4A_287 / 2019
Judgment of January 6, 2020
1st Civil Law Court
Composition
Ms. Federal Judges
Kiss, President, Hohl and May Canellas. Clerk: Mr. Carruzzo.

Parties

A_____,
represented by Mr Fabrice Robert-Tissot, Appellant,
against

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

Object
international sports arbitration,

Appeal against the decision of the Arbitral Tribunal for Sport (CAS) of May 19, 2019 (CAS 2019/A/6148).

Facts:
A.
A.a.
A_____ (hereinafter: the Swimmer or the Athlete) is a professional swimmer from xxx.
The World Anti-Doping Agency (hereinafter: WADA) is a foundation under Swiss law; its headquarters are in Lausanne. It aims in particular to promote, on the international level, the fight against doping in sport.

The International Swimming Federation (hereinafter: FINA), an association under Swiss law with its headquarters in Lausanne, is the world governing body for swimming.

A.b.
Charged for an anti-doping rule violation due to the unsuccessful attempt to take blood and urine samples during an unannounced test carried out at his home in the night of September 4, 2018, the swimmer was cleaned on January 3, 2019 , by the FINA Anti-Doping Commission.

B.
On February 14, 2019, WADA filed a statement of appeal to the Arbitral Tribunal for Sport (CAS), by which it requested the suspension of the athlete for a period of eight years. It also requested an extension of 45 days to file its appeal brief. WADA stated that it needed more time to gather the last elements of the file ("additional time to gather the rest of the file").

The Appellant amended its statement of appeal dated February 18, 2019, adding FINA as the second respondent.
On February 21, 2019, FINA sent to the Appellant the recording of the hearing held on November 19, 2019 by the FINA Anti-Doping Commission.

On February 22, 2019, the CAS granted an extension of 20 days for the filing of the Appeal Brief.

By letter dated March 20, 2019, the Appellant asked the CAS to confirm that the Appeal Brief should be sent no later than April 13, 2019 or April 10, 2019. It also requested the suspension of the time limit to file the Appeal Brief.

On March 21, 2019, the CAS Court Office clarified that it did not provide information relating to the calculation of the time limits and that it was up to the parties to ensure themselves that the deadlines were respected. It also refused to suspend the time limit for the filing of the Appeal Brief.

On March 22, 2019, the Athlete invited the CAS to terminate the arbitration proceedings, arguing that the time for filing the Appeal Brief had expired on March 20, 2019. FINA followed, requesting the issuance of a termination order.

The parties also exchanged several letters concerning the method of calculating the time limit for the filing of the Appeal Brief.

On April 3, 2019, WADA filed its Appeal Brief.

On April 16, 2019, the Challenge Commission of the International Council for Arbitration in Sport Matters (CIAS) rejected the Athlete's request for challenge against Arbitrator B_____.

The Swimmer appealed to the Federal Tribunal against this decision. After noting that the proceedings had become devoid of purpose following the resignation of the arbitrator on June 28, 2019, i.e. after the filing of the appeal, the Federal Tribunal struck out the case from the list (judgment 4A_265/2019 of September 25, 2019).

On May 9, 2019, the Athlete asked the CAS to bifurcate the procedure (Request for bifurcation) and to examine, on a preliminary basis, the question of the admissibility of the appeal and / or its jurisdiction.

On May 19, 2019, the CAS informed the parties that the Hearing Panel had dismissed the plea of inadmissibility due to the late filing of the Appeal Brief, stating the following:
"(...) Admissibility of the Appeal Brief: The objection to the admissibility of WADA's appeal brief filed by Mr. A ._____ and FINA is denied. The Panel considers that WADA's Statement of Appeal and Appeal Brief were timely filed in accordance with Articles R49 and R51 of the Code of Sports-related Arbitration. The reasons for such decision will be set out in the final award. (...) "

During the proceedings, the Swimmer and FINA also argued that the Appellant's counsel was in a conflict of interest. On May 29, 2019, the Athlete filed a brief at the end of which he concluded that counsel for the Appellant should be barred from representing WADA in the proceedings pending before the CAS, he requested the inadmissibility of the Statement of appeal and the Appeal Brief due to the incapacity to act on behalf of WADA's counsel and, consequently, the lack of jurisdiction ratione temporis of the CAS to decide on the matter. By an interlocutory decision of July 26, 2019, the CAS dismissed the request made by the athlete. The Federal Tribunal declared the action brought by the Swimmer against said decision inadmissible (judgment 4A_413 / 2019 of October 28, 2019).

C.
On June 11, 2019, the Athlete (hereinafter: the Appellant) filed a civil law appeal to the Federal Tribunal in order to obtain the annulment of the "decision / award rendered by the Court of Arbitration for Sport on May 19, 2019 relating to the admissibility of the Appeal Brief". He asked the Federal Tribunal to declare that the CAS has no jurisdiction. He also requested the challenge of Arbitrator B._____ and requested that these proceedings be joined with case 4A_265 / 2019.

In the end of its Answer of August 8, 2019, the CAS, through its Secretary General, requested that the Appeal be declared inadmissible.

In its Answer of September 16, 2019, WADA (hereinafter: First Respondent) concluded that the appeal was inadmissible and, in the alternative, should be dismissed to the extent it was found to be admissible.

FINA (hereinafter: Second Respondent) concluded that the appeal should be admitted in the beginning of its answer of September 17, 2019.

The Appellant filed a spontaneous reply, prompting the filing of the First Respondent's rejoinder.

Legal considerations

1.

The Appellant requests the consolidation of this procedure with the case 4A_265/2019. However, the latter appeal has already been decided, so that the application has become devoid of purpose.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals under the conditions provided for in Articles 190 to 192 of the federal law on private international law of December 18, 1987 (PILA; RS 291), in accordance with Article 77 para. 1 lit. a LTF.[1] The seat of the CAS is in Lausanne. The Appellant was not domiciled in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Article 176 para. 1 PILA).

3.
3.1. The civil remedy referred to in Article 77 para. 1 lit. a LTF in conjunction with Articles 190 to 192 PILA is admissible only against an award. The challengeable act may be a final award, which puts an end to the arbitral proceedings on substantive or procedural grounds, a partial award, which relates to a quantitatively limited part of a contested claim or to one of the various claims in question or that terminates the procedure with regard to a party of consorts (ATF 143 III 462 at 2.1; judgment 4A_222/2015 of January 29, 2016 at 3.1.1), even a preliminary or interlocutory award, which settles one or more preliminary substantive or procedural questions (on these concepts, see ATF 130 III 755 at 1.2.1 p. 757). On the other hand, a simple procedural order which can be modified or withdrawn during the proceedings is not subject to appeal (ATF 143 III 462, cited above, at 2.1; ATF 136 III 200 at 2.3.1 p. 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 Article 183 PILA (ATF 136 III 200, cited above, at 2.3 and references).
In determining the admissibility of the appeal, what is decisive is not the name of the act undertaken but its content (ATF 143 III 462, cited above, at 2.1; ATF 142 III 284 at 1.1.1 ; judgment 4A_222 / 2015, cited above, at 3.1.1).

3.2. According to Article 186 para. 2 PILA, the jurisdictional objection must be raised before any defense on the merits. This is in accordance with the principle of good faith, anchored in Article 2 para. 1 Civil Code, which governs all areas of law, including civil procedure. Put differently, the rule in Article 186 para. 2 PILA, like the more general one of Article 6 thereof, implies that the arbitral tribunal before which the defendant proceeds on the merits without making any reservation has jurisdiction for this reason. Therefore, the person who files submissions on the merits without reservation (vorbehaltlose Einlassung) in adversarial arbitration proceedings relating to an arbitrable cause accepts, by this conclusive act, the jurisdiction of the arbitral tribunal and definitively loses the right to object to the jurisdiction of said tribunal. However, the defendant may file submissions on the merits, in the event that the objection of jurisdiction is not admitted, without such behavior amounting to tacit acceptance of the jurisdiction of the arbitral tribunal (ATF 143 III 462, cited above, at 2.3; ATF 128 III 50 at 2c / aa).

3.3. Article 186 para. 3 PILA provides that, in general, the arbitral tribunal rules on its jurisdiction by an interlocutory decision. This provision certainly expresses a rule, but it does not have any imperative and absolute character, and even its violation is without sanction (judgment 4A_222/2015, cited above, at 3.1.2 and references). The arbitral tribunal will derogate from this principle if it considers that the jurisdictional objection is too closely linked to the facts of the case to be judged separately from the merits (ATF 143 III 462, cited above, at 2.2; ATF 121 III 495 at 6d p. 503).

3.4. If the arbitral tribunal, examining the question of jurisdiction beforehand, declares itself incompetent, thereby terminating the procedure, it renders a final award (ATF 143 III 462, cited above, at 3.1).

When it dismisses a jurisdictional objection, by a separate award, it renders an interlocutory decision (Article 186 para. 3 PILA), irrespective of the name given (ATF 143 III 462, cited above, at 2.2; judgment 4A_414/2012 of December 11, 2012 at 1.1). This must be assimilated to the interlocutory or preliminary ruling by which the arbitral tribunal, without ruling directly on its jurisdiction, nevertheless admits it in an implicit and recognizable way by the very fact of settling one or more preliminary questions of procedure or substance (ATF 143 III 462, cited above, at 3.1; ATF 130 III 76 at 3.2.1 p. 80; Judgment 4A_370/2007 of February 21, 2008 at 2.3.1 and references). Pursuant to Article 190 para. 3 PILA, this

[1] Translator's Note : LTF is the abbreviation for the Federal Law on the Swiss Federal Tribunal.

decision, which the defendant must immediately challenge (ATF 130 III 66 at 4.3), can only be challenged before the Federal Tribunal for reasons based on irregular composition (Article 190 para. 2 lit. A PILA) or lack of jurisdiction (Article 190 para. 2 lit. b PILA) of the arbitral tribunal. The grievances referred to in Article 190 para. 2 lit. c to e PILA can also be raised against the interlocutory decisions within the meaning of Article 190 para. 3 PILA, but only insofar as they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal (ATF 143 III 462, cited above, at 2.2; ATF 140 III 477 at 3.1; ATF 140 III 520 at 2.2.3).

As for the simple procedural order which can be modified or revoked during the proceedings, it is not open to appeal, except in exceptional circumstances (judgment 4A_596/2012, cited above, at 3.3-3.7).

3.5. The common denominator of all these decisions, apart from those falling into the last category cited, is that they settle once and for all the question of the jurisdiction of the arbitral tribunal, in one way or another. In other words, in each of them, whether it is a final award or an interlocutory or preliminary ruling, the arbitral tribunal shall definitively decide this question, by admitting or excluding its jurisdiction by an explicit decision or procedural behavior whose finality will be binding on the tribunal as well as on the parties. Such character thus appears to be the substantive common element in all these decisions, whatever their object and form. Therefore, as the Federal Tribunal has already pointed out in relation to Article 92 LTF in the context of criminal proceedings, by requiring that a separate decision on international jurisdiction decide the question definitively in order to be the subject of the appeal provided for by this provision (ATF 133 IV 288 at 2.2), it is also not possible to appeal against a decision that only provisionally deals with the jurisdictional issue of an international arbitral tribunal (judgment 4A_222/2015, cited above, at 3.4).

4.
4.1. Relying on Article 190 para. 2 lit. b PILA, the Appellant argues that the CAS declared itself wrongly competent, insofar as the First Respondent did not file its Appeal Brief in due time. He submits that the question of respecting the time limit for submitting the Appeal Brief constitutes a problem of ratione temporis jurisdiction referred to in Article 190 para. 2 lit. b PILA.

4.2. Similar argument is unfounded. In the present case, the CAS, in its letter of May 19, 2019, dismissed the objection of inadmissibility due to the late filing of the appeal brief raised by the Appellant and the Second Respondent. In so doing, the Panel has not made a final decision on its jurisdiction. In reality, it made a preliminary ruling or an interlocutory decision by which it finally settled a procedural question not relating to a jurisdictional problem. That preliminary question was whether the filing of the Appeal Brief had taken place in a timely fashion. The Panel certainly could not render this preliminary or interlocutory award without admitting, at least implicitly, on the basis of a prima facie examination, that it had jurisdiction to do so. However, it must be admitted that it did not decide the question of its jurisdiction in a definitive manner.

This conclusion is all the more necessary since, in its response to the appeal, the CAS, through its Secretary General, indicated, after consulting the Arbitration Panel, that the latter had not (yet) decided on its jurisdiction and that the letter of May 19, 2019 did not contain a decision on this issue. The characterization of the decision adopted by the CAS, although it certainly does not bind the Federal Tribunal, constitutes an element which must be taken into account. Indeed, faced with an unmotivated decision, the Federal Tribunal cannot completely disregard the opinion expressed by the author of this decision as to its legal nature, also because, until proof of to the contrary, the Panel is still in the best position to provide details concerning the scope of the decision it has rendered, regardless of the name of such decision (judgment 4A_222/2015, cited above, at 3.2.2). Contrary to what the Appellant maintains, the CAS, in its response to the appeal signed by its Secretary General, did not encroach on the inalienable powers of the Arbitration Panel nor did it seek to motivate the decision of May 19, 2019. The CAS Secretary General has indeed contented itself in making certain observations "after consultation with the Arbitration Panel" concerning the admissibility of the appeal to the Federal Tribunal.

For the rest, it will also be noted that the letter of May 19, 2019 is similar to that in question in a previous case tried by the Federal Tribunal in which it considered that a letter rejecting in principle an objection of jurisdiction and stating that the reasons would be communicated in the final award to come could not be

assimilated to a formal and final decision on jurisdiction (judgment 4A_460/2008 of January 9, 2009 at 4).

Hence it follows that the appeal brought against the interlocutory or preliminary ruling of the Hearing which the CAS legal counsel notified to the parties by letter of May 19, 2019 is inadmissible, since said decision does not rule on the jurisdictional question of the CAS in a final way.

For the sake of completeness, it should also be noted that the grievance articulated by the Appellant does not fall within the framework outlined by Article 190 para. 2 lit. b PILA. In the judgment of October 28, 2019 in the related case 4A_413/2019, the Federal Tribunal considered that the question of compliance with the time limit for appealing to the CAS does not constitute a problem of jurisdiction but another condition of admissibility (at 3.3.2). Consequently, the complaint alleging incompetence ratione temporis of the CAS is inadmissible.

5.
In a second plea, based on Article 190 para. 2 lit. a PILA, the Appellant complained of the irregular composition of the Panel which rendered the contested award rejecting the objection of inadmissibility on account of the late filing of the appeal brief. In this regard, he argues that Arbitrator B._____, who resigned on June 28, 2019, did not offer sufficient guarantees of independence and impartiality. In addition to the breach of the duty of disclosure alleged by the arbitrator, the Appellant submits that the fact that he had been appointed ten times as arbitrator by the First Respondent in the past five years, respectively eight times in the last three years constitutes in itself a circumstance demonstrating that said arbitrator did not offer sufficient guarantees of independence and impartiality. Furthermore, in the opinion of the Appellant, the appointment of the same arbitrator by the same party in two parallel arbitral proceedings relating to the same legal question would constitute an additional reason likely to raise legitimate doubts as to his impartiality.

5.1. On March 11, 2019, the Appellant filed a challenge request for Arbitrator B._____. The ICAS Challenge Commission rejected this request by decision of April 16, 2019. On May 31, 2019, the Appellant challenged this decision before the Federal Tribunal. The accused arbitrator chose to resign on June 28, 2019. By judgment of September 25, 2019, the Federal Tribunal noted that the proceedings had become without object since the appeal was filed after the arbitrator's resignation. When ruling on the allocation of costs, the Federal Tribunal considered that the resignation of the arbitrator could not be seen as an admission of his partiality and / or lack of independence. Indeed, it appeared from the explanations given by the arbitrator in his letter of resignation that he hoped by his act to promote a rapid resolution of the dispute in this pre-Olympic year and that the very special circumstances made him opt to spontaneously resign in the interest of the sport concerned in the presence of an unfounded request for challenge. After having recalled that, according to established case-law, the decision on the challenge of an arbitrator rendered by a private body cannot be the subject of a direct appeal to the Federal Tribunal, the Tribunal considered that the prognosis on the outcome the appeal was likely to be unfavorable to the Appellant, so that it was incumbent on him to bear the costs of the proceedings that had become devoid of purpose (judgment 4A_265/2019 cited above).

5.2. Stemming from a private body, the decision rendered by the ICAS Challenge Commission, which could not be the subject of a direct appeal to the Federal Tribunal, cannot bind the latter (ATF 138 III 270 at 2.2.1 p. 271; judgment 4A_644/2009 of April 13, 2010 at 1). Furthermore, the decision in question does not prevent the Appellant from raising the problem which would cover the interlocutory decision rendered on May 19, 2019 due to the participation of an arbitrator who allegedly should have recused himself. Pursuant to Article 190 para. 3 PILA, the interlocutory decision by which the Hearing Panel dismissed an objection of inadmissibility may be challenged before the Federal Tribunal on the ground of the irregular composition of the arbitral tribunal (Article 190 para. 2 lit. a PILA). The Court may therefore in principle freely review whether the circumstances invoked by the Appellant justify the plea of irregular composition of the Arbitral Tribunal.

5.3. However, it should not be forgotten that the challenged arbitrator resigned on June 28, 2019. The requests for relief by the Appellant for the challenge of the said arbitrator have therefore no longer any purpose in the context of these proceedings. It remains to be examined whether, in view of the resignation of the arbitrator, the person concerned still has an interest in appealing against the interlocutory award on the ground that it was made in an irregular composition.

5.3.1. According to Article 76 para. 1 lit. b LTF, the Appellant must have an interest worthy of protection in the annulment of the contested decision. The interest worthy of protection consists in the practical utility which the admission of the recourse would bring to its author, by avoiding a prejudice of an economic, ideal, material or other nature that the attacked decision would cause him (ATF 137 II 40 at 2.3 p. 43). The interest must be current, that is to say that it must exist not only at the time of filing of the appeal, but also at the time when the judgment is rendered (ATF 137 I 296 at 4.2 p. 299; 137 II 40 at 2.1 p. 41). The Federal Tribunal declares the appeal inadmissible when there is a lack of an interest worthy of protection at the time of filing the appeal. On the other hand, if this interest disappears during the procedure, the appeal becomes devoid of purpose (ATF 137 I 23 at 1.3.1 p. 24 f. And the judgments cited). Exceptionally, the present interest requirement is waived when the contestation on which the contested decision is based is likely to occur at any time in identical or analogous circumstances, its nature does not allow it to be decided before it loses its significance and that, because of its scope, there is a sufficiently significant public interest in the solution of the question at issue (ATF 139 I 206 at 1.1; ATF 137 I 23 at 1.3.1 at p. 25; ATF 136 II 101 at 1.1 p. 103; ATF 135 I 79 at 1.1 p. 81).

5.3.2. The PILA does not regulate the consequences of the resignation of an arbitrator on the pleadings preceding such resignation. However, the Code of Arbitration in Sports Matters (hereinafter: the Code), which governs the procedure applicable before the CAS, states in particular the following, in its version which came into force on January 1, 2019: *"Article R36 Replacement In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the provisions applicable to her/his appointment. If, within the time limit fixed by the CAS Court Office, the Claimant/Appellant does not appoint an arbitrator to replace the arbitrator it had initially appointed, the arbitration shall not be initiated or, in the event it has been already initiated, shall be terminated. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement."* Acts performed before the resignation of an arbitrator therefore remain in principle valid (MAVROMATI / REEB, The Code of the Court of Arbitration for Sport, 2015, para. 15 ad Article R36 of the Code).

5.4. In their submissions, the parties do not dispute that Article R36 of the Code is applicable in this case. In his reply, the Appellant submits that *"even if Article R36 of the CAS Code provides, as a general rule, for the continuation of the procedure without repeating acts already performed, there is nothing to exclude, at this stage, that the Parties or, if they do not reach an agreement, that the Hearing Panel decides to repeat procedural acts prior to the replacement of the arbitrator concerned, more particularly to repeat the decision undertaken in this appeal."* (N. 92). However, he acknowledges, in this same writing, that the CAS, in its response to the appeal, "confirmed (and even motivated) the award under appeal" (n. 30). In his response dated August 8, 2019, later than more than a month after the resignation of Arbitrator B._____ on June 28, 2019, the CAS clearly stated, *"after consultation with the Arbitration Panel"*, that the appeal brief had been filed within the time limits. After the resignation of the accused arbitrator, the Arbitration Panel, in its new composition, never manifested the slightest intention of reversing the decision which was rendered on May 19, 2019. It results on the contrary from the content of the response of the CAS that the Arbitration Panel, after the resignation of the disputed arbitrator, confirmed the contested decision. In these circumstances, we cannot discern the current and practical interest that the Appellant might still have in the annulment of the contested decision on the ground of the irregular composition of the arbitral tribunal, since the CAS, more than one month after the resignation of the arbitrator, confirmed, after consulting the Arbitration Panel, that the deadline for submitting the appeal brief had been respected. In addition, the Appellant does not allege - and there is nothing to support - that the conditions permitting to derogate from the requirement of current interest are fulfilled in the present case. Consequently, the action is devoid of purpose on this point, for lack of a current and practical interest on the part of the Appellant.

6.
In view of the above, the appeal is inadmissible insofar as it is not devoid of purpose. As a general rule, the court costs and costs of the legal costs are to be borne by the losing party (Article 66 para. 1 and Article 68 para. 1 LTF). Insofar as the appeal is devoid of purpose, para. 72 PCF, by reference to Article 71 LTF. The Federal Tribunal then rules by a summarily motivated decision taking into account the state of affairs existing before the fact that puts an end to the dispute. It is based first and foremost on the likely outcome of the procedure. If this outcome cannot be determined in the specific case without further examination, the general rules of civil procedure apply: the costs and expenses will be borne by

the party that caused the procedure that has become devoid of purpose or in which the cases that led to this procedure becoming moot were involved (cf. ATF 118 Ia 488 at 4a p. 494; judgments 4A_134/2012 of July 16, 2012 at 4; 4A_636/2011 of June 18, 2012 at 4).

In the present case, the Appellant initiated the procedure which had become devoid of purpose and it does not seem that the complaint based on the irregular composition of the arbitral tribunal (Article 190 para. 1 lit. A PILA) was well founded. Even if it does not bind the Tribunal here, it should be noted in this regard that, by decision of April 16, 2019, the ICAS Challenge Commission rejected the challenge request brought against Arbitrator B._____. Consequently, the Appellant shall bear the costs of the proceedings and shall pay costs to First Respondent. As for the Second Respondent, as it wrongly concluded that the proceedings should be allowed, it cannot claim the award of costs (Article 68 (1) LTF *a contrario*).

For these reasons, the Federal Tribunal decides as follows:

1. The appeal is inadmissible insofar as it is not without object.
2. The legal costs, set at CHF 5'000, shall be borne by the Appellant.
3. The Appellant shall pay the World Anti-Doping Agency (WADA) CHF 6'000.
4. This judgment is communicated to the parties and to the Arbitral Tribunal for Sport (CAS).

Lausanne, January 6, 2020

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

The President:	The Clerk:
Kiss	O. Carruzzo