4A_730/2012[1]

Judgment of April 29, 2013

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: M. Caruzzo

X._____ ,
Represented by Mr. Claude Ramoni,
Appellant,

v.

1. The International Association of Athletics Federations,
Represented by Mr. Martin Bernet and Mrs. Sonja Stark-Traber,

and

2. Z._____ ,
Respondents

Facts:

A.
X._____, born in 1979, is a [name of specialty omitted] athlete of a high level, with a successful international career.

On August 11, 2011, in circumstances that are at the heart of the dispute, the athlete allegedly avoided an out-of-competition anti-doping examination organized by the International Association of Athletics Federations (hereafter IAAF, according to its English acronym).

Reported in violation of anti-doping rules, X._____ was cleared by the [name of country omitted] athletics federation on June 6, 2012.

B.
On June 6, 2012, the IAAF filed an appeal with the Court of Arbitration for Sport (CAS) against the June 6, 2012, decision.

[1] Translator's note: Quote as X._____ *v.* I.A.A.F., 4A_730/2012. The original decision is in French. The text is available on the website of the Federal Tribunal: www.bger.ch.

With the agreement of the parties, the CAS resorted to an expedited procedure so that a decision could be issued before the beginning of the Olympic Games organized in London from July 27 to August 12, 2012, for which X._____ met the participation criteria. A panel of three arbitrators was quickly constituted and the parties were called to a hearing which took place on July 24, 2012. Pursuant to a request from the IAAF, counsel for the [name of country omitted] athlete produced a bundle of documents the day before the hearing, including his client's phone records. The day after the hearing, *i.e.* on July 25, 2012, the CAS sent to the parties the operative part of its award, worded as follows:

> *1. The appeal filed by the IAAF against the decision of 6 June 2012 rendered by the Doping Committee of the* [name of country omitted] *National Anti-Doping Organisation is upheld.*
>
> *2. The decision of 6 June 2012 rendered by the Doping Committee of the* [name of country omitted] *National Anti-Doping Organisation is set aside.*
>
> *3. Mr. X._____ is sanctioned with a ban of two years starting from the date of the present award.*
>
> *4. The issues of the costs of the arbitration and the parties' legal expenses incurred in connection with the arbitration procedure shall be decided in a separate award on costs.*
>
> *5. All further claims are dismissed.*[2]

The reasoned award was notified to the parties on October 18, 2012. Its operative part states as follows:

> *1. The appeal filed by the IAAF against the decision of 6 June 2012 rendered by the Doping Committee of the* [name of country omitted] *National Anti-Doping Organisation is upheld.*
>
> *2. The decision of 6 June 2012 rendered by the Doping Committee of the* [name of country omitted] *National Anti-Doping Organisation is set aside.*
>
> *3. Mr. X._____ is sanctioned with a ban of two years starting from the date of the present award, with credit given for any period of suspension previously served.*
>
> *4. The costs of the arbitration to be calculated and communicated separately to the parties by the CAS Court Office shall be borne in the following proportion: one quarter by the IAAF and three-quarters jointly and severally by the Respondents.*
>
> *5. Z._____ shall make a contribution of CHF 2,000 (...) and Mr. X._____ shall make a contribution of CHF 1,000 (...) towards the IAAF's legal fees and other expenses incurred in connection with the present arbitration.*

[2] Translator's Note: In English in the original text.

6. All further claims are dismissed.[3]

The grounds in support of the award will be mentioned to the extent necessary in the review of the grievances raised against the award.

C.
On December 13, 2012, X._____ (hereafter "the Appellant") filed a civil law appeal with an application for legal aid with a view to obtaining the annulment of the CAS award. By decision of the presiding judge of January 16, 2013, the Appellant was granted legal aid and his counsel became court-appointed counsel.

In its answer of March 1, 2013, the CAS produced its file and submitted that the appeal should be rejected. The IAAF (hereafter "the Respondent") did similarly [argued for the same thing] in its observations of March 8, 2013. As to the athletics federation of [name of country omitted], it did not submit an answer within the time limit it had been given to do so. The Appellant produced a reply on March 22, 2013. The Respondent and the CAS did not avail themselves of the opportunity they had been given to file a rejoinder.

Reasons:

1.
According to Art. 54(1) LTF,[4] the judgment of the Federal Tribunal is issued in an official language,[5] as a rule in the language of the decision under appeal. When the decision is in another language (in this case, English), the Federal Tribunal resorts to the official language chosen by the parties. Before the CAS, the parties used English. In the brief sent to the Federal Tribunal, the Appellant used French (the Respondent's answer was in German). In accordance with its practice, the Federal Tribunal will use the language of the appeal and consequently it will issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admissible against decisions of arbitral tribunals pursuant to the requirements set out in Art. 190-192 PILA[6] (Art. 77(1)(a) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in this case. Therefore nothing prevents the appeal from being addressed.

3.
In a first group of arguments, the Appellant claims that two of the arguments he raised before the CAS in connection with the circumstances in which the anti-doping examination of August 11, 2011, were carried out caused his right to be heard in contradictory proceedings to be violated.

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[3] Translator's Note: In English in the original text.
[4] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[5] The official languages of Switzerland are German, French, and Italian.
[6] 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.

3.1
The right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) PILA does not, in principle, differ in content from that which is found in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus, it was held with regard to arbitration, that each party has the right to express its views on the essential facts for the judgment, to present its legal arguments, to propose evidence as to pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c, p.643).

Admittedly, the right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not require an international arbitral award to be reasoned (ATF 134 III 186[7] at 6.1 and references). However, it imposes upon the arbitrators a minimum duty to review and handle the pertinent issues (ATF 133 III 235 at 5.2, p.248, and the cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some facts stated, arguments made, evidence and offers of evidence submitted by one of the parties and important for the decision to be issued. If the award is totally silent as to some items apparently important to the resolution of the dispute, it behooves the arbitrators or the Respondent to justify this omission in their observations as to the appeal. They must demonstrate that, contrary to the Appellant's arguments, the items omitted were not pertinent to resolve the case at hand or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all arguments raised by the parties, so that they cannot be found in breach of the right to be heard in contradictory proceedings for not refuting, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

Moreover, it is not for the Federal Tribunal to decide whether or not the arbitrators should have upheld the argument they overlooked if they had dealt with it. This would be tantamount to disregarding the formal nature of the right to be heard and the necessity of annulling the decision under appeal where this right is violated, irrespective of the Appellant's chances of obtaining a different result (4A_360/2011 of January 31, 2012[8], at 5.1 and the precedent quoted).

3.2
3.2.1
The circumstances in which the athlete's unexpected examination took place on August 11, 2011, concern the assessment of the evidence. As such, they are beyond the review of the Federal Tribunal in an appeal concerning international arbitration. The Appellant is well aware of this and does not criticize the findings of the CAS Panel. At § 16*ff* of his brief, however, the Appellant regrets that the Arbitrators made only a "shy allusion" to the phone records he had produced, at the Respondent's request, as an attachment to his reply (Exhibit n. 9) and then, the day before the hearing (Exhibit n. 10) although they were, according to him, the only material elements which could demonstrate that the person in contact with the doping control officer (the CO) could only have been a third party. Indeed, according to the

[7] English translation of this decision available at http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties.
[8] English translation of this decision available at http://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear.

Officer, that person used his mobile phone twice in his presence but the phone records produced showed that the Appellant had made no calls that day. According to the Appellant, what took place at the beginning of the hearing, transcribed in his Exhibit n. 11, would confirm that the award under appeal was issued without all members of the Panel being in possession of all of the exhibits in the file of the arbitration.

3.2.2

First of all, one must not lose sight of the fact that the arbitral procedure was conducted in an expedited manner in this case, with the agreement of the parties. Hence, the Appellant cannot challenge the speed with which the arbitration was conducted or, consequently, the short time between the evidentiary hearing and the issuance of the award. Indeed, the transcript of the last minutes of the hearing of July 24, 2012, as mentioned at § 7 of the CAS answer, shows that the Panel had the parties confirm that they had filed all the exhibits they wanted to submit and that they were given a full hearing.[9] Under such circumstances, the argument that the Panel did not issue its decision in full awareness of the facts does not appear founded.

Moreover the existence of the phone records was not overlooked by the Arbitrators, despite what the Appellant claims, as they mention them at paragraph 42 and 62 of the award, albeit when they set out the respective points of view of the parties. The Panel admittedly did not specifically mention this evidence in the reasons of the award. However, it is clear that it did not ascribe it the same importance the Appellant claims as it stated at paragraphs 64*ff* of the award a number of factual items inconsistent with the argument based on the phone records, from which it deduced in its sole discretion that the Doping Control Officer could not have confused the Appellant with another person on the day of the examination. Moreover, the Appellant does not explain sufficiently why the various documents he filed as Exhibits nos. 9 and 10 – they are written in [name of language omitted] and an English translation and some contain hand-written notes – establish beyond dispute that he did not make any phone calls on August 11, 2011. Other assumptions are consistent with the documents filed but not with the Appellant's inference and they cannot be ruled out *a priori*: for instance, the athlete may have had another mobile phone aside from the three mentioned in his phone records or he may have used a third party's mobile phone on that day.

Finally, no matter what the Appellant says, the case at hand is not comparable to the one in the January 31, 2012, judgment in case 4A_360/2011[10] (at 5.2.3.2). In that case, the sole arbitrator, while listing the names of all the witnesses in his description of the proceedings, totally omitted four witness statements due to an oversight as to the existence of a post-hearing brief submitted by one of the parties and these could *a priori* have modified his analysis of the point in dispute. In this case, to the contrary, the three Arbitrators *did* take into account all the evidence they had been given, including the phone records, when they reviewed the manner in which the anti-doping examination of August 11, 2011, had taken place. However, they assessed them in a manner differing from that which the Appellant suggests and upheld a scenario inconsistent with the conclusion he intended them to draw those phone records, implicitly rejecting the evidentiary value of this evidence. Consequently, the Appellant wrongly argues that he was not heard as to this issue.

[9] Translator's note: "full hearing" is in English in the original text.
[10] English translation at http://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear.

3.3
3.3.1

In the second part of the same argument, it is claimed that the Panel did not take into account the alternate argument in the Appellant's reply. According to that argument, even if, against all possibility, the existence of a contact between the Doping Control Officer and the Appellant on August 11, 2011, should be admitted, one still must exclude that the athlete could be blamed for violating anti-doping rules on the basis of the pertinent provisions of the Respondent's anti-doping regulations and the CAS case law in this field because the Doping Control Officer breached the rules concerning the conduct of an anti-doping examination (appeal, no. 26 – 34).

3.3.2
The award under appeal indeed does not allude to this alternate argument. In its answer, the CAS points out that at paragraph 58 of the award, the Panel clearly stated that it had taken into account all the facts, legal arguments, and evidence submitted by the parties in the arbitral proceedings but that it would refer only to the arguments and evidence necessary to explain its reasoning. However, this is a stereotyped formula found in most CAS awards and it has no more value than a routine form of expression. Thus, the mere fact of resorting to it does not suffice to rule out a violation of the right to be heard that an arbitral tribunal commits if it does not take into account some factual statements, arguments, evidence and offers of evidence presented by one of the parties and important to the decision to be issued. However, in this case the Respondent availed itself of the facility made available by the aforesaid federal case law, and sought to demonstrate in the answer to the appeal (§§8-17) that the item omitted by the Panel, namely the Appellant's alternate argument, was not pertinent to decide the case at hand. It did so successfully, it appears indeed from its convincing and detailed explanations that the provisions and the case law invoked by the Appellant do not concern the factual situation found by the Arbitrators, in which the athlete hastily left the premises after the Doping Control Officer contacted him at the place where the anti-doping examination was to take place and warned him that he would do so and left with his car to avoid the examination. In this respect it is not clear why Art. 33.3(b) of the Respondent's competition rules 2010-2011, quoted by the Appellant in his reply, would question these explanations.

Consequently, the Appellant wrongly argues a violation of his right to be heard as to this issue as well.

4.
Furthermore, the Appellant points to a change in the operative part of the award at the last page of the reasoned award of October 18, 2012, as compared to the operative part of July 25, 2012, which had been communicated to the parties before the reasons in accordance with Art. 59(3) of the Code of Sport Arbitration (hereafter "the Code"). The modification challenged is the addition at the end of paragraph 3 of the latter version of some words not contained in the corresponding paragraph of the former ("*with credit given for any period of suspension previously served*"[11]; see section B. above). In a somewhat contradictory manner, the appellant argues on the one hand that the arbitrators violated the principle of *ne eat iudex ultra petita partium*, by omitting, in the operative part of July 25, 2012, to deduct his provisional suspension, although it was requested by the Respondent (see award, n. 5(iv) i.f.) and, on

[11] Translator's note: in English in the original text.

the other hand, that his right to be heard was breached because they did so on their own initiative in the operative part of the reasoned award of October 18, 2012. Be this as it may, the correction made by the Panel was in the Appellant's favor. Therefore he has no interest to challenge it in this appeal (see Art. 76(1)(b) LTF). He replies that the "award issued in October" is "clearly less in his favour" to the extent that, contrary to the "July award" it would order the annulment of all the results he obtained in competitions after the violation of the anti-doping rules (August 11, 2011). The argument is unfounded, as such an order is in neither of the two operative parts quoted by the Appellant.

5.
Finally, the Appellant argues that the award of October 18, 2012,pronounces in its reasons if not in its operative part, the annulment of all the results he obtained since the anti-doping offense was committed while the July 25, 2012, award did not do so. He sees a violation of public policy there for not taking into account that the first award was *res judicata* and possibly a violation of his right to be heard because the award was rectified by an additional award without the parties being given an opportunity to express their views in this respect (appeal, §§ 61-71). The argument appears artificial at the very least because it presupposes the existence of two distinct awards. Yet there is no reason to treat the pronouncement of July 25, 2012 (operative part) and of October 18, 2012 (reasoned award) as two successive and distinct decisions. In reality, it is only one award which, due to the urgency induced by the expedited procedure adopted by the Panel with the agreement of the parties, was communicated to them in two steps, as authorized by Art. 59(3) of the Code, namely by sending the operative part of the award before the reasoned award was notified a little less than three months later.

In any event, the basis of the Appellant's reasoning is mistaken. Indeed there is no mention of an annulment of his results in the operative part of the award under appeal, whether on July 25, 2012, or on October 18, 2012. Looking in parallel at paragraph 1 of the operative part of the reasoned award and at paragraph 84 of the reasons, does not lead to another conclusion, despite what the Appellant suggest (appeal, § 66).

Indeed, paragraph 1 of the operative part merely states that the appeal made by the Respondent against the decision issued on June 6, 2012, by the Committee of the National Anti-Doping body of [name of country omitted] is upheld. It does not say to what extent and in particular, not that it would be entirely upheld. It is rather a partial upholding because the Panel merely annuls the decision under appeal and bans the athlete, rejecting all additional submissions it was seized of at paragraph 6 of the same operative part ("*all further claims are dismissed*"[12]). One of these submissions was the Respondent seeking the annulment of the results obtained by the Appellant (award, n. 5 v).

It does not matter whether – as the Respondent argues in its answer, in apparent contradiction with the *ad-hoc* submission to the Arbitrators – such annulment would be automatic pursuant to its own rules and therefore would not need to be pronounced by the CAS to be enforceable. Similarly it is not decisive that the Respondent had already attempted to enforce it as the Appellant claims on the basis of a letter of January 28, 2013, inviting him to give back a medal obtained in a competition that took place after August 11, 2011. These are issues concerning the interpretation and enforcement of the award under appeal.

[12] Translator's note: in English in the original text.

For the purposes of the case at hand, it is sufficient to find that there is no contradiction as to the issue considered between the two successive operative parts of the aforesaid award. The Appellant's arguments are based on the opposite assumption and therefore lack any basis.

6.
The foregoing leads to the conclusion that the appeal submitted to the review of the Federal Tribunal must be rejected. Despite this, the Appellant shall not pay the costs of the federal proceedings as he was granted legal aid (Art. 64(1) LTF). However, he shall compensate the Respondent, pursuant to Art. 68(1) and (2) LTF. As to his Court-appointed counsel's fees, they will be charged to the Purser of the Federal Tribunal (Art. 64(2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
No costs are imposed.

3. The Appellant shall pay an amount of CHF 2'500 to the International Association of Athletics Federations (IAAF) for the federal proceedings.

4.
The Purser of the Federal Tribunal shall pay a fee of CHF 2'500 to Mr. Claude Ramoni.

5.
This judgment shall be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, April 29, 2013

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Caruzzo