4A_108/2009[1]

Judgement of June 9, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge KISS (Mrs),
Clerk of the Court: HURNI.

X._____Kft,
Appellant,
Represented by Dr Florian BAUMANN

v.

Y._____ AG,
Respondent,
Represented by Mr Daniel HOCHSTRASSER and Mr Andrea BOOG

Facts:

A.

A.a

On October 1st, 2005, X._____ Kft incorporated in Hungary (the Appellant) and Y._____ AG incorporated in Schaffhausen (the Respondent) entered into a contract for work relating to the modernization of the Respondent's electric steel plant. The Respondent undertook against payment of EUR 4'100'000.- to deliver and to install a so-called COSS-batch loading system. The price was to be paid in two instalments of EUR 205'000.- and 37

[1] Translator's note: Quote as X._____ Kft *v.* Y._____ AG, 4A_108/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

monthly instalments. According to art. 4.2.2 of the contract, the first instalment was to be paid at the end of the month following the entry into service according to art. 16 of the contract. Art. 16.3 reads as follows: "the reception shall be confirmed by a certificate signed by both Parties. The reception shall be deemed in each of the following cases: (...) – [par. 4] the timeframe according to article 16.1 has run out and the CONTRACTOR did not have the possibility to carry out or to repeat the performance tests according to annex 3 or if the performance tests could not be successfully performed prior to the entry into service or within 3 months after the entry into force of this contract, whichever the earlier (...)". The contract further contains the following provisions (art. 32 – "termination"): (paragraph 1) each PARTY may terminate this agreement only in case of important violations of the contract by the other PARTY, which have not been corrected timely notwithstanding written notice or in case of bankruptcy or insolvency of the other PARTY [par. 7]. Before a justified termination based on an important breach of the performance guarantee, the PRINCIPAL and the CONTRACTOR shall agree on a possible additional compensation for the failure to reach the guaranteed performance in excess of the agreed upon penalty clause". Art. (1) states the following: "the PRINCIPAL cannot raise claims against the CONTRACTOR except for those specifically provided in this contract".

A.b

Both instalments were paid by the Appellant in accordance with the contract. The Respondent delivered the COSS-batch loading system and installed it in the Appellant's electric steel plant. However, a first attempted entry into service failed and a second attempt was made in July 2006. On December 8, 2006 the Appellant paid a first monthly instalment of EUR 100'000.-. In January 2007 a third attempt at entry into service was undertaken. The Parties disagree as to the result of the second and third attempts.

A.c

On the occasion of a discussion on February 9, 2007 the Appellant told the Respondent that it no longer wanted to maintain the contract. In a letter of April 16, 2007 (the Claimant) terminated the contract, demanded the reimbursement of the instalments paid and invited the Respondent to pick up the already dismantled COSS-batch loading system. According to the Claimant, the system never functioned due to basic conceptual deficiencies.

B.

B.a

On April 20, 2007 the Respondent filed a request for arbitration with the ICC International Court of Arbitration (ICC). Upon proposal by the Parties, Mr A._____ and Mr. B._____ were confirmed as arbitrators and Mr C._____ was appointed Chairman. In its request for arbitration the Respondent submitted that the Appellant was to be ordered to pay the remaining instalments for a total of EUR 3'590'000.-. Alternatively, it was submitted that the Appellant should be ordered to pay the remaining instalments as of the month they would become due.

B.b

On June 26, 2007 the Appellant filed a counterclaim with the answer to the request for arbitration. It submitted that the request should be rejected and that the Respondent should be ordered to pay an amount of EUR 2'743'639.-. This comprised the amount of EUR 410'000.- already paid, the first instalment of EUR 100'000.- paid and damages of EUR 2'233'639.- for refusing to perform the contract. Subsequently the Appellant increased the claim to EUR 3'257'052.-.

B.c

In a final award of January 29, 2009, the Arbitral Tribunal ordered the Appellant to pay EUR 1'900'000.- and rejected the rest of the claim (award par. 1). Furthermore, the Arbitral Tribunal found that the Appellant was obliged to pay to the Respondent the instalments which had not yet become due at the end of the corresponding month (award par. 2). The counterclaim was rejected (award par. 3). Interpreting art. 33 (1) of the contract the Arbitral Tribunal reached the conclusion that the termination system the Parties had agreed upon at art. 32 was conclusive and could not be supplemented by the grounds for termination at articles 107 ff. and art. 366 ff. OR[2]. Termination could therefore take place only according to art. 32 (1) of the contract, i.e. only in case of an important breach as the Parties had not gone bankrupt or become insolvent. According to art. 32 (7) of the contract termination for serious breach required that the Parties had previously conducted formal performance tests showing that the plant did not meet the requirements of Annex III. The Parties had not conducted the performance tests, therefore no important breach of contract by the

[2] Translator's note: OR is the German termination for the Swiss law of contracts, the Code of obligations.

Respondent was at hand, which would have entitled the Appellant to terminate. The Arbitral Tribunal further explained that even if the Appellant could in principle rely on some statutory grounds for termination, the requirements for termination were not met. Termination according to art. 366 (1) OR lapsed because the Respondent had met the agreed upon time schedule. As the Appellant had not terminated the contract immediately, that was no longer possible based on art. 366 (2) compared to art. 107 ff. OR. As to the due date of the first instalment, the Arbitral Tribunal reached the conclusion that it was the acceptance of the plant. The acceptance was regulated by art. 16.3 of the contract. With the unjustified termination in April 2007, the Appellant had taken away from the Respondent the possibility to conduct the performance tests and to implement the acceptance. According to art. 16.3 par.4 of the contract the plant was therefore deemed to have been accepted at the time of termination. The first instalment became due at the end of May 2007 according to art. 4.2.2 of the contract. Since the Appellant had already paid the first instalment it was in default at the end of June 2007 for the first time. Thus 19 instalments of EUR 100'000.- had become due at the time of the award, which gives a global amount of 1'900'000.-.

C.

In a Civil law appeal, the Appellant submits that the Federal Tribunal should annull the final award of January 29, 2009 and send the matter back to the Arbitral Tribunal for a new decision. The Respondent submits in its brief that the appeal should be rejected. The Arbitral Tribunal took no position. A stay of enforcement was granted by the Presiding Judge on April 3, 2009.

Reasons:

1.

1.1

In the field of international arbitration a Civil law appeal is possible under the requirements of art. 190-192 PILA[3] against arbitral awards (art. 77 (1) BGG)[4]. The seat of the Arbitral

[3] 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.

[4] Translator's note: BGG is the German abbreviation for the Federal statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

Tribunal is in Zurich. At the time the arbitration clause was concluded, the Appellant had its seat in Hungary. Since the Parties did not rule out in writing the provisions of the 12th chapter of PILA they are applicable (art. 176 (1) and (2) PILA).

1.2

The Arbitral Tribunal issued a final decision, which may be appealed to the Federal Tribunal on all the grounds set forth at art. 190 (2) PILA. The Appellant is directly affected by the award under appeal. It has therefore a legally protected interest in its annulment (art. 76 (1) BGG). The appeal was filed timely and in the legally prescribed format and is thus to be examined.

2.

The Appellant claims that the Arbitral Tribunal violated the right to be heard (art. 190 (2) (d) PILA) because it applied by surprise some provisions of the contract and legal rules which had not been argued. Specifically they would be the contractual provisions at art. 16.3 (4) and art. 32 (7) and as to the requirement for immediate action as to termination art. 366 (2) compared to art. 107 ff. OR. Conversely, the Respondent argues in its brief that it always addressed the corresponding contractual clause.

2.1

According to art. 182 (3) PILA the Arbitral Tribunal must abide by the right of the Parties to be heard. With the exception of the requirement for reasons, this corresponds to the constitutionally protected right in art. 29 (2) BV[5] (BGE 130 III 35 at 5 p. 37 ff.; 128 III 234 at 4b; 127 III 576 at 2c). Case law draws from that in particular the right of the parties to express their legal position as to all facts important for the decision and to prove their factual allegations with suitable means proposed timely, to participate in the hearing and to access the file (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c, with references). According to the case law of the Federal Tribunal there is no constitutionally protected right of the parties to be heard specifically as to the legal assessment of the facts they introduce into the case. There is an exception to that if a court purports to base its decision on a legal ground which none of the parties involved invoked and which they could not reasonably have anticipated (BGE 130

[5] Translator's note: BV is the German abbreviation for the Swiss constitution.

III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52; 123 I 36 at 2d p. 69; 115 Ia 94 at 1b p. 96 ff.).

2.2

The Appellant argues that art. 16.3 (4) of the contract was applied by surprise. Based on that provision the Arbitral Tribunal explained that the plant was deemed to have been accepted when the Appellant terminated as the Respondent was thus deprived of the possibility to conduct the performance tests.

2.2.1

The Respondent argues in contrast that it stated the following as to that issue at par. 27 of its answer to the counterclaim: "(...) so that no further performance tests could be conducted within the contractually agreed time frame for the entry into service – a month according to art. 16.1 and Annex II of the contract – for reasons for which the Defendant only is liable and not the Claimant. Thus the plant is deemed to have been accepted definitively according to art. 16.3 of the contract". These explanations were adopted by the Arbitral Tribunal in the summary of the arguments of the Parties. The Respondent also points to par. 155.2 of her reply to the counterclaim: "However there was no further test because the Defendant simply dismantled the plant. It is clear that in this respect as well the Claimant's contractual duties must be deemed to have been performed". In par. 100 (3) of the July 11, 2008 post-hearting memorandum (the Respondent) finally stated the following: "The achievement of the performance parameters (and therefore the acceptance of the work) should have been demonstrated in a test run; there was no such test because the Defendant withdrew from the contract. The plant must be deemed to have been accepted at the latest due to that termination, whilst already accepted due to a takeover during the entry into service".

2.2.2

From these quotes it appears that the Respondent argued several times, at least as an alternative, that the Appellant had prevented the accomplishment of performance tests thus causing the plant to be deemed accepted. The Respondent mentioned art. 16.3 of the contract explicitly in this respect. In the arbitral proceedings the Appellant repeatedly had the possibility to express a view in this respect. Its grievance that art. 16.3 (4) of the contract would have been applied by surprise therefore proves to be groundless.

2.3

The Appellant further claims that art. 32 (7) of the contract would have been applied by surprise. According to the opinion of the Arbitral Tribunal that provision means that termination due to some important breach of the contract requires the prior accomplishment of performance tests. Since they were not performed the Appellant could not terminate the contract.

2.3.1

In its answer, the Respondent refers in contrast to various allegations made at par. 16 of its post hearing memorandum of July 11, 2008: "Under these circumstances the Defendant should have given to the Claimant a suitable extra time to perform one test run, which in blatant violation of the Claimant's contractual rights it did not, thus the termination of the contract for work is not to be protected legally". Similarly in par. 79: "(...) so that it could never come to a performance test being conducted, due to no fault of the Claimant, which had fully complied with its contractual obligations, until the Respondent suddenly terminated the contract unilaterally and unexpectedly for the Claimant" and in par. 100 (7) f.: "setting an additional time would thus have been mandatory – this is also clear from art. 32 (1) of the contract. Article 16 of the contract too, which provides for entry into service, performance test and acceptance would have given the Claimant as the contractor the right to prove the compliance with the contract in the framework of several and repeated performance tests. The accomplishment of these tests was neither offered nor requested by the Claimant before it terminated the contract. (...) By its unilateral termination (and the prior dismantling of the COSS) the Defendant denied the Claimant the possibility to prove the proficiency of the work in a test run (...). With the dismantling of the COSS the Defendant also created some facts for these proceedings; it made it impossible for the Claimant to prove the proficiency of the plant by resorting to a court appointed expert in the proceedings".

2.3.2

The Parties contractually anticipated termination of the contract and adopted rules in art. 32. During the arbitration proceedings it was in dispute whether the Appellant could have terminated the contract or not. (The Appellant) should therefore have assumed that the Arbitral Tribunal would review all contractual grounds for termination. In article 32 only

paragraph 7 deals with such requirements. The Appellant should therefore have reckoned that the contractual provision could be applied especially since it was assisted by experienced business lawyers. Even if the Parties did not explicitly invoke art. 32 of the contract, its application is thus not surprising. The Appellant's grievance is unfounded in this respect as well.

2.4

Finally, the Appellant argues that the requirement of immediate termination based on art. 366 (2) compared to art. 107 ff OR was applied by surprise.

2.4.1

The Arbitral Tribunal came to the conclusion that the termination mechanism agreed in the contract was conclusive and could not be supplemented with the grounds for termination contemplated at art. 107 ff and art. 366 ff OR. Alternatively it explained that even if the Appellant could have relied on some contractual grounds for termination their requirements were not met because it failed to terminate immediately according to art. 366 (2) compared with art. 107 (2) OR.

2.4.2

According to case law the right to substitute performance contained in art. 366 (2) OR does not rule out the other legal remedies under art.107 (2) OR (BGE 126 III at 7a/bb p. 233 ff). In principle a termination of the contract based on art. 366 (2) OR compared to art. 107 (2) is only possible when suitable extra time was given to the contractor. The extra time may however be disregarded when it appears at the outset that it will not be used (see art. 108 (1 OR). In that case the creditor must terminate immediately according to case law (judgement 4C58/2004 of June 23, 2004 at 3.3; also see BGE 69 II 243 at 4 and 5). The Appellant itself relied on article 366 OR and also on its paragraph 2. Thus it must have taken into account that the requirement for immediate termination could reasonably be applied. There was no application of the law by surprise.

3.

The appeal must be rejected for the reasons above. In such an outcome of the proceedings the Appellant must pay costs and compensate the Respondent (art. 66 (1) and art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 30'000.- shall be paid by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 35'000.- for the Federal judicial proceedings.

4. This judgement shall be notified in writing to the Parties and to the ICC Arbitral Tribunal in Zurich.

Lausanne, June 9, 2009

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

The presiding Judge (Mrs): The Clerk:

KLETT HURNI