4A_617/2010[1]

Judgment of June 14, 2011

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Kolly,
Federal Judge Kiss,
Clerk of the Court: Hurni.

Appellant,

X._____,
Represented by Dr Tarkan Göksu,

v.

Respondent,

Y._____,
Represented by Dr Michael Schneider, Prof. Jean-Paul Vulliéty and Dr Bernd Ehle,

Facts:

A.

A.a X._____ (the Appellant) is a Turkish common-stock company based in Ankara (Turkey) which is active in constructing and producing steel structures. Y._____ (Respondent) is a Polish limited liability company based in Sosnowiec (Poland). It produces steam boilers for electric power stations.

A.b In 2005, A._____, the mother company of B._____ and the operator of the industrial power plant in Devnya (Bulgaria) decided to erect a new boiler and to replace the obsolete

[1] Translator's note: Quote as X._____ *v.* Y._____ 4A_617/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

equipment of the power station. For that purpose B._____ gave the corresponding works to the Respondent in July 2006. In order to be able to fulfil the contract with B._____, the Respondent intended to subcontract the construction of the steel structure of the boiler and its erection to the Appellant.

In November 2006 the parties entered into several contracts, pursuant to which the Appellant was entrusted with most of the erection works. The contracts provided that the Appellant was to conduct its works on the basis of drawings, plans and technical specifications which were to be provided by the Respondent. The Parties agreed on the jurisdiction of an ICC arbitral tribunal sitting in Zurich to resolve any disputes under the contracts. Various problems and delays subsequently arose in the performance of the works anticipated by the contract. On January 11, 2008 the Parties entered into a termination agreement[2], by which the contract as to the erection of the boiler was terminated in part. In a letter of February 13, 2008 the Respondent terminated the contracts as to the erection of the steel structure and the boiler.

A dispute arose consequently between the parties as to the failure of the business relationship, in particular as to who was responsible for the delays in the performance of the works pursuant to the contracts.

B.

B.a On March 28, 2008 the Appellant filed a request for arbitration against the Respondent with the Court of International Arbitration of the International Chamber of Commerce (ICC). Subsequently a three members arbitral tribunal sitting in Zurich under the ICC Rules was constituted. In its request for arbitration, the Appellant made the submission, amended during the proceedings, that the termination agreement of January 11, 2008 was to be declared invalid and that the Respondent was to be ordered to pay in total Eur 6'440'820.39 with interest. The Respondent opposed the claim and filed a counterclaim that the Appellant should be ordered to pay an amount of Eur 7'376'518.78 in total with interest.

With regard to the issue as to who was responsible for the delay in the performance of the works under the contract, the parties submitted technical expert reports to the arbitral tribunal.

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

B.b In an award of September 30, 2010 the ICC arbitral tribunal sitting in Zurich rejected the claim and partly upheld the counterclaim by ordering the Appellant to pay an amount of Eur 6'587'442.70 with interest to the Respondent.

The arbitral tribunal dealt with the party appointed expert reports in its findings. It held that the Respondent's technical expert report was persuasive and reached the conclusion that the Appellant was responsible for the delay in the performance of the works.

C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the award of the ICC arbitral tribunal of September 30, 2010 and send the matter back to the arbitral tribunal for a new decision. A stay of enforcement should also be granted.

The Respondent submits that the appeal should be rejected. The arbitral tribunal did not express its views.

D.

On November 30, 2010 the Federal Tribunal rejected the request for a stay of enforcement.

Reasons:

1.

According to Art. 54 (1) BGG[3] the Federal Tribunal issues its decision in an official language[4], as a rule in the language of the decision under appeal. Should it be in another language, the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As that is not an official language and the Parties used German in front of the Federal Tribunal, the decision of the Federal Tribunal shall be issued in German.

[3] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

[4] Translator's note: The official languages of Switzerland are German, French and Italian.

2.

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

2.1 The seat of the Arbitral tribunal in this case is in Zurich. The Parties do not have their seat in Switzerland and as they did not rule out the provisions of chapter 12 PILA, these are applicable (Art. 176 (1) and (2) PILA).

2.2 A Civil law appeal within the meaning of Art. 77 (1) BGG may only seek the annulment of the award under appeal with some exceptions not to be found here (see Art. 77 (2) BGG ruling out the application of Art. 107 (2) BGG, to the extent that that provision empowers the Federal Tribunal to decide the matter itself).

The submissions in the appeal are therefore admissible to the extent that the annulment of the award under appeal is requested. Yet to the extent that it is submitted that the matter should be sent back to the Arbitral tribunal for a new decision, the matter is not capable of appeal.

2.3 Only the grievances limitatively listed in Art. 190 (2) PILA are allowed (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 brought forward and reasoned in the appeal. This corresponds to the duty to submit reasoned grievances contained in Art. 106 (2) BGG as to the violation of constitutional rights or cantonal and intercantonal 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).

3.

The Appellant argues that the Arbitral tribunal would have based its decision unilaterally on the Respondent's technical expert report and fully disregarded the Appellant's. According to the Appellant the Arbitral tribunal should have nominated a court appointed expert in order to acquire the necessary technical knowledge to be able to assess the issues relevant for its decision. To the extent that the Arbitral tribunal did not do so it violated both the requirement that the Parties be treated equally and the right to be heard (Art. 190 (2) (d) PILA) as well as procedural public policy

[5] 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.

(Art. 190 (2) (e) PILA). The Respondent objects that the Appellant forfeited these grievances as it did not immediately raise the alleged procedural violation in front of the Arbitral tribunal.

3.1 The party which considers itself harmed by a violation of the right to be heard or another relevant procedural violation according to Art. 190 (2) PILA, forfeits its arguments when it fails to raise them timely in front of the Arbitral tribunal and does not take all reasonable steps to remedy the deficiency (BGE 119 II 386 at 1a p. 388; with regard to challenges: BGE 126 III 249 at 3c p. 253 ff). It is contrary to the rules of good faith to raise a procedural violation in an appeal only although it would have been possible to give the arbitral tribunal a possibility to remedy the deficiency in the arbitral proceedings (BGE 119 II 386 at 1a p. 388; judgment 4P.72/2001 of September 10, 2001 at 4c). In particular, a party acts contrary to the rules of good faith and abusively when it holds some grievances in reserve so to speak, only to raise them if the case develops unfavourably or when it anticipates that it will be lost (see BGE 126 III 249 at 3c p. 254).

3.2 The findings in the record of the arbitration show that the Appellant expressed its position as to the Respondent's technical expert report, namely as to the method used therein (award, p. 110 ff). There is no indication in the factual findings of the Arbitral tribunal and it is not argued in the appeal that the Appellant would have requested then that the Arbitral tribunal nominate an independent court appointed expert in order to obtain the necessary technical expertise to assess the reports of the party appointed experts.

The Appellant would certainly have had the possibility to request the appointment of such an expert before the award of September 30, 2010 was issued. To the extent that it claims that the failure to nominate a court appointed expert would be a procedural violation within the meaning of Art. 190 (2) (d) or (e) PILA, it should have raised that argument in the arbitral proceedings already and thus given the Arbitral tribunal the opportunity to remedy the deficiency. To the extent that it failed to do so and waited to see if the award would be in its favour, it forfeited the right to raise that argument in the appeal proceedings in front of the Federal Tribunal. This applies both to the argument as to the right to be heard (Art. 190 (2) (d) PILA) and as to the argument of a violation of procedural public policy (Art. 190 (2) (e) PILA), as the Appellant raises the same grievance under both headings.

To the extent that the Appellant sees an additional procedural violation in the fact that the Arbitral tribunal would have "completely supressed" the expert report it filed, its grievance is equally unfounded. Indeed, as the Appellant itself concedes, the Arbitral tribunal thoroughly explained at

pages 96 – 114 of the award why it did not follow the Appellant's expert report or gave preference to the Respondent's. There can be no claim of a "suppression" or of "skipping" (the report).

4.

The appeal is therefore to be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the court costs are to be borne by the Appellant and determined principally according to the amount in dispute (Art. 65 (2) BGG and Art. 66 (1) BGG). The Appellant shall also compensate the Respondent according to the Schedule of the Federal Tribunal for the costs incurred in the proceedings (Art. 68 (2) BGG). In disputes involving economic interests the legal fees are generally assessed according to the amount in dispute and with regard to an amount in excess of CHF 5'000'000, they include a basic amount of between CHF 20'000 and up to 1% of the amount in dispute depending on the importance of the matter in dispute, its difficulty and the scope of the work done and the time spent by counsel (Art. 3 and Art. 4 of the Regulations as to party compensation and compensation for court appointed counsel in proceedings in front of the Federal Tribunal of March 31st, 2006; SR 173.110.210.3). In view of the amount in dispute, which exceeds Eur 6'000'000 and of the scope of the award under appeal, a court fee and compensation of CHF 50'000 appear appropriate.

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 50'000 shall be borne by the Appellant.

3.

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

4.

This judgment shall be notified in writing to the Parties and to the ICC Arbitral tribunal.

Lausanne June 14, 2011

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

The Presiding Judge:	The Clerk:
Klett (Mrs)	Hurni