4A_433/2009[1]

Judgement of May 26, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: GODAT ZIMMERMANN.

X._____,
Appellant,
Represented by Mr Elliott GEISINGER and Mrs Alexandra JOHNSON WILCKE

v.

Y._____ Inc.,
Respondent,
Represented by Mr Dominique BROWN-BERSET and Héloïse RORDORF

Facts:

A.

Y._____ Inc. (hereafter Y._____) is a company under American law whose seat is at ... (United States of America). The American Government, represented by the United States Army Corps of Engineers[2] (CoE) entrusted that company with works on an airbase in Iraq. In a contract of June 17, 2004, Y._____ outsourced part of the works to X._____, a Turkish company whose seat is at ... (Turkey). In 2005, the

[1] Translator's note: Quote as X._____ *v.* Y. _____ Inc., 4A_433/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

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

American company terminated the outsourcing contract for default[3] by X._____. The latter challenged the validity of the termination.

B.

In a request of May 25, 2005, X._____ started the arbitration provided for in the outsourcing contract. The arbitral clause sets the seat of the arbitral tribunal in Geneva and subjects the matter to American law. The Claimant submitted in particular that the termination should be qualified as a termination for convenience[4] and that Y._____ should be ordered to pay a little more than USD 8'000'000.-; for its part Y._____ submitted that the claim should be rejected and, in particular, that X._____ should be ordered to pay more than USD 4'000'000.-.

The Arbitral Tribunal closed the evidentiary proceedings on April 5, 2007. In the award issued on June 25, 2009, it held that the termination of the outsourcing contract for default[5] was justified; it rejected X._____'s claim and granted the damage claim by Y._____ up to USD 2'421'095.-.

On July 31, 2009 X._____ submitted a request for rectification and interpretation to the Arbitral Tribunal.

C.

X._____ filed a Civil law appeal against the June 25, 2009 award of which it seeks the annulment.

The Arbitral Tribunal filed an answer.

On December 31, 2009, it issued an addendum partially rectifying the June 25, 2009 award, to the extent that the amount to be paid by X._____ was reduced to USD 479'613.-.

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[3] Translator's note: In English in the original French text.
[4] Translator's note: In English in the original French text.
[5] Translator's note: In English in the original French text.

In its answer, Y._____ principally submitted that the matter is not capable of appeal, which would have become abusive in view of the addendum issued after the initiation of the appeal proceedings in front of the Federal Tribunal. In the alternative, the Respondent submits that the appeal should be rejected.

The Respondent's answers and the comments by the Arbitral Tribunal were notified to the Appellant, which was invited to file a reply. Accordingly, the Appellant submitted a brief in which it withdrew various grievances that had lost their legal relevance as a consequence of the addendum; moreover it persisted in its appeal.

In its rejoinder, the Respondent confirmed the submissions made in its answer.

Reasons:

1.
In the field of international arbitration, a Civil law appeal is possible against the decisions of Arbitral Tribunals under the requirements of Art. 190 to 192 PILA[6] (Art. 77 (1) LTF[7]).

1.1 The seat of the Arbitral Tribunal is in Switzerland and none of the parties had its domicile there at the time the arbitration agreement was concluded; the provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

1.2 The Appellant is directly affected by the final award under review which, in particular, orders it to pay a certain amount to the Respondent; accordingly it has standing to appeal (Art. 76 (1) LTF).

1.3 A December 31st, 2009 addendum followed the original award. Notwithstanding its title, that second award is not an additional award *stricto sensu*, but a corrective award. It adds nothing to the initial award which would not already be there and is presented

[6] 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.
[7] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

as an accessory to the original award, the fate of which it shares (ATF 131 III 164 at 1.1 p. 166 ff; 130 III 755 at 1.3 p. 763).

Contrary to what the Respondent claims by reference to Art. 42 (7) LTF, the appeal has not become abusive as a consequence of the December 31st, 2009 addendum. Indeed, if the grievances in connection with the REAs (Request for Equitable Adjustment)[8] 1,2 and 3 are now moot as the Appellant acknowledges, the same does not apply to the other grievances raised in the appeal.

1.4 Timely filed (Art. 46 (1) (b) and Art. 100 (1) LTF) in the legally prescribed format (Art. 42 (1) LTF), the appeal is to be allowed in principle, a review of the admissibility of the various grievances made being reserved.

1.5 The appeal may be made only for one of the grievances limitatively enumerated at Art. 190 (2) PILA. The Federal Tribunal reviews only the grievances raised and reasoned in accordance with the strict requirements set forth at Art. 106 (2) LTF (Art. 77 (3) LTF; ATF 134 III 186 at 5; ATF 128 III 50 at 1c p. 53 ff.).

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 factual findings of the arbitrators, even when the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the application of Art. 105 (2) LTF).

However, as was the case under the old federal statute organizing courts (see ATF 129 III 727 at 5.2.2 p. 733; 128 III 50 at 2a p. 54 and the case quoted), the Federal Tribunal retains the faculty to review the facts on which the award under appeal is based if one of the grievances contained at Art. 190 (2) PILA is raised against the factual findings or if some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (Art. 99 (1) LTF).

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

2.

Relying on Art. 190 (2) (d) PILA, the Appellant firstly argues that the Arbitral Tribunal violated the right to be heard by committing several obvious oversights which constituted a formal denial of justice.

2.1 An arbitral award may be appealed when the right of the parties to be heard in contradictory proceedings was not complied with (Art. 190 (2) (d) PILA; see Art. 182 (3) PILA).

According to constant case law, the right to be heard in contradictory proceedings does not require an international arbitral award to be reasoned. However, a minimum duty for the authority to examine and deal with pertinent issues has also been deducted from the right to be heard. Case law extended that duty to the field of international arbitration. It is breached when, due to oversight or misunderstanding, the arbitral tribunal does not take into consideration some allegations, arguments, evidence and offers of evidence submitted by one of the parties and important for the decision to be issued. Indeed, the party concerned is then harmed in its right to present its point of view to the arbitrators; it is put in the same situation as though it would not have had the possibility to present them with its arguments.

It behooves the allegedly harmed party to demonstrate in the appeal against the award in what way an oversight by the arbitrators prevented it from being heard on an important issue. It must establish, on the one hand, that the arbitral tribunal did not examine some factual elements, some evidence or legal issues, which it had regularly put forward to substantiate its submissions and, on the other hand, that such elements were of a nature which could have impacted the disposition of the dispute. Such demonstration shall be made on the basis of the reasons contained in the award under appeal. If the award is totally silent as to some apparently important elements to decide the dispute, it is for the arbitrators or the respondent to justify that omission in their answers to the appeal. They may do so either by demonstrating that, contrary to the appellant's allegations, the elements omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly rebutted by the arbitral tribunal.

However, there is a violation of the right to be heard only to the extent that the authority does not comply with its minimum duty to examine pertinent issues. Thus the arbitrators do not have any obligation to discuss all the arguments raised by the parties, so that they could not be blamed for a violation of the right to be heard in contradictory proceedings if they do not address, even implicitly, an argument which is objectively devoid of any pertinence (ATF 133 III 235 at 5.2 p. 248 and cases quoted).

2.2 As already stated, in its reply the Appellant withdrew the grievances stated in connection with REAs 1, 2 and 3. There is accordingly no need to come back to that issue.

2.3 According to the Appellant, the arbitral award does not deal with certain elements of damages, namely items 0002, 0003 and 0004 of REA 4 representing USD 48'000.-, USD 180'000.- and USD 102'570.- for the withholding of recurring expenses in April 2006, the extension of site overhead during the remobilization after the withholding and the damages to a truck.

2.3.1 The Respondent argues that these items are included in the amount of USD 400'000.- awarded by the Arbitral Tribunal. It refers to paragraph 777 and 778 of the award where the Arbitral Tribunal deals with inappropriate adjustment of the estimated value of the services furnished by the Appellant ("increase in the EEV [Estimated Earned Value][9]") by taking into account the entire record[10], including REAs 1 to 3, but not limited to them. The Arbitral Tribunal awards USD 400'000.- there in order to "remedy any inaccuracies, underevaluation [of X._____'s work] or other alleged inequities associated with [Y._____'s] estimated percentages of completion."[11]

For its part, the Arbitral Tribunal points out in its answer that the Respondent did not take up again the items in disputes in its post-hearing memoranda, adding that all essential items should be there when a party files some 830 pages of briefs as it did in

[9] Translator's note: In English in the original French text.
[10] Translator's note: In English in the original French text.
[11] Translator's note: In English in the original French text.

this case. In the additional award, the Arbitral Tribunal explains that the record was not clear as to the amount in dispute but that USD 400'000.- where nonetheless awarded as omnibus allowance[12].

In its reply, the Appellant does not take a position as to these explanations. Neither does it mention items 0002, 0003 and 0004 of REA 4 any longer.

2.3.2 The Arbitral Tribunal explains that it did not specifically discuss the aforesaid items because they were not included in the post-hearing memoranda. By doing so, it relies on a procedural rule justifying not to deal with such issues or even preventing it from doing so. The Appellant does not discuss that justification in its reply. It must accordingly be concluded that it is not challenging it. Accordingly, there is a failure to state the argument in conformity with procedural rules. Under such circumstances there can be no issue as to a violation of the right to be heard.

2.4 According to the Appellant, the Arbitral Tribunal would also have failed to entertain its arguments as to the instalments which the Respondent would have paid. It would thus have been led to conclude wrongly to an amount of USD 7'002'712,83 in this respect instead of USD 6'620'564,81.

2.4.1 In its appeal the Appellant claims that it argued repeatedly that, on the one hand, the difference of USD 382'148.- between the two aforesaid amounts was essentially due to the fact that the Respondent had made a 30 % withholding on Payment Estimate n°3[13] and, on the other hand, that the Respondent conceded in the arbitral proceedings that it had made that withholding. In conclusion, the amount in dispute would not have been paid but merely taken into account by the Respondent.

In the award under appeal, the arbitrators hold that the Appellant admits to receiving USD 6'620'564,81 (§ 219 ff.) and that the Respondent assessed the Appellant's costs at USD 7'002'713.- (§ 744 at 001-2102). The award contains no reason explaining why it

[12] Translator's note: In English in the original French text.
[13] Translator's note: In English in the original French text.

was held that the Appellant had received the latter amount and no reference to the aforesaid objections by the Appellant.

In its answer, the Arbitral Tribunal does not take a specific position. It merely points out that the item is not included in the post-hearing memoranda. Yet in the Claimant's First Post-Hearing Submission [14] of June 1st, 2007, subsequent to the evidentiary proceedings being closed on April 5, 2007, the Appellant claimed that the Respondent had withheld 30 % of instalment n°3 and that a witness had confirmed that fact at the hearing by pointing out that "this claim was a "cost based" claim and not a "payment" based claim"[15] (§ 519). In its answer, the Respondent takes no position in this respect.

In the additional award (§ 51 to 53), the Arbitral Tribunal denies having ignored the Appellant's objections. It explains that it relied on the expert report produced by the Respondent and that the document stated that the costs were accurately accounted by the Respondent ("the costs claimed by Y._____ properly recorded in Y._____'s accounting system"[16]) and it blames the Appellant for not dealing specifically with the consequences of the 30 % withholding ("it failed specifically to address the consequences of the retainage to the calculation of Y._____'s claim"[17]).

In its rejoinder, the Respondent takes the same view. It adds that neither the Appellant nor its party appointed expert took a position as to the consequences of the payment being withheld whilst they had ample opportunity to do so at the hearing or in the post-hearing submissions. Moreover, according to the Respondent, the fact that the Appellant's expert did not challenge the methodology that it proposed could legitimately be understood by the Arbitral Tribunal as an acquiescence.

2.4.2 In the award the Arbitral Tribunal says nothing as to the Appellant's objections. In its answer it does not specifically state its position on this issue, except by inaccurately claiming that the allegation was not made in the post-hearing memoranda. Finally, in the additional award, it relies on the expert report filed by the Respondent,

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[16] Translator's note: In English in the original French text.
[17] Translator's note: In English in the original French text.

according to which the Appellant's costs were correctly accounted for by the Respondent. Yet that assertion does not answer the Appellant's objection, claiming that it received only 70 % of the amount accounted for. Under such circumstances, it cannot be held that the Arbitral Tribunal took into consideration the Appellant's objections and implicitly rebutted them.

In the additional award, the Arbitral Tribunal claims that the Appellant did not specifically deal with the consequences of the 30 % withholding. Yet they are evident. The pertinence of that explanation escapes this Court. The Respondent does not say anything in this respect either.

One must therefore conclude that the Arbitral Tribunal did not abide by its minimum duty to examine the pertinent problems when it did not take into consideration the Appellant's allegations as to the withholding the Respondent made, an important item in the framework of assessing damages. By doing so, the Arbitral Tribunal violated the Appellant's right to be heard.

2.5 According to the Appellant, the Arbitral Tribunal would also have failed to address its arguments as to the intimate relationship between the Respondent's project manager and the owner of a company, which delivered equipment allegedly with inflated invoices.

In its appeal, the Appellant itself states that this relationship was debated at length at the hearing. Accordingly, there one could not hold that the Arbitral Tribunal would have ignored that circumstance. The grievance as to a violation of the right to be heard is unfounded, irrespective of whether the decision not to consider the alleged facts was materially right or not.

3.

3.1 Finally, the Appellant claims a violation of public policy (Art. 190 (2) (e) PILA). The Arbitral Tribunal would have violated the principle of contractual trust (*pacta sunt*

servanda) by holding that the amounts due to the Appellant should not be paid; reference is made to the 30 % withholding described hereabove (at 2.4).

3.2 An award is inconsistent with public policy when it disregards the essential and broadly recognised values which, according to prevailing concepts in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3 p. 395). In particular when it breaches some fundamental principles of material law, among which contractual trust is included. However that principle is breached only when a Court recognises the existence of a contract but refuses to order it complied with by relying on irrelevant considerations or inapplicable legal provisions or, conversely, when it denies the existence of a contract and nonetheless recognises a contractual obligation (decision 4P.143/2001 of September 18, 2001 at 3a/bb and cases quoted).

Such assumptions are not realized here. Actually, a mere question of fact is disputed, namely whether the Respondent paid the entire instalment n° 3 or withheld 30 %. The grievance can only be rejected.

4.
On the basis of the foregoing, the appeal must be admitted in part. The award must accordingly be annulled and the matter sent back to the Arbitral Tribunal (see Art. 77 (2) LTF). The additional award becomes *ipso facto* moot as a consequence of the annulment of the award of which it is an integral part (ATF 131 III 164 at 1.1 p. 167 and at 1.2.4 p. 170).

5.
As none of the parties prevails completely, it is justified to divide the judicial costs by half and not to award any costs (Art. 66 and 68 LTF).

Therefore the Federal Tribunal pronounces:

1. The appeal is admitted in part.

2. The June 25, 2009 award and the additional award of December 31, 2009 are annulled.

3. The matter is sent back to the Arbitral Tribunal.

4. The judicial costs, set at CHF 25'000.- shall be borne by each Party in half.

5. No costs are awarded.

6. This judgment shall be notified in writing to the representatives of the Parties and to the Chairman of the Arbitral Tribunal.

Lausanne, May 26, 2010

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

The presiding Judge (Mrs):	The Clerk:
KLETT	GODAT ZIMMERMANN