Joint and several liability not per se incompatible with Swiss public policy (Swiss Supreme Court)

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In *decision 4A_32/2016*, the Swiss Supreme Court considered a petition to set aside a Court of Arbitration for Sport (CAS) award for incompatibility with Swiss public policy (*ordre public*).

In a French-language decision dated 20 December 2016, but only recently available, the Swiss Supreme Court held that a violation of the personality rights protected by Article 27(2) of the Swiss Civil Code (CC) is only incompatible with substantive Swiss public policy (*ordre public*) in severe cases, violating a fundamental right. Article 27(2) of the CC states that "no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals".

Despite his contract with a football club (Y), a football player (Z) signed a labor contract with another football club (X) for the same seasons on 15 June 2011. Y informed X about the pre-existing contract and called X to desist from hiring Z. Meanwhile, Z was provisionally registered with X. On 19 October 2011, Y filed a claim against Z and X for breach of contract. FIFA's Dispute Resolution Chamber, among other things, found that Z and X were jointly and severally liable under Article 17(2) of FIFA's Regulations on the Status and Transfer of Players (RSTP), to compensate Y in the amount of $670,000. Z and X appealed the decision before the Court of Arbitration for Sport (CAS). On 30 November 2015, the CAS reduced the compensation to $620,000. Based on Article 190(2)(e) of the Private International Law Act (PILA), X (but not Z) appealed against this award under Article 27(2) of the CC for incompatibility with substantive Swiss public policy.

The Supreme Court reiterated the requirements for setting aside an award for incompatibility with substantive Swiss public policy. A violation of the personality rights protected under Article 27 of the CC can only be considered incompatible with public policy in severe cases, where a fundamental right is violated. The joint and several liability of X together with Z, as stated in Article 17(2) of FIFA's RSTP, did not, in this case, lead to a result incompatible with Swiss public policy. Article 17(2) does not violate a fundamental principle of substantive law and the joint liability provision is not excessive. Moreover, the compensation in question did not seriously threaten the economic existence of X as was the case in *decision 138 III 322*.

Case: *Decision 4A_32/2016* (Swiss Supreme Court).

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