Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

{T 0/2}

4A_672/2016

Judgement of January 24, 2017

First Civil Law Court

Federal Judge Kiss (Mrs), presiding,
Federal Judges Hohl (Mrs), Niquille (Mrs),
Clerk of the Court: Leeman.

Parties
A._____ GmbH,
represented by Dr. James T. Peter,
Appellant,

v

B._____ Inc.,
represented by Prof. Dr. Antonio Rigozzzi,
Ms. Sabina Sacco and
Mr. Fabrice Robert-Tissot,
Respondent.

Facts:

A.
A._____ GmbH (Seller, Defendant, Appellant) is a company with its registered office in U._____.
B._____ Inc. (Purchaser, Claimant, Respondent) is a company with its registered office in V._____.
On May 30, 2013, the Parties concluded a Purchase Agreement for the delivery of a packaging machine for a price of EUR 2 million. The Agreement contained, *inter alia*, the following clause:

"Article 6 Arbitration Rules
This Agreement shall be governed by the substantive Civil Law of Switzerland. All disputes arising out or in connection with this Agreement shall be finally settled in English language by the International Chamber of Commerce of Geneva, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by three arbitrators appointed in accordance with said Rules. The language of the arbitration proceeding shall be English. Place of arbitration will be Geneva, Switzerland."

Subsequently, the Purchaser stated that it was rescinding the Purchase Agreement based on defects of the machine which had been delivered to it, and demanded a refund of a portion of the purchase price it had already paid. The Seller refused the refund and, in turn, accused the Purchaser of breach of contract.

B.
On August 27, 2014, the Purchaser commenced an arbitration under the Rules of the International Chamber of Commerce (ICC). In general respects, the Purchaser requested an Order requiring the Seller to refund the portion of the purchase price it had paid, total EUR 1.7 million, plus interest, and to take back the machine, at its own cost.
The Defendant disputed the jurisdiction of the arbitral tribunal and requested, in the alternative, that the tribunal reject the claim.
On November 19, 2014, the Secretary General of the ICC Court of Arbitration confirmed the two Party-appointed arbitrators. These two arbitrators jointly appointed the chairman of the arbitral tribunal, who was confirmed by the Secretary General of the ICC Court of Arbitration on January 16, 2016. By "Final Award" dated October 18, 2016, the ICC Court of Arbitration, seated in Geneva, held that it had jurisdiction over the claim, which it largely upheld.

C.
By Civil law appeal, the Defendant has requested the Federal Tribunal to set aside the final award of the ICC tribunal seated in Geneva dated October 18, 2016.
The Federal Tribunal has not asked for the submission of briefs.

Reasons:

1.
According to Art. 54 (1) BGG[1] the Federal Tribunal issues its decisions in an official language[2], as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award being challenged here is in English. Because that is not one of the official languages, and, in accordance with Art. 42 (1) BGG in conjunction with Art. 70 (1) BV[3], the Parties have submitted their briefs to the Federal Tribunal in German (Appellant) and in French (Respondent), the judgment of the Federal Tribunal is being issued in the language of the appeal brief, as is standard practice (BGE 142 III 521 at 1).

2.
In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190-192 PILA[4] (SR 291) (Art. 77 (1)(a) BGG.

2.1. The seat of the arbitral tribunal in the present case is located in Geneva. At the time in question, the Parties had their registered offices outside Switzerland (Art. 176 (1) PILA). As the Parties did not expressly opt out of the provisions of Chapter 12 PILA, they are applicable (Art. 176 (2) PILA).

2.2. The decision may only be challenged on one of the grounds which are exhaustively enumerated in Art. 190 (2) PILA (BGE 134 III 186 at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p.282). Under Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appellate brief; this corresponds to the duty to provide reasons in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p187, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565 at 3.1, p.567; 119 II 380 at 3b, p.382).

[1] Translator's note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organising the Federal Tribunal (RS 173.110).
[2] Translator's note: The official languages of Switzerland are German, French and Italian.
[3] Translator's note: BV: Swiss Federal Constitution.
[4] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

2.3. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). This includes the findings as to the life circumstances which are the basis of the dispute and those as to the course of the previous proceedings, i.e. the findings as to the subject of the case, to which belong, in particular, the submissions of the Parties, their factual allegations, legal arguments, procedural statements and offers of evidence, the content of a witness statement, an expert report, or the findings as to a visual inspection (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even where 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 BGG and Art. 105 (2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against them or, exceptionally, when new evidence is taken into consideration (BGE 138 III 29 at 2.2.1, p. 34; 134 III 565 at 3.1, p. 567; 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 rectify or supplement the factual findings on that basis must show with reference to the record that the corresponding factual obligations were already made in the arbitral proceedings in accordance with the usual rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; both with references; *see also* BGE 140 III 86 at 2, p. 90).

3.
The Appellant claims that the arbitral tribunal wrongly found that it had jurisdiction (Art. 190 (2)(b) PILA).

3.1.

3.1.1. Pursuant to Art. 190 (2) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends. Yet also in the framework of an appeal concerning jurisdiction, the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is exceptionally taken into account (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1, p.477; 138 III 29 at 2.2.1; each with references).
An arbitration clause must be understood as an agreement in which two or more identified or identifiable parties agree and bind themselves to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original jurisdiction of the state, pursuant to a directly or indirectly determined legal order (BGE 140 III 134 at 3.1, p.138; 130 III 66 at 3.1, p.70). It is decisive that the will of the parties should be expressed to remit the decision of some specific disputes to an arbitral tribunal and not to a state court (BGE 140 III 134 at 3.1, p.138; 138 III 29 at 2.2.3, p.35; 129 III 675 at 2.3, p.679 f.).
The Appellant rightly does not call into question the fact that the arbitral tribunal interpreted the arbitration clause made by the Parties under Swiss law, in accordance with Art. 178 (2) PILA.

3.1.2. The interpretation of an arbitration agreement follows the general rules of interpretation of private declarations of intent. Pursuant to those principles, the first step is to ascertain the real and common will of the parties (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2, p.138; 130 III 66 at 3.2, p.71 with references). This subjective interpretation relies on the assessment of the evidence which, as a general principle, the Federal Tribunal is not permitted to review (BGE 142 III 239 at 5.2.1 with references). If the real, common intent of the parties cannot be established, the court must interpret the arbitration agreement according to the principle of reliance, i.e. it must determine the presumed will of the parties as that which could and should have been understood by the addressee in good faith under the circumstances (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2; 138 III 29 at 2.2.3). In this respect, the court must take into account that which is appropriate and it must not assume that the parties would have wanted an unreasonable solution (BGE 140 III 134 at 3.2, p.139; 122 III 420 at 3a, p.424; 117 II 609 at 6c, p.621; *see also* BGE 133 III 607 at 2.2, p.610). However, when the interpretation shows that the parties wanted to remove the decision from the state courts and submit it to the decision of the arbitral tribunal but that there are some differences as to the implementation of the arbitral proceedings, the principle of effectiveness applies fundamentally; according to this, an understanding of the contract must be one that will let the arbitration clause stand. An imprecise or defective designation of the arbitral

tribunal will thus not necessarily lead o the invalidity of the arbitration clause (BGE 138 III 29 at 2.2.3, p.36; 130 III 66 at 3.2, p.71 f.; 129 III 675 at 2.3, p.681).
The Federal Tribunal reviews the objective interpretation of expressions of intent as a question of law, and in doing so it is, as a basic principle, bound by the findings of fact in the decision under appeal regarding the external circumstances and regarding what the parties knew and intended (*see* BGE 142 III 239 at 5.2.1; 138 III 659 at 4.2.1; 133 III 61 at 2.2.1). .

3.2. The Appellant takes the view that, according to Article 6 of the Purchase Agreement of May 20, 2013, it was not the International Chamber of Commerce (ICC) in Paris, but rather the Geneva Chamber of Commerce and Industry which was appointed to administer the arbitration. The assumption that the reference to a Swiss city – in this case, Geneva – was supposed to designate the seat of the arbitral tribunal does not, it argues, apply in this specific case, because the Parties expressly referred to the seat in their arbitration clause. Thus, it argues, there was no reason to cite Geneva as an addition to the designation of the organisation administering the arbitration in order to define the seat of the arbitral tribunal. It should thus, it argues, not be assumed that the Parties intended to define the seat of the arbitration by specifying a location; rather, the reference was intended to more precisely identify the institution charged with administering the arbitration. The Appellant argues that in essence, the Parties took as their starting point an old ICC arbitration clause which was no longer in use at the time they concluded their contract. The Appellant argues that, by changing their clause to “International Chamber of Commerce of Geneva” instead of merely the “International Chamber of Commerce”, the Parties intended to explicitly assign the arbitration to a different administrative institution than the International Chamber of Commerce. The Appellant argues that it would be unnecessary and useless to change a standard clause if they merely intended to confirm what that clause already provided. By changing the original, the Parties wished to make a change relative to the standard wording. Their intention, it argues, was that the arbitration should be administered by an institution headquartered in Geneva; this, it argues, could only be the Chamber of Commerce in Geneva.
Contrary to the decision under appeal, the Appellant argues, the “Swiss Rules of International Arbitration” or “Swiss Rules” of the Swiss Chambers’ Arbitration Institution do not preclude the possibility that one of the participating chambers of commerce and industry might nevertheless administer an arbitration which is not conducted under the Swiss Rules; in any case, it is not essential for interpretation of the arbitration clause whether the organisation appointed to administer the proceedings ultimately does or does not assume this task. Accordingly, the Appellant argues, the arbitral tribunal incorrectly interpreted this pathological arbitration clause; the correct interpretation would show that the Geneva Chamber of Commerce and Industry had been appointed to administer the arbitration.

3.3. The arbitral tribunal correctly interpreted the arbitration clause in accordance with the principle of good faith, after it was unable to determine any actual, common intent of the Parties with respect to the arbitration rules. The Appellant neither calls into question the fact that the Parties concluded a valid arbitration clause in Article 6 of the Purchase Agreement of May 20, 2013, nor does it dispute that the arbitral tribunal was to have its seat in Geneva. The sole disputed question is the significance of the reference to ‘International Chamber of Commerce of Geneva’ – an institution which does not exist. Contrary to what the Appellant appears to assume, the findings of fact in the decision under appeal do not indicate the actual circumstances under which the arbitration clause in Article 6 of the Purchase Agreement was concluded. Its assertion in its appellate brief that the Parties had used a specific model which they had changed in certain respects must accordingly be disregarded. The arbitral tribunal correctly pointed out that there is only one institution with the name “International Chamber of Commerce”, namely the International Chamber of Commerce (ICC) headquartered in Paris. Accordingly, there is no “International Chamber of Commerce of Geneva”, as referred to in Article 6 of the Purchase Agreement dated May 20, 2013, but rather merely the Geneva Chamber of Commerce, Industry and Services. However, since June 1, 2012, i.e. since the coming into force of the Swiss Rules, the Geneva Chamber of Commerce, Industry and Services no longer administers (international) arbitrations itself; such arbitrations have not, since that time, been administered by individual cantonal chambers of commerce and industry themselves, but rather by the Court of Arbitration of the Swiss Chambers’ arbitration institution. In addition, the arbitration clause refers to the “Rules of Conciliation of Arbitration of the International Chamber of Commerce”. The assumption, following that of the arbitral tribunal, is that the Parties thus were agreeing to the Rules which were to govern the arbitration, which even the Appellant does not dispute in principle.

If the Parties have expressly agreed the application of the ICC Rules ("Rules of Conciliation of Arbitration of the International Chamber of Commerce"), and if they also referred, in terms of the governing arbitration institution, themselves to the "International Chamber of Commerce", then it is an obvious point that by adding "of Geneva", they did not intend to do any more than to have any disputes which may arise be decided by an arbitral tribunal seated in Geneva, in proceedings administered by the International Chamber of Commerce (ICC) (*see* BGE 129 III 675 at 2.3, p. 681). Contrary to the view espoused in the appellate brief, the fact that the Parties themselves stipulated, in the same clause of their contract, where the place of arbitration was to be ("Place of arbitration will be Geneva, Switzerland"), this does not lead to any different interpretation, but rather, to the contrary, is an argument in favour of this understanding; this is all the more so in that the Parties also themselves emphasised, in an additional phrase ("The language of the arbitration proceeding shall be English"), other matters such as the selection of a language of arbitration ("settled in English language").
In contrast with this, the view of the Appellant that the Parties intended to confer the administration of the arbitration on the Chamber of Industry and Commerce in Geneva, i.e. on an institution which does not directly handly international arbitrations, is significantly less likely, on an objective view. Similarly, the view that the Parties intended to engage the Court of Arbitration of the Swiss Chambers' arbitration institution, which is sponsored by the Chambers of Industry and Commerce, to administer proceedings in line with the rules of a third arbitration institution (specifically: the International Chamber of Commerce (ICC)) does not make sense. Manifestly, the Court of Arbitration of the Swiss Chambers' arbitration institution is oriented to applying its own arbitration rules, since it administers arbitrations pursuant to its own body of rules *Swiss Rules* (*see* Swiss Rules [June 2012], Introduction, (b). As correctly pointed out by the arbitral tribunal, the application of both of these bodies of rules, as the Appellant at times has argued, would lead to problems in the course of the proceedings (*see e.g.* BGE 130 III 66 at 3.3). Contrary to what the Appellant appears to assume, when conducting an interpretation under the principle of reliance, consideration should be given to what is appropriate; it cannot be assumed that the Parties intended an unreasonable solution.
The arbitral tribunal correctly interpreted the arbitration agreement in Article 6 of the Purchase Agreement dated May 20, 2013, in accordance with the principle of good faith, such that the Parties intended any possible disputes to be resolved by an arbitral tribunal with its seat in Geneva, in proceedings administered by the International Chamber of Commerce (ICC). There has been no violation of the governing principles of interpretation in accordance with the reliance principle.

4.
The appeal is rejected, to the extent the matter is capable of appeal. Our decision on the merits renders the Appellant's request for an order of suspensory effect moot.
In accordance with the outcome of the case, the Appellant shall be liable to pay costs (Art. 66 (1) BGG). The Respondent, which was required only to make submissions in respect of the request for an order of suspensory effect, should be awarded reduced part compensation for the proceedings in the Federal Tribunal (Art. 68 (1) and (2) BGG.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs of CHF 17,000 shall be paid by the Appellant.

3.
The Appellant shall pay party compensation to the Respondent of CHF 2,000 for the proceedings before the Federal Tribunal.

4.
This decision shall be notified in writing to the Parties, to the arbitral tribunal with its seat in Geneva.

Lausanne, January 24, 2017

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

Presiding judge: Kiss (Mrs)

Clerk of the Court: Leeman