

4A_391/2010; 4A_399/2010¹

Judgment of November 10, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KISS (Mrs),
Federal Judge VON WERDT,
Clerk of the Court: HURNI.

4A_399/2010

1. A. _____ SA,
2. B. _____ SA,
Appellants 1 - 2,
Both represented by Mr. Philipp Känzig

and

4A_391/2010

3. C. _____,
4. D. _____ AG,
5. E. _____ AG,
6. F. _____ AG,
7. G. _____ AG,
8. H. _____ AG,
9. I. _____ AG,
10. J. _____ LLC,
11. K. _____ LLC,
Appellants 3 – 11,

¹ Translator's note: Quote as A. _____ SA and B. _____ SA, 4A_391/2010 and 4A_399/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

All represented by Mr. Bernhard Lötscher and Dr. Axel Buhr

v.

1. L. _____,

2. M. _____ LLC,

Respondents,

Both represented by Mrs. Teresa Giovannini and Mrs. Christiane de Senarclens

Facts:

A.

The Respondents are the Claimants in arbitral proceedings that they initiated through a notice of arbitration with the Zurich Chamber of Commerce (hereafter ZCC) on January 21st, 2008. Appellants 1 – 2 are Respondents 1- 2 and Appellants 3 – 11 are Respondents 3 -11 in the arbitral proceedings as well as five other parties. In the exchange of briefs which took place with a view to constituting the Arbitral Tribunal all Respondents disputed the existence of a joint arbitration clause and accordingly the jurisdiction of the Arbitral Tribunal. The ZCC did not rule out the existence of an arbitration clause however and took the view that the decision on jurisdiction should be left to the Arbitral Tribunal to be constituted. On September 1st, 2008 the ZCC appointed Prof. Dr. Dominique Dreyer upon nomination by the Claimant, Dr. Laurent Killias upon nomination by the Respondents, both as co-arbitrators. On November 10, 2008 the ZCC appointed Prof. Dr. Richard Kreindler as Chairman.

In a letter of November 20, 2008 the Arbitral Tribunal requested the Parties to express their views as to the amount in dispute. Simultaneously it announced the modalities of payment of the deposit. The Respondents disputed again in their brief the existence of an arbitration clause and challenged the jurisdiction of the Arbitral Tribunal.

In a letter of December 5, 2008 the Arbitral Tribunal advised the Parties that the proceedings would be limited to the issue of jurisdiction at first. The amount in dispute was temporarily set at USD 3'017'771.-. Pursuant to the pertinent provisions of the Swiss Rules of International Arbitration (hereafter "Swiss Rules"), this resulted in an advance of costs of CHF 234'065.90 to be paid by the Claimants and the Respondents in half by January 9 and 16, 2009 respectively. Upon receipt of the request that the deposit should be paid several Respondents requested security for costs, which the Arbitral Tribunal rejected in Procedural Order Nr. 1 of December 19, 2008. In letters of December 22, 2008 and January 27, 2009 the Claimants asked the Arbitral Tribunal to issue an urgent decision ordering the

Respondents to pay the entire deposit. The Arbitral Tribunal rejected the request in Procedural Order Nr. 2 of February 12, 2009 and requested the Parties again to pay their respective shares of the deposit by February 18 and 25, 2009. The Arbitral Tribunal threatened at the same time to stay the proceedings pursuant to Art. 41 (4) of the Swiss Rules should the deposit remain unpaid.

In Procedural Order Nr. 3 of March 13, 2009 the Arbitral Tribunal temporarily stayed the proceedings for lack of timely payment of the advance of costs. Thereupon the Claimants and the Respondents submitted various requests yet without paying the advance of costs. In Procedural Order Nr. 4 of June 10, 2009 the Arbitral Tribunal confirmed the suspension of the proceedings, the continuation of which it now made explicitly dependent on the payment of the deposit. Then it set again a time limit to June 30, 2009 and told the Parties that should the payment fail to be made a formal "partial or interim award" would be issued as to the costs. In Procedural Order Nr. 5 of December 11, 2009 the Arbitral Tribunal repeated the warning that it would shortly issue a partial or interim award on costs with a view towards its enforceability, jointly and severally, pursuant to Art. 193 (2) Private International Law Act².

B.

On June 7, 2010 the Arbitral Tribunal issued an "interim award"³. There it declared the proceedings stayed pursuant to Art. 41 (4) of the Swiss Rules until payment of the fees and expenses of the Arbitral Tribunal already incurred (letter A of the award), put on record that the Parties were jointly liable to the Arbitral Tribunal for each of the aforesaid fees and expenses amounting to CHF 175'588.32 (letter B) and ordered the Parties to pay their share into a bank account of the Arbitral Tribunal within 60 days after notification of the decision (letters C and D). Finally the Arbitral Tribunal stated for clarification purposes that in doing so it was not addressing the submissions and requests of the Parties in any way "outside the framework of this partial award" (letter E).

In its reasons the Arbitral Tribunal stated that it was entitled to fees and costs based on the contract between the Parties and the Arbitral Tribunal (*receptum arbitr*). Furthermore the Parties had undertaken to pay the deposit for the arbitration with their agreement to participate in an arbitration based on the Swiss Rules. According to Art. 32 (1) of the Swiss Rules the Arbitral Tribunal has jurisdiction to issue a decision on the costs irrespective of a final award. In the case at hand it was appropriate to issue an interim award as to the fees and costs which the members of the Arbitral Tribunal were entitled to from the beginning of the arbitral proceedings. The Parties had empowered the Arbitral Tribunal to do so as they chose arbitral proceedings according to the Swiss Rules. The fees of the co-arbitrators were assessed by the Arbitral Tribunal at CHF 39'000.- each on the basis of an outlay of 65 hours of work

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

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

each at an hourly rate of CHF 600.-. The Chairman's fee was determined on the basis of an estimated outlay of 130 hours at an hourly rate of CHF 600.- also at CHF 78'000.- with 19% VAT. The Arbitral Tribunal added that the co-arbitrators had actually devoted more hours to the case and that both would normally charge higher rates.

C.

Appellants 1 – 2 and Appellants 3 – 11 appealed the "interim award" of June 7, 2010 independently to the Federal Tribunal on July 7, 2010. Appellants 1 – 2 submit that letters B, C and D of the award should be annulled; Appellants 3 – 11 demand the annulment of the entire award. The Respondents did not make any formal submissions in their brief. The Arbitral Tribunal did not take a position.

On September 8, 2010 the Presiding Judge stayed the enforcement of the award.

Reasons:

1.

The appeals in proceedings 4A_391/2010 and 4A_399/2010 are against the same object and rely on the same facts. Under such circumstances it is appropriate to join the proceedings and to decide both appeals in one judgment.

2.

According to Art. 54(1) BGG⁴ the Federal Tribunal issues its decision in one official language⁵, as a rule in the language of the decision under appeal. When the decision is in another language the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As that is not an official language and the Parties used different languages in front of the Federal Tribunal the decision will be issued in the language of the appeal according to practice.

3.

In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA⁶ (Art. 77 (1) BGG). The seat of the Arbitral Tribunal is in this case in Zurich. Several Parties did not have their seat or domicile in Switzerland at the relevant point in time. As the Parties did not rule out in writing the provisions of Chapter 12 of PILA, they are applicable (Art. 176 (1) and (2) PILA).

⁴ Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

⁵ Translator's note: The official languages of Switzerland are German, French and Italian.

⁶ 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.

4.

According to Art. 77 BGG in conjunction with Art. 190 – 192 PILA a Civil law appeal is allowed only against arbitral awards (BGE 136 III 200 at 2.3.1 p. 203). Whether an appealable award within the meaning of the aforesaid provisions is at hand or not is not determined on the basis of its external description but exclusively according to the contents of the arbitral decision (BGE 136 III 200 at 2.3.3 at 205).

4.1 Final awards by which an arbitral tribunal upholds the claim completely or in part, rejects it or finds the matter incapable of arbitration are arbitral awards which may be the object of a Civil law appeal (BGE 130 III 76 at 3.1.1 p. 78 f.). Furthermore partial awards may be appealed when they decide part of the dispute by disposing comprehensively of some claims in dispute beforehand whilst leaving the others aside for the time being (BGE 130 III 76 at 3.1.2 p. 79). Finally, interlocutory decisions by which the arbitral tribunal decides a procedural or substantive preliminary issue separately in advance may be appealed on the grounds contained at Art. 190 (2) (a) and (b) (Art. 190 (3) PILA, BGE 130 III 76 at 3.1.3 p. 79, at 3.2.1 p. 79 f., at 4 p. 82 ff.)

4.2 As opposed to the foregoing, procedural orders which do not bind the arbitral tribunal and on which it may come back during the proceedings are not among the arbitral awards which may be appealed pursuant to Art. 190 PILA (BGE 136 III 200 at 2.3.1 p. 203; 122 III 492 at 1b/bb p. 494). Procedural orders are among others the decision by which an arbitral tribunal orders the payment of a deposit (SÉBASTIEN BESSON, in: Zuberbühler et al. [Hrsg.], Swiss Rules of International Arbitration, Commentary, 2005, N. 6 zu Art. 31; MARKUS WIRTH, in: Basler Kommentar, 2nd edition. 2007, N. 8 zu Art. 188 IPRG; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd edition, 1993, p. 286; PHILIPP HABEGGER, in: Basler Kommentar, 2010, N. 15 zu Art. 378 ZPO/CH). Decisions by which the arbitral tribunal temporarily stays the proceedings are also procedural orders (BGE 116 Ia 154 at 3a S. 158; MARKUS WIRTH, a.a.O., N. 8 zu Art. 188 IPRG; RÜEDE/HADENFELDT, a.a.O., S. 286; SÉBASTIEN BESSON, a.a.O., N. 9 zu Art. 31) which however may be appealed to the Federal Tribunal when the arbitral tribunal implicitly also decides that it has jurisdiction in the procedural orders staying the proceedings (BGE 116 Ia 154 at 3a p. 159; also see judgment 4A_210/2008 of October 29, 2008 at 2.1).

5.

Appellants 1 – 2 and Appellants 3 – 11 qualify the award under appeal of June 7, 2010 as a partial award. It would address an alleged claim of the arbitrators against the Parties based on the arbitration contract (*receptum arbitri*). The Arbitral Tribunal would have requested final compensation for work

allegedly already performed and not a mere advance of costs. Thus the arbitral proceedings would be concluded by the award under appeal for a “quantifiable part although outside the object in dispute” whilst the proceedings as to the claims of the Parties (including the jurisdictional issue) would remain stayed for the moment.

5.1 As the Appellants themselves recognize the award under appeal does not address the dispute between the Parties in any way. It is accordingly not a partial award as it does not put an end to the proceedings for part of the dispute (see E.4.1). Contrary to its outside characterization as an interim award the award under appeal does not decide any substantive or procedural preliminary issue, the disposition of which would have been necessary with a view to a decision putting an end to the proceedings. The orders contained in the award are more of the nature of procedural orders (see E.4.2).

5.1.1 A stay of the proceedings is ordered at letter A. The Arbitral Tribunal may come back to that at any time and resume the proceedings or terminate them definitively in a decision should the deposit remain unpaid (see BERGER/KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, Rz 1450, 1457, with reference to the Swiss Rules). The stay does not mean implicit admission of jurisdiction as the arbitral tribunal states at letter E explicitly that it does not address in any way any submissions of the Parties “outside the framework of this partial award”. In doing so the Arbitral Tribunal did not decide on its jurisdiction either as it limited the proceedings to the former issue and jurisdiction is disputed by all Respondents.

5.1.2 With regard to the dispositions in letters B, C and D of the decision they are not decisions on costs by their contents but merely renew the request that the deposit should be paid. This appears at first from the reference by the Arbitral Tribunal to Art. 41 (4) of the Swiss Rules as to the stay in letter A. According to that provision the arbitral proceedings may be stayed or temporarily interrupted if the deposit is not paid. Hence when the revocation of the stay (letter A) is made dependent on the payment of the fees and expenditures of the Arbitral Tribunal this is in substance an issue of advances on costs. That their amount corresponds to the expenditures already incurred by the Arbitral Tribunal does not change that qualification. Indeed an arbitral tribunal may collect during the proceedings some advances on costs which do not only secure future but already incurred entitlements. Finally the Arbitral Tribunal specifically refers at Nr. 88 of the award under appeal to the duty of payment of the deposits and reserves for a final award a final decision as to the allocation of the costs. This shows that the decisions in letters B, C and D are not final dispositions as to the allocation of costs between the Parties or as to their amount by which the Arbitral Tribunal would consider to be bound.

5.1.3 Therefore the decisions in letter A (stay) and those in letters B, C and D (request for the payment of the deposit) are procedural orders which do not bind the Arbitral Tribunal and on which it may come back at any time. A Civil law appeal is therefore not open within the meaning of Art. 77 BGG compared with Art. 190 PILA.

5.2 Furthermore even if the Arbitral Tribunal had wanted to issue an actual decision on costs at letters B, C and D its decision could not be the object of a Civil law appeal.

5.2.1 Chapter 12 PILA contains no specific provision which would empower the Arbitral Tribunal to issue a binding decision as to its own costs (ANTON HEINI, in: Zürcher Kommentar, 2nd edition, 2004, N. 26 zu Art. 189 IPRG; BERGER/KELLERHALS, a.a.O., Rz 1477 ff.; this is as opposed to the provisions for internal arbitrations Art. 33 (1) (g) of the concordat on arbitration of March 27, 1969 [CA] or Art. 384 (1) (f) of the Swiss Code of Civil Procedure which came into force on January 1st, 2011 (AS 2010 1739 ff.)).

Legal writers opine in part that the parties may contractually give to the arbitral tribunal the power to issue a binding decision on its own fees (FRANZ HOFFET, *Rechtliche Beziehungen zwischen Schiedsrichtern und Parteien*, Diss. Zürich 1991, p. 251 f.; POUURET/BESSON, *Comparative Law of International Arbitration*, 2nd edition, 2007, Rz. 443). The opinion is advanced here and there that an arbitral tribunal may have jurisdiction to decide on its own fees on the basis of Art. 182 (2) PILA (MARKUS WIRTH, in: *Basler Kommentar*, 2nd edition, 2007, N. 63 zu Art. 189 IPRG, whose opinion is confirmed by an excerpt from ANDREAS BUCHER, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*, Basel 1989, Rz 359 in fine, in which "the award on the costs of the proceedings" is described as a possible object of an appeal based on Art. 190 (2) (e) PILA (public policy)).

Yet according to the majority of legal writing the arbitral tribunal has no authority to issue an enforceable decision as to the fees it may derive from the arbitration agreement (*receptum arbitri*) (ANTON HEINI, a.a.O., N. 26 zu Art. 189 IPRG; BERGER/KELLERHALS, a.a.O., Rz. 1479; HANS-HEINRICH INDERKUM, *Der Schiedsrichtervertrag*, Diss. Fribourg 1988, p. 150; as to the situation before PILA see also MAX GULDENER, *Schweizerisches Zivilprozessrecht*, 3rd edition, 1979, p. 611). This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one's own case (BERGER/KELLERHALS, a.a.O., Rz. 1479; INDERKUM, a.a.O., p. 151). The decision on costs in an arbitral award is therefore nothing else as a rendering of account which does not bind the parties (INDERKUM, a.a.O., p. 151) or a circumscription of the arbitrators' private law claim based on the arbitration agreement on which in case of dispute the State Court will have to decide (HEINI, a.a.O., N. 26 f. zu Art. 189 IPRG). It is only in the relationship between the parties that the indication of the amount

of the procedural costs in the arbitral award has the effect of an enforceable judgment, namely to the extent only that it decides on the allocation of and liability for the costs between the parties (BERGER/KELLERHALS, a.a.O., Rz. 1479).

5.2.2 The jurisdiction of the arbitral tribunal is limited to the dispute submitted by the parties and it ends where the dispute between the parties is not at issue but rather the relationship between the parties on the one hand and the arbitral tribunal on the other. Accordingly any disputes between the parties and the arbitral tribunal as to the arbitrators' compensation is, correctly conceived, to be decided by the competent State Courts (BERGER/KELLERHALS, a.a.O., Rz 1735). Furthermore even legal writing acknowledging jurisdiction of the arbitral tribunal as to its fees under specific circumstances does not suggest that the arbitral tribunal would have such jurisdiction at such an early stage in the proceedings, in which – as in this case – it has not yet decided on its own jurisdiction, whether explicitly or implicitly.

No other conclusion is to be drawn from Art. 32 (1) of the Swiss Rules according to which the arbitral tribunal may also award costs in awards that are not final. This may refer to accessory decisions in partial awards or interlocutory decisions, but not to some self-sufficient interim calculations of the arbitrators' fees dressed into an enforceable judgment.

Lacking authority of the Arbitral Tribunal to decide the issue, letters B, C and D of the "interim awards" under appeal may not contain decisional orders even if one were to see in them the liquidation of previously incurred costs of the Arbitral Tribunal and not a request for the payment of a deposit. They are therefore mere presentations of accounts which lack the characteristics of an award subject to appeal within the meaning of Art. 77 BGG compared with Art. 190 PILA (also see HEINI, a.a.O., N. 26 zu Art. 189 IPRG). A Civil law appeal is therefore not available against them.

6.

The matter is not capable of appeal.

In such an outcome of the proceedings, the Appellants have to pay costs (Art. 66 (1) BGG). No costs are to be awarded to the Respondents as they made no submissions in their brief and therefore did not prevail in the appeal proceedings (Art. 68 (1) BGG).

Therefore the Federal Tribunal pronounces:

1. Proceedings 4A_391/2010 and 4A_399/2010 are joint.

2. The matters are not capable of appeal.
3. The costs of the judicial proceedings in case 4A_391/2010 of CHF 4'000.- shall be paid by Appellants 3 and 11 severally and in equal shares internally.
4. The court costs in case 4A_399/2010 of CHF 4'000.- shall be paid by Appellants 1 and 2 severally and in equal share internally.
5. No costs are allocated to the Respondents.
6. This judgment shall be notified in writing to the Parties and to the Arbitral Tribunal of the Zurich Chamber of Commerce.

Lausanne, November 10, 2010

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

The Presiding Judge:

The Clerk:

KLETT (Mrs)

HURNI