4A_69/2009[1]

Judgement of April 8, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge KISS (Mrs),
Clerk of the Court: HURNI.

X._____ AG,
Appellant,
Represented by Dr. Erich RÜEGG and Mr Alain BIEGER,

*v.*

Y._____,
Respondent,
Represented by Dr. Philipp HABEGGER and Mrs Elena RAPPOLD.

Facts:

A.

On February 12, 1997 X._____ AG, based in Baden (the Appellant) and Y._____, based in Taipei City, Taiwan, (the Respondent) entered into a Consulting Agreement with regard to the conclusion of an agreement between the Appellant and Z._____ Ltd. for the operation and maintenance of an electrical plant. The Appellant thereafter refused to compensate the Respondent for the consulting services rendered by the latter.

[1] Translator's note: Quote as X._____ AG *v.* Y. _____, 4A_69/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

B.

B.a On September 15, 2004, the Respondent initiated arbitration proceedings with the Zurich Chamber of Commerce, submitting that the Appellant should be ordered to pay 10% of the amount paid by Z._____ Ltd. to the Appellant, however no less than CHF 5'400'000. The Appellant challenged the jurisdiction of the arbitrator and further submitted that the claim should be rejected. In doing so, the Appellant raised a number of objections against the validity of the Consulting Agreement.

B.b In an interim award of June 28, 2005, the sole arbitrator assumed jurisdiction. In an additional interim award of February 23, 2007, he held that the Consulting Agreement of February 12, 1997 was valid and had full effect.

B.c Thereafter the Appellant discovered new evidence. It believed that it could prove, based on the newly discovered evidence, that the Consulting Agreement was a promise to pay a bribe, and therefore void. On January 28, 2008, the Appellant filed a request for revision with the Federal Tribunal on these grounds. In its decision 4A_42/2008 of March 14, 2008, the Federal Tribunal rejected the request for revision to the extent the matter was capable of revision.

B.d On June 17, 2008, the arbitrator issued an interim and partial award, in which he decided *inter alia* which payments of Z._____ Ltd. to the Appellant were to be taken into account when calculating the percentage share of the Respondent.

B.e In its final award of December 19, 2008, the sole arbitrator ordered the Appellant to pay CHF 14'168'385.30 plus interest, with different due dates for payment.

C.

In a Civil law appeal filed with the Federal Tribunal on February 2, 2009, the Appellant requested the annulment of the final award of the arbitral tribunal and submitted that the Federal Tribunal should send the matter under dispute back to the arbitral tribunal with instructions to reject the request for arbitration and reallocate costs, or alternatively issue a new award.

In its answer, the Respondent submitted that the Federal Tribunal should hold the matter to be incapable of appeal, or alternatively reject the appeal. The arbitrator requested the rejection of the appeal on the same grounds.

Reasons:

1.

According to Art. 54 (1) BGG[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, the Federal Tribunal uses the official language chosen by the Parties. The decision under appeal is in English. As English is not an official language and the Parties used German before the Federal Tribunal, the Federal Tribunal will issue its decision in German.

2.

2.1 In the field of international arbitration, a Civil law appeal is possible under the conditions of Art. 190-192 PILA[4] (Art. 77 (1) BGG). In this case, the seat of the arbitral tribunal was in Zurich. The Respondent was domiciled in Taiwan, thus not in Switzerland at the time of

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[2] Translator's note: German abbreviation for the Federal Statute of June 17, 2005 organizing 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 frequently used English abbreviation for the Federal Statute of December 18, 1987 on Private International Law, RS 291.

conclusion of the arbitration agreement. As the Parties did not exclude in writing the provisions of chapter 12 PILA, these apply (Art. 176 (1) and (2) PILA).

2.2 The arbitrator issued a final award, which may be challenged before the Federal Tribunal on all the grounds set forth in Art. 190 (2) PILA. The Appellant is directly affected by the award under appeal. It has a legally protected interest to its annulment (Art. 76 (1) BGG). The appeal was filed timely and in the legal format (Art. 42 (1) BGG; Art. 100 (1) BGG in connection with Art. 46 (1) (c) BGG), and the matter is accordingly capable of appeal.

2.3 The Civil law appeal against international arbitration awards (Art. 77 (1) BGG) may only seek an annulment of the award, *i.e.* it may only result in the annulment of the decision under appeal (see Art. 77 (2) BGG, which rules out the application of Art. 107 (2) BGG). Insofar as the Appellant's appeal is broader in scope, the matter is not capable of appeal.

3.

The Appellant claims a violation of material public policy (Art. 190 (2) (e) PILA). In its view, the Consulting Agreement with the Respondent is an unlawful and unethical promise to pay a bribe. The award under appeal, which assumes the validity of this Consulting Agreement, is therefore inconsistent with public policy. The Appellant substantiates its view with evidence, which it did not produce timely in the arbitration proceedings. As the Appellant itself rightly submits, the Federal Tribunal in its decision 4A_42/2009 of March 14, 2008 decided that this evidence was duly disregarded in the arbitration proceedings because it was not submitted timely. The Appellant thus no longer claims that the Arbitral tribunal wrongly disregarded the evidence; however, it holds the view that it may produce the new evidence in federal judicial proceedings based on Art. 99 BGG.

3.1 The Federal Tribunal bases its judgement on the facts found by the lower court (Art. 77 in connection with 105 (1) BGG). In the field of international arbitration, it may neither review the factual findings of the arbitral tribunal at the request of the parties (Art. 77 (2) in connection with Art. 97 BGG) nor rectify or supplement them *ex officio* (Art. 77 (2) in connection with Art. 105 (2) 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). In order to claim an exception from the Federal Tribunal being bound to the factual findings of the lower court and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the documents that the corresponding factual allegations were already made in conformity with the procedural rules in the proceedings in front of the arbitral tribunal (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references). New facts can only be put forward in accordance with Art. 99 BGG to the extent the decision of the lower court itself constitutes grounds for doing so.

3.2 The validity of the Consulting Agreement was already disputed in front of the arbitral tribunal, which is why the award under appeal may not provide a basis for the new claims. The Appellant, however, holds the view that according to a new legal writing, the alleged nullity of a legal relationship may also be reviewed in federal judicial proceedings *ex officio*. New evidence would have to be considered in such a review. However, the Appellant clearly disregards the fact that the only excerpt on which it bases its legal argument (MEYER, in: *Basler Kommentar, Bundesgerichtsgesetz*, n. 32 ad Art. 99 BGG) refers merely to the nullity of public law decisions. The extent to which this opinion is well-founded needs not be decided

here, since with regard to the question of nullity of private law agreements there are no grounds for departing from the wording of Art. 99 BGG. The new evidence is thus inadmissible. As the factual findings of the Arbitral tribunal that are binding on the Federal Tribunal do not contain any elements from which a promise to pay a bribe may be inferred, the appeal on grounds of a violation of material public policy is unfounded.

4.

The Appellant further claims that the Arbitral tribunal violated its right to be heard (Art. 190 (2) (d) PILA) by not taking into consideration, in its interim and partial award of June 17, 2008, evidence submitted in conformity with procedural rules. Both the Respondent and the sole arbitrator argue that the Appellant's right to be heard was forfeited because it failed to immediately invoke the violation of the right to be heard before the arbitral tribunal.

4.1 A party claiming to have been harmed by the arbitral tribunal's denial of its right to be heard or any other procedural violation loses its corresponding claims if it does not invoke them timely in the arbitration proceedings and fails to make all reasonable efforts to secure the principles of equal treatment and the right to be heard (BGE 119 II 386 at 1a p. 388). It is incompatible with the principle of good faith to claim a procedural violation only in appeals proceedings if it was possible in the arbitration proceedings to give the arbitral tribunal an opportunity to remedy the procedural violation in question (BGE 119 II 386 at 1a p. 388; decision 4P.72/2001 of September 10, 2001 at 4c; JERMINI, *Die Anfechtung der Schiedssprüche im internationalen Privatrecht*, thesis, Zurich 1997, p. 221 f.; SCHNEIDER, *Basler Kommentar*, n. 70 ff. ad Art. 182 PILA). In particular, a party violates good faith and behaves unlawfully if it keeps objections in reserve with the intent of raising them only in the event of an

unfavourable outcome of the proceedings and foreseeable loss of the case (see BGE 126 III 249 at 3c p. 254).

4.2 Neither the factual findings of the Arbitral tribunal nor the appeal brief provide evidence that the Appellant disputed the non-admission of the evidence. However, the Appellant is only able to refer to written claims in two letters of July 14, 2008 and October 17, 2008, which were only raised after the interim and partial award of June 17, 2008 had been issued. Before the award of June 17, 2008 was issued the Appellant had several opportunities to claim its right to be heard had been violated. By failing to do so and by making this claim only after the award was rendered, its claim was forfeited.

5.

For these reasons, the appeal must be rejected to the extent the matter is capable of appeal. In accordance with the outcome of the proceedings, the Appellant is liable for the court costs and the Respondent's costs (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 40'000 shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent compensation of CHF 50'000 for the Federal judicial proceedings.

4. This decision shall be notified in writing to the Parties and to the Court of Arbitration of the Zurich Chamber of Commerce.

Lausanne, April 8, 2009

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

| The presiding Judge: | The Clerk: |
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| KLETT (Mrs) | HURNI |