

Update

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CAS award set aside for breach of substantive public policy

In a landmark decision dated 27 March 2012 (4A_558/2011), the Swiss Supreme Court set aside a CAS award for breach of substantive public policy under Article 190(2)(e) of the Swiss Private International Law Act ("PILA"), for the first time since the entry into force of that Act in 1989.

Facts

The case concerned the Brazilian football player Francelino da Silva Matuzalem ("Matuzalem") who had been transferred to the Ukrainian football club FC Shakhtar Donetsk ("Shakhtar") in 2004. In 2007, Matuzalem unilaterally terminated his five-year employment contract and signed a new contract with the Spanish club Real Zaragoza.

Proceedings were initiated by Shakhtar before the FIFA Dispute Resolution Chamber ("DRC") to seek compensation. The DRC awarded Shakhtar EUR 6'800'000, but that decision was appealed before the Court of Arbitration for Sport ("CAS") by all parties. In 2009 a CAS Panel ordered Matuzalem and Real Zaragoza to pay Shakhtar damages in an amount of EUR 11'858'934. Setting aside proceedings were brought against that award, but the Swiss Supreme Court dismissed the application and upheld the award by a decision dated 2 June 2010 ("Matuzalem I", 4A_320/2009).

As Matuzalem and Real Zaragoza were unable to pay the damages awarded, the FIFA Disciplinary Committee sanctioned them with a fine for non-compliance with the CAS award (pursuant to Article 64 of the FIFA Disciplinary Code), and with the threat that Shakhtar could request FIFA to ban Matuzalem from taking part in any football-related activities if he did not pay the amount due. On appeal, the decision of FIFA was confirmed by the CAS in an award dated 29 June 2011. Matuzalem sought to have this new CAS award set aside.

Before the Supreme Court, Matuzalem submitted *inter alia* that the sanction decided by the FIFA Disciplinary Committee for his failure to pay the damages awarded by the CAS was incompatible with public policy within the meaning of Article 190(2)(e) PILA. Matuzalem argued that he would be prohibited from working as a football player worldwide, should Shakhtar so request, on the basis of his inability to pay the damages due. This threat constituted a serious breach of his personal rights and an excessive limitation of personal freedom protected by Article 27(2) of the Swiss Civil Code ("CC").

Decision of the Swiss Supreme Court

The Supreme Court recalled that a violation of fundamental legal principles such as *pacta sunt servanda*, the principle of good faith and the prohibition of the abuse of contractual and legal rights may amount to a breach of substantive public policy (provided that an award conflicts with public policy not only due to its reasons, but also due to the outcome it brings about). The prohibition of forced labour would also fall within these fundamental principles; this means in turn that a violation of Article 27(2) CC, 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 good morals", could also constitute a breach of substantive public policy.

According to the decided cases (BGE/ATF 123 III 337; 4A_458/2009 *Mutu v Chelsea*), a contractual restriction of economic freedom is considered as excessive within the

meaning of Article 27(2) CC if it subjects a person to the arbitrariness of another party, suppresses his economic freedom or restricts that freedom to such an extent that the very foundation of his economic existence is jeopardised. The law imposes limitations on the undertakings which one may assume so as to limit one's personal rights and such limitations apply both to undertakings contained in contracts and statutes or decisions of corporate entities. Sanctions imposed by a federation which encroach upon the legal interests of a person are subject to judicial review. Measures taken by sport federations (when governed by Swiss law) which detrimentally affect the economic development of professional athletes are lawful only insofar as the legitimate interests of the federation under consideration prevail over the athlete's personal rights at stake.

The issue carefully considered by the Supreme Court was the "private enforcement" of a decision awarding damages where the amount due remained unpaid. Upon a simple request by the award creditor (Shakhtar), Matuzalem would have been banned from all professional football activities until payment. In the Supreme Court's opinion, it is questionable that such a sanction is appropriate to achieve the intended purpose, namely the payment of damages: Matuzalem was unable to pay the damages due and prohibiting him from earning an income from professional football activities would not enable him to pay his award debt. The Supreme Court held that the sanction was not necessary since the CAS award ordering Matuzalem to pay damages could be enforced under the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958. The threat of a ban from future football activities constituted a serious interference with the player's personal rights and ignored the mandatory limits imposed by Article 27(2) CC. The economic existence of the player was jeopardised and that was not justified by an overriding interest of FIFA or its members. The abstract objective of enforcing compliance by football players with the duties owed to their employers is insufficient to let the scales come down in favour of an unlimited and worldwide professional ban on the player.

The CAS award was held to be in breach of substantive public policy under Article 190(2)(e) PILA for that reason and was set aside (as regards paragraphs 2-6 of its operative part).

Comments

This landmark decision of the Swiss Supreme Court of 27 March 2012 (made in the German language) is of paramount importance as it is the first decision acknowledging a breach of substantive public policy in the 23 years since the PILA came into force (by way of comparison, the first decision setting aside an award for breach of procedural public policy was also made recently, on 13 April 2010; see BGE/ATF 136 III 345 *Club Atlético de Madrid v Sport Lisboa e Benfica*). A press release was also issued by the Supreme Court, which is exceptional in arbitration matters (both the decision and press release are available on the Supreme Court's website, www.bger.ch; the decision will also be reported in the official publication BGE/ATF).

What was at stake in the decision under consideration was the possibility for sport federations, such as FIFA, to impose further sanctions, such as a professional ban, in case the damages awarded to a party are not paid by the other party.

It was not the issue of damages and their *quantum* which is under scrutiny in this decision, since the Supreme Court declined to set aside the CAS awards ordering football players such as Matuzalem (see "Matuzalem I", 4A_320/2009) or Mutu (4A_458/2009) to pay significant amounts of damages. Rather, it was the additional sanction imposed by the sports federation in case of non-compliance with its decision, regardless of whether the player is in fact unable to pay the amount due. In a prior FIFA case, the Supreme Court had considered that a CAS award upholding a sanction (a fine) imposed on a football club for non-payment of an amount awarded to another club was not incompatible with public policy (4P.240/2006). The distinctive feature of the Matuzalem case is that an unlimited ban could be implemented by a mere request of Shakhtar if its claim remained unpaid. The Supreme Court did not see sufficient justification to uphold such a form of private justice.

This decision may open the door to other cases where the economic freedom of individuals could be jeopardised if they are unable to pay significant amounts (damages, fines) awarded against them, coupled with the threat of a future ban in case of non-payment. This raises the question of the limits of sanctions which sports federations may impose and what is expected from the CAS in the review of such sanctions. A balance has to be found between the

protection of the athletes' personal interests and the need for sanctions in sports, which is important and should not be dismissed too easily. The sensitive issue is the enforcement of the decisions and how far sports federations can impose severe sanctions for non-payment of amounts of money, such as the damages awarded to another party.

Although the Supreme Court might be more protective of the interests of weaker parties in the future, in particular in sports, a breach of Article 27(2) CC protecting against excessive commitments will not systematically mean that an arbitral award is inconsistent with substantive public policy within the meaning of Article 190(2)(e) PILA. Only very serious breaches of personal rights could be considered.

This rationale of this new case law is likely to remain limited to situations where individuals are considered as surrendering their economic freedom to someone else without any real choice. This consideration should in principle be less important for commercial cases. In any event, public policy remains very narrowly defined by the Swiss Supreme Court: an award runs counter to public policy only when it disregards essential and generally accepted values which must underlie any and all systems of law according to the prevailing conceptions in Switzerland (see e.g. BGE/ATF 132 III 389).

Please do not hesitate to contact us if you have any questions.

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