

4G_2/2009¹

Judgement of October 21, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge KISS (Mrs),

Clerk of the Court: LEEMAN.

Y. _____ Federation,

Petitioner,

Represented by Dr. Marc VEIT and Mr. Fabian MEIER

v.

X. _____ AG,

Respondent,

Represented by Dr. Roberto DALLAFIOR

Facts:

A. In an award of January 12, 2009, the ICC Arbitral Tribunal rejected the submission of X. _____ AG (Respondent) with regard to the alleged extension of the November 6, 2001 contract with Federation Y. _____ (Petitioner) (paragraph 1 of the award), whilst it denied jurisdiction with regard to the Respondent's other submissions for findings or for a prohibitory injunction (paragraphs 2 and 3 of the award). The Arbitral Tribunal upheld the Respondent's damage claim in part (award paragraph 4), whilst rejecting the Petitioner's counterclaim as a consequence of set off with the Respondent's claim for damages

¹ Translator's note: Quote as Y. _____ Federation v. X. _____ AG, 4G_2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

(paragraph 5 of the award). Additionally, (the Arbitral Tribunal) decided on costs and compensation in the arbitral proceedings (award paragraphs 5-8).

Both parties filed a Civil law appeal to the Federal Tribunal against the January 12, 2009 award.

B. In a judgment of June 9, 2009, the Federal Tribunal rejected the Respondent's appeal to the extent that the matter was capable of appeal. In contrast it upheld the Respondent's appeal. Paragraph 3 of the judgment of the Federal Tribunal reads as follows:

“The Respondent's appeal (4A_96/2009) is accepted and paragraphs 4 as well as 6-8 of the January 12, 2009 award are annulled and the matter is sent back to the lower court for a new decision as to the costs and compensation for the other Party”

Concerning the Petitioner's counterclaim for damages, which the sole arbitrator rejected (paragraph 5 of the award) the Federal Tribunal held that the Petitioner had not raised an adequate objection to jurisdiction.

C. In a petition of September 17, 2009 the Petitioner submits that paragraph 3 of the judgement of the Federal Tribunal of June 9, 2009 (4A_94/2009 and 4A_96/2009) should be formulated as follows to clarify:

“The Respondent's appeal (4A_96/2009) is accepted, paragraphs 4 to 8 of the arbitral award of January 12, 2009 are annulled and the matter is sent back the lower court for a new decision as to costs and compensation.

No responses were requested.

Reasons:

1.

Should the holding of a judgment of the Federal Tribunal be unclear, incomplete or ambiguous, should its provisions contradict each other or the reasons, should it contain

editing or calculation errors, then the Federal Tribunal undertakes to clarify or rectify upon request from one party or *ex officio* (art. 129 (1) BGG²).

1.1

Clarification provides remedial action when the holding is unclear, incomplete, ambiguous or contradictory. It may also address contradictions between the reasons of the decision and the holding, but not the reasons of the decision as such. The reasons are subject to clarification only if and to the extent that the meaning of the holding can be ascertained only by recourse to the reasons of the decision (Decision 4G_1/2007 of September 13, 2009 at 2.1; see under the aegis of the OG³ BGE 110 V 222 at 1 p.222 with references)

On the other hand, petitions for clarification are inadmissible when they seek a change of the contents of the decision. Equally inadmissible is the introduction of a general discussion as to the decision in force by way of a petition for clarification (for instance as to its legality or adequacy), the object of which would merely be each statement by the tribunal, particularly the legal concepts or the words used. As to the contents of the judgment, only that which features an order is subject to elucidation. That does not extend to issues which the tribunal did not have to review and that it accordingly did not decide (Decision 4G_1/2007 of September 13, 2007 at 2.1 compare with BGE 110 V 222 at 1 p.222 with references).

1.2

The Petitioner essentially claims that according to the wording of the judgment of the Federal Tribunal of June 9, 2009, paragraph 5 of the award would have not been annulled, according to which its counter claim for USD 500'000.-- and interest was rejected as a consequence of set off. In this (the Petitioner) sees a contradiction with the reasons of the judgment because at art. 5.3 the Federal Tribunal came to the conclusion that the

² Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173 110.

³ Translator's note This is the German abbreviation for the old Federal Statute organising federal courts, which was substituted by the BGG, Law on the Federal Tribunal of June 17, 2005, RS 173.110

Respondent had no claim for damages on the basis of the November 6, 2001 contract. At the same time that nonexisting damage claim would have been allowed for set off.

1.3

The Petitioner wrongly claims a contradiction between the holding of the judgement of the Federal Tribunal and its reasons. (The Petitioner) cannot be followed when claiming that the Federal Tribunal would have allowed a claim for damages by the Respondent for set off purposes, because the (Federal Tribunal) did not have to decide that issue. Concerning the counterclaim that was rejected as a consequence of set off, the Federal Tribunal rather held that the Petitioner had raised no adequate jurisdictional grievance according to art. 190 (2) (b) PILA⁴. Considering that only the grievances specifically raised are addressed in the field of international arbitration (art.77 (3) BGG), the Federal Tribunal did not have to review whether or not the arbitrator had wrongly dealt with jurisdiction when rejecting the counterclaim. Thus the judgment of the Federal Tribunal not to set aside paragraph 5 of the award under review is not at all contradictory but consistent instead. The Petitioner's submission that contrary to the decision of the Federal Tribunal it would have also adequately appealed paragraph 5 of the award is incomprehensible as in its appeal brief it did not deal with the counterclaim at all. Be this as it may, it is anyway unacceptable within a clarification procedure to question the legality of the judgement by reference to the brief in the appeal; moreover possible omissions of the parties in the framework of the appeal proceedings cannot be corrected by way of clarification. Accordingly, the Petitioner's submission comes to nothing also (when it claims) that the judgement of the Federal Tribunal would lead to an untenable situation, because the counterclaim would have failed as a consequence of set off with a damage claim never raised, as the contents of the claim for setoff would never have been judicially adjudicated and, due to the *res iudicata* effect of the judgment of the Federal Tribunal, no judicial evaluation could ever be undertaken, which would violate the Petitioner's right to be heard.

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

2.

The request for clarification proves to be unfounded and is to be rejected. In view of the outcome of the proceedings, the Petitioner must pay costs (art. 66 (1) BGG). The Respondent is not to be compensated as the clarification proceedings caused it no burden.

The Federal Tribunal pronounces:

1. The request for clarification is rejected.
2. The judicial costs of CHF 5000.-- shall be borne by the Petitioner.
3. This judgement shall be notified in writing to the Parties and to the ICC Arbitral Tribunal in Zurich.

Lausanne, October 21, 2009

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

The presiding Judge (Mrs):

The Clerk:

KLETT

LEEMANN