

4A_552/2012¹

Judgment of February 21, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
 Federal Judge Corboz,
 Federal Judge Niquille (Mrs.),
 Clerk of the Court: Leemann.

X. _____ SA, represented by Dr Adrian W.Kammerer, Mr Tamir Livschitz and Dr Andreas D.Blattmann
 Appellants,

v.

1. A.Y. _____ Holdings SA
 2. B.Y. _____ SpA,
 3. C.Y. _____ SpA,
 4. D.Y. _____ Holdings Inc.,
 All four represented by Mr Philipp Ganzoni and Mr Eric Fichter,
 Respondents,

Facts:

A.

A.Y. _____ Holdings SA, B.Y. _____ SpA, C.Y. _____ SpA and D.Y. _____ Holdings Inc. (Sellers, Claimants, Respondents) entered into a sales contract in 2008 with Z. _____ Ltd. (Purchaser, Defendant), incorporated in J. _____ [name of the city omitted] as to a 100 per cent participation in Q. _____ Holding Sarl.

In the Share Purchase Agreement ("SPA") of February 7, 2008 it was agreed among other things that Z. _____ Ltd could appoint a company under its control within a specified period of time, which would release it from the Share Purchase Agreement. The contract also contains an arbitration clause and a choice of law clause in favor of Italian law.

On April 23, 2008 Z. _____ Ltd made use of the aforesaid right and appointed its subsidiary X. _____ SA (Purchaser, Defendant, Appellant) as purchaser of the shares pursuant to the February 7, 2008 contract.

On April 30, 2008 the Sellers signed an Addendum to the February 7, 2008 contract, which confirmed in particular the change of party on the purchaser's side. Furthermore, among others things, the original purchase price was reduced from € 34'614'000.-- to € 33'800'000.--, with € 28'980'000.-- payable immediately and the balance (*i.e.*) € 4'820'000.-- on July 30, 2008 at the latest.

¹ Translator's note: Quote X. _____ SA v A.Y. _____ Holding SA *et. al.*, 4A_552/2012. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

The share of the purchase price of € 28'980'000.-- was paid timely. As to the balance of € 4'820'000.— X._____ SA issued some so called Promissory Notes to the Sellers. However the corresponding payment of the balance did not take place.

B.

B.a The Sellers eventually initiated arbitration proceedings against Z._____ Ltd and X._____ SA pursuant to the Rules of the International Chamber of Commerce (ICC). Their submissions read as follows:

"1. Having ascertained that both RESPONDENTS failed to comply with their obligations under the SPA, the ADDENDUM and the Promissory Notes, to condemn the RESPONDENTS jointly and severally to pay the the CLAIMANTS the amount of the Deferred Payment subdivided between each as resulting from the Promissory Notes, i.e.:

- (i) A.Y._____ Holdings SA euro 3.484.195,00;
- (ii) B.Y. _____ SpA euro 851.800,00;
- (iii) C.Y. _____ SpA euro 53.059,00;
- (iv) D.Y. _____ Holdings Inc. euro 246.255,00.

All the above amounts with interest calculated from July 30th [2008] until the date of payment².

B.b in an award of August 20, 2012 the ICC arbitral tribunal sitting in Geneva decided as follows:

"Based on the foregoing, the Arbitral Tribunal:

- a) Declares that it has jurisdiction on Claimants' claims;*
- b) Rejects all claims as directed against Z._____ Ltd.;*
- c) Orders X._____ SA to pay the following amounts:*
EUR 3,484,195 to A.Y._____ Holdings SA;
EUR 851,800 to B.Y._____ SpA;
EUR 246,255 to D.Y._____ Holdings Inc.;
EUR 53,059 to C.Y._____ SpA;
- d) Says that such amounts will bear simple interest, at the applicable legal rate for the relevant periods, from 30 July 2008 to full payment²".*

C.

In a Civil law appeal X._____ SA asks the Federal Tribunal to annul the arbitral award of August 20, 2012 and to send the case back for a new decision. The Respondents submit that the appeal should be rejected. The Arbitral tribunal waived the possibility to submit a brief.

D.

On December 14, 2012 the Federal Tribunal rejected the Appellant's motion for a stay of enforcement.

Reasons:

1.

According to Art. 54 (1) BGG³ the Federal Tribunal issues its decision in an official language⁴, as a rule in the language of the decision under appeal. If the decision was in another language, the Federal

² Translator's note In English in the original text

Tribunal resorts to the official language used by the Parties. The decision under appeal is in English. As this is not an official language and the Parties used different languages in the Federal Tribunal, the judgment of the Federal Tribunal will be issued in the language of the appeal, in accordance with practice.

2.

In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Art. 190 -192 PILA⁵ (SR 291) (Art. 77 (1) (a) BGG).

2.1

The seat of the arbitral tribunal is in Geneva in this case. At the relevant time the parties had their seat outside Switzerland. As they did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2

Only the grievances limitatively spelled out in art 190 (2) PILA are admissible (BGE 134 III 186 at 5, p.187; 128 III 50 at 1a p.53; 127 III 279 at 1 p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances that are brought forward and reasoned in the appeal brief; this corresponds to the duty to provide reasons at Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p 187 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565 at 3.1 p. 567; 119 II 380 at 3b p. 382).

2.3

The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (art 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art 77 (2) BGG, which rules out the application of Art. 97 BGG and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29 at 2.2.1 p. 34; 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 14, each with references). Whoever wishes to rely on an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the facts of the case on this basis must show with reference to the record that the corresponding factual allegations were made in the arbitral proceedings already, in conformity with the procedural rules (BGE 115 II 484 at 2a p.486; 111 II 471 at 1c p.473 each with references).

3.

The Appellant relies on the ground for appeal of art 190 (2) (c) PILA

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

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

3.1

According to this provision it can be argued against an international arbitral award that the arbitral tribunal decided some issues in dispute which were not submitted to it or that it left some submissions unadjudicated.

The Appellant relies on the first part of this ground for appeal and argues that the Arbitral tribunal decided something that was not submitted by the Respondents. The Arbitral tribunal would indeed have held that the Appellant only - and not Z._____ Ltd also – was bound to pay the balance of the purchase price, although it could not uphold the Respondents' request for declaratory relief in that way and despite the fact that the Respondents only demanded that Z._____ Ltd and the Appellant be jointly held responsible.

3.2

Contrary to the Appellant's view the introductory phrase to § 1 of the Respondents' submissions (*"having ascertained that both RESPONDENTS failed to comply with their obligations under SPA, the ADDENDUM and the Promissory Notes..."*⁶) must not be understood as seeking declaratory relief but as part of the justification of the submission on the merits (*"... to condemn the RESPONDENTS jointly and severally to pay the CLAIMANTS the amount of the Deferred Payment..."*)⁷. Irrespective of the foregoing it is not clear how something could be deducted in the Appellant's favor from the circumstance invoked, that an alleged request for declaratory relief from the other Party would not have been included in the operative part of the award.

The Appellant cannot be followed when it seeks to limit the submission on the merits contained in § 1 in such a way that as a preliminary a finding should have been issued that both the Appellant and Z._____ Ltd would have breached the contract. The wording of the submission on the merits: (*"... to condemn the RESPONDENTS jointly and severally to pay"*)⁸ makes it clear that the Defendants were to be ordered to pay severally and therefore each of them should be obliged to pay the entire amount. Contrary to the opinion stated in the appeal, submission 1 cannot be understood in good faith as meaning that the submission on the merits could be upheld against one of the Defendants only provided that a breach of contract of the other Defendants as well would be upheld.

There is no limitation of the power of the Arbitral tribunal as claimed by the Appellant. It is irrelevant in this respect whether the claim aimed principally at the responsibility of Z._____ Ltd or which reasons led the Respondents to include the Appellant as well. With regard to Art. 190 (2) (c) PILA it makes equally little difference that liability by the Appellant allegedly "brings nothing" to the Respondents or that it would have been "brought into the proceedings only for practical and legal reasons".

3.3

The order sought in § 1 of the submissions that the Defendants should severally be ordered to pay also encompasses an obligation by only one of the two Defendants. Contrary to the opinion submitted in the appeal there is no violation of the rule *"ne eat iudex ultra petita partium"* (art 190 (2) (c) PILA) by the Arbitral tribunal when it upheld a claim for payment only against the Appellant while rejecting the claim against Z._____ Ltd. The Arbitral tribunal awarded the Respondents neither more nor something else than what they sought (BGE 116 II 639 at 3a p.642).

⁶ Translator's note: In English in the original text

⁷ Translator's note: In English in the original text

⁸ Translator's note: In English in the original text

4.

The appeal proves to be unfounded and must be rejected. In such an outcome of the proceedings the Appellant must pay the costs and compensate the other party (Art. 66 (1) and Art. 68 (2) PILA).

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 25'000, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondents the amount of CHF 30'000 in total for the federal judicial proceedings.

4.

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

Lausanne February 21, 2013

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

The Presiding Judge:

The Clerk:

Klett (Mrs)

Leemann