Doping charges against Lance Armstrong's former team director: Swiss Supreme Court examines ambiguous CAS decision

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In *decision 4A_222/2015*, the Swiss Supreme Court examined the nature of a decision rendered by the Court of Arbitration for Sport (CAS) in order to determine whether it could be the object of a challenge.

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Speedread

In a French-language decision dated 28 January 2016, published on 23 March 2016, the Swiss Supreme Court dismissed a challenge raised by Johan Bruyneel, Lance Armstrong's former team director, against a decision of the CAS relating to a 10-year ban handed to Bruyneel for his role in the US Postal Service team's doping "conspiracy". The ban had already been upheld by an American Arbitration Association (AAA) panel, whose authority was challenged by Bruyneel. The CAS confirmed the AAA panel's authority in a decision that was communicated to the parties in a simple letter from the CAS Secretariat and was not signed by a member of the CAS panel. The Supreme Court found that this decision did not qualify as an award or as an interim decision on jurisdiction. As such, the decision was not open to a challenge under the Swiss Private International Law Act (PILA).

This unusual case, based on an unusual set of circumstances, contains some interesting obiter dicta on Article 186(3) of the PILA, a provision which has not been the subject of much scrutiny until now. Further, the fact that the CAS panel was acting as an appeal authority to another arbitral tribunal in this case (rather than the usual situation where it acts as an appeal authority for decisions taken by disciplinary boards of sports bodies) raises a whole set of additional issues that are not found in the majority of sports arbitration cases. (*Decision 4A_222/2015.*)

Background

The following provisions of the Swiss Private International Law Act (PILA) are relevant:

- Article 186(3) provides that the arbitral tribunal shall, as a rule, decide on its jurisdiction in a preliminary award.
- Article 190(2) provides that an award may be set aside if, *inter alia*:
  - the arbitral tribunal was not properly constituted;
  - the arbitral tribunal wrongly accepted or declined jurisdiction.
- Article 190(3) provides that preliminary awards may be set aside only on the grounds set out in Articles 190(2)(a) and (b).

Facts

Johan Bruyneel is a former professional cyclist and director (*directeur sportif*) of the US Postal Service (USPS)/Discovery Channel team, of which Lance Armstrong was the star member. In 2012, the US Anti-Doping Agency (USADA) brought charges against Bruyneel, Armstrong and four others for breaches of the Union Cycliste Internationale's (UCI) Anti-Doping Rules (UCI-ADR). It suggested sanctions for each of them.

The USADA's own anti-doping protocol provides that, if the suggested sanctions are contested, the matter is to be heard by a three-member panel at the American Arbitration Association (AAA). Bruyneel challenged not only the sanctions themselves, but also the USADA's – and, by extension, the AAA panel's – authority to issue such sanctions against him.

In April 2014, the AAA panel rendered its final award, confirming its jurisdiction and handing Bruyneel a 10-year ban for his involvement in the so-called USPS doping conspiracy. Bruyneel appealed the award to the Court of Arbitration for Sport (CAS), requesting that the CAS deal with the issue of the USADA's authority and the AAA panel's jurisdiction in a first step. The World Anti-Doping Agency (WADA) also appealed the award, requesting that a longer ban be imposed.

On 11 March 2015, the CAS Secretariat sent the parties a letter indicating that the CAS panel had, after deliberating, "decided that USADA had results management jurisdiction and the AAA the disciplinary authority over [Bruyneel and the other parties]". The letter went on to state that "[t]he present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of

CAS within the meaning of Article 190 of the Swiss Private International [Law] Act" and that the reasons for the panel's decision would be included in its Final Award.

On 24 April 2015, Bruyneel filed a petition with the Swiss Supreme Court challenging the panel's decision, arguing that the CAS did not have jurisdiction over the dispute.

Decision

The Swiss Supreme Court ruled that Bruyneel's petition was not admissible.

It started by highlighting that only certain types of decisions may be challenged pursuant to Article 190 of the PILA, namely:

- Final or partial awards putting an end to the proceedings with regard to all or part of the dispute, on substantive or procedural grounds.
- Preliminary or interim awards in which the arbitral tribunal explicitly or implicitly decides on its own constitution or jurisdiction.

On the other hand, procedural orders, that is orders that may be varied in the course of the proceedings, cannot be challenged before the Supreme Court. Article 186(3) of the PILA provides that, as a rule, arbitral tribunals shall decide on their jurisdiction in a preliminary award. However, this provision is not mandatory and arbitral tribunals may, and indeed frequently do, choose to decide on the issue of jurisdiction in the final award.

The Supreme Court then analysed the CAS panel's decision in order to determine whether it qualified as an award or as a procedural order. The way in which that decision was communicated to the parties, that is in a simple letter from the CAS Secretariat, which was not signed by a member of the panel, was in itself unusual. In that letter, the decision was described as "a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS".

However, the form of a decision is not in itself decisive, nor is the title given to it by the arbitral tribunal or the institution. The nature of the decision must be determined taking into account all relevant factors. Therefore, the Supreme Court examined the specific circumstances of the case.

In this case, the CAS panel was seized with an appeal against an arbitral award issued by an arbitral tribunal. That in itself is fairly unusual, as the CAS usually acts as an appeal authority for decisions taken by disciplinary boards of sports bodies. In addition, Bruyneel was a team director, not a cyclist subject to the authority of a national federation by delegation from the UCI. He was neither a citizen or a resident of the US. As a member of the Belgian Cycling Federation, he had a licence from the UCI, and that organisation indicated that it was opposed to the USADA action. As such, it was not surprising, according to the Supreme Court, that Bruyneel had challenged the USADA's and AAA panel's authority.

However, Bruyneel had not challenged the CAS panel's authority. On the contrary, he was the one who seized the CAS and thereby accepted its jurisdiction to decide on the issue of the USADA's and AAA panel's authority. It was only in his petition to the Supreme Court that he argued, for the first time, that the CAS itself lacked jurisdiction.

The decision itself was ambiguous. Having examined the wording, the Supreme Court held that the CAS panel had rendered a preliminary award on a substantive issue, namely the issue of the USADA's and AAA panel's authority. Had the CAS panel considered that authority to be lacking, it would have had to dismiss the case. As it was, it could proceed to examine the validity and appropriateness of the sanctions imposed by those bodies.

By stating that it had reached a decision on the issue of the USADA's and AAA panels' authority, the CAS panel implicitly accepted jurisdiction over the dispute. However, at the same time, it stated that the decision did not constitute "a preliminary decision on the jurisdiction of CAS". According to the Supreme Court, the CAS panel, in so doing, accepted jurisdiction on a "provisional basis" only, reserving its reasoned decision on that point for the final award. This way of proceeding is not prohibited, even though it does not comply with the rule, set out in Article 186(3) of the PILA (that arbitral tribunals should decide on jurisdiction in the form of a separate, preliminary award). According to the Supreme Court, there is no sanction for breaches of that provision, save possibly in cases of clear abuse, for example where the arbitral tribunal, despite being aware that it lacks jurisdiction, proceeds with the arbitration until the final award in order to collect more fees.

Finally, the Supreme Court held that, if it were to start hypothesising on the CAS panel's reasoning, which was not revealed in the Secretariat's letter, its analysis of the decision would be "artificial and perilous".

Taking into account all those factors, the Supreme Court found that it was "justified", in this case, to wait for the notification of the final award, and any challenge raised against it, to examine the grounds raised by Bruyneel.

Comment

This is an unusual case based on an unusual set of circumstances. The fact that the CAS panel was acting as an appeal authority to another arbitral tribunal raises a whole set of additional issues that are not found in the majority of sports arbitration cases. Moreover, the way in which the decision was communicated was highly unorthodox and one might legitimately question the soundness of the method.

The Supreme Court's ruling contains some interesting obiter dicta on Article 186(3) of the PILA, a provision which has not been the subject of much scrutiny until now. It also highlights that the Supreme Court is not bound by the form or qualification given to a decision by the arbitral tribunal or institution and will always examine the specific circumstances of a case in order to determine the nature of a decision, even one that is notified in such an informal manner.

Bearing that in mind, it is somewhat surprising that the Supreme Court, after conceding that the CAS panel had implicitly decided on its jurisdiction, went on to qualify that decision as "provisional". As the Supreme Court itself pointed out, the CAS panel had no specific reason, at that point, to examine its own jurisdiction, as Bruyneel had accepted to submit himself to the CAS' jurisdiction by filing his appeal. There does not seem to be any indication that the CAS panel considered the issue of its own jurisdiction to be unresolved or provisional. The statement in the CAS Secretariat's letter that the decision was to be qualified as "a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS", could be understood as clarifying for the parties that the issue of the USADA's and the AAA panels' jurisdiction was a substantive issue and that therefore, the decision on that point did not qualify as a preliminary award on jurisdiction that could be challenged before the Swiss Supreme Court.

In any event, given the nature of the dispute and the fact that the issue of the CAS panel's own jurisdiction is so closely intertwined with the merits of the case, it does appear more appropriate to deal with that point in the final award. The Supreme Court's ruling appears to leave the door open for the parties to challenge that award, including on the grounds that the CAS panel lacked jurisdiction. The AAA panel's jurisdiction could arguably also be examined at that juncture, to the extent that it were construed as a procedural or substantive pre-condition to the CAS panel's jurisdiction.

Case

Decision 4A_222/2015 (Swiss Supreme Court).

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