4A_222/2015[1]

Judgment of January 28, 2016

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Kolly

Clerk of the Court: Mr. Carruzzo

X._____,
Represented by Mr. Sébastien Besson,
Appellant

v.

1. United States Anti-Doping Agency (USADA),
2. World Anti-Doping Agency (WADA)
Both represented by Mr. François Roux,
Respondents

Facts:

A.

A.a. X._____, a citizen of Belgium domiciled in Spain, was active as sports manager of several professional cycling teams, American teams in particular, until October 2012. He is a member of the Belgian Cycling Federation (hereafter: the RLVB[2]).

The Union Cycliste Internationale (UCI), of which the RLVB is a member, is an association under Swiss law consolidating the national cycling federations. In order to combat doping in this sport, it adopted Anti-

[1] Translator's Note: Quote as X._____ *v.* United States Anti-Doping Agency (USADA) and World Anti-Doping Agency (WADA), 4A_222/2015. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

[2] Translator's Note: RLVB stands for Royale Ligue Vélocipédique Belge.

Doping Rules (hereafter: ADR). Each year from 2005 onwards, X._____ filled in and signed a form to apply for the license, on the basis of which the UCI issued him a license. It including the following text:

> The holder submits to the regulations of the UCI, and of the national and regional federations, and agrees to the anti-doping controls and blood tests administered there, as well as to the exclusive jurisdiction of the CAS.

The United States Anti-Doping Agency (USADA) is the American agency combating doping. It adopted a protocol organizing the operations of anti-doping controls and dispute resolution in case of positive results (hereafter: the USADA Protocol). The system set up by the USADA provides for a first arbitration before a panel of the American Arbitration Association (AAA) with a possible appeal to the Court of Arbitration for Sport (CAS) in Lausanne.

The World Anti-Doping Agency (hereafter: WADA) is a Swiss law foundation based in Lausanne. Its purpose is in particular to promote the fight against doping in sport at the international level. WADA adopted the World Anti-Doping Code (WADC; reference is made hereafter to the 2009 version of the Code, a revised version of which came into force on January 1, 2015).

A.b. On June 28, 2012, USADA wrote to X._____ and to five other individuals, including the American cyclist Lance Armstrong, to inform them that it had discovered sufficient evidence of repeated violations of anti-doping rules since at least January 1, 1999; and at least as to the sports manager, that it was considering imposing sanctions in this respect and that they had the choice either to accept them or, in the negative, to challenge them in the framework of the arbitral procedure provided under the USADA Protocol.

In a letter of July 12, 2012, X._____ answered the USADA and challenged not only the proposed sanctions but moreover the very jurisdiction of this body to impose them upon him and he stated in particular that his forced appearance before the AAA arbitral tribunal should not be interpreted as a waiver of the rights he had under the UCI Rules.

Upon request from the USADA on July 30, 2012, a three-member Arbitral Tribunal was constituted under the aegis of the AAA (hereafter: the AAA Tribunal). Upon request from the defendants, it agreed to bifurcate the proceedings and to handle various issues first, including jurisdiction. On June 12, 2013, the AAA Tribunal issued a decision entitled “Procedural Order No. 2” in which it provisionally assumed jurisdiction as to X._____, a doctor and a trainer of cycling teams. In substance, it held that the sport manager, as holder of a UCI license, agreed to the application of the ADR and therefore accepted the possibility that he would be involved in an arbitration under the anti-doping rules of a body discovering the breaches in dispute, such as the USADA.

Seized of an appeal filed by X._____ on August 2, 2013, the CAS found the matter incapable of appeal in a decision of December 16, 2013, due to the provisional nature of the opinion expressed by the AAA Tribunal in its procedural order.

Whereupon, the AAA Tribunal addressed the merits of the matter. In particular, it held a hearing on the merits on December 16 and 19, 2013. X._____ did not participate and did not submit any evidentiary material for fear that they may end up in the hands of another professional cyclist (Floyd Landis) and/or with the United States of America's Department of Justice, who may have used them in the framework of a monetary claim called *Q ui Tam* initiated by them against him and concerning USD 90 million, the confidentiality of the arbitral proceedings not being respected, in his opinion.

Upon closing the investigation, the AAA Tribunal issued its final award on April 21, 2014. As to jurisdiction, it simply confirmed its provisional decision contained in the June 12, 2013, provisional order. As to the merits, it found X._____ guilty of violating rules 2.7 and 2.8 of the WADC and banned him for 10 years, namely from June 12, 2012 to June 11, 2022.

B.

On May 12, 2014, X._____ appealed the final award of the AAA Tribunal to the CAS (CAS 2014/A/3598). In parallel, one of the two other defendants and WADA also appealed the award (CAS 2014/A/3599, and CAS 2014/A/3618). The three cases were consolidated.

Upon request by X._____, the CAS agreed to address the issue of jurisdiction as a preliminary issue. According to its appeal brief of June 4, 2014, the Appellant invited the CAS to annul the award of the AAA Tribunal for lack of jurisdiction. He added to this submission a number of reservations challenging the existence of a valid arbitration agreement that would bind him to the USADA, in particular.

In its answer of July 25, 2014, the USADA implicitly submitted that the award under appeal should be confirmed.

A three-member Arbitration Panel (hereafter: the Panel) was constituted by the CAS on August 19, 2014.

In its answer to the WADA appeal of October 8, 2014, X._____ reiterated and developed the submissions and reservations he had expressed in his appeal brief. Thus, he asked the Panel to confirm, among other things, that the USADA was not entitled to direct such findings concerning him and to find that the CAS had no jurisdiction on the merits.

WADA argued the opposite in a brief of November 19, 2014.

On March 11, 2015, the CAS Secretariat sent the following letter to the parties:

Dear Sirs,

Following the telephonic hearing held on 2 March 2015 in respect of the substantive issue of USADA'S results management jurisdiction and the AAA's disciplinary authority over Messrs. X._____, [...] and [...], the Panel, having deliberated, has decided that USADA had results management jurisdiction and the AAA the disciplinary authority over Messrs. X._____, [...] and [...].

The present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS within the meaning of Article 190 of the Swiss Private International Act. The reasons for the Panel's decision will be included in its Final Award, together with its findings on the remaining substantive issues.

In view of this decision, the Panel shall now proceed with the remaining substantive issues of the case and a deadline of 10 days from the receipt of the present letter is granted to the Parties to agree a procedural calendar (exchange of submissions on the remaining substantive issues which have been suspended pending the present decision, hearing location and possible hearing dates). In the absence of any agreement between the Parties within the prescribed deadline, the Panel will fix the procedural calendar.
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William STERNHEIMER
Managing Counsel & Head of Arbitration.[3]

[French translation omitted]

C.

On April 24, 2015, X._____ (hereafter: the Appellant) invoked Art. 190(2)(b) PILA[4] and filed a civil law appeal with the Federal Tribunal with the following submissions:

I. The appeal is accepted;
II. The Appellant is not bound to the USADA by a valid arbitration agreement;
III. The CAS Panel decision under appeal is annulled;
IV. The CAS Arbitration Panel has no jurisdiction on the merits of the doping dispute at hand between the Appellant and the USADA;
V. The CAS Arbitration Panel has no jurisdiction to decide the merits of the doping dispute at hand between the Appellant and WADA;
VI. The AAA Award is annulled for lack of jurisdiction of the AAA Tribunal; in the alternative, the matter is sent back to the CAS Arbitration Panel to annul the AAA Award for lack of jurisdiction of the AAA Tribunal;
VII. The Respondents shall pay the costs of the proceedings in the Federal Tribunal and the Appellant's costs (legal fees).

[3] Translator's Note: In English in the original text.
[4] 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.

The Appellant also applied for a stay of enforcement. Moreover, he invited the Federal Tribunal to order the USADA, "to produce the arbitration agreement which would allegedly establish arbitral jurisdiction over the Appellant."

In their common answer of May 26, 2015, the USADA and WADA (hereafter referred to collectively as the Respondents), represented by the same counsel, mainly submitted that the matter is not capable of appeal and in the alternative, that it should be rejected.

Pursuant to its June 16, 2015, answer, the CAS formally submitted that the appeal should be rejected, whilst arguing that the matter is "not capable of appeal at this stage."

The Appellant reiterated all of his submissions in his reply of July 6, 2015. The Respondents and the CAS filed no observations in respect of this brief within the time limit they had for this purpose.

A stay of enforcement was granted by decision of the presiding judge on October 8, 2015.

Reasons:

1.
According to Art. 54(1) LTF,[5] the Federal Tribunal issues its judgment in an official language,[6] as a rule in the language of the decision under appeal. When the decision is issued in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Both used French before this Court. Therefore, the judgment shall be issued in French.

2.
In the field of international arbitration, a civil law appeal is permitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1)(a) LTF).

The seat of the CAS is in Lausanne. At least one of the parties did not have his domicile in Switzerland at the decisive time. The provisions of Chapter 12 PILA are therefore applicable (Art. 176(1) PILA).

The Appellant took part in the CAS proceedings and is particularly affected by the decision under appeal, which upholds the jurisdiction of the AAA Tribunal, which he challenges. He therefore has a personal and present interest worthy of protection to ensure that the decision was not issued in violation of the guarantees that he invokes, which gives him standing to appeal (Art. 76(1) LTF). Duly reasoned, (Art. 42(1) and (2) LTF), the appeal was submitted in a timely manner (Art. 100(1) LTF). The grievance submitted by the Appellant is on the exhaustive list of Art. 190(2) PILA. From these various points of view, it is beyond discussion that the matter is capable of appeal.

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[5] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

[6] Translator's Note: The official languages of Switzerland are German, French and Italian.

3.

However, the Respondents and the CAS submit that the matter is not capable of appeal, in view of its subject. For various reasons, they argue that the decision communicated to them by the CAS Secretariat on March 11, 2015, is not an appealable award within the meaning of Art. 190(2) PILA and the related case law, at least at this stage.

3.1.
3.1.1. The civil law appeal mentioned at Art. 77(1)(a) LTF in connection with Art. 190-192 PILA is admissible against an *award* only. The appealable decision may be a *final* award, putting an end to the arbitration on meritorious or procedural grounds, a *partial* award, addressing part of a claim in dispute or one of the various claims in dispute, or putting an end to the proceedings with regard to one of the joint defendants (see ATF 116 II 80 at 2b, p. 83), or, as the case may be, a *preliminary* award adjudicating one or several preliminary issues as to the merits or the procedure (on these concepts, see ATF 130 III 755 at 1.2.1, p. 757). However, a mere procedural order that can be modified or rescinded during the proceedings is not capable of appeal (judgment 4A_600/2008[7] of February 20, 2009, at 2.3). The same applies to provisional measures, as referred to at Art. 183 PILA (ATF 136 III 200[8] at 2.3 and references).

The procedural decisions of the arbitral tribunal, such as an order staying the arbitration temporarily, are procedural orders incapable of appeal; however, they may be referred to the Federal Tribunal when the when the arbitral tribunal issuing them has implicitly made a decision as to its jurisdiction (ATF 136 III 597[9] at 4.2), in other words, when in doing so, it necessarily issued an interlocutory decision on jurisdiction (or as to the regularity of its composition if it was challenged) within the meaning of Art. 190(3) PILA (judgment 4A_446/2014[10] of November 4, 2014, at 3.1 and the precedents quoted).

Moreover, the appealable decision may not necessarily be issued by the Panel appointed to decide the case in dispute; it may also originate from the president of an arbitration Division of the CAS (judgment 4A_282/2013 of November 13, 2013, at 5.3.2), or even by the general secretary of the arbitral tribunal (judgment 4A_126/2008 of May 9, 2008, at 2).

Moreover, the decisive element to assess the admissibility of the appeal is not the name of the decision under appeal but rather its content (last case cited, at 3.2).

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/case-struck-by-cas-because-of-late-payment-of-advance-on-fees

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory-

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/different-between-mere-procedural-order-and-award

3.1.2. When an arbitral tribunal rejects a jurisdictional defense in a separate award, it issues a preliminary award (Art. 186(3) PILA), irrespective of the label given (judgment 4A_414/2012 of December 11, 2012, at 1.1). Pursuant to Art. 190(3) PILA, such a decision may be appealed to the Federal Tribunal only on the ground of irregular composition (Art. 190(2)(a) PILA) or a lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal. Art. 186(3) PILA states that, as a rule, the arbitral tribunal decides on its jurisdiction in a preliminary award. This provision does indeed state a rule, yet without any mandatory and absolute character as its violation is without sanction (judgment 4P.61/1991 of November 12, 1991, at 2a and the authors cited; Schott and Courvoisier, *Commentaire bâlois, Internationales Privatrecht*, 3rd ed. 2013, n. 122 ad Art. 186 PILA). The arbitral tribunal may depart from it if it considers that the jurisdictional defense is too tied to the facts of the case to be adjudicated separately from the merits (ATF 121 III 495 at 6d, p. 503). Indeed, as it has to examine all issues on which its jurisdiction depends without reservation when it is challenged, it may not resort to the theory of double pertinence because one cannot compel a party to suffer that such an arbitral tribunal adjudicates the rights and obligations in dispute which is not covered by a valid arbitration agreement (ATF 141 III 294 at 5.3 and the cases quoted).

3.2.

3.2.1. Even from a purely formal point of view, in particular as to the manner in which it was communicated to the interested parties, the decision under appeal is peculiar indeed if compared with the awards the CAS usually issues. It is a mere letter by which a CAS legal counsel on the one hand advises the addressees of the decision taken by the Panel after a conference call on March 2, 2015, as to two issues in dispute – the competence of the USADA to administer the results and the disciplinary authority of the AAA Tribunal as to the Appellant, among other individuals – whilst also noting that the reasons for the decision would be included in the final award and, on the other hand, giving them ten days on behalf of the Panel to agree on a procedural calendar with a view to handling the other issues on the merits. Contrary to what is stated at Art. 59(1) Of the Code of Sport Arbitration, the letter contains no reasons and was not signed by the Chairman of the Panel. Admittedly, the atypical nature of the decision under appeal is not sufficient to rule out that the Panel, whilst communicating the decision in an unusual form, already had definitively decided its own jurisdiction. Similarly, the fact that the decision was issued by the Panel and not by the legal counsel appears clearly from the wording of the letter at issue, no matter what the Respondents say, as the counsel merely communicated its content to the interested parties. That being said, the manner of communication of the decision in dispute is an element to be taken into account in determining whether or not there is a preliminary award on jurisdiction within the meaning of Art. 186(3) PILA in the case at hand.

3.2.2. The content of the March 11, 2015, letter is another element that must be taken into account. Indeed, the Panel itself qualifies the decision in dispute in the letter as a partial decision on a substantive issue while excluding the possibility that it was preliminary decision on jurisdiction pursuant to Art. 190 PILA. This qualification is confirmed at n. 7 of the CAS answer, which reads as follows: “In the case at hand, the Panel considers that it is not an award on jurisdiction and that the issue of the jurisdiction of the CAS has not yet been examined formally in this arbitration.” That the Federal Tribunal is not bound by this qualification is

obvious. Yet, in the face of an unreasoned decision, this Court may not totally disregard the opinion of the author of the decision as to its legal nature either because, until proof of the contrary, the Panel is best placed to provide clarifications as to the scope of the decision it issued, irrespective of the label it gave it. In this respect, the Appellant's argument that the qualification adopted by the Panel, "is manifestly an attempt to avoid an appeal at this stage," (appeal brief n. 106) is unfounded. Quite to the contrary, it appears from the exceptional circumstances germane to the case at hand that the Panel could have good reasons to definitively decide the issue of its own jurisdiction with the merits of the case. Be this as it may, its decision to address the issue with the merits escapes any sanction as has already been seen (above, 3.1.2, 2nd para.).

3.2.3.

3.2.3.1. As a rule, when the CAS issues a decision as an appeal body, it is in appeals concerning decisions issued by the jurisdictional bodies of sport federations. Such jurisdictional bodies are not real arbitral tribunals and their decisions are mere embodiments of the will of the federations concerned; in other words, they are acts of administration and are not judicial acts (ATF 119 II 271 at 3b, p. 275 *f.*). This also applies to the decisions taken by the jurisdictional bodies of FIFA (ATF 136 III 345[11] at 2.2.1, p. 349). In rare cases, the CAS may also address appeals against real awards issued by arbitral tribunals created by sport federations (see judgment 4A_374/2014[12] of February 26, 2015, at 4.3.2.1, 2nd and 3rd para.). Such an instance of double arbitration (the overlap of two arbitral jurisdictions) – goes against the classical doctrine according to which there is "no arbitration on arbitration" (Antonio Rigozzi, *L'arbitrage international en matière de sport*, 2005, n. 492 and the author quoted in footnote n. 1547), but Swiss law took in to account the existence of arbitral appeals in domestic arbitration (Art. 391 CPC[13]) – is a characteristic of the decision-making procedure instituted by the anti-doping American agency by means of the USADA Protocol. In short, the procedure provides for a first-instance arbitration conducted before a panel of the AAA when the sanction proposed by the USADA is not accepted by the individual concerned and there is also the opportunity to make an appeal to the CAS against the arbitral award issued by the AAA Tribunal (for more details, see Antonio Rigozzi, *op. cit.*, n. 248, 292-296 and 1307; von Segesser and Truttman, *Swiss and Swiss-based Arbitral Institutions*, *International Arbitration in Switzerland*, Geinsinger and Voser [ed.], 2nd ed., 2013, p. 275 *ff.*, 298).

Considered in this procedural context, the Appellant's situation was rather different from the ordinary situation of a professional cyclist facing disciplinary proceedings by the *ad hoc* committee of his national federation upon delegation from the UCI because he took some substances forbidden by the ADR. It was much more complex in several respects: *First*, the individual involved was not a professional cyclist but the

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/public-policy-defense-under-new-york-convention

[13] Translator's Note: CPC is the French abbreviation for the Swiss Federal Code of Civil Procedure.

sport manager of cycling teams; *then*, the violation of the anti-doping regulation he was charged with did not concern a sample; moreover, he is a Belgian citizen, not domiciled in the United States of America, a member of the RLVV and the holder of a license issued by the UCI but he was sought by an American anti-doping organization (the USADA) before an American arbitral tribunal and this was against the will of the UCI, which had issued his license. Under such conditions, the question of the jurisdiction of the AAA Tribunal in lieu of the jurisdictional body of the RLVV to issue a disciplinary decision against this person could indeed arise, particularly because the main protagonist of this doping affair, namely the American cyclist Lance Armstrong, seven-time winner of the Tour de France, refused to be drawn into the arbitral procedure, even though he was domiciled in the United States of America, instead initiating a civil action against the USADA and its CEO in a Texas state court. Thus, it is not surprising that the Appellant immediately challenged the jurisdiction of the AAA Tribunal as far as he was concerned, just as he denied that the USADA had the right to exercise its disciplinary power against him.

3.2.3.2. It is worth considering the Appellant's procedural conduct when he was represented by London counsel and faced rejection of his jurisdictional objection, and compare it to his position before the Federal Tribunal, expressed through the Geneva counsel entrusted with filing a civil law appeal submitted to this Court on his behalf.

One remembers that, as a first step, the AAA Tribunal provisionally accepted jurisdiction as to the Appellant by way of a procedural order dated June 12, 2013. The Appellant took the initiative to appeal this decision to the CAS. And, on December 16, 2013, the Panel found the matter incapable of appeal only due to the provisional nature of the decision under appeal. On April 21, 2014, the AAA Tribunal, after investigating the matter, issued its final award. As to its jurisdiction, it confirmed the aforesaid provisional decision. The Appellant appealed to the CAS again and submitted in his statement of appeal of May 12, 2014, that the AAA Tribunal had no jurisdiction to impose a disciplinary sanction upon him for lack of a valid arbitration agreement binding him to the USADA; he consequently asked the Panel to annul the final award issued by the is Arbitral Tribunal. By letter of June 3, 2014, the CAS authorized the Appellant to file an appeal brief limited to the issue of jurisdiction, the elements of the appeal related to the doping issue being suspended pending a decision of the Panel on the issue of jurisdiction. The next day, the Appellant filed a 79-page appeal brief dealing with the issue of the absence of an arbitration agreement between the USADA and himself as well as the jurisdiction of the AAA Tribunal. At the end of this brief, he made the following submission: "The Appellant respectfully requests the Panel to issue an award annulling the AAA Award for lack of 'jurisdiction'" (p. 76). As the CAS rightly points out in its answer to the appeal (n. 4), the Appellant did not challenge the jurisdiction of the CAS as such, but instead expressed the wish that the latter accept jurisdiction in order to address his appeal and to annul the final award of the AAA Tribunal for lack of jurisdiction. Indeed, it would have been hardly logical for the Appellant to seize the CAS if he considered that the latter did not have jurisdiction in the dispute at hand because there is some inconsistency in wanting to call upon an appeal jurisdiction to annul a first instance decision whilst denying it any authority to do so.

In the Federal Tribunal, the Appellant changed his stand and argues that the Panel was seized not only of the issue of the jurisdiction of the AAA Tribunal but also of the issue of its own jurisdiction to address the merits of the dispute, both issues depending, according to him, on the answer given to the following preliminary question: Is there a valid arbitration agreement between the Appellant and the USADA? (appeal brief n. 99 to 102; reply n. 4). However, this argument submitted *a posteriori* by the new counsel for the Appellant, does not correspond to the legal position he took before the CAS, as summarized in the previous paragraph, or to his main submission to the Panel. It does indeed lead to a peculiar submission – submission n. VI at page 7 of the appeal brief – by which not only does he invite this Court to annul the first instance decision (*i.e.* the final award issued by the AAA Tribunal) which, however, is not the decision under appeal, but moreover goes so far as to ask that, in the alternative, the matter be sent back to the CAS for the Panel, which has no jurisdiction in his view, to annul the aforesaid decision for lack of jurisdiction of the AAA Tribunal.

Under such conditions and considering the evolving, if not contradictory, character of the Appellant's argument as to the issue in dispute on the one hand and on the other hand, the very opinion expressed by the Panel as to the scope of its decision in the March 11, 2015, letter, one cannot follow the Appellant when he claims peremptorily that the Panel indisputably issued an award of jurisdiction within the meaning of Art. 190(3) PILA.

3.3. It is not easy to qualify the decision under appeal. Yet, the following remarks may be made in this respect.

3.3.1. In their answers to the appeal, the Respondents (n. 7) and the CAS (n. 8) submit that the dispute relates to an issue of standing. In support of the argument they invoke federal case law, according to which the question of whether a party is entitled to appeal a decision taken by the body of a sport federation on the basis of the applicable rules in the statutes or the legal provisions does not involve the jurisdiction of the arbitral tribunal seized of the matter but is instead an issue of standing (judgments 4A_428/2011[14] of February 13, 2012, at 4.1.1 and 4A_424/2008 of January 22, 2009, at 3.3).

The argument is not at all convincing. In the case at hand, the issue is not whether the Appellant, its joint Respondent, and WADA – or one of them, as the case may be – had standing to appeal the AAA Tribunal final award to the CAS but instead whether the CAS had jurisdiction to address these appeals and to decide the merits of the case.

3.3.2. Whilst qualifying the decision under appeal as a "partial decision on a substantive issue," the Panel did not issue a *partial* award technically speaking (see 3.1.1, above), as it did not rule on part of the quantum of a claim in dispute or on one of the various claims at hand; nor did it put an end to the proceedings as to one of the joint Defendants.

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o

Considering its content, the decision under appeal is not a mere procedural order either, which could be modified or rescinded in the proceedings (*ibid.*).

The Panel actually issued a preliminary or interlocutory (*ibid.*) award by which it settled a substantive issue definitively. The preliminary issue was whether the USADA had jurisdiction to administer the results concerning the Appellant and, as a corollary, whether or not the AAA Tribunal had disciplinary authority over the Appellant and the other individuals involved in the first instance arbitration procedure. As to the preliminary nature of the issue in dispute, it consisted of leading the CAS to annul the final award in the negative, without being obliged to address the substance of the dispute, namely, the existence of violations of anti-doping rules upheld by the AAA Tribunal and the admissibility of disciplinary sanctions inflicted by this Arbitral Tribunal upon the individuals under investigation by the USADA.

3.3.3. Admittedly the Panel could not issue this preliminary or interlocutory award without admitting, at least implicitly on the basis of a *prima facie* review, that it had jurisdiction to do so. The Appellant's procedural conduct and in particular his submission that the Panel annul the award of the AAA Tribunal, was such as to give it confidence that its own jurisdiction was not really challenged by this Appellant.

However, for whatever reason (complexity of the issue interweaving of the jurisdictional and substantive issues, intervention of WADA in the appeal proceedings, existence of several consolidated cases, possible new arguments developed during the March 2, 2015, conference call), the Panel decided to accept jurisdiction provisionally only with a view to address the issue formally and definitively only in its future final award. This is how the sentence in the letter of March 11, 2015, can be understood, stating that the decision thus communicated was not a preliminary award on jurisdiction within the meaning of Art. 190 PILA and that the reasons for the decisions would be included in the final award. In doing so, the letter at issue is similar to the one issued in another case adjudicated by the Federal Tribunal (judgment 4A_460/2008 of January 9, 2009, at 4).

The decision to address the issue with the merits instead of abiding by the general rule of Art. 186(3) PILA is a matter of opportunity. As such, it is without sanction (see 3.1.2, above). One may perhaps reserve instances of blatant abuse of such faculty. One may, for instance, think of an arbitral tribunal which, although aware of its lack of jurisdiction, would nonetheless investigate the merits of the matter before holding *in fine* that the claim is inadmissible, only for the purpose of increasing its fees. Yet, the case at hand has nothing to do with an assumption of this kind, as the Appellant appeared to have accepted the jurisdiction of the CAS in its appeal writings and that, in any event, there was room for careful consideration by the Panel, in particular because both the authority of the anti-doping organization to administer the results and the jurisdiction *ratione personae* of both the AAA Tribunal and the CAS as to the Appellant depended upon the existence of an arbitration agreement between the Appellant and the USADA.

3.3.4. Finally, this Court would engage in an artificial and perilous exercise if it speculated as to the Panel's reasons on the basis of the more than concise explanations in the March 11, 2015, letter and the answer to

the appeal submitted by the CAS, by trying to supplement the pertinent factual findings as case law authorizes (see aforesaid judgment 4A_600/2008[15] at 3), only to compare these reasons to the numerous arguments raised by the Appellant in his appeal brief and in his reply. Therefore, it is in the well-understood interest of all parties to the dispute to wait for the notification of the final award in order to examine, only once, the arguments that the Appellant and the other parties involved may submit in a possible appeal against the aforesaid award.

3.4. This being said, the Appellant's argument of lack of jurisdiction within the meaning of Art. 190(2)(b) PILA in the preliminary or interlocutory decision of the Panel, which the CAS legal counsel notified to the parties in his letter of March 11, 2015, is inadmissible because the aforesaid decision does not definitively settle the issue of the jurisdiction of the CAS.

This decision of inadmissibility *ipso jure* renders moot the stay of enforcement granted by decision of the presiding judge of October 8, 2015.

4.

The Appellant loses and shall pay the costs of the federal judicial proceedings (Art. 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs set at CHF 5'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents severally an amount of CHF 6'000 for the federal proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the Court of Arbitration for Sport.

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/case-struck-by-cas-because-of-late-payment-of-advance-on-fees

Lausanne, January 28, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo