

Recent decisions on public policy

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Introduction

According to four recent decisions:

- the concept of 'public policy' does not depend on the nature of the underlying dispute;
- the transfer of bribes is incompatible with public policy only to the extent that bribery is established but not taken into account by the arbitral tribunal, and the mere violation of internal anti-corruption policies is not incompatible with public policy;
- the violation of personality rights is not incompatible with public policy, unless there is a serious violation of fundamental rights; and
- the rules on the burden of proof are not part of public policy.

Concept of 'public policy'

In a December 13 2016 decision,⁽¹⁾ the Supreme Court recalled that the list of examples given to describe the concept of substantive public policy is not exhaustive, and that it would be dangerous to try to count all the fundamental principles falling under that concept, at the risk of forgetting one or another.⁽²⁾ However, the Supreme Court held that:

"to differentiate the concept of public policy depending on this or that activity and, even more, on a particular branch of the referred activity – in this case, sport, respectively football – would result, to a certain extent, in diluting the force and reducing the significance of this concept by leaving it to the umbrella federation of the referred branch – here, FIFA – to define the branch-specific concept of morality."

According to the Supreme Court, such a differentiation is not desirable because it complicates the task of defining the contours of public policy.⁽³⁾

The dispute underlying this decision pertained to a so-called 'third-party participation' scheme.⁽⁴⁾ After the transfer of a football player, the investor claimed its share of the transfer proceeds from the club, which refused payment. The club started arbitration proceedings to obtain a declaration that the agreements underlying the third-party participation scheme were invalid, which the Court of Arbitration for Sport denied. The Supreme Court upheld the decision.

Bribery

In a November 3 2016 decision,⁽⁵⁾ the Supreme Court recalled that the transfer of bribes is incompatible with public policy, provided that bribery is established but not taken into account by the arbitral tribunal.⁽⁶⁾ The Supreme Court rejected the applicants' argument that the award was incompatible with public policy because it ordered them to make payments that were contrary to internal compliance rules, which the applicants considered to be a concretisation of internationally

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recognised anti-corruption rules and thus of public policy within the meaning of Article 190(2)(e) of the Private International Law Act. According to the Supreme Court:

"it is not conceivable to leave to a private entity, which in addition has not its seat in Switzerland, the faculty to determine, using the definition of the concept of public policy provided by PIL [Private International Law] Act Art. 190(2)(e), the essential and largely recognised values that, according to the conceptions prevailing in Switzerland, should constitute the fundament of any legal order."(7)

The dispute arose out of A's and B's refusal to pay the entirety of the remuneration due to Z under three consultancy agreements on the basis of ongoing investigations for bribery practices and the breach by Z of so-called 'ethic and compliance' rules that had been integrated into the agreements. Z started arbitration proceedings to obtain payment of the outstanding remuneration, which it obtained in part. The arbitral tribunal found that bribery had not been established by A and B. The latter challenged the award before the Supreme Court *inter alia* for incompatibility with public policy.

This decision is in line with the Supreme Court's practice that although it represents a serious concern in relation to arbitration proceedings, bribery may justify the annulment of an award only if the bribery has been established but ignored by the arbitral tribunal, which will rarely be the case.

Joint and several liability

In a December 20 2016 decision,(8) the Supreme Court recalled that the violation of personality rights (Article 27(2) of the Civil Code) is not incompatible with public policy, unless there is a serious and clear violation of fundamental rights.(9) Based on this principle, the Supreme Court found that the joint and several liability between a player and his new club for the compensation payable to the player's former club further to a termination of contract without just cause (Article 17.2 of the FIFA Regulations on the Status and Transfer of Players) is not incompatible with public policy.(10) According to the Supreme Court, it would be difficult to find otherwise, particularly considering that similar rules of liability exist under Swiss law. There is thus no reason for the Supreme Court to intervene in a field that is part of sport policy and where the competent bodies are better placed to intervene.(11) The Supreme Court also held that the compensation in question was not excessive.(12)

In the dispute underlying this decision, a football player (Z) entered into a contract with a club (X) although he was already bound by a contract with another club (Y) for the same seasons. Y filed a claim for breach of contract against Z and X, on which FIFA's Dispute Resolution Chamber found that Z and X were jointly and severally liable to compensate Y. The Court of Arbitration for Sport upheld this decision (although it reduced the compensation due to Y). X challenged the award before the Supreme Court.

Burden of proof

In a December 2 2016 decision,(13) the Supreme Court rejected the plaintiff's argument that the challenged award was contrary to the principle of good faith because it held that the alleged destruction of evidence by the defendants was not decisive for the repartition of the burden of proof. In this context, the Supreme Court recalled that:

"the application of the rules on the burden of proof is exempted from the scrutiny of the Supreme Court... because such rules are not part of substantive public policy within the meaning of Article 190(2)(e) of the Private International Law Act."(14)

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Endnotes

(1) Supreme Court, 4A_116/2016, December 13 2016 (in French).

(2) Ground 4.1.

(3) Ground 4.2.3.

(4) This is a scheme whereby a football club assigns its economic rights in a player to a third-party investor, which can benefit from the gain made by the club when it transfers the player.

(5) Supreme Court, 4A_136/2016, November 3 2016 (in French).

(6) Ground 4.1.

(7) Ground 4.2.2.

(8) Supreme Court, 4A_32/2016, December 20 2016 (in French).

(9) Ground 4.1.

(10) Ground 4.3.

(11) *Id.*

(12) *Id.*

(13) Supreme Court, 4A_522/2016, December 2 2016 (in French).

(14) Ground 3.2.1.

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