

4A_254/2010¹

Judgement of August 3, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: CARRUZZO.

X. _____ SA,

Appellant,

Represented by Mr Nicolas GENOUD

v.

Y. _____ SA,

Respondent,

Represented by Mr Thiemo STURNY

Facts:

A.

A.a On October 12, 2001 X. _____ SA (hereafter: X. _____), a company under Belgian law and Y. _____ SA (hereafter: Y. _____), a company under Spanish law, signed an agreement entitled Business Consultancy Agreement² (hereafter: BCA 2001) pursuant to which the Spanish company undertook to provide some paid services to the Belgian company with a view to allowing the latter to be chosen as contractual counterpart by company V. _____ SA (hereafter: V. _____) which was about to

¹ Translator's note: Quote as X. _____ SA v. Y. _____ SA, 4A_254/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

² Translator's note: In English in the original text.

build a liquefied gas storage facility in Spain. Furthermore Y. _____ undertook to assist X. _____ in the performance of the contract concluded with V. _____ if necessary.

Pursuant to a June 24, 2002 contract concluded within the framework of a reorganization of the eponymous group, X. _____ assigned its liquefied natural gas branch of activities to X.A. _____ GmbH, another company of the group based in Germany, retroactively as of January 1st, 2002.

On June 26, 2002 V. _____ informed X. _____ that the bid of another candidate, a consortium, had been provisionally accepted for the works to be awarded. However it is with a company of group X. _____ that it finally entered into a construction contract in January 2003, which Y. _____ was informed of in a thank you letter from X. _____ on January 29, 2003.

A.b On February 24, 2003 X.A. _____ GmbH and W. _____ BV (hereafter: W. _____), a company under Dutch law, entered into a Business Consultancy Agreement (hereafter: the BCA 2003) almost identical to the BCA 2001, which it was supposed to replace, the only difference between the two contracts being the conditions of payment of the commission due to W. _____.

The 2003 BCA was signed on behalf of W. _____ by a Mr C. _____ who at the time was the sole director of Y. _____ and as such had already signed the 2001 BCA.

On February 17, 2004 W. _____ sent to X.A. _____ GmbH an invoice of EUR 80'500.- as a commission due pursuant to the 2003 BCA.

In the beginning of April 2004 counsel for Y. _____ contacted X. _____ to deplore the fact that his client had not heard from the latter as to the payment of the commission it was due pursuant to the 2001 BCA. In the exchange of correspondence which followed, Y. _____ expressed its surprise to hear of the existence of the BCA 2003.

B.

B.a In a request of April 11, 2005 Y._____, relying on the arbitration clause contained in the 2001 BCA, initiated arbitral proceedings against X._____ with a view to obtaining the payment of a commission of minimum EUR 190'000.- for the services performed pursuant to the contract.

The ICC court of arbitration appointed a sole arbitrator to decide the dispute. It also decided not to admit W._____ and X.A._____ GmbH as parties to the arbitration.

In the arbitral proceedings X._____ challenged both its standing to defend and the standing to act of Y._____ (*locus standi*) because the BCA 2003 had transferred the contractual relation arising from the BCA 2001 to W._____ and to X.A._____ GmbH. According to X._____ the same effect resulted as far as it was concerned from its having assigned the activities involved in the 2001 BCA to the German company of the same group pursuant to a contract of June 24, 2002.

The arbitrator decided to address firstly the issue of *locus standi* and more generally that of jurisdiction. On September 5, 2007 he issued a partial arbitral award³ in which he found that he had jurisdiction in the dispute. Moreover he rejected the arguments as to the standing to act of Y._____ and the standing to defend of X._____.

In substance the arbitrator held that his jurisdiction under the clause inserted in the BCA 2001 was not really challenged by the parties so that at that stage the dispute was limited to the issue of the standing to act and to defend.

Dealing with the four arguments raised by X._____ in connection with that issue, the arbitrator first rejected the argument that the initial attribution of the contract to the consortium had put an end to the BCA 2001 and more generally to the contractual relation between the signatories of that contract. He then ruled out that the assignment of the sector of activities agreed within the X._____ group on June 24, 2002 would

³ Translator's note: In English in the original text.

have implicated the transfer of the 2001 BCA to X.A. _____ GmbH. Finally the arbitrator dealt with the two arguments raised by X. _____ in connection with the 2003 BCA, namely the issue as to whether or not that contract had substituted the 2001 BCA, or, at least, whether or not it had led to the transfer of the contractual relationship as such to W. _____, or even of merely the claims arising from the latter contract. Applying the Swiss Code of Obligations (CO) in conformity with the choice of law contained in the two contracts, he found that their terms were practically identical, that the principal purpose of the 2001 BCA – to seek the award of the construction contract of X. _____ - had already been achieved before the BCA 2003 was executed and that W. _____, as a financial holding, was not in a position to provide the technical services constituting the second purpose of the 2003 BCA. Thus, for the arbitrator, the BCA 2003 was a sham agreement⁴ within the meaning of Art. 18 (1) CO and therefore ineffective. Accordingly the BCA 2001 was still in force and W. _____ could not have been transferred the contractual relationship or the claims relating thereto. It mattered little in this respect whether there was a concealed agreement or not, which he could not determine under the circumstances.

B.b The preliminary objections having been rejected, the case was dealt with on the merits. In its last submissions Y. _____ sought the payment of a commission of EUR 1'139'718.- with interest and an amount of EUR 728'325.- as damages because it had not been implicated in the performance of the construction contract. X. _____ submitted that the claim should be rejected entirely.

In a final award of March 15, 2010 the arbitrator ordered X. _____ to pay to Y. _____ an amount of EUR 1'025'746.- with interest at 5% yearly from January 28, 2009 in connection with the commission due. However he rejected the damage claim made by Y. _____. It was held in the award that Y. _____ had performed the services promised in the 2001 BCA and played a decisive role in the award of the construction contract to a sister company of X. _____, which could not be considered a third party. Moreover the arbitrator held that if Y. _____ had not

⁴ Translator's note: In English in the original text.

participated in the performance of the construction project, X. _____ was not liable for that so that the damage claim was unfounded.

C.

On May 4, 2010 X. _____ filed a Civil law appeal. Arguing that the arbitrator violated its right to be heard (Art. 190 (2) (d) PILA⁵) the Appellant submits that the Federal Tribunal should annul the two awards successively issued by the arbitrator.

In its answer of June 24, 2010 Y. _____ mainly submitted that the matter is not capable of appeal and alternatively that it should be rejected.

In a letter of July 2, 2010 the arbitrator produced his file and made some remarks without any formal submissions as to the appeal.

Reasons:

1.

According to Art. 54 (1) LTF⁶ the Federal Tribunal issues its decision in an official language⁷, as a rule in the language of the decision under appeal. Should that decision be in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the arbitrator they used English and in the briefs submitted to the Federal Tribunal, the Appellant used French and the Respondent German. According to its practice in such a case, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in French.

2.

In the field of international arbitration, a Civil law appeal against arbitral awards is allowed pursuant to the requirements of Art. 190-192 PILA (Art. 77 (1) LTF).

⁵ 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.

⁶ Translator's note: LTF is the Italian and French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

⁷ Translator's note: The official languages of Switzerland are German, French and Italian.

2.1 The seat of the arbitration was set in Geneva. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) and (2) PILA).

2.2 The Appellant is directly concerned by the awards under appeal as the arbitrator ordered it to pay a sum of money to the Respondent after rejecting the arguments it had raised against that claim. Therefore it has a personal, present and legally protected interest to ensure that the awards were not issued in violation of Art. 190 (2) (d) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Filed within 30 days after the final award was notified (Art. 100 (1) LTF in connection with Art. 46 (1) (a) LTF), the appeal satisfies the formal requirements of Art. 42 (1) LTF and the matter is accordingly capable of appeal in principle.

2.3 However the Respondent argues that the matter is not capable of appeal on two grounds which need to be reviewed successively.

2.3.1 Drawing a parallel with the case which led to the judgment published at ATF 128 III 50⁸ the Respondent argues in substance that the partial award the arbitrator issued on September 5, 2007 was an interlocutory decision on jurisdiction within the meaning of Art. 92 LTF, which should have been appealed within 30 days after its notification under penalty of forfeiture. As this was not done the matter would no longer be capable of appeal because the grievance raised exclusively refers to the interlocutory award of September 5, 2007.

Such an opinion cannot be shared. In the case quoted by the Respondent, the Defendant had shown clear intent to refuse arbitration (see ATF 128 III 50 at 2c/bb p. 59 ff). The situation is different in this case. As clearly appears from the text of the June 22, 2006 Procedural order (p. 4 ff at 3 and 4), to which the Respondent refers and even more from the aforesaid award (p. 19 nr. 43 and 44), it is not so much the arbitrator's jurisdiction as such which was challenged by the Appellant in the arbitral

⁸ Translator's note: Case 4P.176/2001 of October 16, 2001.

proceedings but rather the standing of the Parties as to the claim in dispute; and the Appellant did not formally challenge the arbitrator's authority to decide that issue on the merits, neither does it do so in front of the Federal Tribunal. The arbitrator doubtlessly found for his own jurisdiction in the aforesaid award but he also and above all rejected the Appellant's arguments as to the *locus standi* of the Parties, an issue which was central to the dispute. To that extent we are faced with a preliminary award and not with a partial award as its title may suggest (on that concept see ATF 130 III 755 at 1.2.1 p. 757). In view of its nature, such an award could not be appealed directly on ground of violation of the right to be heard (see Art. 190 (3) PILA *a contrario*). Yet the Appellant retains the possibility to criticize it in the appeal against the final award (Art. 93 (3) LTF in connection with Art. 77 (2) LTF *a contrario*; decision 4A_458/2009 of June 10, 2010 at 4.3).

2.3.2 According to case law the party claiming to be the victim of a violation of its right to be heard must complain in the arbitral proceedings immediately; indeed the rules of good faith prevent that party from waiting until the award is notified to raise then only, if the outcome of the dispute is unfavourable, an irregularity which could have been cured if it had been mentioned timely (ATF 119 II 386 at 1a and the cases quoted).

On the basis of that precedent, the Respondent argues that the Appellant never complained of the alleged violation of its right to be heard during the two and a half years between the preliminary award and the final award, although it would have had several opportunities to do so. According to the Respondent, such behaviour, contrary to the rules of good faith, would render the matter incapable of appeal.

The Respondent would doubtlessly be right had the Appellant had the opportunity to cause the procedural irregularity to be cured, which it claims today, in the time between the two awards. Yet that is far from sure. Indeed the arbitrator could not reconsider his preliminary award even though it was not in force (ATF 122 III 492 at 1b/bb). As to the Appellant it could not compel him to do so: on the one hand, the preliminary award could not have been appealed to the Federal Tribunal immediately due to the procedural irregularity to be invoked (in this respect see above at 2.3.1 *in*

fine); on the other hand the procedural irregularity involved was not a ground on which the Appellant could have obtained the revision of the award (see ATF 134 III 286⁹ at 2.1 and the cases quoted). Consequently the Respondent's second argument to deny that the matter is capable of appeal is also to be rejected.

This being said, the fact that the Appellant may never have raised the violation on which it relies today in one way or the other over such a long period and that it even went as far as blaming the Respondent for wanting to revisit the issue of *locus standi*, only to argue that alleged irregularity at a later stage, once the unfavourable outcome of the dispute was known, is doubtlessly likely to weaken that party's position as to the issue in dispute.

3.

As sole grievance, the Appellant argues that the arbitrator based his preliminary award and consequently his final award on a legal ground unforeseeable for the parties and in violation of its right to be heard.

3.1 In Switzerland the right to be heard mainly relates to factual findings. The right of the parties to be asked for their views on legal issues is acknowledged only limitatively. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal impact of the facts and they may also decide the matter based on rules of law other than those relied upon by the parties. Consequently as long as the arbitration agreement does not limit the mission of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically on the impact to be given to the rules of law. As an exception, they have to be asked when the court or the arbitral tribunal considers basing its decision on a provision or a legal consideration which was not discussed in the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and the cases quoted). Moreover, knowing what is unpredictable is a matter of appreciation. Thus the Federal Tribunal shows restraint in applying the aforesaid rule for that reason and because the specificities of this type of proceedings must be heeded to avoid that the argument of an alleged surprise

⁹ Translator's note: An English translation of that decision of March 14, 2008 is available at www.praetor.ch

would be used with a view to obtaining material review of the award by this Court (decision 4A_464/2009 of February 15, 2010 at 6.1 and 4A_400/2008 of February 9, 2009 at 3.1).

3.2 To substantiate its argument, the Appellant claims in summary that the arbitrator based his preliminary award, decisive to the outcome of the dispute, on a legal argument - that the BCA 2003 was void because it was a simulated contract - which none of the parties had raised, whether before or during the arbitral proceedings. In concrete terms, by analysing the various phases of the proceedings (terms of reference, procedural order of June 22, 2006, filing of the briefs of the parties, legal opinion of a Zurich lawyer, witness statements) the Appellant argues that the validity of that contract had never been challenged by anyone.

In a second part of its argument, the Appellant explains why, in its opinion, the parties could not anticipate the pertinence to this case of the legal argument adopted by the arbitrator. It seeks to demonstrate that the parties would and could never have imagined that the arbitrator was going to use such an argument to find that the BCA 2003 was void, whilst admitting that he was not in a position to establish the nature of the concealed contract binding the parties. According to the Appellant, if the parties could have expressed their view on that issue and introduced the necessary evidence, the arbitrator's opinion as to the interpretation of the BCA 2003 and maybe on the contents of the concealed contract would doubtlessly have been different.

3.3 The Appellant may not be followed in its argument that there was an element of surprise. At most it may be granted that the word "concealment" is not specifically mentioned in the briefs of the parties in the record of the arbitration. Concluding from that that the parties could under no circumstances anticipate that the arbitrator would use that legal concept as a basis for his award is a step impossible to take.

Firstly the Appellant itself, represented by Geneva counsel, referred, at least in three briefs (answer of May 18, 2005 p. 12 ff n° 57; synthesis of November 30, 2005, p. 4 n° 21; brief of February 27, 2007 on the issue of locus standi (hereafter brief) , p. 28 n° 163)

to Art. 18 CO¹⁰ the caption of which is as follows: “D.Interpretation of contracts; concealment”. It also quoted the text of the first paragraph, including the section relating to concealment (“...with the intention of concealing the true nature of the contract”¹¹; answer and brief, *ibid.*). And it did so to argue that the parties to the 2003 BCA did not intend to enter into a Business Consultancy Agreement¹² contrary to what the title of that contract and some of its enclosures could have suggested, but rather into an assignment to a third party (W. _____) of the contractual relationship or the claims arising from the 2001 BCA. Proof of that, according to the Appellant, was the fact that the construction contract had already been awarded to a company of group X. _____ at the time the BCA 2003 was signed, although this was the main purpose given to the Business Consultancy Agreement. The Appellant added that company W. _____ would have been totally incapable of providing the services mentioned in the 2003 BCA (brief p. 29 ff n° 171 (a) and (b)) even though it claims the opposite in front of the Federal Tribunal today (appeal p. 14 ff). In other words, the Appellant was aware that the parties to the 2003 BCA had entered into a contract by using language which did not correspond to the true intent. Therefore, at the very least, it should have considered the possibility that the arbitrator could find that contract to be a concealed agreement and hence seek to demonstrate that this was not appropriate.

Furthermore it must be pointed out that the Respondent never conceded that the 2003 BCA, to which it was incidentally not a party, could be qualified as a Business Consultancy Agreement according to its title or as an assignment according to the Appellant’s thesis. The Respondent always maintained that the contract at issue did not in any way modify the legal position resulting from the 2001 BCA on which it based its claims (see concluding brief of February 27, 2007 p. 15 n° 10 (f) and (h)). Thus the Appellant could not but be aware of the fact that the validity of the 2003 BCA was questioned and that it had to consider all the hypothesis, and there are not that many, in which a contract may be ineffective pursuant to the general provisions of the Code of Obligations, including those relating to a concealed contract.

¹⁰ Translator’s note: CO is the French abbreviation for the Swiss Code of Obligations.

¹¹ Translator’s note: In English in the original text.

¹² Translator’s note: In English in the original text.

Finally it could not escape the Appellant that it is consistent case law that a court must take notice of concealment *ex officio* when it is established (ATF 97 II 201 at 5 p. 207; Decision 4A_96/2008 of May 26, 2008 at 2.3). Accordingly the Appellant could not rule out the possibility that the arbitrator would find that a concealed contract had been entered into on the basis of the very text of the 2003 BCA and of the explanations it had given with regard to that contract.

Under such conditions, the grievance based on the violation of the right to be heard appears groundless in this case. Moreover it is not for this court to examine whether the arbitrator was right to see a concealed contract in the BCA 2003 or not. The Appellant is accordingly vainly seeking to demonstrate that this was not the case, arguing in particular that the arbitrator could not say whether the contract concealed another contract or not and in the affirmative what would have been the object of the latter.

4.

This being said, the appeal must be rejected and the costs of the federal proceedings shall be borne by the Appellant (Art. 66 (1) LTF) as well as the costs to which the Respondent is entitled (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.
2. The judicial costs set at CHF 12'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 14'000.- for the federal judicial proceedings.
4. This judgment shall be notified to the representatives of the parties and to the sole ICC arbitrator.

Lausanne, August 3, 2010

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

The presiding Judge:

The Clerk:

KLETT (Mrs)

CARRUZZO