

Challenge of CAS award related to football corruption scandal dismissed (Swiss Supreme Court)

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In decision 4A_494/2018, the Swiss Supreme Court dismissed an application to set aside an award and found that the Court of Arbitration for Sport (CAS) panel had not violated the appellant's right to be heard or public policy.

The dispute leading to the Supreme Court decision dated 25 June 2019 (rendered in French and recently published) arose in connection with a contract between a sports consulting company (appellant) and the South American Football Confederation (CONMEBOL). Before and after the signing of the contract, allegations of corruption were made against several of CONMEBOL's representatives. The appellant terminated the contract on the basis that these events jeopardised its reputation. CONMEBOL initiated arbitration before the Court of Arbitration for Sport (CAS) requesting that the appellant pay the contract price. The CAS panel granted CONMEBOL's requests. The appellant challenged the award on two grounds.

First, it argued that the CAS panel had violated its right to be heard because it had failed to examine whether the corruption events that occurred after the signing of the contract, were foreseeable at the time of signing of the contract, which was relevant to the application of the concept of *clausula rebus sic stantibus* (a concept similar to hardship rendering a contract unenforceable due to changed circumstances). The court found that the CAS panel had, at least implicitly, considered that the appellant was aware of certain corruption events before signing the contract, and that, therefore, the subsequent events were foreseeable.

Second, the appellant claimed that the award was contrary to public policy in that the CAS panel violated the *clausula rebus sic stantibus* concept by ignoring the subsequent corruption events. The court did not examine whether a violation of the *clausula rebus sic stantibus* concept would be contrary to Swiss public policy, simply noting that it constituted an exception to the *pacta sunt servanda* principle. The court ultimately held that the CAS panel's decision was not incompatible with public policy, dismissing the appellant's argument on this ground. In relation to both the appellant's arguments, the court held that the appellant was in fact seeking to have substantive or factual issues re-examined, which is inadmissible.

Whilst the Supreme Court avoided deciding whether corruption allegations, and alleged hardship deriving therefrom, could fall within the ambit of public policy, its indication that the *clausula rebus sic stantibus* concept constitutes an exception to the *pacta sunt servanda* principle could suggest that, depending on the circumstances, it might be open to accepting a motion to set aside an award on grounds of a violation of *clausula rebus sic stantibus* in the future.

Case: *Decision 4A_494/2018 (Swiss Supreme Court)*.

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