

4A_284/2009¹

Judgement of November 24, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

X._____,
Appellant,
Represented by Dr. Monika GATTIKER

v.

Deutsche Reiterliche Vereinigung e.V. Freiherr-von-Langen-Strasse 13, DE-48231,
Warendorf, Deutschland,
Respondent,
Represented by Dr. Stephan NETZLE

Facts:

A.

A.a The German Equestrian Federation based in Warendorf/DE (Respondent) is the national equestrianism organization of Germany. X._____, a German citizen, the Appellant, is an experienced jump rider. He is a member of the Respondent and represented the German national team in the 2008 Summer Olympics in China. The

¹ Translator's note: Quote as X._____ *v.* Deutsche Reiterliche Vereinigung._____, 4A_284/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

Fédération Equestre Internationale (FEI) is the world organization for equestrianism based in Lausanne.

A.b The Appellant was already a member of the German jumping team which won the gold medal at the 2004 Summer Olympics in Greece. The medal was denied after A._____’s horse tested positive to a prohibited substance.

A.c The riding competitions of the 2008 Summer Olympics took place in Hong-Kong between August 8 and August 21, 2008. The Appellant participated in the Olympic jumping competition with horse AX._____. On August 9 and 17, 2008 the competent veterinary committee filled out Medication Form 3 (Authorization for the Use of Medication not Listed as Prohibited under FEI Regulations) as well as Medication Form 1 (Authorization for Emergency Treatment, *i.e.* Medication with Prohibited Substances). The horse AX._____ was declared fit for competition on both documents. A request to the competent authority for the use of Capsaicin was not made and no medication form was filled out for that substance. On August 17, 2008 the horse AX._____ was tested. It was not mentioned in the FEI Medication Control Form that a substance based on Capsaicin could have been used on the animal. The analysis of the A-samples of August 18, 2008 showed that the prohibited substance Capsaicin was proved in the blood and the urine of the horse. X._____ was informed of the foregoing by a fax of August 22, 2008 and was immediately suspended provisionally. On August 22, 2008 a new analysis was made on the basis of the B-samples, which confirmed the presence of Capsaicin. In a press release of August 24, 2008 the Appellant stated that the horse AX._____ had been suffering from chronic back pains since participating in an equestrian event in Cannes in June, 2008. Therefore, ever since he had used the ointment “Equi-block” for treatment. It is not disputed that the product contains Capsaicin.

B.

B.a In a decision of October 22, 2008, the FEI-Tribunal found a violation of the FEI Equine Anti-Doping and Medication Control Rules, EADMC Rules² and imposed a 120 days ban of the Appellant as of August 21, 2008, as well as a fine of CHF 2000.-. It considered that Capsaicin was to qualify either as a doping agent, to the extent that it was used to increase sensitivity (so called hyper-sensitivity), as the forelegs of the horse were rubbed with it (which leads to an excessive sensitivity to pain upon touching the poles and thus to a higher effort during jumping), or as a prohibited substance of the “Medication Class A”³. It decided that there was no proof of a higher sensitivity of the legs of the animal and that accordingly, a mere violation through the use of a “Medication Class A” was proved: the Appellant resumed competitions when the ban expired on December 19, 2008.

B.b On November 13, 2008 the Respondent appealed the October 22, 2008 decision of the FEI-Tribunal to the Court of Arbitration for Sport (CAS) and asked for a ban of at least eight months since August 21, 2008. The Appellant also appealed and submitted essentially that the duration of the ban should be reduced to three months. In an award of April 30, 2009 the CAS upheld the Respondent’s appeal and pronounced a ban of eight months against the Appellant, *i.e.* from August 21, 2008 until April 20, 2009. Simultaneously, all results achieved by the Appellant during that period were denied (with a loss of medals, points and prizes). The CAS rejected the Appellant’s appeal.

C.

C.a In a Civil law appeal and a request for revision, the Appellant submits that the Federal Tribunal should annul the award of the CAS of April 30, 2009 and send the matter back to the CAS for a new decision. The Respondent submits that the appeal should be rejected as well as the request for revision, to the extent that the matter is at all capable of appeal. The CAS submits that the appeal should be rejected. The Appellant filed a reply with the Federal Tribunal.

² Translator’s note: in English in the original German text.

³ Translator’s note: in English in the original German text.

Reasons:

1.

The decision under appeal was issued in English. In the proceedings in front of the Federal Tribunal, the parties used German. According to art. 54 BGG⁴, the decision is to be issued in the German official language.

2.

In the field of international arbitration, a Civil law appeal is possible under the requirements of art. 190-192 PILA⁵ (art. 77 (1) BGG).

2.1 The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant time, the parties had neither their seat, nor their domicile, nor their usual residence in Switzerland. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (art. 176 (1) and (2) PILA).

2.2 Only the grievances limitatively listed in art. 190 (2) PILA are admissible. (BGE 134 III 186 at 5 p. 187; 128 III at 1a p. 53; 127 III 279 at 1a p. 282).

According to art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal. This corresponds to the requirement for reasons in art. 106 (2) BGG with regard to violations of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). As to the grievances based on art. 190 (2) (e) PILA the incompatibility of the arbitral award under review with public policy must be shown specifically (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

2.3 The Federal Tribunal bases its decision on the factual findings of the Arbitral Tribunal (art. 105 (1) BGG). It may neither rectify nor supplement the factual findings of the arbitral tribunal even when they are blatantly inaccurate or based on a violation of the law

⁴ Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

⁵ 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.

within the meaning of art. 95 BGG (see art. 77 (2) BGG which rules out the application of art. 105 (2) and art. 97 BGG). Yet 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 the factual findings or exceptionally when new evidence is considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). Furthermore, new facts and evidence may be introduced only to the extent that the decision of the lower court justifies doing so (art. 99 (1) BGG).

2.4 The Appellant precedes his legal developments with a thorough presentation of the facts, in which he describes the course of events and the proceedings from his point of view. As to various points he deviates from the factual findings of the CAS or widens them without alleging any substantiated exceptions to the binding character of the factual findings. He submits among other things that during the equestrian competitions of the 2008 Olympics some systematic controls of the legs of the horses were carried out as opposed to other tournaments, yet without even the smallest clue to a higher sensitivity being recognized and that as a consequence of a thermography of the legs of the horse AX._____ as well as the results of the test by the Recklinghausen Institute for veterinary matters and food stuffs controls, it could be ruled out that any hyper-sensitivity would have taken place. To that extent, his submissions must remain unheeded. The various means of proof introduced by the Appellant must also remain unheeded. In the rest of his arguments also, the Appellant goes beyond the factual findings of the award under appeal in an impermissible way. Thus he alleges that the FEI would have renounced a prosecution for doping in two other cases (concerning riders B._____ as well as C._____) in which the same substance would have occurred in the 2008 Olympics, from which he wants to deduct a contradictory attitude of the FEI and a violation of the prohibition of the abuse of rights. These submissions are not to be considered in the appeal, so that the grievances based on them come to nothing. The grievance as to a violation of the right to be heard, raised merely sweepingly, does not change the position as the requirements for a sufficient grievance fail in this respect (see art 77 (3) BGG).

3.

The Appellant further claims a violation of public policy according to art. 190 (2) (e) PILA.

3.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy (BGE 121 III 331 at 3a p. 333). The judgement of a claim in dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. The award under appeal may be annulled only if it contradicts public policy in its result and not merely in its reasons (BGE 132 III 389 at 2.2 p. 392 *ff.*; 128 III 191 at 6b p. 198; 120 II 155 at 6a p.166 f.).

3.2 The Appellant sees a violation of the prohibition of abuse of rights in the fact that the CAS did not recognize that the Respondent had no legal interest in the appeal to the CAS. The Respondent would have wanted to make an example of him and would have explicitly confirmed its intent to harm at the hearing in front of the CAS. It should not be a matter for the National Federation to concern itself with violations against international rules in lieu of the International Federation and the Respondent's punitive action proves by itself to be an abuse of rights according to art. 2 ZGB⁶. The right of a national federation to appeal to the CAS would find its limits in the prohibition of abuse of rights, respectively in material public policy. The lack of any legal interest would result from the fact that the Respondent still sanctions riders according to their own national rules; moreover it would have already excluded the Appellant from the national squad for two years before the initiation of the arbitral proceedings. Finally, the right to request sanctions in international competitions would be with the FEI on the basis of its Statutes. The judgement of the FEI Tribunal would have recognized the existence of a need for sanctions in the public interest in the fight against doping and so would have the FEI

Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

through its renunciation to its own appeal. It would not be a matter for the National Federation to ensure the right application of the provisions for sanctions of the International Federation from its point of view. As the award of the CAS came about only due to the abusive appeal of the Respondent, it would violate public policy and should be annulled.

3.3. The grievance is unfounded. The CAS dealt with the issue of the right to appeal thoroughly, which is why the grievance of a violation of the right to be heard (art. 190 (2) (2) PILA), raised simultaneously, proves itself in advance to be blatantly unfounded. Rightly, the Appellant does not deny that article 12.2.2 of the EADMC rules provides for a right of appeal of the National Federation. The CAS held that as the National German Federation and as a member of the FEI, the Respondent could have a legitimate interest to give particular attention to the prevention and the punishment of doping violations in view of the revocation of gold medals in two consecutive Olympics, with a correspondingly negative image in public opinion. Contrary to the Appellant's view, there is no violation of the prohibition of abuse of rights (Art.2 (2) ZGB) there. Contrary to the Appellant's submission, the factual findings of the award under review, which bind the Federal Tribunal (art. 105 (1) BGG), do not lead to the conclusion that the Respondent would have used its right to appeal only with a view to hurting the Appellant. The grievance of an abuse of right is untenable. The CAS is not to be accused of violating public policy.

3.4 The argument submitted by the Appellant in its request for revision, namely that some new facts would have become known in the meantime, which would most probably have led to an other judgement as to standing to appeal and as to the legality of the appeal, do not alter the aforesaid conclusion. Federal law admittedly gives to the parties to international arbitral proceedings the extraordinary legal recourse of revision for which the Federal Tribunal has jurisdiction according to case law (BGE 134 III 286 at 2 p. 286 f. with references). According to that, revision may be requested according to art. 123 (2) (a) BGG when the petitioner subsequently learns of some relevant facts or conclusive evidence, which he could not bring into the previous proceedings, excluding facts and evidence which originated after the decision (BGE 134 III 286 at 2.1 p. 287). Contrary to

the Appellant's view it may not be assumed that the circumstances brought forward with reference to a report in the NZZ⁷ of May 6, 2009 and to a press release of the FEI of May 28, 2009 would have led to a different assessment by the CAS of the Respondent's standing to appeal. To begin with, the Appellant does not describe the article accurately when he claims that the treatment of rider D._____ 's horse described there, on the occasion of the 2008 Olympics would have been carried out with the awareness of the veterinary of the German team E._____, especially as, according to the press report, the keeper would have undertaken the treatment without consultation even before the required approval of the injection. The Appellant does not explain to what extent E._____ 's statement in front of the CAS was relevant to the decision and why the award under review would have been different in light of the new facts argued. Be this as it may, even with a violation of the team veterinary's obligation to report or the alleged awareness of an official of the German Federation, it would not make the Respondent's appeal appear abusive. Contrary to the Appellant's view, the reasoning of the CAS according to which the Respondent could indeed have a legitimate interest to act consistently against doping violations in view of the negative image in public opinion, is rather reinforced by the circumstances described in the framework of the revision. The request for revision must therefore be rejected to the extent that the matter is capable of revision.

4.

Furthermore, the Appellant wrongly claims that the CAS would have disregarded the requirement to interpret in the Appellant's favour (*Unklarheitenregel*)⁸ and thus violated public policy, because faced with two equivalent interpretations (*i.e.* a doping offence and an offence against "Medication Class A") it would have chosen the most unfavourable to the Appellant, namely doping. Contrary to the view expressed in the appeal, the CAS did not disregard the principle of good faith when it did not simply switch to the mildest sanction when faced with a substance which falls both under "Medication Class A" and also doping. Such an automatism in favour of the factual finding most favourable to the sportsman and for the mildest sanction cannot be deducted from the aforesaid principle.

⁷ Translator's note: a Swiss newspaper.

⁸ Translator's note: *Unklarheitenregel* is a concept which leads to the interpretation most favourable to the other party when there is a doubt.

Irrespective of the issue as to whether or not disregarding the aforesaid principle could at all be the object of a grievance based on art. 190 (2) (e) PILA, it does not appear from the Appellant's explanations which provision applied by the CAS would have been unclear and interpreted to the Appellant's detriment. The CAS rather imposed on him the burden to prove that the agent Capsaicin had not been applied to the limbs of horse AX. _____ in this case, but used in an authorized way. When the Appellant disputes that allocation of the burden of proof and the consequences of the absence of evidence of the more inoffensive application of the agent, he does not claim a violation of the principle of good faith, but raises criticism of an appellate nature against the award under review. A violation of material public policy is not demonstrated.

5.

The Appellant further claims that the CAS would have disregarded the evidence altogether (including the statements of the FEI experts) as well as its evidence in rebuttal (see art. 190 (2) (d) PILA) although these would have been appropriate to establish that the legs of the horse had not been rendered hyper-sensitive. The Appellant's arguments show no violation of the right to be heard, but rather criticize the evidence accepted by the CAS on the basis of some particular statements by two experts and that is not allowed. The CAS relied on the statements of the various experts and held that Capsaicin is difficult to establish, as it hardly leaves any trace on the skin of the horse and after a few hours becomes completely untraceable in its blood. The CAS assessed very well the statements of the experts quoted by the Appellant as well as others, yet it found as to Capsaicin that there are differing views. No violation of the right to be heard is demonstrated in connection with the aforesaid finding in the award under appeal. As to the grievance that the CAS would have thus committed an obvious oversight, it is not a grievance admissible according to art. 190 (2) PILA (also see art. 77 (2) BGG, which rules out the application of art. 105 (2) and art. 97 BGG). It is not demonstrated that the Arbitral Tribunal would not have taken into account an important allegation by the Appellant due to oversight (see BGE 127 III 576 at 2e-f p. 579 f.). The same applies for the finding in the award under review, presented as contrary to the evidence, that the problematic substance would leave hardly any trace on the skin, particularly with dark horses. Be this as it may, it is not apparent, neither is it shown by the Appellant, to what

extent the colour of the horse was relevant to the award under appeal. The grievance of a violation of the right to be heard comes to nothing here as well.

6.

The Appellant then claims a severe violation of privacy due to the suspension which took place. The rules applied by the CAS (EADMC rules FEI Equine Prohibited List) would result in an excessive commitment according to art. 27 (2) ZGB, which would cause the CAS arbitral award to violate public policy (art. 190 (2) (e) PILA). The Appellant's arguments are general and in large parts do not relate to the specific considerations of the award under review. He misjudges the scope of review of the Federal Tribunal when criticizing the anti-doping and medication control systems of the FEI, irrespective of the eight months suspension specifically issued and argues that the possible suspension of up to four years contained there, leads to a *de facto* occupational ban. Irrespective of the fact that it is not apparent that the Appellant would have made any corresponding arguments in conformity with the rules of procedure in front of the CAS (see art. 99 (1) BGG) and that his arguments are largely limited to criticism of an appellate nature of the award under review, an illicit intrusion in the personality rights as a consequence of the ban is not discernable. In the April 30, 2009 arbitral award, the Appellant was retroactively suspended for eight months, yet he resumed his tournament activities on December 19, 2008 already and the retroactive ban ordered by the CAS expired as of April 20, 2009. The limitation of his sport activities as a consequence of the award under review was thus rather limited, contrary to what he claims, as compared to other suspensions for doping ordered in the field of sports and the sanction which relates to a violation of the proper doping provisions of the FEI is in no way inconsistent with public policy (art. 190 (2) (e) PILA) (see the judgements 4P.64/2001 of June 11, 2001 at 2d/bb, not published in BGE 127 III 429; 5P.83/1999 of March 31, 199 at 3c).

7.

The appeal and the petition for revision must be rejected to the extent that the matter is capable of appeal or revision. In such an outcome of the proceedings, the Appellant must pay the costs and compensate the other party (art. 66 (1) and art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected, to the extent that the matter is capable of appeal.
2. The petition for revision is rejected to the extent that the matter is capable of revision.
3. The judicial costs set at CHF 4000.-- shall be borne by the Appellant.
4. The Appellant shall pay to the Respondent CHF 5000.-- for the federal judicial proceedings.
5. This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 24, 2009

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

The presiding Judge:

The Clerk:

KLETT (Mrs)

LEEMANN