4A_620/2009[1]

Judgement of May 7, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: CARRUZZO.

1. A._____,

2. B._____,

Appellants,

Both represented by Mr Jorge IBARROLA and Mr Claude RAMONI

v.

International Biathlon Union (IBU),

Respondent,

Represented by Mr Stephan NETZLE

Facts:

A.

A.a A._____ and B._____ are two international biathletes belonging to a national biathlon team.

The International Biathlon Union (IBU) is the international federation for biathlon.

[1] Translator's note: Quote as A._____ and B._____ *v.* International Biathlon Union (IBU), 4A_620/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

The World Anti-Doping Agency (WADA) is the institution in charge, among other things, of establishing and enforcing international anti-doping rules in the field of sport.

A.b In early December 2008, during some competitions organized by the IBU, the two biathletes underwent anti-doping tests. A specialist of the WADA-accredited laboratory in Lausanne analysed the "A" urine samples in the same month. She showed the presence of recombinant EPO (hereafter "rEPO"). A second opinion, issued by the Director of the WADA-accredited Vienna laboratory, confirmed the result of that analysis. The "B" samples were opened on February 10, 2009 and analysed by the same specialist of the Lausanne laboratory, who confirmed the presence of rEPO in the latter two days later. That conclusion too was ratified by the Vienna laboratory.

In two separate decisions issued on May 8, 2009, the Doping Hearing Panel (DHP) of the IBU suspended both biathletes for two years from the date of the tests.

B.
On August 13, 2009, the two biathletes appealed to the CAS with a view to obtaining the annulment of the decision of the DHP and being freed of any charge in connection with the anti-doping tests carried out on December 4 and 5, 2008.

In its answer of September 22, 2009, the IBU submitted that the appeal should be rejected.

Witnesses were heard at a hearing in Lausanne on October 15, 2009.

In an award of November 12, 2009, the CAS rejected the two biathletes' appeal.

C.
On December 10, 2009 A._____ and B._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the CAS award.

The IBU and the CAS, which produced the arbitration file, submit that the appeal should be rejected.

Reasons:

1.

According to Art. 54 (1) LTF[2], the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When that decision is in another language (in this case English), the Court resorts to the official language chosen by the parties. In front of the CAS, they resorted to English. The Civil law appeal filed by the two biathletes is in French, whilst the Respondent's answer is in German. According to its practice, the Federal Tribunal shall opt for the language of the appeal and issue its decision in French.

2.

In the field of international arbitration, a Civil law appeal is possible against the decisions of arbitral awards under the requirements set forth at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF). Whether with regard to the object of the appeal, to the standing to appeal, to the time limit, to the submissions made by the Appellants or as to the reasons raised in the appeal brief, none of these requirements raises any problems in this case. There is accordingly no reason not to address the merits of the appeal.

3.

In a first grievance, the Appellants argue that their right to be heard was violated.

3.1 The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA is not different in principle from that contained in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus in the field of international arbitration it was held that each party has the right to express its views on the facts essential for the

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

[3] Translator's note: The official languages of Switzerland are German, French and Italian.

[4] 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.

decision, to submit its legal arguments, to propose evidence on pertinent facts and to participate in the arbitral hearings (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

Case law also deducted from the right to be heard a minimal duty for authorities to review and to handle pertinent issues. That duty, which was extended to international arbitration, is breached when, inadvertently or by misunderstanding, the arbitral tribunal does not take into consideration some factual allegations, arguments, evidence and offers of proof presented by one of the parties and important for the decision to be issued. It behooves the allegedly aggrieved party to establish that the arbitral tribunal did not review certain factual elements, some evidence or some legal issues which it had regularly put forward to support its submissions and that such elements were of a nature to influence the issue of the dispute. If the award totally overlooks some elements that are apparently important to the resolution of the dispute, it is for the arbitrators or for the respondent to justify that omission in their answers to the appeal. They may do so by showing that, contrary to the appellant's arguments, the items omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly rebutted by the arbitral tribunal. In this context, it must be recalled that the right to be heard is violated only if the authority does not meet its minimum duty to review the pertinent issues. Thus the arbitrators have no obligation to discuss all the arguments raised by the parties, so that they could not be held to have violated the right to be heard in contradictory proceedings for not rebutting, even implicitly, an argument objectively deprived of any relevance (ATF 133 III 235 at 5.2 and cases quoted).

The Appellants argue that the CAS disregarded the aforesaid principles in three respects. The three sections of the grievance raised must be reviewed successively.

3.2

3.2.1 Firstly the Appellants claim that the CAS reviewed neither the issue of the scope of Art. 19.7 of the IBU Anti-Doping Regulations, which came into force on January 1st, 2009 (IBU Anti-Doping Rules; hereafter ADR), nor that of the principle of non-retroactivity. According to them, if it had dealt with these two issues, the CAS should

have applied the 5.0 version of the International Standard for Laboratories (ISL) put into force by WADA in 2008 and not the 6.0 version, which came into force on January 1st, 2009. Yet in the former version but not in the latter, the ISL imposed that the laboratory that analysed the "A" samples should entrust the handling and the examination of the "B" samples to a different analyst (Art. 5.2.4.3.2.2; "rule of two analysts" according to the wording used in the appeal brief). Hence, according to the Appellants, if the CAS had concluded, as it should have, that the 2008 version of ISL was to be applied, it could only have granted the appeal and annulled the disciplinary sanction inflicted on them by the DHP, as the latter sanctioned a violation on the basis of analysis results conducted in violation of the two analysts rule.

3.2.2 The criticism in this first section of the grievance under review is baseless.

Far from ignoring the arguments submitted by the Appellants in connection with the issue of transitional law in the case, because the analysis of the "B" samples had not been made the same year as that of the "A" samples, the CAS devoted a large part of chap. 7 of its award to the issue.

To start with, the Arbitrators found that the Parties agreed that the date at which the samples were collected was decisive for the choice of the law applicable *ratione temporis* (award at 7.2), so that the appeal had to be considered in the light of the pertinent provisions of the 2006 ADR. In that finding, which the Appellants are not entitled to challenge in front of the Federal Tribunal, they implicitly but clearly rejected the applicability of the 2009 version of the ADR and hence that of Art. 19.7 of the aforesaid regulation, which the Appellants had raised in front of them.

The CAS then set forth the reasons for which it held that the 2009 version of the ISL governed the analysis of the "B" samples (award, 7.3 to 7.6). In this respect, it stated that pursuant to Art. 6.1 of the 2006 version of the ADR, that procedure had to follow the rules in force at the time the analysis was performed and not those of an already abrogated earlier version. Consequently the Arbitrators did not overlook their minimal duty to review and handle the pertinent issues of transitional law. In reality, the

Appellants argue that they did not answer those questions in the manner they hoped. Yet this is no criticism connected with a violation of the right to be heard.

3.3 Secondly, the Appellants argue that the CAS did not review the issue of the fundamental nature of the specific rule of the ISL 2008 version or that of the principle of *lex mitior* embodied at Art. 19.7 of the 2009 version of the ADR.

That grievance is not better founded than the preceding one. Indeed after mentioning that the Appellants raised the issue of *lex mitior* (award at 7.2), the Arbitrators specifically reviewed this issue (award at 8.10). To dispose of it they stated the principle that *lex mitior* applies to the sanction and not to the technical rules governing the evidentiary proceedings enabling the discovery of a case of doping. Alternatively, they held the view that even if the scope of application of *lex mitior* should be extended beyond the sanction, one would have to hold that in the case at hand it was impossible to say which of the two versions of the ISL to be considered – i.e. the 2008 and 2009 version – is more favourable to the Appellants. According to the Arbitrators, the analysis of the "A" and "B" samples were made in accordance with the procedural rules applicable at the time they were carried out. Accordingly it did not matter in their view that such rules were not the same because a person charged with doping could not be allowed to rely on the most favourable technical rules by claiming the principle of *lex mitior*. Resorting to *reductio ad absurdum*, the Arbitrators also emphasised that the Appellants' argument, applied to a criminal case, would result in the person charged with a crime escaping any punishment simply because the DNA test proving the guilt did not yet exist at the time the crime was committed.

Reasoning in that manner, the CAS did not at all violate in this respect its minimal duty to review and decide the disputed issue. That the Appellants may not agree with the manner in which it did so does not change the issue.

3.4

3.4.1 Thirdly, it is alleged that the CAS did not discuss and decide with regard to a mistake committed by the Vienna laboratory.

In this respect, the Appellants argue firstly that in order to detect the possible presence of exogenous EPO in an athlete's body, the laboratory gives a number to each sample. The samples given by the biathletes as well as some reference samples are then included in a gel, each line of the gel corresponding to a sample (see the chart in the award at 8.18).

Coming back to the case at hand, the Appellants then argue with reference to § 90 ff of their appeal brief[5] that through the analysis of the report produced by the Vienna laboratory for the "B" samples, they demonstrated the existence of a problem as to how the line numbers were attributed to the samples. Indeed, the numbers of the lines attributed by the Vienna laboratory to the samples belonging to the biathletes would not correspond to the numbers attributed by the Lausanne laboratory to the same samples, although the latter were supposed to refer to the image of the same gel. The Respondent itself would have recognised that there was a problem whilst wrongly trying to minimize its scope. Yet according to the Appellants, the CAS did not at all entertain their argument, merely addressing at 8.21 ff of the award the arguments relating to other mistakes as to the identification of the samples by the laboratories involved. Yet that issue was of fundamental importance in their view because a problem with identifying the samples analysed is undeniably such as to modify the results of the analysis. By not dealing with it, the CAS would therefore have violated the Appellants' right to be heard.

3.4.2 Whether or not the grievance can be reviewed at all is debatable. Indeed, the Appellants merely set forth in a general manner the identification problem they raised in front of the CAS, whilst referring the Federal Tribunal to a part of the appeal brief in the arbitration file, namely the specific and quantified description of the mistake attributed to the Vienna laboratory. By doing so, they overlook that the reasons must be contained in the appeal brief submitted to the Federal Tribunal (see judgment 4A_25/2009 of February 16, 2009 at 3.1 and the references).

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

As to the merits of the grievance under review, it is doubtlessly true that the CAS did not devote a specific section of the award to the issue raised by the Appellants. However, on the basis of the explanations given by the Respondent at 3.7 to 3.10 of its answer, one must admit that the conclusion drawn by the Appellants in connection with this problem was rejected by the Arbitrators, at least implicitly, and that the omission they claim related to an element which was not such as to modify the outcome of the dispute on the merits.

As to the first item indeed, it must be pointed out that the Appellants raised the issue in dispute, among others, under the heading "Mixing-up of the samples in the laboratory documentation packages[6]" (appeal brief[7] at 83 to 96). Yet in the reasons of the award relating to that item (8.21 to 8.24), the CAS, reviewing one of the issues raised, made the following two findings in a completely general manner: "Firstly, the Panel finds...there was no mixing up of the samples...Secondly, the Panel does not find that any other errors contributed to the overall reliability of the results[8]" (at 8.24 p. 14; emphasis supplied by this Court). Thus as a consequence of their generality, these findings may be regarded as reasons applying to all the grievances raised by the Appellants in the specific part of their appeal brief.

As to the second element, the Respondent convincingly shows at 3.9 of its answer that the mistake relied upon by the Appellants, which was also typographic, as the one dealt with in the aforesaid part of the award, did not in any way impact the result of the analysis of the "B" samples made by the Vienna laboratory or the validity of the second opinion issued by that laboratory on the basis of this analysis. In particular, the analysis report issued by the laboratory involved and reproduced at 8.18 of the award clearly confirmed the presence of rEPO in the "B" samples given by the two biathletes as had already been shown by the Lausanne laboratory.

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

This being so, the grievance based on the violation of the right to be heard appears baseless in its third part as well, to the extent that the matter is at all capable of appeal in this respect.

4.
In a second grievance, based on Art. 190 (2) (e) PILA, the Appellants argue that the CAS issued an award incompatible with public policy.

4.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue as to the compatibility of the award with public policy (ATF 121 III 331 at 3a). An award is incompatible with public policy if it disregards the essential and broadly recognized values which, according to prevailing concepts in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3).

4.2 The Appellants argue that the CAS disregarded the principles of *lex mitior* and non-retroactivity which, according to them, are fundamental legal principles belonging to material public policy. It is not necessary to decide here the issue as to whether or not the two principles relied upon by the Appellants both belong to public policy within the meaning of Art. 190 (2) (e) PILA, neither is it necessary in the affirmative to determine whether or not they are an integral part of material or formal public policy. Indeed, the argument that the CAS disregarded these two principles has no merits for the reasons explained hereafter.

4.3
4.3.1 Firstly, the Appellants point out that the CAS applied the ISL 2009 version to an analysis initiated in 2008. According to them, by doing so it would have given to a rule that came into force in 2009 not only a retroactive effect, but also one detrimental to their interests, to the extent that applying that rule led to their being sanctioned, whilst applying the 2008 ISL version, the only correct one, would have led to their being freed as it contained the rule of two analysts, disregarded in the case at hand.

4.3.2 Generally speaking, the principle of non-retroactivity does not apply to the law of procedure (ATF 117 IV 369 at 4e p. 375; 113 Ia 412 at 6 p. 425 and cases quoted) as the latter is normally governed by the rule *tempus regit actum* (see the judgment of European Court of Human Rights Scoppola v. Italy (n°2) of September 17, 2009, § 110, Frowein/Peukert, EMRK-Kommentar, 3rd edition 2009, n° 8 at Art. 7; Stefan Trechsel, Schweizerisches Strafrecht, Allgemeiner Teil I, 6 edition 2004, p. 55; Franz Riklin, Schweizerisches Strafrecht, Allgemeiner Teil I, 3rd edition 2007, p. 115 n° 11). With some exceptions, the same applies to the principle of *lex mitior* by virtue of which, when the criminal law in force at the time the offence is committed and the subsequent criminal laws adopted before a final judgment are different, the court must apply the provisions of the law most favourable to the accused. That principle applies to the norms which define the offenses and the penalties punishing them but not to the provisions determining the procedure to be followed to prosecute and judge the offenses (see the aforesaid Scoppola judgment ibid. and the cases quoted).

Accordingly, nothing prevented the CAS in this case from applying the pertinent provisions of the 2009 version of ISL to the disciplinary proceedings initiated against the Appellants at the end of 2008, after the CAS ruled out the applicability of the rule of transitional law contained at Art. 19.7 of the 2009 version of the ADR (see at 3.2.2, 3rd § above). The principal purpose of the ISL is to ensure the production of laboratory analysis with valid results and that of conclusive data, as well as harmonising the ways in which results are obtained and reported by all laboratories (Art. 1.0, 1st § of ISL version 2009). Hence according to its purpose, the ISL regulate part of the procedure aimed at sanctioning possible doping cases in sport. Belonging to procedural law, its provisions did not accordingly require applying the principle of non-retroactivity or that of the *lex mitior*.

4.4 The Appellants moreover point out that the CAS applied several different rules to the same facts, namely the 2008 version of the ISL to the analysis of the "A" samples and the 2009 version of the ISL to the analysis of the "B" samples. Finally, they state that the Arbitrators applied the 2006 version of the ADR (in force until December 31, 2008) in connection with the ISL version 2009 (in force since January 1st, 2009), thus

combining old and new law, both being applied in part. In this they see a violation of the principle of *lex mitior*.

The grievance is not better founded than the previous one. As the latter, it relies on an erroneous assumption, which consists in giving to the aforesaid principle an extensive meaning that it does not have. Moreover the CAS found in a way that binds the Federal Tribunal that the Appellants and the Respondent had agreed to apply the 2006 version of the ADR in the case at hand and that Art. 6.1 of that Regulation must be interpreted as meaning that the ISL version to be taken into account was that in force at the time the samples were analysed, in other words the 2008 version for the "A" samples and the 2009 version for the "B" samples (award at 7.5).

The grievance based on violation of public policy cannot therefore but be rejected.

As the appeal is rejected, the Appellants shall severally pay the costs of the federal proceedings (Art. 66 (1) and (5) LTF) and pay the costs of the Respondent for the federal judicial proceedings (Art. 68 (1), (2) and (4) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.

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

3. The Appellants shall pay to the Respondent severally an amount of CHF 5'000.- for the federal judicial proceedings.

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

Lausanne, May 7, 2010

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

The presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO