Around the World

Switzerland

SWITZERLAND: RIGHT TO BE HEARD /APPLICABLE LAW /RIGHT TO A MOTIVATED AWARD

(FSC Decision 4A_202 /2016 dated August 3, 2016)

Applicable law; Arbitral tribunals; Right to be heard; Sportspersons; Switzerland

Facts

The professional cyclist Fränk Schleck (hereafter the "Cyclist") and the cycling team Leopard Trek (hereafter the "Team") concluded a Self-employed Agreement in 2010 for the duration of four years. In parallel, the company which held the image rights of the Cyclist (hereafter the "Company") and the Team concluded an Agreement on Image Rights. All three parties were domiciled in Luxembourg.

On July 14, 2012, during the Tour de France, the Cyclist was tested positive for a banned substance and was, consequently, suspended for a year on January 30, 2013 with retrospective effect as of July 14, 2012. The Team terminated the two aforementioned contracts on June 21, 2013 with retrospective effect as of July 14, 2012.

The Cyclist and the Company filed an action against the Team with the Tribunal Arbitral du Sport, requesting the payment of €3,081,750 and €1,170,000 respectively. After more than two years of proceedings, the TAS panel consisting of three Swiss arbitrators awarded a claim of €1,365,000 to the Cyclist and a claim of €630,000 to the Company. The panel held, based on *ex aequo et bono* considerations, that the Team had waived its right to terminate the agreements without notice for just cause by letting almost a year pass between the positive testing result and the termination.

The Team appealed this decision to the Federal Supreme Court.

In its main line of argumentation, it claimed that its right to be heard was breached when the Arbitral Tribunal applied Swiss employment law under the pretence of deciding based on *ex aequo et bono* considerations. The Team claimed to have understood the arbitral clauses in the agreements to determine Luxembourg law to be applicable and alleged to have been taken by surprise by the application of Swiss employment law in the award and therefore not to have been able to raise any objections against this during the proceedings.

In its second line of argumentation, it also claimed that its right to be heard was breached but based this on the alleged fact that its subsidiary reasoning was ignored by the Arbitral Tribunal.

Held

As to the first line of argumentation brought forward by the Team, the FSC elaborated on the scope of the right to be heard which mainly extends to factual issues. As to legal issues, the right to be heard is only granted restrictively. It is strictly limited to situations in which the court or arbitral tribunal intends to base its judgment on legal provisions which were not invoked by the parties during the proceedings and whose application could not have been foreseen by the parties either.

In order to analyse whether any legal provisions were applied by the TAS which were not foreseeable for the parties, the FSC referred to the arbitration clause which contained the following wording:

> "The parties authorise the Arbitral Tribunal to assist them in reaching a settlement and, if it deems it appropriate, to decide ex aequo et bono. Applicable law should be Luxembourg law; the Arbitral Tribunal can also apply any rule of law that it will consider appropriate."

Further, it mentioned that the Order of Procedure signed by both parties contained the following clause:

> "In view of the discretion granted to the Panel by the Parties, of their written submissions and of the fact that they chose Swiss arbitrators, the Panel deems it appropriate to decide this case ex aequo et bono and to refer to Swiss law whenever it deems it appropriate."

Based thereon, the FSC held that the parties could not reasonably exclude that the Arbitral Tribunal would apply any law other than Luxembourg law which was only referred to as "should be applicable". The fact that the parties chose Swiss arbitrators, that the TAS has its seat in Switzerland and that the TAS rules determine Swiss law to be the applicable law in the absence of a choice of law by the parties added to this interpretation. Taking all aspects into consideration, the FSC concluded that the Team would have been obliged to oppose to the Order of Procedure instead of signing it without reservation. Therefore, its allegation to have been taken by surprise was brought forward in abuse of law.

Further, the FSC held that the Arbitration Panel did not apply Swiss employment law to the Agreement on Image Rights, contrary to what the Team alleged. It confirmed that the Arbitration Panel, based on a clause in said contract, closely tied the fate of said contract to the one of the Self-employed Agreement. The fact that the latter was found to have been injustifiably terminated without notice for belatedness of termination—which was decided based on *ex aequo et bono* considerations referring to Swiss employment law—led to identical consequences for the former.

As to the second line of argumentation brought forward by the Team, the FSC clarified that the Arbitral Panel was only obliged to consider all relevant arguments brought forward by the parties but that it did not need to discuss them in detail in its award. It is admissible for an Arbitral Tribunal to implicitly dismiss an argument without having to motivate it, as long as such argument is taken into account during the deliberations leading up to an award.

In the case at hand, the FSC decided that the subsidiary reasoning brought forward by the Team was not sufficiently relevant for the Arbitration Panel which, therefore, did not have to expressly dismiss it. This was even more so the case as the FSC found this subsidiary reasoning not to correspond with the facts and therefore not to be genuine.

Discussion

This case—once again—shows the importance of using unambiguous language and clear solutions in contract drafting. While, in our view, one could quite well argue that the use of the word "should" alone may not compromise an applicable law clause because there would have been no reason to introduce a clause at all if it was not considered binding, the further elements of the clause at hand made such argumentation impossible. Tying a "should" clause together with giving the Arbitral Panel the widest discretion available as to the applicable law is far from a conclusive and undoubtful solution. In connection with the wording of the Order of Procedure, it seems fair to state that the parties were in a position to foresee that Luxembourg law might not be applied and that the Arbitral Panel might, instead, rely on *ex aequo et bono* considerations or Swiss law (and not: Vietnamese, Senegalese or US American law as the Team argued).

In our view—which is based on a legal education pursuant to Swiss law and which, therefore, might admittedly not be objective from an international point of view—we approve of the general legal principle that a termination

without notice for just cause has to be invoked within a reasonable time span after the ground for termination becomes obvious. We consider this to be a principle taking into account further principles such as the requirement to act based on good faith. Therefore, it would have been interesting if the FSC had made a comparison of law, analysing whether the application of Luxembourg law would have let the Arbitral Tribunal come to the same conclusion. Understandably, such a comparison of law was not made in the situation at hand in which the interpretation of the applicable law clause alone offered a clear solution.

* Eva Gut is a member of the major Swiss business law firm Staiger Attorneys at Law and advises clients in various matters of litigation, bankruptcy and arbitration matters, contractual law and sports law. She was, between 2004 and 2011, a member of the working group on doping controls of the Swiss Federal Commission on Sports and has been, since 2005, the secretary to the president of the supervisory body of the judicial bodies within the Swiss Ice Hockey Federation. Christoph Gasser is a member of the major Swiss business law firm BianchiSchwald and advises clients in various matters of intellectual property, litigation and arbitration matters, contractual law and sports law.

Eva Gut
Staiger Attorneys at Law Ltd

Christoph Gasser
BianchiSchwald LLC