4A_43/2010[1]

Judgement of July 29, 2010

First Civil Law Court

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

X._____,
Appellant,
Represented by Dr. Ulf WALZ

v.

Fédération Equestre Internationale,
Respondent,
Represented by Mrs Marjolaine VIRET and Dr. Xavier FAVRE-BULLE

Facts:

A.

A.a X._____ (the Appellant) is an experienced international equestrian in jumping. The Fédération Equestre Internationale (FEI; Respondent) is the world organisation for equestrian sports with seat in Lausanne.

[1] Translator's note: Quote as X._____ *v.* Fédération Equestre Internationale, 4A_43/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b Between August 8 and 21, 2008 the Appellant participated with horse Y._____ as a member of the national team of Z._____ in the 2008 Olympics in China. With the jumping team of Z._____ he won the bronze medal.

On August 18, 2008, after the team jumping final, a sample of urine was taken from horse Y._____. The analysis of the urine sample was conducted by the FEI laboratory recognized "A._____ Laboratory", under the supervision of chemist B._____ and of the "Chief Racing Chemist[2]" and director of the aforesaid laboratory, Dr. C._____. According to the test report of August 21, 2008 the prohibited substance Capsaicin was found. Neither a request for the use of Capsaicin nor a corresponding medication form had been filed.

On August 21, 2008, the Respondent informed the Appellant of the evidence of a prohibited substance and of the possible violation of the rules. Simultaneously he was suspended provisionally whilst being granted the possibility to appear in front of the FEI tribunal during a preliminary hearing, which took place on the same day. The Appellant offered no explanation for the presence of the prohibited substance. The provisional decision was communicated to the Appellant the same day. The provisional suspension was upheld due to the presence of Capsaicin until a final decision by the FEI tribunal.

On August 21, 2008, the Appellant was further advised that the B-sample would be analysed in laboratory A._____. He was also informed of his right to be there for the identification and the opening of the B-sample or to be represented. The Appellant took notice that the B-sample would be analysed as described and stated that he would be represented by Dr. D._____, the team veterinarian of the Swedish Equestrian Federation.

On August 23, 2008, the B-sample was examined by laboratory A._____ under the supervision of chemist Dr. E._____ and of chemist F._____ whilst Dr. D._____ attended as witness and representative of the Appellant.

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

The witness Dr. D._____ confirmed in writing that the container with the B-sample showed no indication of outside influence and that the identification number on the sample to be analysed corresponded with the one on the sample documents. He further certified that he was there when the sample was opened. The analysis of the B-sample confirmed the presence of Capsaicin.

On August 27, 2008 the results of the B-sample were communicated to the Appellant. On September 26, 2008 a final hearing took place at the premises of the Respondent in Lausanne. The parties agreed that a further hearing would be held on November 8, 2008 so that additional evidence could be adduced and in particular the expert could be interrogated and cross-examined.

B.

B.a In a decision of the FEI tribunal of December 22, 2008, horse Y._____ and the Appellant were disqualified from the Olympic Games in Beijing and deprived of all medals and prize money. Furthermore the FEI tribunal ordered a new computation of the results of the jumping team Z._____ with the Appellant's results being supressed. Finally, it issued further sanctions against the Appellant, in particular a ban from any competition for four and a half months from August 21, 2008 and a fine of CHF 3'000.-.

B.b In an appeal of January 19, 2008, the Appellant challenged the decision of the FEI tribunal of December 22, 2008 in front of the Court of Arbitration for Sport (CAS) and submitted that the decision should be annulled.

In an arbitral award of December 4, 2009, the CAS rejected the appeal and confirmed the decision under review. The CAS found a violation of the rules on the basis of the positive urine samples. It rejected the Appellant's various objections, in particular the claim that the urine probes would have been contaminated because the person in charge of collecting the urine sample would not have worn gloves, as is prescribed. The CAS also rejected the argument the Appellant brought only after the final hearing, namely

that the aforesaid individual may have worn gloves but that they had probably been already contaminated. Furthermore the CAS excluded the possibility of a contamination of the urine sample also on the basis of further examination of the first urine sample as to the composition of the substance found.

C.
In a Civil law appeal of January 10, 2010, the Appellant submits that the Federal Tribunal should annul the CAS award of December 4, 2009 and the decision of the FEI tribunal of December 22, 2008.

The Respondent submits that the appeal should be rejected, to the extent that the matter is capable of appeal. The CAS filed a short brief only on the issue of its jurisdiction and otherwise did not take a position.

The Appellant submitted a reply to the Federal Tribunal and the Respondent a rejoinder.

D.
In a decision of February 2, 2010 the Federal Tribunal rejected the Appellant's request for a stay and for provisional measures against the Respondent.

Reasons:

1.
According to Art. 54 (1) BGG[3] the Federal Tribunal issues its decision in an official language[4], as a rule in the language of the decision under appeal. When the decision is in another language the Federal Tribunal resorts to the official language used by the parties. The award under review is in English. As that is not an official language and the parties used different languages in front of the Federal Tribunal, the decision will be issued in the language of the appeal in conformity with practice.

[3] Translator's note : BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[4] Translator's note: The official languages of Switzerland are German, French and Italian.

2.
The Appellant submitted in particular a procedural request that a second exchange of briefs should be organized; moreover he was to be given a time limit to file his reply and counsel for the Appellant should at the same time be granted access to the records of the CAS.

In proceedings in front of the Federal Tribunal there is no second exchange of briefs as a rule (Art. 102 (3) BGG). In this case there is no reason to do otherwise, which is why no time limit was given to file a reply and the request to access the records was rejected. According to case law of the Federal Tribunal the Appellant is free to express a view as to the answer to the appeal without seeking a time limit to do so in advance (BGE 133 I 98 at 2.2 p. 99 ff). The Appellant availed himself of that with his reply.

As to the Appellant's submission that the records should be produced, the CAS made its records available to the Federal Tribunal with a list of the contents of the various binders. This is sufficient to adjudicate the appeal. A consecutively numbered pagination with individual numbers, as demanded by the Appellant in his procedural submission, is not necessary.

3.
In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190 to 192 PILA[5] (Art. 77 (1) BGG).

3.1 The seat of the arbitral tribunal is in Lausanne in this case. At the relevant time, the Appellant had neither his domicile nor his usual residence in Switzerland. As the parties did not exclude the provisions of chapter 12 PILA in writing, they are accordingly applicable (Art. 176 (1) and (2) PILA).

3.2 An amount in dispute in excess of CHF 30'000.- is to be assumed on the basis of the award under review and of the Appellant's submissions. Thus the issue may remain

[5] 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.

undecided as to whether or not the value in dispute threshold of Art. 74 (1) (b) BGG applies also to appeals against international arbitral awards (see already judgment 4A_215/2008 of September 23, 2008 at 1.1).

3.3 In a Civil law appeal according to Art. 77 BGG in connection with Art. 190-192 PILA, it is only the award of the international arbitral tribunal, in this case the award of the CAS of December 4, 2009, which may be appealed. The matter is not at all capable of appeal to the extent that the appeal aims at the decision of the FEI tribunal of December 22, 2008 and seeks its annulment.

3.4 Only the grounds for appeal limitatively spelled out in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward in the appeal and reasoned. This corresponds to the duty to reason contained in Art. 106 (2) BGG as to the violation of fundamental rights and of cantonal and inter-cantonal law (BGE 134 III 186 at 5p. 187 with references). With regard to grievances according to Art. 190 (2) (e) PILA the incompatibility of the arbitral award under review with public policy must be shown in detail (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not admissible (BGE 119 II 380 E. 3b S. 382).

3.5 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG, which rules out the application of Art. 105 (2) and of Art. 97 BGG). However the Federal Tribunal may review the factual findings of the arbitral award under review when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into consideration (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). Whoever argues an exception to the rule that the Federal Tribunal is bound by the factual findings of the lower court and wishes to rectify or supplement the facts on that basis, must show with reference to the record that corresponding factual allegations were already brought

forward in the first proceedings in conformity with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473 with references).

3.6 The Appellant disregards these principles in part.

3.6.1 The Appellant criticizes the jurisdiction of the CAS "dictated by the FEI" and points out that two state courts in Brazil and Germany would have held in connection with two cases of Capsaicin during the 2000 Olympics that the arbitration clause in favour of the CAS was not binding. These courts would have a less restrictive practice of judicial review than the Federal Tribunal. These arguments concerning the validity of the arbitration clause and the jurisdiction of the CAS are incomprehensible as the Appellant himself appealed the decision of the FEI tribunals to the CAS.

That various national courts could on the basis of their respective procedural systems entertain specific and maybe different grounds for appeal or scopes of judicial review does not help the Appellant in any way.

The Appellant vainly demands in general legal arguments an extension of the judicial review of the Federal Tribunal. The limited judicial review according to Art. 77 (1) BGG in connection with Art. 190 (2) PILA applies to all proceedings in the field of international arbitration, including in the field of sport. A broadening of the judicial review of the Federal Tribunal, such as the Appellant demands, relying on the guarantee of recourse to a court, on the principle of equal treatment, on public policy, on the prohibition of arbitrariness and on considerations of legal policy is not justified under the clear provisions of the law.

An appeal against an international arbitral award according to Art. 190 (2) PILA may rely exclusively on the grounds for appeal limitatively listed in that provision and not on a violation of the Federal Constitution, of the European Convention of Human Rights or other international treaties (see judgment 4A_612/2009 of February 10, 2010 at 2.4.1; 4P.105/2006 of August 4, 2006 at 7.3; 4P.64/2001 of June 11, 2001 at 2d/aa, not published in BGE 127 III 429 ff.) and the matter is fundamentally not capable of appeal

as to the repeatedly alleged violation of such provisions. The principles derived from the Constitution or the European Convention of Human Rights may be used where appropriate to substantiate the guarantees contained at Art. 190 (2) PILA; in view of the strict requirements for reasons (Art. 77 (3) BGG) however, it must be shown in the appeal to what extent one of the grounds for appeal contained in the aforesaid provision would be given. The Appellant does not meet these requirements as he brings Art. 9, 32 and 35 (3) BV and Art. 6 (1) and (2) ECHR in front of the Federal Tribunal without corresponding reasons.

Moreover the Appellant fails with his reliance on competition law, in particular the "prohibition of inappropriate terms of business of powerful enterprises" according to Art. 7 (2) (c) KG[6] (SR 251). The isolated grievance of a violation of competition rules does not substantiate a violation of public policy (BGE 132 III 389 at 3.2 p. 397 ff).

3.6.2 To the extent that the Appellant relies on any admissible grounds for appeal, he disregards in many respects the statutory requirement for reasons of the grievances raised. Thus, in connection with the Anti-Doping Provisions applicable in his view, he relies on a violation of the principle of equality or of the right to be heard, without dealing with the specific reasons of the CAS arbitral award and without showing a specific violation. An argument that public policy would have been violated cannot be motivated with a blanket reference to an alleged violation of "mandatory rights of protection of personality" (see Judgment 4A_458/2009 of June 10, 2010 at 4.4.3.2). The Appellant mainly criticises the award under review merely as he would in an appeal and presents his own view of the matter, in particular as to the relevant provisions for analysis in laboratories. This is not admissible in an appeal against an arbitral award.

3.6.3 The appeal contains his own presentation of the facts in which the Appellant presents the sequence of events and the proceedings from his point of view. In several respects, he deviates there, as well as in his further grounds for appeal, from the factual findings of the CAS or widens them without arguing any substantiated exceptions from the rule that the factual findings bind this Court. Thus he sets forth with reference to

[6] Translator's note: KG is the German abbreviation for the Swiss law on unfair competition.

two judgments of this Court that "the Sheikh and husband of the FEI President" and cavalier G._____ would have been granted more extensive rights of presence and control than he was. In this respect his arguments have to remain unheeded.

4.
In connection with the reason supporting his procedural submissions, the Appellant argues several procedural faults.

4.1 At first he claims wrongly that the CAS would have engaged in "secret justice" thus violating the right to be heard (Art. 190 (2) (d) PILA) and public policy (Art. 190 (2) (e) PILA). His contention that the CAS would have relied on analysis records which he would have demanded without success from the Respondent and which would not have been contained in the record, is not plausible.

The Appellant bases his claim only on a consideration in the award under review, according to which the CAS would have had the records of the analysis available ("the cogent supporting analytical material was shown to us"[7]). This indication is however clearly related to the analysis of both urine samples as the previous sentence makes clear ("The presence of Capsaicin in Y._____'s urine was shown by the tests on the "A" and "B" samples"[8]). This understanding is confirmed in the following sentence, which points out the presence of Dr. D._____ when the B-sample was identified and opened, which again unmistakably refers to the urine test. The Appellant's thesis that the CAS would have meant "secret" blood test results or additional investigation records available to the arbitral tribunal when referring to the aforesaid analysis records, which however he would have been denied, is accordingly not tenable.

4.2 There is no violation of the right to be heard (Art. 190 (2) (d) PILA) by the arbitral tribunal because the statements of Dr. C._____ as a witness were not reproduced in the minutes but merely taperecorded. Keeping minutes is not required by law in international arbitration proceedings. A general right to written minutes cannot be deducted from the right to be heard or from procedural public policy (Judgment

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

4P.10/1998 of May 28, 1998 at 2a; vgl. SCHNEIDER MICHAEL E., in: Basler Kommentar zum Internationalen Privatrecht, 2. Ed. 2007, N. 95 to Art. 182 IPRG with references).

4.3 Moreover the Appellant's argument that Dr. C._____ would have been "biased to high degree" is not capable of appeal, the more so because it is not apparent to what extent the Appellant would have raised the lack of independence or impartiality of the aforesaid expert in front of the arbitral tribunal (see BGE 129 III 445 at 3.1 p. 449 with references).

5.

In his further substantiation of the appeal, the Appellant puts to the Federal Tribunal various provisions of the World Anti-Doping Code[9] of the World Anti-Doping Agency (WADA), of the FEI Standard for Laboratories[10] as well as of Parts B and C of ILAC Document G-7: 1996[11] and claims that these would serve to protect the sportsman, yet that they would not have been complied with. Then he criticises the Respondent's regulations as to the proof of doping offenses or the violation of medication provisions. He claims that without presence during the analysis procedure and without complete access to all analysis records no proof could be adduced "that the sample was improperly handled, disregarded recognized international standards in a way that falsified the results, was inaccurately measured and weighted or that the sample was patently manipulated intentionally or inadvertently contaminated".

5.1 The Arbitral Tribunal held that on the basis of the tests conducted in the laboratories, it was established that the forbidden substance Capsaicin was in the two urine samples taken from horse Y._____. Based on the applicable Anti-Doping Provisions of the Respondent it also found that when the presence of a forbidden substance was established in a sample, it was to be assumed that the substance was also in the body of the horse. Should the person responsible for the horse claim the opposite, mainly that in fact the substance traceable in the probe did not come from the

[9] Translator's note: In English in the original text.
[10] Translator's note: In English in the original text.
[11] Translator's note: In English in the original text.

animal at all but rather – as the Appellant argued in front of the Arbitral Tribunal – was due to contamination of the probe, then he would have the burden of proof of such an outside influence.

Such considerations do not violate public policy (Art. 190 (2) (e) PILA). The Appellant actually brings forward criticism of a mere appellate nature against the factual findings of the CAS, which is not admissible in the framework of an appeal against an arbitral award.

5.2 The same applies for his contention that the Respondent, with the assent of the CAS, would have disregarded Art. 7.2 (d) and (e) of the WADA-Code and would have openly contradicted the rules in the FEI Standard for Laboratories[12] in its approach in connection with the analysis procedure, which would constitute a violation of the principle of *pacta sunt servanda* .

The principle of contractual trust is violated only when the arbitral tribunal, whilst acknowledging the existence of a contract, disregards the consequences therefrom or, conversely, when it denies the existence of a contract but nevertheless upholds a contractual obligation (Judgment 4A_256/2009 of January 11, 2010 at 4.2.2; 4A_176/2008 of September 23, 2008 at 5.2; 4A_370/2007 of February 21, 2008 at 5.5; see also BGE 120 II 155 at 6c/cc p. 171; 116 II 634 at 4b p. 638). It cannot be claimed that this would be the case here.

5.3 The Appellant argues that the right to be heard was violated because he could not have his own expert supervise the analysis procedure and because he was denied access to the entire records of the analysis. In doing so, he disregards that the grievance that the right to be heard according to Art. 190 (2) (d) PILA was violated relates to the issue as to whether or not the arbitral tribunal, during the arbitral proceedings, violated some of the appellant's procedural guarantees belonging to the right to be heard. On the contrary, what the Appellant criticises is the Respondent's behaviour as well as the material assessment by the CAS of the legal issue in dispute as to whether or not the

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

positive result of the analysis led to the conclusion that the rules had been violated according to the provisions applicable to the procedure of laboratory analysis and to the controlling Anti-Doping Rules (see Judgment 4P.105/2006 of August 4, 2006 at 9). Such criticism is not capable of appeal. A violation of the right to be heard is not substantiated.

5.4 The grievance of the right to be heard raised in the same context already fails because the Appellant does not show with reference to the record which of his submissions in the arbitral proceedings the CAS would have disregarded. Irrespective of the foregoing, the Appellant disregards that there is no right to reasons of an award to be derived from the principle of the right to be heard within the meaning of Art. 190 (2) (d) PILA (BGE 134 III 186 at 6.1 p. 187 ff with references). Whilst claiming that the CAS would have disregarded the minimal requirement arising from Art. 190 (2) (d) PILA that the issues pertinent to the decision must be reviewed and dealt with, he does not show in a sufficiently specific way to what extent this would have been the case here (see BGE 133 III 235 at 5.2 p. 248).

6.
The appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome the Appellant must pay the costs and compensate the Respondent (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 judicial costs, set at CHF 5'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent and amount of CHF 6'000.- for the federal judicial proceedings.

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

Lausanne, July 29, 2010

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

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