

4A_324/2021¹

Judgment of 3 August 2021

First Civil Law Court

Federal Judge Kiss; Presiding,
Federal Judge Rüedi and
Federal Judge May Canellas.
Clerk: Mr. O. Carruzzo.

Parties

A._____,
represented by Mr Lorenzo Croce,
Appellant,

v.

1. N._____,
2. B._____
Respondents

Considerations in fact and law:

1.

On April 19, 2021, A._____ submitted to the Court of Arbitration for Sport (CAS) a statement of appeal, sent exclusively by e-mail, challenging a decision rendered on March 25, 2021 by the National Football Tribunal.

By letter of April 20, 2021, the CAS set a time limit for the Appellant to complete its brief. Referring to Art. R31 of the Code of Sports-related Arbitration (hereinafter: the Code), it further indicated that the statement of appeal had to be filed by mail on the first working day following the expiration of the appeal deadline and invited the Appellant to provide proof of compliance with this requirement.

As of April 27, 2021, the CAS indicated that it had still not received proof of the mailing and set a three-day deadline for the Appellant to provide the required proof.

On April 28, 2021, the CAS acknowledged receipt of the Appellant's letter containing its statement of appeal and noted that it had been delivered to a private carrier on the same day. Noting that the 21-day appeal period, provided for in Art. R49 of the Code, had expired on April 19, 2021, he pointed out that

¹ Translator's Note:

Quote as A._____ v. N._____ and B._____, 4A_324/2021.

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

the original copies of the statement of appeal should have been forwarded to him by April 20, 2021, pursuant to Art. R31 of the Code. The CAS clarified that it would therefore not proceed with the statement of appeal since it had been mailed after 20 April 2021.

On April 29, 2021, the Appellant claimed *force majeure* due to the Coronavirus crisis affecting the country in which it is based.

The following day, the CAS indicated that the situation described by the Appellant did not justify derogating from the conditions of admissibility provided for in the Code. In this respect, it noted that the Appellant had been able, notwithstanding the alleged disruptions linked to the health crisis, to reply to the letter of April 27, 2021, by mail posted the following day, which demonstrated that the interested party could organize a mailing within a short time. Moreover, the Appellant could have, even if that mailing would have been impossible, filed its brief on the CAS online filing platform and thus complied with the requirements of Art. R31 of the Code.

In response to the Appellant's request, the CAS Legal Counsel in charge of this case decided to refer the question of the admissibility of the statement of appeal to the President of the CAS Arbitration Division.

On May 10, 2021, the CAS notified the parties that the President of said division had confirmed that the appeal was inadmissible. In short, it noted that the Appellant, assisted by counsel, knew or should have known the formal requirements of Art. R31 of the Code and, in particular, the possibility of filing its statement of appeal on the arbitral institution's online filing platform. Regardless of this, the Appellant was clearly able, notwithstanding the invoked *force majeure*, to organize a one-day mailing. When it received the CAS letter dated April 20, 2021 stating that the e-mailing of the statement of appeal was insufficient, the Appellant could therefore have corrected its procedural error immediately, and not after eight days as it did.

2.

On June 9, 2021, A._____ (hereinafter: the Appellant) lodged a civil law appeal for the annulment of the decision taken on May 10, 2021. N._____ and B._____ (hereinafter: the Respondents) were not invited to reply to the appeal.

3.

It is not disputed that the present case falls within the scope of international arbitration and that the provisions of Chapter 12 of the Swiss Private International Law Act (PILA²) are applicable (Art. 176(1) PILA).

The civil law appeal referred to in Art. 77(1)(a) LTF³ is only admissible against an award, which may be final (when it puts an end to the arbitration proceedings for a substantive or procedural reason), partial,

² Translator's Note:

PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

³ Translator's Note:

LTF is the most commonly used French abbreviation for the Federal Law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).

or even interlocutory or interim. By contrast, a mere procedural order that may be modified or revoked during the course of the proceedings is not subject to appeal. The content of the decision, not its name, is decisive (ATF 143 III 462,⁴ para. 2.1). In the present case, the contested decision is not a simple procedural order that can be amended or revoked in the course of proceedings. In fact, the CAS, noting that the statement of appeal had not been filed in the form prescribed by Art. R31 of the Code within the time limit for doing so, decided not to enter into the case. In so doing, the “arbitral tribunal” clearly expressed its refusal to deal with the case before it. Its decision is thus akin to a decision of inadmissibility that closes the case on procedural grounds. It is immaterial whether the decision is issued by the President of the Appeals Chamber or whether it is in the form of a letter. The fact remains that it is a decision that may be appealed to the Federal Tribunal (judgments 4A_238/2018 of September 12, 2018, para. 2.2; 4A_692/2016 of April 20, 2017, para. 2.3).

For the rest, the admissibility conditions appear to be met, including the standing to appeal, the time-limit for appeal, the submissions made by the Appellant, or the complaint itself. It remains to examine the Appeal raised by the Appellant in terms of its reasoning.

4.

4.1. The Federal Tribunal will examine only those grievances that have been raised and reasoned by the Appellant (Art. 77(3) LTF). The latter must satisfy the same strict requirements as when making a complaint on the grounds of complaint of violation of constitutional rights (cf. Art. 106(2) LTF; judgment 4A_516/2020⁵ of April 8, 2021, para. 5.1).

4.2. The Federal Tribunal rules on the basis of the facts set out in the contested award (cf. Art. 105(1) LTF). It may not correct or supplement the arbitrators’ findings *ex officio*, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (cf. Art. 77(2) LTF, which excludes the application of Art. 105(2) LTF).

These principles are not directly applicable in the present case, as the CAS refused to enter into the matter. However, they may be applicable, at least by analogy. Accordingly, in examining the present case, the Federal Tribunal will take account of the course of the proceedings before the CAS, as set out in the case file produced by the latter (see Judgment 4A_692/2016, cited above, para. 3).

5.

In a single plea, the Appellant alleges a breach of public policy (Art. 190(2)(e) PILA), arguing the CAS did not take into account *force majeure*, which it had invoked. The Appellant argues that it was unable to send its statement of appeal by post because the postal services of the state in which it is based were not functioning due to the Coronavirus crisis. It further submits that the CAS did not inform the Appellant of the opportunity to file its written submission on the arbitration institution’s online filing platform, but instead “forced” it to send its submission by post.

⁴ Translator’s Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-98-2017>

⁵ Translator’s Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-516-2020>

In these circumstances, the Appellant considers that the CAS should have granted it an extension of time, especially as it only missed the appeal deadline by a few days.

5.1.

An award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing view in Switzerland, should form the basis of any legal order (ATF 144 III 120⁶, para. 5.1; 132 III 389, para. 2.2.3).

It is not sufficient that a reason given by an arbitral tribunal violates public policy; rather, the result of the award must be incompatible with public policy (ATF 144 III 120, para. 5.1). For there to be incompatibility with public policy, it is not sufficient that the evidence was wrongly assessed, that a finding of fact was manifestly false, or that a rule of law was clearly violated (Judgment 4A_116/2016⁷ of December 13, 2016 para. 4.1).

5.2.

It should be noted at the outset that the grounds for the complaint leave much to be desired, such that there are serious doubts as to its admissibility, having regard to Art. 77(3) LTF. The few lines that the Appellant devotes to criticizing the considerations made by the CAS do not in fact constitute a statement of reasons worthy of the name, intended to demonstrate the existence of an alleged breach of public policy. The Appellant further bases its criticism on facts that differ from those found in the contested decision, in particular when it states that the postal services in its country were not functioning and that it was thus unable to send its statement of appeal by post. If admissible, the complaint, as presented, could only be rejected. With regard to the case of *force majeure* invoked by the Appellant linked to the Coronavirus crisis, it must be noted, as the CAS indeed did, that this particular situation did not prevent it from being able to reply to a CAS submission dated April 27, 2021, by post the very next day. Therefore, the Appellant has in no way established that it was, in fact, impossible for it to send its statement of appeal to the CAS by post before the expiry of the time limit for appeal.

In any event, even if it had indeed been unable to mail its statement of appeal, the Appellant could still have complied with the formal requirements of Art. R31 of the Code by filing, in due time, its statement of appeal on the CAS online filing platform provided for this purpose. While the CAS did not mention this facility in its letter of April 18, 2021, a party, assisted by a lawyer, could reasonably be expected to consult the pertinent provisions of the Code in order to validly file its appeal. The CAS further noted that the Appellant had been aware of the formal requirements of the Code at least since March 4, 2021, the date on which a letter, mentioning the possibility of filing on the CAS online platform, had been sent in the context of another procedure. The solution adopted by the CAS can therefore not be brought into question.

⁶ Translator's Note: The English translation of this decision is available here:
<https://www.swissarbitrationdecisions.com/atf-4a-260-2017>

⁷ Translator's Note: The English translation of this decision is available here:
<https://www.swissarbitrationdecisions.com/atf-4a-116-2016>

Finally, when the Appellant argues that it missed the time-limit by only a few days, it loses sight of the fact that procedural rules are necessary to ensure that the proceedings are conducted in accordance with the principle of equal treatment and that it is therefore not possible to penalize non-compliance with a time-limit more or less severely depending on to what extent the time-limit was exceeded. It follows that the result of the contested decision does not appear to be contrary to public policy within the meaning of Art. 190(2)(e) PILA.

6.

In view of the foregoing, the Appeal can only be dismissed to the very limited extent that it is admissible. The unsuccessful Appellant shall bear the costs of the federal proceedings (Art. 66(1) LTF). The Respondents, who were not invited to file a reply, are not entitled to costs.

For these reasons, the Federal Tribunal rules as follows:

1.

The application is dismissed in so far as it is admissible.

2.

The judicial costs, set at CHF 2'000, shall be borne by the Appellant.

3.

This judgment will be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, August 3, 2021

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

The President:

Kiss

The Clerk:

O. Carruzzo