Swiss Supreme Court rejects branch-specific notion of public policy

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In decision *4A_116/2016*, the Swiss Supreme Court considered an application to set aside a Court of Arbitration for Sport (CAS) award based on an alleged violation of Swiss public policy by certain third party participation schemes previously common in international football.

In a French-language decision of 13 December 2016 but only recently published , the Swiss Supreme Court clarified that the notion of public policy, despite its dynamic character, cannot be branch-specific (in this case, football-specific).

In 2012, a football club (X) entered into several agreements regarding the acquisition of a player (V) with V's former club and an investment company (Z), under which X effectively transferred 95% of the economic rights in V, to Z and V's former club (third party participation scheme). In 2014, when V was transferred to another club, Z requested its share of the transfer proceeds from X.

X refused payment and initiated arbitral proceedings before the Court of Arbitration for Sport, pleading the invalidity of the third party participation scheme as it encouraged speculation in international football and violated Swiss public policy. The arbitral tribunal dismissed all claims and held that the disputed agreements were valid. X subsequently challenged the award before the Swiss Supreme Court.

The Supreme Court refused to set aside the award. First, it clarified the dynamic nature of the notion of public policy under Swiss law. It then proceeded to assess in detail the economic impact of the disputed agreements, ultimately finding the agreements neither excessive nor usurious nor unduly restrictive of X's economic freedom.

Importantly, the Supreme Court rejected X's argument that previously popular third party participation schemes (now prohibited under the 2015 FIFA Regulations on the Status and Transfer of Players) encouraged speculation and were harmful to international football. The court distinctly rejected an area-specific (in this case, football-specific) notion of public policy, cautioning that such an approach would not only result in practical difficulties and a dilution of the public policy notion, but also infringe the rights of relevant associations (here, FIFA) to independently regulate their internal affairs.

Case: *Decision 4A_116/2016* (Swiss Supreme Court).

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Published on 21-Feb-2017

Resource Type

Legal update: case report

Jurisdiction

Switzerland

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