

4A_258/2008¹

Judgement of October 7, 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding,

Federal Judge KLETT (Mrs),

Federal Judge KOLLY,

Clerk of the Court: CARRUZZO.

X. _____,

Appellant,

Represented by Mr Philipp DICKENMANN and Mrs Aline WEY,

v.

Y. _____,

Respondent,

Represented by Mr Jean-Louis DUPONT,

Z. _____,

Respondent,

Represented by Mr J. _____, S. _____ and T. _____,

Facts:

A.

A.a X. _____ is a national sports federation based in A. _____. As a tenpin bowling federation, it is a member of Y. _____. Y. _____ is an international sport federation founded in 1952. Its purpose is *inter alia* to promote the development of

¹ Translator's note: Quote as X. _____ *v.* Y. _____ and Z. _____ 4A_258/2008. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

bowling worldwide and to support national organisations that promote ninepin and tenpin bowling on their respective territories and worldwide. It is domiciled in B. _____ (United States of America).

Z. _____ is a regional sport federation which aims *inter alia* to support the promotion and the practice of sporting activities linked to bowling and its different disciplines, *i.e.* both ninepin and tenpin bowling. It is based in C. _____.

A.b In November 2006, Y. _____ invited its members to a biannual general meeting planned to take place on August 30, 2007 at D. _____ (Mexico). The agenda of the biannual meeting, which is set forth in a statutory clause includes, amongst other items, the admission and expulsion of members. The invitation to such meetings never includes the list of potential members requesting their admission to the Federation. X. _____ was timely advised of the date and the venue of the biannual General Meeting.

On August 15, 2007, Z. _____ applied for membership of the Federation in writing to the Secretary General of Y. _____. The Presidium, the executive body of Y. _____, held a meeting at D. _____ on August 28, 2007. It unanimously decided to recommend to the General Meeting the admission of Z. _____ as a member of Y. _____ and admitted it as a provisional member.

Z. _____'s application was submitted to the General Meeting of Y. _____ on August 30, 2007 along with the applications of four national federations. Its membership was unanimously accepted. X. _____ did not attend the meeting and was not represented.

A.c On September 18, 2007, X. _____ submitted a request to the Presidium seeking a declaration of nullity concerning the decision of the General Meeting to accept Z. _____ as a member of Y. _____.

In its decision of November 18, 2007, notified on the same date to the interested party, the Presidium held that it did not have jurisdiction to rescind a decision taken by the

General Meeting. It indicated that it would submit to the jurisdiction of the Court of Arbitration for Sport (CAS) if its decision was appealed.

B.

On November 28 and December 18, 2007 respectively, X._____ first filed a declaration of appeal before submitting its appeal brief to the CAS. It sought a finding that the decision of the General Meeting was void on the grounds that it violates both the Statutes of Y._____ and the laws of the country in which Y._____ is located.

In its answer of January 16, 2008, Y._____ submitted that the appeal should be rejected. Z._____, inpleaded² in the proceedings by Y._____, likewise submitted that the appeal should be rejected in a brief dated February 11, 2008.

The Panel of the CAS, composed of three arbitrators, heard the parties in a hearing held on March 5, 2008, in Lausanne. At the end of the hearing, the parties expressly declared that their right to be heard had been complied with and that they were satisfied with the manner in which they had been treated during the arbitration proceedings.

In its award of April 23, 2008, the CAS rejected the appeal. First, it ruled out the applicability to the dispute of the laws of the country in which X._____ is based, whether they be mandatory rules or immediately applicable laws. It then examined the Statutes of Y._____ and reached the conclusion that the veto right they confer upon members, allowing them to oppose a derogation from the principle that prohibits the admission of more than one organisation per country to membership in Y._____, may be set aside by a decision of the General Meeting taken by a three-quarter majority of the votes cast to admit a new member, whoever that may be. In this case however, Z. _____'s membership application was unanimously accepted. This means that any objection raised by X._____ would not have had any effect under the circumstances. Be this as it may, X._____ did not validly raise any such objections

² Translators note: "appelé en cause".

as it did not attend the General Meeting of August 30, 2007 and did not arrange to be represented at that meeting. The Panel further explained why it considered that Y. _____ had respected the purpose and the wording of its Statutes in its handling of the process that led to Z. _____ being admitted to the organisation. It underlined in this respect that Y. _____'s members, which do not sit on the Presidium are never advised of admission requests prior to the General Meeting and that the concerned item on the agenda provided for by the Statutes is never detailed in a list of potential members submitting such requests.

C.

On May 23, 2008, X. _____ submitted a Civil law appeal to the Federal Tribunal seeking the annulment of the aforesaid award.

Y. _____ did not file an answer within the time limit given and did not react to the notice inviting it to provide an address for service in Switzerland.

Z. _____, for its part, filed an answer on the last day of the time limit with a post office of C. _____, faxed a copy of its brief to the Federal Tribunal on the same day and provided an address for service in Switzerland.

The CAS submitted its file and waived its right to file an answer.

Reasons:

1.

The award under appeal is in French. The Appellant used German in its brief. In accordance with Art. 54 (1) LTF³, and the Federal Tribunal's practice in this area, the decision will be rendered in French.

³ Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

2.

In a decision of the Presiding Judge of June 18, 2008, a time limit expiring on August 19, 2008 was given to Z. _____ to submit a possible answer to the appeal. Following this decision, Z. _____ addressed to the Federal Tribunal its written answer, dated August 18, 2008, by registered mail with acknowledgement of receipt, which it deposited with a post office of C. _____ on the 19th of the same month. The envelope was received on August 21, 2008 at the Zurich international postal centre. The Respondent further sent a copy of its answer to the Federal Tribunal by fax of August 19, 2008.

In accordance with Art. 48 (1) LTF, briefs must be submitted no later than the last day of the time limit either to the Federal Tribunal, or, bearing its address, to the Swiss Post or to a Swiss diplomatic or consular mission. With the exception of Liechtenstein, foreign post offices are not deemed equivalent to Swiss post offices. Submission of a brief to a foreign post office does not equate with submission to a Swiss post office (ATF 125 V 65 at 1 p. 67). In such case, the time limit is complied with only if the envelope containing the brief arrives no later than the last day of the time limit at the Clerk's office of the Federal Tribunal, or if the Swiss Mail takes possession thereof prior to the expiration of the time limit (KATHRIN AMSTUTZ/PETER ARNOLD, *Commentaire bâlois, Bundesgerichtsgesetz*, no. 10 ad Art. 48; YVES DONZALLAZ, *Commentaire de la loi sur le Tribunal fédéral*, no. 1238). Further, the submission of a brief per fax does not satisfy the requirements for compliance with the time limit (ATF 121 II 252 at 4; AMSTUTZ/ARNOLD, *op. cit.*, no. 6 ad Art. 48; DONZALLAZ, *op. cit.*, no. 1253).

Considered in light of these rules, Z. _____'s submission appears to have been filed late. This Court therefore cannot take the submission into consideration. Indeed, the Swiss Mail took possession of the envelope containing the brief only two days after the expiration of the time limit for filing a response. Moreover, the sending of the brief per fax on the last day of the time limit did not satisfy the requirements for compliance with the time limit.

3.

3.1 In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA⁴ (Art. 77 (1) LTF).

3.2 The seat of the CAS is in Lausanne. At least one of the parties (in this case, all three) did not have its domicile in Switzerland at the pertinent time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

3.3 The Appellant is directly affected by the final award under appeal, as it forces it to accept that a regional federation of its country of domicile be a full member of the international federation of the sport concerned. Thus it has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Filed within 30 days after the notification of the award under appeal (Art. 100 (1) LTF), the appeal satisfies the formal requirements at Art. 42 (1) LTF and is to be allowed.

It is not necessary to examine here the disputed issue as to whether or not the requirement of a minimum value in dispute applies to a Civil law appeal in a matter concerning an international arbitration award. If such were the case, the said requirement would not overreach the requirement applicable to a Civil law appeal against a decision taken by a cantonal court of last instance. This being said, according to case law, a dispute relating to membership of an association as in the present case does not constitute a pecuniary matter within the meaning of Art. 74 LTF and is therefore not subject to the requirement of a minimum amount in dispute (judgement 5A_260/2007 of August 7, 2007, at 1 and the cases cited, particularly ATF 108 II 15 at 1a).

⁴ Translator's note: PILA is the most commonly used abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

3.4 The appeal may only be made for one of the reasons exhaustively listed at Art. 190(2) PILA (ATF 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282; 119 II 380 at 3c p. 383). The Federal Tribunal reviews only those grounds for appeal which were invoked and developed by the Appellant (Art. 77 (3) LTF). Accordingly, the Appellant must state its grounds for appeal in conformity with the strict requirements set by case law under Art. 90 (1) (b) OJ⁵ (see ATF 128 III 50 at 1c), which remain in force under the aegis the new Federal Law of Procedure.

4.

In a single grievance, the Appellant submits that the award under appeal violates public policy within the meaning of Art. 190 (2) (e) PILA.

4.1 An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to Swiss concepts, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). A distinction is made between material public policy and procedural public policy.

Procedural public policy guarantees to the parties the right to an independent judgment on the submissions and the facts presented to the arbitral tribunal in a manner consistent with applicable procedural law; procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to untenable contradiction with the feeling of justice, so that the decision appears incompatible with the values recognized in a state ruled by laws.

An award is contrary to material public policy when it violates some fundamental rules of material law to the point of no longer being consistent with the determining legal order and system of values; among such principles are contractual trust, respecting the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures and the protection of incapable persons.

⁵ Translator's note: OJ is the French abbreviation for the previous Federal Statute organising federal courts, which was substituted by the LTF of June 17, 2005 (see note 3).

4.2 In this case, the Appellant is completely disregarding these principles because under cover of an alleged violation of public policy it is merely seeking to instigate a review of the application of material law, which is inadmissible (ATF 116 II 373 at 7b). What the Appellant is really denouncing, based on arguments of a purely appellate nature and by unduly touching up the facts, is the manner in which Y. _____ organised the General Meeting at which Z. _____ was admitted as a member of the aforesaid international federation and the validity of the decision taken on that point. Indeed, from the legal arguments submitted in the appeal brief it appears that the Appellant challenges the fact that the General Meeting was convened in accordance with the Statutes of Y. _____ and in compliance with its right to be heard, and it opposes the CAS's interpretation of the provision of the Statutes providing for a right of veto and that of another provision of the Statutes on the basis of which the arbitrators inferred the existence of an alternative mode of affiliation to Y. _____.

There is no way of linking such an argument to the concept of public policy germane to international arbitration. An arbitral tribunal's interpretation of the provisions of the Statutes of a private organisation is excluded from the scope of the principle of public policy and cannot be reviewed by the Federal Tribunal in an appeal based on Art. 190 (2) (e) PILA, in the same way as the interpretation process of contracts and the legal conclusions that are drawn therefrom by logical process are excluded. Nor does it appear that merely tolerating the joint presence of a regional federation and a national federation within an international federation contravenes any fundamental principles to the point of no longer being consistent with the determining legal order and system of values.

Under the above circumstances, this appeal cannot but be rejected to the extent that the matter is capable of appeal.

5.

The Appellant, which is loosing, shall pay the judicial costs (Art. 66 (1) LTF). However it shall not be required to compensate the Respondents, as one of them (Y. _____) did not file an answer and the other (Z. _____) filed its answer late.

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 5'000.-, shall be borne by the Appellant.
3. This decision shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, October 7, 2008

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

The presiding Judge:

The Clerk:

CORBOZ

CARRUZZO