4A_582/2009[1]

Judgment of 13 April 2010

First Civil Law Court

Federal Judge KLETT (Mrs) Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH (Mrs),

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: Mr. CARRUZZO.

X._____ SA,

Appellant,

Represented by Mr. Christophe SIVILOTTI,

v.

Y._____ BV,

Respondent,

Represented by Mr. Jean-Yves Hauser,

Facts:

A.

A.a Y._____ BV (hereafter: Y._____), a Dutch company, holds the exclusive rights to use clothing brand A._____ (hereafter: the brand). In November 2005, under circumstances that are not necessary to relate here, X._____ SA (hereafter: X._____), a Swiss company, acquired one-third of the A._____ store

[1] Translator's note: Quote as X._____ SA *v.* Y. _____, BV 4A_582/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

operations, as well as the manufacturing and distribution of clothing bearing the brand. It approached Y._____ to enter into a new license agreement to use the brand as from 1 January 2006. The two companies then started negotiations that proved to be difficult.

Finally, the companies entered into a license agreement on 31 January 2008. Y._____ granted X._____ an exclusive license to use the brand in various European countries through a network of boutiques and excluding large-scale retailers, against payment of an annual royalty of 5% of earnings, but with a minimum of €600'000.--.

The one-year agreement could be extended by tacit renewal. Article 14 of the agreement set out various circumstances for immediate termination, in particular the serious violation of reciprocal commitments and article 16 specified the procedure to be followed once the agreement was terminated. Among other obligations, the licensee was required to sell the inventory of articles in its possession as quickly as possible. The license agreement included an arbitration clause by virtue of which any dispute between the parties was to be submitted to arbitration, in accordance with the Expedited Arbitration Rules of the World Intellectual Property Organization (WIPO). The venue of the arbitration was in Geneva, with French designated as the language of the arbitral proceedings, and the dispute governed by Dutch law.

A.b As of the end of July 2008, the Parties tried to settle problems dividing them involving performance of the license agreement.

By registered letter of 26 January 2009, Y._____ notified X._____ of the termination of the agreement for serious violation of its obligations. In its answer two days later, the Swiss company expressed its astonishment at receiving such a letter and disputed any violation of the agreement. By a letter of 26 February 2009, it nevertheless decided to accept the termination of the agreement with immediate effect, starting on

31 January 2009, while stating its express reservations as to the compensation for the damage that the situation created for it.

The implementation of the procedure set out in article 16 of the agreement to wind up the relationship between the parties resulted in difficulties. Y._____ criticized X._____ for seeking to sell off its inventory outside the selective distribution network, while X. _____ blamed Y. _____ for preventing it from selling its inventory.

Y._____ expressed its intent to X._____ to take back all of the inventory of A._____ items still in its possession. By a letter of 31 July 2009, it submitted a quantified amicable offer amounting to €1'080'005,45.--, adding that it was leaving it to the discretion of an expert if this offer was not accepted. X._____ answered Y._____ on 1 September 2009 that it could not accept the offer because it had the opportunity to sell the inventory at a price ranging between €3'163'474,93.-- and €4'519'249,90.--.

On 1 August 2009, all the A._____ boutiques operated by X._____ or its licensees were renamed "B._____." They continued to sell the A._____ items remaining in inventory.

B.

B.a On 3 August 2009, X._____ filed a claim for damages for nonperformance and wrongful breach of the license agreement as well as a request for interlocutory measures with the WIPO's Arbitration and Mediation Center (hereafter: the Center). On the merits, it submitted in substance that the termination of the license agreement should be declared null and void, that Y._____ should be ordered to pay damages set at €4'679'588,30.-- and compensation for non-pecuniary damages, and that it set off with the claims of its opposing party should be allowed. As for the submissions relating to interlocutory measures, they sought, on the one hand, to prohibit Y._____ from

hindering, by any means whatsoever, the steps undertaken by X._____ to sell the inventory in its possession (i), and, on the other hand, to authorize the requesting party to sell off its inventory in its condition as of 28 July 2009, by all sales channels and means after 31 July 2009 (ii).

By a letter of 19 August 2009, the Center notified the parties that Mr. T._____, attorney-at-law, was appointed as sole arbitrator.

On 20 August 2009, Y._____ filed an answer to X._____'s request with the Center as well as an unquantified counterclaim for nonperformance of the license agreement, accompanied by a request for interlocutory measures. The interlocutory measures, such as specified in a letter of 11 September 2009, requested that the arbitrator enjoin X._____ from continuing to confuse the public forming the regular client basis of the boutiques historically known as A._____ and renamed B._____ on 1 August 2009 and from using internet sales channels with significant discounts (from 50% to 70%) (a). Y._____ also asked the arbitrator to order X._____ to provide it the documents critical to the healthy continuity of the A._____ collections, as well as the collection items, such as specified in articles 2.2, 2.3 and 2.4 of the agreement (b); to pay or to consign the amounts corresponding to the guaranteed minimum royalties for 2008 and 2009 (c); to hand over the internet addresses (d); to transfer or consign the inventory of A._____ products, until the arbitral award (e); lastly, to cease any use of the brand and materials with the A._____ brand and any reference to the brand (f).

In its written submission of 14 September 2009, X._____ submitted its answer on the merits to the counterclaim.

On the same date, the Arbitrator notified the Parties of Procedural order no. 1, in which he confirmed that a hearing was to be held on 18 September 2009 in Geneva,

devoted to the requests for interlocutory measures contained in their written submissions and to lay out a procedural schedule for the requests on the merits.

After the hearing, the minutes of which were communicated to the Parties, the Arbitrator informed them in a letter of 2 October 2009 that the proceedings concerning the requests for interlocutory measures were closed.

B.b On 7 October 2009, the Arbitrator issued a "preliminary award" holding as follows:

"The Arbitral Tribunal

- orders X._____ to transfer to Y._____ the inventory of A._____ products in its possession;
- orders that the start of the transfer operations shall take place within eight days of notification of this award, with the specification that the transfer operations shall be closed within seven days of their start, unless the Parties agree otherwise;
- orders X._____ to prepare a new inventory of stock on the actual transfer date in the presence of both parties, with Y._____ or with any person(s) authorized by it;
- orders Y._____ to pay to X._____ the provisional sum of €1'080'005,45.-- (...) by issuing to X._____ a certified bank cheque, and if the transfer of the inventory cannot take place instantaneously (because of its location in multiple places), the issuance of the cheque to X._____ shall take place when the last portion of the inventory is transferred;
- specifies that this transfer of inventory shall take place EXW (Ex Works) X._____'s stores or warehouses;
- orders X._____ to transfer to Y._____ the domain name registrations www.aaaa.com and www.aaaa.info within fifteen days of notification of this award;
- dismisses all the other requests for interlocutory measures filed by the Parties;

- postpones ruling on the costs of arbitration associated with this preliminary arbitral award until the ruling on the merits of the case."

The Arbitrator examines at first the requests for interlocutory measures filed by both parties relating to the inventory of A._____ products still in X._____'s possession (see B.a, §1 and §3, above). Preliminarily, he observes that his jurisdiction to order the measures requested results from Art. 183 PILA[2] the text of which he quotes at full length. The Arbitrator then reiterates that he is ruling in the context of requests for interlocutory measures, so that he does not have to give his opinion at this stage on the causes of the disputed termination of the license agreement or on attributing the liability for this termination to either of the parties, and even less on the damages that allegedly resulted from it. Having reiterated as such, the Arbitrator begins by explaining why he is justified to decide, as a matter of urgency, on the fate of the inventory. He furthermore specifies that, in the context of his provisional assessment, without prejudice to the decision that he will make on the merits, he will let himself be guided by the principle of "balance of damages" or "balance of interests." Then the Arbitrator explains the reasons leading him to believe that the balance leans in favor of Y._____. In substance, according to the Arbitrator, it is not established, *prima facie*, that the contractual rules affecting the distribution methods of A._____ products had ceased to apply because the agreement was terminated. Yet, the sales channels considered by X._____ to liquidate the inventory are not consistent with these rules and may be such as to damage the reputation of the brand. In addition, it seems that Y._____'s taking back the inventory would limit the potential damages of both parties: it allows X._____ to liquidate its inventory and gives Y._____ the assurance that this inventory will be sold off under conditions that are consistent with its preferred sales and marketing methods. Undoubtedly, the Arbitrator recognizes the profound disagreement between the Parties as to the value of the inventory. However, in his opinion, the examination of this disagreement involves the merits and does not hinder the transfer of the inventory from taking place immediately in exchange for

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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.

payment of the sum offered by Y._____, or €1'080'005,45.--; the final price of the inventory transferred accordingly will be set at the end of the proceeding on the merits. The Arbitrator consequently orders the transfer of the inventory against payment of the aforementioned provisional sum and establishes the terms and conditions of payment by providing in particular for the preparation of a new inventory of stock.

With regard to the other parts of the request for interlocutory measures filed by Y._____ (see B.a, § 3e, above), the Arbitrator finds, firstly, that considering his decision to order X._____ to transfer the inventory or A._____ products to the Dutch company, submission (a) of the request is no longer relevant. He then rejects submission (b) of the request, since Y._____ has not convinced him that the failure to transmit the information it requested exposed Y._____ to imminent or irreparable harm. As for the request forming the purpose of submission (c), to pay or to consign the minimum royalties due for 2008 and 2009, the Arbitrator rejects the request at this stage of the proceeding, because it relates to the merits of the dispute and the requesting party does not establish *prima facie* that the grievances raised by X._____ are manifestly unfounded. However, the Arbitrator grants submission (d) on the grounds that Y._____ has a clear interest in controlling the domain name registrations including the brand. Lastly, he rejects submission (f) because it does not appear that there is a serious risk that X._____ would use the brand.

C.

On 20 November 2009, X._____ filed a Civil law appeal. Claiming that the Arbitrator ruled *extra petita* (Art. 190 (2) (c) PILA), violated its right to be heard in adversarial proceedings (Art. 190 (2) (d) PILA), and issued an award inconsistent with public policy (Art. 190 (2) (e) PILA), the Appellant asks the Federal Tribunal to set aside the first six parts of the award under appeal and, subsidiarily, to declare it null.

The request for a stay of enforcement presented by the Appellant was granted *ex parte* by a decision of the Presiding Judge on 24 November 2009.

By a letter of 1 December 2009, the Arbitrator informed the Federal Tribunal that he would not submit an answer to the appeal.

In its answer of 11 January 2010, Y._____ principally submits that the matter is not capable of appeal and, subsidiarily, that the appeal should be rejected.

The Parties submitted their reply and rejoinder, with supporting documents, on 15 and 21 January 2010.

Reasons:

1.
In the field of international arbitration, arbitral awards are capable of Civil law appeal as provided by articles 190 to 192 PILA (Art. 77 (1) LTF)[3].

The venue of the arbitration was in Geneva. At least one of the parties (in this case, the Respondent) did not have its domicile in Switzerland at the pertinent time. The provisions of chapter 12 PILA therefore apply (Art. 176 (1) PILA).

The Appellant is directly affected by the decision under appeal, which orders it to dispose of all the inventory although, in its opinion, no guarantee was given that it will be paid for the inventory. Thus the Appellant has a personal and legally protected interest to ensure that the award was not issued in violation of the rights arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Filed in the form provided by law (Art. 42 (1) LTF), the matter is therefore capable of appeal from these various perspectives.

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

2.

The admissibility of the appeal is nonetheless disputed by the Respondent for three distinct reasons that should be examined in succession.

2.1 The Respondent raises, in particular, the issue of the time limit for appeal.

2.1.1 On this point, the Appellant explains that the Center sent it the award by registered letter on 16 October 2009, which it collected on the 23rd of the same month. Filed on 20 November 2009, its appeal therefore was filed in due time. The Appellant's assertion corresponds to reality and the legal conclusion that it draws from it is consistent with the applicable rules of law (Art. 191 PILA; Art 77 and 100 (1) LTF).

However, according to the Respondent, the Appellant was already in possession of the written and signed award in the first week of October 2009, as specified by the Arbitrator in a letter sent to the Parties on 2 October 2009. Proof of this would be the fact, demonstrated by Exhibits 4 and 5 to the answer, that the Center had communicated the preliminary award to its recipients by electronic mail on 7 October 2009 and that the Appellant relied on the award during a hearing for a summary judgment on 9 October 2009.

The Appellant disputes the evidence produced to support this argument and its relevance.

2.1.2 Pursuant to Art. 100 (1) LTF, an appeal must be filed with the Federal Tribunal within 30 days following full notification. Provided the date of receipt can be ascertained, Art. 112 (1) LTF does not impose any method of communication (BERNARD CORBOZ, in *Commentaire de la LTF* [LTF Commentary], 2009, no. 12 ad Art. 112). PILA does not specify the communication method of the award either. Consequently, the issue depends firstly on part of the agreement of the parties or on the arbitration rules they chose (judgment 4P. 272/1999 of 20 June 2000 at 5a).

According to Art. 55 of the WIPO's Expedited Arbitration Rules (hereafter: the Rules), applicable in this case, the award must be in writing and state the date on which it was made, as well as the place of arbitration (b); it must be signed by the arbitrator (d). The aforesaid provision specifies in the second sentence of (f) that "the Center shall formally communicate an original of the award to each party and the arbitrator." In accordance with Art. 57 (b) of the Rules, the award is effective and becomes binding for the parties as from the date on which it is communicated in this manner.

In this case, the preliminary award was formally communicated to the Appellant's counsel by a letter of 16 October 2009 on WIPO letterhead, which made reference to Art. 55 (f) of the Rules. The intended recipient of this letter collected the registered letter containing the document from a post office in Lausanne on 23 October 2009. The time limit to appeal therefore began the next day (Art. 44 (1) LTF) and it was not elapsed when the appeal was filed on 20 November 2009.

In this regard, it does not matter that a copy of the preliminary award had already been communicated by the Center on to the Appellant's representative as an attachment to its electronic mail 7 October 2009, or that the Appellant relied on the award at a hearing for a summary judgment on 9 October 2009, as the Respondent maintains by producing two exhibits which incidentally, are admissible since they relate to the issues as to whether or not the decision is capable of appeal (see judgment 4A_464/2009 of 15 February 2010 at 3.3.2). Indeed, such communication did not bear the official character required by the Rules, since the exhibit communicated was not the original of the award. Hence, it could not cause the time limit of Art. 100 (1) LTF and begin running.

That being the case, the first objection relating to the admissibility of the appeal can only be dismissed.

2.2

2.2.1 According to the Respondent, this appeal was filed when the issue had already become moot. Indeed, in accordance with the Arbitrator's orders, the transfer operations were to be performed within 15 days of the notification of the preliminary award, namely not later than 7 November 2009. Since this was not the case, the measures ordered lapsed before the appeal was filed.

What is more, the award under appeal imposes no obligation on the Parties after the time limit for the transfer of the inventory. The Appellant therefore has no legal interest in having it set aside according to the Respondent.

Lastly, the Respondent argues, with supporting evidence that the Appellant continued to liquidate the inventory in significant proportions after the award. Since, according to the Respondent, the obligation to transfer the inventory indisputably related to the state of the inventory at that time, the current inventory would be an *aliud* not considered by the interlocutory measure ordered.

2.2.2 Regardless of what the Respondent says, assuming that the facts it puts forth prove to be true, there is no denying the Appellant's legal interest in setting aside the award, even if it did not timely comply with the injunction in the award or if it violated the injunction by seeking to sell off the stock in some other way. Indeed, even in this hypothesis, the Appellant would still have an interest in setting aside the award. Likewise, it may be important for the Appellant to obtain a finding that the order issued was illegal, so that the Appellant in the subsequent proceeding on the merits could not be blamed for not complying and so that defense on the merits would not be compromised. Setting aside the preliminary award would also have an impact of the costs and expenses related thereto, which will be settled in the upcoming decision on the merits.

Consequently, this objection, too, will be dismissed.

2.3 The last objection relates to the nature of the decision under appeal. According to the Respondent, it has all the characteristics of an interlocutory decision and is not capable of appeal.

2.3.1 Civil law appeals, pursuant to Art. 77 LTF in relation with articles 190 to 192 PILA, are admissible only against awards. Decisions capable of appeal may be final awards, which put an end to arbitral proceedings on substantive or procedural grounds, partial awards, which relate to a quantitatively limited portion of a disputed claim or to one of various claims at issue, or even preliminary or interlocutory awards, which rule on one or more preliminary substantive or procedural issues (on these concepts, see ATF 130 III 755 at 1.2.1 p. 757). However, a mere procedural order that can be modified or set aside during the arbitration is not capable of appeal (judgment 4A_600/2008 of 20 February 2009 at 2.3).

Decisions on interim relief, considered in Art. 183 PILA, have not yet been examined to date by the Federal Tribunal in this respect. Nevertheless, legal scholarship unanimously accepts—and rightly so—that such decisions are not capable of appeal because they are not final awards, partial awards, or preliminary or interlocutory awards (BERGER/KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz,* 2006, nos. 1157 and 1539; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2006, no. 721; BERNARD DUTOIT, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987,* 4th ed. 2005, no. 2 i.f. ad Art. 183; POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, no. 622 p. 533; RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht,* 2nd ed., p. 253 (ff); LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, 1989, no. 13 ad Art. 183 PILA; SÉBASTIEN BESSON, *Arbitrage international et mesures provisoires* ,1998, no. 495 p. 297; CESARE JERMINI, *Die Anfechtung der Schiedssprüche im internationalen Privatrecht*, 1997, no. 65 with other references in footnote 243; ELLIOTT GEISINGER, *Les relations entre l'arbitrage*

commercial international et la justice étatique en matière de mesures provisionnelles, SJ 2005 II p. 375 and thereafter, 382 footnote 21). The hypothesis in which the arbitrator, apparently ordering provisional measures, would in fact issue an actual award, must be reserved (LALIVE/POUDRET/REYMOND, ibid.; POUDRET/BESSON, ibid.; GEISINGER, ibid.).

2.3.2 Art. 183 PILA, unless otherwise agreed, allows the arbitral tribunal to order provisional measures or conservatory measures (1) and to make them subject to, a bond, as the case may be (3). If the party does not voluntarily submit to the order, the arbitral tribunal can request the assistance of the state count(3).

Provisional or interlocutory measures (in French, *mesures provisionnelles* or *provisoires*, and in German, *vorsorgliche Massnahmen* or *einstweilige Verfügungen*) are measures that a party may request to protect its rights on a provisional basis throughout the length of the proceeding on the merits and, in some cases, even before such proceeding begin (FABIENNE HOHL, *Procédure civile* [Civil procedure], volume II, 2002, no. 2776). Although there are a large number of distinctions and classifications, as a result of the very nature of this legal institution (BESSON, op. cit., no. 38 p. 39), legal scholarship generally classifies provisional measures into three categories depending on their purpose: conservatory measures (in French, *mesures conservatoires* and in German, *Sicherungsmassnahmen*), which aim to maintain the object of the dispute in its current state throughout the length of the proceedings; regulatory measures (in French, *mesures de réglementation*, and in German, *Regelungsmassnahmen*), which regulate a lasting legal relationship between the parties throughout the proceedings; interlocutory anticipatory enforcement measures (in French, *mesures d'exécution anticipée provisoires*, and in German, *Leistungsmassnahmen*)—these may relate to either monetary benefits or other obligations to do something or to abstain from doing something—, which aim to obtain enforcement on an interim basis of all or a portion of the claim on the merits (see, among others, Hohl, op. cit., no. 2777).

The last of these three categories of interlocutory measures is based in finding that a modification of the legal situation is often necessary in order to maintain a factual situation (Besson, op. cit., no. 8 i.f. and the quoted author). An anticipatory enforcement measure may, indeed, prove to be critical when the requesting party is likely to incur losses as a result of prolonged nonperformance of a service (Hohl, op. cit., no. 2866). Furthermore, provisional anticipatory enforcement measures are not alien to Swiss law (for examples drawn from federal law, see Hohl, op. cit., no. 2862). Thus, the Federal Tribunal decided that it was admissible to order, on a conservatory basis, the enforcement of a distribution contract in the context of interlocutory measures (ATF 125 III 452 at 3c). Similarly, the Code of Civil Procedure of 19 December 2008, which will soon go into effect, provides in article 262 (d) and (e) that a provisional measure may involve the provision of a benefit in kind and, when the law so provides, the payment of a monetary benefit. Such measures also have currency in the area of intellectual property (see for example, Ralph Schlosser, *Les conditions d'octroi des mesures provisionnelles en matière de propriété intellectuelle et de concurrence déloyale*, sic! 2005 p. 339 and thereafter, 352 s.) and they are not unknown in international arbitration (Berger/Kellerhals, op. cit., no. 1149; Stephen V. Berti, in *Commentaire bâlois, Internationales Privatrecht*, 2nd ed. 2007, no. 7 ad Art. 183 PILA; Geisinger, op. cit., p. 378 i.f.; Jermini, op. cit., no. 65 and footnote 244).

2.3.3. In order to decide on the admissibility of the appeal, the decisive factor is not the name of the decision under review but its contents (judgment 4A_600/2008 of 20 February 2009, at 2.3). Being an award therefore does not depend on the terminology used by the arbitrator; it is not enough to name an order for provisional measures an award to make it capable of appeal under Art. 190 PILA (see Besson, op. cit., no. 483; François Knoepfler, *Les mesures provisoires peuvent-elles être rendues sous forme de sentence arbitrale?* in *Mélanges en l'honneur de Henri-Robert Schüpbach*, 2000, p. 287; Jean-François Poudret, *Les mesures provisionnelles et l'arbitrage. Aperçu comparatif des pouvoirs respectifs de l'arbitre et du juge*, in *Mélanges en l'honneur de François Knoepfler* [Writings in honor of François Knoepfler], 2005, p. 235 and thereafter, 248.

Characterizing a decision on interlocutory measures as an award is, furthermore, dangerous, because it creates a wholly insecure situation (for more details, see Knoepfler, op. cit., p. 286). Thus, the same is true in particular for the characterization of partial award, which is likely to give the erroneous impression that the arbitral tribunal has definitively ruled a portion of the dispute (Georg von Segesser, *Vorsorgliche Massnahmen im Internationalen Schiedsprozes*s, Bulletin ASA 2007 p. 473 and thereafter, 474).

2.3.4

2.3.4.1 The Appellant attaches great importance to the letter that the Arbitrator sent to the Parties on October 2, 2009 to inform them that the proceedings concerning the requests for interlocutory measures were closed. It quotes the following passage of this letter in particular: "You will be notified of the partial arbitral award concerning them in the next few days" (term emphasized by this court). However, such characterization is not at all a determining factor to decide on the nature of the decision taken, as indicated above, no more so than that of "preliminary award" appearing on the first page of the reasoned decision that the Center communicated to the Parties.

2.3.4.2. Arguing a partial award exists, the Appellant furthermore asserts that the orders given to the Parties by the Arbitrator in the decision under appeal are not of a conservatory or provisional nature, since they require transfer to the Respondent, definitively and irreversibly, of the clothing inventory, in other words, to carry out a transfer of ownership of these moveable goods. What is more, criticizing the terms and conditions of this forced transfer, the Appellant claims that the decision at issue relates neither to conservation nor preservation of the situation until the matter is resolved in the arbitral proceedings, but definitively settles a portion of the dispute on the merits, and must be characterized as a partial award. Finally, in support of that view according to the Appellant, is the fact that it would be unthinkable to wait until the end of the arbitral proceedings to appeal the order to transfer the inventory.

This argument is not pertinent. Indeed, it limits the purpose of the provisional measures to one of the three aforementioned categories, ignoring the existence of the other two. Yet, the order given to the Appellant to transfer the clothing inventory to the Respondent should be classified in the category of provisional anticipatory enforcement measures or in the category of regulatory measures, or even in both.

Moreover, the very text of the disputed decision clearly shows the intent of the Arbitrator not to settle any of the claims in a definitive manner. In (17) and (18), the Arbitrator reiterates the limits of his task, namely to decide the requests for interlocutory measures. Later on, in his award, he begins by quoting at full length Art. 183 PILA (70), then lists the questions on the merits that are not his to decide at this stage of the proceeding, since he was seized only "in the context of the requests for interlocutory measures sought by both parties" (71). With regard more particularly to the inventory, the Arbitrator states, in view of the reasons put forth by both parties, that he is justified to decide on its fate "as a matter of urgency" (72). However, he is careful to emphasize that he will do so "in the context of his interlocutory assessment, without prejudice to the decision that he will make on the merits" (73). Similarly, after finding that the transfer of the inventory seemed to him to be such as to limit the potential damages of both parties (80), the Arbitrator notes that the disagreement as to the value of the inventory does not impede the transfer, because it falls under the "merits of the case," adding that the payment of the price offered by the Respondent he ordered will be only "interlocutory and that the final price of the inventory transferred accordingly will be set at the end of the proceeding on the merits" (82). Lastly, the last two items of the operative part of the disputed award confirm the interlocutory nature of the decision.

Furthermore, regardless of what it says, the Appellant does not demonstrate that the issue of ownership of the inventory, if not that of its value, was one of the subject matters of the dispute on the merits. In any case, no such thing can be deduced from

the *ad hoc* prayers for relief it makes in its submissions of 3 August and 14 September 2009 (see B. above).

2.3.5. Since the appeal is directed not against an award, but against a decision on provisional measures as defined in Art. 183 PILA, this matter is consequently not capable of appeal. It is thus not possible to address submissions for setting aside the aforesaid decision or declaring it null and void.

Under these circumstances, there is no need to rule on the request for a stay of enforcement presented by the Appellant and granted *ex parte*.

3.
The Appellant, whose appeal is rejected, shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and the Respondent's costs (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs, set at CHF 20,000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 22,000 as a share of its costs.

4.
This decision shall be notified to the representatives of the parties and to the sole arbitrator of the Arbitration and Mediation Center of the WIPO.

Lausanne, 13 April 2010

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

The Presiding Judge (Mrs):	The Clerk:
KLETT	CARRUZZO