4A_414/2012[1]

Judgment of December 11, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Carruzzo

X._____,
Represented by Mr. Martin Burkhardt,
Appellant,

v.

Z._____,
Represented by Mr. Enrico Monfrini,
Respondent,

Facts:

A.
In a contract of March 11, 2002, Company X._____ entrusted Company Z._____ with inspecting some imports from the Republic of A._____ prior to loading.

Claiming that it had not received the compensation agreed upon for this work, Z._____ initiated arbitral proceedings on December 6, 2007, based on the arbitration clause contained in the aforesaid contract with a view to obtaining the payment of EUR 1'310'760.10. X._____ claimed to have already paid the amount of EUR 1'378'242 to Z._____ and submitted that the claim should be rejected while making a counterclaim for the payment of the difference, namely EUR 67'481.91.

A three member arbitral tribunal was constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC), with the seat of the arbitration in Geneva, the arbitral proceedings governed by the rules of arbitration of the ICC (hereafter: the ICC Rules) and Swiss law applicable on the merits.

[1] Translator's note: Quote as X._____ *v.* Z._____, 4A_414/2012. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

The proceedings were stayed between November 5, 2008, and May 25, 2010. They then resumed and were limited at first to the issue of the jurisdiction of the Arbitral Tribunal.

On June 24, 2011, the Arbitral Tribunal issued a "partial award" in which it found that Z._____ has standing to be a party in the arbitral proceedings and found that it has jurisdiction to adjudicate the dispute between the two companies.

B.
On August 29, 2011, X._____ filed a civil law appeal with the Federal Tribunal against this award, with a request for revision in the alternative (case 4A_512/2011).

As a preliminary issue, the Appellant sought a stay of the federal proceedings until the Arbitral Tribunal issued the additional award it had requested by letter of August 11, 2011, because it had just learned that Z._____ no longer existed, as of February 25, 2011. The request was granted by a decision of the President of October 4, 2011.

C.
After requesting written submissions from the Parties, the Arbitral Tribunal issued a new "partial award" on June 6, 2012. It found that Z._____ had been reinstated in all its rights due to its reinstatement on the Register of Companies of [name of country omitted] on August 15, 2011, with retroactive effect as of February 25, 2011, so that its temporary removal had no impact on its existence or on the pending arbitral proceedings. Moreover, the Arbitrators denied they had the jurisdiction to annul the award of June 24, 2011. Finally, they stated that the arbitral proceedings should continue on the merits.

In accordance with the country of incorporation theory, embodied in Art. 154 (1) PILA[2] and pursuant to Art. 155 (c) PILA, according to which the enjoyment and exercise of civil rights are part of the status of the corporation, the Arbitral Tribunal reviewed under the law of [name of country omitted] the impact on the Respondent's existence of its removal from the Register of Companies of [name of country omitted] on February 25, 2011, and of its reinstatement on August 15, 2011, and what legal fate should befall the "partial award" issued in the meantime, namely the award of June 24, 2011. Based on the explanations given by the Parties – with case law, legal writing, and legal opinions in support – it reached the conclusion that the retroactive reinstatement in the Register of a Company previously struck off re-establishes its legal capacity during the time it was removed. Consequently, in its opinion, the requirement of the Swiss law of civil procedure – applicable in the alternative – that the requirements of admissibility of a claim should be met at the time of judgment, were satisfied as of the date the first award was issued. In any event, the Arbitral Tribunal found, based on Art. 191 PILA, that it had no jurisdiction to

[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.

annul the award of June 24, 2011, or to find that it was void, as this task belongs to the Federal Tribunal.

D.
On July 9, 2012, X._____ (hereafter: the Appellant) filed a civil law appeal against the award of June 6, 2012. It submits that the Federal Tribunal should annul the award and find that Z._____ had no legal personality when the award of June 24, 2011, was issued and accordingly decide that the Arbitral Tribunal has no jurisdiction in the dispute with the aforesaid company.

In its answer of September 14, 2012, Z._____ (hereafter: the Respondent) principally submits that the matter is not capable of appeal, and in the alternative that the appeal should be rejected to the extent that the matter is capable of appeal.

The Arbitral Tribunal submitted its file and filed no answer.

Reasons:

1.
1.1
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) LTF).[3]

The seat of the arbitration is in Geneva. At least one of the parties (here both) did not have its domicile within the meaning of Art. 21 (1) PILA in Switzerland at the relevant time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

When an arbitral tribunal rejects a plea of lack of jurisdiction in a separate award, it issues an interlocutory decision (Art. 186 (3) PILA). Such is the case here, although the award under appeal is inaccurately referred to as "partial". Pursuant to Art. 190 (3) PILA, the aforesaid award could be appealed to the Federal Tribunal only on the grounds of irregular composition (Art. 190 (2) (a) PILA) or lack of jurisdiction (Art. 190 (2) (b) PILA) of the arbitral tribunal. In the case at hand, the Appellant invokes not only the latter ground but also an argument based on the violation of its right to be heard (Art. 190 (2) (d) PILA). The subsequent review of this last grievance, which is not mentioned at Art. 190 (3) PILA, must accordingly be reserved (see hereunder at 3.2).

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

As the Arbitral Tribunal rejected its submission on lack of jurisdiction, the Appellant is particularly affected by the award under appeal and consequently has an interest worthy of protection in its annulment, which gives it standing to appeal (Art. 76 (1) LTF).

Filed in a timely manner (Art. 100 (1) LTF in connection with Art. 45 (1) LTF) and in the legally prescribed format (Art. 42 (1) LTF), the appeal is admissible.

1.2
The two arguments submitted in the answer to the appeal to against this conclusion cannot be upheld.

First, the Respondent refers to Art. 28 (6) of the ICC Rules (1998 version), pursuant to which "[the Parties] shall be deemed to have waived their right to any form of recourse in so far as such waiver can validly be made" and argues that this would call for the application of Art. 192 (1) PILA. However, case law has long held that the rule quoted is not sufficient to justify applying this legal provision (judgment 4A_464/2009[4] of February 15, 2010, quoting ATF 116 II 639 at 2c p. 640). Accordingly, there has been no renunciation to the appeal in this case.

Secondly, the Respondent argues that the Arbitral Tribunal did not decide its jurisdiction in the award of June 6, 2012, because the issue before it "exclusively concerned the existence of Z._____". It is wrong. Indeed, knowing whether or not the Appellant had the capacity to be a party at the time the award of June 24, 2011, was issued, is an issue concerning subjective arbitrability, in other words jurisdiction *ratione personae*, which consequently must be reviewed in light of Art. 190 (2) (b) PILA (see judgment 4A_50/2012[5] of October 16, 2012, to be published in the Official Register, at 3.2 and the cases quoted; ATF 128 III 50 at 2b/bb p. 55).

1.3
An appeal concerning international arbitration may only seek the annulment of the award (see Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF). However, when the dispute concerns the jurisdiction of an arbitral tribunal it was found, as an exception, that the Federal Tribunal could itself issue a finding of jurisdiction or the lack thereof (ATF 136 III 605[6] at 3.3.4 p. 616; 128 III 50 at 1b).

The Appellant's submission that the Federal Tribunal should itself declare the lack of jurisdiction of the Arbitral Tribunal to adjudicate its dispute with the Respondent is accordingly admissible.

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[4] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/no-waiver-of-the-right-to-appeal-to-the-federal-tribunal-in-the-/

[5] Translator's note: Soon to be published at www.praetor.ch

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/

1.4
The Federal Tribunal issues its decision on the basis of the facts contained in the award under appeal (see Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF excluding the applicability of Art. 105 (2) LTF). However, as was already the case under the aegis of the law organizing federal courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the capacity to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190 (2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (judgment 4A_54/2012[7] of June 27, 2012, at 1.6).
2.
2.1
In a first argument, based on Art. 190 (2) (b) PILA, the Appellant submits that the Arbitral Tribunal wrongly accepted jurisdiction as to the Respondent. According to the Appellant, the requirements of admissibility of the claim – among which there is the capacity to be a party – must be met at the time of judgment. Yet, on the basis of the law of [name of country omitted] applicable pursuant to Art. 154 (1) and 155 (c) PILA, the Respondent was struck off the Register of Companies on February 25, 2011, reinstated on August 15, 2011, and in the interim was not a legal entity, in particular on June 24, 2011, when the first award was issued. Applying Swiss law would incidentally lead to the same result according to the Appellant. Hence, for the Appellant, the Arbitrators should not have taken into account the effects of a reinstatement – whether retroactive or not – after that date.

The Appellant then repeats the argument submitted in its civil law appeal against that award. It maintains that the Arbitral Tribunal wrongly found that the Respondent had concluded the contract of March 11, 2002 – which included the arbitration clause – in its own name, when the Respondent, in doing so, had acted only as a representative of two other companies. Thus, according to the Appellant, the Arbitrators, by issuing a second award on June 6, 2012, implicitly confirmed that an arbitration agreement bound the parties to the dispute when in fact there was none, thus also violating Art. 190 (2) (b) PILA from this point of view.

2.2
Seized for lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining the jurisdiction or lack of jurisdiction of the Arbitral Tribunal. As the case may be, the Court may also review how pertinent foreign law was applied; it will do so with full power of review as well, but by subscribing to the majority

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/federal-tribunal-recalls-that-procedural-mistakes-or-a-decision-/

opinion as to the issue at hand, and to the opinion of the supreme jurisdiction of the country that adopted the applicable rule of law in case there is a controversy between legal writing and case law (aforesaid judgment 4A_50/2012,[8] *ibid.*). Yet this Court is not a court of appeal. Thus it does not have to look itself into the award under appeal for the legal arguments that could justify admitting the grievance based on Art. 190 (2) (b) PILA. Rather, the appellant should draw the Court's attention to them in order to meet the requirements of Art. 42 (2) LTF (ATF 134 III 565[9] at 3.1 and cases quoted).

2.3
2.3.1
2.3.1.1 The Arbitral Tribunal examined the issue of the Respondent's capacity to be a party in the light of the law of [name of country omitted]. The Appellant rightly does not challenge the applicability of this law to resolve the issue in dispute (see aforesaid judgment 4A_50/2012, [10] at 3.3.3). Hence its entire argument is irrelevant when it seeks to demonstrate that applying Swiss law would lead to the same result as that which it recommends (see appeal *lit.* ii, p.14 ff).

Moreover, it must be stated that the interpretation of the pertinent rules of the law of [name of country omitted] as conducted by the Arbitral Tribunal (award of June 6, 2012) is not criticized by the Appellant, which does not address it. Thus it must be held that due to the retroactivity of its reinstatement to the Register of Companies of [name of country omitted] the Respondent is irrefutably presumed never to have ceased to exist, including between February 25 and August 15, 2011, when it was removed from the Register and when the first award was issued by the Arbitral Tribunal.

This being so, the Appellant's arguments are hard to follow, except if one were to disregard the retroactivity of the reinstatement of a company in the law of [name of country omitted] as the Appellant apparently would like to. The precedents invoked by the Appellant are not pertinent. The first two even contradict its thesis. In those, the Federal Tribunal recalls that according to the general principles of the law of civil procedure, the requirements of admissibility – and the capacity to be a party is one of them (see Art. 59 (2) (c) CPC;[11] RS 272) – must still exist at the time when the judgment on the merits is issued; however, the Court adds that it is sufficient for them to exist until that time (ATF 116 II 9 at 5 p. 13, 209 at 2b/bb p. 211). Yet in this case, the Arbitral Tribunal has not yet decided the merits – only some preliminary issues in connection with its jurisdiction – as its awards of June 24, 2011, and June 6, 2012 –are both interlocutory. Thus, when it issues its award on the merits, the requirement of admissibility which it had to address in the meantime due to the Appellant challenging the Respondent's capacity to be a party, will no longer be

[8] Translator's note: Soon to be published at www.praetor.ch
[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua/
[10] Translator's note: Soon to be published at www.praetor.ch
[11] Translator's note: CPC is the French abbreviation for the Swiss Federal Code of Civil Procedure.

a problem barring some new circumstances, as the legal consequence of the reinstatement of the Respondent to the Register of Companies of [name of country omitted]. As to the third precedent (ATF 128 III 191 at 4b/bb), the Appellant quotes it to substantiate its argument that the absence of legal capacity of the Claimant means that the Arbitral Tribunal should terminate the proceedings immediately. Yet this is of no help to the Appellant because in the section quoted, the Federal Tribunal merely summarizes the reasons of the arbitral tribunal.

2.3.1.2 In an alternative argument, the Appellant challenges the Respondent's right to rely on the possible *sanatio*[12] inherent to its reinstatement in the Register of Companies of [name of country omitted] and argues that the Arbitrators should not have taken into account its retroactivity. After recalling the general principles applicable in civil procedure – in particular compliance with the rules of good faith, now codified (see Art. 52 CPC), the duty of the parties to collaborate in the adducing evidence (see Art. 164 CPC), and the capacity to be a party (an implicit fact) – it argues that the Respondent committed a double abuse of rights by, on the one hand, intentionally concealing from the Arbitral Tribunal and from its opponent the fact that it no longer existed, and by using the rule of the healing effect of a reinstatement in the Register of Companies in the law of [name of country omitted] in a manner contrary to its purpose and only to remedy its own failures *a posteriori*.

However, this superfluous argument is based on a factual premise that doesn't exist. There is no factual finding by the Arbitral Tribunal that the Respondent intentionally concealed the fact that it had been struck off the Register of Companies of [name of country omitted], nor that it sought to be reinstated only with a view to pursuing the case pending before the Arbitral Tribunal, if indeed the pursuit of such a goal could be considered abusive. However, the Appellant also argues elsewhere and specifically that the award under appeal failed to find the proper facts in this respect. It must be accordingly addressed in due course (see hereunder at 3).

2.3.2
The Appellant sees another violation of Art. 190 (2) (b) PILA in the fact that the Arbitrators implicitly confirmed that an arbitration agreement bound the Parties when there was none (see 2.1, 2nd § above).

The argument is not admissible. Indeed the Arbitrators pointed out at § 8 of the aforesaid award that the issue as to the existence of an arbitration agreement binding the Parties had been decided in their first award issued on June 24, 2011; then, at § 41 of the award under appeal, they declined jurisdiction to reexamine and possibly to annul the first award. Thus, it is in the framework of the parallel appeal proceedings concerning that award that the argument raised by the Appellant will have to be addressed.

[12] Translator's note: Latin for "healing effect".

3.

3.1

At chapter V of its brief (p. 6 ff), entitled "PERTINENT FACTS," the Appellant laments that the Arbitral Tribunal disregarded the assertions, evidence, and offers of evidence it submitted as to the abuse of rights it alleged the Respondent had committed, which, according to the Appellant, should have prevented the Respondent from relying on the healing effect of its reinstatement to the Register of Companies of [name of country omitted] (see 2.3.1.2 above). Thus, the factual findings on which the award is based should be supplemented according to the Appellant.

Continuing to rely on this alleged omission in the findings of pertinent facts, the Appellant also argues a violation of its right to be heard (Art. 190 (2) (d) PILA). In this respect, it states its agreement with some legal writing, according to which the party victim of such a violation should be entitled to invoke it, even in appeal proceedings concerning an interlocutory decision.

3.2

According to Art. 190 (3) PILA an interlocutory decision may be appealed only for the reasons stated at Art. 190 (2) (a) and (b) PILA (ATF 130 III 76 at 4). Thus, the Appellant's argument based on *litt.* (d) of Art. 190 PILA is inadmissible as a matter of principle (judgment 4A_210/2008[13] of October 29, 2008, at 5.2). Some legal writers consider that the grievances based on Art. 190 (2) (c) to (e) PILA may be invoked against interlocutory decisions within the meaning of Art. 190 (3) PILA in the framework of an appeal based on Art. 190 (2) *litt.* a or b PILA, as long as the appeal is not manifestly inadmissible or unfounded (see among others BERGER/KELLERHALS, International and Domestic Arbitration *in* Switzerland, 2nd ed. 2010, nr 1537; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, nr 717). One of them considers that to the extent that it appears indispensable to adjudicate arguments based on *litt.* (a) and (b) of Art. 190 (2) PILA, the appellant must be in a position to argue for instance, that the arbitrators disregarded some important exhibits in the file (ANDREAS BUCHER, Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, nr 20 *ad* Art. 190 LDIP).

There is no need to decide this issue for two reasons. First, if the factual findings of the award under appeal had to be supplemented, this Court could do so pursuant to the requirements mentioned above (see at 1.4) in the framework of the previously examined argument that the Arbitral Tribunal lacked jurisdiction, where the issue of the abuse of rights allegedly committed by the Respondent was raised by the Appellant (see above 2.3.2). Secondly and in any event, the reasons in the appeal as to this issue appear

[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/admissibility-of-appeal-against-interlocutory-decision-procedura/

manifestly insufficient to address the issue. Indeed the Appellant begs the Federal Tribunal to refer to the assertions, evidence and offers of evidence contained in its briefs in the arbitral proceedings in order not to make its brief unnecessarily cumbersome. In doing so, it disregards that the reasons must be contained in the appeal under penalty of inadmissibility of the argument (judgments 4A_481/2010[14] of March 15, 2011, at 5, 4A_620/2009[15] of May 7, 2010, at 3.4.2 and 4A_524/2009[16] of March 5, 2010, at 4.2.1.2).

4.
In conclusion the appeal must be rejected to the extent that the matter is capable of appeal.

The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent (Art. 68 (1) and (2) LTF).

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 10'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 12'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the Representatives of the Parties and to the Chairman of the ICC Arbitral Tribunal.

[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/no-violation-of-substantive-public-policy-argument-based-on-pact/

[15] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-violation-of-due-process-through-disregard-of-certain-a/

[16] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-issues-omitted-by-arbitral-award-rejected-award-not-inf/

Lausanne December 11, 2012.

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Carruzzo