



Arbitration Newsletter Switzerland

Federal Supreme Court annuls CAS award for violation of the right to be heard

On March 4, 2009, the Federal Supreme Court published a decision on its website in which it annulled a CAS award for violation of the right to be heard.¹ This makes it now the second time that the Federal Supreme Court quashed a CAS award.²

The Facts of the Case

On April 28, 2003 José Ignacio Urquijo Goitia ("the Agent"), a FIFA-licensed players' agent from Spain entered into an agreement with Liedson da Silva Muñoz ("the Player") from Brazil, playing in Portugal, guaranteeing the Agent the exclusive right up to August 31, 2003, for the representation of the Player on the European market. On August 27, 2003, the Player signed an agreement with Sporting SAD a Portuguese football club ("the Portuguese Club"), apparently without any involvement of the Agent. The Agent then requested from the Player in vain payment of a commission. Therefore, the Agent started proceedings at the FIFA Players' Status Committee. On May 27, 2007, a sole judge rejected the Agent's request for payment of a commission, arguing that the Agent could not establish that he had in any way contributed to the agreement between the Player and the Portuguese club.

¹ 4A_400/2008 of February 9, 2009 (www.bger.ch/index)

The CAS Award is CAS 2007/A/1371: José Urquijo Goitia v/ Liedson da Silva Muñoz; the panel was constituted as follows: Hendrik Willem Kesler, Netherland, president, Rui Botica Santos, Portugal and Michele A.R. Bernasconi, Switzerland as arbitrators.

² The first case was Guillermo Cañas v. Association of Tennis Professionals, BGE 133 III 235, cf. also our newsletter of April 24, 2007

(www.thouvenin.com/pages_d/frame/05aktuell.html)

The Agent filed an appeal against this decision at the CAS. On August 8, the panel of three arbitrators confirmed the FIFA decision. In doing so the CAS panel stated that the agreement between the parties was primarily covered by the pertaining FIFA Rules and, supplementary, by Swiss Law, in particular by the provisions of Article 412 et seq CO on the brokerage contract.

As to the facts the CAS panel could as well not find any involvement of the Agent in the negotiations of the agreement between the Player and the Portuguese club.

The panel then further dealt with the argument raised by the Agent, that the exclusivity clause in his agreement with the Player would, under the prevailing circumstances, not require from him to establish a causal link between his activities as broker and the conclusion of the contract.³ The CAS panel rejected this argument by referring to a mandatory provision contained in the Federal Law on the Employment Exchange and the Hiring-out of Personnel, of October 6, 1989, which in its Article 8 (2) (a) declares as null and void any arrangement which prevents a person seeking an employment and being contractual bound to one broker from using the services of an other broker. In other words, the CAS panel held that the exclusivity provided for in the agreement between the Agent and the Player was in violation of mandatory provisions of Swiss law and, therefore, the Agent could not derive any benefit from this exclusivity.

The Agent then filed an action for annulment under Article 190 PILA to the Federal Supreme Court and argued that his right to be heard was violated since

³ A position developed already earlier in a Supreme Court decision of 1974 (BGE 100 II 361)



the application of the above legal provision was never before addressed in the CAS proceedings at all.

The Considerations of the Federal Supreme Court

In a first step the Federal Supreme Court analyses the interaction between two procedural principles, namely the right to be heard and *jura novit curia* and states that at least as to questions of law, *jura novit curia* basically prevails. Therefore, a court - be it a state court or an arbitral tribunal - can base its decision also on legal provisions not introduced by the parties but, at the same time, such reference to provisions not addressed by the parties should not come as a surprise.⁴

Thereafter, the Federal Supreme Court concludes that in this particular case the Agent was indeed entitled to maintain that the arguments raised by the CAS panel came as a surprise. Whilst the application of Swiss law has formally been accepted by the parties to this CAS proceedings, the Agent did nonetheless not have to expect the application of the Federal Law on the Employment Exchange and the Hiring-out of Personnel. Article 2 of such law makes it clear that this law primarily covers services provided for the employment exchange and the hiring-out of personnel in Switzerland, requiring a permit of the cantonal labour department. To the extent that such services are provided in Switzerland, for placement outside of Switzerland, an additional permit, to be issued by the State Secretariat for Economic Affairs SECO, is needed. In other words, the application of this law presupposes certain minimum contacts with Switzerland.

⁴ BGE 130 III 35 consideration 5; cf. also ASA Bulletin 2004, p. 574 et seq;

La jurisprudence aménage cependant une exception au principe "jura novit curia" lorsque le juge s'apprête à fonder sa décision sur une norme ou un principe juridique non évoqué dans la procédure antérieure et dont aucune des parties en présence ne s'est prévaluée et ne pouvait supputer la pertinence in casu. D'après le Tribunal fédéral ... savoir ce qui est imprévisible est une question d'appréciation et il convient de se montrer plutôt restrictif dans le domaine de l'arbitrage international, pour tenir compte de ses particularités ...; il s'agit également d'éviter que l'argument tiré de l'imprévisibilité du raisonnement adopté par le tribunal arbitral ne soit détourné pour ... imposer à l'autorité de recours une révision au fond des sentences arbitrales ...

But the particular case had no link whatsoever to Switzerland. The Agent as FIFA players' agent was domiciled in Spain and was claiming a commission from a Brazilian player domiciled in Portugal for a contract which such player concluded with the Portuguese club. Though the pertaining FIFA provisions provided for Swiss Law to be the supplementary law, the Agent did not have to expect that the CAS panel would base its decision on provisions of the Federal Law on the Employment Exchange and the Hiring-out of Personnel to conclude that the exclusivity clause provided for in the agreement between the Agent and the Player was null and void, which provisions were, under the prevailing circumstances, not applicable at all.

According to the Federal Supreme Court the CAS panel should at least have first submitted this legal provision to the parties, thus allowing them to develop their arguments. In not doing so the CAS panel violated the right to be heard of the Agent and, therefore, the matter was sent back by the Federal Supreme Court to the CAS panel.

Conclusions

The CAS panel did apparently not only base its decision to declare the exclusivity clause as null and void on a legal provision not applicable at all in this particular case, but the CAS panel did so also "by surprise", without granting the parties a possibility to develop their arguments as to the application of this specific provision. The decision reached by the Federal Supreme Court, namely to annul the CAS award, is therefore certainly justified.

The question remains, however, whether this is, at the end, going to be of any help to the Agent. As already experienced in the Cañas case, an arbitral award annulled for violation of the right to be heard can easily be "cured" by supplementing a few additional lines, covering the particular gap. It might therefore well be that the victory of the Agent is of preliminary nature only, because he will still have to establish to the satisfaction of the CAS panel that the exclusivity clause in the agreement with the Player entitles him to collect his brokerage commission without having contributed anything to the conclusion of this agreement. *Affair à suivre!*



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