4A_424/2008[1]

Judgement of January 22, 2009

First Civil Law Court

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

X._____,
Appellant,
Represented by Dr Philipp HABEGGER and Mr Fabian MEIER

v.

Fédération Internationale de Hockey (FIH),
Respondent,
Represented by Mr Claude RAMONI

Facts:

A.

A.a X._____ (the Appellant) has its seat in A._____ and is the national field hockey federation of B._____ and as such a member of the world organisation Fédération Internationale de Hockey (FIH; the Respondent), an association under Swiss law with its seat in Lausanne.

[1] Translator's note: Quote as X._____ *v.* Fédération Internationale de Hockey (FIH), 4A_424/2008. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b Between April 12 and 20, 2008 a qualiflier competition was held in A._____, the winner of which would be qualified for the Summer Olympics in Beijing. On April 20, 2008, the Spanish feminine team and the Appellant's team played in the final of that tournament. The Spanish team won the final by 3 to 2 goals.

Anti-doping tests were conducted during the tournament. On May 21, 2008 the Respondent stated that the A-tests of two players of the Spanish team had been positive. On June 4, 2008 the Respondent indicated that the B-tests confirmed the A-tests. Simultaneously, it was stated that the players involved had requested a hearing in front of the Judicial Commission of the Respondent.

However the hearing did not only concern the two players but it also extended possibly to the entire Spanish team as Art. 11.1 of the Respondent's Anti-Doping Policy provides the following: "if more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action."[2].

The Respondent asked the Judicial Commission to find the two players guilty of a doping violation and consequently to disqualify the Spanish team.

The Judicial Commission found that one of the Spanish players had violated the rules against doping. Since the player was at no fault, no sanction was pronounced. As to the second player, the Judicial Commission decided that there was no violation of the rules against doping.

B.

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

The Appellant and the players of its team, as well as the National Olympic Committee of B._____ challenged the decision of the Judicial Commission in front of the *ad hoc* Division of the Court of Arbitration for Sport (CAS), essentially with the submissions that the decision of the Judicial Commission should be overturned, both Spanish players found guilty of a doping violation, the Spanish team disqualified and the team of B._____ declared winner of the tournament, which should substitute the Spanish team with a view to the Olympic Games. The *ad hoc* Division of the CAS rejected the submissions in an arbitral award of August 2, 2008 due to the Appellant's lack of standing to appeal the decision of the Judicial Commission and that of the other Parties ("want of standing"[3]).

After the same Parties initiated an additional arbitral proceeding without results, they went to the *ad hoc* Division of the CAS for the third time, essentially with the same submissions as in the first proceedings. In a decision of August 8, 2008, the *ad hoc* Division of the CAS rejected the arbitral claim.

C.
In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the two arbitral awards of the CAS of August 2 and August 8, 2008.

The Respondent submits that the appeal should be rejected, to the extent that the matter is capable of appeal. The CAS did not state its position.

D.
On November 12, 2008 the Presiding Judge granted the Respondent's request for security for costs and ordered the Appellant to deposit CHF 7'000.- with the Court.

Reasons:

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

1.

According to Art. 54 (1) BGG[4] the Federal Tribunal issues its decision in one of the official languages[5], as a rule in the language of the decision under appeal. Should that decision have been issued in another language, the Federal Tribunal uses the official language to which the parties resorted.

The decision under appeal is in English. Since English is not an 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 according to standing practice.

2.

A Civil law appeal is possible in the field of international arbitration under the requirements of Art. 190-192 PILA[6] (Art. 77 (1) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne. At least one of the parties, in this case the Appellant, does not have its seat in Switzerland. Since the parties did not rule out the provisions of the Chapter 12 PILA in writing, they are to be applied (Art. 176 (1) and (2) PILA).

2.2 The only grievances allowed are those limitatively listed in Art. 190 (2) PILA (BGE 134 III 186 at 5; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the award; this corresponds to the duty to give reasons in Art. 106 (2) BGG for the violation of constitutional rights, of cantonal and inter-cantonal law (BGE 134 III 186 at 5 with references). As to grievances according to Art. 190 (2) (e) PILA, the incompatibility of the arbitral award under review with public policy is to be shown

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

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

specifically (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

2.3 The Federal Tribunal bases its decision on the facts found by the arbitral tribunal (Art. 105 (1) BGG). It may neither rectify nor supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG, ruling out the application of Art. 105 (2) and Art. 97 BGG). However the Federal Tribunal may review the factual findings of the arbitral award under review, when admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the lower court and wishing to rectify or supplement the factual findings on that basis, must show with reference to the record that the corresponding factual claims were already brought in the proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

The Appellant submits a thorough statement of facts to support its legal arguments and describes the events and the proceedings in front of the CAS from its point of view. In this respect, the Appellant deviates in many respects from the factual findings of the CAS or widens them, without claiming any exception from the rule that the factual findings are binding according to Art. 105 (2) and Art. 97 (1) BGG. Its arguments have therefore to remain unheeded.

3.
Relying on Art. 190 (2) (b) PILA the Appellant claims that the CAS should have denied jurisdiction.

3.1 The CAS rejected both arbitration requests pursuant to Art. 11 and 13.2 of the FIH Anti-Doping Policy and reasoned that the Appellant had no standing to appeal the decision of the Judicial Committee.

3.2 The Appellant argues in this respect that in many situations the issue as to whether or not one is bound to the main contract (legitimacy of the claim on the merits) cannot be separated from the issue of the binding character of the arbitration clause (standing to act as a party), and therefore in such cases the arbitral tribunal, in the framework of its review of jurisdiction, has to address thoroughly the preliminary issue as to whether or not the parties are bound by or have standing to act under the main contract (legitimacy of the claim). Should the decision as to jurisdiction be negative, the arbitral tribunal lacks jurisdiction and may not decide the merits of claims arising from the main contract, but its decision is merely of procedural nature. The Appellant further claims it lacked the standing to be sued and therefore both arbitral tribunals should have denied jurisdiction and could not have rejected the claim on the merits even though they may not have shared the Appellant's interpretation of Art. 13.2.1 in connection with Art. 13.2.3 FIH Anti-Doping Policy.

3.3 The Federal Tribunal exercises free judicial review from a legal point of view as to the grievance of lack of jurisdiction based on Art. 190 (2) (b) PILA, including the material preliminary issues from which the determination of jurisdiction depends (BGE 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733; 128 III 50 E. 2a p. 54). However, the Appellant disregards the fact that the issue as to the standing to appeal the decision of the Judicial Commission which it criticises does not concern a material preliminary issue with regard to the determination of jurisdiction. Whether or not a party has standing to appeal the decision of a body of the Respondent's according to the applicable statutory and legal provisions does not affect the jurisdiction of the arbitral tribunal concerned but the issue of the standing to act. The *ad hoc* division of the CAS answered the question in the negative as to the Appellant's request for arbitration, based on Art. 13.2 FIH Anti-Doping Policy ("no standing to request relief for the

merits"[7]) as the latter does not provide for a right of the national federations to appeal in connection with international competitions. The CAS also denied the Appellant's standing to appeal with reference to Art. 11 FIH Anti-Doping Policy as well.

Contrary to the Appellant's point of view, the issue as to the merits of the claim can clearly be separated from that of the binding character of the arbitration clause. What the Appellant argues under cover of a grievance based on Art. 190 (2) (b) PILA is really criticism of an appellate nature of the interpretation by the CAS of Art. 11 and 13.2 of the FIH Anti-Doping Policy, which set forth the conditions for an appeal against decisions of the national federations in connection with doping violations. The CAS reviewed the conditions of an appeal against the decision of the Judicial Commission, denied the Appellant's standing to appeal and therefore rejected its submissions. The Federal Tribunal does not review whether or not the Arbitral Tribunal rightly applied the law on which its decision rests. The Appellant's arguments therefore come to nothing.

Irrespective of the foregoing, the Appellant initiated the two arbitral proceedings itself and therefore assumed that the arbitral tribunals had jurisdiction. For that reason if no other the Appellant may not be heard in front of the Federal Tribunal with an objection to jurisdiction (compare Art. 186 (2) PILA).

3.4 From the aforesaid points of view there is no reason to query the decisions under appeal, in which the CAS assessed the Appellant's arbitral submissions and rejected them for lack of standing to appeal. The Appellant's grievances also come to nothing as to an alleged disregard by the CAS of a review of the claims on the merits, which would violate formal public policy. Finally, contrary to the Appellant's opinion, there is no violation of public policy (Art. 190 (2) (e) PILA) in the circumstance, brought forward by the Appellant, that both arbitral awards are materially enforceable as decisions on the merits, which would stand in the way of a possible claim in front of

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

the ordinary court to attack the decision of the Judicial Commission within the meaning of Art. 75 ZGB[8], as the latter results rightly from the material adjudication and the rejection of its submissions.

4.
The appeal is therefore unfounded and must be rejected, to the extent that the matter is capable of appeal. In view of the outcome of the proceedings, the Appellant must pay the costs of the judicial proceedings and compensate the other party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.
2. The judicial costs, set at CHF 6'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 7'000.- for the federal judicial proceedings. That amount shall be paid from the funds deposited with the court.
4. This judgment shall be notified in writing to the Parties and to the CAS *ad hoc* Division.

Lausanne, January 22, 2009

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

The Presiding Judge (Mrs): The Clerk:

KLETT LEEMANN

[8] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.