4A_428/2008[1]

Decision of March 31, 2009
First Civil Law Court

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

1. Parties
Vivendi S.A.,
2. Vivendi Telecom International S.A.,
3. Elektrim Telekomunikacja Sp. z o.o.,
4. Carcom Warszawa Sp. z o.o.,
5. Elektrim Autoinvest SA,
Appellants,
all represented by Dr. Georg NAEGELI and Mrs Mariella ORELLI,

v.

1. Deutsche Telekom AG,
2. T-Mobile International AG & Co. KG,
3. T-Mobile Deutschland GmbH,
4. T-Mobile Poland Holding No. 1 BV,
5. Polpager p.p. z o.o.,
all represented by Dr. Paolo Michele PATOCCHI and Dr. Martin AEBI,
6. Elektrim SA,

[1] Translator's note: Quote as *Vivendi et al. v.* 4A_428/2008. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

7. Mega Investments Sp. z o.o.,

8. Elektrim Finance B.V.,

represented by Dr. Dieter Gränicher and Dr. Maurice Courvoisier,

9. Polska Telefonia Cyfrowa Sp. z o.o.,

represented by Matthias Scherer, Vincent Tattini and Noradèle Radjai,

Respondents

Facts:

A.

According to the submissions of the Appellants 1-5, on March 29, 2006, they and the Respondents 1-9, including in particular Elektrim S.A., with registered office in Warsaw, Poland, (Respondent 6), entered into, *inter alia*, a Settlement Agreement, a draft of which was in writing but never signed. Article 22.1 of the draft agreement contains the following arbitration clause:

"Any dispute, claim or controversy relating to, arising out of, or in connection with this Agreement, including any question regarding its formation, existence, validity, enforceability, performance, interpretation, breach, or termination, shall be finally resolved under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. None of the arbitrators shall be a German, French or Polish citizen. The language of the arbitral proceedings shall be English. The place of arbitration shall be Geneva, Switzerland.[2]"

B.

B.a In a Request for arbitration of April 13, 2006, the Appellants initiated arbitration proceedings before the International Court of Arbitration of the International Chamber of Commerce (ICC). In their answers, the Respondents essentially challenged the jurisdiction of the Court of Arbitration. Thereupon, the ICC, at its session of August 18, 2006, on the basis of *prima facie* jurisdiction in accordance with Art. 6 (2) of the ICC Rules, ordered the proceedings to continue and an arbitration panel composed of three arbitrators, with seat in Geneva (the "Arbitral Tribunal") was formed and confirmed by the International Chamber

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

of Commerce. In a letter of November 10, 2006 to the Parties, the ICC Secretariat advised that the Court of Arbitration was required to render a final decision on jurisdiction based on Art. 6 (2) ICC Rules. On January 13, 2007, the Parties, with the exception of Respondent 7, agreed on the Terms of Reference for the Arbitral Tribunal. Lacking the agreement of Respondent 7, the Terms of Reference were confirmed by the International Chamber of Commerce on February 23rd, 2007 based on Art. 18 (3) of the ICC Rules.

B.b By letter of September 5, 2007, Respondent 6 informed the Arbitral Tribunal that the Warsaw bankruptcy court had declared it bankrupt by decision of August 21, 2007, which was in force. Pursuant to Art. 142 of the Polish Bankruptcy and Reorganisation Act (*Prawo upadłościowe i naprawcze*; "pKSG"), such a bankruptcy finding results in the automatic cancellation of any arbitration agreements entered into by the bankrupt, and the automatic termination of any ongoing arbitration proceedings in which the bankrupt is involved as a party. The Parties agreed on the following English translation of the wording of Art. 142 pKSG:
"Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.[3]"
For this reason, in the opinion of Respondent 6, the proceedings should be ended with regard to itself, irrespective of whether an arbitration agreement came into force or not.

B.c Against this background, the Arbitral Tribunal limited the proceedings to the procedural position of Respondent 6. In an interim award of July 21, 2008, it stayed the proceedings in its respect on the basis of Art. 142 pKSG. It held that the words "pending arbitration proceedings" in accordance with Art. 142 pKSG were to be understood as meaning any arbitration proceedings, including any proceedings before foreign arbitral tribunals. The aim of Art. 142 pKSG was to exclude the jurisdiction of arbitral tribunals for insolvent Polish parties. The opinion of the Claimants that termination of proceedings before a Swiss court or an arbitral tribunal in Switzerland cannot be terminated on account of Polish law, was accurate. However, Polish bankruptcy law can govern the effects of bankruptcy on insolvent Polish legal entities. With respect to its applicability, the Arbitral Tribunal held that the standing to act in a Swiss arbitration was determined according to the general conflict of law

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

rules of PILA[4] (SR 291), and, for a legal person, determined on the basis of Art. 154 (f) PILA. The continued capacity[5] of the Respondent to appear in arbitration proceedings is thus to be determined according to Polish law. According to Art. 142 pKSG, if a Polish party is declared bankrupt it loses its subjective capacity to be a party in arbitration proceedings. The ongoing arbitration proceedings against Respondent 6 were therefore to be stayed (holding [i]) and the jurisdiction with respect to the remaining Respondents to be determined in subsequent decisions (holding [iii]).

C.

On September 15, 2008, the Appellants filed a Civil Law appeal with the Federal Tribunal seeking the annulment of holding [i] of the arbitral award of July 21, 2008 and a finding that the proceedings be continued in respect of Respondent 6 too.

In their answer, Respondents 1 to 5, 6, and 9 submitted that the appeal should be rejected insofar as it can be allowed. Respondents 7 and 8 and the Arbitral Tribunal did not file any submissions.

Reasons:

1.

According to Art. 54 (1) BGG[6], the Federal Tribunal issues its decisions in one of the official languages, 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 different languages before the Federal Tribunal, the Federal Tribunal, in accordance with its practice, will issue its decision in the language of the appeal.

2.

2.1 In international arbitration, Civil Law appeals are possible against the awards of arbitral tribunals as provided by Art. 190 to 192 PILA (Art. 77 (1) BGG). The seat of the arbitral

[4] Translator's note: PILA is the most commonly used English abbreviation for the Federal Private International Law Act of December 18, 1987, RS 291.

[5] Translator's note: In English in the original text.

[6] Translator's note: German abbreviation for the Federal Statute of June 17, 2005 organising the federal courts, RS 173.110

Tribunal is in Geneva in this case. None of the Parties were domiciled in Switzerland at the time of the alleged conclusion of the arbitration agreement. As the Parties did not exclude in writing the provisions of chapter 12 PILA, these must be applied (Art. 176 (1) and (2) PILA).

2.2 If the arbitral tribunal denies jurisdiction, it issues a final decision, which may be challenged before the Federal Tribunal on all the grounds set forth in Art. 190 (2) PILA. In this case, the Arbitral Tribunal issued a decision in which it denied jurisdiction with respect to Respondent 6. A decision denying jurisdiction in respect of one or several Respondents is an award (Art. 91 (b) BGG), which may be appealed in accordance with Art. 190 (2) PILA in the same way as a final award.

2.3 The Appellants are directly concerned by the award under appeal, which denies the jurisdiction of the Arbitral Tribunal in respect of the Respondent against which they brought a claim. They thus have a legally protected interest to its annulment (Art. 76 (1) BGG). The appeal was filed in a timely manner and in the legal format (Art. 42 (1) BGG; Art. 100 (1) BGG in connection with Art. 46 (1) (b) BGG), and the matter is accordingly capable of appeal.

2.4 A Civil Law appeal against international arbitration awards (Art. 77 (1) BGG) may only seek that the matter be returned for a new decision, *i.e.* it may only lead to the annulment of the decision under appeal (see Art. 77 (2) BGG, which excludes the applicability of Art. 107 (2) BGG). Insofar as the dispute concerns the jurisdiction of the Arbitral Tribunal, as was already the case in the context of public law appeals under the previous statute, the Federal Tribunal may exceptionally issue a finding as to the jurisdiction or lack of jurisdiction of the Arbitral Tribunal (BGE 127 III 282 at 1b; 117 II 94 at 4). In this case, the arbitral tribunal found that it lacked jurisdiction with respect to Respondent 6 due to its lack of standing to participate in arbitration proceedings, however it did not at all examine whether the arbitration agreement was even validly entered into or not. In these circumstances, the Federal Tribunal cannot issue a finding on the jurisdiction of the Arbitral Tribunal with respect to Respondent 6. Accordingly, the matter is not capable of resolution by way of a finding.

3.

The Appellants claim that the Arbitral Tribunal wrongly denied jurisdiction with respect to Respondent 6, in that it denied its standing to participate in the arbitration proceedings.

3.1 The issue as to the standing to appear as a party in arbitration proceedings must be examined in the context of the jurisdictional appeal, according to Art. 190 (2) (b) PILA (BGE 117 II 98 at b with reference; decision 4P.126/1992 of October 13, 1992 at 6a, publ. in: SZIER 1994, p. 131 ff.). The Federal Tribunal has full discretion to examine the arguments pertaining to jurisdiction, including preliminary questions of material law on which the decision on jurisdiction depends (seminal decision: BGE 117 II 94 at 5a p. 97; see further BGE 129 III 727 at 5.2.2 p. 733; 128 III 50 at 2a p. 54; 119 II 380 at 3c p. 383, with references). If such preliminary questions are to be decided in accordance with foreign law, the Federal Tribunal has absolute and full discretion to examine its application in the context of a jurisdictional appeal. In such case, the Federal Tribunal follows the clearly prevalent opinion in the applicable foreign legal system and, in the event of controversy between case law and legal writing, the case law of the higher courts (decision 4P.137/2002 of July 4, 2003 at 7.2.1).

3.2 As to the standing to participate in arbitration proceedings, PILA contains an express rule only for legal entities that are state-owned or -operated (Art. 177 (2) PILA). The law is silent regarding the standing of non-state parties to participate in arbitration proceedings (Message of the Federal Council as to PILA of November 10, 1982, BBl 1983 I 263 ff., p. 459 no. 2101.22). Therefore, the general basic principle of procedure applies, according to which the standing to participate in proceedings depends on the preliminary issue – under material law - of legal capacity (see also BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, mn. 326, 340). This is determined according to the status of the person or legal entity, i.e. based on the applicable law according to Art. 33 f. PILA (for natural persons) and Art. 154, 155 (c) PILA (for legal entities) (KURT SIEHR, Das Internationale Privatrecht der Schweiz, 2002, p. 714; BERGER/KELLERHALS, as cited above., mn. 328; POUDRET/BESSON, Droit comparé de l'arbitrage international, 2001, mn. 271). The special conflict of law rule of Art. 178 (2) PILA does not play any role in this respect.

The Respondent is incorporated as a common stock corporation under Polish law (Spólka Akcyjna). The legal capacity and thus its standing as a party in international arbitral proceedings is assessed based on Art. 154 in connection with Art. 155 (c) PILA and therefore according to Polish law. This corresponds in this case to the bankruptcy law (regarding its application in arbitration proceedings Wenger/Müller, Basler Kommentar, 2nd edition, 2007, n. 78 regarding Art. 178 PILA; Peter Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd edition, 1989, mn. 428; Berger/Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, mn. 511; Poudret/Besson, as cited above., mn. 290; Kaufmann-Kohler/Rigozzi, Arbitrage international, 2006, mn. 271; see also Martin Bernet, Schiedsgericht und Konkurs einer Partei, in: Rechtsetzung und Rechtsdurchsetzung, Festschrift für Franz Kellerhals, 2005, p. 3 ff.; François Perret, Faillite et arbitrage international, ASA Bull. 25 [2007], p. 36 ff.; Kaufmann-Kohler/Lévy, Insolvency and International Arbitration, in: The Challenges of Insolvency Law Reform in the 21st Century, 2006, p. 267; Laurent Lévy, Insolvency in Arbitration [Swiss Law], Int. A.L.R. 2005, p. 26 f.; Brown-Berset/Lévy, Faillite et Arbitrage, ASA Bull. 4/1998, p. 667 f.; Pierre Lalive/Paolo Michele Patocchi, L'arbitrato e il fallimento internazionale, in: Il nuovo diritto internazionale privato in Svizzera, Quaderni giuridici italo-svizzeri, Mailand 1990, p. 321 ff.; concerning preliminary questions not eligible for arbitration see in addition Schnyder/Liatowitsch, Internationales Privat- und Zivilverfahrensrecht, 2nd edition, 2006, p. 188; Anton Heini, in: Zürcher Kommentar, 2nd edition, 2004, no. 17 ff. re. Art. 187 PILA).

3.3 According to the findings of the Arbitral Tribunal, which refer, *inter alia*, to the expert opinions of Polish law professors, Respondent 6, when bankrupt, lost the standing to participate in arbitral proceedings as a party. According to Art. 142 pKSG, which governs a specific aspect of a party's standing to appeal, a Polish bankrupt immediately loses its standing to participate in arbitral proceedings. There is no reason to doubt the validity of this legal finding. Even the Appellants did not try to argue that Polish law must be interpreted otherwise. The Arbitral Tribunal therefore rightly denied jurisdiction in this case with respect to Respondent 6.

4.

For these reasons, the appeal must be rejected, to the extent that the matter is capable of appeal. In such an outcome of the proceedings, the costs shall be borne by the Appellants

and the Appellants shall compensate the Respondents, which they caused to be involved in the Federal judicial proceedings (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 of CHF 50'000 shall be borne by the Appellants severally and in equal shares internally.

3.
The Appellants, shall pay to the Respondents 1 to 5, 6 and 9 (severally and in equal shares internally) an amount of CHF 60'000 for the Federal judicial proceedings.

4.
This decision shall be notified in writing to the Parties and the International Chamber of Commerce arbitral tribunal sitting in Geneva.

Lausanne, March 31, 2009

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

The Presiding Judge: The Clerk:

KLETT HURNI