

Supreme Court partially annuls CAS arbitral award

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Facts

Decision

Comment

In a recent decision the Supreme Court partially annulled a Court of Arbitration for Sport (CAS) arbitral award for violation of the plaintiff's right to be heard.⁽¹⁾

Facts

The dispute arose out of employment contracts entered into between a football club and nine football players, according to which payment of the players' monthly salaries was conditioned on their playing in 70% of the club's matches in the relevant month.

The players filed requests with the dispute resolution chamber of the football federation to which the club belonged, seeking payment of outstanding salaries and a declaration that they had validly terminated the employment contracts for good cause. The dispute resolution chamber recognised the players' right to terminate the contracts and ordered the club to pay the outstanding salaries to the players.

The club appealed the decisions before the appeal commission of the dispute resolution chamber, which:

- found the appeals relating to Players 1 to 7 belated;
- reduced the amount due to Player 8; and
- confirmed the decision relating to Player 9.

The club appealed the commission's decisions before the CAS (which joined the causes) and produced two agreements into which it had entered with Players 6 and 9, whereby they waived their claims and withdrew from the proceedings. The sole arbitrator issued an award declaring the proceedings regarding Players 6 and 9 closed and rejecting the appeals brought by the club.

The club challenged this award before the Supreme Court for violation of:

- the *ne infra petita* rule (according to which the arbitrator must not fail to decide one of the items of the claim);
- the right to be heard; and
- procedural public policy.

Decision

The Supreme Court first recalled that it may review the facts underlying the arbitral award only:

- to the extent that one of the grounds for challenge listed in Article 190(2) of the Private International Law Act is raised against these facts; or
- if new facts or evidence must be taken into consideration.

Based on this rule, the Supreme Court found that the plaintiff's factual allegations – the purpose of

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which was to "ease comprehension" and to "provide clarification" – were inadmissible because they did not relate to any finding or facts by the arbitrator.(2)

Regarding the asserted violation of the right to be heard, the Supreme Court recalled the following principles:

- it cannot review the arbitral tribunal's anticipated assessment of evidence, save from the perspective of public policy;
- the right to be heard does not allow parties to request production of evidence unfit to prove the facts; and
- although the right to be heard does not require arbitrators to issue reasoned awards, they must deal with all allegations, arguments and evidence submitted by the parties that are important for the award to be issued.(3)

Based on these principles, the Supreme Court found that by entering into the merits of the appeals, the sole arbitrator had implicitly admitted the plaintiff's argument that the appeals regarding Players 1 to 7 had been filed on time and thus that he had not violated the plaintiff's right to be heard.(4) The Supreme Court also rejected the plaintiff's argument that the arbitrator had wrongly refused to take into account evidence based on a surprising application of the law, because although the reference to Article 317 of the Code of Civil Procedure was unusual, the reference to Article R57 of the CAS Code alone justified the arbitrator's refusal to take that evidence into account.(5) However, the Supreme Court found that the sole arbitrator had failed to address the plaintiff's arguments questioning the existence of the claim or the amount thereof – namely, the fulfilment of the condition that a minimum number of matches must be played and the calculation of the salaries of Players 1 and 3.(6)

Regarding the asserted violation of public policy, the Supreme Court rejected the plaintiff's argument that the arbitrator's restrictive interpretation of Article R57 of the CAS Code was tantamount to a refusal to exercise his power of review, depriving the plaintiff of the right of access to an independent and impartial judge under Article 6(1) of the European Convention on Human Rights. The Supreme Court found that public policy does not include the arbitral tribunal's obligation to address all the issues of a case with a full power of review and that the parties may limit this power directly or by reference to arbitration rules.(7)

Based on the above reasons, and referring to its previous holding that partial annulment is admitted if the disputed object is independent of the others,(8) the Supreme Court partially admitted the challenge.

Comment

This decision confirms that in specific circumstances, arbitral awards may be partially annulled. It also clarifies that public policy does not prevent parties to arbitration from agreeing – directly, or indirectly by reference to arbitration rules – to limit the arbitrator's power to review the case.

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Endnotes

(1) Supreme Court, 4A_246/2014, July 15 2015 (in French).

(2) Ground 3.

(3) Ground 6.1.

(4) Ground 6.2.

(5) Ground 6.4.3.2.

(6) Ground 6.3.2.

(7) Ground 7.2.2.

(8) Ground 8, referring to Supreme Court, 4A_360/2011, January 31 2012, Ground 6.2. For further details please see "[Violation of right to be heard and partial annulment](#)".

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