4A_514/2010

Judgment of March 1, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge KOLLY,

Clerk of the Court: Mr. CARRUZZO.

A.X._____, represented by Mr Dominique Warluzel,

Appellant,

v.

1. B.X._____, represented by Mrs Gabrielle Kaufmann-Kohler, Mr Antonio Rigozzi and Mr Philippe Neyroud,

2. Y._____, represented by Mr Daniel Tunik,

Respondents.

Facts:

A.

A.a B.X._____ and his younger brother A.X._____ became wealthy from international metal trading, particularly through the companies of the group V._____. As their relationship had deteriorated, they decided at the start of 2000 to put an end to their partnership. The two brothers agreed to share the profits of these companies and that the eldest would repurchase the younger brother's stake. The implementation of this agreement implied an accounting process to determine their respective claims. It was a delicate operation given that some of the companies of the group V._____ constituted assets of the [name omitted] Trust set up in the Bahamas and with the Bahamian attorney Y._____ acting as trustee.

A.b Anthony Julius, a London solicitor, had known both brothers for a long time, as he had provided legal advice to both of them individually for many years and had been involved in a previous attempt to settle their dispute amicably. He had also acted as a consultant for various companies of the group V._____.

At the start of 2004 A.X._____ complained to Anthony Julius that the accounting process had not yet begun. B.X._____ claimed for his part that this was due to his brother, who was in possession of banking documents and supporting documents without which the process could not begin.

It would appear that mid-2004 A.X._____ took the initiative of transferring certain assets from the [name omitted] Trust to other trusts under his control. Thereupon the trustee Y._____ filed a criminal complaint against the aforenamed, following which a police investigation was opened in the Bahamas. A.X._____ wished to obtain the withdrawal of the criminal complaint as swiftly as possible while keeping the transferred assets in the location where they were being held at the time. His brother and the trustee, conversely, wanted the assets to be returned to the [name omitted]

Trust. The dispute between the two brothers had thus reached its paroxysm. In an attempt to resolve it, they once again turned to Anthony Julius.

On 24 July 2004, A.X._____ and B.X._____, after seeking extensive legal advice, as well as Y._____, signed an arbitration agreement with Anthony Julius. In the agreement the Parties appointed the London solicitor as sole arbitrator with full powers to resolve the dispute between them, with which he was already familiar, as well as any further disputes arising during the arbitration. The arbitration agreement was governed by Swiss law and provided that the seat of the arbitration was to be in Geneva. It stated that the Arbitrator could represent or continue to represent the Parties outside of the arbitration against compensation. The Parties further expressly waived any rights they may have had to challenge the appointment of the Arbitrator on any ground, including on the ground of his previous contact with the brothers X._____ as mediator or legal adviser. Moreover, the Parties waived their right to challenge any determination or award by the Arbitrator through set aside proceedings or any other proceedings as well as their right to oppose enforcement of the Arbitrator's determinations or awards in any jurisdiction. The arbitration agreement provided that in a first stage of the arbitration, A.X._____ would hand over to a third person (stakeholder) the transferred documents and securities of the [name omitted] Trust whereas Y._____ would provide to the stakeholder a letter for the withdrawal of the criminal investigation to the competent Bahamian authorities. After verifying compliance with these provisions, the Arbitrator would invite the stakeholder to dispatch the letter to those authorities. At the end of the second stage, pursuant to the agreement, the Arbitrator would satisfy himself that the criminal investigation pending in the Bahamas had been discontinued and would instruct the stakeholder to return all of the documents and assets concerning the [name omitted] Trust to Y._____. In a third stage, which would end on January 15, 2005, at the latest, all issues between the parties would be resolved.

The arbitration started shortly after the signing of the *ad hoc* agreement and gave rise to a significant number of submissions and procedural determinations. At the Parties' request it was the Arbitrator himself who acted as the stakeholder in place and stead of the law firm mentioned in the arbitration agreement. On May 3, 2005, considering that the continuation of the criminal investigation in the Bahamas was prejudicial to the interests of the family of A.X._____, Anthony Julius sent to the Bahamian authorities the letter designed to bring the proceedings to a close. On May 25, 2005 he made two orders: the first affirming that he had received confirmation that the criminal investigation in the Bahamas had been brought to a close; the second indicating to the Parties that the documents in the possession of the stakeholder would be delivered to Y._____ with immediate effect. In a new order dated June 1st, 2005 the sole arbitrator confirmed this second order against the opinion of A.X._____.

A.c On June 1st, 2005 A.X._____ sought and obtained from the London Commercial Court an order preventing the documents delivered to the stakeholder, which were on English soil, from being transferred outside of its jurisdiction. However he subsequently discontinued this action.

A.X._____ commenced a second action before the same court on August 19, 2005 against B.X._____, Y._____ and Anthony Julius to contest the validity of the arbitration agreement. This second action was dismissed by judgment of July 28, 2006, on the grounds that it was incumbent upon the Arbitrator to make a determination on his own jurisdiction, pursuant to the law of the seat of the arbitration.

On September 29, 2005 A.X._____ applied to the English High Court of Justice seeking the production of the documents he had handed over to Anthony Julius when he was his solicitor (chancery action). The relevant proceedings were stayed in November 2005 following agreement by all the interested parties to deliver these papers to the Applicant.

B.

On May 8, 2006, while the second action filed by him was pending before the Commercial Court, A.X._____ requested that the Arbitrator recuse himself.

At the request of A.X._____ the arbitration proceedings were stayed, in order to take account of the proceedings initiated by the Parties before the Bahamian courts. The stay was subsequently extended several times.

By interim award of July 15, 2010, the Arbitrator rejected the challenge. Initially, and as agreed between the Parties, Anthony Julius limited his review to the sole issue the challenge against him, reserving a subsequent determination on his jurisdiction in light of the parallel proceedings before the Bahamian courts. Interpreting the will of the parties, which is determinant pursuant to Art. 180 (3) of the Federal Statute on International Private Law of December 18, 1987 (PILA[1]; RS 291), he found that they had agreed that he should decide himself as to the challenge. In his view such power was incompatible neither with Swiss law nor, specifically, with Swiss procedural public policy. As to the merits, the Arbitrator found that most of the grounds raised in the application were covered by the waivers contained in the arbitration agreement and moreover that by filing three suits against him in England in less than four months after actively participating in the initial stage of the arbitration and then criticizing him for defending himself in the English courts, A.X._____ had attempted to torpedo the proceedings without valid reason. In any event, according to the Arbitrator, A.X._____ was estopped from relying on the grounds stated in his challenge as he had not immediately raised them upon discovering them; moreover these grounds were immaterial.

[1] 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

C.

On September 14, 2010 A.X._____ filed a Civil law appeal with the Federal Tribunal seeking the annulment of the award. Principally, he requested a stay of the federal appeal proceedings "until entry into force of the interim award that the arbitral tribunal will be asked to render on the validity of the arbitration agreement and, therefore, on its own jurisdiction".

A stay of enforcement was granted by presidential order of October 26, 2010.

Invited by presidential order of November 8, 2010 to file its response by December 9, 2010, B.X._____ filed with the Federal Tribunal on December 10, 2010, a submission that the appeal should be rejected, insofar as the matter is capable of appeal.

On the last day of the time limit granted for such purposes, Y._____ filed observations without making any formal submissions as to the outcome of the appeal.

For his part, the Arbitrator indicated to the Federal Tribunal by letter of November 25, 2010 that he would not take a position on the appeal.

Reasons:

1.

Pursuant to Art. 54 (1) LTF,[2] the Federal Tribunal issues its decisions in an official language, as a rule in the language of the decision under appeal. If that decision is in another language (in this case English), the Federal Tribunal uses the official language chosen by the parties. Before the

[2] Translator's note : LTF is the Italian and French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110

Arbitrator they used English, while in the briefs submitted to the Federal Tribunal, the Appellant wrote in French and the Respondent in German. In keeping with its practice in such cases, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in French.

2.

The Appellant principally seeks a stay of the federal appeal proceedings and submits that the matter should be sent back to the Arbitrator for a determination first on the validity of the arbitration agreement and then on his own jurisdiction. In the Appellant's opinion, the Arbitrator should have started by assessing the first of the two questions as it has a direct impact on the issue of whether this appeal may be heard. Indeed, as it contains a waiver of appeals within the meaning of Art. 192 PILA, the arbitration agreement would, assuming it is valid, close the door to an appeal against the Arbitrator's award regarding the challenge of July 15, 2010.

This application need not be addressed. First, notwithstanding the Appellant's arguments (see appeal, at 23), if the Arbitrator assessed the challenge prior to the issue of jurisdiction, he did so with the Parties' agreement (award, at 6, 24 and 84) and *not* for the purpose of rendering more difficult the filing of an appeal against his ruling on the challenge. Second, this course of action was perfectly logical: to the extent that his very appointment was disputed by one of the parties on grounds of alleged lack of independence and impartiality the Arbitrator could not render any award (including on his own jurisdiction) in the matter which had been submitted to him for arbitration before a decision was taken regarding the challenge, yet the parties had agreed that he himself would decide this issue. Finally, the Federal Tribunal may in a preliminary ruling examine the validity of the arbitration agreement and that of the waiver of appeals as requested alternatively by the Appellant (appeal, n. 24 (ii)), without, however, requesting the introduction of evidence in this respect.

3.

3.1 The Federal Tribunal examines *ex officio* whether the matter is capable of appeal (ATF 136 II 101 at 1 p. 103; 470 at 1 p. 472).

3.2 In the field of international arbitration, a Civil law appeal against arbitral awards is possible, subject to the requirements of Art. 190-192 PILA (Art. 77 (1) LTF).

Geneva was determined as the seat of the arbitration. Neither party had its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The Appellant is directly concerned by the interim award under appeal dismissing his challenge. He has a personal and legally protected interest in ensuring that the award was not issued in violation of his rights arising under Art. 190 (2) PILA and therefore has standing to appeal (art. 76 (1) LTF).

Filed in a timely manner (art. 100 (1) LTF in conjunction with art. 46 (1) (b) LTF) and in the form prescribed by law (art. 42 (1) LTF), the matter is therefore capable of appeal insofar as these various requirements are concerned.

3.3 From another perspective, however, it appears less obvious that the matter is capable of appeal, specifically as to the subject matter of the award under appeal, i.e. a decision as to a challenge rendered by the Arbitrator himself. However there is no need to further discuss this question, the practical importance of which should not be overestimated, because this matter, even if it were to be capable of appeal with regard to its subject matter, should in any event be found to be incapable of appeal on other grounds.

4.

The admissibility of an appeal implies, amongst other conditions, that the parties have not opted out of any appeal within the meaning of art. 190 PILA.

4.1

4.1.1 Art. 192 (1) PILA states that if both parties have neither their domicile, nor their habitual residence, nor a place of business in Switzerland, they may agree to exclude any appeal against the awards of the arbitral tribunal by an express statement in the arbitration agreement or a subsequent written agreement; they may also exclude appeals for any of the grounds stated at art. 190 (2) PILA.

Federal case law has gradually developed the principles arising from this provision. In substance, case law exercises restraint in approving agreements excluding appeals and indirect appeal waivers are considered insufficient. As to direct appeal waivers, they need not contain a specific reference to art. 190 PILA and/or art. 192 PILA. It is sufficient if the express statement by the parties clearly indicates their plain joint willingness to waive all appeals. Knowing whether or not this is the case is a matter of interpretation (ATF 134 III 260 at 3.1 and cases cited).

A clause providing that the award will be final does not constitute a valid appeal waiver. The same applies to the commitment of the parties to comply with and enforce the award (judgment 4A_464/2009 of February 15, 2010 at 3.1.1 and references).

4.1.2 In this case it is undisputed that none of the Parties had their domicile or their habitual residence in Switzerland when the arbitration agreement of July 29, 2004 was entered into. Said agreement contains a clause 1.9 with this wording in the original text:

"The parties expressly agree to waive their rights to

a) challenge any determination(s) or award(s) by the Arbitrator through set aside proceedings or any other proceedings;

b) oppose enforcement of the Arbitrator's determination(s) or award(s) in any jurisdiction."[3]

Considered in the light of the case law principles stated above, this clause is clearly a valid appeal waiver. It undisputedly conveys the parties' joint intent to waive any appeal against any award of the sole arbitrator regardless of the nature and cause of the award. The Appellant is, moreover, aware of this and notes that "*prima facie*, this waiver would be valid within the meaning of art. 192 (1) PILA" (Appeal, n. 20). Moreover it is accepted that an appeal waiver may be all-encompassing, that is, that it may encompass all of the causes listed at art. 190 (2) PILA (judgment 4P.198/2005 of October 31, 2005 at 2.2) including the cause of irregular composition of the arbitral tribunal (ATF 133 III 235 at 4.3.2.2 p. 243 *in limine*).

4.2 In an attempt to paralyze the effects of the appeal waiver, the Appellant indicates that he has successfully invalidated the arbitration agreement containing the waiver clause on the grounds that he entered into the agreement under duress.

4.2.1 Like any other contract, an arbitration agreement may be affected by a vitiation of consent (Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd ed. 2010, no. 235). If it is governed by Swiss law it may be invalidated due to undue influence (art. 21 CO[4]), essential mistake (art. 23 et seq. CO), fraud (art. 28 CO) and duress (art. 29 CO).

---

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

[4] Translator's note: CO is the French abbreviation for the Swiss Code of Obligations.

4.2.2 A duress in vitiation of consent exists where a person – a party or a third person – intentionally and unlawfully incites another person to enter into a legal act. Duress is based on the threat of future harm if the person refuses to comply; it vitiates the party's will at the stage of will formation.

For a contract to be invalid due to duress, the following four conditions must be met: a threat made unlawfully against another party or a close relative or friend, the resultant fear, the author's intention to threaten the addressee to enter into a legal act and a nexus between the fear and the consent (ATF 111 II 349 at 2). Further, parties intending to raise a grievance based on duress must declare to the other party their resolve to denounce contract within one year from the time the fear subsides (art. 31 (1) and 2 CO).

Pursuant to art. 30 (2) CO, the fear of a claim being made may only be taken into account if the unease of the threatened party has been exploited to extort an excessive advantage. Generally the use of lawful means to cause lawful harm does not constitute an unlawful threat. However the means must be appropriate to the purpose that the author intends to attain. The expression "excessive advantage" encompasses any inadequate or disproportionate advantage by which the party threatening to make a claim pursues an objective unrelated to said claim or extending beyond its mere exercise in breach of good faith principles (judgment 4A_259/2009 of August 5, 2009 at 2.1.1 and the legal writer quoted).

The burden of proof of the existence of a threat and of its causal effect on the conclusion of the contract lies with the threatened party. This party must also prove the excessive nature of the advantage extorted by threatening to invoke a right (judgment cited, at 2.1.2).

4.2.3. If one correctly understands the Appellant, whose explanations on this point show a singular lack of clarity, Y._____ filed against him an unjustified criminal complaint, which gave rise to the opening of an investigation in the Bahamas, as well as to a house search at dawn in his family domicile in Nassau, in the presence of his wife and children. There resulted a state of fear intentionally created by the Trustee, which had caused the Appellant to sign the arbitration agreement so as to avoid the inconvenience of criminal proceedings likely to affect his reputation. It is for this reason, the Appellant continues, that he wrote by hand on the draft arbitration agreement that the criminal plaint should be irrevocably withdrawn. According to the Appellant, the causal relationship between the fear and his acceptance of said agreement was established by this handwritten addition. Consequently, the statement invalidating the agreement which he addressed to all parties on July 26, 2005, when the Bahamian criminal proceedings had been closed, was effective. As a result, the arbitration agreement and therefore the appeal waiver were not binding on him.

Such an argument, which relies mainly on non-established facts, is not convincing. First, one can hardly see what interest Y._____ could have in seeing the dispute between the two brothers X._____ resolved by arbitration rather than before the ordinary Bahamian courts to the point of wanting to force the Appellant to sign an arbitration agreement. In his response to the appeal, Y._____ credibly disputes ever having had such an intention or even the more general intention of "conspiring with the other party and/or the sole arbitrator" (n. 14). Further, it is clear that A.X._____ and B.X._____ sought extensive legal advice before signing the arbitration agreement; such a circumstance is hardly compatible with the contention that the intent to enter into the contract would have been expressed in conditions of urgency and under the pressure of circumstances. Further, the alleged threat at issue here did not allude to the filing of a criminal complaint, as it had already been filed before the arbitration agreement was signed, but rather to the non-withdrawal of the complaint which gave rise to the ongoing criminal proceedings. It would

therefore be necessary to establish that the plaintiff – that is, Y._____ - indicated to the threatened party that he would only withdraw the criminal complaint if the other party accepted to sign the arbitration agreement. However nothing has been proven in this respect and the handwritten addition regarding the irrevocable nature of the withdrawal of the complaint in the text of the agreement merely shows that the Appellant attached importance to the final cessation of the criminal proceedings against him. On the contrary, the actual wording of the arbitration agreement rather suggests that there was no compelling relationship between the announced withdrawal of the criminal complaint and the signing of this agreement. It is indeed apparent from the agreement that the signing of the agreement alone would not result in the withdrawal of the complaint, given that this withdrawal was conditional on the return of the documents and securities which the Appellant had transferred from the [name omitted] Trust.

There is therefore no choice but to find that the allegedly threatened party has not proven the allegation of vitiated consent.

4.3 Relying on art. 27 CC[5], the Appellant again pleads the nullity *ab initio* of the arbitration agreement. If one were to believe him, he would have alienated his freedom by submitting to the discretionary power of an arbitrator the resolution of all current and future disputes arising between the other Respondents and himself without any specification as to the subject matter of the disputes.

The argument clearly fails, inasmuch as it is based on a false premise. It is indeed apparent from the very wording of the arbitration agreement that the Parties chose the Arbitrator so that he would settle the disputes already known to him in consequence of having attempted to amicably settle them with the Parties (1.1 in conjunction with 1.2 (a)) and further the disputes arising during the

[5] Translator's note : CC is the French abbreviation for the Swiss civil code.

arbitration (1.1 in conjunction with 1.2 (b)). Thus, the arbitration accepted by the Appellant was limited both with regard to subject matter, even if it remained to be further specified, and in time. Further, if the parties involved chose the Arbitrator in question, it is precisely because he had a close professional relationship with them and they trusted him.

4.4 The Parties therefore validly waived their right of appeal against any award made by the Arbitrator by inserting into the arbitration agreement an *ad hoc* clause, which the Appellant agreed to without being under duress and which is not null and void. Therefore the matter is not capable of appeal.

5.

The Appellant loses and shall pay the costs of the federal proceedings (art. 66 (1) LTF). He must also pay costs to Y._____ (art. 68 (1) and 2 LTF). As to B.X._____, he filed his response one day after the expiry of the time limit for a response. Hence, it is not possible to take his brief into consideration nor to order that costs be paid to that Respondent.

Therefore, the Federal Tribunal pronounces:

1. The application for a stay of the appeal proceedings is dismissed.

2. The matter is not capable of appeal.

3. The court costs, set at CHF 15'000, shall be borne by the Appellant.

4. The Appellant shall pay Y._____ an amount of CHF 17'000 for the costs of the proceedings.

5. This judgment shall be notified to the parties and to the sole arbitrator.

Lausanne, 1st March 2011

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

The presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO