4A_246/2019[1]

Judgment of December 12, 2019

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Hohl,
Federal Judge Niquille,
Clerk of the Court: Leemann (Mr.)

Russian Federation,
represented by Mr. Elliott Geisinger and Mr. Christopher Boog,
Appellant,

v.

1. A.________ LLC,
2. B.________ LLC,
3. C.________ LLC,
4. D.________ LLC,
5. E.________ LLC,
6. F.________ LLC,
7. G.________ LLC,
8. H.________ LLC,
9. I.________ LLC,
10. J.________ LLC,
11. K.________ LLC,

collectively represented by Mr. Michael E. Schneider, Dr. Marc Veit, Mr. Dominik Elmiger and Mr. Philippe Hovaguimian,
Respondents

Facts:

A.
1. A.________ LLC, 2. B.________ LLC, 3. C.________ LLC, 4. D.________ LLC, 5. E.________ LLC, 6. F.________ LLC, 7. G.________ LLC, 8. H.________ LLC, 9. I.________ LLC, 10. J.________ LLC, 11. K.________ LLC (Claimants, Respondents), are companies established under Ukrainian law. Between 2000 and 2010, they jointly acquired and operated 31 petrol stations on the Crimean Peninsula.

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[1] Translator's Note: Quote as Russian Federation *v.* A.________ *et.al.,*, 4A_246/2019.
The decision was issued in German. The original text is available on the website of the Federal Tribunal, www.bger.ch.

The two companies J.________ LLC and K.________ LLC were owners of two warehouses in the cities of Simferopol and Sevastopol, which were used to store fuel reserves and petroleum products. In addition, the Claimants owned further assets, such as an office building in the city of Feodosia. Crimea was at that time a part of Ukrainian state territory. The Claimants allege that the Russian Federation (Defendant, Appellant), in connection with its annexation of the Crimean peninsula in 2014 (the Treaty of Integration was ratified on March 21, 2014 and the Integration Act issued), put measures in place relating to the above-referenced assets in the Crimea and leading to their expropriation. In so doing, the Respondents allege, the Defendant breached the Treaty of November 27, 1998 (in force as of January 27, 2000) between the government of the Defendant and the Cabinet of Ministers of Ukraine regarding the encouragement and mutual protection of investments in various respects (Agreement on the Encouragement and Mutual Protection of Investments, hereinafter: 1998 Bilateral Investment Treaty/1998 BIT) and should thus be required to pay compensation.

B.

B.a. On June 3, 2015, the Claimants, based on Art. 9 of the 1998 BIT, initiated an arbitration against the Defendant at the Permanent Court of Arbitration (PCA) under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (UNCITRAL Rules). The Claimants requested that the Defendant pay compensation of USD 47'406'455.00, as follows:

(i)	USD 4'065'584	to A.________ LLC;
(ii)	USD 732'594	to B.________ LLC;
(iii)	USD 3'296'672	to C.________ LLC;
(iv)	USD 1'465'187	to D.________ LLC;
(v)	USD 366'297	to F.________ LLC;
(vi)	USD 1'098'891	to E.________ LLC;
(vii)	USD 366'297	to G.________ LLC;
(viii)	USD 14'100'490	to H.________ LLC;
(ix)	USD 19'523'755	to I.________ LLC;
(x)	USD 1'195'344	to J.________ LLC; and
(xi)	USD 1'195'344	to K.________.

By letter from its Ministry of Justice dated August 12, 2015, as well as a covering letter of its ambassador to the Netherlands dated September 15, 2015, the Defendant disputed the Arbitral Tribunal's jurisdiction to adjudicate the claims asserted.

While the Claimants designated an arbitrator, the Defendant failed to appoint one, for which reason the Secretary General of the Permanent Court of Arbitration ordered the appointment of an arbitrator.

On October 7, 2015, the president of the Arbitral Tribunal was appointed.

On January 15, 2016, the Claimants submitted a fully reasoned Statement of Claim to the Arbitral Tribunal. The Defendant failed to submit any statement in reply within the period set for this purpose.

On July 11, 2016, an oral hearing on the question of jurisdiction took place in Geneva, which the Defendant failed to attend.

In an interim award dated June 26, 2017 (“Award on Jurisdiction”), the Arbitral Tribunal seated in Geneva found that it had jurisdiction to adjudicate the Claim.

By its Judgment of October 16, 2018, the Federal Tribunal dismissed an Appeal filed by the Defendant from the Interim Award of June 26, 2017, to the extent the matter was capable of appeal (Case 4A_398/2017[2]).

B.b. The arbitration continued while the appellate proceedings were pending before the Federal Tribunal.

On August 9, 2017, the Arbitral Tribunal issued its timetable for the further proceedings.

On September 21, 2017, it put substantive questions regarding the issues in dispute to the Parties.

By written submission of November 20, 2017, the Claimants submitted their responses to the Arbitral Tribunal for its substantive adjudication on the merits. The Defendant did not respond to the questions.

On December 7, 2017, a telephone conference to prepare for the oral hearing was held. The Defendant did not participate.

On February 5-6, 2018, an oral hearing took place in Geneva. The Defendant failed to attend the hearing.

On February 28, 2018, the Arbitral Tribunal directed the Parties to comment on the appointment of the expert who was to quantify the damages.

The Claimants submitted their comments to the Arbitral Tribunal on March 6, 2018. The Defendant failed to do so.

On May 30, 2018, the expert submitted a draft of his expert opinion to the tribunal. The Claimants commented on the draft on July 3, 2018. The Defendant failed to submit comments.

On July 16, 2018, the expert submitted the final version of his opinion, which was served on the Parties the next day.

On July 20, 2018, the Claimants commented on the expert’s expert opinion. The Defendant failed to make any comments thereon.

On August 20, 2018, an oral hearing took place in Geneva. The Defendant did not attend.

[2] Translator’s Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-398-2017

On October 13, 2018, the expert forwarded a supplement to his expert opinion to the Arbitral Tribunal, regarding which the Claimants expressed their views on October 13, 2018. The Defendant failed to submit any comments.

B.c. By the Award of April 12, 2019, the Arbitral Tribunal seated in Geneva held that the Defendant had breached Article 5 of the Bilateral Investment Treaty of 1998 in respect of the Claimant's investments, adjudging it liable to pay damages to the Claimant, plus interest from April 22, 2014, as follows:

(a) USD 2'964'057 to A.________ LLC;
(b) USD 534'105 to B.________ LLC;
(c) USD 2'403'473 to C.________ LLC;
(d) USD 1'068'210 to D.________ LLC;
(e) USD 801'158 to E.________ LLC;
(f) USD 267'053 to F.________ LLC;
(g) USD 267'053 to G.________ LLC;
(h) USD 10'280'111 to H.________ LLC;
(i) USD 14'232'000 to I.________ LLC;
(j) USD 871'478 to J.________ LLC; and
(k) USD 871'478 to K.________ LLC.

The Arbitral Tribunal held that the Defendant had expropriated the investments of the Claimants in the form of 31 petrol stations and two warehouses, in breach of Art. 5 of the 1998 BIT. The Arbitral Tribunal held that the Defendant owed compensation in the amounts stated for this expropriation.

C.

By civil law appeal, the Defendant has requested the Federal Tribunal find that the Award of April 12, 2019 is void in its entirety, or, in the alternative, is partially void. In the further alternative, the Defendant argues that the challenged Award should be set aside. At the same time, the Defendant requests a grant of suspensory effect.

The Respondents have requested dismissal of the appeal to the extent the matter is capable of appeal. The Arbitral Tribunal has waived its right to submit comments.

The Parties have submitted Reply Briefs and Rejoinder Briefs.

D.

By Order dated May 31, 2019, the Federal Tribunal refused the order of temporary suspensory effect requested by the Appellant.

Reasons:

1.
The Appellant requests the Federal Tribunal join the present case with the Appellate proceedings 4A_244/2019[3] relating to the Award of the Arbitral Tribunal, seated in Geneva, dated April 12, 2019, in case PCA No. 2015-34. Whilst it is true that there are comparable factual matters underlying cases 4A_244/2019 and 4A_246/2019, the Appeals do not, however, constitute challenges of the same award, nor did the two arbitrations involve the same parties. For these reasons, the Federal Tribunal declines to join the two Appeals.

2.
According to Art. 54(1) BGG[4] the Federal Tribunal issues its decisions in an official language,[5] 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. Where the parties do not use the same official language, the decision of the Federal Tribunal is customarily issued in the language of the Appeal Brief (BGE 142 III 521[6] at 1).

However, in the present case, where the Appellant submitted its Appeal Brief in French and the Respondents their submissions in German, one should consider that the Appellant challenged the interim Award on Jurisdiction in the same arbitration, by filing an appeal with the Federal Tribunal. In that appeal, it submitted its Appeal Brief in German (Judgment 4A_398/2017[7] of October 16, 2018, at 2). In those proceedings, it was represented by the same two lawyers who have submitted its Appeal Brief in the present case. As an exception to its standard practice, the Federal Tribunal will thus issue its decision in German, as in the preceding appellate proceedings.

3.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[8] (SR 291) (Art. 77 (1)(a) BGG).

3.1. 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 the Parties did not expressly opt out of the provisions of Chapter 12 PILA, they are applicable (Art. 176 (2) PILA).

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[3] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-244-2019

[4] 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).

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

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

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-398-2017

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

3.2. The decision may only be challenged on one of the grounds which are exhaustively listed in Art. 190(2) PILA (BGE 134 III 186[9] at 5, p. 187; 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 appellate 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 (BGE 134 III 186 at 5, p187, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[10] at 3.1, p.567; 119 II 380 at 3b, p.382).

3.3. The appeal must be fully submitted within the time limit for appeal, with a fully reasoned Appeal Brief (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use its Reply Brief to supplement or improve its appeal (*see* BGE 132 I 42 at 3.3.4). The Reply Brief may only be used to comment on the statements made in the Answer of another participant in the proceedings (*see* BGE 135 I 19 at 2.2).

To the extent that the Appellant goes further than this in its Reply Brief, its submissions cannot be taken into account.

3.4. The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal even where the factual findings are manifestly incorrect or were made 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). However, the Federal Tribunal retains the power to review the factual findings on which the award under appeal relied, if admissible grievances mentioned at Art. 190 (2) PILA are raised against the findings of fact or if some new facts or evidence are, exceptionally, taken into consideration (BGE 138 III 29[11] at 2.2.1 p. 34; 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; each with references). The party invoking an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and who seeks to rectify and supplement them on that basis must prove, with specific references to the record, that the corresponding allegations were already raised during the arbitral proceedings in accordance with the 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).

3.5. The Appellant ignores these principles where it makes various allegations before the Federal Tribunal with reference to numerous newly-submitted documents concerning Mr. L.________ – a beneficial owner of the Respondents – and infers from these allegations that he came into his fortune through fraudulent schemes and corruption. Contrary to the view expressed in the Appeal Brief, there can be no mention of any facts before the Federal Tribunal that had not been established in the challenged Award, even if those facts are considered to be 'publicly known' (*see*, with regard to facts known to the public or to the court that are not covered by the prohibition on new facts under Art. 99 I BGG, Judgments 9C_748/2014 of April 14, 2015; 4A_560/2012 of March 1, 2013 at 2.2). Moreover,

[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

[10] 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

[11] 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

neither the fact that the Respondents in the arbitral proceedings refrained from presenting any facts along these lines nor a mere reference to the divergent procedural rules of a foreign legal system can be construed to indicate anything in the Appellant's favor. To the contrary, it would have been for the Appellant to assert these facts, in a timely manner, during the arbitral proceedings. However, the Appellant deliberately declined to do so. The Appellant's objections that the investments in question were made under fraudulent circumstances cannot be heard, for which reason the allegation of a violation of a public policy under Art. 190(2)(e) PILA fails at the very outset.

4.

The Appellant submits that the challenged Award is null and void or at least contestable because the Parties' dispute is not arbitrable.

4.1. The Appellant argues that the Arbitral Tribunal held that the dispute was covered by the territorial and temporal scope of the 1998 BIT and that the Claimant had made a valid investment in Russia. In other words, it assumed that, as of a certain date (*i.e.* March 21, 2014), Crimea's status changed with respect to the 1998 BIT. The Appellant argues that the Arbitral Tribunal's decision on the status of Crimea entails legal consequences for the parties and also for Ukraine, in that it made fundamental changes to the obligations of the parties to the BIT, but without making any formal amendment under Art. 13 of the 1998 BIT or even a tacit amendment to it. The Appellant argues that Ukraine, tellingly, wished to take part in the arbitration, a fact that speaks to the importance of the decision regarding the state parties to the 1998 BIT. The status of Crimea with regard to the BIT or amendment of such status is, it argues, a question which cannot be determined either by the Respondents as private legal entities or any state party to the BIT acting on its own. Rather, it argues, only the Contracting States can determine the extent of their mutual obligations, and these can only be modified by a formal amendment to the BIT, in accordance with Art. 13 of the 1998 BIT and the procedure provided for that purpose.

In the present case, the Arbitral Tribunal had, it argues, ruled on an issue – the status of Crimea in relation to the 1998 BIT – which fundamentally changed the obligations of the state parties, a matter which could not, by its nature, be decided in arbitration proceedings between the Respondents and the Appellant and did not constitute a proper claim within the meaning of Art. 177 PILA. Moreover, it argues, the question of the status of Crimea – *i.e.* whether it was to be regarded as Ukrainian or Russian territory in relation to the 1998 BIT – was neither a mere preliminary question to be answered by the Arbitral Tribunal nor a mere interpretation of the 1998 BIT by the Arbitral Tribunal. Rather, it was no more and no less than an answer to the question of whether the obligations of the Contracting States had changed after the integration of the Crimea into the Russian Federation. The Arbitral Tribunal had taken the liberty of deciding on a question that was neither freely determinable as between a contracting state and a private person nor arbitrable within the meaning of Art. 177 PILA. The Appellant argues that the challenged Award must therefore be annulled – at least in part – by holding that, as of a certain date, the nature of the Crimean Peninsula changed with respect to the 1998 BIT. In the alternative, it argues, the arbitral Award must be set aside due to a violation of public policy (Art. 190(2)(e) PILA).

4.2. Contrary to what the Appellant appears to assume, the subject matter of the arbitration was not the status of Crimea with regard to the 1998 BIT nor its status under international law, but rather a claim asserted by the Respondents for compensation payments in the amount of USD 40'406'455, plus

interest, as a result of the Appellant's alleged expropriation of the Respondents' investments. Without question, this is a pecuniary claim within the meaning of Art. 177(1) PILA. The objection of a lack of arbitrability of the dispute is unfounded, and merely for this reason alone, the Appellant's submissions lack any basis. Contrary to the view espoused in the Appeal Brief, the challenged Award – which is being challenged on the grounds of an alleged lack of arbitrability – is neither null and void nor is it contestable. It is therefore not necessary for us to delve in any detail into the question of whether the objection against the final Award which was raised only on Appeal is capable of any appeal at all, which is disputed by the Respondent (*see* BGE 143 III 578[12] at 3.2.2.1, pp. 586-7).

The correct view is that the Appellant is once again disputing the Arbitral Tribunal's jurisdiction. The Appellant directs its remarks against a finding in the challenged Award by which the Arbitral Tribunal merely quoted from its Interim Award on Jurisdiction of June 26, 2017:

> (margin no. 41: "In concluding that it had jurisdiction over the present dispute, the Tribunal held [in the Award on Jurisdiction of April 12, 2019] that 'the dispute falls within the territorial and temporal scope of application of the Treaty and that the Claimant qualifies as an 'investor' under the Treaty, having made an 'investment' in the territory of Russia in accordance with its legislation.").

However, the Federal Tribunal has already ruled on the jurisdiction of the Arbitral Tribunal by Judgment 4A_398/2017[13] of October 16, 2018, in which it dismissed the appeal filed by the Appellant against the interim award to the extent the matter was capable of appeal. In making this finding, the Federal Tribunal found that the grievance that consideration of subsequent border shifts would have required a further agreement between the Parties to the Contract under Art. 13 of the 1998 BIT was not well-founded; in addition, it also expressly held that the Arbitral Tribunal had rightly found that the territory of the Crimean Peninsula was to be regarded as art of the "territory" of the Appellant within the meaning of Art. 1(4) 1998 BIT and was covered by the territorial scope of that Agreement (Judgment 4A_398/2017 of October 16, 2018 at 4.3.2). Because the Federal Tribunal has already issued a *res judicata* ruling on this point, the jurisdiction of the Arbitral Tribunal can no longer be challenged by appeal against the final Award.

The Appellant's objection raised in its Appeal Brief that the challenged Award is void due to a lack of arbitrability of the dispute or is at least contestable (due to a violation of public policy) thus fails.

5.

The appeal is rejected, to the extent the matter is capable of appeal. The Court's decision on the merits renders the request for an order of suspensory effect moot.

In accordance with the outcome of this case, the Appellant shall be liable to pay costs and party compensation (Art. 66(1) BGG and Art. 68(2) BGG).

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[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-12-2017

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-398-2017

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs of CHF 85’000 shall be paid by the Appellant.

3.
The Appellant shall pay party compensation to the Respondents of CHF 135’000 for the proceedings before the Federal Tribunal.

4.
This decision shall be notified in writing to the Parties, and to the Arbitral Tribunal with its seat in Geneva.

Lausanne, December 12, 2019

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

Presiding judge: Kiss

Clerk of the Court: Leemann