

4A_41/2013¹

Judgement of May 3, 2013

First Civil Law Court

Federal Judge Klett (Mrs), Presiding

Federal Judge Corboz,

Substitute Federal Judge Ramelli

Clerk of the Court: Hurni

A. _____ SA

Appellant

v.

B. _____ Ltd,

Represented by Mr. Antonio Monti,

Respondent

Taking into account:

That in an award of December 27, 2012, the Arbitral tribunal sitting in Lugano composed of three practising attorneys, Dr C _____, Chairman, Mr D and Mr E ordered the Defendant A. _____ SA Luxembourg to pay to the Claimant B. _____ Ltd. Cyprus EUR 82'929.54 with interest at 5% from October 31, 2010 with costs;

That the claim is connected to some invoices issued by the Claimant for commercial consulting work done for the Respondent, pursuant to a contract of February 4, 2009 containing an arbitration clause and terminated by mutual agreement on June 21, 2010;

That before addressing the merits, the Arbitral tribunal rejected the jurisdictional defence raised by the Defendant;

¹ Translator's note: Quote as A. _____ Sa v. B Ltd, 4A_41/2013. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch.

That the Massagno branch of A._____SA, (hereafter; the Appellant) filed a Civil law appeal on January 26, 2013 seeking the annulment of the award, a finding that the Arbitral tribunal has no jurisdiction and that "The request for arbitration [...] be formally rejected";

That in its observations of February 18, 2013 the Claimant submits that the appeal should be rejected "as a matter of order" for lack of standing to appeal and for lack of properly submitted reasons as to the merits of the appeal;

That the Appellant submitted a reply on March 4, 2013 while the Arbitral tribunal did not take a position;

That on February 25, 2013 the Presiding Judge of this Court rejected the request of a stay of enforcement submitted by the Appellant;

Considering:

That the Claimant argues that the Ticino branch of the Defendant has no procedural standing to appeal the award issued against the mother company headquartered in Luxembourg;

That the Appellant, with reference to DTF² 120 III 11 at 1b replies that while in the Arbitral Tribunal it appeared as Defendant without stating precisely that it was representing the mother company in Luxembourg, the Claimant never had any doubt as to the identity of its opponent so that the issue was raised for the first time in the Federal Tribunal;

That in judgement 4P1446/2005 of October 10, 2005 at 5 this Court stated that the case law mentioned by the Appellant with regard to enforcement proceedings is also applicable in judiciary or arbitral matters and that consequently, the appearance of a branch in lieu of the headquarters must be considered as mere mistaken designation of a party and does not prejudice its procedural standing;

That in this case as well, the mistaken designation causes no harm to the Claimant which has no doubt as to the identity of its opponent, not even in the Federal Tribunal;

That the Arbitral tribunal being in Lugano and both parties being domiciled abroad at the time the arbitration agreement was entered into, the provisions about international arbitration of PILA³ are applicable;

That pursuant to Art. 77 (1) LTF⁴ and 191 PILA a Civil law appeal against arbitral awards is admissible, pursuant to the requirements of Art. 190-192 PILA;

That the Federal Tribunal reviews only the grievances submitted by the Appellant and properly reasoned, namely with a clear indication of the provisions it considers violated and precisions as to what the violation consists of, similarly to what was requested previously for a Public law appeal (Art. 77 (3) and 106 (2) LTF; DTF 134 3 186 at 5, 128 III 50 at 1c);

That the grounds for appeal in international arbitration are exhaustively enumerated at Art. 190 (2) PILA);

² Translator's Note: DTF is the Italian abbreviation for the Report in which the judgements of the Federal Tribunal are published.

³ Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute of International Private Law of December 18, 1987, RS 291.

⁴ Translator's Note: LTF is the Italian abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Statute RS 173 110

That the Appellant claims to base its appeal “principally” upon Art. 190 (2) c PILA (*recte; litt b*) for lack of jurisdiction of the Arbitral tribunal;

That according to the Appellant, the Claimant would contradict itself and act in bad faith (Art. 2 (2) CC⁵) because before initiating arbitral proceedings the Claimant had filed a criminal complaint and served three orders of payment⁶, conclusively demonstrating in this manner that it had waived arbitral jurisdiction;

That the argument is manifestly unfounded at first sight because the criminal proceedings - aimed at natural persons incidentally- do not at all preclude the right of the aggrieved party to submit its claim for damages to civil jurisdiction, whether ordinary or arbitral and those will in any event will be subject to enforcement by the State;

That the Appellant, instead of addressing the reasons developed in the award in this respect, concentrates upon the nature of the February 4, 2009 contract and upon another contract signed on February 22, 2010, stating its arguments in a hardly comprehensible manner, and in any event not in conformity with the requirements at Art. 77 (3 and 106) 2 LTF;

That the very inadequacy of the argument appears where the Appellant argues that the Arbitral tribunal did not adduce evidence it claims to be pertinent and to have decided the jurisdictional defence with the merits of the case;

That the costs shall follow the decision on the merits (Art. 66 (1) and 68 (1) LTF).

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs set at CHF 5'000 shall be borne by the Appellant, which shall pay CHF 6'000 to the Respondent for the federal judicial proceedings.

3.

This judgement shall be notified to the parties, respectively to their counsel and to the *ad hoc* Arbitral Tribunal sitting in Lugano.

⁵ Translator's Note: CC is the Italian abbreviation for the Swiss Civil Code.

⁶ Translator's Note: A so called, “order of payment” is a peculiar Swiss notification of a claim. If opposed by the Debtor, the Order of payment must be the object of subsequent court proceedings.

Lausanne May 3, 2013

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

The Presiding Judge:

The Clerk:

Klett (Mrs)

Hurni