4A_486/2010[1]

Judgment of March 21, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding
Federal Judge CORBOZ,
Federal Judge KISS (Mrs),
Clerk of the Court: CARRUZZO.

X._____,
Appellant,

v.

Y._____ SA,
Respondent,

Represented by Mr. Sébastien Besson and Mr. Pierre-Yves Gunter

Facts:

A.

In a final award of March 1st, 2010 a three members arbitral tribunal under the aegis of the International Chamber of Commerce (ICC) in the framework of an international arbitration the seat of which was in Geneva, rejected the claim initiated on April 2, 2007 by X._____, a Tunisian citizen domiciled in Tunis (Tunisia) against Y._____ SA (hereafter: Y._____), a company organized under French law and incorporated in [name of the place omitted] (France). It ordered the Claimant to pay to the Respondent some USD 1.2 million as costs and expenses.

[1] Translator's note : Quote as X._____ *v.* Y._____ SA, 4A_486/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

The aforesaid award was not appealed.

B.

On March 15, 2010 Y._____ submitted to the ICC a request for rectification of an error contained in the final award, based on Art. 29 of the ICC Rules. Whilst paragraph 83 of the award stated that the ICC Court had extended the time limit to render the final award until February 28, 2009 for the last time at its session of November 12, 2009, the Petitioner asked the Arbitral tribunal to substitute the dates of February 11, 2010 and March 31, 2010 for these two dates respectively.

Asked to express his views on the request X._____ argued that in his view Y._____ was not trying to rectify an error but to introduce a new fact in the final award as to the time limit given to the arbitrators to issue it.

On June 28, 2010 the Arbitral tribunal issued an amendment to the award entitled Addendum to the final award. Granting Y._____'s request it substituted the text of paragraph 83 of the final award with a new version worded as follows: "In its session of February 11, 2010 the ICC Court extended for the last time the time limit to render the final award until March 31st, 2010".

C.

On September 2, 2010 X._____ filed a Civil law appeal to the Federal Tribunal. He submits that the amended award should be annulled and as a preliminary that a stay of enforcement should be granted.

In its observations of February 11, 2011 and its answer of February 16, 2011 the Respondent submitted that the request for a stay of enforcement should be rejected and that the matter is not capable of appeal or that the appeal should be rejected.

In his briefs of February 16 and March 3, 2011 the Appellant submitted a reply to the arguments developed by the Respondent.

The Arbitral tribunal did not submit an answer.

By presidential decisions of December 6, 2010 and January 11, 2011 the Appellant was asked to pay an amount of CHF 9'000.- as security for costs by January 26, 2011. He did so timely.

Reasons:

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 Arbitral tribunal they used English. In the brief he submitted to the Federal Tribunal the Appellant used French. According to its practice the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.

For a case to be capable of appeal it is required among other things that the parties should not have ruled out the possibility to file an appeal within the meaning of Art. 190 PILA[4].

2.1 Art. 192 (1) PILA provides that if two parties have neither a domicile or their habitual residence or an establishment in Switzerland they may opt out of any appeal against the awards of the arbitral tribunal in a specific statement in the arbitration clause or in a subsequent written agreement; they may also opt out of one or several of the grounds of appeal listed at Art. 190 (2) PILA.

Federal case law progressively developed the principles following from that provision. In substance, practice accepts agreements to opt out restrictively and considers an indirect renunciation as insufficient. As to direct renunciation it must not necessarily mention Art. 190 PILA and/or Art. 192 PILA. It is sufficient that the specific statement of the parties show clearly and outright their common will to opt out of any appeal. It is a matter of interpretation to decide whether this is indeed the case or not (ATF 134 III 260 at 3.1 and cases quoted[5]).

2.2 In this case the Appellant was domiciled in Tunisia and the Respondent had its seat in France at the time the Shareholders' Agreement of September 4, 2010 containing the arbitration clause was entered into. The aforesaid clause contains in particular the following wording:

"Neither party shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any

---

[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.

[5] Translator's note: English translation at www.praetor.ch (judgment of March 6, 2008 4A 500/2007)

award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law."[6] (emphasis supplied by the Federal Tribunal)

Without being contradicted by the Appellant, the Respondent translates the emphasized part of the aforesaid clause as follows: "La Sentence arbitrale sera finale et obligatoire et aucune des parties n'aura le droit de faire appel de cette Sentence devant tout tribunal étatique"[7] (Answer nr. 49).

Considered in the light of the principles of case law recalled above, the aforesaid clause certainly constitutes valid renunciation to the appeal. It expresses doubtlessly the common will of the parties to renounce any right of appeal against any decision of the Arbitral tribunal in front of any state court whatsoever. This intent to rule out any appeal against such a decision, clearly expressed in the emphasized sentence of the arbitral clause is reinforced and indirectly confirmed by the preceding sentence; it appears indeed that the state courts could not be seized by any party except to obtain the enforcement of an award issued by the Arbitral tribunal. Moreover the renunciation at hand closely resembles that which was dealt with in the judgment published at ATF 131 III 173 at 4.2.3.2. Reference may accordingly be made *mutatis mutandis* to the reasons contained in that decision whilst pointing out that in this case as in the one which gave rise to the precedent quoted, the word “appeal” must manifestly be understood in its general meaning.

The Parties have therefore validly opted out of an appeal against any decision of the Arbitral tribunal. Such renunciation applies not only to the final award, not appealed by the Appellant, but also to the Addendum to the award, which is a mere accessory of the former and shares its fate (ATF 131 III 164 at 1.1 and the case quoted). Hence the matter is not capable of appeal in front of the Federal Tribunal.

3.

The Appellant shall pay the judicial costs (Art. 66 (1) LTF) and pay the costs of the Respondent for the federal proceedings (Art. 68 (1) and (2) LTF). They shall be taken from the security for costs deposited with the Federal Tribunal.

---

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

[7] Translator’s note: French rendering of the original English text.

Therefore the Federal Tribunal pronounces:

1. The matter is not capable of appeal.

2. The judicial costs set at CHF 8'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 9'000.- for the federal judicial proceedings.

4. This amount shall be taken from the security for costs deposited with the Federal Tribunal.

5. This judgment shall be communicated to the Parties and to the Chairman of the ICC Tribunal.

Lausanne, March 21, 2011

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

The Presiding Judge: The Clerk:

KLETT (Mrs) CARRUZZO