

## Arbitration - Switzerland

International award annulled on grounds of procedural public policy infringement

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### Introduction

International arbitration tribunals seated in Switzerland enjoy considerable leeway when conducting arbitration proceedings. The Swiss Supreme Court will intervene *ex post facto* only on restrictive grounds, particularly in cases in which fundamental or generally recognised mandatory procedural principles have been disregarded – that is, on procedural public policy grounds according to Article 190(1)(d) of the Private International Law Act – so as to contravene the sense of justice in an intolerable way, resulting in an award that appears to be completely incompatible with the values and legal order of the state.<sup>(1)</sup>

Only the "infringement of a rule essential to guarantee the loyalty of proceedings" can justify the annulment of an arbitral award on such grounds – regardless of the chances of success of the case<sup>(2)</sup> – excluding any other procedural infringements.<sup>(3)</sup> Such fundamental, mandatory procedural principles typically include a party's right to be heard in adversarial proceedings, the secrecy of tribunal deliberations<sup>(4)</sup> and the *res judicata* (a matter already judged) principle.<sup>(5)</sup> Although they have frequently been invoked in challenge proceedings, until recently procedural public policy grounds had never led to the annulment of an international arbitration award. Such challenges most often fail on good-faith consideration or on the basis of estoppel (failure to raise the procedural objection immediately).<sup>(6)</sup>

### Facts

A dispute arose between Portuguese football club Benfica and Spanish football club Athletic Madrid over the payment of a training compensation fee based on the Regulations on the Status and Transfer of Players 1997 following the transfer of a player. The matter was eventually referred to the International Federation of Association Football's (FIFA) internal dispute mechanism, which at the time included no facility for the independent judicial review of FIFA decisions on training compensation requests.<sup>(7)</sup> The FIFA Special Committee upheld the Portuguese club's request and ordered the Spanish club to pay €2.5 million. Given the lack of any other independent judicial review of this decision in the Regulations on the Status and Transfer of Players 1997, the Spanish club successfully challenged FIFA's decision before the Zurich Commercial Court, relying on the general Swiss law provision which allows any member of a Swiss association to challenge any decision which is made by the association without that member's consent.<sup>(8)</sup> The judicial proceeding involved FIFA and Athletic Madrid, but not Benfica. The cantonal court held that the Regulations on the Status and Transfer of Players 1997 infringed European and Swiss competition law, and that FIFA's decision was therefore null and void. The cantonal judgment was not appealed and entered into force 30 days after its notification to the parties.<sup>(9)</sup> Complying with the terms of the judgment, the FIFA Special Committee turned down a request from the Portuguese club, filed two months after the notification of the cantonal judgement, for the same training compensation fee for the same player. On this occasion FIFA's decision was referred to the Court of Arbitration for Sport, which had been designated as the appellate institution for FIFA Special Committee decisions on training compensation fees.<sup>(10)</sup> The arbitration tribunal upheld the appeal in part and ordered Athletic Madrid to pay €400,000, based on the Regulations on the Status and Transfer of Players 1997. This award was successfully challenged before the Supreme Court on procedural public policy grounds.

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## Decision

The Swiss Supreme Court held that:

- the Zurich Commercial Court judgment had disposed of the dispute pertaining to the payment of the training compensation fee to the Portuguese club in a way that was final and binding;
- the binding effect of the cantonal judgment was not limited to the parties involved in the proceeding, but rather was *erga omnes* (in relation to everyone), since the judgment upheld the challenge of a decision of an association; and
- the award disregarded "the material legal effect of the judgment of the Zurich Commercial Court of June 21 2004 and had therefore "violat[e]d] procedural public policy".<sup>(11)</sup>

## Comment

This case represents the first time that the Supreme Court has annulled an international arbitration award on procedural public policy grounds. However, the importance of this case should not be overstated, since it relates to a particularity of FIFA's dispute resolution mechanism, taken in its changing context. It was as a direct result of the changes in FIFA's dispute resolution structure with respect to training compensation fees that the same dispute regarding compensation for the same training fee for the same player between the same two football clubs could be brought before two distinct, independent and impartial adjudicating authorities (ie, the Zurich Commercial Court and the Court of Arbitration for Sport) within a relatively short period of time. Due to the differing nature of the adjudication processes involved, and the differences in the parties participating in the adjudication processes, the triple identity characteristic of the *res judicata* (identity of parties, cause of action and dispute) was not straightforward.

Beyond the particularities of this case, and taking other cases into consideration, there is no indication that the Supreme Court is becoming more intrusive in its approach to the way in which international arbitration proceedings (including Court of Arbitration for Sport proceedings) are conducted in Switzerland.

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## Endnotes

(1) ATF 126 III 249, Ground 3b.

(2) For example, unpublished Decision 4P\_26/2005, March 23 2005, Grounds 3.1 and 3.3.

(3) For example, unpublished Decision in the matter 4P\_154/2005, November 10 2005, Ground 6.1 and references.

(4) ATF 129 III 727, Ground 3.2.

(5) ATF 128 III 191, Ground 4a, on which see for instance Corboz, *Le recours au Tribunal fédéral en matière d'arbitrage international*, in SJ 2002 II p 1 *et seq.*, 19 and 29; Tschanz/Vulliemin, in *Revue de l'arbitrage* 2001 p 885 *et seq.*, 891 .

(6) For example, unpublished Decision in 4P\_146/2005, October 10 2005, Ground 5.2.1 and references.

(7) The review mechanism under the regulations was one of the main points of contention between the European Commission and FIFA, with the initial sets of rules excluding any challenge of FIFA's decision before an independent adjudicating authority. Under the current regulations, disputes are first referred to the Dispute Resolution Chamber (Article 22d and Article 24(1)), whose decision is subject to appeal before the Court of Arbitration for Sport (Article 24(2), second paragraph).

(8) Under Article 75 of the Civil Code, "Every member of an [Swiss] association is entitled by law to challenge before the courts any decisions passed without its assent and which are contrary to law or the constitution of the society, within one month from the day on which its became cognizant thereof".

(9) The European Commission had, at the time, objected to the Regulations on the Status and Transfer of Players 1997, revising the regulations in force as of 1994 in the aftermath of the European Court of Justice *Bosman* ruling (*Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*; Case C-415/93, ECR I-4921) as inconsistent with European competition law and were eventually substituted

for the 2001 regulations (ie, the so-called 'Monti rules'), which were revised and simplified in 2005.

(10) Articles 22 and 24 of the regulations, and Court of Arbitration for Sport Code, Article R47.

(11) Swiss Supreme Court's Decision 4A\_490/2009, April 13 2010, *Club Atlético de Madrid SAD v Sport Lisboa E Benfica - Futebol SAD and Fédération Internationale de Football Association*, to be published in the Digest of the Swiss Supreme Court's decisions. The full text of the decision is available in German at [www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm](http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm).

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