4A_144/2010[1]

Judgment of September 28, 2010

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.

Claudia Pechstein
Petitioner,
Represented by Dr. Philippe NORDMANN and Mrs Eva SENN

v.

International Skating Union (ISU)
Respondent,
Represented by Mr Jean-Cédric MICHEL

Facts:

A.

A.a Claudia Pechstein Diensdorf/Deutschland (Petitioner) is a German speed skater.

The International Skating Union (Respondent) is an association under Swiss law with its seat in Lausanne. It is recognized as the International Federation governing the sports of figure skating and speed skating.

[1] Translator's note: Quote as Claudia Pechstein *v.* International Skating Union (ISU), 4A_144/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b The Respondent underwent numerous anti-doping controls between February 4, 2000 and April 30, 2009 which did not give any indications of prohibited substances. During the same period the Respondent collected more than ninety blood samples from the Appellant as part of its blood profiling program. In particular, between October 20, 2007 and April 30, 2009 twenty-seven blood samples were collected from the athlete, the last twelve of which were collected between January and April 2009.

The blood parameters collected and recorded in the framework of the Respondent's blood profiling programme include *inter alia* haemoglobin, hematocrit and the percentage of immature red blood cells (reticulocytes). As a blood parameter the reticulocyte count allows real-time assessment of the production of red blood cells in the human organism.

Whilst the Respondent considers normal a reticulocyte count of between 0.4 % and 2.4 %, the results of the blood screening results of the Appellant showed reticulocyte counts which were well above 2.4 % and which then sharply decreased.

On February 7/8, 2009 the World Speed Skating Championships organised by the Respondent took place in Hamar (Norway). Blood samples were taken from all athletes on the morning before the Championships commenced, i.e. on February 6, 2009. The reticulocyte count of the Appellant was 3.49 %.

As a consequence of this result, the Respondent took two further blood samples from the Appellant, one in the morning and one in the afternoon of February 7, 2009. The reticulocyte counts were 3.54 % and 3.38 % respectively. The Appellant and the DESG were informed by the medical adviser of the Respondent, Prof. A ._____, that the reticulocyte counts were "abnormal". Although the haemoglobin and hematocrit values did not require it to do so, the DESG subsequently declared that the Appellant would not compete in the races of the following day.

On February 18, 2009 a further blood sample was taken from the athlete outside the Championships. This showed a reticulocyte count of 1.37 %.

B.

B.a After reviewing the blood profile, the Respondent filed a complaint against the Appellant with its Disciplinary Commission.

After a hearing held in Bern on June 29/30, 2009 the Respondent's Disciplinary Commission ruled in a decision of July 1, 2009 that the Appellant was guilty of a doping offence pursuant to Article 2.2 of the ADR in the form of blood doping, disqualified the results obtained at the World Championships on February 7, 2009 and imposed a two-year ban on the Appellant commencing on February 9, 2009.

B.b On July 21, 2009 the Appellant and the DESG appealed the decision of the Disciplinary Commission of July 1, 2009 to the Court of Arbitration for Sport (CAS).

By submission of August 3, 2009 the Appellant submitted its grounds for appeal to the CAS.

On September 16, 2009 the Appellant requested to be allowed to submit a written reply to the Respondent's answer to the notice of appeal. The Respondent objected to another exchange of written submissions. By letter of September 23, 2009 the CAS informed the parties that it would not authorise another exchange of written submissions under application of Article R56 of the CAS Code. However it did exceptionally grant the athlete the possibility to "present any new evidence deriving from medical investigations performed on her, with comments thereto"[2] until eight days before the hearing called for October 22/23 2009.

At the hearing which took place on October 22 and 23, 2009 in Lausanne, a total of twelve experts named by the Parties were heard. All Parties were given the opportunity to put questions to the experts. After oral arguments and the Petitioner's closing statement, the Arbitral Tribunal closed the hearing.

In two faxes of November 23 and 24, 2009 the Appellant submitted an urgent application to the Arbitral Tribunal to reopen the proceedings in order to be able to cross-examine Prof. Sottas, who had not attended the hearing on October 22 and 23, 2009. The application was substantiated by the fact that one of the legal representatives of the Appellant had heard that Prof. Sottas had apparently revised his original opinion owing to evidence she had submitted on October 14, 2009 and that the Respondent had not summoned him to the hearing for this reason.

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

The CAS rejected the Appellant's application to reopen the proceedings and the appeal in an arbitral award of November 25, 2009 and confirmed that the two-year ban on the athlete would continue to apply with the slight difference that the ban would be effective from the earlier time of February 8, 2009.

B.c In a judgment of February 10, 2010 the Federal Tribunal rejected the Petitioner's Civil law appeal against the CAS award of November 25, 2009, to the extent that the matter was capable of appeal.

C.

In a request for revision of March 4, 2010 the Petitioner submits that the Federal Tribunal should annul the CAS award of November 25, 2009 and send the matter back to the CAS for a new decision.

The Respondent submits that the request for revision should be rejected. The CAS did not wish to state its position.

On July 6, 2010 the Petitioner filed a reply with the Federal Tribunal. The Respondent commented on that in a rejoinder of September 3, 2010.

D.

The Federal Tribunal rejected the Petitioner's motion for provisional measures in a decision of April 23, 2010.

In a decision of July 28, 2010 the Federal Tribunal rejected the July 22, 2010 request for reconsideration in which the Respondent again sought an order for provisional measures.

Reasons:

1.

The Petitioner argues that after the CAS award of November 25, 2009, the physician of the German National Federation, Dr. Lutz, would have been "advised by colleagues on November 27, 2009 that as the case may be, some heretofore unknown possibilities of special diagnostics would be

available, with which the Petitioner's hemogram could be investigated". Dr. Lutz would have immediately contacted Dr. Andreas Weimann of the Charity Center for Diagnostic and Preventive Laboratory Medicine, who could have confirmed that. This would actually have involved an evaluation algorithm, hitherto unpublished in part for the capture of some abortive milder up to serious forms of spherocytes anaemia discovered only during the year 2009 by a Belgian doctoral candidate. Dr. Weimann would have become aware of the spherocytes quotients for the first time at a specialized congress in Istanbul in May 2009. He would have been highly interested by this method hitherto published only verbally in specialized circles and from November 2009 he would have obtained from the author of the study, already submitted (but not yet published) the possibility to put the quotients to the test for his own research purposes. At the beginning of December 2009 Dr. Weimann would have analyzed six blood samples of the Respondent with the new method over five days. In addition the Respondent's family would have been examined with the new measurement method. The results of the investigation would have been made available to the Respondent on December 7, 2009 for the first time. Dr. Weimann held in summary that "a diagnosis arose of hereditary membranopathy in the form of an abortive mild form of hereditary spherocytosis". Such a configuration could "accompany durably or intermittently – as well as occasionally occurring – some distinctly increased reticulocytes counts, which was confirmed by the increased MCHC-counts".

Upon receipt of the diagnosis the Petitioner would have decided on December 15, 2009 to publish the blood counts measured in Hamar on her website. Whereupon several experts would have contacted her including Prof. Winfried Gassmann, Chief Physician of the Clinic for Hematology and Internistic Oncology at St. Mary's Hospital, Siegen, a member of the working group laboratories of the German Society for Hematology and Oncology.

Based on Dr. Weimann's investigation further renowned experts would have issued advisory opinions to the allegedly new findings and confirmed the diagnosis.

2.

The Federal Private International Law of December 18, 1997 (PILA[3]; SR 291) contains no provisions as to the revision of arbitral awards within the meaning of Art. 176 ff PILA. According to case law of the Federal Tribunal, which filled the lacuna, the parties to an international arbitration have the extraordinary legal recourse of revision available, for which the Federal Tribunal has

[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.

jurisdiction. If the Federal Tribunal upholds a request for revision it does not decide the matter itself but sends it back to the arbitral tribunal that decided it or to a new arbitral tribunal to be constituted (BGE 134 III 286 at 2 p. 286 ff with references).

2.1

2.1.1 Pursuant to the procedural rules of the OG[4] the parties could rely on the grounds for revision at Art. 137 OG and Art. 140-143 OG would apply to the proceedings by analogy (BGE 118 II 199 at 4 p. 204; Judgment 4P.120/2002 of September 3, 2002 at 1.1 published in Pra 2002 n°199 p. 1041 ff). This still applies in principle to the rules of the BGG[5], namely for the ground for revision according to Art. 123 (2) (a) BGG which corresponds to that of Art. 137 (b) OG (BGE 134 III 45 at 2.1 p. 47, 286 at 2.1 p. 287).

2.1.2 According to Art. 123 (2) (a) BGG revision may be sought when the petitioner subsequently discovers significant facts or decisive evidence which he could not adduce in the previous proceedings to the exclusion of facts and evidence which emerged only after the award. The new facts must be significant, *i.e.* they must be suitable to change the factual basis of the award so that an accurate legal evaluation could lead to another decision. New evidence must either serve to prove the new significant facts on which the revision is based or that of facts which albeit known in the previous proceedings remained unproved to the petitioner's detriment. Should the new evidence prove factual allegations already made previously, the petitioner must show that he could not bring the evidence in the earlier proceedings. Evidence is significant when it is to be inferred that it could have led to another decision if the arbitral tribunal had been aware of it at the hearing. It is decisive that the evidence should not merely support a new evaluation of the facts but their determination. There is no ground for revision simply because the tribunal inaccurately assessed facts already known in the proceedings. Instead it is necessary that the wrong assessment took place because some facts essential for the decision remained unproved (ATF 127 V 353 at 5b p. 358 with references; 110 V 138 at 2 p. 141; see also ATF 121 IV 317 at 2 p. 322; 118 II 199 at 5 p. 205).

When the revision of an international arbitral award is sought the Federal Tribunal must assess on the basis of the reasons contained in the award whether the facts are significant or not and if they

[4] Translator's note: OG is the German abbreviation for the previously existing Federal Statute organizing Federal Courts.

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

would probably have led to a different decision had they been proved (Judgment 4A_42/2008 of March 14, 2008 at 4.1, not published in BGE 134 III 286 ff; 4P.102/2006 of August 29, 2006 at 2.1).

2.2 To substantiate its request for revision the Petitioner submits to the Federal Tribunal various new expert opinions, including by Dr. Weimann, Prof. Dr. Heimpel, Prof. Dr. Schrezenmeier, Prof. Dr. Winfried Gassmann, Prof. Dr. Anjo Veerman and Prof. Dr. André Tichelli, which were established between February and March 2010. Whether or not the medical expert opinions now available, all of which were issued after the CAS arbitral award of November 25, 2009 are to be considered as subsequently discovered evidence within the meaning of Art. 123 (2) (a) BGG, appears debatable in view of the clear wording of the law (see last part of the sentence) (see Elisabeth Escher, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, N. 6 ff. to Art. 123 BGG; Yves Donzallaz, Loi sur le Tribunal fédéral, 2008, Rz. 4710; Pierre Ferrari, in: Bernard Corboz et al. [Hrsg.], Commentaire de la LTF, 2009, N. 22 to Art. 123 BGG). This also applies if one assumes, as the Petitioner argues, that the algorithm presently relied upon was in principle available since May 2009 already but that the algorithm in itself would hardly have been appropriate as evidence, yet according to the Petitioner, Dr. Weimann too would have been put in a position “only from November 2009” to “put the quotients to the test for his own research purposes” and a diagnosis could have been established only in the beginning of December 2009 with the help of numerous new blood samples. However the issue needs not be concludingly examined as the request for revision is to be rejected on other grounds.

2.3 The Petitioner brings no newly discovered facts forward in her request for revision but she relies instead on some allegedly newly discovered evidence to support her arguments, already made in the arbitral proceedings, that she would suffer from a blood anomaly. As the Petitioner itself argues, she tried in vain in front of the Disciplinary Committee in front of the Arbitral Tribunal to substantiate with medical expert opinions her argument that the increased reticulocytes counts were due to a blood anomaly. In the arbitral proceedings the Petitioner was given the possibility to produce new medical evidence until eight days before the October 22/23 2009 hearing. The issue as to whether or not the Petitioner has hereditary spherocytosis, which could possibly explain the abnormal counts detected in Hamar was intensively discussed in preparation of the hearing even according to the allegations in the request for revision and the issue was thoroughly examined by the CAS on the basis of the various expert opinions filed by the Parties as well as by the examination of numerous experts during the October 22/23 hearings. The Arbitral Tribunal rejected the Petitioner’s argument and on the basis of the evidentiary proceedings it found that the Petitioner’s abnormal results of

February 6 and 7 2009 as well as the strong drop of the reticulocytes count established on February 18, 2009 could not be explained by a congenital or acquired anomaly but were to be ascribed to a blood manipulation. Revision is an extraordinary legal recourse and it does not merely allow to continue the proceedings. The parties have the duty to produce evidence timely and according to the rules of procedure to contribute to the establishment of the facts. It is only with restraint that the Court can find that it was impossible to bring forward facts and evidence already in the previous proceedings (ESCHER, a.a.O, N°8 to Art. 123 BGG). This applies particularly when the proceedings for revision seek to prove with allegedly new discovered evidence some factual allegations already made in the arbitration proceedings, which the Arbitral Tribunal found inappropriate on the basis of elaborate evidentiary proceedings with several experts. The Petitioner must accordingly show in the request for revision that notwithstanding proper care he was unable to bring the evidence into the previous proceedings (BGE 127 V 353 at 5b p. 358 with references; Judgment 4A_42/2008 of March 14, 2008 at 4.1, not published in BGE 134 III 286 ff.; 4P.102/2006 of August, 29 2006 at 2.1).

The Petitioner merely argues that she would have become aware on November 27, 2009 only – thus two days after the arbitral award – that since May 2009 a new algorithm was available which "could make possible a more accurate diagnosis as before". She claims to have been made aware of that by Dr. Lutz, the physician of the National Federation, which in his turn would have received a corresponding hint "from colleagues". With such vague allegations the Petitioner does not demonstrate why it would not have been possible for her in the arbitral proceedings already to rely on the allegedly newly discovered diagnosis possibility, more precisely until the middle of October 2009, as the Petitioner could still have brought new medical findings in front of the Arbitral Tribunal. The Petitioner's explanation that she would have discovered a hitherto unknown method through a mere hint from the Federation physician, which it would have been impossible for her to rely upon a mere few weeks earlier in front of the CAS, does not appear plausible.

It is not acceptable to rely on scientifically recognized methods in an arbitration and to submit corresponding medical expert opinions and testimony by expert as evidence, only to rely on some unpublished and scientifically hardly established methods in a request for revision after a negative arbitral award. Had the Petitioner wanted to rely on further conceivable methods of diagnosis to support her position in the proceedings, she could have been granted the possibility to bring in such evidence. Yet she does not show in her request for revision which concrete steps she would have taken in this direction (see Judgment 4P.213/1998 of May 11, 1999 at 3b/aa; JEAN-FRANÇOIS

POUDRET, Commentaire de la loi fédérale d'organisation judiciaire, Bd. V, 1992, N. 2.2.5 to Art. 137 OG, p. 30; ANTONIO RIGOZZI/MICHAEL SCHÖLL, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG, 2002, p. 44 und 46). The Petitioner would also have been at liberty to make her blood counts measured in Hamar available to further experts already during the arbitral proceedings or to publish them on her website as she herself states that she did after the award, whereupon several experts would have contacted her. She would have had the possibility during the arbitral proceedings to seek blood samples from members of her family as she did only a few days after the CAS award.

2.4 Finally it is also debatable that the new evidence submitted in the proceedings for revision would have had to be considered significant in view of the reasons contained in the CAS award of November 25, 2009. Based on testimony by Prof. D'Onofrio, the CAS reasoned that even the (implausible) diagnosis of hereditary spherocytosis could not have explained the variations discerned in the Petitioner's abnormally high counts during the World Championship February 6/7 2009 and the subsequent sharp drop. The diagnosis of hereditary spherocytosis, based on an allegedly newly discovered algorithm in the revision proceedings could therefore merely question the factual finding in the arbitration that the presence of a hereditary blood anomaly of that kind in the Petitioner could not be proved. However, the decisive reason of the CAS, namely that even such a diagnosis could not explain the specific variations of the blood counts would have remained untouched by the allegedly new evidence.

The Petitioner argues that even that objection by the CAS would have been rebutted by the expert opinions of Dr. Weimann, Prof. Gassmann and Prof. Schrezenmeier. The experts she introduces also confirm that the allegedly new diagnosis could be consistent with increased reticulocytes counts. That the established variations in the counts could have been explained by spherocytosis was however already claimed by the Petitioner's experts introduced in the arbitral proceedings, but adjudicated differently by the CAS on the basis of the evidence. The Petitioner does not show in her request for revision to what extent the allegedly newly discovered method of a hitherto unknown diagnosis of a blood anomaly would also lead to new conclusions as to the variations established. Had the experts explained that the spherocytosis allegedly established by new blood samples could lead to higher reticulocytes counts, that would not at all demonstrate which new conclusions the allegedly new method would justify as to the specific variations established in connection with the World Championship in Hamar. The Petitioner's arguments in this respect merely seek a new assessment of the evidence. Yet there is no ground for revision simply because the Arbitral Tribunal

would have wrongly assessed some facts already known in the arbitral proceedings. The Federal Tribunal cannot in the first place review on the basis of the Petitioner's arguments whether or not the findings of the Arbitral Tribunal were accurate that even hereditary spherocytosis could not explain the specific variations in the counts. Thus the new evidence introduced appears as not relevant from the point of view of revision proceedings.

3.
The request for revision is to be rejected to the extent that the matter is capable of revision. Accordingly the Petitioner must pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1. The request for revision is rejected to the extent that the matter is capable of revision.

2. The judicial costs set at CHF 5'000.- shall be borne by the Petitioner.

3. The Petitioner shall pay to the Respondent 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, September 28, 2010

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	LEEMANN