

Arbitration - Switzerland

Supreme Court vacates international arbitration award on public policy grounds

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Introduction

The Supreme Court recently vacated an international arbitration award on material public policy grounds under Article 190, Paragraph 2(e) of the Private International Law Act.⁽¹⁾ Since the enactment of the Arbitration Act (Chapter 12 of the Private International Law Act) in 1987, this is the second instance of annulment on the grounds of public policy. The first case also involved an award issued by the Court of Arbitration for Sport (CAS) and was vacated due to a fundamental disregard of generally recognised mandatory procedural principles (*res judicata* effect of a prior judicial decision).⁽²⁾

Facts

In 2004 Brazilian-born footballer Matuzalem concluded a five-year employment contract with a Ukrainian club. Three years into the contract, the footballer terminated it with immediate effect for just cause, or alternatively for sporting just cause (Articles 14 and 15 of the Regulations on the Status and Transfer of Players). A few days later, Matuzalem concluded a three-year contract with Spanish club Saragossa. The Spanish club signed a hold-harmless provision whereby it committed to compensate the player for any damages he might incur as a result of his premature termination of the 2004 contract. Two years into his new contract, Matuzalem was transferred to Italian club Lazio for a transfer fee of €5.1 million. The International Federation of Association Football's (FIFA) Dispute Resolution Chamber condemned the player to pay €6.8 million in damages to the Ukrainian club for unjustified premature termination of the 2004 contract. Matuzalem and the Spanish club were held jointly and severally liable for twice that amount on appeal by the CAS. That first CAS award was upheld by the Swiss Supreme Court.

The court then considered that the amount of damages awarded was not incompatible with the public order, considering in particular the substantial benefits derived from the transfer by the club and the player.⁽³⁾

Matuzalem and the Spanish club failed to pay any substantial part of the damages, among allegations of the club's serious financial difficulties. As a result, the FIFA Disciplinary Committee initiated disciplinary proceedings against Matuzalem and the club for failure to respect a FIFA decision (Article 64 of the FIFA Disciplinary Code). It fined them Sfr 30,000 and gave them a 90-day deadline to pay the fine in full, failing which:

"the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the Club Real Zaragoza SAD in the domestic league championship."

The decision was upheld by the CAS on appeal. In the meantime, bankruptcy proceedings were initiated against the Spanish club. Matuzalem challenged the second CAS award before the Swiss Supreme Court on public policy grounds. The player argued, among other things, that as a professional football player, and in the face of his financial inability to pay the €11 million fine, the sanction amounted to an indeterminate worldwide working ban upon the sole request of the Ukrainian club. Such a ban seriously infringed Matuzalem's personality rights in a way that was inconsistent with the most fundamental values as recognised in Switzerland.

Supreme Court decision

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The Supreme Court upheld the player's challenge and vacated the second award. It confirmed that a substantive determination violates public policy:

"when it disregards some fundamental legal principles and thus is wholly inconsistent with the essential, generally recognized values, which should be the foundation of any legal order according to the prevailing view in Switzerland."⁽⁴⁾

Such principles typically include the principle of *pacta sunt servanda* (ie, agreements are binding), the prohibition of misuse of rights, the principle of good faith, as well as the prohibition of expropriation without compensation, discrimination, corruption and forced labour.

The court acknowledged that such prime values also encompass core privacy and personality rights. Such rights include the preservation of the fundamental aspects of economic freedom (eg, the right to freely choose, access and perform an occupation) from unnecessary and/or disproportionate public and private interference.

⁽⁵⁾ Contractual curtailment of a party's economic freedom is deemed excessive "when the obligee is exposed to the mercy of a third party, or surrenders or restrains his economic freedom so as to jeopardize his economic existence".⁽⁶⁾ Measures taken by sports federations which seriously harm the economic development of professional sportspeople are proportionate only "when the overriding interests of the federation justify the infringement of privacy".⁽⁷⁾

In this case, the court found that the sanction imposed by FIFA was neither necessary nor proportionate. It was not necessary insofar as the Ukrainian club could enforce the first award against the player and the Spanish club through the facilitated mechanism of the widely ratified 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. The unlimited ban on any football-related activity was also out of proportion with FIFA's goal of securing strict compliance with its decisions. The court thus concluded that:

"In the event of non payment, the challenged arbitral award would result in the applicant being left at the mercy of his former employer and would restrict his economic freedom to such an extent that it would imperil his economic livelihood without any overriding interest of the Football Association and its members. In view of the corresponding threat, the CAS arbitral award of June 29 2011 contains a clear and serious personality right infringement and is contrary to public policy (Article 190(2)(e) of the [Private International Law] Act)."⁽⁸⁾

Comment

The main interest of the case is that it is the first vacation of an international arbitration award on substantive public policy grounds by the Supreme Court since the Private International Law Act was enacted in 1987. The violation was obvious and thus the annulment of the award is no indication that the Supreme Court intends to be more intrusive into arbitrators' decisions and reasoning, as an appeal court would be. With respect to arbitration, the Supreme Court's review is confined to strict and limited grounds for challenge and the court remains remarkably constant in its scrutiny of international awards, in both procedural and substantive matters.⁽⁹⁾

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Endnotes

(1) Supreme Court Decision 4A_558/2011, *Francelino da Silva Matuzalem v FIFA*, March 27 2012. 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.

(2) Supreme Court Decision 4A_490/2009, April 13 2010, *Club Atlético de Madrid SAD v Sport Lisboa E Benfica*, published in *ATF 136 III 345*, noted in "International award annulled on grounds of procedural public policy infringement", ILO, July 29 2010.

(3) Supreme Court Decision 4A_320/2009, June 2 2010, Ground 4. That same year, the Supreme Court upheld another record fine of €17 million on the same grounds: Decision 4A_458/2009, June 10 2010, Ground 4 (*Mutu*).

(4) Ground 4.1 (authors' translation).

(5) Ground 4.3.1.

(6) Ground 4.3.2 (authors' translation).

(7) Ground 4.3.3 (authors' translation).

(8) Ground 4.3.5 (authors' translation).

(9) Out of 32 challenge proceedings against international arbitration awards decided between November 2010 and November 2011, only two have been partly successful.

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