

4A_259/2015¹

Judgment of July 8, 2016

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Niquille (Mrs.)
Clerk of the Court: M. Piatti

A. _____ S.p.A.,
Represented by Mr. Diego Della Casa,
Appellant

v.

B. _____ AG,
Represented by Mr. Paolo Michele Patocchi and Mr. Paolo Marzolini,
Respondent

Facts:

A.
By a contract of January 1, 2002, the Swiss company B. _____ AG gave a license to the Italian company A. _____ S.p.A. to use a trademark. Further to differences that arose as to the computation of royalties due, B. _____ AG initiated arbitral proceedings resulting in a final award of March 31, 2015, in which the Arbitral Tribunal held that three documents produced by A. _____ S.p.A. on December 23, 2014, were inadmissible (operative part n. 2), ordered the latter to pay to the Claimant EUR 1'797'130.36 with interest (operative part n. 3) and CHF 82'007.77 for the costs of the arbitration and CHF 130'000 for the other party's costs (operative part n. 5).

¹ Translator's Note:

Quote as A. _____ S.p.A. v. B. _____ AG, 4A_259/2015.

The decision was issued in Italian. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.

In a civil law appeal of May 11, 2015, A._____ S.p.A. asked the Federal Tribunal to annul operative parts nos. 2, 3, and 5 of the final award. It argues a violation of Art. 190(2)(d) PILA.²

In its answer of July 13, 2015, B._____ AG submitted that the matter is not capable of appeal and in the alternative that the appeal should be rejected with costs.

The parties engaged in a second exchange of briefs spontaneously.

Reasons:

1.

1.1. According to Art. 54(1) LTF,³ the proceedings before the Federal Tribunal take place in one of the official languages,⁴ as a rule in the language of the decision under appeal. When the decision is in another language, as is the case here (English), the Federal Tribunal resorts to the official language chosen by the parties. The civil law appeal was drafted in Italian, therefore this judgment shall be issued in that language.

1.2. Art. 77(1) LTF allows a civil law appeal against arbitral awards pursuant to the requirements of Art. 190-192 of the Federal Law of December 18, 1987, on Private International Law (PILA). That law is applicable because, as the award under appeal shows without challenge, the seat of the arbitration is in Lugano and one of the parties at the time the arbitration agreement was entered into had its seat in Italy (Art. 176(1) PILA). Furthermore, the provisions of Chapter 12 PILA are applicable, as the parties did not explicitly waive their applicability (Art. 176(2) PILA).

1.3. The appeal was filed in a timely manner (Art. 46(1)(a) combined with Art. 100(1) LTF) and against the final decision of the Arbitral Tribunal (Art. 90 LTF) in a civil matter (Art. 72(1) LTF). The Appellant, unsuccessful in the arbitration, has standing to appeal (Art. 76(1) LTF).

1.4. The grounds for appeal in international arbitration are exhaustively listed at Art. 190(2) PILA. The Federal Tribunal reviews only the grievances that the appellant raises and reasons (Art. 77(3) LTF). This corresponds to what is stated at Art. 106(2) LTF as to grievances concerning the violation of constitutional rights or of cantonal and intercantonal law. Like the foregoing, this codifies the principle that grievances must be spelled out (*Rügeprinzip*) and consequently excludes the admissibility of criticism of an appellate nature (judgment 4A_34/2015⁵ of October 6, 2015, at 2.2, unpublished in DTF 141 III 495). The reasons

² 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.

³ Translator's Note: LTF is the Italian and 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: The English translation of this decision is available here:

must be contained in the brief submitted within the time limit to appeal; the appellant may not supplement or improve his appeal brief by way of the reply (judgment 4A_86/2013 of July 1, 2013, at 1.2.2, unpublished in DTF 139 III 345; DTF 135 I 19 at 2.2).

1.5. The Federal Tribunal issues its judgment on the basis of the facts found by the arbitral tribunal (Art. 105(1) PILA). This Court may not rectify or supplement *ex officio* the findings of the arbitrators, even if the facts were found in a blatantly inaccurate manner or in violation of the law (Art. 77(2) LTF, ruling out the applicability of Art. 105(2) PILA). However, as was already the case under the aegis of the Federal Law Organizing the Courts (see DTF 129 III 727 at 5.2.2; 128 III 50 at 2a, with references), the Federal Tribunal retains the power to review the facts on which the award is based if one of the grounds for appeal at Art. 190(2) PILA is raised against such findings or when new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (judgment 4A_342/2015 of April 26, 2016, at 3).

It must also be pointed out that the findings of the arbitral tribunal concerning the unfolding of the procedure bind the Federal Tribunal with the same reservations, whether they concern the submissions, the facts alleged, the legal arguments of the parties, the statements made in the proceedings and the adducement of evidence, or the contents of a witness statement or an expert report or, furthermore, the information gathered during an on-site visit (judgment 4A_342/2015 of April 26, 2016, at 3, with references).

2.

In the course of the proceedings, the Arbitral Tribunal entrusted an auditing company with furnishing an expert report whilst giving the parties the opportunity to appoint their own experts. The expert report entitled "*Judicial Expert Report plus Parties' Experts Comments*" was issued on February 14, 2014. Further to the observations of the parties, the Arbitral Tribunal submitted further questions to the expert. The answers are contained in a document entitled "*Further Details on Judicial Expert Report*" dated October 24, 2014 (Attachment 2), which the Arbitral Tribunal sent to the parties with a procedural order of the same date in which it closed the proceedings and gave them the opportunity to submit observations as to the results of the evidentiary phase and on the merits. On December 23, 2014, the parties submitted their final observations.

When examining which costs of sales may be deducted from the net income from which the royalties must be computed, the Arbitral Tribunal pointed out that the Claimant did not discuss the figures in the supplementary report of October 24, 2014, whilst the Defendant chose to challenge both reports in its final submissions and held that they were not admissible from a procedural point of view. It also noted that the expert appointed by the Defendant was involved in the analysis contained in the forensic expert report and that it could have questioned the latter's position after receiving the first report, particularly as the methodology was already largely adopted in such a report. The Arbitral Tribunal pointed out that it could have reached another conclusion if the expert report had presented deficiencies such that it could not be

used in evidence, a possibility which it excluded however, as it considered the report logical, accurate, and clear. It therefore declared the Defendant's objections concerning the second report and attachments R-203, R-204 and R-205 inadmissible.

3.

3.1. The Appellant invokes Art. 190(2)(d) PILA and argues a violation of the right to be heard and a denial of justice because the Arbitral Tribunal did not accept its observations as to the second report and the attached spreadsheet with errors contained in the aforesaid supplement that contained two new categories of costs. It argues that it therefore could not express its point of view as to an issue pertinent to the decision.

3.2. The right to be heard guaranteed at Art. 182(3) and 190(2)(d) PILA has in principle the same contents as the constitutional right at Art. 29(2) Cost.⁶ (DTF 130 III 35 at 5; 128 III 234 at 4b; 127 III 576 at 2c). Case law infers therefrom that each party has the right to state its views on the facts essential to the decision to submit its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (DTF 133 III 139 at 6.1). Whilst the right to be heard does not impose upon the arbitral tribunal the duty to reason an international arbitral award, it nonetheless has the duty to examine and address the pertinent issues. This duty is violated when, due to inadvertence or oversight, the arbitral tribunal does not take into consideration some statements, arguments and evidence presented by one of the parties and important to the decision (DTF 133 III 235 at 5.2).

In the case at hand, the arguments in support appear unfounded. The Appellant acknowledges that it received the second report when it was given the opportunity by order of October 24, 2014, to file some observations as to the results of the evidentiary phase and the merits of the matter and does not argue that its final submission was ignored. The fact that the Arbitral Tribunal declared its objections inadmissible and as to the respective spreadsheet concerning the figures contained in the supplementary expert report does not fall within the ground for appeal invoked, as such objections concern the substantive accuracy of the expert report and therefore concern the assessment of the evidence (DTF 141 IV 369 at 6.1, with references). Moreover, this results from the text of the award in which the Arbitral Tribunal expressly indicated that it would have reached a different conclusion if the expert report had presented with such deficiencies that it could not be used in evidence, but this was not the case. This concept corresponds moreover to the case law of the Federal Tribunal, according to which a judge may depart from the conclusions of an expert report only if there are valid reasons (DTF 141 IV 369 at 6.1, with references).

4.

The foregoing shows that the appeal must be rejected. The court costs and the other party's costs follow the same fate (Art. 66(1) and 68(1) LTF).

⁶ Translator's Note:

Cost. Is the Italian abbreviation for the Swiss Federal Constitution.

Therefore, the Federal Tribunal rules:

1.

The appeal is rejected.

2.

The judicial costs set at CHF 15'000 shall be borne by the Appellant, which shall pay the Respondent an amount of CHF 17'000 for the federal judicial proceedings.

3.

Notification to counsel for the parties and to the *ad hoc* Arbitral Tribunal.

Lausanne, July 8, 2016

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

Presiding Judge:

Clerk:

Klett (Mrs.)

Piatti