NEWS SECTION

Switzerland

FOOTBALL

Federal Supreme Court No.4P.314/2005, February 21, 2006

LT Court of Arbitration for Sport; Football; Severance payments; Switzerland; Termination of employment

Facts: A Swiss football club (second division) employed a professional football player of a non-European nationality for two years. After the signing of the agreement, the club filed a request for a residency and work permit with the competent authorities. The request was rejected, and, for this reason, the club terminated the employment agreement with immediate effect. The player did not accept this termination and filed a claim with the competent body of the World Football Association, FIFA, requesting for his salary for the two years to be paid. He won, to a large extent.

The club appealed against this decision to the Court of Arbitration for Sport (''CAS''). The CAS awarded the player approximately a third of the amount he had been awarded by FIFA, arguing with various provisions of the employment law section of the Swiss Code of Obligations (''CO''). Basically, it said that the termination was justified after the rejection of the request for a residency and work permit. It also stated, however, that the club had been acting negligently by employing a player who had little chance of obtaining a residency and work permit and therefore had to pay him compensation in the amount of seven and a half months' salary.

The player filed an action to set aside this award with the Federal Supreme Court (''FSC''), claiming that the CAS award was incompatible with public order (i.e. the principle *pacta sunt servanda*) and therefore requesting the annulment of the CAS decision. In his explanatory statement, he went into much detail, stating that the CAS had allegedly wrongly applied Art.337 CO (termination without notice) instead of Art.324 CO (wages in case of prevention from working), had not taken the behaviour of the club into account sufficiently and had not properly explained the grounds given for its decision.

Held: The FSC rejected the action to set aside, to the extent it was admissible at all. It stated that the player did not understand the legal nature of the action to set aside, whose limited scrutiny allows at most the correction of fundamental mistakes. According to Art.190 of the Swiss Federal Act on Private International Law (''PILA''), a final decision of an arbitral tribunal may be set aside by the FSC under certain (limited) circumstances, such as irregular constitution of the arbitral tribunal, wrongful acceptation or declination of jurisdiction by the arbitral tribunal, violation of the right to be heard and similar issues. The player had instead filed an appeal on detailed substantive matters, which is not admissible against a final decision of an arbitral tribunal.

The FSC pointed out that, in the present case, it certainly would have been possible to claim that the principle of *pacta sunt servanda* was violated. Owing to the court's limited scrutiny, however, the player would only have been able to claim severe misinterpretations of Swiss law and obvious contradictions within the decision which would have amounted to a violation of the principle of *pacta sunt servanda*. These mistakes were not made in the present case.

Comment: Not only in sports arbitration but in international arbitration in Switzerland in general, parties need to be aware of the fact that—even

though the law offers the action to set aside—the FSC will not review the final decision of the arbitral tribunal in detail. The possible grounds for setting aside an award of limited nature grant the arbitral tribunal's furthermost final jurisdictional power but still offer a correction possibility for fundamental mistakes.

The parties may even, according to Art.192 PILA, exclude this action to set aside if none of them has its domicile, ordinary residence or a business establishment in Switzerland. They may waive their right to an action to set aside the arbitral award by an explicit declaration either in the arbitration agreement or in a subsequent written agreement. Also, they may confine the exclusion to specified grounds for action to set aside. A recent landmark decision of the FSC[1] has ruled that the wording of such agreement may be quite broad and still be valid.

In the case discussed above, the parties had not agreed on a waiver according to Art.192 PILA—the model employment contract of the Swiss Football National League does not contain such an agreement and, obviously, the parties had not concluded a respective subsequent agreement.

1 131 III 173 [2005].

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