4A_440/2010[1]

Judgment of January 7, 2011

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: M.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 company governed by Dutch law owns the exclusive operation rights for trademark A._____ (hereafter: the trademark) for clothing. In November 2005, in circumstances which need not be recalled here X._____ SA (hereafter: X._____) a company governed by Swiss law, took over from a third party the operation of shops under the sign A._____ as well as the manufacture and distribution of clothes baring the trademark. It sought from Y._____ the conclusion of a new license to operate the trademark from January 1st, 2006. The two companies then went into discussions which proved to be difficult.

[1] Translator's note : Quote as X._____ SA *v.* Y._____ BV, 4A_440/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

Finally a license agreement was concluded on January 31, 2008. Y._____ granted to X._____ an exclusive licence for the operation of the trademark in various European countries through a network of boutiques excluding department stores against payment of a yearly fee equal to 5 % of the turnover but at least EUR 600'000.- The contract was concluded for one year and renewable tacitly. It provided for various possibilities to terminate immediately at its Art. 14, in particular a serious breach of the mutual commitments and set forth at Art. 16 the procedure to be followed after termination. Among other obligations the licensee was under a duty to sell the inventory in its possession within the shortest possible time. The licence agreement contained an arbitration clause pursuant to which any dispute between the parties was to be submitted to arbitration pursuant to the Expedited Arbitration Rules of the World Intellectual Property Organisation (WIPO; hereafter: the Rules).The venue of the arbitration was in Geneva, French was the language of the arbitral proceedings and the dispute was governed by Dutch law.

Also on January 31st, 2003 the Parties entered into an agreement entitled "Settlement" (hereafter: the settlement) with a view to put an end to the disagreements between them as to the period from January 1st, 2006 until December 31st, 2007. The settlement provided among other things for an amount equal to 5 % of the effective net turnover of the period as final compensation for the trademark royalty and for instalments of the payments due to Y._____ by X._____ pursuant to the settlement.

A.b Problems in the performance of the licence agreement divided the Parties as from the end of July 2008 and they tried to resolve them.

In a registered letter of January 26, 2009 Y._____ notified X._____ that the contract was terminated for serious breach of its obligations. In its answer two days later the Swiss company expressed its great surprise to receive such a letter and denied any breach of contract. Yet in a letter of February 26, 2009 it decided to accept the immediate termination of the contract, *i.e.* as from January 21, 2009 whilst expressly reserving its right to seek compensation for the damages the situation was creating for it.

Putting together the procedure provided at Art. 16 of the contract for the liquidation of the relationship between the Parties gave rise to some difficulties. Y._____ claimed that X._____ was trying to sell its stock without the selective distribution network whilst the latter claimed that the former prevented it from selling its inventory.

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

B

B.a On August 3, 2009 X._____ filed a request for damages for breach of the licence agreement and a request for provisional remedies to the WIPO Arbitration and Mediation Centre (hereafter: the Centre). In its last submissions on the merits at the hearing of March 19, 2010 it substantially sought a finding that the termination of the licence agreement was void; an order that Y._____ pay damages amounting to EUR 4'679'588,30 for non-performance and breach of the licence agreement; an order that Y._____ should pay back the amount of EUR 210'000 X._____ had paid as a contribution for the international harmonization of the trademark; the award of compensation for moral prejudice to be set by the arbitral tribunal; the payment by Y._____ of fair compensation to be set by the arbitral tribunal but equal at least to 10 % of the turnover realized by X._____ in 2008 for the added value it had given to the Dutch company by the efforts made to relaunch the trademark; a setoff of its claims with those recognized to its opponents; finally an order that the latter pay fair compensation for procedural and legal costs. The Claimant also sought the rejection of the counterclaim raised by the Defendant.

In a letter of August 19, 2009 the Centre notified to the Parties that Mr Pascal Hollander an attorney at the bar of Brussels had been appointed as sole arbitrator.

On August 20, 2009 Y._____ sent an answer to X._____'s request to the Centre as well as an unquantified counterclaim for damages for non-performance of the licence agreement with a request for provisional remedies.

On October 7, 2009 the Arbitrator issued a "preliminary award" as to the provisional remedies sought by both Parties. X._____ appealed that decision to the Federal Tribunal on November 20, 2009 and the Federal Tribunal declared that the matter was not capable of appeal on April 13, 2010 (ATF 136 III 200[2]).

In its post hearing memorandum of February 26, 2010 Y._____ asked the Arbitrator to order X._____ to take or to refrain from taking a certain number of steps within fifteen days with damages beyond that date, in particular that X._____ should pay the balance of the 2008 royalty and the 2009 royalty to be specified later, yet at a minimum EUR 1'397'783,62. It also sought an order that the

[2] Translator's note : An English translation of that decision is available on www.praetor.ch under the date of reference (April 13, 2010).

Claimant should pay EUR 2'966'400.- as damages due to the extension of the operation of the trademark after the contract terminated on August 1st, 2009 and fair compensation for the damages caused among its clients by the loss of reputation of the trademark.

B.b On June 17, 2010 the Arbitrator issued his final award, correcting an arithmetical error upon request by Y._____ in an amending memorandum of July 9, 2010 whilst rejecting a similar request by X._____. In the rectified final award, deemed to be integrally reproduced herein, the arbitr ator essentially ordered Y._____ to return to X._____ the amount of EUR 210'000.- unduly received for the international harmonization of the trademark (A.1) and the amount of EUR 230'000.- as damages for breach of the licence agreement of January 31, 2008 (A.2). With regard to the counterclaim he issued various injunctions to X._____ with an amount of EUR 2'500.- to be paid for each day of non-compliance (B.1, B.2 and B.3) and set the modalities of the computation of the turnover made by X._____ in 2009 (B.3, B.4 and B.5). He also ordered X._____ to pay to Y._____ an amount of EUR 227'175.- as balance due on the trademark royalties in 2008 (B.6) and an amount of EUR 636'540.- for the minimal royalty due for the use of the trademark in 2009 (B.7), interest at the contractual rate of 4 % yearly being added to both amounts as from different dates and until full payment (B.6 and B.7). The Arbitrator also provided for the case in which the 5 % contractual fee computed according to B.3 and B.4 of the award would go beyond EUR 636'540.- (B.8). Finally he ordered setoff of the amounts awarded to the Parties (A.3 and B.9). Deciding lastly the costs of the arbitration he set them (C.1) and held that they should be borne by both Parties in equal shares (C.2) and left legal fees to be borne by each Party (C.3).

B.c on July 15, 2010 X._____ relied on Art. 59 (c) of the Rules and asked the Arbitrator to issue an additional award on the damages it underwent as a consequence of the illicit termination of the licence agreement by Y._____ because the arbitral proceedings would have been limited in a first phase to the issue of the validity or not of that termination. In its answer of July 16, 2010 Y._____ submitted that the matter was not capable of arbitration.

In a letter of August 4, 2010 the Arbitrator informed the Parties that in his view there was no reason to proceed to an additional award.

C.

On August 23, 2010 X._____ filed a Civil law appeal. Arguing that the Arbitrator decided *ultra* or *extra petita* (Art. 190 (2) (c) PILA[3]), that its right to be heard in contradictory proceedings or the rule that

---

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.

the Parties be treated equally was violated (Art. 190 (2) (d) PILA) and that the award is inconsistent with public policy (Art. 190 (2) (e) PILA) the Appellant sought an annulment by the Federal Tribunal of items A.1, A.2, B.1, B.2, B.3, B.4, B.6, B.7, B.8, B.9, C.2 and C.3 of the rectified final award as well as that of the "additional award rejecting the request for an additional award".

On September 6, 2010 the Arbitrator submitted some observations without any formal submission as to the disposition of the appeal.

A stay of enforcement was issued by presidential decision of October 1st, 2010.

In its answer of October 27, 2010 the Respondent submitted that the appeal should be rejected. In a letter of November 2, 2010 the Appellant asked that the Federal Tribunal should reject the answer from the record due to late filing. The Respondent submitted that the request should be rejected in its observations of November 11, 2010.

Reasons:

1.

1.1 In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA (Art. 77 (1) LTF[4]).

The seat of the CAS is in Lausanne. At least one of the parties (in this case, the Respondent) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The Appellant is directly affected by the final award under appeal, which imposes various obligations on it, in particular monetary ones. It therefore 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) PILA).

There is no need to decide here the disputed issue as to whether or not a Civil law appeal is subject to the requirement of a minimal amount in dispute when it is made against an international arbitral award. Should this be the case that requirement would indeed be obviously met in this case in view of the

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

amounts involved, which are far beyond the threshold at Art. 74 (1) (b) LTF for a Civil law appeal to be possible.

Filed in the legally prescribed format (Art. 42 (1) LTF) the matter is accordingly capable of appeal from these various points of view.

1.2 The appeal has three distinct objects: the final award of June 17, 2010, the amending memorandum of July 9, 2010 and the decision of August 4, 2010 on the request for an additional award.

The matter is certainly capable of appeal to the extent that the appeal is against the final award (ATF 136 III 200 at 2.3.1 p. 203) and against the rectified award (ATF 131 III 164 at 1.2). Although this is not obvious, the matter is also capable of appeal as to the decision by which the Arbitrator refused to issue an additional award as requested by the Appellant on the basis of Art. 59 (c) of the Rules. The principles set by case law with regard to the rectification of awards must be applied *mutatis mutandis* to additional awards (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, n° 1418). Yet the Federal Tribunal understands a rectifying award broadly, which it defines as an award issued pursuant to a request for rectification or *ex officio* "whatever the decision in that award may be" (ATF 131 III 164 at 1.2.3 p. 169). Legal writers who dealt with the issue rightly deducted from that definition that a decision from an arbitral tribunal refusing rectification must also be issued as an appealable award (LAURENT HIRSCH, Recours contre une sentence rectificative en matière d'arbitrage international, in Jusletter du 22 août 2005, nos 57 à 62; BERGER/KELLERHALS, op. cit., n° 1411). The same must apply to the rejection of a request seeking an additional award. Moreover and in line with what was held as to the rectification of awards it must be held here as well that proceedings seeking an additional award and appeal proceedings against a final award should not interfere with each other. Thus the filing of a request for an additional award shall not stay the time limit to appeal the initial award. Similarly the right to appeal should not be subject to the prior submission of such a request (ATF 131 III 164 at 1.2.4). Conversely, the possibility to appeal an award because the arbitral tribunal failed to decide one of the claims (Art. 190 (2) (c) PILA second hypothesis) must not prevent that party from approaching the arbitral tribunal with a view to an additional award which could render the appeal moot; however in such a case the appeal proceedings should be stayed until a decision as to the request that the arbitral tribunal issue an additional award (POUDRET/BESSON, Comparative law of international arbitration, 2nd ed. 2007, n° 765 p. 696; BERGER/KELLERHALS, op. cit., n° 1419).

1.3 Taking into account the suspension of the time limits from July 15 until August 15, 2010 (Art. 46 (1) (b) LTF) the appeal was filed within 30 days after the June 17, 2010 final award was notified. The time

limit at Art. 100 (1) LTF has accordingly been complied with. The same applies even more to the two subsequent decisions which are the object of the same appeal.

There is accordingly no reason not to address the merits of the appeal.

2.

2.1 On August 25, 2010 the Presiding Judge of the First Civil Law Court in charge of the proceedings pursuant to Art. 32 (1) LTF invited the Respondent, namely on its behalf the individual mentioned on the first page on the appeal brief as its representative (R._____) to file its answer by September 27, 2010. On September 25, 2010 R._____ sent a registered letter seeking an extension of the time limit to answer. He stated in support that he had received the presidential decision belatedly at the hospital where he was undergoing chemotherapy as a consequence of three surgical interventions he had undergone since January of that year. The request was granted by presidential decision of October 1st, 2010 and the time limit to answer extended until October 27, 2010. At that point the Respondent filed its answer through counsel. Yet in the meantime the Appellant had stated in its letter of October 22, 2010 that it categorically opposed the extension requested and cast doubt on R._____'s allegations as to his being in hospital. It maintained its request that the answer should be struck from the record in a letter of November 2, 2010 which the Respondent answered on November 11, 2010.

2.2 Pursuant to Art. 47 (2) LTF a time limit set by the Court, such as that to answer an appeal (Art. 102 (1) LTF) may be extended if there are sufficient reasons and if the request is made before it expires. The latter requirement was manifestly met in this case as the request for an extension had been made two days before the time limit expired. The judge in charge held that the other cumulative requirement was met as well and she accordingly extended the time limit until October 27, 2010. The Respondent than filed its answer before the extended time limit expired. According to Art. 32 (3) LTF the decisions of the judge in charge of the case are not subject to appeal. Procedural orders such as those setting the time limit to answer may not be the object of a request for revision as a matter of principle (Pierre FERRARI, in Commentaire de la LTF, 2009, n° 5 ad art. 121). Under such conditions it is vainly that the Appellant seeks to challenge the presidential decision of October 1st, 2010. Accordingly the matter is not capable of appeal with regard to its request that the answer should be struck from the record.

3.

In a first line of arguments the Appellant argues that the Arbitrator decided *ultra* or *extra petita*.

3.1 Art. 190 (2) (c) PILA allows an appeal against an award in particular when the arbitral tribunal decided beyond the claims it was seized of. Awards granting more or something else than that which

was claimed (*ultra* or *extra petita*) fall within that provision. According to case law however, the arbitral tribunal does not go beyond the claims if ultimately it does not award more than the total amount sought by the claimant, yet assesses some of the elements of the claim differently from that party or when it finds that a legal relationship in dispute exists and does so in the award rather than rejecting the action seeking a finding that the right in dispute does not exist. The arbitral tribunal does not violate the rule *ne eat iudex ultra petita partium* when it qualifies the claim in different legal terms than the claimant's. The principle *jura novit curia*, which applies to arbitral proceedings requires indeed the arbitrators to apply the law *ex officio* without being limited to the arguments advanced by the parties. They are accordingly entitled to resort to arguments which were not invoked because that is not a new claim or a different claim but merely a new qualification of the facts of the case. The arbitral tribunal is however bound by the object and the amount of the submissions in front of it, in particular when a party qualifies or limits its claims in the submissions themselves (judgment 4A_464/2009 of February 15, 2010 at 41).

3.2 Applied to this case these principles lead to the rejection of the Appellant's argument based on Art. 190 (2) (c) PILA.

3.2.1 The Appellant argues that the Arbitrator increased the amounts it was ordered to pay to the Respondent (items B.6 and B.7 of the award) by adding contractual interest at the rate of 4 % although the creditor had made no formal submission in this respect. It claims to have been treated unequally because the Arbitrator refused to grant interest on the amounts it was awarded (items A.1 and A.2 of the award) failing *ad hoc* submissions. The argument is unfounded.

In its memorandum of February 26, 2010 the Respondent had worded its counterclaim submission as follows:

"*To pay the royalties remaining for 2008 and the minimum 2009 royalty to be assessed after transmission of the 2009 turnover yet at a minimum EUR 1'397'883,62"* (emphasis by this Court).

The Respondent had specifically pointed out at page 22 of the aforesaid memorandum (ch. 3) that the royalties were subject to interest at 4 % for late payment from the due date according to the contract. It had also included interest under the denomination of "financial costs" in the computation of the amounts it claimed for the two years in question and did so without any discernable intent at all to stop the interest for late payment as of the date of filing of the memorandum or as of the date of the award to be issued. Accordingly in the aforesaid submission duly interpreted in light of its reasons the Respondent had manifested, albeit not expressly but at least in an easily recognisable implicit manner that it intended to claim late payment interest at the contractual rate of 4 % from the Appellant as to the

amounts it would be awarded if and as long as they would not be paid. By awarding such interest the Arbitrator did not decide beyond or outside the scope of the claims in front of him as the specific submission made did not include a ceiling as indicated by the word “at a minimum” relating to the amount sought.

Contrary to those of the Respondent the Claimant’s last submissions were indeed capped and sought the payment of two fixed amounts, namely EUR 4’679’588,30 and EUR 210’000.-. Yet the Appellant sought no interest on these two amounts, neither did it raise that issue in the arguments in support of its claim. Therefore the Arbitrator could not order the Respondent to pay interest *ex officio* for that would have been *ultra petita*. The situation of the two parties was accordingly different from that point of view and therefore did not call for the same solution. Consequently the Appellant cannot claim to have been treated unequally in this respect.

3.2.2 The Appellant further argues that the Arbitrator ordered it to pay the balance of the 2007 royalties amounting to EUR 39’175.- when no submission had been made in this respect by the Respondent. The balance due for the 2008 royalties as set at item B.6 of the rectified final award (EUR 227’175.-) in violation of the rule *ne ultra petita* should be reduced by EUR 39’175.- and brought back to EUR 188’000.-.

The argument is unfounded. It appears indeed from the explanations in the answer to the appeal and the documents in support that the Respondent sought payment of the royalties due in 2008 and not only the royalties for 2008 based on the licence agreement. Thus in its aforesaid brief of February 26, 2010 it pointed out that the balance due for 2008 “was EUR 358’742.- (statement of account of X._____ SA) as of the end of December 2008” (ibid.). Yet the statement of account to which it referred was established by the Appellant in the beginning of the year 2009 and refers to an open-balance of EUR 358’742.- at the end of 2008, including a balance of EUR 39’175.- to be paid pursuant to the January 31st, 2008 settlement (for the period 2006-2007) together with the licence agreement. There is accordingly no doubt that the wording “royalties remaining for 2008” used in the specific submission at the end of the aforesaid memorandum also included the EUR 39’175.-. Accordingly the Arbitrator did not violate the rule of *ne ultra petita* by awarding that amount to the Respondent.

4.

In a second line of argument the Appellant claims that the Arbitrator would have violated its right to be heard in contradictory proceedings or the rule of equal treatment of the parties.

4.1 As guaranteed by Art. 182 (3) and 190 (2) (d) PILA the right to be heard does not have different contents in principle from those consecrated by constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was held in the field of arbitration that each party had the right to express its views on the essential facts for judgment, to present its legal arguments, to propose evidence on pertinent facts and to attend the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

As to the right to introduce evidence it must have been exercised timely and according to the formal rules applicable (ATF 119 II 386 at 1b p. 389). The arbitral tribunal may refuse to hear evidence without violating the right to be heard if the evidence is improper to base its decision, if the fact to be proved is already established, if it is without pertinence or also when the tribunal, by assessing the evidence in advance, reaches the conclusion that its mind is already made up and that the result of the evidentiary procedure requested could not alter it.

Equal treatment of the parties is also guaranteed by Art. 182 (3) and 190 (2) (d) PILA and requires the proceedings to be organized and conducted in such a way that each party has the same possibilities to present its arguments. Finally the principle of contradiction, guaranteed by the same provisions, requires each party to have the possibility to express its views on the arguments of its opponent, to review and to discuss the evidence the latter brings in and to refute them by its own evidence (ATF 117 II 346 at 1a).

The party claiming a violation of its right to be heard or another procedural violation must raise it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to the rule of good faith to invoke a procedural violation only in an appeal against the final award when that violation could have been raised during the proceedings (judgments 4A_348/2009 of 6 January 2010 at 4 and 4A_69/2009 of 8 April 2009 at 4.1).

4.2

4.2.1 The Appellant firstly argues that the Arbitrator decided the damages in its favor without any evidentiary proceedings which would determine the damages it had undergone, thus violating its right to evidence. It points out in this respect that at the January 15, 2010 hearing it had been agreed that in a first phase the object of the dispute would be limited to the issue as to whether or not the termination challenged was abusive. It would indeed be for that reason that it pointed out in the preamble of its post-hearing memorandum of February 26, 2010 that “the determination of damages for non-performance and abusive termination of the contract and how they should be paid will follow”. The Appellant seeks to demonstrate that for the various items of the damage claims to be taken into account the Arbitrator could not decide the amount without prior evidence and attempts to set forth what it would have done to

prove quantum. The grievance is essentially of an appellate nature and unfounded. As the Arbitrator and the Respondent rightly point out the former was not bound by the foreword in the preamble of the Appellant's post-hearing memorandum because neither Procedural order nr. 2 of September 21, 2009 setting forth the schedule of the proceedings nor the minutes of the January 15, 2010 arbitration hearing confirming the rescheduling done at that time anticipated that the proceedings on the merits would be bifurcated and the Appellant raised no objections when it received them. Thus the factual basis on which the entire argument rests – namely that the assessment of damages would have been postponed to a subsequent phase of the proceedings – is not established. Hence the entirety of the reasoning based on that premise falls through. Moreover it must be pointed out that in its last submissions at the March 19, 2010 hearing the Appellant very precisely defined the quantum of its damage claims other than those which it left to the Arbitrator's discretion and that it made no reservations as to subsequent evidentiary proceedings which would assess the final amount of its damage claim. It is accordingly not acceptable that it would claim *a posteriori* a violation of its right to introduce evidence.

For the same reason it is in vain that the Appellant argues against the Arbitrator's refusal to issue an additional award on damages.

4.2.2 The Appellant further argues that the Arbitrator should have applied the provisions of Dutch law allowing an assessment of the scope of damages. As submitted the argument is not capable of appeal for lack of sufficient reasons. From that point of view, this case is manifestly different from that which gave rise to the judgment published at ATF 133 III 235 at 5.3 in which the Appellant had clearly raised some arguments drawn from the application of American and European law which the arbitral tribunal had not reviewed. In this case it would have behooved the Appellant to point out which pertinent provisions of Dutch law as to the compensation of damages it had invoked in the arbitral proceedings without the Arbitrator paying attention to them and it did not do so (see ATF 133 III 235 at 5.2 p. 248).

4.2.3 The reasons pointed out at 4.2.1 above also lead to the rejection of the argument by which the Appellant claims that the Arbitrator wrongly set at EUR 230'000.- the damages for the removal, the manufacturing and the installation of signs. As to that item of the damage claim the Arbitrator found that the Appellant had not justified at all the lump sum of CHF 30'000.- it had put forward so that he used the one admitted by the Respondent, *i.e.* CHF 10'000.-. This is a modality of assessing damages which is outside the scope of judicial review by the Federal Tribunal in a Civil law appeal against an international arbitral award.

4.3 Still with regard to the right to be heard the Appellant further argues that it should not have been ordered to pay the contract royalties for the year 2009 as it would be admitted that the license

agreement was terminated on January 26, 2009. Reading the verbose explanations given in this respect by the Appellant it is not possible to discover there any criticism which could relate to the grievance under consideration. The entire argument presented is really a mere unacceptable challenge of the way in which the Arbitrator interpreted and applied the pertinent provisions of the license agreement as to the liquidation of the relationship between the parties after termination.

Moreover the Appellant itself points out at page 36 of its brief (*litt*. f) the reason for which according to the Arbitrator the royalties had to be paid beyond the aforesaid date, namely the fact that it had continued to "effectively use the trademark until July 31st, 2009" (see award n°288 to 290). Thus even if the right to be heard within the meaning of Art. 190 (2) (d) PILA required an international arbitral award to be reasoned, which it does not (ATF 133 III 235 at 5.2 p. 248), the Appellant could not argue that the award was without reasons in this respect.

The foregoing remark also applies to the Appellant's argument that the Arbitrator would not have mentioned in the award the provision of Dutch law which made it possible for him to justify the Respondent's right to the payment of royalties on the effective use of the trademark after the termination of the license agreement.

5.
Lastly the Appellant argues that the Arbitrator violated procedural and substantive public policy within the meaning of Art. 190 (2) (e) PILA.

5.1
5.1.1 Procedural public policy guarantees to the parties the right to an independent judgment on the legal submissions and the facts submitted to the arbitral tribunal in accordance with applicable procedural law; procedural public policy is violated when some fundamental and generally acknowledged principles were violated, thus leading to an unbearable contradiction with the sentiment of justice, so that the decision appears incompatible with the values recognized in a state of laws (ATF 132 III 389 at 2.2.1). However it must be pointed out that any violation of a procedural rule, even an arbitrary one, does not constitute a violation of procedural public policy. Only the violation of a rule essential to ensure the fairness of the proceedings can be taken into account (ATF 129 III 445 at 4.2.1 and the references).

5.1.2 An 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 determining legal order and system of values; among such principles are in particular the observance of contracts, compliance with the rules

of good faith, the prohibition of abusing one's rights, the prohibition of discriminatory or confiscatory measures as well as the protection of incapables (case quoted *ibid*.).

The rule of *pacta sunt servanda* within the restrictive meanings it is given by case law relating to Art. 190 (2) (e) PILA is violated only if the arbitral tribunal refuses to apply a contract clause whilst admitting that it binds the parties or conversely if it imposes on them the observance of a clause that it considers does not bind them. In other words the arbitral tribunal must have applied or refused to apply a contractual provision in contradiction with the results of its interpretation as to the existence or the contents of the legal matter in dispute. However the process of interpretation itself and the legal consequences logically drawn therefrom are not governed by the rule of observance of contract so that they cannot base an argument for violation of public policy. The Federal Tribunal pointed out repeatedly that almost the entire realm of disputes concerning breach of contracts is outside the scope of protection of the rule *pacta sunt servanda* (judgment 4A_43/2010 of July 29, 2010 at 5.2 and cases quoted).

5.2

5.2.1 In a first argument the Appellant claims that the rule of *pacta sunt servanda* was violated because the final award orders it to pay the royalties for the year 2009 although the license agreement was terminated on January 26, 2009.

Reading the arguments in support shows that the Appellant's arguments is really a copy/paste of what it developed previously with regard to the violation of the right to be heard (see above 4.3). Accordingly it deserves the same fate.

Moreover the Appellant's arguments in this context have nothing to do with the rule of contractual observance as defined by the aforesaid federal case law. Once again they are merely unacceptable criticism of the way in which the Arbitrator found the pertinent facts and applied the rules of law to be taken into consideration.

5.2.2 The Appellant then comes back to the argument as to the award of interest to the Respondent but this time as a violation of procedural public policy. It acknowledges incidentally that it developed the same argument with regard to the prohibition of deciding *ultra petita*.

There is nothing in its argument which would justify a different solution from that which was reached with regard to the similar argument reviewed above (see above 3.2.1). The Appellant disregards the concept

of procedural public policy in particular when it argues that the award under appeal is not consistent with applicable procedural law and particularly with Art. 54 (1) (b) of the Rules.

5.2.3 Still with regard to an alleged violation of procedural public policy the Appellant argues that it should not have been ordered to pay an amount of EUR 2'500.- for each day of non-compliance even though the final award was not yet final and enforceable because it could still be appealed to the Federal Tribunal.

The foregoing statement is inaccurate and contradicted by the fact that its author considered it necessary to apply for a stay of enforcement. Moreover its lack of foundation appears already from the very Rules as Art. 57 (b) provides that the award takes effect and becomes binding for the parties as of the date of its communication by the Center. Hence the argument is deprived of any merit.

5.2.4 In the argument before last in this regard the Appellant argues that the amount it was awarded as damages for abusive termination of the license agreement by the Respondent is insufficient. It sees there an insurmountable contradiction, inconsistent with the values recognized in a state of laws, in the fact that it was acknowledged as a victim of the termination whilst being refused compensation worthy of the name in this respect.

The argument that the reasons of an award would be intrinsically incoherent does not fall within the definition of public policy (aforesaid judgment 4A_464/2009 at 5.1). Moreover the Appellant merely claims the alleged incoherence of the award under appeal without giving any decisive reasons which would justify its claim.

The appeal shall accordingly be rejected in this regard as well.

5.2.5 Finally the Appellant attacks the manner in which the Arbitrator apportioned the costs of the arbitral proceedings. In this respect it proceeds to a demonstration of a purely appellatory nature with a view to establishing why in its opinion the apportionment under challenge would be shocking. However one does not see in what way the apportionment of costs of the arbitration would involve procedural public policy within the narrow meaning that federal case law gives to this concept.

6.

In conclusion the appeal can only be rejected to the extent that the matter is capable of appeal whether with regard to the final award of June 17, 2010, to the amending memorandum of July 9, 2010 or also to the August 4, 2010 decision as to the request for an additional award.

Consequently the Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1. The Appellant's request that the Respondent's answer should be struck off the record is not admissible.

2. The appeal is rejected to the extent that the matter is capable of appeal.

3. The judicial costs, set at CHF 35'000.- shall be borne by the Appellant.

4. The Appellant shall pay to the Respondent an amount of CHF 40'000.- for the federal judicial proceedings.

5. This judgment shall be notified to the Representatives of the Parties and to the sole arbitrator of the World Intellectual Property Organization Arbitration and Mediation Center (WIPO).

Lausanne, January 7, 2011

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

The Presiding Judge: The Clerk:

KLETT (Mrs) CARRUZZO