

4A_146/2019¹

Judgment of June 6, 2019
First Court of Civil Law

Federal Judge Kiss, Presiding,
Federal Judge Niquille,
Federal Judge May Canellas
Clerk: Mr. O. Carruzzo.

A._____,
represented by Jean-Marc Reymond,
Appellant

v.

1. World Anti-Doping Agency (WADA),
represented by Ross Wenzel and Anton Sotir,
2. B._____,
Respondents

Facts:

A.

A.a. A._____ (hereinafter: the Athlete or Boxer), domiciled in [name of country omitted], is a professional Boxer.

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 the international level.

B._____ is [name of country omitted]'s anti-doping agency.

A.b. On February 23, 2018, the Boxer was tested for doping and found to contain a substance on the WADA Prohibited List.

On April 16, 2018, B._____ informed the Athlete of the initiation of a disciplinary investigation into an alleged anti-doping rule violation and provisionally suspended him.

¹ Translator's Note:

Quote as A._____ v. WADA v. B._____, 4A_4A_146/2019.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

In the proceedings conducted by the B. _____ Independent Doping Arbitration Tribunal ("Independent Doping Hearing Panel"), the Boxer argued that the doping control he had undergone was tainted by various irregularities.

Following B. _____'s withdrawal of the complaint against the Athlete, the Independent Tribunal, ruling on October 5, 2018, found that the Boxer had not committed an anti-doping rule violation and confirmed the lifting of his suspension.

B. On 6 November 2018, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (CAS), requesting that its appeal be submitted to a three-member arbitral tribunal. In a footnote, however, WADA reserved the right to request the appointment of a sole arbitrator in the event that the Respondents did not pay their share of the advance on costs.

On January 28, 2019, the CAS informed the parties that B. _____ had paid only half of his advance of costs and that the Boxer had not paid anything. It stated, inter alia, that

In view of the above, the Parties are advised that the Appellant's footnote is understood in a way that in the given circumstances, a Sole Arbitrator is requested. Accordingly, and in the absence of any other information or indication by the Appellant by Wednesday, 30 January 2019, the name of the Sole Arbitrator will be communicated to the Parties in a further CAS Court Office letter.

By email of the same day, WADA maintained its request for the appointment of a sole arbitrator. On January 29, 2019, the CAS notified the parties, indicating the following:

I take note that given the circumstances the Appellant maintains its request for a Sole Arbitrator to be appointed. Accordingly, the Parties are advised that pursuant to Article R54 of the Code of Sports-related Arbitration, it is for the President of the CAS Appeals Arbitration Division, or her Deputy, to appoint the Sole Arbitrator. The Parties will receive further information in this regard in due course.

Responding to a request by the Athlete, CAS, by e-mail of January 29, 2019, granted a time limit to the Respondents to decide on WADA's request. On February 1, 2019, the Boxer, through his previous counsel, made a determination on this point, inviting the CAS to entrust the case to a three-member arbitral tribunal.

On February 25, 2019, the CAS informed the parties that the President of the Appeals Arbitration Division (hereinafter: the President of the Appeals Division) confirmed her decision to submit the appeal to a sole arbitrator, whose name would be communicated to the parties at a later stage.

On February 28, 2019, a sole arbitrator, a Finnish lawyer, was appointed.

By e-mail of March 6, 2019, the Athlete requested written reasons for the CAS decision to appoint a sole arbitrator, noting in this regard that the arbitrator appointed currently chairs the Supervisory Board of the Finnish Anti-Doping Agency.

On March 13, 2019, the CAS stated that the President of the Appeals Chamber had chosen to appoint a sole arbitrator on the basis of Art. R50 para. 1 and R54 of the Code of Sports-related Arbitration (in its 2017 version; hereinafter: the Code).

On March 15, 2019, the Athlete noted that under Art. R50 para. 1 of the Code, the circumstances of the case had to be taken into account, including, but not limited to, the fact that the Respondent had not paid its share of the advance costs within the time limit for doing so. He criticized the CAS for having exclusively relied on this financial aspect.

By decision of March 18, 2019, the International Council of Arbitration for Sport (ICAS) granted the Boxer's application for legal aid and exempted him from paying an advance of costs.

C.

On March 27, 2019, A._____ (hereinafter: the Appellant) lodged an appeal in civil matters with the Federal Tribunal seeking the annulment of the "Decision of 25 February 2019 of the President of the Appeals Arbitration Division of the Court of Arbitration for Sport submitting the case CAS 2018/A/5990 to a single arbitrator (...)". He requested that he be granted legal aid for the federal proceedings and that his agent be appointed as counsel *ex officio*.

WADA (hereinafter Respondent No. 1), B._____ (hereinafter Respondent No. 2) and the CAS, which produced the case file, were not invited to file a response.

Reasons:

1.

In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals under the conditions set out in Articles 190-192 of the Federal Act on Private International Law of 18 December 1987 (PILA; RS 291), in accordance with Article 77(1)(a) LTF.

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 (Art. 176(1) PILA).

2.

2.1. An appeal in civil matters under Article 77(1)(a) LTF in conjunction with Articles 190-192 PILA is admissible only against an award, which may be final (when it terminates the arbitration proceedings for a substantive or procedural reason), partial, or even preliminary or incidental. On the other hand, a simple procedural order that can be modified or revoked during the course of the proceedings is not subject to appeal. The content of the decision, and not its name, is decisive (ATF [143 III 462](#) consid. 2.1).

2.2. According to established case law, a decision taken by a private body, such as the Court of Arbitration of the International Chamber of Commerce (ICC) or the ICAS, on a request for the disqualification of an arbitrator, cannot be appealed directly to the Federal Tribunal (ATF [138 III 270](#), para. 2.2.1; 118 II 359

(judgment 4A_546/2016 of January 27, 2017, at 3b; judgment 4A_546/2016 of January 27, 2017, at 1.2.3). It may nevertheless be reviewed in the context of an appeal against the first contested award on the grounds of the irregular composition of the arbitral tribunal (ATF [138 III 270](#), cited above, at 2.2.1; judgments 4A_546/2016, cited above, at 1.2.3; 4A_644/2009 of April 13, 2010, point 1).

Similarly, the decision to appoint an arbitrator taken by a private body – on the basis of the rules of an arbitration institution – does not constitute an award and is therefore not subject to direct appeal to the Federal Tribunal (judgments 4A_546/2016, cited above, at 1.2.3; P.1703/1982 of May 16, 1983, at 1d, in Bull. ASA 1984 p. 203; Christian Oetiker, in *Zürcher Kommentar zum IPRG*, 3rd ed. 2018, no. 32 ad art. 190 PILA; Stefanie Pfisterer, in *Basler Kommentar, Internationales Privatrecht*, 3rd ed. 2013, no. 30 ad art. 190 PILA; Yves Tschanz, in *Commentaire romand, Loi sur le droit international privé - Convention de Lugano*, 2011, no 46 ad art. 190 PILA; Manuel Arroyo, in *Arbitration in Switzerland, The Practitioner's Guide*, vol. I, 2 nd ed. 2018, no. 13 to art. 191 PILA; Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 3 rd ed. 2015, no. 848; Girsberger/Voser, *International Arbitration - Comparative and Swiss Perspectives*, 3d ed. 2016, no. 731; Kaufmann-Kohler/Rigozzi, *International Arbitration*, 2015, p. 428 f.; Sebastien Besson, *Chronique de jurisprudence arbitrale en matière sportive*, in *Revue de l'arbitrage* 2014, p. 428. 681; Dieter Gränicher, in *Kommentar zur Schweizerischen Zivilprozessordnung*, 3e éd. 2016, no 5a ad art. 392 CPC; Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, no 829; Boog/Stark-Traber, in *Berner Kommentar, Schweizerische Zivilprozessordnung*, vol. III, 2014, No 31 to Art. 361 CPC; Philipp Habegger, in *Basler Kommentar, Schweizerische Zivilprozessordnung*, 3 rd ed. 2017, No 18 to Art. 361 CPC; Felix Dasser, in *Kurzkommentar ZPO*, 2d ed. 2014, No 7 to Art. 361 CPC).

2.3. In a judgment of November 13, 2013, the Federal Tribunal noted that the decision rendered by the President of the CAS Ordinary Arbitration Division relating to the number of arbitrators does not amount to a mere procedural order which may be modified or revoked during the proceedings (judgment [4A 282/2013](#), at 5.3.2, not published in ATF 139 III 511). Indeed, this decision definitively settles a dispute concerning the composition of the Panel called upon to hear the case opposing the parties. Therefore, it could and even should have been referred immediately to the Federal Tribunal. However, the Federal Tribunal pointed out in the aftermath that decisions taken by the ICAS on requests for challenge cannot be challenged directly before the Federal Tribunal by an appeal in civil matters based on Article 190(2)(a) PILA. It pointed out that there could be some inconsistency in opening an appeal against the decision to appoint an arbitrator taken in the course of proceedings by another body of the arbitration institution. The Federal Tribunal finally left this question undecided, as the appeal was in any event to be dismissed (Judgment [4A 282/2013](#), cited above, para. 5.3.2).

2.4. In an unpublished decision of January 27, 2017, on domestic arbitration, the Federal Tribunal declared inadmissible the action against two letters of the Swiss Chamber's Arbitration Institution notifying the parties of the appointment of a sole arbitrator (Case 4A_546/2016). In essence, it held that the appointment of an arbitrator by an administrative body, responsible for administering the arbitral proceedings, did not constitute a challengeable arbitral award, since it did not emanate from an arbitral tribunal within the meaning of Chapter 3 of the CPC, respectively Chapter 12 of the PILA (Judgment 4A_546/2016, cited above, at 1.3). Referring expressly to Judgment [4A 282/2013](#), the Federal Tribunal

also pointed out that it had in no way modified its case law according to which the appointment of an arbitrator by an arbitration institution is not subject to appeal (judgment 4A_546/2016, cited above, para. 1.3).

2.5. In accordance with the above-mentioned case law, which applies *mutatis mutandis* to international arbitration, the appointment of a sole arbitrator by a CAS body cannot be challenged directly before the Federal Tribunal as long as it does not constitute an arbitral award (see also Matthias Scherer, *Decisions of private bodies and institutions cannot be challenged under Art. 190 PIL Act - Really?*, Bull. ASA 2014 p. 107; cf. also the commentary to judgment 4A_546/2016 published in the journal *causa sport* 1/2017 p. 28 [*"Demnach ist beispielsweise die Ernennung eines Einzelschiedsrichters im Rahmen einer Schiedsorganisation, etwa durch den Präsidenten der ordentlichen Schiedskammer des TAS, nicht anfechtbar."*]; cf. furthermore, the doctrine cited above in paragraph 2.2; contra : Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, No. 27 ad art. R40 of the Code, which considers, with reference to Judgment [4A 282/2013](#), that the appointment of arbitrators can be appealed against immediately). Consequently, the appointment of the sole arbitrator may be reviewed only in the context of an appeal against the first challengeable award made by that arbitrator.

3. In light of the foregoing, the appeal is inadmissible.

The Appellant has applied for legal aid pursuant to Article 64(1) FSCA. As his application was unsuccessful, one of the two cumulative conditions for the granting of legal aid under the above-mentioned provision is not met in the present case. That application must therefore be dismissed.

In application of the power conferred on it by Art. 66(1) LTF, the Federal Tribunal will nevertheless waive the collection of costs on an exceptional basis. There is no need to award costs to Respondents No. 1 and No. 2, since they were not invited to submit observations (Art. 68(1) and (2) LTF).

On these grounds, the Federal Tribunal pronounces:

1.

The appeal is inadmissible.

2.

The request for legal aid is dismissed.

3.

No fees shall be imposed.

4.

The present judgment shall be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, June 6, 2019

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

President: Kiss

The Clerk: O. Carruzzo