120039-232/PON/fba

4A_636/2011[1]

Judgment of June 18, 2012

First Civil Law Court

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

A._____,
Represented by Dr. Lucien W. Valloni and Dr. Thilo Pachmann,
Appellant,

v.

X._____ Federation,
Represented by Dr. Xavier Favre-Bulle and Mrs. Marjolaine Viret,
Respondent,

Facts:

A.
A._____ (the Appellant), born on September 12, 1997, is a Polish karting driver. He is a member of Y._____ racing club, which belongs to the Polish Motor Racing Federation. The latter in its turn is a member of X._____ Federation with headquarters in Z._____.

Between July 16 and 18, 2010, the Appellant, then twelve years old, and the holder of a karting driver license of the Polish Motor Racing Federation and of X._____, took part in a race in the framework of the German Junior Karting Championship in Q._____ (Germany) and achieved second place.

On July 18, 2012 he was subjected to a doping test undertaken by the German national Anti-Doping Agency (NADA) upon request of the German Motor Racing Federation (DMSB), which is also a member of X._____. The laboratory found the presence of the illicit substance Nikethamide, which was then confirmed by a blood test.

[1] Translator's note: Quote as A._____ *v.* X._____ Federation, 4A_636/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

B.
B.a On October 11, 2011 the Medical Panel of the Anti-Doping Committee of X._____ held a hearing in Z._____. By decision of the same day the Panel banned the Appellant from competitions for two years from July 18, 2010 until July 18, 2012. Furthermore the Panel banned the Appellant from competing in Q._____ on July 18, 2010 and annulled all his results and prizes from that date.

B.b The Appellant appealed the decision of the Medical Panel of the X._____ Anti-Doping Committee to the CAS.

In an award of September 15, 2011 (CAS 2010/A/2268) the CAS upheld the appeal in part (award § 1) reversed the decision of the Medical Panel of the X._____ Anti-Doping Committee of October 11, 2010 (§ 2) and banned the Appellant from competitions for 18 months beginning on July 18, 2010 (§ 3). Furthermore the CAS banned the Appellant from competing in Q._____ on July 10, 2010 and annulled all his results and prizes since that date (§ 4). The administrative costs of CHF 500 were to be paid by the Appellant; the CAS did not impose any other arbitration costs (§ 5) and let the Parties pay their own costs (§ 6).

C.
In a Civil law appeal of October 17, 2011 the Appellant asks the Federal Tribunal to annul the CAS award of September 15, 2011 (CAS 2010/A/2268). Alternatively, § 3 (ban) and § 4 concerning the annulment of all other results and the ban from the race in Q._____ Germany on July 18, 2010 should be annulled, as well as § 5-6 (costs and award of costs). Even more in the alternative, the award under appeal should be annulled and the matter sent back to the CAS for a new decision.

On November 7, 2011 the Appellant filed a new appeal brief with identical submissions and a procedural motion asking for the submission of October 17, 2011 to be substituted with the new one in case the Federal Tribunal would consider it as a timely filed. Otherwise the appeal of October 17, 2011 would be maintained.

The Respondent submits in its brief of December 12, 2011 that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits in its brief of January 26, 2012 that the appeal should be rejected. The Parties filed a reply and a rejoinder. The arbitration file was submitted to the Federal Tribunal.

Reasons:

1.
According to Art. 54 (1) BGG[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. Should the decision be in another language, the

[2] Translator's note: BGG is the German 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.

Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As this is not an official language and the Parties used various languages in front of the Federal Tribunal, the judgment of the Federal Tribunal will be issued in the language of the appeal in accordance with practice.

2.
In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA[4] (SR 291) (Art. 77 (1) (a) BGG).

2.1
The seat of the arbitral tribunal is in Lausanne in this case. At the relevant time both Parties had their headquarters outside Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2
2.2.1 An appeal against an award must be filed with the Federal Tribunal within 30 days after notification of a full copy (Art. 100 (1) BGG). The time limit cannot be extended (Art. 47 (1) BGG) and applies also to the filing of additional appeal briefs.

According to the case law of the Federal Tribunal the notification through the mail determines the start of the time limit to appeal the award of the CAS, as opposed to a fax notification (judgment 4A_392/2010[5] of January 12, 2011 at 2.3.2).

2.2.2 The decision under appeal is dated September 15, 2011 and was sent to the Appellant by fax on the same day. The notification through the mail took place on October 6, 2011 only. Thus the appeal brief filed on November 7, 2011 was submitted timely (Art. 44 (1) compared to Art 100 (1) BGG). In view of its statement that should the second brief considered timely it would be the decisive one, the brief of November 7, 2011 is the only one to be addressed here.

2.3
2.3.1 A matter is only capable of appeal when the Appellant has an interest worth protecting, *i.e.* a present and practical interest to the annulment or the modification of the decision under appeal (Art. 76 (1) (b) BGG; see BGE 133 III 421 at 1.1 p. 425 ff; 127 III 429 at 1b p. 431). The Federal Tribunal may exceptionally leave aside the requirement of an interest worthy of protection when the issue at hand can be repeated and appear again in similar circumstances and when there is sufficient public interest to its being addressed due to its fundamental nature and when it would be hardly possible to adjudicate it timely in the case at hand (BGE 137 I 120 at 2.2; 135 II 430 at 2.2 S. 434; 135 I 79 at 1.1). If there is a practical interest at the time the appeal is filed, which however disappears subsequently, the case is to be considered as moot according to Art. 72 FCP[6] (SR 273) in connection with Art. 71 BGG.

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[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.

[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/notification-of-an-award-by-fax-time-limit-to-appeal-does-not-ru/

[6] Translator's note: FCP is an English abbreviation for the federal law of civil procedure of December 4, 1947.

The Federal Tribunal reviews in principle *ex officio* whether a matter is capable of appeal or not (Art. 29 (1) BGG). However the grounds for appeal must be explained adequately (Art. 42 (1) and (2) BGG) and the Appellant must show that the legal requirements for an appeal according to Art. 76 (1) BGG are met. When this is not obvious or not immediately so, it does not behoove the Federal Tribunal to search the record or to require additional documents in order to determine whether and to what extent an appeal is admissible (see BGE 133 II 353 at 1 p. 356, 400 at 2 p. 404; judgment 4A_566/2009 of March 22, 2010 at 1.2, publ. *in*: ASA Bulletin 2/2011, p. 433 ff., 435[7]).

2.3.2 The Civil law appeal at hand does not stay the enforcement of the decision under appeal *per se* (Art. 103 (1) BGG). The Appellant did not seek a stay of enforcement. Therefore the ban imposed on him pursuant to § 3 of the award under appeal expired on January 18, 2012 and the Appellant can participate in competitions again since that date. The Appellant's situation would not be changed were § 3 of the award under appeal annulled as requested from this Court. Therefore there is no obvious interest in principle that would be personal, actual and practical and require the annulment of a ban that expired in the meantime.

In his appeal brief the Appellant bases his standing to appeal exclusively on the fact that the decision under appeal prevents him from practicing his sport. He does not explain and does not argue that besides the annulment of the ban that expired in the meantime, he would have an interest worthy of protection to the annulment of the decision under appeal or that public interest would require the issue to be addressed because of its fundamental importance and because timely adjudication would hardly be possible in the case at hand. The appeal has therefore become moot as a consequence of the loss of the standing to appeal, to the extent that it is made against § 3 of the award under appeal (competition ban).

2.3.3 Pursuant to § 4 of the award under appeal, the CAS disqualified the Appellant from the race in Q._____ on July 18, 2010 and canceled all his results and prizes since that date (§ 4).

The Appellant retains a present and practical interest to the annulment of his ban from the race in Q._____ on July 18, 2010 as according to the factual findings of the CAS, which bind this Court (Art. 105 (1) BGG) he achieved second place there (also see judgment 4A_456/2009 of May 3, 2010 at 2.2, publ. *in*: ASA Bulletin 2010, p. 786 ff., 789). As to the annulment of the results and the prizes he obtained since that date there is no obvious present and practical interest for the Appellant to seek annulment. Indeed it does not appear from the award under appeal or from the briefs of the Parties that the Appellant would have taken part in competitions, let alone obtained results that could be cancelled, between the race in Q._____ and the expiry of the ban in January 2012. The Appellant does not claim that he would have participated in additional races since. Future results are no longer subject to annulment as a consequence of the ban expiring pursuant to § 4 of the award under appeal. The matter is therefore also incapable of appeal with regard to the cancellation of all results and prizes obtained since the race in Q._____ on July 18, 2010 (§ 4).

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/arbitration-clause-interpretation-of-declarations-based-on-the-p/

2.4
In the framework of an appeal pursuant to Art. 75 BGG the only admissible grounds for appeal are those limitatively listed at Art. 190 (2) PILA (BGE 134 III 186 at 5 p. 187; 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 arguments that are brought forward and reasoned in the appeal. This corresponds to the requirement to submit reasons contained in Art. 176 (2) BGG as to the violation of constitutional rights and cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with reference). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

The Appellant presents his grounds for appeal only against the ban. As to his disqualification from the race in Q._____ on July 18, 2010, with regard to which he would have standing to appeal, the Appellant submits no arguments. Moreover he acknowledges that in the case at hand it was "absolutely correct that the Appellant was excluded from the race in Q._____, especially because he had in his body some substances which were not allowed in competition as this could distort the sporting balance" (appeal, p. 14 at 35). The matter is therefore not capable of appeal due to the absence of pertinent and developed arguments as to the ban from the race in Q._____ on July 10, 2010.

3.
Should an appellant lack the standing to appeal or no longer have a present interest to the annulment of the main holding of the decision under appeal, he may nonetheless appeal the costs as they affect his personal and direct interests (BGE 117 Ia 251 at 1b p. 255; judgment 4A_604/2010[8] of April 11, 2011 at 1.2; 4A_352/2011 of August 5, 2011 at 2). However the imposition of costs does not make it possible to obtain indirectly judicial review of the merits of the case (BGE 100 Ia 298 at 4 p. 299). The Appellant may only claim that the apportionment of the costs was contrary to the law for another reason than simply because he lost on the merits (BGE 109 Ia 90; judgment 4A_352/2011 of August 5, 2011 at 2), which means that in the case at hand only the grounds for appeal at Art. 190 (2) PILA would be available. As the Appellant does not raise any of the corresponding grounds of appeal against the decision concerning costs, the matter is not capable of appeal with regard to § 5 and 6 of the award under appeal.

4.
In view of the foregoing the matter is not capable of appeal to the extent that the case has not become moot. As a rule the costs of the proceedings are to be imposed on the losing party (Art. 66 (1) (1) BGG) to the extent that the appeal has become moot however, the decision as to the costs of the federal proceedings is based on Art. 71 BGG in connection with Art. 72 CCP. According to that provision the Court issues a summary decision on costs on the basis of the factual situation before the matter became moot. Should the outcome of the proceedings in the case at hand be hard to ascertain, the normal procedural criterias shall be applied. According to these, the party that pays the costs and must compensate the other party will be the one that initiated the proceedings

[8] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/form-of-the-appeal-to-federal-tribunal-legal-interest-to-appeal-/

that became moot or the one that has responsibility for the reasons for which the proceedings lost their purpose (BGE 118 Ia 488 at 4a p. 494).

As the Appellant initiated the proceedings that became moot and it is not immediately apparent that the arguments against the ban would have been admitted, the Appellant must pay the costs and compensate the other party.

Therefore the Federal Tribunal pronounces:

1.
The matter is not capable of appeal to the extent that it has not become moot.

2.
The court costs at CHF 3'000 shall be paid by the Appellant.

3.
The Appellant shall pay CHF 3'500 to the Respondent 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 June 18, 2012.

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Hurni