

4A_596/2012¹

Judgment of April 15, 2013

First Civil Law Court

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

X. _____ (International) AG
 Represented by Dr Anne-Catherine Hahn,
 Appellant,

v.

A. _____,
 Represented by Mr. Michael Mroczek and Michael Kummer,
 Respondent,

Facts:

A.

A.a

X. _____ (International) AG (Defendant and Appellant) is a company active in semi-conductors incorporated in [name of city omitted].

A. _____ (Claimant and Respondent) is an electrical engineer active in distributing electronic products and he is domiciled in J. _____ [name of city omitted] (Germany).

A.b

In 2002 the Parties entered into an "Independent Exclusive Sale Representative Agreement and Nondisclosure Agreement²". They supplemented this in April 2006 with an "Amendment to Independent Exclusive Sale Representative Agreement and Nondisclosure Agreement³". This addendum contains an arbitration clause at § 4 with the following wording: *"This Agreement is made in, governed by, and shall be construed solely in accordance with, the material laws of Switzerland. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be finally settled under the arbitration rules of the International Chamber of Commerce by one or more arbitrators appointed in*

¹ Translator's note: Quote X. _____ (International) v A. _____, 4A_596/2012. The original of 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.

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

accordance with said rules. The arbitration will take place only in St. Gallen, Switzerland and the procedure shall be held in the English language⁴."

A dispute arose between the Parties in connection with the aforesaid agreements.

B.

B.a

By request of October 13, 2010 A._____ filed a claim for disclosure (submission 1) and two concurring compensation claims (submissions 2 and 3) against X._____ (International) AG with the following wording: "1. Order Respondent (...) to hand out the full reporting (revenue overviews, invoices, etc.) concerning all sales numbers as follows: (a) from August 2004 until April 29, 2006 the territory of Germany, Austria, Switzerland, Liechtenstein, Belgium, Netherlands as well as Luxemburg; (b) from April 30, 2006 until August 31, 2009 on the territory of Germany, Austria, Switzerland and Liechtenstein; in particular the full reporting concerning the sales activities with regard to (c) B.Y._____ AG with its registered office in K._____, Switzerland (respectively C.Y._____ AG with its registered office in L._____, Switzerland, D.Y._____ AG with its registered office in M._____, Switzerland, E.Y._____ AG, with its registered office in K._____, Switzerland, and F.Y._____ AG with its registered office in K._____, Switzerland) (altogether hereinafter "Y._____ AG") and (d) Z._____ AG with its registered office in P._____, Germany (hereinafter "Z._____ AG"), during the above mentioned period.

2. Order Respondent to pay to Claimant a commission of 5% on the up to now unconsidered sales yet to be quantified and depending on the result of the interim measure as applied in prayer no. 1 above as follows: (a) from August 2004 until April 29, 2006 on the territory of Germany, Austria, Switzerland, Liechtenstein, Belgium, Netherlands as well as Luxembourg; (b) from April 30, 2006 until August 31, 2009 on the territory of Germany, Austria, Switzerland, Liechtenstein; each plus interest of 5% beginning on August 31, 2009 until the date of payment. Alternatively order Respondent to pay to Claimant damages arising from Respondent's breaches of agreement in the amount yet to be quantified plus interest of 5% beginning on August 31, 2009 until the date of payment.

3. Order Respondent to pay to Claimant a clientele compensation in the amount yet to be quantified and depending the result of the interim measure as applied in prayer no. 1 above, but at least USD 146'397.21 plus interest of 5% beginning on August 31, 2009 until the date of payment.⁵"

B.b

In a partial award of February 22, 2012 the Arbitral tribunal found that it had jurisdiction to adjudicate the disclosure claim (§ 1 of the pronouncement of the award), upheld the claim and ordered the Defendant to produce the documents listed at § 1 of the request (operating part of the award § 2).

The award was not appealed and entered into force.

B.c

In a Procedural Order Nr 7 of September 11, 2012 the Arbitral tribunal requested the Defendant to produce a list as follows (§ 2 and 3 of the operative part): "2. Respondent shall produce to Claimant by 28 September 2012 a list with all X._____ products sold through Z._____ AG (i) between 1 July 2005 and 29 April 2006 in the territory of Germany, Austria, Switzerland, Liechtenstein, Belgium, Netherlands and Luxembourg as well as (ii) between 30 April 2006 and 31 August 2009 in the territory of Germany, Austria, Switzerland and Liechtenstein. This list shall at least provide for a total amount of

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

⁵ Translator's note: In English in the original text.

sales (in the applicable currency) for each product sold through Z._____ AG during the relevant terms and for the relevant countries as defined in the first sentence of this section 2.

3. Claimant shall keep the information produced pursuant to section 2 of the present order strictly confidential and he shall only use it for the purposes of the present arbitration proceedings.⁶"

In a Procedural Order Nr 8 of October 3, 2012 the Arbitral tribunal extended the time limit to produce the list according to § 2 of Procedural Order Nr 7 until October 11, 2012 (§ 2 of the decision) and invited the Parties to discuss in their next submissions what would be the consequences of a possible failure to produce the aforesaid list (§ 4 of the decision).

C.

In a Civil law appeal of October 8, 2012 X._____ (International) AG submits the following to the Federal Tribunal:

"§ 1 and 3 of Procedural Order Nr 7 and § 3 and 4 of Procedural Order Nr 8 must be annulled;

2. It must be found that the Arbitrator has no jurisdiction to compel the Appellant to produce information as to further sales figures in addition to the enforceable partial award of February 22, 2012.

3. It must be found that the partial award of February 22, 2012 is *res judicata*, the Arbitrator may not address claims for commissions or compensation in connection with sales for which the Appellant's duty to disclose information does not arise from the partial award but was imposed only through § 2 of Procedural Order Nr 7 and § 3 of Procedural Order Nr 8.

4. A stay of enforcement must be granted, the ICC case 17456/FM/MHM must be stayed and the Appellant must be freed from the pending time limit to submit its answer until the appeal is decided.

5. All costs should be paid by the Respondent".

The Respondent submits in its brief that the matter is not capable of appeal and in the alternative that the appeal should be rejected. The Arbitral tribunal made no submissions in its brief. The Appellant filed a reply, the Respondent and the Arbitral tribunal submitted a rejoinder.

D.

A stay of enforcement was granted by decision of the Presiding judge of November 12, 2012.

Reasons:

1.

According to Art. 54 (1) BGG⁷ the judgment of the Federal Tribunal is issued in an official language⁸, 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 decision under appeal is in English. As this is not an official language and the parties resorted to German in the Federal proceedings, the judgment of the Federal Tribunal shall be issued in German.

2.

In the field of international arbitration, a Civil law appeal is possible pursuant to the requirements of Art. 190-192 PILA⁹ (SR 291) (Art. 77 (1) (a) BGG).

⁶ Translator's note: In English in the original text.

⁷ Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

⁸ Translator's note: The official languages of Switzerland are German, French and Italian.

⁹ 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.

The seat of the Arbitral tribunal is in St Gallen in this case. The Respondent had his domicile outside Switzerland at the relevant time. As the Parties did not rule out in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

3.

According to the Appellant the Procedural Orders under appeal are “interlocutory decisions as to the jurisdiction of the sole arbitrator, which can be appealed according to Art. 190 (2) (b) PILA”

3.1

A Civil law appeal according to Art. 77 BGG in connection with Art. 190-192 PILA is available only against arbitral awards (BGE 136 III 597¹⁰ at 4 p. 599; 136 III 200¹¹ at 2.3.1 p. 203). Whether the decision is appealable pursuant to the provisions quoted is determined exclusively on the basis of the contents of the arbitral decision and not pursuant to its designation (BGE 136 III 597 at 4 p. 599; 136 III 200 at 2.3.3 p. 205).

3.2

Among the arbitral decisions which may be the object of a Civil law appeal are the final awards, with which an Arbitral tribunal upholds the claim entirely or in part, rejects it or holds it inadmissible (BGE 136 III 597 at 4.1 p. 599 ff.; 130 III 76 at 3.1.2 p. 79). Furthermore partial awards are appealable when they dispose of a part of the objects in dispute, to the extent that certain claims are comprehensively disposed of beforehand and the proceedings as to the others are temporarily postponed (BGE 136 III 597 at 4.1 p. 599 f.; 130 III 76 at 3.1.2 p. 79). Finally, the preliminary and interlocutory decisions by which the Arbitral tribunal decides a procedural or substantive preliminary issue separately in advance can be appealed on the grounds contained at Art. 190 (2) (a) and (b) PILA (Art. 190 (3) PILA; BGE 136 III 597 at 4.1 p. 600; 130 III 76 at 3.1.3 p. 79, at 3.2.1 p. 79 f., at 4 p. 82 ff.)

3.3

However the Procedural Orders that do not bind the Arbitral tribunal and to which it cannot come back during the proceedings are not among the arbitral decisions appealable within the meaning of Art. 190 PILA (BGE 136 III 597 at 4.2 p. 600; 136 III 200 at 2.3.1 p. 203; 122 III 492 E. 1b/bb p. 494).

According to Federal case law, these include the decision of the Arbitral tribunal as to the payment of the deposit (BGE 136 III 597 at 4.2 p. 600) and the decisions concerning a temporary suspension of the proceedings (BGE 136 III 597 at 4.2 p. 600; 116 Ia 154 at 3a p. 158), although the latter may be appealed to the Federal Tribunal when the Arbitral tribunal implicitly also decides its jurisdiction in the order suspending the proceedings (BGE 116 Ia 154 at 3a p. 159; lately judgment 4A_428/2011¹² of February 13, 2012 at 5.1.1).

Furthermore the evidentiary orders of the Arbitral tribunal, in particular those concerning the production of documents do not count among the Procedural Orders appealable to the Federal Tribunal (SÉBASTIEN BESSON, in: Zuberbühler et al. [Hrsg.], Swiss Rules of International Arbitration, Commentary, 2005, Nr 6 at Art. 31 [“production of documents”]; TOBIAS ZUBERBÜHLER et al., IBA Rules of Evidence, Commentary on the IBA Rules of on the Taking of Evidence in International

¹⁰ Translator’s note: Full English translation at <http://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t>

¹¹ Translator’s note: Full English translation at <http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->

¹² Translator’s note: Full English translation at <http://www.swissarbitrationdecisions.com/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o>

Arbitration, 2012, Nr 187 f., 224 at Art. 3; MARKUS WIRTH, in: Basler Kommentar, Internationales Privatrecht, 2. edition 2007, Nr 8 at Art. 188 PILA; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2. edition 1993, p. 286).

3.4

In the Procedural Orders under appeal the Arbitral tribunal ordered the production of a document under the control of the Appellant. In doing so, it relied on Art. 20 (4) of the rules of arbitration of the ICC (hereafter: the ICC rules)¹³ and on Art. 3 (10) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (hereafter : the IBA Rules). According to Art. 20 (4)¹⁴ of the ICC rules the Arbitral tribunal may summon any party to provide additional evidence at any time during the proceedings. According to Art. 3 (10) of the IBA Rules at any time before the arbitration is concluded, the Arbitral tribunal may request any party to produce documents. If a party fails to produce a pertinent document without satisfactory reasons after the other party requested its production or when it was ordered by the Arbitral tribunal and has not objected in due time, the Arbitral tribunal may infer according to Art. 9 (5) of the IBA Rules that such document would be adverse to the interests of that party.

In support of its order to produce documents the Arbitral tribunal stated in Procedural Order Nr 7 that the list to be produced would be useful to quantify the claim and that the production order should not in any way be misunderstood as an enforcement or an application of the first partial award of February 22, 2012. The order to produce was not based on a substantive claim but only on procedural rules ("the list ordered for production is not based on a substantive claim of Claimant against Respondent, but rather on procedural rules ¹⁵ "). Accordingly the Arbitral tribunal pointed out the consequences of noncompliance according to Art. 9 (5) of the IBA Rules. Also in Procedural Order Nr 8 the Arbitral tribunal confirmed these explanations and pointed out that the order to produce documents would not affect in any way the enforceability of the partial award of February 22, 2012.

3.5

The reasons of the Arbitral tribunal are confirmed in legal commentaries to the IBA Rules on the Taking of Evidence in International Arbitration. According to this the rules are exclusively procedural in nature and not substantive (ZUBERBÜHLER et al., a.a.O., Nr 224 at Art. 3; MATTHIAS SCHERER, The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights, International Arbitration Law Review 2010 Vol. 13 Issue 5, p. 195; **vgl.** Also see the survey by GARY B. BORN, International Arbitration: Law and Practice, 2012, p. 185 f.). The production orders based on Art. 3 of the IBA Rules are therefore merely procedural obligations which are different from substantive or contractual obligations to disclose (ZUBERBÜHLER et al., a.a.O., Nr 224 at Art. 3; SCHERER, a.a.O.). Accordingly the order to produce documents is exclusively a Procedural Order (ZUBERBÜHLER et al., a.a.O., Nr 224 at Art. 3). It does not clarify a preliminary issue the adjudication of which would be necessary with a view to an award putting an end to the proceedings (preliminary or interlocutory award), neither does it dispose of part of the dispute (partial award). The order to produce documents does not bind the Arbitral tribunal, which can come back to it at any time during the proceedings. Consequently it is not a decision that can be appealed within the meaning of Art. 77 BGG.

3.6

¹³ Translator's note: Their seems to be a typo here as the pertinent rule in the 1998 ICC Rules is of course Art 20 (5)

¹⁴ Translator's note: Recte: 5

¹⁵ Translator's note: In English in the original text.

The Appellant's objection that the Arbitral tribunal would have decided, at least implicitly, on its jurisdiction in the Procedural Order within the meaning of Art. 190 (2) (b) PILA does not change the foregoing. The Appellant substantiates the argument merely on the basis of a difference of views with the Arbitral tribunal: as the Appellant repeatedly pointed out that the Arbitrator would "in its view act illicitly with reference to the enforcement of the partial award" if he were to issue an order to produce documents but the Arbitrator "issued Procedural Order Nr 7 despite these objections and confirmed it in Procedural Order Nr 8", this would have led him to "state implicitly and also expressly that he has a different understanding of his jurisdiction than the Respondent". This would establish "that the decision under appeal is an interlocutory decision on the jurisdiction of the Arbitrator". These arguments cannot be upheld. Indeed, contrary to the view of the Appellant, the difference of opinions it has with the Arbitrator does not concern the jurisdiction of the Arbitral tribunal to adjudicate the dispute but the issue as to whether or not the Procedural Order to produce documents is licit or opportune. A mere difference of views as to the admissibility of an order to produce documents does not constitute an implicit decision on jurisdiction technically speaking. Moreover the Appellant does not dispute the jurisdiction of the Arbitral tribunal to adjudicate the claims yet undecided.

3.7

Accordingly the Procedural Orders under appeal are procedural decisions which are not subject to a Civil law appeal within the meaning of Art. 77 (BGG) in connection with Art. 190 PILA.

4.

The matter is not capable of appeal.

In such an outcome of the proceedings the judicial costs shall be borne by the Appellant and it shall reimburse the Respondent's costs (ART. 66 (1) BGG and Art. 68 (2) BGG).

Therefore the Federal tribunal pronounces:

1.

The matter is not capable of appeal.

2.

The judicial costs, set at CHF 3'000 shall be borne by the Appellant.

3.

The Appellant shall pay an amount of CHF 3'500 to the Respondent for the federal judicial proceedings

4.

This judgment shall be notified in writing to the Parties and to the ICC Arbitral tribunal sitting in St Gallen.

Lausanne, April 15, 2013.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Hurni