Swiss Supreme Court confirms CAS award in dispute over penalty payments for sports agents

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In *decision 4A 568/2015,* the Swiss Supreme Court considered a petition to set aside an award rendered by a Court of Arbitration for Sport (CAS) panel for violating the parties' right to be heard and being incompatible with (substantive) public policy.

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Speedread

In a German-language decision dated 10 December 2015 and published on 29 January 2016, the Swiss Supreme Court rejected a soccer player's petition to set aside a Court of Arbitration for Sport (CAS) award on the ground that it violated his right to be heard and was incompatible with public policy, in a dispute over a contractual penalty payment for the player's sports agents.

The Supreme Court held that A's petition merely criticised the reasoning of the award and the outcome of the case, without coming close to establishing a violation of the right to be heard and/or an incompatibility with public policy. (*Decision 4A 568/2015.*)

Background

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

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

Articles 158 et seq. of the Swiss Code of Obligations (CO) provide for rules regarding, among other things, the admissibility of contractual penalties, the relationship between a contractual penalty on the one hand and performance and/or damages on the other, as well as the penalty amount due and its possible reduction at the court's discretion.

Article 404 CO provides that an agency contract may be revoked or terminated at any time by either party. However, a party doing so at an inopportune juncture must compensate the other for any resulting damage.

Article 27 of the Federal Constitution of the Swiss Confederation (FCSC) provides that economic freedom is guaranteed, including in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.

Article 29(2) FCSC contains the constitutional right to be heard.

Facts

On 1 March 2014, an Argentinian soccer player (A) and two sports agents (B and C) entered into an agreement, for a fixed period of 24 months. Under the agreement, B and C would exclusively broker and negotiate contracts for A, in return for ten per cent of A's annual income. Under the terms of the agreement, B and C would receive EUR 1 million in contractual penalty payments if A were to unilaterally terminate the agreement.

On 27 May 2014, A unilaterally terminated the agreement. At the time of termination, A was under contract with soccer club E, but on loan to club F. After club F had exercised its unilateral right to make the transfer permanent at the end of May 2014, A signed a new contract with club D on 16 July 2014.

Subsequently, B and C initiated proceedings under the Court of Arbitration for Sport (CAS) Code, requesting payment of EUR 3 million in contractual penalties. On 12 August 2015, following a hearing on the merits in April 2015, the CAS panel partially granted the request and ordered A to pay EUR 1 million to B and C.

A filed a petition to set aside the award, arguing that his right to be heard was violated since the CAS panel had ignored:

- Several of A's express requests for B and C to prove and substantiate certain allegations.
- The fact that, based on the case file, certain allegations by B and C were demonstrably wrong.
- A's actual motives for terminating the agreement.

In addition, A argued that the award was incompatible with public policy for disregarding A's legal reasoning relating to Article 404 CO, Articles 158 et seq. CO, and Article 27 FCSC.

Decision

The Supreme Court rejected the petition.

The Supreme Court confirmed its established case law, whereby the right to be heard under the PILA is equivalent to that granted under Article 29(2) FCSC, except for the right to a reasoned and substantively correct award. As a result, it is not for the Supreme Court to review whether an arbitral tribunal considered and properly understood each and every part of the case file. According to the Supreme Court, A had failed to show how the CAS panel prevented him from pleading his case during the arbitration.

As regards the potential violation of public policy, the Supreme Court held that A merely (and inadmissibly) criticised the legal reasoning of the CAS panel relating to Articles 158 et seq. and 404 CO. According to the Supreme Court, attacking the CAS panel's finding of validity relating to the penalty clause as wrong, illegal and simply untenable did not give rise to a violation of public policy.

The was true for A's argument that, as a matter of public policy, Article 27 FCSC provides for fixed-term contracts to be terminable at will and at any time. In particular, A had failed to show, in this context, that payment of the agreed penalty would constitute a manifest and grave violation of his personal rights capable of rendering the award incompatible with public policy.

Comment

This is another in a long series of cases where an unsuccessful party has attempted to use the right to be heard as a vehicle for achieving a substantive review of the award (for example, see *Legal update, No violation of a party's right to be heard where a tribunal does not address arguments that it considers to be irrelevant (www.practicallaw.com/1-622-7247)*). Once more, the attempt failed.

A's reliance on Article 404 CO and/or Article 27 FCSC in order to establish, as part of public policy, the right to terminate fixed-term contracts at will and at any point in time appears as creative as it was futile under the circumstances.

The present decision may bring some legal certainty for players and sports agents with regard to the validity of penalty clauses sanctioning a player's untimely or immediate termination of a fixed-term agency contract.

Case

BGer 4A_568/2015 (www.practicallaw.com/D-036-5061) (Swiss Supreme Court).

Resource information

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