4A_36/2020[1]

Judgment of August 27, 2020

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Niquille,
Federal Judge May Cannelas
Clerk of the Court: Mr. O. Carruzzo.

A._____ GmbH,
Represented by Mr. Xavier Favre-Bulle and Ms. Elena Neidhart,
Appellant

v.

B._____ Co.,
Represented by Mr. Luca Beffa,
Respondent

Facts:

A.
A._____ GmbH (hereinafter, the Appellant) is a German company with its registered office in Germany. B._____ Co. (hereinafter, the Respondent) is a U.S. company founded by G.C._____ and incorporated in New York.

In June 2011, the Appellant contacted the Respondent as part of its efforts to develop new distribution channels for the pasta it produced. Subsequently, the Respondent ordered various products from the Appellant for resale to E._____ Inc. (hereinafter, E._____).

On January 2, 2013, the parties entered into a contract entitled "Exclusive Importation and Sales Agreement" by which the Appellant granted the Respondent the exclusive right to import, sell, and distribute pasta produced by the Appellant in a territory including the United States, Canada, Israel and former Soviet republics. In this contract, the Respondent undertook, among other things, to achieve

[1] Translator's Note: Quote as A._____ v. B._____, 4A_36/2020.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

various sales objectives. Subsequently, the contract was amended to include a 3.45% commission on sales made by the Respondent to be paid to it by the Appellant.

During the first half of December 2013, the Appellant informed the Respondent of its intention to no longer supply it with products for the American market. Subsequently, it sold the contracted products directly to E._____.

On December 16, 2013, the Respondent entered into an agreement with D._____ Corp. (hereinafter, D._____) for an exclusive distribution contract for the United States territory for the pasta produced by the Appellant. On November 13, 2016, the Respondent and D._____ entered into a settlement agreement ("Settlement Agreement and Mutual Release"[2]) by which the Respondent undertook to pay D._____ the sum of USD 2'209'600 by way of compensation, as the Respondent was no longer able to supply food products to D._____ due to the cessation of deliveries by the Appellant.

B.
On October 18, 2017, the Respondent instituted arbitration proceedings against the Appellant for the payment of commissions allegedly due and damages for breach of the aforementioned contract. A three-member Arbitral Tribunal was constituted and its seat fixed in Geneva, in accordance with the arbitration clause concluded by the parties.

Through an Award dated November 27, 2018, the Arbitral Tribunal ordered the Appellant to pay the Respondent several million US dollars in damages and commissions and awarded the costs of the proceedings against it. In substance, the Arbitral Tribunal found that the contract between the parties had been automatically renewed from year to year until its expiry on January 1, 2018. Noting that the Appellant had stopped delivering products to the Respondent in order to supply them directly to E._____ while the contract was still in force, it considered that the Appellant had breached its contractual obligations and its duty to act in good faith.

With respect to compensation for the damage suffered, the Arbitral Tribunal found, inter alia, that the sum of USD 624'000 was owed to the Respondent as lost profits during the period of the contract and the sum of USD 48'264.12 as commissions. It also ruled that the Respondent was entitled to obtain compensation from the Appellant for the damage suffered in connection with D._____'s settlement agreement, namely USD 1'414'927.

C.
The Appellant submitted a request for revision in which it asked the Federal Tribunal to annul figures (2) and (4) of the operative part of the above-mentioned Award and to refer the case back to the Arbitral Tribunal to complete the investigation and make a new award.

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

The Respondent argued that the request for revision should be rejected. The Arbitral Tribunal waived its right to submit comments. The Appellant voluntarily submitted a reply, prompting the Respondent to submit a rejoinder.

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 award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. As the parties used French in their Appeal Briefs to the Federal Tribunal, the Federal Tribunal shall deliver its judgment in that language.

2.
2.1. The seat of arbitration was fixed in Geneva. At least one of the parties did not have (and in this case, neither of the parties had) its registered office in Switzerland at the relevant time. The provisions of Chapter 12 of the Private International Law Act (PILA[5]; RS 291) are therefore applicable (Art.176 (1) PILA).

2.2. The PILA does not contain any provisions relating to the review of arbitral awards. The Federal Tribunal has filled this gap through case law. The legal considerations for the revision of such awards are set out in Art. 123 LTF. The Federal Tribunal is the judicial authority with jurisdiction to hear requests for the revision of any international arbitral award, whether final, partial, or interlocutory. If it accepts a request for revision, it does not decide on the merits itself but refers the case back to the arbitral tribunal which has ruled or to a new arbitral tribunal to be constituted (ATF 142 III 521[6] at. 2.1; 134 III 286[7] at 2 and references; judgment 4A_666/2012[8] of June 3, 2013, at 3.1).

3.
The Appellant relies on Art. 123(2)(a) LTF It is of the opinion that it discovered after the date of the Arbitral Award relevant facts and conclusive evidence which it had not been able to rely on in the arbitral proceedings.

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[3] Translator's Note: LTF is the French abbreviation for 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 frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

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

[7] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award

[8] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/time-limit-seek-revision

3.1. The request for revision relates to the two agreements entered into between the Respondent and D._____: the exclusive distribution agreement of December 16, 2013, and the settlement agreement of November 13, 2016.

The Appellant relies on the October 11, 2019 hearing of I.C._____, the daughter of the founder of the Respondent, G.C._____, as well as on documents produced by her by order of the United States District Court for the Eastern District of New York in the context of discovery proceedings initiated on May 1, 2019, in the United States. It submits that, at her hearing, I.C._____ explained that she had sent a model settlement agreement on January 14, 2017, even though the settlement agreement on which the Arbitral Tribunal based its award of damages to the Respondent was dated November 13, 2016. I.C_____ also allegedly stated that she never participated in the negotiation of the settlement agreement and that she did not draft it, which would contradict the information provided by the Respondent to the Arbitral Tribunal and G.C._____'s testimony and the testimony of D._____'s witness, F._____.

As new evidence, the Appellant relies on three e-mails produced by I.C._____, models and drafts of the exclusive distribution agreement with D._____ and the settlement agreement as well as metadata relating to these agreements. According to the Appellant, this evidence shows that the exclusive distribution agreement was not created until March 30, 2015, and was finalized in January 2017, even though the Arbitral Tribunal in all likelihood considered that this agreement was concluded by D._____ and the Respondent in December 2013. This new evidence thus validates the Appellant's argument put forward during the arbitral proceedings that both this contract and the settlement agreement allegedly concluded by the Respondent and D._____ were not genuine and were created solely for the purposes of the dispute. As the Arbitral Tribunal based its decision on the existence of the two agreements in order to award the Respondent different amounts for lost profits, damages and commissions, the Appellant considers that the arbitration Award would have been different if the Arbitrators had decided with knowledge of the new facts and evidence.

3.2.

3.2.1. Pursuant to Art. 123(2)(a) LTF, revision may be requested in civil law cases if the appellant subsequently discovers relevant facts or conclusive evidence which it could not have relied on in the previous proceedings, excluding facts or evidence subsequent to the decision which is the subject of the request for revision. A revision can only be justified on the basis of facts which occurred up to the time when, in the previous proceedings, facts could still be alleged, but which were not known to the Appellant despite all its diligence; moreover, these facts must be relevant, *i.e.*, of such a nature as to alter the factual situation underlying the decision taken and to lead to a different solution in accordance with a correct legal assessment. A lack of diligence must be found to exist where the discovery of new facts or evidence is the result of investigations which could and should have been carried out in the previous proceedings. Only in certain, restrictive circumstances will it be accepted that it was impossible for a party to allege a particular fact in the previous proceedings, as revision must not be used to remedy the

Appellant's omissions in the conduct of the proceedings (judgments 4A_247/2014[9] of September 23, 2014, at 2.3; 4A_570/2011[10] of July 23, 2012 at 4.1).

3.2.2. Attempting to demonstrate how the elements relied on in support of its request for revision are relevant and decisive, the Appellant argues that the Arbitral Tribunal relied on the existence of the exclusive distribution contract and the settlement agreement and that its Award would necessarily have been different had it been aware of the lapse of these two agreements. In order to subscribe to its reasoning, however, it should be borne in mind that the new facts and evidence relied upon would have led the Arbitral Tribunal to consider that the said agreements never really existed and that the documents produced in the course of the Arbitral proceedings were merely tricks presented for the sole purpose of demonstrating the damage allegedly suffered by the Respondent. However, this is not the case. Indeed, a careful reading of the Award sought shows that the Arbitral Tribunal did not rely on the terms of the legal documents produced – such as the date or the question of I.C._____'s participation in their drafting – in order to retain the existence of a business relationship between the Respondent and D._____ and the subsequent conclusion between these two companies of a settlement agreement. As regards the drafting of the agreements, the Arbitral Tribunal merely referred to the fact that the draft exclusive distribution agreement had "apparently" been prepared by I.C._____. ("*The Agreement was proposed by B._____ to D._____ and apparently drafted by Mr. G.C._____'s daughter, a lawyer*") (Arbitral Award, no. 243). It did not dwell on the process of drawing up the settlement agreement and, in particular, did not rely on any contributions from I.C._____ in order to find that such an agreement had in fact been concluded between the Respondent and D._____. It is therefore difficult, in the context of evidence-gathering proceedings subsequent to the arbitration proceedings, to understand the relevance of I.C._____'s statements that she had not participated in the negotiations of the settlement agreement and had not drawn up the agreement. With regard to the dates of conclusion of the disputed agreements, including the e-mails, attachments, and metadata transmitted by I.C._____, which in the context of the discovery procedure would, according to the Appellant, make it possible to determine that they were subsequent to the dates held by the Arbitral Tribunal, it should certainly be noted that the Arbitral Tribunal assumed that the exclusive distribution contract and the settlement agreement had been concluded in December 2013, and November 13, 2016, respectively.

However, it does not appear that the Arbitral Tribunal considered the date of the agreements concluded by the Respondent with D._____ as decisive for the outcome of the dispute. In fact, when deciding on the Appellant's argument that the agreements in question were merely the result of an artifice by the Respondent, the Arbitral Tribunal noted that the exclusive distribution contract with D._____ had been concluded after the Respondent had been informed by the Appellant of the Appellant's decision to cease the delivery of goods. However, it did not find that this chronological element meant that the Respondent had falsified the existence of a contract with D._____ for the purposes of the dispute, simply pointing out that the contract was objectively risky for the Respondent (Award, no. 242). It must be noted that,

[9] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/alleged-new-facts-must-be-pertinent-justify-revision

[10] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/federal-tribunal-rejects-request-for-revision-facts-that-were-kn

when making its finding as to the existence of a business relationship between the Respondent and D._____, the Arbitral Tribunal relied on elements other than the process of drafting the documents containing the parties' agreement. It relied to a large extent on the testimony of F._____, a witness for D._____, who was considered credible, as well as on the circumstances of the case.

Contrary to the Appellant's submission, the date of creation of the documents transmitted by I.C._____ in the context of the American evidence-gathering procedure would not necessarily have led the Arbitral Tribunal to find that witness F._____ had openly lied to the Arbitral Tribunal in order to protect the Respondent's interests.

3.2.3. Moreover, and above all, it must be noted that the Appellant had failed to exercise due diligence. There is no need to dwell here on the possibility of it obtaining the evidence produced in a discovery proceeding in the United States during the Arbitral proceedings. On the other hand, in order to establish whether the new facts and evidence result from investigations that could and should have been carried out in the previous proceedings, it is necessary to ask whether the Appellant had any reason to request I.C._____'s testimony in the Arbitral proceedings and had the opportunity to do so. In this respect, the Appellant itself points out in its request for revision that the Respondent alleged during the arbitral proceedings that I.C._____ had participated in the drafting of the settlement agreement, which the Appellant claimed in the arbitral proceedings had never actually existed. In order to contest this allegation of the Respondent, which it considered inaccurate, the Appellant had good reason to request a hearing with I.C._____ so that the latter could testify on her participation in the contractual negotiations and in the preparation of the document or documents in question.

In this regard, the Appellant merely states in its request for revision that "Ms. I.C._____ was not heard as a witness during the Arbitration proceedings and the Appellant had no means of questioning her" (Request for revision, no. 28). After the Respondent alleges in its Answer that the Appellant never actually requested the testimony of I.C._____ during the course of the Arbitral proceedings, the Appellant ventured in its "Observations" of June 9, 2020, to put forward a nebulous argument that the rules to which the arbitral proceedings were subject – namely the "Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce"[11] (hereinafter, the Stockholm Rules) – do not provide any possibility for a party to request the arbitral tribunal to hear a third party as a witness. However, as the Respondent rightly points out, the first paragraph of Article 33 of the Stockholm Rules, entitled "Witnesses", specifically provides that the parties may request the arbitral tribunal hear witnesses ("*In advance of any hearing, the Arbitral Tribunal may order the parties to identify each witness or expert they intend to call and specify the circumstances intended to be proven by each testimony*"[12]). The Appellant cannot therefore base its request for revision on elements that it could have tried to obtain in the course of the arbitral proceedings.

4. Under these circumstances, the request for revision must be rejected. The Appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Art. 66(1) LTF) and shall pay an indemnity as costs (Art. 68(1) and (2) LTF).

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

For these reasons, the Federal Tribunal pronounces:

1.
The request for revision is rejected.

2.
The judicial costs, set at CHF 18’000, are to be borne by the Appellant.

3.
The Appellant shall pay the Respondent compensation of CHF 20’000 as costs.

4.
This judgment shall be communicated to the parties' representatives and to the Arbitral Tribunal with its seat in Geneva.

Lausanne, August 27, 2020

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Mr. Carruzzo