4A 450/2007[1]

Judgement of January 9, 2008

First Civil Law Court

Federal Judge CORBOZ, Chairman
Federal Judges KLETT and ROTTENBERG LIATOWITSCH
Clerk of the Court M. CARRUZZO

X._____ SA,
Appellant, represented by Mr. Guy-Philippe RUBELI, attorney

v.

Y._____ Inc.,
Respondent, represented by Mr. Georg NAEGELI and Laurent GABUS, attorneys

Facts:

A.

On June 12 and 24, 1992, X._____ SA ("X._____"), a company producing pipes and water supply equipment and Y._____ Inc. ("Y._____"), a company incorporated in the Cayman Islands, entered into a contract pursuant to which the latter undertook to give various services to the former against the payment of certain commissions. This was in particular with a view to allowing the former to successfully bid for water supply works for which bids were solicited, particularly the so called A._____, B._____ and C._____ projects and to oversee the management of the operations once the contracts would be signed with the owners.

[1] Translator's note : Quote as X._____ SA v. Y.____ Inc, 4A 450/2007. The original of the decision is in French. The text is available on the web-site of the Federal Tribunal www.bger.ch.

B.

Based upon the arbitration clause inserted in the aforesaid contract Y._____ initiated arbitral proceedings through a request of November 13, 2005, with a view to obtaining the payment from X._____ of a balance of commissions of some EUR 3'000'000 with interest.

The Respondent submitted that the request should be entirely rejected.

Professor V._____, acting as sole arbitrator in Geneva under the aegis of the International Chamber of Commerce, partially granted the request in a final award of September 21, 2007 and ordered X._____ to pay to Y._____ the amount of EUR 2'303'202 with interest at 5% from November 23, 2005.

C.

On October 29, 2007 X._____ filed a Civil Law Appeal with the Federal Tribunal seeking the annulment of the aforesaid award. The Respondent principally submitted that the matter was not capable of appeal and, subsidiarily, that it should be rejected. The sole arbitrator did not express a view on the appeal.

The request for a stay submitted by the Appellant was rejected by presidential decision of November 29, 2007.

Reasons:

1.

According to Art. 54 (1) LTF, the Federal Tribunal issues its decision in one of the official languages of Switzerland, as a rule in the language of the decision under appeal. When that decision was written in another language (in this case English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the Arbitral Tribunal, they opted for English whilst in the briefs submitted to the Federal Tribunal they used French. In conformity with its practice, the Federal Tribunal will accordingly issue its decision in that language.

2.

2.1 In the field of international arbitration, a Civil Law Appeal is allowed against the awards of Arbitral Tribunals under the conditions set forth at Art. 190 to 192 PILA[2] (Art. 77 (1)LTF).

[2] Translator's note : PILA is the generally used abbreviation for the Swiss statute on international private law of December 18, 1987, RS 291.

In this case, the seat of the arbitration was in Geneva. At least one of the parties (in this case both of them) 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 is directly affected by the final award under appeal, which ordered the Appellant to pay an amount of money to the Respondent. Thus, it has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives the Appellant standing to appeal (Art. 76 (1) LTF). Filed timely (Art. 100 (1) LTF), in the legally required format (Art. 42 (1) LTF), the appeal is to be allowed in principle, without prejudice to whether or not the criticism raised by the Appellant against the arbitral award is capable of appeal, which the Respondent denies.

2.2 The appeal may be made only for one of the grounds limitatively set forth at Art. 190 (2) PILA (ATF 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282; 119 II 380 at 3c p. 383). The Federal Tribunal reviews only those grounds for appeal which were raised and developed by the Appellant (Art. 77 (3) LTF). The strict requirements with regard to motivation, as required by case law relating to Art. 90 (1)(b) OJ (ATF 128 III 50 at 1c), remain valid under the new federal procedural law.
The appeal may only seek the annulment of the award (see Art. 77 (2) LTF, which rules out the applicability of Art. 107 (2) LTF). The Federal Tribunal issues its decision on the basis of the facts established by the Arbitral Tribunal (Art. 107 (2) LTF). It may not *ex officio* rectify or supplement the factual findings of the arbitrators event if the facts were established in a manifestly inaccurate way 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 Statute Organising Federal Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and quoted cases), the Federal Tribunal retains the option to review the factual findings upon which the award under appeal was based if one of the grounds for appeal mentioned at Art. 190 (2) PILA is raised against the factual findings or if new facts or new evidence are exceptionally taken into consideration in the framework of the Civil Law Appeal.

3.
3.1 At pages 8 to 11 of its brief, the Appellant set forth its own version of the facts, without reference to the exhibits in the arbitration file. The Appellant departed from the factual findings in the arbitral award or sought to supplement them. Proceeding in such a way is not consistent

with the rules mentioned above and it is therefore not possible to take that version of the facts into consideration.

3.2 At this stage in the proceedings, the only litigious issue is whether or not the Appellant, which had the burden of proving the pertinent facts in this respect, was able to establish the legitimacy of the deductions it made on the commissions owed to the Respondent.
The review hereunder shall accordingly be limited to the arguments raised by the Appellant with regard to that issue. Under such conditions, it is not necessary to set forth herein all the factual aspects of the case, neither is it required to mention the developments the sole arbitrator devoted to the various issues raised by the parties.

4.
4.1 Relying on Art. 190 (2)(d) PILA, the Appellant claims that the sole arbitrator violated its right to be heard.
In order to substantiate that argument, the Appellant essentially argues that the sole arbitrator had granted its request to produce exhibits partially blanked out in order to avoid revealing the identity of the beneficiaries of the commissions directly paid by the Appellant, such commissions having to be deducted from those which the Respondent could claim pursuant to the contract between the parties. Yet, without advising the Respondent in advance of the lack of evidentiary value of the exhibits filed, the sole arbitrator, proceeding with a "negative inference" and, incidentally, assessing the evidence in an arbitrary way, held that the aforesaid exhibits, although their contents had been confirmed by witness W._____, were not sufficient to prove that the commissions paid by the Appellant had indeed been related to projects A._____, B._____ and C._____. The Appellant concluded as follows: "… the sole arbitrator manifestly violated the rules on the fair and impartial assessment of evidence and did so in an inadmissible and unsustainable way, such a principle belonging to the right to be heard of the parties in an arbitration. Such a violation is a serious denial of the Appellant's elementary rights – and, consequently, in breach of Swiss public policy within the meaning of Art. 190 (2)(e) – which, in itself, justifies the annulment of the arbitral award…"

4.2
4.2.1 The right to be heard, as guaranteed by Art. 182 (3) and Art. 190 (2)(d) PILA, does not have a content differing in principle from that which is recognized in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus, it was held in the field of arbitration

that each party has the right to state its case on the facts that are essential for judgement, to present its legal arguments, to propose evidence on pertinent facts and to attend the hearing of the Arbitral Tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

4.2.2 From its aforesaid submission, it appears that the Appellant wrongly amalgamated the right to be heard, the assessment of the evidence and procedural public policy. To that extent, the matter is not capable of appeal, due to the lack of individualized grounds of appeal, which cannot supplement each other.

With regard to the right to be heard, it must be pointed out immediately that the Appellant proposes an extensive interpretation, in support of which it is hard put to quote any precedent when it includes therein the right for a party to an international arbitration to be informed of the fact that the exhibits it filed did not constitute sufficient evidence to establish the pertinent litigious facts it had the burden of proving. It must be reminded that the right to be heard does not mean that the judge must draw the attention of the parties on the facts which are decisive for judgment (ATF 108 IA 293 at 4c p. 295) and this applies also in international arbitration (ATF 130 III 35 at 5 p. 39 *in medio*). It therefore appears even more difficult to hold that the aforesaid guaranty may compel the judge or the arbitrator to inform a party that the evidence adduced is not sufficient to establish a decisive fact and to do so before issuing a judgment or an award.

It is not necessary to decide whether or not and, if so, in what perspective the behaviour of an Arbitral Tribunal may be sanctioned if it authorized a party to file a partially blanked out document, only to reject the claim without prior warning, only due to the fact that the blanking out would remove any evidentiary value to the exhibit involved. Particularly, it is not necessary to decide if such behaviour would have to be considered as a violation of procedural public policy (Art. 190 (2)(e) PILA) to the extent that it would be incompatible with the rules of good faith, the respect of which must ensure the loyalty of the proceedings. Indeed, the circumstances of this case do not fall within that framework for at least two reasons.

Firstly, the Appellant is wrong to argue peremptorily that the sole arbitrator did not inform the Appellant of the lack of evidentiary force of the exhibits it had filed. The explanations given in this respect at paragraph 129 to 132 of the award under appeal demonstrate clearly that it is not so.

Secondly, various sections of the award show that, for the sole arbitrator, the litigious exhibits did not allow a connection between the commissions paid and projects A._____, B._____ and C._____, whatever the identity of the beneficiaries of the payments. It is for that reason that the deductions made by the Appellant from the commissions sought by the Respondent could not be

allowed (see paragraph 134 to 136, 143 to 146 and 152 to 154). Thus, it is clearly not established that the Appellant could have prevailed had it filed the same exhibits, without blanking them out. The consequence is that the blanking out did not play a decisive role in the solution of the dispute in front of the sole arbitrator.

To the extent that it had duly been informed of the fact that the exhibits filed were not sufficient to prove its case, the Appellant may derive no benefit from the fact that the sole arbitrator, instead of authorizing the Appellant to present the exhibits only to the arbitrator, to the exclusion of the Respondent – a conceivable solution, but one which raises difficulties from the point of view of the right to be heard (see Jean-François Poudret/Sébastien Besson, Droit comparé de l'arbitrage international, n. 654, 9. 589) – as the Appellant had proposed as an alternative, chose to have the exhibits partially blanked out. Knowing that the blanked out exhibits would not be sufficient to prove the existence of facts which it had the burden of proving, the Appellant should have taken the steps required under such a situation. It could have made the same proposal again, submitted other evidence or, as a last resort, filed the same exhibits without partially blanking them out. It is thus in vain that it seeks to blame the Respondent for the consequences of its own inaction.

Besides the foregoing, the appeal is merely an inadmissible challenge to the result of the assessment of the evidence – whether with regard to the exhibits in dispute or to W._____'s testimony – as it was carried out by the sole arbitrator.

Under such conditions, the appeal may only be rejected to the extent that the matter is capable of appeal.

5.

The Appellant shall pay the judicial costs of the federal proceedings (Art. 66 (1) LTF) and pay a share of costs to its opponent (Art. 68 (1) and (2) LTF).

Based on the foregoing, 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 20'000, shall be born by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 22'000 as a share of costs.

4.

This decision shall be notified to the representatives of the parties and to the sole arbitrator.

Lausanne, January 9, 2008

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

The presiding judge:	The Clerk:
CORBOZ	CARRUZZO