Swiss Supreme Court upholds CAS award confirming suspension of Russian Paralympic Committee following Sochi doping scandal

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Legal update: case report | Published on 24-Apr-2017 | International, Switzerland

In *decision 4A_470/2016*, the Swiss Supreme Court considered a request to set aside an award issued by the Court of Arbitration for Sport (CAS) based on the Russian Paralympic Committee's argument that the decision was rendered in violation of its right to be heard and is incompatible with public policy.

Speedread

In a decision dated 3 April 2017, the Swiss Supreme Court rejected a request to set aside an award rendered by the Court of Arbitration for Sports (CAS) for allegedly violating the Russian Paralympic Committee's (RPC's) right to be heard and for being incompatible with substantive public policy.

The Supreme Court held that the CAS did not unduly disregard the RPC's assertion that the individual rights of the Russian paralympic athletes had been violated. The Supreme Court reiterated 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. In the present case, the Supreme Court found that the RPC failed to substantiate the alleged incompatibility of the CAS award with public policy.

The Supreme Court could not render a decision on the core issue: the alleged violation of the paralympic athletes' individual rights. This was so despite the fact that the RPC had attempted to assert the individual athletes' rights on their behalf as a reason to set-aside the CAS award because only the RPC was a party to the proceedings, and not the affected athletes themselves.

A decision by the Supreme Court on the merits of the suspension of Russian athletes based on the doping allegations contained in the McLaren Report is yet to be rendered. (*Decision 4A_470/2016.)*

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 was violated.

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

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Facts

By way of factual background, the International Paralympic Committee (IPC), seated in Germany, forms the world association for parasports. The IPC organises the summer and winter Paralympic Games and supervises world championships and other parasport competitions. Unlike the International Olympic Committee (IOC), the national paralympic committees and the international parasport associations are members of the IPC. The Russian Paralympic Committee (RPC) is the Russian national association for parasport. Its members include Russian sport associations, registered Russian non-profit organisations and Russian paralympic athletes.

On 18 July 2016, Mr Richard McLaren, a Canadian attorney appointed by the World Anti-Doping Agency (WADA), published his first report uncovering systematic state-sponsored doping during the 2014 Russian Winter Olympics in Sochi. Thereafter, the IPC initiated internal proceedings against the RPC resulting in the suspension of the RPC's membership rights with immediate effect as of 7 August 2016. The IPC considered that the RPC was unable to comply with its membership obligations, in particular, with its obligation to adhere to the IPC Anti-Doping Code and the WADA Code. As a result of the suspension, the RPC could no longer nominate athletes for IPC competitions, including the summer Paralympic Games in Rio de Janeiro.

On 11 August 2016, the IPC and the RPC signed an arbitration agreement providing for the jurisdiction of the CAS. On 15 August 2016, the RPC filed an appeal against its suspension from the IPC. Following a hearing held in Rio on 22 August 2016, the CAS, in its decision of the following day, confirmed the RPC's suspension as imposed by the IPC.

The RPC immediately initiated set-aside proceedings before the Swiss Supreme Court. On 30 August 2016, the Supreme Court rejected the RPC's request for interim relief, and on 20 January 2017 rejected the RPC's application for reconsideration of the court's previous decision in this regard.

RPC's arguments

Before the Supreme Court, the RPC argued that the CAS had rendered its decision in violation of the the RPC's right to be heard as per Article 190(2)(d) of the PILA by, among other things, not considering the RPC's argument that the Russian paralympic athletes' rights had been infringed and that the CAS award was therefore incompatible with public policy.

It further argued that the refusal to allow the RPC to assert the athletes' individual rights gravely negated the athletes' personality and other fundamental rights. With reference to the United Nations (UN) Convention on the Rights of Persons with Disabilities 2006 (UN Disability Convention), the RPC further asserted that disabled persons require more protection, and that an association's right to bring representative action on behalf of its members serves the exact purpose of supporting such helpless persons who are rarely in a position to raise the necessary funds and to muster the mental strength to initiate proceedings in their own name.

Decision

The Swiss Supreme Court rejected the request to set aside the CAS award.

Right to be heard

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The Supreme Court referred to the fact that the CAS, in its assessment of the proportionality of the suspension, stated that it need not address the alleged violations of the paralympians' rights, that is, their "right of natural justice", their personality rights and their right to equal opportunity as compared to non-disabled Russian athletes because:

- The affected athletes were not party to the arbitration.
- Under Swiss law, the RPC was not entitled to assert such individual rights in its own name.

Hence, the Supreme Court held that the CAS had not disregarded the RPC's assertion in violation of the latter's right to be heard, but rather, had directly addressed the argument and explained why it would not consider it in detail.

Public policy
The Supreme Court reiterated 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.

It further stated that the CAS award did not contain any determination whereby financial, mental or other reasons had prevented the Russian Paralympians from asserting their rights in their own name. On the contrary, the RPC itself acknowledged that some of the Russian Paralympic athletes had initiated civil proceedings against the IPC before German courts.

In addition, the RPC's references to Swiss associations' right to bring representative actions under the Swiss Civil Procedure Code, to the principle of equality of disabled persons as enshrined in the Swiss Federal Constitution, and to the UN Disability Convention were insufficient to establish any specific fundamental principle of Swiss substantive law which had been violated in the present case. Against this background, the Supreme Court held that the RPC failed to substantiate the CAS decision's alleged incompatibility with public policy.

Comment
The decision concerns a parallel case to the matters dealt with in *decisions 4A_444/2016* and *4A_446/2016*, discussed in *Legal update, Swiss Supreme Court clarifies dead-line for set-aside applications*. There, the Supreme Court did not address the affected atheletes' arguments as they had failed to file their respective submissions within the applicable deadlines.

In the present decision, the Supreme Court could again not render a decision on the core issue: the alleged violation of the paralympic athletes' individual rights. This was because only the RPC was party to the proceedings, and not the affected athletes themselves, even though the RPC had attempted to assert the individual athletes' rights on their behalf as a reason to set-aside the CAS award.

A decision by the Supreme Court on the merits of the suspension of Russian athletes based on the doping allegations contained in the McLaren Report is yet to be rendered.

Case
Decision 4A_470/2016 (Swiss Supreme Court).

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