CAS award in Blake Leeper case upheld (Swiss Supreme Court)

by by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_618/2020*, the Swiss Supreme Court dismissed an application to set aside an award of the Court of Arbitration for Sport (CAS) that upheld the prohibition on a bilateral transtibial amputee sprinter from competing with his prostheses against "able-bodied athletes". In doing so, the Swiss Supreme Court recalled, among other things, its restrictive approach in relation to human rights as a self-standing ground to set aside an international award rendered in Switzerland.

Speedread

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In a recently published French-language decision, the Swiss Supreme Court decided that a CAS award upholding the prohibition on Blake Leeper, an athlete with amputated legs, from competing with prostheses in competitions against "able-bodied athletes" was not contrary to public policy, in particular, the prohibition on discrimination and human dignity.

A dispute arose between Blake Leeper (BL) and World Athletics (WA) in relation to BL's participation in athletics competitions against "able-bodied athletes" using prostheses. WA had annulled BL's results in competitions against "able-bodied athletes", finding that the prostheses BL had used provided him with a competitive advantage over an athlete not using such prostheses. Based on its competition rules, WA prohibited BL from competing against "able-bodied athletes" asserting that BL had failed to prove that the prostheses did not give him any competitive advantage. BL appealed to CAS.

The CAS Panel determined that the WA competition rules were unlawful and invalid to the extent that they placed the burden of proof regarding the absence of an overall competitive advantage deriving from the use of prostheses on BL.

However, it found that WA had established, on a balance of probabilities, that the prostheses used by BL had given him an overall advantage and that the WA rule that prohibits the use of prostheses was justified by the legitimate objective of safeguarding the fairness and integrity of WA 400-metre events. The CAS panel therefore partially upheld the WA's decision.

BL filed an application to set aside the CAS award with the Swiss Supreme Court, alleging a violation of his right to be heard (*article 190(2)(d), Swiss Private International Law Act (*PILA*)*) and of public policy (*article 190(2)(e), PILA*). Under the latter heading, he invoked a violation of the prohibition on discrimination pursuant to Article 14 of the European Convention on Human Rights (ECHR), and infringement of the principle of *pacta sunt servanda* and of human dignity.

The Swiss Supreme Court swiftly dismissed BL's argument on the right to be heard.

Regarding the violation of public policy and of some of the provisions of the ECHR, the Supreme Court found that the provisions of the ECHR are not directly applicable as grounds to set aside an international award rendered in Switzerland. The Swiss Supreme Court then determined that the CAS award in this case was not contrary to public policy within the meaning of article 190(2)(e) of the PILA. (*Decision 4A_618/2020) (2 June 2021).*)

Background

Article 6.3.4 of the World Athletics Technical Rules (2018/2019 edition) reads as follows:

"For the purpose of this Rule, the following examples shall be considered assistance, and are therefore not allowed: ...
6.3.4 The use of any mechanical aid, unless the athlete can establish on the balance of probabilities that the use of an aid would not provide him with an overall competitive advantage over an athlete not using such aid."
Article 190(2) of the Swiss International Law Act (PILA) reads as follows:

"The award may only be challenged: ...
(d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated
(e) if the award is incompatible with public policy."
Article 6.1 (right to a fair trial) of the European Convention of Human Rights (ECHR) reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
Article 14 (protection from discrimination) of the ECHR reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Facts

The applicant is an athlete (Athlete) specialised in the 400-metre flat event. He suffered from a congenital malformation, which led to the amputation of both lower limbs at the knees when he was four years old. In order to be able to run, he uses passive-elastic carbon-fiber running-specific prostheses (RSPs).

The respondent is World Athletics (WA) (formerly known as the International Association of Athletics Federations). WA's predecessor had adopted Competition Rules which were re-enacted in essentially identical terms in the World Athletics Technical Rules (Technical Rules).

In 2009, the Athlete started his sporting career and participated in events for athletes with physical disabilities and won several medals at the London 2012 Paralympic Games and the 2013 World Para Athletics Championships.

In June 2017, the Athlete began competing in 400-metre flat events alongside so-called "able-bodied athletes". He achieved a time of 44.42 seconds in a WA-approved competition in 2018, achieving a time that qualified him for the Tokyo 2020 Olympic Games.

On 19 June 2018, the Athlete was informed that his results in races since April 2018 had been annulled on the grounds that he had not adduced evidence to WA that he was not deriving any competitive advantage from the use of his prostheses.

On 3 July 2019, the Athlete requested WA to issue a decision confirming that his RSPs comply with WA's regulations, arguing that the protheses did not give him any competitive advantage over "able-bodied" competitors and that WA had in any event failed to provide proof of such an advantage.

On 18 February 2020, WA refused to grant the Athlete's request on the grounds that he had failed to demonstrate that the use of his prostheses did not give him an overall competitive advantage over "able-bodied athletes".

On 27 February 2020, the Athlete appealed WA's decision to the Court of Arbitration for Sport (CAS), arguing that article 6.3.4 of the Technical Rules, insofar as it places the burden of proof on the Athlete to demonstrate the absence of a competitive advantage related to the use of prostheses, impermissibly discriminates against athletes with a disability. He also requested CAS to order that he could compete in any WA 400-metre events using his RSPs.

The CAS Panel found that:

- Article 6.3.4 of the Technical Rules is unlawful and invalid insofar as it places the burden of proof upon an athlete to establish that the use of a mechanical aid does not provide an overall competitive advantage over an athlete not using such an aid.
- WA had established on a balance of probabilities that the particular prostheses used by the Athlete gave him an overall competitive advantage over an athlete not using such a mechanical aid. Therefore, the Athlete could not be allowed to use his specific prostheses in competitions for "able-bodied" athletes.

Regarding the first finding, the CAS Panel underlined that the provision of article 6.3.4 of the Technical Rules constitutes an indirect discrimination because it largely or exclusively affects athletes with disabilities, as only they have to prove that their prostheses do not give them a competitive advantage. After examining whether article 6.3.4 was proportionate, the CAS Panel concluded that imposing the burden of proof on the Athlete is not a reasonable, necessary and appropriate means to achieve the legitimate objective (that is, ensuring the "fairness and integrity" of the competition) because an athlete with a disability faces serious practical and financial consequences in proving a

negative fact in order to compete at WA-organised competitions. The CAS Panel also emphasized that WA had not provided any clear structure or guidelines as to how to adduce evidence that the prostheses do not give the Athlete any competitive advantage over athletes not using any mechanical aid.

Regarding the second finding, in order to examine whether the Athlete had an advantage using his prostheses, the CAS Panel proceeded with an assessment of the hypothetical performance the Athlete could have achieved if he had had intact biological limbs. The CAS Panel acknowledged that the assessment was more an estimation than an a scientifically verifiable fact and therefore ruled that any material uncertainty had to be assessed to the benefit of the Athlete. In its assessment, the CAS Panel relied on the MASH (Maximum Allowable Standing Height) rule, established by the International Paralympic Committee (IPC) and World Para Athletics. While the CAS Panel acknowledged that the MASH rule does not apply in WA competitions, it nevertheless considered it an objective tool to estimate the potential height of the Athlete, and eventually found that by using the prostheses, the Athlete was running at a significantly elevated height in comparison with the theoretical height that he would have reached if he had had intact biological limbs. The CAS panel therefore concluded that the Athlete had a competitive advantage of several seconds in a 400-metre flat event.

The Athlete challenged the CAS award before the Swiss Supreme Court.

As a first ground, the Athlete pleaded that the award violated his right to be heard (*article 190(2)(d), PILA*), alternatively his right to a fair trial (*Article 6.1, ECHR*).

As a second ground, he argued that the CAS award was contrary to substantive public policy within the meaning of article 190(2)(e) of the PILA or alternatively violated Article 14 of the ECHR, because it violated the principle of prohibition of discrimination, breached the principle of *pacta sunt servanda* (agreements must be kept) and infringed on the Athlete's human dignity.

The Swiss Supreme Court dismissed the Athlete's application to set aside the CAS award.

Decision

Right to be heard (*article 190(2)(d), PILA*) and due process (*Article, 6.1, ECHR*)

The Supreme Court first recalled that when deciding on an application to set aside an international award rendered in Switzerland the Supreme Court does not act as a court of appeal and that it thus enjoys very limited powers of review. It further stressed that it was bound by the facts that the arbitral tribunal had established in the award. As a result, the Supreme Court disregarded the Athlete's attempt to supplement the tribunal's findings of facts even though the Athlete was relying on evidence that was part of the arbitral record.

Further, by reference to its previous judgment in the Caster Semenya case (*Decision 4A_248/2019 (25 August 2020*); see *Legal update, CAS award in Caster Semenya case not contrary to substantive public policy (Swiss Supreme Court)*), the Supreme Court found that provisions of the ECHR do not serve as standalone grounds to set aside an arbitral award under article 190(2) of the PILA, and dismissed the Appellant's argument based on Article 6 of the ECHR.

The Athlete had also argued that the CAS panel had failed to examine his argument that the MASH rule was discriminatory because it was only based on data including Spanish, Asian and Australian individuals and thus inapplicable to him as an athlete of African or African-American descent.

First, the Supreme Court considered that, by acknowledging that the MASH rule reflects a general correlation between the length of an individual's lower limbs and other parts of his body as sufficient to determine scientifically the maximum possible height of a person, the CAS Panel had at least implicitly rejected the Athlete's argument that the rule was not applicable to individuals of African or African-American descent.

Second, the Supreme Court found that the Athlete had failed to demonstrate that the CAS Panel's purported failure to consider the allegedly discriminatory nature of the MASH rule had a material impact on the outcome of the case, which is a requirement for a finding of a violation of the right to be heard.

The Supreme Court therefore dismissed the Athlete's argument that his right to be heard had been violated.

Substantive public policy

The Athlete invoked the plea of violation of substantive public policy on the grounds that:

- The application of the MASH rule constitutes a discrimination on the basis of race or ethnic origin because it was purportedly established based only on data of Spanish, Asian and Australian individuals and African or African-American individuals have proportionately longer legs than others.
- The CAS award breached the principle of *pacta sunt servanda*.
- The CAS award was contrary to human dignity.

In relation to the prohibition on discrimination, the Supreme Court held that, like Article 6.1 of the ECHR, Article 14 of the ECHR it is not directly applicable as a ground for setting aside an international award in Switzerland. The Supreme Court then underlined that a large amount of the evidence which the Athlete had filed before the Supreme Court (mainly scientific studies supposedly demonstrating anthropometric differences between African and Caucasian individuals) had not been submitted in the arbitration and was therefore inadmissible before the Supreme Court. The Supreme Court added that the CAS Panel had in any event not applied the MASH rule, but had simply referred to it to estimate the potential Athlete's height. The Supreme Court concluded that the Athlete was in fact criticising the CAS Panel's assessment of evidence, which is inadmissible in a set-aside application before the Supreme Court.

Regarding the principle of *pacta sunt servanda*, the Athlete argued that the CAS Panel, by applying the allegedly discriminatory MASH rule, had violated article 4.1(j) of the WA's Constitution, which prohibits discrimination, and therefore did not apply a contractual clause which the CAS Panel considered binding on the parties. The Supreme Court recalled that, while the principle of *pacta sunt servanda* generally falls within the ambit of substantive public policy pursuant to article 190(2)(e) of the PILA, it is only violated if the arbitrator refuses to apply a contractual clause while finding that it is binding on the parties or, conversely, if it imposes compliance on the parties with a clause that it found not to be binding. The Supreme Court recalled that the process of interpreting a contractual clause does not fall under the principle and is therefore not covered by article 190(2)(e) of the PILA. The Supreme Court finally emphasised that the Athlete's plea was meritless: the principle of *pacta sunt servanda* does not apply to the rules issued by a major sports association because they must be interpreted by the means of interpretation that apply to legislation, as opposed to those applying to a contractual provision.

Finally, concerning the Athlete's argument that the application of the MASH rule and the prohibition on using RSPs in competitions violated his human dignity, the Supreme Court underscored that the CAS panel had neither applied the MASH rule nor had it ruled that the MASH rule was applicable to all athletes. In particular, the Supreme Court found that the prohibition on using RSPs, which according to the CAS panel's factual findings gave the Athlete a

competitive advantage, was justified in this case by the objective of ensuring the fairness and integrity of competitive athletics and was therefore not contrary to human dignity.

Comment

This decision is another in a line of recent decisions in which the Supreme Court had to decide on an appeal against a CAS decision that was claimed to violate human rights principles. With the *Semenya* case currently pending before the European Court of Human Rights, it will be interesting to see whether the Swiss Supreme Court will uphold its rather reluctant approach to human rights violations in relation to sports law cases in the future.

Case

Decision 4A_618/2020 (2 June 2021) (Swiss Supreme Court).

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