Around the World

Switzerland

SWITZERLAND: ORDRE PUBLIC /PERSONAL FREEDOM

Discussion of Decision 4A _558/2011 (= 138 III 322) dated March 27, 2012 by the Swiss Federal Supreme Court

Banning orders; Fines; Football; Sports governing bodies; Sportspersons; Switzerland

Facts

Francelino Matuzalém da Silva (Matuzalém) is a Brazilian footballer formerly under contract with the Ukrainian football club FC Shakhtar Donetsk. Three years into the employment relationship, and two years before its end, Matuzalém terminated the employment agreement with immediate effect. He neither offered a just cause nor a sporting just cause for his decision.

Two weeks later, the Spanish football club Real Saragossa SAD promised Matuzalém to hold him free from any claims of FC Shakhtar Donetsk in connection with the early termination of the employment agreement. Three days thereafter, Matuzalém signed an employment agreement with Real Saragossa SAD.

FC Shakhtar Donetsk then initiated proceedings against Matuzalém and Real Saragossa SAD with the FIFA Dispute Resolution Chamber. After proceedings before FIFA and the Court of Arbitration for Sports (CAS), FC Shakhtar Donetsk was finally awarded a damages claim for breach of contract in the amount of CHF 11.8 million by the Swiss Federal Supreme Court (FSC), a claim for which Matuzalém and Real Saragossa SAD were declared jointly and severally liable (Case No.4A_320/2009).

Neither Metuzalém nor Real Saragossa SAD settled the claim *vis-à-vis* FC Shakhtar Donetsk. Upon request by FC Shakhtar Donetsk, the FIFA Disciplinary Committee pronounced sanctions upon both Metuzalém and Real Saragossa SAD, amongst which the following:

> "If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player. … Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player … without further formal decisions having to be taken by the FIFA Disciplinary Committee. … Such ban will apply until the total outstanding amount has been fully paid."

Matuzalém and Real Saragossa SAD appealed this decision to the CAS which confirmed the FIFA decision. Matuzalém then appealed the CAS award to the FSC and requested its annulment. Amongst other things, he argued that the CAS award breached the Swiss *ordre public* as his personal freedom was unduly restricted by a ban which would potentially last for life.

Held

The FSC confirmed that art.27 s.2 of the Swiss Civil Code, pursuant to which no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals, has *ordre public* quality and therefore is to be taken into account in appeal proceedings against an award made by a Swiss arbitral tribunal.

Referring to several precedents, the FSC then held that such excessive and undue restriction of personal freedom had previously been confirmed in cases in which someone waived his economic freedom completely or at least excessively enough in order to endanger his economical existence.

This includes sanctions imposed on someone based on rules of association if this association is to be considered crucial for the respective branch or business.

The FSC then categorised the ban threatened on Matuzalém based on art.22 read together with art.64 Section 4 of the FIFA Disciplinary Code as a means of private enforcement of a monetary claim. No matter whether this ban might indeed be helpful to enforce the monetary claim against Matuzalém (which was left open by the FSC but qualified as questionable), it is, from the FSC point of view, not necessary for such enforcement as the claim can be enforced based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in most countries of the world including Italy, the current domicile of Matuzalém.

For this reason, the FSC weighed up the interests of FIFA regarding the upholding of the sanction against the interests of Matuzalém regarding the cancellation of the sanction. It held that Matuzalém's interest not to face an unlimited ban from his profession clearly prevailed over FIFA's interest to assist a football club in the enforcement of a monetary claim against a former player.

Discussion

This case is a good example of how Swiss law can influence the legal relationship even between parties who have hardly any connection to Switzerland. The contractual parties in this case were a Brazilian individual resident in Italy, on the one side, and two clubs, one domiciled in the Ukraine and the other in Spain, on the other side. However, they were all indirect members of FIFA. As FIFA rules and regulations offer an opportunity of appeal to the CAS, which is domiciled in Switzerland, the appeal of CAS awards to the FSC remains reserved. The FSC may, pursuant to the applicable Statutes, apply Swiss law even in cases in which Swiss law generally does not apply, provided that the provisions applied are of *ordre public* quality and, additionally, provided that the appellant explicitly calls upon such provision.

Swiss law provisions can be qualified as *ordre public* provisions if they contain fundamental legal principles whose breach would be incompatible with the ethical values which should, from a Swiss perspective, be the basis of every legal system. Classical examples of principles of *ordre public* quality are, for example, the principle of *pacta sunt servanda*, the inadmissibility of any abuse of law and the principle of *bona fide*.

If two or more parties none of which are domiciled in Switzerland do not want Swiss law to apply, not even restricted to provisions of Swiss *ordre public* quality, they can agree to waive the right to appeal an award given by a Swiss arbitral tribunal to the FSC. They can also agree that an appeal to the FSC is generally admissible but that Swiss *ordre public* provisions may not be applied by the FSC. Such waiver can be agreed either in a contract signed before or after a dispute arises or even be contained in documents to be signed by members of an association based on their membership. It is mostly seen in arbitration clauses or membership documents as it seems easiest to agree upon such an issue before the parties are in dispute.

The admissibility of a waiver contained in association membership documents, however, has some exceptions. The authors of this case discussion have previously presented a leading case in which the FSC found such a waiver to be void. The waiver in the said case was contained in a document drafted by the Association of Tennis Professionals Tour (ATP) which necessarily had to be signed by tennis professionals in order to be admitted to compete on the tour. The FSC held that ATP has a dominant

position in tennis, and as players do not have a realistic choice as to the signing of the document, such waiver cannot be held against them (FSC Case No.4P.172/2006 discussed in [2007] I.S.L.R. 51).

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