4A_202/2016[1]

Judgment of August 3, 2016

First Civil Law Court

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

A._____ SA,
Represented by Mr. Rocco Taminelli, Mr. Alexandre Zen-Ruffinen, Mr. Philippe Schweizer, and Mr. Arsène Kronshagen,
Appellant

v.

1. B._____,
2. C._____ Sàrl,
Both represented by Mr. Antonio Rigozzi and Mrs. Brianna Quinn,
Respondents

Facts:

A.
A.a. B._____ is a professional racing cyclist of [name of country omitted] citizenship. The company under [name of country omitted] law, C._____ Sàrl entirely held by B._____ owns the image rights of the cyclist.

A._____ SA, another company under [name of country omitted] law, is a professional cycling team.

A.b. On September 14, 2010, A._____ SA and B._____ entered into a contract entitled "*Self-Employed Agreement*"[2] (hereafter: the SEA), by which the racing cyclist undertook to furnish his services against payment to the cycling team managed by the aforesaid company from January 1, 2012, to December 31, 2014.

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[1] Translator's Note: Quote as A._____ SA *v.* B._____ and C._____ Sàrl, 4A_202/2016. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

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

On the same date, C._____ Sàrl and A._____ SA signed a contract denominated Agreement on Image Rights (hereafter: the AIR), pursuant to which the professional cycling team was authorized to use B._____'s image against compensation for the same duration as the SEA, both contracts being closely linked.

On July 14, 2012, whilst participating in the Tour de France, B._____ submitted to an anti-doping control, which proved positive. Informed of the result three days later, he quit the Tour de France and did not participate in other competitions until the end of the season, whilst continuing to train with his team.

In a decision of January 30, 2013, issued pursuant to the disciplinary procedure opened against B._____, upon request of the Union Cycliste Internationale, the Disciplinary Committee Against Doping of the Olympic Committee of [name of country omitted] suspended the racing cyclist for a (reduced) duration of a year from July 14, 2012. It also annulled the racing cyclist's individual results achieved during the 2012 Tour de France.

On June 21, 2013, A._____ SA terminated both the SEA and the AIR as of July 14, 2012, retroactively.

B.
On October 27, 2014, B._____ and C._____ Sàrl, relying on an Arbitral Agreement signed by all parties on August 12, 2014, filed a request for arbitration with the Court of Arbitration for Sport (CAS) with a view to having A._____ SA ordered to pay EUR 3'081'750 to the former and EUR 1'170'000 to the latter with interest. The defendant submitted that all claims should be rejected and filed a counterclaim against the claimants.

In an award of January 29, 2016, the CAS Panel composed of three Swiss attorneys, ordered A._____ SA to pay EUR 1'365'000 to B._____ and EUR 630'000 to C._____ Sàrl, both amounts bearing interest at 5% yearly from July 1, 2013. It rejected all other submissions, as well as the counterclaim. In short, the three arbitrators held *ex aequo et bono* that by being late to react after the positive control of B._____, A._____ SA waived any ground to terminate the SEA without notice, so its immediate termination was not justified. In their view, the same theory applied as to the termination without notice of the AIR due to the close link existing between the two contracts.

C.
On April 7, 2016, A._____ SA (hereafter: the Appellant) filed a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award at issue.

In their answer of June 1, 2016, B._____ and C._____ Sàrl (hereafter: the Respondents) submitted that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS, too, submitted that the appeal should be rejected in its answer of June 1, 2016.

In its reply of June 20, 2016, and in their rejoinder of July 6, 2016, the Appellant and the Respondents repeated their previous submissions.

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 is in another language, (here English) the Federal Tribunal resorts to the official language chosen by the parties. In the CAS, they used English. In the briefs submitted to the Federal Tribunal, the Appellant used French. The Respondents did the same. In accordance with its practice, the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.
2.1. In the field of international arbitration, civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements set at Art. 190-192 PILA[5] (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal to appeal, or the grounds for the appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The matter is therefore capable of appeal.

2.2. The Federal Tribunal issues its decision on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal law organizing the judiciary (see ATF 129 III 727 at 522; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the capacity to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when new facts or evidence must be exceptionally taken into account in the framework of the civil law appeal (judgment 4A_42/2016[6] of May 3, 3016, at 3).

Here it must be pointed out that the factual findings as to the evolution of the proceedings also bind the Federal Tribunal with the same reservations, whether they concern the submissions of the parties, the facts alleged, the legal explanations they gave, the statements made during the case, the evidence adduced, or the content of testimony or of an expert report, or even the information gathered during an on-site visit (judgment 4A_54/2015[7] of August 17, 2015, at 2.3, quoting ATF 140 III 16 at 1.3.1).

3.

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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: http://www.swissarbitrationdecisions.com/arbitrator-entitled-organize-proceedings-he-deems-appropriate

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-duty-arbitral-tribunal-expressly-address-any-and-all-points-raised

In its first argument, the Appellant invokes Art. 190(2)(d) PILA and argues that the Panel violated its right to be heard. In its view, the arbitrators chose to apply Swiss law under the cloak of the *ex aequo et bono* clause by way of opaque and unforeseeable reasons and, more specifically, the rules of that law concerning the termination of an employment contract when the parties, all domiciled in the country of X._____, specifically referred to the law of that country in the relevant clause of the arbitration agreement and could therefore not expect that any other law would be applied. This was all the more so as to the AIR, a contract which was concluded between two companies and concerned the assignment of the right to use a third person's image against compensation, could not fall within an employment relationship under any circumstances, even if submitted to Swiss law. Therefore, according to the Appellant, the Panel, by turning to that law unexpectedly, deprived the Appellant of the opportunity to raise any objection as to the very applicability of the Swiss law concerning employment to the circumstances of the case at hand, without any valid reason to do so.

3.1. In Switzerland, the right to be heard relates mainly to factual findings. The right of the parties to be asked for their views as to legal issues is recognized only restrictively. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal scope of the facts and may decide also on the basis of rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the power of the arbitral tribunal to the legal arguments raised by the parties only, they do not have to be heard specifically as to the scope to be given to legal rules. As an exception, they must be asked for their views when the judge or the arbitral tribunal considers basing a decision on a provision or a legal consideration that was not addressed during the proceedings and the relevance of which the parties could not have anticipated (ATF 130 III 35 at 5 and references). Moreover, knowing what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal shows restraint in applying the aforesaid rule for this reason and also because the specificities of this type of procedure must be taken into account, to avoid a situation where the argument of surprise is used with a view to obtaining substantive review of the award by the appellate body (judgment 4A_634/2014[8] of May 21, 2015, at 4.1 and the cases quoted).

3.2. Considered in these principles, the argument under review appears groundless. At paragraph 9 of the arbitration agreement they signed on August 12, 2014, the parties addressed the issue of applicable law in the following terms:

> The parties authorize the Arbitral tribunal to assist them in reaching a settlement and, if it deems it appropriate, to decide *ex aequo et bono*. Applicable law should be X._____ law; the Arbitral Tribunal can also apply any rule of law that it will consider appropriate.

By reading the aforesaid clause, and in particular the last clause in it, the parties could not reasonably exclude that the Arbitral Tribunal would decide to apply another law than the law of [name of country omitted], or even that it would bypass any reference to a specific law to decide the case *ex aequo et bono*, particularly because the verbal form 'should', used in the aforesaid clause as to the reference of the law of X._____ [name of country omitted], did not allow them to conclude at all that the application of the

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-not-pertinent-international-arbitration

latter law was mandatory. Moreover, as the Panel was composed of 3 Swiss arbitrators, the CAS is based in Switzerland, and Swiss law is the supplementary law in the ordinary proceedings before the CAS (see Art. R45 of the Code of Sport Arbitration) the Appellant, assisted by 5 lawyers in the arbitral proceedings, could at the very least, have considered the possibility of Swiss law being applied and not – to quote its own words – the "legal rules of Vietnam, Senegal, or the United States."

Yet, there is more. Indeed, the Procedural Order of August 19, 2015, signed by all parties without objection or remarks, contains Clause 7, entitled *Law Applicable to the Merits*, which, in its first paragraph, recalls the authorization to the Panel to decide *ex aequo et bono* and reproduces the aforesaid Clause 9 of the arbitration agreement in a second paragraph and then states the following in a last paragraph:

> In view of the discretion granted to the Panel by the Parties, of their written submissions and of the fact that they chose Swiss arbitrators, the Panel deems it appropriate to decide this case *es aequo et bono* and to refer to Swiss law whenever it deems it appropriate.

Considering this last sentence one cannot argue euphemistically, as the Appellant does, that the CAS merely "touched on" the possibility it could take Swiss law into account. Instead, it appears that the Panel reserved the opportunity to apply Swiss law according to its own will. Even assuming, therefore, as the Appellant appears to argue, that the parties referred only to the law of [name of country omitted] in their various briefs, which were all submitted before the Procedural Order in question was issued, good faith would have required the Appellant to react upon receipt of the latter and to speak out against the Panel's expressed intent to rely upon Swiss law if it considered it appropriate. Instead, the Appellant chose to remain silent and signed the aforesaid Procedural Order as it was. Therefore, it cannot today make a claim to be the victim of a surprise today, without abusing its right *ipso facto*. Moreover, as the foreseeability of Swiss law is admitted *in casu*, there was nothing extraordinary in the Panel to seeking help in the provisions of that law concerning the termination of an employment contract without notice in its effort to decide the matter *ex aequo et bono*. Therefore, it was not remarkable to qualify the SEA in this manner, which formalized the professional relationship between the Appellant and the Respondent racing cyclist. The Appellant does devote a large part of its brief to demonstrating that it was stunned to see that the Panel applied Swiss labor law to the issue of the termination of the AIR when that contract, entered into by two companies as to the exploitation of the image of a third party, was above and beyond any employment relationship. In doing so, the Appellant disregards the real nature of the reasons developed by the Panel as to the AIR (Award, nn. 158-164). The Arbitrators did not conclude that the termination of the AIR was not justified by applying the provisions of the Swiss Code of Obligations concerning the termination of employment relationships, but rather exclusively based on a clause of the AIR which tied the fate of this contract to that of the SEA and by drawing the conclusion imposed by that clause, after demonstrating that the latter contract was terminated immediately without reasons. It is also by taking into account the interdependence between the two contracts that, in their *ex aequo et bono* award, they referred to Art. 339(1) CO[9] as to the due date of the claims arising from the unjustified unilateral termination of both (Award, n. 206). Under such conditions, the Appellant is wrong to challenge "the unexpected intrusion of Swiss labor law and of Art. 339(1) CO in the case of C._____ Sàrl."

4.

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

Secondly, the Appellant argues that the Arbitral Tribunal violated its right to be heard within the meaning of Art. 190(2)(d) PILA by failing to take into account its minimum duty to examine and deal with the pertinent issues. In its view, the Arbitrators did not have take into account the alternate reasoning developed at B.6 of its brief of May 28, 2015, in the arbitration (p. 14/15) as to the termination of the AIR. According to that argument, irrespective of the automatic termination based on Art. 8.4 of the aforesaid contract, the termination of the latter could still take place autonomously pursuant to its Art. 8.2 if one of the parties committed a material breach, a hypothesis confirmed in the case at hand due to the "association of B._____ to a doping matter." According to the Appellant, this argument, developed in the alternative should the Panel consider – as it did – that the termination of the SEA was unjustified and reach the same conclusion reflexively as to the AIR, would have an impact on the outcome of the dispute, because the claims of C._____ Sàrl should have been rejected if that contract was validly terminated pursuant to its Art. 8.2.

4.1. The right to be heard in contradictory proceedings pursuant to Art. 190(2)(d) PILA does not require an international arbitral award to be reasoned (ATF 134 III 186[10] at 6.1 and the references). However, it imposes upon the arbitrators a minimum duty to examine an address the pertinent issues (ATF 133 III 235 at 5.2, p. 248 and the cases quoted). This duty is violated when, inadvertently or due to oversight, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence presented by one of the parties and important to the decision to be issued. If the award is totally silent as to some items apparently important to decide the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. They must demonstrate that, contrary to the appellant's assertions, the items omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all arguments invoked by the parties so that they cannot be held in violation of the right to be heard in contradictory proceeding for not addressing, even implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

In a recent case, in answer to a litigant believing to have detected a loosening of this jurisprudence towards broader review based on denial of formal justice in connection with the failure to address an argument in an award, the Federal Tribunal pointed out that this was not the case. On the contrary, pointing to the ever-increasing tendency of numerous appellants to invoke this aspect of the guarantee of the right to be heard in the hope of obtaining indirectly the substantive review of the award under appeal, the First Civil Law Court recalled that the Federal Tribunal is not a court of appeal and that the legislator had consciously and deliberately limited its power of review when entrusting it to decide appeals as to international arbitration (judgment 4A_450/2015 of December 16, 2015, at 3.3.1, last §).

4.2. In the case at hand, it is clear on the basis of the convincing explanations they gave in their respective answers (p. 4, nr. 7, for the CAS and nn. 55-64 for the Respondents) that the CAS and the Respondents succeeded in the demonstration reserved by the aforesaid jurisprudence.

[10] 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 this respect, the content of the June 21, 2013, letter, by which the Appellant's representative terminated both contracts simultaneously, is of paramount importance. Therefore, the pertinent passages must be quoted:

> According to the termination clause stipulated at Art. 8 of the Self-employed agreement signed between my client and your client B._____, the aforesaid contract is rescinded *ex officio*, if not terminated, as of July 14, 2012.
>
> According to the termination clause stipulated at Art. 8.8.4 (*recte* 8.4) of the Agreement on image right signed between my client and your client B._____ and in view of its contractual interdependence, the aforesaid contract is also rescinded *ex officio* if not terminated as of July 14, 2012. The automatic effects of the aforesaid termination clauses carry (sic) as to your client B._____ the refund of the salary received for the month of July, 2012, … and the cancellation of the invoices he issued for the period from August 2012 to March 2013.
>
> The invoices of C._____ for the period of July 2012 to March 2013, must also be annulled.

In view of this letter, the Panel could legitimately consider that, insofar as the Appellant itself invoked only Art. 8.4 of the AIR at the time to justify the termination of this contract whilst insisting upon the automatic effects of the termination of the SEA upon this related contract and, more generally, upon the interdependence between the two contracts signed the same day. The reference to Art. 8.2 of the AIR, made in the alternative in a brief filed some two years after the termination of the contracts, did not constitute a pertinent argument requiring specific rebuttal as the alternative argument was at odds with the behavior adopted at the time by the party invoking it and appears to have been formulated *a posteriori* for the sake of the cause.

The Appellant's cryptic remark. at n. 3 of its reply, according to which the words "rescinded *ex officio* if not terminated" contained in the second paragraph of the aforesaid July 21, 2013, letter, already included the distinction between the termination of the AIR reflexively in connection with that of the SEA ("rescinded *ex officio*"), on the one hand and the independent termination based on Art. 8.2 of the AIR ("if not terminated") on the other hand, cannot be serious, particularly as the same wording was used by the drafter of the aforesaid letter with regard to the termination of the SEA only (see para.1 of the letter at issue).

The argument that the right to be heard was violated therefore appears unfounded from this point of view as well, which leads to the rejection of the appeal.

5.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondents as joint creditors of the compensation to which they are entitled (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeals are rejected.

2.
The judicial costs set at CHF 17’500 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents as joint creditors an amount of CHF 19’500 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS)

Lausanne, August 3, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo