Suspected leak to the press does not lead to overturned award (Swiss Supreme Court)

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In *decision 4A_510/2015*, the Swiss Supreme Court considered whether a suspected (but unproven) leak of information from the arbitral tribunal to the press constituted a basis for overturning an arbitral award.

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Speedread

In a French-language decision dated 8 March 2016 and published on 29 March 2016, the Swiss Supreme Court upheld an arbitral award rendered by an arbitral tribunal at the Court of Arbitration for Sport (CAS). Ten days before the award was sent to the parties, a newspaper article purporting to report the outcome of the impending award was published. The appellant alleged that a member of the CAS tribunal had leaked information to the press but was unable to furnish hard proof or a plausible explanation for the leak. The Swiss Supreme Court ruled that under these circumstances, even if there had been a leak, the award would not be set aside. With this case, the Swiss Supreme Court has confirmed the view of many Swiss commentators that a breach of confidentiality will not, in general, result in the setting aside of the award. (*Decision 4A_510/2015.*)

Background

Article 190(2)(a) of the Swiss Private International Law Act (PILA) provides that an award will be set aside if the arbitral tribunal was not properly constituted.

Article 190(2)(d) of the PILA provides that an award will be set aside if the principle of equal treatment or the right of the parties to be heard was violated.

Article 190(2)(e) of the PILA provides that an award will be set aside if the award is incompatible with public policy.

Section 19(1) of the Court of Arbitration for Sport (CAS) Statute provides that "CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS."

Facts

In January 2010, a soccer player (A) transferred from one soccer club (Y) to another soccer club (X), pursuant to a transfer agreement under which X paid to Y US$500,000 and promised not to lend or transfer the player to a third club before 31 December 2011 without Y's written consent. Article 8 of the transfer agreement provided that a violation of this undertaking would result in a contractual penalty of US$2 million. If an anticipated breach of the player's employment contract was attributable to X, X would owe Y a penalty of US$1.5 million. On 19 January 2011, X asked for Y's consent to prematurely terminate the player's employment contract or temporarily transfer him to another club (Z) for personal reasons. Y rejected this demand. At the end of January 2011, X lent the player to Z. Y filed a complaint before the FIFA Player Status Committee. On 13 December 2013, a judge with the FIFA committee rejected Y's complaint, holding that Y had not suffered any specific damage despite a breach of contract attributable to X. Y appealed this decision to a three-member arbitral tribunal at the CAS.

The CAS tribunal held a hearing on 16 July 2015, rendered its award on 24 August 2015 and faxed it to the parties. This decision was apparently not signed by the Chairman of the tribunal until sometime thereafter.

In its award, the CAS overturned the FIFA committee decision. It held that there was no reason not to apply the penalty clause in Article 8 of the transfer agreement providing for a penalty of US$2 million. However, in the specific circumstances, the tribunal reduced the penalty by 25% and ordered X to pay to Y US$1.5 million.

However, on 13 August 2015, 11 days before the award was faxed to the parties, a news article appeared on the internet reporting that a CAS tribunal had ordered X to pay to Y US$2 million in an arbitration between the two clubs. The next day, X sent the CAS an email stating its surprise and asking the CAS to ensure that any decision be first communicated to the parties and not to the press. It stated that otherwise, its right to a fair process would be violated. The secretary general of the CAS immediately ordered an internal investigation. By email dated 24 August 2015, the secretary general informed X that the investigation revealed that any rumour did not originate from either the parties or the arbitrators.

X filed a petition before the Swiss Supreme Court to set aside the award on three grounds.

First, X argued that there was a violation of Article 190(2)(a) of the PILA because of a leak of information from the tribunal to the press.

X alleged that one of the arbitrators must have been the source of the leaks, or perhaps this arbitrator informed Y first, which then contacted the press. According to X, the leak constituted a violation of section 19(1) of the CAS statutes and a particularly grave breach of confidentiality. X argued that the tribunal might have been influenced by the outcome reported in the press. Perhaps the tribunal even tried to protect one of the arbitrators by ensuring that the sum in the final award was not identical to that in the report.

Second, X argued that this breach of confidentiality violated procedural public policy under Article 190(2)(e) of the PILA.

Third, X argued that the failure to reduce the contractual penalty violated substantive public policy under Article 190(2)(e) of the PILA.

Decision

The Swiss Supreme Court rejected the appeal.

It first noted that there was no evidence to support X's allegation that the tribunal had leaked information about the award, nor was the allegation plausible. The news report was wrong on many points, it did not mention any sources, and no journalist had contacted the CAS to verify it. Further, the CAS publishes a list of upcoming hearings and the parties involved on its website. Thus, a journalist might be able to obtain additional information on the case through various sources other than the tribunal. The Swiss Supreme Court added that the leak might have even come from X itself. The Supreme Court stated that the affirmation by the CAS was credible. Finally, X's first reaction after the leak was not to question the arbitrators' impartiality but to ask that the award first be communicated to the parties.

Relying on the majority of Swiss legal commentators, the Swiss Supreme Court held that even if there had been a breach of confidentiality attributable to the arbitrators, such a breach per se would not constitute a basis for setting aside an award. While the court referred to some authors who argue that a breach might violate the principle of equal treatment (*Article 190(2)(d), PILA*) because it provides one party with additional information, this risk was not applicable here because the (meritless) allegation was that the tribunal changed the awarded quantum based on the published report.

The Swiss Supreme Court rejected X's alleged violation of procedural public policy for the same reason.

Finally, as to X's allegation that the award violated substantive public policy, the Swiss Supreme Court confirmed that while Article 163(3) of the Swiss Code of Obligations (which permits a reduction of excessive penalties) is a mandatory provision under Swiss law, that does not mean that it necessarily falls within the narrow scope of substantive public policy within the meaning of Article 190(2)(e) of the PILA (although the court did not expressly exclude that it could). In any event, the arbitral tribunal had considered various aggravating and mitigating circumstances in its application of the contractual penalty, and moreover, had agreed on a US$1.5 million penalty in connection with the player's anticipated breach of contract.

Comment

Confidentiality in arbitration is a perennial "hot topic". This case provided an opportunity for the Swiss Supreme Court to confirm the view of many Swiss commentators that a breach of confidentiality will not, in general, result in the setting aside of an award. However, again consistent with several authors, the court left the door somewhat open to a challenge if the breach results in an improper imbalance of information between the parties.

As in this case, it will often be difficult to prove a breach that is clearly attributable to one of the actors in the arbitration. Here, not only was there no proof, but X's allegations, essentially that one arbitrator sought to influence the quantum of the award by procuring the publication of a report that contained a higher figure than what the tribunal presumably was prepared to award before publication of the report, seemed implausible.

In any event, the case may serve as a reminder to protect against the risk of breaches by including appropriate confidentiality provisions in the terms of reference.

Case

Decision 4A_510/2015 (Swiss Supreme Court).

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