

4A_93/2020¹

Judgment of June 18, 2020

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Niquille,
Federal Judge May Canellas,
Clerk of the Court: Curchod (Mr.).

Parties

A._____ S.A. (formerly B._____ S. A.),
represented by Urs Boller and David Peter,
Appellant

v.

C._____ PTE.LTD,
represented by Brian Perrott and Lee Forsyth,
Respondent

Facts:

A.

A.a. C._____ PTE. LTD (Claimant, Respondent) is a company with its seat in Singapore which, *inter alia*, operates raw materials trading with manganese ore.

A._____ S.A. (formerly B._____ S. A.; Defendant, Appellant) is a producer of manganese ore with its seat in Sao Paul, Brazil.

A.b. On January 15, 2015, the parties concluded a contract for the sale of and marketing of 1'150'000 tonnes of manganese ore by the Claimant. The present dispute relates to the sixth delivery under that contract. That agreement was for the delivery of 49,830 tonnes of manganese ore which was loaded aboardship in Brazil on Decemer 29, 2016 and was delivered in Tianjin, China, on February 22, 2017. The Claimant made various advance payments for the cargo, which was supposed to have been sold to end customers in China.

¹ Translator's Note:

Quote as A._____ v. C._____, 4A_93/2020.

The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Prior to the arrival of the vessel in China, the parties failed to reach any agreement regarding the price at which the cargo was to be sold to the end customer. Ultimately, the Claimant sold the cargo without the Defendant's consent to an affiliate company at a price which was lower than the overall value of the advance payments made by it. Following this, it demanded that the Defendant pay the difference between the payments made and a reasonable price, plus a "marketing fee".

B.

After the Claimant had filed request for arbitration against the Defendant, the Swiss Chambers' Arbitration Institution appointed a sole arbitrator in accordance with Art. VI ("*Law and Arbitration*") of the Agreement.

By Award of January 13, 2013 [*sic*], the sole arbitrator adjudged the Defendant liable to pay the Claimant the amount of USD 3'565'231.81 plus 5% interest from April 1, 2017.

C.

By civil law appeal, the Defendant has requested the Federal Tribunal to set aside the Award of the sole arbitrator of January 13, 2020, and to remand the matter to the Arbitral Tribunal for readjudication.

The Appellant [*sic*] has requested dismissal of the Appeal. The sole arbitrator has waived the right to submit comments.

Reasons:

1.

According to Art. 54(1) BGG² the Federal Tribunal issues its decisions in an official language,³ as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. Where the parties do not use the same official language, the judgement of the Federal Tribunal will be issued in the language of the Appeal Brief, as is its standard practice. The challenged Award was rendered in the English language. Because English is not one of the official languages of this Court and because the Appellant used German and the Respondent has used French, the Decision of the Federal Tribunal is being issued in German.

2.

2.1. In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA⁴ (SR 291) (Art. 77(1)(a) BGG).

2.2. The seat of the Arbitral Tribunal in the present case is located in Geneva. Both of the Parties' registered offices are located outside Switzerland (Art. 176(1) PILA). The Parties did not make use of the

² Translator's Note:

BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organising the Federal Tribunal (RS 173.110).

³ Translator's Note:

The official languages of Switzerland are German, French and Italian.

⁴ Translator's Note:

PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

option under Art. 176(2) PILA and have not made any express agreement to apply the third chapter of the Swiss CCP. For this reason, the provisions of the PILA are applicable (Art. 176(2) PILA).

2.3. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek to set aside the decision subject to challenge (see Art. 77(2) BGG, ruling out the applicability of Art. 107 (2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself).

There is no exception to that rule made out here (see BGE 136 III 605⁵ at 3.3.4 p.616 with references).

2.4. Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appellate brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186⁶ at 5, p. 187, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565⁷ at 3.1 p.567; 119 II 380 at 3b p.382).

3.

The Appellant asserts the grievance that its right to be heard has been violated (Art. 190(2)(d) PILA).

3.1. The Appellant argues that in the arbitration proceedings, it always took the position that the Agreement concluded by the Parties was a marketing agreement. The Appellant asserts that this Agreement covers the terms under which the Respondent was to organise the sale of manganese ore to end customers and the commission it was to receive for this. Sec. 7.2 of the Agreement, which, in particular, envisaged payment of 3.1% commission on the final purchase price to the Respondent and set out the requirement of the Appellant's consent to the sale of the raw material is, the Appellant argues, of major significance to the Award. Throughout the entire arbitration, the Appellant relied on this clause of the Agreement. In so doing, it claims to have emphasised that the Agreement should have been characterised as a marketing agreement. However, the Appellant alleges, the sole Arbitrator failed to take account of its arguments and submissions on these points. The sole Arbitrator assumed, the Appellant argues, that the Agreement was a purchase agreement, but without delving into the issue of the agreed commission. From the perspective of the Appellant, an adjudication of the parties' dispute was impossible without delving into these points.

3.2.

3.2.1. In the realm of international arbitration, the right to be heard does not include the right to a reasoned award (BGE 134 III 186 at 6.1 with references). However, there is a minimum duty on the part of arbitrators to review and deal with the issues that are important to their decision. That duty is violated

⁵ 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>

⁶ Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

⁷ 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>

where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party (BGE 142 III 360⁸ at 4.1.1; 133 III 235 at 5.2 with references).

3.2.2. The Appellant does not sufficiently identify any such matters.

The fact that the Parties made an Agreement with respect to a “marketing fee” was most definitely taken into account by the sole arbitrator, in that he in fact himself noted that the Agreement envisaged a commission fee in line with this (“C._____ was to receive a marketing fee of 3.10%”). The fact that the Respondent’s sale of the cargo to third parties – customers – in China comported with the intention of the parties was unmistakably considered by the Arbitrator:

The structure of the contract was that the shipment was purchased by C._____ on CFR terms from A._____ with the title passing in Brazil. The arrangement was for C._____ having made advance payments to A._____ to resell the cargo to buyers in China in the meantime.

As the Appellant itself recognises, the Arbitrator did deal with its argument that the Agreement concluded by the Parties was a “pure” marketing agreement. In saying this, the sole Arbitrator explained that the Respondent had, however, not merely undertaken to market the cargo, but *also* to purchase it. Consequently, the elements which allegedly had not been considered were in fact expressly raised as a topic in the arbitral Award.

Thus, from the perspective of the Arbitrator – and contrary to the view of the Appellant – it was considered to have been proven that the Respondent undertook to market the cargo in exchange for a commission fee. The Arbitrator found that the Respondent did have a claim against the Appellant, based on considerations that the Appellant fails to deal with. In substantial respects, the Arbitrator found that the Appellant had refused its consent to the sale of the cargo in bad faith, despite the expert advice of the Respondent (“*In short, A._____ were given sound advice by C._____ and continually rejected it without any reasoned basis, other than an irrational and persistent insistence on relying on the Index*”).

This does not establish any violation of the right to be heard on the part of the Appellant.

4.

The Appeal is rejected, to the extent the matter is capable of appeal. In accordance with the outcome of this case, the Appellant shall be liable for the judicial costs (Art. 66(1) BGG). The Appellant shall pay costs and party compensation to the Respondent for the proceedings before the Federal Tribunal (Art. 68(2) BGG).

⁸ Translator’s Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties>

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected, to the extent the matter is capable of appeal.

2.

The judicial costs of CHF 21'000 shall be paid by the Appellant.

3.

The Appellant shall pay party compensation to the Respondent of CHF 23'000 for the proceedings before the Federal Tribunal.

4.

This Decision shall be notified in writing to the Parties, and to the arbitral tribunal with its seat in Geneva.

Lausanne, June 18, 2020

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

Presiding Judge:

Clerk of the Court:

Kiss

Mr. Churchod