4A_93/2013[1]

Judgment of October 29, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Niquille (Mrs.)
Clerk of the Court: M. Piatti

1. A._____ Ltd.,
2. B._____ Sàrl,
3. C._____ Ltd.,
All represented by Mr. Brenno Brunoni, Mr. Andrea Visani and Mr. Dario Jucker,
Appellants

v.

D._____ Ltd.,
Represented by Mr. Saverio Lembo and Mrs. Olivia Pelli,
Respondent

Facts:

A.
D._____ Ltd., as licensee, entered into some contracts concerning TV rights with A._____ Ltd. (on December 1, 2009, and March 9, 2010), with B._____ Sàrl (on December 9, 2009) and with C._____ Ltd. (on December 14, 2009) as licensors. The licensee paid only the first two installments for a total EUR 2'250'000 as per the contracts. On November 22, 2010, the licensors terminated the contracts due to the failure to pay the following installments and denied impeding the activity of the licensee.

[1] Translator's Note: Quote as A._____ Ltd., B._____ Sàrl, C._____ Ltd. *v.* D._____, 4A_93/2013. The original decision is in Italian. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.
On December 30, 2010, A._____ Ltd., B._____ Sàrl and C._____ Ltd. initiated arbitration proceedings against D._____ Ltd. in the Court of Arbitration for Sport (CAS). In an award of December 20, 2012, the CAS entirely rejected the licensors' claims while upholding in part the counterclaim of the licensee and ordered the Claimants to pay EUR 2'250'000 for breach of contract.

C.
In a civil law appeal of February 15, 2013, A._____ Ltd., B._____ Sàrl, and C._____ Ltd. submit that the award should be annulled and apply for a stay of enforcement and security as per Art. 104 LTF.[2] The Appellants argue a violation of public policy and of their right to be heard.

In an answer of April 2, 2013, D._____ Ltd. stated that it would accept the decision of the judge in charge of the case as to the stay of enforcement while opposing the request for security. Moreover, it submits that the matter is not capable of appeal and, in the alternative, that the appeal should be rejected.

On April 22, 2013, the Appellants spontaneously filed a short reply.

Reasons:

1.
According to Art. 54(1) LTF, the proceedings in the Federal Tribunal are conducted in one of the official languages,[3] as a rule in the language of the decision under appeal. When the decision is in another language, as is the case here (English), the Federal Tribunal resorts to the official language chosen by the parties. The civil law appeal was submitted in Italian and this judgment will accordingly be issued in that language.

2.
2.1.
Art. 77(1) LTF allows a civil law appeal against arbitral decisions pursuant to the requirements set forth at Art. 190 to 192 of the Federal Law of December 18, 1987, on International Private Law (PILA).[4] This law is applicable because the seat of the arbitration is Lausanne and at the time the arbitration clause was entered into, the parties did not have a seat in Switzerland (Art. 176(1) PILA).

[2] Translator's Note: LTF is the Italian abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French and Italian.
[4] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

2. 2.
The appeal was filed in a timely manner (Art. 100(1) LTF) and against the final decision of the CAS (Art. 90 LTF) in a civil law case (Art. 72(1) LTF). The Appellants lost in the arbitral proceedings and they have standing to appeal (Art. 76(1) LTF).

2.3.
The grounds for appeal in the field of international arbitration are exhaustively set forth at Art. 192(2) PILA. The Federal Tribunal reviews only the grievances that the appellant submits and supports with reasons (Art. 77(3) LTF). The reasons in support of the appeal must meet the requirements of Art. 106(2) LTF, which are analogous to those previously applicable to public law appeals; from this point of view, the entry into force of the LTF changed nothing (DTF 134 III 186[5] at 5). The appellant must accordingly state clearly the rules of law it considers to have been violated and state precisely what the violation consists of (DTF 128 III 50 at 1c).

3.
The Respondent claims that the parties opted out of any appeal against the award because the contracts they entered into contained an arbitration clause according to which all disputes arising from or connected with such contracts shall be submitted exclusively to the Court of Arbitration for Sport in Lausanne and finally adjudicated in accordance with the Code of Sport Arbitration. Moreover, according to Art. R59 of the Code, the award notified by the Secretariat of the CAS disposes of the dispute finally and is not subject to any appeal to the extent that the parties have neither their domicile, habitual residence or a stable organization in Switzerland and expressly renounced the possibility to appeal in the arbitration clause or in a subsequent written agreement, in particular at the outset of the proceedings. On this basis, relying on Art. 192(1) PILA, the Respondent takes the view that the matter is not capable of appeal.

It must be recalled, first of all, that in the case at hand, the reference to Art. R59(4) of the Code of Arbitration for Sport proves to be irrelevant because the provision concerns appeal proceedings. However, Art. R46(2) of the Code, which indeed refers to ordinary proceedings, has the same contents. Yet, as already pointed out in DTF 133 III 235 at 4.4.1, such provisions merely paraphrase Art. 192(1) PILA and do not prevent the filing of an appeal in the absence of a written agreement excluding such possibility. Moreover, it is sufficient to recall that merely mentioning in the arbitration agreement that the disputes will be decided finally is not a valid opting-out of the right to appeal (judgment 4P.99/1993 of November 15, 1993, at 2, also quoted in DTF 131 III 173 at 4.2.1). As a matter of principle, the appeal is accordingly admissible.

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

4.

4.1.

The Appellants rely on Art. 190(2)(e) PILA and argue a violation of public policy with reference to the principle of *pacta sunt servanda*. They submit that the Arbitral Tribunal recognized the existence of clauses allowing the termination of the contracts if the required payments were not made in a timely manner – as happened in the case at hand – but failed to hold that the termination of the contract was justified.

4.2.

According to Art. 190(2)(e) PILA, an award may be appealed if it is incompatible with public policy. An arbitral award is incompatible with substantive public policy when it violates some fundamental principles of substantive law in such a manner that it is no longer compatible with the legal order and the determining system of values. Among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures, and the protection of incapables (DTF 132 III 389 at 2.2.1). The principle of *pacta sunt servanda* in the restrictive meaning given by Art. 190(2)(e) PILA is violated only if the arbitral tribunal refuses to apply a contractual clause whilst admitting that it binds the parties or, conversely, if it imposes upon them compliance with a clause which it considers as not binding (judgment 4A_46/2011[6] of May 16, 2011, at 4.2.1). However, the process of interpretation and the logical consequences drawn from it are not governed by this principle and the Federal Tribunal has emphasized many time that almost all disputes arising from an alleged breach of contract are outside the scope of protection of the rule *pacta sunt servanda* (judgment 4A_14/2012[7] of May 2, 2012 at 5.2.1, unpublished in DTF 138 III 270).

In the case at hand, the Arbitral Tribunal held that pursuant to Art. 82 CO,[8] the Appellants could not demand performance of the contracts and payment of the remaining installments from the Respondent because they had breached their contractual obligations. In doing so, it held that the clauses concerning the payment of the installments and therefore also the consequences of late payment no longer bound the parties. There is accordingly no contradiction at all between the reference to such clauses in the award and the holding that the termination of the contract was unjustified. The argument is accordingly unfounded.

5.

5.1.

Furthermore, the Appellants rely on Art. 190(2)(d) PILA and argue a violation of their right to be heard because the Arbitral Tribunal totally ignored their principle argument that the Respondent was in default, merely examining the contractual breaches raised by the latter.

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg

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

[8] Translator's Note: CO is the Italian abbreviation for the Swiss Code of Obligation.

5.2.
The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not require an arbitral award to be reasoned (DTF 134 III 186[9] at 6.1 and references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (DTF 133 III 235 at 5.2, p. 248 and references). This duty is breached when, due to oversight or a misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence and offers of evidence submitted by the parties and relevant to the decision. However, the arbitrators are not obliged to discuss all arguments raised by the parties and they cannot be criticized for allegedly violating the right to be heard if they did not rebut – at least implicitly – an argument entirely irrelevant to the decision (DTF 133 III 235 at 5.2, p. 249).

In the case at hand, as the Appellants explicitly acknowledge, the argument that the termination of the contract was justified as a consequence of the Respondent's failure to pay the installments was mentioned in the award. As already pointed out above with regard to the alleged violation of public policy, the Arbitral Tribunal held that the Respondent's failure to pay the installments in a timely manner did not justify the termination of the contracts due to the contractual breaches by the licensors. Hence, the Appellants' argument was considered and there is therefore no violation at all of their right to be heard.

6.
The foregoing shows that the appeal is unfounded and must be rejected. The decision on the merits renders moot the Appellants' request for security. The judicial and party costs shall be adjudicated accordingly (Art. 66(1) and 68(1) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 20'000 shall be borne by the Appellants, which shall pay to the Respondent an amount of CHF 22'000 for the federal judicial proceedings.

3.
To be notified to the representatives of the parties and to the Court of Arbitration for Sport.

Lausanne, October 29, 2013

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

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Piatti