Swiss Supreme Court rules on improper representation in arbitral proceedings

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In decision *4A_668/2016*, the Swiss Supreme Court considered an application to set aside a Court of Arbitration for Sport (CAS) award due to alleged improper representation of the appellant in the arbitration.

In a French-language decision of 24 July 2017, the Swiss Supreme Court refused to set aside a Court of Arbitration for Sport (CAS) award, dated 13 October 2016, in which the sole arbitrator had ordered a football player (X) to pay outstanding monies to an intermediary (Z) in relation to the negotiation of a player loan deal. X applied to the Supreme Court to vacate the award, arguing that the arbitrator had not treated the parties equally and had violated Swiss public policy.

The Supreme Court dismissed the appeal. Among other reasons, the Supreme Court was not convinced by X's contention that the arbitrator had deliberately ignored the fact that X had not been properly represented at the oral hearing, which he himself had not attended. Moreover, it held that X had not substantiated an alleged conflict of interest of his agent (B), who had represented him at the hearing. Ruling based on the facts of this case alone, the Supreme Court left open the interesting issue of a tribunal's obligation with regard to conflicted counsel. Nor did it address the question of whether the award could have been set aside if the existence of a conflict was only discovered after the award had been rendered.

Further, the Supreme Court held that, even if the disputed agreement (as alleged, but again not substantiated, by X) had violated FIFA regulations, this fact alone would not be sufficient to constitute a public policy violation. The court clarified that even a violation of Article 27 of the Swiss Civil Code (which prohibits excessive and overly restrictive contractual obligations and which was applied for the first time in the *Metuzalem* case (*Decision 138 III 322*)) would not of itself constitute a public policy violation, unless it involved a serious violation of fundamental rights. (For discussion about the *Metuzalem* case, see *Legal update, Landmark ruling of Swiss Supreme Court setting aside CAS award for violation of substantive public policy*.)

Case: *Decision 4A_668/2016* (Swiss Supreme Court).

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