

4A\_623/2014<sup>1</sup>

Judgment of April 30, 2015

First Civil Law Court

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

A.\_\_\_\_\_ AG,  
Represented by Mr. Peter Frick,  
Appellant

v.

B.\_\_\_\_\_,  
Respondent

Facts:

A.

A.a. A.\_\_\_\_\_ AG is a provider of computing services and offers hardware and software advice and trading in this respect. By way of an Employment Agreement of March 24, 2011, A.\_\_\_\_\_ AG hired B.\_\_\_\_\_, a resident of St. Petersburg, as Director of Product Management. During the following months, the employee worked in St. Petersburg where he was in charge of certain services for a group of companies consisting of the employer, C.\_\_\_\_\_ AG and D.\_\_\_\_\_ LLC.

A.b. The Employment Agreement between the parties provides for, among other things, as follows:

"14 Governing Law: This Agreement and any dispute, disagreement, or issue of construction or interpretation arising hereunder whether relating to its execution, its

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<sup>1</sup> Translator's Note:

Quote as A.\_\_\_\_\_ AG v. B.\_\_\_\_\_, 4A\_623/2014.

The original decision is in German. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

validity, the obligations provided therein or performance shall be governed or interpreted according to the internal laws of Switzerland.

(...)

18 Jurisdiction: Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, breach or termination thereof, shall be settled by arbitration in accordance with the Swiss Rules of Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. (a) The number of arbitrators shall be one; (b) The seat of the arbitration shall be in Zurich (city in Switzerland, unless the parties agree on a city abroad); (c) The arbitral proceedings shall be conducted in English. "<sup>2</sup>

A.c. By letter of February 12, 2013, B.\_\_\_\_\_ terminated the employment relationship in conformity with the six-month notice period. After he did not heed a request from A.\_\_\_\_\_ AG to travel to Zürich between February 18 and 20, 2013, for the purpose of clarifying conversations, A.\_\_\_\_\_ AG terminated the contract without notice, citing various transgressions by the employee.

B.

B.a. On December 31, 2013, B.\_\_\_\_\_ filed a Notice of Arbitration dated December 11, 2013, against A.\_\_\_\_\_ AG with the Zürich Secretariat of the Swiss Chambers' Arbitration Institution. His full Statement of Claim followed on June 20, 2014. It contained the following submissions:

"Without to [sic] prejudice to its rights to amend, supplement or restate the relief to be requested in the arbitration, the Claimant request [sic] the Tribunal to:

1. Declare that Respondent have [sic] breached the terms of the Employment Contract, the Swiss Code of Obligation [sic].

2. Award all monetary damages and underpayments for a total of USD 107'252.3 as compensation for all of Claimant's losses sustained as a result of being deprived of his rights under the Swiss Law as following:

a. The amount of USD 36'169 [USD 5'167 (salary for February, 2013) 6 x USD 5'167 (salaries from March to August, 2013) ] plus interest at the rate of 6.75% USD 616.11 calculated up till 31 August 2013 for a total of USD 36'785,11.

b. The amount for overtime work USD 29'710,25 [USD 5'167 \* 23 months \* 25%] plus interest USD 2'005.44 calculated up till 31st August 2013 in accordance with Art. 321c CO for a total of USD 31'715,69.

c. The amount USD 7'750,5 [sic] as the compensation for unused 6 weeks of vacations [sic].

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<sup>2</sup> Translator's Note:

In English in the original text.

d. Moreover taking into account all the circumstances it appears reasonable the responder to pay [sic] to the Claimant the compensation due to unjustified dismissal during sickness of six month salary of the employee for a total of USD 31'002.

3. Award all costs [sic] associated with any and all proceedings undertaken in connection with this arbitration.

4. Grant such other relief the Tribunal may deem appropriate."<sup>3</sup>

B.b. In its Statement of Defense of July 21, 2014, A.\_\_\_\_\_ AG submitted that the claim should be rejected, with costs.

B.c. In an email of July 22, 2014, the Sole Arbitrator asked B.\_\_\_\_\_ for his views as to the value in dispute pursuant to Submission 1. (Request for a Finding). B.\_\_\_\_\_ stated his position on July 28, 2014, made some further submissions and filed additional exhibits. The Sole Arbitrator gave A.\_\_\_\_\_ AG the opportunity to state its views as to B.\_\_\_\_\_’s filing. The latter dates from August 12, 2014. On August 21, 2014, the Sole Arbitrator issued her Procedural Order No. 5, according to which, except for B.\_\_\_\_\_’s remarks as to the value in dispute, neither his submission of July 28, 2014, nor the submission of A.\_\_\_\_\_ AG of August 12, 2014, were admitted. Furthermore, the Sole Arbitrator set forth the schedule for the hearing of August 28, 2014.

B.d. At the hearing of August 28, 2014, during which no minutes were kept with the agreement of the parties, four individuals were heard as witnesses or parties. Both parties filed their post-hearing briefs with the Sole Arbitrator on September 4, 2014.

B.e. In an award of October 1, 2014, the Arbitrator upheld the claim in part and ordered A.\_\_\_\_\_ AG to pay to B.\_\_\_\_\_ USD 44'371.40, with interest at 5% from March 1, 2013, as to the amount of USD 5'167. The costs amount to CHF 16'772.10 were apportioned 3/5 for B.\_\_\_\_\_ and 2/5 for A.\_\_\_\_\_ AG and B.\_\_\_\_\_ was ordered to pay the costs of A.\_\_\_\_\_ AG up to CHF 16'142.05. The rest of the claim was rejected.

The amount awarded at §1 of the dispositive part of the award comprised of USD 5'167 with interest at 5% from March 1, 2013, as salary for February 2013, USD 29'710.25 and USD 2'005.44 interest as compensation for overtime and USD 7'488.70 for holidays not taken.

C.

C.a. In a civil law appeal of October 30, 2014, A.\_\_\_\_\_ AG makes the following submissions to the Federal Tribunal:

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<sup>3</sup> Translator’s Note: In English in the original text.

“1. The [Arbitral] Award of October 1, 2014, [...] is to be annulled as to the following parts of the claim:

a. Award of USD 29'710.25 as compensation for overtime and USD 2'005.44 as interest on this amount (§84 and 85 of the [Arbitral] Award).

b. Award of USD 7'488.70 as compensation for holidays not taken (§90 of the [Arbitral] Award)

2. Paragraph 1 of the [Arbitral] Award of October 1, 2014, [...] is to be annulled and adapted as follows:

The Defendant, *i.e.* the Appellant, shall pay to the Claimant *i.e.* the Respondent USD 5'167 with interest at 5% from March 1, 2013.

3. The award on costs of the arbitral procedure and party costs contained in paragraph 3 and 4 of the [Arbitral] Award are to be annulled and are to be substituted as follows:

The costs of the arbitral proceedings amounting to CHF 16'772.10 shall be paid up to 4.8% by the Defendant *i.e.* the Appellant and up to 95.2% by the Claimant *i.e.* the Respondent.

*The Claimant, i.e. the Respondent, shall be ordered to pay an amount of CHF 25'612 to the Defendant, i.e. the Appellant as compensation for its costs.*

4. In the alternative, the [Arbitral] Award of October 1, 2014, [...] should be completely annulled and the matter sent back to the Sole Arbitrator for a new award within the meaning of the reasons of the judgment.

5. The Respondent should pay to the Appellant an appropriate amount as costs for the appeal proceedings.

6. The costs of the appeal proceedings should be paid by the Respondent.”

C.b. The Claimant (Respondent) did not state his position.

C.c. The Sole Arbitrator submitted her views on December 15, 2014, in which she stated that all of the Appellant's arguments were late or unfounded and furthermore refers to the arbitral award under appeal.

The Appellant submitted a reply.

D.

By decision of the Presiding Judge of January 5, 2015, the Appellant's motion for a stay of enforcement was granted.

Reasons:

1. According to Art. 54(1) BGG,<sup>4</sup> the judgment of the Federal Tribunal is issued in an official language,<sup>5</sup> as a rule, in the language of the decision under appeal. When this 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 Appellant used German before the Federal Tribunal and the Respondent did not file an answer, the judgment of the Federal Tribunal shall therefore be issued in German.

2.

In the field of international arbitration, a civil law appeal is permitted under Art. 190-192 of the Federal Law of December 18, 1987, on International Private Law (PILA,<sup>6</sup> SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal was in Zürich in this case. At the decisive time, the Respondent had its domicile outside of Switzerland (Art. 176(1) PILA). The parties did not expressly opt out of Chapter 12 PILA and the provisions of the chapter are accordingly applicable (Art. 176(2) PILA).

2.2. A civil law appeal within the meaning of Art. 77(1) PILA may, in principle, seek only the annulment of the award under appeal. According to Art. 77(2) BGG, which excludes the applicability of Art. 107(2) BGG – to the extent that this provision allows the Federal Tribunal to decide the matter itself – the appeal may only seek the (complete or partial) annulment of the award under appeal (as to partial annulment, see judgment 4A\_360/2011<sup>7</sup> of January 31, 2012, at 6.1, published in *ASA Bulletin* 2012, p. 645). Only where the dispute involves the jurisdiction of the arbitral tribunal, or its composition, is there an exception in this respect and the Federal Tribunal itself can determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal or decide that the arbitrator concerned should be removed (judgment 4A\_74/2014<sup>8</sup> of August 28, 2014, at 2.4, not published in BGE 140 III 477<sup>9</sup>; 136 III 605<sup>10</sup> at 3.3.4, p. 616 with references). None of these exceptions

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<sup>4</sup> Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

<sup>5</sup> Translator's Note: The official languages of Switzerland are German, French, and Italian.

<sup>6</sup> 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.

<sup>7</sup> 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>

<sup>8</sup> Translator's Note: The English translation of this decision is available here:  
[http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-\"showpiece\"-contract](http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-\)

<sup>9</sup> Translator's Note: The English translation of this decision is available here:  
[http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-\"showpiece\"-contract](http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-\)

<sup>10</sup> Translator's Note: The English translation of this decision is available here:

is applicable here, so the Appellant's submissions are inadmissible insofar as they argue beyond a (partial) annulment of some specific paragraphs or parts of the operative part of the award under appeal.

## 2.3.

2.3.1. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These include the findings as to the circumstances upon which the subject in dispute is based and those concerning the course of the arbitral proceedings, namely the findings as to the subject of the case, to which also belong the submissions of the parties, their factual allegations, legal arguments, procedural statements, and evidentiary materials, the contents of a witness statement, an expert report or the findings during 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 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, excluding the applicability of Art. 97 BGG and of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings in the award under appeal 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<sup>11</sup> at 2.2.1 with references). Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings on this basis must show, with reference to the record, that the corresponding factual allegations were raised during the arbitral proceedings, in accordance with procedural rules (see BGE 115 II 484 at 2a; 111 II 471 at 1c; each with references).

2.3.2. The Appellant disregards these principles insofar as under the heading "8. *As to the course of the proceedings and the facts (summary)*" (appeal brief p. 7 ff.). It presents the facts from its point of view over several pages, even referring to evidence in this respect, yet without even showing where, in the award under appeal, such factual findings were originally made or why exceptions to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal were made out. The developments under the aforesaid heading are therefore irrelevant for the Federal Tribunal. The same applies insofar as under the heading "9. *As to the grounds for appeal and the grievances in detail*" (appeal brief p. 11 ff.). The Appellant introduces factual elements that have no basis in the factual findings of the Arbitral Tribunal. They will not be reviewed.

## 2.4.

2.4.1. The admissible means of recourse are only those exhaustively listed at Art. 190(2) PILA. According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are raised and reasoned in the appeal brief. This corresponds to the duty to provide reasons contained in Art. 106(2) BGG as to the

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<sup>11</sup> Translator's Note:

<http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in>

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>

violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186<sup>12</sup> at 5 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565<sup>13</sup> at 3.1; 119 II 380 at 3b, p. 382).

2.4.2. The Appellant largely disregards these principles as well. Under the heading “9. As to the grounds for appeal and the grievances in detail” (appeal brief p. 11 ff.), it relies on the ground of appeal contained at Art. 190(2) PILA. In doing so, however, it fails to abide by the strong requirement at Art. 106(2) BGG that reasons should be given. It then describes the alleged procedural errors of the Arbitrator, only to claim by way of an example that this would meet the requirements, “within the meaning of Art. 190(2) PILA, in the alternative also within the meaning of Art. 190(2)(d) PILA, in the further alternative of Art. 190(2)(e) PILA” (appeal brief § 9.2, p. 12 ff.). Instead, the Appellant should show in detail, with reference to parts in the award under appeal, which specific aspects of the admissible ground for appeal are implicated. Submissions failing to meet these requirements will not to be taken into account.

The Appellant fails to comply with the strict requirement that reasons be presented insofar as it simply claims that it had “the right to know which factual allegations of the other party are the subject of the arbitral procedure” (appeal brief p. 13). Instead, it should show precisely to what extent this alleged right is derived from the right to be heard or the principle of equal treatment of the parties according to Art. 190(2)(d) PILA or from another procedural principle arising from Art. 190(2) PILA. It cannot succeed in doing so by the mere unspecified claim that there are “fundamental procedural rules” (appeal brief p. 13).

### 3.

Essentially, the Appellant argues that the Arbitral Tribunal violated the right to be heard or committed some other relevant procedural violations according to Art. 190(2) PILA, because it based its decision on some factual elements which could have arisen from witness statements but were never explicitly asserted by the parties.

3.1. According to Art. 182(1) and (2) PILA, the parties and, as the case may be, the arbitral tribunal, may determine the procedural rules of the arbitration themselves. However, the right to equal treatment and the right to be heard in adversarial proceedings are excluded from the free agreement of the parties according to Art. 182(3) PILA. Art. 190(2)(d) PILA allows for an appeal only in case of a violation of the mandatory procedural rules according to Art. 182(3) PILA. According to this provision, the arbitral tribunal must, in particular, heed the right of the parties to be heard. With the exception of the duty to provide reasons, this corresponds to the constitutional right guaranteed by Art. 29(2) BV<sup>14</sup> (BGE 130 III 35 at 5, p. 37 f.; 128 III 234 at 4b; 127 III 576 at 2c).

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<sup>12</sup> Translator’s Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

<sup>13</sup> 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>

<sup>14</sup> Translator’s Note: BV is the German abbreviation for the Swiss Federal Constitution.

3.2. The Appellant disregards the scope of the right to be heard in adversarial proceedings and the principle of *ne eat iudex ultra petita*, when it argues that the Arbitral Tribunal would have violated the principle of the right to be heard in adversarial proceedings insofar as it relied on witness statements even though the corresponding factual elements were not explicitly alleged by the parties.

The manner of collecting materials (whether based on hearings or by investigation) is not derived from the principle *ne eat iudex ultra petita* or from the right to be heard. The principle *ne ultra petita* refers to whether and to what extent the arbitral tribunal must limit itself to the submissions of the parties. The manner in which materials are collected is not prescribed there. Then, the right to be heard demands only that the parties be permitted to express their views as to all important facts, submit their legal arguments, are allowed to prove the factual allegations important to the decision by relevant means offered in a timely manner and in the prescribed format, participate in the hearing, and have access to the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 f.; each with references).

The Appellant does not claim that it did not have an opportunity to express its views as to the witness statements in dispute and, in any case, does not claim that it was not aware of the corresponding witness statements. Instead, in its submission of September 4, 2014, the Post-Hearing Brief, it went into the details of the hearing. Contrary to the Appellant's point of view, there is no right derived from the right to be heard, "*to know when the Respondent made the statements found or upheld by the Arbitrator.*" The Appellant's argument claiming that the Arbitral Tribunal should not have relied on the witness statements does not fall within any ground for recourse under Art. 190(2) PILA.

4.

The matter is therefore largely incapable of appeal and furthermore the arguments must be rejected for lack of proper reasons.

In such an outcome of the procedure, the Appellant must pay the costs (Art. 66(1) BGG). Having failed to submit a brief in the case at hand, the Respondent undertook no costs and therefore no party costs will be awarded.

Therefore the Federal Tribunal Pronounces:

1.

The appeal is rejected insofar as the matter is capable of appeal.

2.

The judicial costs set at CHF 2'000 shall be borne by the Appellant.

3.

No costs are awarded.

4.

This judgment shall be notified in writing to the parties and to the Arbitral Tribunal of the Swiss Chambers' Arbitration Institution.

Lausanne, April 30, 2015

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

Presiding Judge:  
Kiss (Mrs.)

Clerk:  
Hurni