

4A_584/2009

Judgment of 18 March 2010

First Civil Law Court

Federal Judge KLETT, Presiding,
Federal Judge CORBOZ,
Federal Judge KOLLY,
Clerk of the Court: Mr. CARRUZZO.

X. _____ SA,

Appellant

Represented by Mr. Charles C. ADAMS, Jr. and Mrs. Vanessa LIBORIO,

v.

Y. _____ SpA,

Respondent,

Represented by Mr. Maurice HARARI,

Facts:

A.

A.a In November 1981, two legal entities, succeeded by the French company X. _____ SA (hereafter: X. _____) and the Italian company Y. _____ SpA (hereafter: Y. _____), entered into a series of joint-venture cooperation agreements (hereafter: the Basic Agreements) dealing with the development, production, marketing and sales of airplanes. They were to carry out the [omitted] program on an equal basis using a French Economic Interest Group (EIG) created for this purpose.

The Basic Agreements included an Industrial Agreement that set out the rights and obligations of the parties. The parties were to divide the work and deliver the [omitted] airplane components, known in the aeronautics industry as "sections," to the EIG in view of the airplane's final assembly and sale to the buyer. According to one of the important principles of the Basic Agreements and the Industrial Agreement, the sections delivered by both partners were supposed to be sold to the EIG at cost, without any profit margin or funds request.

A.b Over the years, the partners arranged their contractual relationship to take into account, in particular, various [name omitted] versions produced and cost increases associated with technical modifications made to the [omitted] models. Accordingly, they entered into a contract in June 1986, called the "[omitted] Agreement," followed in October 1995 by a new agreement called the "Contractual Regulations."

On 30 May 2001, the parties signed a last agreement (hereafter: the 2001 Agreement), governed by French law, pursuant to which their respective sections were to be sold to the EIG at an irrevocable fixed price for the years 2001, 2002 and 2003. They were supposed to revise the price at the end of 2003.

Subsequent negotiations relating to the price revision were unsuccessful.

B.

On 18 December 2007, X._____, relying on the arbitration clause inserted in the 2001 Agreement, sent a request for arbitration to the International Court of Arbitration of the International Chamber of Commerce (ICC) against Y._____. The former submitted in substance that the Arbitral Tribunal find that the Italian company had violated its obligation to negotiate in good faith new transfer prices applicable as from January 2004, in accordance with the 2001 Agreement (i); that it appoint an expert who would be responsible for examining the actual costs of the

sections produced by each partner since 2004 (ii); that it order Y. _____ to pay X. _____ damages estimated for the time being at 55 million U.S. dollars (iii); and lastly, that it declare that, from January 2009 until the dissolution of the joint venture, Y. _____ may sell its sections to the EIG only at the cost price, without profit or provision (iv). According to X. _____, Y. _____ had violated its obligation to negotiate in good faith new transfer prices valid as from 2004, totally ignoring the contractual framework set out in the Basic Agreements, refusing it the opportunity to evaluate the actual production costs of the sections incurred by each party and insisting on a simple indexing of the 2001 Agreement in order to determine the new transfer prices of the sections starting from 2004.

Y. _____ submitted that the entire request be rejected and made counterclaims unrelated to the issues in the request. In its opinion, the transfer prices applicable starting from 2004 were to be determined according to the [omitted] Agreement and not according to the Basic Agreements.

A three-member Arbitral Tribunal was constituted under the aegis of the ICC, in accordance with the arbitration clause included in the 2001 Agreement, which set the seat of the arbitration in Lausanne and provided that the arbitration proceedings would be conducted in English. It approved the request of the parties to decide first on the principle of liability and to examine only afterwards the question of damages.

In a majority award of 15 October 2009, the Arbitral Tribunal held that X. _____'s grievance against Y. _____—that the latter violated its obligation to negotiate in good faith new transfer prices applicable as from January 2004—was unfounded. Consequently, it rejected submission (i) of the request, as well as its submissions (ii), (iii) and (iv) because the outcome of these three submissions was related to the outcome of submission (i). In addition, the Arbitral Tribunal allowed one of the counterclaims and rejected the others. Moreover, it reserved one or more future awards concerning the decisions still pending as well as the costs of the arbitration.

C.

On 20 November 2009, X. _____ filed a civil law appeal before the Federal Tribunal, with a view to obtaining the annulment of the award. It criticized the Arbitral Tribunal for violating its right to be heard.

Y. _____ submitted that the appeal be rejected. As for the Arbitral Tribunal, it did not file an answer within the time limit it was given for that purpose.

Reasons:

1.

According to art. 54(1) LTF¹, the Federal Tribunal issues its decision in an official language, as a rule, in the language of the decision under appeal. If the decision is in another language (in this case English), the Federal Tribunal uses the official language chosen by the parties. They chose English before the Arbitral Tribunal, while they used French in the federal proceedings. In accordance with its practice, the Federal Tribunal will use the language of the appeal and will issue its decision in French.

2.

2.1 In the field of international arbitration, the decisions of arbitral tribunals are capable of civil law appeal under the conditions provided in articles 190 to 192 PILA² (Art. 77 (1) LTF).

In this case, the seat of the arbitration was in Lausanne. At least one of the parties (in this case both) was not domiciled in Switzerland at the pertinent time. The provisions of chapter 12 PILA therefore apply (art. 176 (1) PILA).

¹ Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

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.

2.2 The actual partial award or partial award *stricto sensu* mentioned at art. 188 PILA is that by which the arbitral tribunal decides some of the claims or one of the various claims in dispute ([ATF 128 III 191](#) at 4a p. 194). It is distinguished from the interlocutory award, which decides one or several preliminary issues, whether procedural or on the merits (same decision, *ibid.*). According to case law, a partial award may be appealed immediately under the same conditions as a final award because, like the latter, it is an award falling under art. 190 (1) and (2) PILA ([ATF 130 III 755](#) at 1.2.2 p. 761 s.).

The award under appeal does not put an end to the proceedings between the parties, since the Arbitral Tribunal must still rule on the amount of the counterclaim it allowed as well as on the costs of the arbitration. However it disposed of the Claimant's submissions. Therefore it is an actual partial award subject to Civil law appeal for all the reasons provided in art. 190 (2) LTF.

2.3. The appellant is directly affected by the award under appeal, which dismissed its claim. The appellant thus has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from art. 190 (2) (d) PILA, which gives it standing to appeal (art. 76 (1) LTF).

Filed in the appropriate timeframe (art. 100 (1) LTF) and in the form provided by law (art. 42 (1) LTF), the matter is capable of appeal.

3.

As its sole grievance, the appellant claims the violation of its right to be heard.

3.1 The right to be heard, as guaranteed by articles 182 (3) and 190 (2) (d) PILA, does not differ in principle from the right recognized in constitutional law ([ATF 127 III 576](#) at 2c; [119 II 386](#) at 1b; [117 II 346](#) at 1a p. 347). Thus, in the field of arbitration, it was held that each party has the right to state its case on the facts that are essential for

judgment, to present its legal arguments, to propose evidence on pertinent facts and to take part in the hearings of the arbitral tribunal ([ATF 127 III 576](#) at 2c; [116 II 639](#) at 4c p. 643).

With regard to the right to produce evidence, such right must have been exercised within the appropriate timeframe and according to the applicable formal rules ([ATF 119 II 386](#) at 1b p. 389).

Case law also drew from the right to be heard a minimal duty for the authority to examine and to deal with pertinent issues ([ATF 126 I 97](#) at 2b). This duty, which was extended to international arbitration (ATF 121 III 331 at 3b p. 333), is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration certain statements, arguments, evidence or offers to produce evidence presented by one of the parties and important for the decision to be issued. It is incumbent on the party allegedly harmed to establish, on the one hand, that the arbitral tribunal did not examine certain facts, evidence or legal arguments duly advanced to substantiate its submissions and, on the other hand, that these elements could have influenced the outcome of the dispute ([ATF 133 III 235](#) at 5.2 and the decisions quoted).

3.2 In substantiation of its grievance, the appellant maintains in substance that although both the respondent and itself departed from the principle that the Basic Agreements were the reference point for setting the transfer price of the sections to the EIG—which was furthermore established by the admissions, ignored by the Arbitral Tribunal, of a manager of Y. _____ (named A. _____)—, the majority arbitrators refused to take into consideration this essential element of the proceedings, which made it possible to decide the issue as to whether or not the Respondent had violated its obligation to negotiate in good faith the revision of the transfer price for the period after 31 December 2003. The appellant adds that, informed in due time of such refusal, it could have presented additional evidence. Moreover, the appellant relies on the opinion

expressed by the minority arbitrator in a dissenting opinion appended to the appeal brief.

3.3 Upon examining the reasons stated in the award under appeal and the explanations provided in the Respondent's answer, the grievance raised by the Appellant appears groundless.

The award under appeal begins by explaining in detail, over more than 60 pages, the submissions, statements and arguments presented by each party on the points of fact and law pertinent for resolving the dispute, including the interpretation, according to French law, of the clause relating to the revision of the transfer price of the sections, inserted in the 2001 Agreement. Then, these elements are discussed by the Arbitral Tribunal, which states that it had taken them all into consideration (award, § 370). It is understandable that the result of this review does not satisfy the appellant, but this in no way implies a violation of its right to be heard.

Moreover the Appellant bases its reasoning on an erroneous premise when it asserts that both parties considered that the Basic Agreements were the reference for setting the transfer price of the sections. Indeed the Arbitral Tribunal expressly finds the contrary in § 371 of its award. Undoubtedly the Appellant is trying to bring this finding into question by quoting extensively from A. _____'s deposition. In doing so, however, it attacks the manner in which the Arbitral Tribunal assessed the evidence at its disposal and the result of this assessment. Yet the Federal Tribunal may not review the assessment of the evidence in an international arbitration, except from the very narrow perspective of public policy (judgment 4A_539/2008 of 19 February 2009 at 4.2.2). To the extent that the Appellant seeks to have the Federal Tribunal to conduct such review without relying on such an exception, it does so in vain.

It is also in vain that the appellant seeks to substantiate its demonstration by extended references to the dissenting opinion of the minority arbitrator. Indeed, even though it is

communicated to the parties, the dissenting opinion remains an independent opinion, extraneous to the award, which affects neither the reasons nor the holding (judgment 4P.23/1991 of 25 May 1992 at 2b).

Lastly, and above all, the majority arbitrators admitted in § 373 and § 374 of the award under appeal that, even if the principles appearing in the Basic Agreements had been the reference point for setting the transfer price of the sections, as the Appellant argued, their decision would not have been different. Indeed, with regard to complex and highly debatable principles, the Respondent could not in that case have been held to act contrary to the rules of good faith for not taking them into consideration.

Under these circumstances, it is inaccurate to claim, as the Appellant does, that the Arbitral Tribunal did not fulfill its minimum obligation to examine and to deal with pertinent issues.

Consequently the appeal can only be rejected.

4.

As the unsuccessful party, the appellant shall pay the costs of the federal proceedings (art. 66 (1) LTF) and compensate its opponent (art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.
2. The judicial costs, set at CHF 60,000, shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 70,000 as a share of its costs.

4. This decision shall be notified to the representatives of the parties and to the Chairman of the Arbitral Tribunal.

Lausanne, 18 March 2010

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:

The Clerk:

KLETT

CARRUZZO