

## Arbitration - Switzerland

### Tribunal's constitution – parties' agreement, immediate challenge

Contributed by **Tavernier Tschanz**

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#### Introduction

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#### Introduction

Pursuant to Article 190(2)(a) of the Private International Law Act, an arbitral award may be annulled "if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted".

In a recent decision, the Supreme Court confirmed that this ground for challenge is not limited to the grievance of the arbitrators' lack of independence and impartiality, but includes the possibility to invoke a breach of the parties' agreement on the tribunal's constitution.<sup>(1)</sup> Such challenge must be brought immediately.

#### Facts

The dispute arose out of a consultancy agreement between a Spanish company and a football club, whereby the former agreed to provide services to the latter in view of securing the renewal of a player's contract with the club. The consultancy agreement contained an arbitration clause in favour of a three-member panel of the Court of Arbitration for Sport (CAS).

Further to the filing of a request for arbitration by the Spanish company, and to the respondent's refusal of the company's suggestion to appoint a sole arbitrator, the president of the CAS ordinary arbitration division appointed a sole arbitrator to resolve the dispute. The sole arbitrator awarded the company's claim. The respondent challenged the award on the ground that the arbitral tribunal was not properly constituted.

#### Decision

The applicant asserted a breach of Article 190(2)(a) of the Private International Law Act because the award had been issued by a sole arbitrator instead of the three-member panel which the arbitration agreement required.

The Supreme Court recalled that, according to the majority of legal authors, the ground for challenge relating to the arbitral tribunal's improper constitution (Article 190(2)(a) of the Private International Law Act) is not limited to the lack of independency or impartiality of arbitrators, but extends to the breach of the parties' agreement on the tribunal's constitution.<sup>(2)</sup> In line with two previous decisions,<sup>(3)</sup> the Supreme Court held that the majority view should prevail because:

*"those who waive in advance, by entering into an arbitration agreement, the right, of constitutional... and conventional nature... that his case be heard by a tribunal established by law... may reasonably expect that the members of the arbitral tribunal or the sole arbitrator, not only offer sufficient guarantees of independence and impartiality, but also meet the requirements that the parties have determined by mutual agreement (number, qualifications, method of appointment) or that result from arbitration rules adopted by them, or even from legal provisions that apply subsidiarily".<sup>(4)</sup>*

Moreover, the Supreme Court considered that this view has the advantage of being consistent with Article V(1)(d) of the New York Convention, according to which recognition and enforcement of an arbitral award may be refused if the composition of the arbitral tribunal was not in accordance with the parties' agreement.<sup>(5)</sup>

#### Authors

**Frank Spoorenberg**



**Daniela Franchini**



Thus, the Supreme Court accepted to assess whether the arbitration agreement required that the arbitral tribunal be composed of three members. Referring to Article R40.1 of the CAS Code, which provides that the CAS division president shall determine the number of arbitrators if the arbitration agreement contains no rule in this respect, and considering that in the present case the arbitration agreement contained such a rule, the Supreme Court found that the CAS division president had breached the arbitration agreement (the principle of autonomy). The Supreme Court further found that this breach constituted a ground for challenge under Article 190(2)(a) of the Private International Law Act.<sup>(6)</sup>

However, the Supreme Court held that the applicant's right to bring such a challenge was forfeited because the applicant failed to object immediately to the arbitral tribunal's constitution. More precisely, the Supreme Court found that the applicant's silence further to the sole arbitrator's appointment, its behaviour during the proceedings and the signature by its counsel of a procedural order confirming that the arbitration panel would be composed of the sole arbitrator, meant that the applicant had accepted the appointment of a sole arbitrator rather than a three-member panel. According to the Supreme Court, this acceptance deprived the applicant of its right to challenge the arbitral tribunal's constitution.<sup>(7)</sup> The Supreme Court further implied that the applicant should already have challenged the CAS division president's decision to appoint the sole arbitrator because this decision settled definitely an objection concerning the constitution of the tribunal. However, the Supreme Court did not clearly impose such a direct challenge against the CAS division president's decision, since it conceded that such a finding would contradict previous decisions of its own.<sup>(8)</sup>

### Comment

The settlement of the discussion about the scope of Article 190(2)(a) of the Private International Law Act is of practical importance. It is now well settled that a breach of the parties' agreement about the constitution of the arbitral tribunal is within the scope of this provision. Consequently, it is now also well settled that a challenge based on such a breach must be brought immediately. As to the decision against which such immediate challenge must be brought, the Supreme Court has consistently held that it is the first decision by which the arbitral tribunal confirms, even implicitly, its constitution.<sup>(9)</sup>

However, in the decision 4A\_282/2013, the Supreme Court seemed to move towards blaming the applicant for not having acted even before the arbitral tribunal was in place, and more particularly for failing to challenge the CAS division president's decision setting the number of arbitrators.<sup>(10)</sup> This apparent blame should not be overestimated. First, the Supreme Court itself acknowledged that providing for such an obligation would go against its previous decisions.<sup>(11)</sup> Second, this apparent blame was made in the context of sports arbitration and in relation to the CAS's specific rules. Its scope would thus be limited. Indeed, the Supreme Court generally held that decisions of arbitral institutions cannot be directly challenged; they can be reviewed only in the context of a setting aside proceeding to be lodged against the award itself.<sup>(12)</sup> Consequently, the Supreme Court has consistently refused to consider direct challenges of the decisions pertaining to arbitrators' appointment or challenge issued by the Court of Arbitration of the International Chamber of Commerce.<sup>(13)</sup>

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@taverniertschanz.com](mailto:spoorenberg@taverniertschanz.com) or [franchini@taverniertschanz.com](mailto:franchini@taverniertschanz.com)). The *Tavernier Tschanz* website can be accessed at [www.taverniertschanz.com](http://www.taverniertschanz.com).

### Endnotes

(1) Supreme Court, 4A\_282/2013, November 13 2013. See [www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html](http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.html) (in French).

(2) Ground 4, referring to, among others, Kaufmann-Kohler/Rigozzi, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, Second edition, 2010, N 799; Tschanz, *Commentaire Romand – Loi sur le droit international privé – Convention de Lugano*, 2011, N 48 to Article 190. With respect to the minority view, the Supreme Court referred to Girsberger/Voser, *International Arbitration in Switzerland*, Second edition, 2012, Page 334; Geisinger/Voser, *International Arbitration in Switzerland*, Second edition, 2013, Page 238; Rigozzi, *L'arbitrage international en matière de sport*, 2005, N 1356.

(3) Supreme Court, 4A\_146/2012, January 10 2013, Ground 3.2 and Supreme Court, 4A\_538/2012, January 17 2013, Ground 4.3.2.

(4) Ground 4.

(5) *Ibid.*

(6) Ground 5.2.

(7) Grounds 5.3 and 5.4.

(8) Ground 5.3.2. More precisely, the Supreme Court referred to a decision in which it held that decisions on arbitrators' challenge issued by the International Council of Arbitration for Sport may not be challenged directly (Supreme Court, 4A\_644/2009, April 13 2010, Ground 1).

(9) ATF 130 III 76, Ground 3.2.1; Supreme Court, 4P.168/1999, February 17 2000, Ground 1b.

(10) Ground 5.3.2.

(11) *Ibid.*

(12) Supreme Court, 4P.208/2004, December 14 2004, Ground 3.2.

(13) Supreme Court, 4A\_644/2009, April 13 2010, Ground 1, referring to ATF 118 II 359, Ground 3b, to Supreme Court, 4A\_348/2009, January 6 2010, Ground 3.1 and to Supreme Court, 4A\_256/2009, January 11 2010, Ground 3.1.2; Supreme Court, 4P.208/2004, December 14 2004, Ground 3.2; Tschanz, *Commentaire Romand – Loi sur le droit international privé – Convention de Lugano*, 2011, N 46 to Article 190 ; Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, Second edition, 2010, N 783 and footnote. For further details please see "Court declines to hear constitution-based challenge against arbitral award" and "No two-tier judicial review of constitution of arbitral tribunal".

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