



Arbitration CAS 2006/A/1190 World Anti-Doping Agency (WADA) v. Pakistan Cricket Board (PCB) & Shoaib Akhtar & Muhammed Asif, award of 28 June 2006

Panel: Mr David Rivkin (USA); Mr Peter Leaver QC (United Kingdom); Mr Jan Paulsson (France)

Cricket

Doping

CAS lack of jurisdiction

In order for the CAS to have jurisdiction to rule on an appeal, Article R47 of the CAS Code requires that a direct reference to CAS be contained in the statutes or regulations of the body whose decision is being appealed, or that a specific agreement between the parties allow the CAS to rule on the merits of a particular dispute. In the absence of such elements, the CAS does not have jurisdiction.

The World Anti-Doping Agency (“WADA”) is an independent international anti-doping agency, whose aim is to promote, coordinate and monitor, at the international level, the fight against doping in sports in all its forms.

The Pakistan Cricket Board (the “PCB”) is the national body responsible for promoting and developing the game of cricket in Pakistan and maintaining control of the game, particularly with reference to the rules and regulations governing its conduct. The PCB has its own set of doping control regulations (the Anti Doping Regulations for Pakistan Cricket Board) (the “PCB Regulations”).

Shoaib Akhtar (“Akhtar”) is a professional cricketer, who plays for the Pakistani national cricket team.

Muhammed Asif (“Asif”) is a professional cricketer, who plays for the Pakistani national cricket team.

On 14 September 2006, the then Chairman of the PCB directed that doping tests may be carried out on all 19 players being considered for inclusion in the Pakistani Cricket Team participating in the International Cricket Council (“ICC”) Champions Trophy.

In pursuance of that directive, the PCB’s Anti Doping Officer (the “ADCO”) carried out doping tests of all 19 players in a one week period from 25 September 2006 to 2 October 2006.

Between 12 and 19 October 2006, the ADCO learned that 17 samples had tested negative for banned substances under WADA’s prohibited list, while two samples (those of Akhtar and Asif) had been found to contain 19-Norandrosterone, a metabolite of nandrolone, greater than the threshold of

2ng/ml. On receipt of this information, the PCB suspended both Aktar and Asif with effect from 15 October 2006 and set up an Anti Doping Commission (the “ADC”), which, under clause 5.7 of the PCB Regulations, is empowered to determine whether a person has committed a doping offence and, if so, what sanctions will apply and for how long.

The ADC concluded, in its decision dated 1 November 2006, that Akhtar and Asif had each committed a doping offence as defined in clause 4.1 of the PCB Regulations and were to be banned for two and one years respectively under clauses 7 and 8 of the PCB Regulations.

Akhtar and Asif subsequently appealed the ADC’s decision to the Anti-Doping Appeals Committee constituted by the PCB (the “PCB Appeals Committee”). Hearings before the PCB Appeals Committee took place on 15, 20 and 21 November 2006.

Akhtar’s defence to the charge of doping was as follows: (i) that his high protein intake and rigorous workout schedule over the years had caused endogenous production of 19-Norandrosterone in his system well over the prescribed limit of 2 ng/ml; (ii) that the nutritional supplements taken by him – including Blaze Xtreme, Nitron 5, Size On, T-Bomb II, Promax 50 and Viper – were not banned items; (iii) that contamination in the aforesaid supplements taken by him could have been the reason for the elevated level of 19-Norandrosterone; and (iv) that he was never warned by the PCB about the PCB Regulations. Asif’s defence to the charge of doping was more circumscribed. He pleaded: (i) that he had not knowingly taken any medicine or substance which could explain the test result; (ii) that he had started using supplements, including Promax, when he was in the U.K. three years ago; (iii) that he honestly did not know the effects of the supplements he was taking; and (iv) that when recently the team physiotherapist Mr. Darryn Lipson advised him to discontinue the use of supplements, he immediately stopped ingesting them.

The PCB Appeals Committee’s decision was sent to Akhtar and Asif on 5 December 2006. The majority decision was that Akhtar and Asif did not commit a doping offence under clause 4.1 of the PCB Regulations, so that the sanctions imposed by the ADC decision should be set aside. The PCB Appeals Committee reached their majority decision on the basis that Akhtar and Asif had “*successfully established that they held an honest and reasonable belief that the supplement ingested by them did not contain any prohibited substances*”, and the players had therefore “*met the test of ‘exceptional circumstances’ as laid down under clause 4.5 of the PCB Anti Doping Regulations*”.

On 21 December 2006, WADA filed an appeal with the Court of Arbitration for Sport (“CAS”) against the decision of the PCB Appeals Committee.

WADA filed its Statement of Appeal on 21 December 2006. WADA proposed Mr Peter Leaver QC as its nominee to the Panel.

On 28 December 2006, the PCB wrote to CAS and disputed CAS’s jurisdiction to entertain the Appeal. The PCB requested that the Panel be appointed solely for the purpose of determining whether or not CAS has jurisdiction in this case. The PCB proposed Mr Jan Paulsson as its nominee to the Panel.

On 4 January 2007, the PCB wrote to CAS and confirmed that Akhtar and Asif were aware of the Appeal. However, the PCB refused to provide the contact details of Akhtar and Asif to CAS. The PCB said that it did not want them to be involved in the matter, as they were in the middle of their playing season, and the PCB could not see any basis upon which WADA had jurisdiction to take any direct action against any players under the jurisdiction of the PCB.

On 5 January 2007, the President of the Appeals Arbitration Division confirmed that the deadline for WADA to file its appeal brief was suspended until the question of CAS's jurisdiction had been resolved.

On 9 January 2007, WADA agreed that the Panel should first render a partial award on the issue of CAS's jurisdiction only.

On 10 January 2007, CAS invited the parties each to file a submission solely addressing the issue of CAS's jurisdiction in the case.

On 19 January 2007, CAS, wrote to Akhtar and Asif to put them on notice of the agreement between WADA and the PCB that a CAS Panel would be appointed to decide the issue of CAS's jurisdiction. CAS provided Akhtar and Asif with a copy of the submissions and correspondence. Neither Akhtar nor Asif has taken any active role in the proceedings.

The CAS Panel, consisting of Mr Peter Leaver QC and Mr Jan Paulsson (as the party-appointed arbitrators) and Mr David W. Rivkin (as the President of the Panel, appointed by CAS), was duly appointed, and its constitution was notified to the parties on 6 February 2007.

The PCB filed its submission on the issue of CAS's jurisdiction on 24 January 2007.

WADA filed its submission on the issue of CAS's jurisdiction on 6 February 2007.

The PCB filed its submission in response to WADA's submission on the issue of CAS's jurisdiction on 12 April 2007.

WADA submits that this dispute is subject to the jurisdiction of CAS, according to the terms of Article R47 of the Code of Sports-Related Arbitration (the "CAS Code"). WADA contends that, according to CAS's precedents and to the case law of the Swiss Federal Tribunal, a global reference to a document containing an arbitration clause in favour of CAS is sufficient ground to establish CAS's jurisdiction, so long as the arbitration clause is customary amongst the parties involved or with respect to the issues to be dealt with.

In this regard, WADA urges that this case meets the test of the arbitration clause by reference, so that CAS has jurisdiction to decide on WADA's appeal. WADA supports this argument by reference to CAS's decisions in the cases of CAS 2006/A/1153 (where WADA was found to have a right to appeal by virtue of the fact that FPF's Statutes contained a global reference to the FIFA Statutes); and CAS 2006/A/1102 & 1146 (where WADA had the right to appeal because Ski Austria's Order of Conduct contained a global reference to article 13.2.1 of the FIS Anti-Doping Rules and of the WADC). In

these cases, WADA's right of appeal was not expressly provided for in the anti-doping rules of the national federations, but the rules contained a global reference to the regulations of International Federations providing for WADA's right of appeals or to the relevant provisions of the World Anti-Doping Code (the "WADC").

WADA submits that it has a right to appeal the decision of the PCB Appeals Committee to CAS, according to the terms of Article 13.2 of the WADC, which states:

"A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that an Anti-Doping Organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or in violation of Article 7.5 may be appealed exclusively as provided in this Article 13.2:

13.2.1 In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court".

WADA states that the fact that the PCB Regulations provide for an appeal right to an organ of the PCB does not prevent WADA from appealing to CAS; WADA is entitled to appeal against "final" national level decisions of sports federations.

WADA argues that *"neither articles 13.2.1 and 13.2.3 WADC nor article R47 of the Code of Sports-related Arbitration require the inclusion of an additional express provision in the rules of the anti-doping organisation for CAS to have jurisdiction on WADA's appeals"*.

Further, WADA submits that, although the PCB Regulations do not contain any express provision providing for WADA's right to appeal, the PCB Regulations state, under paragraph 2 of the section entitled 'Matters not provided for', that, *"for any dispute in connection with these Doping Regulations, the IOC-WADA law should be followed"*. WADA contends that this provision should be construed as incorporating by reference into the PCB Regulations the provisions of the WADC, and in particular Article 13.2 of the WADC providing for WADA's right of appeal.

WADA submits that this interpretation is supported by: (i) the PCB's statement that the PCB Regulations are WADA compliant; (ii) the lacuna in the PCB Regulations, which is to be filled in as provided for by the PCB Regulations by applying *"IOC/WADA law"*; (iii) the PCB's, Akhtar's and Asif's obligations to comply with the ICC Anti-Doping Code (the "ICC Code") as participants in ICC Events; (iv) the recognition of WADA in Pakistan; (v) the fact that the present case differs significantly from the situation in both of the CAS precedents cited by the PCB in its submission; and (vi) the similarity between this case and the case of CAS 2006/A/1153.

WADA submits, in conclusion, that it is entitled to appeal before CAS the decision of the PCB Appeals Committee, by virtue of the global reference to WADA's right to appeal before CAS as provided under Articles 13.1 and 13.2 of the WADC.

LAW

Competence of CAS to rule on its own jurisdiction

1. In accordance with Swiss Private International Law, CAS has the power to decide upon its own jurisdiction.
2. Article 186 of the Swiss Private International Law Act states:
 - “1. The arbitral tribunal shall rule on its own jurisdiction.
 2. The objection of lack of jurisdiction must be raised prior to any defence on the merits.
 3. In general, the arbitral tribunal shall rule on its own jurisdiction by means of an interlocutory decision”.
3. According to Swiss legal scholars, this provision “*is the embodiment of the widely recognised principle in international arbitration of ‘Kompetenz-Kompetenz’*. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement” (ABDULLA Z., *The Arbitration Agreement*, in: KAUFMANN-KOHLER/STUCKI (eds.), *International Arbitration in Switzerland – A. Handbook for Practitioners*, The Hague 2004, p. 29). “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (...). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement*” (MULLER C., *International Arbitration – A Guide to the Complete Swiss Case Law*, Zurich et al. 2004, pp. 115-116). “*It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence*” (WENGER W., n. 2 ad Article 186, in: BERTI S. V. (ed.), *International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute*, Basel et al. 2000). The provisions of Article 186 are applicable to CAS arbitration (RIGOZZI A, *L’arbitrage international en matiere de sport*, thesis Geneva, Basel 2005, p. 524).
4. Furthermore, WADA and the PCB have expressly accepted the competence of CAS to rule on its own jurisdiction in the present case. WADA has repeatedly recognised in correspondence and submissions the competence of CAS to decide both the preliminary issue of jurisdiction as well as the substantive issues in question. In its letter to the Clerk of CAS’s Appeals Arbitration Division dated 28 December 2006, the PCB recognised the jurisdiction of CAS, “*solely for the purpose of determining whether or not CAS have jurisdiction in this case*”. Further, in accordance with Article R44.5 of the CAS Code, the Panel may proceed to rule on its own jurisdiction, notwithstanding that Akhtar and Asif have failed to participate in the proceedings.

Competence of CAS to rule on the substantive issues on appeal

5. Article R47 of the CAS Code states that, “*an appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the*

legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

6. In order for CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise CAS as an arbitral body of appeal. This interpretation of Article R47 is supported by CAS’s jurisprudence, particularly CAS 2002/O/422 (where the Panel held that because the articles of the FIFA Statutes had not yet been amended expressly to recognise CAS, the FIFA regulations relevant to the case contained no arbitration clause establishing CAS’s jurisdiction) and the case CAS 2005/A/952 where the Panel stated in its decision that *“for CAS to have jurisdiction to rule on an appeal, Article R47 of the Code requires that a direct reference to CAS be contained in the statutes or regulations of the body whose decision is being appealed against”*.
7. In the present case, the statutes or regulations of the relevant body – the PCB – do not contain any reference to a right of appeal to CAS. In fact, clause 11.5 of the PCB Regulations states that the decision of the PCB Appeals Committee will be final and binding on the parties to the appeal. CAS cannot derive jurisdiction to hear an appeal from a decision of the PCB Appeals Committee on the basis of its statutes or regulations.
8. WADA has submitted that it has a right to appeal to CAS the decision of the PCB Appeals Committee, according to the terms of Articles 13.1 and 13.2 of the WADC, which it urges is incorporated by reference.
9. Article 13.2.1 of the WADC states that, *“in cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court”*. Article 13.2.3 goes on to state that, *“in cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (e) WADA...”*.
10. However, Article 13.2.1 of the WADC does not create an omnibus right for WADA to appeal to CAS all decisions with which it disagrees. To the contrary, the right afforded to WADA is limited by the CAS Code.
11. As indicated above, the CAS Code provides at Article R47 that CAS only has jurisdiction in circumstances where the statutes or regulations expressly provide for the ability of a party to appeal to CAS, and the statutes and regulations of the PCB do not contain any reference, direct or indirect, to a right of appeal to CAS.
12. WADA has argued that the PCB Regulations have to be interpreted in a manner that complies with the ICC Code and that, in order for the PCB to comply with its commitments to the ICC, paragraph 2 of the PCB Regulations of the section *‘Matters Not Provided For’* should be interpreted as incorporating by reference the “customary” provisions of the WADC.
13. The ICC Code states at Article 16.1, that *“all Members participating in ICC Events shall comply with this Anti-Doping Code. This Anti-Doping Code shall also be incorporated either directly or by reference into each Members domestic rules, regulations and/ or contracts for ICC Events. Notwithstanding whether or not the*

rules, regulations and/or contracts of each Member participating in ICC Events shall specifically provide it, all Cricketers under the jurisdiction of such Members participating in ICC Events shall be bound by this Anti-Doping Code". "ICC Event" is defined as "an international cricket tournament owned by ICC or an ICC Group Company and to which the ICC designates that this Anti Doping Code shall apply...". Cricketer means, "the Cricket Players and the Cricket Support Personnel involved in playing Cricket for one of the Members participating in the relevant ICC Event"; and Cricket Player means, "a person who participates as a player in the relevant ICC Event".

14. As these provisions show, the ICC Code does not contain any mandatory provision that obliges the PCB to allow a right of appeal from its decisions in all circumstances. Instead, to the extent that Article 16.1 creates any obligation on the part of its member federations and players, that obligation is limited to the time of participation in ICC Events. The doping tests here did not occur during an ICC Event, but during a national event organised by the PCB. The terms of Article 16.1 therefore cannot create an obligation or agreement to allow appeal to CAS in these circumstances.
15. In any event, Article 15.2 of the ICC Code affords WADA the right to appeal to CAS only "*a decision that an [ICC Code] violation was committed, a decision imposing Consequences for an Anti-Doping Code violation, a decision that no Anti-Doping Code violation was committed, a decision that the ICC lacks jurisdiction to rule on an alleged Anti-Doping Code violation or its consequences ...*".
16. In this case, WADA is seeking to appeal the decision of the PCB Appeals Committee, not a decision made under the ICC Code. It is clear from the facts that the testing of Akhtar and Asif did not take place during an ICC Event or under the ICC Code. Therefore, Article 15.2 cannot provide a source of CAS jurisdiction in this case.
17. Moreover, CAS's jurisprudence has held that even if the ICC Code did compel the PCB to provide for a right of appeal from its decisions, no right of appeal to CAS would exist until the PCB had made provision for this right in its statutes or regulations (see the case of CAS 2004/A/676). The general reference to "*IOC/WADA law*" in the PCB's section on "*Matters Not Provided For*" cannot serve as such a provision, because: (i) rights of appeal are provided in the PCB Regulations; and (ii) any incorporation of the ICC Code in this regard must be explicit.
18. In order for CAS to have jurisdiction to rule on an appeal, Article R47 of the CAS Code requires that a direct reference to CAS be contained in the statutes or regulations of the body whose decision is being appealed.

Conclusion

19. The PCB Regulations do not provide for a right of appeal to CAS.
20. The ICC Code does not provide for a right of appeal to CAS of decisions of the PCB Appeals Committee.

21. The ICC Code contains no provision which obliges the PCB to allow a right of appeal of its decisions to CAS.
22. If the PCB were subject to such a mandatory provision, no right of appeal to CAS would exist until the PCB amended its statutes or regulations to incorporate such a right of appeal.
23. There is no specific agreement between the parties to allow CAS to rule on the merits of this particular dispute.
24. CAS therefore does not have jurisdiction to rule on the appeal filed by WADA in the present arbitral proceedings.
25. The Panel reaches this conclusion with some considerable regret. The fight against doping will be severely hampered if international federations, such as the ICC, and national governing bodies, such as the PCB, do not ensure that their anti-doping rules are able to avoid unsatisfactory decisions as the majority decision of the PCB Appeals Committee in this case. That decision was inconsistent with a long and invariable line of CAS's decisions which hold that it is the athlete's duty to ensure that what he or she ingests does not contain a prohibited substance, and with the WADC which is to the same effect.
26. It is the responsibility of the ICC to ensure that its members promulgate anti-doping rules which are consistent with the WADC, and which enable either the ICC or its member or WADA to appeal against what might be termed "rogue" decisions. Other international federations have such provisions in their anti-doping rules; see, for example, the cases CAS 2006/A/1067 and CAS 2003/A/517. Equally, ICC members should ensure that their anti-doping rules enable appeals to be made against such decisions either by the member itself, by the ICC, or by WADA.

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has no jurisdiction to decide the present dispute between the World Anti-Doping Agency and the Pakistan Cricket Board, Mr Soaib Akhtar and Mr Muhammed Asif.
2. The appeal filed by the World Anti-Doping Agency on 21 December 2006 is inadmissible.
3. The arbitration procedure *CAS 2006/A/1190 WADA v/Pakistan Cricket* shall be removed from the CAS roll.