4A_348/2009[1]

Judgement of January 6, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge KOLLY,
Clerk of the Court: CARRUZZO.

1. X._____ SA,
2. Y._____ SA,
Appellants,
Both represented by Mr Christophe IMHOOS

v.

1. V._____ Ltd., (previously A._____ Ltd)
2. W._____ GmbH, (success. B._____ GmbH),
Respondents,
Both represented by Mr Philipp J. DICKENMANN and Mr Niklaus ZAUGG

Facts:

A.

At the end of the years 1990, X._____ SA (hereafter X._____), and Y._____ SA (hereafter Y._____), both Romanian state-owned companies, who took over from Compania T._____ all the rights and obligations arising from a contract concluded for this purpose, entrusted to a consortium composed of a Finnish company V._____ Ltd. (hereafter V._____; then named A._____ Ltd), a German company B _____ GmbH (hereafter B _____; company absorbed by W._____ GmbH in 2006) and a

[1] Translator's note: Quote as X._____ and Y. _____ *v.* V. _____ and W. _____, 4A_348/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

third party, the execution of work for the rehabilitation and the modernisation of a unit of a power plant located in Romania.

By virtue of an ad hoc clause inserted into the contract in question, any dispute relating to the execution thereof was to be submitted, firstly, to an adjudicator, Professor R. _____, who would render a decision on the subject. The party unsatisfied by the decision made by this specialist could submit the matter to a three members Arbitral Tribunal under the aegis of the International Chamber of Commerce (ICC). The seat of the arbitration was in Zurich.

Based upon a provision of the general conditions in the contract, V._____ and B._____, holding that the two Romanian companies did not make the stipulated payments within the time limit, suspended the performance of the contract between May 17, 2000 and January 13, 2003.

B.
On October 26, 2005, V. _____ and B. _____, after having asserted their claims before the adjudicator, submitted a request for arbitration to the ICC to obtain the reimbursement of the supplementary costs incurred by the suspension of the performance of the contract.

An arbitral tribunal composed of three arbitrators was constituted. Dr S. _____ was appointed by the ICC to preside.

X._____ and Y._____ submitted that the request should be rejected and filed a counterclaim for various reasons, in particular for the damages in connection with the explosion of a flash tank.

By means of cross-counterclaims, V. _____ and B._____ raised other claims, particularly concerning the last-mentioned point.

The arbitral procedure gave rise to the filing, by X. _____ and Y. _____, of a challenge against the Chairman of the Arbitral Tribunal. The ICC International Court of Arbitration rejected the challenge in its session of May 30, 2008.

On June 2, 2009, the Arbitral Tribunal issued its final award. X. _____ and Y. _____ were severally ordered to pay, with interest, EUR 6'870'640 to V._____ and EUR 2'137'230 to B. _____. All other and further submissions by the parties were rejected.

C.
In a Civil law appeal, X. _____ and Y. _____ submit that the award should be annulled. They argue that the arbitral tribunal was irregularly composed and disregarded both the equality between the parties as well as their right to be heard in contradictory proceedings.

The Respondents submitted that the appeal be rejected to the extent that the matter is capable of appeal. The Arbitral Tribunal implicitly did the same.

The Appellant's request for a stay was rejected by decision of the Presiding Judge of November 18, 2009.

Reasons:

1.

According to Art. 54 (1) LTF[2], the Federal Tribunal issues its decisions in one of the official languages[3], as a rule in the language of the decision under appeal. When the decision under appeal was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In front of the Arbitral Tribunal, they opted for English, whilst in the federal proceedings they used French (for the Appellants) and German (for the Respondents). According to its practice, the Federal Tribunal will resort to the language of appeal and issue its decision in French.

2.

In international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF). As far as the object of appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellants or even the grounds raised in the appeal brief are concerned, they do not pose any problems concerning the pre-condition for allowing the appeal. There is therefore no reason not to entertain the appeal.

3.

In a first ground for appeal, based on Art. 190 (2) (a) PILA, the Appellants claim that the chairman of the Arbitral Tribunal who issued the decision under appeal, was irregularly appointed.

3.1 The Appellants also filed a challenge, which was rejected by the ICC Court of International Arbitration. As it was issued by a private organism, such a decision to reject a challenge was not capable of a direct appeal to the Federal Tribunal (ATF 118 II 359 at 3b), and would not bind the Court, which may accordingly freely review whether or not the

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

[3] Translator's note: The official languages of Switzerland are German, French and Italian.

[4] 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.

circumstances invoked to support the challenge properly justify the grievance under review (ATF 128 III 330 at 2.2 p.332).

3.2 Similar to a judge, an arbitrator must present sufficient guarantees of independence and impartiality. The violation of that rule leads to an irregular composition of the arbitral tribunal. To determine whether an arbitrator presents such guarantees or not, the constitutional principles developed with regard to state courts must be referred to. However, the specificities of arbitration, in particular those of international arbitration, must be taken into account when examining the circumstances of the case at hand (ATF 129 III 445 at 3.3.3 p. 454 and the references, in particular the case law concerning Art 30 (1) Cst[5]).

It must be examined whether or not the circumstances alleged by the Appellants give the appearance that the arbitral tribunal, which issued the decision under appeal, was irregularly composed.

3.3

3.3.1 During a phone conference held on February 27, 2008 by the Arbitral Tribunal with the parties, the Appellants were given until March 10, 2008 to formulate their observations on the explanations that the Respondents had to provide by March 3, 2008 concerning the cross-counterclaims made by them in connection with the explosion of a flash tank. They did so on the last day of the time limit shortly after 7.30 pm. However, on the afternoon of the same day, the Arbitral Tribunal had already notified the parties of its Procedural Order N°25 by which it agreed to consider the aforementioned requests.

On the same day of March 10, 2008, counsel for the Appellants sent a fax to the Arbitral Tribunal, in which they severely criticized the procedure followed, even going so far as to describe the behaviour of the Arbitral Tribunal as "absolutely abusive"[6].

In an e-mail of March 11, 2008, addressed to the Appellants, the chairman of the Arbitral Tribunal took exception to this inopportune reaction. Then, in another e-mail sent on March 25, 2008 to all concerned, he admitted that Procedural Order N°25 had been notified to the

[5] Translator's note: Cst. is the French abbreviation for the Swiss Federal Constitution.
[6] Translator's note: In English in the original text.

parties prematurely and apologised, informing them that Arbitral Tribunal would take the necessary action to remedy the error.

Thus, under paragraph 3 of its Procedural Order N°26 of April 29, 2008, the Arbitral Tribunal indicated that it would reconsider its Procedural Order N°25 on the basis of the objections raised by the Appellants. Thereafter, under paragraph 3 of its Procedural Order N° 27 of May 22, 2008, it confirmed the disputed Procedural Order, despite these objections.

3.3.2 In support of the grievance under consideration, the Appellants argue that the President of the Arbitral Tribunal adopted an attitude "as surprising as it is incomprehensible", by admitting that the cross-counterclaims filed by the Respondents could be addressed without waiting for their observations although he had clearly expressed doubts about the claims being admissible in Procedural Order N°23 of February 21, 2008. They argue that the bias of the chairman of the Arbitral Tribunal also emerges in his e-mail sent to them on March 11, 2008, and would further be confirmed by the complete lack of response to their requests for reconsideration of Procedural Order N°25.

3.3.3 In light of the detailed explanations provided by both the arbitrator under challenge and by the Respondents in their responses to the appeal, the grievance appears to be inconsistent.

It must be recalled that some procedural mistakes or a materially erroneous decision are not sufficient to create the appearance of an arbitral tribunal's bias, except for particularly serious or repeated errors, which would constitute manifest disregard of its duties (Decision 4A_539/2008 of February 19, 2009 at 3.3.2 and the case quoted). In this case, whilst the mistake was not only committed by the chairman, but also by the Arbitral Tribunal *in corpore*, the mistake on which the Appellants rely, obviously made inadvertently in all likelihood, was that the time limit given to the Appellants during the telephone conference of February 27, 2008, was not mentioned, due to an oversight, in the subsequent Procedural Order N°24 of February 29, 2008. That this isolated error, which occurred during proceedings that lasted nearly four years, would be so severe that the impartiality of the Arbitral Tribunal should be questioned, is also untenable. It is difficult to escape the feeling that the Appellants have used the pretext of this error to try to obtain the annulment of an award that was unfavourable to them. Be this as it may, the Arbitral Tribunal has repaired the procedural mistake in question

by Procedural Orders N°26 and 27, contrary to what the Appellants claim, curiously failing to mention their existence.

Moreover, the Appellants do not indicate how the content of the e-mail that the chairman of the Arbitral Tribunal sent them on March 11, 2008 was objectively likely to cast doubt on the arbitrator's impartiality. When considering the text of the controversial document, one could see nothing more than an understandable and measured reaction to the severe and unjustified questioning of the impartiality of the Arbitral Tribunal.

4.

The Appellants also criticize the Arbitral Tribunal for violating the equality of the parties and their right to be heard in contradictory proceedings (Art. 190 (2) (d) PILA).

A party considering itself the victim of a violation of his right to be heard or another procedural error, should immediately invoke this in the arbitration proceedings, under penalty of forfeiting. It is, indeed, incompatible with the principle of good faith to claim a procedural error only in appeal proceedings directed against an arbitral award, if it was possible to raise the violation during the arbitration proceedings. (Decision 4A_69/2009 of April 8, 2009 at 4.1 with references). This principle is also expressed in Art. 33 of the ICC Rules of Arbitration.

In this case, at the end of the week of hearings of June 30, 2008, the chairman of the Arbitral Tribunal had specifically invited the parties to indicate whether they would like to express any complaints about the way the arbitration proceedings had been conducted, particularly from the point of view of the right to be heard. The Appellants' counsel answered as follows: "Everything is OK. I do not have any complaint ..."[7]. In these circumstances, to claim, once the unfavourable outcome of the proceedings is known, that the guarantee of the right to be heard and the principle of equal treatment have been violated by the Arbitral Tribunal, as the Appellants have done, is incompatible with the rules of good faith. Accordingly, the Appellants' complaint of the violation of Art. 190 (2) (d) PILA is not capable of appeal.

5.

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

The appeal, which verges on recklessness, cannot but be rejected to the extent that the matter is capable of appeal. The Appellants, whose appeal is rejected, shall severally pay the costs of the federal proceedings (Art. 66 (1) and (5) LTF) and pay costs to the Respondent (Art. 68 (1) and (4) LTF).

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 43'000.- shall be borne by the Appellants severally and in equal shares among themselves.

3. The Appellants shall pay to the Respondents severally an amount of CHF 53'000.- as costs for the federal judicial proceedings.

4. This judgment shall be notified to the representatives of the parties and to the ICC Arbitral Tribunal.

Lausanne, January 6, 2010

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

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