

4A_645/2014¹

Judgment of February 20, 2015

First Civil Law Court

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

A. _____ S.p.A,
Represented by Mr. Fabrizio Mion,
Petitioner

v.

B. _____,
Represented by Mr. Tuto Rossi
Respondent

Facts:

A. On September 27, 2010, the Italian company A. _____ S.p.A, acting as sponsor, entered into a endorsement contract with Spanish company B. _____, which manages the cycling team C. _____. The parties also agreed (Art. XII) that "*all disputes deriving from this agreement or linked to it in any manner shall be definitively decided by an arbitral tribunal to the exclusion of ordinary courts, according to the regulations of the UCI and Italian law.*"

In a final award of July 25, 2011, the *ad hoc* Arbitral Tribunal, seized by B. _____, rejected the request for an assessment and a declaration of termination of the endorsement contract, held that the contractual payment obligations of A. _____ S.p.A. were still governed by the aforesaid agreement, and ordered it

¹ Translator's Note:

Quote as A. _____ S.p.A. v. B. _____, 4A_645/2014.

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

to pay to the Claimant several amounts at specific maturity dates for the period from November 31, 2010, to June 30, 2013.

A. _____ S.p.A introduced a first request for revision of the award on December 14, 2011, which was rejected by the Federal Tribunal in its judgment of August 21, 2012.

B.

In a request for revision of November 10, 2014, based on Art. 123(2)(a) LTF,² A. _____ S.p.A again seeks a stay of enforcement and the annulment of the award with the matter sent back to the Arbitral Tribunal for a new decision. The Petitioner bases its request upon a decision of the Union Cycliste Internationale (UCI), mentioned by the press on July 12, 2014, which imposed a sanction (two years of disqualification and cancellation of the sport results in the years 2009-2010 and 2012) for doping upon D. _____, the team leader and "image man" of the aforesaid cycling team. After setting forth the endorsement contract and the importance it gives to compliance with ethical norms, it states that it would not have sponsored B. _____ if it had known that among its cyclists it included an athlete who had repeatedly breached the UCI Doping Regulations. Accordingly, A. _____ considers that it was acting in fundamental error which would entitle it to seek the annulment of the contract. It also states that it would have been entitled to terminate the contract immediately for breach if B. _____ had been aware of the facts concerning the cyclist's doping at the time the contract was entered into.

In its answer of December 4, 2014, B. _____ argues that the request for revision is late and unfounded as to the merits, whilst in a brief of the same day, the Arbitral Tribunal doubts that, "*new facts could be proved only with newspaper articles or information communicated by or posted on internet sites.*"

The parties spontaneously conducted a second exchange of briefs.

The presiding judge ordered a stay of enforcement by decision of January 22, 2015.

Reasons:

1.

The dispute concerns international arbitration as both parties had their domicile abroad at the time the arbitration clause was entered into. The seat of the arbitration is Lugano and it does not appear that the parties concluded an opt-out agreement within the meaning of Art. 176(2) PILA.³ According to case law, which filled a lacuna in this respect, they may accordingly avail themselves of the extraordinary legal recourse of revision, for which the Federal Tribunal has jurisdiction (DTF⁴ 134 III 286⁵ at 2, with

² Translator's Note: LTF is the Italian abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

³ 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.

⁴ Translator's Note: DTF is the Italian abbreviation equivalent to 'ATF' or 'BGE', "*Decreto del Tribunale Federale.*"

references). The grounds for revision are, in particular, those spelled out at Art. 123(2)(a) LTF (DTF 134 III 286⁶ at 2.1).

2.

According to Art. 123(2)(a) LTF, a request for revision based on Art. 123(2) LTF must be filed within 90 days of the discovery of the ground for revision.

The Petitioner claims to have become aware of the aforesaid sanction on July 12, 2014, through articles published in the press. For this reason, it takes the view that it filed the request of November 10, 2014, in a timely manner, also taking judicial holidays into account. The Respondent argues instead that the request is late because, as it appears from an email attached to the rejoinder, the disqualification of the cyclist was already on the list of UCI sanctions published on the internet on June 30, 2014. In the case at hand, the request for revision cannot succeed for reasons which will be explained hereunder and the issue as to its timeliness needs not be examined more in detail and can remain open.

3.

3.1. According to Art. 123(2)(a) LTF, invoked here, revision may be sought when, after the award was issued, the petitioner becomes aware of relevant facts or finds decisive evidence that he could not have adduced in the previous proceedings, to the exclusion of facts or evidence arising subsequent to the award. As is clear from the wording of the provision – which adopted the old Art. 137(b) OG⁷ (DTF 134 III 286⁸ at 2.1) – the fact invoked must be pertinent and apt to change the findings of a fact on which the challenged decision was based and hence to lead to a different solution from that in the award, the revision of which is sought on the basis of a correct legal assessment (judgment 4A_763/2011⁹ of April 30, 2012, at 3.1; DTF 127 V 353 at 5b; 108 V 170 at 1).

3.2. In the case at hand, the relevant fact relied upon by the Petitioner is the sanction imposed due to anomalies in the biological passport of a cyclist of the Respondent, which led to his disqualification for two years and to the annulment of his ranking in the Tour de France 2009, 2010, and 2012.

3.2.1. From this fact, the Petitioner first concludes that it was acting in fundamental error, as was the Respondent at the time it signed the endorsement contract, because it did not know that the aforesaid cyclist was doping. It claims that the fundamental error allowed it to annul the contract, a circumstance it

⁵ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award>

⁶ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award>

⁷ Translator's Note: OG is the Italian abbreviation for the previous federal statute organizing the Swiss Courts.

⁸ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award>

⁹ Translator's Note: The English translation of this decision is available here:
<http://www.swissarbitrationdecisions.com/request-for-revision-of-an-icc-award-rejected-the-petitioner-mus>

could not submit to the Arbitral Tribunal. However, pursuant to Italian law, which governs the relationship between the parties, the mere existence of a fundamental error is not sufficient to discontinue the contract: to obtain this, the parties must invoke it expressly, proposing, in particular, an action for annulment (Art. 1442 of the Italian Civil Code). Thus, the possible annulment of the contract pursuant to the Petitioner's action is a fact taking place after the award, which consequently cannot justify its revision.

3.2.2. The Petitioner adds that, should the Respondent have been aware of the facts concerning the aforesaid cyclist's doping when the endorsement contract or the "amendment agreement" of January 20, 2011, were entered into, it could have requested the termination of the contract for breach. However, the fact discovered by the Petitioner (a sanction imposed due to anomalies found in the biological passport) is not susceptible to change the factual findings on which the award is based. Indeed, this does not lead to the conclusion that the Respondent knew of the cyclist's behavior. Moreover, the Petitioner does not explain, and it is also not apparent, how it would be possible to infer from the single fact on which the request for revision is based that there would have been a breach of the Respondent's contractual obligations. It must be observed in this respect that the excerpts of the contract quoted in the petition show that at 6.1, a "*performance obligation*" was expressly excluded as to the management of the cycling team but that the Respondent undertook a "*duty of care*" (items 6.2 and 6.3) and at item 6.4 the parties expressly agreed as to the procedure to be adopted should a cyclist turn out to be doped when they adopted the following clause: "*The SPORT GROUP, pursuant to a written request of the SPONSOR, undertakes to terminate forthwith the contract of any cyclist and/or staff member of the SPORT GROUP and of the TEAM who, by any action or behavior damages the image of the SPONSOR, particularly on grounds of doping.*"

4.

The foregoing shows that the request for revision must be rejected. The judicial costs and the party costs will be set accordingly (Art. 66(1) and 68(1) LTF).

Therefore the Federal Tribunal pronounces:

1.

The request for revision is rejected.

2.

The judicial costs set at CHF 10'000 shall be borne by the Petitioner, which shall also pay to the Respondent an amount of CHF 12'000 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