Violation of Human Rights under the ECHR: A Valid Challenge of Arbitral Awards at the Swiss Federal Supreme Court?

Kluwer Arbitration Blog
March 23, 2021

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Please refer to this post as: Mercedes Chiabotti, Charlotte Rosenkranz, Myrtha Talirz, 'Violation of Human Rights under the ECHR: A Valid Challenge of Arbitral Awards at the Swiss Federal Supreme Court?', Kluwer Arbitration Blog, March 23 2021 ,
http://arbitrationblog.kluwerarbitration.com/2021/03/23/violation-of-human-rights-under-the-echr-a-valid-challenge-of-arbitral-awards-at-the-swiss-federal-supreme-court/

Among its over 50 decisions on appeals against arbitral awards rendered in 2020, the Swiss Federal Supreme Court ("Supreme Court") in two decisions yet again addressed a delicate issue on the interaction of human rights and arbitration: can private parties challenge arbitral awards on the basis that the arbitral tribunal violated their human rights under the European Convention on Human Rights ("ECHR")? The question had originally been brought up by the European Court of Human Rights ("ECtHR") in a much-noted 2018 decision (2 October 2018, *Mutu and Pechstein v. Switzerland* – 40575/10 and 67474/10; "*Mutu and Pechstein*"). In 2020, the Supreme Court had the opportunity to elaborate on the issue again, first, on the occasion of a dispute between Turkish football clubs (17 August 2020, case no. 4A_486/2019) and, second, in the high-profile case of Olympic athlete Caster Semenya (25 August 2020, case no. 4A_398/2019). In both decisions, the Supreme Court further cemented its restrictive stance. This article summarizes the above-mentioned decisions and makes a short commentary.

The Question before the European Court of Human Rights

In *Mutu and Pechstein*, the ECtHR had assumed the direct applicability of Article 6 ECHR between the applicants and the Court of Arbitration for Sport ("CAS"). Article 6(1) ECHR grants the right "*to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". In this decision, the ECtHR decided that athletes forced to agree to arbitration in order to participate in competitions have had their right to access to justice violated under Article 6(1) ECHR. It found that Article 6(1) ECHR applied even though the CAS was not a state court; specifically, that Switzerland could be found liable if its authorities did not act upon violations of the ECHR. In the case of *Mutu and Pechstein*, this meant that Switzerland breached its obligations under the ECHR through the Supreme Court's decision to uphold the CAS award.

No (Human) Right to Sue for Whistleblowers

In its decision of 17 August 2020 (case no. 4A_486/2019), the Supreme Court for the first time addressed the direct application of the ECHR as a ground to set aside an arbitral award. Turkish football club "V" accused Turkish football club "W"'s managers of match-fixing. The Turkish Football Federation ("TFF") refused to sanction W and V subsequently filed a complaint with the International Federation of Association Football ("FIFA"). FIFA declined to intervene. V appealed the FIFA decision to the CAS and requested that the TFF sanction W and that the ranking of the 2010/2011 championship be corrected. Further, V requested the preliminary hearing to be held in public and the hearing transcripts to be published. The CAS refused to hold the hearing in public and dismissed V's appeal for lack of standing without considering the merits of the dispute.

In its appeal to the Supreme Court, V challenged the CAS award, arguing *inter alia* that the award violated public policy and its right to a fair trial under Article 6(1) ECHR by rejecting the request to a public hearing and publication of the transcripts.

The Supreme Court dismissed the appeal, stating that the grounds to set aside awards issued by international arbitral tribunals seated in Switzerland are

restricted to those listed in Article 190(2) Swiss Private International Law Act ("SPILA"). Therefore, violations of the ECHR need to be raised under one of the grounds of Article 190(2) SPILA. In cons. 4.1, the Supreme Court explicitly rejected the contention that a violation of Article 6(1) ECHR by itself constituted a violation of public policy under Article 190(2)(e) SPILA.

Regarding the *Mutu and Pechstein* decision, the Supreme Court merely noted that the CAS had considered the ECtHR decision when rendering its award. Further, the Supreme Court followed the CAS' reasoning that an exclusion of the public from the preliminary hearing was justified and Article 6(1) ECHR thus not infringed. It agreed that Article 6(1) ECHR did not apply to V since, as a mere whistleblower, it lacked the right to initiate disciplinary proceedings against another club and was thus not directly affected by the dispute. The Supreme Court also deemed the CAS' further reasoning sufficient: even if Article 6 ECHR applied, the exclusion of the public from the preliminary hearing did not infringe Article 6(1) ECHR because the hearing only concerned purely legal and highly technical issues based on undisputed underlying facts.

"Discrimination for a Reason" Not Contrary to Public Policy

On 25 August 2020, the Supreme Court issued a second decision on the ECHR's applicability in international arbitration (case no. 4A_398/2019). The female South African athlete Caster Semenya and the Athletics South Africa challenged the validity of the Regulations for the Female Classification for Athletes with Differences of Sex Development ("DSD Regulations") issued by the International Association of Athletics Federations before the CAS. The DSD Regulations set out the requirements female athletes with the genetic condition of "46 XY DSD" (causing a heightened level of testosterone) have to meet to participate in international competitions as part of the "protected class women". The CAS dismissed their case and the applicants submitted a challenge of the CAS award to the Supreme Court, *inter alia*, on the ground that the award violates substantive public policy by infringing the prohibition of discrimination under both Swiss constitutional law and Article 8 ECHR (Article 190(2)(e) SPILA).

The Supreme Court reiterated its own jurisprudence and the ECtHR's decision in *Mutu and Pechstein* regarding the question whether the CAS qualifies as an

“independent and impartial tribunal established by law” to support its notion that the CAS tribunal was independent and impartial. Furthermore, it cited the ECtHR’s latest decision in the case of *Platini v. Switzerland* (decision of the ECtHR of 11 February 2020, case no. 526/18) and the conclusions therein that neither the obligation to refer a dispute to the CAS nor the limitation of grounds for appeal to the Supreme Court against an award issued by the CAS infringe the right of access to a tribunal enshrined in Article 6(1) ECHR. The Supreme Court stated that it could not act as a general court of appeal on all aspects of a decision by the CAS and that appeals against such decisions had to be restricted to the exhaustive list of grounds under Article 190(2) SPILA, meaning a violation of provisions of the ECHR can only be taken into account within the context of public policy.

The Supreme Court dismissed the alleged violations of substantive public policy. It concluded that to achieve the legitimate aim of fair competition conditions among athletes, the solution adapted in the DSD Regulations were reasonable. The interests of female athletes with and without the “46 XY DS” could not outweigh one another and thus the DSD Regulations were not arbitrary and, consequently, in line with public policy. Even the requirement for athletes with the “46 XY DS” condition to take oral contraceptives in order to achieve a hormone level in compliance with the DSD Regulations it did not view as a violation of public policy. The Supreme Court conceded that such measures might constitute a serious infringement of the right to personal integrity. However, it rejected the argument that such breach was not justifiable by the legitimate aim and proportionate means of the DSD Regulations.

Conclusion

Both Supreme Court decisions match its restrictive approach to challenges against arbitral awards rendered in Switzerland in general and interpreted the ECtHR’s decision in *Mutu and Pechstein* in the narrowest way possible. As much as the issue of human rights as a basis to challenge arbitral awards in Switzerland seems to be driven by sports arbitration, the Supreme Court did, however, not elaborate on the question whether the ECHR was directly applicable to proceedings before the CAS. It merely rejected the argument that a violation of the ECHR (or Swiss constitutional law) could be invoked as a ground by itself to set aside a CAS decision. Appellants in the future will need to satisfy the high threshold of a serious

violation of public policy established by the Supreme Court. As with other violations of public policy, it does not suffice that a different solution would be more preferable, rather a decision must "*seriously disregard a clear and unchallenged legal standard or principle, or shockingly offend the feeling of justice and equity*" (case no. 4A_398/2019, cons. 9.1). Nevertheless, the decisions of the Supreme Court need to be interpreted in light of the underlying specific circumstances and should not be taken out of context. For example, the denial of a public hearing (as in case no. 4A_486/2019) might seem more severe where an individual's reputation is at stake. It will be interesting to see the Supreme Court's case law become more nuanced on this issue in time.