4A_305/2013[1]

Judgment of October 2, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Niquille (Mrs.)
Clerk of the Court: Hurni

1. X._____ AG, and
2. X._____ *Technologies S.A.E.*
Both represented by Dr. Nathalie Voser, Dr. Manuel Liatowitsch and Mrs. Sonja Stark-Traber,
Appellants

v.

Y._____,
Represented by Dr. Khaled El-Shalakany
Respondent

Facts:

A.
A.a. X._____AG (Appellant 1) is a capital company under German law seated in R._____.

X._____ Technologies S.A.E. (Appellant 2) is a capital company under the law of the Arab Republic of Egypt seated in Egypt.

[1] Translator's Note: Quote as X._____AG and X._____ Technologies S A.E. *v.* Y._____. 4A_305/2013. The original of the decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Y._____ (Respondent) is a company under the law of the Arab Republic of Egypt seated in Egypt. The Respondent and Z._____ belong to the Egyptian group Q._____.

A.b. On February 18, 1999, the Appellants entered into an exclusive distribution contract ("The Distribution Agreement 1999") on the basis of which the Respondent was the Appellant 1's distributor in Egypt between 1999 and 2003.

The Distribution Agreement 1999 contains an arbitration clause at Article 18.

On November 25, 2003, the parties terminated the Distribution Agreement 1999 by way of a termination agreement. Eventually, the Appellants entered into a new Distribution Agreement 2003 with C._____, which superseded the Distribution Agreement 1999 with the Respondent.

In 2004, the Appellants and Z._____ entered into a Side Letter 2004 in which C._____ undertook to take over the entire responsibility for *"all commitments, obligations and litigations out of the business of Y._____"*[2]. In 2006, the Appellants and Z._____ entered into a new Distribution Agreement 2006 that was not exclusive as opposed to the previous distribution contracts. Parallel to this, a Settlement Agreement 2006 was concluded, in which Z._____ undertook to withdraw various claims pending against the Appellants in the Egyptian courts against payment of a certain amount. However the Appellants did not make the corresponding payment.

A.c. Subsequently, the Respondent filed various cases in the Egyptian courts in which it made claims against the Appellants on the basis of the Distribution Agreement 1999. The Appellants invoked the arbitration clause in these proceedings.

B.

In order to defend against the Respondent's repeated claims in Egypt under the Distribution Agreement 1999, the Appellants started arbitration proceedings in the ICC on January 13, 2011, seeking a finding that the Respondent had no claims in connection with the Distribution Agreement 1999 and/or in connection with its termination.

The Respondent disputed the jurisdiction of the arbitral tribunal.

---

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

In an award of May 6, 2013, the arbitral tribunal denied jurisdiction to decide the arbitral claim brought against the Respondent by the Appellants.

C.
In a Civil law appeal, the Appellants made the following submissions to the Federal Tribunal:

"1. The arbitral award of May 6, 2013 in the International Chamber of Commerce arbitration n. 17680/FM/MHM/EMT must be annulled with a finding that the arbitral tribunal has jurisdiction to decide the Appellants' claim, with the exception of submissions n. 2, 3 and 4 of the Appellants, according to the Terms of reference.
2. The case should be sent back to the arbitral tribunal with the exception of submissions n. 2, 3 and 4 of the Appellants, according to the Terms of reference, for a new, substantive adjudication of the arbitration claim.
3. Alternatively, the proceedings should be sent back to the arbitral tribunal for a new decision on jurisdiction.
4. The Respondent should pay the costs and compensate the Appellants."

No exchange of brief was ordered.

Reasons:

1.
According to Art. 54 (1) BGG[3], the judgment of the Federal Tribunal is issued in an official language, as a rule in the language of the decision under appeal. Should this be in another language, the Federal Tribunal uses the official language[4] chosen by the parties. The decision under appeal is in English. As this is not an official language and the Appellants used German in the Federal Tribunal, the judgment of the Federal Tribunal will be issued in German.

[3] Translator's Note: BGG is the German 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.

2.

In the field of international arbitration, a Civil law appeal is allowed under the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77 (1) (a) BGG).

2.1. The seat of the arbitral tribunal is in Zürich in this case. Both parties had their seat outside Switzerland at the relevant time. As the parties did not exclude in writing the provisions of Chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

2.2. Only the grievances limitively listed in Art. 190 (2) PILA are admissible (BGG 134 III 186[6] at 5 P. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3 BGG) the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief; This corresponds to the duty to submit reasons in Art. 106 (2 BGG) for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[7] at 5 p. 187 with reference). Criticism of an appellate nature is not allowed (BGE 134 III 565[8] at 3.1 p. 567; 119 II 380 at 3b p. 382).

2.3. The Federal Tribunal bases its judgment on the facts found by the arbitral tribunal (Art. 105 (1) BGG). This Court can neither rectify nor supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 BGG and of Art. 105 (2) BGG). However, the Federal Tribunal can review the factual findings of the award under appeal when some admissible grievances are raised against such factual findings within the meaning of Art. 190 (2) PILA or when some new evidence is exceptionally taken into consideration (BGE 138 III 29 at 2.2.1 p. 34[9]; 134 III 565 at 3.1 p. 567[10]; 133 III 139 at 5 p. 141; each with references). Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to have the factual findings corrected or supplemented on this basis must show with reference to the record that the corresponding factual allegations were made in the arbitral proceedings in accordance with the procedural rules (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; each with references).

---

[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: Full English translation available at http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[7] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties%20?search=%22January+22%2C+2008%22

[8] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[9] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[10] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

3.

The Appellants argue on the basis of Art. 190 (2) b PILA that the arbitral tribunal wrongly denied jurisdiction. It would have reached the conclusion that the Parties had fully terminated the Distribution Agreement 1999 - including the arbitration clause- on the basis of a normative interpretation of two contractual provisions agreed upon between the Appellants and Z._____ as a third party in the Side Letter 2004, respectively in the Settlement Agreement 2006. This construction of a normative consent by the arbitral tribunal would be untenable and violates the principle of autonomy of the arbitration clause. The statements and actions of the parties would rather prove that the Parties intended that the arbitration clause should remain in force, even after the termination of the Distribution Agreement 1999.

3.1. The Federal Tribunal reviews jurisdictional issues according to Art. 190 (2) b PILA freely from a legal point of view, including the substantive preliminary issues on which the determination of jurisdiction depends. However, even in the framework of a jurisdictional appeal, it reviews the factual findings of the arbitral award under review only when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29 at 2.2.1 p. 34[11]; 134 III 565 at 3.1 p. 567[12]; 133 III 139 at 5 p. 141).

3.2.

3.2.1. An arbitration clause is an agreement by which two or more determined or determinable parties agree to bind themselves to submit one or several existing or future disputes to an arbitral tribunal by excluding the original jurisdiction of the state, according to a legal order determined directly or by reference (BGE 138 III 29 at 2.2.3 p. 35[13] with references).

When an arbitration clause has been entered into, it can be rescinded at any time, *i.e.* in particular, during the arbitral proceedings, by an informal mutual agreement (POUDRET/BESSON, Comparative law of international arbitration, 2nd edition, 2007, n. 379; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd edition, 2010, n. 556; Pierre-Yves Tschanz, in: Commentaire romand, 2011, n. 181 to Art. 178 PILA; Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd edition, 2010, n. 273). In such a case, the jurisdiction of the arbitral tribunal lapses.

---

[11] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s%20?search=%224A_246%2F2011++%22

[12] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[13] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

3.2.2. The interpretation of an arbitration clause follows the principles applicable to the interpretation of private declarations of intent. Principally, it is the concurrent factual intent of the parties that is decisive. This subjective interpretation of the contract relies on the assessment of the evidence (BGE 132 III 626 at 3.1 p. 632 with reference).

If the first instance finds a contractual content supported by the actual concurrent intent of the parties, this is a factual finding which is basically binding for the Federal Tribunal (Art. 105 (1) BGG).

It is only when no concurring factual intent can be determined that the arbitration agreement must be interpreted objectively, *i.e.* by determining the presumable intent of the parties as it could and should be understood by the recipient of the statement in good faith, according to the overall circumstance (BGE 138 III 29 at 2.2.3[14]; 130 III 66 at 3.2 p. 71). The time of the conclusion of the contract is decisive in this respect, as the subsequent behavior of the parties is of no significance to interpretation according to the principle of reliance (BGE 129 III 675 at 2.3 p. 680 with reference).

3.3. According to the arbitral tribunal, the evidence of the agreements concluded after the termination of the Distribution Agreement 1999 shows that the Parties wanted to terminate the Distribution Agreement 1999 completely, *i.e.* including the arbitration clause. The arbitral tribunal points out in this respect that both the Side Letter 2004 and the Settlement Agreement 2006 contain a passage according to which all agreements between the Respondent and the contractual parties would remain in force except the Distribution Agreement 1999 ("*all previous agreements, except for the Distribution Agreement dated February 18, 1999, between Y._____ and the Parties and/or End-users of Contractual Products in Egypt remain in force and will be adhered to by the Distributor without limitations*[15]"). The statement repeated twice that the Distribution Agreement 1999 was terminated and the abandonment of any reservation in favor of the continued validity of the arbitration clause prove according to the arbitral tribunal a joint intent of the Appellants and the Respondent as well as their affiliated company Z._____ to terminate the Distribution Agreement 1999 including the arbitration clause.

3.4. Contrary to the views of the Appellants, these reasons of the arbitral tribunal do not constitute normative but indeed subjective interpretation of the contract. Based on the subsequent behavior of the parties, the arbitral tribunal assessed the evidence and reached the conclusion that there was a concurrent factual intent of the parties at the time the termination agreement was concluded. This

[14] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

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

appears from the clear wording of the reasons according to which the subsequent behavior of the parties "evidenced[16]" "joint intent[17]" and the fact that the subsequent behavior of the parties is not relevant to an interpretation according to the principle of reliance. The conclusion of the arbitral tribunal that the arbitration agreement contained in the Distribution Agreement 1999 was rescinded by factual consent is a factual finding which binds the Federal Tribunal (Art. 105 (1) BGG).

The Appellants raise no admissible grievances in this respect and merely argue that the normative interpretation of the Termination agreement - which did not take place here - would be inaccurate; in view of the factual findings of the arbitral tribunal, the corresponding arguments of the Appellants appear as mere appellate criticism of the assessment of the evidence by the arbitral tribunal, which is not admissible in an appeal against an arbitral award according to Art. 190 (2) PILA. This also applies to the argument that, according to the Appellants, the principle of autonomy of the arbitration agreement would have been disregarded. The argument is not admissible.

4.

Furthermore the Appellants argue that their right to be heard would have been violated (Art. 190 (2) d PILA) due to a surprising application of the law because the arbitral tribunal would have given a "new interpretation" to the principle of autonomy of the arbitration clause and would have constructed a "normative consent" without hearing the Appellants in this respect.

This argument too relies on the inaccurate assumption that the arbitral tribunal would have assumed a termination of the arbitration agreement by normative consent. The arbitral tribunal did not give a new interpretation to the principle of the autonomy of the arbitration clause or construct normative consent but rather assessed the evidence and reached the conclusion that there was concurrent factual intent to rescind the arbitration agreement. This is no surprising application of the law. To the extent that the Appellants may wish to claim "surprising assessment of the evidence" by analogy, they disregard the principles developed by the Federal Tribunal, according to which there is no application by analogy to the assessment of the evidence of the concept of application of the law by surprise (Judgment 4A_214/2013 of August 5, 2013, at 4.1, 4.3.1[18]; 4A_538/2012 of January 17, 2013 at 5.1[19]). The arguments of the Appellants, in this respect as well, constitute unauthorized criticism of the assessment

[16] Translator's Note: In English in the original text.
[17] Translator's Note: In English in the original text.
[18] Translator's Note: Full English translation soon available at http://www.swissarbitrationdecisions.com
[19] Translator's Note: Full English translation available at http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue

of the evidence by the arbitral tribunal in the framework of an appeal against an arbitral award according to Art. 190 (2) PILA, which is not admissible.

5.
The matter is not capable of appeal.

In such an outcome of the proceedings, the Appellants are jointly liable for the costs (Art. 66 (1) and (5) BGG). The Respondent underwent no costs as a consequence of the federal proceedings and therefore is not to be awarded costs.

Therefore the Federal Tribunal Pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs set at CHF 20'000.-- shall be borne jointly by the Appellants and in equal shares between them.

3.
This judgment shall be notified in writing to the parties and to the ICC arbitral tribunal in Zürich.

Lausanne, October 2, 2013

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Hurni