4A_300/2020[1]

Judgment of July 24, 2020

First Civil Law Court

Federal Judge Kiss (Ms.), Presiding
Federal Judge Rüedi (Mr.)
Federal Judge May Canellas (Ms.)
Clerk of the Court: Mr. O. Carruzzo

A._____,
Represented by Mr. Wolfgang Peter, attorney,
Appellant,

v.

1. B._____
2. C._____
Both represented by Mr Constantin Partasides, Mr Georgios Petrochilos and Mr Jan Paulsson, attorneys,
Respondents,

Facts:

A.
On April 25, 2001, B._____ (hereinafter: B._____) and A._____ (hereinafter: A._____) entered into a contract entitled "Gas Sales Purchase Contract"[2] (hereinafter: GSPC) under which the latter undertook to supply certain quantities of gas to its contractual partner and to transport them to the place of delivery. The contract contained a formula to determine the price of the goods. Following several successive postponements agreed by the parties, the start of deliveries was set for December 1, 2005.

In the course of 2003, C._____ (hereafter: C._____) became a member of the GSPC. A._____ never delivered gas to B._____ or C._____.

In an award dated July 31, 2014, a London-based arbitral tribunal recognized that A._____ had breached its gas delivery obligations under the GSPC and continued to default on its commitments.

[1] Translator's Note: Quote as A._____ v. B._____ and C._____, 4A_300/2020.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

[2] Translator's Note: In English in the original text.

B.
On June 28, 2018, B._____ and C._____, on the basis of the arbitration clause included in the GSPC, initiated new arbitration proceedings against A._____ for the payment of damages due to the non-delivery of gas and compensation for the loss resulting from the loss of the market for Iranian gas. The plaintiffs provisionally estimated the amount of damages at 18.6 billion US dollars (USD), *i.e.* USD 5.7 billion for the period between July 31, 2014, and June 28, 2018, and USD 12.9 billion for the period from the submission of the arbitration notice to the GSPC's due date in December 2030.

A three-member Arbitral Tribunal was constituted under the auspices of the Permanent Court of Arbitration (PCA), with its seat in Geneva. English was designated as the language of arbitration.

On April 18, 2019, the Claimants informed the Arbitral Tribunal that they had terminated the GSPC on September 11, 2018.

In a procedural order dated May 24, 2019, the Arbitral Tribunal indicated to the parties that it would first consider its jurisdiction. In a second phase, it would rule on the validity of the termination of the GSPC.

By Award dated July 30, 2019, the Arbitral Tribunal declared that it had jurisdiction to hear the dispute between the parties.

After receiving the written submissions of the parties on the validity of the termination of the GSPC, the Arbitral Tribunal held a hearing on April 5 and 6, 2020, devoted to this issue.

By Award dated May 5, 2020, the Arbitrators found that the GSPC had been validly terminated on September 11, 2018. They specified that the question of costs would be settled in the final award.

C.
On June 4, 2020, A._____ submitted a civil appeal to the Federal Tribunal, with a request for suspensory effect and provisional measures, seeking the annulment of the Award under appeal.

By order of June 9, 2020, the request for suspensory effect and provisional measures was rejected on the grounds that the appeal in all likelihood did not appear to be very well founded.

The Federal Tribunal did not require the submission of an Answer to the appeal.

Reasons:

1.
According to Art. 54(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF[3]; RS 173.110), the Federal Tribunal issues its judgment in an official language[4], as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In the Appeal Brief sent to the Federal Tribunal, the Appellant used French. According to its practice, (see ATF 142 III 521[5] at 1), the Federal Tribunal shall consequently issue its judgment in French.

2.
In the field of international arbitration, civil appeals are admissible against the decisions of arbitral tribunals under the conditions set out in Art.190 to 192 of the Federal Law on Private International Law of December 18,1987, (PILA[6]; RS 291), in accordance with Art. 77(1)(a) LTF.

In the present case, the seat of the Arbitral Tribunal is in Geneva. The Appellant was not based in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Art. 176(1) PILA).

3.
3.1. The civil appeal covered in Art. 77(1)(a) LTF, in connection with Art. 190-192 PILA is admissible only against an award. The juridical act that may be challenged can be a final award, which terminates the arbitral proceedings on substantive or procedural grounds, a partial award, which relates to a quantitatively limited part of a disputed claim or to one of the various claims at issue, or which terminates the proceedings with respect to one of the parties (ATF 143 III 462[7] at 2.1), or even a preliminary or interlocutory[8] award, which settles one or more preliminary questions of substance or procedure (on these concepts, see ATF 130 III 755 at 1.2.1, p. 757).

Partial awards and final awards are not subject to any restriction as to the legal considerations that may be invoked in an appeal against them (ATF 142 III 384 at 1.1.1).

Pursuant to Art. 190(3) PILA, an interlocutory decision can only be challenged directly before the Federal Tribunal on the grounds of irregular composition (Art. 190(2)(a) of the PILA) or lack of jurisdiction (Art.190

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[3] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[4] Translator's Note: The official languages of Switzerland are German, French and Italian

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

[6] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

[7] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-98-2017

[8] Translator's Note: The original text refers to *une decision incidente* or *une sentence incidente* which we have chosen to interchangeably translate as 'interim' or 'interlocutory'.

(2)(b) of the PILA) of the arbitral tribunal. The grievances referred to in Art. 190(2)(c)-(e) PILA can also be raised against interlocutory decisions within the meaning of Art. 190(3) PILA, but only to the extent that they are strictly limited to matters directly related to the composition or competence of the arbitral tribunal (ATF 143 III 462 at. 2.2; 140 III 477[9] at 3.1; 140 III 520[10] at 2.2.3). The possibility of appealing against an preliminary or interlocutory award does not depend on the conditions laid down in Art. 93(1) LTF, as Art. 77(2) LTF excludes, in appeals in international arbitration, the application of Arts. 90-98 LTF (ATF 143 III 462 at 3.2.2). The possibility remains of challenging such awards by means of an appeal against the final award, or even against a partial award, insofar as they influence the content of one or the other of these awards, except to say that this faculty does not derive from Art. 93(3) LTF since the provision is included in the exclusion list of Art. 77(2) LTF but can only be deduced from it by analogy (judgment 4A_335/2014 of December 18, 2014, at. 3.1.1; Bernard Corboz, in *Commentary on the LTF*, 2nd ed. 2014, no. 57 to Art. 77 LTF).

3.2. In the present case, the Award is not final as it was made in the context of arbitral proceedings which are ongoing, regardless of the fate of the present action.

4.
4.1. In its Appeal Brief, the Appellant argues that the Arbitral Tribunal issued a partial award. In its view, the Arbitrators decided part of the subject matter of the dispute separate from the remaining claims and there is no risk of conflicting decisions.

4.2. According to the case-law, a decision is said to be partial when the judge makes a final decision on a part of what is claimed, which could have been judged independently of the other claims made. This independence thus implies that the settled claim could have been the subject of separate proceedings, and that the award under appeal definitively settles part of the dispute (ATF 141 III 395 at 2.4; 135 III 212 at 1.2).

In a decision of principle intended for publication (judgement 4A_203/2019 of May 11, 2020), the Court provided certain clarifications concerning the notion of partial awards and the requirement of independence of claims. It emphasized that a partial award implies not only that it is possible to reach a decision on claims already settled independently of those not yet settled, but also that the outcome of the case still in dispute can be settled independently of the claims already settled (judgment cited, at 2.1.4).

4.3. In this case, the Respondents agreed, among other things, in their request for arbitration prior to the termination of the GSPC, to pay the sum of USD 12.9 billion in damages for the period between June 28, 2018, and the GSPC expiration of December 2030. Insofar as the Arbitral Tribunal finds that the contract has been validly terminated by the Respondents, it will necessarily have to take this circumstance into account when calculating the amount of damages, in the event that it finds that the Appellant breached

[9] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-can-be-different-each-joint-defendant

its contractual commitments and incurred liability. These two issues (the termination of the contract and the calculation of any damages suffered by the Respondents) are therefore closely linked. In this respect, it should be noted that at the procedural hearing of April 24, 2019, to which the Appellant refers in its Appeal Brief, the Respondents indicated the following:

> So far as our claim is concerned, for damages, if the GSPC has been terminated, you will understand as a matter of law we can claim damages for the entire duration of the GSPC. If the termination is found not to be valid, then our claim for damages must be limited to the final date of your award, and so the question of termination will have a profound impact on what follows so far as Claimant's claims are concerned.[11]

It will therefore be for the Arbitral Tribunal to decide on this point and to determine, in the event that it accepts that the Appellant is liable, whether the Respondents are indeed entitled to damages for the entire agreed duration of the GSPC notwithstanding the termination of the GSPC. In these circumstances, it must be considered that the requirement of independence is not met in this case, so that the contested decision is not a partial award.

4.4. The Appellant further notes that as of October 31, 2018, in its Answer to the notice of arbitration, it confirmed its intention to make counterclaims if the Arbitral Tribunal were to declare that it had jurisdiction. Referring to the statements made by the Respondents at the procedural hearing of April 24, 2019, it states that the Respondents themselves acknowledged that the Award under appeal was decisive in determining the outcome of the counterclaim. It points out that it had not formally made a counterclaim at the time the award was issued because it had not yet had the opportunity to submit its Statement of Defense[12] (Appeal Brief) and Counterclaim[13]. According to it, "*it was understood by all (...) that the counterclaim was based on the principle of the continued validity of the GSPC, that is, the invalidity of the alleged termination of the GSPC*" (judgement, no.106). Therefore, the Appellant maintains that the Award under appeal must be a partial award if it now prevents it from submitting its counterclaim.

Such arguments do not convince the Court. As the Appellant itself acknowledges, it had only announced that it intended to submit a counterclaim but had not formally made a counterclaim for enforcement by the GSPC. It must therefore be assumed that the Arbitral Tribunal has not formally decided any counterclaim by the Appellant. The fact that the Appellant can no longer, as it claims, submit a counterclaim does not change the characterization of the Award under appeal, which is of a preliminary nature. Moreover, although it claims the contrary, it is not clear why the interested party could not have formally submitted a counterclaim before the delivery of the Award, in particular in its Brief of March 13, 2020, in which it merely argued, in substance, that the termination of the GSPC was invalid.

4.5. For the rest, the remarks made by the Appellant regarding the possibility that the Award under appeal may be described as final in other countries that are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, (CNY; RS 0.277.12) are irrelevant when assessing whether the conditions for the admissibility of a civil appeal against an international arbitral

[11] Translator's Note: In English in the original text.
[12] Translator's Note: In English in the original text.
[13] Translator's Note: In English in the original text.

award of an interim nature are met. The same applies to considerations relating to the allegedly exceptional dimension of the case, the financial interests at stake, and the lengthening of the proceedings.

5.
In its Appeal Brief, the Appellant exclusively claims the breach of its right to be heard (Art. 190(2)(d) PILA). In so doing, it puts forward an inadmissible argument in a civil appeal against an interlocutory award issued in international arbitration (Art. 190(3) PILA – see at 3.1 above).

6.
On the basis of the foregoing, the appeal is inadmissible.

The Appellant, who is unsuccessful, will incur reduced costs due to the outcome of the federal proceedings (Art. 66(1) LTF). However, it will not have to pay costs to the Respondents as they were not invited to submit an Answer.

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 25'000, shall be borne by the Appellant.

3.
This decision shall be communicated to the parties' counsel and to the Arbitral Tribunal located in Geneva.

Lausanne, July 24, 2020

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

The Presiding Judge:	The Clerk
Kiss	Mr. Carruzzo