Judgment of February 7, 2017[1]

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Klett,
Federal Judge May Canellas

Clerk of the Court: Kölz (Mr.)

A._____ GmbH,
represented by Dr. Jodok Wicki and Dr. Axel Buhr,
Appellant,

v.

X._____,
represented by Mr. Gianni Masera,
Respondent,

B._____ Sàrl,
represented by Mr. Taoufik Rekik,

Facts:

A.
X._____ (Claimant, Respondent) is a company formed under Tunisian law with its registered office in Tunisia. A._____ GmbH (Defendant 1, Appellant) has its registered office in Germany. On September 7, 2007, the Claimant and Defendant 1 as well as its then-subsidiary in Tunisia, B._____ Sàrl (Defendant 2), signed a contract, with annexes, for the performance of services by the Claimant in Tunisia for operation of a warehouse and logistics.

That contract contained an arbitration clause in favour of an arbitral tribunal with its seat in Zurich. Swiss law was found to be applicable to the merits of the case.

As of September 2010, the invoices that the Claimant addressed to Defendant 2 were no longer being paid regularly. Following its sale to C._____, in March 2011 Defendant 2 ceased paying the Claimant's

[1] Translator's Note: Quote as A._____ *v.* X._____ and B._____, 4A_478/2016.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

invoices completely. On December 1, 2011, Defendant 1 terminated the Agreement effective December 31, 2012. Following this, a dispute arose regarding the outstanding invoices. In addition, uncollected material remained in the Claimant's warehouse.

B.
On December 3, 2013, the Claimant commenced an arbitration under the Rules of the International Chamber of Commerce (ICC) against the Defendant, in which it made claims in the main proceedings for various payments under the Parties' Agreement ("unpaid invoices for storage", "unpaid Annual Consideration", "unpaid investments", "unpaid storage since January 1st 2013", "all further costs and disbursements [...]"). Defendant 1 disputed the jurisdiction of the Arbitral Tribunal due to the lack of a binding arbitration clause. In the alternative, Defendant 1 requested that the Tribunal reject the claim.

On April 17, 2014, the ICC Court of Arbitration appointed a sole arbitrator. By a decision of March 24, 2015, that arbitrator found that she had jurisdiction.

On December 15, 2015, an oral hearing took place at which multiple witnesses were heard.

By an Award rendered on July 26, 2016, the sole arbitrator held Defendant 1 liable for EUR 128,278.29, plus interest (dispositive part, para. 1) as well as EUR 207,603.75 and EUR 333,971.25 (dispositive part, para. 2) to the Claimant. Furthermore, the arbitrator imposed one half of the costs of the arbitration on Defendant 1 and ordered it to reimburse the Claimant accordingly (dispositive part, para. 3). Finally, paragraph 4 of the dispositive part, it states "All other claims against Defendant 1 and Defendant 2 are dismissed."

C.
By civil law appeal, Defendant 1 has challenged the Award before the Federal Tribunal. It requested that the Court "set aside the orders made against the Appellant in the Award's dispositive part, paras. 1-3, and to dismiss the Respondent's applications directed against [Defendant 2] in para. 4 of the dispositive part of the arbitral award […]". In the alternative, Defendant 1 asks the Court to set aside the Award in its entirety.

The Federal Tribunal has not requested the submission of briefs.

Reasons:

1.
According to Art. 54(1) BGG[2] the Federal Tribunal issues its decisions in an official language,[3] as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award being challenged here is in

[2] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).
[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.

English. Because that is not one of the official languages, the judgment of the Federal Tribunal is being issued in the language of the appeal brief.

2.
2.1. The seat of the Arbitral Tribunal whose decision is being challenged in the Federal Tribunal is located in Zurich. At the time of concluding the arbitration clause, the Parties had their registered offices outside Switzerland. As the parties did not expressly opt out of the provisions of Chapter 12 PILA,[4] they are applicable (Art. 176(1) and (2) PILA). This civil law appeal is thus admissible, under the prerequisites of Art. 190-192 PILA (Art. 77(1)(a) BGG).

2.2. The decision may only be challenged on one of the grounds that are exhaustively listed in Art. 190(2) PILA. Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appellate brief; this corresponds to the duty to provide reasons in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[5] at 5 with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[6] at 3.1; 119 II 380 at 3b).

3.
The Appellant asserts the grievance that its right to be heard in the arbitration was violated in various ways.

3.1. Art. 190(2)(d) PILA only permits parties to challenge an arbitral award based on the mandatory procedural rules set out in Art. 182(3) PILA. The right to legal hearing codified in that section essentially corresponds to the constitutional right embodied in Art. 29(2) BV.[7] Case law infers from this, in particular, the right of the parties to state their views as to all facts important to the judgement, to state their legal arguments, to present suitable evidence supporting their factual allegations relevant to the judgment in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 142 III 360[8] at 4.1.1 p. 360; 130 III 35 at 5. S. 38; 127 III 576 at 2c; all with references).

By contrast and by well-established case law, the right to be heard in international arbitration does not include the right to a reasoned arbitral award. However, there is a minimal duty on the part of arbitrators to review and deal with the issues that are important to their decision. That duty is violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party. However, this does not mean that the arbitral tribunal is required to address each and every submission of the parties (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2 with references).

---

[4] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[7] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

3.2. Specifically, the Appellant initially raises the grievance, arguing that this constitutes a violation of its right to be heard, that in para. 4 of the dispositive part of the Award, the arbitrator comprehensively rejected the Respondent's claim against Defendant 2 "without delving into the liability of the latter in addition to the Appellant."

Indeed, is not entirely clear from the plain text of the Award on what grounds the Arbitral Tribunal's rejection of the claim with respect to Defendant 2 is based. So far as this Court can see, the latter did not participate in the arbitration. However, the Respondent, who did not prevail in the arbitration on this point, did not itself challenge the Award. By contrast, the Appellant does not state why it should be entitled under Art. 76 BGG to appeal the relevant paragraph of the ruling. The mere fact that the Respondent's claim was directed both against the Appellant and against Defendant 2 does not establish any such right, even if the Appellant argues that it "at all times disputed that it was liable in addition to [Defendant 2] and […] also stated why [Defendant 2] should potentially be liable to make payment to the Respondent." It is likewise impossible to see that, as a result of the rejection of the claim against Defendant 2, the Appellant's right of recourse against Defendant 2 is being cut off, as assumed by the Appellant in its appeal brief without any justification. However, the Appellant likewise fails to demonstrate to what extent the existence of claims on the part of the Respondent against Defendant 2 in connection with the claims of the Respondent against it (the Appellant) which were upheld by the Arbitral Tribunal would have been significant and would have thus had to have been dealt with for this reason (in this respect, *see also* Award, part 4). The Appellant's mere assertion that if its right to be heard had been honoured, the Arbitrator would "have rejected liability on the part of the Appellant and would potentially have imposed liability on [Defendant 2]", does not make sense.

In such circumstances, the Appellant's request to set aside the Award with respect to the rejection of the claim against Defendant 2 in paragraph 4 of the dispositive part of the Award is inadmissible. Likewise, the Arbitrator's alleged failure to consider the Appellant's "arguments and evidence" regarding Defendant 2's liability does not represent any violation of its right to be heard.

3.3. The Appellant then asserts the criticism that the Arbitral Tribunal ignored that the Appellant had always disputed that it was the owner "of the goods in dispute." The Appellant argues that the Arbitrator merely insinuates in the Award that "the Appellant is the owner of the goods allegedly held in the Respondent's warehouse, without delving into the Appellant's allegations and evidence regarding the ownership status of these goods".

This criticism is unfounded.

The sole Arbitrator did not overlook the Appellant's assertion that it was not the owner of the goods, rather she expressly dealt with it in connection with the claims for "unpaid annual consideration". In paragraphs 208-209, the Arbitrator states:

> As evidenced by the terms of the Contract, the Respondent 1 was the sole owner of the goods.

> The Respondent 1 has not established that with the alleged sale of Respondent 2 to C._____, the Contract and the goods in the warehouse have also passed to C._____. Considering that the Respondent 1 remains bound by the bank guarantee and was also the entity terminating the Contract in December 2011, *i.e.* one and a half years after the alleged transfer to C._____, the evidence seems to suggest that the Contract and the obligations contained therein remained with the Respondent 1.[9]

In stating this, the Arbitrator has sufficiently honoured the Parties' right to be heard in arbitration. In any event, the Appellant has not succeeded in demonstrating any violation of its right to be heard by referring to individual allegations and evidence it claims the Arbitral Tribunal did not expressly deal with in connection with ownership of the goods. There are no indications that this was based on an oversight or a misunderstanding. However, the Appellant does not, in any event, logically demonstrate how the alleged transfer of civil law ownership would, on its own, have made a difference to the Arbitrator's analysis of the contract claims at issue in these proceedings and that its allegations in this respect would thus have been legally material. In any event, this does not clearly follow from the quoted passage of the arbitral award.

3.4. Furthermore, the Appellant regards it as a violation of its right to be heard that the Arbitrator found that there had been "an assumption of a guarantee by the Appellant for [Defendant 2]'s contractual liability to make payment," but did not first "alert [the Appellant] to this legal assessment and did not first afford it an opportunity to comment thereon."

The principle of the right to be heard does not give the parties a right of a special hearing regarding the legal analysis of the facts introduced by the parties, except where the Court intends to base its decision on a legal rule to which none of the parties had referred and the significance of which could not reasonably have been anticipated by the parties. In such cases, the parties should not be surprised by unanticipated legal arguments (BGE 130 III 35 at 5, para. 39 with references).

In the arbitration at hand, the question of the Appellant's liability under the Parties' contractual relations was a disputed point. According to the Award, both the Respondent and the Appellant made submissions to the Arbitral Tribunal regarding their respective positions on this. The Respondent disputed that it had the capacity to be sued. It argued that the Parties' agreement was that Defendant 2 was solely liable for payment of the invoices, and, furthermore, that the Appellant had not furnished any guarantee for payment of Defendant 2's obligations to the Respondent (" [...] Respondent 1 has never issued any guarantee for Respondent 2's payment obligations towards the Claimant."). If the sole Arbitrator did not adopt this view, but rather, after a detailed analysis, reached the conclusion with respect to the head of claim "Unpaid Invoices" that the Appellant had implicitly guaranteed Defendant 2's payments (within the meaning of Art. 111 OR[10]), this does not constitute surprise in terms of the Arbitrator's application of the law. The grievance of a violation of the Appellant's right to be heard in this respect is thus unfounded.

4.
Finally, the Appellant claims that the Award constitutes a violation of public policy within the meaning of Art. 190(2)(e) PILA. It argues that it is contradictory for the sole Arbitrator to entirely reject any liability on

[9] Translator's Note: In English in the original text.
[10] Translator's Note: OR is the German abbreviation for the Swiss Code of Obligations.

the part of Defendant 2, but simultaneously order the Appellant to pay the invoices addressed to it "based on a guarantee which the Appellant supposedly provided in respect of [Defendant 2]'s obligation to pay the invoices addressed to it."

4.1. The doctrine of public policy has both procedural and substantive aspects (Art. 190(2)(e) PILA). The adjudication of a disputed claim will only violate public policy where it disregards some fundamental legal principles and is thus utterly inconsistent with the important and widely recognized values which should form the basis of any legal order according to prevailing opinion in Switzerland. Such principles include the sanctity of contracts (*pacta sunt servanda*), the prohibition on the abuse of rights, the principle of good faith, the prohibition on expropriation without compensation, the prohibition on discrimination, and the protection of parties lacking legal capacity. However, this list is not exhaustive. An annulment of an arbitral award is only possible when its result – not merely its reasons – contradicts public policy (BGE 138 III 322[11] at 4.1 with references).

4.2. The Appellant fails to demonstrate any incompatibility with substantive public policy in the sense described. The Swiss Law of Obligations most certainly recognises a "pure guarantee" under which a guarantor undertakes to pay for an outcome which is independent of any specific contractual relationship (*see*, *e.g.*, BGE 113 II 434 at 2a p. 436). Thus, under the law of property applicable in this case, the Appellant's obligation, as found by the Award, does not "logically presuppose that [Defendant 2] has any obligation at all to pay the invoices addressed to it." In any event, for that reason alone, the Arbitral Tribunal's holding that the Appellant is liable is not in conflict with its dismissal of the claim against Defendant 2 in terms of the outcome of the Award and could dispense with further discussions of the reasons for that dismissal.

This grievance is thus unfounded.

5.
The Appeal is therefore rejected, insofar as the matter is capable of appeal. The Appellant is therefore liable for costs (Art. 66(1) BGG). The Respondent has not incurred any expenditure for which compensation would be payable to it under Art. 68(2) BGG.

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs of CHF 15'000 shall be paid by the Appellant.

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

3.
This decision shall be notified in writing to the Parties, and to B._____ Sàrl, and the Arbitral Tribunal with its seat in Zurich.

Lausanne, February 7, 2017

Presiding Judge:	Clerk of the Court
Kiss	Kölz (Mr.)