5A_754/2011[1]

Judgment of July 2, 2012

Second Civil Law Court

Federal Judge Hohl (Mrs.), Presiding
Federal Judge Escher (Mrs.)
Federal Judge L. Meyer,
Federal Judge von Werdt,
Federal Judge Herrmann,
Clerk of the Court: Bettler.

X._____ SA,
Represented by Mr. Philipp Schaller and Mr. Marc Gerber,
Appellant,

v.

Z._____ LLC,
Represented by Dr. Peter Straub and Dr. Michael Cartier,
Respondent,

Facts:

A.
X._____ SA (incorporated in Switzerland) and Z._____ LLC (incorporated in the USA) entered into an Exclusive Representation and License Agreement on May 17, 2002, which they submitted to Swiss law and that contained an arbitration clause (ICC sole arbitrator with venue in London; English as language of the proceedings).

In 2006 X._____ SA initiated arbitration proceedings. In an award of November 3, 2009 the Arbitrator found in particular that X._____ SA was the owner of certain trademarks; he prohibited Z._____ LLC from using them any further and ordered X._____ SA to pay USD 50'000 with interested. He ordered X._____ SA to pay to Z._____ LLC the half of the arbitration costs it had advanced, amounting to USD 185'000 with interest and ordered it to pay costs of USD 3'794'824.98 with interest and to reimburse the VAT advanced.

A request of X._____ SA of December 2009 for interpretation of the award was rejected by the arbitrator in a decision of January 8, 2010.

[1] Translator's note: Quote as X._____ SA, *v.* Z._____ LLC, 5A_754/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

B.
On October 28, 2010 Z._____ LLC started collection proceedings for an amount of CHF 4'014'624.88 with interest and compound interest. To justify its claim it referred to "ICC arbitral award (…) of November 3, 2009". On November 11, 2010 X._____ SA sought judicial adjudication of the claim contained in the order of payment served on November 2, 2010 in Matter nr. [number omitted] by the Debt Collection Office of A._____.

C.
C.a On December 1st, 2010 Z._____ applied to the district court of Höfe[2] for a summary judgment for CHF 4'014'624.88 with interest and compound interest. The petition contained in particular certified copies of the Exclusive Representation and License Agreement with the arbitration clause of May 17, 2002, of the award of November 3, 2009 and the arbitrator's decision of January 8, 2010 as to the request for interpretation. Furthermore Z._____ produced a certified translation of the pronouncement of the award of November 3, 2009.

With its reply of January 12, 2011 Z._____ also produced a translation of part "V. Costs" of the November 3, 2009 award and of the arbitrator's decision of January 8, 2010 as to the request for interpretation.

C.b In a decision of April 13, 2011, rectified on April 19, 2011, the District Court issued a summary judgment in favor of Z._____ LLC for the amount of "CHF 3'984'690.94 plus CHF 205'713.89, as well as for interest and compound interest of CHF 4'190'404.84 at 5% *per annum* from October 29, 2010". The rest of the petition was rejected.

D.
In a judgment of October 10, 2011 the Schwyz Cantonal Court rejected the appeal filed by X._____ SA on April 28, 2011, to the extent that the matter was capable of appeal.

E.
X._____ SA (hereafter: the Appellant) asks the Federal Tribunal in a Civil Law appeal of October 25, 2011 to annul the judgment of the Cantonal Court and to reject the petition of Z._____ LLC (hereafter: the Respondent) for a summary judgment. Furthermore it seeks a stay of enforcement of the judgment. The Cantonal Court did not express its views as to this request (brief of November 3, 2011). The Respondent submitted that the request should be rejected and alternatively asked for security for costs (brief of November 11, 2011). The Presiding Judge of the Second Civil Court of the Federal Tribunal granted a stay of enforcement on November 14, 2011 – as had been done *ex parte* previously – and rejected the application for security for costs.

As to the merits, the Cantonal Court (brief of November 20, 2011) and the Respondent (brief of December 2, 2011) submit that the appeal should be rejected to the extent that the matter is capable of appeal.

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[2] Translator's note: Höfe is a district of the Swiss canton of Schwyz.

Reasons:

1.
1.1
The final judgment (Art. 90 BGG[3]) under appeal upholding the summary judgment (in which the preliminary issue of the enforceability was decided) is subject to a Civil law appeal according to Art. 72 BGG (judgment 5A_49/2011 of July 12, 2011 at 1.1 with references, not published. *in*: BGE 137 III 429). It concerns a matter reaching the required value threshold in value (Art. 74 (1) (b) BGG). The Cantonal Court issued its decision as a Cantonal Court of last resort (Art. 75 BGG). As the appeal was timely filed (Art. 100 (1) BGG) it is admissible in principle.

1.2
Summary judgments are not provisional measures within the meaning of Art. 98 BGG (BGE 137 III 193 at 1.2 p. 197; 135 III 670 at 1.3.2 p. 673) and therefore the appeal may also be based on the violation of federal and international law among others (Art. 95 (a) and (b) BGG) (judgment 4A_403/2008 of December 9, 2008 at 1.2, not published. *in*: BGE 135 III 136).

1.3
1.3.1 The appeal brief must contain the grounds for appeal (Art. 42 (2) BGG). It must show concisely by reference to the reasons of the decision under appeal which provisions were violated by the lower court and why. General arguments that are presented without demonstrated or recognized connection to any specific grounds in the decision are not sufficient as the Federal Tribunal does not have to examine all legal issues at hand as a Court of first instance would (BGE 137 III 580 at 1.3 p. 584; 134 V 53 at 3.3 p. 60). The Federal Tribunal reviews the alleged violation of constitutional rights only to the extent that the grievance is made in the appeal and pertinently reasoned (Art. 106 (2) BGG; BGE 134 II 244 at 2.2 p. 246).

1.3.2 The Federal Tribunal bases its decision on the facts found by the lower Court (Art. 105 (1) BGG). Should a factual finding be challenged, the appeal brief must show why this finding would have been blatantly inaccurate and therefore arbitrary (BGE 136 III 636 at 2.2 p. 638) or that it came about as a consequence of another violation within the meaning of Art. 95 BGG and demonstrate to what extent the rectification of the violation is decisive for the outcome of the proceedings (Art. 97 (1) BGG).

1.3.3 No new facts or evidence may be contained in the appeal, unless they are required as a consequence of the very decision of the lower Court (Art. 99 (1) BGG). New facts are those which were not stated in the previous proceedings or found by the lower Court (BGE 136 V 362 at 3.3.1 p. 364 ff; 136 III 123 at 4.4.3 p. 128 ff).

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

1.4
In a first part of its appeal the Appellant describes the facts and the procedural history extensively. To the extent that its presentation departs from the factual findings of the Cantonal Court or supplements them, however, the Appellant had to appeal the cantonal factual findings in the aforesaid manner. The matter is not capable of appeal in this respect (see at 1.3.2 above; BGE 136 II 508 at 1.2 p. 511 ff). To the extent that the Appellant brings forward some new facts, they are unauthorized and not to be considered (see 1.3.3 above).

2.
The Respondent introduced the application for summary judgment on December 1st, 2010 and the District Court notified its decision of April 13, 2011 to the Parties on April 15, 2011. According to the transitional provisions of the Swiss Code of Civil Procedure entered into force on January 1st, 2011 (CCP; SR 272), the proceedings in the District Court were governed by the previous law (Art. 404 (1) CCP) and the substantive adjudication in an appeal according to the new law is also governed by the old law (BGE 138 I 1 at 2.1 p. 3). This transitional rule also applies to the laws amended pursuant to enclosure 1 to the CCP, so that Art. 80 (1) and – Art.81 (3) SDEBL[4] were to be applied as they were until December 31st, 2010 (AS 1995 1227 1307). The Federal Decree of December 11, 2009 as to the approval and the implementation of the Lugano Convention (AS 2010 5601) which modified the last part of Art. 81 (3) SDEBL contains no transitional provision and Art. 81 (3) SDEBL must therefore be applied in the wording in force until December 31st, 2010 as provided in Art. 1 TPCC[5].

3.
3.1
In front of the Federal Tribunal the Appellant argues that the Respondent failed to produce a full translation of the arbitral award in the summary proceedings (appeal at 4 and 5) and that the recognition and enforcement of the arbitral award is contrary to Swiss public policy (appeal at 6). The Cantonal Court should therefore have rejected the application.

3.2
According to the (old) Art. 80 (1) SDEBL the creditor may apply for a summary judgment when the claim is based on an enforceable court decision. Arbitral awards are the equivalent of court decisions (BGE 130 III 125 at 2. p. 128).

3.3
As to a foreign judgment, the declaration of enforceability is addressed as a preliminary issue in the summary proceedings pursuant to (old) Art. 81 (3) SDEBL (BGE 135 III 670 at 1.3.2 p. 673). When the judgment was issued in a state with which there is a treaty providing for mutual recognition of judicial decisions, the defendant can raise the defenses contained in the treaty.

The decisions of arbitral tribunals sitting outside Switzerland, as was the case here, are foreign arbitral awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral

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[4] Translator's note: SDEBL is the English abbreviation for the Swiss Debt Enforcement and Bankruptcy Law of April 11, 1889, amended extensively since (SR 281.1)

[5] Translator's note: TPCC is the English abbreviation for the Transitional Provisions of the Swiss Civil Code.

Awards of June 10, 1958 (SR 0.277.12; hereafter New York Convention) applies to the defenses admissible according to the (old) Art. 81 (3) SDEBL (on the issue in general, BGE 135 III 136 at 2.1 p. 139; judgment 4A_508/2010 of February 14, 2011 at 3.1 ff, *in*: Pra 2011 p. 938). This is not disputed by any of the Parties.

4.
4.1
Pursuant to Art. IV (1) of the New York Convention the Claimant must provide the Court in which enforcement is sought with the award (duly authenticated or a duly certified copy thereof) and the arbitration clause (original agreement or a duly certified copy thereof).

When the arbitral award or the arbitration clause are not in one of the official languages of the country in which the award is invoked, the party seeking its recognition and enforcement must produce a translation of the aforesaid documents. The translation must be by an official or sworn translator or certified by a diplomatic or consular representation (Art. IV (2) New York Convention). The certified (Art. XVI New York Convention) versions of the New York Convention in French and in English are worded as follows: “(...) aura à produire une traduction (...)” and “(...) shall produce a translation (...)”.

4.2
As to the requirement of a translation pursuant to Art. IV (2) of the New York Convention the Cantonal Court found in the judgment under appeal that in the summary proceedings the Respondent had merely provided a certified German translation of the pronouncement of the award in English. Furthermore it produced an uncertified German translation of chapter “V. Costs” of the award in English and of the decision of January 8, 2010 as to the request for interpretation, which is also in English. The Cantonal Court pointed out that the Appellant did not criticize the absence of a translation of the arbitration clause, so that no further remarks were necessary in this respect. As to the failure to translate the entire award, the Appellant did require a translation from the beginning. However the Cantonal Court had extensive knowledge of English, so that on grounds of procedural economy, a translation of the rest of the award (in addition to the certified translation of the pronouncement at hand) could be dispensed with, especially because a translation – albeit not certified – was available as to the issue in dispute with regard to the costs (chapter “V. Costs” and decision as to interpretation of January 8, 2010).

4.3
The Appellant does not argue that the Cantonal Court would have relied on the uncertified translation of chapter “V. Costs” of the award and of the interpretation decision of January 8, 2010 (see in this respect judgment 5P.174/1993 of June 22, 1993 at 5; and as to comparable issues under Art. IV (1) of the New York Convention judgment 5A_427/2011 of October 10, 2011 at 5, *in*: SJ 2012 I 81; 4A_124/2010 of October 4, 2010 at 4.2; 5P.201/1994 of January 9, 1995 at 3, *in*: ASA Bulletin 2001 p. 294). Instead it argues a violation of Art. IV (2) of the New York Convention because this provision is clear and mandatory and must be complied with even when the Court can handle materials in English. A judicial review of the defense that the award violates Swiss public policy (Art. V (2) (b) New York Convention) requires an examination of the contents of the arbitral award which makes a full translation necessary. Therefore the summary judgment should not have

addressed the petition for a summary judgment due to the lack of a full translation of the arbitral award, thereby violating not only Art. IV (2) of the New York Convention but also acting arbitrarily (Art. 9 BV[6]).

5.
5.1
The Federal Tribunal has not yet decided whether Art. IV (2) of the New York Convention must be understood as mandatory, thus requiring a translation of the full award issued in English in all cases and without exceptions.

5.2
Some commentators take the view, expressly or in any event without mentioning any exceptions, that Art. IV (2) of the New York Convention is mandatory (BUCHER, in: Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, N. 11 zu Art. 194 PILA; BERGER/KELLERHALS, International and domestic arbitration in Switzerland, 2. Aufl. 2010, N. 1881; KAUFMANN-KOHLER/ RIGOZZI, Arbitrage international, 2. Aufl. 2010, N. 871; JOSI, Die Anerkennung und Vollstreckung der Schiedssprüche in der Schweiz, 2005, S. 198, wonach eine Übersetzung in die Amtssprache am Vollstreckungsort nötig sei; SCHWAB/WALTER, Schiedsgerichtsbarkeit, 7. Aufl. 2005, S. 475; FOUCHARD/GAILLARD/GOLDMAN, On international commercial arbitration, 1999, N. 1675 S. 971; SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, Band I, 1975, N. 806 S. 757). The issue is sometimes described as disputed or left open (POUDRET/ BESSON, Comparative law of international arbitration, 2. Aufl. 2007, N. 951). According to other commentators the Court may dispense the applicant from producing a translation of the arbitral award when recognition and enforcement is sought (STAEHELIN, in: Basler Kommentar, SchKG I, 2. Aufl. 2010, N. 95 zu Art. 80 SchKG; KRONKE/NACIMIENTO/OTTO/PORT, Recognition and enforcement of foreign arbitral awards, 2010, S. 194; CZERNICH, New Yorker Schiedsübereinkommen, 2008, p. 38, according to whom a translation of the full award – and not only of the pronouncement – should be required only when reasons to refuse enforcement according to Art. V of the New York Convention are raised; VAN DEN BERG, The New York Arbitration Convention of 1958 - Towards a uniform judicial interpretation, 1981, S. 250 und 259, according to whom a translation must be produced only when the Court finds it necessary or when the other party requires it on the basis of a legitimate interest).

5.3
Judicial practice too addresses the requirement of a translation according to Art. IV (2) of the New York Convention variably.

On one side a translation is required mandatorily and without exception. Thus, for instance, the highest Court of Austria decided that a translation of the entire award was required (judgment of the OGH 3Ob211/05h of 26 April, 2006, available at http://www.ris.bka.gv.at/jus and excerpts in English in: Yearbook Commercial Arbitration 2007 p. 259 ff).

[6] Translator's note: BV is the German abbreviation for the Swiss Constitution.

Alternatively the requirement of a translation was repeatedly waived for awards in English because the Court knew enough English to acquire comprehensive knowledge of the contents of the award in English (judgment of the Voorzieningenrechters Rechtbank Amsterdam of June 18, 2009, excerpts in English in: Yearbook Commercial Arbitration 2009 S. 718; judgment of the Arrondissementsrechtbank Zutphen of November 11, 1998, excerpts in English in: Yearbook Commercial Arbitration 1999 S. 725 [concerning the failure to produce a translation of the arbitration clause]; decision of the Presiding Judge of the Rechtbank Amsterdam of July 12, 1984, excerpts in English in: Yearbook Commercial Arbitration 1985 p. 488). Furthermore a Norwegian court held that a translation is expensive and could create contradictions with the original wording (judgment of the Enforcement Court Vardø of July 10, 2002, in: excerpts in English Yearbook Commercial Arbitration 2003 p. 824). A German court rejected the defense raised by a party that there was no translation by pointing out that it had concluded the contract in English and conducted the arbitration proceedings in English, so that it was unnecessary to request a translation (judgment of the Hanseatic High Court of March 14, 2006, excerpts in English in: Yearbook Commercial Arbitration 2009 p. 496).

In the framework of a 1995 compilation by the United Nations Commission on International Trade Law as to the implementation of the New York Convention, constantly updated since, Switzerland stated that to the extent that the documents as to Art. IV (2) of the New York Convention were not in one of the official languages, an English translation should be produced in principle; in practice however, it is not excluded that the Court could also accept other languages (see http://www.uncitral.org/uncitral/en/uncitral_texts/ arbitration/NYConvention_implementation.html [consulted on June 12, 2012]).

5.4

5.4.1 The New York Convention must be interpreted according to Art. 31-33 of the Vienna Convention on the Law of Treaties of May 23, 1969 (SR 0.111; hereafter the Vienna Convention) (VAN DEN BERG, a.a.O., S. 3 ff.; ICCA's guide to the interpretation of the 1958 New York Convention, 2011, S. 12 ff. [hereafter ICCA's guide; accessible at http://www.arbitration-icca.org/publications/NYC_Guide.html, consulted on 12. Juni 2012]; as to the interpretation in general PATOCCHI/JERMINI, in: Basler Kommentar, Internationales Privatrecht, 2. Aufl. 2007, N. 20 zu Art. 194 IPRG). According to Art. 31 (1) of the Vienna Convention a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (see BGE 122 II 234 at 4c p. 238). The preparatory work of the New York Convention (Art. 32 Vienna Convention) gives no clear indication (see KRONKE/NACIMIENTO/OTTO/PORT, a.a.O., S. 146 ff. in particular p. 194; VAN DEN BERG, a.a.O., S. 258 with references) and the message of the Federal Council of September 18, 1964 concerning the approval of the New York Convention (BBl 1964 II 605 ff) contains no indications as to the issue at hand.

5.4.3 The purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, thus requiring the treaty to be interpreted in favor of enforcement. Courts should apply a pragmatic and flexible approach without formalism (ICCA's guide, a.a.O., p. 14 ff and p. 71). Art. IV (2) of the New York Convention purports to submit the award to the Court in the state of enforcement in an understandable version so that a decision can be issued on the reasons to

refuse enforcement according to Art. V of the New York Convention (BERGER/KELLERHALS, a.a.O., N. 1881; JOSI, a.a.O., p. 198).

5.4.4 The formal requirements of Art. IV of the New York Convention are not to be applied strictly according to federal case law and a formalistic application of this provision is to be avoided (see the judgments quoted at 4.3 above; also see GEISINGER, Implementing the New York Convention in Switzerland, in: Journal of international arbitration, 2008, S. 694 ff.; PATOCCHI/JERMINI, a.a.O., N. 53 zu Art. 194 IPRG; JOSI, a.a.O., S. 199; PAULSSON, The New York Convention in international practice - Problems of assimilation, in: The New York Convention of 1958, ASA Special Series No. 9, 1996, S. 105 ff.; PATOCCHI, The 1958 New York Convention - The Swiss Practice, in: The New York Convention of 1958, ASA Special Series nr 9, 1996, N. 14 p. 162 ff).

5.5
A generous interpretation of Art. IV (2) of the New York Convention is required in the case at hand too. It would be pure formalism to require a translation of the rest of the arbitral award besides the translation of the pronouncement and of chapter “V. Costs”, which are available, particularly since the attribution of the costs was in dispute (and was the basis for the alleged ground to refuse enforcement according to Art. V of the New York Convention). Under the conditions prevailing today it can be assumed that as a rule, Courts will not require a translation of an award in English and therefore the purpose of Art. IV (2) of the New York Convention can be reached just as well (see to the time factor also VAN DEN BERG, a.a.O., S. 258; as to the language abilities of Swiss Courts in general HUNZIKER-BLUM, Beweisurkunden in der Amtssprache, in Landessprachen und in Fremdsprachen im Zivilprozess, SZZP 2009 p. 203 ff).

A flexible understanding, pragmatic and without formalism of Art. IV (2) of the New York Convention therefore leads to the conclusion in the case at hand that the partial translation produced by the Respondent is sufficient.

The more narrow interpretation suggested by the Appellant would be contrary to the generally friendly spirit of recognition and enforcement and to the purpose of the treaty (see also judgment 4A_124/2010 of October 4, 2010 at 3.1). Furthermore the Appellant rightly abstained from claiming in the cantonal proceedings that it would need a complete translation of the award to defend its rights.

The argument that Art. IV (2) of the New York Convention (and Art. 9 BV) were violated appears therefore unfounded. In such an outcome it may be left open whether or not a translation would have been superfluous already on the basis of Art. VII (1) of the New York Convention (see too German practice the judgment of the Federal Court of September 25, 2003, excerpts in: SchiedsVZ 2003 p. 282; SCHWAB/WALTER, a.a.O., p. 268 and p. 475).

6.
6.1
The Appellant also argues that the Cantonal Court wrongly denied the existence of the ground for refusing enforcement of Art. V (2) (b) of the New York Convention.

6.2
According to Art V (2) (b) of the New York Convention, the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country (as to the so called “ordre public” see judgment 5A_427/2011 of October 10, 2011 at 7.1 with references).

6.3
The Cantonal Court came in substance to the conclusion that there was no violation of public policy when the lower Court understood the provisions concerning costs in the arbitration clause as “loser pays it all”[7] and applied it accordingly. Measuring by the global value of all claims, the Appellant was mainly defeated so that it would breach neither substantive nor procedural public policy for the lower Court to consider the Appellant as the losing party and order it to pay all the costs.

6.4
The appeal completely leaves aside a discussion of the thorough reasons of the Cantonal Court. Instead, the appeal to the Federal Tribunal as Art. V of the New York Convention coincides almost *verbatim* with the April 28, 2011 appeal to the Cantonal Court (see 51 ff of the appeal to the Federal Tribunal and 45 ff of the appeal to the Cantonal Court). It is only in a few ancillary points that the Appellant added some words or phrases, slightly changing some phrases or formulating them differently.

It is not sufficient to submit to the Federal Tribunal the same grounds of appeal as in the cantonal proceedings (BGE 134 II 244 at 2.3 p. 247). The matter is therefore not capable of appeal due to the failure to examine the decision under appeal and to submit sufficient reasons (Art. 42 (2) BGG).

7.
For the reasons explained the appeal must be rejected to the extent that the matter is capable of appeal. The Appellant must pay costs and compensate the other party for the federal proceedings (Art. 66 (1) and Art. 68 (1) 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 15’000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 15’000 for the federal judicial proceedings.

[7] Translator’s note: In English in the original text.

4.
This judgment shall be notified in writing to the Parties and to the Appellate Chamber of the Cantonal Court in Schwyz.

Lausanne July 2, 2012

In the name of the Second Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
Hohl (Mrs.)	Bettler