4A_414/2010[1]

Judgment of October 27, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge KISS (Mrs),

Clerk of the Court: LEEMANN.

X._____ Bank,

Appellant,

Represented by Dr. Andreas Baumgartner and Dr. Dominik Zaugg

v.

Y._____,

Respondent,

Represented by Mr. Matteo Pedrazzini

Facts:

A.

In connection with two contracts nr. 04-0204 and nr. 04-0204/S-AT concerning the consignment of ceramic production equipment to the Ukrainian company Z._____, the predecessor of X._____ Bank, based in Zaporozhye Ukraine (the Appellant) opened two bank guarantees on May, 27, 2005 in favor of the predecessor of Y._____, Formigine, Italy (the Respondent): guarantee 111._____ for an amount of EUR 409'224.- and guarantee 222._____ for EUR 1'347'856.50. Both contain an arbitration clause.

A.b On June 5 and on June 26, 2007 the Respondent called guarantee 222._____ for EUR 1'347'856.50. On January 30, 2008 it also demanded payment of EUR 409'224.- under

[1] Translator's note : Quote as X._____ Bank *v.* Y._____, 4A_414/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

guarantee 111._____ and the Appellant refused this payment as well on the basis of alleged discrepancies in the request.

B.

B.a The Respondent initiated arbitral proceedings against the Claimant on September 5, 2008, submitting that the latter should be ordered to pay a total of EUR 1'757'080.50 with interest.

On May 4, 2009 the Parties signed the Terms of Reference and agreed on the schedule of the arbitral proceedings. The Respondent filed a statement of claim on June 12, 2009. On July 17, 2009 the Appellant filed its answer and on July 24, 2009 various certified English translations of certain enclosures. On September 11, 2009 additional submissions were filed by both parties. In that last submission the Appellant argued for the first time that the calling of the guarantees was abusive because the Respondent's consignment had not taken place and Z._____ had had to procure the equipment elsewhere.

On September 28, 2009 the Arbitral Tribunal authorized a new exchange of briefs in which the parties had to take a position as to the specificities of the consignments agreed upon and effectively carried out as well as on the corresponding payments. On October 27, 2009 the Appellant submitted its brief, on which the Respondent expressed its views on November 17, 2009. None of the Parties asked for witnesses in support of their submissions. A hearing took place in Geneva on January 20, 2010.

B.b In an award of June 14, 2010 the ICC arbitral tribunal sitting in Geneva upheld the claim and ordered the Appellant to pay EUR 1'347'856.50 with interest at 3 % from May 30, 2007 as well as EUR 409'224.- with interest at 3 % from January 15, 2008.

C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the award of the ICC arbitral tribunal sitting in Geneva of June 14, 2010 and that the matter should be sent back to the arbitral tribunal for a new decision.

The Respondent and the ICC Arbitral Tribunal submit that the appeal should be rejected.

Reasons:

1.

A Civil law appeal is allowed against awards of arbitral tribunals under the requirements of Art. 190-192 PILA[2] (Art. 77 (1) BGG[3]).

1.1 The seat of the arbitral tribunal is in Geneva in this case. The parties are not based in Switzerland. Since they did not rule out in writing the provisions of Chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

1.2 The only grievances allowed are those limitatively spelled out in Art. 190 (2) PILA (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the duty to reason contained in Art. 106 (2) BGG as to the violation of fundamental rights and of cantonal and inter-cantonal law (BGE 134 III 186 at 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

1.3 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may neither rectify nor supplement the factual findings of the arbitral tribunal, even when they are obviously wrong or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the applicability of Art. 105 (2) and of Art. 97 BGG). Yet the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or when new evidence is exceptionally considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 both with references). Whoever claims an exception to the rule that the factual findings of the arbitral tribunal bind the Federal Tribunal and wishes to rectify or supplement the facts must show with reference to the record that the corresponding factual allegations were already brought forward in the arbitral proceedings in accordance with procedural rules (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; both with references). At chapter “II. Substantive” the Appellant presents the facts of the case and the procedural history from its point of view and argues that the bank guarantees were called pursuant to another contract and therefore abusively. In this respect it diverges repeatedly from the factual findings of the Arbitral Tribunal or supplements them without raising any

[2] 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.

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

sufficient grievance against the factual findings. Thus it argues that no consignment would have taken place under contract 04-0204/S-AT covered by the bank guarantee, which it would have proved with a certificate from the Ukrainian customs. Yet the Arbitral Tribunal found in this respect that the Appellant itself had acknowledged at the hearing that it could not document the alleged absence of consignment and the procurement from a third party. Its arguments are accordingly not to be taken into account.

2.
In various respects the Appellant argues a violation of public policy (Art. 190 (2) (e) PILA).

2.1 The judicial review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the award is consistent with public policy or not (BGE 121 III 331 at 3a p. 333). The adjudication of the merits of a claim violates public policy only when it disregards some fundamental legal principles and therefore becomes incompatible with the essential and widely recognized values which according to concepts prevailing in Switzerland should be the basis of any legal order. Among such principles are the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. An annulment of the award under appeal takes place only when its result and not merely its reasons contradict public policy (BGE 132 III 389 at 2.2 p. 392 with references).

2.2 The Appellant misconstrues the concept of public policy and the strict requirements that the corresponding grievances should be reasoned (BGE 117 II 604 at 3 p. 606) when it presents to the Federal Tribunal with reference to “international case law and legal writing” its own view as to the requirements for a bank guarantee to be called, particularly as to the necessary nexus between the obligation to pay and the contract guaranteed and claims on this basis that the calling of the guarantees would have been abusive in the case at hand and would be “void in international law under these circumstances”. In doing so, the Appellant questions in an impermissible way the legal assessment of its obligation to pay by the Arbitral Tribunal – to the extent that it does not depart from the factual findings of the Arbitral Tribunal – yet without showing to what extent the Arbitral Tribunal would have disregarded the fundamental validity and the contents of the prohibition of abuse of rights or of the rules of good faith. A violation of public policy is not shown.

2.3 The Appellant does not demonstrate any incompatibility with public policy either when it argues that the Arbitral Tribunal would have failed to deal with the issue of the allegedly abusive calling of the bank guarantee although it should have done so *ex officio* and reasons are required pursuant to Art. 189 (2) PILA and the parties conducted an exchange of briefs on that issue pursuant to the instructions of the Arbitral Tribunal. As to the allegedly insufficient reasons of the Arbitral Tribunal the Appellant shows neither a violation of public policy nor another grievance included in Art. 190 (2) PILA (see BGE 134 III 186 at 6.1 p. 187; 127 III 576 at 2b p. 577 ff. with references). Be this as it may, the Arbitral Tribunal considered the Appellant's arguments as to the allegedly abusive calling of the bank guarantees. Yet it found in fact that the Appellant had failed to prove, whether by producing witnesses or with documentary evidence, that the consignment would not have taken place as it claims and that the object of the contract would instead have had to be procured elsewhere. Accordingly the argument is untenable that the Arbitral Tribunal would have violated the rule of good faith by failing to address the issue of abuse of rights.

It cannot be claimed that public policy (Art. 190 (2) (e) PILA) was violated.

3.
The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. Accordingly the Appellant will pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) 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 16'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent CHF 18'000.- for the federal judicial proceedings.

4. This judgment shall be notified in writing to the parties and to the ICC arbitral tribunal seating in Geneva.

Lausanne, October 27, 2010

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

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