4A_416/2008[1]

Judgement of March 17, 2009

First Civil Law Court

Federal Judge CORBOZ, Presiding,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: WIDMER.

1. Parties
A._____,
2. Azerbaijan Wrestling Federation (AWF),
Appellants,
both represented by Dr Lucien W. Valloni,

v.

1. World Anti-Doping Agency (WADA),
Represented by Mr Claude Ramoni,
2. International Federation of Associated Wrestling Styles (FILA),
Respondents,

Facts:

A.

A.a A._____ (Appellant 1), domiciled in Azerbaijan, is a professional wrestler. She has been a member of the Azerbaijan Wrestling Federation since July 2007. She was previously a member of the Ukraine Wrestling Federation.

[1] Translator's note: Quote as A._____, AWF *v.* WADA, FILA, 4A_416/2008. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

The Azerbaijan Wrestling Federation (AWF; Appellant 2) is the Azeri national wrestling federation responsible for the promotion and development of wrestling in Azerbaijan. It oversees wrestling, particularly with regard to compliance with applicable rules.

The World Anti-Doping Agency (WADA; Respondent 1) is a Foundation under Swiss law based in Lausanne. Respondent 1's mission is to fight doping worldwide in sport, in all its forms.

The International Federation of Associated Wrestling Styles (FILA; Respondent 2) is the international federation of associated wrestling styles. It is responsible for the promotion and development of sport wrestling at international level and oversees sport wrestling particularly with regard to compliance with applicable rules. It is an association under Swiss law.

A.b On April 25 and 26, 2006, Appellant 1 participated in the European wrestling championship in Moscow. She won the competition in the women's 48 kg category. On April 26, 2007, she underwent a doping test. She tested positive for unauthorized use of the diuretic Furosemide.

In his decision of May 31, 2006, the FILA Sporting Judge imposed a one-year ban on Appellant 1.

On June 9, 2006, FILA sent a copy of this decision to WADA. WADA replied that, in its view, a one-year ban did not comply with regulations and that it was considering taking action against the decision before the CAS. Thereupon, FILA advised WADA that it intended to review the decision.

On September 4, 2006, the FILA Sporting Judge issued a new decision and imposed a two-year ban on Appellant 1.

A.c The Ukraine Wrestling Federation informed FILA, in a letter of November 23, 2006, that it had sought further clarification on the matter. According to that letter, a friend and former competitor of Appellant 1, B._____, admitted to have inserted the forbidden substance into a bottle of mineral water that Appellant 1 drank from at dinner at the Hotel

"C._____" in Moscow, on April 24, 2006. B._____ was later banned for life for this conduct. In light of this new finding, the Ukraine Wrestling Federation requested the sanction issued against Appellant 1 be reconsidered.

On December 14, 2006, the FILA President submitted the request to the members of the FILA Federal Appeal Commission and explained, *inter alia*:

" ... Mrs A._____ and the President of the Ukrainian Wrestling Federation are now appealing against this decision as new developments came to light which enable us to review this judgement. [...] Considering this claim as unquestionable, we have decided to submit this appeal to your kind assessment and to ask you to pronounce in favour of her rehabilitation, notwithstanding the start of legal proceedings against Mrs B._____."[2]
On June 18, 2007, the Ukraine Wrestling Federation filed a new request with FILA and requested the shortening of the ban.

In a fax of June 20, 2007, the FILA President wrote to the Ukraine Wrestling Federation that he had reviewed the case again and was in his capacity as FILA President in favour of shortening the ban to 15 months. According to the FILA President, the Appellant would be entitled, after July 26, 2007, to participate in all national and international championships.

A.d On September 21, 2007, an anonymous person informed WADA of Appellant 1's participation in the world championship in Baku in September 2007. She came in 7th place and thus qualified for participation in the Olympic Games in Peking.

On the same day, WADA requested an explanation from the FILA Secretary General, who informed WADA on September 26, 2006, that, following the appeal of the Ukrainian Wrestling Federation, the FILA Federal Appeal Commission had shortened the ban to 15 months. On the same day, WADA requested a copy of the decision and a detailed explanation.

In a letter dated September 28, 2007, signed by the FILA President and the FILA Secretary General, FILA explained to WADA the decision-making process as follows:

[2] Translator's note: in English in the original text.

" ... Indeed, after the appeal of the Ukraine of November 23, 2006 (...), the opinion of the Appeal Commission was sought in writing and the majority of its members declared itself in favour of a reduction in the sanction. As the Commission was not unanimous, and although unanimity is not required for a decision on an appeal, the athlete was not informed of the reduction in the sanction immediately, but after the meeting held at FILA's headquarters for the inauguration on June 15, 2007, where a unanimous decision was reached, as the decision was not at all urgent in view of the wrestler's objective, which was to participate in the world championship in September 2007. After this meeting, Appellant 1 was notified of the reduction of the sanction by letter of June 20, 2007. (...)"[3]

On October 1, 2007, WADA sought further explanations. On October 3, 2007, the FILA Secretary General informed WADA that the FILA President has the power to offer an amnesty and to reduce sanctions based on Art. 60 of the FILA Disciplinary Regulations.

B.

On October 11, 2007, Respondent 1 appealed to the Court of Arbitration for Sport (CAS) against the decision that was notified to Appellant 1 on June 20, 2007, irrespective of whether it had been rendered by the FILA Federal Appeal Commission or by the FILA President. It requested a two-year ban against Appellant 1.

The CAS was composed of Dr Christian Duve (President), Quentin Byrne-Sutton and Türker Arslan.

In an arbitral award of July 17, 2008, the CAS assumed jurisdiction over the appeal of Respondent 1. It granted the appeal, annulled the decision of FILA of June 20, 2007, and imposed a two-year ban on Appellant 1 from April 26, 2006, to April 25, 2008.

C.

In a Civil law appeal, the Appellants request the complete annulment of the arbitral award of the CAS dated July 17, 2008, and a finding of the CAS' lack of jurisdiction over the appeal of WADA of October 11, 2007, against the decision of June 20, 2007, of the FILA President. Furthermore, they seek a finding that the FILA President's decision of June 20, 2007,

[3] Translator's note: in French in the original text.

relevant to A. _____ came into force, and that Appellant 1 was excluded and banned from participating in national or international wrestling competitions for a period of 15 months, namely from April 26, 2006, to July 26, 2007. Respondent 1 submits the appeal should be rejected. Respondent 2 expressed no view. The CAS waived its right to express an opinion.

D.
In a decision of the Presiding Judge of November 26, 2008, Respondent 1's request that CHF 5'000.-- be provided in security for costs was granted.

Reasons:

1.
This decision was notified to the Parties and the lower court on March 17, 2009. Due to an oversight, Federal Judge Klett was listed as co-Presiding Judge instead of Federal Judge Corboz, who sat as presiding member of the First Civil Law Court. In this complete text of the decision, that oversight has been corrected.

2.
With regard to the procedural request of the Appellants that they be given the opportunity to express their position on any submissions and answers of the Respondents and any opinions expressed by the CAS, it must be held that, as a rule, the Federal Tribunal does not order a second exchange of briefs (Art. 102 (3) BGG[4]). The Appellants were however free to express their position once more – without delay – on the answer of the Respondent 1 (BGE 133 I 98 at 2.2). They did not avail themselves of this possibility.

3.
The arbitral award under appeal is in English. In the proceedings before the Federal Tribunal, the Appellants used German, and Respondent 1 used French. As the language of the award

[4] Translator's note: German abbreviation for the Federal Statute of June 17, 2005 organising the federal courts, RS 173.110.

under appeal is not an official language[5], the Federal Tribunal will issue its decision in the language of the appeal in accordance with its practice (see Art. 54 (1) BGG).

4.
A Civil law appeal is admissible against the decisions of arbitral tribunals under the conditions set forth at Art. 190-192 PILA[6] (Art. 77 (1) BGG).

In this case, the seat of the arbitral tribunal is in Lausanne. The Appellants do not have their domicile or seat in Switzerland but in Azerbaijan. As the Parties did not exclude in writing the provisions of Chapter 12 of the PILA, these apply (Art. 176 (1) and (2) PILA).

According to Art. 77 (3) BGG, the Federal Tribunal only examines the grounds of appeal that are raised and reasoned in the appeal. The strict requirements developed by the Federal Tribunal under Art. 90 (1) (b) OG[7] (see BGE 128 III 50 at 1c p. 53) continue to apply in view of the fact that the new law did not purport to make any changes in this respect (BGE 134 III 186 at 5).

The Federal Tribunal bases its decision on the facts established by the Arbitral Tribunal (Art. 105 (1) BGG). It cannot rectify or supplement the factual findings of the arbitrators, even if these findings are clearly inaccurate or were made in violation of the law within the meaning of Art. 95 BGG (Art. 77 (2) BGG, which excludes the application of Art. 105 (2) BGG). However, as was already the case in Public law appeal proceedings under the old law[8], the Federal Tribunal retains the faculty to review the factual findings on which the award under appeal is based if admissible grounds for appeal, within the meaning of Art. 190 (2) PILA, are raised, or if new facts or evidence exceptionally admitted within the scope of a Civil law appeal based on Art. 99 (1) BGG, are taken into account (decision 4A_128/2008 of August 19, 2008 at 2.4, in: Bull. ASA 4/2008 777; see further: BGE 129 III 727 at 5.2.2; 128 III 50 at 2a p. 54).

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[5] Translator's note: The official languages of Switzerland are German, French and Italian.
[6] 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.
[7] Translator's note: German abbreviation for the previous Federal Statute organizing Federal courts, which was substituted by the BGG (see note 4).
[8] Translator's note: in the original text: „im altrechtlichen Verfahren der staatsrechtlichen Beschwerde".

5.

The Appellants challenge the jurisdiction of the CAS based on Art. 190 (2) (b) PILA.

5.1 According to Art. 190 (2) (b) PILA, the Federal Tribunal exercises free judicial review on the issue of jurisdiction, including preliminary questions of material law on which the decision on jurisdiction depends. However, the Federal Tribunal reviews the factual findings of the arbitral award under appeal in the framework of an appeal on jurisdiction only to the extent that admissible means of appeal within the meaning of Art. 190 (2) PILA are brought forward against these factual findings or when new facts may exceptionally be taken into account (BGE 134 III 565 at 3.1; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references).

5.2 The CAS assumed jurisdiction in accordance with R47 of the Code of Sports-related Arbitration (CAS Code) and Art. 13.2.1 of the FILA Anti-Doping Regulations.

R47 CAS Code provides, insofar as relevant to this decision:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide (…) and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body."[9]

Art. 13 of the FILA Anti-Doping Regulations provides:

"13.2.1 Appeals from international level athletes

In cases arising from a competition in an international event or in cases involving international level athletes, the FILA Sporting Judge's decision may be appealed to the FILA's Federal Appeal Commission. In case of disagreement about the decision, the parties may appeal exclusively to the Court of Arbitration for Sport (CAS), in accordance with the provisions applicable before such court. The CAS decision is executory and final.

[9] Translator's note : In French in the original text, the English version is cited here.

13.2.3 Persons authorized to appeal

In cases mentioned in Article 13.2.1, at the first level of appeal, the following parties shall have the right to appeal to FILA Federal Appeal Commission:
[...]
and
e) WADA." [10]

5.3 The Appellants submit that, pursuant to the arbitration clause of Art. 13.2.1 of the FILA Anti-Doping Regulations, only the decisions of the FILA Federal Appeal Commission are capable of appeal to the CAS, however not the decisions of the FILA President. The decision of June 20, 2007, appealed by Respondent 1 before the CAS was made by the FILA President. This decision was not capable of appeal to the CAS. Consequently, the CAS wrongly assumed jurisdiction.

5.4 This argument fails already in light of the fact that the Federal Tribunal cannot review the factual findings of the lower court (Art. 105 (1) BGG; at 3 and 4.1 above). Contrary to the opinion of the Appellants, the question of whether or not the award under appeal on the shortening of the ban was rendered by the FILA Federal Appeal Commission or the FILA President is not a question of law but a factual issue. In its assessment of the file, in particular FILA's letter of September 28, 2007 (see above at Ad), the CAS reached the factual conclusion that the FILA Federal Appeal Commission made the decision to reduce the ban on Appellant 1 from two years to 15 months at its meeting following the inauguration of June 15, 2007. This decision was notified to the interested parties by the FILA President in his letter of June 20, 2007.

5.5 In this respect, the Appellants claim a violation of their right to be heard, in accordance with Art. 190 (2) (d) PILA. If this were a factual question, the finding of the CAS that the decision of June 20, 2007, was rendered by the FILA Federal Appeal Commission would be clearly erroneous and contrary to the file. This is because the decision of June 20, 2007, which was provided to the CAS with the file, clearly shows that it was made by the FILA President.

[10] Translator's note : In English in the original text.

In this respect, an erroneous finding or a finding incompatible with the file alone does not in itself constitute a violation of the right to be heard. Such a violation occurs only in the case of a formal denial of rights, including if a party is denied the possibility of participating in proceedings, of influencing them and of submitting its position (BGE 133 III 235 at 5.2; 127 III 576 at 2b-e).

The Appellants make no such argument. Rather, they had ample opportunity to express their position on the issue of which organ of FILA rendered the award under appeal. The CAS considered and assessed the whole file, including the letter of the FILA President of June 20, 2007. The fact that this assessment led to a different conclusion to the one reached by the Appellants does not mean the right to be heard was violated.

The Federal Tribunal must therefore proceed on the assumption that the decision challenged by WADA before the CAS concerning the shortening of the ban to 15 months was made by the FILA Federal Appeal Commission. Thus, the CAS had jurisdiction to decide WADA's appeal.

The Appellants' claim that the CAS should not have assumed jurisdiction to decide WADA's appeal is thus unfounded.

6.

In the event of the Court holding that the decision on the shortening of the ban was rendered by the FILA Federal Appeal Commission, the Appellants argue that the CAS adjudicated issues that were not raised before it within the meaning of Art. 190 (2) (c) PILA. Even if the FILA Federal Appeal Commission had in fact rendered a formal decision, it would not yet be established that this decision was the one dated June 20, 2007. Respondent 1 challenged before the CAS the decision of June 20, 2007, which was made by the FILA President. If the CAS had, in the decision under appeal, annulled a decision of the FILA Federal Appeal Commission, it would have adjudicated an issue which was not raised before it.

Article 190 (2) (c) PILA covers arbitral awards that grant more than was requested, or something different, or omit to adjudicate a legal issue (BGE 120 II 172 at 3a). This is not the

case here. Prior to the appeal, WADA was unclear as to whether the decision concerning the shortening of the ban had been rendered by the FILA Federal Appeal Commission or by the FILA President. It therefore challenged the decision of June 20, 2007, "irrespective of whether it had been taken by the FILA Federal Appeal Commission or by the President"[11]. It is therefore not specified which organ of FILA rendered the decision. Accordingly, par. 4 of the arbitral award merely states: "The decision of FILA, dated 20 June 2007, is set aside."[12] In these factual circumstances, it cannot be said that the CAS made a ruling beyond the scope of Respondent 1's claim.

7.

Lastly, the Appellants argue that the arbitral award under appeal violates formal public policy (Art. 190 (2) (e) PILA). They argue that Appellant 1 was denied access to the state courts as a result of the CAS wrongly assuming jurisdiction. This is all the more serious in the field of sport arbitration, as sportsmen have no choice other than to consent to the arbitration clause of the world sporting federations. The award under appeal, which the CAS did not have jurisdiction to issue, is therefore gravely inconsistent with the sense of justice.

The grievance cannot be upheld at all as it is not true that the CAS did not have jurisdiction to decide Respondent 1's appeal. The CAS did not wrongly assume jurisdiction. The grievance, which relies on an assumption to the contrary, is therefore unfounded.

8.

The appeal is therefore unfounded and must be rejected. In accordance with the outcome of proceedings, the Appellants are liable for court costs and the Respondent's costs (Art. 66 (1) and Art. 68 (2) BGG). Solely Respondent 1's costs shall be borne by the Appellants. Respondent 2, which was not represented by an attorney, did not make any submissions.

[11] Translator's note: in English in the original text.
[12] Translator's note: in English in the original text.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 4'000, shall be borne severally by the Appellants.

3.
The Appellants shall severally pay to the Respondent 1 an amount of CHF 5'000 as a share in the costs for the federal judicial proceedings. This amount shall be paid out of the security paid to the Court.

4.
This decision shall be notified in writing to the Parties and the Court of Arbitration for Sport (CAS).

Lausanne, March 17, 2009

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

The presiding Judge: The Clerk:

CORBOZ WIDMER