120039-610/PON/pon

4A_413 / 2019

Judgment of 28 October 2019
First Civil Law Court
Composition

The Federal Judges Kiss, President, Hohl and May Canellas. Clerk: Mr. O. Carruzzo.

Parties
A._____,
represented by Fabrice Robert-Tissot,
Appellant,

against

1. World Anti-Doping Agency (WADA), represented by Xavier Favre-Bulle,
2. International Swimming Federation (FINA), represented by Serge Vittoz,
Respondents.

Object
International arbitration in the field of sport

Appeal against the decision rendered on July 26, 2019 by the Court of Arbitration for Sport (CAS 2019/A/6148).

Facts:

A.
A.a. A._____ (hereinafter: the Swimmer or the Athlete) is a professional Swimmer xxx.
The World Anti-Doping Agency (hereinafter: WADA) is a foundation under Swiss law; its headquarters are in Lausanne. One of its aims is to promote the fight against doping in sport at international level.

The International Swimming Federation (FINA), a Swiss-based association with headquarters in Lausanne, is the governing body for swimming at a global level.

A. B. Accused of an anti-doping rule violation due to an unsuccessful attempt to take blood and urine samples during an unannounced doping control at his home in the night of September 4, 2018, the Swimmer was cleared by the FINA Anti-Doping Commission on January 3, 2019.

B.
On February 14, 2019, WADA sent a statement of appeal to the Court of Arbitration for Sport (CAS), signed by Counsel B._____ and C._____, in which it requested the suspension of the Athlete for eight years.

The Appellant amended its statement of appeal on February 18, 2019, citing FINA as the second Respondent.
On March 9, 2019, the Athlete's Counsel invited Counsel B._____ to immediately resign due to a conflict of interest, since said Counsel sat on the FINA Legal Commission.

On March 11, 2019, FINA did the same, ordering the Counsel to terminate his appointment. FINA noted that the solicitor resigned from the FINA Legal Commission on February 1, 2019, in order to represent WADA in the FINA dispute before the CAS.

On March 12, 2019, WADA's Counsel denied the existence of a conflict of interest and refused to withdraw from the case.

On March 16, 2019, the Athlete once again invited WADA's Counsel to give up his mandate.

On April 3, 2019, Counsel B._____ and C._____ sent the CAS the appeal brief on behalf of their client.

In the course of the proceedings, the Swimmer and FINA raised a plea of inadmissibility because of the allegedly late filing of the appeal brief. The CAS rejected this request on May 19, 2019. The Athlete lodged an appeal in civil matters against this decision with the Federal Tribunal. This procedure is currently pending (matter 4A_287/2019).

Following the resignation of one of the three arbitrators of the Panel, the CAS appointed a new one in the person of the lawyer Romano Subiotto. On July 12, 2019, the Athlete filed a challenge to the newly appointed arbitrator, who was dismissed on July 26, 2019, by the Challenge Commission of the International Council of Arbitration for Sport (ICAS).

After referring to the conflict of interest of Counsel B._____ in the petition entitled "Request for bifurcation" addressed to the CAS on May 9, 2019, the Swimmer filed, on May 29, 2019, a request at the end of which it concluded that it was prohibited for Counsel B._____ and C._____ to represent WADA in the proceedings pending before the CAS, that the statement of appeal was inadmissible because of the inability to retain the above-mentioned Counsel and, consequently, the lack of jurisdiction *ratione temporis* of the CAS to settle the dispute.

FINA and the Appellant responded to said motion on May 29, 2019 and June 26, 2019, respectively.

By decision of July 26, 2019, transmitted to the parties by email on August 2, 2019, CAS dismissed the Athlete's application in its entirety. In short, it considered that the Appellant's Counsel were not in a situation of conflict of interest, that participation in the proceedings of those Counsel did not affect the admissibility of the submissions filed on behalf of the Appellant or the jurisdiction of the CAS to decide on the case.

C.
On September 2, 2019, the Athlete (hereinafter called the Appellant) lodged an appeal in civil matters with the Federal Tribunal against the decision of 26 July 2019, at the beginning of which he made the following requests:

1. Declare the present motion admissible.

2. Annul the decision / award rendered by the Court of Arbitration for Sport on August 2, (recte: 26 July) 2019 relating to the request for disqualification from the World Anti-Doping Agency (WADA), of Mr. B._____ and Mr. C._____, and to the jurisdiction of the Court of Arbitration for Sport in the CAS 2019/A/6148 arbitration.

3. Declare that the Court of Arbitration for Sport has no jurisdiction.

4. Order the challenge of Mr. Romano Subiotto QC. (...)."

WADA (hereinafter First Respondent) and FINA were not invited to decide on the appeal.

Legal Considerations:

1.
In the field of international arbitration, an appeal in civil matters is admissible against the decisions of arbitral tribunals under the conditions provided by Art. 190 to 192 of the Federal Law on Private International Law of 18 December 1987 (PILA, RS 291), pursuant to Art. 77 para. 1 let. at LTF.[1]
The seat of the CAS is in Lausanne. The Appellant was not domiciled in Switzerland at the pertinent moment. The provisions of Chapter 12 of the PILA are therefore applicable (Article 176 (1) PILA).

[1] Translator's Note : LTF is the abbreviation of the Law of the Federal Tribunal (Loi sur le Tribunal Fédéral).

2.
2.1. An appeal in civil law under Art. 77 para. 1 let. LTF in conjunction with Art. 190 to 192 PILA is admissible only against an award. The appealed decision may be a final award, which puts an end to the arbitral proceeding on a substantive or procedural ground, a partial award, which relates to a quantitatively limited part of a litigious claim or to one of the various claims in question or which terminates the proceedings in respect of a part of the consorts (ATF 143 III 462 at 2.1, judgment 4A_222/2015 of January 28, 2016 at 3.1.1), or even a preliminary or interlocutory ruling, which deals with one or more preliminary questions of substance or of procedure (on these notions, see ATF 130 III 755 at 1.2.1, page 757). On the other hand, a simple procedural order which may be amended or reported in the course of the proceedings is not subject to appeal (ATF 143 III 462, cited above, at 2.1, ATF 136 III 200 at 2.3.1 at 203; ATF 136 III 597 at 4.2, judgment 4A_596/2012 of April 15, 2013 at 3.3). The same applies to a decision on provisional measures referred to in Art. 183 PILA (ATF 136 III 200, cited above, 2.3 with references).

When deciding on the admissibility of the appeal, what is decisive is not the name of the decision rendered but its content (ATF 143 III 462, cited above, at 2.1, ATF 142 III 284 at 1.1.1; 4A_222/2015, cited above, at 3.1.1).

2.2. It follows from art. 190 (2) and (3) PILA that a final or partial award may be challenged for all the grounds enumerated in Art. 190 para. 2 PILA. According to art. 190 (3) PILA, an interlocutory award can only be appealed before the Federal Tribunal for reasons of irregular composition (Art. 190 (2) (a) PILA) or lack of jurisdiction (Art. 190 (2) (b) PILA) of the arbitral tribunal). The grievances referred to in Art. 190 para. 2 let. c to e PILA can also be raised against interlocutory decisions within the meaning of Art. 190 para. 3 PILA, but only to the extent that they are strictly limited to matters directly related to the composition or jurisdiction of the arbitral tribunal (ATF 143 III 462, supra, at 2.2, ATF 140 III 477 at 1, ATF 140 III 520 at 2.2.3).

3.
3.1. Invoking Art. 190 para. 2 let. (b) PILA, the Appellant complains that the CAS wrongly accepted its jurisdiction to hear the first Respondent's appeal. In support of this grievance, he alleges that the first Respondent's incapacity to represent WADA would render the appeal inadmissible. Since the notice of appeal and the appeal brief were not validly filed in due time, the CAS should not have jurisdiction *ratione temporis* to rule on the appeal.

3.2. An appeal on the ground provided for in Art. 190 para. 2 let. b PILA is open when the arbitral tribunal has ruled on claims that it did not have jurisdiction to review, whether there was no arbitration agreement, or it was restricted to certain matters not including the claims in question (*extra potestatem*). An arbitral tribunal has jurisdiction, among other conditions, only if the dispute enters into the scope of the arbitration agreement and it itself does not exceed the limits assigned to it by the request for arbitration and, where applicable, the mission statement (judgment 4A_210/2008 of October 29, 2008 at 3.1 and references).

3.3. As presented, the Appellant's complaint seems to be inadmissible.

3.3.1. Indeed, although Art. 92 and 93 LTF are not applicable - since the text of Art. 77 para. 2 LTF excludes the application of Art. 90 to 98 LTF in arbitration - it must be noted from the outset that the Federal Tribunal considers that the refusal to decide on the incapacity to act as a lawyer and prohibit such person from representing a client because of an alleged conflict of interest is *"an interlocutory decision that does not concern jurisdiction or a question of challenge within the meaning of art. 92 LTF, so this is an "other interlocutory decision"* within the meaning of Art. 93 para. 1 LTF (judgment 4A_366/2019 of September 2, 2019, 4A_349/2015 of January 5, 2016 at 1.11, 5A_47/2014 of May 27, 2014 at 3 and 4.1, 1B_420/2011 of November 21, 2011 at 1.2.1). There is no difference when such decision is rendered in the context of arbitral proceedings. It must therefore be admitted that the contested decision does not concern the composition of the arbitral tribunal in any way and is not a decision on jurisdiction which can be challenged immediately. In reality, the capacity to act as a lawyer does not fall within the jurisdiction of the tribunal but is only a condition of admissibility. In the present case, and irrespective of what the Appellant says, the decision that the CAS notified to the parties on July 26, 2019 is not an interlocutory decision on jurisdiction. Therefore the Appellant cannot attack such

decision concerning the capacity to act as a lawyer immediately, making use of an alleged violation of art. 190 para. 2 let. b PILA and in application of art. 190 para. 3 PILA, against an interlocutory decision.

3.3.2. It is questionable whether the failure to act as the First Respondent's Counsel, if proven, could entail the inadmissibility of the statement of appeal and the appeal brief as argued by the Appellant. In a judgment rendered in application of the rules of the Code of Civil Procedure (CPC),[2] the Federal Tribunal has considered that, in the absence of capacity to act as a representative, the court must in principle set a time limit for the party to allow him to designate a representative satisfying the legal requirements (judgment 4A_87/2012 of April 10, 2012 at 3.2.3). That being the case, even following the Appellant's argument, the complaint does not fall within the framework of Art. 190 para. 2 let. b PILA. In two judgments, the Federal Tribunal examined the question whether the late filing of the appeal entails the lack of jurisdiction of the CAS or simply its inadmissibility, or even rejection of the appeal (judgments 4A_170/2017 of May 22, 2018 at 5.2, 4A_488/2011 of June 18, 2012 at 4.3.1). Even though it finally left the question open, the Federal Tribunal set out the reasons that argue in its opinion in favor of the second hypothesis. It thus noted that the criticism made to an arbitral tribunal for not having respected the temporal validity limit of the arbitration agreement or the precondition of conciliation or mediation certainly relates to the conditions of exercise of jurisdiction, more precisely to the competence *ratione temporis*, and as such, falls under art. 190 para. 2 let. b PILA (judgments 4P.284/1994 of August 17, 1995 at 2 and 4A_18/2007 of June 6, 2007 at 4.2). However, this jurisprudential principle essentially concerns the typical or traditional arbitration; it is doubtful that it is also appropriate for atypical arbitration, such as sports arbitration, and it considers in particular the hypothesis in which the jurisdiction of the arbitral tribunal results from the reference to the statutes of a sports federation providing for an arbitration procedure to settle disputes of a disciplinary nature. Whether a party is entitled to challenge the decision taken by the body of a sports federation on the basis of the statutory rules and the applicable legal provisions does not concern the jurisdiction of the arbitral tribunal seized of the case, but is a question of standing, that is to say a procedural issue to be resolved according to the relevant rules which the Federal Tribunal does not review when seized of an appeal against an international arbitral award (judgments 4A_428/2011 of February 13, 2012 at 4.1.1 and 4A_424/2008 of January 22, 2009 at 3.3).

One author, cited by the Federal Tribunal in 4A_488/2011, pointed to the unsatisfactory result of applying to the appeal period provided by Art. R49 of the Code of Arbitration for Sport (hereinafter: the Code) the general principle that the exceeding of the period agreed upon by the parties entails the lack of jurisdiction of the arbitral tribunal and, in turn, the jurisdiction of the state courts: in short, the application of this principle would have the consequence that after the expiry of the 21-day appeal period laid down in that provision, the decisions of sports federations whose seat is in Switzerland could be brought before the state courts until the expiry of the period of one month provided for in art. 75 CC;[3] such a consequence would undoubtedly be contrary to the spirit of international arbitration in the field of sport, in that it would not make it possible to ensure that Athletes are judged in the same manner and according to the same procedures; it would, moreover, cause important complications. According to this author, the appeal period before the CAS must therefore be considered as an expiry period, the non-compliance of which does not entail the lack of jurisdiction of the arbitral tribunal, but the forfeit of the right to submit the decision to judicial review and, therefore, the dismissal of the appeal (ANTONIO RIGOZZI, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente, in Le temps et le droit,* 2008, p. 255 ff.).

According to another author, the question of compliance with the time limit for bringing an arbitral tribunal to court is in principle not a problem of jurisdiction *ratione temporis*. In this respect, the expiry of the fixed period does not entail the lack of jurisdiction of the arbitral tribunal in favor of state courts. In fact, the respect of the time limit to file an appeal is simply a condition of admissibility of the action which in no way affects the jurisdiction of the arbitral tribunal. Consequently, the complaint of the late submission of the arbitral jurisdiction does not fall within the ambit of Art. 190 para. 2 let. b PILA (STEFANIE PFISTERER, *Die Befristung der Schiedsvereinbarung und die Zuständigkeit eines*

[2] Translator's Note : CPC is the abbreviation of the Swiss Code on Civil Procedure (Code de Procédure Civile Suisse).

[3] Translator's Note : CC is the abbreviation of the Swiss Civil Code (Code Civil suisse).

Schiedsgerichts ratione temporis - eine Illusion ?, in Mélanges à l'honneur de Anton K. Schnyder, 2018, pp. 292).

The opinion of these two authors seems convincing. Moreover, if it were sufficient for a party to wait for the expiry of the time limit for appeal of Art. R49 of the Code in order to seize the Swiss state courts, this party would be able to bypass the jurisdiction of the arbitral tribunal by its inaction alone. In the light of the foregoing, it must be considered that compliance with the time limit for appeal to the CAS is a condition of admissibility and not a problem of jurisdiction. Accordingly, the complaint based on Art. 190 para. 2 let. b PILA is inadmissible.

3.3.3. For the sake of completeness, it should be noted that the Appellant's complaint also appears inadmissible for another reason. As regards the challenge of an arbitrator, the case-law considers that the party must invoke the ground of challenge as soon as it becomes aware of it (ATF 136 III 605 at 3.2.2). This jurisprudential rule applies both to the grounds for challenge that the interested party knew but also those that it could have known by showing the attention required, since the choice to remain in the ignorance can be seen, depending on the case, as an abusive maneuver comparable to the delayed request for challenge (ATF 136 III 605, cited above, at 3.2.2, judgment 4A_506/2007 of March 20, 2008 at 3.1.2). This rule constitutes an application, in the field of arbitral proceedings, of the principle of good faith. By virtue of this principle, the right to invoke the plea of improper composition of the arbitral tribunal expires if the party does not raise it immediately. The same applies to a situation where a party intends to contest the capacity to act as a representative, since the requirement to immediately raise such an issue in the arbitral proceedings is an expression of the principle of good faith.

In the present case, after the filing of the Statement of Appeal on February 14, 2019, the Appellant, by letter of March 9, 2019, invited Counsel B._____ to cease his mandate because of the existence of an alleged conflict of interest. Following Counsel's refusal to withdraw from the case, the Appellant again invited him by letter of March 13, 2019, to stop representing the interests of the Respondent. First Respondent sent its appeal brief to the CAS on April 3, 2019, which did not give rise to any immediate reaction on the part of the Appellant. Thus, the Appellant's attempt to have the Respondent's inability to apply for the Respondent's first Counsel, more than a month after the filing of the appeal brief, appears manifestly late. In conclusion, the Appellant is estopped from raising the violation of art. 190 al. 2 let. b PILA.

4.
On a separate ground, the Appellant, relying on Art. 190 para. 2 let. d PILA, raises the violation of his right to be heard. According to the case-law referred to above (see recital 2.2 and the judgments cited), no exception can be made to the inadmissibility of the grounds provided for in Art. 190 let. c-e PILA, deduced *a contrario* from Art. 190 para. 3 PILA, where the civil law appeal relates to an interlocutory decision only to the extent that the grievances based on these grounds are strictly limited to matters relating to the composition or the jurisdiction of the arbitral tribunal (ATF 143 III 462, cited above). 2.2 pp. 465, ATF 140 III 477, cited above, at 3.1, 520 at 2.2.3). In reserving this exception, the First Court of Civil Law had mainly in mind cases in which the arbitral tribunal rendered its interlocutory decision concerning its composition or jurisdiction on the basis of findings of fact that it would have determined without respecting the equality of the parties or their right to be heard (ATF 140 III 477, cited above, at 3.1, pp. 479 ff.).

In the present case, the Appellant's complaint of lack of jurisdiction against the interlocutory decision of the CAS dated July 26, 2019 is inadmissible, since that decision does not resolve the question of the jurisdiction of the arbitral tribunal. Therefore, the grievance based on art. 190 para. 2 let. d PILA is also inadmissible.

5.
As an ultimate ground for appeal, the Appellant, raising the irregular composition of the arbitral tribunal, seeks to challenge the arbitrator Romano Subiotto. In doing so, the Appellant loses sight of the fact that this question is not the subject of the contested decision. The challenge filed by the Appellant was indeed rejected on July 26, 2019 by the ICAS Challenge Commission, that is after the decision challenged in this appeal. Moreover, the Appellant expressly acknowledges in n. 81 of his brief that the grounds of that decision had not yet been communicated to the parties at the time of the present appeal

to the Federal Tribunal. It follows from the foregoing that the challenge of the Arbitrator Romano Subiotto falls outside the scope of the present appeal proceedings.

6.
Consequently, the appeal is found to be inadmissible.

The Appellant, as the losing party, will bear the costs of the federal proceedings (Article 66 (1) LTF). On the other hand, he will not have to pay legal costs to the Respondents since they have not been asked to file an answer.

For these reasons, the Federal Tribunal decides as follows:

1.
The appeal is inadmissible.

2.
The legal costs, fixed at CHF 2,000, shall be borne by the Appellant.

3.
This judgment is communicated to the representatives of the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, October 28, 2019

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The President: Kiss

The Clerk: O. Carruzzo