4A_54/2012[1]

Judgment of June 27, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Godat Zimmermann (Mrs).

X._____,
Represented by Mr. Elliott Geisinger and Mrs Anne-Carole Cremades,
Appellant,

v.

Y._____ Inc.,
Represented by Mrs Dominique Brown-Berset and Mrs Dominique Ritter,
Respondent,

Facts:

A.
Represented by the United States Army Corps of Engineers (CoE) the American government entrusted the American company Y._____ Inc. (hereafter: Y._____) with certain works on an airbase in Iraq. By contract of July 17, 2004 Y._____ subcontracted part of the works to the Turkish company X._____. In 2005, the American company terminated the outsourcing contract for default by X._____. The Turkish company disputed the validity of the termination.

B.
B.a In a request of May 25, 2005 X._____ initiated arbitral proceedings as provided in the outsourcing contract. A three members arbitral tribunal was constituted under the aegis of the International Court of Arbitration of the International Chamber of Commerce (ICC). The arbitration clause sets the seat of the arbitral tribunal in Geneva and provides for American law to govern the dispute. The Claimant submitted in particular that Y._____ should be ordered to pay a little more than USD 8'000'000. For its part Y._____ submitted that the request should be rejected and in particular that X._____ should be ordered to pay more than USD 4'000'000 to Y._____.

The Arbitral tribunal closed the case on April 5, 2007. In its award issued on June 29, 2009 it found that the termination of the outsourcing contract for default was justified; it rejected X._____'s claim and

[1] Translator's note: Quote as X._____ *v.* Y._____ Inc., 4A_54/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

upheld the damage claim of Y._____ up to USD 2'421'095. Moreover it ordered X._____ to pay USD 300'000 as a share of Y._____'s legal fees.

X._____ filed a Civil law appeal to the Federal Tribunal against the June 29, 2009 award (case 4A_433/2009).

Simultaneously it submitted a request for rectification and interpretation of the aforesaid award to the Arbitrators.

On December 31st, 2009 the Arbitral tribunal issued a supplementary award amending the June 29, 2009 award in part, to the extent that the amount to be paid by X._____ was reduced to USD 479'613.

In a judgment of May 26, 2010[2] the Federal Tribunal upheld the appeal in part, annulled the award of June 25, 2009 and consequently the supplementary award of December 31st, 2009 and sent the case back to the Arbitral tribunal. This Court held that with regard to one issue, the Arbitral tribunal had not heeded the right to be heard of X._____, more specifically that it had not complied with its minimal duty to examine the pertinent issues when it did not take into consideration X._____'s arguments as to a withholding of 30% – corresponding to an amount of USD 382'148 – that Y._____ would have made on a down payment due to the Turkish company, an important item to assess damages (judgment at 2.4).

B.b After the case was sent back to the Arbitral tribunal X._____ asked the three Arbitrators to resign in a letter of September 16, 2010. In substance it took the view that after amending its award of June 25, 2009 and seeing both awards annulled by the Federal Tribunal, the Arbitral tribunal was no longer in a position to decide the case with equanimity without defending its own work.

In a letter of November 3, 2010 the Arbitrators refused to resign, taking the view that they continued to be impartial and independent from the Parties.

On December 3, 2010 X._____ filed a challenge of the Arbitral tribunal. X._____ mainly invoked a loss of trust in the Arbitrators. Describing the circumstances of the case as extraordinary, it pointed out that the Arbitral tribunal, after requiring close to two years to close the proceedings, issued in June 2009 an award containing a mistake, the correction of which had led to the damages awarded to Y._____ being reduced by about 80%. X._____ also referred to the reason for which the Federal Tribunal subsequently annulled the award of June 25, 2009, namely the fact that the Arbitrators failed to take into consideration some important arguments put forward by X._____ on a pertinent issue; it took the view that the Arbitral tribunal had made the same mistake as to other points, such as the validity of the termination of the contracts by Y._____, which should be taken into account even though it was not a ground for appeal to the Federal Tribunal.

In its plenary meeting of December 22, 2010, the International Court of Arbitration of the ICC rejected the challenge of the Arbitrators. However, in a letter to the Parties of December 23, 2010, the Court stated its concern as to the way in which the arbitration was conducted and asked the Arbitral tribunal to

[2] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/award-annulled-for-violation-of-due-process/

inform it by January 28, 2011 as to the coming proceedings, in particular as to the extent of the reassessment of the case and the tentative time schedule; the Court stated that it would then review whether or not a process of substitution of the arbitrators should be initiated pursuant to Art. 12 (2) of the ICC Arbitration Rules.

By letter of December 24, 2010 the Arbitral tribunal asked the Parties to indicate the issues they wished to see reassessed. X._____ mentioned twelve issues, which in its view should be reconsidered, in particular that which caused the annulment of the award, the validity of the termination of the contract by Y._____ and the reimbursement of the costs of the arbitration. Moreover X._____ informed the Arbitral tribunal that henceforth it would no longer participate in the proceedings. For its part Y._____ requested that the reassessment of the Arbitral tribunal should be limited to the issue that had caused the annulment of the award.

In a procedural order of January 25, 2011 the Arbitral tribunal decided to reassess its award only as to the issue discussed at § 2.4 of the judgment of the Federal Tribunal, namely as to whether or not the amount of USD 382'148 should be included in the damages due by X._____ to Y._____. On March 4, 2011 Y._____ announced that it renounced the aforesaid claim of USD 382'148 in order to reduce the expenses and the duration of the arbitration; this amount could therefore be deducted from the damages set at USD 479'613 in the supplementary award, so that the amount in Y._____'s favor was USD 97'465.

By letter of June 16, 2011 the Arbitral tribunal took notice of Y._____'s renunciation; it also asked the Parties to express their views as to the costs of the arbitration should it reexamine the issue. The Parties submitted their briefs on costs on July 6, 2011.

The Arbitral tribunal issued its final award on December 8, 2011. As it had done in the June 25, 2009 award it found that Y._____ was entitled to terminate the outsourcing agreement for default (§ 1 of the award) and rejected X._____'s claim that the termination should be converted into a termination for convenience (§ 2 of the award). It then ordered X._____ to pay USD 97'465 to Y._____ as damages and USD 200'000 for the costs of the arbitration.

C.
X._____ files a Civil law appeal. It submits that the Federal Tribunal should annul the award of December 8, 2011 and dismiss the Arbitral tribunal in its entirety. It also submits that the names of the parties should be kept anonymous in the opinion published on the internet and, as the case may be, in the Official Register.

In its answer Y._____ submits that the matter is not capable of appeal and alternatively that the appeal should be rejected.

For its part the Arbitral tribunal takes the view that it had no reason to withdraw from the case and that its decision to reassess only two issues of the award has nothing to do with an alleged bias.

X._____ filed some comments as to Y._____'s answer and the comments by the Arbitral tribunal.

Y._____ filed some supplementary comments.

Reasons:

1.
In the field of international arbitration, a Civil law appeal is allowed against decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[3] (Art. 77 al.1 LTF[4]).

1.1
The seat of the Arbitral tribunal is in Switzerland and none of the Parties had its domicile here at the time the arbitration agreement was entered into; the provisions of chapter 12 PILA are accordingly applicable (see Art. 176 (1) PILA).

1.2
The Appellant is directly affected by the final award under review which, in particular, orders it to pay a certain amount to the Respondent; thus it has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

1.3
Timely filed (Art. 46 (1) (c) and Art. 100 (1) LTF) against a final award and in the legally prescribed format (Art. 42 (1) LTF) the appeal is admissible in principle, without prejudice to a review of the admissibility of the submissions and of the grievances developed there.

1.4
Besides the annulment of the award under appeal the Appellant asks the Federal Tribunal to dismiss the Arbitral tribunal in its entirety. After leaving the issue undecided in several decisions the Federal Tribunal recently held that such a submission is admissible, by way of an exception to the rule that a Civil law appeal against an international arbitral award may only seek the annulment of the award (ATF 136 III 605[5] at 3.3.4 p. 615 ff).

1.5
The Respondent claims that the appeal is frivolous and should be declared inadmissible pursuant to Art. 42 (7) LTF. The issue may remain open to the extent that as will be seen hereunder, the only grievance raised in the appeal is unfounded anyway.

1.6
The appeal may be made only on the basis of one of the grounds for appeal limitatively spelled out at Art. 190 (2) PILA. The Federal Tribunal reviews only the grievances raised and reasoned in accordance

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[3] 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.

[4] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/

with the strict requirements of Art. 106 (2) LTF in this respect (Art. 77 (3) LTF; ATF 134 III 186 at 5; see ATF 128 III 50 at 1c p. 53 ff).

The Federal Tribunal bases its decision on the facts found by the arbitral tribunal (Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators even if the facts were established in a manifestly erroneous way or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However, as was the case under the aegis of the previous Federal Statute Organizing Federal Courts (see ATF 129 III 727 at 5.2.2 p. 733; 128 III 50 at 2a p. 54 and the case quoted), the Federal Tribunal retains the faculty to review the facts on which the award under appeal was based if one of the grievances mentioned at Art. 190 (2) PILA is raised against such fact findings or when some new facts or evidence are exceptionally taken into account in the framework of the Civil law appeal (see Art. 99 (1) LTF).

1.7
The Appellant's submission that the names of the parties should be anonymized in this opinion has no independent scope as this judgment will be published in an anonymous format according to Art. 27 (2) LTF and to the practice of the Court.

2.
Invoking Art. 190 (2) (a) PILA, the Appellant argues that the Arbitral tribunal that issued the award under appeal was irregularly appointed or composed.

2.1
After the Arbitrators refused to resign the Appellant filed a challenge based on Art. 11 of the ICC Arbitration Rules. The ICC Arbitration Court rejected the challenge of the three Arbitrators while asking the Arbitral tribunal to provide information as to the proceedings, with a view to initiating a possible substitution process. Emanating from a private body, this decision, which could not be appealed to the Federal Tribunal directly (see judgment 4A_14/2012[6] of May 2, 2012 at 2.2.1) does not bind this Court, which may accordingly review freely whether the circumstances invoked to justify the challenge are such as to base a finding that the Arbitral tribunal was irregularly composed (ATF 136 III 605 at 3.1 p. 608; 128 III 330 at 2.2 p. 332).

2.2
2.2.1 Like a State Court an arbitral tribunal must present sufficient guarantees of independence and impartiality. A violation of this rule leads to irregular designation or composition pursuant to Art. 190 (2) (a) PILA. In order to determine whether an arbitral tribunal presents such guarantees or not, reference must be made to the constitutional principles developed with regard to State Courts. However the specificities of arbitration and in particular those of international arbitration must be taken into account when reviewing the circumstances of the case at hand (ATF 136 III 605 at 3.2 p. 608 and the cases quoted).

The guarantee of an independent impartial court arising from Art. 30 (1) Cst.[7] and from Art. 6 (1) ECHR justifies the disqualification of a judge whose situation or behavior is such as to cast doubt as to his

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/an-international-arbitral-tribunal-seating-in-switzerland-is-gen/

[7] Translator's note: Cst. is the French abbreviation for the Swiss Constitution.

impartiality. It aims in particular at avoiding that some circumstances extraneous to the case may influence the judgment in favor or to the detriment of a party. It does not require disqualification only when an effective bias is established, because an inward disposition may hardly be proved; it is sufficient for the circumstances to create the appearance of a bias and to cast doubt on the magistrate's impartiality. However only the circumstances objectively identified must be taken into account, as the mere subjective impressions of the party filing the challenge are not decisive (ATF 138 I 1 at 2.2 p. 3 ff and the cases quoted).

Subjective impartiality – which is presumed until proof of the contrary – ensures each litigant that his cause will be adjudicated without distinction of persons. Objective impartiality seeks in particular to prevent the same magistrate from participating in a case under various titles (for instance as member of a judicial body, as counsel to a party, as expert or as witness) and to guarantee the independence of the judge towards all parties (ATF 136 III 605 at 3.2.1 p. 609 and the cases quoted).

2.2.2 According to the Appellant, the Arbitral tribunal would have found itself in a situation after the case was sent back by the Federal Tribunal depriving its members of the independence and the equanimity indispensable to take a second look at the case – in particular to correct other mistakes than those sanctioned by the Federal Tribunal – before issuing a new final award. The circumstances causing such a situation would be the time elapsed until the first award was issued (two years), the "drastic" mistake leading to an 80% reduction of the damages in the supplementary award and the annulment of the first award for violation of the right to be heard. Moreover the threat of destitution contained in the December 23, 2010 letter of the ICC Court of Arbitration would have increased the pressure on the Arbitrators even more, preventing them from taking a timely new look at the case with the necessary equanimity.

The Appellant also argues the lack of impartiality of the Arbitral tribunal as to the object of the dispute (issue conflict[8]). In the unusual context of the annulment of the first award and the supplementary award, the Arbitrators would have been deprived of the equanimity required for a second look at the case because a full review would have led to further questioning of their own work and to additional delays.

2.2.3 The Appellant assumes that after the final and supplementary awards were annulled by the Federal Tribunal the Arbitrators could reassess all the issues examined in the first award, including the validity of the termination of the contract for default, but that in view of the specific circumstances of the case they were not in a position to consider serenely the Appellant's request to do so.

In so doing the Appellant misunderstands the scope of the judgment of the Federal Tribunal annulling the awards and sending the case back to the Arbitral tribunal. Whilst the LTF, contrary to the previous Federal Statute Organizing Federal Courts, does not specifically say so, the body to which the case is sent back is bound by the reasons of the judgment of the Federal Tribunal (ATF 135 III 334 at 2 and the cases quoted). The same applies when the body involved is an arbitral tribunal (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, nr 1654 p. 479; Jean-François POUDRET, Le recours au Tribunal fédéral suisse en matière d'arbitrage international (Commentaire de l'art. 77 LTF), in ASA Bulletin 2007, p. 686; see ATF 112 Ia 166 at 3e p. 172). This means in particular that the arbitrators may review only the issues left open by the judgment of this Court and that they are moreover bound by their first award (Sébastien BESSON, Le recours

[8] Translator's note: In English in the original text.

contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), in ASA Bulletin 2007 p. 21;see ATF 112 Ia 166 at 3e p. 172; see also judgment 4A_360/2011 of January 31st, 2012 at 6.2 *in fine*). This means that in the case at hand, the arbitral tribunal called upon to issue a new decision could only review the Appellant's arguments concerning the 30% withholding corresponding to the amount of USD 382'148, an issue it needed not review after all because the Respondent renounced that claim in its letter of March 4, 2011; however the Arbitrators did not have to review the other issues decided in the awards of June 25 and December 31st, 2009. This being so, the issue as to the attitude of the Arbitrators with regard to the scope of the reassessment could not be pertinent to assess a possible bias. And since the Arbitral tribunal did not have to reassess any other issues than the one connected with the aforesaid withholding, one hardly sees how it could have been lacking equanimity when reassessing the case and consequently would have displayed a bias as to the issue in dispute.

Moreover, it is appropriate to recall that procedural mistakes or a decision erroneous in substance are not sufficient to create the appearance that an arbitrator or an arbitral tribunal is biased, except for particularly severe or repeated mistakes that would constitute a blatant breach of their obligations (ATF 115 Ia 400 at 3b p. 404; 113 Ia 407 at 2a p. 409 ff; judgment 4A_539/2008[9] of February 19, 2009 at 3.3.2). In this case, the Arbitral tribunal corrected its award of June 25, 2009 pursuant to the Appellant's request. One hardly sees how such behavior could display an apparent bias against the Appellant. Moreover, after the first award and the supplementary award were annulled by the Federal Tribunal, the case went back to the same arbitrators. As the Appellant rightly points out, the same Arbitral tribunal has indeed jurisdiction in principle to issue a new decision when an award is annulled by the Federal Tribunal (see recently § 3.1 unpublished of the aforesaid judgment of May 2, 2012[10] to be published). However nothing justifies a derogation from this principle in this case, as the violation of the right to be heard found by the Federal Tribunal on May 26, 2010 is manifestly not serious enough to create the appearance of a bias. Finally, any other possible mistakes allegedly committed by the Arbitral tribunal are not to be taken into account and they are not even described in the appeal brief.

On the basis of the foregoing the ground for appeal derived from Art. 190 (2) (a) PILA appears unfounded, which leads to the appeal being rejected.

3.
As the appeal is rejected the Appellant shall bear the judicial costs (Art. 66 (1) LTF) and pay the costs of the Respondent for the federal judicial proceedings (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 10'000 shall be borne by the Appellant.

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[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/criticism-against-the-conduct-of-the-procedure-by-the-arbitrator/

[10] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/an-international-arbitral-tribunal-seating-in-switzerland-is-gen/

3.
The Appellant shall pay to the Respondent an amount of CHF 12’000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the representatives of the Parties and to the chairman of the Arbitral tribunal.

Lausanne June 27, 2012.

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

The Presiding Judge:	The Clerk:
Klett (Mrs)	Godat Zimmermann (Mrs)