

4A_452/2007¹

Judgement of February 29, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding

Federal Judge KOLLY

Federal Judge KISS (Mrs.)

Clerk of the Court: SOMMER

X. _____ GmbH,

Appellant,

Represented by Mr Klaus NEFF

v.

Y. _____ Corporation,

Respondent,

Represented by Mr Franz SZOLANSKY

Facts:

A.

A.a On October 23, 2000, X. _____ GmbH (Appellant) with its headquarters in A. _____ (Germany) and Y. _____ Corporation (Respondent) with headquarters in B. _____ (Russia) entered into an Exclusive agreement for the delivery of Ferro Titanium (ELV 2000). The Parties also entered into an additional undated exclusive agreement (ELV 2004), which came into force on January 1, 2004. Both contracts contained the following clause among others:

¹ Translator's note: Quote as X. _____ GmbH v. Y. _____ Corporation, 4A_452/2007. The names have been omitted, in accordance with Swiss practice. The original of the decision is in German. It can be downloaded from the Court's web-site www.bger.ch.

“Swiss law shall apply to this contract.

The Parties will endeavour to settle any dispute by consultations. Should this be impossible, the forum shall be Zurich.”

A.b The Parties eventually concluded five agreements referred to as Contracts for successive deliveries, namely contract No. 2800164F of June 20, 2002 (contract 64F), contract No. 2800165F of April 2, 2004 (contract 65F), contract No. 2800166F of June 2, 2004 (contract 66F), contract No. 2800167F of March 25, 2005 (contract 67F) and contract No. 2800168F of May 5, 2005 (contract 68F). In the aforesaid contracts, they stipulated the following:

“In case of a dispute as to the performance of the contract, Russian law shall apply. [...] All disputes and differences of opinion which arise from the performance of the contract shall be subject to the jurisdiction of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) pursuant to its Rules, to the exclusion of the normal jurisdiction.”

A.c On July 18, 2006, the Parties agreed upon “Addendum No. 2 to the Exclusive agreement of October 23, 2000 and of January 1, 2004” (Addendum No. 2). The jurisdiction clause of the Exclusive agreements was thus substituted with the following arbitration clause:

“Disputes, differences of opinion or claims arising from or in connection with this contract, including as to its validity, lack of validity, breach or termination, shall be decided by an Arbitral Tribunal pursuant to the International Rules of Arbitration of the Swiss Chamber of Commerce. The version of the Rules in force at the time of notification of the initiation of the proceedings shall govern. The Arbitral Tribunal shall consist of three Arbitrators. The seat of the arbitration is Zurich; the language of the arbitration is German.”

B.

B.a Based on the arbitration clause of Addendum No. 2, the Appellant initiated arbitral proceedings in front of the Zurich Chamber of Commerce on March 7, 2007. It submitted that the Respondent should be ordered to pay USD 12'000'000.-- with interest at 5% since March 7, 2007 (Claim No. 1; claims based on the Exclusive agreements ELV 2000 and ELV 2004 and of USD 300'000.-- based on Contract 68F). The Appellant also sought a finding that the

Respondent had no claims under Contracts 67F and 68F (Claim No. 2). In its answer, the Respondent submitted that the Arbitral Tribunal should not assume jurisdiction on Claim No. 1 up to USD 300'000.--and on Claim No. 2. The request should furthermore be denied. After the Appellant modified its Claim No. 2 in its additional request, it changed it again at the first hearing of the Arbitral Tribunal as follows:

“It shall be decided that the Respondent has no claims against the Claimant for payment of purchase prices, penalty payments or any other claims based on the Exclusive agreements of October 23, 2000 and on the Contracts for successive deliveries entered into from January 1, 2004 onwards (namely from Contracts No. 2800164F of June 20, 2002, No. 2800165F of April 2, 2004, No. 2800166F of June 2, 2004, No. 2800167F of March 25, 2005 and No. 2800168F of May 5, 2005).”

In addition the Claimant submitted that the partial objection to jurisdiction of the Respondent should be rejected.

B.b The Arbitral Tribunal consisted of Dr. Daniel WEHRLI (Chairman), Dr. Pierre A. KARRER (appointed by the Claimant) and Prof. Daniel GIRSBERGER (appointed by the Respondent).

In an award of September 28, 2007, the Arbitral Tribunal found in favour of the partial challenge of jurisdiction and decided to assume jurisdiction on Claim No. 1 only with regard to the amount of USD 11'700'000.-- with interest at 5% from March 7, 2007, but not with regard to the additional amount of USD 300'000.-- (§1). Jurisdiction was not assumed on Claim No. 2 as amended with regard to the Contracts for successive deliveries mentioned there (§2).

C.

In a Civil Law Appeal, the Appellant seeks an annulment of §1 and §2 of the arbitral award of September 28, 2007 on jurisdiction and an order to reconsider the matter. The Respondent submits that the Appeal should be rejected, to the extent that the matter is capable of appeal at all. The Arbitral Tribunal expressed no view.

Reasons:

1.

1.1 Under the requirements of Art. 190 - 192 PILA² a Civil Law Appeal is allowed against awards of arbitral tribunals (Art. 77 (1) BGG³). The seat of the Arbitral Tribunal is in Zurich in this case. Both Parties have their place of incorporation outside Switzerland. Since the Parties did not exclude in writing the provisions of the 12th chapter of PILA, these must be applied (Art. 176 (1) and (2) PILA).

According to Art. 77 (3) BGG the Federal Tribunal reviews only the grounds for appeal which are put forward and reasoned in the appeal. As previously, the strict requirements developed by the Federal Tribunal under the aegis of Art. 90 (1)(b) OG (see BGE 128 III 50 E. 1c p. 53) remain in force, since the BGG did not introduce any changes in this respect (Klett, Basler Kommentar at Art. 77 BGG).

1.2 In this case, the Arbitral Tribunal decided on its jurisdiction in a partial award within the meaning of Art. 186 (3) PILA. In granting the Respondent's partial objection on jurisdiction the Arbitral Tribunal found that it had jurisdiction on one part of the claim and not on the other. The award is appealed only to the extent that the Arbitral Tribunal denied jurisdiction. An award in which an arbitral tribunal denies jurisdiction is a final award; an award in which it assumes jurisdiction is an interlocutory award. An interlocutory award assuming jurisdiction may be appealed according to Art. 190 (3) PILA only for the reasons set forth at Art. 190 (2)(a) and (b) PILA. This limitation does not apply to an award denying jurisdiction (see BGE 130 III 76 E. 4, 755 E. 1.2.2 p. 762; Poudret, *Les recours au Tribunal fédéral suisse en matière d'arbitrage international*, ASA 2007, p. 669 ff, 690 and 693; Kaufmann-Kohler/Rigozzi, *Arbitrage international*, Bern 2006, p. 306 Rz. 711; Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, p. 233 Rz. 654f; Wenger/Schott, *Basler Kommentar*, N. 65 zu Art. 186 IPRG; Berti/Schnyder, *Basler Kommentar*, N. 86 zu Art. 190 IPRG; Heini, *Zürcher Kommentar*, N. 13 zu Art. 186 IPRG and N.67 zu Art. 190 IPRG).

² Translator's note: PILA is the generally used abbreviation for the Swiss statute on international private law of December 18, 1987, RS 291.

³ Translator's note: This is the German abbreviation for the Federal Statute of June 17, 2005 organising the federal courts, RS 173 110.

2.

The Appellant submits that the Arbitral Tribunal erred in denying jurisdiction (Art. 190 (2)(b) PILA).

2.1 According to Art. 190 (2)(b) PILA, the Federal Tribunal exercises free judicial review on the issue of jurisdiction, including preliminary questions of material law on which the decision on jurisdiction depends. However, the Federal Tribunal reviews the factual findings of the award under appeal in the framework of an appeal on jurisdiction only to the extent that admissible means of appeal within the meaning of Art. 190 (2) PILA are brought forward against these factual findings or when new facts may exceptionally be taken into account (BGE 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733 with references).

2.2 The interpretation of the arbitration clause in Addendum No. 2 is in dispute here. According to the Appellant, the clause also encompassed disputes based on the Contracts for successive deliveries. As opposed to that, the Respondent takes the view that the arbitration clause applies only to the two Exclusive agreements.

2.3 The interpretation of an arbitration agreement follows the principles applying to the interpretation of private manifestations of intent. The mutually agreed factual understanding of the parties is decisive at first. Should such a factual will of the parties be impossible to determine, the arbitration agreement must be interpreted objectively, *i.e.* the manifestations of intent must be interpreted according to the principle of trust as they could and should have been understood by a receiver acting in good faith (BGE 130 III 66 E. 3.2 p. 71 with references).

2.4 In this case, the Arbitral Tribunal held that the subjective intent of the Parties alleged by the Claimant was not sufficiently substantiated. Accordingly, it proceeded to an objective interpretation of the arbitration agreement. The analysis of its wording showed that Addendum No. 2 made no mention of the Contracts for successive deliveries and gave no hint that the arbitration clause would also be applicable to disputes arising from the Contracts for successive deliveries. The arbitration agreement in Addendum No. 2 specifically substituted the jurisdiction clause of the Exclusive agreements ELV 2000 and ELV 2004. If the Parties had also intended to substitute the arbitration clauses already existing in the Contracts for successive deliveries, they could have stated this without great commitment in Addendum No. 2. Additionally, even before Addendum No. 2 was concluded, the jurisdiction clause contained in the Exclusive agreements in

favour of the Zurich courts could have coexisted with the arbitral clauses in favour of the ICAC in Moscow contained in the Contracts for successive deliveries. The risk of contradictory judgements alleged by the Appellant and its concerns about avoiding unnecessary proceedings could thus arise even before Addendum No. 2 was concluded. Accordingly, this could not support the Appellant's view that the arbitration clause also substituted the other arbitration agreements in the Contracts for successive deliveries. Admittedly, the wording "or in connection with this contract" may well have referred to other contracts. Yet, this could not apply when such other contracts contained other clearly formulated jurisdiction agreements and there was no indication of a will of the Parties to substitute them. Since even before the arbitration clause in Addendum No. 2 the Exclusive agreements and the Contracts for successive deliveries contained different provisions for jurisdiction, the principle of trust should mean that, failing a different agreement between the Parties, this should also apply subsequently.

2.5 The Appellant claims that the Arbitral Tribunal violated the principle of trust⁴ (Art. 2 Civil Code, Art. 1 Obligations Code).

2.5.1 In particular, the Appellant claims that when the Arbitral Tribunal stated that the arbitration clause could only apply to disputes which found their source in the ELV 2000 and ELV 2004 Exclusive contracts, this would disregard the clear wording which referred to "claims arising from or in relation to this contract". The Appellant's view cannot be followed. The formulation "in relation to this agreement" must not be understood as meaning that other claims arising from other contracts with arbitration clauses differently worded should be included. Rather, arbitration clauses formulated in this way also include disputes as to the entry into force or the validity of the contract as well as claims resulting from the termination of the contract or claims based on illicit acts (Wenger/Müller, Basler Kommentar, N. 35 zu Art. 178 IPRG; Berger/Kellerhals, op.cit., p. 160 Rz. 466 and p. 163 Rz. 473).

2.5.2 The Appellant names certain elements purporting to establish a connexity of the Contracts for successive deliveries with the Exclusive contracts. It deduces from this connexity that the arbitration clause in Addendum No. 2 also encompassed claims arising from the Contracts for successive deliveries, particularly with regard to the formulation "in relation to this contract".

⁴ The principle of trust, *Principe de la confiance*, *Vertrauensprinzip* is a fundamental principle of Swiss contract law whereby a party's statements can and should be interpreted as meaning what could be understood in good faith under the circumstances. See Art. 18 of the Swiss Code of Obligations (CO).

Even if a certain connexity were to be found, this would be of no help to the Appellant. As mentioned (above 2.5.1), the wording “in relation to this contract” is to be understood as referring to other claims in connection with the aforesaid contract (Entry into force, termination, etc) but not to claims arising of other contracts relating to the aforesaid contract in various elements. That the corresponding formulation would also include the latter claims cannot be deducted when, above all, the related contracts contain arbitration clauses, which clearly provide otherwise. The Arbitral Tribunal’s finding was accurate.

2.5.3 The Appellant further claimed that the Arbitral Tribunal, when determining the purported will of the Parties, failed to take into consideration what reasonable Parties would have wanted. Without doubt, reasonable Parties would have rather avoided than perpetuated different jurisdictions for claims arising from the exclusive contracts and from the Contracts for successive deliveries. The structural connexity of contracts and their connected contents would suggest that, as well as the risk of contradictory judgements, in addition to considerations of economies of proceedings and costs. Also, the different jurisdictions could lead to a *de facto* impossibility of offsetting claim if the Respondent were to obtain enforceable judgements in the proceedings at the ICAC in Moscow, long before the Arbitral Tribunal in Zurich would have decided the less liquid claims of the Appellant.

The Arbitral Tribunal rightly considered the clear wording of Addendum No. 2. Already the title “Addendum No. 2 to the exclusive contract of October 23, 2000 and of January 1, 2004” will have referred only to the Exclusive contracts. In the preamble, it was stated explicitly that the Parties wanted to change, supplement and clarify the provisions of the Exclusive contract of October 23, 2000 and/or January 1, 2004 through Addendum No. 1. Further, some provisions of the Exclusive contracts were substituted, thus in particular the jurisdiction clause with the present model clause of the “Swiss Rules”. Neither the wording nor the genesis of Addendum No. 2 lead to a conclusion that the Contracts for successive deliveries should be included. The Appellant’s arguments would not lead to the opposite conclusion. It may well be sensible to provide for similar jurisdiction. However, it happens that different jurisdiction forums are agreed upon. The corresponding disputes must then be brought in front of different arbitral tribunals (Berger/Kellerhals, *op.cit.*, p. 165 Rz. 478). It cannot be said that it would therefore be unreasonable to provide for different jurisdictions. In the case at hand, it is noticeable that the Parties subjected the exclusive contracts to Swiss law, the Contracts for successive deliveries, however, to Russian law. The different jurisdictions (Zurich/Moscow) correspond to this choice

of law. In Addendum No. 2 the choice of law was not modified, which also speaks in favour of the fact that the arbitration clause contained there should not apply to the Contracts for successive deliveries governed by Russian law. There were therefore objective reasons for a finding that the Parties wanted to resort to different jurisdiction clauses. If the Parties had effectively wanted to set aside the different jurisdictions for claims from the Exclusive contracts and from the Contracts for successive deliveries, as the Appellant argues, it is not to be understood why they would have failed to mention the Contracts for successive deliveries at all in Addendum No. 2 and, to the contrary, remained completely silent in this respect.

2.6 To sum up, the claim that the Arbitral Tribunal would have violated the principle of trust is unfounded. The interpretation of the arbitration clause in Addendum No. 2 by the Arbitral Tribunal is not to be called into question.

3.

The Appellant further claimed a violation of the right to be heard according to Art. 29 (2) BV⁵, namely the right to a reasoned decision arising from that provision.

3.1 The Appellant argued that the Arbitral Tribunal would have taken its arguments into consideration only formally, without treating them objectively. The Arbitral Tribunal would not at all have considered the argument as to the hierarchy of the contracts and the equity considerations formulated by the Appellant. The violation of the right to be heard according to Art. 29 (2) BV would thus have resulted in an illegal denial of jurisdiction.

3.2 The Respondent takes the view that this means of appeal is not to be allowed. According to Art. 190 (3) PILA, positive decisions on jurisdiction may only be appealed on the grounds stated at Art. 190 (2)(a) and (b) PILA and a violation of the right to be heard (Art. 190 (2)(d) PILA) may therefore not be claimed in this respect. The September 28, 2007 arbitral award at hand, to the extent that it is appealed, is a negative decision on jurisdiction and therefore a partial award, which is not subject to the limitation of the means of appeal according to Art 190 (3) PILA. Therefore, the claim of violation of the right to be heard is to be allowed. In this respect it is not Art. 29 (2) BV that is to apply, but the principle of the right to be heard within the meaning of Art. 182 (3) and Art. 190 (2)(d) PILA.

⁵ BV is the German abbreviation for Swiss Constitution.

3.3 According to well established case law, the principle of the right to be heard according to Art. 182 (3) and Art. 190 (2)(d) PILA does not encompass a right to a reasoned decision (BGE 133 III 235 E. 5.2 p. 248 with references). However, even in international arbitral proceedings, the Federal Tribunal acknowledges a minimal duty of the Arbitral Tribunal to entertain the legally relevant arguments of the Parties effectively and to examine them. Yet, this does not mean that the Arbitral Tribunal must express a view on each argument of the Parties (BGE 133 III 235 E. 5.2 p. 248; 121 III 331 E. 3b p. 333).

3.4 Here the Arbitral Tribunal did not misunderstand or overlook the legally pertinent arguments of the Appellant. With regard to the argument as to “hierarchy of contracts” in the list on page 9 (xi) of the arbitral award, it spoke of “subordinated successive delivery contracts” according to the Appellant. Admittedly, the Arbitral Tribunal did not mention the “equity considerations” which the Appellant developed in the Statement of claim and the Additional statement of claim. Yet, the Appellant did not specify what the equity considerations should consist of and it is not clear to what extent they would have played a role in the interpretation of the arbitration clause. There was accordingly no need for a decision in this respect. The Arbitral Tribunal did not need to address each and all arguments to the extent that on the basis of its assessment it did not find them relevant. The fact that the Arbitral Tribunal listed the arguments brought forward by the Appellant but did not address them specifically created no violation of the right to be heard according to Art. 182 (3) and Art. 190 (2)(d) PILA.

4.

The appeal must be rejected. Consequently, the Appellant must pay the costs and compensation to the other Party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs of CHF 5'000.-- shall be paid by the Appellant.

3.

The Appellant shall pay the amount of CHF 6'000.-- to the Respondent for the Federal proceedings.

4.

This decision shall be notified in writing to the Parties and to the Arbitral Tribunal of the Zurich Chamber of Commerce.

Lausanne, February 29, 2008

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

The presiding judge:

The Clerk:

CORBOZ

SOMMER