4A_614/2010[1]

Judgment of April 6, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Clerk of the Court: M.CARRUZZO.

X._____,
Appellant,

Represented by Mr. Bernard Lachenal

v.

Y._____ SA,
Respondent,

Represented by Mrs. Anne-Véronique Schlaepfer, Mr. Philippe Bärtsch and Mrs Anne-Carole Cremades

Facts:

A.

A.a On January 31, 2006 Y._____ SA (hereafter: Y._____), a company based in Luxemburg and X._____ a company under French law, entered into a Protocol by which the former assigned 123'981'707 shares of A._____ company (hereafter: the A._____ shares) to the latter, created for the purposes of that acquisition, for a total price of EUR 70 million.

[1] Translator's note : Quote as X._____ *v.* Y._____ SA, 4A_614/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

The shares had been contributed to Y._____ by a Mr. V._____ pursuant to a December 27, 2005 contract registered on January 30, 2006. V._____ himself had acquired them at the price of one Euro from W._____, the majority shareholder of A._____ on April 30, 2002.

A.b Immediately after the January 31, 2006 assignment judicial disputes arose as to the ownership of the shares.

A._____ refused to register the assignment. It was ordered to do so pursuant to Court proceedings concluded by a judgment of the Paris Court of appeals of October 8, 2008.

On February 3, 2006 W._____ and A._____ sued X._____ and V._____ in front of the Paris Commercial Court. They sought a finding that the assignment of the A._____ shares on April 30, 2002 was void "for lack of cause and vile price" and accordingly that they could not be opposed to the subsequent assignment of the shares between Y._____ and X._____ on January 31, 2006. The Petitioners' submissions were rejected and a judgment of the French Supreme Court put an end to the proceedings on November 15, 2009.

Whilst the proceedings were pending, Y._____ and X._____ concluded two transitory agreements: an Addendum n.1 of February 14, 2006 to the January 31, 2006 Protocol and a Summarizing Protocol of March 5, 2008. The latter points out that as a consequence of the payment of EUR 7,5 million, X._____ owed some EUR 66 million to Y._____ as of December 31, 2006, the said amount bearing interest at 5,5 % yearly as from January 1st, 2008.

B.

B.a On November 23, 2009 Y._____ filed a request for arbitration against X._____ based on the arbitration clause included in the Summarizing Protocol in front of the Court of arbitration of the International Chamber of Commerce (ICC). The Petitioner sought to invalidate the sale of the A._____ shares for breach of contract by the Respondent, to recover all the shares sold and to obtain damages.

On January 19, 2010 W._____ initiated court proceedings in a Luxemburg against V._____, Y._____ and X._____ with a view to obtaining a finding that the contribution of the A._____ shares to Y._____ by V._____ was void because that contribution would have been made in breach of a clause forbidding the assignment of these shares contained in a

Shareholders' Agreement entered into by V._____ and himself on June 1st, 1999 under the name "U._____ Consortium" (hereafter: U._____). According to the Claimant the nullity would also cause that of Y._____ for lack of an actual share capital and consequently that of the subsequent assignment of the A._____ shares by Y._____ to X._____.

B.b In a request of February 10, 2010 X._____ asked the Arbitral tribunal to stay the proceedings until the adjudication of the Luxemburg proceedings.

Y._____ submitted that the request should be rejected.

After giving the parties an opportunity to submit their arguments in writing and a hearing on the stay of the proceedings in Geneva, the seat of the arbitration, on September 15, 2010, a three members Arbitral tribunal under the aegis of the ICC rejected the request for a stay in a decision entitled Procedural Order n.1 issued in French by a majority of the arbitrators on October 5, 2010.

The majority justified its refusal to stay the proceedings as follows.

The Arbitral tribunal is seized of a request to invalidate a contract between companies Y._____ and X._____. The proceedings initiated in Luxemburg by W._____, which is not a party to the arbitration, do not have the same object. They were initiated less than two months after the filing of the arbitration request and after about four years of judicial proceedings conducted in France without success by the aforesaid W._____. Should he prevail fully in Luxemburg, the A._____ shares would be returned to V._____ so that his standing to act does not appear obvious. Moreover it cannot be excluded that the Luxemburg Court could hold that *res judicata* exists on certain aspects of the dispute. Furthermore the Claimant does not explain why the hypothetical breach of a clause of U._____ by V._____ could be opposed to Y._____ and invalidate the contribution of the shares in dispute to the capital of that company. It would also remain to be established that the nullity of Y._____ could be opposed to a third party in this arbitration - X._____ - which claims to be in good faith. Moreover the Arbitral tribunal is not faced in this case with a situation in which one of the parties to the arbitration would have lost or would be about to lose its legal personality. Furthermore certain disturbing elements suggest that the proceedings introduced by W._____ could have other purposes than the protection of legitimate interests. Under such conditions and considering that the legal proceedings in Luxemburg have not yet started on the merits, the need to conduct the arbitration promptly prevails on the

interest of the parties to a stay of the arbitral proceedings. Be this as it may, the instant decision is without prejudice of a re-examination of the issue at a later stage.

C.

On November 4, 2010 X._____ filed a Civil law appeal with the Federal Tribunal. It submits that Procedural Order n.1 should be annulled and seeks a finding by the Federal Tribunal that the Arbitral tribunal has no jurisdiction to address the merits of the dispute before the Luxemburg proceedings have been adjudicated and seeks a stay of the arbitral proceedings until then.

On November 10, 2010 the Appellant filed an undated dissenting opinion which the minority arbitrator had faxed to its French representative the day before.

A stay of the arbitral proceedings was ordered by the Presiding judge on December 10, 2010 until a decision on the appeal.

In its answer of January 31, 2011 the Respondent submitted that the matter was not capable of appeal and alternatively that the appeal should be rejected.

The Arbitral tribunal did not submit a brief.

Reasons:

1.

In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[2] (Art. 77 (1) LTF[3]). The seat of the arbitration was in Geneva. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The Appellant is directly affected by the decision under appeal, which rejected its request for a stay. Consequently it has a personal and legally protected interest to ensure that the decision was not

[2] 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.

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

issued in violation of the rights arising from Art. 190 (2) PILA; which gives it standing to appeal (Art. 76 (1) LTF).

Filed in the legally prescribed format (Art. 42 (1) LTF) and timely (Art. 100 (1) LTF) the appeal can be addressed from that point of view.

However the Respondent disputes that the matter is capable of appeal as a consequence of its object. According to the Respondent the Federal Tribunal would not be seized of an appeal against an arbitral award.

2.1 The Civil law appeal within the meaning of Art. 77 LTF in connection with Art. 190 to 192 PILA is possible only against an award. The appealable decision may be a final award putting an end to the arbitral proceedings on the merits or on procedural grounds, a partial award addressing part of the claim in dispute or one of the claims in dispute, or an interlocutory award disposing of one or several preliminary issues, whether procedural or on the merits (on these concepts see ATF 130 III 755 at 1.2.1 p. 757). As opposed to the foregoing a mere procedural order which can be modified or withdrawn during the proceedings cannot be appealed (judgment 4A_600/2008 of February 20, 2009 at 2.3). The same applies to a decision as to provisional measures pursuant to Art. 183 PILA (ATF 136 III 200 at 2.3 and references).

The decisions of the Arbitral tribunal as to the temporary stay of the arbitral proceedings are procedural orders not subject to appeal; they may nonetheless be submitted to the Federal Tribunal when the Arbitral tribunal in adopting them also implicitly issued a decision on its jurisdiction (ATF 136 III 597 at 4.2), in other words when, by doing so, it issued *ipso facto* a decision on its jurisdiction (or on the regularity of its composition if it was disputed) within the meaning of Art. 190 (3) PILA (judgment 4A_210/2008 of October 29, 2008 at 2.1).

2.2 On the basis of its title (Procedural Order n.1) the decision under appeal, by which a majority of the Arbitral tribunal rejected the Appellant's request for a stay, appears to be a mere procedural order which could be modified or rescinded during the proceedings; as such it cannot be appealed to the Federal Tribunal (ATF 122 III 492 at 1b/bb). However, the denomination of the decision under appeal is not decisive as to whether the matter is capable of appeal or not, but its contents (ATF 136 III 200 at 2.3.3 p. 205, 597 at 4). Therefore the object and the scope of the decision in dispute must be examined further.

2.3

2.3.1 According to the Appellant the Arbitral tribunal, by refusing to stay the proceedings, found that it had jurisdiction to immediately decide the Respondent's submissions as to the invalidation of the sale of the A._____ shares and their restitution. Yet according to the Appellant, the preliminary issues which it raised during the proceedings concerning the stay – the nullity of the contribution of the A._____ shares to the capital of Y._____ by V._____ and consequently the nullity of that company itself – challenged the Respondent's standing to act as Claimant in the arbitral proceedings (standing to be a party[4]) and its capacity to act (standing to act[5]), namely two issues concerning the existence of the arbitral proceedings and not their conduct. By issuing the decision in dispute, the majority arbitrators would thus have found that they had jurisdiction on the merits without regard to the outcome of the Luxemburg proceedings, from which however depends the Respondent's capacity to continue the arbitration proceedings it initiated. Thus a decision on jurisdiction would have been issued in this case as provided at Art. 186 (3) and 190 (3) PILA, which could be appealed to the Federal Tribunal immediately and which must be appealed under penalty of forfeiture.

2.3.2 The argument does not appear convincing for the following reasons.

Firstly the very text of the decision under challenge shows that in the mind of its writers, the decision was a mere procedural order, which could be modified or withdrawn during the proceedings. The Arbitral tribunal particularly emphasizes the fact that it does not intend to "prejudge the merits" (Procedural Order n. 83); that it wishes to privilege "the requirement to conduct the arbitration promptly" as opposed to "the interest of the parties to a stay of the arbitration" (*ibid*.), in view of "almost four years of proceedings in France" (Procedural Order n. 84) and because the Luxemburg proceedings were initiated after the arbitration by a third party whose standing to act "is difficult to establish at this stage" (*ibid*.); be this as it may the Arbitral tribunal reserved the possibility of "revisiting the issue at a later stage" (Procedural Order n. 85). It is accordingly a decision issued on opportunity grounds in which the Arbitral tribunal holds the view that, at least for the time being, the Luxemburg proceedings do not justify a stay of the arbitration. This case is accordingly fundamentally different from that which produced the aforesaid judgment of the Federal Tribunal of October 29, 2008 in case 4A_210/2008. Indeed in that case the Arbitral tribunal had refused to stay the arbitral proceedings, despite the fact that the Respondent had

[4] Translator's note: In German in the original text.
[5] Translator's note: In German in the original text.

initiated other arbitration proceedings to obtain a finding that it had invalidated the contract the performance of which was the object of the first arbitral proceedings; yet if it had refused to do so, it was because it found that it had jurisdiction to decide the issue of the invalidation of the contract as well, which that party wanted to submit to another arbitral tribunal. Consequently the Federal Tribunal concluded that that Arbitral tribunal had issued a decision as to its jurisdiction, at least implicitly (case quoted at 2.1).

Furthermore, as the Respondent rightly points out in its answer to the appeal, the Claimant did not challenge the jurisdiction of the Arbitral tribunal to substantiate its request that the arbitral proceedings be stayed, contrary to what it does in front of the Federal Tribunal today. The Appellant made no formal submission to that effect and went as far as submitting a counterclaim with a view to obtaining the payment of damages. The Appellant justified its request for a stay by arguing among other that the outcome of the Luxemburg proceedings could have an impact on its counterclaim. This shows that the Arbitral tribunal was in no way invited by the Appellant to decide its jurisdiction.

Finally one does not see in the reasons of Procedural Order n. 1 any indication from which it could be inferred that the Arbitral tribunal issued a decision on that issue, albeit implicitly. It certainly does not show that the Arbitral tribunal would have decided once and for all the issues as to the Respondent's standing to be a party and its capacity to act in the proceedings. In reality it merely shows the intent to continue the arbitral proceedings to comply with the requirement that the arbitration be conducted promptly notwithstanding the proceedings subsequently opened in Luxemburg by a third party against V._____ and the parties to the arbitration.

2.4 Involving a procedural order *stricto sensu*, the matter is consequently not capable of appeal.

3.

The Appellant shall pay the judicial costs (Art. 66 (1) LTF) and compensate the Respondent for the federal judicial proceedings (Art. 68 (1) and (2) LTF). The amounts to be paid in this respect shall be computed on the basis of the amount in dispute as provisionally set at nr. 10.4 of the Terms of Reference (EUR 7'500'000.- as of June 2010) and with a view to the nature of the decision under appeal.

Therefore the Federal Tribunal pronounces:

1. The matter is not capable of appeal.

2. The judicial costs, set at CHF 40'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 50'000.- for the federal judicial proceedings.

4. This judgment shall be notified to the representatives of the Parties and to the Chairman of the ICC Arbitral tribunal.

Lausanne, April 6, 2011

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

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