4A_468/2007[1]

Judgement of January 22, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding

Federal Judges KLETT (Mrs.) and ROTTENBERG LIATOWITSCH (Mrs.)

Federal Judge KOLLY

Federal Judge KISS (Mrs.)

Clerk of the Court: HÜRLIMANN

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

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.

[1] Translator's note : Quote as A.C. _____ SE, A.D. _____ Ltd., A.E. _____ Ltd., J. _____ Ltd. v. K. ____ SAS, 4A 468/2007. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

B.

Art. 19 PDA contained an arbitration clause. On April 28, 2006 K. _____ SAS (previously F.H. _____SAS, Claimant and Counterrespondent) initiated arbitration proceedings against A.C._____ SE (Respondent and Appellant 1), A.D. _____ Ltd. (Respondent and Appellant 2), A.E. _____ Ltd (Respondent and Appellant 3) as well as J. _____ Ltd. (Respondent and Appellant 4). The ICC Arbitral Tribunal issued a partial award on May 27, 2007. The Arbitral Tribunal held that it had jurisdiction on the submissions made by the Respondent in the request for arbitration of April 28, 2006, in section 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 on the counterclaim presented by the Appellant in its answer 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 of the fact that on March 7, 2007, the Respondent withdrew its submissions concerning "Support regarding CTA" for EUR 14'100.-- (Holding - lit. B). The Respondent's claims mentioned at Chapter IV.A of the award were granted in the amount they were to be allowed and otherwise rejected. Consequently, the Appellants were jointly ordered to pay an amount of EUR 8'010'270.41 to the Respondent (Holding – lit. C). The Respondent's counterclaims set forth at Chapter IV.B were similarly granted in the amount for which they were to be allowed and moreover rejected. Correspondingly, the Respondent was ordered to pay an amount of EUR 2'312'826.99 to the Appellants (Holding – lit. D). The submissions for findings by both parties were rejected (Holding – lit. E, F). A decision of the Arbitral Tribunal was reserved on the Respondent's claim for the loss of opportunity of investment in an amount of EUR 1'989'113.-- and for loss of reputation due to late payment in an amount of EUR 10.5 million, as well as with regard to interest and costs. A Civil Law Appeal was filed against that partial award in which the Appellants challenged the jurisdiction of the Arbitral Tribunal. That appeal was rejected in a decision issued today.[2]

C.

In an award of October 10, 2007, the ICC Arbitral Tribunal decided the issue it had previously reserved and ordered the Appellants severally to pay an amount of EUR 800'000.-- to the Respondent as compensation for loss of investment possibilities regarding the amounts awarded or due up to the time of the interim award, plus interest at 5% since the day of the judgment (Holding - nr. 1a); for the yet unpaid amount of EUR 1'528'696.--, the Arbitral Tribunal rejected the claim on the merits (Holding - nr. 1b). Moreover, the Respondent's claim for loss of

[2] Translator's note: Reference is made here to Decision 4A_244/2007, an English version of which is available at www.praetor.ch.

reputation due to late payment in an amount of EUR 10.5 million was rejected (Holding - nr. 2). With regard to interest the Appellants were severally ordered to pay an amount of EUR 50'652.43.-- to the Respondent (Holding - nr. 3a), the Respondent was ordered to pay the Appellants EUR 197'265.38.-- (Holding - nr. 3b) and the Appellants were severally ordered to pay to the Respondent interest at 8% on EUR 1'217'860.13.- since June 12, 2007 until payment and at 5% for EUR 310'933.15 from June 12, 2007 until full payment (Holding - nr. 3c). Finally, the Appellants were severally ordered to pay an amount of EUR 500'000.-- as costs, EUR 125'000.-- and USD 85'000.-- with interest at 5% since the day of judgment until payment (Holding – nr. 4). All other and further claims by the Respondent and the Appellants were rejected.

D.

In an appeal of November 8, 2007, the Appellants submitted that the award of October 2007 in ICC proceedings [number omitted] should be completely annulled for lack of jurisdiction of the Arbitral Tribunal; should jurisdiction be confirmed, then paragraphs 1a, 3a, b, c and 4 of the award should be overturned. They applied for a stay of the enforcement of the award and for provisional measures and submitted that the appeal proceedings should be consolidated with proceedings 4A_244/2007, the files should be delivered to the Federal Tribunal, a second exchange of pleadings should be ordered and the decision of the Federal Tribunal should not be published, or with no names mentioned. To substantiate their claim that the award should be annulled for lack of jurisdiction, the Appellants referred to their appeal against the partial award. To substantiate their claim that the right to be heard was violated, they referred to their developments in nr. 64 -70 of the appeal of June 28, 2007 and added that the additional amounts granted in the award relied among others on the corresponding briefs of the Respondent, which were taken into consideration. To support their claim of a violation of the equality of the parties, they also referred to their earlier appeal and added that they were treated unequally due to the re-opening of the proceedings.

E.

The Respondent submitted that the matter is not capable of appeal and subsidiarily that the appeal should be rejected. Procedurally, it submitted that a stay of the award and any other procedural measures (nr. 1 and 2) should be rejected, that no second exchange of pleadings should be ordered (nr. 3), that the two proceedings should not be consolidated (nr. 4) and that the files of the proceedings 4A_244/2007 should be adduced to the proceedings (nr. 5).

F.

The request for a stay and for provisional measures was rejected by a decision of December 10, 2007.

Reasons:

1.

The appeals against the partial award of May 27, 2007 and against the October 10, 2007 final award are to be dealt with simultaneously. There is no need to join the proceedings.

2.

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[3] the decision is to be issued in the German language.

3.

According to Art. 102 (3) BGG a second exchange of pleadings is generally not allowed. Since the Appellants did not present their request as a consequence of receiving the Answer[4], their request is certainly to be denied (BGE 133 I 98 E. 2.3 p. 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 judgement (Art. 27 (2) BGG).

4.

According to Art. 92 (1) BGG, interlocutory or preliminary decisions on jurisdiction are capable of appeal. Such decisions may no longer be appealed later according to Art. 92 (2) BGG (see for the old law BGE 130 III 66 E. 4.3 p. 75). The Arbitral Tribunal held that it had jurisdiction in its partial award of May 27, 2007 and the Appellants appealed that award. In the proceedings at hand, their submission that the award should be overturned for lack of jurisdiction is time barred. The matter is not capable of appeal from that point of view.

---

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

[4] Translator's note: What is meant here is the Answer to the appeal.

5.

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 reasoned 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 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).

6.

The Appellants see a violation of their right to be heard in the fact that the Arbitral tribunal did not expressly address their submissions that the Respondent's attitude should be sanctioned procedurally because two briefs had been submitted to the Arbitral tribunal one day too late.

6.1

According to well established case law, the right to be heard within the meaning of Art. 190 (2) (d) PILA does not encompass a right to reasons in an award (BGE 133 III 235 E. 133 S. 248 with references). Within the scope of Art. 77 BGE nothing has changed in this respect. Indeed, a Civil Law Appeal against arbitral awards is allowed under the conditions of Art. 190 – 192 PILA. Whilst the requirements for cantonal decisions capable of appeal are determined according to Art. 112 BGG, arbitral awards within the meaning of art. 190 PILA are governed by Art. 189 PILA. Accordingly, they are issued in the proceedings and in the format which the parties agreed upon (par. 1). Subsidiarily they must be issued in writing, reasoned, dated and signed (par. 2). From the fact that reasons could be renounced by the parties, case law, notwithstanding some criticism in legal writing, concluded that a right to reasons does not belong to the principles of the right to be heard which cannot be renounced within the meaning of Art. 182 (3) PILA, the violation of which could be appealed according to Art. 190 (2) (d) PILA (see the criticism of Heini, Zürcher Kommentar zum IPRG, 2nd edition 2004, N. 33 at Art. 190 PILA and N. 13 at Art. 189 PILA; Berti/Schnyder, Basler Kommentar zum IPRG, 2nd edition 2007, N. 65 at Art. 190 PILA; contrarily, approving, Dutoit, Droit international privé suisse: Commentaire de la loi fédérale du 18 décembre 1987, 3rd edition 2001, N. 6 at Art. 182 PILA).

6.2

It cannot be deducted from the appeal that the parties, in their agreement on the procedural rules (Terms of Reference), would have stated that not abiding by a time limit would lead to the corresponding pleading not being taken into consideration by the Arbitral Tribunal. It is not possible to ascertain and neither is it explained in the appeal (see E. 5) in what way the Arbitral Tribunal would have breached Art. 190 (2) (d) PILA when it denied the corresponding submission by the Appellants. That the Arbitral Tribunal did not expressly take a position on the submission by the Appellants that Respondents' attitude should be procedurally sanctioned did not violate their right to be heard. Indeed, the Arbitral Tribunal took into account the Respondent's pleadings in its award, as the Appellants concede, and thereby effectively rejected the submission. A specific set of reasons was not necessary for the rejection of the submission by the Arbitral Tribunal. The ground for appeal is unfounded, to the extent that it is capable of appeal.

7.

The Appellants see a violation of the principle of equality between the parties in the fact that the Arbitral Tribunal did not take into consideration the time limits imposed and reopened the proceedings.

7.1

The Appellants' right to equal treatment in the proceedings was not violated by the fact that they complied with their time-limits and thus had less time available than the Respondent. They do not claim that the Respondent, due to its alleged earlier knowledge of the opposing arguments, would have been heard with concrete arguments on which the Appellants could no longer have taken a position. The issue of unequal treatment could only arise if the Appellants themselves had failed to abide by certain time-limits and if the Arbitral Tribunal had taken against them the procedural measures that they advocate. The Appellants make no claim in this respect. The claim that the equality between the parties was violated is accordingly unfounded.

7.2

After issuing the partial award, the Arbitral Tribunal opened the proceedings again and invited the parties to express their views on the submissions left open, namely the loss of investment possibilities and reputational damage. The Appellants conceded themselves that the Arbitral Tribunal mentioned in this respect that such claims for damages by the Respondent, as opposed to all other claims, were still developing, at least potentially. They do not challenge this reason for

a reopening of the proceedings, but claim that the Respondent seized the opportunity to take a renewed position on issues which they were excluded from raising at that stage in the proceedings. Thus, they claim that the award could have gone differently if the Respondent had not been given the possibility of a further statement of its position. From the appeal it is not possible to see to what extent the Arbitral Tribunal would have effectively relied on such inadmissible arguments by the Respondent (see E. 5). Considering the special nature of the claim for damages, the Arbitral Tribunal did not violate the right to be treated equally by reopening the proceedings to clarify the position of the Respondent's assets at the time. To what extent the equality of the parties could have been violated if the tribunal had considered late submissions by one party in this context may be left open as the Appellants quoted no items in the award under appeal indicating that such arguments would have been taken into consideration.

8.

The appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings, the judicial costs shall be born by the Appellants severally and in equal shares internally (Art. 68 (1) and (5) BGG). The Appellants shall severally and in equal shares internally pay the costs of the Respondent for the federal judicial proceedings (Art. 68 (2) and (4) 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 20'000.-- shall be born by the Appellants severally and in equal shares internally.

3.

The Appellants shall pay to the Respondent severally and in equal shares internally an amount of CHF 25'000.-- for the federal judicial proceedings.

4.

This judgement shall be notified in writing to the parties and to the ICC 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