Swiss Supreme Court confirms restrictive approach to "surprise" decisions by arbitral tribunals

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In decision *4A_716/2016*, the Swiss Supreme Court considered an application to set aside a Court of Arbitration for Sport (CAS) award due to an alleged "surprise" application of the law by the CAS Panel, violating the applicant's right to be heard.

In a French-language decision of 26 January 2017, but only recently published, the Swiss Supreme Court confirmed its restrictive approach to "surprise" decisions by arbitral tribunals.

In 2009, a football player (Z) signed a five-year contract with a football club (X). In mid-2013, Z prematurely terminated the contract and subsequently signed a new contract with another football club (Y). X brought the dispute before the FIFA Dispute Resolution Chamber which found that Z had terminated the contract without good cause and held Z and Y jointly and severally liable for damages.

Z and Y appealed to the Court of Arbitration for Sport (CAS) which set aside the decision of the FIFA Dispute Resolution Chamber. The CAS Panel held that X had not incurred any damage and among other things, took into consideration payments which X had received from another club to which it had loaned Z during the contract period. X subsequently applied to the Supreme Court to vacate the award.

The Supreme Court upheld the CAS decision. It confirmed its long-standing case law, clarifying that the right to be heard primarily applies to the facts, and is of only limited relevance to the law. Unless the arbitration agreement provides otherwise, the arbitral tribunal is free to apply and interpret the legal rules it considers appropriate. A "surprise" decision violating a party's right to be heard can only exist where the arbitral tribunal applies rules in an unpredictable manner, in particular, rules which the parties have not themselves argued. However, the Supreme Court pointed out that the unpredictability of the application of a rule is a matter of discretion and advocated a restrictive approach to "surprise" decisions in order to prevent an improper review of the merits. In the present case, no such "surprise" existed as Z himself had invoked the loan payment before the CAS.

Case: *Decision 4A_716/2016* (Swiss Supreme Court).

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Published on 16-Mar-2017

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Legal update: case report

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