4A 244/2007[1]

Judgment of 22 January 2008

First Civil Law Division

Judge CORBOZ, Chairman

Judges KLETT (Mrs.), ROTTENBERG LIATOWITSCH (Mrs.)

Judge KOLLY

Judge KISS

Clerk: HURLIMANN

A.C. _____ SE,

A.D. _____ Ltd.,

A.E. _____ Ltd.,

J. _____ Ltd.,

Appellants,

All represented by Mr. Andrea MONDINI,

v.

K. _____ SAS.,

Respondent,

Represented by Dr. Philipp HABEGGER and Dr. Marco STACHER.

[1] Translator's note : Quote as A.C. ____ SE and al. v. K. _____ SAS, 4A 244/2007. The names have been omitted, in accordance with Swiss practice. The original of the decision is in German. It can be downloaded from the Court's web site www.bger.ch.

Facts:

A.

On July 13 and 26, 2004 F.G. _____ Corp. and its affiliates on the one hand and A. B._____ Corp. and its own affiliates on the other hand entered into a Product Development Agreement. The project did not encounter the expected success.

B.

Art. 19 of the Product Development Agreement ("PDA") contained an arbitration clause. According to that, all disputes between the parties relating to the contract were to be decided by a three members Arbitral Tribunal constituted according to the rules of the International Chamber of Commerce in Paris. The venue of the Arbitral Tribunal would be Zurich and the Zurich Rules of Civil Procedure would apply to the extent that the ICC Rules were silent. The language of the proceedings was English (19.1). The parties could also apply to the state courts for provisional relief and the decisions would be binding for the parties and enforceable in front of any court having jurisdiction (19.3). The arbitration clause read as follows:

> "19. ARBITRATION
>
> 19.1 All disputes, differences or questions between the Parties to this agreement with respect to any matter arising out of or related to this Agreement shall be finally settled under the Riles of Arbitration Institute of the International Chamber of Commerce, Paris, France ("Rules") inland [sic] by three (3) arbitrators in accordance with said Rules. The seat of arbitration shall be Zurich, Switzerland. The procedural law of this place shall apply where the Rules are silent. The Proceedings shall be conducted in the English language.
>
> 19.2 Notwithstanding the foregoing, the Parties may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.
>
> 19.3 All awards shall be final and binding on the Parties and enforceable in any court of competent jurisdiction."[2]

C.

On April 28 2006, K. _____ SAS (previously F.H. _____ S.A.S., Claimant and Respondent in the appeal) initiated arbitral proceedings against A.C. _____ SE (Respondent and Appellant 1), A.D. _____ Ltd. (Respondent and Appellant 2), A.E. _____ Ltd. (Respondent and Appellant

[2] Translator's note : The Arbitration Clause was reproduced in English in the decision.

3), as well as J. _____ Ltd. (Respondent and Appellant 4). On July 28, 2006 and on August 31, 2006, the ICC Secretary General confirmed the two arbitrators appointed by the parties and the chairman they had nominated. The Terms of Reference were signed by the arbitrators and all parties on October 9 2006. The Arbitral Tribunal subsequently issued several procedural orders and held a hearing from February 26 to February 28, 2007 with a view to hearing witnesses. On May 27 2007, the Arbitral Tribunal issued a partial award. The Arbitral Tribunal decided it had jurisdiction to decide the claims contained in the Request for arbitration of April 28, 2006, in sections V.1 of the Terms of Reference of October 9, 2006 and in the Final Statement of Relief Sought of April 13, 2007 as well as to decide the Counterclaims maid by the Respondents in their reply to the Request for arbitration of July 24, 2006 and furthermore in section V.2 of the Terms of reference of October 9 2006 (holding – lit A). The Arbitral Tribunal took notice that the Respondent withdrew its claim of EUR 14'100.-- concerning "Support regarding CTA"[3] on March 7 2007 (holding – lit B). The Appellants' claims set forth in paragraph IV. B of the reasons were granted for the amount explained and otherwise rejected. Accordingly, the Respondent was ordered to pay a total amount of EUR 2'312'826.99 to the Appellants (holding – lit. D). The findings requested by both parties were rejected (holding – lit. E, F). The decision of the Arbitral Tribunal on the claims of the Respondent for the loss of investment opportunities in the amount of EUR 1'989'113.-- was rejected and so was a claim of EUR 10.5 million for damages to reputation due to late payment, as well as the interests and the costs of the proceedings (holding – lit. G).

D.

In an appeal of June 28, 2007 the Appellants submit that the partial award in the ICC proceedings [number omitted] must be completely overturned. Motions were filed to obtain production of the file from the Chairman of the Arbitral Tribunal (Count 1), to obtain a second exchange of pleadings (Count 2) and to avoid the publication of the decision, or subsidiarily to have it in an anonymous format (Count 3). The Appellants claim that the Arbitral Tribunal was wrong to assume jurisdiction. They also claim a violation of the right to be heard and of equal treatment between the parties because the Arbitral Tribunal did not rule on their submission as to the late filings of the Respondent (reasons in support of the Claim and Answer to the Counterclaim).

[3] Translator's note : In English in the German text.

E.

The Respondent submits that the appeal should be "allowed and struck off" to the extent that the part of the award on which the Appellants obtained a total of EUR 2'312'826.99 should be overturned and the Arbitral Tribunal advised to substitute lit. D of the holding with the wording "Respondent's Counterclaims are dismissed", or subsidiarily that a new decision should be issued bearing in mind that the amount of EUR 2'312'826.99 granted as a counterclaim should be deducted from the amount in dispute, or more subsidiarily that part D of the holding, in which a total of EUR 2'312'826.99 was granted to the Appellants, should be overturned and that to that extent, the award should not be capable of appeal (Submission 1). Moreover – and to the extent that the submissions according to paragraph I are rejected the Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal (Submission 2). The Respondent also submits that the request for a second exchange of pleadings should be rejected.

F.

Respondent's request for security for costs was rejected by a decision of September 11, 2007.

Reasons:

1.

The award under review was issued in English. In front of the Federal Tribunal, the parties used the German language. According to Art. 54 BGG[4] the decision is to be issued in the German language.

2.

With regard to the procedural submissions of the Appellants, it must be pointed out that the file of the Arbitral Tribunal was produced to the extent necessary. According to Art.102 (3) BGG a second exchange is generally not allowed. There is no reason to proceed differently here as the Appellants made their submission without knowing the contents of the Respondent's answer. Having failed to react as a consequence of the filing of the response, they must be denied their procedural motion (BGE 133 I 98 E. 2.3 S. 100). Moreover, maintaining the anonymity of the parties is the rule when judgements are published, to the extent that, as is the case here, knowing the names of the parties is not necessary to understand the judgment (Art. 27 (2) BGG).

[4] Translator's note : German abbreviation for the Federal statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

3.

According to Art. 77 (2) BGG, Art. 107 (2) BGG, which makes it possible for the Federal Tribunal to decide the matter itself, is not applicable to appeals against international arbitration awards. The Federal Tribunal, as it did under the old law, must accordingly limit itself to overturning the award under appeal and to sending the matter back to the arbitrators for a new decision. The Appellants' submissions are accordingly inappropriate to the extent that they would request a decision on the merits or specific instructions to the Arbitral Tribunal as to the decision to be issued. Moreover, the Respondent fails to see the real scope of the submissions made in the appeal. Since the Appellants dispute the jurisdiction of the Arbitral Tribunal and also claim violations of a procedural nature, and on that basis submit that the award should be completely overturned, no submission for a partial overturning of the award could be deducted there from, particularly not in view of the fact that the submissions by the Appellants were granted by the Arbitral Tribunal. The Respondent's submissions are to be rejected to the extent that they request more than the rejection of the appeal.

4.

According to Art. 77 (1) BGG, an appeal in civil matters is allowed against arbitral awards within the scope of Art. 190-192 PILA[5].

4.1

The venue of the arbitration was Zurich. No party has its seat in Switzerland and the parties did not exclude the application of chapter 12 PILA on international arbitration (Art. 176 PILA)

4.2

According to Art. 190 PILA, the award can be appealed only on specific grounds. The only grounds allowed are the ones spelled out in Art. 190 (2) PILA (BGE 128 III 50 E. 1a S. 53; 127 III 279 E. 1a S. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grounds for appeal which are raised and reasoned in the appeal; that corresponds to the duty to raise specific violations of fundamental rights or of cantonal and inter-cantonal law contained in Art. 106 (2) BGG (see in this respect BGE 133 II 249 E. 1.4.2 S. 254). The strict requirements that a ground for appeal should be motivated continue to be as valid as those which the Federal Tribunal developed under the old Art. 90 (1)(b) OG (see BGE 128 III 50 E. 1c S. 53), in view of

[5] Translator's note : PILA is the generally used abbreviation for the Swiss statute on international private law of December 18, 1987, RS 291.

the fact that the new law did not purport to make any changes in this respect (Klett, Basler Kommentar zum BGG, N. 8 zu Art. 77 BGG).

5.

The Appellants claim that the Arbitral Tribunal should not have assumed jurisdiction. Such a ground for appeal is admissible according to Art. 190 (2)(b) PILA.

5.1

The issue as to the jurisdiction of the Arbitral Tribunal also embodies that of the subjective scope of the arbitration agreement. Whether all parties are bound by it or not is a question of their standing as parties in the arbitral proceedings and therefore a factual issue or a condition of the appeal (BGE 128 III 50 E. 2b/aa S. 54). When examining its own jurisdiction, the Arbitral Tribunal must decide which persons are bound by the arbitration clause (BGE 128 III 50 E. 2b/aa S. 54; 117 II 94 E. 5b S. 98; see also BGE 120 II 155 E. 3b/bb S 163 f.). According to Art. 190 (2)(b) PILA, the Federal Tribunal exercises free review on the legal issues as to jurisdiction. The factual findings of the award under appeal are reviewed in the context of the appeal on jurisdiction only to the extent that a ground for challenge according to Art. 190 (2) PILA, or exceptionally Art. 99 BGG, can be made for new facts to be taken into consideration (BGE 129 III 727 E. 5.2.2 S. 733 and references).

5.2

In the award under appeal, the Arbitral Tribunal set forth that before the Management Buy Out of November 2006, the Respondent, as a subsidiary of F.G. _____ Corp., was a party and therefore that it was bound by the arbitration clause as per Art. 19 PDA. According to the Arbitral Tribunal, the contract could not be interpreted to mean that the Respondent should lose its position as a party to the PDA and to the arbitration agreement when it left the F. _____ - Group as a consequence of the Management Buy Out, as practically all relevant facts with regard to the project in dispute took place before the Management Buy Out. The reciprocal intent of the parties was accordingly not that a party to the PDA should be in a position to lose its rights under the contract and to free itself from its contractual obligations as a consequence of a change in its affiliates. The wide definition of the parties in the PDA rather gave both parties the possibility to concentrate the rights from that contract within one or several companies of a group. The "Allocation and Assignment Agreement"[6], which was concluded in the framework of

[6] Translator's note: In English in the German text.

the Management Buy Out and through which the rights of the PDA were assigned to the Respondent, was accordingly a concentration of certain rights within the Respondent, without an assignment in the legal meaning taking place. Also, a Management Buy Out would be a relatively frequent occurrence and to that extent, it should be consistent with the provisions of the PDA. A retroactive loss of the position of the Respondent in the PDA was excluded by the Arbitral Tribunal also on the basis of the definition of the subsidiaries, to the extent that the concept "control" used in this respect should be understood as meaning at least a share of 50% of the mother company. Furthermore, the assignment of the rights in the PDA to the Respondent would not violate the prohibition of an assignment in Art. 24 PDA even if it were an assignment in the legal meaning, as Art. 24 PDA only made impossible the assignment to third parties extraneous to the contract. Finally, the legal positions and the interests of the Appellants would not be affected as the Respondent never denied its contractual obligations according to the PDA and the Appellants also had the possibility, which they did not avail themselves of, to adopt other rules for the participation to the contract and nothing would imply that the Appellants would have been claimed against by other parts of the F._____-Group.

5.3

The Appellants do not question that the Respondent was a subsidiary of the F.G. _____ Corp. at the time the PDA was concluded and thereby became a contractual party. They claim that the PDA would clearly state that only the two mother companies of the two groups should be contractual parties, particularly in view of the fact that their names were indicated with a complete address, as opposed to the names of the subsidiaries, which were not mentioned and merely defined as companies controlled by a "party". The description of the group companies as parties, according to the Appellants, was only to avoid discussions as to their competence in the framework of the development of the contract. The Appellants insist that for Appellant 1 it was only the mother company of the Respondent, which came as contractual counterpart. They hold the view that it would be consistent neither with the literal meaning of the contract nor with the understanding of the contractual parties to recognize the possibility for a subsidiary to assume the fundamental contractual rights of the mother company. They point to their submissions and evidence in front of the Arbitral Tribunal to support their claim that it was not the Respondent but its mother company, which had the leadership of the contractual project. Finally, they claim that the mother company of the Respondent could not have assigned its contractual rights towards the Appellants to its subsidiary at will, or to Appellant 1, as the prohibition to assign in

Art. 24 PDA, contrary to what the Arbitral Tribunal held, would also apply to the assignment of contractual rights to a subsidiary of one of the groups participating in the contract.

5.4

The interpretation of an arbitration clause follows the rules generally applicable to private expressions of will. The decisive element is first the mutual and identical factual understanding of the parties as to the statements exchanged. Should such a factual will of the parties not be ascertained, the arbitration clause must be interpreted objectively, *i.e.* the presumed intent of the parties is to be established as it would be from a person receiving the same statement in good faith (BGE 130 III 66 E. 3.2 S. 71 and references). To the extent that the Arbitral Tribunal took notice of the reciprocal factual will of the parties, such a notice needs not be reviewed as it is not challenged by the Appellants (see E. 5.1). The Arbitral Tribunal took into consideration that the Appellants would have had the possibility to adopt some other rules for the participation to the contract, but that they did not make use thereof and to that extent, it is not to be excluded that the Arbitral Tribunal made a finding of the actual intent of the parties. Be this as it may, the interpretation of the arbitration clause by the Arbitral Tribunal according to the Principle of Trust[7] would lead to the same result as it is to be held that the subsidiaries of the company the name of which was mentioned, F.G _____ Corp., were expressly mentioned as parties to the contract and thus as parties to the arbitration clause within the meaning of Art. 19 PDA. The Respondent, as a subsidiary of F.G. _____ Corp., was accordingly also a party pursuant to Art. 19 PDA, to the extent that no specific grounds to the contrary appear. The Appellants fail to show such grounds. They claim that the contractual parties, contrary to the wording of the PDA, would be only the mother companies of the groups involved. They rely on circumstances, which were not considered in the appeal under review or that the award indeed contradicts and are therefore not to be followed. Additionally, it is hard to understand why the performance of specific duties in a contractual project by certain companies of the groups involved would have required their being included as parties in the contract as the Appellants claim. If the contractual rights and obligations should have been exclusively limited to the mother companies at the time, it would in any event have called for a corresponding possibility to delegate in the contract. In the absence of clear circumstances to the contrary, the specific participation of all the companies of both groups as parties to the contract and therefore to the arbitration clause according to Art. 19 PDA, could only be understood by the Arbitral Tribunal as meaning that both parties had the

[7] Translator's note: The "Vertraeunsprinzip" or "Principe de la confiance" embodied in article 18 of the Swiss Code of Obligations means that a statement must be interpreted as meaning that which could legitimately be understood in good faith under the circumstances.

possibility to concentrate the rights and obligations of that contract within one or several companies of the group.

5.5

The Arbitral Tribunal held that it had jurisdiction to decide the Respondent's claim on the basis of Art. 19 PDA. The claim that Art. 190 (2)(b) PILA was thus violated is unfounded.

6.

According to Art. 190 (2)(d) PILA, an award can be appealed when the principle of equal treatment of the parties or their right to be heard was violated.

6.1

The Appellants claim their right to be heard was violated to the extent that the Arbitral Tribunal would not have adjudicated their submission that the Respondent's behaviour should be sanctioned because the detailed Statement of Claim and the Answer to the Counterclaim were filed one day too late and were to be excluded from the proceedings. They take the view that they were treated unequally because they abided by the time limits they were given and therefore had less time at their disposal.

6.2

The right to be heard in an international arbitration essentially corresponds to the procedural guarantees derived from Art. 29 (2) CF[8]. It includes in particular the right for the parties to participate in the proceedings and to influence the process of adjudicating the dispute (BGE 127 III 576 E. 2c S. 578 with references). Therefrom case law deducted the right for the parties to express their views on all facts essential for the judgement, to present their legal standpoint, to propose appropriate evidential measures, to participate in the hearings and the right to access the files (BGE 130 III 35 E. 5 S. 38; 127 III 576 E. 2c S. 578 f., with citations). A formal refusal to apply the law by way of a refusal to hear a party takes place when a party could not present its point of view in the proceedings, so that the Tribunal could not take it into account to issue its decision and thereby acted to the detriment of that party in the procedure (BGE 127 III 576 E. 2e S. 579, with citations). In particular, the principle of equal treatment of the parties requires the Arbitral Tribunal to fundamentally treat all parties in the same way in all procedural questions (Vischer, Zürcher Kommentar zum PILA, 2. Auflage 2004, N. 25 about Art. 182 PILA; Dutoit,

[8] Translator's note : CF means the Federal Constitution of Switzerland.

Droit international privé suisse : Commentaire de la loi fédérale du 18 décembre 1987, 3e édition 2001, N. 6 about Art. 182 PILA).

6.3

The Appellants see a violation of Art. 190 (2)(d) PILA in the fact that the Arbitral Tribunal did not exclude from the proceedings two briefs which had been filed with the Arbitral Tribunal one day late. From the appeal, however, one cannot deduct that the parties had established in the Terms of Reference that not abiding by a time limit would lead to the corresponding brief to be excluded by the Arbitral Tribunal. To the extent that the legal consequence advocated by the Appellants was not established in that way, it is not to be seen to what extent the Arbitral Tribunal would have treated the parties unequally within the meaning of Art. 190 (2)(d) PILA by refusing the submission of the Appellants in this respect. The Appellants do not claim that they themselves would not have complied with a time limit and that in such a situation the Arbitral Tribunal would have taken against them the procedural measures that they advocate. The fact that they themselves adhered to the time limits imposed to them does not result in an unequal treatment of the parties by the Arbitral Tribunal. The claim that the principle of equality was violated is therefore unfounded.

6.4

According to well established case law, no enforceable right to reasons for the award is to be deducted from the right to be heard within the meaning of Art. 190 (2)(d) PILA (BGE 133 III 235 E. 5.2 S. 248 with citations). This has not been changed by the new Art. 77 BGG. Indeed, the appeal in civil matters is available against arbitral awards under the conditions of Art. 190 to 192 PILA. Whilst the requirements for cantonal decisions which are capable of appeal are governed by Art. 112 BGG, arbitral awards within the meaning of Art. 190 PILA are governed by Art. 189 PILA. Consequently, they are issued in a procedure and in a format, which the parties have agreed upon (par. 1), and unless differently agreed, they must be issued in writing, with reasons, dated and signed (par. 2). Notwithstanding the critics of legal writers, case law refused to deduct from the right to renounce the reasons of the award that such a right would not belong to the core of the right to be heard, which cannot be renounced within the meaning of Art. 182 (3) PILA, the violation of which can be appealed under Art. 190 (2)(d) PILA (see the criticism of Heini, Zürcher Kommentar, a.a.O., N. 33 on Art. 190 PILA and N. 13 on Art. 189 PILA; Berti/Schnyder, Basler Kommentar zum IPRG, 2. Auflage 2007, N. 65 on Art. 190 PILA; Dutoit, a.a.O., N. 6 on Art. 182 PILA). The fact that the Arbitral Tribunal did not expressly take

a position on the submission by the Appellants that the Respondent's attitude should be sanctioned in the proceedings does not violate their right to be heard. Indeed, the Arbitral Tribunal took into account the submissions of the Respondent in its award, as the Appellants themselves explain, thus correspondingly rejecting the submission by the Appellants. The rejection of the submission by the Claimants in this respect did not require specific reasons from the Arbitral Tribunal. The claim that Art. 190 (2)(d) was violated is thus unfounded.

7.

The appeal must be rejected. However, neither does the Respondent fully succeed and this must be taken into account with regard to the costs (Art. 66 (1) and Art. 68 (2) BGG). The Respondent's submission hereby rejected relates to the Appellants' Counterclaim of EUR 2'312'826.99 granted by the Arbitral Tribunal. It is therefore justified to impose one fifth of the court costs on the Respondent and to grant the Respondent a limited share of its costs, reduced to 3/5.

Therefore the Federal Tribunal pronounces:

1.

The submissions in Paragraph 1 of the Respondent's brief are rejected to the extent that they are capable of appeal.

2.

The appeal is rejected.

3.

The court costs of CHF 50'000 shall be paid by the Appellants severally up to CHF 40'000 and by the Respondent up to 10'000.

4.

The Appellants shall be severally liable for a share of the costs of the Respondent of CHF 36'000 to be divided internally in equal shares among the Appellants.

5.

This judgement shall be notified in writing to the Parties and to the Arbitral Tribunal in Zurich.

Lausanne, January 22, 2008

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

The presiding judge:	The clerk:
CORBOZ	HURLIMANN