4A_224/2008[1]

Judgement of October 10, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: WIDMER.

X._____ A.S.,

Appellant,

Represented by Dr. Lukas WYSS

v.

Y._____ GmbH,

Respondent,

Represented by Dr Thomas ROHNER and Dr Roger MORF

Facts:

A.

A.a X._____ A.S. (Appellant) is a Turkish company, which is active in the production of fertilisers. Among other base materials to produce fertilisers it uses sulfuric acid. Y._____ GmbH (Respondent) is active in the building of sulfuric acid plants among others.

[1] Translator's note: Quote as X._____ A.S. *v.* Y._____ GmbH, 4A_224/2008. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

On July 3, 2003 the Parties entered into a contract for a project to transform and modernise the plant the Appellant had been operating since 1981 to produce sulfuric acid from crude sulfur. The global price was EUR 22'950'000.-. It is undisputed between the parties that in particular the capacity of the existing plant was to be increased, the recovery of energy improved and the lifetime of the plant extended. At paragraph 16 the contract contains a choice of law and arbitration clause with the following wording:

> "16.1 Applicable law
>
> The interpretation of this contract and the application of the specific contractual points shall take place in accordance with material Swiss law to the exclusion of the uniform UN-sales law.
>
> 16.2 Arbitral tribunal
>
> All controversies arising from this contract must be resolved in friendly consultations between the parties. Should this fail to lead to an agreement within 60 days after one party gives notice of the dispute to the other, such disputes shall be finally decided according to Rules of conciliation and arbitration of the International Chamber of Commerce in Paris by three arbitrators appointed according to such rules.
>
> X._____ A.S. and Y._____ GmbH undertake to recognise and to submit themselves to the award. The seat of the arbitral tribunal is Bern/Switzerland where the hearing shall take place as well."

Moreover the following rules were adopted at paragraph 3 of the contract with regard to a payment on account by the Appellant and a bank guarantee to be issued by the Respondent:

"3.1.1 15 % of the total price as payment on account after signature of the contract. Payment according to Art. 2.1 takes place against a statement of account.

Deposit of a bank guarantee by Y._____ GmbH, valid until the end of the material guarantee according to Art. 5.1, at most 30 months after the entry into force of the contract (...)"

A.b The plant modernised by the Respondent was taken into operation on September 2, 2004. Eventually the parties fell into a dispute as to whether or not the modernised plant had successfully passed the test run according to the July 3, 2003 contract, with proof of the contractual procedural guarantees (levels of capacity, emission, quality of acid, production of steam and consumption of sulfur) and if (the plant[2]) functioned properly and if it was to be considered as accepted by the Appellant.

According to the Respondent's view the Appellant at first delayed the acceptance of the plant by illegitimately refusing to sign acceptance minutes after receiving proof of the levels of performance. On the basis of an additional agreement of December 15, 2004 the plant would be considered as accepted at the latest after the subsequent delivery of an additional sulfur smelter tank. To the extent that the plant would have shown defects which the Respondent would have to provide for it had done so within the framework of the guarantee. Any additional failures were caused by the fact that the Appellant did not operate and attend the plant properly. The Respondent had provided various additional items in excess of the originally agreed scope and cured some failing functions of or damages to the plant for which the Appellant was responsible and had to pay compensation.

Conversely, the Appellant takes the view that various severe problems would have appeared in the operation of the sulfuric acid plant and that the contractual test and guarantee runs could not be carried out successfully. The Respondent's objections that the defects or the damages were related to incorrect operation of the plant were a mere

[2] Translator's note: Added for clarity.

attempt at protecting itself. The Respondent was liable for damages according to Art. 97 ff OR[3], among others due to additional energy costs caused by a reduced production of steam, for loss of profit because the sulfur acid plant stood idle, for useless costs incurred and substitution materials.

A.c On August 4, 2005, the Appellant attempted to call the EUR 3'442'500.- bank guarantee that the Respondent had made available through Bank A._____ pursuant to paragraph 3.1.1 of the July 3, 2003 contract.

The Respondent obtained an injunction from the competent Finnish court in Helsinki, according to which Bank A._____ was enjoined from performing the guarantee. The Finnish court proceeding is presently at the merits stage. In a decision of October 25, 2006 it was stayed until a decision in the Swiss arbitral proceedings. The Appellant is an intervening party in the Finnish case.

On November 14/16, 2005, the Appellant obtained an attachment in Turkey on the basis of the payment obligation of Bank A._____ and a seizure of its assets in the amount of EUR 3'442'500.-. Bank A._____ filed an objection against the proceedings. In that procedure, in which the Respondent appeared at the side of Bank A._____, an appeal is still pending in front of the Turkish Supreme Court. Until now the bank guarantee has not been paid.

B.

B.a On June 26, 2006, the Respondent filed a request for arbitration against the Appellant with the Court of arbitration of the International Chamber of Commerce in Paris based on the arbitration clause in paragraph 16 of the July 3, 2003 contract. It presented the following submissions, modified on January 26, 2007:

[3] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

"1.a It is found that the Defendant[4] has no claims against the Claimant guaranteed by bank guarantee Nr. 233384-550338 issued by Bank A._____ on September 16, 2003.

1.b The Defendant is ordered to desist from calling the guarantee Nr. 233384-550338 issued by Bank A._____ on September 16, 2003.

1.c The Defendant is ordered to return the original of guarantee Nr. 233384-550338 of September 16, 2003 to Bank A._____.

1.d The Defendant is ordered to withdraw the claim pending against Bank A._____ in Istanbul 4. Asliye Ticaret Mahkemesi (Az. 2006/89 E.) as well as all claims pending in front of the Turkish courts as to the guarantee Nr. 233384-550338 of September 16, 2003.

1.e It is found that the Defendant must pay to the Claimant all the costs that the Claimant and Bank A._____ underwent or will undergo due to or in connection with the court proceedings relating to guarantee Nr. 233384-550338 of September 16, 2003 in front of the Helsingin Käräjäoikeus (Az 05/15940) and the Helsingin Käräjäoikeudelle (Az 05/24340) in Finland, as well as in front of the Istanbul 9. Asliye Ticaret Mahkemesi (Az. 2005/1019 D.I5.), the Istanbul 5. Icra Dairesi (Az. 2005/17011), the Istanbul 4. Asliye Ticaret Mahkemesi (Az 2006/89 E.) in Turkey, as well as all other Turkish authorities.

2.

The Defendant is ordered to pay to the Claimant an amount of EUR 385'040.92 for the repair of the damage to the sulfur furnace.

[4] Translator's note: The word "Defendant", (*der Beklagte*) is used to avoid confusion with "Respondent", used with reference to the Respondent in the appeal proceedings. "Defendant" means the Respondent in the arbitration proceedings.

3.

The Defendant is ordered to pay an amount of EUR 930'000.- to the Claimant for the additional services the Claimant gave to the Defendant.

4.

The Defendant carries the costs of the arbitral proceedings."

The Appellant opposed the claim with the following submission:

"1.

Submissions 1.a – 1.e are not capable of arbitration. The rest of the claim is to be rejected.

2.

Alternatively: the claim is to be rejected.

3.

Costs and compensation to be paid by the Claimant."

Besides other reasons for which submissions 1.a – 1.e should not be entertained by the Arbitral tribunal, the Appellant particularly claimed that the Arbitral tribunal had no jurisdiction to entertain submissions 1.b – 1.e.

B.b The Arbitral tribunal was composed of the arbitrators appointed by the parties, Dr Daniel BUSSE and Dr Gert THOENEN and the chairman they proposed Dr Philipp HABEGGER.

In a partial award (Award) of April 9, 2008, the Arbitral tribunal decided the following:

"1.

The Defendant's jurisdictional objection is rejected.

2.

As to submission 1.b, the Defendant shall desist from calling the bank guarantee Nr. 233384-550338 issued by Bank A._____ on September 16, 2003 for an amount in excess of EUR 1'000'000.-.

3.

The Claimant's submissions 1.c and 1.d are rejected.

4.

The other submissions and the costs of the arbitration until this partial award as well as a possible compensation for the costs of the parties will be decided in a later award."

C.

The Appellant filed a Civil law appeal against the award, with the following submissions:

"1.a Paragraph 1 of the partial decision under appeal of April 9, 2008 (ICC arbitration Nr. 14441/JHN) is to be annulled to the extent that it found jurisdiction of the arbitral tribunal as to submissions 1.b, 1.c and 1.e in the arbitration and rejected the corresponding jurisdictional objection of the Appellant.

1.b The jurisdiction of the arbitral tribunal is accordingly to be denied and the arbitral tribunal is to be instructed not to entertain submissions 1.b, 1.c and 1.e as per the reasons in the opinion.

2.a Paragraph 2 of the partial decision under appeal of April 9, 2008 (ICC arbitration Nr. 14441/JHN) is to be annulled.

2.b Alternatively: paragraph 2 of the partial decision under appeal of April 9, 2008 (ICC arbitration Nr. 14441/JHN) is to be annulled. The jurisdiction of the arbitral

tribunal is to be denied in that respect and the arbitral tribunal is to be instructed not to entertain the Claimant's submission 1.b within the meaning of the reasons in the opinion.

2.c Alternatively to 2.b: paragraph 2 of the partial decision under appeal of April 9, 2008 (ICC arbitration Nr. 14441/JHN) is to be annulled for violation of the right to be heard and the matter is to be returned to the arbitral tribunal for a new decision as per the reasons in the opinion.

3. (...)."

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The Arbitral tribunal did not take a position as to the appeal and expressed a view only with regard to the violation of the right to be heard, in relation to which it submits that the appeal should be rejected.

Reasons:

1.

Since the grievances advanced by the Appellant can be decided on the basis of the decision under appeal and in view of the documents filed by the parties, it appears unnecessary to order the production of the entire file of the Arbitral tribunal as the Appellant requested.

2.

A Civil law appeal is possible against the decisions of arbitral tribunals under the requirements of Art. 190-192 PILA[5] (Art. 77 (1) BGG[6]).

[5] 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.

[6] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal.

2.1 The seat of the arbitral tribunal is in Bern. The parties do not have their seat in Switzerland. Since they did not rule out in writing the provisions of the 12th chapter of PILA, they are applicable (Art. 176 (1) and (2) PILA).

2.2 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 requirement in Art. 106 (2) BGG that grievances should be reasoned for the violations of fundamental rights and of cantonal and inter-cantonal law (see in this respect BGE 133 II 249 at 1.4.2). The strong requirements for reasons that the Federal Tribunal set pursuant to Art .90 (1) (b) OG[7] apply here as in the past (see BGE 134 III 186 at 5).

2.3 In the decision under appeal, the Arbitral Tribunal found that it had jurisdiction and rejected the Appellant's jurisdictional objection. In doing so it issued an interlocutory decision within the meaning of Art. 186 (3) PILA, which can be appealed for the reasons mentioned at Art. 190 (2) (a) and (b) PILA (Art. 190 (3) PILA; see BGE 130 III 76 at 3.1.3).

Furthermore the Arbitral tribunal issued a final decision in the judgment under appeal as to part of the submissions, to the extent that it granted submission 1.b in part and rejected the Claimant's submissions 1.c and 1.d. In doing so it issued a partial decision, which can be appealed as a final decision, i.e. for all the grounds set forth at Art. 190 (2) PILA (Art. 91 (a) BGG; also see BGE 130 III 755 at 1.2).

2.4 The Civil law appeal within the meaning of Art. 177 (1) BGG fundamentally provides for annulment, i.e. it may only seek the annulment of the decision under appeal (see Art. 77 (2) BGG, ruling out the application of Art. 107 (2) BGG). To the extent that the dispute relates to the jurisdiction of the arbitral tribunal, however, an exception applies, as it already did under the old public law appeal and the Federal

[7] Translator's note: OG is the German abbreviation for the previous Statute Organising Federal courts.

Tribunal can itself issue a finding that the arbitral tribunal has or lacks jurisdiction (BGE 127 III 282 at 1b, 117 II 94 at 4; Judgment 4A_128/2008 of August 19, 2008 at 2.3).

The Appellant's submission that paragraph 1 of the award should be annulled and the jurisdiction of the Arbitral tribunal as to Claimant's submission 1.b, 1.c and 1.e denied is admissible in this respect. Not capable of appeal, however, is the submission that the Arbitral tribunal should be instructed not to entertain the aforesaid submissions (Judgment 4A_244/2008 of January 22, 2008 at 3). The submission going beyond the annulment of paragraph 2 of the arbitral award, namely that the matter should be returned to the Arbitral tribunal for a new decision within the meaning of the reasons of the opinion is not admissible either.

2.5 Only he who has a legally protected interest to the annulment or modification of the decision under appeal has standing in a Civil law appeal (Art. 76 (1) (b) BGG; see also BGE 122 III 279 at 3a; 116 II 351 at 3a/b with references).

The Appellant demands the annulment of the decision under appeal and the denial of the jurisdiction of the Arbitral tribunal also to the extent that (the arbitral tribunal) accepted jurisdiction to decide the Claimant's submission 1.c and entertained the claim in this respect. However it is doubtful to what extent the Appellant would have a practical interest in such a submission. Since the Arbitral tribunal, according to the wording of the award, rejected submission 1.c finally and the Appellant completely prevailed in this respect, it appears not to be affected.

2.5.1 However, the Appellant takes the view that submission 1.c was rejected in a mere provisional way.

In submission 1.c, the Respondent asked that the Appellant should be ordered to return guarantee Nr. 233384-550338 of September 16, 2003 to Bank A._____. In the

decision under appeal, the Arbitral tribunal came to the conclusion that the Appellant's claims were encompassed in the security purpose of the guarantee for an amount of up to EUR 1'000'000.- and that the Appellant could claim the guarantee for that amount without establishing first the violation of the contract by the Claimant. In order to exercise that right, it was to be directed to the bank guarantee, which is why submission 1.c was to be rejected.

The Appellant now claims that this meant that the Arbitral tribunal may again decide whether the bank guarantee had properly been called up to EUR 1'000'000.- or not after deciding the issues relating to the defects and damages, which had to be decided anew in the pending expert proceedings.

It is true that in the partial decision under appeal the Arbitral tribunal did not express a view as to whether the Appellant's claims against the Respondent for up to EUR 1'000'000.- were justified or not. It merely decided that the Appellant's claims were covered to that extent by the security which is the purpose of the bank guarantee. The Arbitral tribunal anticipated that in the final award it would decide after evidentiary proceedings whether or not the Appellant had any claims protected by the guarantee within the meaning of submission 1.a against the Respondent, to the extent that the Appellant would not have received the amount of the guarantee paid in the meantime on the basis of the partial decision, which would suppress any interest for a finding in this respect. It may indeed be questioned whether the rejection of the Respondent's submission for a return of the guarantee may not have been decided too soon in this respect. A return of the document containing the guarantee could thus be appropriate in case the final award might approve submission 1.a, thus finding that the Appellant has no claims against the Respondent secured by the guarantee. However, how this turns out is not decisive here. The Arbitral tribunal rejected without reservations submission 1.c in the form in which it had been made. Thus it may not come back to that decision according to the general principles of civil procedure (see VOGEL/SPÜHLER, Grundriss des Zivilprozessrechts, 8 Aufl., Bern 2006, S. 227 Rz.

63; GULDENER, Schweizerisches Zivilprozessrecht, Zürich 1979, at 362 f.). The Respondent did not appeal the partial award and the rejection of submission 1.c has become final to that extent. The Appellant's view that it would have a legally protected interest to the adjudication of jurisdiction with regard to submission 1.c because this would have been decided only provisionally may accordingly not be followed.

2.5.2 To reject submission 1.c, the Arbitral tribunal also stated that it was debatable whether the Appellant was obliged or not to exchange the existing bank guarantee against a guarantee for the reduced amount of CHF 1'000'000.-[8]. Yet there was neither an offer by the Respondent in the proceedings to exchange nor a reduced submission with regard to submission 1.c. The Appellant now claims that this would have meant at the same time that the Arbitral tribunal automatically considered itself to have jurisdiction should such a new submission be made, whilst broadly acknowledging its jurisdiction in the decision under appeal. Thus the Appellant would have to challenge the jurisdiction with a view to such a new submission and do so today already, within the time limit of Art. 100 BGG.

In this respect, the Appellant may not be followed. The Arbitral tribunal acknowledged its jurisdiction merely with regard to the submissions made. Should the Respondent make a new submission and should the Appellant object to jurisdiction in this respect, the Arbitral tribunal will have to decide – as a matter of principle in a partial decision according to Art. 186 (3) PILA – and a new appeal may be made. Such a decision would not be prejudiced by the decision under appeal, even if it were true that the likely answer of the Arbitral tribunal to the jurisdictional issue to be addressed then might be drawn from the former.

2.5.3 The Appellant therefore lacks a legally protected interest to the review of the decision on jurisdiction with regard to Claimant's submission 1.c in the arbitration. To that extent the matter is not capable of appeal.

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[8] Translator's note: This appears to be a typo, because the decision above refers to EUR 1'000'000.- and not CHF.

2.6 The Respondent submits that the matter is not capable of appeal because the parties would have renounced any legal recourse against the arbitral award.

2.6.1 According to Art. 192 (1) PILA when none of the parties has its domicile, habitual residence or an establishment in Switzerland, the parties may completely rule out any appeal against the arbitral award in a specific statement in the arbitration agreement or in a subsequent written agreement. The opting out of an appeal is admissible in particular as to decisions on the jurisdiction of an arbitral tribunal (BGE 133 III 235 at 4.3; 131 III 173 at 4.1 with references).
The requirement of a lack of territorial connection of the parties to Switzerland is undisputed in this case. The only issue to review is whether the parties validly renounced the filing of an appeal against the award or not.

2.6.2 The statement excluding the appeal of arbitral awards according to Art. 192 (1) PILA must be specific. The Federal Tribunal at first required in this respect that the appeals which the party wants to rule out should be specifically named (BGE 116 II 639 at 2c). That requirement, on which the Appellant relies, was however held to be too restrictive in the new jurisprudence; it is now sufficient that the common intent of the parties to avail themselves of the possibility of Art. 192 (1) PILA and to renounce the appeal of an international award to the Federal Tribunal should unmistakably be contained in the statement. Whether that is the case or not is to be derived from the interpretation of the actual arbitration clause (see BGE 133 III 235 at 4.3.1 p. 240 f.; 131 III 173 at 4.2, in particular 4.2.3.1, with references; KLETT, Basler Kommentar, Nr. 6 to Art. 77 BGG). Considering the importance of a renunciation to an appeal, the intent to renounce must be expressed clearly (see BGE 133 III 235 at 4.3.1 p. 241; 116 II 639 at 2c).

2.6.3 According to the wording of the arbitration clause, the disputes arising from the contract are to be decided by the arbitrators finally and the parties undertook to

recognise and to submit to the arbitral award. Contrary to the Respondent's view, this does not meet the requirements of a specific renunciation within the meaning of Art. 192 PILA (see in this respect the presentation of case law in BGE 131 III 173 at 4.2.1 p. 175 ff.; Decision 4P.114/2006 of September 7, 2006 at 5 concerning the expression "final and binding", Bulletin ASA 2007 p. 123 ff., RSDIE 2007 p. 104 f.).

According to normal language use, referring to a decision as "final" does not rule out an appeal based on extraordinary legal means, but merely the free review of a decision through ordinary legal recourses, such as for instance an appeal (see in this respect Judgment 4P.114/2006, *op. cit.*, at 5.3 with references). Thus Art. 190 PILA states in paragraph 1 that the decision of the arbitral tribunal issued on the basis of Art. 176 ff PILA is "final" but it also provides in the following paragraphs 2 and 3 in connection with Art. 191 PILA for a possibility based on some limitatively numbered grounds to appeal to the Federal Tribunal by means of a Civil law appeal according to Art. 77 BGG, which is essentially similar to the (old) public law appeal according to Art .85 (c) OG and therefore, as the latter, presents the characteristics of an extraordinary legal recourse (KLETT, *op. cit.*, Nr. 7 to Art. 77 BGG, HANS PETER WALTER, Neue Zivilrechtspflege, in: Neue Bundesrechtspflege, Auswirkungen der Totalrevision auf den kantonalen und eidgenössischen Rechtsschutz, Tagung vom 19./20. Oktober 2006 an der Universität Bern, Bern 2007, p. 113 ff., 147).

Neither could clear, undoubtful will to make use of the possibility of Art. 192 (1) PILA and to renounce the appeal of an international award to the Federal Tribunal be deducted from the wording that the parties undertake to recognise and to submit to the arbitral award. In this respect the Federal Tribunal has already decided with regard to a wording according to which the arbitral award must be binding (Judgment 4P.114/2006, *op. cit.*, at 5.3). In an additional new decision (the Federal Tribunal) did not consider as an exclusion of appeals according to Art. 192 PILA a similar wording of the arbitration clause (All awards shall be final and binding on the parties and

enforceable in any court of competent jurisdiction[9]) (Judgment 4A.244/2007 of January 22, 2008).

In order to interpret the disputed clause as a renunciation to any appeal against the award, including the appeal based on Art. 190 ff. PILA in connection with Art. 77 BGG, an additional sentence should have been included, in which it would have been made clear, for instance, that the parties renounced any legal recourse against the arbitral award (also see the example of such a clause in BGE 134 III 260 at 3.2.2).

2.7 Under the reservations made at paragraphs 2.2 – 2.5 above, the matter is therefore capable of appeal and fulfils the requirements for a review on the merits.

3.

The Appellant claims that the Arbitral tribunal wrongly found that it had jurisdiction to adjudicate submissions 1.b and 1.e in the arbitration (as to submission 1.c see the reasoning above at 2.5). An appeal as to jurisdiction is available according to Art. 190 (2) (b) PILA (see above at 2.3). The Federal Tribunal exercises judicial review freely as to legal issues, including preliminary material legal issues upon which the determination of jurisdiction depends (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; 117 II 94 at 5a).

3.1 Pursuant to submission 1.b, partially granted in the decision under appeal, the Respondent sought to have the Appellant enjoined from claiming the bank guarantee from Bank A._____. Pursuant to submission 1.e it sought a finding that the Appellant was to compensate for all the costs incurred by the Respondent and Bank A._____ due to or in connection with the proceedings relating to the guarantee in Finland and Turkey or those which would occur.

[9] Translator's note: In English in the original text.

The Appellant claims that by such submissions the Respondent tries to interfere in the legal relationship between (the Appellant) and Bank A._____. Whether the Appellant could draw the guarantee or not and whether the Respondent would have to reimburse the costs in connection with the proceedings in Finland and in Turkey or not would concern the guarantee relationship between Bank A._____ and the Appellant and would be decided by the Finnish or Turkish courts. Having jurisdiction only to decide the disputes between the parties, the Arbitral tribunal would not have jurisdiction in this respect. With regard to these issues there would be no identity of parties in the two proceedings and they would not be covered by the scope of the arbitration clause.

3.2 To assess the jurisdiction of the arbitral tribunal, the foundation of the claim is decisive, *i.e.* the facts of life from which the Claimant wants to deduct its claim (see in this respect the decision of the Federal Tribunal 4P.114/2006, *op. cit.*, at 6.5.4 with references to BGE 119 II 66 at 2 p. 68 f. and to BGE 131 III 153 at 5.1; 129 III 80 at 2.2 *in fine*; 122 III 249 at 3b/bb).

It is undisputed that according to the wording of the arbitration clause in Art. 16 of the July 3, 2003 contract (all disputes arising from this contract) the Arbitral tribunal has overall jurisdiction to adjudicate claims arising out of that contract. In the contract, the Respondent committed to provide the Appellant with a bank guarantee to secure certain claims. As to the guarantee issued, the issue is as to the value. That must be distinguished from the guarantee relationship existing between the guaranteeing bank and the Appellant as beneficiary, as well as from the mandate or the duty to reimburse between the Respondent, which ordered the guarantee and the guaranteeing bank (GAUCH/SCHLUEP/SCHMID/EMENEGGER, Schweizerisches Obligationenrecht, Allgemeiner Teil, Bd. II, 9. Aufl., Zürich 2008, Rz. 3924; DIETER ZOBL, Die Bankgarantie im schweizerischen Recht, in Personalsicherheiten, Berner Bankrechtstag 2007, Hrsg. Wolfgang Wiegand, S. 48/50; DANIEL GUGGENHEIM, Die Verträge der schweizerischen Bankpraxis, 3. Aufl., Zürich/Genf 1986, S. 155 f.).

To substantiate its claim, the Respondent argued that according to the July 3, 2003 contract, the Appellant has a duty to avail itself of the bank guarantee only in specific cases. To the extent that the Appellant's attempts to avail itself of the guarantee in a manner contrary to its purpose, the Respondent consequently has a claim, made in submissions 1.b and 1.e, to seek an injunction from calling the guarantee and for the reimbursement of the costs it underwent as a consequence of its being called.

The foundation of submissions 1.b and 1.e is consequently in the July 3, 2003 contract, hence the submissions fall within the arbitration clause in paragraph 16 of the contract. The Arbitral tribunal was obviously right to find that it had jurisdiction to decide whether or not the Appellant had a contractual duty towards the Respondent to call the guarantee only in some justified cases and whether that duty was breached or not, with the consequence that submission 1.b (an order to desist) and 1.e (compensation for procedural maneuvers) were to be granted as they affect the relationship between the parties.

The following must be stated as to what is said in the appeal in this respect:

3.2.1 Contrary to the Appellant's point of view, there is no interference in the relationship between the Appellant and Bank A._____ (guarantee relationship) based on which the Appellant seeks from Bank A._____ the payment of the amount guaranteed, merely because the Arbitral tribunal, in deciding submission 1.b as to the relationship between the parties, (adjudicates) whether the bank guarantee may be called according to the July 3, 2003 contract (value relationship) or not. Indeed, with regard to the issues pending in front of the Finnish and Turkish courts, relating to the guarantee relationship and not to the value relationship, namely whether the Appellant may seek redress from Bank A._____ based on the guarantee or not, the foregoing is not an identical object in dispute, as it involves other parties than the ones in the arbitration. The Respondent did not seek from the Arbitral tribunal any injunction at

Bank A._____ and did not seek to involve a party which is not subjectively encompassed by the arbitration clause.

It is not helpful to determine jurisdiction that the Respondent argues that the Appellant's attempt to rely on the guarantee would fundamentally contradict the general law of bank guarantees, which is governed by the rule "first pay then litigate". Indeed, to uphold the Respondent's submission to enjoin from calling the guarantee from that point of view would raise an issue on the merits and not to jurisdiction.

3.2.2 The same applies with regard to submission 1.e in the arbitration. The Respondent asks the Arbitral tribunal to order the Appellant to compensate for the costs incurred or to be incurred as a consequence of the violation of the duty which according to the Respondent is in the July 3, 2003 contract, to call the guarantee only in some specific cases. The Appellant may not be followed when it claims that the adjudication of that claim would affect the legal position of Bank A._____ or oblige it to a certain attitude. The Appellant does not succeed in explaining in concrete terms to what extent this should be the case. The issue as to the subjective bearing of the arbitration clause due to a decision affecting the rights of third parties, which did not sign the arbitration clause, is therefore not to be decided. Contrary to the Appellant's claims, the Respondent's damage claim relies only on the value relationship (July 3, 2003 contract) and not on the guarantee relationship between (the Appellant) and Bank A._____.

3.2.3 In summary, the grievance according to which the Arbitral tribunal would fall within the ground for appeal at Art .190 (2) (b), because it would have wrongly found that it had jurisdiction, is unfounded to the extent that the matter is capable of appeal.

4.

The Appellant justifies its appeal of the partial decision according to which it was enjoined by the Arbitral tribunal from calling the guarantee for an amount exceeding

EUR 1'000'000.- through a violation of its right to be heard within the meaning of Art. 190 (2) (d) PILA. That grievance is admissible *per se* (see above at 2.3).

4.1 The right to be heard in an international arbitration corresponds – with the exception of the right to a reasoned decision (BGE 134 III 186 at 6.1 with references) – to the constitutionally protected right in Art. 29 (2) BV[10]. Case law deducts from that, in particular, the right of the parties to express their view on all facts important for the judgment, to present their legal arguments, to prove their factual submissions important for the decision with appropriate and timely and formally accurate means, to participate in the hearing and to access the contents of the files (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c with references). A formal denial of due process within the meaning of the violation of the right to be heard takes place when a party could not present its point of view in the proceedings, so that the tribunal did not consider it in the decision process thus causing harm to the party in the proceedings (BGE 127 III 576 at 2e with references).

4.2 According to the Arbitral tribunal, the dispute revolved around the security purpose of the guarantee (instalment guarantee or material guarantee) and whether the Appellant's claims fell within that security purpose or not. The Arbitral tribunal came to the conclusion that the parties had secured the payment on account only in case of a late or incomplete delivery or performance, hence a guarantee for the payment on account. As the plant was not accepted, the Appellant's claims were in principle appropriate to fall under the security purpose of the guarantee. Yet, it needed to be reviewed whether or not the claims were affected from the point of view of a release from the security purpose as the latter was to be determined not only in view of the nature of the lack of performance but also according to the scope of the contractually agreed release. Indeed, the amount of the claim for damages, going beyond the contractually agreed cap, could not be within the security purpose. In this respect the Arbitral tribunal came to the conclusion that the Appellant's claims were in principle

[10] Translator's note: BV is the German abbreviation for the Swiss Constitution.

limited to a contractually agreed amount of EUR 1'000'000.-. A claim for damages beyond that would only be available to the Appellant if it proved that the damages arose as a consequence of the Respondent's grossly negligent behaviour and that the release clause would therefore have no validity according to Art. 100 (1) OR[11]. The Appellant failed to substantiate accurately to what extent the Respondent would have largely deviated from the standards to be expected. Therefore, the Appellant could only call the guarantee for an amount of EUR 1'000'000.-.

4.3 In this respect the Appellant claims that the decision under review takes a position as to some aspects for which the parties could not do so due to procedural limitations. Thus, in its Procedural Order Nr. 7 of December 14, 2007, the Arbitral tribunal would have given the parties a time limit to express their views as to the security purpose of the bank guarantee and the acceptance of the plant. Yet, the Arbitral tribunal subsequently did not limit itself to issue a partial award on these two groups of issues, on which the parties had been able to take a position after the hearing on 22/23 October, 2007. The arbitral tribunal rather considered the issues of the validity and scope of the release clauses as well as the scope of the bank guarantee as well as the release and the amount in which the bank guarantee (...) could be called and made that part of the partial award.

4.4 The grievance is unfounded:

4.4.1 The procedural limitation on which the Appellant relies took place in its view only after the hearing of October 22/23, 2007 pursuant to a Procedural order of December 14, 2007. Indeed, the Arbitral tribunal, with Procedural Order Nr. 4 of July 19, 2007, advised the parties that it intended to allow no further factual claims, except if specially permitted, already after the filing of the rebuttal which the Appellant submitted on August 13, 2007 and the Appellant does not challenge that as a violation of procedural rules. Accordingly, the Appellant should have substantiated its claim that

[11] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

the Respondent acted in gross negligence, with the consequence that the acceptance was invalid, in the rebuttal at the latest. According to the decision under review it did not do so and the Appellant does not question that in a seriously reasoned grievance. Thus the issue of gross negligence could not be the object of the evidentiary proceedings due to the lack of a timely substantiation.

In the Order of December 14, 2007, the parties were merely given a time limit to take a position with regard to the groups of issues relating to the security purpose of the bank guarantee and to the acceptance of the plant with a view to the result of the evidence. Thus the parties could only express themselves as to the issue of whether some timely and therefore previously alleged facts had been proved or not, from which gross negligence could be concluded. New allegations and factual claims to substantiate the alleged gross negligence had at that point been qualified as being late by the Arbitral tribunal and therefore must have remained unconsidered. This applies irrespective of whether the December 14, 2007 Order contained a procedural limitation of the nature claimed by the Appellant or not. There can be no claim that through the December 14, 2007 Order, the Claimant would have been prevented from expressing its legal point of view as to the validity and scope of the release clause including the issue of gross negligence relating thereto.

4.4.2 Irrespective of the foregoing the aspect of the security purpose of the bank guarantee, according to the Arbitral tribunal in the decision under review, encompasses the point of view that claims which were released are not covered by the security purpose, which also deals with the issue as to whether the release is valid or not, be it due to gross negligence or for other reasons. According to that approach, which is not challenged by the Appellant, the Appellant would have had the opportunity and ground to express itself even then as to all issues in relation to the release, including those of gross negligence if the proceedings had earlier been restricted to the issues of the security purpose of the bank guarantee and the acceptance of the plant, which, however, is not claimed by the Appellant.

4.4.3 The Appellant's argument does not succeed either, to the extent that it tries to construct a violation of the right to be heard from the fact that after the decision of the Arbitral tribunal that it had not complied with its duty to prove (*recte* its obligation to substantiate) the Respondent's gross negligence, it could no longer be found in the subsequent proceedings that (the Appellant) had a claim against the Respondent on that legal basis (at all, *i.e.* not covered by the bank guarantee). According to the submissions in the pending proceedings, the Arbitral tribunal merely had to decide in the partial award under appeal or in the final award, whether or not and to what extent the Appellant has some claims covered by the security purpose of the bank guarantee. It is not demonstrated that within the framework of the exchange of briefs the Arbitral tribunal would not have given the Appellant the opportunity to express its view in that context as to the issue of the release or the gross negligence. Whether or not the Appellant has any claims at all against the Respondent based on the July 3, 2003 contract as a consequence of gross negligence, which are in excess of the amount of EUR 1'000'000.- is not the object of the pending proceedings. The Appellant is accordingly free, as the Arbitral tribunal made clear, to seek payment of damages from the Respondent beyond the amount of EUR 1'000'000.- in further proceedings or within the framework of a counterclaim.

4.4.4 As explained above (at 4.4.1) the issue of the gross negligence could not be the object of the evidentiary proceedings due to the lack of timely substantiation in the pending proceedings. Accordingly, it is irrelevant from the point of view of the right to be heard whether an assessment proceeding has been conducted or not, as from the outset the circumstances from which gross negligence could have been concluded could not have been its object.

5.

The appeal must thus be rejected, to the extent that the matter is capable of appeal.

In such an outcome of the proceedings, the Appellant must 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 20'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent CHF 22'000.- for the federal judicial proceedings.

4. This judgement shall be notified in writing to the parties and to the ICC arbitral tribunal with seat in Bern.

Lausanne, October 10, 2008

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

The presiding Judge: The Clerk:

CORBOZ WIDMER