

Arbitration - Switzerland

Four recent Supreme Court arbitration decisions provide legal guidance

Contributed by **Tavernier Tschanz**

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Introduction

According to four recent Supreme Court decisions it can be said that:

- the issue of whether the principle according to which the onus lies with the parties to allege the facts and produce evidence (*maxime des débats*) belongs to the procedural public policy remains unsettled;
- although an award need not be reasoned, sufficient reasons must be given in order to comply with the right to be heard (confirmation of line of decisions);
- legal capacity must exist at least at the time of the first decision on the merits; and
- the waiver to receive a reasoned award does not entail a waiver to challenge such award.

Onus to allege facts and submit evidence

On December 6 2012⁽¹⁾ the Supreme Court reiterated that the *pacta sunt servanda* principle is violated only when an arbitral tribunal refuses to apply a contractual provision which it considers binding on the parties or, conversely, when the arbitral tribunal finds that a provision is not binding, but then demands compliance therewith.⁽²⁾ The court considered that when arbitrators make their own assessment of a settlement agreement and find it to be binding only with regard to certain claims, there is no violation of the *pacta sunt servanda* principle or internal incoherence in the reasons of the award.⁽³⁾ Further, the Supreme Court confirmed that in any event, the internal incoherence of the reasons of an award does not fall within the definition of 'substantive public policy'.⁽⁴⁾ Finally, the Supreme Court did not take a position on the plaintiff's argument that procedural public policy includes the principle that the parties must allege the facts and produce relevant evidence.⁽⁵⁾

The case pertained to a dispute between a professional football player and two football clubs. The player entered into a contract with one club while he was still under contract with the other. In the proceedings before the Court of Arbitration for Sport (CAS), the arbitrators had to assess the impact of a settlement agreement entered into by the player and the two clubs. The CAS considered that the parties were free to waive any financial claims raised by either of them, as they had done in the settlement agreement, but were prohibited from evading the disciplinary system put in place by the International Federation of Football Associations (FIFA) by entering into a settlement agreement that contradicted the facts.

In its challenge to the Supreme Court, the plaintiff argued that the arbitrators had admitted the binding nature of the settlement agreement with respect to the pecuniary claims, but denied such nature when deciding on the disciplinary penalties, and therefore had violated the *pacta sunt servanda* principle (ie, the principle that the agreements and stipulations of the parties to a contract must be observed).

International arbitral award need not be reasoned

On December 10 2012⁽⁶⁾ the Supreme Court reiterated that an international arbitral award need not be reasoned.⁽⁷⁾ Therefore, if a claim has not been addressed in the reasons of an award, it cannot be inferred from this omission that this claim was ignored by the arbitrators.⁽⁸⁾ However, the right to be heard imposes on arbitrators a

Authors

Frank Spoorenberg



Daniela Franchini



minimal duty to examine and address the pertinent issues. This duty is breached if the arbitral tribunal fails to take into account, either inadvertently or due to a misunderstanding, some statements, arguments, evidence and offers of evidence adduced by the parties that are important for the decision to be issued.⁽⁹⁾

A dispute arose after a football club which had sold a player did not receive full payment for that player. The club successfully commenced proceedings before the FIFA Players' Status Committee. The respondent's appeal to the CAS was partially admitted. In its challenge to the Supreme Court, the respondent argued that the arbitral tribunal had decided *infra petita* (ie, decisions that consider less than the issues submitted to the arbitral tribunal), and that it had violated the respondent's right to be heard.

Legal capacity to be met at time of award

On December 11 2012⁽¹⁰⁾ the Supreme Court held that according to the general principles of civil procedure law, the admissibility requirements (*conditions de recevabilité*) to which the capacity to be a party belongs must be met when the decision on the merits is issued. However, it will suffice if these requirements are fulfilled until then.⁽¹¹⁾ Therefore, the Supreme Court held that as long as the court or arbitral tribunal has issued no decision on the merits, the temporary removal of a party from the trade register has no impact on that party's legal capacity, provided that its re-registration in the trade register re-establishes its legal capacity pursuant to the applicable substantive law.⁽¹²⁾

In a case which involved a contract for the surveillance of imports, a dispute arose when the contractor claimed that it had not been paid in full. A three-member International Chamber of Commerce arbitral tribunal seated in Geneva was constituted. The tribunal issued a preliminary award in which it found that the contractor (the claimant) had capacity to arbitrate, and that the tribunal had jurisdiction over the case. Subsequently, the respondent became aware that the contractor had not been registered on the trade register when the preliminary award was issued and requested the arbitral tribunal to issue an additional award. Meanwhile, the contractor had re-registered in the trade register; according to the applicable substantive law, this registration retrospectively reestablished its legal capacity. Therefore, in this award, the arbitrators found that the temporary removal from the trade register had no impact on the contractor's existence or on the arbitration proceedings. The respondent challenged this decision before the Supreme Court.

Waiver of a reasoned award

On December 14 2012⁽¹³⁾, referring to numerous scholars, the Supreme Court held that the waiver to request a reasoned award is not to be taken as a waiver to challenge such award.⁽¹⁴⁾ The Supreme Court further confirmed that a violation of the European Convention on Human Rights is not a ground for challenging an international arbitral award, since such violation is not included in the exhaustive list of grounds provided in Article 190(2) of the Private International Law Act (for further details please see "[Supreme Court rules on Private International Law Act](#)").⁽¹⁵⁾

The case pertained to a dispute between a professional basketball player and his agent. The Basketball Arbitral Tribunal ordered the player to indemnify his agent in an award of which only the dispositive part was notified to the parties. Without requesting the arbitral tribunal to provide a reasoned award, the player filed a challenge with the Supreme Court.

For further information on this topic please contact [Frank Spoorenberg](#) or [Daniela Franchini](#) at Tavernier Tschanz by telephone (+41 22 704 3700), fax (+41 22 704 3777) or email (spoorenberg@taverniertszanz.com or franchini@taverniertszanz.com).

Endnotes

(1) Supreme Court Decision 4A_276/2012. Full text available in French at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(2) Ground 3.1.

(3) Ground 3.2.

(4) *Id.*

(5) Ground 4.2.2.

(6) Supreme Court Decision 4A_635/2012. Full text available in Italian at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(7) Ground 4.2.

(8) *Id.*

(9) Ground 5.2.

(10) Supreme Court Decision 4A_414/2012. Full text available in French at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(11) Ground 2.3.1.1.

(12) *Id.*

(13) Supreme Court Decision 4A_198/2012. Full text available in French at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

(14) Ground 2.2.

(15) Ground 3.1. See also Supreme Court Decision 4A_238/2011.

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