4A_199/2014[1]

Judgment of October 8, 2014

First Civil Law Court

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

A._____ Inc.,
Represented by Mr. Bernd Ehle and Mr. Pierre-Oliver Allaz,
Appellant

v.

B._____ SA,
Represented by Mr. Daniel Hochstrasser and Mrs. Simone Stebler,
Respondent

Facts:

A.
B._____ SA, a company organized under [name of country omitted, hereafter: "xxx"] law, (hereafter: B._____ or the Defendant) and A._____ Inc., a company under [name of country omitted, hereafter: "yyy"] (hereafter: A._____ or the Claimant) entertained business relationships since the middle of the 1990s, the former acting as distributor of the pharmaceutical products commercialized by the latter in [yyy].

On January 24, and February 12, 2003, B._____ and A._____ signed a Distribution Agreement on the basis of which the latter was granted by the former the non-exclusive right to import and to sell various products involved in [yyy]. The contract was governed by the law of [xxx]. Disputes arising under the contract would be adjudicated by a three-member arbitral tribunal. According to its Art. 23(2), the contract could not be modified except by the written agreement of both parties.

[1] Translator's Note: Quote as *A._____ Inc* v. *B._____ SA, 4A_199/2014*.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.
On January 9, 2012, A._____ filed a request for arbitration against B._____, based on the arbitration clause contained in the Distribution Agreement. According to the Claimant, the parties had extended and amended the aforesaid contract in June 2003 and April 2004. However, the Defendant did not abide by certain obligations in the amended contract so it had to compensate its contractual counterpart in this respect (Art. 97 and 423 CO[2]), or for unjust enrichment (Art. 62 CO). A._____ specifically stated that it had worked intensively with a view to persuading the decision makers to finance the acquisition of the pharmaceutical products produced by B._____, in particular four very expensive new drugs to be used in the treatment of cancer. According to the Claimant, its efforts met with success and resulted in a significant increase of the sales of these new drugs in [yyy] but without it benefiting from the result of its work due to the Defendant's fault.

Denying the existence of the oral agreements alleged by A._____, B._____ submitted that the claim should be entirely rejected.

A three-member arbitral tribunal was constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC). With the agreement of the parties, it decided to pronounce first on the principle of the Defendant's liability only.

After examining the case (some of the elements of which will be explained hereunder to the extent necessary), the Arbitral Tribunal issued a final award on February 19, 2014, by which it rejected the claim entirely. In substance, it held on the basis of the evidence adduced that the Claimant failed to establish the existence of the verbal agreements in dispute, pursuant to which the written Distribution Agreement would have been transformed into an exclusive, long-term distribution agreement: the Claimant did not succeed in proving it by documents or direct testimony; neither was it established that the parties waived, by conclusive acts, the reservation in favor of amendments in written form contained at Art. 23(2) of the Distribution Agreement by implementing and performing in part the Action Plan they purportedly agreed upon in the 2003 oral agreement. As to the claim based on unjust enrichment, the Arbitral Tribunal rejected it as well, as the Claimant had failed to prove the nature and the exact purpose of the services furnished to the Defendant and consequently did not show that such services would go beyond those covered by the distribution agreements in force.

C.
On March 28, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the February 19, 2014, award. It argues that the Arbitral Tribunal violated its right to be heard in several respects.

[2] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

In its answer of June 10, 2014, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

In a letter of May 13, 2014, to which its file was attached, the Arbitral Tribunal stated that it had no observations as to the appeal.

On July 11, 2014, the Appellant, represented by new counsel, submitted a reply in which it renewed its original submissions.

The Respondent did the same in a rejoinder of July 28, 2014.

Reasons:

1. According to Art. 54(1) LTF,[3] the Federal Tribunal issues its judgment in an official language,[4] as a rule in the language of the decision under appeal. When the decision was issued in another language (in this case, English), the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal, they used to English but in the briefs sent to the Federal Tribunal, the Appellant used French and the Respondent, German. In accordance with its practice, the Federal Tribunal will consequently issue its judgment in French.

2. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[5] (Art. 77(1)(a) LTF). Whether as to the object of the appeal – a final award rejecting the claim entirely for lack of fulfilment of a necessary condition to the claim being judicially upheld – or as the standing to appeal, the time limit to appeal, the appellant's submissions or the ground for appeal invoked, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal. The admissibility of the various chapters of the sole argument formulated in the appeal brief is reserved.

3.
3.1. For an admissible argument duly raised in a civil law appeal to be addressed, it must be reasoned as prescribed by Art. 77(3) LTF. This provision corresponds to what Art. 106(2) LTF foresees for a grievance based on the violation of constitutional rights or of cantonal and intercantonal law. Like this article, it instituted the principle that a grievance must be raised (*Rügeprinzip*) and thereby excludes the admissibility of criticism of an appellate nature (judgment 4A_654/2011[6] of May 23, 2012, at 2.2 and the precedents quoted).

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[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.

[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:

Two points are required as to how a civil law appeal against an international arbitral award should be reasoned as well as when it should be: the first to recall that the reasons must be contained in the appeal brief under penalty of inadmissibility, so that one may not ask the Federal Tribunal to refer to the arguments, evidence, and offers of evidence contained in the briefs submitted to the arbitral tribunal; the second to insist upon the fact that an appellant may not use its reply to invoke factual or legal arguments it had not submitted in a timely manner, namely before the inextensible time limit expired (Art. 100(1) LTF in connection with Art. 47(1) LTF) or to supplement beyond the time limit some insufficient reasons (judgment 4A_606/2013 of September 2, 2014, at 1.1 with the other references).

3.2. In view of these principles, the reasons in support of the appeal submitted to this Court leaves much to be desired.

The structure of the appeal brief is most strange. Whilst it is usual, even though it is not a procedural requirement (see Art. 42(2) LTF *a contrario*), to submit a summary of the factual findings in the award under appeal, particularly when it was not issued in an official language, the Appellant merely refers the Federal Tribunal to "the facts contained in the award under appeal" (appeal n. 1). One would have wished that it set forth, at least broadly, the relatively complex factual situation characterizing the matter in dispute (appeal n. 1), as they appear from the award and in particular that it described the somewhat sinuous path a foreign pharmaceutical company must tread to market its products in [yyy]. Instead, the Appellant gives a long list of exhibits and testimony complied in an annex to the appeal (exhibit n. 2) supposedly corresponding to the arguments it reserves to develop further, and all this with some explanations. In this framework, it reproduces, over some ten pages, the excerpts of witness statements, some of which are emphasized and highlighted (appeal, p. 13 to 24) and then similarly quotes some fragments of the briefs it submitted in the arbitration (appeal, n. 25 and n. 28 to 31). The Appellant is even more succinct on the merits (see for instance appeal n. 91) to the point that it is hardly possible to determine the real object of its legal argument by reading its meagre legal considerations. It must be recalled that considering the specific nature of a civil law appeal against an award issued in an international arbitration, it does not behoove the Federal Tribunal to supplement insufficient arguments on its own initiative.

Doubtlessly aware of the deficiencies of its initial arguments, pointed out in the Respondent's answer, the Appellant tried to remedy them in a long reply filed by new counsel. In so doing, it departed from the scope the aforesaid case law gives to such a brief. Its supplementary argument is therefore inadmissible to the extent that it does not exclusively address objections raised in the answer to the appeal.

4.
The Federal Tribunal issues its decisions on the basis of the factual findings in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrator, even

when the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the application of Art. 105(2) LTF). Thus, the mission of the court seized of a civil law appeal against an international arbitral award is not to exercise full judicial review as an appeal court would but only to examine if the admissible grievances raised against the award are well-founded or not (aforesaid judgment 4A_606/2013, at 2 and the precedents quoted).

5.
The Appellant argues a violation of its right to be heard in various manners in a sole argument divided into four parts.

As guaranteed by Art. 182(3) and 190(2)(d) PILA, the right to be heard is not in principle different from that which is enshrined in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus, it was held with regard to arbitration that each party has the right to state its views on the essential facts for judgment, to present its legal argument, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c, p. 643).

The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not indeed require an international arbitral award to be reasoned (ATF 134 III 186[7] at 6.1 and references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2, p. 248 and the cases quoted). This duty is breached when, due to oversight or misunderstanding, the arbitral tribunal does not take into consideration some submissions, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some apparently important elements to decide the case, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. They have to demonstrate that contrary to the appellant's submissions, the omitted elements were not pertinent to decide the case at hand or, if they were, that they were implicitly rejected by the arbitral tribunal. However, the arbitrators do not have the obligation to discuss all arguments raised by the parties so that they cannot be held in breach of the right to be heard in contradictory proceedings for failing to address, even implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

It is in the light of these principles of case law that the four arguments submitted in this appeal will be examined consecutively.

6.
6.1.
6.1.1. In the first part of its argument, the Appellant points to the following passage of the award under appeal (n. 348):

[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

> The Tribunal notes that most of the evidence submitted by Claimant in support of the action plan is internal evidence, i.e. witness statements of Claimant's employees Mss C._____, D._____, and Messrs. E._____, F._____ and G._____. ***There is no documentary evidence directly confirming the scope and content of the alleged action plan***.[8]

Yet, according to the Appellant, only one of the five aforesaid individuals, namely Mrs. C._____, is in its employment, contrary to what the Arbitral Tribunal states in the passage quoted. However, the four others are not in an employment relationship with it: D._____ is the director of the H._____ public relations firm since 2003; E._____ was the spokesperson for the prime minister of the government of [yyy] in 2004 and is presently a producer for the largest national television network; F._____ is the director and CEO of I._____ company, after being finance minister in the [yyy] government between 2001 and 2005, then he went to the [yyy] parliament from 2005 to 2009; finally, G._____ heads the internal audit department of the national health insurance fund.

According to the Appellant, the Arbitral Tribunal simply ignored the contents of the witness statements of the aforesaid individuals, except that of F._____ quoted at n. 367 of the award, erroneously relying, according to the Appellant, on the closeness of the witnesses with one of the parties and without engaging at all in any advanced assessment of the pertinence of the evidence. By doing so, it violated the Appellant's right to be heard, just as the Arbitral Tribunal held in violation by the Federal Tribunal in case 4A_360/2011[9] of January 31, 2012, had done.

And, the Appellant makes the following submissions (appeal n. 91):

> As to the merits, hearing F._____ and the other independent witnesses would have been pertinent to allow the Arbitral Tribunal to have independent evidence to determine in particular how and why the minister of finances granted the indispensible funding to include the new products of B._____.

6.1.2. As presented in the appeal brief, the argument under review cannot succeed. The Appellant is certainly right when it criticizes the Arbitral Tribunal for holding witnesses D._____, E._____, F._____ and G._____ as *Claimant's employees*. Indeed, the friendly relationship that, according to the Respondent, these three witnesses developed with individuals close to the Appellant (answer n. 31) do not indicate the existence of an employment relationship between the former and the latter. But for that, the argument does not appear founded insofar as it may be admissible.

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[8] Translator's Note: In English in the original text. (Emphasis by the Federal Tribunal.)

[9] 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

First, its reasoning leaves much to be desired. The Appellant should show why the evidence allegedly ignored by the Arbitral Tribunal, namely the statements of witnesses D._____, E._____, F._____ and G._____, could influence the outcome of the dispute (ATF 133 III 235 at 5.2, p. 248, *i.f.*). Yet, in this respect, the few lines it devotes to this demonstration in the aforesaid excerpt of its appeal brief appear insufficient as it totally abstains from setting forth the factual and legal context of the dispute with the Respondent (see above at 3.2). The Appellant is aware of the insufficiency in its original submissions as, under n. 3 of its reply, it concedes that the explanation given in §91 of its appeal brief quoted above and the facts on which it relies, "*are perhaps not easily understood by a reader who did not participate in the decision process*." Hence its doomed attempt (see 3.1, above) to supplement the argument in its reply (n. 4 *ff*).

Then, one must wonder if not taking into account a witness statement due to the alleged subordination link between this individual and one of the parties to the dispute based on an alleged employment contract they would have entered still falls within the guarantee of the right to be heard and does not concern the assessment of the evidence, insofar as it is tantamount to denying the probative value of the witnesses' statement because it is too close to the party presenting him. In these circumstances and even if the finding of the subordination link were untenable, setting aside this piece of evidence could not be reviewed by the Federal Tribunal in a civil law appeal against an international arbitral award. Be this is as it may, it is not at all established in the case at hand that if the Arbitral Tribunal did not take into consideration the statements of the individuals it wrongly considered as employees of the Appellant, it did so on this ground only. Indeed, it appears from the general remark at n. 349 of the award, which also applies to these individuals, that it denied any probative value to the Appellant's witness statements altogether because they described the steps that it claimed to have undertaken, pursuant to the Action Plan in too general terms, so the issue remained uncertain as to what the lobbying activities alleged in support of the claim consisted of. Moreover, the Respondent convincingly demonstrates under n. 35 to 38 of its answer that the Arbitral Tribunal devoted several paragraphs of the award to the statements of witnesses F._____ and G._____. In this respect, the case is not at all comparable to case 4A_360/2011,[10] invoked by the Appellant, which concerned an oversight of the Arbitral Tribunal as to the very existence of a post-hearing memorandum submitted by the Appellant, in which it referred to four statements which could have modified the outcome of the case (at 5.2.3.2).

Finally, after finding that the Appellant did not succeed in proving the existence of the Action Plan, the Arbitral Tribunal still considered the possibility that the Appellant would nonetheless make some or all of the efforts it claims to have undertaken in the framework of the Action Plan. It reached the conclusion that such a circumstance would not confirm the disputed verbal agreements because the services rendered by the Appellant to the Respondent may very well have taken place, pursuant to the performance of the rights and obligations arising from the formal Distribution Agreement signed in January and February 2003. In this alternate reasoning, which the Appellant leaves untouched, the Arbitral Tribunal therefore admitted that the

[10] 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

services allegedly furnished by the Appellant to the Respondent's advantage would not modify the result of its legal analysis of the case, even if they were established on the basis of the witness statements. In other words, it found that the fact that the Appellant sought to establish pursuant to the witness' statements included in the arbitration file – namely the reality of the services it had performed – was not pertinent to decide the legal issue in dispute. Consequently, the Appellant would not be entitled to criticize this, even if it had not taken the evidence into consideration, which is not the case.

6.2.

6.2.1. Still as a violation of its right to be heard, the Appellant raises the refusal of the Arbitral Tribunal to hear witnesses D._____, E._____, and F._____ and expert J._____. In this respect, it argues that it formally requested these four individuals be heard at least three times between March 14 and April 13, 2013, yet only to be met each time with unjustified refusals based on too strict an interpretation of Procedural Order n. 1. While availing itself of the formal nature of the right to be heard, the Appellant still seeks to show why hearing the three aforesaid witnesses would have changed the outcome of the dispute.

As to F._____, it argues that the witness, who was the Minister of Finance of [yyy] at the time, had decided to allocate an important budgetary supplement to the Ministry of Health, with a view to enabling it to include in its tender the four new medications against cancer produced by the Respondent. According to the Appellant, F._____ could have explained, among other things, why and how he had taken such an important decision which he had been led to by the Appellant's efficient lobbying and persuasive work after the Respondent sought the same decision in vain for three or four years. The Appellant further underlines in this context that F._____'s witness statement was written very early, on December 19, 2011, already, namely much before the Respondent's answer dated March 15, 2012, so that the witness could not be questioned by the parties and the Arbitral Tribunal as to the Respondent's allegations contained therein. In its view, hearing the witness would have allayed the doubts remaining in the Arbitrators' minds after reading the witness statement as to the existence of the verbal agreement in dispute, the essential contribution of the Appellant in the Respondent's favor, and the latter's unjust enrichment.

As to the hearing of D._____ and E._____, according to the Appellant, it would have clarified the statements in their written testimonies, which the Arbitral Tribunal did not understand well and which proved the existence of the Action Plan and its successful performance by the Appellant.

6.2.2. Summarized in this way, the argument as to the grievance considered corresponds to that which is in the appeal brief. However, the Appellant expanded it considerably in its reply (n. 19 to 64), bolstering it and adding new arguments such as the violation of equality of the parties. The Respondent convincingly demonstrates this at n. 18 to 28 of its rejoinder, to which one may refer here. It goes without saying that the Appellant's method is not admissible (see 3.2, above). Hence this Court will purely and simply ignore the additional argument submitted by this party.

6.2.3. In Procedural Order n. 1 dated June 25, 2012, the Arbitral Tribunal decided that a witness filing a written statement would be called to appear for questioning only if the party which did not submit the written

statement wanted to cross-examine the witness. The Appellant concedes that it did not challenge this procedural order (reply n. 28). Hence the refusal to hear the four individuals whose written statements it had submitted was completely consistent with the procedure adopted by the Arbitral Tribunal in agreement with the parties since the Respondent did not require these individuals to be heard. The Appellant was represented in the arbitral proceedings by four lawyers and it could therefore not argue *a posteriori* that it could not envisage at the time the risks carried by the procedural method now criticized.

The same procedural order also gave the Appellant until January 25, 2013, to file its reply, which could include if necessary some rebuttal witness statements. Thus, nothing would have prevented that party, contrary to what it claims, to refute the arguments advanced by the Respondent in its answer of March 15, 2012, in this brief and to produce a second witness statement of F._____ with it, as it did for other witnesses. The latter remark may not apply to the reply subsequently filed by the Respondent with new witness statements, as this was the last brief admitted before the hearing. However, the argument that the Appellant submits to the Federal Tribunal in this respect appears only in its reply (n. 28 lit. i). It is therefore inadmissible, like the developments contained in this brief (n. 28), by which the Appellant explains what was covered in its view by the "tactical reasons" merely mentioned at n. 117 of its appeal brief.

Moreover, the arguments submitted by the Appellant to demonstrate why hearing witnesses F._____, D._____ and E._____ would have affected the outcome of the dispute (see 6.2.1, above), do not appear at all decisive because they are not such as to establish why this hearing would have made it possible to gather facts that could not have been brought to the attention of the Arbitral Tribunal by witness statements, if necessary supplemented by other similar statements issued by the same witnesses. As to expert J._____, the situation is even clearer, as the Appellant specifically concedes that it did not sufficiently develop the argument concerning the alleged violation of the right to be heard in connection with this individual (reply n. 19).

Finally, it must be recalled in any event and broadly speaking that, according to case law, Art. 182(3) PILA does not give the parties the right to ask or to have questions asked verbally to the writer of witness statements (judgment 4P.196/2003 of January 7, 2004, at 4.2.2.2).

This being so, the argument does not appear founded to the small extent that it is admissible.

6.3.
6.3.1. In a third part of the same argument, the Appellant criticizes the Arbitral Tribunal for "*the lack of legal examination of the corruption argument invoked by [it].*" According to its explanation, a company named K._____, superseded it by corrupt maneuvers during the tender of the Ministry of Health of [yyy] of December 2004, in connection with the new medications that the Respondent wished to market in that country. Since then, its contractual relationship with the [xxx] company deteriorated and never returned to its previous level. According to the Appellant, the Arbitral Tribunal simply ignored the argument in question, which should have led it to "*assess in a different manner the contractual relationship between the parties*," thus violating its right to be heard.

6.3.2. The passage quoted of this last sentence clearly shows the insufficiency of the argument considered. It was incumbent upon the Appellant to explain why the argument based on corruption, which the arbitrators allegedly failed to examine, was pertinent to decide the case at hand. It goes without saying that simply stating that it was pertinent without further explanation, as the Appellant does, does not satisfy this requirement at all.

Moreover, the Respondent convincingly shows in its answer to the appeal (n. 128 to 136) – and the Appellant does not seek to refute this in its reply in which it does not go back to the argument under review – that the issue of corruption was not pertinent to deciding the dispute between the parties.

The argument based on the violation of the right to be heard therefore also falls flat in this respect.

6.4. Finally, the Appellant laments that the Arbitral Tribunal did not examine the issue of the reliability of witness L._____ – despite its objections in this respect, based on the "discussions" that this employee of the Respondent had with the latter's previous counsel – and that it used this testimony to set aside the much more credible testimony of G._____.

Assessing the reliability of a witness as such or in comparison with another witness is a matter of assessment of the evidence. Consequently, the Appellant seeks in vain to have it reviewed by the Federal Tribunal.

7.
The appeal can thus only be rejected insofar as it is admissible. This being so, the Appellant shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondent for its costs (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 70'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 80'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the representatives of the parties and to the chairman of the ICC tribunal.

Lausanne, October 8, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo