Around the World

Switzerland

ARBITRATION LAW:

Procedural Orders May Not Be Appealed To The Federal Supreme Court (Federal Supreme Court Decision 4A_146/2019 of 6 June 2019)

Appeals; Appointments; Arbitrators; Courts' powers and duties; International arbitration; Jurisdiction; Misuse of drugs; Sportspersons; Switzerland

Facts

In a dispute on a potential doping case, the competent independent doping hearing panel of a national anti-doping agency held that the athlete had not committed any breach of any anti-doping rules. The World Anti-Doping Agency (WADA) appealed this decision to the Court of Arbitration for Sport (CAS).

In its appeal, WADA requested that the proceedings be conducted by a panel of three arbitrators, unless the athlete would not pay its part of the cost advance, in which case a sole arbitrator should be nominated. After it had become clear that the athlete would not pay its part of the cost advance, the CAS Court Office informed the parties of this fact and announced it would nominate a sole arbitrator unless the parties opposed this within two days. While WADA confirmed its agreement with the suggested way to proceed, the athlete opposed the nomination of a sole arbitrator and requested that a panel of three arbitrators be installed. Nevertheless, the CAS Court Office proceeded to nominate a sole arbitrator based upon Articles R50(1) and R54 of the Code of Sports-related Arbitration, 2017 version.

The athlete appealed the CAS decision to nominate a sole arbitrator to the Swiss Federal Supreme Court (FSC).

Held

The FSC confirmed that this was a case of international arbitration and that, therefore, the provisions of the Swiss Private International Law Act (PILA) applied. It referred to article 190 of PILA pursuant to which the parties may only appeal awards. Such awards may be final awards (which conclude arbitral proceedings for procedural or substantive reasons) or partial awards (which partially terminate the proceedings, either the proceedings against one of several parties to the dispute, or a limited part of a disputed claim or one of several disputed claims). They may even be preliminary or interim awards that concern one or more procedural or substantive preliminary questions. On the other hand, simple procedural orders that may be revoked or altered during the proceedings cannot be subject to an appeal.

The FSC then went on to describe earlier case law. Based thereon, it concluded that a decision by an administrative body of an arbitral organisation regarding the nomination of a sole arbitrator may not be appealed before the FSC as this could not be qualified as an award in the sense of article 190 of PILA. Any criticism regarding the nomination of the sole arbitrator has to be brought forward in the course of an appeal against the first decision by that arbitrator that meets the requirements of article 190 of PILA.

Discussion

The impact of earlier case law on the question whether the nomination of a sole arbitrator (instead of an arbitral panel) could be appealed was causing confusion before the FSC clarified it in the case discussed here.

This confusion was due to rationale 5.3.2 of the earlier FSC decision 4A_282/2013, in which the FSC mentioned that decisions on the number of arbitrators could not be remedied in the course of the proceedings and that, therefore, such decisions should be appealable to the FSC. It then went on to leave this issue unanswered, as, in that specific case, there were other reasons that prevented an appeal anyway. Based thereon, several authors expressed their view that the FSC could have changed its previous case law and that it would now allow the appeal against the nomination of a sole arbitrator by an administrative body.

The FSC clarified this confusion twice—in its decision 4A_546/2016 regarding a dispute before an arbitral organisation other than the CAS and in the presently discussed decision 4A_146/2019, which concerns a CAS dispute. It stated that it had only raised (but not answered) the question whether a sole arbitrator nomination decision should be appealable in FSC decision 4A_282/2013. However, the wording of said allegedly misunderstood decision went further and seemed straightforward. The confusion caused is understandable to the authors of this contribution. All the more, it is welcome that the FSC has now, in clear words, confirmed at which occasion the nomination of a sole arbitrator may be appealed.

Taking into account the clear wording of and the case law on article 190 of PILA, which only extends to awards, the non-appealability of the nomination of the sole arbitrator in the case at hand makes sense. This leads to the situation that such a sole arbitrator may conduct the arbitral proceedings before the parties even have the opportunity to file an appeal against their nomination. These proceedings may possibly progress to the final award if no appealable award is issued earlier (article 186 of PILA which concerns the challenge of competence does not force the arbitrator to issue an immediate decision regarding such a challenge). It remains questionable whether this is reasonable.

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