

Arbitration - Switzerland

Foreign mandatory provisions and arbitrability

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Should an arbitral tribunal sitting in Switzerland consider a mandatory provision of foreign law when deciding whether a claim may be subject to arbitration (arbitrability)? In a March 2013 decision,⁽¹⁾ the Supreme Court repeated its "Yes, but..." response.

Facts

The case pertained to a dispute between the coach of the Bulgarian national football team and the Bulgarian Football Union (BFU). The employment agreement entered into by the parties contained the following arbitration clause:

"the dispute shall be referred for resolving by the competent court. The parties to the contract recognize the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland as in this case the Statute and the regulations of BFU and the provisions of Bulgarian legislation will apply."

Further to the premature termination of his employment agreement by the BFU, the coach started judicial proceedings before the competent court in Sofia in order to obtain payment of a penalty. The court admitted jurisdiction, notwithstanding the arbitration agreement. It based its jurisdiction on a provision in Bulgarian law which excludes arbitration for employment claims:

"The parties to a property dispute may agree that it be settled by a court of arbitration, unless the dispute has as its subject property rights or possession of immovable property, alimony or rights as per employment relationship."

The same court rejected the claim on the merits.

The claimant then started arbitration before the Court of Arbitration for Sport, which denied jurisdiction for lack of arbitrability.

The claimant challenged the Court of Arbitration for Sport's award before the Supreme Court, arguing that the dispute was arbitrable.

Decision

The Supreme Court rejected the claimant's challenge.

First, the Supreme Court recalled that the question of whether a dispute is capable of settlement by arbitration in Switzerland is governed by Article 177(1) of the Private International Law Act, which provides that "any dispute of a financial interest may be the subject of an arbitration". The Supreme Court further recalled that this provision sets forth a substantive rule of arbitrability, as opposed to a conflict of laws rule.⁽²⁾

In line with its past decisions, the Supreme Court then held that the arbitrability of a specific claim may be denied if foreign legal provisions submit such a claim to the state courts' mandatory jurisdiction, provided that these provisions belong to public order.⁽³⁾

However, as the Supreme Court again made clear, this possibility should not mean that any foreign mandatory provisions which have a connection with the dispute, and which possibly contain a narrower definition of arbitrability than under Swiss law, must be taken into consideration for the assessment of arbitrability.⁽⁴⁾ It is not pertinent for this assessment that the disregard of such mandatory provisions may eventually result in the enforcement of the award being denied further to an objection under Article V(2)(a) of the New York Convention, since the Swiss legislator chose to define arbitrability based on a substantive test (as opposed to a conflict-of-rule test). Its intent must have

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been to accept that some Swiss awards may be conceivably unenforceable in a specific country which has adopted a definition of arbitrability which differs from the Swiss definition.⁽⁵⁾

In this case, the Supreme Court nevertheless found that the Court of Arbitration for Sport's decision to decline jurisdiction was correct.⁽⁶⁾ In doing so, the Supreme Court did not apply the abovementioned Bulgarian legal exclusion. It proceeded to an interpretation of the purported arbitration agreement and found that the parties had not actually agreed to arbitration. More particularly, they had not agreed to exclude the jurisdiction of the state courts.⁽⁷⁾ The Supreme Court relied on the wording used by the parties, especially the reference to the "competent court". It further relied on the parties' choice of law in favour of Bulgarian law, which excludes arbitration for employment claims. It also found that the claimant's seizing of the Bulgarian state courts before resorting to arbitration was an additional indication of the parties' lack of agreement to arbitrate.⁽⁸⁾

Comment

The acknowledgment that the definition of arbitrability under Swiss law, without regard to possible stricter rules of the *lex causae* or the parties' national laws, may prevent the recognition and enforcement of a Swiss award in another country is not new.⁽⁹⁾ It is a known and assumed consequence of this definition.

Neither is anything new in leaving the door open for some kind of consideration for foreign legal provisions which grant mandatory jurisdiction to state courts over certain claims if such provisions belong to the public order. This was held in a decision of principle in 1992 (*Ficantier*)⁽¹⁰⁾ and repeated in 2007⁽¹¹⁾ and May 2012.⁽¹²⁾ However, this is criticised by commentators. According to these commentators, arbitrability must be established in accordance with the sole test of Article 177 of the Private International Law Act (any dispute which has a monetary value may be arbitrated), to the exclusion of any rule of any other legal order, even if such a legal order has a connection with the dispute.⁽¹³⁾

Neither the decision of principle in 1992 nor the 2007 decision gave an indication as to what should be understood by 'public order'. Is it the public order of the foreign country where the exclusive jurisdiction applies (Article 19 of the Private International Law Act), or is it the public order which, if violated, would result in the award being set aside in Switzerland (Article 190(2)(e) of the Private International Law Act)?⁽¹⁴⁾ Pursuant to the latter provision, an award may be challenged if it violates fundamental principles of law so that it is irreconcilable with the prevailing legal order and system of values.⁽¹⁵⁾

Both the May 2012 and the March 2013 decisions seem to clarify which public order would apply, if any. They both refer to Article 190(2)(e) of the Private International Law Act.⁽¹⁶⁾ Thus an arbitral tribunal sitting in Switzerland may, arguably, give consideration for the purpose of assessing the arbitrability of a claim to a foreign legal provision which submits such a claim to the exclusive jurisdiction of state courts under two cumulative conditions. First, there is a sufficiently close connection between the dispute and the foreign country where this provision was enacted. Second, the arbitral tribunal's decision to accept jurisdiction would infringe public order as per Article 190(2)(e) of the Private International Law Act.

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Endnotes

(1) Supreme Court 4A_388/2012. See www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html (in German).

(2) Ground 3.2.

(3) Ground 3.3.

(4) *Ibid.*

(5) *Ibid.*

(6) Ground 3.4.

(7) Ground 3.4.3.

(8) Ground 3.4.3.

(9) ATF 118 II 193, Ground 5c/aa.

(10) ATF 118 II 353.

(11) Supreme Court 4A_370/2007, February 21 2008, Ground 5.2.2.

(12) Supreme Court 4A_654/2011, May 23 2012, Ground 3.4.

(13) Tschanz, Commentaire Romand LDIP, Helbing & Lichtenhahn 2011, N 19 to Article 177.

(14) In favour of the latter proposition, see Poudret and Besson "Comparative Law of International Arbitration" 2nd ed, N 333 and Berger and Kellerhals "International and Domestic Arbitration in Switzerland" 2nd ed, N 257.

(15) ATF 116 II 634, Ground 4.

(16) Supreme Court 4A_388/2012, Ground 3.3, and 4A_654/2011, Ground 3.4.

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