4A_438/2008[1]

Judgement of November 17, 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KISS (Mrs),
Clerk of the Court: CARRUZZO.

X._____ AG, Y._____ SA,
Appellants,
Represented by Mr Christophe WILHELM

v.

A._____,
Respondent,
Represented by Mr Pierre-Louis MANFRINI and Mr Guillaume FATIO

Facts:

A.

A.a X._____ AG (hereafter X._____), which has its seat in Germany, is the mother company of the X._____ Group, an important manufacturer of machines. In a contract of May 18, 2001, A._____ and the English group V._____ Ltd, each holding half of the capital of W._____ SA, a company incorporated in [omitted], held indirectly by the former and directly by the latter, sold all the shares of that company to X._____, which changed the name into Y._____ SA.

[1] Translator's note: Quote as X._____ AG, Y._____ SA, *v.* A._____, 4A_438/2008. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b On May 10, 2001, A._____ and X._____ entered into a commission agreement, written in English ("the Commission Agreement"), whereby the former authorised Y._____ SA to keep using the name "A._____" and undertook not to compete until December 31, 2005. As a counterpart, X._____ undertook to pay a commission of 3 % to A._____ on each order of machines and ancillary equipment passed by clients of Y._____ SA between April 1, 2001 and December 31, 2005.

The contract contains an Art. 4, the contents of which are the following, with the expression "the Company" used to refer to Y._____ SA:

> *"Article 4: Audit of the Commission* [2]
>
> *4.1 X._____ shall provide Mr A._____ with a yearly statement of commission by the 31st of January of each year for the previous calculation period, starting from April 1st, 2001.*
>
> *4.2 Such statements contain a list of all the orders received for the company's products during the previous year(s) indicating, for each order received, (i) the date on which the order was received, (ii) the value of the corresponding contract(s), and (iii) the date of the goods delivery.*
>
> *4.3 The yearly statement of commission shall be controlled and certified as true and correct by an accounting firm (the "Auditor") jointly appointed by both parties and which shall not be X._____'s and/or the company's auditors. The Auditor shall be independent from both parties. The costs of the Auditor shall be honored equally by each party, i.e. Mr A._____ for 50 % , X._____ for 50 %. The audit review shall take place each year during the five first days of February.*
>
> *4.4 For the purpose of such control and certification, X._____ undertakes to provide or to have the company provide the Auditor with all supporting documentation including but not limited to certified copies of (i) the order book of the company, (ii) all orders received regarding the company's products, (iii) all outstanding contracts with the customers, and (iv) all documents evidencing the delivery of the goods to the customer.*

[2] Translator's note: The text is quoted in English in the opinion.

4.5 The Auditor shall have the right to request additional information and documentation from X._____ and/or the company if it so deems necessary for the purpose of the control and certification and X._____ undertakes to provide such information and documentation without delay.

4.6 Mr A._____ and X._____ shall have the right to provide the Auditor with information and/or suggestions regarding the market of … machines at any time for the purpose of facilitating the Auditor's mission.

4.7 In case of discrepancies between the yearly statement prepared by X._____ and the Auditor's certification, the Auditor's opinion shall prevail and both parties hereto undertake to respect and materialize such opinion through corresponding payments and/or reimbursements, as the case may be. The Auditor's decision shall be final and both parties waive all challenge of this decision.

As to Art. 14 of the Commission Agreement, relating to arbitration, it states the following in particular:

14.1 All disputes arising out or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules.

The place of the arbitration shall be Geneva, Switzerland.

The language of the arbitration shall be English.

14.2 …"

By mutual agreement, the Parties appointed the firm of U._____ at [omitted] as auditor for the purposes of Art. 4 of the Commission Agreement.

From the beginning, the implementation of the mechanism for the payment of commissions created difficulties, particularly with regard to an order for machines made from China. Discussions between the Parties allowed for a resolution of the difficulties.

The audited statement of commissions for the year 2005 gave rise to a new dispute between the Parties. Indeed, A._____ complained that orders placed from Nigeria and Malaysia were not included. X._____ argued that such orders did not have to be included.

In a letter of June 28, 2006, U._____ indicated to the Parties that it would rather let them reach an agreement in this respect or resort to arbitration as provided by Art. 14 of the Commission Agreement.

B.

On February 8, 2007 A._____ sent a request for arbitration to the International Court of Arbitration of the International Chamber of Commerce (ICC). The Arbitral Tribunal to be constituted was asked to find that the orders from Nigeria and Malaysia must be included in the litigious statements of commissions (submissions 1 and 2), then to order X._____ and Y._____ SA severally to pay the amount of CHF 2'672'229.- and CHF 3'249'522.- with interest (submission 3). The Claimant also sought from the Respondents, taken severally, the payment of CHF 240'044.- as interest for late payment of the commissions and CHF 93'822.- for additional procedural costs, with interest (submission 4). In their answer to the request for arbitration of March 16, 2007, the Respondents denied that the future Arbitral Tribunal would have jurisdiction *ratione materiae* to decide submissions 1 to 3 and they sought a rejection of submission 4.

A three members Arbitral Tribunal was constituted under the aegis of the ICC Court of Arbitration. On August 18, 2008, it issued an interlocutory and partial award pursuant to which it assumed jurisdiction *ratione materiae* (paragraph 1 of the award), found that the orders placed by Nigeria and Malaysia were to be included in the statements of commissions (paragraph 2 and 3 of the award), rejected submission 4 (paragraph 4 of the award) and reserved a future award on the outstanding issues, including the costs of the arbitration (paragraph 5 of the award). On the merits, the arbitrators interpreted the terms "orders placed" at Art. 3.1 of the Commission Agreement and found, contrary to the Respondent's opinion, that the Claimant was entitled to a commission for each order placed between April 1st, 2001 and December 31st, 2005, even though the commission could be claimed only after delivery and payment of the object of the order. That principle being established, the Arbitral Tribunal held that it did not have all the factual elements necessary to decide Claimant's

submission 3. As to submission 4, it was rejected for failure to establish that the Respondents had been put under notice.

C.

On September 19, 2008, X._____ and Y._____ SA filed a Civil Law Appeal. They invite the Federal Tribunal to annul paragraph 1 of the award under appeal, by stating that the Arbitral Tribunal has no jurisdiction to decide submissions 1 to 3 presented by A._____ and to annul paragraphs 2 and 3 of the award. Subsidiarily, the Appellants submit that the award under appeal should be annulled and the matter sent back to the Arbitral Tribunal with instructions to reopen the evidentiary proceedings to hear the witnesses requested by the Appellants.

The Respondent leaves to the Court whether the matter is capable of appeal or not and submits that the appeal should be rejected.

The Arbitral Tribunal did not express a view on the appeal, whilst pointing out that its members were the object of a challenge made by the Appellants and presently pending in front of the ICC Court of Arbitration. A request for a stay was made by the Appellants and rejected by decision of the presiding judge of October 20, 2008.

Reasons:

1.

According to Art. 54 (1) LTF[3], the Federal Tribunal issues its decision in an official language, as a rule the language of the decision under appeal. When that decision was issued in another language (in this case English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the Arbitral Tribunal they chose English whilst in the briefs sent to the Federal Tribunal, they used French. In accordance with its practice, the Federal Tribunal will accordingly issue its decision in that language.

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

2.

2.1 In International Arbitration, a Civil Law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF).

2.2 The seat of the arbitration was in Geneva. At least one of the parties (in this case the Respondent and one of the two Appellants) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.3 At paragraph 1 of the award under appeal, the Arbitral Tribunal found that it had jurisdiction *ratione materiae*, thus issuing a decision within the meaning of Art. 186 (3) PILA, which could be challenged only on the grounds set forth at Art. 190 (2)(a) and (b) PILA (Art. 190 (3) PILA). The Appellants principally challenge that decision in their Civil Law Appeal, relying on one of the aforesaid two grounds. The matter is therefore capable of appeal from that point of view.

Whether or not it is capable of appeal is a much more delicate question with regard to paragraphs 2 and 3 of the award under appeal. The arbitrators found there that the orders from Nigeria and Malaysia should be included in the statements of commissions. Such a finding is only preliminary to the admission of Respondent's submission 3, seeking payment of the commissions related to such orders, on which the Arbitral Tribunal will issue a decision later on. Therefore the award under appeal, which must be qualified as an interlocutory award with regard to its paragraphs 2 and 3, could be challenged, with regard to these two items, only on the grounds stated at Art. 190 (2)(a) and (b) PILA (ATF 130 III 755 at 1.2.2 p.162), to the exclusion of the grievance of a violation of the right to be heard (Art. 190 (2)(d) PILA) raised by the Appellants in that context (Appeal brief, p.27 and following). The matter is therefore not capable of appeal in this respect. It is true that the litigious finding was made on the basis of specific submissions made by the Respondent (submissions 1 and 2 of the request), which the arbitrators found to be acceptable notwithstanding the existence of submissions for the payment of commissions relating to the orders included in the submissions for findings. Be this as it may, notwithstanding the finding made in their

[4] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on Private International Law of December 18, 1987, RS 291.

respect at paragraphs 2 and 3 of the award under appeal, the litigious monetary claims have not yet been dealt with, even *in parte qua*, as the award does not provide the Respondent with a decision it could enforce, albeit in part, against the Appellants. In other words, this is a somewhat peculiar case in which a decision was issued on one of the submissions relating to the same monetary claim without an enforceable decision being issued in this respect. Hence, unless (formal) submissions and (mere) claim are to be confused, it must be found that with regard to the commissions relating to the orders from Nigeria and Malaysia, the Arbitral Tribunal did not issue a decision on part of the Respondent's claim but merely found that one of the elements of that claim existed, namely the fact that the litigious orders were placed during the time frame referred to in the Commission Agreement. In doing so, it issued an interlocutory award and not a partial award, against which a violation of the right to be heard could be claimed.

Conversely, when rejecting the Respondent's monetary submissions as to the alleged late payment of commissions at paragraph 4 of the award, the arbitrators issued a partial award. However, that part of the award, which was in favour of the Appellants, was not appealed by the Respondent and is therefore unrelated to the proceedings conducted in front of the Federal Tribunal.

2.4 The Appellants are directly affected by the award under appeal as they claim that the Arbitral Tribunal had no jurisdiction. Therefore they have a personal, present and legally protected interest to a finding that the award was issued by an Arbitral Tribunal having no jurisdiction *ratione materiae* (Art. 190 (2)(b) PILA), which gives them standing to appeal (Art. 176 (1) LTF).

Filed within 30 days after the award under appeal was notified (Art. 100 (1) LTF in connection with Art. 45 (1) LTF), the appeal meets the formal requirements of Art. 42 (1) LTF and is accordingly to be allowed within the limits described above.

2.5 The appeal is limited to the annulment of the award (see Art. 77 (2) LTF ruling out Art. 107 (2) LTF). However, when the dispute involves the jurisdiction of an arbitral tribunal, it was decided, as a matter of exception, that the Federal Tribunal may itself issue a finding of jurisdiction or lack thereof (ATF 127 III 279 at 1b; 117 II 94 at 4). Therefore, the Appellants'

submission seeking a finding of the Federal Tribunal that the Arbitral Tribunal has no jurisdiction on the Respondent's submissions 1 to 3 and that the findings at paragraphs 2 and 3 of the award within that wrongly assumed jurisdiction should be annulled, are to be allowed. Conversely, the matter is not capable of appeal with regard to the subsidiary submission by which the Appellants seek not only the annulment of the award by the Federal Tribunal, but instructions to the arbitrators.

2.6 The Federal Tribunal issues its decision on the basis of the facts established by the Arbitral Tribunal (Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the findings of the arbitrators, even if the facts were established in a manifestly erroneous way or in violation of the law (see Art. 77 (2) LTF ruling out Art. 105 (2) LTF). However, as was the case under the Federal Law organising the judiciary (ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and cases quoted), the Federal Tribunal may review the factual findings on which the award under appeal is based if one of the grievances of Art. 190 (2) PILA is raised against such factual findings or if new facts or evidence are exceptionally taken into consideration within the framework of the Civil Law Appeal (decision 4A_450/2007 of January 7, 2008, at 2.2). In this case, the Appellants do not challenge the factual findings of the Arbitral Tribunal. Therefore, the Federal Tribunal must rely on the facts contained in the award under appeal.

2.7 The appeal may be made only for one of the grounds exhaustively spelled out at Art. 190 (2) PILA. The Federal Tribunal reviews only the grievances raised and reasoned by the appellant (Art. 77 (3) LTF). The Appellant must therefore state its grievances in accordance with the strict requirements established by case law relating to Art. 90 (1)(b) OJ[5] (see ATF 128 III 50 at 1c), which remain applicable under the aegis of the new Federal Procedural law.

3.

Relaying on Art. 190 (2)(b) PILA, the Appellants argue that the Arbitral Tribunal wrongly assumed jurisdiction to decide submissions 1 to 3 of the claim made by the Respondent against them.

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[5] Translator's note: This is the French abbreviation for the previous Federal law organising Federal courts, which was substituted by the LTF of June 17, 2005.

3.1 Seized for lack of jurisdiction, the Federal Tribunal freely reviews issues of jurisdiction which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal, including preliminary issues. However, it reviews the facts on which the award under appeal is based only under the exceptional circumstances recalled above (see at 2.6), even as to jurisdiction.

3.2 The dispute relates to the interpretation of the aforesaid Art. 4 of the Commission Agreement, a provision relating to the auditing procedure agreed by the Parties with a view to determining the yearly amount of the commissions that the Appellants would pay to the Respondent. More precisely, the issue is whether the auditor in charge of that work was entrusted with the mission of an arbitrator, as the Appellants claim, or that of an expert as the Respondent argues.

3.2.1 The expert determination is a material law contract whereby the parties entrust a third party with giving an opinion on a factual or legal issue, stating in advance that they will be obliged to comply with the opinion (ATF 129 III 535 at 2 and references; on this, see particularly: MICHAEL SCHÖLL, Réflexions sur l'expertise-arbitrage en droit suisse, Bulletin de l'Association suisse de l'arbitrage (ASA) 2006 p. 621 and following). The mutual intent to submit to the opinion of the expert, stated in advance, distinguishes an expert determination from a private expert opinion (SCHÖLL, op. cit., p. 629). The distinction between an arbitral award and an expert determination is that the former enjoys the formal and material authority of *res judicata* and may be modified if the requirements of a request for revision are met whilst the latter, even when it decides factual or legal issues in a way binding the parties, may be invalidated only in an ordinary proceeding, in which it must be established that the findings of the expert are manifestly inaccurate, arbitrary, faulty, gravely contrary to equity or relying on an erroneous factual statement, or affected by a failure to consent (ATF 129 III 535 at 2.1 and cases quoted; decision 5P.215/1993 of September 30, 1993 at 2a). Case law set forth various criteria allowing such a distinction; it suggests to take into consideration, among other things, the terms of the agreement of the parties, the scope of the powers given to the third party to be appointed according to that agreement, as well as the capacity of that third party's decision to be enforceable (ATF 117 Ia 363 at 6 p. 368 and following; decision 4P.299/2006 of December 14, 2006, at 3 and references).

Moreover, arbitration and expert determination do not necessarily exclude each other, so that it is possible to encounter a combination of these two institutions (Jean-François Poudret/Sébastien Besson, Comparative Law of International Arbitration, 2nd edition, 2002, p. 14 note 62a; Schöll, op. cit., p. 645).

3.2.2 On the basis of these principles, it must be determined what role the Parties to the Commission Agreement intended to give to the Auditor.

3.2.2.1 The Arbitral Tribunal first took notice of the fact that the Parties did not provide it with the elements necessary for subjective interpretation of the pertinent provisions of the Commission Agreement. Hence, only objective interpretation was to be taken into account. Considering not only Art. 4 of the Commission Agreement but also the other provisions of that contract, the Arbitral Tribunal concluded that the Auditor's mandate was to control the conformity of the statements of commissions prepared by the Appellants with the attachments they provided, which was not work of a legal nature but an auditor's typical task. The limited nature of the mission corresponds to the role that the Parties reserved for themselves in their relationship with the Auditor: the expert would be given information or suggestions as to technical questions and not with regard to legal issues. The Auditor himself had not interpreted his role as that of an arbitrator called upon to pronounce on that type of problems. Thus, when opinions would diverge as to a legal issue, he would suspend his mission until the Parties could reach an agreement. Similarly, in a letter of June 28, 2006, he invited them to reach an agreement as to the issue of the litigious orders or, failing that, to resort to arbitration according to Art. 14 of the Commission Agreement. Moreover, still according to the arbitrators, it is inconceivable that the Parties could have agreed to entrust a person who was manifestly not a lawyer with interpreting legal concepts contained in the aforesaid contract, such as determining when an order was to be deemed to have been placed. If that had been the case, Art. 14 of the Commission Agreement, anticipating that all disputes arising from or related to the contract would be submitted to arbitration, would remain moot. The Arbitral Tribunal also points out that the binding, final and unchallengeable character of the expert determination is inherent to the institution of expert determination, so that it is not an element allowing to qualify as an arbitration the mission entrusted to that specialist. Finally, according to the arbitrators, the Contractual Agreement as to the expert determination cannot be considered a *lex specialis* compared to that relating to

arbitration, considering the difference between an auditor's tasks and the arbitrator's mandate.

For all these reasons, the Arbitral Tribunal considers to have jurisdiction pursuant to Art. 14 of the Commission Agreement.

3.2.2.2 According to the Appellants, Art. 4 of the Commission Agreement must be interpreted as an arbitration agreement including a simplified arbitration procedure and, at paragraph 4.7, a renunciation to appeal the decision of the sole arbitrator within the meaning of Art. 192 PILA. However, the long explanations given to support that thesis are not such as to invalidate the opposite solution reached by the Arbitral Tribunal.

The Appellants accurately spell out the various elements on which Federal case law relies to distinguish an expert determination from an actual arbitration. However, they do not demonstrate how the circumstances of the case at hand should have led the arbitrators, on the basis of such elements, to find that with regard to the commissions related to the orders from Nigeria and Malaysia, the Auditor had issued a binding arbitral award.

Art. 4 of the Commission Agreement does not show that the Parties would have agreed on specific procedural rules nor, above all, would they have entrusted the Auditor with the power to decide legal issues and to issue decisions which could be enforced. Indeed, the aforesaid provision, particularly its paragraphs 4.1 to 4.6, merely states what supporting exhibits the Appellants must submit to the Auditor, whilst allowing the specialist to ask information and additional documents from the Parties with a view to controlling and certifying, as well as authorizing the Parties to provide the Auditor with information and/or technical suggestions as to the machines. This is not the format of an actual detailed evidentiary procedure as generally found in international arbitration, whether in arbitration rules or in terms of reference. As to the mandate given to the Auditor, it was strictly limited as he was only entrusted with verifying the yearly statement of commissions made by X._____. Essentially an accounting task, this meant that the yearly statement had to be compared with all the documents requested (order books, contracts signed with clients, certificates of delivery of the products to the clients). The recourse to interpretation to a certain extent was inevitable, yet this would not justify its assimilation to that which is

generally entrusted to an arbitral tribunal. That the Auditor's decision was to be final and unchallengeable pursuant to Art. 4.7 of the Commission Agreement is not decisive either since the binding character of the expert's decision is inherent to an expert determination. However, that binding character does not mean that the Parties would have accepted in advance that the Auditor's decision as to the yearly statement of commissions would be enforceable as to the amount contained in that decision. They doubtlessly committed to abide by that decision and to make the payments or the reimbursements it would imply. However, the *ad hoc* provision agreed by the Parties does not show that the party, obliged to make a payment or a reimbursement, would in advance have accepted to recognize the Auditor's decision as an enforceable one against which it could no longer avail itself of its defenses on the merits in a judiciary or arbitral procedure, particularly those having no relationship with the decision, such as set off. According to the Appellants, the behavior of the Parties between April 1, 2001 and December 31, 2004 would show that the Auditor's mission undoubtedly was that of an actual arbitrator. However, it must be emphasized immediately that the argument does not rely on factual findings in the award under appeal, but on documents taken from the arbitration file. As such, the matter is not capable of appeal since the Appellants do not raise one of the grievances mentioned at Art. 190 (2) PILA against such factual findings, except in an evasive manner insufficiently reasoned at paragraph 4.1.2.7 of their brief. Be this as it may, the alleged practice is contradicted by a fact the Arbitral Tribunal found as to the issue in dispute, namely the commissions relating to Nigeria and Malaysia. This is the letter quoted at paragraph 10.3.5 *in fine* of the award under appeal, namely the letter sent to the Parties by the Auditor on June 28, 2006. In that letter, he pointed out that to maintain the position he had adopted some years earlier with regard to disagreements on the interpretation of the Commission Agreement, he preferred to let the Parties find an agreement or resort to arbitration as foreseen at Art. 14 of the aforesaid contract. On the basis of such a letter, it is impossible to find that the Auditor would have issued a final decision on the litigious orders.

Moreover, contrary to what the Appellants argue, the Arbitral Tribunal does not say that it would be impossible to appoint an arbitrator without legal training. It merely points out, with reason, that it is hardly conceivable that the Parties would have entrusted such a person with interpreting the Commission Agreement and it wonders, rightly, what the scope of

application of Art. 14.1 of the Commission Agreement would be in such a case, as it refers to arbitration of all disputes raising from or relating to that contract.

Finally, the Appellants' explanations as to the requirements of Art. 192 PILA are beside the point since the Auditor did not issue an arbitral award on the litigious point, but merely invited the Parties to seek an award if they could not reach an agreement. Therefore, the claim that the Arbitral Tribunal had no jurisdiction to decide the dispute arising from the 2005 statement of commissions is unfounded.

4.

In a second mean of action, the Appellants claim that the award under appeal was issued in violation of their right to be heard. They blame the Arbitral Tribunal for proceeding with an objective interpretation of the text of Art. 3.1 of the Commission Agreement, particularly as to the words "orders placed" there, without giving them the possibility to produce witnesses as to the negotiation of the aforesaid contract and the internal practice followed by the Parties in performance of the agreement since 2001.

As indicated above at 2.3, the Arbitral Tribunal, whilst interpreting the litigious expression and holding that it applied to orders made by Nigeria and Malaysia, did not issue a partial award but an interlocutory award. Indeed, in deciding that issue, even though it was formalized in an *ad hoc* finding in the award, the arbitrators merely decided one of the material requirements preliminary to granting the Respondent's submissions to obtain the payment of the commissions relating to the aforesaid orders. To the extent that a violation of the right to be heard as to the interlocutory award is claimed, the matter is not capable of appeal (see above at 2.3).

5.

The Appellants shall severally pay the costs of the Federal proceedings (Art. 66 (1) and (5) LTF) and pay costs to the Respondent (Art. 68 (1) and (4) 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 20'000.-, shall be borne by the Appellants severally and in equal shares among themselves.
3. The Appellants shall pay to the Respondent severally an amount of CHF 22'000.- for the Federal judicial proceedings.
4. This judgment shall be notified to the representatives of the Parties and to the Chairman of the ICC Tribunal.

Lausanne, November 17, 2008

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

The presiding Judge: The Clerk:

CORBOZ CARRUZZO