Swiss Supreme Court sets aside CAS award on jurisdictional grounds

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In decision 4A_432/2017, the Swiss Supreme Court considered a request to set aside an award issued by the Court of Arbitration for Sport (CAS) based on the petitioner’s argument that the CAS panel had wrongfully accepted jurisdiction.

Speedread

In a decision dated 22 January 2018, and published on 26 February 2018, the Swiss Supreme Court granted a request to set aside an award rendered by the Court of Arbitration for Sports (CAS) for lack of jurisdiction of the deciding CAS Panel.

Based on its interpretation of the dispute resolution clause in question, the Swiss Supreme Court held that the intention of the parties to submit their dispute to arbitration, to the exclusion of state court litigation, was not established with sufficient clarity. (Decision 4A_432/2017.)

Background

Article 190(2)(b) of the Private International Law Act (PILA) provides that an award will be set aside if the arbitral tribunal wrongfully accepted or declined jurisdiction.

Article 178(2) of the PILA provides that an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

Facts

In September 2011, professional football player A and former players’ agent B, licensed by the Argentinian Football Association (AFA), entered into an exclusive brokerage contract. The contract contained a dispute resolution clause in Spanish. The CAS award included a translation into English, based on a translation submitted by B as follows:

"For processing and elucidation of any conflict that may arise in connection with the conclusion, interpretation, execution, and extinction of the present contract and without prejudice that can occur before national and international bodies corresponding states [...], based on the constitutional guarantee of natural judge (Art. 18 N.C.) the parties submit themselves to the jurisdiction and decisions of the courts in the Comercial de Capital Federal, República Argentina."
In the months following the conclusion of the contract, A renewed his employment contract with football club D, signed a sponsoring deal with company E, and sold the rights to his image for use in a computer game. In December 2012, A terminated the brokerage contract. In January 2013, A entered into an employment contract with football club F.

In September 2013, B initiated proceedings before the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) (FIFA Committee) and submitted a claim against A for alleged outstanding remuneration under the brokerage contract. In June 2015, the FIFA Committee refused to admit the claims.

Upon B's appeal, the CAS, in an award dated 21 June 2017, set aside the decision rendered by the FIFA Committee and ordered A to pay to B EUR 560,000 plus interest.

A filed a petition to set aside the award with the Swiss Supreme Court. A argued that the CAS had wrongfully accepted jurisdiction, as no valid arbitration agreement existed between the parties.

**Decision**

The Swiss Supreme Court granted the request to set aside the CAS award.

As an initial matter, the court referred to Article 178(2) PILA and stated that in the absence of a choice of law clause in the brokerage contract, it will apply Swiss law when assessing the validity of the arbitration agreement.

As a first step, the court recalled its established case law regarding the assessment of the validity of arbitration agreements. The court defines an arbitration agreement as an agreement between two or more parties to submit any existing or future disputes to arbitration in accordance with expressly or tacitly specified rules, to the exclusion of state court litigation. A decisive factor is that the parties express their intention to waive state court litigation in favour of obtaining a decision from an arbitral tribunal.

The court reiterated that an arbitration agreement must be interpreted based on the general interpretation rules under Swiss contract law. Accordingly, the court primarily relies on the parties' true and common intent (so-called subjective interpretation). As the establishment of such intent rests on the consideration of evidence, such interpretation lies outside of the Swiss Supreme Court's scope of review. However, if the true and common intent of the parties cannot be ascertained based on the evidence adduced, the arbitration agreement must be interpreted based on the principle of good faith (so-called objective interpretation). Such interpretation is open to the court's review. Accordingly, the court determines the presumed intention of the parties by examining the meaning that each party, acting in good faith, was entitled to ascribe, or must have ascribed, to the agreement.

In this context, the court recalled its long-standing practice whereby it applies a restrictive approach with regard to the parties' consent to arbitrate. In particular, considering that a waiver of state court litigation results in a limitation of the legal remedies available to the parties following the rendering of the arbitral award, such waiver cannot be assumed lightly. On the other hand, once the parties' consensus to submit their dispute to arbitration is established, the court adopts a more liberal, arbitration friendly approach in its interpretation of the scope of the arbitration clause.
The Swiss Supreme Court proceeded to apply the above interpretation principles to the dispute resolution clause at hand.

The court held that the CAS had indirectly accepted jurisdiction by accepting the FIFA Committee's jurisdiction based on the brokerage contract. However, the CAS award does not contain an ascertainment of a mutual consensus between the parties. Hence, the dispute resolution clause must be interpreted based on the principle of good faith.

The court observed that the clause did not mention an arbitral tribunal let alone the CAS. Rather, the parties expressly submitted themselves to the jurisdiction of the commercial courts of the Argentinian capital, with reference to the right to a constitutional judge. According to the court, a reference to the dispute resolution bodies of the AFA and FIFA could not be determined based on the clause's wording, nor on the circumstances of the contract's conclusion. B had argued an alternative competence between the association bodies referred to in the dispute resolution clause and the state courts. The CAS in its award had assumed a precedence of the association authorities where a dispute falls within their respective scopes.

The Swiss Supreme Court held that the reference to the AFA and FIFA bodies did not reflect a clear presumed intention of the parties to waive state court jurisdiction in favour of arbitration with regard to disputes arising from the brokerage contract. The two referenced authorities are not arbitral tribunals, but mere internal association bodies. Further there were no indications that the dispute resolution clause providing for disputes to be resolved in the courts of Argentina, constituted a mere substitute jurisdiction, to be used only in cases where the association authorities had declined jurisdiction. Under the pertinent association rules, all national disputes between players and players' agents fall under the competence of the AFA, and all international disputes between players and player's agents fall under the competence of the FIFA Committee. Against this background, the CAS' assumption of a precedence of the association committees would, in fact, leave no room for any potential jurisdiction of the state courts of Buenos Aires. To give a rank order when considering the wording of the dispute resolution clause did not correspond to the parties' presumed intention. Further, the parties' express emphasis on the right to a constitutional judge could not be reconciled with B's argument that the parties were at liberty to choose between the association bodies or the Argentinian state courts.

Aside from the fact that the dispute resolution clause did not mention the jurisdiction of an arbitral tribunal, an interpretation based on the principle of good faith did not provide for a clear order of priority between the associations and the state courts. Accordingly, the contractual provision lacked the required certainty regarding future dispute settlement before an arbitral tribunal. The clause did not allow for the conclusion, based on good faith considerations, that the parties had a common intention to waive state court litigation.

Therefore, the CAS panel wrongfully accepted jurisdiction to decide on the present matter.

**Comment**
This case led to one of the rare instances in which the Swiss Supreme Court granted a request to set aside an arbitral award.

Although the restrictive approach to interpretation of arbitration agreements requiring that a clear intention of the parties to refer their dispute to arbitration has come under scrutiny by some legal authors in Switzerland, this decision confirms that the Swiss Supreme Court consistently applies this approach and intends to continue to apply it.
The CAS award which was set aside seems to have applied the somewhat more relaxed approach whereby an agreement to arbitrate is generally assumed in disputes involving athletes. But the Swiss Supreme Court, with the present decision, clarified that such a relaxed approach is only justified where there are no indications to the contrary. The decision might also be understood to confirm that the broader approach is only applicable where the purpose warrants a harmonised dealing with the issues at stake by the CAS tribunal, such as in doping cases in particular.

**Case**

*Decision 4A_432/2017*