

4A\_609/2014<sup>1</sup>

Judgment of February 20, 2015

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding

Federal Judge Klett

Federal Judge Kolly

Clerk of the Court: M. Piatti

A. \_\_\_\_\_ S.p.A.,

Represented by Mr. John dell'Oro and Mr. Alberto Bernardinello,

Appellant

v.

B. \_\_\_\_\_,

Represented by Mr. Tuto Rossi

Respondent

Facts:

A.

On September 27, 2010, A. \_\_\_\_\_ S.p.A., an Italian company, entered into an endorsement contract as the sponsor with B. \_\_\_\_\_, a Spanish company managing the cycling team, C. \_\_\_\_\_. The contract foresaw that over three years – *i.e.*, until December 31, 2013, – the sponsor was to pay installments up to EUR 6'000'000. The parties also agreed (Art. XII) that *“all disputes arising from or in any way connected with this agreement shall be finally resolved by an arbitral tribunal to the exclusion of ordinary courts, according to the Regulations of the UCI and Italian law.”*

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<sup>1</sup> Translator's Note:

Quote as A. \_\_\_\_\_ S.p.A. v. B. \_\_\_\_\_, 4A\_609/2014.

The original decision is in Italian. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

The performance of the aforesaid contract led to two *ad hoc* arbitrations: the first, initiated by B. \_\_\_\_\_, resulted in a final award issued on July 25, 2011; the second, initiated by A. \_\_\_\_\_ S.p.A., resulted in the September 23, 2014, final award. The later award rejected the Claimant's submissions and ordered the payment to B. \_\_\_\_\_ of costs amounting to EUR 239'400, whilst the latter should pay to the former a total CHF 25'000 for costs and fees of the arbitral tribunal. On the day it was issued, the award was sent to the parties by electronic and registered mail. In the email, the Chairwoman of the arbitral tribunal wrote, "Please find herewith an advanced copy of the arbitral tribunal's letter of today with its enclosure (final award)." In the letter sent by registered mail, she mentioned above the address of counsel for the parties, "registered anticipated by email" and in the text she stated, "Please find attached hereto the original copy of the final award."

B.

A. \_\_\_\_\_ S.p.A. filed a civil law appeal before the Federal Tribunal on October 24, 2014, submitting that a stay of enforcement should be issued and, principally, that the award should be annulled or, in the alternative, sent back to the arbitral tribunal for a new decision in accordance with the reasons in the judgment of the Federal Tribunal.

While stating that the appeal is without merit, B. \_\_\_\_\_ submitted in its answer of November 18, 2014, that the matter is not capable of appeal due to late filing.

In its submissions of November 18, 2014, the Arbitral Tribunal submitted that the appeal should be rejected.

The parties exchanged various exhibits.

The presiding judge of this Court issued a stay of enforcement on January 20, 2015.

Reasons:

1.

The case concerns international arbitration as the two parties were domiciled abroad at the time the arbitration agreement was entered into. The seat of the arbitration is Lugano and there is no indication that the parties waived the right to arbitrate within the meaning of Art. 176(2) PILA.<sup>2</sup>

2.

According to Art. 100(1) LTF,<sup>3</sup> an appeal must be filed with the Federal Tribunal within 30 days of notification of the integral text of the decision. The time limits depending upon a decision being notified or

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<sup>2</sup> 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.

<sup>3</sup> Translator's Note: LTF is the Italian abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

an event taken place run from the following day (Art. 44(1) LTF). Art. 48(1) LTF then states that the appeal brief must be submitted to the Federal Tribunal either at its address or via the Swiss Mail or to a Swiss embassy or consulate at the latest on the last day of the time limit to appeal.

2.1. The Appellant argues that the October 24, 2014, appeal was given to the Swiss Mail in a timely manner because the registered letter containing the award was received on September 24, 2014. It claims that, “*the advance copy by electronic mail in the late afternoon of the 23<sup>rd</sup>*” of September is irrelevant.

2.2. The Respondent argues to the contrary that the appeal is late because it sees the day at which the parties received the entire award, albeit merely by electronic mail, as determinant to calculate the beginning of the time limit to appeal.

2.3. It is undisputed in the case at hand that the Chairwoman of the Arbitral Tribunal sent an electronic mail to counsel for both parties on September 23, 2014, to which she attached a copy of the award and that the appeal at hand may only be taken to have been filed in a timely manner if the time limit to appeal started upon receipt of the registered letter on September 24, 2014.

2.3.1. The manner in which an award is notified depends upon the agreement of or the rules chosen by the parties (judgment 4A\_582/2009<sup>4</sup> of April 13, 2010, at 2.1.2, not published in DTF 136 III 200). The Appellant does not refer to this, but the arbitration clause contains a reference to the UCI (Union Cycliste Internationale) regulations and the Respondent submits that the UCI Cycling Regulations apply. They do not confirm the Appellant’s view. They indeed state that the original copy of the decision shall be signed by the president of the panel (§ 12.3.028) and logged with the UCI secretariat while a copy of the decision shall be sent to each party (§ 12.3.030). In other words, the regulations do not embody a requirement that the parties should be notified with an original of the award signed by the arbitrators and the Appellant does not argue to the contrary. Therefore, the case at hand is different from that on which the case law quoted in the appeal was based, which relates to the notification of awards issued by the Court of Arbitration for Sport (judgment 4A\_392/2010<sup>5</sup> of January 12, 2011, at 2.3.2; 4A\_604/2010<sup>6</sup> of April 11, 2011, at 1.3) or pursuant to Art. 55 of the Expedited Arbitration Rules of the World International Property Organization (aforesaid judgment 4A\_582/2009<sup>7</sup> of April 13, 2010). In these judgments, it was held that the transmission of a copy

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<sup>4</sup> Translator’s Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->

<sup>5</sup> Translator’s Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/notification-of-an-award-by-fax-time-limit-to-appeal-does-not-ru>

<sup>6</sup> Translator’s Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/form-of-the-appeal-to-federal-tribunal-legal-interest-to-appeal->

<sup>7</sup> Translator’s Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->

of the award did not start the time limit of Art. 100(1) LTF because the applicable rules required that an original copy be notified to the parties.

2.3.2. As the Respondent points out, it must be noted that communication by electronic mail was used repeatedly throughout the arbitral proceedings by the Arbitral Tribunal (see for instance § 9, 35, and 62 of the award showing that the Claimant was asked via electronic mail to pay its share of the provisional deposit unpaid by the Respondent, and that a time limit was given to the Claimant to state its position as to a submission of the defendant, and the amendment of Procedural Order n. 2 in the same manner) or by the parties (see for example § 35 and 78 of the award, showing that the Claimant's requests as to the Defendant's failure to pay the fee deposit and the joint request of the parties to postpone some procedural deadlines were submitted by electronic mail).

2.3.3. In its reply, the Appellant submits that while the Arbitral Tribunal had attached an 'advance copy' of a letter and the arbitral award to the email, it had also stated that the original would be notified through the mail. However, the Appellant does not explain and one does not see from the aforesaid regulation why the arbitral award would not have been notified by transmitting an (electronic) copy of the award. Neither does it help the Appellant to state that since the transmission by electronic mail took place "*without any notice*" in the late afternoon, one could not claim that counsel "*would be at that precise time in a position to become aware of the message*": to determine whether or not an appeal was filed in a timely manner, it is indeed the date of notification of the decision under appeal which is relevant and not the time at which it was read by the addressee.

3.

The foregoing shows that the appeal is late and therefore the matter is not capable of appeal. The judicial costs and the costs of the Respondent follow accordingly (Art. 66(1) and Art. 68(1) LTF).

Therefore the Federal Tribunal pronounces:

1.

The matter is not capable of appeal.

2.

The judicial costs set at CHF 5'000 shall be paid by the Appellant, which will reimburse CHF 15'000 to the Respondent for the federal judicial proceedings.

3.

Notification to counsel for the parties and to the *ad hoc* arbitral tribunal.

Lausanne, February 20, 2015

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

Presiding Judge:

Clerk:

Kiss (Mrs.)

Piatti