4A_74/2014[1]

Judgment of August 28, 2014

First Civil Law Court

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

A._____ SA,
Represented by Mr. Andreas Fankhauser and Mr. Andreas Hauenstein,
Appellant

v.

B._____,
Represented by Mr. Marco Albrecht,
Respondent

Facts:

A.
A.a. On October 12, 2012, B._____, [name of city omitted], Turkey, (Claimant, Respondent) initiated arbitration proceedings in the Basel Chamber of Commerce against A._____ SA Luxembourg (Defendant, Appellant) and submitted that it should be ordered to pay USD 21 million with interest at 5% from July 2, 2012.

The Claimant relied upon an arbitration clause contained at n. 16 of three contracts identical in contents:

Art. 16 Applicable Law and resolution of disputes

[1] Translator's Note: Quote as A._____ SA *v.* B._____, 4A_74/2014.
The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

For all disputes arising out of this contract, the Arbitration Committee, to be established in Basel (Switzerland), is authorized and the law to be applied is Swiss Law. The Arbitration language is German.
The decision of the Arbitration Committee is a judgment in absolute, eliminating the right to appeal of the parties.[2]

The three contracts involved ("the First Contract") are the following:

- A Share Purchase Contract of October 15, 2011, between the Claimant as seller and the Defendant as acquirer of all shares of C._____, a company incorporated in Vilnius, Lithuania, for a price of USD 7 million ("the First Lithuanian Contract");
- A Share Purchase Contract of October 19, 2011, between the Claimant as seller and the Defendant as acquirer of all shares (corresponding to 100% of the capital) of SIA C._____, a company incorporated in Riga, Latvia, for a price of USD 7 million ("the First Latvian Contract");
- A Share Purchase Contract of October 19, 2011, between the Claimant as seller and the Defendant as acquirer for two shares (corresponding to 1% of the capital) of C._____ SRL, a company incorporated in Bucharest, Romania, for a price of USD 100'000 ("the First Romanian Contract").

In addition, the Claimant submitted to the Arbitral Tribunal a document described as a Share Purchase Contract (without signatures) dated October 21, 2011, concerning 4'500 shares (corresponding to 90% of the capital) of C._____ Bulgaria OOD, a company incorporated in Sofia, Bulgaria ("the First Bulgarian Contract"). As opposed to the other three contracts, however, the latter contained a jurisdiction clause ("Place of jurisdiction is Istanbul, Turkey"[3]).

The Defendant submitted to the Arbitral Tribunal the following contractual documents, each of which contained a jurisdiction clause in favor of the state courts of the respective countries ("the Second Contracts"):

- "Stock Purchase-Sale Agreement" of October 20, 2011, between the Claimant as seller and the Defendant as acquirer for all 1'000 shares of C._____, Vilnius, Lithuania, for a price of LTL 100'000, corresponding to EUR 28'962 ("the Second Lithuanian Contract");
- "Share Purchase Contract" of October 19, 2011, between the Claimant as seller and the Defendant as acquirer of all shares (100% of the capital) of SIA C._____, Riga, Latvia, for a price of LVL 2'000, corresponding to EUR 2'845.70 ("the Second Latvian Contract");
- "Assignment of Shares Agreement" between the Claimant (owner of two shares) and D._____, Moscow, (owner of 198 shares) as seller and the Defendant as acquirer of a total of 200 shares of

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

C._____ SRL, Bucharest, Romania, for a total purchase price of RPM 2'000 corresponding to USD 632 or EUR 454 ("the Second Romanian Contract").

It also submitted an Agreement for the Sale and Purchase of Shares of February 16, 2012, between the Claimant as seller and the Defendant as acquirer of 90% of the shares of C._____ Bulgaria OOD, Sofia, Bulgaria, ("the Second Bulgarian Contract") which did not contain either an arbitration clause or a jurisdiction clause.

The Arbitral Tribunal also had at hand the copies of three debit notes, which according to the Defendant should establish that it paid the following amounts of the purchase price to the Claimant:

- EUR 28'962 for the acquisition of the shares according to the Second Lithuanian Contract;
- EUR 2'845.70 for the acquisition of the shares pursuant to the Second Latvian Contract;
- EUR 454.11 for the acquisition of the shares pursuant to the Second Romanian Contract;

The record of the arbitration also contained a copy of the excerpt of the Commercial Register of Luxembourg concerning the Defendant. This shows that its board consists of three members, with one member described as belonging to Class A and that the other two are referred to as Class B. The signature regulations in the Commercial Register show that insofar as the board consists of several members, the company may be bound towards third parties by the joint signatures of two board members, one Type A and one Type B, or by the sole signature of a duly authorized person.

A.b. The Claimant submitted that the parties had agreed upon the arbitral jurisdiction of the Basel Chamber of Commerce; therefore, the Swiss Rules of the Swiss Chambers' Arbitration Institution (SCAI) were applicable to the proceedings. Furthermore, he submitted that a three-member panel should be constituted.

However, the Defendant submitted that the arbitration clauses invoked by the Claimant were not validly concluded and, moreover, not apt to base the jurisdiction of an arbitral tribunal constituted according to the Swiss Rules. It additionally submitted that a sole arbitrator should be appointed.

On February 27, 2013, the SCAI Arbitration Court appointed a sole arbitrator subject to a decision of the Arbitral Tribunal as to jurisdiction. The Sole Arbitrator was appointed by the Arbitration Court on April 14, 2013.

A.c.
During the hearing, the Claimant reduced his claim to an amount corresponding to the purchase price according to the First Bulgarian Contract (USD 6'900'000) and made the following reformulated submissions concerning jurisdiction:

"To find that the Arbitral Tribunal has jurisdiction to decide the claims based on the purchase price for the sale of the share package according to the Latvian, Lithuanian, and Romanian Contracts for USD 14'100'000 with interest at 5% from July 2, 2012."

B.
In a partial award of December 17, 2013, the Arbitral Tribunal rejected the Defendant's jurisdictional objection and found that it had jurisdiction as to the Claimant's submissions based on the First Lithuanian Contract, the First Romanian Contract and the First Latvian Contract.

The Arbitral Tribunal first rejected the Defendant's argument that board member E._____ could not represent it under his own signature for the conclusion of the First Contracts; this is because the Arbitral Tribunal had reached the conclusion that the powers of attorney authorizing E._____ to represent the Defendant when the Second Contracts were concluded also empowered him as to the First Contracts. The Arbitral Tribunal furthermore concluded that with the Second Contracts the parties did not want to waive the arbitration clauses contained in the First Contracts but rather, according to the real intent of the parties, the First Contracts should have remained applicable as to the arbitration clauses in dispute. It was therefore established that the parties wanted to remove any possible disputes from the jurisdiction of the state courts and submit to the jurisdiction of an arbitral tribunal.

In addition, the arbitration clauses in dispute should be interpreted according to the principle of reliance to the effect that they had not aimed at an *ad hoc* arbitral tribunal but meant an arbitral tribunal to be constituted according to the Swiss Rules.

C.
In a civil law appeal, the Defendant submits that the Federal Tribunal should annul the Partial Award of Arbitral Tribunal of December 17, 2013, and find that the Arbitral Tribunal has no jurisdiction.

The Respondent and the Arbitral Tribunal submit that the appeal should be rejected. The Appellant submitted a reply to the Federal Tribunal on April 17, 2014. The Respondent waived the submission of another brief.

Reasons:

1.
In support of its submission that the judgment of the Federal Tribunal should not be published, the Appellant merely invokes "grounds of privacy" which does not amount to an interest worthy of protection to

maintain confidentiality. The alternative submission that the judgment should be published anonymously if at all can be upheld, as publication in anonymous form is the rule (Art. 27(2) BGG[4]).

2. In the field of international arbitration, a civil law appeal is allowed, pursuant to the requirements of Art. 190 – 192 PILA[5] (SR 291)(Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Basel in this case. Both parties had their seat or their domicile outside Switzerland at the relevant time (Art. 176(1) PILA). As the parties did not explicitly waive the application of Chapter 12 PILA, those provisions are therefore applicable (Art. 176(2) PILA).

2.2. The arbitral award under appeal is a partial award on jurisdiction issued independently. According to Art. 190(3) PILA, it may be the object of a civil law appeal (BGE 130 III 76 at 3.1.3, at 3.2.1, p. 80).

The grounds for appeal of an international award are left to the determination of the parties in the framework of Art. 192 PILA (see Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed., 2010, n. 1541, 1691; Paolo Michele Patocchi and Cesare Jermini, *Basler Kommentar*, 3rd ed., 2013, n. 3 to Art. 192 PILA). While the Appellant elaborately explains why, in its view the right to appeal was not explicitly waived, the Respondent does not argue such a waiver but considers the appeal admissible and submits that it should be rejected. As the parties agree that the award is appealable, there is no room for a different interpretation of their statements concerning a possible waiver.

2.3. The appeal must be fully reasoned within the time limit to appeal (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use the reply to supplement or improve its appeal (BGE 132 1 42 at 3.3.4). The reply can only be used to comment upon the statements made in the answer of another participant in the proceedings (see BGE 135 I 19 at 2.2).

Insofar as the Appellant goes further in its reply, its submissions cannot be taken into account.

2.4. A civil law appeal within the meaning of Art. 77(1) BGG may, in principle, only seek the annulment of the decision (see Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar at this empowers the Federal Tribunal to decide the matter itself). Insofar as the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception in this respect and the Federal Tribunal may itself determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal or the removal of the arbitrator involved (BGE 136 III 605[6] at 3.3.4, p. 616 with references).

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

[5] 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.

[6] 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

The Appellant's submission is admissible in this respect.

2.5. According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons contained at Art. 106(2) BGG as to the violation of constitutional rights and of cantonal or intercantonal law (BGE 134 III 186[7] at 5, p. 187 with references). Criticism of an appellate nature is not admissible (BGE 134 III 565[8], at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.6. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). Considering the very limited grounds for appeal in the field of arbitration, this Court may not rectify or supplement the factual findings of the arbitral tribunal, even if 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 and Art. 105(2) BGG).

3.
The Appellant argues that the Arbitral Tribunal wrongly accepted jurisdiction as there is no valid arbitration agreement at hand (Art. 190(2)(b) PILA).

3.1. The Federal Tribunal freely reviews the jurisdictional defense according to Art. 190(2)(b) PILA as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 140 III 134 at 3.1 with references). Yet also in the framework of an appeal concerning jurisdiction, the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence is exceptionally taken into account (BGE 138 III 29[9] at 2.2.1, p. 34; 134 III 565[10] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references).

This also applies to an appeal against a partial award on jurisdiction. According to the wording of Art. 190(3) PILA, preliminary and partial decisions may only be appealed on the grounds at Art. 190(2)(a) and (b) PILA, *i.e.* due to improper composition (*lett*. (a)) or the wrongful acceptance or denial of jurisdiction (*lett*. (b)) of the arbitral tribunal. This corresponds to the general principle that, considering their nature, issues as to the organization of the tribunal must be decided finally before the proceedings are continued (note that

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[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

[9] 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

[10] 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

BGE 130 III 76 at 3.2.1, p. 80, at 4.6 addresses an exclusion of grievances "outside the domain of jurisdiction and organization"; see also BGE 138 III 94 at 2.1 with references). This also places an obligation upon the parties to immediately raise these grievances in an appeal against the first preliminary or interlocutory decision, otherwise the defenses are forfeited (BGE 130 III 76 at 3.2.1, p. 80).

However, the goal of an early and final determination of organizational matters as to the jurisdiction of or the appointment or composition of the arbitral tribunal may only be achieved if the decision of the Federal Tribunal on appeal relies on a factual basis that cannot be questioned again later on. If improper composition or wrongful assessment of jurisdiction is pleaded according to Art. 190(2)(a) and (b) PILA, the parties must be allowed to avail themselves of the grounds for appeal contained at Art. 190(2) PILA as to the factual findings on the basis of which the arbitral tribunal found that it was properly composed or had jurisdiction, such as the right to be heard or the principle of equal treatment (*lit*. d). Otherwise, it would be assumed that, depending on the circumstances, the Federal Tribunal could base its decision as to jurisdiction or composition on factual findings, which would have been reached by the arbitral tribunal in violation of these procedural guarantees. In this manner, an appeal could be upheld and a partial award finding for jurisdiction annulled and the jurisdiction of the arbitral tribunal denied on purely legal jurisdictional grounds even though the other party could not rely on a possible violation of the right to be heard in the factual findings. Should the appeal be rejected, the violation of due process would be postponed only to be raised against the final or the first partial award on the merits, which could require assessing jurisdictional issues again at the end of the arbitral proceedings. This would contradict the purpose of Art. 190(3) PILA, which is to solve issues immediately and finally.

The appeal against a preliminary or interlocutory decision concerning the wrong appointment of an arbitrator or the wrong composition of the arbitral tribunal (Art. 190(2)(a) PILA) or the lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) must be decided by the Federal Tribunal on the basis of factual findings of the arbitral tribunal which withstand any possible arguments of a violation of fundamental procedural rights. In the framework of such an appeal, therefore, the additional grievances of Art. 190(2) PILA may be invoked as well, insofar as they have to do with the composition or jurisdiction of the arbitral tribunal (see Berger and Kellerhals, *op.cit*., 2nd ed., 2010, n. 1537; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage international*, 2nd ed. 2010, n. 717; Erich Tagwerker, *Zur Anfechtung schiedsgerichtlicher Vor- und Zwischenentscheide nach Art. 190 IPRG*, 2009, p. 34 *ff*.; Sébastien Besson, *Le recours contre la sentence arbitrale internationale selon la nouvelle LTF*, ASA Bull. 1/2007 p. 9 FN 24; Andreas Bucher, in: *Commentaire romand*, 2011, n. 20 to Art. 190 PILA; Matthias Leemann, *Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator*, ASA Bull. 1/2011 p. 18 *f*.; Christian Luczak, Beschwerde gegen Schiedsgerichtsentscheide, in: *Geiser und andere [Hrsg.], Prozessieren vor Bundesgericht*, 3rd ed. 2011, n. 6.24; see also Art. 190(3) PILA corresponding to the provision Art. 392(b); ZPO Dieter Gränicher, in: Thomas Sutter-Somm und andere [Hrsg.], *Kommentar zur Schweizerischen Zivilprozessordnung [ZPO]*, 2nd ed. 2013, n. 25 to Art. 392 ZPO; Michael Mráz, in: *Basler Kommentar*, 2nd ed. 2013, n. 14 to Art. 392 ZPO; Daniel Marugg and Anna Neukom Chaney, in: *Berner Kommentar*, 2014, n. 23 to Art. 392 ZPO; a.M. Stefanie Pfisterer, in: *Basler Kommentar*, 3rd ed. 2013, n. 90 to Art. 190 PILA). However, such grievances must be strictly limited

to points directly concerning the composition or the jurisdiction of the arbitral tribunal; otherwise they are inadmissible and may not be addressed.

The Appellant's arguments that the Arbitral Tribunal violated the principle of equal treatment of the parties and the right to be heard in assessing its jurisdiction (Art. 190(2)(d) PILA) are therefore admissible.

3.2. In connection with its argument that the three arbitration clauses contained in the First Contracts did not become valid (Art. 190(2)(b) PILA), the Appellant argues that the Arbitral Tribunal violated the right to be heard and the principle of equal treatment of the parties (Art. 190(2)(d) PILA) in several respects.

3.2.1. Art. 190(2)(d) PILA allows an appeal only for violation of mandatory procedural rules according to Art. 182(3) PILA. In this respect, the Arbitral Tribunal must in particular guarantee the right of the parties to be heard. With the exception of the right to a reasoned decision, this corresponds to the constitutional guarantee contained at Art. 29(2) BV[11] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law deduces from this, in particular, the right of the parties to state their views as to all facts important for the judgment, to submit their legal arguments, to prove their factual allegations important for the decision with suitable means submitted in a timely manner, and in the appropriate format, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

According to well-established case law, the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to reasons of an international arbitral award (BGE 134 III 186[12] at 6.1 with references). However, it carries a minimal duty for the arbitrators to examine and handle the issues important to the decision. The Arbitral Tribunal violates this duty when, due to oversight or misunderstanding, it fails to consider some allegations, arguments, evidence, or evidentiary submissions of a party (BGE 133 III 235 at 5.2 with references).

3.2.2. In the arbitral proceedings the Appellant submitted that the First Contracts were signed on its behalf by E._____, a board member of Class A, although, according to the register of commerce, the second signature of a board member of Class B was necessary to a legally binding commitment. After the parties stated their views at the hearing as to the power of representation of E._____ upon specific request of the Arbitrator, the Arbitral Tribunal found, on the basis of the documents submitted and the submissions of the parties, that the powers of attorney empowering E._____ to represent the Appellant in the conclusion of the Second Contracts also gave him that power for the conclusion of the First Contracts. In this respect, the Arbitrator particularly took into consideration that the First Contracts were entered into between October 15 and 19, 2011, and the Second Contracts just a few days later or even on the same day (October 19 and 20 and November 9, 2011); considering this timely coincidence, it lead to a natural presumption that E._____ could represent the Appellant for the conclusion of the First and Second

[11] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

Contracts on the basis of the same power of attorney or separately for the Lithuanian, the Romanian, and the Latvian Contracts.

3.2.3. The Appellant raises no admissible ground for appeal according to Art. 190(2) PILA when it submits as to the aforesaid finding of the Arbitral Tribunal that it could not be based on the powers of attorney in the record or when it argues that the arbitral "hypothesis [has] simply been plucked from the air." Moreover, the view presented in the appeal is inaccurate, insofar as it claims that the required factual finding allowing the Federal Tribunal to assess jurisdiction was missing, as the Arbitral Tribunal indeed reasoned that factually, it was to be assumed that E._____ was empowered to enter into the First Contracts. Nor did the Arbitral Tribunal decide the jurisdictional issue on the basis of a mere summary or preliminary assessment or simply by relying on disputed factual allegations of the Claimant (see BGE 128 III 50 at 2b/bb, p. 65 *f.*), as assumed in the appeal brief.

3.2.4. Furthermore, the Appellant's argument that the Arbitral Tribunal made no finding that E._____ had a power of attorney meeting the formal requirements of Art. 178(1) PILA is not effective, if only because the Arbitral Tribunal found the power to enter into the First Contracts on the basis of the same powers of attorney with which E._____ also signed the Second Contracts. According to the award under appeal, these powers of attorney were in existence and thus in a form which made verification possible by way of the text and the Arbitrator found that the Second Contracts were submitted to the register of commerce authorities with their entire wording, *i.e.* including the powers of attorney in favor of E._____. Therefore, the issue of the formal requirement of a power of attorney to conclude an arbitration agreement needs not be analyzed in more depth.

3.2.5. The Appellant's argument that the Arbitral Tribunal overlooked its argument that the First Contracts were not validly concluded for lack of a power of attorney is therefore unfounded. It is accurate that the Arbitral Tribunal – understandably in principle – pointed out that, with its argument that the First Contracts were substituted by the Second Contracts later on, the Appellant implicitly acknowledged that the First Contracts were validly concluded, as otherwise they could not have been replaced or rescinded. Contrary to what the Appellant seems to assume, however, the Arbitral Tribunal did not leave it at that but also addressed its argument that there was no power to conclude the First Contracts as opposed to the Second Contracts. The argument that the right to be heard was violated is not justified.

3.2.6. Its arguments are unpersuasive as to the reasons in the award under appeal, according to which, the Respondent submitted by analogy that the power of attorney used to execute the Second Contracts would also have sufficiently authorized E._____ to sign the First Contracts. Its argument is appellate in nature and therefore inadmissible when it refers to the briefs in the arbitration proceedings and relies on submissions allegedly in the record or undisputed to submit to the Federal Tribunal its own views as to the Respondent's allegations on the issue of the power of attorney and thereby describes the factual findings of the Arbitral Tribunal as "wrong," "contrary to the record," or "plucked out of the air." In doing so, it disregards that, according to well-established case law of the Federal Tribunal, a factual finding blatantly wrong or contrary to the record is not sufficient in itself to annul an international arbitral award; the right to

be heard contains no entitlement to a decision accurate on the merits (BGE 127 III 576 at 2b, p. 577 *f.*; 121 III 331 at 3a, p. 333). The Appellant does not show that an obvious omission of the Arbitral Tribunal prevented it from submitting its point of view in the proceedings and to prove it (BGE 133 III 235 at 5.2, p. 248 *f.*; 127 III 576 at 2b-f, p. 577 *ff.*).

Moreover, the Appellant argues a violation of the principle of equal treatment (Art. 190(2)(d) PILA), but is unable to show in its arguments in what way the parties were not treated equally throughout the proceedings (BGE 133 III 139 at 6.1, p. 143). In reality, it does not allege that it was denied something granted to the other party in the proceedings but rather claims that an arbitral finding as to the Respondent's submission would have been obviously untenable, such as its grievance that the Arbitral Tribunal "set up on its own" the allegation in dispute. Under the cloak of the principle of equal treatment, this seeks to raise an argument of arbitrariness, which the legislature wanted to specifically exclude by way of the limited grounds for appeal according to Art. 190(2) PILA (see judgment 4A_360/2011 of January 31, 2012, at 4.1 with references). Furthermore, the Appellant shows no violation of this principle with the allegation that the Arbitral Tribunal "overstretched the principle of party presentation." Nor is there any unequal treatment in the questioning of the Respondent by the Arbitrator at the hearing as to the issue already mentioned in the October 16, 2013, letter. The Appellant rightly does not argue that during the arbitral proceedings, and in particular at the hearing, it was not given the same opportunity as the Respondent to express its views as to the issue of the power of attorney.

There is no unequal treatment according to Art. 190(2)(d) PILA.

3.3. The Appellant wrongly argues that the Arbitral Tribunal violated Art. 178(1) PILA. In connection with this provision, the Arbitral Tribunal accurately pointed out that a writing was sufficient and that a signature in one's own hand, according to the rules of representation by an officer of the company – thus with joint signatures as the case may be – was not a mandatory requirement. Moreover, it pointed out that the Appellant did not challenge that E._____ also turned over the copies of the First Contracts he had signed to the Respondent and therefore the arbitration clauses could be ascribed to the Appellant.

Contrary to the Appellant's view, in doing so, the Arbitral Tribunal did not at all disregard that Art. 178(1) PILA merely concerns the formal requirements and not the issue as to whether or not the person acting as a representative of a party in the conclusion of an arbitration agreement is authorized to enter into the arbitration clauses. Instead, the developments in the award under appeal refer exclusively to the issue of form. The Appellant therefore wrongly argues that the Arbitral Tribunal would have confused the issues of form and authority to represent; contrary to its allegation, the Arbitral Tribunal did not assume that the sole signature of a representative with authority to only sign jointly would be sufficient to conclude an arbitration agreement.

The Appellant rightly does not question that the arbitration clauses at issue can be attributed to it and that the formal requirements of Art. 178(1) PILA are sufficient. Its arguments lead to nothing.

4.
Should the arbitration clauses be valid, the Appellant submits that they were substituted with the jurisdiction clauses contained in the Second Contracts and that the Arbitral Tribunal therefore had no jurisdiction.

4.1. The Arbitral Tribunal examined the validity of the arbitration clauses in dispute from the point of view of Swiss law according to Art. 178(2) PILA as to their content, which none of the parties questions before the Federal Tribunal. The Arbitral Tribunal rejected the Appellant's point of view that the arbitration clauses contained in the First Contracts were rescinded by and substituted with the jurisdiction clauses contained in the Second Contracts. In doing so, it took into account the striking circumstance of the very significant differences in the purchase prices in the two groups of contracts and pointed out that it would have behooved the Appellant to explain for what reasons – if the Second Contracts were meant to modify the first ones – the parties would have reduced the purchase prices within a few days or even on the same day from USD 7 million (First Lithuanian and First Latvian Contracts) and USD 100'000 (First Romanian Contract) to a small fraction thereof. After interrogating the parties as to the background of the two different Contracts at hand, the Arbitral Tribunal found that the parties intended to regulate the already agreed-upon purchase price and its settlement as well as any disputes in this respect in the First Contracts on confidentiality grounds; the Second Contracts did not express the true factual will of the parties in these respects but would serve only as "show piece" documents to obtain the registration of the purchases in the register of companies and as shareholders without having to disclose the actual purchase price in the process. The desire to treat the purchase prices and their payment as confidential as well as the connection to Switzerland by way of an account of the Respondent in a Swiss bank plausibly explained that the parties to the First Contracts did not want to address any possible disputes in hearings open to the public in the ordinary courts of Bucharest, Riga or Vilnius but instead behind closed doors in an arbitral tribunal in Switzerland. On this basis, the Arbitral Tribunal inferred that the parties did not at all intend to rescind the arbitration clauses contained in the First Contracts with the Second Contracts but that the arbitration clauses in dispute should remain in force according to the real will of the parties to the First Contracts. It was thus established that the parties wanted to remove any possible disputes from state courts and submit them to an arbitral tribunal.

4.2. Once again, the Appellant submits its own view as to the Respondent's pertinent assertions with reference to several exhibits in the record and relies on various exhibits allegedly in the record or allegedly indisputable to submit that the jurisdiction clauses in the Second Contracts substituted the arbitration agreements in the First Contracts, yet without showing any ground for appeal as per Art. 190(2) PILA. In this respect as well, it does not show any violation of the rule of equal treatment with the allegation that the Arbitral Tribunal apparently disregarded the principle of party presentation. Contrary to its view, there is no unequal treatment in the arbitral proceedings because the Arbitrator interrogated the parties in detail as to the background behind the presence of two different contracts for the same purchase with different prices as the corresponding questions arose and both parties had an opportunity to state their views in this respect. Moreover, it cannot be argued that the Arbitral Tribunal itself brought into the proceedings the allegation that the Second Contracts would have been mere "showpiece documents" according to the real will of the parties. The Arbitral Tribunal did not treat the parties unequally when it inferred from the

Respondent's allegation that the Second Contracts were "implementation contracts" to achieve the full transfer of the shares according to local law that they would be merely used in the submissions to the local registers, yet without changing anything as to the will of the parties in the First Contracts in respect of the purchase price and the settlement of disputes. Contrary to what the Appellant seems to assume, the Respondent took the view in its request for arbitration for the payment of the price in the First Contracts that they reflected the real will of the parties both as to the purchase prices at issue here and as to the settlement of disputes.

There is no violation of the principle of equal treatment of the parties in this respect either.

4.3. Furthermore, the Appellant submits to the Federal Tribunal its own view with reference to submissions of the parties that it claims to be in agreement as to the relationship between the First and the Second Contracts and concludes in particular that they were rescinded by the subsequent agreements, in particular because the Contracts with the jurisdiction clauses were concluded after the arbitration agreements. Its arguments do not address the specific reasons in the award under appeal; in particular the Appellant relies technically upon the timely sequence of the conclusion of the Contracts, yet without at all addressing the specificity pointed out by the Arbitral Tribunal: that within a few days, or even on the same day, the parties did enter into two contracts as to the same transaction but in the Second Contract, only a fraction of the purchase price – according to the First Contract – was mentioned. The factual findings of the Arbitral Tribunal as to the real will of the parties concerning the purchase price and the settlement of disputes are not addressed by the Appellant.

Its arguments show no violation of the pertinent provisions as to jurisdiction. Thus, the finding of the Arbitral Tribunal stand, according to which, the parties intended to remove possible disputes from the state jurisdiction and submit them to the decision of an arbitral tribunal.

5.
Finally, the Appellant argues that the arbitration clause concluded should be interpreted in good faith to the effect that an *ad hoc* arbitral tribunal has jurisdiction as opposed to an arbitral tribunal (to be constituted according to the Swiss rules) by the Chambers of Commerce of the two Basel.

5.1. It submits that the arbitration clauses concluded refers neither to the Swiss rules nor to the rules of any other chamber of commerce or industry mentioned at Art. 1(1) of the Swiss rules. This in and of itself would show that the parties did not seek an arbitral tribunal to be constituted according to the Swiss rules but an *ad hoc* arbitral tribunal. The interpretation of the Arbitral Tribunal, according to which the wording used ("the Arbitration Committee") pointed more to an existing institution than to an arbitral tribunal to be constituted, possibly with the assistance of the state court, was not persuasive simply because this would not show that the requirements to apply Art. 1(1) of the Swiss rules were met. Irrespective of the foregoing, the consideration of the Arbitral Tribunal was unfounded because there is no arbitral tribunal in existence under the aegis of the Swiss Chambers Arbitration Institution as it should be constituted later. Neither the circumstance pointed out in the award under appeal that the arbitration clause was formulated very

concisely nor the requirement that the First Contracts be treated confidentially would be of importance to the interpretation. Moreover, there is no reference at all to the Chamber of Commerce of Basel in the arbitration clause.

In good faith, the arbitration clause concluded could and should be understood as meaning that "the Arbitration Committee to be established in Basel" was an arbitral tribunal to be constituted in Basel; this meant an *ad hoc* arbitral tribunal.

5.2.
5.2.1. The provisions of arbitration agreements that are incomplete, unclear or contradictory give rise to pathological clauses. Insofar as their objective is not the mandatory requirements of the arbitral agreement, namely the binding submission of the dispute to a private arbitral tribunal, they do not necessarily become invalid. Instead, a solution must be sought by interpretation and if necessary, by supplementing the contract in accordance with general contract law, which heeds the fundamental will of the parties to submit disputes to arbitration (BGE 138 III 29[13] at 2.2.3, p. 35; 130 III 66 at 3.1, p. 71). If no real mutual will of the parties can in fact be determined as to the arbitration clause, it must be interpreted according to the principle of reliance, *i.e.* the presumed will is to be determined according to what the actual addressee could and should have understood in good faith (BGE 130 III 66 at 3.2, p. 71; 129 III 675 at 2.3, p. 680). If the interpretation shows that the parties wanted to forego the jurisdiction of the state courts and submit to the decision of an arbitral tribunal but that there are differences concerning the handling of the arbitration, there is no reason to interpret restrictively. Instead, the desire of the parties to have the dispute decided by an arbitral tribunal should be taken into consideration. An imprecise or flawed designation of the arbitral tribunal does not therefore mandatorily lead to the invalidity of the arbitration agreement when interpretation can establish which arbitral tribunal the parties meant (BGE 138 III 29[14] at 2.2.3; 130 III 66 at 3.2; 129 III 675 at 2.3, p. 681).

5.2.2. As it must be assumed that the parties intended to submit the dispute to an arbitral tribunal, there is no room for the restrictive interpretation demanded by the Appellant. Without violating the pertinent principles of interpretation in good faith, the Arbitrator held that the description of the Arbitral Tribunal as "the Arbitration Committee" and in particular the use of the definite article ("the") and the capital letters suggested that it should not be understood as a material designation ("an arbitration committee") but rather as a reference to a specific, pre-existing institution. The wording "to be established" used by the parties does not contradict this understanding if the arbitral tribunal entrusted with the dispute is at first to be constituted in case of an arbitration according to the rules of an arbitral institution, which even the Appellant acknowledges. It is true that the arbitration clause does not refer to the Chamber of Commerce of Basel,

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[13] 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

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yet when it must be assumed that the parties wanted to entrust an arbitral tribunal of an existing arbitral institution in Basel with deciding the dispute, the Arbitrator's conclusion is obvious that this meant an arbitral tribunal to be constituted according to the rules of the Basel Chamber of Commerce. The award under appeal accurately points out in this respect that clauses such as "Swiss Arbitration Court, Zürich", "International Trade Arbitration Organization Zurich," or "International Trade arbitration in Zurich" were accepted to mean that the parties intended an arbitral tribunal of the Zürich Chamber of Commerce (see BGE 129 III 675 at 2.3, p. 681). The Appellant does not claim that there is another arbitral institution in Basel which could have been intended by the wording chosen (BGE 129 III 675 at 2.4 where the Federal Tribunal examined which arbitral institution in Zürich was to be understood in the denomination "commercial court, respectively economic court with seat in Zürich").

The reference to the rules of the Chamber of Commerce of Basel (see Art. 1(1) Swiss Rules) disputed by the Appellant therefore results from the interpretation of the arbitration clause and the argument to the contrary has no value. The arbitral finding based on the principle of reliance that the parties did not intend an *ad hoc* arbitral tribunal but an arbitral tribunal to be constituted according to the Swiss Rules is not objectionable.

Insofar as the Appellant claims in its submissions that the descriptor "Arbitration Committee" showed that the parties wanted a body consisting of several persons and not a sole arbitrator, the submission is not admissible. Indeed, after the arbitration was initiated, it submitted itself that a sole arbitrator should be appointed and it is barred from the corresponding grievance in the proceedings in the Federal Tribunal (BGE 136 III 605[15] at 3.2.2; 130 III 66 at 4.3, p. 75).

The Arbitrator therefore rightly accepted jurisdiction.

6.
The appeal proves to be unfounded and must be rejected insofar as the matter is capable of appeal. In such an outcome of the proceedings, the judicial costs shall be borne by the Appellant and it shall compensate its opponent for the federal judicial proceedings (Art. 66(1) and Art. 68(2) BGG).

[15] 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

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 20'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 22'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the Arbitral Tribunal in Basel.

Lausanne, August 28, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann