



Arbitration Newsletter Switzerland

Hachim, its Rider HH Sheikh Hazza and the unbiased Arbitrator

The Swiss Federal Supreme Court ("the Supreme Court") put recently an interesting decision on its website, analysing a potential bias of an arbitrator¹.

HH Sheikh Hazza Bin Sultan Bin Zayed Al Nayhan (hereinafter "HH Sheikh Hazza") won the Endurance World Championship of the Fédération Equestre Internationale ("FEI") with his horse Hachim on January 27, 2005 in Dubai (160 km in 7'03'22" hours!). Barbara Lissarague, France, came off second best with her horse Georgat, trailing by just 52 seconds!

Hachim was running probably too fast - at least it turned out thereafter that the horse was doped. Hachim's urin contained Methylprednisolone, a prohibited substance pursuant to the Veterinary Regulations of the FEI. HH Sheikh Hazza asked on several occasions to be represented at the confirmatory analysis ("B-Test"). This B-Test, confirming the result of the A-Test was, however, made in absence of representatives of HH Sheikh Hazza.

Therefore, the Judicial Committee of the FEI closed the proceedings on Hachim since, in their view, fundamental procedural rights were violated by not admitting representatives of HH Sheikh Hazza to the B-Test². Barbara Lissarague, the Fédération Française d'Equitation and the Organizing Committee of the FEI Endurance World Championship 2005 filed jointly an appeal³ against this decision respectively against FEI⁴ and HH Sheikh Hazza⁵ at the Court of Arbitration for Sport (CAS) in Lausanne.

Appellants 1-3 requested the annulment of the decision of the FEI Judicial Committee and requested that the positive doping result of Hachim be confirmed. Appellants 1-3 nominated Massimo Coccia, Rome, as arbitrator. Since Respondent 1 and 2 could not, in due time, agree on an arbitrator⁶, such

arbitrator was appointed by the Vice President of CAS in the person of Olivier Carrard, Geneva. Carole Barbey, Geneva, took the chair in the arbitral tribunal. On March 9, 2006 this arbitral tribunal set the decision of the FEI Judicial Committee aside and disqualified HH Sheikh Hazza and Hachim from the FEI Endurance World Championship in Dubai⁷. In particular, it held that the right to fair evidence proceedings had not been breached by not having admitted representatives of HH Sheikh Hazza to the analysis of the B-Test⁸.

HH Sheikh Hazza filed an action for annulment against this decision at the Supreme Court based on Art. 190 (2) of the Privat International Law Act ("PILA"), raising a variety of objections against the decision of the CAS arbitral tribunal. Amongst other, HH Sheikh Hazza argued that the arbitral tribunal was not properly constituted in the sense of Art. 180 (1) (c) PILA⁹ due to lack of independence of one of the arbitrators. The argument was that Michele Bernasconi, acting as counsel for Appellants 1-3, was also a listed CAS arbitrator and sitting with the arbitrator Olivier Carrard on a panel of an other case pending at the CAS. HH Sheikh Hazza claimed that this fact became known to him only after the CAS award had been rendered on March 9, 2006.

The Supreme Court rejected this argument and it reconfirmed its landmark decision of Larissa Lazutina vs. the International Olympic Committee¹⁰. In this decision the Supreme Court had analyzed in detail the particular situation at the CAS where arbitrators have to be chosen from a special list of at least 150 "CAS approved" arbitrators. The Supreme Court held that the organisation with the list of selected arbitrators meets the constitutional requirements as to independence and impartiality of arbitral tribunals¹¹.

In the present decision, the Supreme Court confirmed its previous considerations: The pure fact that an



arbitrator sits on another panel with one of the counsels in the proceedings is *per se* not reason enough to have objective doubts as to the independence of this arbitrator. Even a friendly relationship between the arbitrator and the counsel of one party does not serve as sufficient reason to assume a bias. Additional arguments need to be forwarded why such arbitrator would not be in a position to maintain his independence. HH Sheikh Hazza could not bring forward such specific additional reasons. His pure assumption, namely that it would be out of touch with reality that Olivier Carrard and Michele Bernasconi would not discuss in the other case also aspects of this particular case was for the Supreme Court not reason enough to doubt on the independence of Olivier Carrard as arbitrator. In the view of the Supreme Court it can be expected from a judge that, in despite of such personal links, he is in a position to maintain his independence.

Since the fact that an arbitrator serves in another matter on the panel together with the counsel of one party is not a reason to assume bias of such arbitrator, Olivier Carrard had also no duty to disclose this fact to the parties. Further, the Supreme Court also shared the view of Appellants 1-3, namely that HH Sheikh Hazza could have known that Olivier Carrard and Michele Bernasconi were serving on a different panel together as arbitrators since the decision in this other CAS case had already been rendered on December 5, 2005 and had been made available on the website of CAS considerably earlier than March 9, 2006. As the publication was made earlier than the award rendered in this case, the argument should also have been presented earlier¹².

Consequently, the Supreme Court dismissed the argument of HH Sheik Hazza and held that the CAS arbitral tribunal was properly constituted and that there was no justifiable doubt as to the independence of Olivier Carrard as arbitrator.

This decision is to be welcomed. It takes proper account of the fact that the "World of Arbitration" remains a small world where the same persons may meet each other in different places in different roles, a fact which was already acknowledged by the Supreme Court in the Lazutina case¹³.

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¹ 4P.105/2006, dated August 4, 2006. The decision (in German) has been, made available on the website www.bgr.ch on October 3, 2006.

² Decision of the Judicial Committee of the FEI, dated April 28, 2005.
(www.horsesport.org/PDFS/FEI/05_02/decision_Hazza.pdf).

³ Appellants 1-3, all represented by Michele Bernasoni, Zurich.

⁴ Respondent 1, represented by Guy Vermeil and Xavier Favre-Bulle, Geneva.

⁵ Respondent 2, represented by Lucien W. Valloni and Alessandro L. Celli, Zurich.

⁶ R41.1 (2) and R54 (4) CAS-Code.

⁷ CAS 2005/A/895.

⁸ CAS-Award; N93-103.

⁹ "An arbitrator may be challenged.. (c) if circumstances exist that give raise to justifiable doubts as to his independence."

¹⁰ BGE 129 III 445 (=4P. 267/2002, confirming the decision CAS 2002/A/370.

¹¹ Consideration 3.3.3.2.

¹² In this respect the Supreme Court goes too far; it can not be the task of a counsel to proactively search on websites for potential conflicts.

¹³ Consideration 4.2.2.2: "Les rencontres sont fréquentes dans le cercle restreint de l'arbitrage international; il n'est pas rare, comme le souligne le CIO, que la même personne soit à une occasion arbitre dans une affaire déterminée, et une autre fois conseil d'une partie dans une autre affaire, plaidant devant son coarbitre de l'affaire précédente. Ces contacts seront encore plus réguliers, par la force des choses, lorsque les arbitres, tenus de figurer sur une liste fermée, doivent être au bénéfice d'une formation juridique et avoir une compétence reconnue en matière de sport, comme ceux du TAS." See, however, the concern expressed by Antonio Rigozzi, L'arbitrage international en matière de sport, Bâle 2005, p. 491.