4A_236/2017[1]

First Civil Law Court

Judgement of November 24, 2017

Federal Judge Kiss, presiding,
Federal Judge Klett
Federal Judge Hohl,
Clerk of the Court: Leemann (Mr.).

A._____ SA,
represented by Mr. Daniele Favalli and Ms. Barbara Badertscher,
Appellant,

v.

B._____ Ltd,
represented by Fabien Hohenauer,
Respondent

Facts:

A.
A.a. A._____ SA (Defendant, Appellant) is a stock company with its registered office in U._____ which operates a mobile phone and telecommunications network in that country.

B._____ (Claimant, Respondent) is a company incorporated under English law with its registered office in V . It provides international phone and telecommunications services.

A.b. On August 23, 2004, the Parties concluded an Agreement referred to as the "Voice Over Internet Protocol Interconnection Agreement" ("VoIP Agreement") for an initial 24-month term.

On August 23, 2006, they extended the term of the Agreement to October 31, 2014.

By letter of June 9, 2014, the Defendant terminated the Agreement of August 23, 2004, with immediate effect and ceased performing the Agreement. It accused the Claimant of fraudulent conduct by wrongfully generating sales volume by artificially generating calls to inactive numbers and charging fees for this. The Claimant disputes this and, for its part, accuses the Defendant of having invented the accusations raised by it in order

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_236/2017. The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.com.

to justify premature termination of the Agreement. Clause 22 of the VoIP Agreement contains an arbitration clause providing for an arbitral tribunal with its seat in Geneva.

B.
B.a. The Claimant subsequently initiated an arbitration against the Defendant under the Rules of the International Chamber of Commerce (ICC), which primarily contained an application (which was amended in the course of the arbitration) for a ruling ordering the Defendant to pay damages for breach at least equal to USD 471'529.66, plus default interest.

By Answer to the Request of November 28, 2014, the Defendant filed a defense to the Request for Arbitration. In addition, it rejected the three individuals proposed by the Claimant as arbitrators and itself proposed three candidates.

On December 8, 2014, the Claimant proposed two further candidates as arbitrators. The Defendant, in turn, rejected these. It stated that the Parties had been unable to reach agreement on a sole arbitrator and requested the ICC Court of Arbitration to appoint the arbitrator. On January 8, 2015, the ICC Court of Arbitration appointed the sole Arbitrator.

B.b. On January 19, 2015, the Arbitrator forwarded a draft of the Terms of Reference to the Parties.

On January 30, 2015, the Arbitrator conducted a preparatory telephone conference with the Parties in which the Terms of Reference, the applicable procedural rules and the procedural timetable were discussed.

On February 3, 2015, the Arbitrator issued Procedural Order No. 1 with respect to the arbitration rules generally applicable to the arbitration.

On February 20, 2015, the Terms of Reference were signed by the Arbitrator, after the Parties had previously already confirmed their agreement to them. On February 20, 2015, the Arbitrator also gave notice to the Parties of the procedural timetable.

B.c. On March 6, 2015, the Claimant submitted its fully reasoned Statement of Claim together with evidence and offers of evidence.

On April 10, 2015, the Defendant submitted its Answer, together with evidence.

On May 16, 2015, the Claimant submitted its Reply with exhibits CX-22 to CX-26.

On June 9, 2015, the Claimant applied to the Tribunal for leave to submit a new legal document as exhibit CL-18 and a new item of evidence as exhibit CX-27 (a website relating to alleged acts of corruption by the Defendant's parent company in Azerbaijan).

By email of June 10, 2015, the Defendant raised an objection to this request on the grounds that the request was belated; in addition, it argued that exhibit CX-27 was immaterial.

By Procedural Order No. 2 dated June 11, 2015, the Arbitrator admitted the exhibits CL-18 and CX-27.

On June 15, 2015, the Defendant filed its Rejoinder together with written witness statements of C._____ (fraud specialist for the Defendant) and D._____ (technical expert) as well as exhibits RX-24 to RX-28.

On June 25, 2015, the Claimant applied to the Tribunal for an examination of its expert E._____ outside the hearings set for July 8 and 9, 2016, because he then had to be in V._____**.** On June 26, 2015, a preparatory telephone conference was held in respect of the oral hearings scheduled for July 8 and 9, 2015.

On June 29, 2015, the Defendant stated that it was objecting to the separate examination of expert E._____, and also submitted an application for a ruling that his written witness statement should be disregarded.

On June 30, 2015, the Arbitrator gave notice that, in his view, the procedural rights of the Defendant would be safeguarded if the Defendant's expert D._____ was likewise questioned at the time of the separate examination of expert E._____.

On July 6, 2015, the Arbitrator issued Procedural Order No. 3 regarding the procedure for the oral hearing on July 8 and 9, 2015.

On July 7, 2015, the Claimant submitted exhibits CX-28 to CX 31.

B.d. On July 8, 2015, the Parties discussed various procedural matters with the Arbitrator, including, in particular, the Claimant's requests to separately question expert E._____ and to admit the newly submitted exhibits. The hearing was thereupon briefly interrupted in order to afford the Parties the opportunity to resolve their procedural difference. After having told the Arbitrator that they were unable to reach any agreement, the Arbitrator informed the Parties orally that the newly submitted documents would be admitted, subject to certain limitations. The hearing was interrupted for two hours. In addition, he stated that expert E._____ would be separately examined provided that the Claimant assumed the relevant costs of such a hearing, including the costs of any additional questioning of D._____.

Following a further interruption of the hearing, the Parties informed the Arbitrator that they had reached an agreement to postpone the hearing. They stated that further statements form the Claimant in respect of the newly-submitted evidence would follow, and the Defendant would apply for an examination of further witnesses; in addition, they stated that the Defendant would be granted the opportunity to comment on the Claimant's new evidence and to submit new documentary evidence of its own. They stated that the hearing should take place on August 27 and 28, 2015, and that a cut-off date ("cut-off") should be stipulated prior to the hearing with respect to the submission of new evidence.

The Arbitrator consented to this agreement, with the clarification that in such case, the documents which the Claimant had newly submitted on July 7, 2015, were being admitted without limitation.

B.e. On July 10, 2015, the Claimant submitted its further statements in respect of the newly submitted evidence, in accordance with the Parties' agreement.

On July 11, 2015, the Defendant informed the Arbitrator that the Parties had agreed to the periods in which they were permitted to call further witnesses as well as submit further statements, documentary evidence and written witness statements.

By Procedural Order No. 4 dated July 13, 2015, the Arbitrator provided rules governing the oral hearing which had been scheduled for August 27 and 28, 2015, and the question of further submissions ("further written submissions and evidence of fact and law").

On July 24, 2015, the Defendant requested an extension of the time for admitting new witness testimony to run to August 3, 2015. The Claimant objected to this request. On July 31, 2015, the Arbitrator granted the extension requested by the Defendant. The Defendant subsequently dispensed with applying for the admission of further witness testimony within the period of the extension.

B.f. On August 7, 2015, the Defendant challenged the Arbitrator for bias and applied for suspension of the arbitration. On August 13, 2015, the Arbitrator ordered a postponement of the oral hearing to a date following the decision of the ICC Court of Arbitration on the challenge. In addition, he noted that the Defendant had not applied for the admission of any further witness testimony within the period of the extension to August 3, 2015, for which reason, as a fundamental matter, such further witness testimony was not permitted for the further arbitration.

Furthermore, he extended the period which had been set for the Defendant to submit statements and documentary evidence in response to the Claimant's submission of July 7, 2014 (exhibits CX-28 to CX-31) to run to August 28, 2015, noting, however, that no further extensions of time would be granted.

The written submission in question was filed on August 28, 2015. In that written submission, the Defendant applied, *inter alia*, for disclosure of invoices of the Claimant to various third parties. By written submission of August 31, 2015, the Claimant and the Arbitrator each submitted their respective written comments on the Defendant's challenge to the ICC Court of Arbitration. On October 1, 2015, the ICC Court of Arbitration rejected the Defendant's challenge. On October 30, 2015, the Arbitrator held a telephone conference with the Parties on the further course for the proceedings.

By Procedural Order No. 5 dated December 2, 2015, he granted the Defendant's request for disclosure of August 28, 2015. On December 18, 2015, he rejected a further request for disclosure of documents by Procedural Order No. 6.

On January 26, 2016, the Arbitrator issued Procedural Order No. 7 regarding the pending oral hearings on February 17 and 18, 2016, which *inter alia* contained the following rules regarding the admissibility of new evidence:

> II. FURTHER WRITTEN SUBMISSIONS AND EVIDENCE OF FACT AND LAW
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> 4. No submissions or evidence of fact or law may be filed except where expressly provided for in the Procedural Timetable as then in force or by order of the Sole Arbitrator (for example in response to an express request from a Party).

5. Except in extraordinary circumstances, the Sole Arbitrator will refuse any request to admit new evidence of fact or law subsequent to Friday, 5 February 2016.

On February 5, 2016, the Parties informed the Arbitrator that they had reached agreement on postponing the deadline for submitting new evidence to February 8, 2016.

By Procedural Order No. 8 dated February 12, 2016, the Arbitrator noted that the Defendant's request for disclosure of February 1, 2016, had been withdrawn, and dismissed the requests made by the Parties for admission of new evidence and declined to admit the new evidence which had been submitted shortly before this. In particular, he held that the written submissions were late.

On February 17 and 18, 2016, the oral hearings were held in Geneva, in the course of which various witnesses were examined.

On March 21, 2016, the Parties submitted their written briefs to the Arbitrator following the oral hearings (Post-Hearing Briefs) and also provided comments on the costs of the proceedings. By briefs of March 29, 2016, the Parties each commented on the opponent's Statement of Costs.

On March 31, 2016, the Defendant asserted that the Claimant's written submission of March 29, 2016, contained inadmissible substantive allegations that bore no relationship with the costs. The Arbitrator subsequently declared the allegations in question to be immaterial.

B.g. By Arbitral Award of March 14, 2017, the Arbitrator found the Defendant liable to pay the amount of USD 471'529.66 (plus default interest) to the Claimant. He did not regard the Defendant as having proven its allegation that the Claimant was guilty of fraudulent conduct with respect to the calls which had been invoiced. He stated that there was no good cause present for the premature termination of the VoIP Agreement, for which reason the Defendant was liable to compensate the Claimant for the losses occasioned by its breach.

C.
By a civil law appeal, the Defendant applied to the Swiss Federal Tribunal for an order setting aside the Award of the ICC Arbitral Tribunal with its seat in Geneva dated March 14, 2017, and the removal of the Arbitrator.

The Respondent applied for dismissal of the appeal, to the extent the matter is capable of appeal. The Arbitrator has waived the right to submit comments.

The Appellant has filed a Reply and the Respondent a Rejoinder with the Federal Tribunal.

D.
By Order of July 4, 2017, the Appellant's request for a grant of suspensory effect was dismissed.

Reasons:

1.
According to Art. 54(1) BGG[2] the Federal Tribunal issues its decisions in an official language,[3] as a rule in the language of the decision under appeal. When that decision, as in this case, is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The challenged Award is in English. Because the English language is not an official language and in accordance with Art. 42(1) BGG in conjunction with Art. 70(1) BV[4] the Parties had submitted their briefs to the Federal Tribunal in German (Appellant) and in French (Respondent), the decision of the Federal Tribunal is issued, in accordance with its standard practice, in German, the language of the appeal. (BGE 142 III 521[5] at 1).

2.
In the field of international arbitration, a civil law appeal is admissible subject to the prerequisites of Art. 190-192 PILA[6] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the arbitral tribunal in this case is in Geneva. At the relevant times, both Parties' registered offices were located outside Switzerland (Art. 176(1) PILA). Since the Parties did not explicitly exclude the provisions of Chapter 12 PILA, these must be applied (Art. 176(2) PILA).

2.2. Only the grievances listed in Art. 190(2) PILA are admissible. An award may only be challenged for one of the reasons 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). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons at Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[7] at 5 s. 187 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565[8] at 3.1; p. 567; 119 II 380 at 3b p. 382).

2.3. A Civil law appeal within the meaning of Art. 77(1) BGG may, in principle, seek only the annulment of the decision under appeal (see Art. 77(2) BGG, which rules out the applicability of Art. 107(2) BGG, to the extent that this empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, there is an exception to the effect that the Federal

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[2] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 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: BV is the German abbreviation for the Swiss 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
[6] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties
[8] 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

Tribunal may itself decide the jurisdiction of the arbitral tribunal or lack thereof and as to the challenge to the arbitrator concerned (BGE 136 III 605[9] at 3.3.4 p.616 with references).

2.4. The appeal must be fully submitted within the time limit for appeal, within a fully reasoned Appellate brief (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use the Reply to supplement or approve its Appeal (see BGE 132 I 42 at 3.3.4). The Reply may only be used to comment on the statements made in the Answer of another participant in the proceedings (see BGE 135 I 19 at 2.2).

To the extent that the Appellant goes further in its Reply, its submissions cannot be taken into account.

2.5. 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 facts upon which the dispute is based and those concerning the course of the first instance proceedings, *i.e*. the findings as to the contents of the case, which include, in particular, the submissions of the Parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the contents of a witness statement or an expert report, or the outcome of 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, 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 when new evidence is, exceptionally, taken into consideration (BGE 138 III 29[10] at 2.2.1 p.34; 134 III 565 at 3.1 p.567; 133 III 139 at 5 p.141; each with references). The Party who 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 precise reference to the record, that the corresponding factual allegations were raised during the arbitral proceedings, in accordance with the procedural rules (see BGE 115 II 484 at 2a p.486; 111 II 471 at 1c p.473; each with references; see also BGE 140 III 86 at 2 p.90).

2.6. The Appellant disregards these principles where it precedes its legal arguments with detailed factual allegations in which it describes the background of the dispute and the course of the arbitration proceedings in its point of view, thereby departing, in various respects, from the factual findings of the arbitral tribunal or expanding on them without claiming any specific exception to the rule that factual findings are binding on this Court. In its further grounds of appeal, the Appellant likewise expounds on its view of matters for the Federal Tribunal, whilst departing from the actual findings of the arbitrator, or expands on those findings without satisfying the statutory prerequisites for asserting a sufficient fact-related objection. For example, it comments on the alleged motives of the Respondent for submitting new evidence prior to the hearing on July 8, 2015, and on the contents of the documents submitted. Such arguments shall not be taken into account.

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[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[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

3.
The Appellant asserts the grievance that, based on various Orders made during the first oral hearing of July 8, 2015, the Arbitrator could no longer be regarded as unbiased and impartial (Art. 190(2)(a) PILA).

3.1.1. Similarly to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality. Where an arbitral tribunal lacks independence or impartiality, then its composition should be regarded as irregular or the arbitrator in question as having been irregularly appointed within the meaning of Art. 190(2)(a) PILA. However, when adjudicating whether an arbitrator satisfies these requirements, reference must be made to the constitutional principles developed with regard to state courts although the specifics of arbitration and particularly those of international arbitration must be taken into account (BGE 142 III 521[11] at 3.1.1; 136 III 605[12] at 3.2.1 p.608 with references; see also BGE 129 III 445 at 3.1 p.449).

There is no direct appeal against a challenged decision by a private arbitral body such as the Court of Arbitration of the International Chamber of Commerce (ICC); however, an decision of this kind is itself susceptible to an indirect review in the course of proceedings to set aside the arbitral award (BGE 138 III 270 at 2.2.1 p.271; 128 III 330 at 2.2 p.332; 118 II 359 at 3b).

3.1.2. Pursuant to Art. 30(1) BV and Art. 6(1) ECHR, any person whose legal claim is subject to adjudication in court proceedings will have a right to adjudication of their dispute by a judge who is unbiased, unprejudiced and impartial. This is intended to ensure that no extraneous circumstances lying outside the proceedings have improper impacts on the Court's judgement in favour of or to the detriment of a party. Art. 30(1) BV is supposed to ensure openness of the proceedings required for a proper and fair trial in individual cases and thus facilitate a just decision (BGE 142 III 732 at 4.2.2 p.736; 140 III 221 at 4.1; 139 III 120 at 3.2.1 p.124, 433 at 2.1.2).

The guarantee of a constitutional judge is infringed if, objectively, there are circumstances present which would potentially establish an apprehension of bias or the risk of partiality. In this regard, partiality and bias are assumed in court jurisprudence if, in the individual case, in light of all of the factual and procedural circumstances, there are circumstances present which are apt to cast doubt on the impartiality of the judge. In this regard, the focus is not on the subjective perceptions of a Party. Rather, the doubts as to the judge's impartiality must appear to have an objective basis. It will suffice if there are circumstances present which, upon an objective view, would create an apprehension of bias and prejudice. For the removal of a judge, there is no requirement that the judge actually be biased (BGE 142 III 521 at 3.1.1; 140 III 221 at 4.1 p.222; 139 III 433 at 2.1.2 p.436; each with citations).

Subjective impartiality – which is presumed until proof of the contrary – ensures each litigant that their cause will be adjudicated without distinction of persons. Objective impartiality seeks in particular to prevent the same

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

magistrate from participating in a case under various titles, and to guarantee the independence of a judge toward both parties (BGE 142 III 521 at 3.1.1; 136 III 605 at 3.2.1 p.609 with references).

3.2. The Appellant submits that, by his Order in respect of the first oral hearing of July 8, 2015, in which he admitted the newly-submitted evidence, the Arbitrator favored the Respondent to the detriment of the Appellant, to a substantial degree. The Appellant argues that the Arbitrator was not willing to grant the Appellant and its witness sufficient time to view and examine the evidence, although it was obvious that one or two hours of preparatory time would not have sufficed to refute the newly submitted arguments by the opponent. The Arbitrator's order, in particular, was also said to establish a significant risk that the Appellant's witnesses would respond differently to the questions of a Respondent's counsel on cross-examination than if they had had sufficient time to thoroughly review and examine the documents. The Order to interrupt the hearing for two hours to permit the Appellant and its witnesses to study the newly-submitted evidence was merely given in order to create the impression that the Appellant's right to be heard had been safeguarded. The Appellant argues that the bias of the Arbitrator was also manifested by his Order that the Appellant was permitted only to call D._____ as a witness for the defense in respect of the new argument, which would not have happened if the Respondent had already submitted the new evidence together with its Statement of Claim or Reply.

Thus, the Appellant claims, the Arbitrator's orders substantially favoured the Respondent, to the detriment of the Appellant; it states that the Arbitrator helped the Respondent to introduce a decisive argument in the proceedings without affording the Appellant sufficient opportunity to put forward a proper and reasonable defence. The Appellant submits that the purpose sought by the Arbitrator in doing this was to impermissibly promote the position of the Respondent, to the detriment of the Appellant. In doing this, it says, the Arbitrator made clear at the outset of the hearing of July 8, 2015 that he was no longer independent, impartial and unbiased, but rather that he had already mentally decided the case in favor of the Respondent.

This impression of bias, the Appellant argues, is also emphasized by the fact that the Arbitrator admitted the new evidence without examining the question of whether Respondent had had the opportunity to present the evidence at an earlier time. In doing this, he violated the applicable rules of procedure, the Appellant says, and the evidence should not have been admitted. The order to admit the new exhibits subject to restrictions does nothing, the Appellant argues, to change the manifest bias in favor of the Respondent, but rather it limited the Appellant's procedural rights all the more. In addition, the fact that the hearing of July 8, 2015 ultimately had to be interrupted and the examination of the Appellant's witnesses as to the new evidence was not carried out, does nothing, the Appellant says, to alter the appearance of bias. Thus, it argues, the hearing was broken off based on an agreement of the parties, and it was, the Appellant says, a case of pure luck that the Respondent agreed to such a postponement.

3.3. In its submissions, the Appellant fails to demonstrate that the Arbitrator lacked the requisite independence and impartiality. Although it is conceivable that an arbitrator's conduct in the course of arbitration raises doubts as to his independence and impartiality, the Federal Tribunal applies a strict standard when assessing alleged bias of an arbitrator. Pursuant to consistent case law, procedural measures, whether correct or incorrect, cannot as such, establish any objective apprehension of bias on the part of the arbitrator who issued them (BGE 111 Ia 259 at 3b/aa p.264; for judgements since that time, *see* Judgment 4A_704/2015 dated February

16, 2017 at 3.1; 4A_606/2013[13] dated September 2, 2014 at 5.3; 4A_458/2010 dated June 10, 2010 at 3.3.3.2). The Appellant fails to recognize this where it accuses the Arbitrator of procedural errors in various respects in relation to his Orders on the evidence proffered by the Appellant prior to the hearing of July 8, 2015, and attempts to draw the conclusion that the documents were submitted late and should not have been admitted. The assertion made in the Appeal brief that the Arbitrator, by his Orders, intended to impermissibly advance the position of the Respondent and had already decided the case in favor of the Respondent at the time of the oral hearing cannot be sustained by the objective circumstances. The Appellant is, furthermore, unable in its submissions to, for example, demonstrate how, in the instant case, there are supposed to be blatant errors or repeated mistakes of law which would have to be assessed as a breach of obligation of such severity that they would establish the appearance of bias (BGE 115 Ia 400 at 3b p.404; Judgement 4A_54/2012[14] dated June 27, 2012 at 2.2.3; 4A_539/2008[15] dated February 19, 2009 at 3.3.2).

Similarly, the Appellant fails to demonstrate any disregard for the principle of impartiality where it supplements its legal submissions on impartiality in general terms that there is an appearance that the Arbitrator failed to systematically assess evidence in favor of the Appellant or that the Arbitrator had accorded them no probative value whatsoever, whereas evidence that was unfavorable to the Respondent was, conversely, held to be legally void. Where the Appellant furthermore contents itself with referring to its grievances of a violation of a right to be heard (Art. 190(2)(d) PILA) and of public policy (Art. 190(2)(e) PILA), it fails to satisfy the statutory requirements for establishing a grievance that the Arbitrator was appointed contrary to the legal rules under Art. 190(2)(a) PILA.

Where the Appellant argues that the Arbitrator should be regarded as biased in light of his Procedural Order No. 8 of February 12, 2016, it cannot be heard. If the Appellant had wished to rely on this fact, then it would have needed to assert it promptly during the arbitration; because it did not undertake any steps in this respect, it has forfeited its claim to subsequently assert this ground of challenge (see BGE 130 III 66 at 4.3 p.75; 129 III 445 at 3.1 p.449; 126 III 249 at 3c; each with references).

4.
The Appellant accuses the Arbitrator of having violated the principle of equal treatment of the Parties and of the principle of the right to be heard (Art. 190(2)(d) PILA).

4.1. Art. 190(2)(d) PILA allows an appeal only on the basis of mandatory procedural rules provided under Art. 182(3) PILA. According to this, the arbitral tribunal must honor the right of the parties to be heard. With the exception of the requirement that reasons be given, this corresponds to the constitutional right embodied in Art. 29(2) BV. Case law derives from this in particular the right of the parties to express their views as to all facts important to the judgement, to present their legal arguments, to prove their factual submissions important for the decision with suitable offers of evidence presented in proper format and in a timely manner, and the

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/challenge-expert-forfeited-if-not-filed-immediately

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-recalls-that-procedural-mistakes-or-a-decision-

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/criticism-against-the-conduct-of-the-procedure-by-the-arbitrator

right to participate in the hearing and to access the record (BGE 142 III 360[16] at 4.1.1 p.360; 130 III 35 at 5 p.37; 127 III 576 at 2c; each with references).

According to established case law, the right to be heard in adversarial proceedings under Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international award (BGE 134 III 186[17] at 6.1 with references). However, there is a minimal duty on the part of the arbitrators to review and deal with the issues that are material to their decision. That duty is violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party. However, this does not mean that the arbitral tribunal is compelled to examine each and every submission of the parties (BGE 142 III 360 at 4.1.1 p.361; 133 III 235 at 5.2, with references).

The right of equal treatment requires the arbitral tribunal to treat the parties equally (BGE 133 III 139 at 6.1 p.143) at all stages of the proceedings (including at any potential hearing, to the exclusion of the deliberation of the arbitral tribunal (Judgment 4A_360/2011[18] dated January 31, 2012 at 4.1) and does not grant one party what it refuses the other one (Judgments 4A_80/2017[19] dated July 25, 2017 at 3.1.2; 4A_636/2014[20] dated March 16, 2015 at 4.2). Both parties must be granted the same opportunity to argue their position in the proceedings (BGE 142 III 360 at 4.1.1 p.361).

4.2.
4.2.1. The Appellant argues that the Arbitrator treated the Parties unequally in comparable situations in that he easily gave the Respondent leave to introduce extensive new evidence into the proceedings only a few hours prior to the hearing of July 8, 2015, and by contrast, had rejected the new evidence submitted by the Appellant on February 8, 2016, contrary to the procedural rules in place, without any substantive or logical reasons for doing so.

4.2.2. In its submissions, the Appellant does not establish any violation of the principle of equal treatment of the Parties. Quite apart from the fact that the Appellant itself consented *ex post* to the admission of the Respondent's newly-submitted evidence on July 8, 2015, it inadmissibly criticizes the Arbitrator's evidentiary rulings which had admitted exhibits CX-28 to CX-31 submitted by the Respondent at the hearing of July 8, 2015, but by Order of February 12, 2016, had held that the exhibits RX-46 to RX-55 submitted by the Appellant were late. The Appellant's assertion that the Arbitrator allowed the aforementioned evidentiary submission by the Respondent – contrary to the Appellant's later submission – without any review as to whether it was timely submitted cannot be sustained by the factual findings in the challenged Award, which are binding on the Federal Tribunal (Art. 105(1) BGG). Rather, it is obvious that the Arbitrator implicitly considered the

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

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[18] 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

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-80-2017

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-review-assessment-evidence-arbitral-tribunal-under-cloak-right-be-heard

Respondent's evidence to have been timely submitted when he designated it orally as admissible at the hearing of July 8, 2015. As the Appellant confirmed its agreement to the admission of the new evidence that very same day, he had no cause to delve in any detail in his Award into the question of whether it was timely. In addition, and contrary to the description by the Appellant, it is not correct that the Arbitrator, in his Order of February 12, 2016, merely rejected evidentiary applications by the Respondent which were submitted after the agreed cut-off date. Rather, it appears from the Statement of Facts in the challenged Award that the Arbitrator also simultaneously rejected a request for admission of new evidence which the Respondent had submitted on February 3, 2016, *i.e*. prior to the relevant evidentiary submission by the Appellant.

The arguments of the Appellant in which it describes the substance of the documents submitted by it in detail and refers to them as timely (contrary to the challenged Award) and refers to the Arbitrator's directions as 'arbitrary' amount to an attempt, under the cover of the principle of equal treatment, to assert a grievance of arbitrariness, which the Swiss legislature precisely intended to rule out, by stipulating the limited grounds of grievance under Art. 190(2) PILA (*see* Judgements 4A_74/2014[21] dated August 28, 2014 at 3.2.6, unpublished in BGE 140 III 477; 4A_360/2011[22] dated January 31, 2012 at 4.1, with references). With these arguments, the Appellant has not demonstrated that its opponent was granted something in the course of the proceedings which was denied to it.

The grievance that the Arbitrator violated the principle of equal treatment of the Parties is unfounded.

4.3.
4.3.1. The Appellant further argues that the Arbitrator simply ignored its challenges to the evidence or of the probative value of the revenue figures asserted by the Respondent, or failed to give consideration to them. This, it says, follows unmistakably from his finding in n. 401 of the challenged Award ("I am entirely satisfied with this methodology and in the absence of any challenge from the Respondent as to the authenticity of the data, I accept its veracity"[23]) [emphasis added by the Appellant].[24] It argues that the Appellant's substantiated challenges and arguments regarding the asserted revenue figures are probative and material because the Respondent, it argues, bore the burden of proof of the losses suffered based on Art. 8 ZGB,[25] who accordingly bore a duty to sufficiently substantiate the losses claimed. The allegations in the Appellant's Answer and in its Rejoinder, which the Arbitrator disregarded, demonstrated, the Appellant argues, that the Respondent had not substantiated its losses in any way. The Appellant argues that the Arbitrator's failure to give consideration to the corresponding submissions and arguments constitutes a formal denial of its rights; the Appellant, it says, was, in terms of the outcome of the Award, disadvantaged just as much as if the Arbitrator had failed to afford it any opportunity to comment on the damages claimed. This, it says, should be regarded as a violation of its right to be heard.

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[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[22] 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

[23] Translator's Note: In English in the original text.

[24] Translator's Note: This indication regarding emphasis is in the original German version (at least, as it appears on the website of the Federal Tribunal) however, there is no emphasis in the English text.

[25] Translator's Note: ZGB is the German acronym for the Swiss Civil Code.

4.3.2. The Appellant is unable to show to what extent it would have been impossible for it to present its position on the alleged lack of substantiation of damages in these proceedings. As is apparent from the contested Award, the Arbitrator did not overlook the objection raised by the Appellant that the Respondent had not sufficiently substantiated its lost profits in its legal submissions (n. 398: "It is true that the approach the Claimant adopted to determining its profit does not fully emerge from the Claimant's submissions themselves"). However, considering that the Arbitrator did consider the Claimant's submissions sufficient, in light of the overview in exhibit CX-15, and based on this, calculated the lost profits arising out of the premature termination of the contract, this cannot be regarded as a violation of the right to be heard. Contrary to what the Appellant appears to believe, the Arbitrator merely proceeded on the basis of the undisputed authenticity of the generated data sheet in CX-15 and not on the assumption that the Appellant had failed to contest the basis for calculating the Claimant's damages; on the contrary, the Arbitrator took account of the various submissions made by the Appellant. By arguing in these proceedings that lost profits could not be derived from exhibit CX-15 any more than from the invoices subsequently submitted by the Respondent, it once again impermissibly criticizes the Arbitrator's assessment of the evidence. By its arguments, it fails to demonstrate that the Arbitrator failed to take into account legally relevant allegations, arguments, evidence or offers of evidence due to an oversight or misunderstanding.

The allegation that the Appellant's right to be heard was violated is unfounded.

5.
The Appellant raises the grievance of a violation of procedural public policy (Art. 190(2)(e) PILA).

5.1. Public policy (Art. 190(2)(e) PILA) has substantive and procedural contents. Procedural public policy is breached in cases of violations of fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, such that the decision appears absolutely incompatible with the values and legal order of a state ruled by law (BGE 141 III 229[26] at 3.2.1 p.234; 140 III 278[27] at 3.1 p.279; 136 III 345[28] at 2.1; 132 III 389[29] at 2.2.1 p.392; 128 III 191 at 4a p.194). This procedural guarantee is subsidiary to the further grievances under Art. 190(2) PILA (BGE 138 III 270[30] at 2.3).

5.2. The Appellant submits that the testimony of the witness D._____, who it called, and a witness E._____, called by the Respondent was not treated equally by the Arbitrator. The Appellant argues that the Arbitrator gave no consideration to the testimony of D._____, due to its alleged relationship of

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[26] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

[27] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

[28] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

[29] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[30] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

dependency on the Appellant, while in contrast, he simply ignored a similar relationship existing between witness E._____/his employer and the Respondent and the interests associated with this. This, the Appellant argues, demonstrates that the Arbitrator's assessment of the evidence lacked any objectivity whatsoever. He argues that this unequal treatment was all the more incomprehensible given that witness E._____ lacked any technical expertise whatsoever which, it says, was expressly apparent from the cross-examination at the oral hearing on February 17-18, 2016; this was, it said, entirely in contrast to D._____, an engineer with a successfully completed degree course and more than 18 years of experience in the telecommunications sector.

The Appellant argues that the objective assessment of evidence by an independent and unbiased judge constitutes a fundamental procedural principle. It argues that unequal treatment of this kind in assessing evidence without a substantive justification violates any conceivable sense of justice and exceeds any judicial discretion whatsoever. The Appellant argues that the Arbitrator's assessment of the evidence as described in the Appeal brief is in untenable conflict with such a sense of justice. This, the Appellant argues, represents a violation of formal public policy.

5.3. The Appellant does not demonstrate any violation of public policy, but rather impermissibly criticizes the Arbitrator's assessment of the evidence by submitting its own assessment of the credibility of its witness D._____ to the Federal Tribunal and wishes to draw opposing conclusions from the testimony of witness E._____. The Arbitrator has plausibly explained why, based on the lengthy employment relationship of D._____ with the Appellant's parent company, he did not wish to rely in an uncritical fashion on his testimony. In assessing the witness testimony, the Arbitrator also took account *inter alia* of disparities between the oral testimony and the preceding written statements. Contrary to the view espoused in the Appeal brief, it does not appear obvious why this assessment, as compared with the testimony of witness E._____, who works for a company performing services for the Respondent, is supposed to indicate that the evidence was assessed in a way which was not guided by substantive considerations.

In connection with the assessment of the two witnesses' testimonies, the Appellant likewise wrongly accuses the Arbitrator of having adjudicated in a partisan, biased, and prejudicial fashion (*see* Art. 190(2)(a) PILA). To the extent the Appellant wishes to call into question the Arbitrator's assessment of the two witnesses' testimonies and wishes to draw different conclusions from those testimonies, the Appellant's grievance that the subsidiary guarantee of formal public policy (Art. 190(2)(e) PILA) was violated additionally misses the mark.

5.4. Finally, in its argument that the ICC Court of Arbitration ruled on the Appellant's challenge application by its Decision of October 1, 2015, without any reasoning, the Appellant fails to demonstrate any violation of its right to be heard or any violation of procedural public policy (in this respect, *see* Judgement 5A_68/2013 and 5A_69/2013 dated July 26, 2013, at 4.2.2 and 4.3). The Appellant does not demonstrate in what respect a lack of reasoned grounds (*see* Art. 11(4) of the ICC Rules 2012) made it impossible for the Appellant to assert its position in the proceedings or how the proceedings supposedly were no longer fairly conducted. The Appellant's argument cannot be followed where it now claims that it was not explained to the Parties in any way "whether there was anything 'to' the grievances asserted […] or whether the Appellant was in error and thus the procedural actions by the Arbitrator were fully proper," particularly since, as is undisputed, its challenge application was rejected by the ICC Court of Arbitration. Contrary to what the Appellant appears to

assume, one cannot infer from the grounds of Appeal invoked here any right to be informed regarding "procedural guardrails," let alone infer a right to a "well-rounded" unblemished relationship with the Arbitrator. The objection, for which it fails to submit any further substantiation, that it had no other choice than to consent to the ICC Rules in their entirety, misses the mark (Judgement 5A_68/2013/5A_69/2013 dated July 26, 2013, at 4.3). Where it refers to the fact that the ICC Rules have been amended in the interim and that Art. 11(4) in the form as amended since March 1, 2017, would no longer represent any obstacle to the provision of reasoned grounds of a decision on a challenge application, the Appellant no more demonstrates a public policy violation than it does by its comparison with challenge proceedings before state courts in international *ad hoc* arbitrations. Quite apart from this, with its latter argument it overlooks the fact that in international arbitration, judicial decision on a challenge application is final under Art. 180(3) PILA and cannot be challenged, even indirectly, before the Federal Tribunal (BGE 141 III 444 at 2.2.4.2 p.456; 138 III 270[31] at 2.2.1 p.271).

The Appellant's grievance that there has been a violation of procedural public policy is unfounded.

6.
The appeal is rejected to the extent the matter is capable of appeal. In view of outcome of the proceedings, the Appellant shall pay costs and compensate the Respondent (Art. 66(1) and Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs, set at CHF 8'000 shall be imposed on the Appellant.

3.
The Appellant shall pay the Respondent the amount of CHF 9'000 for the Federal judicial proceedings.

4.
The decision shall be notified in writing to the Parties and to the ICC Arbitral Tribunal with its seat in Geneva.

Lausanne, November 24, 2017

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

Presiding Judge:	Clerk:
Kiss	Leemann (Mr.)

[31] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen