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A decision based on a written submission of a third party does not violate the right to be heard if the parties to the proceedings had enough time to comment on it

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In a decision of 23 June 2009 (4A_62/2009), the Swiss Federal Supreme Court held that the right to be heard is not violated where an arbitral tribunal bases its decision on a written submission of a third party and the parties to the proceedings had enough time to comment on such written submission.By letter of 7 July 2008, the national football association of country F (the "Respondent"), a member of the Fédération Internationale de Football Association ("FIFA"), informed the German National Football Association that it had selected a player (the "Football Player"), to participate in the Olympic Games in Peking in August 2008 (the "Olympic Games"). At that time, the Football Player was engaged by a German football club (the "Complainant"). The Respondent asked the German National Football Association to order the Complainant to make the Football Player available for this event. By letter of 11 July 2008, the Complainant refused Respondent's request and stated that under the applicable FIFA regulations it had no duty to make the Football Player available. By letter of 17 July 2008, the German National Football Association confirmed the statement of the Complainant.

On 11 August 2008, the Complainant filed a claim against the Respondent with the FIFA Players' Status Committee. The Complainant requested that the Respondent be enjoined from engaging the Football Player for the Olympic Games, including the preparation and training for the Olympic Games. By letter of 12 August 2008, FIFA informed the Complainant that it was not in a position to intervene in this matter. The Complainant appealed to the Court of Arbitration for Sport ("CAS") against FIFA's letter of 12 August 2008 and requested that FIFA's decision be dismissed and that the Complainant's demands submitted to FIFA be granted.

By an arbitral award of 16 December 2008, the CAS decided that, among other things, an appeal against FIFA's letter of 12 August 2008 was inadmissible. Referring to R47 of the CAS Code de l'arbitrage en matière de sport, and to article 63.1 of the FIFA Statutes, the CAS held that an appeal is only admissible against a decision of a court of lower instance. FIFA's letter of 12 August 2008 was only informative in character and did not anticipate possible decisions of the competent institutions of FIFA in this matter. Since FIFA's letter of 12 August 2008 did not affect the legal positions of the

parties, it was not a "decision" against which an appeal before CAS was admissible. When rendering its award of 16 December 2008, the CAS based its considerations, among other things, on an unsolicited letter, submitted to it by FIFA on 4 November 2008.

Subsequently, the Complainant filed an appeal before the Swiss Federal Supreme Court and put forward, among others, two arguments of general interest:
The Complainant argued that its right to be heard in an adversarial proceeding had been violated because the CAS based its considerations, among others, on FIFA's letter of 4 November 2008. There had been no indication that CAS would rely upon this letter "as a deciding part of the position of the lower instance". The Complainant argued that, by basing its award on this letter without giving the parties an opportunity to comment, the CAS infringed the principle of the right to be heard.

The Federal Supreme Court held that CAS did not violate the Complainant's right to be heard in this regard. The CAS delivered FIFA's letter of 4 November 2008 to the Complainant for its information on 5 November 2008 – the Complainant never denied this fact -, and the appealed decision was issued on 16 December 2008. The Complainant, therefore, had more than one month to comment on FIFA's letter of 4 November 2008. Since the Complainant did not explain why it had not been able to comment on FIFA's letter during that period of time, its complaint that its right to be heard had been violated was unfounded.

Before the Federal Supreme Court the Complainant further argued that the CAS' award of 16 December 2008 violated Swiss public policy because CAS' decision was not based on the law chosen by the parties according to FIFA Statutes, but on its own case law. Hence, according to the Complainant, CAS' award was based on the wrong legal system.

The Federal Supreme Court dismissed this complaint as well. The Complainant had admitted that the CAS, in its award, rightly held that FIFA Statutes, as well as Swiss law, were applicable to the dispute. The Complainant's allegation that the CAS decision was based on CAS' own case law, and therefore on the wrong legal system, was flawed. It was aimed at criticizing the application of the law itself, rather than the identification of the applicable law. Such arguments, however, cannot be brought before the Federal Supreme Court.

Although this decision was rendered in the context of sports arbitration, it indicates that under Swiss arbitration law the arbitral tribunal is free to base its decision on an unsolicited submission, even where the submission comes from a third party (who is not formally a party to the proceedings), and does not need to specifically invite the parties to comment on it for that purpose. The right to be heard seems to be complied with if the parties are given sufficient time to comment on such submission. Consequently, if a party to an arbitration is presented with an unsolicited submission on which the arbitral tribunal could rely for the purpose of rendering the award, it should comment on it on its own motion.

In its decision, the Federal Supreme Court further raised, but left unanswered, the question of whether an arbitral tribunal violates Swiss public policy if it bases its

decision on a legal system not chosen by the parties. In its past decisions the Federal Supreme Court held that Swiss public policy is not violated where a tribunal renders an award based on a legal system different from the one chosen by the parties and the award, in result, does not deviate materially from the decision which would have been rendered had the tribunal applied the law chosen by the parties (see, e.g., the decision of the Federal Supreme Court of 14 November 1990, published as 116 II 634, on p. 637). This view has been supported by Swiss legal authorities.

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