4A_672/2012[1]

Judgment of April 23, 2013

First Civil Law Court

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

1. X._____ Ltd,
Represented by Dr. Martin Burkhardt,
Appellant,

v.

Y._____ GmbH
Represented by Mr. Daniel Hochstrasser and Ms. Nadja Jaisli Kull,
Respondents,

Facts:

A.
A.a
X._____ Ltd is a company limited by shares headquartered in A._____, Israel. Its goal is the distribution of biotechnological and pharmaceutical products in Israel and in the neighboring territories.

Y._____ GmbH has its seat in Zug and is mainly involved in coordinating the activities of the American group Y._____ in Europe, in particular the operational management, the support and the supervision of the companies of this group already in existence or still to be created.

A.b
From 2001 until 2009, X._____ Ltd acted as local distributor for Y._____ GmbH in the framework of various distributions and supply contracts concerning the promotion the sales and the distribution of a pharmaceutical on "the territory of Israel, the West Bank and the Gaza-Palestine Autonomous Authority."[2]

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[1] Translator's note: Quote X._____ *v.* Y._____; 4A_672/2012. The original the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

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

On November 22, 2009, the parties entered into a "Transition Agreement" as to the early termination of all distribution contracts. This "Transition Agreement" contains an arbitration clause at § 7.1 stating that an arbitral tribunal sitting in Zurich would have jurisdiction to resolve the disputes arising from and in connection with the contract. As compensation for the early termination of its distribution rights X._____ Ltd was to receive a so-called 'Transition Payment' amounting to USD 1'050'000 according to Art. 3.1 of the "Transition Agreement". This payment was subject to the realization of four conditions according to Art. 3.1 in connection with Art. 4 of the Agreement. A dispute eventually arose between the parties as to the fulfillment of the "Transition Agreement."

B.

B.a

Pursuant to a Request for Arbitration of November 28, 2010, X._____ Ltd initiated arbitral proceedings according to § 7.1 of the Transition Agreement and the Rules of the International Chamber of Commerce (ICC). In a Statement of Claim of July 29, 2011, it submitted the following claims against Y._____ GmbH to the ICC Arbitral Tribunal sitting in Zurich:

> *1. Respondent be ordered to pay to Claimant an amount of USD 1'721'898.50, plus such amount the Arbitral Tribunal finds fair and equitable in application of X._____'s right under Article 418(u) CO, plus interest of 5 %:*
>
> *1.1 on an amount of USD 752'023.20 since January 17, 2010;*
> *1.2 on an amount of USD 190'805.50 since May 11, 2010;*
> *1.3 on an amount of USD 594'043.20 since May 6, 2010;*
> *1.4 on an amount of USD 27'772.80 since May 6,2010;*
> *1.5 on an amount of USD 8'744.80 since December 28, 2010;*
> *1.6 on an amount of USD 148'600 since December 28, 2010;*
>
> *2. Respondent be ordered to bear all costs of the arbitration proceedings and to reimburse Claimant's costs and attorney fees.*[3]

In a submission of January 31, 2012, Y._____ GmbH made the following submissions:

> *As to the Main Claim:*
> *Reject with prejudice any and all of Claimant's claims.*
>
> *As to the Counterclaim:*
> *Order Claimant to pay to Respondent the amount of USD 1'005'142.50 plus interest of 5% per annum from 21 June 2010.*
>
> *As to the Costs:*
> *Order Claimant to bear all costs of these arbitral proceedings, including the ICC administrative expenses as they will be fixed by the ICC Court, the fees and expenses of the arbitrators, and all legal and other costs incurred by Respondent in the course of this arbitration as will be duly specified after the closing of these proceedings.*[4]

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

In a final award of October 8, 2012, (case 17631/GZ) the Arbitral Tribunal upheld the counterclaim of Y._____ GmbH in part and rejected the claim of X._____ Ltd.

C.
In a civil law appeal, X._____ Ltd submits that the Federal Tribunal should annul the award of October 8, 2012. The Respondent submits in its answer that the appeal should be rejected to the extent that the matter is capable of appeal. The Arbitral Tribunal has not taken a position.

Reasons:

1.
According to Art. 54(1) BGG[5] the judgment of the Federal Tribunal is issued in an official language,[6] as a rule in the language of the decision under appeal. When the latter is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award under appeal is in English. As this is not an official language and the parties used German in the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in German.

2.
In the field of international arbitration, a civil law appeal is admissible pursuant to the requirements of Art. 190-192 PILA[7] (SR 291) (Art. 77(1)(a) BGG).

2.1
The seat of the Arbitral Tribunal is in Zurich in this case. The Appellant did not have its seat in Switzerland at the determining time. As the parties did not rule out the provisions of chapter 12 PILA in writing, they are applicable (Art. 176(1) and (2) PILA).

2.2
Only the grievances listed at Art. 190(2) PILA are admissible (BGE 134 III 186[8] 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 that are brought forward and reasoned in the appeal brief. This corresponds to the duty to provide reasons contained at Art. 106(2) BGG as to the violation of constitutional rights and cantonal or intercantonal law (BGE 134 III 186 at 5, p.187 with references). Criticism of an appellate nature is not permitted (BGE 134 III 565[9] at 3.1, p.567; 119 II 380 at 3b, p.382).

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

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

[7] 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.

[8] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties.

[9] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua.

2.3
The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This Court may not rectify or 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 applicability of Art. 97 and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or exceptionally when new evidence is taken into account (BGE 138 III 29[10] at 2.2.1, p.34; 134 III 565 at 3.1, p.567; 133 III 139 at 5, p.141; all 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 rectify or supplement the factual findings on this basis must show, with reference to the record, that the corresponding factual allegations were made during the arbitral proceedings in conformity with procedural rules (BGE 115 II 484 E. 2a S. 486; 111 II 471 E. 1c S. 473; with references).

The Appellant disregards these principles in its brief as it bases its arguments in large part on factual allegations, in which it describes the background of the dispute and the proceedings from its own point of view. It thereby significantly departs from the factual findings of the Arbitral Tribunal, without claiming any specific exceptions from the rule that the factual findings are binding. In this respect the matter is not capable of appeal.

3.
The Appellant argues a violation of the right to be heard (Art. 190(2)(d) PILA) by the Arbitral Tribunal in several respects.

3.1
3.1.1
Art. 190(2)(d) PILA allows a recourse only on the basis of mandatory procedural rules according to Art. 182(3) PILA. Thus, the arbitral tribunal must safeguard the right of the parties to be heard. This essentially corresponds to the constitutional right embodied in Art. 29(2) BV[11] (BGE 130 III 35 at 5, p.37 ff.; 128 III 234 at 4b, p.243; 127 III 576 at 2c, p.578 ff.). Case law deduces from this, in particular, the right of the parties to state their views as to all facts important to the judgment, to present their legal point of views, to prove their factual allegations important for the decision with suitable evidence submitted in a timely manner and according to the procedural rules, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p.38; 127 III 576 at 2c, p.578 ff.; with references). The counterpart is a duty of the arbitral tribunal to actually hear the legally pertinent arguments of the parties and to consider them. However this does not mean that the arbitral tribunal must specifically deal with each argument of the parties (BGE 133 III 235 at 5.2, p.248 ff.; 121 III 331 at 3b, p.333). According to well established case law there is no right to a reasoned award based on the right to be heard within the meaning of Art. 190(2)(d) PILA.

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[10] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s.

[11] Translator's note: BV is the German abbreviation for the Swiss Federal Constitution.

3.1.2
A violation of the right to be heard within the meaning of Art. 190(2)(d) PILA is not established simply because some obvious oversight of the arbitral tribunal leads to a wrong award. A finding blatantly false or contrary to the record is not sufficient in itself to annul an international arbitral award. The right to be heard does not guarantee a substantively accurate award (BGE 127 III 576 at 2b, p.577 ff.; 121 III 331 at 3a, p.333). Therefore it is not a matter for the Federal Tribunal to check whether or not the arbitral tribunal took into account and correctly understood the whole file.

A violation of the right to be heard occurs only if the parties are blocked from participating in the case, influencing its outcome, and presenting their point of view, thus effectively 'hollowing out' their right to be heard due to such an obvious oversight. Only this justifies the annulment of the award without regard to its chances of success on the merits as the right to be heard does not guarantee the substantive accuracy of the decision but the right of the parties to participate in the decision-making process (BGE 127 III 576 at 2c, p.579). Whoever alleges a violation of the right to be heard from an obvious oversight must accordingly demonstrate that the oversight on the part of the arbitral tribunal made it impossible to present and to prove its point of view in respect of a pertinent issue in the case (BGE 133 III 235 at 5.2, p.248 ff.; 127 III 576 at 2b-f).

3.2
The Appellant disregards these principles.

3.2.1
At p.49 ff. of its brief the Appellant criticizes the "unclear" reasons of the award and claims a violation of its right to be heard. The argument is unfounded as, according to well established case law, there is indeed no right to a reasoned award arising from Art. 190(2)(d) PILA (see above 3.1 *in fine*). The same applies to the arguments entitled "*3. Denial of the claim for reimbursement of the first advanced payment despite restitution of the first partial delivery*," throughout which the reasons of the Arbitral Tribunal are addressed inadmissibly. While stating the alleged insufficient reasons of the award under appeal, the Appellant does not establish a grievance based on Art. 190(2) PILA.

3.2.2
Under the heading "*B. As to the main claim of the Transition Payment*," the Appellant argues that, in deciding whether or not the condition pursuant to Art. 3 in connection with Art. 4 of the Transition Agreement was met, the Arbitral Tribunal reached a conclusion which "contradicts in an irreconcilable manner the specific factual allegations of both parties and the evidence adduced". The Arbitral Tribunal made "allegations contrary to the record," ignored "an array of relevant and undisputed facts," resorted to a "clearly false consideration," "failed to take into account even rudimentarily what the Appellant submitted," or "purely and simply refused to take its submissions into account." To substantiate these grievances, the Appellant refers to numerous submissions in its briefs and thus presents its own view of the matter. Thus its submissions mainly amount to nothing more than mere appellate criticism. The Appellant does not show in any way meeting the requirements of reasons of Art. 77(3) BGG that, due to the alleged oversight, the Arbitral Tribunal deprived the Appellant of the opportunity to participate in the case, to influence its outcome, and to present its point of view. Its submissions are rather in the nature of inadmissible criticism of the contents of the arbitral award without even alleging that it violated public policy (Art. 190(2)(e) PILA).

3.2.3
The same applies to the argument under the headings "*C. Observations of the Arbitral Tribunal as to Art. 2.8 of the Transition Agreement*", "*4. Finding contrary to the record and unsupported by any allegation of the parties that the Respondent would have paid an amount of USD 30'844.80 to the Appellant*", as well as "*F. Rejection of the claim for "Delivery Costs*." Here too the Appellant argues that the reasons of the Arbitral Tribunal were based "on a series of findings contrary to the record, assumptions or even invented findings," yet these are based on inadmissible criticism of the contents of the award without showing with appropriate arguments why the alleged oversight of the Arbitral Tribunal made it impossible for the Appellant to present and to prove its point of view in connection with a pertinent issue in the case. To the extent that under the heading "*4. § 106 ff. of the award: the Arbitral Tribunal ignores the specific factual allegations of the Appellant because the witness statement of a witness for the other party does not address these facts*," the Appellant argues an alleged assessment of the verbal and written witness statements in contradiction with the right to be heard, it really submits the assessment of the evidence by the Arbitral Tribunal to criticism of an appellate nature. This is not admissible in a civil law appeal.

3.2.4
Under the heading "*D. As to the main claim of the "Incentive Payment*," the Appellant argues that the Arbitral Tribunal "refused" to apply Art. 6 of the Transition Agreement and thus violated its right to be heard. The Appellant's argument disregards that the right to be heard does not encompass a right to accurate application of the substantive law and contractual provisions. In the guise of an alleged violation of the right to be heard, the Appellant also resorts here to inadmissible criticism of the contents of the award under appeal.

3.2.5
The Appellant then argues that the Arbitral Tribunal violated its right to be heard because it adjudicated claims "which were made merely provisionally in the request for arbitration and then changed" while ignoring "the final submissions contained in the Statement of Claim." In this respect as well the Appellant argues various findings "contrary to the record", as the Respondent rightly points out and the arguments fail simply because in its Statement of Claim of July 29, 2011, at § 238 the Appellant itself states:

> *In its Request for Arbitration, X._____ has claimed 'refund of prepayments' (USD 467'126.40) and 'repurchase costs' (USD 30'844.80) which claims were fully set-off against the Z._____ invoices. In this Statement of Claim, X._____ raises exactly the same claims, yet it has refined these claims into various subdivisions (...). The identity of these claims becomes apparent on the basis of the following table.*[12]

The Appellant itself grants that its "Statement of Claim" contained no other submissions other than the initial Request for Arbitration, which shows that its argument that the Arbitral Tribunal switched to the initial claims instead of the Statement of Claim and thus ignored "the final submissions" is baseless. Moreover the Arbitral Tribunal specifically points out at § 37 of the award under appeal that it addresses the submissions in the Statement of Claim. There can be no allegation that they were ignored.

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

3.2.6
Under the heading "*G. Rejection of the claim of a contractually agreed upon bonus*" the Appellant argues a violation of the right to be heard by the Arbitral Tribunal because § 151 of the award under appeal "addressed an argument" which "none of the parties advanced and which does not result from the wording of the contract". The argument is unfounded because, as the Respondent accurately points out, at § 151 of the award under appeal the Arbitral Tribunal addressed arguments which the Respondent had advanced in its Post-Hearing Brief of June 29, 2012.

3.2.7
Equally unfounded is the argument that the Arbitral Tribunal violated the Appellant's right to be heard by refusing to take into account its objections to the presence of the Respondent's main witnesses during the hearing. Indeed, it appears from the award under appeal (p.21 ff.) that the Arbitral Tribunal took into account and well considered the Appellant's objections during the hearing.

3.2.8
Finally the Appellant argues that the Arbitral Tribunal violated the right to be heard by subsequently rejecting "all exhibits to its 'True Rejoinder' of March 30, 2012, for the only reason that they had not been mentioned at the Witness Hearing of April 18, 2012." The Appellant merely argues that the method was "untenable." This does not meet the requirement to submit reasons at Art. 77(3) BGG as it fails to show why the Arbitral Tribunal's reasons for not admitting the exhibits were deficient and it does not show that the corresponding exhibits were submitted to the Arbitral Tribunal both in a timely fashion and in the appropriate format. The matter is not capable of appeal from this point of view.

4.
The Appellant argues several violations of its right to equal treatment according to Art. 190(2)(d) PILA.

4.1
4.1.1
The substance of the right to equal treatment is largely similar to the right to be heard (judgment 4P_208/2004 with references). In particular, it requires the Arbitral Tribunal to treat the parties in the same way procedurally in comparable situations (BGE 133 III 139 at 6.1, p.143; judgment 4P_196/2002 from December 17, 2002, at 3.2).

4.1.2
The inadvertent failure to take into account a pertinent rule or a relevant factual allegation does not constitute unequal treatment within the meaning of Art. 190(2)(d) PILA. There is no reason to introduce an actual grievance of arbitrariness under the heading of a violation of Art. 190(2)(d) PILA, which the federal legislator specifically intended to exclude. Thus the principle of equal treatment is not affected by the assessment of the evidence or the application of the law, even should they prove to be untenable (judgment 4A_360/2011[13] from January 31, 2012, at. 4.1, publ. in: ASA Bull. 2012, p.634).

[13] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear

4.2
The Appellant disregards these principles.

4.2.1
To the extent that in various sections of its appeal brief the Appellant seeks to argue a substantive violation of the right to equal treatment with the same arguments as concerning the violation of the right to be heard, it fails to show – in a manner consistent with the requirements for reasons of Art. 77(3) BGG – to what extent a comparable situation took place, in which not only its right to be heard was violated but the parties were procedurally treated unequally as well. Moreover the numerous arguments as to the alleged unequal treatment in the case amount to inadmissible criticism of the assessment of the evidence or the application of the law by the Arbitral Tribunal, and thus the Appellant completely fails to show unequal treatment within the meaning of Art. 190(2)(d) PILA.

4.2.2
The same applies as to the arguments that the attribution of the burden of proof (p.23 ff.), the refusal to consider a Witness Statement (p.41 ff.), and the failure to apply Art. 6 of the "Transition Agreement" (p.52 ff.) violated the principle of equal treatment. Again it is criticism of the application of the law or the assessment of the evidence by the Arbitral Tribunal, which is inadmissible in an appeal against an arbitral award according to Art. 190(2) PILA.

5.
The appeal must accordingly be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the Appellant must pay the costs and compensate the other party (Art. 66(1), compared to 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 set at CHF 18'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 20'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the ICC Arbitral Tribunal sitting in Zurich.

Lausanne, April 23, 2013.

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

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