4A_16/2012[1]

Judgment of May 2, 2012

First Civil Law Court

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

X._____ SA,
Represented by Mr. Daniel Hochstrasser and Mrs. Simone Stebler,
Appellant,

v.

Y._____ SPRL,
Represented by Mr. Marc S. Palay, Dr. Dorothee Schramm and Mr. Alexis Schoeb,
Respondent.

Facts:

A.
A.a Y._____ SPRL (the Claimant, the Respondent), based in A._____ in the Democratic Republic of Congo is a licensed trading house. It buys tin ore mined there (cassiterite) which it transports to its production plant at A._____ to process it there and eventually to export it.

X._____ SA, Luxemburg (the Defendant, the Appellant) is a raw materials trading company. It trades metals and minerals across boarders and acts as intermediary between producers and industrial purchasers.

A.b The Parties began their collaboration when on November 7, 2008 they entered into a so called "High Grade Tin Concs Purchase / Sale Contract for 2008[2]", which was valid until December 31st, 2008. Next they signed a new contract on January 2, 2009 concerning the purchase of cassiterite by the Defendant for the year 2009, which provided that the cooperation would end as of December 31st, 2009 and contained among other things a choice of law clause in favor of substantive Swiss law (to the exclusion of the Vienna Convention on the International Sale of Goods). Pursuant to this

[1] Translator's note: Quote as X._____ SA *v.* Y._____ SPRL, 4A_16/2012. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

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

agreement the Claimant delivered tin ore to the Defendant. However neither the first nor the second contract defined for a minimal or maximum quantity of cassiterite to be delivered or acquired.

The most important cassiterite deposits of the Democratic Republic of Congo are located in the eastern part of the country. Cassiterite is mined exclusively by hand (*i.e.* with shovels, pickaxes or other similar tools). The miners often belong to organizations similar to cooperatives, selling the tin ore to intermediaries ("*négociants"*[3]), which sell it on to companies that, like the Claimant, act as trading houses ("*comptoir miniers"*[4]). They purchase and process the minerals for export. The Law on Mining of the Democratic Republic of Congo provides that all miners, intermediaries and trading houses must be licensed.

A.c The Democratic Republic of Congo has been politically unstable for a long time; the east of the country, in particular, has been haunted by armed conflicts repeatedly in the last fifteen years. A number of rebel groups, in particular, the "*Forces démocratiques pour la liberation du Rwanda*"[5] and the "*Congrès national pour la défense du peuple*"[6] finance their operations with income derived from mining. The United Nations took measures to contain the conflicts in the Democratic Republic of Congo and in particular acted against the financing of illegal armed groups from income obtained by mining. In 2005 the UN set up an expert committee to deal with the problem of the illegal exploitation of raw materials in that country ("Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo"[7]).

In 2007 the Security Council appointed a group of experts to oversee the activities of the armed groups, in particular with a view to containing their financing and arming in the east of the country.

During the last years various UN panels of experts dealt with the Democratic Republic of Congo; they produced numerous reports citing the names of the individuals and businesses involved with conflict-laden minerals and make recommendations. The UN Security Council adopted the recommendations in resolutions to prevent the financing of armed groups in the east of the country, particularly Resolution 1857 of December 28, 2008. The latter points to the illegal exploitation of mineral resources as one of the principal factors of the conflicts in the region; it points out in particular that individuals and legal persons that support armed groups in the east of the country by illegal trading in raw materials should face sanctions.

A.d With this background the Defendant sent an e-mail to its suppliers in the region concerned on April 6, 2009, including the Claimant, whereby it demanded that they immediately cease to acquire any minerals originating from mines controlled by the rebels and asked for information as to the origin of the raw materials. The Claimant answered the same day and the Defendant thanked it for its prompt and complete answer on April 7, 2009.

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[3] Translator's note: In French in the original text.
[4] Translator's note: In French in the original text.
[5] Translator's note: In French in the original text.
[6] Translator's note: In French in the original text.
[7] Translator's note: In English in the original text.

In a letter of April 30, 2009 the Defendant informed the Claimant that it was stopping the purchase of minerals from the Democratic Republic of Congo as of June 1st, 2009 and that it suspended the performance of the agreement of January 2, 2009 due to *force majeure*. The Defendant justified these decisions in particular because it could not persuade the Expert Panel of the United Nations that the minerals did not originate from mines controlled by the rebels and also because the Expert Panel had advised to stop the purchases.

By letter of May 13, 2009 the Claimant disputed the aforesaid explanations of the Defendant and alleged in particular illegal trading practices and a violation of due diligence.

On September 11, 2010 the President of the Democratic Republic of Congo issued an immediate ban of mining related activities in three provinces in the east of the country. On March 10, 2011 the ban was lifted.

B.

B.a On September 29, 2009 the Claimant started arbitration proceedings according to the Rules of the International Chamber of Commerce (ICC) against the Defendant. It submitted that the Defendant should be ordered to pay damages in the amount of at least USD 21'936'540; in the subsequent proceedings it reduced its claim for damages to USD 9'511'017 with interest at 5% from September 25, 2009.

On November 23, 2009 the ICC Court of Arbitration confirmed the sole arbitrator appointed by the Parties.

In an award of November 22, 2011 the Arbitrator upheld the claim (award § 1) and ordered the Respondent to pay USD 9'188'162,48 with interest at 5% from November 29, 2009 (award § 2). Furthermore he decided that the Defendant should pay 80% of the costs of the Claimant and the costs of the arbitration. Accordingly he ordered the Defendant to pay USD 992'258.18 and GBP 4'641.68 as costs to the Claimant (award § 3) and USD 160'000 to reimburse the costs of the arbitration paid by the Claimant (award § 4).

C.

In a Civil law appeal the Defendant asks the Federal Tribunal to annul the arbitral award of November 22, 2011 and to send the case back to the Arbitral tribunal. Alternatively, paragraphs 2 (as to the interest awarded), 3 and 4 of the award under appeal should be annulled and the matter sent back to the Arbitral tribunal. The Respondent submits that the appeal should be rejected, to the extent that the matter is capable of appeal. The Arbitral tribunal did not take a position in the appeal proceedings.

D.

By decision of March 5, 2012 the Federal Tribunal rejected the Appellant's request for a stay of enforcement.

Reasons:

1.
According to Art. 54 (1) BGG[8] the decision of the Federal Tribunal is issued in an official language[9], as a rule in the language of the decision under appeal. Should this be in another language the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As this is not an official language and the Parties used German in front of the Federal Tribunal the decision of the Federal Tribunal shall be in German.

2.
In the field of international arbitration a Civil law appeal is allowed under the requirements of Art. 190-192 PILA[10] (SR 291) (Art. 77 (1) (a) BGG).

2.1
The seat of the Arbitral tribunal is in Geneva in this case. None of the Parties has its seat in Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2
The only grievances admissible are listed limitatively in Art. 190 (2) PILA (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 reviews only the grievances that are brought forward in the appeal and reasoned; this corresponds to the duty to submit reasons contained in Art. 106 (2) BGG as to 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 admissible (BGE 119 II 380 at 3b p. 382).

2.3
The Federal Tribunal bases its judgment on the facts found by the arbitral tribunal (Art. 105 (1) BGG). This Court may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are obviously inaccurate or rely on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG which rules out the applicability of Art. 97 BGG and of Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grounds for appeal are raised against such factual findings within the meaning of Art. 190 (2) PILA or exceptionally when new evidence is taken into consideration (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references).Whoever wishes to claim an exception to the rule that the factual findings of the arbitral tribunal bind the Federal Tribunal and seeks to rectify or supplement the statement of facts on this basis, must show with reference to the record of the arbitration that the corresponding factual allegations were already made in the arbitral

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

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

[10] 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.

proceedings in conformity with applicable procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

2.4
The Appellant disregards the requirement that reasons should support the corresponding grounds of appeal (Art. 73 (3) BGG) when in front of the Federal Tribunal it merely claims that the Arbitral tribunal would have breached the principle of *pacta sunt servanda* and Art. 27 ZGB[11] or that the Arbitral tribunal would have lacked jurisdiction to adjudicate the damages it awarded. The matter is not capable of appeal as to such arguments, which are not reasoned even rudimentarily.

The Appellant's argument are equally inadmissible when it repeats the points of view of the Parties as to the claim for damages and criticizes in an inadmissible manner the assessment by the Arbitral tribunal as to damages and causality, to the extent that it describes them as wrong, incomprehensible or arbitrary and argues that the arbitrator wrongly apportioned the burden of proof. In doing so the Appellant does not raise any of the ground for appeals contained at Art. 190 (2) PILA.

3.
The Appellant argues a violation of the principle that the parties should be treated equally and of the principle of the right to be heard. Art. 190 (2) (d) PILA.

3.1
In this respect it argues first that the Arbitral tribunal would have wrongly and without basis assumed in the award that the Appellant would have dropped its arguments as to the causal link; this would not be the case as the Appellant would always have emphasized in its Post-Hearing Brief that it wanted to hold on to all its arguments in previous briefs.

The Appellant does not explains sufficiently to what extent an oversight of the Arbitral tribunal would have made it impossible for it to present its point of view as to an issue pertinent to the case and to prove it (see BGE 133 III 235 at 5.2 p. 248; 127 III 576 at 2f p. 580). In particular the Appellant does not show which of its specific arguments as to the causal link between the breach of contract and the damages caused would have been overlooked by the Arbitral tribunal.

Moreover the Arbitrator did not leave aside an assessment of the liability requirement of the causal link. Instead he was persuaded pursuant to his assessment of the evidence that the damage was due to a breach of contract by the Appellant. He explained in this respect that there was no indication in the evidence available that the damage would have occurred anyway had the Appellant maintained its activities in the Democratic Republic of Congo and that the Appellant had produced no evidence that would support its point of view to the contrary. The argument of an alleged violation of the right to be heard is untenable.

3.2
The Appellant disregards the strong requirements that reasons must be provided (Art. 77 (3) BGG) when in front of the Federal Tribunal it claims by mere reference to various passages of the award under appeal that the Arbitral tribunal would have repeatedly adopted the Respondent's allegations without closer examination whilst always holding the Appellant's allegations for unpersuasive; moreover

[11] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

the documents and expert reports submitted by the Respondent would have been assessed uncritically and always held as persuasive whilst the Appellant's would have been characterized as unpersuasive. With the undeveloped argument that the Arbitral tribunal would have "assessed the evidence unilaterally throughout in favor of the Respondent" the Appellant shows no violation of the right to be heard (Art. 190 (2) (d) PILA). Moreover it disregards the fact that the reasons in support of the argument must be contained in the appeal brief itself and that mere reference to the record is insufficient (BGE 133 II 396 at 3.1 p. 399 ff; 131 III 384 at 2.3 p. 387 ff; with references).

3.3
Equally inadmissible are the arguments in the appeal to the extent that the Appellant supports its claim that the principle requiring the parties to be treated equally and the right to be heard were violated because the Arbitral tribunal did not give it the possibility to study and to take a thorough position as to the extensive and new computations of damages introduced by its opponent on February 5, 2011, thus shortly before the hearing. A party considering itself harmed by a denial of the right to be heard or another procedural violation relevant for the purposes of Art. 190 (2) PILA forfeits its right to raise the argument when it does not do so timely in the arbitration proceedings and does not undertake all possible efforts to remedy the violation. It is contrary to good faith to argue a procedural violation only in the framework of an appeal although there would have been a possibility in the arbitral proceedings to give the Arbitral tribunal an opportunity to rectify the alleged violation (BGE 119 II 386 at 1a p. 388; judgment 4A_617/2010[12] of June 14, 2011 at 3.1; 4P.72/2001 of September 10, 2001 at 4c). A party acts contrary to good faith and in an abusive way in particular when it keeps the alleged violation in reserve only to put it forward if the case does not proceed well and a loss is foreseeable (see BGE 126 III 249 at 3c p. 254; judgment 4A_617/2010 of 14 June 2011 at 3.1).

The record of the arbitration shows that on February 3, 2011 the Respondent asked the Arbitrator for leave to produce some new documents and that the Appellant did not oppose the request when asked by the Arbitrator. Between the 7th and the 10th of February 2011 the hearing took place, during which the Parties could explain their points of views thoroughly. It does not appear from the factual findings in the award and neither is it claimed in the appeal that the Appellant would have asked the Arbitrator for more time to deal with the submission of the other Party of February 5, 2011.

To the extent that the Appellant wishes to see a procedural violation within the meaning of Art. 190 (2) (d) PILA in the lack of time for a detailed answer to the Respondent's submission of February 5, 2011, this could have been raised in the arbitral proceedings already and the Arbitral tribunal could have been given the opportunity to rectify the alleged violation. To the extent that it did not do so and waited to see if the award would be in its favor, the Appellant forfeited the right to raise the argument in the proceedings in front of the Federal Tribunal.

4.
The Appellant argues that the Arbitral tribunal violated public policy (Art. 190 (2) (e) PILA) in connection with the scope of the damages awarded. Essentially it argues that the Arbitral tribunal would have disguised punitive damages under the caption "lost earning".

[12] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/the-right-to-the-appointment-of-an-expert-by-the-arbitral-tribun/

4.1
The substantive judicial review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the award is consistent with public policy or not (BGE 121 III 331 at 3a p. 333). The substantive adjudication of a claim violates public policy when it disregards some fundamental legal principles and therefore becomes plainly incompatible with the important and broadly recognized values that according to the dominating opinion in Switzerland should be the basis of any legal order. Among such principles are the rule of *pacta sunt servanda*, the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination, the protection of incapables and the prohibition of commitments beyond measure (see Art. 27 (2) ZGB), when the latter constitute a blatant and severe infringement of privacy. The award under appeal may only be annulled when not only its reasons but indeed its results violate public policy (BGE 132 III 389 at 2.2 p. 392 ff with references; BGE 4A_558/2011[13] of March 27, 2012 at 4.1 and at 4.3.1 and 4.3.2).

4.2
The Appellant argues in support of a violation of public policy that the Arbitral tribunal would have awarded the Respondent damages for the loss of earning in the accounting year 2010 although it was undisputed that the Appellant had undertaken no contractual obligation to receive goods in that year. On the basis of Art. 97 OR[14] only, it could not be explained how the Arbitral tribunal nonetheless came to the conclusion that the Respondent would have sustained loss of earnings in the year 2010 due to a breach of an agreement of January 2, 2009 valid only for the year 2009. In the year 2010 it would in no way have undertaken any purchase commitment so that it was incomprehensible how the breach of the agreement for the year 2009 could be the causal link to a loss of earnings; the scope of that alleged loss of earnings in 2010 would also be incomprehensible. Nonetheless the Arbitral tribunal would have awarded damages for the year 2010 “essentially by speculation”. The award of “damages” which have no causal link to the event causing the damage and the scope of which is not comprehensible meets the requirement of “punitive damages”[15] and violates public policy according to Art. 190 (2) (e) PILA.

4.3
Contrary to the point of view expressed in the appeal there are no indications in the reasons of the award under appeal that the Arbitral tribunal would have awarded damages irrespective of losses to the Respondent in addition to the damages caused by the cassiterite which was not accepted in breach of the contract in 2009. The Arbitrator held as to the actual losses undergone in connection with the year 2000 that the damages sought by the Respondent were not based on the assumption of a valid contract between the Parties for that period; instead the Respondent’s argument had to be weighted that it was due to the wrongful termination of the contract of January 2, 2009 that it became impossible to expand its production in the year 2010 as planned. By assessing the evidence available the Arbitrator reached the conclusion that the Appellant’s breach of the contractual obligation to accept delivery in the year 2009 led to reduced profits from the business relationship with the third party B._____, in particular as a consequence of the advantageous payment conditions of the Respondent according to the agreement of January 2, 2009.

Significantly, the Appellant does not claim that the issue of the award of punitive damages would ever have been mentioned in the arbitration proceedings. It limits itself to the sweeping and not

[13] Translator’s note: Full English translation at http://www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/
[14] Translator’s note: OR is the German abbreviation for the Swiss Code of Obligations.
[15] Translator’s note: In English in the original text.

documented allegation that on the basis of “the manner in which the dispute was assessed” it should be concluded that the Arbitral tribunal would have wanted to give the Appellant “a lesson in connection with the accusations floating around as to the financing of the rebels in Congo”. In reality the Appellant merely criticizes in an unauthorized manner the finding of the Arbitral tribunal that there was a contractual claim for damages due to the losses occurred in 2010; by doing so it disregards the limited judicial review of the Federal Tribunal in the framework of appeals against international arbitral awards. It is therefore not necessary to explore more in depth whether or not the prohibition of punitive damages belongs to public policy according to Art. 190 (2) (e) PILA, as the Appellant claims.

4.4
Moreover the Appellant misunderstands the concept of public policy when claiming in the alternative that the finding as to the date from which interest would run was arbitrary or criticizes it inadmissibly and submits to the Federal Tribunal its own legal view according to which interest should have been awarded only as from the date of the arbitral award. By doing so the Appellant shows neither a violation of public policy nor another ground for appeal provided by Art. 190 (2) PILA.

5.
The Appellant argues that the Arbitral tribunal would have left undecided its submission regarding the consequences of compensation (Art. 190 (2) (c) PILA).

5.1
The Appellant argues that it always unequivocally submitted that the Arbitral tribunal should have the Respondent bear the costs of the arbitration with interest at 5% from the day of the award. This submission as to the award of costs, constantly repeated, would have been left undecided by the Arbitral tribunal in the award.

5.2
The Appellant cannot be followed in this respect. The Arbitrator awarded the Respondent compensation for 80% of its costs, in particular by considering the additional effort induced by the reduction of the claim. At the same time he held specifically that the Appellant would have to bear its own costs. Based on this adjudication of costs it is incomprehensible that the Appellant would claim that the Arbitrator left undecided its submission to obtain its costs.

6.
Furthermore the Appellant shows no other violation of public policy (Art. 190 (2) (e) PILA) when it criticizes the apportionment of the costs as untenable and inappropriate. It is unable to point out any violation of a legal principle that would belong to the essential generally recognized order of values that according to the dominating view in Switzerland, should be the basis of any legal order (BGE 132 III 389 at 2.2.1 with references; BGE 4A_558/2011 of March 27, 2012 at 4.1) and that would call for an annulment of the arbitral adjudication of costs in the case at hand.

7.
The appeal proves to be unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome the Appellant shall pay the costs of the federal proceedings and compensate the other party (Art. 66 (1) as well as 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 30'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent CHF 35'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the Parties and to the ICC Arbitral tribunal sitting in Geneva.

Lausanne May 2, 2012.

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Leeman