4A_428/2010[1]

Judgment of November 9, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), presiding,
Federal Judge CORBOZ,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

X._____ GmbH
Appellant,
Represented by Mr. Joachim Lerf

v.

Y._____ GmbH & Co. KG
Respondent,
Represented by Prof. Dr. Andreas Furrer and Mr. Jonatan Baier

Facts:

A.
X._____ GmbH based in Germany (the Appellant) entered into a Consortium Agreement with Y._____ GmbH & Co. KG based in Austria (the Respondent) on March 10, 2004.

The Consortium Agreement contained a choice of law clause in favor of Swiss law and an arbitration clause. The Consortium constituted by the Parties undertook to build a biomass power plant on a turnkey basis as general contractor for Z._____ GmbH. The construction project subsequently experienced technical problems and delays.

[1] Translator's note: Quote as X._____ GmbH *v.* Y._____ GmbH & Co. KG, 4A_428/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

B.

On August 28, 2008 the Respondent initiated arbitration against the Appellant with the submission, changed during the proceedings, that the Appellant should be ordered to pay EUR 1'437'689.88 with interest at 5 % from January 23, 2006. The Appellant rejected the claim and filed a counterclaim that the Respondent should be ordered to pay EUR 34'147.70 with interest at 5 % from the filing of the claim.

In an award of June 11, 2010 the ICC arbitral tribunal sitting in Zurich ordered the Appellant to pay EUR 438'359.37 with interest at 5 % from September 1st, 2008; the rest of the Respondent's claim was rejected (award at 1). The Appellant's counterclaim was upheld for EUR 24'186.49 with interest at 5 % from June 8, 2009 (award at 2). Furthermore the Arbitral Tribunal dealt with the costs in proportion to losing and winning (award at 3-6).

C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should essentially annul items 1 and 3-6 of the award of June 11, 2010 of the ICC arbitral tribunal sitting in Zurich.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. Alternatively that the award under review may be annulled and the matter sent back to the Arbitral Tribunal. The Arbitral Tribunal submits in its brief that the appeal should be rejected.

D.

In a decision of October 6, 2010 the Federal Tribunal rejected the Appellant's request for a stay of enforcement.

Reasons:

1.

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

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

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[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.

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 argued and reasoned in the appeal brief; this corresponds to the duty to argue properly 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 inaccurate or result from 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 award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against the 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 Federal Tribunal being bound by the factual findings of the arbitral tribunal and wishes to rectify or supplement the factual findings on that basis has to show with reference to the record that the corresponding factual allegations were already made in the previous proceedings in accordance with procedural rules (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

2.
The Appellant relies on Art. 190 (2) (b) PILA and argues that the Arbitral Tribunal would have exceeded its jurisdiction.

2.1 The Appellant wrongly argues that the Arbitral Tribunal would have inaccurately held that the claim of Z._____ GmbH for a contractual penalty against the members of the Consortium for failing to meet the target date was a preliminary issue in the arbitration, which the Arbitral Tribunal could decide. In the assessment of the Respondent's contractual claim for set off against the Appellant according to paragraph 7.1.4 of the Consortium Agreement the Arbitral Tribunal initially reviewed the issue as to whether or not Z._____ GmbH had made a sound claim for payment of the contractual penalty due to the target date being exceeded and legitimately withheld the corresponding amount. Contrary to the Appellant's view the Arbitral Tribunal did not misconstrue the scope of a preliminary issue in doing so. When the Appellant argues that the existence or inexistence of the claim for the contractual penalty based on the third party relationship between the Consortium on the one hand and Z._____ GmbH

on the other hand would be a "logical prerequisite to decide the relevant contractual claim in the internal relationship between the members of the Consortium", nothing may be derived from that in its favor. In doing so the Appellant merely describes the preliminary issue at hand in connection with the set off claim and emphasizes itself in doing so the necessity to address that issue in the arbitral proceedings.

2.2 The Appellant raises no jurisdictional argument when its claims that the preliminary issue decided would be a factual prerequisite for which the Respondent, as Claimant, would have had the burden to bring forward the corresponding facts and evidence. When it argues in this context that by deciding the preliminary issue the Arbitral Tribunal would have "created the factual prerequisite itself and induced the facts of the case itself for the sake of argument", it sweepingly criticizes the manner in which the Arbitral Tribunal assessed the evidence and applied the law as well as the applicable procedural rules, yet without raising an admissible grievance according to Art. 190 (2) PILA. The Appellant's argument cannot be followed, according to which the Arbitral Tribunal would have considered exceeding of jurisdiction blatantly by adding to its legal reasons that its considerations in this respect would not create *res iudicata.* The Arbitral Tribunal actually pointed out consequently that addressing the preliminary issue in the arbitral proceedings would not prejudicate the claim of Z._____ GmbH based on the contractual penalty in any subsequent proceedings. Contrary to the view expressed in the appeal the Arbitral Tribunal did not preempt the issue of the *quantum* of the conventional penalty in favor of Z._____ GmbH in the award under appeal. The latter was not a party to the arbitral proceedings and is not bound by the arbitral award.

2.3 Thus the Arbitral Tribunal breached no jurisdictional rules when it reviewed as a preliminary issue to the decision as to the Respondent's contractual claim according to Art. 7.1.4 of the Consortium Agreement whether or not Z._____ GmbH had rightly raised a claim based on the contractual penalty for missing the target date and withheld the corresponding amount.

Without prejudice to the foregoing the Appellant did not raise an issue of jurisdiction in the arbitral proceedings at all but claimed an excess of jurisdiction in front of the Federal Tribunal for the first time. Yet according to the rules of good faith objections against the jurisdiction of the Arbitral Tribunal should have been made at the earliest possible stage in the proceedings (BGE 130 III 66 at 4.3 p. 75 with references).

3.

The Appellant further argues that the Arbitral Tribunal would have decided an issue that was not in front of it (Art. 190 (2) (c) PILA).

3.1 The grievance is unfounded. According to case law a violation of the principle *ne eat iudex ultra petita partium* is not given when a tribunal assesses the claim from a legal point of view partly or completely differently from the submissions of the parties, to the extent that it remains within the submissions (BGE 120 II 172 at 3a p. 175; decision 4A_464/2009 of February 15, 2010 at 4.1; 4P.134/2006 of September 7, 2006 at 4). The amount of EUR 438'359.37 awarded to the Respondent as contractual compensation is below the amount of EUR 1'437'689.88 sought in the claim and remained therefore within the submissions. When the Arbitral Tribunal assessed the claim for compensation on the basis of Art. 7.1.4 of the Consortium Agreement and thus assessed the obligation to pay a conventional penalty differently from the Appellant, it simply undertook a legal assessment of the basis of the claim in the framework of the adjudication of the submissions in the claim. This is not a decision on an issue which would not have been in front of the Arbitral Tribunal within the meaning of Art. 190 (2) (c) PILA:

3.2 As with regard to the jurisdictional issue (see above at 2.2) it is equally unfounded in this context to claim that the Arbitral Tribunal would have decided the relationship of the Parties towards Z._____ GmbH. Instead the Arbitral Tribunal accurately pointed out that the claim of the aforesaid company for a contractual penalty was merely assessed as a preliminary issue and therefore the decision would not bind that company. The argument made in the appeal is accordingly unfounded that the award under review would directly abridge the Appellant's right in the legal relationship with Z._____ GmbH as well. When the Appellant argues that the proceedings should have been stayed, the claim should have been rejected as unfounded at the time or corresponding compensation should have been assessed, this does not show at all that a decision would have been made on an issue not submitted to the Arbitral Tribunal, as with the argument that the reasons in the award under review would go beyond or pass by the matter.

4.
The Appellant finally argues that the Arbitral Tribunal would have violated the right to be heard (Art. 190 (2) (d) PILA).

4.1 It argues that it would have been granted the right to be heard insufficiently as to the preliminary issue of the claim for a contractual penalty. If the Arbitral Tribunal considered that the specific preliminary issue was important to its decision it should have advised the Parties and adopted corresponding procedural guidelines according to the Appellant. In the November 17, 2008 answer it would have argued that the legality of the deduction of the contractual penalty would have been dealt with extensively in the negotiations as to the final account. The Respondent's presentation as to contractual compensation would have been confused, thus leading the Appellant to ask the Arbitral

Tribunal in the answer and in the counterclaim of June 8, 2009 for specific advice from the Arbitral Tribunal to the extent that, "contrary to expectations", it would consider the Respondent's factual allegation as "relevant to the decision". Neither in Procedural Order nr. 2 of August 27, 2009 nor in Procedural Order nr. 3 of September 23, 2009 would the Arbitral Tribunal have drawn attention in any way that it had considered the preliminary issue of the contractual penalty as important or decisive to the case. Moreover the Appellant would have pointed out in its rejoinder of November 9, 2009 that the Respondent had failed to meet its burden to present and prove the existence of a justified claim for a contractual penalty. In Procedural Order nr. 5 of November 17, 2009 the Arbitral Tribunal would have explained that the presence of a representative of Stadtwerke Leipzig GmbH was not necessary, which the Appellant could not have understood otherwise than meaning that the Arbitral Tribunal was not giving any particular importance to the legal relationship between the Consortium and Z._____ GmbH. Finally the Appellant would have pointed out again in its Post-Hearing Memorandum of March 1st, 2010 that the logical prerequisite for a compensation claim in the internal relationship between the Parties was tied to the contractual penalty of the members of the Consortium with Z._____ GmbH being valid and justified. Accordingly the decision in the award would be "completely surprising and not consistent with orderly proceedings".

4.2

4.2.1 According to case law there is no constitutionally protected right of the parties to be specifically heard as to the legal assessment of the facts they bring forward in the proceedings. Neither does the right to be heard mean that the parties should be advised in advance of the facts important for the decision. There is an exception in particular when a court purports to base its decision on a legal basis on which the parties involved did not rely and the relevance of which they could not reasonably take into account (BGE 130 III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52).

The issue as to whether the legal assessment by the Arbitral Tribunal is to be considered as surprising within the meaning of case law is a matter of appreciation as to which the Federal Tribunal imposes restraint on itself in the field of international arbitration. The specificity of the proceedings – namely the intent of the Parties not to submit their dispute to state courts and the fact that the arbitrators come from various legal traditions - must be taken into account in this respect and it must be avoided that the argument of an allegedly surprising application of the law should be misused to obtain judicial review of the substance of the award by the Federal Tribunal (BGE 130 III 35 at 5 p. 39 f. with references).

4.2.2 Contrary to the Appellant's view the preliminary issue as to whether Z._____ GmbH had a claim for contractual penalty or not was addressed in the arbitration at various times. As appears even from the Appellant's arguments, the Appellant was aware of the importance of the preliminary issue and

expressed its view several times in the proceedings. Thus it argues that it had raised the legality of the deduction of the contractual penalty in its answer already and among other things in its reply, that the Respondent had not met its burden to allege and prove the existence of a claim to the contractual penalty by the principal. Its arguments in the Post-Hearing Memorandum as to the third party relationship with Z._____ GmbH also suggest that the Appellant was quite aware of the significance of the preliminary issue at hand. Moreover the Arbitral Tribunal specifically requested in paragraph 4 of Procedural Order nr. 2 of August 27, 2009 that the Appellant, to the extent it would consider it necessary, should better substantiate its general denial of the Respondent's allegation in the context of the second exchange of pleadings. There can be no claim that the Appellant could not have reasonably taken into account the relevance of the preliminary issue at hand. It is equally unhelpful to the Appellant that the Arbitral Tribunal in its Procedural Order nr. 5 of November 17, 2009 waived the questioning of a representative of Z._____ GmbH on the basis of the record as it was after the exchange of pleadings. In that context the Arbitral Tribunal specifically pointed out that it was a matter for the Parties to invite the witness they wanted to the hearing. Contrary to the Appellant's point of view it cannot be concluded from the Procedural Order at hand that the Arbitral Tribunal would have given no importance to the legal relationship between the Consortium and Z._____ GmbH. There is no violation of the right to be heard by the Arbitral Tribunal to be found as to the preliminary issue of the contractual penalty.

5. The appeal proves unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Appellant shall 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 8'500.- shall be paid by the Appellant.

3. The Appellant shall pay CHF 9'500.- to the Respondent for the federal judicial proceedings.

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

Lausanne, November 9, 2010

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

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