

Award set aside for lack of jurisdiction

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In a recently published decision, the Supreme Court set aside an arbitral award on the grounds that the arbitral tribunal had wrongly accepted jurisdiction. ⁽¹⁾

Facts

The dispute arose out of an exclusive brokerage contract between football player A and former players' agent B. The contract contained a dispute resolution clause drafted in Spanish, which the Court of Arbitration for Sport (CAS) translated as follows in the challenged award: ⁽²⁾

"For processing and elucidation of any conflict that may arise in connection with the celebration [conclusion], interpretation, execution, and extinction of the present contract and without prejudice that can occur before national and international bodies corresponding states [Dispute Resolution Body of the Asociación del Fútbol Argentino (AFA) and the Fédération Internationale de Football Association (FIFA) Players' Status Committee in the international order], ⁽³⁾ based on the constitutional guarantee of natural judge (Art. 18 N.C.) the parties submit themselves to the jurisdiction and decisions of the courts in the Comercial de Capital Federal, República Argentina."

Further to A's termination of the brokerage contract and its entering into an employment contract with a new football club, B started arbitration proceedings before the FIFA Players' Status Committee to seek payment of remuneration allegedly due under the brokerage contract. Following the committee's refusal to admit B's claim, the latter brought an appeal before the CAS, which annulled the committee's decision and ordered A to pay €560,000 plus interest to B.

A challenged the CAS's award before the Supreme Court, arguing that the CAS had wrongly accepted jurisdiction in the absence of an agreement to arbitrate.

Decision

The Supreme Court first recalled that the existence and validity of an arbitration agreement are governed by:

- the law chosen by the parties;
- the law applicable to the dispute; or
- Swiss law (Article 178(2) of the Private International Law Act).

In the absence of a choice of law and considering that neither of the parties had invoked the provisions of a foreign law, the Supreme Court applied Swiss law to the disputed arbitration agreement. ⁽⁴⁾ It also recalled that:

"an arbitration agreement is an agreement, whereby two or more determined or determinable parties agree bindingly to submit one or more, present or future disputes to arbitration pursuant to directly or indirectly specified rules, to the exclusion of the original

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In this respect, the expression of the parties' intent to exclude the jurisdiction of state courts in favour of arbitration is decisive. **(5)**

The Supreme Court then recalled that the interpretation of arbitration agreements follows the principles of contract interpretation. It also recalled that the existence of an arbitration agreement must be admitted restrictively because it involves a strong limitation of the legal remedies, but that once the parties' intent to submit a dispute to arbitration is established, arbitral tribunals must choose the interpretation that is most favourable to the validity of the arbitration agreement. **(6)**

After analysing the findings in the challenged decision, the Supreme Court concluded that the CAS had interpreted the parties' declarations objectively. **(7)** In this respect, the Supreme Court noted that the arbitration agreement did not mention any arbitral tribunal, let alone the CAS, and that the parties had explicitly submitted to the jurisdiction of the commercial courts of Buenos Aires.

According to the Supreme Court, it was unclear how the reference in the arbitration agreement to the dispute resolution bodies of FIFA and the AFA was to be understood, but such reference was insufficient to establish the parties' clear presumed intent to submit disputes arising out of the brokerage contract to arbitration, to the exclusion of state courts.

Further, the Supreme Court held that these bodies were not even arbitral tribunals, but mere internal association bodies, and that there were no indications that the choice of Argentinian courts was to be considered as a mere alternative jurisdiction for cases in which these association bodies would decline jurisdiction. **(8)** In any event, if the jurisdiction of such bodies took precedence, there would have been no room for any remaining jurisdiction of the Argentinian courts, which did not correspond to the parties' presumed intent.

Based on these reasons, the Supreme Court found that the dispute resolution clause in the brokerage contract prevented the conclusion that the parties had waived the jurisdiction of state courts in favour of arbitration, and thus annulled the award. **(9)**

Comment

This decision follows an October 4 2017 decision (4A_150/2017) **(10)** in which the Supreme Court also set aside an arbitral award for lack of consent to arbitrate.

These decisions unsurprisingly confirm the well-established Supreme Court's line of decisions according to which the existence of an arbitration agreement may not be accepted lightly – namely, that the parties' clear intention to waive the jurisdiction of state courts in favour of arbitration must be established. However, once the existence of an arbitration agreement is established, its scope and content are broadly construed under the assumption that, if they chose to enter into an arbitration agreement, the parties intended to have an arbitral tribunal with broad jurisdiction.

The recently published decision clarifies that such practice also applies to sports arbitration.

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Endnotes

(1) Supreme Court, 4A_432/2017, January 22 2018 (in German).

(2) The Spanish original reads as follows:

"Para la tramitación y dilucidación de cualquier conflicto que pudiere suscitarse con motivo de la celebración, interpretación, ejecución y extinción de este contrato y sin perjuicio que podrán ocurrir por ante las instancias federativas nacionales e internaciones que

correspondan (Órgano de Resolución de Litigos AFA y Comisión del Estatuto del Jugador FIFA en el orden internacional), con fundamento en la garantía constitucional del juez natural (art. 18 C.N. [Constitución Nacional]) las partes se someten al la jurisdicción y decisión del las tribunales ordinarios en lo Comercial de Capital Federal, República Argentina."

(3) Author's translation. The wording in the square brackets was omitted from the English translation contained in the Supreme Court's decision and appears only in the Spanish version thereof.

(4) Ground 3.2.

(5) *Id.*

(6) For further details please see "[Award set aside for lack of consent to arbitrate](#)".

(7) Ground 3.3.

(8) Ground 3.3.

(9) *Id.*

(10) For further details please see "[Award set aside for lack of consent to arbitrate](#)".

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