4A_352/2009[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,

Appellant,

Represented by Mr. Douglas Hornung and Mrs. Tetiana Bersheda

v.

Y._____,

Respondent,

Represented by Mr. Rocco Taminelli

[1] Translator's note: Quote as X._____ *v.* Y._____, 4A_352/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

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.

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.

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

In a Civil law appeal X. _____ Sàrl submits that the Federal Tribunal should annul the June 15, 2009 award. It claims that the CAS violated its right to be heard.
The Respondent mainly submits that the matter is not capable of appeal and alternatively that the appeal should be rejected. The CAS proposes that the appeal should be rejected.

D.
After filing its appeal, X. _____ Sàrl submitted a request for revision of the award.

Reasons:

1.
The Federal Tribunal is seized of a Civil law appeal and a request for revision aimed at the same arbitral award. According to the general rule from which there is no reason to derogate in this case, the Civil law appeal will be dealt with in priority (see ATF 129 III 727 at 1)

2.
In the field of international arbitration a Civil law appeal is allowed against the decisions of arbitral awards under the conditions set forth at art. 190 to 192 PILA[3] (art. 77 (1) LTF[4]). The seat of the CAS is in Lausanne. At least one of the parties (here both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (art. 176(1) PILA). The Appellant is directly concerned by the award under appeal as it was ordered to pay an amount of money to the Respondent. It therefore has a personal, present and legally protected interest to ensure that the award was not issued in violation of art. 190 (2) (d) PILA, which gives it standing to appeal (art. 76 (1) LTF).
Filed within 30 days after the notification of the award (art. 100 (1) LTF) the appeal meets the formal requirements of art. 42 (1) LTF and the matter is consequently capable of appeal.

3.

[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: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal RS 173.110

To deny that the matter is capable of appeal, the Respondent claims that the Appellant validly renounced an appeal against the CAS award. In this respect, he relies on the wording of the arbitration clause in which the parties state in substance their will to submit to the award in good faith and faithfully (translation of the English text made by counsel for the Respondent). *Per se* nothing would prevent the alleged renunciation to appeal from being taken into consideration in this case since it is not invoked here against the sportsman but rather his former employer (ATF 133 III 235 at 4). However the terms used in the language quoted by the Respondent do not at all meet the formal requirements set at art. 192 (1) PILA and in case law relating thereto (ATF 134 III 260 at 3 and the cases quoted) in order to find for a valid renunciation to appeal. The matter is accordingly capable of appeal.

4.

4.1 As sole grievance the Appellant claims that the CAS violated its right to be heard. More precisely it argues that (the CAS) completely disregarded the letter that its counsel at the time sent to the CAS on June 12, 2009, after the April 29, 2009 hearing and the documents attached thereto. Such documents, as the Appellant emphasizes, showed in particular the existence of some new technical regulations adopted on May 9, 2009 by the World Anti-Doping Agency (WADA) as to EPO (TD2009EPO) in force since May 31, 2009. Yet, according to the Appellant, the Respondent's bone marrow stimulation as a consequence of the administration of exogenous EPO should have been held as established on the basis of the new regulations, as confirmed by the other attachments submitted. Hence the racing cyclist's immediate termination was justified *a posteriori* since the employer had been able to establish the reality of the doping suspicions on the basis of which it had terminated the contract. Thus the CAS should have taken into consideration this new evidence, which could impact the outcome of the dispute.

4.2

4.2.1 The right to be heard, as guaranteed by art. 182 (3) and 190 (2) (d) PILA is not different in principle from its constitutional equivalent (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus it was admitted in the field of arbitration that each party has the right to express its views on the facts that are essential for the judgment, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the Arbitral Tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

As to the right to introduce evidence, it must have been exercised timely and according to the applicable formal rules (ATF 119 II 386 at 1b p.389).

Case law also deducted from the right to be heard a minimum duty for the authority to examine and handle the pertinent issues (ATF 126 I at 2b). Such duty, which was extended to international arbitration (ATF 121 III 331 at 3b p. 333) is breached when the Arbitral Tribunal, inadvertently or due to a misunderstanding, does not take into consideration some factual allegations, legal arguments, or evidence submitted by one of the parties, which are important for the decision to be issued. The party allegedly harmed must establish that the Arbitral Tribunal failed to review some factual elements, evidence or legal arguments that had been regularly brought to substantiate its submissions and that such elements could have had an influence on the outcome of the dispute (ATF 133 III 235 at 5.2 and cases quoted).

4.2.2 From the duly supported explanations given by the CAS in its answer to the appeal it appears that the firm of the Appellant's former counsel received the award by fax on June 15, 2009 at 5.08 pm and that the aforesaid letter dated June 12, 2009 was actually sent to the CAS only on June 15, 2009 at 8.12 pm. Thus, all the evidence on which the Appellant relies to justify *post factum* its immediate termination of the Respondent's employment contract were sent to the CAS after the award under appeal was notified. Hence the grievance that the Arbitral Tribunal would not have taken such elements into consideration verges on recklessness.
Moreover it must be pointed out that at the end of the CAS hearing each party stated that its right to be heard had been complied with and that it had no objection as to the way the hearing had been conducted.

Therefore the Appellant's sole grievance is completely groundless. The appeal must therefore be rejected which renders moot the request for a stay.

5.
The Appellant 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 appeal is rejected.

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

3. The Appellant 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