4A_256/2009[1]

Judgment of January 11, 2010
First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

X._____,
Appellant,
Represented by Dr Michael MRÁZ

v.

AY._____ Holding B.V.,
Respondent,
Represented by Dr Sabine BURKHALTER and Barbara RUTZ

Facts:

A.

A.a X._____, Czech Republic, (Appellant) invests *inter alia* in large Czech steel and machine-industry companies.

[1] Translator's note: Quote as X._____ v. AY._____ Holding B.V., 4A_256/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

AY._____ Holding B.V. (formerly AAY._____ Group Holding B.V.) (Respondent) is a Dutch holding company which has holdings, inter alia, in numerous Czech companies. The Respondent is controlled by Y._____, Czech Republic.

A.b On November 9, 2005 the Appellant concluded a "Joint Operation Agreement" with Y._____. In a purchase agreement concluded on the same day with the Respondent, the Appellant undertook to transfer its shareholding of 45 % in the company A._____ Holding to the Respondent. By subscribing to the new shares in the Respondent issued by virtue of a capital increase and by offsetting the amount owed by the Appellant to pay up the new shares against the purchase price owed to the Appellant, the Appellant was to obtain a 50 % shareholding in the Respondent. The "Joint Operation Agreement" provided for a contractual penalty in the event that certain contractual duties were not performed. Both agreements also contain a choice of law clause in favour of Czech law and an arbitration clause.

The capital increase subsequently did not take place and the shares in company A._____ Holding were not transferred either.

B.

B.a In a brief of November 9, 2006 the Respondent filed a request for arbitration with the International Chamber of Commerce (ICC) against the Appellant and requested, on the basis of the share purchase agreement of November 9, 2005, transfer of the shares which it held in A._____ Holding (ICC Case No. _____).

The Appellant, for its part, filed a request for arbitration based on the "Joint Operation Agreement" of November 9, 2005 against Y._____ for payment of the contractual penalty (ICC Case No. _____). It also demanded payment of the contractual penalty by way of a counterclaim.

Both proceedings were adjudicated by the same arbitrators. In each instance the Appellant appointed Q._____, the Respondent/Y._____ appointed P._____ as arbitrator; these arbitrators agreed on O._____ as chairman. The arbitral tribunal waived joining the two proceedings.

B.b In an award of May 15, 2009 the Arbitral Tribunal upheld the Respondent's claim in the proceedings ICC Case No. _____ and ordered the Appellant to transfer the shares in A._____ Holding in return for payment of a purchase price of CZK 1,182,500,000.00 (which corresponds to approximately CHF 67m). In particular, the Arbitral Tribunal took the position that the share purchase agreement of November 9, 2005 had to be performed irrespective of whether or not the "Joint Operation Agreement" was effective.

C.
In a Civil law appeal (supplemented within the time limit) the Appellant is requesting that the Federal Tribunal annull the award of May 15, 2009 in ICC Case No. _____.

The Respondent argues that the appeal should be rejected to the extent that the matter is capable of appeal. The chairman of the Arbitral Tribunal filed two briefs and, accordingly, also requests that the appeal be rejected to the extent that the matter is capable of appeal.

The Appellant filed a reply with the Federal Tribunal, the Respondent a rejoinder. The Appellant commented on the rejoinder in a further brief; the Respondent, in turn, commented hereon in a short brief. The Respondent then filed a "request to accelerate the proceedings" with the Federal Tribunal.

D.

On July 24, 2009 the Federal Tribunal granted a stay of enforcement and rejected the Respondent's subsidiary application to order security in the amount of CHF 1,128,352.00.

Reasons:

1.

1.1 The "request to accelerate the proceedings" filed by the Respondent is rendered moot by the decision in the matter.

1.2 The Appellant requests that these proceedings be joined with the appeal 4A_258/2009 as the grievance of irregular composition of the Arbitral Tribunal is identical. There is, in principle, a possibility of joining different Federal Tribunal proceedings (see BGE 124 III 382 at 1a p. 385; 111 II 270 at 1 p. 272). However, both appeals filed by the Appellant are against awards which were issued in two separate arbitration proceedings, whereby the opposing parties were different in each case and differing claims had to be appraised. Although it essentially makes the same complaint in both proceedings, owing to the identical composition of the arbitral tribunals, with respect to the lack of impartiality of two of the arbitrators (Art. 190 (2) a PILA[2]), the other complaints are based on different factual and legal circumstances. There is no need to join the two proceedings here.

2.

A Civil law appeal against arbitral awards is possible under the requirements of Art. 190-192 PILA (Art. 77 (1) BGG[3]).

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[2] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291

[3] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organising the Federal Tribunal, RS 173 110.

2.1 The seat of the arbitral tribunal is in Zurich in this case. None of the parties has its seat in Switzerland. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

2.2 The Respondent incorrectly argues that the matter is not capable of appeal because the parties waived the right to appeal the arbitral award in the arbitration agreement.

If none of the parties has its domicile, habitual residence or a branch in Switzerland, which is the case here, it is true that they can, pursuant to Art. 192 (1) PILA, completely exclude appeals of arbitral awards by way of express declaration in the arbitration agreement or in a later agreement. However, according to the case law of the Federal Tribunal, the common will of the parties wanting to make use of the possibility at Art. 192 (1) PILA and waive their rights to file an appeal against an international arbitral award with the Federal Tribunal must be unmistakably clear from the declaration. Whether or not this is the case must be determined by interpreting the specific arbitration clause (see BGE 133 III 235 at 4.3.1 p. 240 f.; 131 III 173 at 4.2, especially at 4.2.3.1 p. 177 ff.; each with references).

According to the wording of the arbitration clause at hand, disputes arising from the agreement are decided "finally, excluding the jurisdiction of the general courts, in accordance with the rules of the arbitral tribunal of the International Chamber of Commerce". Contrary to the Respondent's view, this does not satisfy the requirements of an express waiver in the sense of Art. 192 PILA. First, the reference to the exclusion of the jurisdiction of the "general courts" merely expresses that an arbitral tribunal, instead of the state courts, should decide on any disputes. An intent of the parties to waive an appeal against the arbitral award to the Federal Tribunal cannot be derived herefrom. Second, designating an award "final", according to customary language usage in civil procedural law, does not exclude an appeal by way of extraordinary legal remedies but merely the (free) review of the award by way of ordinary legal remedies, such as, for example, an ordinary appeal (see the awards 4A_224/2008 of October, 10

2008 at 2.6.3; 4P.114/2006 of September 7, 2006 at 5.3; each with references). For example, Art. 190 PILA provides in (1) that the award of the arbitral tribunal is "final" but provides in the following two paragraphs (2) and (3), in connection with Art. 191 PILA, for an extraordinary appeal, for the reasons limitatively set forth, with the Federal Tribunal as sole appeal instance by way of a civil law appeal according to Art. 77 BGG.

2.3 Only those grievances which are limitatively set forth in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal only examines the grounds of appeal that are raised and reasoned in the appeal; this corresponds to the requirement for reasons in Art. 106 (2) BGG regarding the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

2.4 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 and Art. 105 (2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; each with references). In order to claim an exception from the Federal Tribunal being bound to the factual findings of the lower court and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the record that the corresponding factual allegations were already made in conformity with procedural rules in the proceedings in front of the lower court (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; each with references).

3.

The Appellant argues on the basis of Art. 190 (2) (a) PILA that the arbitral tribunal was irregularly composed. It argues that P._____, appointed by the Respondent, and the chairman of the arbitral tribunal, O._____, were partial which is why there was no guarantee that the arbitral tribunal would be impartial and independent.

3.1

3.1.1 The Appellant allegedly read at the end of May 2007 in the Czech media that the ICC did not approve P._____ in other arbitration proceedings (against Z._____), for which this arbitrator had also been appointed by the Respondent, because he had been appointed too frequently by Y._____ or by persons affiliated with it. The newspaper article mentioned allegedly "states that JUDr. P._____ has been appointed as arbitrator by Y._____ or by persons affiliated with it in approx. 10 different arbitration proceedings in the recent past". The Appellant claims to be able to confirm this from its own perspective since it also allegedly faced Y._____ in the year 2006 in two proceedings before the arbitral tribunal of the Czech Chamber of Commerce. There too P._____, as party-appointed arbitrator, was standing on Y._____ 's side, and has thus, over the course of time, become its "usual arbitrator". However, the ICC approved P._____ in these arbitration proceedings on April 27, 2007 and, in its decision of April 28, 2007, rejected the Appellant's challenge, without reasons in accordance with its practice.

3.1.2 Direct legal remedies are excluded against a decision rejecting a challenge by a private body such as the ICC International Court of Arbitration; such a decision can, however, be the subject of an indirect review in the appeal against the arbitral award itself (BGE 128 III 330 at 2.2 p. 332; 118 II 359 at 3b p. 360 f.) However, the Appellant does not show, to the extent that its arguments are sufficiently substantiated at all, any circumstances which would give rise to justified doubts with respect to the independence of P._____ (see Art. 180 (1) (c) PILA).

First, its argument is based solely on an allegation made in a newspaper article of May 20, 2007 that P._____ had been appointed arbitrator "in the recent past" in numerous cases by Y._____ or "persons affiliated with it"; this argument is too uncertain for its accuracy to be clarified in evidentiary proceedings and for an appraisal of the independence of the arbitrator in question to be made on its sole basis. The Appellant would at least have had to specifically name the different arbitration proceedings, the time at which they took place and the parties involved, and show which party had appointed P._____ and what relationship this party had with the Respondent. The mere fact that P._____ was not granted approval by the ICC International Court of Arbitration in other ICC arbitration proceedings between the Respondent and a Mr Z._____ (ICC Case No. _____) does not allow any conclusions as to the issue of independence in these proceedings. Contrary to the allegation made in the appeal, the letter from the ICC dated April 27, 2007 in ICC Case No. _____ does not reveal that the approval was refused owing to a "close link" with the Respondent.

As it states itself, the Appellant was involved in the two proceedings before the arbitral tribunal of the Czech Chamber of Commerce in the year 2006 referred to in the appeal. It would therefore have been aware that P._____ had been appointed by Y._____ in these arbitration proceedings when P._____ was approved as arbitrator on April 27, 2007 in these proceedings by the ICC International Court of Arbitration. If it had wanted to appeal to the fact that P._____ had already been appointed at least twice over the last three years as arbitrator by the other party or an affiliate, it should have done this without undue delay after his confirmation and should not have waited until August 17, 2007 to file a challenge (see Art. 180 (2) sentence 2 PILA). The Appellant forfeited its right to invoke the reason for challenge at a later time (see BGE 129 III 445 at 3.1 p. 449; 126 III 249 at 3c p. 253 f.; each with references).

Given these circumstances, there is no need to address the Appellant's argument that, pursuant to art. 3.1.3 of the IBA Guidelines on Conflicts of Interest in International Arbitration[4], approved on May 22, 2004 «http://www.ibanet.org», under Publications/IBA guides and free materials [visited on March 3, 2010], an arbitrator who has been appointed arbitrator more than twice by the same party in the last three years may only then act as arbitrator if he has disclosed this fact and the parties have not raised any objections. Moreover, the Appellant refers to art. 2.3.6 of the IBA Guidelines, according to which a significant economic relationship between the law firm of the arbitrator and one of the parties or an affiliate constitutes a conflict of interest and the arbitrator can only act if the parties have consented to his involvement in awareness of the circumstances. However, the Appellant does not explicitly indicate wherein this significant economic relationship allegedly lies in the case at hand.

The grievance that arbitrator P._____ appointed by the Respondent was allegedly partial or appeared to be biased, comes to nothing.

3.2

3.2.1 The Appellant uses facts which allegedly came to its attention at the end of October 2008 in arbitration proceedings in London between a foundation it had established and the company B._____ Ltd to justify the alleged partiality of chairman O._____. Allegedly, the owners of B._____ Ltd, Mr S._____ and Mr T._____, are simultaneously majority shareholders and members of the board of directors of the Slovakian company C._____ a.s. with its seat in Bratislava. Chairman O._____ is allegedly also a member of the board of directors of C._____ a.s. and also sits with the same persons on the board of directors of a further company, D._____ a.s. (Bratislava).

The Appellant also submits that it carried out further research after becoming suspicious of this strange "connection". It allegedly discovered that apparently the same

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

C._____ a.s. regularly cooperates with Y._____ or with companies it controls. The company was, for instance, allegedly involved in the establishment of the Respondent, in that it held shares in the Czech industrial company E._____ for it and sold these to it in the year 2005.

It alleges that the cooperation between C._____ a.s. and Y._____ was even closer in the proceedings regarding claims of bank F._____ a.s., which was declared bankrupt in the 90s, against a second major Czech bank, G._____ a.s. C._____ a.s. allegedly concluded what is referred to as a "Consignment Agreement" in March 2005 with the Dutch company H._____ B.V., according to which I._____ a.s. was to enforce a claim in the amount of CZK 40 billion against the major bank G._____ a.s. in arbitration proceedings in its own name but for H._____ B.V.'s account. In the proceedings subsequently commenced, ICC Case No. _____, P._____ apparently acted as chairman. The law firm of I._____ a.s. in these proceedings, J._____, allegedly regularly represents the interests of Y._____, and the persons affiliated with it, in the Czech Republic. The attachment to an e-mail from this firm dated March 17, 2006 apparently contains a draft of a power of attorney from H._____ B.V. for assertion of the claim against the major bank G._____ a.s. in the proceedings of ICC Case. No. _____. In the e-mail a Ms K._____ apparently writes in this respect that there is a possible intention to get rid of C._____ a.s. on cost grounds and Y._____/its BY._____ Group a.s. "will do it itself", whereby the assertion of the claim would be meant. The result, according to the Appellant, would be that there are close economic ties between C._____ a.s. and companies and representatives of Y._____ which also control the Respondent. It could allegedly be concluded from the word choice in the e-mail ("get rid of C._____") that there is even an (indirect) controlling relationship between BY._____ Group a.s. and C._____ a.s. in which case the latter and the Respondent would be sister companies.

The Appellant's assertions, which it uses to justify its complaint of partiality, are disputed by the Respondent.

3.2.2 In its arguments, the Appellant does not show any relationship between chairman O._____ and the Respondent which, from an objective point of view, would point to partiality or the risk of bias.

Irrespective of the fact that the Appellant does not show in its submission that it would have informed the Arbitral Tribunal and the Respondent without undue delay of the reason for challenge it is claiming (see Art. 180 (2) sentence 2 PILA), it does not substantiate, in particular, why the nature of the relationship between C._____ a.s. and the Respondent/Y._____ would make chairman O._____ 's membership in the board of directors of the above mentioned company seem to suggest that O._____ would be biased in these proceedings. The cooperation described by the Appellant does not suggest a relationship going beyond customary business relationships. The claim that C._____ a.s. is controlled by Y._____ or persons affiliated with it is speculative and is not sufficiently substantiated by the Appellant. Contrary to its view, the e-mail from the law firm J._____ of March 17, 2006 does not point to such a controlling relationship. The intention expressed by BY._____ Group a.s. to do without the services of C._____ a.s. on cost grounds and to assert the claim itself points neither to a direct nor an indirect control relationship.

Moreover, neither the fact that I._____ a.s. was represented by a law firm in arbitration proceedings, which apparently regularly represents the interests of Y._____ and persons affiliated with it in the Czech Republic, nor the fact that in said arbitration proceedings P._____ acted as chairman, constitutes a risk that O._____ would be biased in these proceedings. The mere fact that O._____ sat on the board of directors of a company together with persons who apparently control a company with B._____ Ltd, which, in turn, faced a foundation – allegedly

established by the Appellant – in arbitration proceedings, gives equally little rise to justified doubts with respect to the impartiality of the arbitrator in these proceedings.

Contrary to the view expressed in the appeal, it cannot be assumed that, owing to the relationships shown, it was "a foregone conclusion" that the two arbitrators P._____ and O._____ would take mutual consideration of one another and that the interests of the Respondent/ Y._____ would be "considered favourably". The claims put forward by the Appellant are not sufficient to suggest partiality (see Art. 180 (1) (c) PILA).

4.
The Appellant argues that the Arbitral Tribunal violated public policy (Art. 190 (2) (e) PILA).

4.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy or not (BGE 121 III 331 at 3a p. 333). The appraisal of a claim in dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the widely recognized system of values which, according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. The award under appeal may be annulled only if it contradicts public policy in its result and not merely in its reasons (BGE 132 III 389 at 2.2 p. 392 ff.; 128 III 191 at 6b p. 198; 120 II 155 at 6a p.166 f.).

4.2
4.2.1 There is no need to address the sweeping complaint, made under the heading violation of public policy, that two of the arbitrators were biased. The Appellant does

not sufficiently substantiate its claim, even when arguing that the third arbitrator, Q._____, did not sign the arbitral award (Art. 77 (3) as read with Art. 106 (2) BGG).

4.2.2 The principle of fidelity to contracts (*pacta sunt servanda*) is violated only when an arbitral tribunal acknowledges the existence of a contract but disregards its consequences or – conversely – denies the existence of a contract but finds that there is a contractual obligation (Decisions 4A_370/2007 of February 21, 2008, at 5.5, 4P.104/2004 of October 18, 2004 at 6.3; see also BGE 120 II 155 at 6c p. 171; 116 II 634 at 4b p. 638).

The Appellant does not show to what extent the arbitral award under review overrides this principle. What it is actually objecting to is the legal appraisal by the Arbitral Tribunal of the relationship between the "Joint Operation Agreement" with Y._____ and the purchase agreement with the Respondent of November 9, 2005. It claims that the Arbitral Tribunal has "based" its decision "on a perspective which deviates completely from the actual agreements between the Appellant, Y._____, and the Respondent controlled by Y._____" and draws conclusions which deviate from the award, arguing that some determinations were, in its view, incorrect. In its submission, in which it does not make one single sufficient factual complaint (see above at 2.4), the Appellant criticizes the factual determinations of the Arbitral Tribunal, which are binding for the Federal Tribunal, and fails to recognise that incorrect contractual interpretation is not sufficient for a violation of public policy (BGE 116 II 634 at 4b p. 638; decisions 4P.104/2004 of October 18, 2004 at 6.3; 4P.62/1999 of May 26, 1999 at 1a/aa at the end).

4.2.3 The contradictions claimed in the supplementary grounds for appeal does not constitute an abuse of rights. By arguing that the Respondent – unlike Y._____ in the two Czech arbitration proceedings in the year 2007 – invoked independent performance of the share purchase agreement of November 9, 2006, the Appellant does not show an incompatibility of the award with public policy (Art. 190 (2) (e) PILA).

The Appellant does not show a violation of public policy either where it argues that its obligation to transfer to the Respondent its 45% holding in A._____ Holding in return for a bill of exchange for CZK 1,182,500,000.00 would be economically senseless and that it would never have agreed without the consideration of 50 % of the shares in the Respondent.

A violation of the principle of *pacta sunt servanda*, an abuse of rights and/or the violation of the principle of good faith are not demonstrated.

5.
The appeal must be rejected to the extent that 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).

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 75,000.00 shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent CHF 85,000.00 for the federal judicial proceedings.

4. This judgment shall be notified in writing to the Parties and to the ICC arbitral tribunal in Zurich.

Lausanne, January 11, 2010

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

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