Swiss Supreme Court addresses whether alleged punitive damages constitute public policy violation

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In *joint decision 4A_536/2016 and 4A_540/2016*, the Swiss Supreme Court considered two applications to set aside two Court of Arbitration for Sport (CAS) awards allegedly violating substantive public policy by awarding punitive damages.

Prof. Dr. Nathalie Voser (Partner) and Benjamin Gottlieb (Associate), Schellenberg Wittmer Ltd

In a French language decision dated 26 October 2016, but only recently published, the Swiss Supreme Court rejected two applications to set aside Court of Arbitration for Sport (CAS) awards allegedly awarding punitive damages by combining contractual penalties and several delay interests.

Both parties to the dispute were professional soccer clubs. The respondent commenced its first arbitration against the petitioner for outstanding payments based on a player transfer agreement. In several subsequent arbitration proceedings, the respondent successfully claimed payment of sums including delay interests and contractual penalties.

In the present case, which was directed against the latest awards in this series, the petitioner claimed that the combination of penalties and interest payments was punitive and thus violated substantive public policy. The Supreme Court examined the different contractual and statutory interest rates, as well as the contractual penalties. It concluded that they were not excessive and thus did not relinquish the parties' economic freedom or restrict the use of such freedom to a degree that was contrary to law or morals. In the context of statutory provisions to reduce contractual penalties, it further noted that domestic mandatory norms do not automatically amount to public policy provisions.

Finally, the Supreme Court, while concluding that no punitive damages had been imposed considered whether punitive damages were contradictory to substantive public policy. As in a previous decision rendered in 2012, it left the question open, but held that the majority view in Switzerland was that awarding punitive damages was not in itself sufficient to constitute a breach of substantive public policy.

Case: *Joint decision 4A_536/2016 and 4A_540/2016 (www.practicallaw.com/w-005-0784)* (Swiss Supreme Court).

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