4A_428/2011[1]

Judgment of February 13, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Kolly,
Clerk of the Court: Carruzzo.

Appellants,

1. A.________,
2. B.________,

v.

Respondent,
World Anti-Doping Agency (WADA),

Respondent
Flemish Tennis Federation (VTV)

Facts:

A.

A.a The Royal Belgium Federation manages tennis in Belgium. Affiliated to the International Tennis Federation (hereafter: ITF according to its English acronym) it contains two distinct associations: the French speaking league and the Flemish speaking league (Flemish Tennis Federation or Vlaamse Tennisvereniging; hereafter: the VTV).

A.________ is a professional tennis player affiliated to VTV.

B.________ is a professional tennis player and she is also affiliated to VTV.

The World Anti-Doping Agency (hereafter: WADA) is a foundation governed by Swiss law with headquarters in Lausanne. Its purpose is among others to promote the fight against doping in sport at the international level.

[1] Translator's note: Quote as A._____ and B._____ *v.* World Anti-Doping Agency (WADA) and Flemish Tennis Federation (VTV), 4A_428/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

A.b In a decision of November 5, 2009 the Vlaams Doping Tribunal (hereafter: the VDT), a body which is part of VTV, pronounced a one year ban against A.________ for breach of anti-doping rules (two failures by the player to report his whereabouts and one test missed). On the same date, the VDT imposed a one year ban on B.________ for violating anti-doping rules (three failures by the player to provide information as to her whereabouts).

B.

B.a On November 16, 2009 A.________ and B.________, acting separately, appealed to the Court of Arbitration for Sport (CAS), which opened two files under the docket numbers of respectively CAS 2009/A/1994 A.________ *v.* VDT (hereafter: case 1994) and CAS 2009/A/1995 B.________ *v.* VDT(hereafter: case 1995).

On December 21st, 2009 WADA too appealed the two decisions issued on November 5, 2009 by the VDT. The CAS then opened cases CAS 2009/A/2020 WADA *v.* VDT, VTV and A.________ (hereafter: case 2020) and CAS 2009/A/2021 WADA *v.* VDT, VTV and B.________ (hereafter: case 2021).

B.b In parallel to their appeals to the CAS, A.________ and B.________ (hereafter referred to collectively as the Athletes or the Appellants) initiated several procedures in the Belgium state courts and required some of them to apply to the Court of Justice of the European Union for a preliminary ruling as to the compatibility of various rules of the World Anti-Doping Code (WAC) and Code of Sport Arbitration (CSA) with Community law and with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, they applied for an injunction on November 16, 2009, which led the CAS to stay cases 1994 and 1995 until further notice on November 25, 2009. At the same time the Athletes also sued the Belgium state in front of the European Commission.

Relying on the proceedings pending in front of the Belgium Courts or the European authorities, the Athletes requested the stay of cases 2020 and 2021. Moreover they challenged the jurisdiction of the CAS to address the cases.

A hearing of the CAS was held in French in Brussels on November 2, 2010. The Parties raised no objection as to its conduct or as to the composition of the three members Panel appointed to decide their appeals.

After asking for their written determinations in this respect the CAS advised the Parties on March 2, 2011 that the Panel would soon issue a decision on the stay of cases 1994, 1995, 2020, 2021 and as to its jurisdiction as the case may be.

B.c In a majority “partial award” of June 10, 2011, the CAS found that it had jurisdiction in cases 1994 and 2020; it rejected the request that case 2020 should be stayed, held that cases 1994 and 2020 would be consolidated by the Panel and ordered case 1994 to be continued. An identical award, except for the docket numbers was issued as to cases 1995 and 2021 concerning B.________ on the same day.

The reasons of the two awards will be explained hereunder in the framework of the review of the grievances raised against them.

C.
On July 7, 2011 the two Athletes, represented by the same counsel, filed a memorandum entitled "request for a stay with a view to an upcoming Civil law appeal" in order to have their cases joined and the enforcement of the awards stayed until a decision on the stay of enforcement itself, then it should be granted until the matter is decided by the Federal Tribunal.

On September 13, 2011 the Appellants filed a joint appeal brief. They repeated their preliminary submissions that the two cases should be joined and a stay of enforcement ordered and they sought an additional determination of the facts with a view to taking into account "the Appellants' briefs and not the incomplete summary that the CAS produced in the awards under appeal", "the rules of procedure of the Flemish Tennis Federation" and "Art. O.1 of the Anti-Doping Rules of the International Tennis Federation (ITF)" and on the merits they submitted that the two awards under appeal should be annulled.

By decision of the presiding judge of September 21, 2011 the cases involving the two Athletes were joined. A stay of enforcement was granted to the appeal and it was held that the VDT should not be considered a party or a participant in the federal appeal proceedings.

In its answer of October 24, 2011, WADA submitted that the appeal should be rejected. The CAS did the same in its answer of November 14, 2011. However the VTV submitted that the appeal should be granted, the two awards annulled and the arbitral proceedings stayed until the Belgium or European jurisdictions could reach a decision in the proceedings concerning among other things the challenge of the jurisdiction of the VDT and/or the CAS or alternatively as long as VTV would be barred from carrying out the sanctions pronounced against the two Athletes.

On November 24, 2011 the Appellants filed a reply. They raised a procedural objection as to the representatives of WADA, which will be referred to hereunder. In its observations of November 30, 2011 WADA submitted that the procedural objection should be rejected. On December 1st, 2011 the Appellants filed their observations as to the CAS answer.

Finally, WADA filed a rejoinder on January 16, 2012. Whereupon the Parties were informed by letter of January 31st, 2012 that the exchange of briefs was closed.

Reasons:

1.
1.1 The seat of the CAS is in Lausanne. At least one of the parties (in this case the two Appellants and VTV) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA[2] are accordingly applicable (Art. 176 (1) PILA). In the field of international arbitration a Civil law appeal is allowed against the decisions of arbitral tribunals pursuant to the requirements contained at Art. 190 to 192 PILA (Art. 77 (1) LTF[3]). The decision to be appealed may be a final award, putting an end to the

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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: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

arbitral proceedings on the merits or on procedural grounds, a partial award addressing the claim in dispute in part or one of the claims involved, or even a preliminary or interlocutory award deciding one or several preliminary issues as to the merits or procedurally (as to these concepts see ATF 130 III 755 at 1.2.1 p. 757). To decide whether the matter is capable of appeal or not the decisive factor is not the name of the decision under appeal but its contents (ATF 136 III 200[4] at 2.3.3 p. 205, 597 at 4).

When an arbitral tribunal accepts jurisdiction in a separate award, it issues a preliminary decision (Art. 186 (3) PILA). Such is the case here although the awards under appeal are improperly designated as partial. Pursuant to Art. 190 (3) PILA the awards could be appealed to the Federal Tribunal only on the basis of an alleged irregular composition of the Panel (Art. 190 (2) (a) PILA) or for lack of jurisdiction of the CAS (Art. 190 (2) (b) PILA). These are the two arguments invoked by the Appellants as to the decision on jurisdiction in compliance with the provision quoted.

However the issue as to the capability of appeal must be reserved when it comes to the CAS decision to refuse a stay of the proceedings as that grievance raises a specific issue (see hereunder 5.1.1).

1.2 The Appellants are directly affected by the awards under appeal, which rejected the jurisdictional defense they raised. They have therefore a personal and present interest worthy of protection to ensure that the awards were not issued in breach of the guarantees arising from Art. 190 (2) (a) and (b) PILA, which gives them standing to appeal (Art. 76 (1) LTF).

1.3 Pursuant to Art. 100 (1) LTF an appeal must be filed with the Federal Tribunal within 30 days after the notification of the full decision. According to case law the notification by fax of a CAS award in an international arbitration does not cause the time limit of Art. 100 (1) LTF to start running (judgment 4A_604/2010[5] of April 11, 2011 at 1.3 and the precedent quoted). In this case the signed awards were received by counsel for the Appellants on June 20, 2011. Having filed a brief on September 30, 2011, which meets the formal requirements of the law (Art. 42 (1) LTF) they have accordingly acted within the time prescribed by the law in view of the recess between July 15 and August 15, 2011 (Art. 46 (1) (b) LTF).

1.4 Respondent VTV submits that the appeal should be upheld because an injunction issued by the First Instance Tribunal of Brussels on December 14, 2009 enjoins it from carrying out the bans issued by VDT against the two Athletes on December 5, 2009. VTV fears to have to carry out two perfectly contradictory decisions should the proceedings conducted in parallel in front of the CAS on the one hand and those in front of the Belgium Courts on the other hand go to their respective end.

Such a submission is admissible. Such is not the case for the same Party's submissions that the two awards should be annulled and the arbitral proceedings stayed until a final decision in the Belgium proceedings: such submissions could not be made by a respondent that did not itself appeal the awards in dispute; moreover the second submission disregards that an appeal against an international award may only seek the annulment of the award (Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF) and it is not covered by the exception which allows the Federal Tribunal to decide itself the lack of

[4] Translator's note: 4A_582/2009. Full English translation at http://www.praetor.ch/arbitrage/decision-on-provisional-measures-characterized-as-interlocutory-/

[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/form-of-the-appeal-to-federal-tribunal-legal-interest-to-appeal-/

jurisdiction of the arbitral tribunal should the corresponding argument be accepted (ATF 127 III 279 at 1b; 117 II 94 at 4).

1.5 In their reply to WADA's answer the Appellants raised a procedural question seeking to deny to Mr. C.________ and D.________ and generally to any lawyer of the firm of X.________ the "capacity to appear" in this case due to a conflict of interest and to order them to seize representing the interests of WADA, the latter being given a time limit to appoint new counsel. To justify such a step they explain in substance that they learned in a prospectus received on October 26, 2011 from the aforesaid firm that Mr. E.________ was one of the new partners although he was still a financial director of WADA and the director of legal affairs of this body, even though his employment contract had been terminated. According to them this would create a conflict of interests, Mr. E.________ having his own interests in the outcome of the dispute in his quality as "director of a client company".

WADA replies in its observations that the lawyer involved is not its employee, that he is merely the legal counsel of this non-profit international body created as a foundation governed by Swiss law and that he has no personal interest in the outcome of the dispute.

There is no need to examine any further whether or not the matter is capable of appeal as to the preliminary submissions made to this Court at this late stage of the federal proceedings. It is indeed obvious that the Appellants' initiative is groundless. The theory of a conflict of interest they concocted is groundless and substantiated in no way by the examples they borrow from case law and legal writing in this field. In any event a possible upholding of the procedural objection raised would have no consequence on the outcome of this case as the Appellants do not submit that what was done by counsel for WADA in the name of that Respondent would have to be annulled.

1.6 The Federal Tribunal issues its decision on the basis of the facts established by the CAS (see Art. 105 (1) LTF). The Court may not rectify or supplement *ex officio* the factual findings of the arbitrators even when the facts were established in a manifestly incorrect way or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However, as was already the case under the aegis of the law organizing federal courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted) the Federal Tribunal retains the power to review the factual findings on which the award under appeal relied if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal proceedings (judgment 4A_128/2008[6] of August 19, 2008, at 2.4, not published *in* ATF 134 III 565).

As the Appellants argue that the factual findings of the awards under appeal should be supplemented as to two of the four grievances they raise, their *ad hoc* request shall be addressed in the framework of the review of the grievances in question.

2.

In a first argument based on Art. 190 (2) (a) PILA the Appellants submit that the CAS is not an independent tribunal in doping matters but an indirect body of all the federations interested in the outcome of the dispute which appear in front of the CAS and also of WADA.

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[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua/

2.1 When an arbitral tribunal lacks independence or impartiality it is a case of irregular composition within the meaning of the aforesaid provision. Pursuant to the requirement to act in good faith the right to raise the issue is forfeited if the party does not raise it immediately; a party may not keep its arguments in this respect in reserve only to raise them should the outcome of the arbitral proceedings be unfavorable (ATF 129 III 445 at 3.1 p. 449).

2.2 Quoting that case themselves the Appellants claim that they dutyfully raised the issue of the irregular composition of the CAS in the arbitral proceedings although the awards under appeal are moot on this issue. Invoking Art. 97 (1) and 105 (2) LTF they invite the Federal Tribunal to supplement the factual findings in this respect.

However they overlook that Art. 77 (2) LTF specifically declares the aforesaid two provisions inapplicable in a Civil law appeal against arbitral awards. Admittedly they tried to make up for this omission in their subsequent briefs. Such an attempt was however doomed to fail because such subsequent writings are not meant to allow a party to raise grievances or make submissions which it failed to present in due course, namely in an appeal brief to be filed before the expiry of the time limit which cannot be extended (Art. 47 (1) LTF) as stated at Art. 100 (1) LTF.

Be this as it may, the excerpt of their Belgium counsel's brief of January 26, 2011 that the Appellants asked the Federal Tribunal to take into account as a supplement to the factual findings (appeal, p. 6 *i.f.*/7 *i.l.*) could in no way be assimilated to a grievance, even implicit, as to the composition of the CAS. This is merely an excerpt of the answer given by counsel to a question asked by the Panel, among other questions, in a letter to the Parties of November 5, 2010 that related to the jurisdiction of the Panel, particularly to its power to take into account the proportionality factor to assess a sanction requested by WADA.

Moreover the CAS finds in its awards that the Parties made no remarks as to the composition of the Panel at the hearing held in Brussels on November 2, 2010 (nr. 27 [A.________] and 28 [B.________]). Therefore the Appellants have forfeited their first argument, which shall be rejected without examination of its merits.

3.
Relying on Art. 190 (2) (b) PILA the Appellants further argue that the CAS wrongly admitted jurisdiction to decide the appeals made by WADA against the decisions issued by VDT on November 5, 2009.

3.1
3.1.1 The CAS essentially gave the following reasons in support of its rejection of the Appellants' jurisdictional defense. The Flemish community, abiding by its international commitments, decided in its decree of July 13, 2007 (hereafter: the Decree) that the CAS would have exclusive jurisdiction as to doping matters. Such a compulsory form of arbitration is considered as a special type of arbitration. Thus, far from objecting to the arbitral jurisdiction of the CAS, the Belgium legal order acknowledges it expressly. The same jurisdiction is also provided in the VTV Anti-Doping Rules. Moreover Swiss federal case law acknowledges the principle of arbitration clauses by reference, namely those contained in the statutes of the international federation to which the statutes of a national federation refer.

In this case, since VTV delegated its disciplinary powers to the VDT and both Athletes took part in competitions organized by the ITF and they have an ATP (Association of Tennis Professionals) or WTA (Women's Tennis Association) ranking, the CAS jurisdiction is reinforced by the arbitral clause contained in the ITF anti-doping program. That clause provides for the exclusive jurisdiction of the CAS in this area to decide appeals made by natural or legal persons spelled out there, among which are the athlete concerned by the decision under appeal and WADA.

The CAS had various occasions to address the issue of a possible conflict between national law and international sport regulations. On December 19, 2006 it issued an award in this respect (CAS 2006/A/1119, UCI v. Landaluce and RFEC) in which it acknowledged the compelling necessity for international federations to have the power to review the decisions of national federations as to doping, in order to prevent international competitions from being distorted by exceedingly lenient sanctions, which a national federation or a national state body could issue. The Panel adopted this case law particularly because Belgium law, relied upon by the Appellants, specifically acknowledges the WAC. It is admittedly aware that its interlocutory awards may not prevail on Belgium territory against the internal law of that country. However the issue is the principle of a single sport order, which justifies that the decision of the CAS should prevail at least at the international level.

Moreover the national mechanisms of redress have been exhausted. Accordingly an appeal can be made to the CAS.

3.1.2 The Appellants raised in substance the following arguments against these reasons.

Firstly, the awards under appeal fail to state that the procedural rules of VTV and VDT were adopted after the Decree was published. Such an omission is arbitrary because it leads to the conclusion that the VTV arbitration was agreed upon by the Appellants. The factual findings must therefore be supplemented in this respect by including the specific provisions of the VTV procedural rules, which will enable the Federal Tribunal to find that the arbitration imposed on the Appellant finds its source in a Flemish legislative act.

Secondly, the CAS overlooked that the sanctions against the Appellants were not issued pursuant to the ITF Anti-Doping Program. Consequently the arbitration clause contained in that program could not be applied. On this issue also the factual findings must be supplemented as the CAS arbitrarily disregarded Art. O.1 of the aforesaid Program in its awards.

Consequently the only arbitration clause binding the Appellants is the one contained in the Decree. However it is not valid because an athlete could not consent to arbitration imposed by law. It is indeed due to its consensual nature that arbitration as intended at Art. 176 ff PILA is distinguished from mandatory arbitration, which is a form of state jurisdiction to which all procedural guarantees of Art. 6 (1) ECHR apply fully. Lacking party autonomy, the arbitration clause applied to the Appellants is therefore invalid. Consequently the CAS had no jurisdiction to issue the awards under appeal.

3.2

3.2.1 Seized for lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal (ATF 133 III 139 at 5 p. 141 and the cases quoted). However this does not turn this Court into an appeal court. Thus it does not behoove the Court itself to research in the award under appeal which legal

arguments could justify the admission of a grievance based on Art. 190 (2) (b) PILA (see Art. 77 (3) PILA). It behooves the appellant to draw the Court's attention to them in order to comply with the requirements of Art. 42 (2) LTF (ATF 134 III 565[7] at 3.1 and the cases quoted).

3.2.2 For the reasons already explained the Appellants cannot obtain the supplementary factual findings they seek (see above 2.2, § 1 and 2). This applies to the two issues in their *ad hoc* request. Moreover the Appellants resort to a concept which is out of place in an appeal against an international arbitral award when they describe as arbitrary the two omissions which they blame the CAS for. The Federal Tribunal will accordingly decide only on the basis of the facts found in the awards under appeal.

Consequently the arguments the Appellants draw from the allegedly involuntary nature of the arbitration instituted by VTV and the limited scope of the arbitration clause inserted into the ITF anti-doping clause shall not be taken into account. The argument based on the alleged mandatory nature of the arbitration is thus deprived of any foundation because it relies on the unproved assumption that the Appellants would be bound only by the arbitration clause contained in the Decree.

3.2.3 The arbitration agreement must be in the format prescribed by Art. 178 (1) PILA. Whilst taking into consideration that requirement in good part (judgment 4A_358/2009[8] of November 6, 2009 at 3.2), the Federal Tribunal reviews with "benevolence" the consensual nature of sport arbitration with a view to enhancing speedy disposition of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS (ATF 133 III 235 at 4.3.2.3). The liberalism of case law in this respect (case quoted *ibid*.; on that issue, see among others: Antonio RIGOZZI, L'arbitrage international en matière de sport, 2005, nr 832 ff) appears clearly in the flexibility with which case law treats the issue of the arbitration clause by reference (judgment 4A_246/2011[9] of November 7, 2011 at 2.2.2 and the precedents quoted); it also appears tangentially in the principle of case law according to which depending on the circumstances, a certain behavior may supplement compliance with a formal requirement pursuant to the rules of good faith (ATF 129 III 727 at 5.3.1 p. 735). Thus, as two specialists of international arbitration point out, it is generally held that the CAS arbitration clause is typical of the sport requirements (KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, p. 128 footnote 150). In other words, to recall the conclusion of another specialist in this field, there is practically no elite sport without consent to sport arbitration (Pierre-Yves TSCHANZ, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, nr 149 *ad* Art. 178 PILA).

In this case the CAS relied in particular on the VTV Anti-Doping Regulations and case law of the Federal Tribunal as to an arbitration clause by reference in order to accept jurisdiction (awards nr 79 [A.________] and 80 [B.________]). Relying on the allegedly mandatory nature of the arbitration involved, which would rely exclusively on the Decree according to them, the Appellants fail to explain why this alternate basis, which belongs to private association law, would have been upheld in violation of the aforesaid Regulations or of federal case law. It does not behoove this Court to do it for them (see 3.2.1 above).

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[7] Translator's note: 4A_128/2008. Full English translation at http://www.praetor.ch/arbitrage/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua/

[8] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/lack-of-jurisdiction-of-the-cas-arbitration-clause-by-reference/

[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s/

It may be useful to add as to the consensual nature or not of the arbitration at hand that one hardly sees from the point of view of the freedom to contract what difference there could be for an athlete who has no other choice than accepting the arbitration clause contained in the Regulations of the sport federation to which he is affiliated, whether the aforesaid federation adopted the Regulations on its own initiative or pursuant to a requirement of the state in which it is based.

Finally it must be pointed out that the Appellants raise no understandable criticism as to the explanations given by the CAS as to the relationship between the state proceedings and the private proceedings set up to sanction athletes found guilty of doping.

This being so, the argument that Art. 190 (2) (b) PILA was violated cannot but be rejected, if the matter is capable of appeal in this respect at all.

4.
The Appellants argue furthermore that the CAS had no jurisdiction as to the WADA appeals as this foundation lacks any interest to appeal.

4.1
4.1.1 It is not obvious that the matter is capable of appeal in this respect no matter what the Appellants claim.

Admittedly, when it reviews whether it has jurisdiction to decide the dispute at hand the arbitral tribunal must decide the issue of the subjective scope of the arbitration clause among others. It behooves the arbitral tribunal to determine which are the parties bound by the clause and to determine, as the case may be, whether one or several third parties not mentioned there nonetheless fall within its scope. This is an issue of jurisdiction *ratione personae* – to be clearly distinguished from the issue of the standing to act which is connected with the active or passive possession of the right in dispute (ATF 128 III 50 at 2b/bb p. 55) – which must be decided in the light of Art. 178 (2) PILA (ATF 134 III 565 at 3.2 p. 567). However that case essentially refers to typical or normal arbitration, which finds its source in a contractual relationship and is characterized by the existence of an arbitration clause from which it must be determined if it binds other people than the contractual parties, particularly in case of inheritance, merger, assignment or debt assumption (for examples, see ATF 134 III 567 at 3.2; 129 III 727 at 5.3; 128 III 50 at 2 and 3; 120 II 155 at 3; 117 II 94 at 5). However it is doubtful that it would also apply to atypical arbitration, such as sport arbitration, particularly when the jurisdiction of the arbitral tribunal comes from the reference to the statutes of a sport federation providing for arbitration to settle disciplinary disputes. In this area, the Federal Tribunal already held that deciding whether or not a party has standing to appeal the decision taken by a body of a sport federation pursuant to its statutes and to the applicable legal provisions does not relate to the issue of jurisdiction of the arbitral tribunal seized but to the issue of the standing to act (judgment 4A_424/2008[10] of January 22, 2009 at 3.3).

In the light of the latter case it is doubtful that the matter is capable of appeal in this respect. Indeed, if one admits that the CAS was right to accept jurisdiction as to the appeals against the decisions taken by the VDT on November 5, 2009 (see at 3 above) the issue as to whether or not WADA had standing to

[10] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-no-review-of-the-decision-of-the-/

appeal these decisions as did the two Athletes sanctioned, did not involve the jurisdiction of the Arbitral tribunal but merely a procedural issue – WADA's standing to appeal – to be solved pursuant to the pertinent procedural rules. Yet it does not behoove the Federal Tribunal to review how such rules were applied in the framework of an appeal against an international arbitral award.

4.1.2 The Appellants point out that "the awards under appeal are moot as to WADA's standing to act…" (appeal, p.16, 3rd §) although they mention the objections they raised in this respect (award, nr. 40 [A.________] and 41 [B.________]). Admittedly the CAS does not appear to have specifically dealt with the issue in dispute. Assuming this to be the case, the awards should have been appealed not from the point of view of Art. 190 (2) (b) PILA, which relates to the jurisdiction of the arbitral tribunal – to the extent that the matter could be capable of appeal in this respect (see 4.1.1 above) – but for a violation of the right to be heard, which is sanctioned by Art. 190 (2) (d) PILA. The right to be heard in contradictory proceedings within the meaning of that provision does impose upon the arbitrators a minimal duty to review and deal with the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). Such duty is breached when the arbitral tribunal fails to take into consideration an argument validly submitted by one of the parties and important to the decision to be issued.

In this case the Appellants do not rely on Art. 190 (2) (d) PILA to substantiate their argument as to WADA's participation in the appeal proceedings. This is an additional reason to cast doubt on the capability of appeal of the matter in this respect. Furthermore had the argument been raised it could have been taken into consideration only by leaving aside the rule that only the grievances stated at Art. 190 (2) (a) and (b) PILA are allowed against a preliminary award (Art. 190 (3) PILA; see above at 1.1. § before last).

4.2 In any event the argument as presented could only be rejected even if capable of appeal.

It must be found in this regard that the Appellants based almost their entire argument on the rule of Swiss law as to the standing to file a Civil law appeal with the Federal Tribunal, namely Art. 76 LTF and on federal case law as to the standing to appeal of private law associations (ATF 130 I 82 at 1.3). From the former they deduct the obligation to have been a party in the proceedings of first instance in order to be entitled to seize the appeal body (Art. 76 (1) (a) LTF); from the former they deduct that having a direct and personal interest to modify the decision under appeal is a necessary condition of the right to appeal. As to the first requirement the Appellants point out that WADA was not a party to the proceedings in front of the VDT and as to the latter that the Respondent could not claim any personal interest worthy of protection to a more severe disciplinary sanction than the one inflicted on them. "WADA", so they submit, "is not a state attorney who could avail himself of the public interest that the rules it adopted itself be uniformly applied" (appeal p.17, 2nd §).

In doing so the Appellants attempt to apply a rule of law and a principle of case law as to the capability of appeal of matters submitted to the Federal Tribunal, *i.e.* to the Supreme Court of a specific state. Yet the admissibility of such appeals raises specific issues, so that the requirements to which it is subject cannot be extended to other lower state courts, even by analogy, or even less to private jurisdictions such as arbitral tribunals.

Be this as it may, WADA explains in its answer (n. 37) that the Appellants chose a career as professional tennis players and thereby accepted to submit to the regulations of VTV to which they are affiliated and consequently to the anti-doping rules of that association, which provide for a right to

appeal in WADA's favor. WADA concludes that it does not have to justify any specific interest to appeal. In their reply the Appellants leave that argument untouched as they merely challenge the ones WADA sought to derive from the October 19, 2005 International Convention Against Doping in Sport (RS 0.812.122.2), from the Copenhagen Declaration Against Doping in Sport and from the WAC. Under such conditions the argument by which the Appellants claim that WADA should not have been recognized as a party in the appeal proceedings in front of the CAS although it was not a party in the lower instance proceedings could not be upheld even if procedurally acceptable.

5.

The Appellants' last argument relates to Art. 186 (1*bis*) PILA. According to that provision the arbitral tribunal decides its jurisdiction irrespective of any action on the same object already pending between the same parties in front of another court or arbitral tribunal except if there are serious grounds to stay the proceedings.

5.1

5.1.1 The decisions of the arbitral tribunal as to the temporary stay of the arbitral proceedings are procedural orders not subject to appeal; they may nonetheless be submitted to the Federal Tribunal when an arbitral tribunal issuing them decided its own jurisdiction implicitly (ATF 136 III 597[11] at 4.2 and references), in other words when by doing so the arbitral tribunal issued a preliminary decision on jurisdiction (or as to the regularity of its composition if it was disputed) within the meaning of Art. 190 (3) PILA (judgment 4A_614/2010[12] of April 6, 2011 at 2.1 and 4A_210/2008[13] of October 28, 2008 at 2.1). It must be conceded that part of the legal writing on the issue criticizes that case law and recommends that a decision to stay the proceedings or not pursuant to Art. 186 (1*bis*) PILA should not be appealable (KAUFMANN-KOHLER/RIGOZZI, *op. cit*., nr 456c and 813b; Jean-François POUDRET, Les recours au Tribunal fédéral suisse en matière d'arbitrage international [Commentaire de l'art. 77 LTF], *in* Bulletin de l'Association suisse de l'arbitrage [ASA] 2007 p. 669 ff, 699 ch. 7.4) or to the very least that no appeal could be made against the decision of the arbitral tribunal as to the existence of "serious grounds" within the meaning of that provision as this is a matter of appreciation for the discretion of the arbitrators (Sébastien BESSON, The Relationships between Court and Arbitral Jurisdiction: the Impact of the new Article 186 (1*bis*) PILS, in New Developments in International Commercial Arbitration 2007 [Christoph Müller, éd.], p. 57 ff, 74).

5.1.2 The pertinence of that legal writing needs not be reviewed here as the argument is anyway inadmissible for another reason (see 5.2 hereafter).

On the basis of case law as of this writing it will be admitted that the matter is capable of appeal from that point of view. The CAS doubtedly treated the stay (awards at 3.2.1) and jurisdiction (awards at 3.2.2) separately. Yet it clearly connected both issues (award, nr 56 [A.________] and 57 [B.________]) and the decision it took as to the former does not at all feature a procedural order which could be modified or rescinded during the proceedings, against which an appeal would be impossible (for an

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[11] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t/

[12] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/decision-of-the-arbitral-tribunal-not-capable-of-appeal-procedur/

[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/right-to-be-heard-equal-treatment-of-the-parties-legal-fees-awar/

example of a refusal to stay falling within that category of decisions, see the aforesaid judgment 4A_614/2010, at 2.3.2 to be compared with the aforesaid judgment 4A_210/2008, *ibid*.).

5.2
5.2.1 When a decision is based on two independent reasons the appellant must explain why each reason violated the law, failing which the matter is not capable of appeal (ATF 133 IV 119 at 6.3. p. 121). This rule applies also to international arbitration (judgment 4A_458/2009[14] of June 10, 2010 at 4.2.2 and 4P.168/2004 of October 20, 2004 at 2.2.2).

5.2.2 According to the CAS the issue of *lis pendens* which could lead to Art. 186 (1*bis*) PILA being applied implies compliance with three cumulative requirements: firstly the two concurrent proceedings must concern the same parties and the same dispute; then the case in front of the ordinary state court must have been initiated before the CAS was seized; finally some serious grounds must justify staying the proceedings, the existence of which must be demonstrated by the party claiming *lis pendens*.

Reviewing whether or not these three cumulative requirements were met in the case at hand the CAS held that the first requirement did not appear fulfilled because, on the one hand, WADA was not a party to all the proceedings opened in Belgium and on the other hand the Flemish community is not a party to the proceedings in front of the CAS. As to the second requirement it held that the Athletes could not claim to have acted at the national level first but at best simultaneously. Finally, as to the third requirement, the CAS spells out in details the reasons for which it considers that there is no serious ground in this case which would justify staying cases 2020 and 2021. That analysis leads the CAS to conclude that "the cumulative requirements necessary to applying the *lis pendens* exception contained at Art. 186 (1*bis*) PILA are not met" (awards nr 75 [A.________] and 76 [B.________]).

5.2.3 In their appeal brief (p.17 to 21) the two Athletes merely dispute the reasons adopted by the CAS with regard to the third requirement for applying the aforesaid provision. However one looks in vain for the slightest criticism as to the first and second requirements of the same provision. Such failure is decisive according to the case law quoted above because they are cumulative requirements and it results in two reasons being left unaffected when both are *per se* sufficient to rule out the applicability of Art. 186 (1*bis*) PILA in this case.

Hence the matter is not capable of appeal for violation of Art. 186 (1*bis*) PILA.

6.
The Appellants lose and shall accordingly pay the costs of the federal proceedings (Art. 66 (1) and (5) LTF) and compensate WADA (Art. 68 (1), (2) and (4) LTF). As to VTV, since it wrongly submitted that the appeal should be upheld it cannot claim costs (Art. 68 (1) LTF *a contrario*).

Therefore the Federal Tribunal pronounces:

1.
The preliminary request submitted by the Appellants of November 24, 2011 is rejected.

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[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-/

2.
The appeal is rejected to the extent that the matter is capable of appeal.

3.
The judicial costs set at CHF 4'000 shall be borne by the Appellants severally.

4.
The Appellants shall pay severally to Respondent World Anti-Doping Agency (WADA) an amount of CHF 5'000 for the federal judicial proceedings.

5.
This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne February 13, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs) Caruzzo