

Pitfalls in proceedings to set aside an arbitral award in Switzerland

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In a recent decision of 22 January 2009 (4A_424/2008), the Swiss Federal Supreme Court had to consider an appeal against a decision of the Court of Arbitration for Sport (CAS). In the run-up to the 2008 Summer Olympics in Beijing, a qualifying competition was held for the women's Olympic hockey tournament. The Spanish team won the event and qualified for the Games. However, two of its players had tested positive for doping abuse, which could have led to disqualification of the entire team had the Judicial Commission of the International Hockey Federation found more than one player of the team to have violated an Anti-Doping Rule. Yet the Commission found that only one of the two players had committed such violation. X., a national hockey federation the national team of which had been the runner-up at the qualifier, appealed this decision to the CAS. It asserted that both Spanish players were to be found in violation of an Anti-Doping Rule, the Spanish team was to be disqualified and its national team was to replace Spain at the Olympic tournament. The *ad hoc* division of the CAS rendered an arbitral award dismissing the appeal for want of standing of X.

X challenged the CAS award before the Swiss Federal Supreme Court, arguing that the CAS, instead of dismissing its claim, should have merely declined jurisdiction. It asserted that the situation at hand was one in which the question of entitlement to bring a claim could not be distinguished from the question of who was bound by the arbitration agreement, in which case the arbitral tribunal, in order to determine its jurisdiction, was forced to undertake a comprehensive examination of the

claimant's entitlement to bring a claim by means of a preliminary question. If such examination led to a negative decision on jurisdiction, the tribunal lacked jurisdiction to come to a binding decision regarding a party's standing and was therefore limited to issuing a procedural decision on jurisdiction. The Federal Supreme Court rejected this argument and dismissed the appeal.

Besides reminding practitioner's of the importance of correctly determining a party's standing in an arbitration, the Federal Supreme Court in the case at hand had the opportunity to restate a procedural particularity which may, if applied correctly, be of great benefit to a party seeking to set aside an arbitration award in Switzerland but may also, if not applied correctly, constitute a significant pitfall: As a matter of principle, the Federal Supreme Court bases its decision on the facts determined by the arbitral tribunal. Based on Article 77(2) of the Federal Supreme Court Act (FSCA), the Supreme Court cannot rectify nor amend these facts, even if they are obviously wrong or based on a violation of rights pursuant to Article 95 FSCA. The case law of the Federal Supreme Court does, however, allow for an exception to this rule, in that the Court will review the facts determined by the tribunal if permissible grounds for appeal pursuant to Article 190(2) of the Private International Law Act are pleaded or if, in exceptional circumstances, *nova* are admissible. The Supreme Court confirmed in the case at hand that a party alleging such an exception and requesting the Supreme Court to rectify or amend the facts determined by the arbitral tribunal must prove, by means of clear references to the file, that it had already correctly asserted the respective facts on which it now relies in the previous proceedings. In the case at hand, the appellant party had deviated from and amended the facts determined by the tribunal in its notice of appeal without however substantiating why the Supreme Court should depart from the general rule, for which reason its deviant factual assertions were disregarded.

Besides the more commonly known pitfalls of set-aside proceedings in Switzerland – such as for instance the duty of a party attempting to preserve grounds to challenge an unfavorable award to assert such grounds as soon as it becomes aware of them during the course of the arbitral proceedings – a party attempting to set aside an arbitral award is also well advised to examine its possibilities to challenge the facts determined by the arbitral tribunal and to act according to the guidelines set by the Swiss Federal Supreme Court in doing so. We would be interested in learning of any hidden or less commonly known pitfalls which should be taken into consideration in proceedings to set aside awards in other

jurisdictions.

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