4A_214/2011[1]

Judgment of October 18, 2011

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Deputy Judge Ramelli,
Clerk of the Court: Piatti.

Appellants,

1. B._____ Ltd.,
2. D._____ Trust,
3. C._____ Ltd.,
4. B._____,

Represented by Mr Damiano Brusa,

v.

Respondent,
A._____,
Represented by Mr Filippo Solari,

Facts:

A.
On April 27, 2007 B._____ Ltd. Dubai (United Arab Emirates), Claimant, initiated civil proceedings against A._____, Trieste, the Respondent, in front of the arbitration Court of the International Chamber of Commerce. The case was extended to Claimants C._____ Ltd. And D._____ Trust Guernsey (Chanel Islands) and to B._____, Mali Losinj (Croatia) further to the judgment of the Federal Tribunal of December 5, 2008 issued pursuant to an appeal by the Respondent against the "interlocutory award" issued by the arbitrator on June 16, 2008.

The submissions by the Claimants changed in many ways throughout the proceedings. In the "brief in conclusion" Claimant B._____ Ltd. submitted that A._____ should be ordered to cease certain competitive behaviour and to provide a long list of information on his own operations and that he should be ordered to pay € 1'000'000 with interest. Claimant C._____ Ltd. and D._____ Trust submitted that A._____ should be ordered to pay € 1'328'514.25 with

[1] Translator's note: Quote as B._____ Ltd. *et al v.* A._____, 4A_214/2011. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch

interest. The Respondent submitted that the main claim should be entirely rejected and as a counterclaim that all Claimants should be ordered severally to pay him € 577'426.51 with interest.

B.
Two contracts containing an arbitration clause are at the origin of the dispute: the Sales Contracts[2] of March 12, 2006 by which C._____ Ltd., the trustee in charge of administering D._____ Trust, which held 100% of the shares of B._____ Ltd. and B._____, the Executive Director of the company, undertook to transfer the shares to A._____; and the "Employment Contract"[3] of the same date (or of June 25, 2006) pursuant to which A._____ became "Managing Director"[4] of B._____ Ltd.

The Claimants argue that the Respondent is still bound by the contracts and that he breached them in various ways, such as breaching the prohibition to compete, misappropriating clients, theft and embezzlement. The Respondent argues that he was forced to terminate the contracts by the behaviour of the Claimants from which he seeks damages and the payment of commissions.

C.
In an award of February 22, 2011 the Arbitrator found that the Respondent had validly terminated the two contracts and he ordered him to pay € 173'000 to B._____ with interest at 5% from November 20, 2008; the other claims were rejected or found inadmissible. Partially granting the counterclaim, the arbitrator ordered B._____ Ltd., C._____ Ltd. as trustee of D._____ Trust and B._____, severally among each other, to pay € 499'338.23 to A._____ with interest at 5% from August 27, 2007, as well as CHF 116'792 and USD 48'000 as fees and expenses.

D.
The Claimants filed a Civil law appeal with the Federal Tribunal on March 31st, 2011 in which they submit that a stay of enforcement should be granted and the arbitral award annulled with the matter sent back to the arbitrator with instructions to issue a decision accordingly.

The Respondent and the Arbitrator answered on May 20, 2011 that the appeal should be rejected to the extent that the matter is capable of appeal. On June 27, 2011 the Appellants filed an unsolicited reply as to which the Respondent expressed its position on July 28, 2011.

E.
The stay of enforcement applied for with the appeal was rejected by decision of the Presiding judge of May 17, 2011. A second request, made on May 27, 2011 was rejected on June 27, 2011.

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

Reasons:

1.
The Federal Tribunal exercises full judicial review on its own jurisdiction and on the admissibility of the grievance raised (DTF 135 III 1 at 1.1).

1.1
Art. 77 (1) LTF[5] allows a Civil law appeal against arbitral awards pursuant to the requirements of Art. 190 to 192 of the Federal Law of December 18, 1987 on International Private Law (PILA[6]). This law applies because the seat of the arbitration is Lugano and the Parties had neither their seat nor a domicile in Switzerland, nor a habitual residence there at the time they entered into the arbitration clause (Art. 176 (1) PILA).

1.2
The appeal is timely (Art. 100 (1) LTF) and aimed at the arbitrator's final decision (Art. 90 LTF) in a civil case (Art. 72 (1) LTF). There is no need to determine whether Art. 74 (1) (b) LTF is applicable in this case as the amount in dispute is beyond CHF 30'000. Appellants B._____ Ltd., C._____ Ltd. and B._____ lost in front of the arbitrator and have the right to appeal (Art. 76 (1) LTF).

As the Respondent argues, it may be discussed whether D._____ Trust has standing to appeal because whilst it participated as claimant in the proceedings, it is involved in the award only through its trustee C._____ Ltd. As the appeal is based on one single grievance, which does not distinguish among each of the Claimants and as its outcome will be seen hereunder, the right to appeal may be conceded to D._____ Trust as well (Art. 76 (1) (b) LTF) even without researching its procedural position in depth.

1.3
The grounds for appeal in the field of international arbitration are exhaustively listed at Art. 192 (2) PILA. The Federal Tribunal reviews only the grievances which the appellant puts forward and reasons (Art. 77 (3) LTF). The requirement for reasons of Art. 106 (2) LTF is analogous to those which applied to the public law appeal; from that point of view the entry into force of the LTF did not change anything (DTF 134 III 186 at 5). The Appellant must consequently indicate clearly the rules of law which he argues were violated and state precisely what the violation consists of (DTF 128 III 50 at 1c).

1.4
An appeal as to an international arbitration may only seek the annulment of the award (Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF to the extent that the latter provision empowers the Federal Tribunal to decide the merits of the matter itself). The submission that the matter should

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[5] Translator's note: LTF is the Italian abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[6] 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.

be sent back to the Arbitrator for a new decision consistent with the reasons of this Court is accordingly inadmissible.

1.5
The answers to the appeal filed by the Respondent and by the Arbitrator do not contain any new elements which could be decisive for the case so that a second exchange of briefs would become necessary. The spontaneous reply filed by the Appellants will nonetheless be taken into account, to the extent necessary in conformity with case law of the European Court of Human Rights as to Art. 6 (1) ECHR (on the issue see judgment 5A_119/2011 of March 29, 2011 at 2.2). However the grievances which the Appellant could have raised within the time limit to appeal are inadmissible (DTF 135 I 19 at 2.2).

1.6
The Federal Tribunal is bound by the facts contained in the award. It may not rectify it even if it were manifestly inaccurate as Art. 77 (2) rules out the applicability of Art. 105 (2) LTF (DTF 133 III 139 at 5; judgement 4A_376/2008 of December 5, 2008 at 3.3). Consequently the new documents produced by the Appellants in front of the Federal Tribunal are not admissible either.

2.
The Appellants mainly availed themselves of the ground of appeal at Art. 190 (2) (d) PILA: they argue that the Arbitrator violated their right to be heard and the principle of equal treatment of the parties. Alternatively they invoke Art. 190 (2) (c) PILA as well.

However the appeal brief is hard to read, structured in a complex manner, confused and repetitive. The Appellants put under the heading of the right to be heard many arguments that have nothing to do with such a right; instead they concern the merits or the assessment of the evidence and they are expressed as though this Court were a court of appeal. The Federal Tribunal will review only the grievances which emerge with sufficient clarity and that are argued in conformity with the requirements of Art. 77 (3) and 106 (2) LTF.

3.
According to the Appellants the first violation of the right to be heard is the Arbitrator's refusal of exhibits A-1 to A-44 after previously hinting that they were admissible.

These documents were filed by the Claimants electronically on July 12, 2010 with their post hearing memorandum and they were rejected pursuant to an interlocutory decision of July 13, 2010. The Arbitrator held that their production had not been authorized and breached the directions previously given to the Parties. The Appellants do not challenge the interlocutory decision, although they mention it, neither do they deal with the Arbitrator's reasons. They do not do so even in their reply, in which they practically repeat the arguments already contained in the appeal, merely adding that the Arbitrator should have conducted a "differentiation between the various documents filed".

The grievance is therefore inadmissible and consequently all the arguments that the Appellants develop repeatedly around the documents rejected by the Arbitrator are equally inadmissible: for instance as to the comments of positions F._____, I._____, J._____, K._____ and n.

4.996.00. The production of such documents in front of the Federal Tribunal is equally inadmissible (above at 1.6).

4.
The award contains some general considerations as to the greater utility of documentary evidence as opposed to testimony. The Arbitrator relates them to the fact that in international trade transactions take place in writing above all and to the personal interest the witnesses introduced by the Claimants have in the dispute. The Appellants claim that this would violate the right to be heard. The continuation of the argument is then scattered with innumerable grievances referring to each position in dispute as to the alleged failure to consider documents and testimony.

4.1
Whilst the Appellants are careful to mention the right to be heard repeatedly, as was already said, their arguments do not concern the formal nature of the right to evidence; instead they concern the assessment of the evidence, namely the weight that the Arbitrator gave to documents and testimony in order to ascertain the facts that he considered decisive for his decision. The Federal Tribunal may not engage in such examination as it is bound by the facts ascertained in the award (above at 1.6). All the grievances relating to these issues are accordingly inadmissible, be they expressed in general terms or with reference to specific findings. This applies in particular to the arguments – of an appellate nature anyway – against the assessment of the evidence which led the Arbitrator to refuse to recognize positions F._____, G._____, H._____, I._____, J._____ and K._____ as well as n.1024.10/13 and 9.971.01, as well as those concerning the Respondent's appointment as Managing Director of B._____ Ltd. or the activity he carried out on behalf of L._____ GmbH.

4.2
The criticism raised against the granting of the Respondent's counterclaim relating to sale commissions is inadmissible for the same reason. In this respect the Appellants argue a violation of the principle of equal treatment. In itself the grievance could be a ground for appeal according to Art. 190 (2) (d) PILA if it were connected to unequal treatment from the point of view of the procedural rights of the Parties. In reality, the Appellants again criticize merely the assessment of the evidence by the Arbitrator; they persist in doing so even in their reply.

5.
According to the Appellants the right to be heard would have been violated because the Arbitrator failed to comply with his duty to inform the Parties of his intent to base the award on unforeseeable legal reasons and on his failure to ask for explanations on some unclear issues by giving them the possibility to express their views, to supplement their arguments and to offer evidence. The argument is raised generally at first and then in the context of the detailed review regarding positions K._____ 1024.10/13 and 9.971.01 as well as the several liability.

5.1
Swiss law contains the principle *jura novit curia* pursuant to which an arbitrator, as a court, is not bound by the legal arguments of the parties: as a rule – with the exception of circumstances not argued here – he may accordingly apply rules of law differing from those proposed by the parties

without being under a duty to warn them in advance; neither does he have to inform them as to the decisive nature of the facts on which he intends to base his decision, provided they were claimed and proved regularly (DTF 130 III 35 at 5 and references).

5.2
The Appellants' thesis is consequently erroneous. Moreover that the clarifications that the Arbitrator should have engaged into according to them ultimately concerned the adequacy of the elements in the record to prove the facts or the assessment of the evidence. Obviously, a party may not pretend that the arbitrator or the court would warn it that a document it filed does not prove a specified fact before issuing a decision not in its favour (judgment 4A_450/2007 of January 9, 2008 at 4.2.2).

6.
The Appellants variously argue that the Arbitrator should not have rejected some claims which were not challenged or based on undisputed facts or conversely.

Under specified circumstances the failure of assessing the arguments of the Parties may indeed be a formal denial of justice; one may refer in this respect to DTF 121 III 331 at 3b (quoted in the appeal brief). However it is not necessary to verify whether such circumstances would be met in the cases mentioned by the Appellants.

6.1
They explain that position F._____ of € 110'000 originated from the acquisition of machines by the Respondent using the funds of B._____ Ltd.; he would have resold the machines on his own account subsequently, without returning the money. The Arbitrator would have rejected the claim although the Respondent never denied paying the machines with the money of B._____ Ltd.

To justify such arguments however, the Appellants isolate some parts of the Respondent's statements and give them a meaning they do not have. In reality the Respondent did object at page 8 of his answer and counterclaim of August 27, 2007 and at page 13 of his answer and counterclaim of August 26, 2009 that the allegations by B._____ Ltd. were confused and he had disputed the amount of the payments made and also added that if the amount in dispute were € 110'000 it would have been returned anyway.

Accordingly it is not true that the Respondent would not have disputed the facts in discussion. This means that the argument in this respect is unfounded and that the arguments according to which the lack of dispute would have led the Appellants to submit the pertinent documents in a second phase only, hence making the refusal to include them in the record a violation of the right to be heard, are equally unfounded. The Arbitrator rejected the claim, holding that the evidence available – the mere statements of B._____ and of its counsel – were not adequate to prove the facts, which he otherwise defined as "hard to comprehend". Such reasons are not subject to appeal (above 1.6).

6.2
The Appellants repeat the argument as to position 9.971.01, claiming that the Arbitrator would not have recognized it although the Respondent would not have disputed it. However they disregard the

meaning of the statement “assumptions and not facts and even less new facts” at page 17 of the brief of March 1st, 2010 in which the Respondent undoubtedly disputed the claim.

6.3
As to the Respondent’s counterclaim with regard to sale commissions the Appellants argue that the Arbitrator considered that exhibit C-30 was unchallenged; they claim that the challenge was “implied” in the argument that exhibit C-20 was false, the latter being identical according to them. The argument is manifestly unfounded.

The two documents are not at all identical; let alone that one consists in a spreadsheet of one page (C-20) whilst the other consists in a different spreadsheet to which a good thirty pages are added (C-30). The Appellants argue in their reply that they merely produced the statements of accounts into the record as exhibit C-19. The argument is again inadmissible because the Appellants could have submitted it in the appeal brief in which instead they merely argued the comparison between exhibits C-20 and C-30 (above at 1.5).

7.
The last argument is based on Art. 190 (2) (c) PILA: the Appellants claim that the Arbitrator would have “disregarded” the requests for rendering of accounts that they submitted several times in the proceedings.

That argument as well is manifestly unfounded. The Arbitrator did not at all forget the submissions involved: he registered them with n. 3, 6 and 8 in connection with the Claimant’s post hearing brief of July 12, 2010 and rejected them at nr 3 of the award. The reasons do not matter: the Appellants confuse a formal violation, which they argue erroneously, with a rejection on the merits.

8.
For all these reasons, the Civil law appeal is unfounded to the extent that the matter is capable of appeal. The costs follow the determination on the merits (Art. 66 (1) and 68 (1) LTF).

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 10’000 shall be borne by the Appellants severally and they shall severally pay to the Respondent CHF 12’000 for the federal judicial proceedings.

3. Notification to the representatives of the Parties and to the ICC Arbitrator.

Lausanne, October 12 2011.

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	Piatti