Termination of proceedings for failure to pay advance, not excessively formalistic (Swiss Supreme Court)

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In decision 4A_692/2016, the Swiss Supreme Court considered an application to set aside a Court of Arbitration for Sport (CAS) termination order rendered as a result of the appellant's failure to pay the advance on costs within the specified deadline.

Speedread

In a decision dated 20 April 2017, the Swiss Supreme Court refused to vacate a termination order by the Court of Arbitration for Sport (CAS). It held that the termination of the proceedings under Article R64.2 of the CAS Code, due to the appellant's failure to pay the full advance on costs within the specified deadline, neither violated the appellant's right to be heard nor constituted excessive formalism.

The Swiss Supreme Court held that the termination order did include a final decision on substance and therefore constituted a matter capable of appeal.

The court emphasised that its scope of review did not extend to the question of whether the CAS had properly interpreted Article R64.2 of the CAS Code. Even though this was not required, the termination order had adequately set forth the relevant facts and conclusions on which the CAS had based its decision and therefore did not violate the appellant's right to be heard.

The court further held that the termination order did not contravene Swiss procedural public policy. It pointed out that the wording of Article R64.2 of the CAS Code was clear in that it leads to the CAS terminating the proceedings. The parties had been made aware in advance of the amount to be paid, the payment deadline and the consequences of non-payment. Therefore, the court considered it irrelevant that the appellant only paid the respondents' share of the advance on costs after the deadline, due to an internal clerical error. It cautioned that a more lenient approach would likely result in abuse and render Article R64.2 meaningless.

The notable elements of this decision are the finding that a termination order is capable of appeal and the fact that the termination of proceedings for failure to pay the advance on costs is not per se excessively formalistic. (*Decision 4A_692/2016.*)

Background

Article 190(2)(d) of the Private International Law Act (PILA) provides that an award will be set aside if the principle of equal treatment of the parties or the right of the parties to be heard is violated.

Article 190(2)(e) of the PILA provides that an award will be set aside if it is incompatible with public policy.

Article R64.2 of the Court of Arbitration for Sport (CAS) Code of Sports-related Arbitration and Mediation Rules (CAS Code) provides that the CAS Court Office shall fix the amount, the method and the time limits for the payment of the advance of costs. The advance shall be paid in equal shares by the parties. If a party fails to pay, the other party may pay the defaulting party's share. In case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the appeal shall be deemed withdrawn and the CAS shall terminate the arbitration.

Facts

The initial dispute concerned an "Acceptance of sanction" agreement entered into between an American gymnast (X) and the United States Anti-Doping Agency (USADA) in July 2016. The Swiss Supreme Court's decision provides no further background on the content of the agreement, but the World Anti-Doping Association (WADA) subsequently brought appeal proceedings before the CAS contesting the agreement (*WADA v X and United States Anti-Doping Agency CAS 2016/A/4743*).

Upon receipt of the appeal and the filing fee, the CAS Court Office, by letter dated 31 August 2016, requested an advance on costs in the amount of CHF36,000 from the parties to be paid by 20 September 2016 at the latest. Half of the advance (CHF18,000) was to be paid by WADA and the other half was to be paid in equal shares by X and USADA.

X and USADA subsequently indicated to the CAS Court Office that they would not pay their share of the advance on costs. In reaction to the respondents' refusal to pay, by letter dated 12 September 2016 the CAS Court Office formally requested WADA to pay the full amount (CHF36,000) of the advance on costs by 20 September 2016 and reminded the parties that a failure to pay the advance on costs would result in the appeal being deemed withdrawn in accordance with Article R64.2 of the CAS Code.

On 19 September 2016, WADA made a payment in the amount of CHF18,000 to CAS. By letter dated 28 September 2016, the CAS Court Office requested WADA to furnish proof of payment for the outstanding amount of CHF18,000. By letter of the same date, WADA replied that it had failed to pay the full amount of the advance because of an internal clerical error and that it would swiftly arrange for payment of the outstanding amount. On 29 September 2016, WADA made a second payment in the amount of CHF18,000 to CAS.

The parties and the CAS subsequently exchanged correspondence regarding the legal consequences of the belated payment of the advance on costs. X and USADA unanimously demanded that the CAS terminate the proceedings in accordance with Article R64.2 of the CAS Code due to WADA's failure to pay the advance on costs within the deadline set by the CAS. WADA, in turn, argued that:

- It had always been willing to pay.
- It had only failed to make the payment within the deadline set by the CAS due to an internal error.
- It had swiftly corrected its error.

- A termination of the proceedings under Article R64.2 of the CAS Code would therefore constitute excessive formalism.

On 11 November 2016, the President of the CAS Appeals Arbitration Division (Division President) issued a termination order, closing the arbitration proceedings in accordance with Article R64.2 of the CAS Code for failure to pay the advance on costs within the deadline specified by CAS. In its order, the Division President set out the facts of the case and held that the wording of Article R64.2 of the CAS Code was clear and did not provide for an extension of the payment deadline.

WADA subsequently appealed to the Swiss Supreme Court to vacate the termination order.

Decision

The Swiss Supreme Court rejected the request to set aside the termination order.

The Supreme Court initially considered the question whether the termination order constituted a matter capable of appeal (an 'award' in the sense of Article 190 of the PILA). Citing previous case law (see *Decision 4A_600/2008*), the Supreme Court re-affirmed its position that in order to decide if a matter is capable of appeal, the contents of the decision under appeal (and not its title) are decisive. Applying those criteria, the Supreme Court held that the termination order, unlike a 'regular' procedural order, could not be subsequently modified or amended. Rather, it contained a substantive and final decision: the irrebuttable presumption of a withdrawal of the appeal. Consequently, and irrespective of the fact that it was rendered by the CAS Division President and not by a CAS Panel, it could be the subject of an appeal to the Supreme Court.

The Supreme Court then proceeded to examine whether the termination order violated WADA's right to be heard or Swiss procedural public policy.

Right to be heard

The Supreme Court first addressed WADA's argument that the CAS Division President had failed to take into account its arguments regarding whether a strict literal interpretation of Article R64.2 of the CAS Code was appropriate in light of the circumstances.

The court reiterated that the right to be heard requires the arbitral tribunal to consider the main allegations, arguments, evidence and offers of evidence, but does not oblige the tribunal to discuss every argument advanced by the parties. The court further emphasised that its scope of review did not extend to the question of whether the Division President had properly interpreted Article R64.2 of the CAS Code.

Notwithstanding the above, the Supreme Court noted that while the right to be heard did not require an arbitral award and certainly not a procedural order to contain reasons, the termination order had indeed set forth the relevant facts on which the Division President had based its decision, including notably the fact that WADA could not rely on its own error to justify its failure to make the required payment within the deadline set by CAS. According to the Supreme Court, long elaborations on the reasons seem less necessary if, as in the present case, the sanction related to the violation of a procedural rule that leaves little room for appreciation for the deciding body.

Consequently, the Supreme Court dismissed WADA's argument that the termination order had violated its right to be heard.

Procedural public policy

The Supreme Court subsequently addressed an alleged violation of public policy by the CAS Division President and initially recalled that an arbitral award is only contrary to public policy if it disregards or is incompatible with fundamental legal principles that constitute the basis of any legal system.

The court then examined whether the notion of procedural public policy also included a prohibition on excessive formalism, finding that neither case law nor legal doctrine addressed that issue in detail. The court ultimately decided to leave the issue undecided, holding that the Division President's decision to terminate the proceedings constituted neither excessive formalism nor a denial of justice.

In this regard, the court pointed out that the parties had been made aware in advance of the amount to be paid, the payment deadline and the consequences of non-payment. Citing case law, the court affirmed that the sanction of the appeal being deemed withdrawn did not constitute excessive formalism, stating among other things, that "procedural formalities are necessary to ensure effective legal recourse." Given that the payment instructions provided by CAS had been clear and that WADA had freely admitted that its failure to timely pay the advance was due to its own internal error, the balance of interests had to be made in CAS' favour. Specifically, and in light of the circumstances of the case, the court found that CAS had not been obliged to extend the payment deadline.

Lastly, the Supreme Court noted that admitting WADA's argument would likely foster abuse and render Article R64.2 of the CAS Code meaningless. The fact that WADA had subsequently paid the outstanding amount could therefore not justify a different assessment. In this regard, the Supreme Court also took into account that WADA had been represented by experienced counsel and could have requested clarification regarding its payment obligations from CAS at any time.

Comment

The case is interesting in two main respects.

First, the Swiss Supreme Court recognises that a termination "order" is a matter capable of appeal under Article 190 of the PILA and confirms its previous decision in this regard (see *Decision 4A_600/2008*). Notwithstanding the Supreme Court's previous decision on this question, this is rather surprising since, as a rule, procedural orders issued by arbitral tribunals seated in Switzerland cannot be appealed unless they deal with the allocation of costs, which is inherently the content of an award (see *Decision 4A_422/2015*, discussed in *Legal update, Swiss Supreme Court confirms allocation of arbitration costs contained in closing order constitutes final award subject to appeal*). Therefore, it must be assumed that in the future the rule that procedural orders are not capable of appeal before the Swiss Supreme Court does not apply to procedural orders terminating the procedure (independently of whether there is a cost allocation in the termination order or not). As the Supreme Court correctly points out, given that a termination order may have a very significant impact on the parties, the court's clarification that termination orders are capable of appeal also closes a gap in the legal protection of parties to CAS proceedings and ensures their ability to challenge such orders before the Swiss Supreme Court.

Second, the decision deals once more with the allegation of excessive formalism and whether this forms part of Swiss procedural public policy. While in two former cases (see *Decision 4A_600/2008* and *Decision 4A_690/2016*, discussed in *Legal update, Swiss Supreme Court denies excessive formalism and rules on applicability of legal aid regime in setting aside proceedings*), the Supreme Court seemed to assume that it does, the present decision is more careful and rightly posits that, by comparison, even decisions which are arbitrary cannot be set aside on the basis of public policy considerations. Therefore, the court suggests that it might be justified to limit the excessive formalism argument to cases "characterized" by the prohibition on excessive formalism in order to avoid any potential abuse of the public policy regime. While it is not entirely clear what this will mean in practice, it appears likely that the Supreme Court will pursue a restrictive approach with respect to allegations of excessive formalism in the future.

In the present case, the Supreme Court refused to set aside the termination order on the basis of the appellant's allegations of excessive formalism. From a legal point of view, this was the correct result. However, one wonders whether the outcome is indeed satisfactory taking into account that Article R64.2 of the CAS Code expressly obligates the parties to jointly pay, in equal shares, the advance on costs. In the present case, the respondents deliberately chose not to fulfil their respective payment obligations. As a result, it seems rather questionable if the principle of equal treatment and the expectations of the respondents that the CAS respect its own procedural provisions, on which the Supreme Court relies in its decision, are really pertinent. Can a party, which is in violation of its obligations under the applicable procedural rules, really expect the CAS to observe a strict formalism with regard to those same rules? This question becomes even more urgent if one considers that the appellant paid the respondents' share of the advance on costs only nine days after the deadline had expired (and only one day after the CAS' request for proof of payment). There is very little factual information in the Supreme Court's decision, but in view of the seemingly insignificant disruption the appellant's failure to pay caused in the very early stages of the arbitration (and even before the CAS Panel had been constituted) there might be questions as to whether the interest in an anti-doping case proceeding to judgment would not supersede the interest in the strict literal observance of a procedural rule.

In the case at hand, the Supreme Court's hands were somewhat tied by the clear wording of Article R64.2 of the CAS Code which expressly grants the CAS a right to terminate the proceedings if the advance on costs is not paid within the specified deadline. However the question is whether this rule is justified in the context of paying the advance of the costs for a party that unduly failed to do so. Institutions dealing with commercial arbitration cases do not have such rules or apply them as strictly, and for good reason: it is already a burden on a party (usually the claimant) to pay the other party's share of the advance on costs, and it does not seem justified to put additional and unnecessary pressure on such a party. In fact, an arbitral institution should only take such a drastic measure and terminate the procedure if, within a reasonable timeframe, the concerned party has clearly indicated that it will not pay the (full) advance on costs.

Case

Decision 4A_692/2016 (Swiss Supreme Court).

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