

4A_524/2016¹

Judgment of September 20, 2016

The Presiding Judge of the First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding

Clerk of the Court: Mr. Carruzzo

A._____ Ltd,

Represented by Mrs. Dominique Brown-Berset and Mrs. Diane Vallée-Grisel,
Appellant

v.

B._____ S.p.A.,

Represented by Mr. Elliott Geisinger, Mrs. Anne-Carole Cremades and Mrs. Julie Raneda,
Respondent

Reasons:

1.

1.1. An international arbitration proceeding is pending in a three-member Arbitral Tribunal seated in Geneva, constituted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) between A._____ Ltd (hereafter: A._____ or the Defendant), a company registered in the British Virgin Islands, active in exploring for and producing hydrocarbons in Algeria on the one hand, and B._____ S.p.A. (hereafter: B._____ or the Claimant), an Algerian law company active in exploration, production, pipeline transport, processing, and marketing of hydrocarbons and their derivatives on the other. The *ad hoc* request was submitted by B._____ on January 16, 2015, after the aforesaid company took the view that the request for preliminary conciliation it filed with the competent body of the International Chamber of Commerce (ICC), on September 8, 2014, did not enable the parties to settle their dispute amicably with the help of a conciliator.

¹ Translator's Note:

Quote as A._____ Ltd v. B._____ S.p.A., 4A_524/2016.

The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

Denying that the conciliation proceedings could be completed, the Defendant raised a jurisdictional defense.

In a jurisdictional award of October 13, 2015, the Arbitral Tribunal found that it had jurisdiction over the dispute between the parties. It rejected the jurisdictional defense raised by A. _____ and held B. _____'s claim admissible.

On November 16, 2015, A. _____ filed a civil law appeal to the Federal Tribunal with a request for a stay of enforcement, with a view to obtaining the annulment of the aforesaid award and a finding that the Arbitral Tribunal had no jurisdiction *ratione temporis* in this matter. At its request, a stay of enforcement was granted *ex parte* by decision of the presiding judge of November 24, 2015.

In a judgment of March 16, 2016, which was published in part at ATF 142 III 296,² the First Civil Law Court accepted the appeal, annulled the award under appeal and stayed the arbitration until the end of the conciliation proceedings according to the ICC ADR rules.

1.2. On March 31, 2016, the Arbitral Tribunal issued Procedural Order No. 5, by which, with reference to the aforesaid federal judgment, it ordered a stay of the arbitration proceedings and invited the parties to resume the conciliation proceedings.

It is established that, on May 31, 2016, the attempt at conciliation ended without the parties reaching an amicable settlement.

In Procedural Order No. 6, dated July 14, 2016, and notified to the parties on the same day, the Arbitral Tribunal held that the second phase of the arbitration - *i.e.* that concerning the request for termination of the contracts binding the parties – resumed on June 1, 2016; it rejected the Defendant's request seeking a procedural hearing, held that Procedural Orders ns. 1-5 continued to be applicable, subject to amendments contained in subsequent orders and stated that the schedule of proceedings as to Phase 2 will be the object of a subsequent procedural order. Among other reasons, the Arbitrators stated the following in the Procedural Order:

3.7. The solution upheld by the Federal Tribunal demonstrates unequivocal will to preserve the autonomy of the Arbitral Tribunal and above all to ensure the continuity of the proceedings which, whilst they were stayed, will nonetheless resume where they had stopped. For its part, the Arbitral Tribunal was deprived neither of its jurisdictional mission nor of its powers to organize the proceedings and neither of the power to organize the conditions of a stay procedurally. The annulment of the award, therefore, did not call into question the procedural decisions taken by the Arbitral Tribunal.

² Translator's Note:

The full English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/mandatory-pre-arbitration-procedure-not-complied-results-annulment-award>

3.8 the scope of the sanction is thus limited. Indeed, it allows for a procedural parenthesis during which the case is stayed without calling into question the previous decisions of the Arbitral Tribunal and without depriving the Arbitral Tribunal of its jurisdictional mission.

In Procedural Order No. 7, dated August 11, 2016, and notified to the parties on the same day, the Arbitral Tribunal – to which the Defendant sent a legal opinion of Professor X. _____ on July 28, 2016, concerning the impact of the aforesaid federal judgment – rejected the Defendant’s request asking for reconsideration and amendment of Procedural Order No. 6 in the light of this legal opinion. Confirming its decision – notified to the parties by email on July 28, 2016 – to not hold a hearing and to decide as to the request for termination of the contracts on the basis of the briefs filed by the parties and the exhibits related thereto, including a witness statement by Mr. Z. _____, it closed the proceedings in this phase.

1.3. On September 14, 2016, A. _____ (hereafter: the Appellant) filed a civil law appeal, at the outset of which it asked the Federal Tribunal to annul Procedural Orders Nos. 6 and 7 and then to hold that the Arbitral Tribunal had no jurisdiction *ratione temporis* between May 22, 2015, and June 1, 2016. Moreover, the Appellant seeks an *ex parte* stay of enforcement, to be confirmed after hearing the other party, and seeks an order, whether *ex parte* or not, staying the arbitration proceedings until a judgment is issued in the appeal.

B. _____ and the Arbitral Tribunal were not asked to file an answer.

2.

2.1. The civil law appeal pursuant to Art. 77(1)(a) LTF³ in connection with Art. 190 to 192 PILA⁴ is admissible only against an *award*. The act capable of appeal may be a *final* award, which puts an end to the arbitral proceedings on the merits or on procedural grounds, a *partial* award dealing with a limited part of the quantum of a claim in dispute or with one of the claims at hand, or putting an end to the proceedings as to some of the co-defendants (ATF 116 II 80 at 2b, p. 83), or an interlocutory award disposing of one or several issues as to the merits or procedurally (as to these concepts see ATF 130 III 755 at 1.2.1, p. 757). However, a mere procedural order which can be modified or withdrawn during the proceedings is not capable of appeal (judgment 4A_600/2008⁵ of February 20, 2009, at 2.3). The same applies to a decision on provisional measures pursuant to Art. 183 PILA (ATF 136 III 200⁶ at 2.3 and references).

³ Translator’s Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

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.

⁵ Translator’s Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/case-struck-by-cas-because-of-late-payment-of-advance-on-fees>

⁶ Translator’s Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->

The procedural decisions of the arbitral tribunal, such as an order to stay the proceedings temporarily, are procedural orders not capable of appeal; they may nonetheless be referred to the Federal Tribunal when the arbitral tribunal, by issuing them, implicitly ruled on its own jurisdiction (ATF 136 III 597⁷ at 4.2). In other words, when by doing so it issued an interlocutory decision as to its jurisdiction (or as to the regularity of its composition if it was challenged) within the meaning of Art. 190(3) PILA (4A_222/2015⁸ of January 28, 2016, at 3.1.1).

Moreover, what is decisive to determine if the matter is capable of appeal is not the designation of the decision challenged but its content (last case quoted, *ibid.*).

2.2. In the case at hand and no matter what the Appellant says, the excerpt of the reasons of Procedural Order No. 6 reproduced above corresponds exactly to the scope the Federal Tribunal intended to give to its judgment of March 16, 2016, in the same case. As to Procedural Order No. 7, it is not different from the previous one. This obviously shows that one is not faced here with interlocutory decisions as to jurisdiction but to mere procedural directives which, as such, are not capable of appeal to the Federal Tribunal. Moreover, it must be pointed out that even according to Professor X._____, the steps and the decisions taken between May 22, 2015, until June 1, 2016, “are not voidable as such because only the award is capable of appeal in an arbitration but they may, if they remained, impact the future award because the award would be based on acts and decisions issued without jurisdiction” (legal opinion n. 85).

This is sufficient to establish that the matter is not capable of appeal. Indeed, the Appellant seems to have disregarded that while procedural orders may indeed contain some implicit decisions of the Arbitral Tribunal as to its jurisdiction, this does not mean that all procedural orders contain such decisions.

3.

3.1. According to Art. 76(1)(b) LTF, the Appellant must have an interest worthy of protection to the annulment of the decision under appeal. The interest worthy of protection consists in the practical use that upholding the appeal would have for the Appellant by preventing economic, ideal, material, or other damage which the decision under appeal may cause (ATF 137 II 40 at 2.3, p. 43). The interest must be present, namely it must exist not only at the time the appeal is filed but also when the judgment is issued (ATF 137 I 296 at 4.2, p. 299; 137 II 40 at 2.1, p. 41). The Federal Tribunal holds the matter incapable of appeal when the interest worthy of protection fails at the time the appeal is filed. However, if the interest disappears during the proceedings, the appeal becomes moot (ATF 137 I 23 at 1.3.1, p. 24 *f.* and the cases quoted).

⁷ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t>

⁸ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal>

3.2. In the case at hand, the Appellant argues that by ratifying Procedural Orders No. 1 to 5 in Procedural Order No. 6, presently under appeal, the Arbitral Tribunal issued decisions directly impacting the Appellant's legally protected interests, despite the fact that in its view, it had no jurisdiction to do so.

One searches in vain for what interests may be involved *in casu* for lack of any demonstration by the Appellant other than the intent to postpone the resolution of the arbitral process even longer, as could be inferred from the fact that the Appellant waited until the last day of the time limit to appeal (considering the summer recess (Art. 46(1)(b) LTF)) to file its brief. It is obvious that such a will, if it corresponds to reality, would not be worthy of protection.

The absence of any demonstration of an interest worthy of protection to obtain the annulment of the two decisions under appeal is an additional reason for the matter not to be capable of appeal and sufficient *per se*. This being so, the obvious inadmissibility of the appeal requires the use of the simplified proceedings pursuant to Art. 108(1) LTF.

4.

The Appellant fails in its appeal and shall pay the judicial costs of the federal proceedings. The Respondent is not entitled to costs as it was not invited to file an answer.

Therefore, the Presiding Judge of the First Civil Law Court:

1.

Holds that the matter is not capable of appeal.

2.

Orders the Appellant to pay the judicial costs set at CHF 2'000.

3.

Notifies this judgment to the representatives of the parties and to the Chairman of the Arbitral Tribunal.

Lausanne, September 20, 2016

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

Presiding Judge:

Clerk:

Kiss (Mrs.)

Carruzzo

