

4A_482/2010

Judgment of 7 February 2011

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding

Federal Judge Corboz

Federal Judge Rottenberg Liatowitsch (Mrs.)

Federal Judge Kolly

Federal Judge Kiss (Mrs.)

Clerk of the Court: Mr. Carruzzo.

Participants in the proceedings

X. _____ SA, represented by Mr. Daniel Tunik,

Appellant,

v.

1. A.Y. _____ SA,

2. B.Y. _____ SA,

3. C.Y. _____ B.V., (formerly Z. _____ B.V.),

4. D.Y. _____ SA,

all four represented by Mr. Elliott Geisinger and Ms. Anne-Carole Cremades,

Respondents.

Facts:

A.

A.a Companies A.Y. _____ SA (hereinafter: A.Y. _____), B.Y. _____ SA, C.Y. _____

B.V. (hereinafter: C.Y. _____; formerly: Z. _____ B.V.) and D.Y. _____ SA (hereinafter:

D.Y. _____), Respondents to these proceedings, are part of the Y. _____ Group.

The Appellant X. _____ SA (hereinafter: X. _____) is a telephone company.

E._____ SA (hereinafter: E._____), another telephone company, is the parent company of a holding company to which F._____ SA (hereinafter: F._____) belongs. F._____ SA holds a concession to operate a mobile telephony service.

A.b By Purchase Agreement of 29 July 2005, B.Y._____ SA agreed to acquire some 79% of the share capital of the holding company from the majority shareholders of E._____ and from those minority shareholders in the company who participated in the agreement.

On 31 October 2005, a large number of E._____ 's minority shareholders, including X._____, signed an agreement with E._____ 's majority shareholders to adhere to the purchase agreement.

The sale of E._____ 's shares was formalized by notarial deed on 8 November 2005. D.Y._____, which was substituted for B.Y._____ SA, acquired the shares for a total price of 6.3 billion euros. As part of this transaction, X._____ sold shares of E._____ to it for a price of 146.9 million euros.

Also on 8 November 2005, D.Y._____, A.Y._____ and C.Y._____ on the one hand and the minority shareholders that held on to shares of E._____, including X._____, on the other hand signed a Shareholder Agreement.

The Purchase Agreement, the Adhesion Contract and the Shareholder Agreement (hereinafter collectively: the Agreements of sale) each included a similar non-compete clause. They also included an identical arbitration clause under which all disputes arising from them or related to them would be decided by an arbitral tribunal formed according to the rules of arbitration of the International Chamber of Commerce (ICC), with the seat of the arbitration in Geneva.

A.c On 16 December 1998, F._____ entered into a Collaboration Framework Agreement (hereinafter: CFA) with X._____. Through this agreement, the Parties joined forces for the development of mobile telephony services in the [name omitted] territory. Essentially, F._____ made its concession and its network available to X._____, which was in charge of marketing mobile telephony services in the territory. The CFA included an arbitration clause to resolve any disputes relating to its interpretation, its performance or any other issue relating to it.

The performance of the CFA gave rise to various problems among the parties, particularly when new technologies appeared.

In September 2006, D.Y._____ (formerly: F._____) terminated this agreement. X._____ accepted the principle of the termination. However, the Parties were not able to agree on the consequences devolving from the termination of the CFA. Seized by X._____ and by D.Y._____, respectively, the competent authority in telecommunications market matters (AMT) and the Commercial Court of [name omitted] ordered the Parties to pursue arbitration as foreseen in the Agreement.

A.d Having obtained the status of virtual mobile operator - an expression referring to an operator that does not have its own network but uses that of a third party -, X._____ provided mobile telephony services under its own name in the [name omitted] territory, starting from 1 January 2007, by means of the network made available to it by G._____, another telephone company, on the basis of an agreement it entered into with that company.

B.

On 2 June 2008, the aforementioned four companies of the Y._____ Group, basing their action on the arbitration clauses included in the Purchase Agreements, sent a request for arbitration directed against X._____ to the Secretariat of the ICC. The Claimants alleged that the Respondent had violated the non-compete clauses inserted in the aforesaid agreements and claimed payment of some 300 million euros as damages.

A three-member arbitral tribunal was formed.

Upon the opening of proceedings, X._____ lodged a partial challenge to the Tribunal's subject matter jurisdiction, arguing that, while it admitted the Arbitral tribunal's jurisdiction in disputes arising from the Purchase Agreements, it objected to the Tribunal deciding any issue relating to the dispute resulting from the termination of the CFA.

By final award of 6 July 2010 issued by the majority of its members, the arbitral tribunal admitted its jurisdiction with a few exceptions, found that X._____ violated the non-compete clause stipulated in the Purchase Agreements, ordered the Respondent to pay just over 220 million euros to the

Claimants and rejected the other claims they raised. One of the three arbitrators issued a dissenting opinion.

C.

On 8 September 2010, X._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the aforesaid award.

The Respondents submitted that the appeal should be rejected. As regards the President of the Arbitral Tribunal, he did not file a response within the time limit allotted to him for that purpose.

Reasons:

1.

According to art. 54 (1) LTF¹, the Federal Tribunal issues its decision in an official language, as a rule in the language of the decision under appeal. If the decision is written in another language, the Federal Tribunal uses the official language chosen by the parties. The Parties used [name of language omitted] in front of the Arbitral tribunal. In the brief submitted to the Federal Tribunal, the Appellant used French. In accordance with its practice, the Federal Tribunal will use the language of the appeal and will consequently issue its decision in French.

2.

In the field of international arbitration the decisions of arbitral tribunals are capable of a Civil law appeal under the requirements of articles 190 to 192 PILA² (art. 77 (1) LTF). Whether with regard to the subject of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant or even the grounds invoked in the appeal, none of these admissibility requirements poses a problem in this case. Therefore the matter is capable of appeal.

¹ Translator's note : LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

² 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.

3.

3.1 The Federal Tribunal decides the matter on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). It may not rectify or supplement the factual findings of the arbitrators of its own motion, even when the facts were established in a clearly inaccurate manner or in violation of the law (see art. 77 (2) LTF, which rules out the applicability of art. 105 (2) LTF). However as was already the case under the Federal Act on the Organization of Federal Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the right to review the facts on which the award under appeal is based if one of the grounds for appeal mentioned at art. 190 (2) PILA is raised against the factual findings or when new facts or evidence are exceptionally taken into consideration in the framework of a Civil law appeal (see art. 99 (1) LTF).

3.2 The Appellant's argument is preceded by a "brief summary of the facts," which nevertheless covers seven pages (appeal nos. 15 to 46). It alleges that the Arbitral tribunal violated the Appellant's right to be heard. It thus invokes one of the exceptions that allow the Federal Tribunal to deviate from the findings of the arbitrators, whether by setting some findings aside or by revising others.

Case law holds that the right to be heard implies a minimum duty on the part of the authority to examine and find on the pertinent issues. This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration certain statements, arguments, evidence, or offers to produce evidence, presented by one of the parties and important for the decision to be issued. It is incumbent upon the allegedly aggrieved party to demonstrate in its appeal against the award how the arbitrators inadvertently prevented it from being heard on an important point. It is incumbent on the appellant to establish that the arbitral tribunal did not examine certain facts, evidence or legal arguments that the former had duly advanced to substantiate its submissions and that such information could have influenced the outcome of the dispute (ATF 133 III 235 at 5.2 p. 248 and the decisions quoted).

The Appellant raises these principles of case law, but does not hold itself to them. It sets forth the circumstances of the case in its manner by referring to a series of exhibits. It states, admittedly, that the "relevant facts have been duly alleged in the proceedings" (appeal no. 21); however, it refrains from specifying where and when they were introduced. Under these circumstances, the Federal Tribunal will rule on the sole basis of the facts as they are set forth in the award under appeal.

4.

The Appellant, invoking art. 190 (2) (b) PILA, maintains that the Arbitral tribunal wrongly declared that it had jurisdiction to rule on the claims raised by the Respondents.

4.1 Seized for lack of jurisdiction, the Federal Tribunal freely reviews the issues of law, including preliminary issues, which determine jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 133 II 139 at 5 p. 141 and cases quoted). However, it reviews factual findings only within the abovementioned limits (see 3.1).

The appeal based on art. 190 (2) (b) PILA is possible when the arbitral tribunal decided claims on which it had no jurisdiction, whether because there was no arbitration agreement or because the latter was limited to certain issues not including the issues involved (*extra potestatem*). An arbitral tribunal indeed has jurisdiction only if, among other conditions, the dispute falls within the anticipations of the arbitration agreement and the tribunal does not go beyond the limits which the request for arbitration sets and, as the case may be, the Terms of reference (decision 4A_210/2008 of 29 October 2008 at 3.1 and references).

4.2 In support of its jurisdictional grievance, the Appellant alleges, in substance, that the Arbitral tribunal ruled on claims that did not fall within the scope of the non-compete clauses inserted into the agreements of sale, with regard to which its jurisdiction *ratione materiae* was given. Rather, it allegedly ruled on claims that in reality related to the winding-up of the CFA, an issue beyond its jurisdiction since this agreement contained a specific arbitration agreement.

According to the Appellant, in order to determine the principal element contributing to the damages resulting from the Purchase Agreement violations (portion of the damages referred to as "*lucrum cessans* type I"), namely the allegation that it unfairly acquired D.Y. _____'s customers during the non-compete period, the Arbitral tribunal held that the customers in question were D.Y. _____'s customers and not the Appellant's. By deciding accordingly on whose customers were obtained during the time the CFA was in effect, it allegedly dealt with the consequences of the termination of the agreement and, consequently, exceeded its authority. Indeed for various reasons, such as their extent, the damages awarded to the Respondents would correspond, in truth, to the winding-up of the CFA and not to compensation for the harm resulting from violating the temporary non-compete conditions stipulated in the Purchase Agreements.

4.3

4.3.1 It is not disputed (appeal no. 62 ff), nor is it disputable, that the arbitration clauses inserted in the Purchase Agreements gave the Arbitral tribunal jurisdiction to review the Respondents' claim that the Appellant allegedly violated the non-compete clause and to determine, as the case may be, the amount of damages to be paid by the Appellant in this regard.

It is also clear that the Arbitral tribunal did not have jurisdiction to render a judgment having the force of *res judicata* on the claims that the Parties to the CFA might have submitted to it regarding the winding-up of this agreement. The CFA indeed contained an arbitration clause applicable to the resolution of disputes resulting from the termination of the CFA, and this is why the Parties were sent back to take different action when they submitted such a dispute to the AMT and to the Commercial Court of [name of country omitted] In addition, the Arbitral tribunal itself refused to accept jurisdiction *ratione materiae* relating to the winding-up of the CFA (award, no. 99, 165 and 166).

However the Arbitral tribunal considered that it had jurisdiction to decide on the preliminary issues on which the outcome of the dispute submitted to it depended (award, no. 100). It considered that it had to take into account the situation of the customer base at the time the CFA was terminated, by interpreting this agreement as needed, in order to determine whether the Appellant appropriated a portion of D.Y._____ 's customer base during the non-compete period stipulated in the Purchase Agreements and, if so, to determine the number of customers transferred from the one to the other. In doing so, it in no way overstepped its authority. It is appropriate here to recall that an arbitral tribunal is authorized to decide preliminary issues that are not within the scope of the arbitration clause (judgment 4A_428/2010 of 9 November 2010 at 2; WENGER/SCHOTT, in *Commentaire bâlois, Internationales Privatrecht*, 2nd ed. 2007, no. 22 ad art. 186 PILA and the authors quoted) and that it may clarify points on a preliminary basis that were not eligible for arbitration as such (ATF 133 III 139 at 5 p. 142 and references). Along the same lines and with regard to the set-off, the tendency is to generalize the principle of "the judge of the action is the judge of the objection," which suggests, as stated in the text of art. 21 (5) of the Swiss Rules of International Arbitration, that the arbitral tribunal has jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause (see, among others, BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd

ed. 2010, nos. 483 and 484 and the authors quoted in footnote 316 p. 135). In Switzerland, this principle was given force by the law with regard to domestic arbitration (art. 377 (1) CPC³; RS 272).

4.3.2 The Appellant certainly maintains that the arbitral tribunal, although it denies it, nevertheless ruled on the consequences of the winding-up of the CFA.

However, the argument, essentially appellate in nature, that it develops to support this assertion is not convincing.

In this regard the Appellant attributes importance to the fact that the Arbitral tribunal allegedly based its decision on an expert opinion that had proceeded on the assumption that the existing customers, at the time when the CFA was terminated, were not the Appellant's but those of D.Y._____. Supposing that the Arbitral tribunal based its decision on this piece of evidence in order to determine the preliminary issue of whose customers belonged to whom on the date the non-compete clause took effect and that it made the finding in an arbitrary manner, this would still not mean that it had intended to decide once and for all, at the same time, the issue of the consequences of terminating the CFA by issuing a decision with binding force on this point.

In addition, such intent cannot be deduced from the sole fact that the damages allocated to the Respondents exceeded the selling price that they had paid to the Appellant. Indeed the extent of the damages caused by the seller to the buyer is not necessarily less than or equal to the price paid for the acquisition of the item sold. Moreover it is difficult to grasp the relationship that the Appellant seeks to establish here between the extent of the damages and the alleged winding-up of the CFA.

Lastly, the fact that the Arbitral tribunal did not assume jurisdiction to decide on certain elements of the damages, on the grounds that they arose out of the winding-up of the CFA, in no way implies that the items with which the Tribunal did deal also arose therefrom.

It follows that the argument based on the Arbitral tribunal's lack of jurisdiction is groundless. Consequently the appeal, based on this single argument, can only be rejected.

5.

The Appellant shall pay the judicial costs (art. 66 (1) LTF) and shall also pay expenses to the Respondents severally (art. 68 (1) and (2) LTF).

³ Code of Civil Procedure / Code de procédure civile

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 80,000, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondents, severally, an amount of CHF 100,000 for legal costs.

4.

This judgment shall be notified to the representatives of the parties and to the ICC arbitral tribunal.

Lausanne, 7 February 2011

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Carruzzo