4A_424/2017[1]

Judgment of October 23, 2017

First Civil Law Court

Composition
Federal Judge Kiss, Presiding,
Federal Judge Klett, and
Federal Judge Niquille.
Clerk of the Court: Mr. Carruzzo.

X._____, represented by Mr. Olivier Ducrey,
Appellant,

v.

1. World Anti-Doping Agency, represented by Mr. Ross Wenzel and Mr. Nicolas Zbinden,
2. International Squash Federation, represented by Mr. Claude Ramoni,
Respondents

Facts:

A.
On October 2, 2016, X._____, a professional squash player of [nationality omitted], concluded an agreement entitled "Agreement" with the World Squash Federation (WSF), according to which he admitted having violated the anti-doping rules and accepted, to this end, a one-year suspension as of February 7, 2016, as well as the annulment of all of his results at the 2016 South-Asian Games.

B.
On December 23, 2016, the World Anti-Doping Agency (WADA) filed a statement of appeal with the Court of Arbitration for Sport (CAS) in order to contest the Agreement. The CAS rendered an award on June 27, 2017. Its operative part upheld WADA's appeal (n.1), annulled the sanction stipulated in the Agreement of October 2, 2016 (n. 2), imposed a four-year suspension on X._____ starting on February 29, 2016 (n. 3), invalidated all the results obtained by the athlete at the South-Asian Games of Guwahati, India in February 2016 (n. 4), as well as all other results obtained by the athlete since February 7, 2016, a sanction that included, among others, the withdrawal of all medals, points, and prizes won (n.5), it ruled on the costs and expenses of the arbitral procedure (nn.6 and 7) and rejected all other requests and submissions (n. 8).

[1] Translator's Note: Quote as X._____ *v.* WADA & WSF, 4A_424/2017.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

In summary, the CAS Panel found that X._____ had committed a violation of Art. 2.1 of the Anti-Doping Rules of the WSF (hereafter: the Rules), that he could not establish the non-intentional character of such violation, and that he should therefore be suspended for a duration of four years according to Art. 10.2.1 of the Rules, as the conditions for a reduction of the length of the sanction in accordance with Art. 10.6.3 were not met in the case at hand.

C.
On August 28, 2017, X_____ (hereafter : the Appellant) filed a civil law appeal in which he requested the Federal Tribunal annul the award in question and to render a new decision "taking into consideration the reduction [of the sanction] to two years following the prompt admission of Mr. X._____ pursuant to Art. 10.6.3 of the Anti-Doping Rules of the World Squash Federation". In the alternative, the Appellant requested the case be remitted to the CAS in order for it to rule "by taking into account the facts ignored in violation of the right to be heard." The Respondents and the CAS, which produced the file of the case, were not invited to file an answer.

Reasons:

1.
According to Art. 54(1) LTF,[2] the Federal Tribunal issues its judgement in an official language, as a rule in the language of the decision under appeal.[3] When the decision is in another language (here, English) the Federal Tribunal uses the official language chosen by the parties. Before the CAS, the parties used English. In his submissions before the Federal Tribunal, the Appellant used French, respecting therefore Art. 42(1) LTF in connection with Art. 170(1) CST[4] (ATF 142 III 521[5] at 1). According to its past practice, the Federal Tribunal adopts the language used in the appeal and consequently will render its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA[6] (Art. 77(1)(a) LTF). Whether as to the subject matter of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant, or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The appeal is, therefore, admissible.

3.
In his first argument, the Appellant alleges a violation of his right to be heard.

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[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[4] Translator's Note: CST is the French abbreviation of the Federal Constitution of April 18, 1999, RS 101.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[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 differ in principle from what is established by constitutional law. Thus, it was held that, in the field of arbitration, each party has the right to state its views on the essential facts for judgment, to submit its legal arguments, to introduce evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal. On the other hand, the right to be heard does not include the right to state one's case orally. By the same token, it does not require an international arbitral award to be reasoned. However, case law has also inferred a minimal duty for the arbitral tribunal to examine and handle the pertinent issues. This duty is breached when, due to an oversight or misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued (ATF 142 III 360[7] at 4.1.1 and the case law cited).
It is for the party alleging such a violation to establish, in its appeal against the award, how the arbitrators' oversight prevented it from being heard on an important issue. It must establish, on the one hand, that the arbitral tribunal did not examine some of the elements of fact, evidence or law that were regularly raised in its submissions and, on the other hand, that these elements were such that they affect the outcome of the case. Such demonstration is to be made based on the reasons set out in the award under appeal (*ibid*, at 4.1.3).

3.2.
3.2.1. The Appellant alleges that the Panel failed to examine whether the conditions for a reduction of the suspension to a minimum of two years, as provided for in Art. 10.6.2 of the Rules, were met in the present case. According to the French translation, provided by the Appellant, said provision, cited in English in the text of the award under appeal (p. 11 *in fine*), provides as follows [*sic*]:

> 10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1 "An Athlete or other Person potentially subject to a four (4) year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by the WSF, and also upon the approval and at the discretion of both WADA and the WSF, may receive a reduction in the period of Ineligibility down to a minimum of two (2) years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.

By referring to the provision above, the Appellant, who admits not being able to invoke the one or the other specific grounds for annulment or reduction of the suspension period as provided for in Art. 10.4 and 10.5 of the Rules (the first condition for its application implicitly derives from the systematics of Art. 10 of the Rules), contends that he immediately admitted ("*prompt admission*,"[8] according to the English version of Art. 10.6.3) the infraction of the Rules of which he was accused (second condition for the application of this provision).

Regarding the third condition for the application of the aforementioned provision, that is the discretionary consent that must be given by WADA and by the WSF, the Appellant holds that the WSF clearly approved the application of Art. 10.6.3 of the Rules in the specific case and also pointed out that he asked for WADA's approval in his answer of March 6, 2017 (exhibit 45). Invoking Art. 13.1.1 of the Rules, which grants the appeal instance the full power of review, the Appellant contends that the Panel

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

[8] Translators' note: In English in the original text.

did not deal with or even examine the question of whether he had promptly admitted the anti-doping violation, on which the reduction of his four-year suspension depended under Art. 10.6.3 of the Rules, and all this because the Panel considered, against all the evidence, that the WSF had not given its approval for such a reduction. According to the Appellant, this was a violation of his right to be heard.

3.2.2. As it is presented, the plea of violation of such a guarantee cannot be upheld.

It must be concluded, first, that the Panel dedicated an entire chapter, entitled "3. Prompt Admission ?",[9] to the examination of the conditions for the application of Art. 10.6.3 of the Rules (Award, paras. 84-87).

The Appellant's plea that the Panel entirely ignored this question is therefore dismissed.

It further must be recalled that the application of the aforementioned provision requires, among other conditions, that WADA, like the WSF, gives its discretionary consent for its application in a given case. The Appellant also noted this himself on page 7 of his submission. He rightly does not pretend that the three conditions of Art. 10.6.3 of the Rules are not cumulative. However, in para. 85 of the Award, the Panel found that WADA refused to give its consent as to the application of this provision in the particular case. This finding, that binds the Federal Tribunal (Judgment 4A_668/2016 of July 25, 2017, at 2.2 and case law cited therein), results in the inapplicability of Art. 10.6.3 of the Rules in the case at hand, something the Panel unambiguously highlighted in the same paragraph of the Award ("That refusal is fatal to the Athlete's attempt to rely on that provision.").[10] Therefore, the Panel cannot be held liable for a violation of the Appellant's right to be heard for leaving unanswered the question, which forms the basis of one of the two other, cumulative conditions required for the application of the aforementioned provision: whether the Appellant had promptly admitted having committed the violation of the anti-doping rules that he was accused of.

Finally, it is of little importance, in view of the clear conclusion reached by the Panel, that the latter, following an open debate on this subject by the parties during their hearing, also dealt with other questions relating to Art. 10.6.3 of the Rules linked to its power of review as an appellate authority (Award, para. 86).

Indeed, the Panel itself questioned, before answering in the affirmative, whether the party aggrieved by WADA's or WSF's denial of consent for the application of the aforementioned provision, could file an appeal in the absence of an explicit rule to this effect (Award, para. 87). To this end, the Panel held the following: *"*However, the WSF has wide discretion whether or not to grant such approval and the Panel cannot identify and the Athlete has not proposed any particular reason why the WSF's denial of approval was improper.*"*[11] (*ibid*.). It is indeed worth questioning, along with the Appellant, the merit of such a finding, as it is true that the WSF, other than WADA, clearly pleaded in favor of the application of Art. 10.6.3 of the Rules before the CAS (cf. answer of March 6, 2017, n. 49): *"...* Consequently, the WSF gives its approval for article 10.6.3 WSF ADR to apply,"[12] (para. 59 of the Award and the finding n. III, repeated in p. 6 *i.f*. of the Award). It is possible to consider here the hypothesis, if not of a mistaken

[9] Translator's note: In English in the original text.
[10] Translator's note: In English in the original text.
[11] Translator's note: In English in the original text.
[12] Translator's note: In English in the original text.

identity, at least of a slip of the pen, that made the Panel refer to the WSF in lieu of WADA. In any event, be it an error or not, this does not change anything in this case: in the first case, the Panel endorsed WADA's denial to give its approval to the application of Art. 10.6.3 of the Rules; in the second case, its oversight as to the question to know whether the WSF had given or not its own approval, according to the provision, is without consequence, as the correction of such oversight would not change the fact that WADA had not consented to the application and there is no other way the Panel would have been able to reach a different conclusion – the Appellant does not have any – when it comes to WADA's required consent, from the one reached as to the consent required by the WSF. It follows that, from the two hypotheses, the Panel could skip the examination of the condition as to the prompt admission of the anti-doping rule violation by the Appellant, without the latter being entitled to allege a violation of his right to be heard.

4.
In a second plea, based on Art. 190(2)(c) PILA, the Appellant alleges that the Panel omitted to address one of the claims.

4.1. According to Art. 190(2)(c), second sentence, an award may be challenged when the arbitral tribunal fails to examine one of the claims submitted to it. Failure to do so entails a formal denial of justice. By the phrase "*chefs de la demande*" ("*Rechtsbegehren*," "*determinate conclusioni*," "claims"),[13] what is meant is all requests and submissions of the parties. What is referred to here is an incomplete award, that is, a case in which the arbitral tribunal failed to decide on one of the claims filed by the parties. This complaint does not support the contention that the arbitral tribunal failed to decide a question important for the outcome of the case (ATF 128 III 234 at 4a p. 242 and case law cited; *see also* Judgment 4A_173/2016[14] of June 20, 2016, at 3.2).

4.2. The Appellant refers to conclusion No. 3 of his answer of March 6, 2017, in which he requested, in the alternative, the reduction of the suspension period based on Art. 10.6.3 of the Rules. According to him, the Panel did not examine in the Award, nor reject in its operative part, the question of his prompt admission of the violation of the anti-doping Rules and the reduction of the duration of the suspension, in application of the aforementioned provision, to which the WSF had consented. In his view, it is not pertinent that the Panel rejected all the other requests and submissions in n. 8 of the operative part of the Award.

The appeal must be dismissed in this respect. Indeed, if we compare n. 8 and n. 3 of the operative part, which changed the suspension period from one year to four years, to the reasons of the award, particularly those that can be found in the part examined on the previous paragraph of this judgment, it is clear that the Panel rejected the Appellant's alternative submission in his answer to the appeal [to the CAS] and it was not limited to formulating a conclusion only in order to "cover itself," to repeat the expression used by an author cited by the Appellant (Andreas Bucher, in *Commentaire romand, Loi sur le droit international privé* - Convention de Lugano, 2011, n° 81 ad art. 190 LDIP).

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[13] Translator's note: The part of this sentence that reads **'**"*chefs de la demande*" ("*Rechtsbegehren*," "*determinate conclusioni*," "claims")**'** appears here exactly as it does in the original text, for clarity.

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-assessment-merits-case-admissible

5.
Pursuant to this review, the appeal must be rejected. The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF). The Respondents, who have not been invited to file an answer, are not entitled to costs.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The Appellant shall pay CHF 5'000 for federal proceedings.

3.
The present judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport.

Lausanne, October 23, 2017

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

The President:	The Clerk:
Kiss	Carruzzo