4A_550/2009[1]

Judgement of January 29, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: WIDMER

A._____ GmbH,
Appellant,
Represented by Mr Peter SCHATZ,

v.

B._____ SA,
Respondent,
Represented by Dr Wolfgang PETER and Dr Christoph BRUNNER.

Facts:

A.

B._____ SA (Respondent), with its registered seat in X._____ is active in the steel industry as a purchaser for various steel processors. A._____ GmbH (Appellant), with its registered seat in Y._____, Germany, belongs to the A._____-Group of companies. It is the main distribution company in Europe for steel products of the A._____-Group. The Respondent placed four orders with the Appellant (hereafter the "Contracts") for a total of 25'000 tons of steel bloom dated February 20, March 12, March 31 and April 8, 2008 respectively with delivery dates ranging from March 2008 to July 2008. The steel blooms were

[1] Translator's note: Quote as A._____ *v.* B._____, 4A_550/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

to be produced in the Appellant's steelworks, located in Z._____, Romania. Following commencement of production and delivery of 1'360 tons, an explosion occurred on April 15, 2008 in the Z._____ steelworks. It was necessary to suspend production temporarily. For the Appellant, this represented a *force majeure* situation on the basis of which it could not be held responsible for delays in delivery for an initial period lasting until May 30, 2008. This was subsequently extended until June 29, 2008. The *force majeure* situation gave rise to a degree of uncertainty as to the delivery date. In addition, the Parties entered into discussions on prices. The Respondent then alleged that the Appellant led it to believe that the Contracts would no longer be honoured unless the Respondent declared its consent to a significant price increase. The Respondent deemed this to be an anticipated breach of contract within the meaning of Art. 72 of the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on April 11, 1980 (CISG; SR 0.221.211.1). With its letters of June 12, and 24, 2008, it rescinded the Contracts it had entered into with the Appellant. On 23 June 2008, the Respondent initiated covering purchases with C._____.

B.

The Contracts contained an arbitration clause, on the basis of which the Respondent filed a request for arbitration before the Geneva Chamber of Commerce and Industry against the Appellant on August 1, 2008. The Geneva Chamber of Commerce and Industry appointed Prof. Dr Ingeborg SCHWENZER, LLM (Mrs) as Arbitrator. The Respondent requested a factual finding that the Appellant had committed a breach of contract[2] and that the Contracts had been validly rescinded by the Respondent as a result of the Appellant's anticipated breach of contract[3]. In addition, it sued for compensation for damages in the amount of EUR 3'915'875.44 plus interest. The Appellant submitted that the claim should be rejected. In a final award of October 5, 2009, the Arbitrator essentially granted the claim and found that the Appellant had breached the Contracts and that the Respondent had validly rescinded the Contracts as a result of the anticipated contract breach by the Appellant. She ordered the Appellant to pay the Respondent compensation for damages in the amount of EUR 3'787'344.44 plus interest of 5 percent over the German base rate since the date of various occurrences.

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[2] Translator's note: "Vertragsverletzung" in the original German text. The German translation of the CISC uses the term "breach of contract" for "Vertragsverletzung" and "Vertragsbruch".

[3] Translator's note: "Vertragsbruch" in the original German text. See Translator's note 2.

C.

In a Civil law appeal, the Appellant submits that the arbitral award of October 5, 2009 be annulled and that the Respondent's claim be completely rejected. The Respondent requests that the appeal be rejected in its entirety, to the extent that the matter is capable of appeal. The Arbitrator made a submission on December 11, 2009. On December 22, 2009, the Appellant filed a brief in rebuttal, without having been requested to do so. The Respondent expressed its views with regard thereto in its submission dated January 12, 2010.

D.

In a decision of the Presiding Judge of January 12, 2010, a previous decision of November 13, 2009 granting a stay was revoked after the Appellant withdrew its request for a stay.

Reasons:

1.

The arbitral award under appeal is in English. In the proceedings before the Federal Tribunal, the Parties used German. As the language of the award under appeal is not an official language, the Federal Tribunal will issue its decision in the language of the appeal in accordance with its practice (see Art. 54 (1) BGG[4]).

2.

A Civil law appeal is admissible against the decisions of arbitral tribunals under the conditions set forth at Art. 190-192 PILA[5] (Art. 77 (1) BGG). In this case, the seat of the arbitral tribunal is in Geneva. The Appellant does not have its seat in Switzerland. As the Parties did not exclude in writing the provisions of Chapter 12 of the PILA, these apply (Art. 176 (1) and (2) PILA). Only those grievances which are 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 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward in the appeal and reasoned; this corresponds to the obligation to reason contained at Art. 106 (2) BGG in case of violation of fundamental rights or cantonal and intercantonal law (BGE 134 III 186 at 5 with references). As to grievances based on Art. 190

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[4] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, SR 173.110.

[5] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, SR 291.

(2) (e) PILA, the inconsistency of the decision under appeal with public policy must be demonstrated as to each of them (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b).

3.

A Civil law appeal against international arbitration awards may only seek (see **BGE 127 III 279** at 1b p. 282; **117 II 94** at 4 p. 95 ss.) that the matter be returned for a new decision (see Art. 77 (2) BGG, which excludes the applicability of Art. 107 (2) BGG to the extent that the latter authorises the Federal Tribunal to decide the matter itself). The Appellant disregards this rule when seeking that the Federal Tribunal completely rejects the Respondent's claim. In this respect, the matter is not capable of appeal.

4.

The Federal Tribunal bases its judgment on the facts found by the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 105 (2) and of Art. 97 BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or it may exceptionally consider some new facts (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references).

5.

The Appellant alleges two counts of formal denial of justice in the dispute over the breach of contract and one in the dispute as to the recognition of its transactions with C._____ as covering purchases.

5.1 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 134 III 186** at 6.1 p. 187; 133 III 235 at 5.2 p. 248). However, even in international arbitral proceedings, the Federal Tribunal acknowledges a minimal duty of the arbitral tribunal to hear and review the legally relevant arguments of the Parties effectively. Yet, this does not mean that the Arbitral Tribunal must express a view on each argument of the parties explicitly (BGE 133 III 235 at 5.2 p. 248; 121 III 331 at 3b p. 333). The right to be heard

contains no right to a materially accurate decision. It is not for the Federal Tribunal to review whether the arbitral tribunal took into account all documents and rightly understood them or not. What is required is a denial of justice within the meaning that the right to be heard of the parties was factually made meaningless by the obvious mistake and that as a result the party finds itself not better off than if the right to be heard had been completely denied with regard to an issue important for the decision. He who wishes to deduct a violation of the right to be heard from a blatant disregard of facts must demonstrate that the judicial omission made it impossible for him to bring forward and to prove its point of view as to issues procedurally relevant in the case (BGE 133 III 235 at 5.2; 127 III 576 at 2b-f).

5.2 The Appellant fails in this respect:

5.2.1 It contests the Arbitrator's reasoning pursuant to which the Respondent was entitled, given the prevailing uncertainty, to demand that the Appellant confirm its willingness to deliver subject to the contractually agreed prices, as "wrong for various reasons". In addition, it argues that the Arbitrator failed to examine the Appellant's arguments. Firstly with the argument that the Respondent was only entitled to deny the Appellant the right to supply it where the Respondent could not have reasonably been expected to tolerate such uncertainty. Moreover with the argument that where the Respondent was granted, alternatively, the right to set a deadline for expiration of the contract, it was not interested in any attempt to clarify the uncertainties which had arisen from the discussions over price, but rather sought to generate a damage compensation claim.

The Arbitrator dealt with the issue, relevant to the outcome of the dispute, as to whether or not anticipated breach of contract by the Appellant within the meaning of Art. 72 CISG was given (paragraph 78 ss of the Award) thoroughly and in so doing also addressed the question, raised by the Appellant, as to whether or not the Respondent could be expected to continue to tolerate the uncertainty and remain inactive. Ultimately, she answered in the negative as to this issue, in paragraph 94 of the award. Even if she did not actually base her considerations on the notion of "unreasonableness", but rather spoke of the fact that one could not reasonably expect the Respondent to remain inactive under the circumstances ("... under the given circumstances Claimant could not be reasonably expected to stay inactive..."; paragraph 94 of the Award), she nevertheless addressed the substance of the Appellant's argument adequately. There is no formal denial of justice. Also inaccurate is any reproach that the

Arbitrator failed to consider elements of the correspondence, such as in particular the Appellant's letter of May 30, 2008. On the contrary, this correspondence was mentioned in paragraph 124 of the award. Merely because the Arbitrator failed to assess the correspondence in the Appellant's sense, does not constitute a violation of the right to be heard.

5.2.2 The Arbitrator then examined in detail whether or not the Respondent was justified in demanding that the Appellant confirm that it would deliver subject to contractually agreed prices (paragraph 89 ss of the Award), which she acknowledged after explicitly considering the Appellant's opposing view (paragraph 89 ss of the Award). In acknowledging the Respondent's right to demand such confirmation, she implicitly rejected the Appellant's objection that the Respondent "abusively" set a time limit solely in order to lay the basis for a claim for damages. The Arbitrator was not required to address explicitly each and every argument asserted by the Appellant, particularly not once she had found in favour of anticipated breach of contract and in light thereof, it was not clear to what extent the assertion of a claim for damages would constitute an abuse or that the allegation of abuse made by the Appellant could be legally pertinent.

5.2.3 The Appellant then criticizes the lower court for formal denial of justice in that it failed to entertain the argument that the transactions with C._____, alleged by the Respondent to be covering purchases, differed so greatly from the Purchase Orders when it came to their size, quality, and delivery date, that they could not be deemed to serve as a replacement for these. This grievance is unfounded. The Arbitrator dealt thoroughly with the issue of whether the Appellant[6] carried out a covering purchase "in a reasonable manner" within the meaning of Art. 75 CISG, which she ultimately answered in the affirmative (paragraph 101 ss of the Award). She addressed, in explicit detail, the differing quality of the goods obtained in transactions with C._____ and those set out in the Contracts between the Parties (paragraph 112 ss of the Award). The fact that on the basis of her understanding of the meaning of Art. 75 CISG, she did not consider essential or attribute special significance to the variations alleged by the Appellant in the products of C._____ with regard to size and delivery date (paragraph 115 of the Award), has an impact on the material appreciation of the dispute, namely whether or not the Respondent was entitled to calculate its damages pursuant

[6] Translator's note: This is a typo. Read "the Respondent".

to Art. 75 CISG. Whether the Arbitrator's appreciation is legally correct or not, is beyond the Federal Tribunal's scope of review. This also fails to constitute a formal denial of justice.

6.

The Appellant has complained of a violation of public policy pursuant to Art. 190 (2) (e) PILA. It alleges that public policy has been materially violated on the one hand in the context of its dispute regarding the effective execution of the C._____ transactions, and on the other hand in the context of its dispute regarding the date of commencement of its obligation to pay interest.

6.1 The judicial review of an international award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy or not (BGE 121 III 331 at 3a, p. 333). The material adjudication of a claim violates public policy only when it breaches fundamental legal principles and thus becomes incompatible with the essential, broadly recognized system of values and laws, which according to prevailing Swiss perceptions should form the basis of any legal order. The respect for contract obligations (*pacta sunt servanda*) belongs to such principles, as well as the prohibition of abuse of rights, the duty to act in good faith, the prohibition of expropriation without compensation, the prohibition to discriminate and the protection of incapables. An annulment of the award is possible only when its result contradicts public policy and not merely its reasons (BGE 132 III 389 at 2.2; 128 III 191 at 6b; 120 II 155 at 6a, p. 166 s.).

6.2 The Appellant alleges that it contested the effective execution of the C._____ transactions. Nevertheless the Arbitrator disregarded the evidence on this matter (namely production of transportation documents), because she deemed the issue as to whether or not delivery on the basis of the covering purchases had effectively taken place to be of no relevance for the outcome of the dispute. The Appellant deems this approach to be so erroneous that it must be overturned as constituting a material breach of public policy. It argues that it cannot be tolerated that covering purchases which never took place be used in order to calculate damage compensation claims. To do so would throw into disarray the understanding of damages as a financial loss effectively incurred. This grievance is not capable of appeal. The Appellant has failed to present sufficient legal arguments (see at 2) to demonstrate that the award under appeal is in contravention with material public policy. It fails to mention even one such fundamental legal principle which would have been violated.

It actually criticizes the Arbitrator's interpretation and application of Art. 75 CISG. However, whether the Arbitrator correctly interpreted the law or not cannot be the subject of review by the Federal Tribunal. Even a false or arbitrary application of the law does not constitute a breach of public policy (see BGE 127 III 576 at 2b p 578; 121 III 331 at 3a, each with further references).

6.3 The same applies concerning the Appellant's additional grievance according to which the Arbitrator's legal view that the obligation to pay interest, contrary to that stipulated in the Payment Conditions, would not begin upon actual payment by the Respondent, but rather already upon conclusion of the corresponding transactions, is so totally at odds with the notion of damages as an effective loss of income, that it is completely incompatible therewith. This grievance too fails to establish any material breach of public policy, but merely criticizes in an inadmissible manner the Arbitrator's material judgement.

7.

The Appellant alleges that in issuing the decision of February 1, 2009 concerning the obligation to maintain confidentiality about the C._____ transactions, the Arbitrator violated the Appellant's right to be heard (Art. 190 (2) (d) PILA). This decision was without any legal basis and was from the outset completely incorrect. In its letter dated January 28, 2009 it alleged that the Arbitrator could only, if at all, require the Appellant to maintain confidentiality where the Respondent had filed a reasoned request for such measures and where the Appellant had been afforded an opportunity to express itself with regard thereto. The next day, the Respondent filed a corresponding request. However the Appellant was not afforded an opportunity to express its opinion. On the contrary, the Arbitrator issued the February 1, 2009 decision without even consulting the Appellant. This constituted a breach of its right to be heard. By having to comply with the obligation to maintain confidentiality, it was massively prejudiced in its right to defend itself as this denied it the possibility of carrying out its own investigation of C._____ LLC and/or of the C._____ transactions. It had no other alternative than to submit corresponding offers of proof, all of which were rejected by the Arbitrator. Because the Appellant was unable to effectively defend itself, the award under appeal must be annulled due to a violation of the right to be heard.

7.1 With this grievance, the Appellant challenges the decision of February 1, 2009, with regard to the imposition of confidentiality obligations concerning the C._____

transactions, claiming that the decision constituted a violation of its right to be heard. However, it does not request that it be annulled. The decision is an interlocutory award, which can only be appealed with the final award to the extent that it impacts it (Art. 93 (3) BGG). That this is the case here has not, however, been demonstrated by the Appellant. In this respect, the matter is therefore not capable of appeal. In the same manner, it should be noted that the Appellant, prior to the February 1, 2009 decision, had ample opportunity to express itself with regard thereto, i.e. to the fact that it was to be bound by confidentiality obligations regarding the C._____ transactions. In this context, it expressed its position in its letter of January 26, 2009. The Arbitrator advised the Parties, on January 27, 2009, as to the contents of a possible decision, at which point the Appellant expressed its stance in its letter of January 28, 2009 (paragraph 23 of the Award). There can therefore be no question of a denial of the right to be heard. Nor would there be a formal denial of justice where the Arbitrator deemed it justified to impose confidentiality obligations on the Appellant despite its stance on this issue.

7.2 Also without merit is the Appellant's argument that its right to defend itself was hampered by the confidentiality obligations imposed by the February 1, 2009 decision regarding the C._____ transactions, which constituted a violation of its right to be heard with regard to the final award. In doing so, it fails to substantiate a violation of its right to be heard but merely – when viewed objectively – criticizes the contents of the February 1, 2009 decision, i.e. the confidentiality obligations imposed, which allegedly rendered its own clarification of the matter impossible. Such criticism cannot be heard in the present proceedings. Finally, to the extent that it seeks to substantiate a violation of its right to be heard with the rejection of its submissions to produce evidence, there is no sufficient reasoning. (The Appellant) has failed to set out, in sufficiently clear terms, and to show with reference to the record which submissions of evidence it duly made in the arbitration proceedings that were rejected by the Arbitrator. It merely gives some examples, and without references to evidence, and refers to "the presentation of transportation documents for the C._____ transactions and/or interrogation of the responsible individuals of D._____ and C._____ LLC". The Federal Tribunal is therefore not in a position to examine whether or not a violation of the right to be heard took place by the rejection of certain submissions as to evidence concerning legally pertinent allegations. Nevertheless, it should be pointed out that the Arbitrator did not deem it relevant, in the context of calculating the scope of damages pursuant to Art. 75 CISG, whether or not the C._____ transactions

had been effectively executed (paragraphs 114 and 115 of the Award). The rejection of submissions for the production of evidence with regard to issues that have not been deemed relevant to the outcome of the dispute, does not represent a violation of the right to be heard (see BGE 116 II 639 at 4c p. 644).

8.
The appeal is to be rejected, to the extent that the matter is capable of appeal. In view of the outcome of the proceedings, the Appellant shall pay the judicial costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected, to the extent that the matter is capable of appeal.
2. The judicial costs set at CHF 25'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent compensation of CHF 30'000.- for the Federal judicial proceedings
4. This judgment shall be notified in writing to the Parties and the Arbitral Tribunal in Geneva.

Lausanne, January 29, 2010

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

The Presiding Judge (Mrs):	The Clerk:
KLETT	WIDMER