

Arbitration & ADR - Switzerland

Supreme Court rules again on *res judicata*

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Introduction

The Supreme Court has confirmed that there is no incompatibility with public policy where a Swiss arbitral tribunal ignores a foreign decision which, although vested with *res judicata* effect in the country of origin, cannot be recognised in Switzerland under the New York Convention.⁽¹⁾ The Supreme Court also held that it is not a foregone conclusion that the principle according to which procedural defects must be raised as soon as possible during the proceedings (under penalty of forfeiture) applies to procedural defects which are part of procedural public policy.

Facts

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 favour 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 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 defence 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. 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 Court of Arbitration for Sport (CAS) and the club raised defences of litispendence 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 defences, 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 before the Supreme Court, invoking a violation of Articles 190(2) (b) and (e) of the Private International Law Act.

Decision

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 Article 48 of the Federal Tribunal Statute. 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.⁽²⁾

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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.⁽³⁾ Referring to a previous decision,⁽⁴⁾ the Supreme Court confirmed that where a claim which 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 recognised in Switzerland (for further details please see "[Supreme Court rules on *res judicata*](#)"). Failure to do so would qualify as a violation of procedural public policy.⁽⁵⁾

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 heard.⁽⁶⁾ 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 unfavourable, and that this foreclosure effect also applies to defects that justify refusal of recognition under the New York Convention. However, a defendant to recognition which 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.⁽⁷⁾ 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 (eg, 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 behaviour.⁽⁸⁾

In applying these principles, the Supreme Court noted that the club had raised no *res judicata* defence before the CAS, which excluded any incompatibility with procedural public policy based on the principle of good faith.⁽⁹⁾ Moreover, according to the Supreme Court, even if it had raised the defence, 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.⁽¹⁰⁾ 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 no possibility to defend themselves against this violation before the commission, which 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.⁽¹¹⁾ Therefore, since the commission's second decision was contrary to Swiss public policy and could not be recognised 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 Article 190(2)(e) of the Private International Law Act.⁽¹²⁾

Comment

This decision confirms the well-settled principle that *res judicata* is public policy. It further confirms that a *res judicata* defence arising from a foreign decision requires that the arbitral tribunal examine as a preliminary question whether this decision can be recognised in Switzerland.

With reference to the parties' obligation to raise immediately an objection of procedure under penalty of forfeiture, the question arises whether this forfeiture should extend at the enforcement stage to public policy defects that justify refusal of recognition *ex officio* under the New York Convention. By prescribing a case-by-case approach instead of deciding the issue once and for all, the Supreme Court did not exclude such an extension.

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Endnotes

(1) Supreme Court, 4A_374/2014, February 26 2015 (in French).

(2) Ground 3.2.

(3) Ground 4.

(4) ATF 140 III 278.

(5) Ground 4.2.1.

(6) 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.

(7) Ground 4.2.2, referring to Supreme Court, 4A_124/2010, October 4 2010, Ground 6.3.3.1.

(8) Ground 4.2.2.

(9) Ground 4.3.1.

(10) Ground 4.3.2.2.

(11) Ground 4.3.2.3.

(12) 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 uncertainty 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.

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