Kluwer Arbitration Blog

Swiss Federal Supreme Court sets aside CAS award for lack of a valid arbitration agreement

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In a recent decision dated 6 November 2009 (4A_358/2009), the Swiss Federal Supreme Court set aside an award by the Court of Arbitration for Sport (CAS) in Lausanne. The Supreme Court held that although its practice regarding the validity of arbitration agreements was generally liberal, in the present case the mere fact that the appellant had signed an entry form for a specific ice hockey tournament did not prove sufficient to constitute a valid arbitration agreement for disputes outside the scope of such tournament.

A. was a member of the German national Ice Hockey team and had represented Germany at a number of World Championships, as well as the 2006 Olympic Games in Turin. In March 2008, he was visited by an inspector of the German National Anti-Doping Agency (NADA) for a so-called "out-of-competition sample collection". A. allegedly refused to undergo the test and turned the inspector away despite having been warned of the severe consequences. Nonetheless, on the very same day he underwent a doping test under the supervision of the German Ice Hockey Federation (DEB), the result of which was negative. After having been informed about the incident by the NADA, the DEB on 15 April 2008 issued an official warning against A. and punished him with a fine of EUR 5'000 and 56 hours of community work. The DEB informed the NADA that it considered the sanctions provided for by both the Code of the NADA and the Code of the Word Anti-Doping Agency (WADA) to be exorbitant given the facts of the case at hand. In the following, A. was nominated to play for Germany at the 2008 World Championship in Canada from 2-11 May 2008. The WADA became aware of this fact and issued a request to the International Ice Hockey Federation (IIHF) to suspend A. from the tournament. On 7 May 2008, the IIHF denied the request. The WADA filed an appeal against this decision with the CAS in Lausanne. The CAS accepted jurisdiction based on the fact that A. has repeatedly signed the so-called "Player Entry Form" before each World Championship. It overturned the decision of the IIHF and imposed a two-year ban on A. A. appealed against this decision to the Swiss Federal Supreme Court.

At the core of the action for annulment of the CAS award before the Supreme Court was the question of whether by signing the Player Entry Form, A. had entered into a valid arbitration agreement with regard to the present dispute. The Entry Form contained the following clause:

"I, the undersigned, declare, on my honour that

a) I am under the jurisdiction of the National Association I represent.

[…]

l) I agree to abide by and observe the IIHF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution."

The Federal Supreme Court had to examine whether – in the case at hand – this represented a valid arbitration agreement in terms of Article 178 of the Private International Law Act (PILA). To begin with, the Court held that the above clause had to be construed in such manner as the parties could and should have understood it in good faith, taking into account the overall circumstances of the case. Based on these specific circumstances, the Supreme Court concluded that the arbitration clause contained in the Player Entry Form could not be understood as referring to any and all disputes, but was limited to such disputes deriving from the specific tournament before which the Form was signed.

Interestingly, having taken this decision, the Federal Supreme Court expressly confirmed that its jurisprudence regarding the validity of arbitration agreements in sports matters was generally liberal. In particular, it referred to former case law in which it had held that a global reference to an arbitration clause contained in bylaws or articles of association or incorporation of a sports federation sufficed to create a valid arbitration agreement (see decisions BGE 133 III 235 consid. 4.3.2.3 at 244 f.; 4A_460/2008; 4P.253/2003; 4P.230/2000; 4C.44/1996). In the present case, however, the Court denied that such a sufficient global reference existed.

This decision is noteworthy for at least two reasons: First, it is a reminder of the Swiss Federal Supreme Court's generally very liberal approach regarding the validity of an arbitration agreement under Article 178 PILA. In particular, the Supreme Court regularly accepts arbitration clauses incorporated by global reference. This applies especially to sports arbitration matters, but also to commercial matters between experienced business persons, since in many cases a global reference to a set of rules such as General Terms and Conditions can be considered usual business practice. At the same time, the Federal Supreme Court reminds us that this liberal practice is not without boundaries. In particular, where the interpretation of an arbitration agreement according to the principle of good faith reveals that a party did not have to assume that it had signed a (comprising) arbitration agreement, such agreement should not be inferred lightly.

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