Switzerland

ARBITRATION CLAUSE

Federal Supreme Court Decision 4a_432/2017 dated 22 January 2018

Allocation of jurisdiction; Arbitration clauses; Court of Arbitration for Sport; Football; Intention; Jurisdiction; Sportspersons; Switzerland

Facts

An Argentinian soccer player (Player) and an Argentinian agent (Agent) concluded a contract on agency services to be rendered by the Agent to the Player. This contract contained a clause which can be translated 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 by anything that can occur before the corresponding national and international bodies (AFA Dispute Resolution Body and FIFA Players' Status Committee internationally), based on the constitutional guarantee of natural judge (Art.18 N.C.

[86] CAS 2017/A/5379, *Legkov v IOC*, Award of 23 April 2018 at [727].

> [National Constitution]) the parties submit themselves to the jurisdiction and decisions of the courts in the Comercial de Capital Federal, República Argentina."

When a dispute out of this contract arose, the Agent sued the Player before the FIFA Players' Status Committee (PSC), which refused to hear the case. The Agent appealed this to the Court of Arbitration for Sport (CAS), which vacated the PSC judgment and awarded the Agent a claim of approximately €560,000 plus interest against the Player.

The Player appealed this decision to the Swiss Federal Supreme Court (FSC), arguing that the above clause could not be qualified as a clause of arbitration and that, therefore, the CAS had unlawfully declared itself to be competent.

Held

The FSC stated that, for lack of an applicable law clause in the relevant contract, the question whether the parties had agreed on an arbitration clause was to be analysed based on Swiss law.

It then went on to outline the general principles of contract interpretation based on Swiss law which also apply to the interpretation of an arbitration clause. In the first instance, the court has to accept the unanimous expression of will by the parties. Only if the court cannot find any such unanimous expression of will, it will have to interpret the intent of the parties based on good faith, i.e. it has to analyse how the expressions of will by each party had to be interpreted and understood by the other party based on good faith.

If this interpretation concerns a clause of arbitration, the court also has to take into account that such a clause constitutes a waiver of access to the state courts, which strongly limits the appeal possibilities. The FSC has stated before that it may not be assumed lightly that a party had the intent to waive these appeal possibilities. Therefore, if in doubt about the nature of a competence clause, the court has to interpret the intent of the parties restrictively.

However, if the court can establish that the parties wanted to waive the access to the state courts and to submit their dispute to arbitration, this is to be respected in the further interpretation of the respective clause. Hence, the court has to search for an interpretation which will uphold the arbitration clause as such if it can be established that the parties agreed on an arbitration clause, but they interpret this clause differently.

Applying these general rules to the case at hand, the FSC searched in vain for a unanimous will of the parties and therefore had to interpret the contract based on good faith. In doing so, it took into account mainly the following aspects: neither the AFA Dispute Resolution Body nor the FIFA Players' Status Committee are arbitral tribunals but rather bodies within the national and international associations. The CAS is, like any other arbitral tribunal, not mentioned at all. However, the parties expressly submitted themselves to the jurisdiction of the commercial courts of Argentina's capital and added a reference to the constitutional judge, which both hindered the court to safely assume that the parties intended to waive the jurisdiction of the state courts. The scope of the reference to the two AFA and FIFA bodies is unclear; namely, the FSC could not establish whether the parties intended to have the choice between these bodies or the state courts, whether they intended to establish a specific order of the two dispute resolution methods (and, if so, which) or whether this reference had any other purpose.

For lack of clarity of the clause, so the FSC concluded, no clear intent of the parties to submit their dispute to arbitration to the exclusion of state courts could be established. Therefore, the CAS was—contrary to the CAS findings—not competent to hear the case. Consequently, the FSC vacated the award given by the CAS.

Discussion

We fully agree with the FSC. The clause which was subject to interpretation did not reflect a clear and unambiguous will of the parties to submit their dispute to arbitration and, consequently, to waive their access to the state courts. It seems only logical that the FSC vacated the award given by the CAS for lack of CAS' competence.

This illustrative FSC decision nicely outlines the way an alleged arbitral clause is interpreted by the Swiss courts. This decision compliments an earlier FSC decision in an unrelated matter which the authors presented in [2012] I.S.L.R. Issue 4 (p.108). In that decision, the parties had clearly demonstrated their will to submit their dispute to arbitration, but it was unclear which arbitral tribunal was designated by the parties (the FIFA Commission or the UEFA Commission, which both declined to hear the matter). Therefore, at the time, the FSC decided to uphold the arbitration clause as such and confirmed the competence of the CAS which had been called upon by the claimant.

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