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Federal Circuit Confirms $455 Million ICC Arbitration Award

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The Federal Circuit this month, for the first time, confirmed an international arbitral award administered by the International Chamber of Commerce (ICC). In another first for the Federal Circuit, the court indicated that it would follow the Fourth Circuit's approach of recognizing "manifest disregard of law" as a potential basis for vacating an arbitral award. The Federal Circuit's decision thus widened the existing circuit split between the Second, Fourth, Sixth and Ninth Circuits on the one hand, and the Seventh, Eighth and Eleventh Circuits on the other, paving the way for a potential Supreme Court showdown in the near future.

In the underlying case, the arbitral tribunal had ruled in favor of two subsidiaries of Bayer AG in their breach-of-contract and patent-infringement row with Dow Agrosciences LLC. The ICC tribunal had held that Dow breached a cross-license agreement with one of those subsidiaries, Bayer Cropscience AG (BCAG), by sublicensing the genes contained in certain weed-control products. According to the tribunal, that rendered Dow liable for $374 million in lost-opportunity damages. Dow was also liable under U.S. law, the tribunal concluded, for more than $68 million in damages based on its infringing use of several Bayer-owned patents. Both aspects of the award were confirmed by a federal district court and again by the Federal Circuit.

The Genesis of the Dispute

The dispute has its roots in a 1992 agreement between the predecessors of BCAG and Dow. In relevant part, the agreement granted to Dow's predecessor a license to several patents in the Straunch and Leemans patent families. BCAG's predecessor owned the Straunch patents and exclusively licensed the Leemans patents from the predecessor of Bayer Cropscience NV (BCNV), the other Bayer subsidiary in this case. Included in the patented products were two genes with herbicide-resistant properties. Article 4 of the agreement prohibited Dow's predecessor from sublicensing the patents that covered those genes.

Fifteen years later, in 2007, Dow entered into a series of agreements with MS Technologies for the transfer of certain soybean products from Dow to MS. Those products contained the genes that were covered by Bayer's Straunch and Leemans patents.

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Bayer took issue with those transactions, terminating the 1992 agreement based on Dow's effective sublicense of the patents and breach of Article 4. A suit for patent infringement soon followed in U.S. district court, as did an order from that court staying the case pending arbitration. Bayer then filed an arbitration with the ICC for breach of contract (based on Dow's sublicense) and patent infringement (based on Dow's use of four Leemans patents).

The ICC Arbitration

Dow's chief argument before the arbitral tribunal was that the Leemans patents were invalid for obviousness, based on purported double patenting with two of the Straunch patents. The tribunal accepted the premise that the two patent families did not claim distinct inventions. As Dow put it, because one subsidiary of Bayer (BCAG) owned the Straunch patents and because another subsidiary (BCNV) owned the Leemans patents, the two patent families were commonly owned.

Dow's argument did not carry the day. In a 348-page award, the tribunal rejected Dow's double-patenting argument, reasoning that the two Bayer subsidiaries were different entities and that Dow had provided little evidence to justify piercing the corporate veil. Dow's other arguments related to the 1992 agreement and the validity of the Leemans patents met the same fate. According to the tribunal, Dow breached the agreement—a contract governed by French law—by sublicensing one of the protected genes to MS Tech. Dow had also infringed the Leemans patents under U.S. law by creating products with the patented technology. Those findings resulted in a total award of $455 million in Bayer's favor.

Federal Court Confirmation of the Award

Following the arbitral award, Bayer returned to its pending federal court case in 2015 for confirmation of the award. After the district court confirmed the award, Dow appealed that judgment, raising a bevy of challenges.

None of Dow's challenges as to liability or damages was successful. At the outset of the Federal Circuit's analysis, the court emphasized the Fourth Circuit's strict standard of review applicable to arbitral awards. As the panel explained, judicial review of the award was "very limited," and ordinary legal or factual error was not a ground for disturbing the award.

As in the ICC arbitration, Dow's primary argument related to double-patenting. This time, however, Dow had to meet the much higher bar of proving that the tribunal manifestly disregarded the law or acted contrary to U.S. public policy by awarding damages based on the Leemans patents. According to the Federal Circuit, "manifest disregard of law" may serve as a proper ground for vacating an arbitral award (even though that ground is not among the grounds listed in 9 U.S.C. §§ 10–11, the sections of the federal code governing review of arbitral awards). Citing the Fourth Circuit, the court explained that "the manifest-disregard ground exists either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10." The court went on to explain, however, that manifest disregard is a "carefully circumscribed standard" that in no way invites a merits review of an arbitrator's decision.

Having concluded that both manifest disregard and public policy serve as potential bases for vacating an arbitral award, the Federal Circuit then applied those standards to the award at issue, holding that Dow's arguments did not meet either of those high hurdles. In the first place, the court said, the tribunal had

"carefully scrutinized Dow's argument" and found that "Dow had not provided sufficient evidence to pierce the corporate veil separating [the two Bayer subsidiaries]." The court further focused on the dearth of judicial precedent on this issue in the American system, as well as the nonbinding nature of Dow's cited authority, the *Manual of Patent Examining Practice*.

As in the ICC arbitration, Dow's other arguments for vacating the arbitration ruling did not fare any better, including the argument that the tribunal had improperly rejected Dow's defense related to the adequacy of the written descriptions of the Leemans patents. The Federal Circuit explained that this defense "amount[s] to no more than allegations of ordinary legal error," a type of error that does not justify vacating an arbitral award. As this case of first impression in the Federal Circuit shows, even if that court entertains claims that an arbitral body manifestly disregarded the law, the court's review of arbitral awards under that standard will be strictly circumscribed. It remains to be seen whether the Supreme Court will step in to resolve the existing circuit split on the question.

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