4A_368/2009[1]

Judgement of October 13, 2009

First Civil Law Court

Federal Judge Klett (Mrs), Presiding,
Federal Judge Corboz,
Federal Judge Kolly,
Clerk of the Court: Caruzzo

X._____ Sàrl,
Petitioner,
Represented by Mr. Douglas Hornung and Mrs. Tetiana Bersheda

v.

Y._____,
Respondent,
Represented by Mr. Rocco Taminelli

Facts:

A.
In a contract of November 15, 2007 governed by Swiss law,
X._____ Sàrl in charge of financial matters for the professionals biking team
W._____ hired the professional racing cyclist Y. _____ for two years as from January 1st, 2008. The racing cyclist's compensation was set at €275'000.—for 2008 and at €340'000.—for 2009.

[1] Translator's note: Quote as X._____ *v.* Y._____, 4A_368/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

X._____ Sàrl terminated the aforesaid contract with immediate effect by a registered letter of July 23, 2008 because a medical report attached to the letter showed some anomalies in the values of urine and blood taken from the racing cyclist during an internal check conducted by the team. According to (the Respondent) this seriously hinted to a stimulation of the bone marrow as a consequence of an administration of exogenous EPO.

B.

On September 1st, 2008 Y._____ filed a request for arbitration with the Court of Arbitration for Sport (CAS) based on the arbitration agreement contained in the contract, with a view to obtaining some 5.7 million Euros of damages pursuant to art. 49, 328 and 337c CO[2]. X._____ Sàrl submitted that the request should be rejected and counterclaimed for an amount of € 1'000'000.-- as compensation for reputational damage.

In an award of June 15, 2009, the CAS partially granted the request and ordered X._____ Sàrl to pay an amount of € 654'166.67 to Y._____ with interest at 5% as from November 27, 2008 and authorized the publication of the award by the Claimant and decided to make it available to the International Cycling Union (UCI). 75% of the arbitration costs were to be paid by X. _____ Sàrl which was ordered to pay CHF 25'000 to Y. _____ as costs, all other and further submissions by the parties being rejected. In summary, the CAS held that the employer had terminated the employment contract between the parties in an unjustified manner, on the basis of a simple suspicion of doping and without resorting to the preliminary *ad hoc* procedure set forth in the contract.

C.

On July 15, 2009, X. _____ Sàrl filed a Civil law appeal against the June 15, 2009 award. The appeal was rejected in a separate decision today.

D.

On August 10, 2009, X. _____ Sàrl filed a request for revision with a view to the annulment of the same award.

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[2] Translator's note: CO is the French abbreviation for the Swiss contract law, known as *Code des Obligations*

The Respondent principally submits that the matter is not capable of revision and alternatively that the request should be rejected. The CAS submits that the request should be rejected.

Reasons:

1.

The Statute on Private International Law (PILA[3]; RS 291) contains no provisions as to the revision of arbitral awards within the meaning of art. 176 *ff* PILA.
The Federal Tribunal supplemented that lacuna by case law. The grounds for revision of such awards were those of art. 137 OJ[4]. They are now contained at art. 123 LTF[5]. The Federal Tribunal has jurisdiction as to a request for revision of any international arbitral award, whether final, partial or interlocutory; its jurisdiction in this respect extends only to awards that are binding the arbitral tribunal as opposed to mere procedural orders or directives, which may be modified or withdrawn during the proceedings. When granting a request for revision, the Federal Tribunal does not adjudicate the matter itself but it sends the case back to the arbitral tribunal which issued the decision or to a new arbitral tribunal to be constituted (ATF 134 III 286 at 2 and cases quoted).

2.

The Respondent claims that the matter is not capable of revision as the Petitioner validly renounced to challenge the award. Whether the renunciation to appeal as allegedly included in the arbitration clause would also exclude the filing of a request for revision or not may remain undecided here (see judgement 4A_234/2008 of August 14 at 2,1 and the cases quoted). Indeed the renunciation involved is in any event ineffective for the reasons set forth at paragraph 3 of the judgement issued today as to the Civil law appeal.

3.

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[3] 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.

[4] Translator's note: OJ is French abbreviation for the *Loi d'Organisation Judciaire*, the law organizing federal courts prior to the new Federal Statute of June 17, 2005

[5] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal RS 173.110

3.1 In its request for revision the Petitioner relies on a new fact and new evidence contained in documents it submitted to the CAS as an enclosure to its fax dated June 12, 2009 (yet sent on the 15th of the same month). The new circumstance claimed is the adoption on May 9, 2009 and the entry into force on May 31st, 2009 of the new technical guidelines of the World Anti-Doping Agency (WADA) with regard to EPO (TD2009EPO). According to (the Petitioner) the stimulation of the Respondent's bone marrow caused by exogenous EPO should be considered as established for the purposes of the new guidelines, which would justified after the fact the immediate termination of the racing cyclist.

3.2

3.2.1 Pursuant to art. 123 (2) (a) LTF, revision may be sought in civil matters if the petitioner subsequently discovers some pertinent facts or some conclusive evidence, which he could not rely upon in the previous proceedings, to the exclusion of any facts or evidence subsequent to the judgment.

That provision substantially repeats art. 137 (b) OJ so that previous case law retains its value. Thus only the facts which took place until the time at which some new factual allegations could still be made in the main proceedings may justify revision based on art. 123 (2) (a) LTF, provided they were not known to the petitioner despite all his diligence and were discovered only after the decision for which revision is sought; such facts must also be pertinent, *i.e.* of a nature that could modify the factual findings on which the decision under review is based and lead to a different decision on the basis of an accurate legal assessment (ATF 134 II 669 at 2 and cases quoted). The same applies *mutatis mutandis* to new evidence (see judgement 4P.213/1998 of May 11, 1999 at 2b).

3.2.2. The requirements justifying revision of the CAS award on the basis of art. 123 (2) (a) LTF are evidently not met in this case. It its Civil law appeal the Petitioner claimed that regulation TD2009EPO indeed came into force on May 31st, 2009 namely after the April 29, 2009 hearing, but that during the hearing it had been mentioned "that it is likely that the new regulation will come into force soon" (p. 18 last paragraph). In the request for revision the Petitioner again claims that the new WADA regulations were indeed mentioned during the aforesaid hearing as "entry into force was possible as of the end of May 2009"; it adds that the team doctor had applied precisely the new rules (brief p. 8 at 23). Moreover it sets the time of discovery of the ground for revision

on May 9, 2009 to determine when the time limit of
art. 124 (1) (d) LTF to file the *ad hoc* request started running (brief p. 12 at c). It is thus clearly established that the Petitioner knew of the alleged new fact or evidence before the award of June 15, 2009 was notified.
Irrespective of what (the Petitioner) says it is hardly debatable that it could have introduced the "new fact" in the proceedings. It hardly needs to be recalled that it had been mentioned at the April 29, 2009 hearing. Hence elementary prudence would have required that party to invite the CAS to take into consideration the new guideline, which was about to be adopted and the entry in force of which was considered already for the following month, whilst requesting if necessary that the arbitral proceedings should be stayed until the new regulation came into force. Instead of doing so, the Petitioner waited until it knew the outcome of the Respondent's request and only then it relied on the alleged new circumstance. Contrary to what it claims and as the CAS points out with reason in its answer to the petition, art. R44.3 of the Sport Arbitration Code made it possible for (the Petitioner) to require the CAS to take the circumstance into consideration. Consequently the Petitioner must face its own lack of diligence.

3.3. Moreover even if the ground for revision were established, the request could not be granted. Indeed paragraphs 87 to 96 of the award under review show that in the opinion of the CAS, the Petitioner did not resort to the preliminary procedure set forth in the employment contract, which should have been applied before the Respondent could be terminated. That additional reason, which the Petitioner leaves untouched, would be sufficient to uphold the award even if it were to be admitted on the basis of the new WADA guidelines that the Respondent was effectively doped and that the Petitioner's suspicions were accordingly well founded.

4.
In view of the foregoing, the request for revision may only be rejected, which renders moot the request for a stay.

Consequently the Petitioner shall pay the costs of the federal proceedings (art. 66 (1) LTF) and pay costs to the Respondent (art. 68 (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The request for revision is rejected.

2. The judicial costs set at CHF 9'000.-- shall be borne by the Petitioner.

3. The Petitioner shall pay to the Respondent an amount of CHF 10'000.-- as costs.

4. This judgement shall be notified to the representatives of the parties and to the Court of Arbitration for Sport (CAS)

Lausanne, October 13, 2009

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

The presiding Judge | The Clerk:

KLETT (Mrs) | CARUZZO