Petitioner must demonstrate current interest in having award set aside (Swiss Supreme Court)

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In *decision 4A_620/2015*, the Swiss Supreme Court considered a petition to set aside an arbitral award in circumstances where the petitioner lacked a "current, practical and concrete" interest in having the award set aside.

Prof. Dr. Nathalie Voser (Partner) and Elisabeth Leimbacher (Senior Associate), Schellenberg Wittmer Zurich

Speedread

The Swiss Supreme Court has rejected a petition to set aside an arbitral award on the ground that the petitioner lacked a "current, practical and concrete" interest in having the award set aside. The court noted that the petitioner, who already lacked a legitimate interest in the context of proceedings before the Court of Arbitration for Sport (CAS), had therefore, no "current" interest when challenging the CAS award before the Supreme Court. (*Decision 4A_620/2015*.)

Background

Article 76(1)(b) of the Federal Supreme Court Act (FSCA), provides that a petitioner must have an interest worthy of protection in having an arbitral award set aside.

Facts

A dispute arose between the parties in the context of a sports arbitration. The main issue was the interpretation of a specific provision of the FIFA Regulations on the Status and Transfer of Players according to which a player can only be registered with three clubs at the same time and can only participate at two official games on behalf of two clubs during a season (from 1 July until 30 June of the following year) (RSTP Provision).

A professional football player (Player) was registered with Club B since August 2010 for which he only played one match in the context of the U21 Professional Development League (U21 PDL Game). He was later seconded to Club C for which he participated in several games. In January 2015, the Player and Club B jointly terminated their contract and on the next day the Player registered with Club D for the season 2014/2015. Before approving the new contract with Club D, the French Professional Football League (FPFL) (through the French Federation of Football) seised the FIFA Players' Status Committee (PSC) to find out whether U21 PDL matches were "official games" under the RSTP Provision. The PSC answered in the affirmative (PSC Decision). On this basis, the FPFL approved the new contract but specified that the Player could not participate in official matches before the end of season 2014/2015, that is until 30 June 2015 (FPFL Decision).

The Player did not challenge the FPFL Decision. Instead, it challenged the PSC Decision before the Court of Arbitration for Sport (CAS), which rejected the appeal on the ground that the Player had no legitimate interest since the PSC Decision provided for a general interpretation of a statutory provision and did not adjudicate its particular case (CAS Award).

The Player filed a petition to set aside the CAS Award before the Swiss Supreme Court.

Decision

The Supreme Court rejected the appeal.

It reaffirmed its long standing case law on the requirement of a "legitimate interest" in having an award set aside pursuant to Article 76(1)(b) FSCA. To have a legitimate interest, the petitioner must show that the decision challenged would be economically or morally detrimental to him. The court also underlined that the petitioner's interest must be current, that it must exist both when the challenge to the award is filed and when the Supreme Court renders its decision.

In this case, the Supreme Court confirmed the reasoning of the CAS, noting that it was not the PSC Decision (which was a general and abstract interpretation of the RSTP Provision) but the FPFL Decision that could have temporarily prevented the Player from playing for Club D. In any event, when the CAS rendered its award in September 2015, the Player had already been able to play for Club D since 30 June 2015 and thus lacked a legitimate interest. Accordingly, the Player no longer had a legitimate interest when it challenged the CAS Award before the Supreme Court.

Finally, the Supreme Court observed that since the request for setting aside was not admissible, it could not rule on the challenge against the costs part of the CAS Award. It referred to its previous *decision 4A_134/2012*, which stated that "when the grounds for appeal invoked against the decision on the merits are inadmissible, the Appellant may only claim that the costs award must be annulled or amended for other reasons than those invoked as to the main issue" (see *Legal update, Football club's request to set aside CAS ruling dismissed due to lack of legitimate and current interest (www.practicallaw.com/8-521-2427)*). In this case the appeal contained no specific arguments against the costs award that differed from those formulated against the decision on the merits.

Comment

Parties considering filing a challenge before the Supreme Court should, among other considerations, analyse if they have the necessary current legitimate interest. Such interest is regularly denied by the Supreme Court, particularly in sports-related cases. The fact that a party wishes to file a claim for damages at a later stage for the lost opportunity to play games and thus might be seen to have a *prima facie* interest to show an irregularity in a sport organisation's decision is not sufficient, *per se,* to establish a current legitimate interest.

Case

Decision 4A_620/2015 (Swiss Supreme Court).

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