Kluwer Arbitration Blog

Sports Arbitration and Due Process

Laurence Burger (Perréard de Boccard) · Wednesday, March 2nd, 2011

Sports arbitration is becoming an increasingly important field. In Switzerland, where the Court for Arbitration for Sports is located, the Swiss Supreme Court is seeing lately nearly half of its cases coming from the CAS.

Sports arbitration, however, gives rise to a specific concern with respect to the issue of consent. Often, athletes find themselves before arbitral tribunals whose jurisdiction was not directly chosen by them, but to which they are attracted for the sole reason that they signed an agreement with a federation which submits its disputes to arbitration. Courts, and in particular the Swiss Supreme Court, have seldom held arbitration agreements by reference in the sport context to be contrary to due process. The stated reason, to which the author adheres, is that arbitration representing the functional equivalent of judicial process, an athlete cannot be deemed to enter into an engagement violating its personality rights (and in particular Article 27 of the Swiss Civil Code) when entering into an arbitration agreement. Moreover, the recourse to arbitration is often in the best interest of the federations, by ensuring an harmonious case law, and of the athletes, by ensuring in particular a speedy resolution of their disputes.

Nevertheless, the situation changes when, as a result of the entering into an arbitration agreement by reference, a party looses his right to see his matter decided by a judge.

A 2009 decision of the Swiss Supreme Court raises this specific issue.

In a decision 4A_600/2008 dated February 20, 2009, the Supreme Court had to consider a challenge of a decision of the CAS which deemed an appeal withdrawn after the appellant failed to pay the advance on costs.

The facts of the matter arise out of a claim filed with the International Football Federation by a football club against the club's former coach, whereby the club claimed EURO 400,000 to the coach for early termination of the employment agreement. The coach, alleging that the sum had already been paid, concluded that the claim be dismissed.

The Commission of the Player's Status considered that proof of payment had not been brought with satisfaction and condemned the defendant to pay the amount plus interests.

The defendant appealed this decision before the CAS. The CAS acknowledged receipt of the appeal and brought the attention of the parties to the fact that they would have to pay an advance of costs. About a month later, the CAS informed both parties that the advance on costs had been set at

CHF 19,000 each, and asked to be paid this amount by 15 September 2008. While the appellant paid this amount within the deadline, the appellee did not. On September 25, 2008, the CAS set the appellant another deadline until October 10, 2008 to pay the advance on costs. The letter of CAS reminded the appellant that "in the absence of payment within the said time limit, the appeal will be deemed withdrawn".

On October 15, 2008, the CAS reminded the appellant that the deadline had passed and asked him to provide evidence of payment of the advance on costs. Counsel for appellant replied that the advance on costs would be paid shortly.

On 12 November 2008, the advance on costs having not been paid, the CAS send a fax to the parties informing them that the appeal was deemed withdrawn and that a closing order would be sent shortly.

On 13 November 2008, appellant's counsel sent a confirmation of payment to the CAS and asked to be informed of the continuation of the proceedings. Attached to this correspondence was a letter dated 12 November 2008 of the appellant requesting his bank to wire CHF 19,000 on the CAS' account.

By order of 18 November 2008, the President of the CAS Appellate Chamber [verify terminology] declared the proceedings closed. On 20 November 2008, the CAS received a notice of credit informing it that the appellant had paid CHF 19,000 on its account.

The CAS order of 18 November 2008 was challenged before the Supreme Court. The CAS took position to dismiss the challenge on the ground that the order was not an award. The Supreme Court admitted the challenge but rejected it on the merits.

One of the grounds raised by the appellant was the fact that the CAS had been excessively formalistic in holding the appeal as withdrawn although the advance on costs had been received, albeit late. Because of the CAS dismissal, the appellant was loosing any chance not to pay EURO 400,000 a second time. The Supreme Court dismissed however this argument, holding that it was not excessively formalistic for the CAS to withdraw the appeal when it was conditioned upon the payment of an advance on costs and when the appellant had been duly informed of the amount of the advance and of the deadline for payment.

Although this decision did not receive much attention, it raises difficult issues of due process which go beyond the sole issue of consent. Here, the defendant lost an opportunity to have his case heard by the CAS. The CAS, in this case, would have been the first instance external to the FIFA and thus truly independent.

I do not know what happened to the dispute afterwards, and in particular if the defendant tried to bring the matter before a state court, and more importantly whether a state court would have heard an issue already decided by the FIFA.

In light of the circumstances of the case, and in particular of the CAS' numerous attempts to see the advance of costs paid, I do not believe that it can be blamed for the outcome of the case, in particular in light of the negligence displayed by counsel for the defendant.

But the matter remains unsettling, particularly if the defendant consented to arbitration by reference. In this case, not only did the defendant not choose to bring the matter to arbitration, but

also, because of this imposed dispute resolution mechanism, ended up without the possibility to have his dispute reviewed by a court of independent jurisdiction. This result seems to be pushing the limits of the constitutionally guaranteed right to an access to a judge.

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