbitration agreements created by such legal entities are not imputed to the States controlling them. If the Appellants take the view that this has changed in more recent jurisprudence, this Court is unable to concur with them. The fact that the competent arms of the Respondent may have signed the arbitration clause cannot be inferred from the arbitral tribunal's findings of fact, nor are the Appellants in a position to question them. The Respondent did not conclude the

Arbitration Agreement itself, and cannot be bound by it solely because it established and controls the legally-independent entity D._____. The Appellants fail to take account of this where they attempt to show "possible grounds for extension" alleging that the State wished to actively submit to the arbitration agreement contained in the contract in question. There is no basis for this in private contract-based arbitration law.

4.5.2. According to the principle of privity of contract, the arbitration clause contained in a contract will only be binding on the parties to that contract. However, the Federal Tribunal has always recognized in certain circumstances that the arbitration clause may also be binding on persons who have not signed it. This is particularly true in the case of the assignment of a claim, of the cumulative or private assumption of debt or the delegation of a contract, where the arbitration clause appears to be ancillary (BGE 134 III 565 at 3.2, p. 567). The Appellants do not assert that any of these constellations are present here. However, they do maintain that based on the interference of Respondent 2 in the contract, they should have been entitled to conclude in good faith that it was bound by the contract.

4.5.3. A third party who, in a constant and repeated fashion, interferes in the performance of a contract containing an arbitration clause will be treated as if he had acceded to that contract and submitted to the arbitration clause, if in so doing he demonstrates his intention to be a party to the arbitration agreement himself (BGE 134 III 565 at 3.2, p. 568; 129 III 727 at 5.3.2, p. 737; judgement 4A_473/2018 of June 5, 2019 at 5.1.2). The Appellants are unable to identify any circumstances that would have entitled them to conclude, in good faith, that the Respondent state had acceded to the contract. The Arbitral Tribunal expressly rejected their factual allegations. The facts and circumstances that were found by Arbitral Tribunal do not yield any evidence of interference by the Respondent state with the Contract that would be sufficient for the Appellants to infer, in good faith, that it was acceding to the arbitration clause contained therein. Moreover, the fact that the Respondent state was under an authoritarian regime at the time the contract was concluded and that the infrastructure project was particularly important to the government at that time (to which the Appellants refer as a 'notorious fact') cannot establish any protectable reliance interest in assuming that the State intended to enter into particular contract obligations.

5.
The Appeal is rejected to the extent the matter is capable of appeal. It is appropriate to impose the judicial costs on the Appellants (jointly and severally, and internally – in the absence of any agreement to the contrary – at the rate of 1/3 each) (Art. 66(1) BGG). They shall pay party compensation to the Respondent state, who is represented by counsel (jointly and severally, internally – absent any other agreement – at a rate of 1/3 each) for the proceedings before the Federal Tribunal (Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs in the total amount of CHF 200'000 are imposed on the Appellants (jointly and severally, and internally – in the absence of any agreement to the contrary – at the rate of 1/3 each).

3.
The Appellants (jointly and severally, and internally – in the absence of any agreement to the contrary – at the rate of 1/3 each) shall pay party compensation to Respondent 2 in the amount of CHF 220'000 for the proceedings before the Federal Tribunal.

4.
This Decision shall be notified in writing to the parties and the Arbitral Tribunal with its seat in Geneva.

Lausanne, September 24, 2019

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding judge:	Clerk of the Court:
Kiss	Mr. Curchod