4A_279/2010[1]

Judgment of October 25, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: WIDMER.

1. X._____ Holding AG,

2. X._____ Management SA,

3. A._____,

4. B._____,

Appellants,

All four represented by Mr. Alexander Schwarz and Mr. Marcel Hubschmid

v.

Y._____ Investments N.V.,

Respondent,

Represented by Dr. Florian Baumann

Facts:

A.

A.a Y._____ Investments N.V. (the Respondent) is an investment company domiciled in the Netherlands Antilles and 100 % controlled by Y._____ Holding AG. In November 2007 upon investigation by its former treasurer C._____ it invested in a 100 Mio. Credit Linked Note[2] issued by Z._____ Bank. For that transaction X._____ Management SA (Appellant 2) submitted an invoice in excess of 1.5 Mio. which was paid by the Respondent or Y._____ Holding AG eventually, although the parties have differing opinions in this respect.

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[1] Translator's note : Quote as X._____ Holding AG, X._____ Management SA, A._____ and B._____ *v.* Y._____ Investments N.V. , 4A_279/2010. 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.

On January 21st, 2008 C._____ executed on behalf of the Respondent an Asset Management Facilitation Agreement[3] (hereafter: AMFA) with X._____ Holding AG (Appellant 1) as to an amount invested of USD 200 Mio. Eventually C._____ pledged the aforesaid Credit Linked Note[4] to I._____ Bank against a loan in excess of USD 82 Mio. From that loan 70 Mio. were invested in the purchase of two HSBC Structured Notes[5] with a face value of USD 35 Mio. each. For that transaction the Respondent paid an amount of USD 1.225 Mio. to Appellant 2.

A.b In connection with the two commission payments in an amount of USD 2.725 Mio. the Respondent filed a criminal complaint against C._____ as well as A._____ and B._____ (Appellants 3 and 4; members or former members of the board of Appellant 1) with the office of the Attorney General of the canton of Zurich on July 25, 2008 for embezzlement, alternatively unfaithful management. On July 30, 2008 the competent District Attorney's office III blocked all accounts of the Appellants and C._____ with the Swiss subsidiaries of L._____ Bank.

A.c Due to an alleged breach of the AMFA Appellant 1 obtained an attachment for USD 209.3 Mio against the Respondent in Curaçao, Netherlands Antilles, on July 18, 2008. To pursue the claim it introduced arbitration proceedings in front of International Center for Dispute Resolution in New-York on the basis of Art. 22 AMFA on October 15, 2008.

Art. 22 AMFA is worded as follows:

""In the event of disputes concerning any aspect of the Agreement, including Claim of breach, remedy shall first be sought by communication between parties. If such communication fails to resolve the dispute then the parties agree in advance to have the dispute submitted to binding arbitration through The American Arbitration Association or to any other US court. The prevailing party shall be entitled to attorney's fees and costs. The arbitration may be entered as a judgment in any court of competent jurisdiction. The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500).[6]"

The International Center for Dispute Resolution did not act on the request because the ICC Rules chosen in the AMFA do not correspond with the rules in force of the American Arbitration Association (hereafter: AAA).

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

Appellant 1 then filed a request with the United States District Court of the Southern District of New-York to compel arbitral proceedings, which was rejected in a judgment of April 2, 2009 because there was no enforceable arbitration clause. Appellant 1 appealed that judgment to the United States Court of Appeals for the Second Circuit on April 8, 2009.

B.

On January 6, 2009 the Respondent filed a claim with the Cantonal Court of Zug and submitted that the Appellants should be severally ordered to pay an amount of USD 1.5 Mio. as well as USD 1.225 Mio. with interest, an additional claim being reserved. It should also be found that the contract entitled Asset Management Facilitation Agreement allegedly signed in the name of the Respondent and of Appellant 2 on January 21st, 2008 never validly came into force. Alternatively it was to be found that the aforesaid contract was null and alternatively again that it did not bind the Respondent, even more alternatively that the contract had been automatically terminated within the meaning of its Art. 17 (a) and also terminated in conformity with the law. In their answer of April 22, 2009 the Appellants submitted that the proceedings should be limited to the issue of jurisdiction of the tribunal called upon by the Respondent. Moreover they submitted that the proceedings were to be temporarily stayed until the appeal in front of the United States Court of Appeals for the Second Circuit as to the judgment of the United States District Court for the Southern District of New-York was decided or until the criminal investigation in the canton of Zurich was finished. In a decision of December 14, 2009 the Cantonal Court rejected the defense based on the arbitration clause as to Appellant 1 and that of the lack of jurisdiction in Zurich as to Appellants 2-4 and decided to act on the claim. The request for a stay was rejected.

The Appellants appealed that decision to the Zug Court of appeal (hereafter: the Court of appeal) and submitted that as to Appellant 1 the Parties were to be told to go to arbitration and as to Appellants 2-4 that the claim should be rejected because Zug is not the proper forum. The Court of appeal rejected the appeal on April 8, 2010. It denied that there would be a valid arbitration clause between Appellant 1 and the Respondent and found that the Cantonal Court had jurisdiction on the basis of Art. 129 (1) PILA[7] in comparison with Art. 2 (1) LUC[8]. As to Appellants 2-4 the Court of appeals confirmed that the Cantonal Court had jurisdiction as the first court seized within the meaning of Art. 129 (2) PILA.

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[7] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

[8] Translator's note: LUC stands for the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1998.

C.

In a Civil law appeal the Appellants submit that the judgment of the Court of appeals should be overturned. With regard to Appellant 1 the Parties are to be directed to arbitration and as to Appellants 2-4 the claim should be rejected for lack of jurisdiction. Alternatively the matter should be sent back to the lower court for further investigation and a new decision.

The Respondent submits that the appeal should be rejected. The Court of appeals referred to the reasons in the decision under review and did not submit a brief.

The Presiding judge granted a stay on June 3, 2010. The Respondent's request for security for costs was rejected on July 29, 2010.

Reasons:

1.

The judgment under review is an interlocutory decision issued independently with regard to jurisdiction within the meaning of Art. 92 BGG[9], against which an appeal is authorized in principle. Interlocutory decisions are subject to the rules applicable to the decisions on the merits (BGE 133 III 645 at 2.2). This case involves a civil law dispute as to an amount in excess of CHF 30'000.- and the decision on the merits will be subject to a Civil law appeal (Art 72 (1) and Art. 74 (1) (b) BGG). As the other formal requirements are also met, the matter is capable of appeal.

2.

The only issue in front of the Federal Tribunal is whether or not the lower court was right to reject the argument that pursuant to Art. 22 AMFA a valid and effective arbitration clause had been entered into between Appellant 1 and the Respondent and that the defense of an existing arbitration clause accordingly prevented the admissibility of the claim against Appellant 1. The formal validity of the arbitration clause is not in dispute in this case. The Appellant submits that the lower court violated Art. II (3) of the New-York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (SR o.277.12; NYC) as well as Art. 1 and 18 OR[10].

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

[10] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

The Respondent is incorporated in the Netherlands Antilles and the Appellant is domiciled in Zug. This is therefore an international relationship within the meaning of Art. 1 PILA. The issue in dispute as to whether or not the courts of the canton of Zug have jurisdiction to decide on the merits notwithstanding Art. 2 AMFA is accordingly to be decided on the basis of the pertinent provisions of PILA under reservation of international treaties (Art. 1 (1) (a) and Art. 1 (2) PILA).

In the field of international arbitration the NYC is to be considered particularly. Among other things it deals with the lack of jurisdiction of state courts when there is an arbitration agreement. Thus Art. II (3) (the contents of which correspond to Art. 7 (a) and (b) PILA) provides that the court of a state party to the convention seized of a dispute for which the parties entered into an arbitration agreement must reject it upon request of one of the parties to go to arbitration, unless it finds that the arbitration clause is invalid, inoperative or incapable of being performed. In the purview of the New-York Convention the jurisdiction of the state courts to decide the dispute is denied when a party raises the arbitration defence under the conditions of Art. II (3) NYC (see BGE 124 III 83 at 5b p. 87).

Since the Appellant claims that there is an arbitration clause according to which the allegedly agreed upon arbitral tribunal would have its seat in the USA and therefore the competing jurisdiction of a foreign arbitral tribunal is at issue, the New-York Convention is applicable to this case (BGE 121 III 38 at 2 p. 40; 110 II 54 p. 55 and E. 2; see also BGE 122 III 139 at 2a when the arbitral tribunal to be constituted has its seat in Switzerland as well as Poudret/Besson, Comparative Law of International Arbitration, 2. Ed. 2007, Rz. 489 p. 417 f.; Stephen V. Berti, in: Basler Kommentar, Internationales Privatrecht, 2. Ed. 2007 N. 4 to Art. 7 PILA). As Switzerland withdrew its reciprocity reservation this applies irrespective of whether the arbitration is to take place in a state party to the New-York Convention or not (see in this respect Paul Volken, Zürcher Kommentar, PILA, 2. Ed. 2004, N. 14 f. to Art. 7 PILA; Judgment 4C.206/1996 of July 16, 1997 at 7b/aa).

Since it was argued that there is an agreement to arbitrate in front of an arbitral tribunal outside Switzerland, the lower court appropriately reviewed the validity of the arbitration clause with full jurisdiction (BGE 121 III 38 at 2b; see also BGE 122 III 139 at 2b p. 142 [as to the existence of an alleged agreement to arbitrate in Switzerland see to the contrary BGE 122 III 139 at 2b, Decision 4C.44/1996 of October 31, 1996 at 2, providing for a prima facie review and the criticism raised by Poudret/Besson, a.a.O., p. 431 ff. Rz. 502, by Berger/ Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, p. 112 f. Rz. 316 f. and by Berti, a.a.O., N. 8 to Art. 7 PILA; Judgment 4C.206/1996 of July 16, 1997 at 7b/bb-cc and 4C.40/2003 of May 19, 2003 at 3; yet also see the efforts to revise Art. 7 IPRG with a view to giving the international arbitral tribunal

the priority to decide its jurisdiction as opposed to the state court: Pierre-Yves Tschanz, De l'opportunité de modifier l'art. 7 LDIP, ASA-Bull. 2010 p. 478 ff.]). The Federal Tribunal exercises free judicial review as to whether or not the lower court violated Art. II (3) NYC when finding that the arbitration clause was inoperative (Art. 95 (b) BGG).

As to the law under which the validity of the arbitration agreement should be reviewed materially, the lower courts held (with reference to Judgment 5C.215/1994 of March 21, 1995 at 2b and Berger/Kellerhals, a.a.O., p. 109 f. Rz. 311) that the Parties had not chosen the law applicable to the arbitration clause, which meant that the *lex arbitri* was applicable in principle *i.e.* the law of the country in which the award would be issued. As none of the Parties relied upon a foreign law after proving its contents or showed any interest to its application, Swiss law was also applicable alternatively. As that reason (based on Keller/ Girsberger, Zürcher Kommentar, PILA, 2. Ed. 2004, N. 61 f. to Art. 16 PILA) remained undisputed, this case is to be decided under Swiss law (BGE 130 III 417 at 2.2.1 in fine).

3.
In the decision under appeal the lower court came to the conclusion that the arbitration clause in dispute did not allow a clear conclusion that the Parties wanted to rule out the jurisdiction of the state courts and to submit the dispute brought in front of the Cantonal Court to an arbitral tribunal. Even if this were not the case it would remain unclear which arbitral tribunal would have jurisdiction and the arbitration clause failed to meet the requirement of precision thus rendering it an “incurably pathological clause”.

3.1 An arbitration clause must be understood as an agreement by which two or more parties determined or to be determined agree in a biding way to submit one or several present or future disputes to an arbitral tribunal to the exclusion of the primary jurisdiction of the state on the basis of a legal order determined directly or indirectly (BGE 130 III 66 at 3.1 p. 70; 129 III 675 at 2.3 p. 679 f.).

Whether or not the parties have entered into such an agreement and as the case may be with what contents is to be decided by interpretation of the arbitration clause. The interpretation of an arbitration clause follows the general rules applicable to the interpretation of private declarations of will. The concurrent factual understanding of the parties as to the statements exchanged is decisive for the main part. When such factual will of the parties cannot be ascertained, the arbitration clause

must be interpreted objectively, *i.e.* putative will of the parties is to be determined according to that which could and should have been understood by an addressee acting in good faith (BGE 133 III 66 at 3.2 p. 71; 129 III 675 at 2.3 p. 680; 116 Ia 56 at 3b).

To interpret an arbitration clause one has to heed that the choice of an arbitral tribunal is of great consequence as arbitral proceedings regularly lead to higher costs and judicial remedies are limited as a consequence of renouncing the state courts. Such an intent to renounce cannot be assumed lightly and in case of doubt restrictive interpretation is accordingly called for (BGE 129 III 675 E. 2.3 S. 680 f.; 116 Ia 56 E. 3b S. 58).

Furthermore clarity and precision as to the private jurisdiction are additional requirements of an arbitration clause, *i.e.* the arbitral tribunal must either be unequivocally determined or in any case determinable (BGE 133 III 66 at 3.1 p. 70). When indeed the result of the interpretation shows that the parties wanted to except the dispute from the state courts and submit it to an arbitral decision but some differences remain as to the implementation of the arbitral proceedings, then the so called *Utilitätsgedanke*[11] applies, according to which an understanding of the contract must be sought which allows the arbitration clause to subsist. Therefore an imprecise or flawed description of the arbitral tribunal does not lead to invalidity of the arbitration clause when interpretation makes it possible to determine which arbitral tribunal the parties intended (BGE 130 III 66 at 3.2; 129 III 675 at 2.3 p. 681; 110 Ia 59 at 4).

Accordingly it must be determined hereunder whether or not the clause in dispute in Art. 22 AMFA shows without doubt an intent to submit the disputes arising from the contract to a private arbitral tribunal to the exclusion of state courts. It is only if that is established that it will be examined whether or not it is sufficiently clear from the arbitration clause interpreted with a view to preserving its validity which arbitral tribunal the parties agreed upon.

3.2 In Art. 22 AMFA the Parties undertook "(...) to have the dispute submitted to binding arbitration through The American Arbitration Association [hereafter: AAA] or to any other US court. (...) The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500)."

The lower court rightly denied that thereby a clear intent would have been expressed to submit the disputes arising under the AMFA to an arbitral tribunal to the exclusion of the primary jurisdiction of the

[11] Translator's note: The principle according to which all terms of a contract should be given effect.

state courts. According to the wording of the clause the parties only agreed to submit a dispute to the binding arbitration of the AAA[12] or to any other[13] "US court", yet not to binding arbitral jurisdiction but also through any other "US court". This may easily be understood as meaning that they wanted to submit disputes either to the AAA for an arbitration ("to binding arbitration through the AAA[14]") or to another optional "US court" (to any other US court[15]). From the wording chosen it is not clear that even the "other US court" to deal with the dispute would lead to an arbitration and not to other proceedings and that with "other US court" another American arbitral tribunal is meant. Under "US court" within the framework of the wording chosen a state court may anyway be understood and only a description like "US arbitral court" would have shown with sufficient clarity that the ordinary state courts were to be excluded.

The Appellants' arguments cannot challenge this interpretation. That the clause in dispute is preceded by the title "arbitration" and that it is stated that the arbitral proceedings should be conducted according to the Rules of Arbitration of the International Chamber of Commerce (ICC 500) (The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce [ICC 500][16]) does not change the fact that a sufficiently clear formulation of an unequivocal exclusion of the ordinary state jurisdiction is lacking in the case at hand and that the clause may be understood as an (insufficient) alternative agreement to an arbitral tribunal or to a state court. Indeed in the context outlined it is not thereby excluded that the arbitral proceedings are only one of the alternative possibilities agreed upon. That the word "court" could have the meaning of a judicial body which could also include an arbitral tribunal cannot lead to another result for the same reasons. Even the fact that the Parties anticipated that the winning party in the dispute would be entitled to costs although the issue of costs is dealt with in the law in front of state courts, does not lead to a different conclusion, as the Appellants claim, since most arbitration rules also contain provisions as to the allocation of the costs incurred by the parties. The lower court must also be approved when its states that the expression "any other[17]", which can be translated as "any other", "an other" or "an optional", does not lead to the conclusion that the subsequent concept "US court" should refer to the same kind of object as the previous one, namely a US arbitral tribunal (like the AAA) and not to an object of the higher category, namely a US court. As to the other sentence contained in Art. 22 AMFA "The arbitration may be entered as a judgement in any court of competent jurisdiction" it is not obvious that it should lead to the conclusion that the primary state jurisdiction was clearly excluded and the Appellants, whilst relying on the provision, do not explain why it should be so.

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[12] Translator's note: In English in the original text.
[13] Translator's note: In English in the original text.
[14] Translator's note: In English in the original text.
[15] Translator's note: In English in the original text.
[16] Translator's note: In English in the original text.
[17] Translator's note: In English in the original text.

3.3 In this context the Appellants rely on a decision of the United States of Appeals for the Second Circuit of October 27, 2009 in which it was held that the clause under dispute would be ambiguous thus causing the judgment of the United States District Court for Southern District of New-York of April 2, 2009 to be reversed and the case sent back to the District Court for continuation of the proceedings in accordance with the decision appealed.

The lower court refused to take that decision into consideration on two grounds. First it held that the judgment was belatedly brought into the proceedings by the Appellants and was therefore inadmissible evidence. Even if the decision had to be taken into account it would not be apparent to what extent it would be relevant in the case at hand as the proceedings in the United States were not litigation previously pending abroad within the meaning of Art. 9 (1) and (2) PILA.

The Appellants do not submit any sufficiently reasoned arguments against these considerations (Art. 42 (2) and Art. 106 (2) BGG). Neither do they claim that holding the decision of the Court of appeals as inadmissible evidence would have resulted from arbitrarily applying the rules of cantonal procedure (see BGE 135 V 2 at 1.3), nor do they explain to what extent the lower court would have violated the law when it held that decision to be irrelevant in the case at hand. It is therefore unnecessary to review that issue (see BGE 134 II 244 at 2.1 p. 245 f. and at 2.2; 133 III 439 at 3.2). Anyway the Appellants inadmissibly broaden the factual findings of the lower court and therefore are not to be heard (Art. 105 (1) BGG; see BGE 135 III 127 at 1.5 p. 129 f., 395 at 1.5) when they argue without raising an appropriate grievance against the factual findings of the lower court according to Art. 105 (2) and Art. 97 (1) BGG that the Court of appeals would have reached the conclusion that the Parties had agreed to submit any possible disputes to a private arbitral tribunal, to the exclusion of the primary state jurisdiction and that the clause would be ambiguous only as to which arbitral tribunal would have jurisdiction.

3.4 The Appellants further argue that whilst the wording “to any other US court[18]” may have meant a reference to a state court, this would be merely a reference to a state institution to appoint the arbitral tribunal in case of impossibility to reach a decision by the first arbitral tribunal within the meaning of § § 4 and 5 of the Federal Arbitration Act, as opposed to the state court deciding the matter itself.

The argument cannot be approved. From the entire wording of Art. 22 AMFA it is not possible to understand why the “difference in wording” between “through the AAA” and “to any other US courts” would require drawing a difference between jurisdiction to decide the case on the merits (by an AAA

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

arbitral tribunal) and the mere jurisdiction to appoint an arbitral tribunal (by another US court). The clause lacks any objective indication that the jurisdiction of an "other US court" would be limited to the mere authority to appoint or that the reference to "any other US court" would only encompass the rules, already established pursuant to § § 4 and 5 of the Federal Arbitration Act anyway, pursuant to which the jurisdiction of the state court would be given to appoint the arbitral tribunal when its appointment could not be agreed upon by the Parties, as the Appellants claim. To the extent that the Appellants repeat their arguments in this respect that Art. 22 AMFA refers the Parties only to private arbitration as to the merits, reference may be made to what was previously explained in this respect.

Accordingly, even in the light of the arguments presented by the Appellants, it remains that an unambiguous exclusion of the primary state jurisdiction on the merits is lacking in the AMFA.

3.5 Therefore the lower court rightly denied the validity of Art. 22 AMFA as an arbitration clause. Accordingly the issue may remain moot as to whether or not the arbitration clause should also be considered as "incurably pathological" because even by interpreting it with a view to ensuring its effectiveness it could not be determined which arbitral tribunal would have jurisdiction on the merits. The issue already left open by the lower court may remain undecided as to the lack of authority and power of C._____ to conclude the AMFA thereby causing the arbitration clause not to bind the Respondent.

The Appellants do not persist in the argument that the lower court rejected, namely that the clause in dispute should in any way be interpreted as a valid jurisdiction clause pursuant to which the parties would have agreed that the dispute should be decided by an American court and not by a Swiss court. A review of that issue is accordingly not called for (see BGE 135 III 397 at 1.4; 133 II 249 at 1.4.1 p. 254 with references).

4.
In summary the appeal is to be rejected. In such an outcome the Appellants must pay costs and compensate the Respondent (Art. 66 (1) and (5) and Art. 68 (2) and (4) BGG).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs set at CHF 5'993.- shall be borne by the Appellants severally.

3. The Appellants shall pay to the Respondent severally an amount of CHF 7'000.-.

4. This judgment shall be notified in writing to the parties and to the Court of Appeal of the Canton of Zug.

Lausanne, October 25, 2010

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	WIDMER