120039-553/PON/cel
4A_188/2016[1]

Judgment of January 11, 2017

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Hohl, and
Federal Judge Niquille.
Clerk of the Court: Mr. Carruzzo.

X._____ Ltd,
Appellant,

v.

Z._____ Ltd,
represented by Mr. Patrick Eberhardt,
Respondent.

Facts:

A.
By final award of February 25, 2016, a Geneva lawyer, ruling as sole arbitrator (hereafter: the Arbitrator) under the aegis of the Swiss Chambers' Arbitration Institution and applying the accelerated procedure provided for in Art. 42 of the Swiss Rules of International Arbitration (version in force since June 1, 2012), (hereafter: the Rules), rejected in full the claim for payment of at least USD 713'238.30, plus interest, that the Turkish company X._____ Ltd. had made on May 18, 2015, against Z._____ Ltd., a company with headquarters in Kowloon (Hong Kong), based on a contract of September 18, 2014, by which the defendant had sold goods to it.

[1] Translator's Note: Quote as X._____ Ltd. *v.* Z._____ Ltd., 4A_188/2016.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

B.
On March 30, 2016, X._____ Ltd (hereafter: the Appellant) submitted two appeal briefs – one in English (original version), the other in French (translation) – to the Federal Tribunal with the aim of annulling the Award. It also attached various annexes to the brief.

In its answer of June 10, 2016, Z_____ Ltd (hereafter: the Respondent) submitted that the appeal should be rejected.

The Arbitrator, who submitted his file, did the same in his answer of June 15, 2016.

Both answers were sent to the Appellant, following the Presiding Judge's instructions of June 16, 2016, with the indication that any observations should be filed by July 7, 2016, an extension of this time limit being excluded.

By letter of June 28, 2016, the Appellant nevertheless sought an extension of the time limit, which the President of the First Civil Law Court formally rejected on June 29, 2016.

C.
The Appellant also filed a request for interpretation and rectification of the award. The Arbitrator dismissed the request on March 30, and May 12, 2016.

Reasons:

1.
According to Art. 54(1) LTF,[2] the Federal Tribunal issues its decision in one of the official languages,[3] as a rule in the language of the decision under appeal. When the decision is issued in another language (here, English) the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, the parties used English. In the original version of its appeal brief, the Appellant used the same language. However, it simultaneously provided a French translation to the Federal Tribunal, thus respecting Art. 42(1) LTF with Art. 70(1) Cst.[4] (ATF 142 III 521[5] at 1). According to its practice, the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French. Furthermore, when deciding the merits of the appeal, it will only consider the French version of the Appellant's brief.

2.

[2] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[3] Translator's Note: The official languages of Switzerland are German, French and Italian.
[4] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

In international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals under the conditions of Art. 190-192 PILA[6] (Art. 77(1) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission, or the ground of appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal, subject to an examination by this Court of the admissibility of the grievances against the award.

3.
An appeal brief concerning an arbitration award must satisfy the requirements of reasoning that arise from Art. 77(3) LTF in conjunction with Art. 42(2) LTF and the case law relating to the latter provision (ATF 140 III 86 at 2, and references). This assumes that the Appellant discusses the reasons in the award and indicates precisely why it considers that the author of the award has disregarded the law (Judgment 4A_522/2016[7] of December 2, 2016, at 3.1). Needless to say, it can only do so within the limits of the admissible grievances against that award, namely with regard to the only grievances listed in Art.190(2) PILA where the arbitration is international in nature.

The Federal Tribunal, it should be recalled, bases its decisions on the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement the findings of the arbitrators of its own motion, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art.77(2) LTF, Art.105(2) LTF, excluding the applicability of Art.105(2) LTF). As well, when seized of a Civil law appeal against an international arbitral award, does its mission not consist of deciding with full power of review, like an appellate jurisdiction—but only to consider whether the admissible grievances raised against the award are justified or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would not be compatible with such a mission, even though the facts may be established by evidence contained in the arbitration file (Judgment 4A_386/2010[8] of January 3, 2011, at 3.2). However, as was already the case under the Federal Law of Judicial Organization (see ATF 129 III 727[9] at 5.2.2, 128 III 50 at 2a, and the references cited), the Federal Tribunal has the power to review the facts of the award under appeal if one of the grievances mentioned in Art. 190(2) PILA is raised against these facts, or new facts or evidence are exceptionally considered in the civil law appeal procedure (ATF 138 III 29[10] at 2.2.1 and the references cited).

It is on the basis of those principles the Court now examines the various aspects of the Appellant's argument.

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[6] Translator's Note: PILA is the most commonly used abbreviation for the Swiss Private International Law Act of December 18, 1987.

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-522-2016

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory

[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

4.

4.1. First, the Appellant, invoking Art. 190(2)(b) PILA and the decision published at ATF 140 III 75,[11] argues that the award under appeal should be annulled for having been rendered after the expiry of the Arbitrator's powers. The Appellant recalls, as a preliminary point, that under Art. 42(1)(d) of the Rules, the award must be rendered within six months from the date on which the Secretariat sent the file to the arbitral tribunal. Referring next to a letter dated August 29, 2015, in which the Arbitrator informed the parties that he had received the file on August 24, 2015, (Annex 5 to the appeal) as well as the procedural calendar of October 1, 2015, in which there are the following entries: "Receipt of the File 24 August 2015" and "Final Award of the Arbitral Tribunal 24 February 2016" (Annex No. 6 to the appeal), the Appellant claims that the deadline for rendering an award expired on February 24, 2016, and the Award was delivered the day after that date. Having done so, the Appellant cites an excerpt from the aforementioned decision to infer that applying that case law to the case in dispute can only lead to the annulment of the award under appeal, which was rendered by an incompetent arbitrator *ratione temporis.*

4.2. This first grievance is unfounded in many respects.

4.2.1. First, the underlying reasoning is based on a factual premise that cannot be accepted.

In this regard, it should be noted that the decisive date for applying Art. 42(1)(d) of the Rules is the receipt by the Arbitrator of the file sent to him by the Secretariat of the Court of Arbitration (De Vito Bieri/Favre Schnyder, in *Swiss Rules of International Arbitration*, Commentary, Zuberbühler/Müller /Habegger [ed.], 2nd ed. 2013, Nos.12 and 12a ad Art.42 of the Rules).

In his award, the Arbitrator states that he received the file dated August 25, 2015, (n. 14) an indication which is corroborated by the postal seal attached to the notice of receipt forming Annex No.1 to his reply. This finding on the conduct of the arbitral proceedings is binding on the Federal Tribunal in the same way as the findings on the facts of the case (Judgment 4A_342/2015[12] of April 26, 2016, at 3, not published, referenced as ATF 142 III 360). The Appellant, however, does not invoke, in connection with this finding, one of the exceptions allowing the Federal Tribunal to review the facts contained in the award under appeal (see above, at 3 i.f.). Faced with this sovereign finding, the clerical error made by the Arbitrator by his own admission in his letter to the parties of August 29, 2015, and copied by him in the procedural timetable established on October 1, 2015, does not matter, particularly as it was not likely to cause any prejudice to the parties.

Issued on February 25, 2016, the Award under appeal was rendered within six months of August 25, 2015, the date of receipt of the file by the Arbitrator. The aforementioned regulatory provision was therefore not overlooked by the Arbitrator.

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[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/receptum-arbitrii-does-expire-if-time-has-been-set-beyond-which-arbitrator-loses-jurisdiction

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

4.2.2. Moreover, even if reception had been a day earlier, *quod non*, the appeal submitted to this Court would nonetheless be doomed to fail.

Art. 2(2) of the Rules provides that periods of time provided for by the Rules begin on the day following the day on which the notice, communication, or proposal was received. The *dies a quo* for this period was therefore August 25, 2015, in this case, if the file had been received the day before by the Arbitrator. February 25, 2016, was thus the end of this period expressed in months (*see* Article 77(1)(iii) of the Swiss Code of Obligations [CO] applied here under the *lex arbitri*). Released to the parties on that day, the Award bearing that date was, therefore, timely.

4.2.3. Finally, even the foregoing considerations aside and without dwelling too long on this argument, it must be observed that there is no commonality between the circumstances that caused the Federal Tribunal to intervene in the case dealt with in ATF 140 III 75 and those in the present case. Furthermore, an arbitrator who does not respect an agreement made by him with both parties regarding the conclusion of his mission, after many formal notices addressed to him have been ineffective, is not at all the same situation as an arbitrator who may have been mistaken by one day when calculating the time within which they had to deliver the award under the pertinent provision of a set of arbitral rules.

5.
The Appellant seeks to show, in the second part of its brief, that the Arbitrator did not give sufficient reasons, that he had not dealt with all of the important issues in his award, and that he did not take the bad faith of the Respondent into account when deciding the dispute submitted to him.

In light of the aforementioned principles relating to the reasoning of an appeal against an international arbitral award (see above, at 3), the Appellant's contentions here are so incompatible with them that all of the complaints articulated in this part of the brief are manifestly inadmissible.

Additionally, the Appellant, confusing the Federal Tribunal with a court of appeal, merely lists, in a jumble, questions that the Arbitrator allegedly ignored, quoting passages from documents in the arbitration file extensively, without being able to explain the underlying rationale, and by concluding each paragraph of explanations with the same statement according to which the Arbitrator violated Art. 190(2)(c)-(e) PILA.

The Court will therefore not deal with these grievances, given their very inadequate reasoning.

6.
That being the case, this appeal should be rejected insofar as the matter is capable of appeal. Accordingly, the Appellant, who is unsuccessful, is ordered to pay the costs of the Federal proceedings (Art. 66(1) LTF) and to compensate the Respondent for its legal costs (Art. 68(1) and (2) LTF).

As for the Arbitrator, he too would like to obtain costs, amounting to CHF 5'500, as compensation for his efforts in drafting his reply to the Appeal. However, the Federal Tribunal has already clarified that such a claim has no legal basis (Judgement 4P.99/2000 of November 10, 2000, at 7, see also Kaufmann-

Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland*, 2015, No. 8.103). The Federal Tribunal sees no reason to depart from the long-standing practice of this Court that the arbitrator or the arbitral tribunal whose award is under appeal is not entitled to costs for the observations submitted by him or by it on the appeal or on other applications of the Appellant before the Federal Tribunal.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected, insofar as the matter was capable of appeal.

2.
The judicial costs, set at CHF 9'000, are to be borne by the Appellant.

3.
The Appellant shall pay the Respondent compensation of CHF 10'000 for the federal proceedings.

4.
This judgment shall be communicated to the parties and to the sole Arbitrator.

Lausanne, January 11, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Chair:	The Clerk:
Kiss	Carruzzo