4A_633/2014[1]

Judgment of May 29, 2014

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Leemann

A._____ LLP,
Represented by Dr. Thomas Rohner and Dr. Matthias Wiget,
Appellant

v.

B._____,
Represented by Dr. Fridolin Walther,
Respondent

Facts:

A.
A.a. A._____ LLP (Defendant, Appellant) is an international law firm based in the United States.

B._____ (Claimant, Respondent) is a lawyer domiciled in Germany.

A.b. On July 1, 2008, the parties entered into a "Business Combination Agreement" ("BCA") by which the German law firm co-founded by B._____, "C._____", was to be integrated into the A._____ LLP firm.

[1] Translator's Note: Quote as A._____ LLP *v.* B._____, 4A_663/2014.
The original text of the decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

In paragraphs 5.2 and 5.3 and in schedule 5 of the BCA, the parties agreed on a yearly amount which was to be paid to the Claimant in accordance with the requirements of this contractual provision. Paragraphs 5.2 and 5.3 of the BCA read as follows:

> *5.2 Schedule 5 sets forth the initial share of each C._____ Partner in Net Income and, where applicable, Net Loss. The tier placements assigned in Schedule 5 to Dr. B._____ [...] are valid until 2010 (inclusive). All other tier placements (regardless of whether these are variable and/or fixed) are valid until 2009 (inclusive). The Floor Amount indicated in Schedule 5 [EUR 2 Mio.], which represent minimum amounts per annum payable to C._____ Partners, are valid until 2012 (inclusive), subject, however, to Sub-Clause 5.3.*
>
> *5.3 The tier placements and Floor Amount set out in Schedule 5 for each C._____ Partner are agreed with the understanding that the respective C._____ Partner will continue as active partner of A._____ devoting his/her full time and efforts to the business of A._____ going forward consistent with his/her past practices and concentrations as a partner of C._____, which is to be considered based on a holistic approach taking into consideration all relevant aspects (disregarding, however, past individual deviations from common standards, e.g. over- or underperformance in total or billable hours per year) including, among others, billable and total hours, availability, vacation, quality of work, turn-over from billable hours, general market conditions in a specific industry and potential effects of the business combination contemplated herein, it being understood that no single aspect alone shall be decisive and that it will be taken into account to which extent these factors are under the control of the respective C._____ Partner.*[2]

The Business Combination Agreement is governed by German law and contains the following arbitration clause at paragraph 12.3:

> *All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce ('ICC') by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Zurich, Switzerland. The arbitration proceedings shall be conducted in the English language*.[3]

A.c. A difference of opinion eventually arose as to the payments the Claimant had been assured in paragraphs 5.2 and 5.3 in connection with schedule 5 of the BCA.

In April 2010, the Claimant started a first arbitration according to the rules of the International Chamber of Commerce (ICC) against the Defendant, in which he demanded payment, among other things, of the difference between the floor amount of EUR 2 million for the years 2009 and 2010 and the amount actually paid for these years.

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

The ICC Arbitral Tribunal, which the parties agreed to seat in Frankfurt despite the arbitration clause at paragraph 12.3 of the BCA, rejected the claim as to the guaranteed yearly floor amounts for the years 2009 and 2010 in an arbitral award of September 30, 2011.

In rejecting the claim for the payment of the floor amount, the Arbitral Tribunal reasoned that the amount guaranteed according to Art. 5.2 of the BCA was due only when the then-partner met the requirements in paragraph 5.3 of the BCA concerning involvement, dedication, and performance ("*prerequisites for activities, devotion and performance*"). The Claimant did not meet these contractual requirements and he was thus not entitled to the floor amounts for the years 2009 and 2010.

B.
On April 23, 2013, the Claimant initiated a second arbitration, in which he sought an order that the Defendant pay EUR 1'662'939 and EUR 1'843'302 (both with interest), corresponding to the difference between the floor amount guaranteed by paragraphs 5.2 and 5.3 of the BCA in his view for the years 2011 and 2012 and the amount actually paid for these years.

On July 18, 2013, the party-appointed arbitrators were confirmed and the chairman was appointed by the ICC court on September 19, 2013.

The Defendant raised a defense of *res judicata*, which the ICC Arbitral Tribunal sitting in Zürich rejected in its Procedural Order No. 3 of February 12, 2014. The Defendant then raised objections against this decision in connection with the guarantee of the right to be heard and the parties were given an additional opportunity to express their views as to certain issues, whereupon the Arbitral Tribunal rejected the *res judicata* defense in Procedural Order No. 5 of March 18, 2014, with detailed reasons. The Arbitral Tribunal found in particular that it was not bound by the reasons of the arbitral award of September 30, 2011, and interpreted paragraph 5.3 of the BCA independently. It took into account the corresponding reasons of the ICC Arbitral Tribunal sitting in Frankfurt of September 30, 2011, but based its decision on a different interpretation of the contract, insofar as it held that an overall evaluation was decisive and found on this basis that, although the Claimant remained short of the expectations as to billable hours and turnover, he met all other requirements paragraph 5.3 of the BCA – and therefore the majority of the requirements. It found that the first arbitral award of the ICC Arbitral Tribunal sitting in Frankfurt principally considered the two items of billable and total hours and turnover from billable hours, which was incompatible with the "holistic" approach required by the contract.

Thus, the ICC Arbitral Tribunal sitting in Zürich upheld the claim for payment of the contractual Floor Amount for the years 2011 and 2012 in principle, yet decided that a reduction based on paragraph 254 BGB[4] was justified by the Claimant's own negligence. Correspondingly, the award of September 29, 2014, upheld the claim in part and ordered the Defendant to pay EUR 1'997'221 with interest.

[4] Translator's Note: BGB is the German abbreviation for the German Civil Code.

C.
In a civil law appeal, the Defendant asks the Federal Tribunal to annul the award of the ICC Arbitral Tribunal sitting in Zürich of September 29, 2014, and to reject the claim; in the alternative, the matter should be sent back to the Arbitral Tribunal.

The Respondent and the Arbitral Tribunal submit that the matter is not capable of appeal; in the alternative, that it should be rejected.

D.
By decision of December 16, 2014, the Federal Tribunal rejected the Appellant's request for a stay of enforcement. However, it upheld the Respondent's request for security for costs and ordered the Appellant to post security for the Respondent's costs in the amount of CHF 17'000. The payment was made to the office of the Federal Tribunal in due course.

Reasons:

1. According to Art. 54(1) BGG,[5] the judgment of the Federal Tribunal is issued in an official language,[6] as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal uses the official language chosen by the parties. The award under appeal is in English. As this is not an official language and both parties used German before the Federal Tribunal, the judgment of the Federal Tribunal shall consequently be issued in German.

2.
In the field of international arbitration, a civil law appeal is permitted under the requirements of Art. 190-192 PILA[7] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Zürich in this case. Both parties had their domicile or their seat outside Switzerland at the decisive time (Art. 176(1) PILA). As the parties did not explicitly waive the application of Chapter 12 PILA, the provisions of the chapter are accordingly applicable (Art. 176(2) PILA).

2.2. The Respondent argues that the matter is not capable of appeal because the parties waived any recourse against the final award.

2.2.1. When none of the parties has a domicile, a habitual residence or an establishment in Switzerland, as is the case here, they can waive completely according to Art. 192(1) PILA any recourse against the arbitral

[5] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[6] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[7] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

awards by a specific statement in the arbitration agreement or in a later agreement. According to the case law of the Federal Tribunal, however, the common intent of the parties to avail themselves of the opportunity within the meaning of Art. 192(1) PILA and to waive the appeal of the international arbitral award to the Federal Tribunal must be unmistakably expressed in their statement (BGE 134 III 260[8] at 3.1; 133 III 235 at 4.3.1; 131 III 173 at 4.2; all with references). According to settled case law, an indirect waiver by reference to a specific set of arbitration rules, which contain a waiver of the appeal, is not sufficient (BGE 134 III 260 at 3.1; 133 III 235 at 4.3.1, p. 241; 131 III 173 at 4.2.1; since then also judgments 4A_238/2011[9] of January 4, 2012, at 2.1; 4A_486/2010[10] of March 21, 2011, at 2.1; 4A_514/2010[11] of March 1, 2011, at 4.1.1).

2.2.2. The Respondent rightly does not submit that there was a direct waiver in the case at hand. The mere applicability of the rules of arbitration of the International Chamber of Commerce ("ICC Rules"), which contain at Art. 34(6) a provision as to the waiver of an appeal against the arbitral award, is not sufficient according to the principles just recalled to constitute a valid waiver and neither is the Appellant's general statement in the appeal proceedings that "*the first goal* [of the parties] *was to avoid proceedings in the national courts*."

Contrary to the view presented in the answer to the appeal, there is here no valid waiver according to Art. 192(1) PILA that would exclude the appeal of the final arbitral award to the Federal Tribunal.

2.3. The civil law appeal within the meaning of Art. 77(1) BGG may, in principle, only seek the annulment of the award under appeal (see Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this allows the Federal Tribunal to decide the matter itself). Insofar as the dispute concerns the jurisdiction of the arbitral tribunal or its composition, there is an exception to the effect that the Federal Tribunal may itself decide the jurisdiction or the lack of jurisdiction of the arbitral tribunal as well as the removal of the arbitrator concerned (BGE 136 III 605[12] at 3.3.4, p. 616 with references).

The submission that the claim should be rejected is therefore inadmissible. The Appellant's other submissions are admissible, however (see judgment 4A_460/2013[13] of February 4, 2014, at 2.3).

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/renunciation-to-appeal-against-the-award

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-holds-that-opting-out-agreements-pursuant-to

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/valid-clause-waiving-the-appeal-to-the-federal-tribunal

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/valid-waiver-of-appeal-clear-renunciation-to-all-setting-aside-p

[12] 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

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

2.4. The Arbitral Tribunal and the Respondent both submit that the matter is not capable of appeal because the Appellant should have appealed one of the decisions of the Arbitral Tribunal as to the *res judicata* issued before the final award of September 29, 2014, which it did not. Thus, it forfeited the right to appeal.

2.4.1. The objection of the Arbitral Tribunal cannot be followed, according to which Procedural Order No. 5 of March 18, 2014, rejecting the defense of *res judicata* would be a partial award (see Art. 188 PILA), that should have been appealed within 30 days. Contrary to the view of the Arbitral Tribunal, it is not clear how a specific item in dispute would have been comprehensibly adjudicated there beforehand (see BGE 140 III 520[14] at 2.2.1, p. 523; 136 III 597[15] at 4.1; 130 III 76 at 3.1.2, 755 at 1.2.2; each with references). Instead, Procedural Order No. 5 addressed a preliminary issue which did not put an end, even in part, to the arbitral proceedings (BGE 140 III 520[16] at 2.2.1, p. 523; 136 III 597[17] at 4.1, p. 600). There is therefore no partial award which should have been appealed immediately but rather an interlocutory or preliminary decision (see Art. 190(3) PILA).

2.4.2. The Respondent wrongly submits that the violation of procedural public policy argued in the appeal brief (Art. 190(2)(e) PILA) should have been raised in an appeal against Procedural Order No. 3 to the Federal Tribunal, thus causing the argument to be forfeited according to Art. 190(3) PILA. While there are similarities between the issue of substantive *res judicata* and that of the jurisdiction of the Arbitral Tribunal, as the Federal Tribunal considered with regard to this Court's scope of review for instance (BGE 140 III 278[18] at 3.4, p. 283), both have different admissibility requirements in the field of international arbitral jurisdiction as well, to which different rules apply to a recourse according to Art. 190 PILA (see previously referenced judgment 1P.113/2000 of September 20, 2000, at 3b). The Respondent does not argue that the Appellant raised an argument based on Art. 190(1)(b) PILA, but instead acknowledges that its defense of *res judicata* of the first arbitral award was raised in the framework of a violation of procedural public policy within the meaning of Art. 190(2)(e) PILA.

The Respondent overlooks that even if the Arbitral Tribunal had implicitly acknowledged its jurisdiction in the Procedural Order concerning the *res judicata* defense, such a decision could be appealed according to Art. 190(3) PILA only for improper composition (Art. 190(2)(a) PILA) or for lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA). While other grievances can be raised in such an appeal according to Art.

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

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t

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

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t

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

190(2) PILA to the extent that they are related to the composition or the jurisdiction of the arbitral tribunal, such arguments are however to be strictly limited to issues that directly concern these problems (BGE 140 III 477[19] at 3.1, p. 479). In its appeal brief, however, the Appellant does not challenge the composition or the jurisdiction of the Arbitral Tribunal but instead relies on the *res judicata* effect of a previous arbitral award, which it raises in an independent argument according to Art. 190(2)(e) PILA. Such an appeal was not admissible against Procedural Order No. 3 of February 12, 2014, or Procedural Order No. 5 of March 18, 2014.

2.4.3. The argument that the Appellant should have appealed the procedural decision concerning *res judicata* immediately, thus resulting in forfeiture of the argument of a violation of procedural public policy in the appeal at hand (Art. 190(2)(e) PILA) is not convincing. The matter is therefore capable of appeal.

3.
The Appellant argues that the ICC Arbitral Tribunal sitting in Zürich violated procedural public policy (Art. 190(2)(e) PILA) by disregarding the material *res judicata* effect of the first arbitral award of the ICC Arbitral Tribunal sitting in Frankfurt of September 30, 2011.

3.1. It does not argue that the claim raised in the first arbitration was identical to the claim in the second arbitration but concedes that the first claim concerned the floor amounts for the years 2009 and 2010 while the claim in the arbitral proceedings at hand concerned the floor amounts for the years 2011 and 2012. Accordingly, the Appellant does not submit that the second claim was excluded due to the *res judicata* effect of the first arbitral award but acknowledges that the ICC Arbitral Tribunal sitting in Zürich was right to address the claim. However, the Appellant takes the view that the first arbitral award was prejudicial for preliminary and partial issues of the second arbitration, which is why the ICC Arbitral Tribunal sitting in Zürich should have abided by the "*binding legal and factual findings of the first Arbitral Tribunal*".

The Appellant takes the view that, in an international arbitration with international parties, an international concept of *res judicata* should be applied instead of a traditional one. The *res judicata* effect of the arbitral award of a foreign arbitral tribunal would therefore not correspond to that of a judgment of a domestic state court. The specific interests of the parties to an international arbitration derogate from those of the parties to a Swiss state court proceeding substantially and therefore the *res judicata* effect should also extend to the essential reasons of the award. This was emphasized by the International Law Association (ILA) (ILA Final Report on *Res Judicata* and Arbitration, *Arbitration International*, Volume 25, Number 1 [2009] p. 67 *ff.*) among others, in which a broader concept of the conclusive and preclusive effects would be described, which would particularly extend to legal and factual issues already adjudicated.

The *res judicata* effect of the first arbitral award would therefore extend also to the reasoning according to which the floor amounts would be due only when the criteria of "billable hours" and "turnover from billable

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

hours" were fulfilled according to paragraph 5.3 of the BCA in the year concerned. The ICC Arbitral Tribunal sitting in Zürich was bound by these reasons and should not have adjudicated the fulfillment of the requirements of paragraph 5.3 of the BCA for the yearly floor amount differently. Insofar as it nonetheless held that the failure to meet the two criteria of "billable hours" and "turnover from billable hours" was not sufficient to deny the floor amounts to the Respondent, the Second Arbitral Tribunal contradicted the legally binding reasons of the first arbitral award and therefore violated procedural public policy within the meaning of Art. 190(2)(e) PILA.

According to the Appellant furthermore, even if the traditional concept of *res judicata* were to be applied, the Arbitral Tribunal would have been bound by the findings of the first arbitral award as to the preconditions of a claim for the floor amounts, particularly as the reasons in the decision have prejudicial effects, even according to the case law of the Federal Tribunal, especially when a claim is rejected. In the case at hand, the Arbitral Tribunal violated the principle that a first arbitral award is prejudicial as to preliminary and partial issues in a second trial.

3.2.
3.2.1. Public policy (Art. 190(2)(e) PILA) has substantive and procedural content. A violation of procedural public policy takes place when some fundamental and generally recognized procedural principles are breached, the disregard of which leads to an untenable contradiction with the concept of justice to such an extent that the decision appears incompatible with the system of values and rules applicable in a state of laws (BGE 140 III 278[20] at 3.1, p. 279; 136 III 345[21] at 2.1; 132 III 389 at 2.2.1, p. 392; 128 III 191 at 4a, p. 194).

The arbitral tribunal violates procedural public policy when, in particular, it disregards the *res judicata* effect of a previous judgment in its decision or when it departs in its final award from the view expressed in a preliminary decision as to a material preliminary issue (BGE 140 III 278[22] at 3.1, p. 279; 136 III 345[23] at 2.1, p. 348; 128 III 191 at 4a, p. 194).

3.2.2. *Res judicata* applies both domestically and internationally and applies in particular to the relationship between an arbitral tribunal sitting in Switzerland and a foreign court or arbitral tribunal (judgment 4A_374/2014 of February 26, 2015, at 4.2.1; see also BGE 140 III 278[24] at 3.1, p. 279; 127 III 279 at 2).

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[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-

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

[23] 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-

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

Therefore, should a party raise a claim in an arbitral tribunal sitting in Switzerland which is identical to a foreign judgment or arbitral award in force as to the claim adjudicated there, the arbitral tribunal may not address the matter insofar as the foreign judgment can be recognized in Switzerland according to Art. 25 or Art. 194 PILA (judgment 4A_374/2014 of February 26, 2015, at 4.2.1; see also BGE 140 III 278[25] at 3.1, p. 279; judgment 4A_508/2010 of February 14, 2011, at 3.1).

The recognition of a foreign arbitral award gives it the same effects as a domestic judgment (judgment 4A_374/2014 of February 26, 2015, at 4.2.2; see also Paolo Michele Patocchi and Cesare Jermini, *Basler Kommentar*, Internationales Privatrecht, 3rd ed. 2013, n. 136 to Art. 194 PILA). If a party to a procedure in a Swiss state court or an arbitral tribunal sitting in Switzerland objects that an issue has already been adjudicated in a foreign arbitral award in force, the former must examine, as a preliminary issue, whether or not the conditions for recognition of the foreign arbitral award are met; an independent recognition procedure is not necessary (judgment 4A_374/2014 of February 26, 2015, at 4.2.2, 4A_508/2010 of February 14, 2011, at 3.1). According to Art. 194 PILA, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, applies to the recognition and the enforcement of foreign arbitral awards (SR 0.277.12; hereafter: the New York Convention).

3.2.3. Whether the claim adjudicated in a foreign decision and the claim raised before a Swiss tribunal or arbitral tribunal are the same is decided according to the *lex fori* unless an international convention provides differently; the principles developed in the case law of the Federal Tribunal as to *res judicata* are accordingly to be applied. It must be taken into account that the *res judicata* effect results from the corresponding foreign decision and therefore depends upon the law of the state of origin, which is why the conditions and limits of *res judicata* are determined according to that law (BGE 140 III 278[26] at 3.2).

The *res judicata* effect of a foreign judgment cannot therefore go further than the *res judicata* effect of a similar judgment of a Swiss court or an arbitral tribunal sitting in Switzerland (judgment 4A_374/2014 of February 26, 2015, at 4.2.2 a.,E,; 4A_508/2010 of February 14, 2011, at 3.3; see also BGE 140 III 278[27] at 3.2, p. 281). The substantive *res judicata* effect of a foreign judgment which, according to the law of the state of origin, would be independent from the parties' submissions adjudicated and would also include the reasons of the judgment, by contrast would have to be limited to the framework of the dispositive part of the judgment in Switzerland (BGE 140 III 278[28] at 3.2, p. 281 with references). On the other hand, a foreign judgment or arbitral award may not have wider effects in Switzerland as in the state where it was issued

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

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

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

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

(judgment 4A_374/2014 of February 26, 2015, at 4.2.2 a.e,; 4A_508/2010 of February 14, 2011, at 3.3; see also BGE 140 III 278[29] at 3.2, p. 281).

3.2.4. The Appellant disregards these principles by submitting to the Federal Tribunal in the appeal proceedings that the *res judicata* effect of the foreign arbitral award must extend to the reasons determining the decision "*within the meaning of the Swiss and international doctrine of* res judicata."

First, and contrary to its view, it is not the case that the Federal Tribunal has never decided heretofore whether the *res judicata* effect of a foreign arbitral award would correspond to that of the judgment of a domestic state court. The Federal Tribunal has applied the same criteria for judgments as to *res judicata* to foreign arbitral awards for a fairly long time and in this respect as well, it emphasizes that the *res judicata* effect of a foreign arbitral award is limited to the dispositive part of the award and that the reasons are not included (BGE 128 III 191 at 4a as to the *res judicata* effect of the judgment of an international arbitral tribunal sitting in Switzerland). In a more recent judgment, this Court applied to the *res judicata* effect of a foreign arbitral award the same principles as with regard to the foreign judgment of a state court (judgment 4A_508/2010 of February 14, 2011, at 3.3).

This was confirmed in a recent judgment in which the Federal Tribunal specifically held that the substantive *res judicata* effect also applies internationally and determines in particular the relationship between an arbitral tribunal sitting in Switzerland and a foreign arbitral award, while the scope of the *res judicata* effect of a foreign arbitral award is determined according to the same principles as for a foreign court judgment (judgment 4A_374/2014 of February 26, 2015, at 4.2.1 and 4.2.2).

Moreover the principle that an arbitral award, once issued, acquires the effect of an enforceable court judgment is specifically stated in the law on domestic arbitration (Art. 387 ZPO[30]) and this applies also to the decisions of international arbitral tribunals sitting in Switzerland (Simon Zingg, *Berner Kommentar*, Schweizerische Zivilprozessordnung, vol. I, 2012, No. 114 to Art. 59 ZPO; Thomas Rüede and Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed., 1993, p. 309 *f.*).

3.2.5. Neither the Appellant's alleged "*specific interests of the parties to an international arbitration*" or the desirability of uniform standards and transnational concepts or the recommendations of a private organization quoted by the Appellant (*ILA Final Report on Res Judicata and Arbitration*, a.a.O; in this respect Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., 2015, No. 1666 *ff.*) could modify the legal position in this respect. The Appellant rightly does not submit that the New York Convention or another applicable treaty would provide different rules as to substantive *res judicata*. There is no legal ground for the application it advocates of the broad concept of *res judicata* "*according to the world wide concept of Anglo-American origin.*"

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

[30] Translator's Note: ZPO is the German abbreviation for the Swiss Code of Civil Procedure

Irrespective of the foregoing, the Appellant disregards that the *res judicata* effect of a foreign arbitral award results from the corresponding foreign decision and therefore its only impact in Switzerland is that which the law of procedure of the state of origin provides. The Appellant rightly does not claim that German law would apply not only to the dispositive part but also to the reasons of the award at issue of the ICC Arbitral Tribunal sitting in Frankfurt (see instead, many, Joachim Münch, *Münchener Kommentar*, Zivilprozessordnung, vol. 3, § 1025-1109, 4th ed,, 2013, n. 14 *f.* to § 1055 ZPO; see also BGE 138 III 714 at 3.2, according to which the Federal Tribunal itself follows, as to the preliminary questions concerning foreign law, the clearly dominant opinion in the foreign legal order and in cases of controversy between case law and legal writing, it follows the highest court).

The *res judicata* effect of the award of the ICC Arbitral Tribunal sitting in Frankfurt of September 30, 2011, is therefore to be assessed according to the principles developed by the Federal Tribunal as to substantive *res judicata*.

3.2.6. The Appellant wrongly submits that the ICC Arbitral Tribunal sitting in Zürich would have been bound by the findings of the first arbitral award as to the contractual requirements of a claim concerning the floor amounts even if the concept of *res judicata* applied by the Federal Tribunal were to be relied upon.

The *res judicata* effect applies only insofar as the specific claim was decided. To what extent this is the case is determined by the interpretation of the judgment on the basis of its entire contents. While the *res judicata* effect is limited to the dispositive part of the award, its scope frequently results from the reasons of the decision, particularly when a claim is rejected (BGE 121 III 474 at 4a, p. 478). The meaning of the specific operative part of the award is therefore to be assessed in each case on the basis of the entire reasons of the decision (BGE 136 III 345[31] at 2.1, p. 348 with references).

To determine as to which claim the first request for arbitration was rejected with *res judicata* effect, it is indeed right that the reasons of the award of the ICC Arbitral Tribunal sitting in Frankfurt of September 30, 2011, were to be taken into account. But, contrary to the Appellant's allegation, the ICC Arbitral Tribunal sitting in Zürich did address the reasons of the first Arbitral Tribunal and rejected, with thorough reasons, the *res judicata* defense in its Procedural Order No. 5 of March 18, 2014. It correctly held that the claim raised in the first arbitration was not identical to the claim raised in the second arbitration because it concerned the floor amounts of the years 2011 and 2012 whilst the latter was based on the floor amounts for the years 2009 and 2010, which even the Appellant acknowledges. Contrary to the view expressed in the appeal brief, there is no further binding effect as to the reasons in the first arbitral award; as to the interpretation of paragraph 5.3 BCA, it is merely part of the subsumption, which do not become *res judicata* by themselves (BGE 121 III 474 at 4a, p. 478; see as to the rejection of a claim consisting of various items based on the same contract judgment 4A_352/2014 of February 9, 2015, at 3). The Appellant disregards

[31] 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-

that the interpretation of the contract was not by itself an item in dispute in the first award and could not be the object of a legally binding finding as to this question.

Contrary to the Appellant's view, the case law of the Federal Tribunal as to *res judicata* does not bind the second Arbitral Tribunal to the legal considerations of the first award. The ICC Arbitral Tribunal sitting in Zürich, which had to adjudicate a different claim from that entrusted to its counterpart sitting in Frankfurt, could revisit the claim from scratch and was bound neither to the factual findings nor to the legal reasons of the first arbitral award. The ICC Arbitral Tribunal sitting in Zürich therefore did not violate public policy (Art. 190(2)(e) PILA) when it based its award on a different interpretation of paragraph 5.3 BCA. Quite the contrary, it would have violated public policy if, in the assessment of the claim, it held itself bound by the interpretation of the contract in the first arbitral award and renounced the corresponding review although a different claim was decided in the first award.

4.
The appeal proves to be unfounded and must be rejected insofar as the matter is capable of appeal. In such an outcome, the Appellant must pay the costs and compensate the other party (Art. 66(1) and Art. 68(2) BGG). The party costs will be paid from the amount deposited with the Federal Tribunal.

Therefore the Federal Tribunal Pronounces:

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

2.
The judicial costs set at CHF 15'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 17'000 for the federal judicial proceedings. This amount shall be paid from the security for costs deposited with the Federal Tribunal.

4.
This judgment shall be notified in writing to the parties and to the ICC Arbitral Tribunal in Zürich.

Lausanne, May 29, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leeman