4A_640/2010[1]

Judgment of April 18, 2011

First Civil Law Court

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

Appellant,

A._____,
Represented by Mr. Philipp J. Dickenmann and Mr. Reto Hunsperger,

v.

Respondent,
1. World Anti-Doping Agency (WADA),
Represented by Mr. François Kaiser and Mr. Serge Vittoz,
2. Fédération Internationale de Football Association (FIFA),
Represented by Mr. Christian Jenny,
3. Cyprus Football Association (CFA),
Represented by Mr. Antonio Rigozzi,

Facts:

A.

A.a A._____ is domiciled in X._____ [name of the country omitted] (the Appellant) and is a professional football trainer.

The World Anti-doping Agency (WADA; Respondent 1) is a foundation under Swiss law with headquarters in Lausanne. Its goal is the worldwide fight against doping in sport.

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[1] Translator's note: Quote as A._____ *v.* WADA, FIFA and CFA 4A_640/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

The Fédération Internationale de Football Association (FIFA; Respondent 2) is the international football federation with headquarters in Zurich. The Cyprus Football Association (CFA; Respondent 3) is the national football federation of Cyprus and as such a member of the FIFA.

A.b At the relevant time the Respondent was active within the Cypriot football club of Y._____, which in its turn belongs to the CFA.
After the plays of October 31st, 2008, November 9, 2008 and November 24, 2008 various players of the Y._____ team were made to undergo a doping test. “Oxymesterone” a substance which is on the list of prohibited anabolics was found in two players.
Consequently the CFA conducted an investigation as to the background of the positive doping tests. The person in charge of the investigation found among other things in his report of December 31st, 2008 that the Appellant as trainer of Y._____ offered two white pills to the eleven players before the play. The players were not forced to take the pills and some did not take the pills, which the Appellant described as caffeine pills.

A.c Based on this investigation the CFA initiated disciplinary proceedings for breach of doping rules against the Appellant and the two players who had tested positive. In a decision of April 2, 2009 the Judicial Committee of the CFA issued a two years ban against the Appellant, valid from the day of the decision. The Judicial Committee held with a view to the sanction to be pronounced that the Appellant’s cooperation and his readiness to contribute to the clarification of the matter had to be taken into account. Accordingly the four years ban as per the applicable provisions of the FIFA Disciplinary Code and of the World Anti-Doping Code was to be reduced to two years. In a decision of April 24, 2009 the Judicial Committee banned the two players who had tested positive for a year whilst no disciplinary proceedings were opened against the other players.

B.
B.a On March 30, 2009 Respondent 1 appealed the decisions of the CFA in connection with the events described as to football club Y._____ (proceedings CAS 2009/A/1817) to the Court of Arbitration for Sport (CAS). As Respondent 1 had not participated in the proceedings in front of the bodies of the Federation and had not been notified the decisions they took, it required from the CAS a notification of the corresponding decisions and of other documents. After receiving the decisions Respondent 1 submitted the reasons for its appeal to the CAS on September 8, 2009 and submitted that the decisions of the Disciplinary Committee of the CFA were to be annulled and that the Appellant should be banned for four years and the other players who had taken the pills for two. On

May 5, 2009 Respondent 2 appealed to the CAS the decision of the CFA Disciplinary Committee of April 2, 2009 by which the Appellant had been banned for two years and submitted that the Appellant should be forbidden to work as a trainer for at least four years (CAS proceedings 2009/A/1844). In Its brief of September 8, 2009 Respondent 2 repeated its submissions and as an intervening party in proceedings CAS 2009/A/1817 it confirmed the submissions made by Respondent 1. Subsequently the CAS did not formally join both proceedings but informed the parties that both proceedings would be conducted simultaneously and decided by the same arbitrators.

B.b In his answer to the appeal of October 26, 2009 the Appellant challenged the jurisdiction of the CAS and moreover argued that the decision of the CFA Judicial Committee of April 2, 2009 was legally accurate.
The Appellant argued in support of his objection to jurisdiction that the mere reference to the FIFA Statutes in the applicable Rules of the CFA was insufficient because the CFA did not explicitly provide in its Statutes for a right to appeal the decisions of the Judicial Committee to the CAS. Article R47 of the Procedural Rules of the CAS Code demanded an explicit reference to the jurisdiction of the CAS.

B.c In an award of October 26, 2010 the CAS upheld the appeal against the decision of the CFA Judicial Committee of April 2, 2009 to the extent that it concerned the Appellant (award nr 1) and banned the Appellant for four years starting from April 2, 2009 (award nr 2). Furthermore the Appellant was ordered to pay costs (award nr 7).

C.
In a Civil law appeal of November 24, 2010 the Appellant essentially submits that the Federal Tribunal should annul paragraphs 1, 2 and 7 of the CAS award of October 26, 2010 and should find that the Arbitral tribunal has no jurisdiction on the Appellant. Alternatively paragraphs 1, 2 and 7 of the October 26, 2010 arbitral award should be annulled and the matter sent back to the Arbitral tribunal for a finding that the Arbitral tribunal has no jurisdiction as to the Appellant. More alternatively, paragraphs 1, 2 and 7 of the award under appeal should be annulled and the matter sent back to the Arbitral tribunal.
The Respondents submit that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected. On March 28, 2011 the Appellant filed a reply with the Federal Tribunal.

D.

On December 20, 2010 the Federal Tribunal rejected a request for security for costs by Respondent 2. On February 2, 2011 the Federal Tribunal rejected the Appellant's request for a stay of enforcement. On March 17, 2011 a new request for a stay of enforcement was rejected.

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. When that decision was issued in another language, the Federal Tribunal resorts to the language used by the parties. The decision 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 decision will be issued in the language of the appeal according to practice.

2.

In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA[4] (SR291) (Art. 77 (1) (a) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne in this case. The Appellant and Respondent 3 had their seat outside Switzerland at the relevant time. 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 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle only result in the annulment of the decision (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG, to the extent that the provision empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal, there is however an exception, according to which the Federal Tribunal can decide itself the jurisdiction or lack of jurisdiction of the arbitral tribunal (judgment 4A_456/2009 from May 3, 2010 at 2.4; 4A_240/2009 of December 16, 2009 at 1.2; all with references; compare in the framework of the old public law appeal with BGE

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[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.

[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.

127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 ff). The Appellant's main submission is therefore admissible.

2.3 The Federal Tribunal bases its judgement on the facts found by the arbitral tribunal (Art. 105 (1) BGG). It may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are obviously inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the applicability of Art. 97 BGG and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against these factual findings or exceptionally when new evidence (see Art. 99 (1) BGG) is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). Whoever relies on an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wants to rectify or supplement the factual findings on this basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

3.
The Appellant argues on the basis of Art. 190 (2) (b) PILA that the Arbitral tribunal wrongly accepted jurisdiction.

3.1 The CAS examined its jurisdiction on the basis of Article R47 of the CAS-Code, according to which a decision of a sport federation can be appealed to the CAS to the extent that the statutes or the regulations of the Federation so provide or when the parties have entered into a specific arbitration agreement. Accordingly it was to be decided whether the statutes or regulations of the CFA, the decision of which was appealed, contained a possibility to appeal to the CAS.
The Arbitral tribunal furthermore considered that Respondents 1 and 2 could rely on Articles 62 and 63 of the FIFA Statutes with regard to the issue of jurisdiction as these provide the following:
"62 Court of Arbitration for Sports (CAS)
1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.
2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.
63 Jurisdiction of CAS

1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.

5. FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members or Leagues under the terms of par. 1 and par. 2 above.

6. The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or Leagues under the terms of par. 1 and par. 2 above.

7. Any internally final and binding doping-related decision passed by the Confederations, Members or Leagues shall be sent immediately to FIFA and WADA by the body passing that decision. The time allowed for FIFA or WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectively, of the internally final and binding decision in an official FIFA language."[5]

The Arbitral tribunal held that it was proved that the Appellant was registered with the CFA as trainer of the football club Y._____ and that in the framework of that registration he had agreed to comply with the statutes and regulations of the CFA (including their anti-doping provisions).

It stated furthermore that the Appellant, who was bound by the statutes and regulations of the CFA, was also bound by the FIFA Statutes, particularly as

- the CFA is obliged according to Art. 13.1 (d) of the FIFA Statutes to ensure that its own members comply with the Statutes, Regulations, Directives and Decisions of FIFA bodies;
- Article 11.7 of the FIFA Statutes provides that the anti-doping rules of the CFA must comply with FIFA rules among others;
- according to Art. 21 of the CFA Statutes the FIFA rules are applicable in case of unclear or lacking internal provisions of the CFA;

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

- Article 22.5 of the CFA Statutes provides for the applicability of the FIFA Statutes to disputes between members of the CFA and foreign law subjects.

The Arbitral tribunal held accordingly that Articles 62 and 63 of the FIFA Statutes were binding for the Appellant. To the extent that an appeal to the CAS was possible according to these Statutes they justified jurisdiction of the CAS to decide the dispute at hand. Based on the general reference to the FIFA Statutes in the CFA Statutes the CAS had jurisdiction to decide the appeal made by Respondents 1 and 2 in conformity with Article R47 of the CAS-Code.

3.2.

3.2.1 The Federal Tribunal reviews freely the legal issues as to the jurisdictional grievance according to Art. 190 (2) (b) PILA, including the preliminary substantive issues from which the determination of jurisdiction depends. Yet it reviews the factual findings of the decision under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against these factual findings or exceptionally when new evidence is taken into account and this applies also in the framework of the jurisdictional grievance (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.2.2

The arbitration clause must meet the requirements of Art. 178 PILA. However the Federal Tribunal reviews the agreement of the parties to call upon an arbitral tribunal in sport matters with some "benevolence"; this is with a view to encouraging quick disposition of disputes by specialized tribunals which, like the CAS, offer adequate guarantees of independence and impartiality (BGE 133 III 235 at 4.3.2.3 p. 244 ff with references). The generosity which characterizes case law of the Federal Tribunal in this context appears in the assessment of the validity of arbitration clauses by reference (judgment 4A_548/2009[6] of January 20, 2010 at 4.1; 4A_460/2008[7] of January 9, 2009 at 6.2 with references).The Federal Tribunal has accordingly found valid at times a general reference to the arbitration clause contained in the statutes of a federation (judgement 4A_460/2008[8] of January 9, 2009 at 6.2; 4P.253/2003 of March 25, 2004 at 5.4; 4P.230/2000 of February 7, 2001 at 2a; 4C.44/1996 of October 31st, 1996 at 3c; see BGE 133 III 235 at 4.3.2.3 p. 245; 129 III 727 at 5.3.1 p. 735; all with references). Thus in the case of a football player who was a member of a national federation this Court considered as a legally valid reference to the arbitration clause

[6] Translator's note: English translation available on www.praetor.ch
[7] Translator's note: English translation available on www.praetor.ch
[8] Translator's note: English translation available on www.praetor.ch

contained in the FIFA Statutes the provision contained in the Statutes according to which the sportsmen belonging to the federation had to comply with FIFA rules (judgement 4A_460/2008[9] of January 9, 2009 at 6.2).

3.3

3.3.1

The Appellant rightly does not dispute that as a professional trainer he agreed through his registration with the CFA to comply with the statutes and regulations of the CFA. However he disputes that Articles 62 and 63 of the FIFA Statutes apply to him.

The Appellant accurately points out at first that Article 13.1 (d) of the FIFA Statutes, which requires the national football federations to ensure that their members comply with the Statutes, regulations, directives and decisions of FIFA cannot be applied directly to the Appellant as he is not himself a member of FIFA. It is instead necessary that the CFA Statutes, by which the Appellant agreed to be bound in the framework of his registration as a football trainer, provide for the applicability of the corresponding provision of the FIFA Statutes directly or by global reference to the FIFA rules.

Article 11.7 of the CFA statutes provides that the anti-doping rules of the CFA have to comply among others with the Statutes and Regulations of FIFA. Contrary to the Appellant's view this reference is not "clearly a mere reference to the substantive anti-doping rules of FIFA" which cannot accordingly mean a reference to the formal provisions of Article 62 and 63 of the FIFA Statutes but merely seeks to ensure that the strictest rules come to application in a given situation. There are no discernable hints that the reference would be limited to some specified anti-doping rules and that the arbitration clause in Article 62f of the FIFA Statutes would be excluded therefrom. Respondent 2 points out rightly that the FIFA Statutes, to which Article 11.7 of the CFA Statutes refer among others, contain no substantive anti-doping rules but that in Article 63 (5) and (6) they provide for a right of appeal by Respondents 1 and 2 to the CAS against final internal decisions in connection with doping. In view of these specific provisions which serve the international fight against doping, the argument is unpersuasive in the Appellant's reply that Article 24[10] of the final provisions of the FIFA Statutes would indeed contain a substantive doping provision, according to which with reference to Art. 2 (e) of the FIFA Statutes, "FIFA shall take action especially, but not exclusively, against irregular betting activities, doping and racism". It is not clear, neither does the Appellant

[9] Translator's note: English translation available on www.praetor.ch

[10] Translator's note: It would appear to be Article 14.

explain more precisely, to what extent Article 11.7 of the CFA statutes should serve as a direct reference to this general provision, which aims at FIFA directly and illustrates the general objective in Art. 2 (e) of the FIFA Statutes. One should not fail to recognize that in the worldwide fight against doping the CAS is of ever more important significance. Thus an international development towards the CAS jurisdiction in doping matters is to be upheld with a view to ensuring compliance with international standards in this field. Article 13.2.1 of the World-Anti-Doping Code (WADA-Code) provides for the CAS as appeal body for all doping cases in which international athletes are implicated whilst according to Article 13.2.3 (2) (2) of the WADA-Code WADA and the international federation concerned are entitled to appeal to the CAS when national athletes participate (see already BGE 129 III 445 at 3.3.3.3 p. 462 and judgment 4A_149/2003 of October 31st, 2003 at 2.2.2). This development is also emphasized by the reference in the appeal to the Statutes of the Swiss Football Federation, which are not decisive for the case at hand, but according to whose Article 64*bis* (3) the decisions of the Disciplinary Chamber for Doping Cases of the Swiss Olympic Association can be appealed to the CAS.

Against this background it is unpersuasive to object that the jurisdiction of the CAS as to appeals against CFA decisions with regard to doping would have been impossible to ascertain for the Appellant. The Arbitral tribunal did not act illegally when it saw a reference in Article 11.7 of the CFA Statutes to the jurisdiction of the CAS to adjudicate appeals against final decisions of national football federations in Article 63 (5) and (6) of the FIFA Statutes to the extent that compliance with international standards by the national bodies must be ensured by way of an appeal to the CAS, this serves directly the worldwide fight against doping in sport (see judgment 4A_17/2007 of June 8, 2007 at 5). The Appellant's argument that Article 62 (f) of the FIFA Statutes as a procedural rule would not be encompassed in the reference at Article 11.7 of the CFA statutes is accordingly not persuasive.

3.3.2

Even if there were no clear reference to Article 62 (f) of the FIFA Statutes in Article 11.7 of the CFA Statute, Article 21 of the CFA Statute would speak in favour of CAS jurisdiction as it provides that in case of unclear internal CFA provisions or failing any, the rules of FIFA are applicable. In this case it would be unclear to what body the internal doping decision of CFA could be appealed, which would call for the application of Article 63 (5) (6) of the FIFA Statutes.

The Appellant may not be followed when he argues that the lack of reference to a possibility to appeal to the CAS would be an intentional omission. He himself concedes that according to Article 64 of the FIFA Statutes the national federations are obliged to adopt a provision in their statutes and regulations preventing their members from bringing football related disputes in front of the state courts. Instead the national federations must provide for the jurisdiction of an arbitral tribunal, which can be either the CAS or another arbitral tribunal. Yet he did not show in the arbitral proceedings or in front of the Federal Tribunal that a doping decision of the CFA could be appealed to an independent arbitral body according to its statutes. In view in this general obligation of the CFA to make possible an appeal either to the CAS or to another independent tribunal and contrary to the point of view argued in the appeal, there can be no finding of an intentional omission whereby decisions of the Judicial Committee of the CFA could be appealed neither to the CAS nor to another arbitral tribunal. To the contrary, it appears even from the legal opinion as to Cyprus law produced by the Appellant, however scantily reasoned, which moreover does not deal with the legal situation of the case at hand.

3.3.3

The reference to the anti-doping rules of the FIFA Statutes contained in the CFA statutes and thus the jurisdiction of the CAS provided in Article 63 (5) and (6) to adjudicate appeals by Respondents 1 and 2 against doping decisions of national football federations must be considered as legally binding in view of case law of the Federal Tribunal as to the validity of arbitration clauses by reference in the field of sport arbitration (see above E 3.2.2). If it is sufficient for a statutory provision to contain the general applicability of the rules of the international sport federation, including an arbitration clause among others, with regard to a sportsman who validly submitted to the statutes of a national federation according to Art. 178 (1) PILA (see judgment 4A_460/2008 of January 9, 2009 at 6.2), then the same must apply to a (limited) reference to parts of the statutes which provide for the jurisdiction of an arbitral tribunal for specific disputes – in this case decisions in the field of doping.

When the Appellant argues in his reply with reference to the formal requirement of Art. 178 (1) PILA that nowhere in the award did the CAS find that he would have issued a written statement joining the CFA or submitting to the CFA statutes, he does not show the violation of any jurisdictional provisions. The Arbitral tribunal held that it was proved that the Appellant as trainer of football club Y._____ was registered with the CFA and in the framework of that registration had agreed to comply with the Statutes and regulations (including the Anti-Doping provisions) of the CFA. It is true

that the award under appeal does not go into the details of that registration. However the Arbitral tribunal had no reason to clarify these circumstances any further as the Appellant did not factually dispute in the arbitral proceedings that there was a formally valid declaration of intent to be bound but merely – and wrongly as was shown – took the view that the reference contained in the pertinent CFA rules to the FIFA Statues was not sufficient but that it was necessary for the CFA statutes to contain an explicit right to appeal the decision of the Judicial Committee to the CAS. In view of this lack of contestation the Arbitral tribunal did not violate Art. 178 (1) PILA when it found that the registration met the necessary requirement of written form. To the extent that the Appellant would want to deny in his argument ever to have made a written statement that can be proved by its text in which he submitted to the CFA statutes, this would be a new argument raised for the first time in front of the Federal Tribunal and therefore inadmissible (Art. 99 (1) BGG).

The same applies to the argument that the Arbitral tribunal would not have found that the Appellant would have had the FIFA Statutes at hand or that their contents would have been known to him at the point in time when he submitted to the CFA statutes. The Appellant's argument that the formal requirement of Art. 178 (1) PILA would not be met appears accordingly unfounded to the extent that his arguments are admissible at all.

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

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that matter is capable of appeal.

2. The Court costs of CHF 5'000 shall be paid by the Appellant.

3. The Appellant shall pay CHF 6'000 to each of the Respondents for the federal proceedings.

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

Lausanne April 18, 2011

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

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