Bundesgericht Tribunal federal Tribunale federale Tribunal federal

4A_358/2009

Judgment of 6 November 2009 I. Civil Law Department

Composition
Federal Judge Klett, President, Federal Judge Corboz, Federal Judge Rottenberg-Liatowitsch, Federal Judge Kolly, Federal Judge Kiss, Law Clerk Leemann.

Parties
Florian **Busch,**
Friedhofstrasse 2, DE-13053 Berlin,
Appellant,
Represented by the Law Offices of Dr. Maurice Courvoisier
and Dr. Philippe Nordmann, Aeschenvorstadt 55,
Postfach 659, 4010 Basel,

versus

World Anti-Doping Agency (WADA),
Tour de la Bourse, Place Victoria 800, Bureau 1700,
Case postale 120, Montreal, Quebec, H4Z 1B7, Canada,
Appellee,
Represented by Maîtres François Kaiser et Yvan Henzer
Place Saint-François 1, case postale 7191,
1002 Lausanne.

Subject
International Arbitral Tribunal,
Complaint against the arbitral award given by the Tribunal Arbitral du Sport (TAS) of 23 June 2009.

Facts:

A.
A.a Florian Busch (the Appellant), residing in Berlin, is a professional Ice Hockey Player. As a member of the German Ice Hockey National Team, he participated in various international competitions in 2003, 2004, 2006, 2007 and 2008 as well as in the Olympic Winter Games in Turin in 2006.

The World Anti-Doping Agency (WADA) (the Appellee) is a foundation under Swiss Law with its head office in Lausanne, Switzerland. Its mandate is the world-wide fight against doping in athletics.

The International Ice Hockey Federation (UHF) is the international ice hockey association with its head office in Zurich, Switzerland.

A.b On 6 March 2008 at 12.30 p.m., Mr. Kursawe on behalf of the German National Anti-Doping Agency (NADA) appeared at the residence of the Appellant to perform an unannounced drug test ("out-of-competition sample" or "training sample"). As testified to by the Appellee, the Appellant refused to comply with the control, even after having been informed by the doping inspector of the severe disciplinary sanctions which could ensue. It is not in dispute that the doping inspector left the Appellant's residence at 12:50 p.m. empty-handed.

Four minutes later, the Appellant contacted NADA by telephone and informed them of the incident. At 2:16 p.m., he again called NADA and offered to submit to the sampling, at which time he was told by NADA that a repeat of the control would not be possible. Subsequently, a doping control occurred on the same day at 5:00 p.m. upon his initiative, organized by the German Ice Hockey Federation (Deutscher Eishockey-Bund - DEB) and performed by Mr. Kursawe. The sample was analyzed by the Institute of Doping Analysis und Sports Biochemistry Dresden whereupon no banned substances or illegal methods were found.

A.c On 7 March 2008, NADA informed the German Ice Hockey Federation of the incident. On 19 March 2008, the Federation informed NADA of its intention to publicly issue a warning to the Appellant. NADA then notified the DEB that refusing to provide a sample violates Article 2.3 of the NADA

Code (NADC) which is identical to Article 2.3 of the WADA Code (WADC) and must be sanctioned accordingly.

The DEB informed NADA that the sanctions as proposed by NADC and/or WADC would be excessive and a public warning would be sufficient, considering the circumstances of the actual case. Accordingly, it pronounced a public reprimand of the player on 15 April 2008 and fined him EUR 5,000.00 and 56 hours community service.

NADA learned of the decision by the DEB through the media and also learned that the IIHF supported this and would permit the player to play in the Ice Hockey World Championship in Canada during 2 - 11 May 2008. NADA then informed the Appellee on 21 April 2008 for the Appellee to be able to instigate measures.

In a letter dated 6 May 2008, the Appellee appealed to the directory of the IIHF World Championships, on the basis of Article 3.1 of the IIHF Disciplinary Regulations 2004, to temporarily suspend the Appellant as of 6 May 2008 and for the IIHF to decide within 48 hours on a provisional suspension. In addition, the Appellee requested that the IIHF Disciplinary Committee to instigate disciplinary proceedings against the Appellant and to impose a two-year suspension.

On 7 May 2008, the IIHF Board informed the Appellee via e-mail that it would be unable to act as per the request. Amongst other things, the IIHF noted that the Internal Disciplinary Commission established by the German Ice Hockey Federation had decided on this matter on 15 April 2008 and that the period for an appeal had not yet lapsed.

On the same day, the Appellee wrote to the IIHF that she would assume that the letter of 7 May 2008 would be a decision according to the meaning of the IIHF disciplinary regulations which would be subject to the Tribunal Arbitral du Sport (TAS).

A.d On 9 May 2008, the Appellee appealed against the decision of 15 April 2008 of the DEB at the Ad-hoc Arbitral Tribunal of the German Olympic Sports Association and applied for the decision to be reversed and for the imposition of a two-year suspension on the player.

The ad-hoc Arbitral Tribunal dismissed the appeal with its decision of 3 December 2008, citing the reason that the sanction applied for by the Appellee would lack legal foundation.

B.
On 27 May 2008, the Appellee appealed at TAS the letter of the IIHF of 7 May 2008 and applied for the imposition of a two-year suspension (Proceedings CAS 2008/A/1564). It noted that the request for arbitration was made to ensure its rights, in particular for the case that the request submitted to the German ad-hoc Arbitral Tribunal would not be allowed. Subsequently, the proceedings were suspended pending a decision by the German Arbitral Tribunal.

Following this, the Appellee also appealed the decision made by the ad-hoc Arbitral Tribunal of the German Olympic Sports Association (Proceedings CAS 2008/A/1738). With the decision of 23 June 2008, TAS refused on the grounds of lack of jurisdiction.

The IIHF waived participation in the arbitration proceedings. Amongst others, the Appellant objected on the grounds of want of jurisdiction, because an arbitration agreement was lacking.

C.
In respect to the first appeal (Proceedings CAS 2008/A/1564), based on the "Player Entry Form" signed by the Appellant for the World Championship, TAS declared itself to be competent and took the e-mail sent by the IIHV on 7 May 2008 as an appealable decision. It revoked the decision by the IIHF with an arbitration ruling of 23 June 2008 and pronounced a two-year suspension of the Appellant.

D.
The Appellant applied to the Federal Court as a civil complaint to revoke the arbitration ruling by TAS of 23 June 2009 (CAS 2008/A/1564).

Both the Appellee and the prior instance concluded a dismissal of the complaint. The Appellant has submitted a reply to the Federal Court.

E.
With its decision of 7 September 2009, the Federal Court granted a suspensory effect to the appeal.

Considerations:

1.
As per Article 54 Para. 1 BGG, the decision of the Federal Court is provided in an official language, usually the one of the appealed decision. If this decision is written in another language, the Federal Court will use the official language used by the parties. The appealed decision has been provided in English. As this is not one of the official languages and the parties use different languages before the Federal Court, the Federal Court will provide its decision in the language of the appeal, as is customary.

2.
Within the scope of international arbitration, the complaint in civil matters is admissible according to the prerequisites in Article190-192 IPRG (SR 291) (Art. 77 Para. 1 BGG).

2.1 The Arbitral Tribunal is located chiefly in Lausanne. At the relevant times, the Appellant had neither his domicile nor his usual abode in Switzerland. As the parties have not excluded in writing the provisions of the 12th Chapter of the IRPG, they will be applied (Art. 176 Para. 1 and 2 IPRG).

2.2 Only the complaints conclusively listed in Art. 190 Para. 2 IPRG (BGE 134 III 186 E. 5 p. 187; 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282) will be admissible. According to Art. 77 Para. 3 BGG, the Federal Court considers only the complaints mentioned and reasoned in the appeal; this complies with the obligation to notify as provided in Art. 106 Para. 2 BGG and Cantonal and Intercantonal laws against the violation of basic rights (BGE 134 III 186 E. 5 with annotation).

2.3 The Federal Court bases its decision on the facts stated by the Arbitral Tribunal (Art. 105 Para. 1 BGG). It can neither correct nor amend the statement of facts by the Arbitral Tribunal, even if these are obviously incorrect or

are based on a violation of rights as per Art. 95 BGG (cf. Art. 77 Para. 2 BGG, excluding the applicability of Art. 105 Para. 2 and Art. 97 BGG). However, the Federal Court can verify the actual findings of the appealed arbitral decision, if admissible, as per 190 Abs. 2 IPRG Complaints against these findings are submitted or, in exceptional cases, new facts [under Swiss *Novenrecht*] are taken into account (BGE 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733; each with annotations). New facts and evidence may also be introduced only inasmuch as the decision of the prior instance gives occasion (Art. 99 Para. 1 BGG).

The Appellant precedes his legal arguments with a comprehensive statement of facts in which he sets forth the sequence of events and the proceedings from his point of view. As the Appellee argues rightly, he deviates in various instances from the actual findings of the prior instance or expands the same, without claiming exceptions from the obligation to stay with the facts as per Art. 105 Para. 2 and Art. 97 Para. 1 BGG. His arguments must be disregarded therefore. Also to be disregarded are the various evidences newly submitted by the Appellant.

3.
Referring to Art. 190 Para. 2 Letter b IPRG, the Appellant claims that the prior instance wrongfully declared itself to be competent.

3.1 With reference to the obligation to comply with and to realize the WADC, the wide-ranging purpose of the then- applicable IIHF statutes exceeding the responsibility for the IIHF championships made by the IIHF and the membership of the DEB in the IIHF, the prior instance stated at first that the Appellant - from the point of view of the statutes of the IIHF - is to be considered as a player fielded by the DEB for participation in an IIHF championship or event and who is, as such, bound by the IIHF statutes and regulations and must acknowledge the final and binding power of decision. Consequently, the IIHF demands the signing of an entry form ("Player Entry Form") on the occasion of an IIHF championship or IIHF event that states, amongst other things, as follows:

"I, the undersigned, declare, on my honour, that

a) I am under the jurisdiction of the National Association I represent.
…

l) I agree to abide by and observe the IIHF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution."

The prior instance correctly found that the aforementioned arbitral agreement would have to comply with the prerequisites of Art. 178 IPRG and also declared Swiss law to be applicable, which neither party disputes. It then construed the declaration of the complaint by applying the principle of trust and deliberated that the players declared themselves bound to the IIHF statutes and regulations in general and, in particular, to the decisions (including disciplinary measures) made by the IIHF. The obligation to reach the TAS after exhaustion of the internal remedies, would not relate only to disputes in connection with the IIHF championship but also to those that are not necessarily in connection with the IIHF championship and the connected aspects of the IIHF statutes and regulations. This would follow from the use of the terms "and/or" in the wording of Letter I but also from the general formulation of the initial sentence of that clause. Hence, there would be no indication arguing for the exclusion of the competence of the TAS.

The prior instance also found that the fact that the Appellant signed the aforementioned entry forms almost every year since 2003, would not mean that the validity of the document would be limited to one year. Furthermore, the IIHF would require a repeated signature for administrative reasons on the occasion of every IIHF championship even from players who already signed such a form, in order to ensure that all participants in the current IIHF championship would have complied.

Due to the fact that the IIHF could never know whether a player who had been registered for a IIHF championship would be able to participate in the coming championship, or - due to an injury or performance weakness - in a later championship only, the IIHF would be able to comply with their obligation to WADA to perform training checks and checks out of season only if players once registered for a IIHF championship would remain within the authority of the IIHF as long as they may be considered for future meets and/or events.

The prior instance is of the opinion that the entry form signed by the Appellant thus complies with the requirements of a valid arbitration agreement. In addition, the letter of 7 May 2008 by the IIHF should be considered as the decision of the IIHF disciplinary committee, for which reason the appealed prior instance, supported by Article 3.9 of the IIHF Disciplinary Regulation 2004 in combination with Articles 47 - 49 of the then valid IIHF statutes which provide for the option to appeal to the TAS, would be competent for an assessment of the appeal made by the Appellant. By signing the entry form, particularly on 26 April 2007 and again on 1 May 2008, the Appellant would be bound by these provisions.

3.2

3.2.1 The Federal Court verifies that the complaint of jurisdiction according to Art. 190 Para. 2 letter b IPRG, including material preliminary questions to which the answer to the competence depends, be clear in respect to the law. On the other hand, it examines the actual statements of fact of the appealed arbitration decision within the framework of the complaint of jurisdiction, only if complaints are submitted contradicting these statements of facts that are admissible as per the meaning of Art. 190 Para. 2 IPRG or, in exceptional cases, where new facts [under Swiss *Novenrecht*] are taken into account (BGE 134 III 565 E. 3.1 p. 567; 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733).

3.2.2 Since the prior instance could not determine a genuine desire of the parties, it correctly evaluated, according to the principle of trust, the content of the declaration of intent as contained in the signed entry form (cf. BGE 132 III 268 E. 2.3.2 p. 274 with annotations). The declaration has thus to be interpreted, as it should and must be understood in good faith according to its language and context as well as the overall circumstances (BGE 133 III 61 E. 2.2.1 p. 67; 132 III 268 E. 2.3.2 p. 274 f.; 130 III 417 E. 3.2 p. 424, 686 E. 4.3.1 p. 689; each with annotations).

As per Letter I of the entry form, the player submits for certain disputes ("such dispute") to the jurisdiction of the TAS. To what disputes this obligation relates is defined in the previous phrase, namely any dispute arising in connection with the IIHF championship and/or the Statutes, By-laws and Regulations as well as decisions made by the IIHF relating thereto ("the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto"). Based on the wording, the use of the terms "and/or" does indicate, as correctly determined in principle by the prior instance, that disputes concerning the statutes and regulations would need to be submitted to the TAS, even without regard to the respective IIHF championship. On the other hand, the objection by the Appellant, that the addition "relating thereto" could be understood as limitation in the sense that even disputes concerning the statutes, regulations and decisions by the IIHF are only then covered by the arbitration clause if they are connected to the IIHF championship, cannot be denied. However, the question does not require further examination as the meaning of the declaration in good faith becomes clear from the context.

3.2.3 The Appellant did sign each entry form in anticipation of his participation in the IIHF world championship. The "Player Entry Form" consisted of a single-page form listing first the respective IIHF meet, its location and date and the player's team. Sometimes the designation of the meet was shown in the letterhead (e.g., in the years 2006 and 2007: "IIHF World Championship, MEN"). Once it also showed the logo of the world championship (in 2007: "World Championship Russia"). In the main section of the form, the personal data of the player is entered and, in the final section, in considerably reduced font size which is difficult to read, various explanations are shown, amongst other things, the aforementioned arbitration clause.

Regardless of the wording of the clause, the player, who had completed and signed the entry form in principle annually at irregular intervals, could assume that his declarations, as with the data listed in the beginning, would refer to a specific competition. He did not need to assume, when signing in respect to an athletic event that was

exactly described showing time and location, that he would also be required to submit in the small print to the competence of an arbitral tribunal for any dispute, completely in general and without any connection to the said championship. The argument of the Appellee as well as the reasoning of the prior instance, that the annually-repeated signature is provided only for administrative reasons and would not effect the validity that is unrestricted in time and subject, are also not convincing. Much more plausible is the idea that the entry form, its purpose corresponding to the designation as "Player Entry Form" and the orientation to a concrete match, was to be annually completed and signed by the players fielded for the national teams, just and exclusively for the upcoming world championship.

The Appellee did not prove a connection between the actual testing ordered on 6 March 2008 and the requested general suspension of two years with the IIHF world championship taking place in Canada on May 2 - 11, 2008. According to the findings in the appealed decision, the control had been ordered neither by WADA nor the IIHF, whereby and, to the contrary, the latter declared itself incompetent in the subject matter. The control was performed not by WADA, but by NADA, and the German Ice Hockey Federation was first and foremost competent for to evaluate the test result. Even the reference in the prior instance to the obligation of the IIHF towards WADA to perform training controls and out-of-season controls is thus unable to substantiate any connection with a IIHF competition. The Appellant had not to proceed in good faith from the assumption that, with signing the entry form on 1 May 2008, he would agree to an arbitration agreement comprising the sanctioning of his behaviour during the doping control on 6 March 2008 that already had resulted in the instigation of disciplinary proceedings with the national federation.

The dispute at hand in relation to the two-year suspension requested by the Appellee in connection with the doping control performed on 6 March 2008 by NADA was not covered in the arbitral agreement in Letter I of the entry form ("Player Entry Form"). Contrary to the appealed decision, the competence of the prior instance cannot be supported by the entry form signed by the Appellant.

3.2.4 Except for the entry form for the world championships that has been found to be insufficient in view of Art. 178 IPRG, the findings of the appealed decision do not provide any indication of an arbitral clause valid in the sense of this provision. The Appellee states in its response, in a “blanket” manner, that the Appellant, by signing the entry form, only confirms an existing condition, since he belongs to a national federation participating in the world championship, which federation itself is a member of the international organization IIHF. The prior instance, however, has based the binding of the Appellant to its jurisdiction on the signing of the IIHF entry forms, in particular for the years 2007 and 2008. Although it maintains in its consultation that the IIHF statutes and other IIHF regulations, in particular Article 3.1 of the IIHF Disciplinary Regulations 2004, form a further statutory basis for its competency, but in turn bases the binding of the player to these regulations on the signing of the entry forms, it argues that this second statutory basis is derived in a “cascade” effect from the first one.

Neither the prior instance nor the Appellee demonstrate specifically how the Appellant should have submitted in proper form and in general to the IIHF statutes and other regulations, in particular to the IIHF Disciplinary Regulation 2004. However, the administration of justice is, in respect to the validity of arbitral agreements in the area of international arbitral jurisdiction, characterized by generosity, as demonstrated in the assessment of the effectiveness of arbitral agreements using references (BGE 133 III 235 E. 4.3.2.3 p. 244 f.; with annotations). Correspondingly, the Federal Court has occasionally considered as valid a global reference to an arbitral agreement contained within the federation's statutes (Judgments 4A_460/2008 of 9 January 2009 E. 6.2; 4P.253/2003 of 25 March 2004 E. 5.4; 4P.230/2000 of 7 February 2001 E. 2a; 4C.44/1996 of 31 October 1996 E. 3c; cf. BGE 133 III 235 E. 4.3.2.3 p. 245; 129 III 727 E. 5.3.1 p. 735; each with annotations). Thus, in the case of a soccer player being a member of the national federation, it considered the provision contained in the statutes, stating that players belonging to the federation must comply with FIFA regulations, as a legally effective reference to the arbitral clause contained in FIFA’s statutes (Judgment 4A_460/2008 of 9 January 2009 E. 6.2). However, the findings of the appealed decision do not show corresponding circumstances in the subject case.

An arbitral agreement valid as per Art. 178 IPRG has not been proven, contrary to the appealed decision. Hence, the prior instance incorrectly declared itself competent for the judgment of the subject dispute by basing it on the "Player Entry Form". It remains, however, open as to whether competence could be possibly supported by a reference, accepted by the player, to an arbitral clause contained in the federation's regulations, using the arguments of the parties to be considered in the arbitral proceedings.

4.
The complaint in civil matters against the international arbitral decision is purely of a cassatory nature (cf. Art. 77 Para. 2 BGG, excluding the applicability of Art. 107 Para. 2 BGG) - apart from exceptions where the present prerequisites are not given (cf. BGE 127 III 279 E. 1b p. 282; 117 II 94 E. 4 p. 95 f.). Hence, the decision of the prior instance of 23 July 2008 must be set aside following the approval of the appeal.

Corresponding with the outcome of the proceedings, the Appellee becomes liable for costs and damages (Art. 66 Para. 1 and Art. 68 Para. 2 BGG).

Thus, the Federal Court finds:

1.
The appeal is approved and the decision of the prior instance of 23 June 2008 is set aside.

2.
The court fees of SFR. 5,000.00 are imposed on the Appellee.

3.
The Appellee has to compensate the Appellant for the Federal Court proceedings with SFR 6,000.00.

4.
This judgment is provided in writing to the parties and the Tribunal Arbitral du Sport (TAS).

Lausanne, 6 November 2009

In the name of the I. Civil Law Department
of the Swiss Federal Court

The President:	The Law Clerk:
Klett	Leemann

[seal]