4A_627/2011[1]

Judgment of March 8, 2012

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: Hurni.

International Ice Hockey Federation (IIHF),
Represented by Mr. Daniel Eisele and Mr. Tamir Livschitz,
Appellants,

v.

SCB Ice Hockey AG,
Represented by Mr. Michael Bader and Mrs. Elena Valli,
Respondents.

Facts:

A.
A.a The International Ice Hockey Federation (IIHF, Appellant) is an association under Swiss law based in Zurich and registered at the Registry of commerce. Among its members is the Swiss Ice Hockey Federation (SIHF), also an association under Swiss law based in Zurich. The Swiss National Hockey League GmbH (NL-GmbH) based in Ittigen (Bern) belongs to this parent organization.

SCB Ice Hockey AG (SCB AG, the Respondent) is a corporation headquarted in Bern. Its goal is to conduct, organize and manage a professional hockey team (SCB, Skating Club Berne), including the conduct of games and the handling of transfers. It is a member of SIHF and of NL-GmbH.

A.b In April 2008 the Appellant entered into an agreement with SIHF and NL-GmbH as to the participation of Swiss clubs to the Champions Hockey League, a European hockey tournament of high level (the CHL-Agreement). This provides among other things for some financial contributions for a total amount of € 10'000'000 in favor of the participating clubs (Art. 8) as well as the rules

[1] Translator's note: Quote as International Ice Hockey Federation *v.* SCB Ice Hockey AG, 4A_627/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

pursuant to which the clubs become entitled to participate (Art. 10). The CHL-Agreement provides for Swiss law to be applicable and states that "*any dispute between the parties under or relating to the subject matter of this agreement*[2]" is to be decided exclusively and finally by an award of the Court of Arbitration for Sport in Lausanne (CAS).

Art. 10 of the CHL-Agreement ("*Entries for the Competition*[3]") contains the following provisions:
"*10.1 European IIHF member national association / leagues shall enter a certain number of clubs for this competition (...).*

10.3 (...) For the first season, national associations / leagues shall be represented on the following basis: (...)
c) Switzerland (...) : One representative being the top league national champion (...).

10.4 Clubs must be entered by the National Association / League by means of the official entry form (...).[4]"

The Respondent made an application to the Appellant to participate in the CHL 2008/2009 by way of a letter of May 19, 2008. The application form signed by the Respondent ("*Entry Form*[5]") provides that the competition shall be conducted according to the rules contained in the corresponding agreements between the Appellant and the national federation of the applicant club as well as in the rulebook of the Appellant and that the applicant club accepts all obligations contained in these applications and rules.

On the basis of its results in the national championship the Respondent met the requirements to participate in the 2009/10 and 2010/11 CHL.

A.c In January 2009 the company sponsoring the CHL suspended its payments as a consequence of the financial crisis. On April 9, 2009 the Appellant terminated its agreement with that company and informed various national federations, including the SIHF, that it was no longer in a position to finance the CHL 2009/10 and 2010/11 and that it could not guarantee the prize money of € 10'000'000 each time. In the middle of June the Appellant decided to suspend the CHL 2009/10 due to the lack of new investors. At the end of 2009 the Appellant, the SIHF and NL-GmbH entered into a "*Settlement agreement*[6]" with a view to conducting the CHL in the season 2010/11 again.

B.
B.a In a request for arbitration of October 13, 2010 the Respondent submitted to the CAS that the Appellant should be ordered to pay € 107'600 (reduced to € 53'800 later), with interest.

The first two amounts correspond to the alleged prize money that the Respondent would have received in any event for participating in the CHL 2009/10 and 2010/11 pursuant to the CHL-

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

Agreement. The third amount corresponds to the damages that the Respondent would have suffered as a consequence of the fact that it bought three players with a view to participating in the CHL 2009/10.

In its answer of November 11, 2010 the Appellant mainly submitted that the CAS should decline jurisdiction. Alternatively it submitted that the claim should be rejected.

B.b In a "*Partial Award on Jurisdiction*[7]" of September 13, 2011 the CAS found that it had jurisdiction.

The main reason for that finding was that Art. 10 of the CHL-Agreement, which defines which clubs are entitled to participate in the CHL on the basis of their performance in the national championships, constitutes a pure contract in favor of third parties (namely in favor of the clubs entitled to participate) within the meaning of Art. 112 (2) OR[8] and that consequently the arbitration clause contained in the CHL agreement is also applicable to such third parties.

C. In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the partial award of September 13, 2011 and deny the CAS jurisdiction.

The Respondent submits that the appeal should be rejected. The CAS submitted some comments and the Parties filed a reply and a rejoinder.

A stay of enforcement was granted by the Presiding judge on November 7, 2011.

Reasons:

1.
In front of the Federal Tribunal the Parties used German. The judgment of the Federal Tribunal is therefore to be issued in German.

2.
2.1
The award under appeal concerns two parties that are both based in Switzerland. The parties to the contract or the parties in the arbitration did not stipulate in the arbitration clause or later that the provisions as to international arbitration (Art. 176 ff PILA[9]) should be applied (see Art. 353 (2) CCP[10]). The provisions as to internal arbitration are accordingly applicable as provided by Title III of the CCP (Art. 353 ff).

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

[8] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

[9] 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.

[10] Translator's note: CCP stands for Code of Civil Procedure, the English abbreviation for the new Swiss Code of Civil Procedure in force since January 1st, 2011, RS 272.

2.2
The award under appeal is an interim award on jurisdiction. It may be appealed to the Federal Tribunal by way of a Civil law appeal on the grounds stated at Art. 393 (a) and (b) CCP (Art. 77 (1) (b) BGG[11] compared with Art. 392 (b) CCP).

2.3
A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle result only in the decision under appeal being annulled and not modified (see Art. 77 (2) BGG ruling out the applicability of Art. 177 (2) BGG to the extent that the latter provision empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns jurisdiction however, there is an exception and the Federal Tribunal may find itself in favor or against jurisdiction (BGE 136 III 605 at 3.3.4 p. 616 with references). The Appellant's submission for a finding that the CAS has no jurisdiction in the case at hand is accordingly admissible.

2.4
The Federal Tribunal reviews only the grounds for appeal which are brought forward and reasoned in the appeal (Art. 77 (3) BGG). This corresponds to the duty to submit reasons with regard to the violation of constitutional rights (Art. 110 (2) BGG). As before, the strict requirements for reasons developed by the Federal Tribunal under the aegis of Art. 90 (1) (b) of the previous law remain valid (BGE 134 III 186 at 5). The Appellant must specify which of the various grounds for appeal are met in its view. It is not for the Federal Tribunal to research which ground for appeal according to Art. 393 (a) and (b) CCP should be invoked with the various arguments raised if that is not specified by the Appellant in relation to them. Thus the Appellant must show in details why the requirements of the grounds for appeal invoked are met and point out in its criticism which of the reasons of the lower Court are legally inaccurate (see BGE 128 III 50 at 1c; further: BGE 134 II 244 at 2.1 p. 245 f.; 133 IV 286 at 1.4 p. 287; 134 V 53 at 3.3). Mere references to the record are inadmissible; to what extent the grounds for appeal relied upon are met must be explained in the appeal brief itself (see BGE 133 II 396 at 3.1 p. 400; 126 III 198 at 1d; 116 II 92 at 2; 115 II 83 at 3 p. 85).

3.

The Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction.

3.1
The jurisdictional appeal provided by Art. 393 (b) CCP as to internal arbitration corresponds to the one contained at Art. 190 (2) (b) PILA as to international arbitration (see message of June 28, 2006 as to the Swiss Code of Civil procedure § 5.25.8 *ad* Art. 391 E CCP, BBl[12] 2006 7405).
As to jurisdiction the Federal Tribunal exercises free judicial review including as to the substantive preliminary issues from which the determination of jurisdiction depends. However this Court does not review the factual findings of the award under appeal, even in an appeal concerning jurisdiction, as it is bound by the factual findings of the arbitral tribunal, which it may neither supplement nor

[11] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

[12] Translator's note: BBl is the German abbreviation for the Swiss Federal Reporter.

rectify (see Art. 77 (2) in conjunction with Art. 97 and Art. 105 (2) BGG). It is only when some admissible grievances within the meaning of Art. 393 CCP are brought against the factual findings or when exceptionally some new evidence is taken into account that the Federal Tribunal may review the factual findings of the award under appeal (Art. 99 BGG; see BGE 4A_246/2011[13] of November 7, 2011 at 2.2.1).

3.2

The issue as to the jurisdiction of the arbitral tribunal also includes the subjective scope of the arbitration clause. In its review process the arbitral tribunal must clarify which persons are bound by the arbitration clause (BGE 134 III 565 at 3.2 S. 567 with references). According to the principle of the relativity of contractual commitments (*alteri stipulari nemo potest*; ULP. D. 45,1,38,17) an arbitration clause contained in a contract basically binds only the parties to the contract. However the Federal Tribunal has long held that an arbitration clause may under certain circumstances also bind persons that did not sign the contract and are not mentioned there, for instance when a claim is assigned, in case of the simple or joint assumption of an obligation, or when a contractual relationship is taken over (BGE 134 III 565 at 3.2 p. 567 ff; 129 III 727 at 5.3.1 p. 735).When a third party involves itself in the performance of a contract containing an arbitration clause it is furthermore accepted that by doing so the third party ratifies the arbitration clause by conclusive behavior and makes known its intent to become a party to the arbitration agreement (BGE 134 III 565 at 3.2 p. 568; 129 III 727 at 5.3.2 p. 737). Finally the objective scope of an arbitration clause is extended to the beneficiary in case of a pure contract in favor of a third party within the meaning of Art. 112 (2) OR: when such a contract contains an arbitration clause the third party may rely on it to enforce its claim against the promissor unless the arbitration clause excludes that possibility (judgment 4A_44/2011[14] of April 19, 2011 at 2.4.1; Pierre-Yves TSCHANZ, in: Commentaire romand, 2011, N. 136 *ad* Art. 178 IPRG). On objective interpretation of the CHL-Agreement the Arbitral tribunal reached the conclusion that the national clubs meeting the requirements set forth at Art. 10 of the CHL-Agreement had obtained their own independent right to claim performance of the various clauses of the Agreement as provided in a pure contract in favor of third parties.

3.3

As to issues of consent and interpretation Swiss contract law recognizes the principle that concurring subjective intent prevails on what is stated objectively, yet differently understood subjectively (BGE 123 III 35 at 2b p. 39). In a dispute relating to consent and interpretation the Court must first determine whether the parties actually expressed the same thing or not, understood the same and united in this understanding (subjective interpretation). Is this the case there is actual consent (BGE 132 III 626 at 3.1 p. 632).

When the parties concurred in their expression but not in their understanding there is a hidden disagreement, which results in the contract being concluded when one of the parties must be protected on the basis of the principle of trust in its understanding of the other's statement of intent and that accordingly the latter must suffer objective interpretation of its statements. When the

[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s/

[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/arbitral-clause-as-contract-in-favor-of-a-third-party-binding/

addressee of a statement of will understands it differently from the one who makes it or when it is impossible to ascertain an actual understanding, the party making the statement must accept that it be understood as the addressee could in good faith according to the wording and context as well as under the circumstances (objective or normative interpretation). In such a case there is normative consent (BGE 135 III 410 at 3.2 p. 413; 133 III 675 at 3.3 p. 681; 123 III 35 at 2b p. 39 ff).

3.4
The Appellant criticizes the factual finding of the Arbitral tribunal that an actual common intent of the Parties to create rights in favor of third parties through the CHL-Agreement cannot be proved. It argues that the finding is arbitrary within the meaning of Art. 393 (e) CCP, in particular because some clear statements of witnesses would have been disregarded. By entering into the CHL-Agreement it would not have intended to entitle the clubs to have their own claims.

3.4.1 The Arbitral tribunal did not issue a finding as to how SHIF and NL-GmbH as counterparties understood the text of the CHL-Agreement in this respect. It does not appear from the arbitral award that SIHF and NL-GmbH or their representatives were heard at all as to this. Only the general secretary of the German Ice Hockey Federation, Franz Reindl, was interrogated for *in some of the meetings Mr. Reindl took also part on behalf of the SIHF*[15] as he had been called as a witness upon the Appellant's request. *Mr. Reindl testified that it had been the intention of the parties to regulate in the CHL Agreement the rights and obligations of the signatory parties only and that there had been no intention to create any rights and obligations for the benefit of third parties*[16]. The Arbitral tribunal held that his statement was not decisive to deny the existence of a contract in favor of third parties because it emanated from a person without legal background. Finally the arbitral award held that *the possibility of a contract for the benefit of a third party was apparently not discussed or analyzed in the course of the negotiations*[17] and that it was not proved that at the time the agreement was concluded the parties wanted to exclude such an entitlement in favor of third parties ("*such an unanimous will of the contracting parties cannot be established*[18]") that the Appellant on the one hand and SIHF and NL-GmbH on the other hand both agreed to create an entitlement in favor of the clubs is not proved. Neither is it established that they agreed in wanting to exclude such a right. Finally it is not established factually that SIHF and NL-GmbH wanted to grant the clubs an entitlement anyway and that they understood the agreement differently from the Appellant in this respect. Therefore neither factual consent nor hidden disagreement is established or excluded.

3.4.2 According to Art. 393 (e) CPC an award may be appealed when it is arbitrary in its result because it relies on factual findings obviously contrary to the record or on a blatant violation of the law or equity. The Appellant – and the Respondent incidentally – disregard the scope of this ground for appeal, which was taken over from the earlier Concordate on Arbitration of March 27, 1969 (Art. 36 (f) KSG[19] (messages at 5.25.8 Art. 391 Draft CPC, BBl 2006 7405). An arbitral tribunal issues factual findings blatantly contrary to the record when due to oversight it puts itself in contradiction

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[15] Translator's note: In English in the original text.
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[17] Translator's note: In English in the original text.
[18] Translator's note: In English in the original text.
[19] Translator's note: KSG is the German abbreviation for the old Intercantonal Concordate on Arbitration of March 27, 1969.

with the record, whether by overlooking parts of the record or by giving them other contents than the accurate ones, or because it mistakenly assumes that a fact is proved on the record whilst the record in reality provides no conclusion in this respect. Contradicting the record is not equal to arbitrary assessment of the evidence. The result of the assessment of the evidence and the evaluations contained there are not subject to recourse for being arbitrary but only the factual findings that are undisputedly contradicted by the record (BGE 131 I 45 at 3.6 p. 50). Furthermore a blatant violation of the law means only a violation of substantive law and not a procedural violation (BGE 131 I 45 at 3.4 p. 48; 112 Ia 350 at 2 p. 352); a blatant violation of equity may only be claimed when the arbitral tribunal was entitled to decide *ex aequo et bono* or when it applied a norm referring to equity (BGE 107 Ib 63 at 2a p. 65 ff). The Appellant does not demonstrate any contradiction with the record in the aforesaid meaning; its argument is basically criticism of the assessment of the evidence, which is not admissible. Moreover the Appellant does not claim that the Arbitral tribunal would have rejected any submissions of evidence in respect of the factual issues that were pertinent and formulated in the prescribed format. Under such circumstances it was not objectionable for the CAS to assume the absence of proof of factual consent and to resort objective interpretation (see BGE 123 III 35 at 2b p. 39 ff).

3.5
The Appellant criticizes the objective interpretation of the CHL-Agreement by the Arbitral tribunal. Contrary to the opinion of the CAS this would not be a pure contract in favor of a third party.

3.5.1 In a pure contract in favor of a third party (Art. 112 (2) OR) the two parties create a right for the third party to demand independently and to claim performance from the obligee of what was promised. The third party becomes a creditor without being party to the contract. The imperfect contract in favor of a third party (Art. 112 (1) OR) however entitles only the obligor to claim performance in favor of the third party from the obligee. The third party has no immediate claim and is entitled only to receive performance as a beneficiary. Whether the third party has an independent immediate right to claim performance is decided in principle on the basis of the statements made by the parties to the contract, alternatively through a corresponding exercise. The third party claiming a direct right to claim and correspondingly alleging the existence of a contract in favor of a third party has the burden of proof (Rolf H. WEBER, Berner Kommentar, N. 6 ff. and 190 to Art. 112 OR). A pure contract in favor of a third party cannot be assumed (BGE 123 III 129 at 3d p. 136).

3.5.2 The CAS stated the following with regard to the issue as to whether or not SIHF and NL-GmbH, at the time of concluding the CHL-Agreement and in particular its Art. 10, on the basis of its wording and the overall circumstances, must have understood it objectively in good faith as meaning that a direct right and therefore a claim was given to the participating clubs: admittedly no provision of the CHL-Agreement uses the concept of a contract in favor of third parties but there is also no clause which would exclude interpreting the CHL-Agreement as a contract in favor of third parties. Art. 10 of the CHL-Agreement limitatively spells out the rules to determine which clubs are entitled to participate. They rely on some purely objective criteria and the national federations therefore could not decide freely if they wanted to register a club. The wording of the registration form shows that the Respondent itself registered for the CHL and that SIHF merely confirmed the registration. For its part the Appellant could not reject the registration of a club that met the requirements for participation as stated in Art. 10 of the CHL-Agreement. From all of this the CAS

concludes that Art. 10 of the CHL-Agreement *confers a right for the benefit of the clubs*[20] and that *the right conferred therein to a club consists of a claim against both contracting parties to be admitted […]*[21].

Finally the CAS stated the following: the German Ice Hockey League together with two clubs, initiated arbitration proceedings against the Appellant seeking damages in connection with the CHL, which would lead to the conclusion that the German league assumes a right of the clubs to claim directly. The Settlement agreement at the end of 2009 provides that the national federations renounce any claims against the Appellant as a consequence of the cancellation of the 2009/10 CHL season and also represent that the clubs will renounce such claims ("*the National Association / League, by signing this agreement, waive, and ensure that all clubs will waive, any potential claim they may have against die IIHF based on the alleged breach by the IIHF of the CHL Agreement in connection with the cancellation of the CHL Season 2009/2010"*[22]), which presupposes that claims by the clubs must be considered possible. The CHL-Agreement was created in the interest and to the advantage of the clubs and they were not included as contractual parties because it was not known in advance which clubs would be entitled to participate to the CHL. The clubs were admittedly not involved in the negotiations but they were informed early and approved the conclusion of the CHL-Agreement at the general meetings of the national federations. Taking part in the CHL was obviously causing the clubs to undergo expenses and therefore they needed certain guarantees, which speaks in favor of a direct right to claim.

3.5.3

The CHL-Agreement refers neither explicitly nor tacitly to a direct claiming right of the participating clubs. According to the CAS *at first sight Art. 10.4 of the CHL Agreement speaks against such a right to the benefit of the clubs*[23]. However, contrary to the opinion of the CAS even a second look at the matter does not change this. Indeed the CHL-Agreement contains some wording according to which the clubs could not register themselves but had to register for the competition through their national federations ("*national associations / leagues shall enter a certain number of clubs for this competition. [...] clubs must be entered by the National Association / League by means of the official entry form*[24]") or according to which the clubs took part in the CHL as representatives of their national federations ("*national associations / leagues shall be represented [...]*"[25]). On the other hand there is no word in the CHL-Agreement as to any independent rights of the participating clubs. The wording of the CHL-Agreement therefore contains nothing that would speak in favor of a pure contract in favor of third parties. As the CAS stated the Agreement rather speaks against it.

The question arises therefore whether CHL and NL-GmbH should nonetheless have understood CHL-Agreement differently in this respect. Nothing can be deducted from the contractual negotiations in this respect as the issue of an entitlement of the clubs was not discussed at all. The

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CAS attributes great significance to the fact that the national federations could not decide freely which club could participate in the CHL but that they had to register those which met the qualifying criteria in the CHL-Agreement. However it is not clear why this would lead to the conclusion that the corresponding club had its own right to claim participation and why it would not be a simple beneficiary without any creditor position. Finally it is not explained on what basis the German federation is claiming together with two clubs so that nothing can be concluded from this. In any event a possible opinion of this federation – obviously not shared by its own general secretary incidentally – would not be relevant as to the rights of the clubs. Indeed even if this federation had understood the agreement it signed as a pure contract in favor of third parties, this would not mean that SIHF and NL-GmbH should have understood the CHL-Agreement in the same way in good faith at the time of conclusion, even if it had the same wording.

The Settlement agreement says nothing about possible claims of the clubs. However this is inconclusive as to the issue at hand namely how SIHF and NL-GmbH should have understood the CHL-Agreement six months earlier. Yet that clause of the Settlement agreement could be used as a clue in the ascertainment of the subjective intent of the Parties when they entered into the CHL-Agreement; however this is irrelevant to objective interpretation.

Finally the CAS held that granting the clubs their own direct rights would have been advantageous in various ways. This may be so but it is not decisive for objective interpretation. This circumstance would be important however if the CHL had been inapplicable or difficult to apply without such a right for the clubs. However this was not found and it cannot be assumed that the implementation of the CHL would have been markedly simpler for the Appellant and for the national federations with such a right being granted. Why SIHF and NL-GmbH thus would have had to understand the CHL-Agreement due to the situation with regard to the interests of the clubs as meaning according to good faith that it and the Appellant were granting the clubs a primary entitlement is not apparent.

Accordingly the grievance with regard to the objective interpretation of the CHL-Agreement appears well founded. A direct entitlement of the participating clubs cannot be derived from the CHL-Agreement and therefore the subjective scope of its arbitration clause cannot be extended to the Respondent.

4.
The appeal shall be granted, the award under appeal annulled and it shall be found as requested that the CAS has no jurisdiction in the dispute at hand.

In such an outcome of the proceedings the Respondent must pay costs and compensate the other party (Art. 66(1) BGG and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is upheld and the award under appeal of September 13, 2011 is annulled.

2.
The Court of Arbitration for Sport (CAS) has no jurisdiction in the dispute at hand.

3.
The costs of CHF 8'000 shall be paid by the Respondent.

4.
The Respondent shall pay CHF 9'000 to the Appellant for the federal proceedings.

5.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne March 8, 2012.

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

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