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YARGITAY KARARI
JUDGMENT OF THE COURT OF CASSATION

* Annotations and Summaries of Decisions of the Swiss Federal Supreme Court Issued in 2014 and 2015 Concerning International Arbitration

İsviçre Federal Mahkemesi'nin 2014-2015 Yıllarında Milletlerarası Tahkime İlişkin Olarak Verdiği Kararların Özetleri ve Şerhleri

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ANNOTATIONS AND SUMMARIES OF DECISIONS OF THE SWISS FEDERAL SUPREME COURT ISSUED IN 2014 AND 2015 CONCERNING INTERNATIONAL ARBITRATION[*]

İSVİÇRE FEDERAL MAHKEMESİ'NİN 2014-2015 YILLARINDA MİLLETLERARASI TAHKİME İLİŞKİN OLARAK VERDİĞİ KARARLARIN ÖZETLERİ VE ŞERHLERİ

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I.
Introduction

This note submits a review of some of the most salient decisions issued by the Swiss Federal Supreme Court (the "Supreme Court") in the past twelve months[1] in connection with international commercial

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[1] Cases until October 30, 2015 (publication date) have been taken into consideration.

An introduction to challenge proceedings against international arbitral awards before the Supreme Court may be found in the note published by F. Spoorenberg and I. Fellrath in the Journal of International Trade and Arbitration Law 2013 (Volume 2, Issue 2).

arbitration and, to the extent relevant beyond the specificities of their subject matter, with sport arbitration, in application of the Swiss international arbitration law (Chapter XII of the Private International Law Act of December 18, 1987; the "PIL Act"[2]).[3]

As it has constantly been the practice since the inception of the PIL Act, the Supreme Court was very restrictive in the application of the grounds for challenge in the decisions issued in 2015. As a result, the tendency has remained unchanged: the Supreme Court issued 36 decisions on challenge of international awards and only 1 challenge was partially successful in the course of 2015.

This review examines successively developments related to the arbitration agreement (*infra* II), the constitution of the arbitral tribunal (III), the jurisdiction of the arbitral tribunal (*infra* IV), the parties' right to be heard and public policy (V) and to post-award mechanisms (VI).[4]

II.
The Arbitration Agreement
SUPREME COURT
June 3, 2015
A. ___ v/ B. ___ and C. ___ (4A_676/2014)
and
September 15, 2015
B. ___ Ltd v/ C. ___ (4A_136/2015)

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Arbitration clause. – Pathological arbitration clause. – Invalid arbitration clause. – Mandatory elements. –

[2] Chapter XII is available for download in original official French, German and Italian languages from http://www.admin.ch>, <droit fédéral>, <recueil systématique>. An unofficial English translation thereof is available for download from https://www.swissarbitration.org/sa/download/IPRG_english.pdf.

[3] Domestic arbitration in Switzerland, which is governed by the Swiss Code of Civil Procedure of December 19, 2008 ("CPC") since January 1, 2011 (formerly by the Swiss Concordat on Arbitration of March 27, 1969), is not discussed.

[4] The full, but anonymized, texts of all decisions are available in their original (French, German or Italian) language on the Supreme Court's official website www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm (matter number search). All English quotes in the sections below are attributable to the authors' only.

Interpretation (subjective / objective). – General rules of contract interpretation. – Exclusion of state court's jurisdiction. – Intent to arbitrate. – Parties' common actual intent. – Principle of trust. – Subsidiary means of interpretation. – Jurisdiction. – PIL Act Art. 178. – PIL Act Art. 186. – PIL Act Art. 190(2)(b). – Art. 77 of the Swiss Federal Tribunal Statute ("LTF").

A clause referring to "the provisions and statutes of the International Chamber of Commerce, Zurich" without any reference to arbitration or dispute settlement was not held to be a valid arbitration agreement because the parties' intent to refer their dispute to arbitration and to exclude the state court's jurisdiction was not established. On the other hand, a poorly drafted clause titled "Arbitration" and referring to "the empowered jurisdiction of Geneva, Switzerland" was held to be a valid arbitration agreement based on the subjective interpretation of the clause (including the parties' subsequent conduct). Caution is thus required when drafting arbitration clauses.

OBSERVATIONS. – 1. The Supreme Court issued two interesting decisions regarding the validity of arbitration agreements and the difference between invalid and pathological arbitration agreements, which we will comment together below. The common background to these decisions is that arbitration clauses that are incomplete, unclear or contradictory (i.e. so-called pathological arbitration clauses) do not necessarily render the arbitration agreement invalid, provided that they contain the mandatory elements of an arbitration agreement, such as the parties' agreement to refer a dispute to arbitration.[5] For this purpose, pathological arbitration clauses must be interpreted in accordance with the general rules for contract interpretation. Therefore, one must first seek to ascertain the parties' common actual intent and, if such intent cannot be established, one must interpret the clause pursuant to the principle of good faith (objective interpretation).[6]

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[5] Supreme Court, 4A_676/2014, June 3, 2015, ground 3.2.2 and Supreme Court, 4A_136/2015, September 15, 2015, ground 2.2.2.

[6] *Ibid*. The Supreme Court further referred to subsidiary means of interpretation such as the *Unklarheitsregel* (according to which, in case of doubt, the contract must be interpreted against the party who drafted the contract) and the *Utilitätsgedanke* (according to which the meaning that allows upholding the arbitration agreement should be preferred).

2. In the first case,[7] the agreement giving rise to the dispute contained a clause according to which "*[t]his agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zurich, Switzerland and subsidiary by the laws of Germany*." The arbitral tribunal, which examined jurisdiction *ex officio* because the respondent had failed to take part in the proceedings, denied jurisdiction on the grounds that, under Swiss law, the parties' common actual intent to arbitrate was not established and a reasonable reader in good faith should have understood the abovementioned clause as a choice of law agreement instead of an arbitration agreement. The claimant challenged the award, arguing that the arbitral tribunal had wrongly denied jurisdiction.

3. The Supreme Court first found that it was bound by the arbitral tribunal's finding that the parties' common actual intent to exclude the state court's jurisdiction in favor of arbitration was not established. It also rejected the plaintiff's argument that a reduced burden of proof should have been applied due to the defendant's default. In doing so, the Supreme Court recalled its well-established practice that arbitral tribunals must examine jurisdiction *ex officio* if the respondent is in default and that they must be strict when verifying whether the parties intended to exclude the state court's jurisdiction.[8] Then, noting, on the one hand, the absence of any reference in the clause to the resolution of disputes and, on the other hand, the link created in the clause by the adverb "*subsidiary*" between "*the provisions and statutes of the International Chamber of Commerce in Zurich*" and the "*laws of Germany*", the Supreme Court agreed with the arbitral tribunal's objective interpretation that there was no valid arbitration agreement and that the disputed clause could instead be understood as a choice of law agreement.[9] In conclusion, the Supreme Court found that the clause was not only pathological (for failing to designate the arbitral tribunal with

[7] Supreme Court, 4A_676/2014, June 3, 2015.

[8] Ground 3.2.3.1, referring to Supreme Court, 4A_682/2012, June 20, 2013, ground 4.4.2.1.

[9] Ground 3.2.3.2. One may question why the Supreme Court went on to determine the objective meaning of the clause if it was satisfied that the parties' common actual intent could be established.

sufficient precision), but also invalid because the parties' intent to exclude the state courts' jurisdiction was not established.[10]

4. In the second case,[11] there were two disputed clauses. The first clause contained in a tripartite distribution agreement drafted in English and Russian between A, B and C. This clause read: "*22 - ARBITRATION Any disputes and disagreements that may arise out of or in connection with this Contract have to be settled between the Parties by negotiations. If no Contract can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Geneva, Switzerland.*"[12]. The second clause was contained in a so-called quality and safety data exchange agreement between A and C and read: "*7-1) Governing law – Jurisdiction* […] *The Parties shall do their utmost to reach an amicable settlement to any dispute arising hereunder. If no agreement can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Lyon, France*". Further to A's early termination of the distribution agreement, B filed a request for conciliation before the Geneva Tribunal of First Instance seeking damages from A, arguing that Article 22 of the distribution agreement was not an arbitration agreement. A answered that Article 22 was indeed an arbitration agreement and that the "*empowered jurisdiction of Geneva*" was to be understood as the Geneva Chamber of Commerce, Industry and Services (the "CCIG"). After the Geneva Tribunal of First Instance granted B an authorization to proceed, B and C filed a request for arbitration with the CCIG, seeking payment of damages from A, thereby accepting the latter's interpretation of Article 22. For its part, A denied the existence of a valid arbitration agreement, arguing that the two agreements between the parties contained contradictory dispute resolution clauses and that priority should be given to the more recent agreement, which provided for the French court's jurisdiction. In any event, according to A, Article 22 was not a valid arbitration agreement because several elements necessary to conduct arbitration proceedings were missing and B had waived its right to resort on arbitration by seizing the Geneva courts. The sole arbitrator designated by the CCIG found that the parties'

[10] Ground 3.2.3.2.

[11] Supreme Court, 4A_136/2015, September 15, 2015.

[12] In the Russian version of the agreement, this clause was titled "Arbitrazh", which could simply mean "jurisdiction" in Russian, according to the Russian party.

common actual intent to resort to arbitration was established (by Article 22 and by the parties' subsequent conduct) and thus that he had jurisdiction over the parties' dispute. A challenged this award for violation of PIL Act Article 190(b).

5. The Supreme Court found that it was bound by the arbitrator's finding of the parties' common actual intent to resort to arbitration and that, even if the arbitrator's considerations were the result of an objective interpretation (*quod non*), they had to be approved.[13] According to the Supreme Court, the fact that Article 22 could qualify as a pathological clause was not decisive because the parties' obligation to resort to arbitration resulted from this clause.[14] The Supreme Court also rejected A's argument that Article 7 of the quality and safety data exchange agreement voided Article 22 of the distribution agreement because the two agreements were not among the same parties, the former was merely an annex to the latter and it had a narrower scope.[15] At the end of the decision, the Supreme Court seemed to question A's conduct under the principle of good faith for first objecting to the state courts' jurisdiction based on an asserted arbitration agreement and then raising a jurisdictional objection before the arbitrator.[16]

III.
The Constitution of the Arbitral Tribunal
SUPREME COURT
May 21, 2015
A. ___ SA v/ B. ___ Sàrl (4A_709/2014)

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Arbitrators' mandate. – Prerogatives inherent to the

[13] Ground 2.2.3.1. The Supreme Court found that (1) the title of Article 22 (i.e. "ARBITRATION"), written in capital and bold letters, was significant, (2) A's argument that Article 22 provided for a double mechanism of amicable settlement of disputes was artificial, (3) the term "empowered" in Article 22 did not necessarily refer to state courts, and (4) the international nature of the distribution agreement also supported the arbitrator's interpretation.

[14] *Ibid*.

[15] Ground 2.2.3.4

[16] *Ibid*., referring to Supreme Court, 4A_579/2010, January 11, 2011, ground 2.2.2.

judicial task. – No delegation. – Appointment of secretary. – Assistance of external consultants. – Legal consultant. – Parties' presumed consent. – Limits. – Irregular composition of the arbitral tribunal. – Right to be heard. – Duty to object. – Forfeiture. – PIL Act Art. 182. – PIL Act Art. 179. – PIL Act Art. 180(1)(b) and (c). – PIL Act Art. 180(3). – PIL Act Art. 190(2)(a). – PIL Act Art. 190(2)(d). – LTF Art. 77.

Arbitrators are entitled to rely on the assistance of administrative secretaries and external consultants, provided that the parties have not expressly excluded this right and that arbitrators do not delegate the core prerogatives inherent to the arbitrators' mission.

_____

OBSERVATIONS. – 1. The dispute arose out of a site owner's immediate termination of a general contracting agreement for the main contractor's alleged unjustified delays in the commencement of the agreed renovation work. The agreement contained the following clause: "*All disputes arising in connection with this Agreement, including concerning the interpretation or application of this contract shall be exclusively settled by a sole arbitrator. The Parties nominate D. as sole arbitrator, who will decide the case ex aequo et bono, and they declare that they* […] *will recognize his judgment as final and binding, without recourse to another arbitrator or tribunal."* The arbitrator – an architect – decided in the constitutive procedural order 1 that the place of arbitration would be Geneva and that the arbitration would be conducted in French. After the main contractor's failed attempts to obtain the arbitrator's removal from the arbitrator himself and from the Geneva judicial authority for alleged flaws in the constitutive order, the arbitration proceedings continued and an evidentiary hearing with oral closing arguments was held. In the course of this hearing, the arbitrator was assisted by two external lawyers, one acting as secretary to the tribunal, and the other as counsel to the tribunal (with a proactive role which consisted in asking questions and taking notes). It transpires from the commented decision that the parties had not expressly agreed either to a tribunal's secretary or to the assistance of a counsel to the tribunal, although their level of objection at least at the hearing itself remains unclear. The final award was largely favorable to the site owner and it contained the following statement: "*Given the openly hostile attitude adopted by A. SA towards it, the Arbitral Tribunal has chosen to be assisted by Attorneys E. and F. of the law firm G. in Geneva, at its*

expense and for the sole purpose of keeping the record of the hearing, advising the Arbitral Tribunal at the hearing about the innumerable objections raised in particular by A. SA and assisting the Arbitral Tribunal in drafting the award. Both lawyers have held the record and advised the Arbitral Tribunal to ensure that the basic rules of arbitration, which the non-lawyer arbitrator was not necessarily entirely familiar with, are respected. In doing so, Attorneys E. and F. have acted upon the request of the Arbitral Tribunal under Art. 365 CPC, without taking part in the decision-making process or issuance of the award which the Arbitral Tribunal alone assumes without external influence or advice." The main contractor challenged the award, invoking amongst other arguments the irregular composition of the arbitral tribunal.[17]

2. As a premise, the Supreme Court embarked into a convincing analysis of the inherently individual nature of the arbitrator's mandate to state the law (*jurisdictio*). Such mandate, it goes, "*is highly personal, and the contract to arbitrate is concluded on a strictly personal basis. This implies that the arbitrator must discharge his own task and not delegate it to a third party, not even to a colleague working in the same law firm […] It is therefore paramount that, at the decision-making stage, the arbitrator be familiar with the file, deliberates and participates in the formation of the will of the arbitral tribunal; for this, the president must retain intellectual control of the outcome of the dispute and the co-arbitrator must contribute to the decision-making process.*"[18] Any infringement of this fundamental prerequisite of arbitration could result in the annulment of the ensuing award on ground of irregular composition of the tribunal.

3. The Court nevertheless concedes exceptions to the inherently individual nature of the arbitrator's mandate to arbitrate. Firstly,

[17] The main contractor also unsuccessfully argued that the arbitrator had decided *ultra petita* (PIL Act Art. 190(2)(c)), that he had violated the contractor's right to be heard (PIL Act Art. 190(2)(d)) and that he had violated substantive and procedural public policy (PIL Act Art. 190(2)(e)).

[18] Ground 3.2.2, referring to CLAY, *L'arbitre*, 2001, N. 422, 632, 785 and 895, and to KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2nd edn, 2010, N. 678.

arbitrators may appoint a secretary[19] provided that the parties have not expressly excluded such appointment (presumed consent).[20] The tasks of a secretary in arbitration are comparable to those of a law clerk in court proceeding, *i.e.* "*organization of exchanges of written submission, organization of hearings, minutes keeping, preparation of cost statements, etc. They do not exclude some assistance in the drafting of the award, however under the control and according to the guidelines of the arbitral tribunal or, if not unanimous, the majority arbitrators, which implies that the secretary shall attend the hearings and the deliberations of the arbitral tribunal. However, unless otherwise agreed by the parties,* [the secretary] *may not exercise the functions of a judicial nature* […]."[21] Secondly, the arbitral tribunal may, on its own move, seek the assistance of external consultants "*to help it deal with specific, non legal, questions, that it would not be able to apprehend without the support of experts in the field*."[22] In both cases, however, the core prerogatives inherent to the arbitrator's mission should remain the exclusive preserve of arbitrators and cannot be delegated.

4. In the case at hand, the Supreme Court held that "*nothing in the present case precluded the sole arbitrator appointed by the parties to settle their dispute in equity, i.e. an architect whose training did not predispose to address sensitive procedural issues in an a confrontational case to say the least, to seek the guidance of a lawyer and a secretary to assist him in the conduct of the arbitration proceedings.*"[23] Whilst conceding the peculiarity of the role attributed to the assisting lawyer, the Supreme Court assimilated him to an external consultant selected not for his specific technical skills in the area of the dispute – the arbitrator having the required skills in this respect – but rather for his "*specific*

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[19] *Ibid.*, referring to BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edn, 2015, N. 1008; GÖKSU, *Schiedsgerichtsbarkeit*, 2014, N. 883.

[20] See *Official Federal Gazette* 2006, 7103 and *Swiss Parliament Official Bulletin* 2007, Council of States (CE), 641, on the initial intended but eventually abandoned legal requisite of the parties' express consent to the appointment of a secretary.

[21] Ground 3.2.2.

[22] *Ibid.* Such prerogative is derived from PIL Act Art. 182(2), which leaves considerable leeway to the tribunal for the management of the proceeding.

[23] Ground 3.4.

knowledge […] *in the field of arbitration proceedings*."[24] The parties not having expressly regulated the issue of external consultant, the arbitrator was thus entitled to appoint its own "consultant" to support him in his adjudicatory task, which he did at its own expenses.

5. The fact that the arbitrator had to decide the matter *ex aequo et bono* – which of course does not exempt the arbitrator from respecting the limits derived from public policy[25] – presumably played a part in the outcome of the case, and obviously so did the fact that the parties had individualized the arbitrator in the arbitration clause – an unwise decision. They knowingly chose to take the risk of a non-law-trained arbitrator, and must bear the consequences thereof. Should one lesson be drawn from this case, it is that the parties should by all means avoid over-limiting their options in the arbitration agreement, and if they do, allow for some sort of opting out of the contractual mechanism when it reveals not fit for purpose. For the rest, the decision is to be read with all required circumspection under the very specific – but unspecified – circumstances of the case.

IV.
The Jurisdiction of the Arbitral Tribunal
SUPREME COURT
November 4, 2014
A. ___ SA v/ B. ___, C. ___ Limited and D. ___ (4A_446/2014)

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Object of challenge. – Arbitral Awards. – Procedural orders. – Discontinuation or stay of arbitration proceedings. – Challenge. – Content of the challenged decision. – Implicit decision on jurisdiction. – PIL Act Art. 190 to 192. – PIL Act Art. 190(3). – LTF Art. 77.

Procedural orders on the discontinuation or stay of arbitration proceedings cannot be challenged, unless they contain an implicit decision on jurisdiction. Therefore, when drafting procedural orders on

[24] *Ibid.*

[25] Manifest violation of equity or mandatory law; e.g. Supreme Court, 4P.25/2005, March 23, 2005, ground 4.

the discontinuation or stay of arbitration proceedings, arbitrators should indicate clearly whether they intend to make any final determination on jurisdiction to avoid uncertainty as to whether the order may be challenged or not.

OBSERVATIONS. – 1. The dispute arose out of a contract for the construction of a Turkish hammam in a Swiss chalet, containing an arbitration clause in favor of a sole arbitrator to be appointed under the Swiss Chambers' Arbitration Institution. The place of arbitration was Geneva. Following suspension of the works, the construction company started arbitration seeking payment of the balance of the contract price and reimbursement of the costs incurred in connection with this suspension. Before the sole arbitrator was appointed, one of the construction company's three managers (X) argued that the other managers (Y and Z) had started arbitration on the company's behalf without X's consent and thus the arbitration had to be annulled. One of the defendants (A) requested a stay of the arbitration proceedings pending a decision on the powers of the managers. During the first procedural meeting with the sole arbitrator, A reiterated this request and alternatively requested bifurcation of the proceedings. For its part, the construction company objected to the requests on the grounds that the decision to start arbitration had been validly taken by the majority of its managers and that X had been relieved of his duties. A disputed the construction company's position and restated its request that the proceedings be discontinued, or at least stayed and bifurcated. The sole arbitrator first rejected A's request to bifurcate the proceedings; then, by way of a procedural order, he rejected A's request to discontinue or stay the proceedings.[26] A challenged this procedural order, invoking the sole arbitrator's lack of jurisdiction to decide the construction company's claims.

[26] The arbitrator found that he had no jurisdiction to decide on the internal dispute between the construction company's managers because the relationship between them was governed by another agreement, the extraordinary circumstances required to order a discontinuation or stay were missing in this case and, on a preliminary view, Y and Z had the power to start arbitration on behalf of the construction company.

2. The Supreme Court first emphasized that a challenge can be brought against arbitral awards only (whether final, partial or preliminary), to the exclusion of procedural orders that can be modified or added to in the course of the proceedings and decisions on interim measures.[27] However, the Supreme Court confirmed that procedural orders on the stay of arbitration proceedings "*may nevertheless be referred to the Supreme Court if the arbitral tribunal, issuing them, has implicitly ruled on its jurisdiction* […]*, in other words if, in doing so, it has issued with them a preliminary decision regarding its jurisdiction (or the regularity of its composition, if it was disputed) within the meaning of PIL Act Art. 190(3).*"[28] This means that the content of the challenged decision is decisive, not its title.[29]

3. The Supreme Court agreed with the plaintiff that the question of whether Y and Z had the power to start arbitration on behalf of the construction company related to jurisdiction *ratione personae* in the broad sense.[30] The Supreme Court also made clear that the only issue to be resolved in terms of admissibility was whether the sole arbitrator's determinations on jurisdiction were final. In the affirmative, the Supreme Court would have to assess whether the arbitrator's findings on jurisdiction were correct.[31]

4. Based on these considerations, the Supreme Court found that the sole arbitrator had made no final determination on jurisdiction.[32] It first observed that the title of the challenged procedural order (although this was not decisive) referred to a stay of the proceedings "*until the dispute with respect to the construction company's management is resolved.*" According to the Supreme Court, this title revealed that the sole arbitrator's intent was limited to deciding whether the proceedings

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[27] Ground 3.1, referring to ATF 130 III 755, ground 1.2.1 and to ATF 136 III 200, ground 2.3.

[28] Ground 3.1, referring to ATF 136 III 597, ground 4.2; Supreme Court, 4A_596/2012, April 15, 2013, ground 3.3; Supreme Court, 4A_428/2011, February 13, 2012, ground 5.1.1; Supreme Court, 4A_614/2010, April 6, 2011, ground 2.1; Supreme Court, 4A_210/2008, October 29, 2008, ground 2.1.

[29] Ground 3.2.

[30] Ground 3.3.2.

[31] *Ibid.*

[32] Ground 3.3.3.

should be stayed until the legal situation of the construction company's management had been clarified. Moreover, according to the Supreme Court, the reference in the challenged procedural order to the exceptional nature of a stay and the use of terms such as "*prima facie*" and "*based on the documents currently before him*" indicated that this decision was not final and could be modified if required.[33] Finally, the Supreme Court relied on the context in which the challenged procedural order had been issued: shortly before issuing the order, the sole arbitrator had rejected the plaintiff's request for bifurcation, which was based on objections to the arbitrator's jurisdiction over the other defendants, and thus had refused to decide on his jurisdiction over these defendants. Under these circumstances, the Supreme Court considered it unlikely that the sole arbitrator had changed his mind and that he intended to make a determination on jurisdiction in the challenged procedural order.[34]

V.
The Parties' Right to be Heard and Public Policy
SUPREME COURT
January 29, 2015
Y. __ SA and Z. __ SA v/ B. __ B.V. (4A_532/2014) and V. __ Ltd and W. __ SA v/ B. __ B.V. (4A_534/2014)

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Bribery. – Incompatibility with public policy. –Establishment of bribery. – Refusal to consider bribery. – Assessment of evidence. – Inadmissibility. – PIL Act Art. 190(2)(e). – LTF Art. 77.

The Supreme Court confirmed its practice that arbitral awards may be annulled for bribery, to the extent that bribery is established and the arbitral tribunal has refused to consider it in the challenged award.

OBSERVATIONS. – 1. The dispute arose out of two consultancy agreements in relation to the construction of an underground railway and

[33] Ground 3.3.2.

[34] *Ibid.*

a power plant, containing identical arbitration clauses in favor of an ICC arbitral tribunal in Geneva. Based on these clauses, the claimant started arbitration proceedings seeking payment of commission under the two consultancy agreements. The respondents requested a stay of the arbitration proceedings pending the outcome of criminal bribery investigations involving the claimant in England. The arbitral tribunal rejected the respondents' request and issued two awards in favor of the claimant. The respondents challenged these awards, invoking the awards' incompatibility with substantive public policy according to PIL Act Article 190(2)(e).

2. The Supreme Court examined the plaintiffs' argument that payment orders would expose them to criminal penalties under the UK Bribery Act 2010. Referring to a previous decision,[35] the Supreme Court held that in order for bribery to constitute a ground for annulment, it must be established that bribery was involved and that the arbitral tribunal had refused to consider it in the award.[36] Applying these requirements, the Supreme Court noted that the arbitral tribunal had analyzed the evidence adduced by the plaintiffs and found the bribery allegations to be unproven. Such a finding is based on the arbitral tribunal's assessment of evidence, which the Supreme Court cannot review, and excludes any incompatibility with public policy from the outset.[37]

3. The Supreme Court also considered that instead of deploring the bribery itself, the plaintiffs actually deplored the risk of being exposed to criminal penalties if they performed the challenged awards. It noted the arbitral tribunal's findings that proof of objectionable conduct on the claimant's part had not been submitted and that the principle that criminal law has precedence over civil law ("le pénal tient le civil en l'état") is not part of procedural public policy according to PIL Act

[35] Ground 5, referring to Supreme Court, 4A_231/2014, September 23, 2014.

[36] Ground 5.1, referring to Supreme Court, 4A_538/2012, January 17, 2013, ground 2.d; Supreme Court, 4P.208/2004, December 14, 2004, ground 6.1; Supreme Court, 4P.115/1994, December 30, 1994, ground 2.d.; KAUFMANN-KOHLER/RİGOZZİ, *Arbitrage international*, 2nd edn, 2010, N. 666.

[37] Ground 5.1.

Article 190(2)(e).[38] According to the Supreme Court, the plaintiffs' challenges were limited to an inadmissible criticism of the arbitral tribunal's assessment of evidence, and therefore they had to be rejected.[39]

4. The Supreme Court did not deal with the question whether the plaintiffs' asserted risk of being exposed to criminal penalties under English law itself could entail incompatibility with public policy. Moreover, the Supreme Court did not indicate whether a revision of the awards could be sought in the event that the criminal proceedings in England revealed that the underlying contracts were illegal, which should be possible in our opinion.[40]

SUPREME COURT
February 24, 2015
A. ___ v/ *Fédération Internationale de Football Association* (FIFA)
(4A_544/2014)

International arbitration. – Sport arbitration (CAS). – Principle of equal treatment. – Right to be heard. – Procedural defects. – Immediate objection. – Forfeiture. – Right to cross-examine witnesses. – Limits. – PIL Act Art. 190(2)(d). – PIL Act Art. 182(3). – LTF Art. 77.

The limitation by the arbitral tribunal of a party's right to cross-examine the opposing party's witnesses or experts to what it deems necessary to establish the facts of the case does not constitute a violation of the right to be heard.

OBSERVATIONS. – 1. In the context of a FIFA disciplinary proceeding against a football player, the player appealed the decision confirming disciplinary sanctions against him before the CAS. During the proceedings, two experts on behalf of the football player and one expert on behalf of FIFA were heard. The CAS rejected the appeal and

[38] Ground 5.2, referring to ATF 119 II 386, ground 1c; Supreme Court, 4A_604/2010, April 11, 2011, ground 2.2.2.

[39] *Ibid.*

[40] Supreme Court, 4A_596/2008, October 6, 2009.

confirmed the disputed decision. The player challenged the CAS' decision for violation of the principle of equal treatment and of the right to be heard (PIL Act Art. 190(2)(d)) on grounds that the arbitral tribunal allegedly prohibited first questions pertaining to the reliability and the expertise of FIFA's expert and then any question.

2. Referring to previous decisions, the Supreme Court pointed out that a party forfeits its right to rely on a violation of the right to be heard or on any other procedural defect if it has not objected during the arbitration proceeding and made all reasonable efforts to eliminate the defect.[41] A party acts abusively if it keeps such grounds in reserve only to invoke them if the outcome of the proceedings is unfavorable.[42] Based on the player's statement at the end of the hearing that "*we are very satisfied with the fact how we were treated by the Panel here; thank you very much, Mr. President,*" the Supreme Court found that the player had not made all reasonable efforts to eliminate the alleged defects and thus that he had forfeited its right to rely on such defects.[43]

3. In any event, the Supreme Court found that the player had not established any violation of the principle of equal treatment nor of the right to be heard, because such rights do not provide an unlimited right to cross-examine the opposing party's experts, the arbitral tribunal being entitled to set time requirements for witness and expert examination and to prohibit certain questions.[44]

SUPREME COURT
February 25, 2015
A. __ v/ XB. __ (4A_486/2014)

International arbitration. – Commercial arbitration. – Swiss substantive law. – Right to be heard. – Review of the merits (no). –

[41] Ground 3.2.2, referring to ATF 130 III 66, ground 4.3; ATF 126 III 249, ground 3c; ATF 119 II 386, ground 1a.

[42] *Ibid.*, referring to ATF 136 III 605, ground 3.2.2; ATF 129 III 445, ground 3.1; ATF 126 III 249, ground 3c.

[43] Ground 3.3.

[44] Ground 3.4, referring to BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edn, 2015, N. 1334.

Interpretation of contracts. – Relevant provision of substantive law. – Duty to mention (no). – Anticipated assessment of evidence. – Procedural public policy. – PIL Act Art. 182(3). – PIL Act Art. 190(2)(d). – Swiss Code of Obligations ("SCO") Art. 18(1). – PIL Act Art. 190(2)(e). – LTF Art. 77.

An arbitral award that does not mention the relevant provision of Swiss substantive law (in casu SCO Article 18(1) relating to the interpretation of contracts) does not violate the parties' right to be heard, provided that the arbitral tribunal has addressed the plaintiff's position in this respect and applied the relevant principles of Swiss law. If the arbitral tribunal has done so, any challenge seeking a review of the merits under the guise of a violation of the right to be heard must be rejected.

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OBSERVATIONS. – 1. The case underlying this decision relates to a share purchase agreement ("SPA") and to a dispute as to whether two clauses in the SPA had to be amended further to changes that occurred in the hydroelectric construction projects supervised and controlled by the parties' joint venture. In the arbitration proceedings, the claimant sought and obtained an award ordering the respondent to make payments under the two clauses. The respondent challenged this award for violation of its right to be heard.[45]

2. The Supreme Court first recalled that in challenge proceedings a plaintiff may not use its reply brief to raise factual or legal arguments that it had not raised before expiration of the time period to bring the challenge or to complete an insufficient motivation.[46]

3. Then, the Supreme Court dealt with the plaintiff's argument that the arbitral tribunal had failed to apply the principles of interpretation provided by SCO Article 18(1), despite its having drawn the tribunal's attention on this issue, and to address its arguments on the interpretation of the two clauses in the SPA. Pointing out that an express reference to SCO Article 18(1) in the award was not required, provided that the arbitral tribunal had interpreted the relevant clauses in the SPA pursuant

[45] The respondent also relied on a violation of public policy, which the Supreme Court swiftly denied.

[46] Ground 2.

to the principles set forth in this provision, the Supreme Court found that the arbitral tribunal had indeed interpreted these clauses and that the plaintiff was challenging the result of this interpretation, which the Supreme Court may not review.[47] More particularly, the Supreme Court found that the arbitral tribunal's subjective interpretation of the clauses determined that there was no gap in the contract, but rather a deliberate decision of the parties not to provide for an adaptation of the two clauses in case of modification of the projects.[48]

4. Regarding the plaintiff's argument that the arbitral tribunal had failed to take into consideration its two produced expert reports, the Supreme Court recalled the well-established principle that "*the right to be heard does not allow to request consideration of proof unfit to prove*,"[49] although the question here was not the probative weight of these reports, but rather the irrelevance of the facts that these reports were supposed to establish.[50]

SUPREME COURT
February 26, 2015
Club A. __ v/ B. __ and C. __ (4A_374/2014)

International arbitration. – Sport arbitration (CAS). – *Lis pendens*. – Previous decision of the same tribunal. – Previous decision of a Swiss arbitral tribunal. – Previous decision of a foreign tribunal. – Decision capable of recognition in Switzerland (preliminary question). – *Res judicata* effect. – Principle of good faith. – Procedural defects. – Objections. – Public policy. – Mexican civil procedure. – PIL Act Art. 25. – PIL Act Art. 194. – PIL Act Art. 190(2)(e). – PIL Act Art. 190(3). – New York Convention Art. V(2)(b). – LTF Art. 77.

47 Ground 4.3.2.

48 *Ibid.*

49 Ground 5.1.

50 Ground 5.2. The Supreme Court also rejected the plaintiff's arguments that the arbitral tribunal had violated the principle of contradiction, the parties' egality and public policy (grounds 6, 7 and 8).

There is no incompatibility with public policy where a Swiss arbitral tribunal ignores a foreign decision that, although vested with res judicata effect in the country of origin, cannot be recognized in Switzerland under the New York Convention. The arbitral tribunal must examine as a preliminary question whether this decision can be recognized in Switzerland. The question whether procedural defects that are part of procedural public policy must be raised as soon as possible during the proceedings (under penalty of forfeiture) was left open.

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OBSERVATIONS. – 1. The dispute arose out of an employment contract between a football club member of the Mexican Football Federation ("MFF") and two Argentine trainers. The contract contained a dispute resolution clause in favor of the employment courts of State X and the MFF. After the employment contract had expired, the trainers sought payment of damages from the club before the Commission for Conciliation and Resolution of Disputes of the MFF (the "Commission") based on an alleged second employment contract which would have extended the trainers' employment if the club had remained in Mexico's top football league. Considering the club's defense that no such contract had been entered into and the filing of a criminal complaint by the club, the Commission ordered a stay of the proceedings (the "Commission's First Decision"). Two years later, as no steps had been taken in the proceedings, the Commission issued a second decision declaring the trainers' tacit withdrawal of action and closing the proceedings based on a provision of Mexican employment law (the "Commission's Second Decision"). In the meantime, after issuance of the Commission's First Decision, the trainers submitted their claim to FIFA Players' Status Committee (the "Committee"). After admitting jurisdiction, the Committee rejected the trainers' claim because the disputed contracts had been signed by an entity over which FIFA had no jurisdiction *ratione personae* and the club had no capacity to be sued. The trainers appealed the Committee's decision before the CAS and the club raised defenses of *lis pendens* and statute of limitations. The CAS partially admitted the trainers' appeal, annulled the Committee's decision and ordered the club to compensate the trainers. More precisely, after rejecting the club's defenses, it found that the Committee had jurisdiction to decide the claims submitted by the trainers because the Commission's decisions did not restrict the trainers' right to bring their

claims before another competent body. Regarding the fact that the disputed contracts had been signed by an entity that was not affiliated to FIFA, the CAS found that – based on the principle of primacy of the facts and in the absence of any objection by the club – it had jurisdiction to decide the dispute between the parties. The club challenged the CAS award, invoking a violation of PIL Act Article 190(2)(b) and (e).

2. As a preliminary issue, the Supreme Court had to decide whether the trainers' response had been submitted in time. It made clear that where a party puts its brief in the post on the last day of the applicable time period, but has paid insufficient postage, it will suffice if the party pays the missing postage amount to comply with this time period in accordance with LTF Article 48. Conversely, if the party extracts the brief from the envelope returned by the postal service, inserts it into a new envelope and delivers this envelope to the Supreme Court on the day following the expiration of the time period, as in the case at hand, it has not complied with the applicable time period.[51]

3. The Supreme Court then examined the club's argument that the CAS had violated public policy by disregarding the *res judicata* effect of the Commission's Second Decision.[52] Referring to a previous decision,[53] the Supreme Court confirmed that where a claim that is identical to a claim between the same parties that has been finally resolved by a foreign court decision is brought before an arbitral tribunal seated in Switzerland, the tribunal must dismiss the claim to the extent that the foreign decision can be recognized in Switzerland. Failure to do so would qualify as a violation of procedural public policy.[54]

4. Article V(2)(b) of the New York Convention provides that a country may refuse recognition or enforcement of an arbitral award if this would be contrary to public policy. The Supreme Court pointed out that Swiss public policy requires compliance with fundamental procedural rules, such as the right to a fair trial and the right to be

[51] Ground 3.2.

[52] Ground 4.

[53] ATF 140 III 278, commented in the previous note published by F. Spoorenberg and D. Franchini in the Journal of International Trade and Arbitration Law 2015 (Volume 4, Issue 1), pp. 256-259.

[54] Ground 4.2.1.

heard.[55] The Supreme Court also highlighted that the principle of good faith prevents parties from keeping a procedural defect in reserve only to invoke it if the outcome of the proceedings is unfavorable, and that this forfeiture effect also applies to defects that justify refusal of recognition under the New York Convention. However, a defendant to recognition that has (unsuccessfully) raised a procedural irregularity during the proceedings is not required to exhaust all available remedies against the award at the seat of arbitration.[56] Moreover, pointing out the uncertainty as to the application of the forfeiture effect to defects that are part of procedural public policy and that must be examined *ex officio* by the enforcement court (e.g. the violation of the right to be heard), the Supreme Court advocated a case-by-case approach to this question based on an analysis of the parties' respective behavior.[57]

9. In applying these principles, the Supreme Court noted that the club had raised no *res judicata* defense before the CAS, which excluded any incompatibility with procedural public policy based on the principle of good faith.[58] Moreover, according to the Supreme Court, even if it had raised the defense, the outcome of the challenge would be no different. It acknowledged that the Commission's Second Decision excluded any new action based on the same object, that the Committee should have declared the trainers' claim inadmissible and that the CAS should not have entered into the case.[59] However, in order to blame the CAS for ignoring the *res judicata* effect of the Commission's Second Decision, this decision had to be capable of recognition in Switzerland pursuant to the New York Convention. Referring to the right to be heard as defined under Swiss law, the Supreme Court found that the Commission's Second Decision had been issued in manifest violation of this right and that the trainers had had no possibility to defend themselves against this violation before the Commission, which

[55] Ground 4.2.2, referring to Supreme Court, 4A_124/2010, October 4, 2010, ground 5.1; Supreme Court, 4A_233/2010, July 28, 2010, ground 3.2.1; Supreme Court, 4P.173/2003, December 8, 2003, ground 4.1.

[56] Ground 4.2.2, referring to Supreme Court, 4A_124/2010, October 4, 2010, ground 6.3.3.1.

[57] Ground 4.2.2.

[58] Ground 4.3.1.

[59] Ground 4.3.2.2.

excluded any forfeiture. The fact that they had not appealed the Commission's Second Decision before the CAS did not change this finding, considering the uncertainty regarding the application of the forfeiture effect for failure to use available remedies against the award and the application of this effect to procedural defects which justify refusal of recognition *ex officio* under the New York Convention.[60] Therefore, since the Commission's Second Decision was contrary to Swiss public policy and could not be recognized in Switzerland pursuant to Article V(2)(b) of the New York Convention, the Supreme Court found that neither the committee nor the CAS had violated public policy within the meaning of PIL Act Article 190(2)(e).[61]

SUPREME COURT
April 29, 2015
A. __ Sport Club v/ B. __ (4A_70/2015)

International arbitration. – Sport arbitration (CAS). – Notifications and communications. – Representation. – Failures of a party. – Failures attributable to legal representative. – Right to be heard. – Principle of contradiction. – Procedural defects. – Immediate objection. – Forfeiture. – Substantive public policy. – PIL Act Art. 182(3). – PIL Act Art. 190(2)(d). – PIL Act Art. 190(2)(e). – LTF Art. 77.

A party must assume the consequences of its counsel's failure to undertake procedural acts required by the arbitral tribunal and to attend the hearing and, if necessary, file a lawsuit against this counsel. Moreover, parties should avoid keeping any argument based on violation of their right to be heard or on other procedural flaws in reserve only to use it if the outcome of the award is unfavorable. Objections should be expressed during the entire proceeding.

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60 Ground 4.3.2.3.

61 Ground 4.4. The Supreme Court also rejected the club's argument that the CAS had wrongly admitted jurisdiction on the grounds that this argument was put forward merely because of the club's incertitude as to whether *res judicata* is a question of admissibility or of jurisdiction and that it was based on the premise that the Commission's Second Decision had *res judicata* effect and could be opposed to the trainers.

OBSERVATIONS. – 1. The dispute arose under a contract between a football club and a player. In the arbitration proceedings, the failures of the club's counsel had caused the party's inability to attend the hearing.

2. Recalling that a violation of the right to be heard or any other procedural defect must be raised immediately during the arbitration proceedings, under penalty of forfeiture, the Supreme Court found that the clubs' second counsel, although he had requested that a new hearing be scheduled, should have maintained its objection to the issuance of any award before a new hearing was held until the end of the proceedings. By failing to do so, the club forfeited its right to rely on a violation of its right to be heard.[62] In any event, according to the Supreme Court, the club had to bear the consequences of its counsel's failure to attend the hearing, this being an issue covered by the mandate between the club and its counsel, and to file a lawsuit against counsel to establish that the arbitration proceedings would have had a different outcome if the club had been able to participate in the proceedings.[63] In relation to the clubs' argument that the CAS had issued an award incompatible with public policy, the Supreme Court reaffirmed that the interpretation of a contract or of a private entity's statutory provisions as well as bad assessment of evidence, wrong finding of fact or violation of law do not fall within the scope of substantive public policy.[64]

SUPREME COURT
May 21, 2015
A. __ S.p.A. v/ B. __ Ltd (4A_634/2014)

International arbitration. – Sport arbitration (CAS). – Jurisdiction of the arbitral tribunal. – Plea of Lack of jurisdiction. – Timing. – Right to be heard. – *Iura novit curia*. – Substantive public policy. – *Pacta sunt servanda*. – Interpretation of contracts. – Public policy rule. – Limited review of arbitral awards. – PIL Act Art. 186(2). – Art. R39 of the CAS

62 Ground 3.2.1.

63 Ground 3.2.2.

64 Ground 4.2.

Arbitration Code. – PIL Act Art. 190(2)(d). – PIL Act Art. 190(2)(e). – SCO Article 163(3). – SCO Article 105(3). – LTF Art. 77.

The parties' right to be heard is applied restrictively in respect of legal questions. Refusal to reduce a contractual penalty and allocation of compound interest do not violate public policy.

OBSERVATIONS. – 1. The object of this decision is a CAS award ordering an Italian football club to make payments to an English company under two contracts whereby the club had acquired a player's economic rights from the company. The club challenged the CAS award for lack of jurisdiction, violation of the right to be heard and incompatibility with public policy.

2. The Supreme Court found the club's challenge inadmissible insofar as it was based on the CAS' asserted lack of jurisdiction because Article R39 of the CAS Arbitration Code requires a plea for lack of jurisdiction to be raised in the response and the club had not raised such a plea during the arbitration proceedings.[65]

3. The Supreme Court also rejected the clubs' argument that the CAS had violated its right to be heard by refusing to take FIFA regulations into account and by failing to request the parties to take position on the applicable law. The Supreme Court held that it follows from the principle *iura novit curia* that "*as long as the arbitration agreement does not restrict the arbitral tribunal's mission to the legal means raised by the parties, the latter must not be heard specifically regarding the scope to be given to the legal rules*," however mentioning that the parties should be allowed to take position "*if the judge or arbitral tribunal considers basing its decision on a provision or a legal consideration that has not been mentioned during the proceedings and the relevance of which could not be guessed by the parties.*"[66] The Supreme Court found that the club indeed had taken position on the

[65] Ground 3.2. In this respect, the Supreme Court reaffirmed that PIL Act Article 186(2), according to which a plea of lack of jurisdiction must be raised before any defense on the merits, is dispositive and that arbitration rules may define the form and time limits for such a plea (ground 3.1, referring to Supreme Court, 4A_682/2012, June 20, 2013, ground 4.4.2.1).

[66] Ground 4.1.

applicable law and that it was complaining about the CAS' failure to uphold its line of argument.[67]

4. The club's last arguments were based on an asserted violation of substantive public policy in relation to the principle of *pacta sunt servanda*, the prohibition of usurious interest and the protection against excessive penalties. Regarding *pacta sunt servanda*, recalling that interpretation of contracts and the legal consequences thereof are not governed by this principle (and thus may not give rise to incompatibility with public policy) and that almost all contractual disputes are excluded from the scope of protection of *pacta sunt servanda*, the Supreme Court found that the operative part of the award did not contradict the arbitral tribunal's interpretation of the disputed agreements.[68] Regarding the asserted protection against excessive penalties, the Supreme Court recalled that SCO Article 163(3)[69] is a public policy rule (*norme d'ordre public*), i.e. a mandatory provision that the judge must apply even in the absence of a request from the debtor, but that this concept has nothing to do with public policy within the meaning of PIL Act Art. 190(2)(e). The Supreme Court held that the club was essentially criticizing the arbitral tribunal's interpretation of the parties' agreements, which is excluded from the Supreme Court's scope of review.[70] Regarding the asserted prohibition of usurious interest, the Supreme Court pointed out that the club wrongly assimilated interest for late payment of the penalty to interest for late payment of default interest and that, in any event, allocation of compound interest is not incompatible with public policy within the meaning of PIL Act Art. 190(2)(e).[71]

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67 Ground 4.2.

68 Ground 5.1, referring to Supreme Court, 4A_232/2013, September 30, 2013, ground 5.1.2.

69 SCO Article 163(3) provides that "[a]t its discretion, the court may reduce penalties that it considers excessive."

70 Ground 5.2.2.

71 *Ibid.*

SUPREME COURT
May 29, 2015
A. ___ LLP v/ B. ___ (4A_633/2014)

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Partial award (no). – *Res judicata* effect. – Foreign state court or arbitral tribunal. – Swiss state court or arbitral tribunal. – Recognition of foreign decision in Switzerland (preliminary question). – Limits – Applicable law. – Interpretation of contracts. – Procedural public policy. – PIL Act Art. 25. – PIL Act Art. 194. – PIL Act Art. 190(2)(e). – New York Convention Art. V. – LTF Art. 77.

Following its decisions of May 27, 2014 (published in ATF 140 III 278) and February 26, 2015 (4A_374/2014),[72] *the Supreme Court issued an additional decision dealing with the principle of res judicata. In this decision, the Supreme Court makes clear that the liberal approach advocated when assessing the identity of the parties in its decision of May 27 2014 should not apply when assessing the identity of the claims. It further seems to exclude application of an international concept of res judicata in Switzerland instead of the principle as defined by Swiss law.*

OBSERVATIONS. – 1. The dispute arose out of an agreement between a US law firm and a German lawyer on the combination of the US firm and a German law firm founded by that lawyer. The agreement contained a dispute resolution clause in favor of ICC arbitration in Zurich and was governed by German law. The lawyer commenced arbitration against the US law firm seeking payment of the difference between the so-called "floor amount" to be paid to the partners of the German firm under the agreement and the amounts actually paid to him

[72] The decision of May 27, 2014 was commented in the previous note published by F. Spoorenberg and D. Franchini in the Journal of International Trade and Arbitration Law 2015 (Volume 4, Issue 1), pp. 256-259, and the decision of February 26, 2015 is commented in this note, pp. 21-25. For further details on these decisions, please see F. Spoorenberg, D. Franchini, "Supreme Court rules on *res judicata*", *ILO Newsletter*, September 18, 2014; F. Spoorenberg, D. Franchini, "Supreme Court rules again on *res judicata*", *ILO Newsletter*, July 16, 2015; F. Spoorenberg, D. Franchini, "Additional decision on *res judicata*", *ILO Newsletter*, September 10, 2015.

for 2009 and 2010. An arbitral tribunal seated in Frankfurt denied the claim on the grounds that payment of the floor amount was subject to the lawyer fulfilling certain prerequisites, which he had not fulfilled. Subsequently, the lawyer commenced a second arbitration against the US law firm seeking payment of the difference between the floor amount and the amounts actually paid to him for 2011 and 2012. The US law firm raised a *res judicata* objection, which the arbitral tribunal (this time seated in Zurich) rejected by way of procedural orders 3 and 5. This tribunal did not find itself bound by the decision of the first tribunal and made its own interpretation of the relevant provision in the combination agreement. Based on this interpretation, it found that the lawyer had fulfilled the majority of the prerequisites for payment of the floor amount, and that the first tribunal's decision was not consistent with the holistic approach required by this provision. Therefore, in its final award the tribunal granted the lawyer's claim, but reduced the amount awarded. The law firm challenged the award.

2. The Supreme Court first recalled the well-settled principle that the reference in an arbitration agreement to specific rules of arbitration that contain a provision on the exclusion of challenge, such as Article 34(6) of the ICC Rules, does not qualify as a waiver of challenge within the meaning of PIL Act Article 192(1).[73]

3. Further to the position of the lawyer and of the tribunal that the law firm should have challenged one of the decisions dealing with the *res judicata* objection issued before the final award, under penalty of forfeiture, the Supreme Court held that procedural orders 3 and 5 were not partial decisions, and thus did not have to be challenged directly.[74] Therefore, the Supreme Court found that the challenge was admissible.[75]

4. On the merits, the law firm did not argue that the awards of the first and second tribunal were identical, recognizing that the first award pertained to the floor amounts for 2009 and 2010, while the second pertained to the floor amounts for 2011 and 2012. However, the law firm argued that the first award was binding in respect of preliminary issues arising in the proceeding before the second tribunal. Referring to an international definition of the *res judicata* principle, the law firm argued

[73] Grounds 2.2.1 and 2.2.2.

[74] Ground 2.4.1.

[75] Ground 2.4.2.

that the binding effect should extend not only to the dispositive part, but also to the reasons that were decisive for the first tribunal – including its finding that the floor amounts were due only insofar as the prerequisites "billable hours" and "turnover from billable hours" under the combination agreement were fulfilled, which the second tribunal had disregarded. According to the law firm, application of the national definition of *res judicata* should have led to the same result.[76]

5. After reiterating the well-established principles in relation to *res judicata*,[77] the Supreme Court addressed the law firm's arguments. First, referring to its previous decisions on the issue, the Supreme Court denied that it had not rendered any decision as to whether the binding force of a foreign award corresponds to that of a national state court.[78] It also made clear that there is no legal basis for applying the broad Anglo-American concept of binding effect, as advocated by the law firm.[79] Second, the Supreme Court held that this binding effect applies only if the claim raised has been decided by the arbitral tribunal and that to determine whether this is the case, the entire award must be considered. The Supreme Court found that the second tribunal had looked into the reasons of the first award and that it had rightly rejected the plaintiff's *res judicata* objection with full reasoning in procedural order 5 because the claims in the two proceedings were not identical. Therefore, the Supreme Court found that the second tribunal had not violated procedural public policy by giving its own interpretation of the combination agreement and indeed had to do so in order to avoid such a violation.[80]

[76] Ground 3.1.

[77] For further details please see the commentaries referred to in footnote 72.

[78] Ground 3.2.4, referring to ATF 128 III 191; Supreme Court, 4A_508/2010, February 14, 2011, ground 3.3; Supreme Court, 4A_374/2014, February 26, 2015, grounds 4.2.1 and 4.2.2.

[79] Ground 3.5.2.

[80] Ground 3.6.2.

SUPREME COURT

July 15, 2015

A. ___ SA v/ B. ___, C. ___, D. ___, E. ___, F. ___, G. ___, H. ___, I. ___, J. ___ and Federation L. ___ (4A_246/2014)

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International arbitration. – Sport arbitration (CAS). – right to be heard. – Public policy. – Arbitrators' power of review. – Limitation. – Partial annulment. – PIL Act Art. 190(2)(c). – PIL Act Art. 190(2)(d). – PIL Act Art. 182(3). – PIL Act Art. 190(2)(e). – Art. 6(1) of the European Convention on Human Rights. – LTF Art. 77.

This is the only decision issued this year in which the Supreme Court partially annulled a CAS award for violation of the plaintiff's right to be heard.

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OBSERVATIONS. – 1. The dispute arose out of employment contracts entered into between a football club and nine football players, according to which payment of the players' monthly salaries was conditioned on their playing in 70% of the club's matches in the relevant month. The players filed requests with the dispute resolution chamber of the football federation to which the club belonged, seeking payment of outstanding salaries and a declaration that they had validly terminated the employment contracts for good cause. The dispute resolution chamber recognized the players' right to terminate the contracts and ordered the club to pay the outstanding salaries to the players. The club appealed the decisions before the appeal commission of the dispute resolution chamber, which found the appeals relating to players 1 to 7 belated, reduced the amount due to player 8, and confirmed the decision relating to player 9. The club appealed the commission's decisions before the CAS (which joined the causes) and produced two agreements into which it had entered with players 6 and 9, whereby they waived their claims and withdrew from the proceedings. The sole arbitrator issued an award declaring the proceedings regarding players 6 and 9 closed and rejecting the appeals brought by the club. The club challenged this award before the Supreme Court for violation of the *ne infra petita* rule, the right to be heard, and procedural public policy.

2. The Supreme Court first recalled that it can review the facts underlying the arbitral award only to the extent that one of the grounds

for challenge listed in PIL Act Article 190(2) is raised against these facts or if new facts or evidence must be taken into consideration. Based on this rule, the Supreme Court found that the plaintiff's factual allegations – the purpose of which was to "ease comprehension" and to "provide clarification" – were inadmissible because they did not relate to any finding or facts by the arbitrator.[81]

3. Regarding the asserted violation of the right to be heard, the Supreme Court recalled the following principles: (i) it cannot review the arbitral tribunal's anticipated assessment of evidence, save from the perspective of public policy, (ii) the right to be heard does not allow parties to request production of evidence unfit to prove the facts and (iii) although the right to be heard does not require arbitrators to issue reasoned awards, they must deal with all allegations, arguments and evidence submitted by the parties that are important for the award to be issued.[82]

4. Based on these principles, the Supreme Court found that by entering into the merits of the appeals, the sole arbitrator had implicitly admitted the plaintiff's argument that the appeals regarding players 1 to 7 had been filed on time and thus that he had not violated the plaintiff's right to be heard.[83] The Supreme Court also rejected the plaintiff's argument that the arbitrator had wrongly refused to take into account evidence based on a surprising application of the law, because although the reference to CPC Article 317 was unusual, the reference to Article R57 of the CAS Arbitration Code alone justified the arbitrator's refusal to take that evidence into account.[84] However, the Supreme Court found that the sole arbitrator had failed to address the plaintiff's arguments questioning the existence of the claim or the amount thereof – namely, the fulfillment of the condition that a minimum number of matches must be played and the calculation of the salaries of players 1 and 3.[85]

5. Regarding the asserted incompatibility with public policy, the Supreme Court rejected the plaintiff's argument that the arbitrator's

[81] Ground 3.

[82] Ground 6.1.

[83] Ground 6.2.

[84] Ground 6.4.3.2.

[85] Ground 6.3.2.

restrictive interpretation of Article R57 of the CAS Arbitration Code was tantamount to a refusal to exercise his power of review, depriving the plaintiff of the right of access to an independent and impartial judge under Article 6(1) of the European Convention on Human Rights. The Supreme Court found that public policy does not include the arbitral tribunal's obligation to address all the issues of a case with a full power of review and that the parties may limit this power directly or by reference to arbitration rules.[86]

6. Based on the above reasons, and referring to its previous holding that partial annulment is admitted if the disputed object is independent of the others,[87] the Supreme Court partially admitted the challenge.

VI.
Post-award mechanisms
SUPREME COURT
February 20, 2015
A. ___ S.p.A. v/ B. ___ (4A_609/2015)

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International arbitration. – Commercial arbitration. – *Ad hoc* arbitration. – Challenge of awards. – Time period for challenge. – Starting point. – Diligence. – Actual method of communication. – LTF Art. 44, 48 and 100.

In the absence of an agreement, and of arbitration rules, on the method of communication of the final award, the actual method of communication used by the parties (in casu email communication) was held to be decisive to determine the starting point of the thirty-day time period to challenge the award.

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OBSERVATIONS. – 1. Since the parties had not agreed on a method of communication of the final award and the arbitration rules referred to in the arbitration agreement (i.e. the regulations of the *Union*

[86] Ground 7.2.2.

[87] Ground 8, referring to Supreme Court, 4A_360/2011, January 31, 2012, ground 6.2. For further details please see F. Spoorenberg, D. Franchini, "Violation of right to be heard and partial annulment", *ILO Newsletter*, July 25, 2013.

Cycliste Internationale) did not contain any rule in this respect, the Supreme Court relied on the method used by the parties and the arbitral tribunal to communicate during the arbitration proceedings, in particular on the method used for communication of procedural orders. The Supreme Court noted that this method was email communication and thus found that the thirty-day time period had started to run as from communication of the final award to the parties by email. Considering that the plaintiff had filed the challenge more than thirty days after the final award had been communicated to the parties by email, the Supreme Court found that the challenge was belated and thus inadmissible.

2. This decision teaches that diligence is required when determining the starting point of the time period to challenge an arbitral award before the Supreme Court and that, in *ad hoc* arbitration, the parties should agree on the method of communication of arbitral awards to avoid surprises.