4A_358/2009[1]

Judgement of November 6, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

A._____,
Appellant,
Represented by Dr Maurice COURVOISIER and Dr Philippe NORDMANN

*v.*

World Anti-Doping Agency (WADA),
Respondent,
Represented by Mr François KAISER and Mr Yvan HENZER

Facts:

A.

A.a A._____ (the Appellant) domiciled in D._____ is a professional ice hockey player. He took part in various international competitions with the German national team and among others in the world ice hockey championships of the years 2003, 2004, 2006, 2007 and 2008 as well as in the Winter Olympics in Turin in 2006. The World Anti-Doping Agency (WADA) (the Respondent) is a foundation under Swiss law with seat in Lausanne. Its goal is

[1] Translator's note: Quote as A._____ *v.* World Anti-Doping Agency (WADA), 4A_358/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

the worldwide battle against doping in sport. The International Ice Hockey Federation (IIHF) is the international ice hockey federation with its seat in Zurich.

A.b On March 6, 2008 at 12.30 pm, Mr B._____, acting on behalf of the German National Anti-Doping Agency (NADA) appeared at the Appellant's domicile to undertake an out-of-competition sample collection[2]. According to the Respondent the Appellant refused to submit to the test even after he was advised by the controller of possible heavy disciplinary sanctions. It is undisputed that the doping controller left the Appellant's domicile at 12.50 pm without accomplishing anything. Four minutes later the Appellant called NADA to inform them of what had happened. At 2.16 pm he called NADA again and stated that he wanted to submit to a sample collection and NADA told him that a repetition of the test was not possible. Later and at his initiative, a doping test took place the same day at 5 pm, organised by the German Ice Hockey Federation (DEB) and carried out by Mr B._____. The test was analysed by the Institute of Doping Analysis and Sports Biochemistry Dresden; no forbidden substance or impermissible method was shown.

A.c On March 7, 2008, NADA informed the German Ice Hockey Federation of the case. On March 19, 2008, the latter advised NADA of its intent to warn the Appellant publically. NADA again told the DEB that refusing a sample collection was a violation of article 2.3 of the NADA code (NADC), which corresponds to article 2.3 of the WADA code (WADC) and had to be sanctioned accordingly. The DEB informed NADA that the sanctions in the NADC or the WADC were disproportionate and that in view of the circumstances of the case a public warning would be sufficient. Accordingly it pronounced a public warning against the player on April 15, 2008 and punished him with a fine of Eur. 5'000.- and 56 hours of charitable work. NADA became aware of the decision of the DEB in the media and learned also that the IIHF approved it and would let the player play in the World Ice Hockey Championship in Canada on May 2 – 11, 2008. NADA advised the Respondent on April 21, 2008 in order to enable it to take measures. In a letter of May 6, 2008, the Respondent requested the directorate of the IIHF World Championship to suspend the Appellant provisionally from May 6, 2008 and requested the IIHF to issue a decision within 48 hours as to his provisional suspension. Furthermore the Respondent requested the IIHF disciplinary committee to initiate a disciplinary procedure against the Appellant and to sanction him with a two years

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

suspension. The presidency of the IIHF advised the Respondent in an e-mail of May 7, 2008 that it was not in a position to act according to the request. The IIHF pointed out among other things that the disciplinary committee set in motion by the German Ice Hockey Federation had issued a decision in the matter on April 15, 2008 and that the time to appeal was not yet expired. The Respondent wrote to the IIHF on the same day that it assumed that the letter of May 7, 2008 was a decision within the meaning of the IIHF Rules, which was subject to an appeal to the Court of Arbitration for Sport (CAS).

A.d On May 9, 2008 the Respondent appealed the decision of the DEB of April 15, 2008 to the *ad-hoc* Arbitral Tribunal of the German Olympics Sports Confederation and submitted that the decision should be annulled and a two years suspension pronounced against the player. The *ad-hoc* arbitration tribunal rejected the appeal in a decision of December 3, 2008, as there was no legal basis for the sanctions requested by the Respondent.

B. On May 27, 2008 the Respondent appealed to the CAS against the IIHF letter of May 7, 2008 and submitted that a two years suspension should be ordered (CAS case 2008/A/1564). It pointed out that the request for arbitration was made to protect its rights in particular should the request be rejected, which it had filed with the German *ad-hoc* Arbitral Tribunal. The proceedings were then stayed until a decision by the German Arbitral Tribunal. Subsequently the Respondent appealed the decision of the *ad-hoc* Arbitral tribunal of the German Olympics Sports Confederation in front of the CAS as well (CAS case 2008/A/1738). In a decision of June 23, 2009, the CAS held that it had no jurisdiction. The IIHF did not participate in the arbitration. The Appellant raised in particular the lack of jurisdiction as there was no arbitration agreement.

C. With regard to the first appeal (CAS case 2008/A/1564), the CAS held that it had jurisdiction on the basis on the “Player Registration Form” signed by the Appellant each time with a view to the World Championship and held that the May 7, 2008 e-mail from the IIHF was a decision that could be appealed. In an award of June 23, 2009, it annulled the IIHF decision and ordered the Appellant suspended for two years.

D. In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS award of June 23, 2009 (CAS case 2008/A/1564). Both the Respondent and the CAS[3] submit that the appeal should be rejected. The Appellant submitted a reply to the Federal Tribunal.

E. The Federal Tribunal ordered a stay of the award on September 7, 2009.

Reasons:

1.

According to art. 54 (1) BGG[4], the Federal Tribunal issues its decision in one of the official languages, as a rule that of the decision under appeal. Should the decision have been issued in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As English is not a (Swiss) official language and the parties used different languages in front of the Federal Tribunal, the decision shall be issued in the language of the appeal brief according to practice.

2.

In the field of international arbitration a Civil law appeal is possible under the requirements of art. 190-192 PILA[5] (art. 77 (1 BGG)).

2.1

The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant time the Appellant had neither his domicile nor his habitual residence in Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA, these are to be applied (art. 176 (1) and (2) PILA).

2.2

All grievances exhaustively set forth in art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to art. 77 (3) BGG the

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[3] Translator's note: In the following developments I translated the word "Vorinstanz" by "CAS", although the word literally means "the lower court". CAS is clearer in the context.

[4] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[5] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the requirement at art. 106 (2) BGG as to the violation of constitutional rights or of cantonal and intercantonal law (BGG 134 III 186 at 5 with references).

2.3

The Federal Tribunal bases its decision on the facts found by the arbitral tribunal (art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are manifestly wrong or rely on a violation of the law within the meaning of art. 95 BGG (see art. 77 (2) BGG), which rules out the application of art. 105 (2) and art. 97 BGG). However the Federal Tribunal may review the factual findings of the decision under appeal when some admissible grievances are made against them within the meaning of art. 190 (2 PILA) or exceptionally when new evidence is taken into consideration (BGG 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). New facts or evidence may only be presented to the extent that the decision of the lower jurisdiction itself justifies doing so (art. 99 (1BGG). The Appellant precedes his legal developments with a detailed statement of facts in which he presents the course of events and the proceedings from his point of view. As the Respondent rightly objects, he thus deviates in various points from the factual findings of the CAS or broadens them without claiming any exceptions to the binding character of the factual findings according to art. 105 (2) and art. 97 (1) BGG. His submissions shall be disregarded to that extent. The new evidence introduced by the Appellant is also irrelevant.

3.

Based on art. 190 (2) (b) PILA the Appellant claims that the CAS wrongly accepted jurisdiction.

3.1

The CAS initially held that in view of the WADC's duty to comply with and implement the broad purpose of the IIHF Statutes at the time, which went beyond the IIHF championships and in view of the membership of the DEB in the IHF, the Appellant had to be considered, from the point of view of the IIHF Statutes, as a player summoned for an IIHF championship or event and as such he was bound by the IIHF Statutes and had to recognize the final and binding decision power of the IIHF. On the occasion of an IIHF championship or an IIHF event, the IIHF would consequently request from the players that they sign a Player Entry

Form[6] which reads in particular as follows: "I, the undersigned, declare, on my honour that a) I am under the jurisdiction of the National Association I represent. ... 1) I agree to abide by and observe the IIHF Statutes, By-Laws and Regulations (including those relating 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 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".[7] The CAS rightly held that the aforesaid arbitration clause would have to meet the requirements of art. 178 PILA and that the parties agree that Swiss law is applicable. The CAS thus interpreted the Appellant's statement on the basis of the principle of trust and considered that the players would have declared themselves generally bound by the IIHF Statutes and Regulations as well as by the decisions issued by the IIHF (including disciplinary measures). The duty to seize the CAS after exhausting the internal legal remedies would apply not only to disputes in relation with the IIHF Championship but also to those which are not necessarily connected to the IIHF Championship and to the aspects of the IIHF Statutes and Regulations in relation thereto. This would result from the use of the words "and/or" in the text of *litt*. l and from the general wording of the introductory sentence in that clause. Nothing would point to an exclusion of the jurisdiction of the CAS. Moreover the CAS adjudicated that the fact that the Appellant signed the aforesaid application form almost every year since 2003 would not mean that the validity of the document would be limited to a year. Besides, the IIHF demanded repeated signatures for administrative purposes on the occasion of each IIHF Championship also from players who had already signed such a form and only in order to ensure that everyone at the present IIHF Championship would have signed the form. Since the IIHF could not know whether a player summoned to one IIHF championship would also participate in the following or in a later championship, due to injury or feeble performance, the IIHF could meet its duty towards WADA to perform sample collections during training and outside the season only if players once summoned for an IIHF Championship remain within the legal jurisdiction of the IIHF as long as they may be considered for future championships or events. According to the CAS the registration form signed by the Appellant thus meets the requirements of a valid arbitration clause. Moreover the IIHF letter of May 7,

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

2008 must be considered as a decision of the IIHF disciplinary Committee thus giving jurisdiction to the CAS as to the Respondent's appeal pursuant to art. 3.9 of the IIHF 2004 Disciplinary Regulations in connection with article 47-49 of the IIHF Statutes in force at the time, which allow for an appeal to the CAS. To the extent that the Appellant signed the registration form, in particular on April 26, 2007 as well as on May 1st, 2008, he is bound by these provisions.

3.2

3.2.1

The Federal Tribunal exercises free judicial review from a legal point of view as to jurisdictional grievances according to art. 190 (2) (b) PILA, including the preliminary material issues from which the determination of jurisdiction depends. On the other hand, even within the framework of an appeal as to jurisdiction, (the Federal Tribunal) reviews the factual findings of the award under appeal only to the extent that some admissible grievances within the meaning of art. 190 (2) PILA are brought forward against such factual findings or exceptionally when new evidence is taken into consideration (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.2.2

Being unable to determine an actual intent of the parties, the CAS accurately interpreted the statement of intent contained in the registration form according to the principle of trust (see BGE 132 III 268 at 2.3.2 p. 274 with references). The statement must therefore be interpreted as it could and should have been understood according to its wording and context and under the circumstances (BGE 133 III 61 at 2.2.1 p. 67; 132 III 268 at 2.3.2 p. 274 f; 130 III 417 at 3.2 p. 424, 686 at 4.3.1 p. 689; with references). According to *litt.* l of the inscription form, the player submits certain disputes – "such dispute"[8] – to the jurisdiction of the CAS. The preceding part of the sentence describes to which disputes this undertaking relates, namely "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"[9]. To begin with the wording, the use of the two words "and/or" does suggest that the statutes and regulations concerning disputes even without connection to the IIHF Championship then held would have to be submitted to the CAS, as the CAS recognized

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

accurately in principle. On the other hand the Appellant's objection cannot be rejected out of hand, that the additional "relating thereto" must be understood as a limitation, namely that disputes relating to the statutes, regulations and decisions of the IIHF can be covered by the arbitration clause only when they are connected to the IIHF Championship. The issue needs not be analysed in depth however as the meaning of the statement at hand can be deducted from the context according to the rules of good faith.

3.2.3

The Appellant signed the registration form at the time with a view to participating in the IIHF Championship. The "Player Entry Form"[10] consisted of a one page form, on which the IIHF competition involved, its venue and date as well as the player's team were mentioned first of all. Moreover the description of the competition appeared in part already on the letterhead (for instance in the years 2006 and 2007: "IIHF World Championship, Men"[11]) once also with the corresponding logo of the World Championship (in the year 2007: "World Championship, Russia"[12]). The player's personal data are registered in the main body of the form whilst various explanations, including the aforesaid arbitration clause are mentioned in some distinctly smaller and thus hardly readable fonts. Irrespective of the wording of the clause the player filling out and signing the inscription form in principle for a year in a recurring manner at irregular intervals should assume that his statements and the indications given relate to a specific competition. When signing with a view to a sport competition precisely described in time and space he should not take into account that he would submit at the same time in small fonts, generally and without connection to the specific championship to the jurisdiction of an arbitral tribunal for any disputes. The Respondent's argument and the reasons of the CAS, according to which a signature recurring yearly would be necessary merely for administrative purposes and would change nothing to the unlimited validity as to time and object are not persuasive. It is much more plausible that the inscription form was to be filled and signed by the players yearly precisely and exclusively with a view to the coming world championship, corresponding to its purpose, to the description as "Player Entry Form" and to its reference to a specific tournament. The Respondent failed to demonstrate a connection between the sample collection ordered on March 6, 2008 as well as the requested general suspension for two years and the IIHF World Championship taking place in Canada on May 2-11, 2008. According to

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

the factual findings of the decision under appeal, the test was ordered neither by WADA nor by IIHF and the latter held to the contrary that it had no jurisdiction in the matter. The test was not conducted by WADA but by NADA and the German Ice Hockey Federation was primarily competent to assess its results. The reference by the CAS to the duty of the IIHF towards WADA to conduct tests during training and outside the season could not justify a connection to an IIHF competition. According to the rules of good faith, the Appellant did not have to assume that by signing the inscription form of May 1st, 2008, he would enter into an arbitration agreement which included sanctions for his behaviour as to the doping test of March 6, 2008, which had already led to disciplinary proceedings in front of the national federation. The dispute at hand as to the two years suspension requested by the Respondent in connection with the doping test conducted by NADA on March 6, 2008 is not included in the arbitration clause contained in *litt.* 1 of the Player Entry Form[13]. Contrary to the decision under appeal the CAS jurisdiction against the Appellant cannot be deducted from the registration form.

3.2.4

Except for the registration form to the World Championship, which has proved to be insufficient for the purposes of art. 178 PILA, the factual findings of the decision under appeal do not show any effective arbitration clause within the meaning of that provision. The Respondent flatly claims in its answer that by signing the inscription form the Appellant would have merely confirmed a pre-existing state of affairs as he belongs to a national federation participating in the World Championship which is itself a member of the international federation IIHF. Yet the CAS based its finding that the Appellant was bound to its jurisdiction on the signature of the IIHF inscription form, in particular in 2007 and 2008. In its brief it does hold that the IIHF statutes and other IIHF regulations, in particular article 3.1 of the IIHF 2004 Disciplinary Regulations established an additional legal ground for its jurisdiction, yet it refers again to the signature of the inscription form to claim that the player was bound, to the extent that it holds that the second legal basis would be deducted from the first one "in cascade". Neither the CAS nor the Respondent show concretely how the Appellant would have submitted in a formally valid and general way to the IIHF Statutes and other provisions, in particular the IIHF 2004 Disciplinary Regulations. Admittedly case law as to the validity of arbitration agreements in the field of international arbitration is generous, as

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

shown in adjudicating the validity of arbitration agreements by reference (BGE 133III 235 at 4.3.2.3 p. 244 with references). Hence the Federal Tribunal found that a global reference to an arbitration clause contained in the statutes of a federation was valid (Decision 4A_460/2008, January 9, 2009 at 6.2; 4P.253/2003, March 25, 2004 at 5.4; 4P.230/2000, February 7, 2001 at 2A; 4C.44/1996, October 31, 1996 at 3c; see also BGE 133 III 235 at 4.3.2.3 p. 245; 129 III 727 at 5.3.1 p. 735; with references). Also, in the case of a football player who belonged to a national federation, which had in its statutes a provision according to which the members would have to abide by the rules of FIFA, it held that there was a legally valid reference to the arbitration clause contained in the FIFA Statutes (Decision 4A_460/2008, January 9, 2009 at 6.2). However, the factual findings of the decision under appeal do not show that in the case at hand there would be some corresponding relationship. Contrary to what was held in the decision under appeal there is no valid arbitration agreement according to art. 178 PILA. The CAS was wrong to accept jurisdiction to decide the case at hand on the basis of the "Player Entry Form"[14]. Whether or not on the basis of the submissions of the Parties in the arbitral proceedings, jurisdiction, if any, could be based on a reference accepted by the player to an arbitration clause contained in the regulations of a federation remains open.

4.

The Civil law appeal against international arbitral awards only purports to the annulment of the decision (see art. 77 (2) BGG), ruling out the application of art. 107 (2) BGG, with some exceptions, the conditions of which are not met here (see BGE 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 f.). The decision of the CAS of June 23, 2009 is accordingly to be annulled as a consequence of the appeal being accepted. In view of the outcome of the proceedings the Respondent must pay the costs and compensate the other party (art. 66 (1) and art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1. The appeal is accepted and the decision of the CAS of June 23, 2009 is annulled.
2. The judicial costs, set at CHF 5'000.-, shall be paid by the Respondent.

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

3. The Respondent shall pay to the Appellant an amount of CHF 6'000.- for the federal judicial proceedings.
4. This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 6, 2009

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

The presiding Judge : The Clerk:

KLETT (Mrs) LEEMANN