

4A_579/2010¹

Judgment of January 11, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding

Federal Judge CORBOZ,

Federal Judge KOLLY,

Clerk of the Court: CARRUZZO.

X. _____ SA,

Appellant,

Represented by Mr. Christophe RAPIN

v.

International Olympic Committee,

Respondent,

Represented by Mr. Edgar PHILIPPIN

Facts:

A.

Entrusted by the International Olympic Committee (hereafter the IOC) with negotiating the rights as to the DVDs produced and sold during the Olympic games in Beijing, which took place from the 8 to the 24th of August 2008, company V. _____ negotiated with X. _____ SA, a company of [name of country omitted] which produces and distributes DVDs in the field of sports in particular.

¹ Translator's note:

Quote as X _____ SA v. Comité International Olympique, 4A_579/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

On June 10, 2008 V, acting in the name and on behalf of the IOC and X._____ SA signed two documents entitled "Deal Memo"². The first related to the DVD production and distribution rights in various territories in Asia; the second concerned the same rights for the United Kingdom and Ireland. The two documents reserved the execution of two License Agreements ("Long Form Agreement"³) which were executed on July 30 and August 5, 2008 respectively. Each of the four agreements contains a choice of law clause providing for Swiss law and the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) to resolve possible disputes as to their interpretation or performance.

B.

Claiming that X._____ SA failed to perform its financial obligations pursuant to the License Agreements, the IOC seized the CAS of an arbitration request on September 15, 2009.

In its answer of November 30, 2009, X._____ SA challenged the jurisdiction of the CAS because the two License Agreements would not have been validly concluded and would accordingly never have come into force. It made some alternate submissions on the merits should its objection to jurisdiction be set aside.

In a final award of September 14, 2010, Brigitte Stern, a law professor in Paris, acting as sole arbitrator in CAS ordinary arbitral proceedings, ordered X._____ SA to pay some 2.9 million USD to the IOC and issued a number of injunctions towards the defendant company.

C.

On October 14, 2010 X._____ SA filed a Civil law appeal with the Federal Tribunal with a view to obtain the annulment of the aforesaid award and to obtain a finding that the CAS has no jurisdiction in the dispute between the Parties.

In its answer of November 18, 2010 the IOC submitted that the appeal should be rejected to the extent that the matter is capable of appeal. For its part, the CAS did not file an answer.

The request for a stay of enforcement pending the appeal was rejected by decision of the Presiding Judge of November 10, 2010.

Reasons:

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

³ Translator's note: In English in the original text.

1.

In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set at Art. 190 to 192 PILA⁴ (Art. 77 (1) LTF⁵). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant or the grievances raised in the appeal brief, none of the admissibility requirements raises any problem in this case. The appeal must accordingly be examined on the merits.

2.

In a first argument the Appellant relies on Art. 190 (2) (b) PILA and argues that the CAS was wrong to accept jurisdiction to decide the dispute with the Respondent.

2.1 Seized of an argument of lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining jurisdiction or lack of jurisdiction of the Arbitral Tribunal (ATF 133 III 139 at 5 p. 141 and the cases quoted). However it reviews the factual findings on which the award under appeal relies only to the extent that one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into account within the frameworks of the Civil law appeal proceedings (Judgment 4A_234/2010 of October 29, 2010 at 2.1).

2.2 It is not challenged and neither would it be possible to do so that the four aforesaid agreements all contain an arbitration clause giving exclusive jurisdiction to the CAS to decide the disputes arising from them.

2.2.1 However the Appellant claims in substance that the License Agreements containing the arbitral clause were never concluded because it is not established that it would have received a signed copy before May 20, 2009. According to the Appellant the CAS would have failed to notice that under Swiss law both an offer and its acceptance are subject to being received.

The argument relies on an allegation departing from the factual findings of the CAS, yet the Appellant raised none of the aforesaid exceptions. Indeed the award under appeal states the following in this respect: "at the beginning of October 2008, Ms B._____ sent a copy of the Agreements, duly signed by V._____ on behalf of the IOC, back to X._____"⁶.(N.2.12 in fine) Then at paragraph 5.9 of the award the

⁴ Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

⁵ Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

⁶ Translator's note: In English in the original text.

CAS indicates why on the basis of the testimony given by that person and the circumstances around the expedition of the copies of the License Agreements, it holds that “the Respondent must have received copies of the two Licensed Agreements at the end of October 2008”⁷.

In any event, as the Respondent points out and demonstrates convincingly in its answer (Nr. 22 to 25), both the Appellant and the Respondent fulfilled at least in part their respective obligations under the License Agreements. Therefore the Appellant could not in good faith challenge their validity or accordingly that of the arbitral clause they contain.

2.2.2 the Appellant also argues that in a letter of December 22, 2008, V._____ acting on behalf of the IOC, threatened the Appellant with judicial proceedings in front of the State Courts of [name of country omitted] or [name of country omitted] should it fail to fulfill its financial obligations before the end of the year. Claiming that in the answers it gave to that letter it never raised an arbitration defense, the Appellant concludes that the renunciation to arbitration proposed by the Respondent was tacitly accepted.

The argument is without any pertinence. Admittedly it is possible to renounce an arbitration clause tacitly. This happens in particular when a party acts in front of the State Courts notwithstanding the existence of an arbitration clause and the respondent proceeds on the merits without invoking the arbitration clause (ATF 127 III 279 at 2c/ee p. 287; cf. Art. 7 (a) LDIP; see also: POUDRET/BESSON, Comparative law of international arbitration, 2nd edition, 2007, nr. 379). However a renunciation cannot be deducted from a mere letter of notice, albeit accompanied by a threat to sue in the State Courts, yet which remained without effect because the legal person on behalf of which the letter was sent acted in front of the arbitral tribunal mentioned in the arbitration agreement between the parties. It is equally artificial to try to see there an offer to renounce the arbitration clause which the addressee would have accepted by failing to avail itself of the arbitration clause in the answers given to the letter.

Consequently the argument that the CAS lacked jurisdiction is manifestly unfounded.

3.

In a second argument the Appellant claims a violation of public policy within the meaning of Art. 190 (2) (e) PILA and in particular of the principle of good faith.

3.1 An international arbitral award is contrary to substantive public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the

⁷ Translator's note : In English in the original text.

determining legal order and system of values; among such principles are in particular compliance with the rules of good faith. The latter must be understood in the meaning that they are given by case law with regard to Art. 2 CC⁸ (Judgment 4A_488/2009 of February 15, 2010 at 3.1).

3.2 As the Respondent argues one has to acknowledge that it is doubtful that the matter is capable of appeal in this respect in the manner in which the grievance is presented in the appeal brief. Be this as it may, the argument fails.

Firstly the Appellant comes back to the issue as to when the copies of the License Agreements were received, which it already raised in vain to substantiate its argument of lack of jurisdiction and which was dealt with above (see 2.2.1). There is no reason to revert to the issue.

The Appellant then challenges the way in which the CAS applied Art. 82 CO⁹. Deciding whether the Arbitrator was right or not when she held that the Respondent was entitled to rely on *exceptio non adimpleti contractus* in this case has nothing to do with the issue of good faith in the limited meaning that case law gives it as an element of substantive public policy.

The same remark can be made with regard to the Appellant's last argument by which it challenges the way in which the CAS interpreted the provisions of the License Agreements as to the payment of royalties.

4.

In summary the appeal can only be rejected to the extent that the matter is capable of appeal. Consequently the Appellant shall pay the costs of the federal proceedings (Arts 66 (1) LTF) and compensate the Respondent (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 20'000.- shall be paid by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 22'000.- for the federal judicial proceedings.

⁸ Translator's note : CC is the French abbreviation for the Swiss Civil Code.

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

4. This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, January 11, 2011

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

The Presiding Judge:

The Clerk:

KLETT (Mrs)

CARRUZZO