4A_384/2017[1]

Judgment of October 4, 2017
First Civil Law Court
Composition
Judge: Kiss (Mrs.), Presiding, Hohl (Mrs.) and May Canellas (Mrs.)
Clerk of the Court: Mr. Carruzzo.

Participants to the procedure
X._____,
Appellant
v.
1. Federation A._____, represented by Mr. Salah Eddine Ben Rahal,
2. Association B._____, represented by Mr. Nicolas Zbinden,
Respondents

Subject-matter:
International sports arbitration

Civil law appeal against the termination order rendered on May 29, 2017 by the President of the Appeals Division of the Court of Arbitration for Sport

Facts

A.
A.a. X._____ is an international-level middle-distance runner from…. Between June 7, 2014 and August 24, 2015, he was subject to three antidoping controls in view to updating the data of his biological passport. The profile of the athlete was submitted to a group of experts, which found highly probable the use of a prohibited substance or method in a report of February 22, 2016, and then confirmed its first opinion after considered the explanations given by the person concerned to the Association B._____ (hereafter: B._____, according to its English acronym) on March 10, 2016.

X._____ was provisionally suspended on April 12, 2016, and heard on June 14, 2016 by the Disciplinary Commission of the Federation A._____ (hereafter: A._____), which found a violation of the Rule 32.2 (b) of the Rules of B._____, suspended him for a duration of four years as of April 12, 2016 and retroactively annulled all the results obtained by him since June 7, 2014. Said decision can be found, with grounds, in the minutes of the meeting of the Disciplinary Commission of June 14, 2016; its operative part was repeated in a letter addressed to the athlete, dated June 28, 2016 referring to the minutes.

[1] Translator's note: Quote X._____ v. Federation A._____ & Association B._____; 4A_384/2017. The original the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b. On June 30, 2016, Dr. L._____, medical and antidoping officer with the Federation A._____ and Member of the Disciplinary Commission, addressed the following letter to the athlete:
"Mr X._____,
Please find enclosed the Minutes of the Disciplinary Commission together with a letter of A._____, referring to your pending file, for your attention [...]."[2]
On August 8, 2016, X._____ sent the following email to A._____, to the World Anti-Doping Agency (WADA), to B._____ and to the Court of Arbitration for Sport (CAS):
"By a decision rendered by the Disciplinary Commission f A._____ on June 14, 2016 and notified on June 30, 2016, I was sanctioned with a suspension from any competition in athletics for a duration of four (4) years starting on April 12, 2016 and the annulment of all the results obtained since June 7, 2014.
I herewith inform you that I strongly contest this decision because it is in full contradiction with the rules of the Association B._____ and its applicable standards and I lodge an appeal against the decision that was taken against me...]"
A *"detailed explanation of the grounds of [the] appeal"*, dated August 7, 2016, was attached to this letter. This document did not mention any addressee but it results from its reading that it was addressed to A._____. The athlete did not receive any answer to his email dated August 8, 2016 and the attached explanations.
X._____ alleges that he later *"encountered serious psychological crises due to the injustice that he felt"*, and that he addressed, in January 2017, a new collective email to A._____, to WADA, to B._____ and to the CAS.

With an email dated January 23, 2017, the CAS Secretariat sent a message to the athlete in which it explained that it did not considered itself as being the real addressee of the document entitled "appeal", attached to the email of August 2016, and that in any event it could not initiate an arbitration procedure based on this document, which did not fulfil the conditions for an appeal to the CAS.

Assisted by his counsel, X._____ filed to the Office of A._____, on February 16, 2017, a request for transfer of the full decision and the full file of his case.
On February 28, 2017, an officer of the antidoping department of B._____ wrote a letter to the athlete indicating that it seemed that he had not filed an appeal to the CAS against the decision of A._____ of June 28, 2016 and asking him *"irrespective of any subsequent decision of the President of the Appeals Division of the CAS as to the late filing of the appeal against the decision of A. _____ of June 28, 2016"*, to undertake the necessary steps to file a true appeal if he still intended to contest this decision. The attention of the athlete was eventually drawn to Art. R47 ff. of the Code of Sports-Related Arbitration (hereafter : the Code).

B.
B.a. On March 21, 2017, X._____, represented by lawyer..., filed to the CAS a statement of appeal along with a request for provisional measures.
On March 24, 2017, the CAS Court Office initiated the arbitral procedure, inviting the respondents A._____ and B._____ to express themselves as to the request for provisional measures.

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

With a letter dated April 6, 2017, A._____ opposed the granting of the provisional measures and requested, principally, the termination of the arbitral procedure in application of Art. R49 of the Code, since it considered that the appeal was clearly filed late. In a letter sent the same day, B._____ adopted the same position as his affiliate as to the request for provisional measures and to the question of admissibility of the appeal.
Invited by the CAS Court Office, the athlete filed, on April 20, 2017, his observations as to the admissibility of his appeal.

B.b. On May 29, 2017, the President of the Appeals Division of the CAS (hereafter, the President), based on its power to decide of Art. R49, issued a termination order, in the operative part of which it held that the appeal filed on March 21, 2017 by X._____ against the decision taken on June 28, 2016 by the Disciplinary Commission of A._____, was inadmissible; it therefore terminated the pending arbitral procedure and removed the case from the CAS role.
After summarizing the parties' arguments, the President substantiated its refusal to entertain the appeal as follows:
Rule 42.15 of the Rules of B._____ fixes the deadline for appeal to the CAS to 45 days from the day after the reception of the decision under appeal. Only this rule is applicable in the present case, since this decision was rendered following the allegations of violation of the antidoping rules. X._____ admits having received the email of Dr L._____, dated June 30, 2016, and having taken note of the decision against him, even if he does not admit having received the minutes including the reasons of the decision. This must be taken for granted notwithstanding his denial, especially in the light of his explanations provided in the annex to his email of August 8, 2016, that he well received the decision of June 28, 2016 and the minutes including the reasons of said decision that were sent to him by email on June 30, 2016.
In the present case, the time limit to appeal started to run on July 1, 2016, which means that the appeal, filed on March 21, 2017, is late and therefore inadmissible. In the present case, the applicable rule is clear, and there is no need to seek the application of other rules established by B._____ or found under the laws of vvv, of www or of xxx. What is more, as the applicable rules of B._____ do not provide any other form of notification, the Appellant wrongly referred to the judgment 4A_488/2011 of June 18, 2012 where the question was about a decision whose notification had to be made by registered mail with acknowledgement of receipt. For the rest, and since the reception of the decision by the Appellant was established, the problems related to proof that could arise from a notification made exclusively through email are not pertinent in the present case. In any event, the athlete could not validly invoke the protection of his good faith, to the extent that he had gained knowledge of the decision and its grounds since more than 8 months when he sent his statement of appeal to the CAS.

C.
On July 12, 2017, X._____ (hereafter: the Appellant) filed an appeal to the Swiss Embassy of... directed against the aforementioned termination order and such appeal was transmitted to the Federal Tribunal on July 20, 2017. He requested the annulment of said order and to be granted legal aid for the setting aside proceedings.

A._____ (hereafter: the Respondent n° 1), B._____ (hereafter: Respondent n° 2) and the CAS, which sent the file of the case, were not invited to file an answer.

Reasons:

1.
In the field of international arbitration, a civil law appeal is admissible against arbitral awards according to the conditions provided by Art. 190 – 192 PILA[3] (Art. 77 (1) (a) LTF[4]).

1.1. The seat of CAS is in Lausanne. None of the parties had its domicile or its seat in Switzerland at the relevant time. The provisions of the 12th chapter of the PILA (Art.176 (1) PILA) are therefore applicable.

1.2. The civil law appeal of Art. 77 (1) (a) LTF in connection with Art. 190 – 192 PILA is only admissible against an award, either final, partial, preliminary or interlocutory. By contrast, it is not possible to appeal against a simple procedural order capable of being modified or repealed during the procedure (judgment 4A_600/2008 of February 20, 2019 at 2.3). The same applies to a decision on provisional measures in the meaning of Art. 183 PILA (ATF 136 III 200 at 2.3 and references cited therein). Furthermore, the challengeable act does not need to derive from the Panel that was appointed to decide on the case; it can also be the act of the President of an arbitral Division of CAS, and even of the Secretary General of this arbitral tribunal. In the present case, in order to decide on the admissibility of the appeal, what is important is not the name given to the act, but its content (ATF 142 III 284 at 1.1.1 and the judgment cited).
It must also be considered that, even from its title (Termination Order), the challengeable decision is not a simple order of procedure that can be modified or repealed during the procedure. In fact, according to Art. R49 of the Code, the President of the CAS Appeals Division, addressing a request filed by the Respondent n° 1 once the arbitral procedure was initiated, decided to terminate this procedure after inviting the other parties to express themselves in this respect. She therefore rendered a decision on inadmissibility that terminated the procedure based on a ground arising out of the procedural rules. The fact that the decision is rendered by a President of a Division rather than an arbitral panel, which had not yet been constituted, does not prevent the decision from being considered as a decision appealable to the Federal Tribunal (judgment 4A_692/2016 of April 20, 2017 at 2.3 and the case law cited therein).

1.3. The Appellant, who took part in the CAS proceedings, is particularly affected by the decision under appeal, since the latter entails a refusal of the arbitral tribunal to entertain his appeal. He therefore has an interest that is personal, current and worthy of protection that the appealed decision was not rendered in violation of the guarantees invoked by him, and he therefore has standing to appeal (Art. 76 (1) LTF). The appeal was filed in a timely manner. The Appellant established that he received the decision under appeal on June 12, 2017. The time limit to appeal of 30 days, provided in Art. 10 (1) LTF, would therefore expire on July 12, 2017. The time limit was respected by the filing of the appeal, to the attention of the Federal Tribunal, to a Swiss diplomatic mission, which acknowledged its receipt (Art. 48 (1) LTF). Therefore, the appeal is admissible in principle. The pleas invoked by the Appellant must further be examined from the angle of their reasoning (Art. 42 (1) (2), Art. 77 (3) LTF).

2.

[3] Translator's Note: PILA is the English abbreviation of the Federal Statute of December 18, 1987, on private international law, RS 291.
[4] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

The Federal Tribunal issues its decision based of the facts established by the arbitral tribunal (Art. 105(1) LTF). This Court may not rectify or supplement ex officio the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). Equally, its mission, when it is called to decide on a civil law appeal against an award rendered in the context of international arbitration, does not consist in deciding avec full power of review like an appeal authority, but to merely examine whether the admissible pleas against the award are founded or not.
It would no longer be compatible with such a mission to allow the parties to invoke other facts than those that were already found by the arbitral tribunal, apart from exceptional cases confirmed by the jurisprudence, since these facts have already been established by the evidence included in the arbitration file. However, as was already the case under the aegis of the federal judicial organization law, the Federal Tribunal retains the capacity to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against the aforesaid factual findings or when some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal.
The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105(1) BGG).
These include the submission of the parties, their factual allegations, their legal arguments, their statements in the case and offers of evidence, or even the content of a witness or of an expert report or the findings during an inspection (judgment 4A_668/2016 of July 24, 2017, at 2.2 and case law cited therein). These principles apply by analogy to the international arbitration decisions subject to an appeal to the Swiss Federal Tribunal but which do not qualify as awards in the strict sense of the term, like the one that was rendered in the case at hand by the President of the Appeals Division of the CAS.

3.
In his first argument, based on Art. 190 (2) (c) PILA, the Appellant alleges that the President omitted to express herself on one of his claims.

3.1. According to Art. 190 (2) (c) second hypothesis of the PILA, the award can be attacked when the arbitral tribunal failed to examine one of the claims submitted to it. Failure to do so entails a formal denial of justice. With « claims »[5] (“Rechtsbegehren”, “determinate conclusion”, “claims”[6]), are meant all requests and submissions of the parties. What is aimed 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 plea does not allow to bring forward that the arbitral tribunal omitted to address a question important for the outcome of the case (ATF 128 III 234 at 4a p. 242 and case law cited ; see also the judgment 4A_173/2016 of June 20, 2016, at 3.2).

3.2. In the case at hand, the President, dealing with an appeal filed by the Appellant against a decision against him rendered by the Disciplinary Commission of A._____ on June 28, 2016, decided, as a preliminary question and according to Art. R49 of the Code and the request by the Respondent n° 1, on whether the statement of appeal was late or not. Retaining the first hypothesis, she therefore terminated the pending procedure before the Panel was constituted. By doing so, she dealt with the only question

[5] Translator’s note : “Chefs de la demande” in the original text.
[6] Translator’s note: in English in the original text.

that was raised at that initial stage of the appeals procedure and decided on the only "claim" that was raised, that is the respondents' request to terminate the procedure due to the late filing of the statement of appeal. Therefore, the plea made by the Appellant that the President decided *infra petita* is clearly to be dismissed.
In fact, the Appellant complaints that the President did not examine his argument, according to which A._____ had disregarded the ADAMS Rules (*Administration & Management System*)[7], an online management tool designed by WADA to simplify the administration of anti-doping operations of partners and athletes on a daily basis (see, in this regard, the website : https://www.wadaama.org/fr/nosactivites/adams). However, as it was noted above, Art. 190 (2) (c) PILA does not allow to raise that the arbitral tribunal omitted to decide on an important question for the outcome of the dispute.

4.
In his second argument, divided into three sections, the Appellant holds that the appealed decision is incompatible with public policy (Art. 190 (2) (e) PILA).

4.1. An arbitral award is incompatible with public policy when it disregards some fundamental and widely acknowledged values which, according to the prevailing opinion in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). Public policy has both substantive and procedure contents. Procedural public policy, in the meaning of Art. 190 (2) (e) PILA, is only a subsidiary guarantee (ATF 138 III 270 at 2.3) and ensures that the parties had the right to an independent judgment as to their submissions and the facts submitted to the arbitral tribunal in a manner compliant with the applicable procedural law; there is a breach of procedural public policy where there is the violation of fundamental and generally recognized procedural principles and where the disregard of such principles contradicts the sense of justice in an intolerable way, rendering the decision absolutely incompatible with the values and legal order of a state ruled by law (ATF 132 III 389 at 2.2.1).
An award is contrary to substantive public policy when it violates some fundamental principles of substantive law to such an extent that it is no longer consistent with the determining legal order and value system; among such principles are in particular contractual trust, compliance with the rules of good faith, the prohibition of abuse of law, prohibition of discriminatory or confiscatory measures, as well as the protection of persons lacking the civil capacity (same judgment, ibid.).

4.2.
4.2.1. In the first section of his argument under examination, the Appellant complains that the President violated his right of respect of his private life and the protection of his personal data, as guaranteed by Art. 8 of the European Convention on Human Rights (CEDH; RS 0.101) and by Art. 13 of the Federal Constitution of the Swiss Confederation (Cst.; RS 101). She did so not only by not sanctioning A._____ for using the ADAMS system, but also by validating the use by such federation of a free private electronic messaging system (*Yahoo*) for the notification of his disciplinary decision.
It is not possible to agree with this opinion. First, the Appellant does not indicate on what basis A._____ was obliged to apply the ADAMS Rules in order to notify to him his disciplinary decision. Furthermore, a party cannot complain in a direct way, in the framework of a civil law appeal to the Federal Tribunal against

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

an award or an assimilated decision, that its drafter violated the CEDH or the Cst., even if the principles deriving by these legal instruments can potentially serve to clarify the guarantees invoked on the basis of Art. 190 (2) PILA (judgment 4A_246/2014 of July 15, 2015, at 7.2.2). For the rest, the Appellant does not indicate how the notification system used by A._____ could, more concretely, jeopardize his private life; he does not argue, more specifically, that the disciplinary decision rendered against him could have a large exposure, going beyond the circle of the interested persons. Finally, even if this were the case, one cannot see how this fact could have a consequence on the respect of the time limit to appeal.

4.2.2. In the second section of the same argument, the Appellant alleges a violation of his fundamental defense rights and his right to a fair trial. Invoking Art. 6 CEDH, he alleges that the President declared his appeal late while, according to him, she could not have establish, in a legally acceptable manner, the exact moment of reception of the disciplinary decision of A._____.
Like with the previous point raised, this point is unfounded. The reference made by the Appellant to a provision of the CEDH calls for the same remark as the one that was made above (cf. at 4.2.1). For the rest, the President, and other than what is alleged by the Appellant, fixed the moment of reception of the decision under appeal on June 30, 2016.
The President did so based on the available proof. This finding binds the present Tribunal (cf. at 2, 2e § above). Therefore, the premise of the Appellant's reasoning is not correct, which renders the Appellant's submission irrelevant.

4.2.3. The Appellant entitles the third section of his plea as follows : "the violation of the right to a second level of jurisdiction and the right to a fair trial". Invoking Art. 6 and 13 CEDH, he alleges a number of circumstances that are supposed to establish his good faith, then insists on the importance of having the opportunity to submit his case to an independent and specialized instance, something that, in his opinion, could not be offered by A._____ , confirms having the real chances to succeed in his point of view before this tribunal [the CAS] and exposes, finally, the very difficult situation that he is facing, with his family, due to the disciplinary sanction that was imposed on him.
This last part of the second argument has also to be dismissed. First, the provisions of the CEDH, as it was shown above, are not directly applicable in the present procedure. Second, the right to a double degree of jurisdiction does not emanate from the procedural public policy in the meaning of Art. 190 (2) (e) PILA (judgments 4A_530/2011 of October 3, 2011, at 3.3.2 and 4A_386/2010 of January 3, 2011 at. 6.2). What is more, the Appellant's alleged good faith could not remedy the non-respect of the time limit to appeal. In addition, the circumstances referred to by the Appellant in his appeal, whether they concern his personal situation or the behavior of the bodies which have dealt with his case, even assuming they are true, are not enough, as alleged and without being substantiated, to establish the incompatibility of the contested decision with procedural or substantive public policy.
Finally, it needs to be noted that the procedural conditions are necessary for the legal remedies in order to ensure the conduct of the procedure in accordance with the principle of equal treatment. In view of this principle and from the angle of the principle of legal certainty, it is important to ensure a strict respect of the provisions related to the time limits to appeal (judgment 4A_690/2016 of February 9, 2017 at 4.2). It is therefore not possible, in the absence of a written provision to the contrary, to sanction -more or less severely- the non-respect of the time limit to appeal instead of declaring the appeal inadmissible, depending on the seriousness of the infringement of the appealable decision for the party who did not appeal in time against that decision.

The appeal must therefore be rejected to the extent that the matter is capable of appeal.

5.
Invoking Art. 64 (1) LTF, the Appellant requests to be granted legal aid. As a matter of principle, nothing prevents the granting of such a request, notwithstanding the fact that the decision was rendered in the framework of arbitration (judgment 4A_690/2016 of February 9, 2017 at 5.1).
However, and since the appeal was devoid of chances of success, one out of the two cumulative conditions for the granting of legal aid was met in the case at hand. Such request should therefore be rejected. However, in application of its discretion granted by Art. 66 (1) in fine LTF, this Tribunal will not request costs, given the circumstances.

The Respondents, who were not invited to file an answer, are not entitled to their legal costs.

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.

2. The request for legal laid is rejected.

3. No fees or costs are awarded.

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

Lausanne, October 4, 2017

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

The Presiding Judge: Klett (Mrs.)
The Clerk: Carruzzo (Mr.)