4A 500/2007[1]

Judgment of 6th March 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding

Federal Judges KLETT (Mrs), ROTTENBERG LIATOWITSCH (Mrs)

Federal Judge KOLLY

Federal Judge KISS (Mrs)

Clerk of the Court: CARRUZZO

X _____ SPA,

Appellant,

Represented by Mr. Franz KELLERHALS and Mr. Bernard BERGER

v.

Y _____,

Respondent,

Represented by Mrs Anne Véronique SCHLAEPFER

[1] Translator's note: quote as X____SPA v. Y____ 4A 500/2007. The names have been omitted, in accordance with Swiss practice. The original of the decision is in French. It can be downloaded from the Court's web site www.bger.ch.

Facts:

A.

A.a. Y____ ("Y_") is a common stock corporation under French law.

X____SPA ("X_") is a financial company under Italian law.

Both Y_ and X_, with other investors, were shareholders of the company B____SPA ("B_"), an Italian holding company which, in 2002, held 63% of the stock of the Italian company C____SPA ("C_").

A.b. During the year 2002, Y_ entered into a number of put and call contracts with the other shareholders of B_ with a view to acquiring all the shares they held in that company. The purpose of these contracts was to give Y_ indirect control of C_ and to make it possible for the other shareholders of B_ to dispose of their holdings in that company.

Thus Y_ and X_ executed a put and call contract on September 16th 2002, containing an arbitration clause, which among other things, contained the following language: (art. 13) "…all the controversies relating to the interpretation or to the performance of the contract, or in any way deriving from the contract or in relation thereto, shall belong to the exclusive jurisdiction of an Arbitral Tribunal appointed and deciding in conformity with the Rules of Arbitration of the Geneva Chamber of Commerce and Industry …"[2].

Performance of the put and call contract took place on July 26th 2005 through the transfer to Y_ of the shares in B_ belonging to X_ and through the payment of the price of these shares after the Italian company exercised the put option containing in the aforesaid contract.

A.c. Still in 2002, B_ had issued 399'984'000 warrants (purchase options) reserved to its shareholders. Each warrant gave the right to subscribe one new share of B_ during the exercise period, namely from October 1st 2005 to June

[2] Translator's note: translated from the Italian, which is the language in which the arbitration clause was quoted by the Federal Tribunal.

30th 2007, at a price set by that company's Rules on the emission of warrants. Their emission purported to give B_ the necessary means to reimburse a loan granted by one of its subsidiaries and used to finance C_.

On October 7th 2002, X_ as shareholder, underwrote 68'014'806 warrants at a unit price of € 0.30, for a total amount of € 20'404'441.80.

Further to the emission of the warrants, B_, Y_ and X_ discussed the possibility to extend to those securities the put and call contract, which heretofore related only to the shares of B_. The discussion particularly related to the conditions under which Y_ would agree to acquire the warrants of B_ underwritten by X_. The parties specifically exchanged some letters on December 5th 2002, followed by several draft agreements, through their counsel, between December 6th 2002 and September 30th 2003.

On July 20th 2005, invited by X_ to proceed to the acquisition of the warrants, Y_ answered two days later that it had contracted no obligations in this respect. Since then, the parties disagreed on the following point: X_ held the view that an agreement with regard to the warrants was concluded orally and then confirmed by the exchange of letters of December 5th 2002, whilst Y_ claimed that the negotiations were never concluded.

B.

On April 14th 2006, X_ filed a claim against Y_ amongst others in front of the Milan Court with a view to obtaining, principally, the payment of an amount corresponding to the purchase price of the warrants it had underwritten.

For its part Y_ initiated arbitration proceedings against X_ in a request of November 7th 2006. In substance, it submitted that a finding should be issued that it had not committed to purchase the warrants of B_ held by X_ and therefore owed no amount in this respect and that X_ should be ordered to pay € 25'000'000 for the breach of the arbitration agreement.

In its answer of December 16th 2006, X_ objected to the jurisdiction *ratione materiae* of the Arbitral Tribunal. Should the latter assume jurisdiction, it

submitted that the claims by Y_ should be rejected with an order to pay the price of the warrants, plus interest, as well as compensation for abusive proceedings.

An Arbitral Tribunal composed of three arbitrators was set up under the aegis of the Geneva Chamber of Commerce and Industry. The site of the arbitration was established in that city and Italian was chosen as the language of the proceedings.

On October 31st 2007, a majority of the Arbitral Tribunal issued a final award. After assuming jurisdiction, the Arbitral Tribunal found that Y_ owed nothing to X_ with regard to the warrants of B_ and rejected all monetary claims by both parties, with the costs of the arbitral proceedings to be shared equally by both, adding that each party would bear its own legal costs.

C.

On November 29th 2007, X_ filed a Civil Law Appeal. It submitted principally that the Federal Tribunal should annul the award of October 31st 2007 and find that the Arbitral Tribunal had no jurisdiction to decide the dispute relating to the specific agreement as to the warrants of B_. Subsidiarily, the Appellant seeks the mere annulment of the award under appeal.

In its answer of January 31st 2008, to which a French translation of the aforesaid award was attached, Y_ principally submitted that the matter was not capable of appeal and subsidiarly that the appeal should be rejected. The Arbitral Tribunal referred to the reasons contained in the award.

On February 14th 2008, one of the attorneys for the Respondent provided the Federal Tribunal with a French translation of the dissenting opinion issued by one of the three arbitrators, the original of which had been communicated to the parties as a separate document and with a covering letter.

On February 27th 2008, the same attorney wrote to the Federal Tribunal to communicate a copy of the Judgment issued by the Milan Court on January 28th 2008, with a partial French translation. From these documents it appears

that the Italian court denied jurisdiction to decide the dispute relating to the warrants of B_ but that it rejected the claims of X_ based on the alleged agreement entered into by the parties in this respect.

Reasons:

1.

According to art. 54 (al. 1 LTF[3]), the Federal Tribunal issues its decision in one of the official languages, as a rule in the language of the decision under appeal (in this case Italian). When the parties use an other official language, the latter may be adopted (art. 54 (1) 2nd sentence, LTF). In the briefs submitted to the Federal Tribunal, both parties used French. According to its practise, the Federal Tribunal will consequently issue its decision in that language.

2.

In the field of International arbitration, a Civil Law Appeal is possible against the decision of arbitral tribunals under the conditions set forth at art. 190 to art. 192 PILA[4] (art. 77 (1) LTF).

In this case, the site of the arbitration was in Geneva. At least one of the parties (actually both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (art. 176 (1) PILA). The Appellant was directly affected by the final award under appeal, which rejected its monetary claims. Thus it has a personal, present and legally protected interest to insure that the award was not issued in violation of the guarantees arising from art. 190 (2) PILA, which gives it standing to appeal (art. 76 (1) LTF). Timely filed (art. 100 (1) LTF), in the legally prescribed format (art. 42 (1) LTF), the appeal is to be allowed in principle.

3.

---

[3] Translator's note: French abbreviation for the Federal statute of June 17th 2005 organising the Federal Tribunal, RS 173.110.

[4] Translator's note: PILA is the generally used abbreviation for the Swiss statute on International Private Law of December 18th 1987, RS 291.

According to the Respondent, the Appellant validly renounced any right of appeal against the award.

3.1.

Art. 192 (1 PILA) states that when both parties have neither domicile nor habitual residence, nor an establishment in Switzerland, they may rule out any appeal against the awards of the Arbitral Tribunal in a specific statement in the arbitration clause or in a subsequent written agreement; they may also exclude the appeal only for one or more of the grounds stated at art. 190 (2)PILA. In a seminal decision, this court reviewed in depth the issue of the renunciation to an appeal in the field of International arbitration (ATF 131 III 173). Substantially, it was stated that case law is restrictive in admitting agreements excluding appeals and that an indirect renunciation is considered insufficient. As to a direct renunciation, the Federal Tribunal, with a view to clarifying its previous case law, stated in the same decision that a specific reference to art. 190 PILA and/or to art. 192 PILA is not mandatory. It is sufficient that an express statement by the parties should show clearly their common will to renounce any appeal. Knowing whether or not this is the case is a matter of interpretation.

The aforesaid decision was confirmed since and, in a recent judgement, the Federal Tribunal held that there was no need for a new review of the issue, notwithstanding the criticism raised by certain writers (ATF 133 III 235, at 4.3.1, last § p. 241 and the cases quoted). However, the latter decision, taking into account the specificity of international arbitration in the realm of sport, excluded as a matter of principle that a renunciation to the appeal may be opposed to a sportsman, even if it fullfils the formal requirements of art. 192 (1) PILA (see at. 4).

3.2

3.2.1

In this case, the requirement that both parties be extraneous as stated by art. 192 (1) PILA is not in dispute. Indeed, it is neither established nor even alleged

that either party would have had its domicile, i.e. its place of incorporation (art. 21 (1) PILA) or an establishment, i.e. a branch (art. 21 (3) PILA) in Switzerland at the time when the agreement renouncing appeals was concluded.

3.2.2

The arbitration clause contained in the put and call contract executed on September 16th 2002 by Y_ and X_ (art. 13) contained the following sentence: "the parties renounce from now any ordinary or extraordinary appeal against the decision which will be issued"[5]. That a renunciation to the appeal thus stated satisfies the formal requirements set forth at art. 192 (1) PILA and case law mentioned above is beyond doubt. The arbitration clause quoted could not have expressed more clearly the common will of the parties to renounce challenging any future award by any ordinary or extraordinary legal means, whilst the word "*decisione*"[6] even if it is more generic than the word "*lodo*"[7], cannot but refer in this case to the award to be issued by the arbitrators, in view of its context. Such a clause also corresponds more or less to the sentence quoted in a recent decision as an example of a renunciation, which would be formally valid (Decision 4P.114/2006 of September 7th 2006 at 5.3 *in fine*). Furthermore, whilst raising the issue of the renunciation to the appeal in its brief, the Appellant did not challenge the formal validity of the renunciation in dispute.

3.2.3

At Nr. 39 of its brief, the Appellant claimed that the validity of such a renunciation to appeal "is doubtful in view of recent case law of the Federal Tribunal (Decision 4P.172/2006 at c. 4.3.2.2. as to the doubts concerning the compatibility of art. 192 PILA with art. 6 ECHR[8])". As stated, the argument is not sufficiently reasoned to be acceptable. In fact, the Appellant did not

[5] Translator's note: translated from Italian, as the opinion quoted the clause in that language.
[6] In Italian in the original text.
[7] In Italian in the original text.
[8] Translator's note: ECHR is the generally used abbreviation for the European Convention of Human Rights of November 4th 1950 RS 0.101.

explain why art. 192 PILA would be incompatible with art. 6 ECHR, be it in a general way or only in the case at hand. The decision quoted – that at ATF 133 III 235 mentioned above – is furthermore of no help to the Appellant to the extent that it did not involve commercial arbitration as the case presently reviewed by the Federal Tribunal, but a dispute between a professional tennis player and a sport organisation, which had taken disciplinary action against him.

3.2.4

The Appellant also claimed that the issue of extending the arbitration agreement contained in the put and call contract to the specific agreement on the warrants of B_ would determine whether or not the issue would be capable of appeal and whether or not this appeal is to be allowed. Thus, the Federal Tribunal could hold the matter incapable of appeal only if it reached the conclusion that the arbitration clause contained in the put and call contract effectively covered the aforesaid agreement and this requires the Federal Tribunal to start by reviewing the grievance of lack of jurisdiction raised by the Appellant.

Such reasoning cannot be followed. Indeed, it would make the renunciation to the appeal meaningless when the grievance raised would relate to the jurisdiction of the Arbitral Tribunal (art. 190 (2) (b) PILA). Yet, it is undeniable that the exclusion of all appeals within the meaning of art. 192 (1) PILA also includes such a grievance (ATF 131 III 173 at 4.2.3.1 p. 178/179). It was moreover recognized that the parties may exclude the appeals only with regard to the arbitrators' jurisdiction (Decision 4P.98/2005 of November 10th 2005 at 4.2). It must be reminded that the appeal based on art. 192 (2) (b) PILA is available when the Arbitral Tribunal decided claims which it had no jurisdiction to review, be it because there was no arbitration agreement or because the arbitration clause was limited to certain issues which did not encompass the claims at hand (*extra protestatem* ATF 116 II 639 at 3 *in fine* p. 642). Indeed, among other conditions, an Arbitral Tribunal only has jurisdiction when the dispute falls within the scope of the arbitration clause

and if it did not exceed the limits imposed by the request for arbitration and, as the case may be, the terms of reference. Thus, when a party claims that the Arbitral Tribunal arrogated for itself a power it did not have by deciding an issue on which the parties had not agreed to arbitrate, it raises an issue of jurisdiction by doing so (Decision 4P.114/2001 of December 19th 2001 at 2b).

This is what is involved in this case. Challenging the jurisdiction of the Arbitral Tribunal *ratione materiae*, the Appellant claims that the former could not deduct from the arbitration clause in the put and call contract that it had jurisdiction to review whether or not the parties were bound by a specific agreement on the warrants of B_. In other words, the Appellant takes the view that the Arbitral Tribunal disregarded the objective scope of the arbitration clause by including in it a problem – the existence, or lack thereof, of the agreement in dispute – which, according to the Appellant, was outside that clause. In short, it claims that the Arbitral Tribunal decided an issue which the parties had not submitted to it, thus exceeding its powers. However, when they inserted the renunciation clause in dispute into the put and call contract, the parties deprived themselves once and for all of any possibility to challenge the decision taken by the Arbitral Tribunal with regard to its own jurisdiction, whatever the reasons. Thus, they assumed the risk that the arbitrators may arrogate for themselves some jurisdictional powers which they did not have and rule on an issue which was not encompassed by the arbitration clause. Accordingly, it is impossible to claim *a posteriori,* as the Appellant did, that the litigious renunciation would be valid only if the Arbitral Tribunal was right in assuming jurisdiction *ratione materiae*. Such an argument would unduly restrict the scope of the arbitration clause by removing the hypothesis in which the Arbitral Tribunal would have wrongly extended its power of decision to legal relationships entered into by the same parties, but for an other reason not covered by the arbitration agreement. One does not see why it would be justified to condition the validity of a total renunciation to any appeal to a previous acknowledgment of the soundness of one of the grounds for appeal which could have been raised without such a renunciation. Specifically as to the arguments derived from the lack of jurisdiction of the Arbitral Tribunal, it

does not appear that in so far as the renunciation to the appeal is concerned, one should distinguish between arbitrators extending their jurisdiction to a legal relationship (allegedly) unrelated to that for which the parties agreed to arbitrate and a case in which, for instance, they would have decided an issue which could not be arbitrated.

The Appellant refers to the criticism raised by some legal writing with regard to the decision published at ATF 131 III 173 (François Perret, commenting that decision, at Bulletin ASA 2005, p. 520ss; Sébastien Besson, Etendue du contrôle par le juge d'une exception d'arbitrage; renonciation aux recours contre la sentence arbitrale: deux questions choisies de droit suisse de l'arbitrage, in Revue de l'arbitrage 2005 p. 1076 ss ; Jean-François Poudret/Sébastien Besson, Comparative law of international arbitration, 2e éd, n. 839, p. 782 *in fine* ; Paolo Michele Patocchi/Cesare Jermini, Commentaire bâlois, Internationales Privatrecht, 2e éd. n. 19, art. 192 PILA ; Bernhard Berger/Franz Kellerhals, Internationale und interne Schiedsgerichsbarkeit in der Schweiz, n.1688 and foot note 263). By doing so, the Appellant loses sight of the fact that the aforesaid decision dealt with the scope of the arbitration agreement *ratione personae* and, consequently, of the exclusion agreement contained there. It is also on that issue that the legal writers quoted against that decision raised their criticism, which there is no need to review here. The subjective bearing of an arbitration agreement including a renunciation to appeal indeed raises a specific problem with regard to the form of the renunciation, as art. 192 (1) PILA conditions the validity of the renunciation to all appeal to a specific statement from the parties to the arbitration agreement. This does note apply when, as is the case here, both parties to the arbitration agreement made the specific statement required by art. 192 PILA, thus leaving in dispute only the material scope of the aforesaid agreement.

3.3

Thus, it must be found that the parties validly renounced any appeal against the award under review. Consequently, the matter is not capable of appeal.

The appeal being rejected, the Appellant shall pay the judicial costs (art. 66 (1) LTF) and compensate the Respondent (art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.

The matter is not capable of appeal.

2.

The Court costs of CHF 75'000 shall be paid by the Appellant.

3.

The Appellant shall pay to the Respondent compensation of CHF 85'000 as costs.

4.

This Judgement shall be notified to the representatives of the parties and to the *ad hoc* Arbitral Tribunal.

Lausanne, March 6th 2008

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

The Presiding Judge	The Clerk
CORBOZ	CARRUZZO