

Swiss Supreme Court denies excessive formalism and rules on applicability of legal aid regime in setting aside proceedings

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In *decision 4A_690/2016*, the Swiss Supreme Court considered whether a Court of Arbitration for Sport (CAS) tribunal was overly formalistic in rejecting the admissibility of an appeal to the CAS because the appeal was, within the deadline, only submitted by facsimile and not in its original. It further considered the possibility of being granted legal aid in setting aside proceedings.

Speedread

In a French-language decision of 9 February 2017, but only recently published, the Swiss Supreme Court ruled, among other issues, that it was not excessively formalistic to reject the admissibility of an appeal because it was submitted within the deadline only by facsimile and not in its original. The Supreme Court ruled that filing deadlines are to be adhered to strictly in order to ensure legal certainty and so that the proceedings are being conducted in accordance with the principle of equal treatment of the parties.

It further ruled on an application for legal aid in setting aside proceedings. It had been uncertain based on its prior rulings, whether the exclusion of legal aid only applied to the arbitration proceedings as such or extended to subsequent setting aside proceedings as well. The Supreme Court found that while legal aid is not available for arbitration proceedings, this exclusion does not apply for setting aside proceedings before a state court. However, in the present case the application for legal aid was denied, as the Supreme Court found that the appeal was devoid of any chance of success and, therefore, the applicant was not entitled to legal aid, regardless of his financial situation. (*Decision 4A_690/2016*.)

Background

Article 190(2)(d) of the Swiss Private International Law Act (PILA) permits the initiation of setting aside proceedings where the principle of equal treatment of the parties or the parties' right to be heard is violated.

Article 190(2)(e) of the PILA allows setting aside proceedings to be initiated where the award is incompatible with public policy.

The PILA does not contain a specific provision for legal aid with regard to arbitration. However, Article 380 of the Swiss Civil Procedure Code (CPC) specifically excludes legal aid for domestic arbitration. As there is no reason to differentiate between domestic and international arbitration on this point, the Supreme Court has held that Article 380 of the CPC applies analogously to international arbitration.

For proceedings before the Supreme Court, including setting aside proceedings, the conditions under which legal aid is granted are codified in Article 64 of the Federal Supreme Court Act (FSCA), which stipulates that legal aid is granted to applicants who do not have the necessary financial means if their petition does not seem devoid of any chance of success.

Facts

While the decision is sparse on factual background, the dispute seems to have arisen from the transfer of a professional football player to another football club, which led to claims for damages by the player's former club for breach of contract without just cause.

In its decision of 4 October 2016, the Court of Arbitration for Sport (CAS) ruled inadmissible the petition by the appellant, the professional football player, against a decision dated 10 April 2015 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA), in which the appellant and one of the football clubs involved were held jointly and severally liable to pay EUR3,100,000 to another football club as compensation for breach of contract without just cause.

The appellant had, within the filing deadline, only submitted a facsimile of his submission but not the original. Under the CAS procedural rules an advance copy may be transmitted by facsimile but filing is only valid upon receipt of such advance copy if the original is filed within the first subsequent business day (CAS Procedural Rules R31). Therefore, the CAS considered the submission to have been filed past the deadline and ruled it inadmissible.

On 5 December 2016 the appellant filed a request with the Swiss Supreme Court to have the CAS decision annulled for violating the principle of equal treatment of the parties, his right to be heard and excessive formalism. He also requested legal aid for the proceedings before the Supreme Court.

Decision

The appeal was dismissed and the application for legal aid denied. The appellant had missed the filing deadline because he had only submitted his appeal by facsimile, which according to the CAS procedural rules is insufficient. The appellant's argument, that the CAS had violated procedural public policy in, therefore, considering the appeal inadmissible was primarily rejected by the Supreme Court for lack of proper substantiation. Although not strictly necessary, the Supreme Court went on to rule that legal certainty and the principle of equal treatment of the parties would be in jeopardy if filing deadlines and formal requirements were not strictly adhered to. Therefore, a strict interpretation of these requirements does not amount to excessive formalism. The Supreme Court further rejected the appellant's claim that the CAS acted in bad faith when accepting an advance on costs even though the submission was ultimately considered inadmissible for having been submitted too late.

The Supreme Court also extensively addressed the appellant's request for legal aid and, while ruling that the appellant's petition did not merit legal aid because his claims were devoid of any chance of success, it held that legal aid is in general available for setting aside procedures. The Supreme Court had previously ruled that legal aid was not available for arbitration proceedings, as it was not incumbent on the state to facilitate access to justice not administered by it. However, the Supreme Court has now ruled that a differentiation has to be made between an

arbitration proceeding as such and a subsequent setting aside proceeding before a state court. In the latter, legal aid must be available pursuant to the same criteria as in any other proceeding before a state court.

Comment

The Supreme Court addressed two noteworthy issues in this decision.

The Supreme Court elaborated on the question of what constitutes excessive formalism. It did so even though it had already concluded that the appellant's claim on this point was insufficiently substantiated. What seems interesting in this context is that the Supreme Court, by entering into the discussion, implicitly seems to accept that excessive formalism pertains to the procedural public policy. In the present case, there were good reasons to apply formal conditions strictly, but this case seems to open the door to argue excessive formalism when this is not the case.

In addition, this is the first time the Supreme Court has explicitly ruled on the question of legal aid in setting aside proceedings. It had in prior cases, only implicitly acknowledged that the legal aid regime applied also in setting aside proceedings. Furthermore, it had on at least one occasion previously, by its own admission, wrongly concluded that legal aid was excluded in setting aside proceedings because it was not available in the arbitral procedure (*order dated 10 February 2009 in case 4A_44/2009*). With this new and explicit decision, the Supreme Court follows the prevalent opinion of legal scholars and establishes legal certainty on this question. While this is to be welcomed, the cases where legal aid can be granted will be very few (if not even remain theoretical) taking into account, on the one hand, the requirement that the appeal must not seem devoid of any chances of success, and, on the other hand, that the chances of success in setting aside proceedings before the Supreme Court are less than 10%.

Case

Decision 4A_690/2016 (Swiss Supreme Court).

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