Review of the 2016 Case Law of the Swiss Federal Tribunal Concerning Sports Arbitration

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1. Introduction

This 7th edition of our regular review of the case law concerning sports arbitration deals with the decisions rendered by the Swiss Federal Tribunal (the «Federal Tribunal») in the year 2016. Twelve decisions concerned sports arbitration, i.e. challenges brought against awards of the Court of Arbitration for Sport (the «CAS»), one of which was rendered in a domestic dispute[1]. For once, no challenge was upheld. All the twelve challenges against CAS awards were dismissed (or not dealt with) by the Federal Tribunal.

As in the past editions[2], this review only summarizes the most interesting decisions rendered in 2016, grouped according to the main ground(s) for challenge, namely irregular constitution of the arbitral tribunal, lack of jurisdiction and public policy[3].

2. Irregular constitution of the arbitral tribunal

In a decision dated 8 March 2016[4], the Federal Tribunal confirmed that the breach of the duty of confidentiality imposed upon the arbitrators does not constitute, as a rule, a ground for setting aside an international arbitral award, be it for irregular constitution of the arbitral tribunal or for other reasons such as violation of public policy.

In January 2010, two football clubs had entered into a contract concerning the transfer of a player. The contract provided for a transfer fee of USD 500 000 and for a contractual penalty of USD 2 million in case of transfer of the player by the new club (the «Appellant») to a third club before the end of 2011, without the old club's (the «Respondent's») consent.

In January 2011, the Appellant asked the Respondent to consent to the early termination of the player's contract or to his temporary transfer to another club, due to the player's personal situation. The Respondent refused. This notwithstanding, the Appellant loaned the player to the other club. The Respondent filed a complaint before the FIFA Players' Status Committee (PSC), which however dismissed the complaint holding that the Respondent had not proven having suffered any actual damage despite the contractual breach.

Seized with an appeal against such a decision, the CAS Panel issued an award on 24 August 2015 setting aside the PSC decision and ordering the Appellant to pay USD 1.5 million (i.e. 25% less than the penalty amount provided for in the contract) to the Respondent. In the meantime, however, a press article had been published on the internet on 13 August 2015 (i.e. 11 days before the issuance of the award), revealing that the CAS had ordered the Appellant to pay USD 2 million to the Respondent. Informed about the leak by the Appellant, the CAS Secretary General ordered an internal investigation and eventually confirmed that the leak did not come either from the CAS or from the arbitrators.

This notwithstanding, the Appellant moved to set aside the CAS award before the Federal Tribunal, arguing in particular that the leak could only have come, directly or indirectly, from a member of the Panel, in violation of his (or her) duty of confidentiality embodied in Article S19(1) of the CAS Code. According to the Appellant, such a violation would strongly suggest that the award was issued by an irregularly composed arbitral tribunal within the meaning of Article 190(2)(a) PILA, as one cannot exclude that the Panel, which had not issued a formal decision at the time of the publication of the press article, could have been influenced by said publication. The Appellant added that one could even suppose that the Panel

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1 Decision 4A_494/2015.

2 See, e.g., Luca Beffa/Olivier Ducrey, Review of the 2015 Case Law of the Swiss Federal Tribunal Concerning Sports Arbitration, CaS 2016, 219 *et seqq.* (including references to previous reviews).

3 Pursuant to Article 190(2) of the Swiss Private International Law Act («PILA»), an international award can also be challenged if the arbitral tribunal decided on points of dispute which were not submitted or if it left undecided prayers for relief which were submitted (let. c) or if the principle of equal treatment of the parties or the right to be heard was violated (let. d). However, none of the commented decisions dealt with these grounds.

4 Decision 4A_510/2015.

decided to retain an amount of USD 1.5 million instead of 2 million in order to ensure that the amounts be different, thereby avoiding any suspicion that the leak might originate form one of the arbitrators[5].

The Federal Tribunal dismissed the challenge, holding first of all that the Appellant had failed to prove that the leak had indeed originated with a member of the Panel. The Federal Tribunal actually considered that the circumstances of the case (i.e.: the information published in the article was incorrect on several points, including the awarded amount; no official source was mentioned and no journalist contacted the CAS to verify its accuracy; any journalist could have heard of the dispute and, in particular, of the hearing published on the CAS website, and then carried out his or her own investigation with unofficial sources; the CAS Secretary General confirmed that the leak did not come from the CAS or from the Panel; and the Appellant's first reaction when it heard of the article was not to question the impartiality and independence of the Panel, but to invite the CAS to ensure that the award be communicated as a priority to the parties, and not to the press) made it hard to believe that the leak could come from the Panel. The Federal Tribunal added that the leak might have even come from the Appellant itself.

In any event, the Federal Tribunal also held that, even if there had been a breach of confidentiality attributable to the arbitrators, such a breach would not justify *ipso facto* the setting aside of an international arbitral award. The Federal Tribunal relied on the opinion expressed by several authors in this respect, while noting that the only exception admitted by some of these authors (i.e. a violation of the principle of equal treatment of the parties within the meaning of Article 190(2)(d) PILA if, due to the arbitrator's unilateral indiscretion during the proceedings, a party obtains information that could advantage it in the evidentiary phase of the proceedings) did not come into play in the present case.

The decision of the Federal Tribunal is sound in its outcome, especially insofar as it confirms the majority view of the doctrine regarding the fact that a breach of confidentiality imposed upon the arbitrators does not constitute, as a rule, a ground for setting aside an international arbitral award[6]. This being said, it is disturbing that leaks about a forthcoming award may occur. In view of the difficulties both for an institution, such as the CAS, to prevent the risk of information being leaked to the press, and for the parties to prove the existence of a breach of confidentiality, it is generally recommended that parties try to protect themselves against the risk of breaches by agreeing upon specific measures such as confidentiality provisions or ad-hoc agreements[7].

3. Lack of jurisdiction

In a decision dated 28 January 2016[8], the Federal Tribunal held that a simple letter sent by the CAS counsel in charge of the case to the parties, confirming the decision of the Panel to uphold the disciplinary authority and jurisdiction of an anti-doping agency (the United States Anti-Doping Agency, USADA) and an arbitral tribunal constituted under the rules of another arbitral institution (the American Arbitration Association, AAA), respectively, does not qualify as an award or as an interim decision on jurisdiction and can therefore not be challenged before the Federal Tribunal.

In 2012, the USADA had initiated arbitration proceedings against a Belgian sport manager of several professional cycling teams, including American teams, for violation of anti-doping rules. The proceedings were initiated in accordance with the USADA protocol applicable to anti-doping offences, which provides for a first arbitration before an AAA Tribunal with a possible appeal to CAS.

The sport manager challenged the jurisdiction of the AAA Tribunal as well as the authority of the USADA to impose sanctions on him, on the basis of the UCI Anti-Doping Rules (ADR) which provide for the exclusive jurisdiction of the CAS. However, the AAA Tribunal provisionally accepted jurisdiction in a Procedural Order, holding that the ADR, to which the sport manager was bound as holder of the UCI licence, provide that the licence holder submits to the regulations, not only of the UCI but also of the national and regional federations, and agrees to the anti-doping controls administered there.

[5] The Appellant raised also the ground of violation of public policy (Article 190(2)(e) PILA) for the same reasons, as well as with respect to the fact that the Panel did not reduce the penalty. The Federal Tribunal dismissed these arguments, holding in particular that the possible violation of mandatory provisions (such as Article 163(3) of the Swiss Code of Obligations which obliges a tribunal to reduce penalties which are deemed to be excessive) is not sufficient to retain a violation of public policy.

[6] See Philipp Ritz, Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht, 2007, 188 *et seq*. See also Christoph Müller, La confidentialité en arbitrage commercial international: un trompe-l'oeil?, in: Bulletin ASA 2005, 216 *et seqq.*, 233, and the other authors referred to in the decision.

[7] In this respect, see also Philippe Bärtsch/Anna Kozmenko, Suspected leak to the press does not lead to overturned award, available at: www.swlegal.ch/getdoc/0a0b25c3-027f-4968-8153-367737c1e64b/2016_Philippe-Bartsch_Anna-Kozmenko_Suspected-leak.aspx.

[8] Decision 4A_222/2015.

The sport manager challenged this decision before the CAS but the Panel found the appeal inadmissible due to the provisional nature of the opinion expressed by the AAA Tribunal in its Procedural Order. The proceedings before the AAA Tribunal moved on without the participation of the sport manager, and eventually the AAA Tribunal rendered its final decision confirming its jurisdiction and banning the sport manager for 10 years.

The sport manager again challenged this decision before the CAS and the Panel accepted to address the issue of jurisdiction as a preliminary issue. After granting the parties the opportunity to be heard on this issue, the CAS counsel in charge of the case sent a letter to the parties informing them that the Panel, having deliberated, had decided that both the USADA and the AAA had disciplinary authority and jurisdiction in this case, while indicating that «*the present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS*» within the meaning of Article 190 PILA and that «*the reasons for the Panel's decision will be included in its Final Award, together with its findings on the remaining substantive issues*».

The sport manager moved to set aside this decision before the Federal Tribunal for lack of jurisdiction (Article 190(2)(b) PILA). The Federal Tribunal, however, held that the decision was not capable of appeal.

The Federal Tribunal started by recalling that only *awards* can be challenged. Mere procedural decisions are not capable of appeal, unless the arbitral tribunal implicitly made a decision as to its jurisdiction. The distinction between challengeable and non-challengeable decisions does not depend on who issues the decision at hand (the Panel or another body of CAS) or on the name of the decision (award, procedural order, etc.) but on its content.

Regarding more specifically decisions on jurisdiction, the Federal Tribunal recalled that, as a rule, pursuant to Article 186(3) PILA, arbitral tribunals shall decide on their jurisdiction in a preliminary award. However, this provision is not mandatory and the arbitral tribunal may depart from it if it considers that the jurisdictional defense is too tied to the facts of the case to be adjudicated separately from the merits.

Against this background, the Federal Tribunal moved to review the decision at hand. It first held that neither the mere fact that the decision was communicated in a peculiar way (by a simple letter, and not an award, signed by the counsel in charge of the case, and not by the Panel), nor the fact that the letter expressly excluded that the Panel's decision could be considered as a preliminary decision on jurisdiction capable of appeal, were sufficient to rule out that the Panel had already definitely decided upon its own jurisdiction. The Federal Tribunal noted, however, that one cannot totally disregard the manner in which the decision was communicated and the opinion expressed by its author.

The Federal Tribunal also recognized that it was not surprising that the sport manager immediately challenged the jurisdiction of the AAA Tribunal (and the authority of the USADA) in view of the peculiar circumstances of the case (the individual involved was not a cyclist but a sport manager of cycling teams; the violation of the anti-doping regulation he was charged with did not concern a sample; and he was a Belgian citizen not domiciled in the US but it was sought by the USADA before an American arbitral tribunal, and this against the will of the UCI which had issued his license). The Federal Tribunal highlighted however that, during the CAS proceedings, the sport manager had not challenged the jurisdiction of the CAS as such, but had actually seized the CAS himself (which is hardly logical if he considered that the latter lacked jurisdiction) and had expressed the wish that the CAS accepts jurisdiction in order to address its appeal and annul the award issued by the AAA Tribunal.

The Federal Tribunal further recognized that the Panel had rendered a preliminary award by which it had definitively settled a substantive issue (i.e. the authority and jurisdiction of the USADA and the AAA Tribunal, respectively), thereby admitting, at least implicitly on the basis of a *prima facie* review, its own jurisdiction. However, the Federal Tribunal considered that, for whatever reason, the Panel had decided to accept jurisdiction only in a provisional manner, with a view to address the issue formally and definitively only in the final award. According to the Federal Tribunal, the decision to address the issue with the merits instead of abiding by the general rule of Article 186(3) PILA is a matter of opportunity and can therefore not be sanctioned.

Finally, the Federal Tribunal highlighted that it would be better for everyone, parties included, to wait for the final award in order to examine this and the other issues raised by the parties against the award, in particular in view of the fact that the Panel had not provided any reasoning in support of its decision to provisionally accept, *inter alia*, the jurisdiction of the AAA Tribunal.

This last remark as well as the very careful and detailed reasoning adopted by the Federal Tribunal in this decision speaks volume about the difficulties the Swiss supreme court must have faced in this very peculiar case. We agree with other commentators that the manner in which the CAS Panel took the decision at stake and, in particular, notified it to the parties was highly unorthodox[9] and left no other choice to the sport manager but to challenge it in order not to risk forfeiting his rights, even though the chances of success of the challenge were objectively low.

We agree with the Federal Tribunal that, practically speaking, the non-recognition of the CAS decision as a challengeable award was the best and probably only sound decision that could be made in the case at hand. Legally speaking, however, it is hard to understand how the Federal Tribunal can, on the one hand, admit that the Panel decided, at least implicitly, on its jurisdiction, but reject, on the other hand, that the decision is capable of appeal. This seems to contradict the Federal Tribunal's case law pursuant to which procedural decisions may be challenged when the arbitral tribunal issuing them has implicitly made a decision as to its jurisdiction.

Admittedly, the Federal Tribunal found that the decision of the CAS Panel was not challengeable because it was a «provisional» decision. However, we agree with other commentators that there does not seem to be any indication that the CAS Panel considered the issue of its own jurisdiction to be unresolved or provisional[10]. Some doubts remain, thus, concerning the legal soundness of the Federal Tribunal's reasoning.

4. Public policy

4.1 No sport- or football-specific notion of public policy

In a decision dated 13 December 2016[11], the Federal Tribunal confirmed, *inter alia*, that the notion of public policy cannot be interpreted differently on a case-by-case basis, in order to take into account branch-specific (in case, sport- or football-specific) peculiarities.

In July 2012, the Argentinian player, *Marcos Rojo*, was transferred by Spartak Moscow to Sporting Lisbon for a transfer fee of EUR 4 million plus 20% of the transfer fee possibly paid to Sporting Lisbon should the player be transferred to another club before the end of August 2015 for more than EUR 5 million. To finance the transfer of the player, Sporting Lisbon entered into an Economic Right Participation Agreement (ERPA) with an investment company, Doyen Sports, pursuant to which the latter agreed to pay 75% of the player's transfer fee, against the assignment by the club to the investment company of 75% of the economic rights related to the player.

Due to his performances during the 2014 World Cup in Brazil, Rojo's value increased substantially. Eventually, in August 2014, Sporting Lisbon transferred him to Manchester United for EUR 20 million plus the loan, for free, of another player until the end of the season. In the meantime, in August 2012, Sporting Lisbon and Doyen Sports entered into a similar ERPA with respect to another player, who was eventually loaned, for free, to another club in January 2014.

In August 2014, Doyen Sports issued an invoice for EUR 15 million but Sporting Lisbon paid only EUR 4.5 million and initiated arbitration proceedings before the CAS, in accordance with the arbitration clause provided for in the ERPAs, requesting in particular that the ERPAs be considered null and void for various reasons. The CAS Panel eventually dismissed the club's claims upholding the validity of the ERPAs and ordered Sporting Lisbon to pay, *inter alia*, the outstanding amount invoiced by Doyen Sports.

Sporting Lisbon moved to set aside the CAS award before the Federal Tribunal for violation of substantive public policy (Article 190(2)(e) PILA), arguing first of all that the ERPAs were usurious, leonine and entailed excessive undertakings, because of: (i) the extremely high percentage of return on investment for Doyen Sports (reaching 400% *in casu*, since Doyen Sports claimed EUR 15 million after having paid only 3 million), if compared to the lack of return for the club (which would be left with EUR 1 million only, after deduction of the amounts due to Doyen Sports and Spartak Moscow, respectively); and (ii) certain contractual provisions allegedly empowering the investment company to force the club to accept a transfer offer deemed sufficiently high in order for the club to avoid paying 75% of such offer should the offer be rejected, and allegedly preventing the club from invoking the unacceptable character of its own undertakings.

The club highlighted in this respect that agreements, such as the ERPAs, pursuant to which clubs assign the economical rights of players to an investor (so-called *Third Party Ownership*, TPO) are prohibited by FIFA (see Article 18ter of the FIFA Regulations on the Status and Transfer of Players, RSTP). While recognizing that the fact that a contract is prohibited by a private association such as FIFA does not necessarily mean that it should be null and void pursuant to Swiss law, the club pleaded for the recognition of the existence of concepts of moral standards pertaining to the sport field in general, and to football in particular, to avoid that players become objects of speculation and investment funds take advantage of the financial difficulties of clubs in order to make indecent profits.

[9] See Nathalie Voser/Anya George, Doping charges against Lance Armstrong's former team director: Swiss Supreme Court examines ambiguous CAS decision, available at: www.swlegal.ch/getdoc/744c856d-1602-4fde-bb3f-9f34aee56df3/2016_Nathalie-Voser_Anya-George_Doping-charges-aga.aspx.

[10] See Nathalie Voser/Anya George, *Op. cit.* at *supra* footnote 9.

[11] Decision 4A_116/2016.

The Federal Tribunal rejected this first argument, considering first of all that it is not for the Federal Tribunal, nor for CAS, to review the complex and highly political issue of football financing in general. The Federal Tribunal further denied that the notion of public policy should be modulated in accordance to a purported sport- and football-specific notion of moral standards, if any. According to the Federal Tribunal, this would only result in a dilution of the notion of public policy and would create significant difficulties in practice.

Concerning the specific arguments raised by the club, the Federal Tribunal found in substance that: (i) the fact that the investment company was entitled to the same share (75%) of the transfer fee of the player it had itself financed cannot be considered as usurious, leonine or immoral, in particular since the increase in the player's value which contributed to the 400% return on investment depended on something, i.e. the extraordinary performances of the player in the World Cup, that could not be foreseen or predicted; and (ii) a contractual limitation of the economic freedom of a party is only excessive pursuant to Article 27(2) CC if the latter submits to the other party's arbitrariness or restricts its economic freedom in such a way that it endangers its own economic existence, which the Federal Tribunal found was not the case in the present instance.

The Federal Tribunal finally rejected also the last argument raised by the club pursuant to which the ERPAs would purportedly violate the personality and fundamental rights of the players insofar as it would encourage clubs to transfer players before the end of their employment contracts. The Federal Tribunal considered that the club limited itself to purely theoretical principles, without showing *in concreto* how the ERPAs would undermine the rights of the players concerned, in particular Rojo. The Federal Tribunal found that the opportunity for him to play for one of the best clubs worldwide for a higher salary could certainly not be considered as a violation of his personality or fundamental rights.

The decision of the Federal Tribunal appears to be correct, at least in view of the specific circumstances of this case. We tend to agree with the Federal Tribunal that it is particularly difficult to admit the existence of sport- and football-specific moral standards which may justify a certain relaxation of the strict notion of public policy. It is submitted that this would create a dangerous precedent and threaten legal certainty concerning a notion which is already difficult to define as admitted by the Federal Tribunal itself.

We also welcome the refusal of the Federal Tribunal to interfere with issues, such as the financing of football in particular and the validity of TPOs, which fall within the competence of the international federations governing football. This has not prevented, however, our Supreme Court from expressing its own opinion concerning the relationship between football and money: in an *obiter dictum*, the Federal Tribunal has indeed qualified this relationship as a «minefield», which «defies comprehension» in particular due to the «astronomic» amounts into play and the «opacity» of the relations between the various actors. It is difficult not to share this opinion, which is (or should at least be) of concern to the football community in general, and its governing authorities in particular[12].

4.2 Joint and several liability pursuant to Article 17(2) RSTP does not violate public policy

In a decision dated 20 December 2016[13], the Federal Tribunal clarified that the rule embodied in Article 17(2) RSTP, pursuant to which if a player is required to pay compensation, the player and his new club shall be jointly and severally liable for its payment, does not violate public policy.

A player entered into two employment contracts almost simultaneously with two clubs: an Israeli club first and a French club then. Seized by the Israeli club, the FIFA Dispute Resolution Chamber (DRC) found that, by entering into the contract with the French club, the player had unlawfully breached the pre-existing contract with the Israeli club. The DRC therefore ordered the player and the French club to jointly and severally pay an indemnity of USD 670'000 to the Israeli club, and imposed other sanctions on both the player and the French club.

The player and the French club appealed before the CAS. The CAS Panel eventually reduced the indemnity to USD 620'000 and annulled the sanctions imposed upon the French club, considering that the latter had not encouraged the player to breach his contract with the Israeli club.

The French club moved to set aside the CAS award before the Federal Tribunal for violation of public policy (Article 190(2)(e) PILA), arguing that the fact that the CAS had considered the club jointly and severally liable even though it had not influenced the contractual breach committed by the player, would violate Article 27(2) CC which

12 For further interesting comments on this case see: www.asser.nl/SportsLaw/Blog/post/doyen-vs-sporting-ii-the-bitter-end-of-sporting-s-fight-at-the-swiss-federal-supreme-court-by-shervine-nafissi.

13 Decision 4A_32/2016.

provides that «no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals».

The Federal Tribunal held that such a rule, which is embodied in Article 17(2) RSTP, is not *per se* incompatible with public policy, even if it has been criticized and its application has been excluded in a case in which the old club had terminated the contract with a player who had breached his professional duties[14]. Furthermore, according to the Federal Tribunal, the French club failed in any event to prove that the amount for which it was found to be jointly and severally liable had an excessive character and/or endangered its own economic existence[15].

The decision of the Federal Tribunal is perfectly logic in our opinion, no matter how logic may sound the rule pursuant to which new clubs must be held as jointly and severally liable for compensations due by their players. Again, it is not for the Federal Tribunal to interfere with the opportunity of such rules which fall within the competence of football governing authorities. Critics are obviously welcome, but should be addressed to those authorities directly, and not raised indirectly in challenge proceedings which do not serve the purpose of correcting rules or behaviors which may potentially be considered as unjust or unfair.

14 See CAS 2013/A/3365, Juventus FC v. Chelsea FC, and CAS 2013/A/3366, AS Livorno Calcio SpA v. Chelsea FC.

15 See in this respect supra section 4.1 (with regard to decision 4A_116/2016).