

4A_10/2009¹

Judgement of July 8, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Clerk of the Court: GIANINAZZI.

A. _____,

Represented by Mr B. _____,

Appellant

v.

World Anti-Doping Agency (WADA),

Represented by Mr François KAISER

Respondent,

International Military Sports Council (CISM), CISM General Secretariat, Rue Jacques
Jordaens 26, BE-Bruxelles

Facts and reasons :

1.

The World Anti-Doping Agency (WADA) is a Swiss private law foundation with seat in Lausanne and headquarters in Montreal, created pursuant to an initiative of the International Olympic Committee (IOC) in 1999 with a view to promoting, coordinating and supervising the fight against doping in sport in all its forms worldwide (www.wada-ama.org). A. _____, an Italian citizen, is a professional swimmer enlisted in the Italian army.

¹ Translator's note: Quote as A. _____ *v.* World Anti-Doping Agency (WADA), 4A_10/2009. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch.

The International military sports council (CISM) is an international sport organisation with seat in Brussels, purporting to promote friendly relationships between the armed forces of the members states through the organisation of sport competitions among other things (www.cism-mil sport.org).

2.

In 2007 A._____ took part in the fourth edition of the World Military swimming championship in Hyderabad, India, from October 14 until October 22. Submitted to an anti-doping check immediately after his victory on October 19, 2007 in the 400 meters free-style, he tested positive to an illegal substance.

A disciplinary proceeding followed in front of the Discipline Commission of the CISM, which decided the following on January 15, 2008: the annulment of A._____’s individual results in the aforesaid competition; two tests to be carried out by surprise between January 15 and July 15, 2008 outside any competition; finally, should there be a positive test between January 15, 2008 and January 15, 2010, an immediate suspension for two years. That decision was communicated to the Federation Internationale de Natation (FINA)². On May 12, 2008, the Anti-Doping Office of the Italian National Olympic Committee (CONI-NADO) notified WADA that it had received the file concerning the Italian swimmer A._____ including the aforesaid decision on May 5. On May 30, 2008, WADA appealed the January 15, 2008 decision of the CISM discipline Commission in front of the Court of Arbitration for Sport (CAS), which has its seat in Lausanne. In an award of August 4, 2008 notified with full reasons on November 4th, the CAS rejected A._____’s argument that the appeal was late, annulled the decision under appeal and ordered cancelled the results made by A._____ between October 19, 2007 and August 4, 2008. (A._____) was also disqualified for two years from February 6, 2008, the voluntary suspension from December 3, 2007 to February 5, 2008 being deducted.

3.

Assisted by attorney B._____ (Italy) A._____ submitted a “deed of appeal” to the Federal Tribunal on January 5, 2009 with a view to obtaining a preliminary finding that the WADA

² Translator’s note: The International swimming federation goes by its French name. See www.fina.org

appeal was inadmissible for being late and, on the merits, the annulment of the award issued on August 4, 2008.

3.1

In an order of January 14, 2009, the presiding judge of this Court, based on the legal provisions governing the proceedings for appeals to the Federal Tribunal in the realm of international arbitration, gave A._____ 30 days from receipt of the order to (1) appoint a representative in Switzerland to receive any judicial documents to be notified according to art. 39 (3) LTF³ (2) indicate to what extent the measures ordered by the CAS had an impact on his financial situation, considering the contents of art. 74 LTF and the fact that he is enlisted in the Italian army.

A._____ reacted to the order on July 1st, 2009, through Italian counsel, who communicated that a domicile had been elected in Switzerland at the office of attorney C._____. However, the Federal Tribunal never received a statement to that effect from the latter.

3.2

Neither the CAS nor the CISM were invited to express their views.

4.

Since the decision under appeal is in English, which is not an official language, whilst the appeal is in Italian, the proceedings in front of the Federal Tribunal take place in Italian, which is a national language (art. 54(1) LTF).

5.

The Federal Tribunal exercises full judicial review *ex officio* on its own jurisdiction and as to the admissibility of the relief sought (art. 29(1) LTF; DTF⁴ 135 III 1 at 1.1 p. 3).

³ Translator's note: LTF is the Italian abbreviation for the federal statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110

⁴ Translator's note: Italian abbreviation equivalent to ATF (French or bge (German) to indicate the official reporter of the decisions of the Federal Tribunal)

6.

In the field of international arbitration, a Civil law appeal is possible against arbitral awards pursuant to the requirements of art. 190-192 PILA⁵ (art. 77 (1) LTF). For an arbitral award to be appealed to the Federal Tribunal, there must accordingly be an international arbitration subject to the Private International Law (PILA; RS 291).

That requirement is met in this case as the seat of the arbitral tribunal is in Lausanne and the Appellant has neither domicile nor an habitual residence in Switzerland and the application of PILA was not excluded in writing (art. 176 (1) and (2) PILA).

7.

The grounds on which an arbitral award may be appealed are exhaustively listed at art. 190 (2) PILA (DTR 134 III 186 at 5), namely: a. if a sole arbitrator was designated irregularly or the Arbitral Tribunal was constituted irregularly; b. if the Arbitral Tribunal erroneously held that it had or did not have jurisdiction; c. if the Arbitral Tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; d. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected; e. if the award is incompatible with public policy⁶.

7.1

Pursuant to art. 77 (3 LTF), the Federal Tribunal reviews only the grievances which are raised and reasoned in the appeal.

The requirements for reasons in that provision correspond to the ones set forth at art. 106 (2 LTF) for the violation of fundamental rights and that of provisions of cantonal law and therefore to those of the previous public law appeal for a violation of constitutional law at

⁵ Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987 on Private International Law, RS 291.

⁶ Translator's note: The translation of art. 190 PILA is borrowed in part from the English translation provided by the Zurich law firm of Umbricht Attorneys At Law (www.umbricht.com)

art. 90 (1) (b) OG⁷ (DTF 133 III 638 at 2); the LTF therefore made no significant change in this respect (DTF 134 III 186 at 5).

Consequently, the appeal brief must indicate clearly the legal provisions allegedly violated, specifying what the violation is (DTF 134 II 244 at 2.2; 133 III 393 at 6).

7.2

The brief submitted to the Federal Tribunal completely disregards the requirement for reasons just explained, from which the Appellant does not even appear to be aware, considering that he did not refer to PILA or to the LTF even minimally.

He generally stated his intent to “make an appeal against an award which appears illegitimate in its reasons, illogical and contradictory”. Firstly because the appeal of the other party was not held to be late notwithstanding the fact that it was submitted much beyond the time limit set by art. 4.9 of the CISM Anti-Doping rules, which provide for an appeal within 21 days from the decision. Considering the clear wording of that provision it was indeed impossible according to the Appellant to compute the time limit from the day in which the decision was communicated to the appealing party, as held by the arbitrators; such a solution would also open the way to various time limits, thus creating an intolerable lack of legal certainty. Secondly because the sanction against him would be “very heavy, with contradictory and illogical reasons”.

As stated, such arguments manifestly do not meet the requirements for reasons set forth above at 7.1 and the matter must accordingly be declared incapable of appeal.

8.

Since the matter is not capable of appeal for lack of a sufficiently reasoned appeal, the matter may be decided without reviewing the merits according to the simplified proceedings of art. 108 (1)(b) LTF. The judicial costs shall follow the decision (art. 66 (1) LTF).

⁷Translator’s note: OG is the Italian abbreviation for the previous statute organizing the Federal Tribunal which was substituted by the Federal Statute of June 17, 2005, known as LTF.

Therefore, the Presiding Judge pronounces:

1. The matter is not capable of appeal.
2. The judicial costs set at CHF 2'000.- shall be borne by the Appellant.
3. This judgment shall be to the representatives of the parties, to the CISM and to the CAS.

Lausanne, July 8, 2009

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

The presiding Judge:

The Clerk:

KLETT (Mrs)

GIANINAZZI