4A_422/2019[1]

Judgment of April 21, 2020

First Civil Law Court

Federal Judges Kiss, Presiding,
Federal Judge Niquille,
Federal Judge May Canellas.
Clerk: Mr. Curchod.

A._____,
represented by Serge Vittoz,
Appellant

v.

1. Russian Anti-Doping Agency (RUSADA),
represented by Graham Arthur, lawyer,
2. World Anti-Doping Agency (WADA),
represented by Mr. Ross Wenzel and Mr. Nicolas Zbinden, Kellerhals Carrard, Attorneys at Law,
3. International Federation of Rowing Societies (FISA),
Respondents

Facts:

A.
A.a. A._____ (hereinafter: the Athlete, the Appellant) is a former professional rower of Russian nationality residing in Moscow.

The Russian Anti-Doping Agency (hereinafter: RUSADA, Respondent 1) is the Russian Anti-Doping Agency. Its seat is in Moscow.

The World Anti-Doping Agency (hereinafter: WADA, Respondent 2) is a foundation under Swiss law with headquarters in Lausanne. One of its aims is to promote the fight against doping in sport at the international level.

[1] Translator's Note: Quote as A._____ v. RUSADA, WADA, and FISA, 4A_422/2019.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

The International Rowing Federation (hereinafter: FISA, Respondent 3) is an international organization governing rowing competitions at world level. Its headquarters are in Lausanne.

A.b. On May 17, 2016, while taking part in a training camp, the Appellant underwent a doping control. On June 15, 2016, the Swiss Laboratory for Doping Analysis in Lausanne (hereinafter referred to as “the Laboratory”) issued a report indicating that the A Sample collected contained trimetazidine, a "non-specified" substance prohibited according to the Prohibited List published by WADA. On June 16, 2016, the Appellant was informed of his Provisional Suspension from all competitions and training camps and of his right to request the analysis of the collected B Sample.

At the request of the Appellant, the B Sample was subsequently opened and analyzed. The main issue in the subsequent arbitral proceedings (see B. below) was whether the Appellant and the expert appointed by him were given the opportunity to observe the entire analysis procedure that took place at the laboratory on June 30, 2016.

On July 1, 2016, RUSADA informed the Appellant that the analysis of Sample B confirmed the presence of the proscribed substance. This was followed by several exchanges of correspondence between the Appellant, the USADAA, WADA and the laboratory.

B.
By a submission filed on May 5, 2018, the Appellant filed a request for arbitration before the Court of Arbitration for Sport (hereinafter: CAS) seeking, principally, a declaration that he had not committed any anti-doping rule violation and a suspension of his Provisional Suspension. In the alternative, he sought a declaration that he had committed an unintentional anti-doping rule violation and a suspension of up to 2 years.

An Arbitral Tribunal composed of three arbitrators was subsequently constituted. On January 23, 2019, a hearing was held in Lausanne in the presence of the Appellant and his counsel as well as counsel for RUSADA and WADA, respectively.

By an Award dated June 26, 2019, the Arbitral Tribunal found that the Appellant had committed a violation of the rule enshrined in Art. 2.1(c) of the Russian Anti-Doping Rules ("Presence of a Prohibited Substance or its Metabolites or Markers in a Athlete's sample") and imposed a 4-year period of Ineligibility from the date of the Provisional Suspension. In addition, it declared the annulment of all the results obtained by the Appellant in competitions held between May 17, 2016 and June 16, 2016.

C.
The Appellant filed a civil law appeal with the Federal Tribunal. He requests, principally, the annulment of the arbitral Award of June 26, 2019 and, in the alternative, the annulment of para.s 2, 3, 4 and 5 of that award. In both cases, he concludes that the case should be referred back to the Arbitral Tribunal for a new decision.

Respondent 2 was the only one to file an Answer, in which it requested the dismissal of the appeal. The Appellant and Respondent 2 filed, respectively, a Reply and a Rejoinder, in which they maintained their respective requests.

Reasons:

1.
Under Art. 54(1) of the LTF, the Federal Tribunal shall write its judgment in an official language, as a general rule in the language of the contested decision. Where the decision has been issued in another language (in this case English), the Federal Tribunal shall use the official language chosen by the parties. The parties have filed their submissions in French before the Federal Tribunal, which is why the Federal Tribunal will deliver its judgment in that language.

2.
Under Art. 77(1)(a) LTF, appeals in civil matters are admissible against international arbitral awards under the conditions laid down in Art. 190-192 of PILA. It is not disputed that the present dispute falls within the scope of international arbitration (cf. Art. 176(1) PILA), and therefore within the scope of Chapter 12 of the PILA. Moreover, the appeal is in conformity with the formal requirements of Art. 42 Swiss Federal Tribunal Act and was filed in due time (Art. 100(1) LTF, in conjunction with Art. 46(1)(b) LTF). In principle, therefore, there is nothing to prevent the authorities from dealing with the matter.

3.
The Appellant complains of a violation of his right to be heard. He considers that the Arbitral Tribunal failed to consider two elements of such a nature as to affect the outcome of the dispute invoked in the proceedings, namely the argument that the Appellant and his expert left the laboratory on the basis of false information given by the representatives of the laboratory and the numerous arguments aimed at demonstrating that any violation committed by the Appellant could only have been unintentional.

3.1. According to settled case law, the right to be heard in adversarial proceedings, enshrined in Art. 182(3) and 190(2) (d) of the PILA, does not require that reasons be given for an international arbitration award (ATF 142 III 360, at 4.1.2; 134 III 186, at 6.1 and references). However, case law has construed from this a minimum duty for the arbitral tribunal to examine and deal with the relevant issues. This duty is breached when, by inadvertence or misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and relevant to the award to be made. It is incumbent upon the allegedly injured party to demonstrate, in its appeal against the award, how an inadvertence of the arbitrators prevented it from being heard on an important point. It is for the aggrieved party to establish, on the one hand, that the arbitral tribunal failed to consider some of the factual, evidentiary or legal elements that it had regularly put forward in support of its conclusions and, on the other hand, that those elements were of such a nature as to affect the outcome of the dispute. Such a demonstration will be made on the basis of the grounds set out in the contested award (ATF 142 III 360, at 4.1.1 and 4.1.3).

3.2.

3.2.1. In his appeal, the Appellant refers to "false information" allegedly provided by the representatives of the laboratory, without, however, specifying the nature of that information. In the extract from the defense memorandum cited in the appeal, it is simply stated in that regard as follows: *"And if [...] the Athlete and Dr. Ilgisonis left the controlled zone on the basis that they were told that there was nothing more to observe as the analysis had stared [sic], this would have been according to misleading information provided by the LAD staff and would therefore also lead to the conclusion that the Athlete's fundamental right was breached"*. The Appellant thus seems to criticize the Arbitral Tribunal for not having taken into account his argument that the laboratory representatives had induced him and his expert to leave the laboratory by claiming that there was nothing more to observe since the analytical process had been initiated, which would constitute misleading information.

The Appellant cannot be followed in his argument. First of all, there is no indication that the Arbitral Tribunal did not take into account his short arguments in relation to the information given by the representatives of the laboratory. In any event, it is not apparent how allegedly false information relating to the time of the start of the analysis given by the laboratory staff could have influenced the reasoning of the Arbitral Tribunal, since the Arbitral Tribunal specifically held that the Appellant and the expert left the laboratory with the knowledge that the analytical process would be initiated in their absence and without having objected to it. The fact that WADA and RUSADA asserted during the proceedings that the analysis was initiated in the presence of the Appellant and/or his expert does not change this. The Appellant disregards the fact that the Arbitral Tribunal agreed with the Appellant on this particular point (*"the computer sequence starting the analytical process was launched after the Athlete and his representative left the LC-MS/MS Room"*), considering, however, that the Appellant had agreed that the analysis should be initiated and conducted in his absence.

With respect to his brief general statement that the Athlete or his representative have the right to be present at the opening and analysis of the B Sample, it is difficult to see what the point that the Appellant wishes to make. Again, he misunderstands the Arbitral Tribunal's finding that he and the expert had consented to the analysis of the sample in their absence.

3.2.2. The Appellant's developments regarding the allegedly unintentional nature of the violation are not more convincing. It is apparent from the Award that the Arbitral Tribunal expressly addressed and rejected the Appellant's argument that the presence of the substance in dispute in the samples was due to the Athlete's consumption of contaminated dietary supplements. The Appellant cannot simply challenge this conclusion by making reference to various elements presented before the Arbitral Tribunal, namely the CAS jurisprudence dealing with contaminated dietary supplements, the conclusions of an expert that contamination was likely in this case, a decision of the Anti-Doping Commission of the International Swimming Federation and various testimonies. Contrary to what he appears to support, the Appellant cannot infer from his right to be heard a right to have all the elements invoked in the arbitration proceedings that may have supported his arguments expressly mentioned in the Award. The Arbitral Tribunal considered that the explanation provided by the Appellant was based only on a theoretical possibility without, however, being supported by evidence or even relating to specific circumstances.

There was no evidence of a violation of the Appellant's right to be heard within the meaning of Art. 190(2)(d) of the PILA.

On these grounds the Federal Tribunal pronounces:

1.
The appeal shall be dismissed in so far as it is admissible.

2.
The legal costs, set at CHF 5'000, shall be borne by the Appellant.

3.
The Appellant shall pay the respondent 2 compensation of CHF 6'000.

4.
The present judgment shall be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, April 21, 2020

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

President:	The Clerk:
Kiss	Curchod