4A_237/2010[1]

Judgment of October 6, 2010

First Civil Law Court

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

X._____
Petitioner,
Represented by Dr. Adreas GÜNGERICH

v.

Union Cycliste Internationale (UCI)
Respondent,
Represented by Mr Jean-Christophe DISERENS

Facts:

A.
X._____ (the Petitioner) was a professional cyclist until the year 2006. The Union Cycliste Internationale, which has its seat in Aigle (UCI, Respondent) is the International Cycling Federation.

B.
B.a In an award of the CAS of April 20, 2006 (CAS proceedings 2005/A/936) the Petitioner was banned for two years among other things for violating the applicable Anti-Doping rules during a race in Spain retroactively from the 2nd of February 2006.

[1] Translator's note: Quote as X._____ *v.* Union Cycliste Internationale, 4A_237/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

B.b In an award of May 5, 2006 (CAS proceedings 2005/A/969) the CAS banned the Petitioner for life in connection with a bicycle race in Canada due to a renewed doping violation.

In a judgment of August 14, 2006 (4P.176/2006) the Federal Tribunal found that the Public law appeal filed by the Petitioner against the award was not capable of appeal.

In a request for revision of April 28, 2010 the Petitioner seeks the annulment of the CAS awards of April 20, 2006 and May 5, 2005 (actually: 2006).

The Respondent and the CAS submit that the request for revision should be rejected.

On July 27, 2010 the Petitioner filed a reply with the Federal Tribunal. The Respondent stated its position in this respect in a rejoinder of August 9, 2010.

Reasons:

1.

The Petitioner argues that in the CAS case 2005/A/936 upon receipt of the results of the A-sample analysis he demanded the analysis of a B-sample. Once the latter was done and assessed he would have received only the counter analysis of the B-sample two pages in length, yet not the laboratory's report which contained more than 80 pages. Neither would he have been advised of the possibility to request the complete analysis report of the B-sample. The Petitioner further argues that his counsel did submit during the February 2006 hearing in front of the CAS that he should be allowed to review the full laboratory's report; however neither the CAS nor the Respondent responded to the request which "very likely was not even mentioned in the record". Only through an e-mail of January 29, 2010 would he have received the full report concerning the B-sample. At that point in time he would have learned that the A and B analysis had been conducted at least in parts by the same lab technicians. According to the applicable rules of the International Standard for Laboratories this is not allowed. Thus a breach of the rules took place, which according to the Petitioner should have led to an acquittal. An acquittal in CAS 2005/A_936 would lead in turn "inevitably to a milder sanction in the CAS case 2005/A_969 to be reopened", namely only to a two years ban and not to a ban for life.

2.

The Federal Statute on International Private law of December 8, 1987 (PILA[2]; SR 291) contains no provisions as to the revision of arbitral awards within the meaning of Art. 176 ff PILA. According to the case law of the Federal Tribunal, which filled that lacuna, the parties to an international arbitration have the extraordinary legal recourse of revision, for which the Federal Tribunal has jurisdiction. If the Federal Tribunal upholds a request for revision, it does not decide the matter itself but sends it back to the arbitral tribunal that decided the case or to a new arbitral tribunal to be constituted (BGE 134 III 286 at 2 p. 286 with references).

2.

2.1.1 Under the aegis of the OG[3] the parties could raise the grounds for revision contained at Art. 137 OG and the proceedings were governed by Art. 140 - 143 OG by analogy (BGE 118 II 199 at 4 p. 204; Judgment 4P.120/2002 of September 3, 2002 at 1.1, publ. in Pra 2002 Nr. 199 p. 1041 ff). This remains basically applicable under the aegis of the BGG[4], namely for the ground for revision provided at Art. 123 (2) (a) BGG, which corresponds to the one of Art. 137 (b) OG (BGE 134 III 45 at 2.1 p. 47, 286 at 2.1 p. 287).

2.1.2 According to Art. 123 (2) (a) BGG revision may be sought when the Petitioner subsequently discovers some significant facts or discovers decisive evidence which he could not introduce in the earlier proceedings, to the exclusion of facts and evidence which occurred only after the award.

Revision may be justified only as to facts or evidence which were not known to the Petitioner at the time of the proceedings despite all due diligence. The new facts must be significant, which means that they must be appropriate to change the factual basis of the award under review in such a way that their accurate legal assessment could lead to a different decision (BGE 134 III 669 at 2.2 p. 671 with references).

When revision of an international arbitral award is sought the Federal Tribunal must assess on the basis of the reasons contained in the award whether the fact is significant or not and if it would probably have led to a different decision had it been proved (Judgment 4A_42/2008 of March 14, 2008 at 4.1, not publ. in BGE 134 III 286 ff.; 4P.102/2006 of August 29, 2006 at 2.1).

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[2] 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.

[3] Translator's note: OG is the German abbreviation for the previous Swiss statute organizing federal courts.

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

2.1.3 The revision of an arbitral award also requires a legally protected interest (see Art. 76 (1) (b) BGG). Submissions made in the proceedings are to be adjudicated only if they are based on a sufficient interest to obtain redress. It is not sufficient in this respect that the award under review would not have granted, or not fully granted some of the Petitioner's submissions. Rather it is necessary that the decision as to revision should be appropriate to provide the Petitioner with the success on the merits he seeks (see BGE 114 II 189 at 2 p. 190; ANTONIO RIGOZZI/MICHAEL SCHÖLL, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG, 2002, p. 24 ff.)

2.2 The Petitioner rests his legally protected interest to the revision of the arbitral award of April 20, 2006 (CAS case 2005/A/936) on a document allegedly discovered afterwards, which according to him proved a violation of the rules and must lead to an acquittal. The two years ban pronounced would admittedly have run out in the meantime. However the Petitioner argues that an acquittal in the former case would have an impact on case CAS 2005/A/969. On the other hand he does not claim that the document in dispute would also show a violation of the rules in the former case which must lead to a repeal of the ban but claims that an acquittal in case CAS 2005/A/936 would necessarily lead to a milder sanction in case CAS 2005/A/969. By doing so the Petitioner disregards the fact that the Federal Tribunal does not decide the matter itself if it grants revision but sends the matter back to the arbitral tribunal, which would itself have to decide the issue of an acquittal in that case. To what extent a possible acquittal in the first case would justify revision of the second arbitral award of May 5, 2006 is not explained by the Petitioner, but the issue needs not be explored more in depth, because the request for revision of the first arbitral award of April 20, 2006 comes to nothing.

3.
The request for revision appears contradictory to the extent that on the one hand the Petitioner claims that he would not have had the possibility to review the B-Report of the sample in case CAS 2005/A/936, whilst he argues on the other hand that he demanded production of the B-Report in the arbitral proceedings. The Petitioner thus acknowledges that during the arbitral proceedings already he was at least partly aware that besides the counter analysis of the B-sample contained in two pages there was also a more extensive laboratory report of the B-sample, in which the names of the people involved in the analysis were mentioned among other things. Moreover the corresponding laboratory report of the A-sample was obviously available to him in the arbitration.

To the extent that the Petitioner argues that he could not have acquainted himself with the contents of the report during the arbitration proceedings, his arguments are not persuasive. If the Petitioner had wanted to claim a violation of the rules in connection with the prescribed procedure for the analysis of the A- and B-samples in front of the arbitral tribunal, as he now argues in the request for the revision, a

comparison of the complete reports as to the A- and B-samples was called for. The Petitioner now admittedly claims that during the February 2, 2006 hearing in front of CAS he would have demanded access to the full laboratory's report of the B-sample. Yet this would have been denied. On the other hand he does not explain to what extent he would have further sought access to the document in dispute, let alone that he would have exhausted the legal remedies in respect to its production.

In arbitral proceedings as well the parties have a duty to produce evidence timely and in conformity with the rules of procedure with a view to clarifying the facts of the case. That it would have been impossible for a party to put forward a fact in the arbitral proceedings is to be accepted only with restraint as the ground for revision based on evidence existing at the time but which could not be produced according to Art. 123 (2) (a) BGG does not serve the purpose of curing omissions in the previous proceedings (see ELISABETH ESCHER, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, N. 8 to Art. 123 BGG). It is not acceptable to demand access to a central document in connection with the lab analysis of a central document which is evidence of a doping violation merely during a hearing and then to put the matter to rest, only to claim later in revision proceedings that the corresponding report would now have been "discovered". The Petitioner's argument that his request would have been ignored and "most likely not even mentioned in the record" does not change the issue. That grievance does not justify revision. The corresponding legal argument would rather have had to be made against the arbitral award in an appeal. Yet the Petitioner did not appeal the CAS award of April 20, 2006.

The Petitioner's argument that it would have been impossible for him to rely in front of the arbitral tribunal on the facts which he claims in the revision proceedings may accordingly not be accepted.

4.
The request for revision is to be rejected to the extent that the matter is capable of revision. In such an outcome the Petitioner has to pay for the costs and compensate the other Party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1. The request for revision is rejected to the extent that the matter is capable of revision.

2. The judicial costs set at CHF 2'000.- shall be paid by the Petitioner.

3. The Petitioner shall pay to the Respondent CHF 2'500.- 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, October 6, 2010

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

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