4A_198/2012[1]

Judgment of December 14, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Carruzzo

A._____,
Appellant,

v.

X._____,
Respondents,

Facts:

A.
In an award of March 12, 2012, Ulrich Haas, deciding the case as sole arbitrator of the Basketball Arbitral Tribunal (hereafter: the BAT), previously called FIBA Arbitral Tribunal (FAT) ordered the professional basketball player A._____ to compensate its former agent, company X._____.
,
B.
On April 11, 2012 A._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the award, of which it had received only the operative part. In a separate letter of the same day, confirmed on May 25, 2012, she sought a stay of enforcement.

The BAT produced the case file on May 2, 2012 upon invitation by the Federal Tribunal and submitted its answer to the appeal on August 3, 2012.

Respondent X._____ was not asked to submit an answer to the appeal.

On August 7, 2012 the BAT answer and its enclosures were communicated to the Appellant. She did not avail herself of the possibility given to state her views as to this answer by August 31, 2012.

Reasons:

[1] Translator's note: Quote as A._____ *v.* X._____, 4A_198/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

1.
According to Art. 54 (1) LTF[2], the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When the decision is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the BAT, they used English. In the brief submitted to the Federal Tribunal, the Appellant used [name of language omitted]; however she produced a French translation of the brief. According to its practice, the Federal Tribunal will consequently issue its decision in French.

2.
2.1
In the field of international arbitration, a Civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[4] (Art. 77 (1) LTF).

Whether as to the object of the appeal, the standing to appeal, the time limit to appeal and the submissions made by the Appellant, none of these admissibility requirements raises any problems in this case.

2.2
However the admissibility of the appeal raises a delicate issue that needs to be examined *ex officio*.

Pursuant to a specific provision of the Arbitration Rules of the BAT (hereafter: AR), the arbitrator notified to the parties only the operative part of his award. None of them availed itself of the possibility contained in this provision to ask within ten days to receive the reasons of the decision by paying the advance on costs set by the secretariat of the BAT for this purpose. By abstaining from asking that a reasoned award be notified, did the Appellant implicitly renounce an appeal against the award?

This solution cannot be ruled out from the start. It has been adopted in Swiss civil procedure as to the decisions against which an appeal or a recourse is possible. Art. 239 (2) of the Swiss Civil Procedure Code of December 19, 2008 (CPC; RS 272) states that when reasons are not asked for, the parties are deemed to have renounced the appeal or the recourse. However there is no similar provision in Swiss domestic or international arbitration law. Moreover legal writers are almost unanimous in admitting that renouncing the reasons does not at all imply a renunciation to the right to appeal the decision of the arbitral tribunal even though it severely limits the possibilities of appealing as a party cannot argue that the lack of reasons renders impossible the review by this Court (see among others: ANDREAS BUCHER, Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 4 *ad* Art. 189 PILA; BERNARD DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, 4e éd. 2005, n° 10 *ad* Art. 189 PILA; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, 1989, n° 14 *ad* Art. 189 PILA; MARKUS WIRTH, in Commentaire bâlois, Internationales Privatrecht, 2e éd. 2007, n° 37 *ad* Art. 189 PILA; URS ZENHÄUSERN, in Schweizerische Zivilprozessordnung (ZPO), Baker & McKenzie (éd.), 2010, n° 12 *ad* Art. 384 CPC;

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

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

[4] 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.

PIERRE JOLIDON, Commentaire du Concordat suisse sur l'arbitrage, 1984, p. 476 i.m.; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2e éd. 1993, p. 300 i.f.).

In view of the foregoing it must be concluded that the failure to ask for the reasons of an arbitral award does not create a legal obstacle to an appeal against the award, even though it significantly reduces the chances of success of the party intending to appeal the unreasoned award.

The merits of the appeal must consequently be reviewed.

3.
3.1
The appeal in front of the Federal Tribunal appears inadmissible from the outset to a large extent.

Since she did not ask for the reasons of the award under appeal, it is in vain that the Appellant starts by stating at the beginning of her brief the circumstances in which her dispute with the Respondent arose, in order to show a breach by the latter of its duties under the contract between the Parties. Indeed this Court is not in a position to verify whether or not the Appellant's allegations correspond to reality, for lack of a reasoned decision at hand. Moreover the argument based on a mere breach of the contract by the Respondent is not admissible as such, because it does not fall within any of the hypotheses contained at Art. 190 (2) PILA.

Moreover the Appellant argues a violation of Art. 6 ECHR, thereby disregarding case law according to which a violation of the European Convention on Human Rights does not fall within the grounds for appeal enumerated exhaustively at Art. 190 (2) PILA (judgment 4A_238/2011[5] of January 4, 2012 at 3.1.2 and the references). The argument that the Arbitrator would have wrongly applied the BAT Arbitration Rules does not fall within the aforesaid provision either.

3.2
Furthermore the Appellant alleges a violation of the principle of equal treatment of the parties and of her right to be heard because the Arbitrator would have completely ignored her answer to the request for arbitration sent to the BAT Secretariat on December 2, 2011. Contrary to the preceding arguments, this one is admissible in principle.

3.2.1 An award may be appealed on the basis of Art. 190 (2) (d) PILA for failure to give the parties equal treatment or to hear them in contradictory proceedings.

Equal treatment of the parties, as guaranteed by Art. 182 (3) PILA irrespective of the procedure chosen, requires the proceedings to be organized and conducted in such a way that each party has the same possibilities to present its arguments. Pursuant to this principle the arbitral tribunal must treat the parties in a similar manner at all stages of the proceedings, namely during the examination stage, including the hearing as the case may be, to the exclusion of the deliberation of the arbitral tribunal (judgment 4A_360/2011[6] of January 31, 2012 at. 4.1 and references).

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[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/swiss-supreme-court-holds-that-opting-out-agreements-pursuant-to/

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear/

As to the right to be heard, also guaranteed by Art. 192 (3) PILA irrespective of the procedure chosen, it is violated when inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some factual allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the decision to be issued (ATF 133 III 235 at 5.2 p. 248).

Furthermore it must be recalled that a party claiming a violation of its right to be heard or any other procedural error must raise it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to good faith to invoke a procedural error only in the framework of an appeal against the arbitral award when that same error could have been signaled during the proceedings (judgment 4A_530/2011[7] of October 3, 2011 at 2.2). Art. 3.2 AR codified this principle.

3.2.2 It is obvious that if the BAT had actually refused to accept the Appellant's answer to the request for arbitration, her right to be heard would have been violated as well as the requirement of equal treatment. The Arbitrator is the first to acknowledge this (answer nr 34).

However the Arbitrator firmly states in his answer to the appeal (nr 35 to 41) with exhibits in support that the BAT never received the answer, contrary to the Appellant's allegations. The explanations he gives in this respect appear convincing. Be this as it may, it must be concluded that the Appellant does not contradict them since she did not avail herself of the faculty she had been given to express her views as to them. Yet it behooved her to establish that she had sent the answer in dispute to the BAT Secretariat and that the latter refused to accept it. Her argument is consequently doomed for lack of supporting evidence.

Moreover the chronological indications concerning the arbitral proceedings in the answer (nr 43 to 57) show that the Arbitrator informed the Parties by electronic mail – a system of communication applicable in this case pursuant to number (V) of the Procedural Order of November 22, 2011 – on January 18, 2012 that the Appellant had not filed her answer or paid her share of the advance on costs within the time limit given and he gave the Appellant a grace period until January 27, 2012 to rectify this omission, failing which the case would be adjudicated *in absentia*. The Appellant did not comply and in an electronic mail of February 29, 2011 that the Appellant acknowledged reading on March 3, 2012, the BAT Secretariat advised the Parties that the Appellant had not submitted her answer within the last time limit she had been given on January 18, 2012, so that the Arbitrator had decided to close the examination phase and to issue an award, the Parties being therefore invited to submit a detailed statement of their costs by March, 5 2012 at the latest. This shows that the Appellant must have known that the BAT had not received the answer she had allegedly sent. Under such circumstances Art. 3.2 AR and more generally the rules of good faith required her to raise the matter with the BAT immediately and to demonstrate that it was mistaken in claiming that no answer had been submitted. Accordingly it is no longer admissible for the Appellant to argue now that the BAT would have refused to take into consideration the answer she claims to have sent.

Consequently the arguments based on Art. 190 (2) (d) PILA are unfounded.

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[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/failure-to-raise-a-violation-of-the-right-to-be-heard-immediatel/

3.3
As to the merits, the Appellant refers to the *Matuzalem* judgment 4A_558/2011 of March 27, 2012, published in ATF 138 III 322[8] to argue that the disciplinary measures FIBA may impose on her should she fail to comply with the award under appeal, would be an inadmissible obstacle to her economic future.

However one must see that it is not the award itself that may have such consequences as it does not impose any sanction should the Appellant fail to pay in due course the amount awarded to the Respondent. Yet it is the award, and the award only, that is the object of this appeal and not a possible sanction issued by the competent body of FIBA (see judgment 4A_458/2009[9] of June 10, 2010 at 4.4.8).

4.
In view of the foregoing this appeal can only be rejected to the extent that the matter is capable of appeal. Consequently the request for a stay of enforcement becomes moot.

In view of the outcome the Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF). However she will not have to compensate the Respondent as the latter was not asked to submit an answer.

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 1'000 shall be borne by the Appellant.

3.
This judgment shall be notified to the Parties and to the Basketball Arbitral Tribunal.

Lausanne December 14, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Carruzzo

[8] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/

[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-/