

CAS award in Caster Semenya case not contrary to substantive public policy (Swiss Supreme Court)

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In *A and another v International Association of Athletics Federation and others* (Cases 4A_248/2019 and 4A_398/2019), the Swiss Supreme Court upheld the award of the Court of Arbitration for Sports (CAS) in the Caster Semenya case, confirming that the Association of Athletics Federation's *Regulations for the Female Classification: Athletes with Differences of Sex Development* are not contrary to public policy.

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In a recent French language decision, slated for publication in the official court reporter of leading cases, the Swiss Supreme Court dismissed an application to set aside a Court of Arbitration for Sports (CAS) award, holding that it was not contrary to substantive public policy (*article 190(2)(e), Private International Law Act (PILA)*).

The decision involved Caster Semenya, an Olympian middle-distance runner from South Africa, (Athlete) and Athletics South Africa (ASA) to World Athletics (formerly International Association of Athletics Federations (IAAF)), based in Monaco.

In April 2018, the then IAAF published new rules entitled *Regulations for the Female Classification: Athletes with Differences of Sex Development* (DSD Regulations), according to which female athletes

presenting a testosterone level above an established limit are obliged to artificially reduce it in order to compete in some women's athletics competitions.

As she wished to compete naturally, the Athlete and the ASA challenged the DSD Regulations before the CAS, arguing that they discriminated against her on the basis of sex or gender (or both). The CAS confirmed, by majority, that, while being discriminatory, the DSD Regulations were necessary and reasonable to ensure a level playing field because female athletes with higher levels of testosterone have an unsurmountable biological advantage in comparison to other athletes belonging to a "protected category" of athletes.

The Athlete and the ASA challenged the CAS award before the Swiss Supreme Court, alleging several violations of substantive public policy (*article 190(2)(e), PILA*), including a breach of human dignity and personality rights, as well as a breach of the prohibition on discrimination.

The Supreme Court initially granted the Athlete's *ex parte* request that the DSD Regulations be inapplicable during the pendency of the Supreme Court proceedings, which it later reversed in a procedural order after hearing IAAF's arguments.

In an unusually long decision (34 pages), the court dismissed the setting-aside application, stating that the DSD Regulations do not breach substantive public policy and are a proportionate means to ensure a level playing field among all female athletes. (*A and another v International Association of Athletics Federation and others (Cases 4A_248/2019 and 4A_398/2019) (25 August 2020)*.)

Background

DSD Regulations

On 23 April 2018, the then IAAF published the new *Regulations for the Female Classification: Athletes with Differences of Sex Development* (DSD Regulations). Difference in Sex Development (DSD) is defined as a "congenital abnormality causing an atypical development of the chromosomal, gonadal and/or anatomical sex". The DSD Regulations set out the special conditions which a "Relevant Athlete" must fulfil in order to take part in a "Restricted Event" in the women's category in an international competition or to set a world record in a non-international competition. The DSD Regulations define a "Relevant Athlete" as an athlete who meets the following three cumulative criteria:

- Having one of the DSDs listed in this provision.
- Blood testosterone level is greater than or equal to five nanomoles per litre of blood (nmol/L).
- Sufficient androgens sensitivity to have a material androgenic effect at these testosterone levels.

Where there is doubt as to whether the above three conditions have been met, the doubt benefits the athlete who can compete freely. In addition, according to DSD Regulations, a "Relevant Athlete" is solely responsible for maintaining the qualification conditions as long as she wishes to take part in a "Restricted Event" in the women's category at an international competition. If it is established that a "Relevant Athlete" has not continuously maintained her blood testosterone level below five nmol/L, the athlete will not be allowed to participate in the women's category in a

"Restricted Event" at an International Competition until she establishes that she again meets the conditions for participation. The DSD Regulations further specify that a "Relevant Athlete" who does not meet the qualification requirements may take part in either:

- All events in the women's category, including "Relevant Events", but not "Target Events".
- All events of the male category.
- Any intersex or similar category events.

In case of dispute, the DSD Regulations contain a CAS arbitration clause, according to which the CAS award is final and binding on all parties, with no right of appeal before any court or judicial authority.

Private International Law Act

Article 190(2) of the Private International Law Act (PILA) provides an exhaustive list of grounds on which the Swiss Supreme Court can set aside an international arbitration award, including if the award is incompatible with public policy within the meaning of article 190(2)(e).

According to the Supreme Court's case law, public policy under article 190(2)(e) of the PILA comprises procedural and substantive public policy. An award contravenes substantive public policy when it violates fundamental principles of the law applicable to the merits to such an extent that it is no longer consistent with notions of justice and the system of values. Such principles include the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapacitated persons. The Swiss Supreme Court has declined to give an exhaustive definition of what is contrary to public policy.

According to article 192 of the PILA, if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express declaration in the arbitration agreement or a subsequent written agreement, waive any right to annul an award as well as limit the waiver of any appeal to one or several of the grounds listed in article 190(2).

Article 8 of Swiss Constitution (prohibition of discrimination)

Under article 8(2) of the Swiss Constitution, no person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, or religious, ideological or political convictions, or because of a physical, mental or psychological disability.

Facts

This decision involves Caster Semenya, a female South African athlete of international level, (Athlete) and Athletics South Africa (ASA) against World Athletics (formerly International Association of Athletics Federations (IAAF)), based in Monaco.

Caster Semenya is a "Relevant Athlete" according to the DSD Regulations. In June 2018, the Athlete and ASA filed two requests for arbitration before the CAS to challenge the validity of the DSD Regulations.

On 30 April 2019, the CAS panel dismissed both requests for arbitration in a 165-page award. In its award, the CAS panel explained that the need for separate female and male athletic competitions is legitimate to ensure a level

playing field, because testosterone is the primary driver of physical benefits and thus of the sex difference in athletic performance. To this effect, the DSD Regulations represent the IAAF's latest attempt to reconcile the binary male and female division in athletic events, with the heterogeneous spectrum of biological sexual characteristics and the increasingly complex and different national laws governing sex. The CAS panel found in particular that, on the balance of evidence, athletes with 5-alpha reductase deficiency (5-ARD), or other forms of DSD, have a testosterone level equivalent to the ordinary concentration found in males. In certain athletic competitions that are covered by the DSD Regulations, this leads, in practice, to a significant performance advantage over other female athletes of such a magnitude as to be likely to compromise the fairness of competitions.

Regarding the lawfulness of the DSD Regulations, the CAS panel stated that, prima facie, they appear discriminatory because they differentiate on the basis of legal sex and certain innate biological characteristics. However, after recalling that the DSD Regulations had the legitimate objective of ensuring fair competition in women's athletics, the CAS panel pointed out that it is human biology, and not legal status or gender identity, that determines which individuals possess the physical traits that give them this insurmountable advantage. Further, it may be legitimate to regulate the right to participate in a competition in the women's category by reference to biological factors rather than to legal sex alone. In a nutshell, the CAS panel concluded that the DSD Regulations were a necessary, reasonable and proportionate means of achieving the aims pursued by the IAAF.

The Athlete sought to set aside the CAS award before the Swiss Supreme Court in May 2019. On 31 May 2019, the Supreme Court ordered the provisional suspension of the DSD Regulations on an ex parte basis. This order was subsequently reversed in July 2019 after the IAAF was given an opportunity to be heard (see [Legal update, Swiss Supreme Court reverses prior ruling in Semenya case on suspension of IAAF regulations for female classification](#)). In August 2019, ASA also filed an application to set aside the award.

Decision

The Swiss Supreme Court upheld the CAS award and dismissed the application to set aside.

Validity of waiver of challenge to award in sports arbitration

The Supreme Court first recalled that a waiver of the right to file an application to set aside can only be accepted restrictively and that an indirect waiver by submission to arbitration rules, which provide for such a waiver, are insufficient. A valid waiver requires an explicit and unambiguous declaration by all parties. Whether an explicit waiver has been given is a matter of interpretation. The court further confirmed its case law that, in the field of sports arbitration, a waiver is in principle not enforceable against the athlete, even if it satisfies the formal requirements of article 192 of the PILA.

Based on the above, the court concluded that the waiver contained in the DSD Regulations was not binding on the Athlete. Regarding the ASA, the court considered that, because the waiver necessarily presupposes the agreement of the parties, and because the DSD Regulations adopted by the IAAF are binding on all member federations worldwide irrespective of their intent (including ASA), the waiver contained in the DSD Regulations was not the result of a freely expressed consent by ASA and was therefore ineffective.

Limited power of review of Supreme Court

The court first underscored that, in the case of *Mutu and Pechstein v Switzerland* (Application Nos 40574/10 and 67474/10), the European Court of Human Rights (ECtHR) confirmed that the right of access to court under Article 6 of the European Convention on Human Rights (ECHR) does not necessarily imply the right to have recourse to a

state court, but that arbitral tribunals can also fulfil the mandatory safeguards of Article 6 of the ECHR (see *Legal update, Swiss Supreme Court confirms that Article 6(1) ECHR not directly applicable in setting aside proceedings*).

The ECtHR has held that the CAS has the appearance of a tribunal established by law and is genuinely independent and impartial (see *Mutu and Pechstein v Switzerland* (discussed in *Legal update, CAS procedures compatible with right to a fair trial except for refusal of public hearing (European Court of Human Rights)*) and *Platini v Switzerland*).

The court further emphasised that its role, when seized with an application to set aside an international arbitral award, is not to decide on the application with unfettered powers of review, like a court of appeal, but only to examine whether or not the limited pleas set out in the PILA which are advanced against the award are well founded. The court then referred to the ECtHR judgments *Mutu and Pechstein v Switzerland* and *Tabbane v Switzerland* to underline that the special rules governing appeals against an international arbitral award are all compatible with the ECHR guarantees.

Incorrect composition of CAS panel and right to be heard

ASA alleged a violation of article 190(2)(a) of the PILA (incorrect composition of the panel), arguing that the CAS panel had unduly restricted its power of review when it declined to amend the DSD Regulations. ASA argued that this meant that the CAS panel was not duly constituted.

The Supreme Court stated that it is doubtful whether a court, which would in theory have restricted its power of review, could on that ground alone be described as an "irregularly constituted panel" within the meaning of article 190(2)(a) of the PILA, as this may at most constitute an infringement of the right to be heard (which falls under article 190(2)(d) of the PILA). The court further explained that the CAS panel did not in fact restrict its power of review, but that it had decided, after a thorough and detailed review, that the eligibility requirements set out in the DSD Regulations were *prima facie* discriminatory, since they created a differentiation based on legal sex and innate biological characteristics, but that they were a necessary, reasonable and proportionate measure to ensure fair competition and protection of the women's category.

Breach of substantive public policy

The Athlete alleged three violations of substantive public policy (*article 190(2)(e), PILA*). Before addressing them, the Supreme Court recalled its case law and clarified that an award is incompatible with public policy if it disregards the essential and widely recognised values that should form the basis of any legal system. In assessing whether the award was incompatible with public policy, it noted that it was not to review the legal assessment made by the arbitral tribunal but only whether the result of the legal assessment was compatible with public policy.

First, the Athlete asserted that the award contravened the prohibition on discrimination based on article 8 of the Swiss Constitution.

The court recalled its case law that the violation of the provisions of the ECHR or the Swiss Constitution do not count among the grounds exhaustively listed under article 190(2) of the PILA. A plea alleging a violation of public policy is therefore not admissible insofar as it merely seeks to establish that the award is contrary to guarantees drawn from the ECHR or the Swiss Constitution. This point is even more notable in the case at hand where Swiss law was not applicable to the arbitration proceedings before the CAS.

The Supreme Court further explained that, from a Swiss constitutional law perspective, the prohibition on discrimination is addressed to the state and in principle does not have a direct horizontal effect on relations between

private individuals. The court held that the ground of incompatibility with substantive public policy (*article 190(2) (e), PILA*) is not admissible insofar as it merely seeks to establish that the challenged award conflicts with a provision of Swiss law, even if it has constitutional rank. Consequently, all considerations relating to the scope of article 8(2) of the Swiss Constitution and to the requirements resulting therefrom in terms of Swiss domestic law are irrelevant in setting-aside proceedings. On that basis, the court considered that it was far from obvious that the prohibition on discrimination by private individuals amounted to one of the essential and widely recognised values that, according to the prevailing Swiss understanding, should be the basis of any legal order.

The court further explained that, although it is true that the relationship between athletes and the organisations involved in various sports disciplines is based on a vertical axis and differs in this respect from the horizontal relationship between the parties to a contractual relationship, it is not certain that this is sufficient to allow an athlete to rely on the prohibition on discrimination in the context of a setting-aside application. The court concluded that, in any event, the CAS had conducted a full review of the parties' claims, considering all relevant elements and carefully weighted the different interests at stake. In particular, the CAS panel had considered that the sole reference to a person's legal sex is not always a fair and effective means of distinction, which is why it may be legitimate to regulate the right to compete in the women's category by reference to biological factors rather than to legal sex alone. In this regard, the CAS panel considered that testosterone is the primary factor in physical advantage and therefore in the gender difference in athletic performance. The court restated that it was bound by the CAS panel's findings of fact. The court concluded that there was no violation of substantive public policy because the result of the award was not intolerable or unreasonable in light of the DSD Regulations' goal to ensure fairness in sport and protect the women's category.

Second, the Athlete claimed to be the victim of an infringement of her personality rights under articles 27 onwards of the Swiss Civil Code (CC), since the award upheld a violation of several of her fundamental rights. In that context, the Athlete alleged a violation of:

- Her physical and mental integrity as a consequence of the obligation to undergo humiliating intrusive examinations to determine sensitivity to androgens and the obligation imposed on her to take oral contraceptives in order to reduce her testosterone levels.
- The right to respect her social and gender identity on the ground that the DSD Regulations redefine or even call into question the sexual or gender identity of female athletes with "46 XY DSD", that is, a condition in which the affected individual has XY chromosomes and no XX chromosomes.
- Economic freedom.

The court recalled that, according to its case law, a violation of article 27(2) of the CC is not automatically contrary to substantive public policy; it must be a serious and clear-cut violation of a fundamental right. The court then considered that:

- The duty to undergo intrusive tests does not affect the very essence of the right to physical integrity, since the examinations were only executed by qualified physicians and the requirement of taking oral contraceptives in order to compete cannot be considered forced medical treatment.
- The DSD Regulations only establish eligibility rules designed to ensure sporting equity and equal opportunities for all female athletes.
- Despite the DSD Regulations violating the Athlete's economic freedom, they are adequate, necessary and proportionate, therefore justifying the restriction.

For all these reasons, the court concluded that the DSD Regulations are not contrary to substantive public policy under article 190(2)(e) of the PILA.

Third, the Athlete invoked an infringement of human dignity, arguing that the award conveys gender stereotypes by endorsing the idea that only women with biological characteristics corresponding to the stereotype of woman are allowed to compete freely in the women's category.

The court stated that the award did not deal with the question of what a woman or an intersex person is and that the result reached by the CAS is not incompatible with the guarantee of human dignity because, in certain contexts, such as in competitive sport, it can be accepted that biological characteristics may, exceptionally and for the purposes of fairness and equality of opportunity, overshadow a person's legal sex or gender identity. To this effect, restricting the access of female athletes with 46 XY DSD, who have naturally an insurmountable advantage over other women to certain competitions does not appear to be contrary to the human dignity of these athletes. The Supreme Court further pointed out that athletes can refuse to undergo the test, and that, while it is true that such a refusal will result in the impossibility of taking part in certain athletic competitions, it cannot be accepted that this consequence alone violates a person's human dignity.

For all the above reasons, and emphasising the limits of its power of review, the Swiss Supreme Court decided that the CAS award did not breach substantive public policy (*article 190(2)(e), PILA*).

Comment

Apart from confirming the court's case law regarding CAS' independence and the invalidity of indirect waivers in sports arbitration, this decision raises challenging and quite novel legal questions.

The outcome of the decision is not unexpected as the Supreme Court merely confirmed its case law that human and constitutional rights do not constitute grounds to set aside under article 190(2) of the PILA, pointing out that, under Swiss law, constitutional rights, such as the prohibition on discrimination, only apply in the vertical relationship between an individual and the state. As surprising as this finding may be to foreign counsel, under Swiss law, constitutional rights cannot be invoked as pleas in disputes between private parties, save for gender equality in the context of employment relationships. Violation of fundamental rights can be claimed under the public policy plea (*article 190(2)(e), PILA*), namely as a violation of personality rights (*articles 27 onwards, CC*).

However, the Supreme Court's holding that "... it is far from obvious that the prohibition on discrimination by private individuals is one of the essential and widely recognised values that, according to the prevailing Swiss understanding, should be the basis of any legal order" (unofficial English translation) is unconvincing. It is difficult to think of a more core value than that of the prohibition on discrimination, even between individuals.

In addition, one may argue that the court's case law failed to take into consideration the reality of international sports, where international federations act de facto as state entities, and in certain jurisdictions sports federations are indeed state entities. One must not overlook that, in this case, the IAAF put itself "above the State" by adopting regulations which disregard the legal gender of the athlete, especially in a situation where the athlete was born female. In this respect, the public policy ground under article 190(2)(e) of the PILA should have acted as a "safety valve" to cure the impossibility of directly invoking human and constitutional rights between private individuals.

Finally, this decision is a good example of the extremely strict approach adopted by the Supreme Court when assessing the content of substantive public policy under article 190(2)(e) of the PILA. Regrettably, the Swiss Supreme Court rejected quite swiftly any violation of human dignity by finding that the Athlete was not forced to undergo a test even if her refusal to do so necessarily results in not taking part in certain athletic competitions. This argument

is unconvincing in relation to a professional athlete who makes a living from sport. One could have expected a more detailed analysis of the argument inherent to human dignity, in particular because such a plea, which the court confirmed forms part of public policy, has to our knowledge never been dealt with in the context of an application to set aside.

A fair decision?

It is difficult to draw a clear line between the complex legal issues of this case and its moral and ethical consequences. The outcome of the decision might be considered by some as being at odds with diversity and inclusion in competitive sport, as well as fundamental human rights.

However, it should be noted that the Supreme Court was bound by its very strict and narrow power of review in such proceedings, which the court itself emphasised at the end of its reasoning:

"It follows from the foregoing analysis, which the court has carried out within the limits that case law imposes on its power of review, that the challenged award is not incompatible with substantive public policy within the meaning of article 190 paragraph 2 letter e of the PILA, whichever way it is approached." (Unofficial English translation.) This kind of statement at the end of the decision is quite unusual, and therefore it may be legitimately inferred that the Swiss Supreme Court considered it necessary to explain (in particular to the non-Swiss audience) the procedural framework that had led it to dismiss the Athlete's application.

Case

A and another v International Association of Athletics Federation and others (Cases 4A_248/2019 and 4A_398/2019) (25 August 2020).

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