Breach of mandatory statutory provisions alone does not automatically constitute violation of Swiss public policy

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In *decision 4A_132/2016*, the Swiss Supreme Court considered a petition to set aside an award rendered by the Court of Arbitration for Sports (CAS) for being incompatible with substantive public policy.

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The Swiss Supreme Court has rejected a petition to set aside an award rendered by the Court of Arbitration for Sports (CAS) for being incompatible with substantive public policy. The court reiterated that an arbitral award is contrary to public policy if it disregards or is incompatible with fundamental legal principles that constitute the basis of any legal system. In this case, the petitioner had argued that the award disregarded mandatory provisions of French and Swiss statutory law, specifically the provisions governing the maturity of salary payments. The court clarified that because a statutory provision is mandatory, meaning that parties may not deviate from the provision by mutual agreement, it does not mean that it falls within the scope of public policy under Article 190(2)(e) of the Private International Law Act (PILA). Therefore, the court found that the petitioner had misconstrued the concept of public policy. (*Decision 4A_132/2016.)*

Background

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

Facts

A French football player (A) terminated his employment contract with a Cypriot football club (B), with immediate effect, due to the club's repeated delays in making salary payments and reimbursing expenses. Before the Fédération Internationale de Football Association (FIFA) Chamber for Dispute Resolution, A requested payment of the outstanding sums as well as damages for loss of future salary payments. As he was only granted a small part of his claim, A appealed the decision before the Court of Arbitration for Sports (CAS).

The CAS tribunal awarded A the outstanding salary payments, but rejected his claim for damages relating to the loss of future remuneration. The CAS found that A did not have "just cause" to terminate the contract with immediate effect, as required under Article 14 of the FIFA Regulations on the Status and Transfer of Players.

Thereafter, A petitioned for the award to be set aside before the Swiss Supreme Court on the basis that it was incompatible with Swiss public policy pursuant to Article 190(2)(e) of the PILA.

Decision

The Supreme Court rejected the petition to set aside the award. The court reiterated that an arbitral award is contrary to public policy, within the meaning of Article 190(2)(e) of the PILA, if it disregards fundamental legal principles and is entirely incompatible with essential and prevalent values which, according to prevailing view in Switzerland, should constitute the basis of any legal system. Such legal principles include, for example:

- The principle of *pacta sunt servanda* (agreements must be kept).
- The prohibition of the abuse of rights.
- The principle of good faith.
- The prohibition of discrimination.

The Supreme Court held that A, when disputing the CAS award, misconstrued the concept of public policy. A had argued that the award disregarded mandatory provisions of French and Swiss statutory law, specifically the provisions governing the maturity of salary payments. The court clarified that the fact that a statutory provision is mandatory, meaning that parties may not deviate from the provision by mutual agreement, does not mean that it falls within the scope of public policy under Article 190(2)(e) of the PILA and would therefore, be subject to the Supreme Court's review.

Comment

Whilst the decision does not contain any new holdings, it demonstrates the Supreme Court's reasoning when a party attempts to widen the ambit of the court's scrutiny to include a review on a tribunal's wrong application of the law and wrong determination of the facts.

The Supreme Court held that the limited grounds for review of Article 190(2) of the PILA applies to all international arbitrations and thus also to employment contracts of athletes. In 2007, the Supreme Court held that athletes could not validly waive the possibility of appeal of an arbitral award as provided for in Article 192 of the PILA (*DFT 133 III 235 dated 22 March 2007*). It appears from the present decision that the court is not willing to make further adaptations to Swiss arbitration law in order to take into account the specifics of sports related disputes. In any event, adaptations of the law which go beyond the interpretation of the statutory provisions would have to be decided by the Swiss legislator.

The pending revision of Swiss arbitration law would allow for the introduction of provisions specific to sports arbitration. However, whether or not this is desirable is an open question.

Case

Decision 4A_132/2016 (www.practicallaw.com/9-633-6389) (Swiss Supreme Court).

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