

**II** **SELECTED DECISIONS OF THE SWISS FEDERAL  
SUPREME COURT ISSUED IN 2012 AND 2013  
CONCERNING INTERNATIONAL ARBITRATION  
(SUMMARY AND ANNOTATIONS)**



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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,<sup>1</sup> in connection with international commercial

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<sup>1</sup> Cases until October 2013 (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 Mr. Frank Spoorenberg and Ms. Isabelle 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, related to sport arbitration, in application of the Swiss international arbitration law (the Private International Law Act Chapter XII, the “PIL Act”<sup>2</sup>).<sup>3</sup>

This review examines successively developments related to arbitrability (*infra* II), the capacity to arbitrate (*infra* III) the arbitration agreement (*infra* IV), the constitution of the arbitral tribunal (V), the jurisdiction of the arbitral tribunal (*infra* VI), the parties’ right to be heard and public policy (VII) and to post-award mechanisms (VIII). 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.<sup>4</sup> All English quotes in the sections below are attributable to the authors’ only.

## II

### ARBITRABILITY

#### SUPREME COURT

March 18, 2013

**A. \_\_\_ v/ Bulgarische Fussballunion (4A\_388/2012)**

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International arbitration. – Sport arbitration (CAS). – Swiss law. – jurisdiction of the arbitral tribunal. – Arbitrability based on substantive test. – Observation of foreign provision providing for mandatory jurisdiction of state courts (only if public policy). – PIL Act Art. 190(2)(b). – PIL Act Art. 177(1). – Bulgarian Code of Civil Procedure Art. 19(1). – PIL Act Art. 190 (2)(e). – New York Convention on the

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<sup>2</sup> Of December 18, 1987, Systematic Register for Swiss Federal Legislation (“SR”) 291. Chapter XII is available for upload in original official French, Italian and German languages from <http://www.admin.ch>, <droit fédéral>, <recueil systématique> and an unofficial English translation from [https://www.swissarbitration.org/sa/en/former\\_rules.php](https://www.swissarbitration.org/sa/en/former_rules.php).

<sup>3</sup> Domestic arbitration in Switzerland, which is governed by the Swiss Civil Procedure Code of December 19, 2008, in force as of January 1, 2012, SR 272 and until December 31, 2011, by the Intercantonal Arbitration Convention of March 27, 1969, SR 279, is not discussed.

<sup>4</sup> [www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm](http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm) (matter number search).

Recognition and Enforcement of Foreign Arbitral Awards (“NYC”) Art. V(2)(a). – PIL Act Art. 178(2).

*An arbitral tribunal sitting in Switzerland may consider a mandatory provision of foreign law when deciding whether a claim may be subject to arbitration (arbitrability).*

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OBSERVATIONS. – 1. The dispute arose out of an employment agreement between the coach of the Bulgarian national football team and the Bulgarian Football Union (“BFU”), which contained the following arbitration clause: *“The disputes concerning the interpretation of the meaning and the performance of the contract will be resolved amicably by agreement of the parties. In case an agreement is impossible to reach, the dispute shall be referred for resolving by the competent court. The parties to the contract recognize the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland as in this case the Statute and the regulations of BFU and the provisions of Bulgarian legislation will apply.”* Further to the premature termination of his employment agreement by the BFU, the coach started judicial proceedings before the courts in Sofia in order to obtain the payment of a penalty. Notwithstanding the arbitration agreement, the court admitted jurisdiction, based on Article 19 of the Bulgarian Code of Civil Procedure, which excluded arbitration for employment claims: *“The parties to a property dispute may agree that it be settled by a court of arbitration, unless the dispute has as its subject [...] rights as per employment relationship.”* The same court rejected the claim on the merits. The coach then sued again in Bulgaria and at the same time started arbitration before the Court of Arbitration for Sport (“CAS”), which denied jurisdiction for lack of arbitrability. The coach challenged the CAS’ award before the Supreme Court, arguing that the CAS had wrongly denied jurisdiction.

2. The Supreme Court rejected the challenge. First, the Supreme Court recalled that the question of whether a dispute is capable of settlement by arbitration in Switzerland is governed by PIL Act Article 177(1), which provides that *“any dispute involving an economic interest may be the subject-matter of an arbitration.”* The Supreme Court further recalled that this provision sets forth a substantive rule of arbitrability, as

opposed to a conflict of laws rule.<sup>5</sup> In line with its past decisions, the Supreme Court then held that the arbitrability of a specific claim may be denied if foreign legal provisions submit such a claim to the state courts' mandatory jurisdiction, provided that these provisions belong to public order.<sup>6</sup> However, the Supreme Court again made it clear that this possibility should not mean that any foreign mandatory provision which has a connection with the dispute, and which possibly contains a narrower definition of arbitrability than under Swiss law, must be taken into consideration for the assessment of arbitrability.<sup>7</sup> The fact that the disregard of such mandatory provisions may eventually result in the enforcement of the award being denied further to an objection under NYC Article V(2)(a) is not pertinent because the Swiss legislator chose to define arbitrability based on a substantive test (as opposed to a conflict-of-laws test). According to the Supreme Court, when adopting such a definition, the legislator's intention must have been to afford that some Swiss awards may be conceivably unenforceable in a specific country that has adopted a definition of arbitrability that differs from the Swiss definition.<sup>8</sup>

3. However, the Supreme Court found that the CAS' decision to decline jurisdiction was correct.<sup>9</sup> In doing so, the Supreme Court did not apply the abovementioned Bulgarian legal exclusion, but proceeded to an interpretation of the purported arbitration agreement and found that the parties actually had not agreed to arbitration. More particularly, they had not agreed to exclude the jurisdiction of the state courts.<sup>10</sup> The Supreme Court relied on the wording used by the parties, especially the reference to the "*competent court*", and on the parties' choice of law in favour of Bulgarian law, which excludes arbitration for employment claims. It also found that the coach's seizing of the Bulgarian state courts before resorting to arbitration was an additional indication of the parties' lack of agreement to arbitrate.<sup>11</sup>

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<sup>5</sup> Ground 3.2.

<sup>6</sup> Ground 3.3.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Ground 3.4.

<sup>10</sup> Ground 3.4.3.

<sup>11</sup> Ground 3.4.3.

4. The acknowledgment that the definition of arbitrability under Swiss law, without regard to possible stricter rules of the *lex causae* or the parties' national rules of law, may prevent the recognition and enforcement of a Swiss award in another country is not new.<sup>12</sup> Neither is anything new in leaving the door open for some kind of consideration for foreign legal provisions which grant mandatory jurisdiction to state courts over certain claims if such provisions belong to the public order. This was held in a decision of principle in 1992 (Ficantieri)<sup>13</sup> and repeated in 2007<sup>14</sup> and May 2012.<sup>15</sup> However, this is criticised by commentators, according to which arbitrability must be established in accordance with the sole test of PIL Act Article 177 (any dispute which has a monetary value may be arbitrated), to the exclusion of any rule of any other legal order, even if such a legal order has a connection with the dispute.<sup>16</sup> Neither the decision of principle in 1992 nor the 2007 decision gave an indication as to what should be understood by "public order."

Is it the public order of the foreign country where the exclusive jurisdiction applies (PIL Act Article 19), or is it the public order which, if violated, would result in the award being set aside in Switzerland (PIL Act Article 190(2)(e))?<sup>17</sup> Pursuant to the latter provision, an award may be challenged if it violates fundamental principles of law so that it is irreconcilable with the prevailing legal order and system of values.<sup>18</sup> Both the May 2012 and the March 2013 decisions seem to clarify which public order would apply, if any. They both refer to PIL Act Article 190(2)(e).<sup>19</sup> Thus, an arbitral tribunal sitting in Switzerland, arguably, may give consideration for the purpose of assessing the arbitrability of a claim to a foreign legal provision which submits such a claim to the

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<sup>12</sup> ATF 118 II 193, ground 5c/aa.

<sup>13</sup> ATF 118 II 353.

<sup>14</sup> Supreme Court, 4A\_370/2007, February 21, 2008, ground 5.2.2.

<sup>15</sup> Supreme Court, 4A\_654/2011, May 23, 2012, ground 3.4.

<sup>16</sup> Tschanz, *Commentaire Romand – Loi sur le droit international privé*, Helbing & Lichtenhahn, 2011, N. 19 to Article 177.

<sup>17</sup> In favor of the latter proposition, see Poudret/Besson, *Comparative Law of International Arbitration*, 2<sup>nd</sup> ed., Sweet & Maxwell, 2007, N. 333 and Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2<sup>nd</sup> ed., Sweet & Maxwell, 2010, N. 257.

<sup>18</sup> ATF 116 II 634, ground 4.

<sup>19</sup> Supreme Court, 4A\_654/2011, May 23, 2012, ground 3.4; Supreme Court, 4A\_388/2012, March 18, 2013, ground 3.3.

exclusive jurisdiction of state courts under two cumulative conditions. First, there is a sufficiently close connection between the dispute and the foreign country where this provision was enacted. Second, the arbitral tribunal's decision to accept jurisdiction would infringe public order as per PIL Act Article 190(2)(e).

III  
THE CAPACITY TO ARBITRATE  
SUPREME COURT  
December 11, 2012  
X. \_\_\_ v/ Z. \_\_\_ (4A\_414/2012)

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International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Swiss law. – Challenge against preliminary awards. – Jurisdiction of the arbitral tribunal. – Capacity to arbitrate. – Violation of right to be heard. – PIL Act Art. 190(3). – PIL Act Art. 190(2)(b). – PIL Act Art. 190(2)(d).

*The parties' legal capacity to proceed in an arbitration in Switzerland must exist at least at the time of the first decision on the merits.*

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OBSERVATIONS. – 1. Further to a contractor's claim that it had not been paid in full under a contract for the surveillance of imports, a three-member ICC arbitral tribunal seated in Geneva was constituted. The arbitral tribunal issued a preliminary award in which it found that the claimant had capacity to arbitrate and that the tribunal had jurisdiction over the case. Subsequently, the respondent became aware that the claimant had not been registered on the trade register when the preliminary award was issued and requested the arbitral tribunal to issue an additional award. Meanwhile, the claimant had re-registered in the trade register, which retrospectively re-established its legal capacity, according to the applicable substantive law. Therefore, in the additional award, the arbitrators found that the temporary removal from the trade register had no impact on the claimant's existence or on the arbitration proceedings. The respondent challenged this decision before the Supreme Court.

2. The Supreme Court recalled that according to the general principles of civil procedure law, the requirements of admissibility (*Prozessvoraussetzungen*) to which the capacity to be a party belongs must be met when the decision on the merits is issued, the fulfilment of these requirements until that time being sufficient.<sup>20</sup> Therefore, the Supreme Court held that as long as the court or arbitral tribunal has issued no decision on the merits, the temporary removal of a party from the trade register has no impact on that party's legal capacity, provided that its re-registration in the trade register re-establishes its legal capacity pursuant to the applicable substantive law.<sup>21</sup>

3. Unfortunately, the Supreme Court did not decide the issue whether the challenge against a preliminary award is limited to arguments of lack of jurisdiction and/or of irregular composition of the arbitral tribunal, as provided by PIL Act Article 190(3),<sup>22</sup> or whether a party may also argue a violation of the right to be heard, based on the insufficiency of the appellant's reasons in support of its alternative argument in this respect.<sup>23</sup>

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<sup>20</sup> Ground 2.3.1.1, referring to ATF 116 II 9, ground 5 and to ATF 116 II 209, ground 2b/bb.

<sup>21</sup> *Ibid.* In respect of the applicable substantive law, the Supreme Court confirmed that it has jurisdiction to review the application of foreign law and that, in this exercise, it will generally follow the prevailing view and, in any event, the view of the highest court of the state involved (ground 2.2, referring to Supreme Court, 4A\_50/2012, October 16, 2012, ground 3.2, commented in the previous note published by Mr. Frank Spoorenberg and Ms. Isabelle Fellrath in the Journal of International Trade and Arbitration Law 2013 (Volume 2, Issue 2), pp. 195-196).

<sup>22</sup> In favor of no such limitation, see Bucher, *Commentaire Romand – Loi sur le droit international privé*, Helbing & Lichtenhahn, 2011, N. 20 to Article 190. In a decision dated April 15, 2013, the Supreme Court recalled that final and partial (i.e. awards deciding certain issues in dispute before addressing other issues) awards may be challenged for the grounds listed in PIL Act Article 190(2), while preliminary awards (i.e. awards deciding procedural or substantive procedural issues in advance) may be challenged only for the grounds provided in PIL Act Article 190(2)(a) and (b) (Supreme Court, 4A\_596/2012, April 15, 2013, ground 3.2). In that decision, the Supreme Court also repeated that procedural orders, such as among others orders for document production, that do not bind the arbitral tribunal and that may be revisited in the course of the proceedings, are not challengeable, unless they contain an implicit determination on jurisdiction (grounds 3.3 and 3.6).

<sup>23</sup> Ground 3.2.

IV  
THE ARBITRATION AGREEMENT  
SUPREME COURT

**October 2, 2013**

**X. \_\_\_ AG and X. \_\_\_ *Technologies S.A.E.* v/ Y. \_\_\_ (4A\_305/2013)**

International arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Swiss law. – Jurisdiction of the arbitral tribunal. – Parties’ agreement to terminate arbitration agreement (established). – No review of findings of fact by the Supreme Court. – Federal Tribunal Statute Art. 77 and 105. – PIL Act Art. 190(2)(b). – PIL Act Art. 190(2)(d).

*The establishment of the parties’ real and common intention to terminate the arbitration agreement by the arbitrators constitutes an issue of fact and of assessment of evidence, which the Supreme Court is not entitled to review in a jurisdictional challenge against an arbitral award.*

**OBSERVATIONS.** – 1. In challenge proceedings against arbitral awards, the Supreme Court is not authorized to make any corrections or amendments in respect of the findings of facts made by the arbitral tribunal (Federal Tribunal Statute Article 105(2) *cum* Article 77(2)), unless one of the grounds listed in PIL Act Article 190(2) is invoked against such factual findings. Based on this premise, the Supreme Court refused to review the merits of a challenge against an arbitral award, in which the arbitrators had declined jurisdiction after having established the parties’ intention to terminate the arbitration agreement.

2. In their challenge, the plaintiffs argued that the arbitral tribunal’s decision to deny jurisdiction based on the normative interpretation of contractual provisions, according to which the parties had terminated their original agreement, including the arbitration agreement, was untenable and violated the principle of autonomy of arbitration agreements.

3. The Supreme Court rejected this argument. First, it explained that the termination of arbitration agreements is not subject to any

requirements of form.<sup>24</sup> Then, recalling that the interpretation of arbitration agreements follows the principles applicable to the interpretation of private declarations,<sup>25</sup> it held that: “[i]f the court of lower instance establishes the content of a contract based on the parties’ joint actual intention, it is a finding of fact which in principle binds the Supreme Court.”<sup>26</sup> In application of these principles, the Supreme Court found that the arbitral tribunal’s conclusion did not rely on a normative interpretation, but on a subjective interpretation establishing that the parties’ joint intention was to terminate the arbitration agreement which, as a finding of fact, was binding on the Supreme Court.<sup>27</sup>

4. The Supreme Court further rejected the plaintiffs’ argument that the arbitral tribunal had violated their right to be heard in issuing a decision which would have taken them by surprise (*überraschende Rechtsanwendung*). Whereas arbitrators may exceptionally be under a duty to advise the parties when they consider basing their decision on a provision or a legal consideration that was not raised during the proceedings, the Supreme Court made it clear that this exceptional duty does not apply to the establishment of facts.<sup>28</sup> Since the plaintiffs’ argument precisely pertained to the establishment of facts, the Supreme Court rejected the argument.

## V

### THE CONSTITUTION OF THE ARBITRAL TRIBUNAL SUPREME COURT January 10, 2013

**État X. \_\_\_ v/ Société Z. \_\_\_ (4A\_146/2012)**

International arbitration. – Commercial arbitration. – Ad hoc. –  
Seat of arbitration in Switzerland. – Swiss law. – Appointment of

<sup>24</sup> Ground 3.2.1, referring to Poudret/Besson, *Comparative Law of International Arbitration*, 2<sup>nd</sup> ed., Sweet & Maxwell, 2007, N. 379.

<sup>25</sup> Ground 3.2.2, referring to ATF 132 III 626, ground 3.1.

<sup>26</sup> *Ibid.* (authors’ translation).

<sup>27</sup> Ground 3.4.

<sup>28</sup> Ground 4, referring to Supreme Court, 4A\_214/2013, August 5, 2013, grounds 4.1 and 4.3.1 and to Supreme Court, 4A\_538/2012, January 17, 2013, ground 5.1 (also commented herein, pp. 18 *et seq.*).

arbitrator. – Arbitration clause. – Regularity of the constitution of the arbitral tribunal. – Requirement of independence and impartiality of arbitrators. – Jurisdiction of the arbitral tribunal. – PIL Act Art. 186(3). – PIL Act Art. 190(3). – PIL Act Art. 190(2)(a). – PIL Act Art. 179. – PIL Act Art. 178(2). – PIL Act Art. 190(2)(b).

*The Supreme Court confirmed the regular constitution of an ad hoc arbitral tribunal seated in Geneva where French courts had appointed the co-arbitrator of the Israeli respondent. The domestic court seized to appoint the co-arbitrator was located in a state (France) other than that which the parties had chosen as the seat of the arbitration (Switzerland). The only connection with France at the time of the appointment by the French courts was the reference in the arbitration clause to the president of the ICC in Paris, as the ancillary appointing authority of the presiding arbitrator. The French Cour de cassation considered such a connection to be sufficient for the purpose of the French court's jurisdiction to appoint the co-arbitrator. The Supreme Court held that it was bound by the decisions of the French courts, at least with respect to their jurisdiction to appoint the co-arbitrator.*

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OBSERVATIONS. – 1. The dispute referred to arbitration pertained to a participation agreement for the construction, maintenance and exploitation of the Eilat-Ashkelon Oil Pipeline. The arbitration clause contained in the participation agreement provided that each party had to nominate an arbitrator, and that “[i]f such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator.” No reference was made in the arbitration clause to the place of arbitration.

2. After having started arbitration, further to the respondent's refusal to nominate its arbitrator, the claimant requested the president of the Tribunal de grande instance of Paris to appoint the respondent's co-arbitrator. In the face of the respondent's persistent refusal to nominate its co-arbitrator, the French courts proceeded to make the appointment. The French courts' jurisdiction was eventually upheld by the *Cour de cassation*, which considered that the impossibility for a party to access a court of law, even an arbitral tribunal, would be tantamount to a denial of justice inconsistent with fundamental international public policy as enshrined in the principles of international commercial arbitration and

Article 6(1) of the European Convention on the Protection of Human Rights (“ECHR”). According to the court, the protection against denial of justice conferred jurisdiction on the French courts to assist and cooperate in the constitution of the arbitral tribunal, since there was a connection, however remote, with France.<sup>29</sup> The *Cour d’appel* appointed the respondent’s co-arbitrator and the place of arbitration was agreed to be Geneva, Switzerland.

3. The respondent’s objection of the arbitral tribunal’s irregular composition was dismissed by the same tribunal in a partial award. This tribunal found that a party to an arbitration clause has the primary duty to nominate an arbitrator, and that the failure to comply with this obligation allows the other party to seek assistance from the competent domestic court. The arbitral tribunal further considered that, in the specific case, the parties’ right to be heard had been respected and the decision of the *Cour de cassation* could not be questioned legitimately. The respondent challenged this partial award before the Supreme Court on the grounds that the arbitral tribunal as constituted had no jurisdiction to hear the case.

4. The Supreme Court dismissed the respondent’s challenge against the partial award and confirmed the arbitral tribunal’s finding. It pointed out that the dispute presented two particularities, namely that a foreign domestic court had appointed an arbitrator for the respondent, which unsuccessfully challenged this appointment, and that the respondent’s arbitrator had been appointed before the seat of the arbitration was agreed to be in Geneva.<sup>30</sup>

5. Regarding the second particularity, the Supreme Court held that it appeared questionable whether the respondent still had an interest in challenging the appointment of its arbitrator by the *Cour d’appel* since, assuming this challenge to be successful, the claimant could simply request the competent judge in Geneva to appoint an arbitrator pursuant to PIL Act Article 179(2) and (3). Thus, the respondent would be in the same position as that resulting from the challenged award.<sup>31</sup>

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<sup>29</sup> *Etat d’Israël c/ société National Iranian Oil Company, Cour de cassation, Première chambre civile* 404, February 1, 2005, 3<sup>rd</sup> *Attendu* (see [www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/02\\_15-237\\_635.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/02_15-237_635.html)).

<sup>30</sup> Ground 3.3.

<sup>31</sup> Ground 3.3.1.

6. Regarding the first particularity, the Supreme Court recalled that the decision of a domestic court appointing an arbitrator has no *res judicata effect*: it is for the arbitral tribunal to decide on its own jurisdiction and composition in a decision that can be challenged before the Supreme Court.<sup>32</sup> However, the Supreme Court considered that this case should be treated differently, for three reasons. First, the appointment proceeding had been conducted before the courts of a state other than that of the place of the arbitration. Second, the appointment of the respondent's co-arbitrator by the French courts was not merely an administrative decision, but a decision taken by the highest court in France in full consideration of all relevant arguments. Third, the arbitrators had in no way expressed their intention to review the decisions of the French courts on the issue in dispute. In light of these considerations, the Supreme Court found that the respondent was prevented from indirectly challenging the French decisions before the Supreme Court.<sup>33</sup>

7. Therefore, according to the Supreme Court, it was required only to examine whether the arbitration clause was effectively meant to exclude any domestic court from appointing the respondent's arbitrator, which the *Cour de cassation* had not examined.<sup>34</sup> The respondent argued that the parties had deliberately omitted to mention the place of the arbitration and the applicable law in order to exclude any judicial intervention in the process of the co-arbitrators' appointment, with the consequence that if one party failed to nominate its co-arbitrator, no arbitration would take place.<sup>35</sup> Proceeding by way of interpretation of the contractual provision based on the principle of good faith, the Supreme Court considered that it was inconceivable that the parties had consciously agreed that the failure by one of them to nominate its arbitrator would have prevented the other party from proceeding in arbitration.<sup>36</sup>

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<sup>32</sup> Ground 3.3.2, referring to ATF 115 II 294, ground 2a, to ATF 110 Ia 59, ground 2b and to Tschanz, *Commentaire Romand – Loi sur le droit international privé*, Helbing & Lichtenhahn, 2011, N. 47 to Article 190.

<sup>33</sup> Ground 3.3.2.

<sup>34</sup> Ground 3.3.3.

<sup>35</sup> Ground 3.4.2.

<sup>36</sup> Ground 3.4.3.

8. The judicial review of the regularity of the composition of the arbitral tribunal by Swiss courts is guaranteed by local courts when the initial determination on the constitution of the tribunal is made in ancillary proceedings (as is the case for ad hoc arbitration), and by the Supreme Court in the challenge against the arbitration award when the review of the regularity of the composition of the tribunal is made by a private body (as is usually the case for institutional arbitration).<sup>37</sup> This decision, while short of setting forth a generally applicable rule, seems to suggest that the Supreme Court would also decline to hear constitution-based challenges when the arbitral tribunal has been appointed, in part, by a foreign judicial authority having jurisdiction to do so. If confirmed beyond the particularities of this case, it remains to be seen whether such practice would be consistent with the ECHR standards.

9. What the Supreme Court's decision would have been, had it found that the parties' intention had been to foreclose arbitration if a party failed to appoint its arbitrator, remains to be seen. For instance, the parties' agreement could have been intended to exclude all interferences in their dispute by any state authority, even in assistance to the arbitration process. The Supreme Court would then have had to balance the parties' agreement against their protection against denial of justice.

## SUPREME COURT

July 26, 2013

**X. \_\_\_ SA v/ Y. \_\_\_ and Z. \_\_\_ (5A\_68/2013 and 5A\_69/2013)**

International arbitration. – Commercial arbitration. – Foreign arbitral award. – Exequatur in Switzerland. – Irregular Constitution. – ICC Court of Arbitration (“ICC Court”). – Motivation of the arbitrator's challenge decision. – NYC Art. V(1)(b). – NYC Art. V(2)(b). – ECHR Art. 6(1). – ICC Rules of arbitration 2012 (“ICC Rules”) Art. 14(3).

*When parties consent to ICC arbitration, they agree to forfeit a motivated decision of the ICC Court regarding the challenge of an arbitrator. A party may not, in good faith, argue that the regularity of this process violates his right to be heard, including the right to obtain a*

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<sup>37</sup> Fox example, ATF 138 III 270 and Supreme Court, 4A\_46/2011, May 16, 2011.

*motivated decision, in the context of a setting aside proceeding against an adverse decision.*

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OBSERVATIONS. – 1. When administering the challenge of an arbitrator, the ICC Court endeavours to ensure compliance with due process fundamentals resulting from the right to be heard of all the parties to the arbitration. The parties, the affected arbitrator and the other arbitrators, as the case may be, are invited to comment in writing on the challenge. However, the reasoning of the ICC Court’s decisions on the merits of the challenge, usually taken at its monthly and non-public plenary session, is not communicated. Moreover, its decisions are final (ICC Rules Article 14(3), formerly Article 7(4)). The Supreme Court recently confirmed, in an enforcement proceeding, that this process is in principle consistent with the right to be heard guaranteed under the NYC.

2. In the case at hand, two foreign companies filed for debt collection proceedings in Switzerland against a third Swiss company in order to enforce a foreign ICC arbitral award.<sup>38</sup> The debtor objected to the recognition and enforcement of the award in Switzerland arguing that this award, issued following the ICC Court’s unmotivated dismissal of its challenge against one member of the arbitral tribunal, infringed its right to be heard. In the applicant’s view, neither its continued involvement in the arbitration proceeding (notwithstanding its persistent constitution-based objection), nor its agreement to an ICC arbitration (and therefore to an unmotivated challenge decision pursuant to the ICC Rules) constituted a waiver of its right to rely on its right to be heard. The Swiss enforcement courts dismissed the objection and declared the arbitral award enforceable in Switzerland. The Supreme Court upheld the lower courts’ decisions.

3. On the question of the applicable provision, the Supreme Court reiterated the subsidiary character of the reservation of the public policy of the enforcement place (NYC Article V(2)(b)), which should only be considered in the absence of a more specific ground for enforcement

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<sup>38</sup> It transpires from the narrative of the facts of the commented decision that the applicant had challenged the award on constitution-based grounds before the *Cour d’Appel* of Paris, presumably unsuccessfully.

refusal. Considering that the elementary procedural guarantees include the right to be heard, the Supreme Court decided first to examine whether the applicant was prevented from defending itself due to the absence of motivation in the decision on the arbitrator's challenge in the basis of NYC Article V(1)(b). In particular, the Supreme Court found that: “[t]he subsidiarity of the Swiss public policy reservation has to be observed all the more since, regarding the procedure, any irregularity does not necessary imply the refusal to execute the foreign award, even if such an irregularity would imply the setting aside of the award if the latter had been issued in Switzerland; it must be a violation of fundamental principles of the Swiss public policy that affects in an intolerable manner the sense of justice.”<sup>39</sup>

4. On the merits of the applicant's arguments, the Supreme Court acknowledged that the lack of motivation of a decision on the challenge of an arbitrator does not ease the task of the enforcement judge. However, it also found that this difficulty is for the parties to bear, having consented freely to arbitration for other good reasons. Indeed: “[s]hould it be allowed for that party to simply invoke the lack of motivation to resist the enforcement of an award issued in application of a freely chosen procedure, it would often lead to protect a behavior inconsistent with good faith requirements. The fact that judicial authorities' decisions need to be motivated does not imply that the same principles should prevail in arbitration proceedings, where the parties' autonomy plays a far more important part and which, [insofar as they are] freely chosen for other advantages, should not necessarily offer the same guarantees as ordinary judicial proceedings.”<sup>40</sup> In this respect, the Supreme Court referred to its constant line of decisions, according to which the right to be heard, in international arbitration, does not warrant the right to have a reasoned arbitral award.<sup>41</sup>

5. The outcome of the decision is undisputable: when consenting to arbitration, parties agree to forfeit certain procedural guarantees

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<sup>39</sup> Ground 4.2.1 (authors' translation). On the uneasy distinction between NYC Article V(1) (to be invoked by the parties) and NYC Article V(2) (applied *ex officio*), see Supreme Court, 4A\_233/2010, July 28, 2010, ground 3.3.

<sup>40</sup> Ground 4.2.2 (authors' translation).

<sup>41</sup> *Ibid.*, referring to earlier decisions published in ATF 134 III 186, ground 6.1; ATF 133 III 235, ground 5.2; ATF 130 III 125, ground 2.2. For further details please see Note F. Spoorenberg, D. Franchini, “Four recent Supreme Court arbitration decisions provide legal guidance”, *ILO Newsletter*, February 27, 2013.

typically associated with court litigation. They cannot in good faith negate this agreement when confronted with the enforcement of an adverse arbitral award. However, this does not mean that, when consenting to ICC arbitration and thus implicitly waiving their right to a motivated decision on an arbitrator's challenge, parties also waive their right to challenge the regularity of the composition of an arbitral tribunal. Of course, it is dubious that parties could invoke their right to be heard based on ECHR Article 6(1) with respect to a procedure conducted before a private *gremium*, such as the ICC Court, the decisions of which are contractually binding, but devoid of any jurisdictional effects.<sup>42</sup> However, the regularity of the arbitral tribunal's constitution is in any event subject to judicial review – independently from the ICC Court's prior decision – in the challenge proceeding against the arbitral award and, as a last resort, in the recognition and enforcement proceeding, both of which are compliant of the minima of ECHR Article 6(1).<sup>43</sup> Furthermore, one may argue that a party should be entitled to raise the irregular constitution of the arbitral tribunal also before the arbitral tribunal itself, at least when the arbitrator's challenge is not admitted by the ICC Court, in application of PIL Act Article 186 by analogy.<sup>44</sup> Indeed, granting an “administrative” authority (actually a contractual authority to a common representative) to the ICC Court

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<sup>42</sup> Supreme Court, 4A\_644/2009, April 13, 2010, ground 1, and Supreme Court 4P.226/2004, March 9, 2005, ground 3.1. In effect, in proceedings ancillary to the arbitration which gave rise to the enforcement and to the decision commented herein, the applicant had also (unsuccessfully) assigned the ICC Court before the *Tribunal de grande instance* in Paris to obtain the communication of the motivations of its decision on the arbitrator's challenge (*Tribunal de grande instance de Paris*, December 19, 2012, excerpts in *Les Cahiers de l'arbitrage* 2013/2, pages 476 to 477 and Note S. Akhouad, *Les décisions de l'institution d'arbitrage sur la demande de récusation d'un arbitre sont-elles confidentielles?*, pages 455 to 476). The *Tribunal de grande instance* dismissed the case, among other reasons, on the grounds that due process was guaranteed with the possibility for the parties to seek the assistance of judicial authorities in ancillary proceeding failing any resolution from the institution in charge of managing the proceeding, or as a last resort, with the possibility to invoke constitution grounds in the challenge of the award.

<sup>43</sup> Supreme Court, 4A\_14/2012, May 2, 2012 (published in ATF 138 III 270) and Supreme Court, 4A\_146/2012, January 10, 2013.

<sup>44</sup> Tschanz, *Commentaire Romand – Loi sur le droit international privé*, Helbing & Lichtenhahn, 2011, N. 10 and 29 to Article 186.

should not deprive the arbitral tribunal of part of its jurisdictional authority, in particular of its jurisdiction to decide on its own constitution.

## VI

### THE JURISDICTION OF THE ARBITRAL TRIBUNAL

#### SUPREME COURT

January 17, 2013

X. \_\_\_ v/ Y. \_\_\_ Ltd (4A\_538/2012)

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International arbitration. – Commercial arbitration. – Swiss law. – Jurisdiction of the arbitral tribunal. – Irregular composition of the arbitral tribunal. – Violation of the right to be heard. – Violation of public policy. – PIL Act Art. 190(2)(b). – PIL Act Art. 190(2)(d). – PIL Act art. 190(2)(e).

*The party representative's alleged lack of authority to start arbitration is an issue of jurisdiction, not of constitution of the arbitral tribunal.*

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OBSERVATIONS. – 1. A dispute arose in the framework of an exclusive agency agreement for the sale of diesel engines to be used in electrical power plants. Based on the arbitration agreement contained in the agency agreement, the French agent started an ICC arbitration in Lausanne to request the payment of commission by the Iraqi principal, which the arbitral tribunal partially awarded, rejecting bribery allegations. The principal challenged the award before the Supreme Court.

2. In the challenge proceedings, the parties disagreed on the qualification of the alleged lack of authority of the party's representative that had submitted the request for arbitration: according to the plaintiff, it was an issue of jurisdiction to be analyzed under PIL Act Article 190(2)(b); according to the defendant, it was an issue of constitution of the arbitral tribunal to be analyzed under PIL Act Article 190(2)(a). The Supreme Court held that: “[t]hus, in principle and considering the note of section IV of PIL Act Chapter 12 (“Arbitral Tribunal”), the regularity of the constitution of the arbitral tribunal, within the meaning of PIL Act Art. 190(2)(a), only means the manner in which the arbitrators were

*appointed or replaced (PIL Act Art. 179) and the questions regarding their independence (PIL Act Art. 180). Other issues pertain either to the jurisdictional grievance (PIL Act Art. 190(2)(b)), or to one of the other specific grounds of appeal provided in PIL Act Art. 190(2)(c to e) [...]”.*<sup>45</sup> Therefore, considering that the disputed issue did not pertain to the manner in which the arbitral tribunal was designated or to the independence and impartiality of its members, the Supreme Court examined the issue from the perspective of PIL Act Article 190(2)(b) and found that the alleged lack of authority of the defendant’s representative subsequently was tacitly ratified.<sup>46</sup> The Supreme Court restated its long-standing position that a party cannot in good faith allege a fact that is in contradiction with the position that this party had adopted in the arbitration proceedings.<sup>47</sup>

3. In relation to the plaintiff’s argument that the arbitral had violated its right to be heard, referring to the principle of free assessment of evidence and to its restrictive practice in connection with the establishment of facts, the Supreme Court held that the right to be heard “*does not require the arbitrators to request the parties to take position as to the bearing of each of the produced exhibits, nor does it authorize one of the parties to limit the autonomy of the arbitral tribunal in the assessment of a specific exhibit in accordance with the purpose for which it produced the piece of evidence.*”<sup>48</sup>

4. Finally, the Supreme Court held that promises to pay bribes breach public policy. However, the bribery must be established, which it was not in the case at hand.<sup>49</sup>

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<sup>45</sup> Ground 4.3.2.

<sup>46</sup> Ground 4.3.3 *et seq.*

<sup>47</sup> Ground 4.4.2.

<sup>48</sup> Ground 5.1.

<sup>49</sup> Ground 6.1. In this respect, the Supreme Court reviewed the arbitral tribunal’s decision to reduce the commission so that it represented less than 10% of the price of the sold goods because a commission exceeding 10% is an indication of bribery. The Supreme Court did not annul this decision because it considered that this reduction did not violate public policy (ground 6.2).

**SUPREME COURT**  
**January 17, 2013**  
**FC X. \_\_\_ v/ Y. \_\_\_ (4A\_244/2012)**

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International Arbitration. – Sport Arbitration (Cas). – Swiss Law. – Violation of the Right to be Heard. – Jurisdiction of the Arbitral Tribunal. – Conflicting Dispute Resolution Clauses. – Interpretation of Arbitration Clauses. – PIL Act Art. 190(2)(D). – PIL Act Art. 190(2)(B). – PIL Act Art. 178(2).

*The Supreme Court annulled an arbitral award issued by the CAS on the grounds that the latter lacked jurisdiction. The Supreme Court recalled that jurisdiction and arbitration clauses must be interpreted in accordance with the principle of reliance (Vertrauensprinzip), if the parties' actual mutual intention cannot be established.*

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OBSERVATIONS. – 1. The case pertained to the contractual relationship between a coach and a football team, which was based on an employment agreement, a second agreement concerning the coach's employment and a settlement agreement. These agreements contained different dispute resolution clauses. More precisely, the employment agreement provided for exclusive arbitration before the CAS in Lausanne, but also contained a governing law clause providing for submission to “*the non-exclusive jurisdiction of the Swiss courts*”; the second agreement provided for dispute resolution by using “*the appropriate bodies of the Professional football league of B. \_\_\_, Football Federation B. \_\_\_, AFC and FIFA*”; and the settlement agreement provided for resolution by “*the non-exclusive jurisdiction of the Swiss Courts.*” A dispute arose and the coach started arbitration to obtain the payment of damages before the CAS, which admitted jurisdiction and partially granted the relief sought. The football team challenged the CAS' award before the Supreme Court on the grounds that the CAS had no jurisdiction.

2. First, the Supreme Court reiterated its well-established principle, according to which “[i]t is contrary to good faith to raise a procedural flaw only in the framework of an appeal, while there was the opportunity during the arbitration proceeding to give the arbitral tribunal the possibility to cure the alleged flaw” and “[a] party acts contrary to good

*faith and abusively in particular when it keeps the grievance in reserve, to raise it only in case of unfavourable outcome of the proceeding and of foreseeable loss of the case.”*<sup>50</sup>

3. Then, the Supreme Court recalled that, if the parties’ actual mutual intention to submit to arbitration cannot be established, arbitration agreements must be interpreted in accordance with the principle of reliance (*Vertrauensprinzip*), meaning that “*the presumptive intention of the parties must be established according to what the party receiving the declaration could and should understand in good faith,*” whereby an intention to exclude the ordinary legal remedies before state courts must be admitted restrictively. However, where the parties’ intention to exclude dispute resolution before state courts is established, the arbitration agreement must be interpreted liberally.<sup>51</sup>

4. Applying these principles, the Supreme Court rejected the CAS’ finding that it had jurisdiction based on an interpretation in accordance with the principle of reliance of the relevant provisions in the different agreements. It found that, considering the conflicting provisions contained in the different agreements between the parties, the parties’ intention to exclude certain disputes from the jurisdiction of state courts in favor of arbitration, could not be established.<sup>52</sup> The Supreme Court further found that this conclusion was supported by its constant practice according to which a jurisdiction clause contained in an out-of-court settlement agreement substitutes the arbitration clause contained in the main agreement, unless the parties agree otherwise (which they did not in the case at hand).<sup>53</sup> Therefore, the Supreme Court annulled the arbitral award and declared that the CAS had no jurisdiction to decide the dispute.

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<sup>50</sup> Ground 3. The Supreme Court reiterated these principles in two subsequent decisions that are not specifically addressed in the present note (Supreme Court, 4A\_620/2012, May 29, 2013, ground 4.2 and Supreme Court, 4A\_476/2012, May 24, 2013, ground 3.1).

<sup>51</sup> Ground 4.2.

<sup>52</sup> Ground 4.4.

<sup>53</sup> Ground 4.5, referring to ATF 121 III 495, ground 5.

**SUPREME COURT****June 20, 2013*****Egyptian Football Association v/ Al-Masry Sporting Club***  
**(4A\_682/2012)**

International arbitration. – Sport arbitration (CAS). – Swiss law. – Jurisdiction of the arbitral tribunal. – Exhaustion of extraordinary remedies (not required). – Decision ultra petita. – Violation of the right to be heard. – Violation of public policy. – PIL Act Art. 190(2)(b). – Art. R47(1) and R55(1) of the Sport Arbitration Code. – Art. 42(4) of the statutes of the Egyptian Football Association (“EFA”). – Art. 21bis of the rules of appeal of the EFA. – PIL Act Art. 186(2). – PIL Act Art. 190(2)(c). – PIL Act Art. 182(3). – PIL Act Art. 190(2)(d). – PIL Act art. 190(2)(e).

*Parties are not required to exhaust the extraordinary legal remedies provided by the rules of appeal of a sport federation before challenging the decision of such a federation’s appeal committee before the CAS.*

**OBSERVATIONS.** – 1. The case pertained to the violent confrontations that took place at the end of a football match in Egypt between the supporters of the two clubs involved. Further to this tragic event, the EFA imposed sanctions on the two clubs and, after it was seized by one of the teams, the Appeal Committee aggravated the sanctions imposed on the appealing team. Subsequently, this team appealed to the CAS, which partially upheld the appeal and reduced the sanctions. The EFA challenged the CAS’ decision before the Supreme Court.

2. In the challenge, the EFA argued among others that the CAS wrongly had admitted jurisdiction on the grounds that the club had not exhausted the internal legal remedies provided by the EFA.<sup>54</sup> Referring to the internal regulations governing the challenge proceedings against a decision of the EFA and the Appeal Committee,<sup>55</sup> the Supreme Court found that the possibility to request a “re-examination” of the decision

<sup>54</sup> Ground 4.1.

<sup>55</sup> Ground 4.3.1.

issued by the Appeal Committee does not constitute a remedy to be exhausted before seizing the CAS.<sup>56</sup>

3. On the EFA's argument that the CAS had violated its right to be heard by deciding the case without giving the EFA the opportunity to take position on the evidence produced, and on the conclusions modified, by the club during the hearing (to which the EFA had not attended), the Supreme Court held that: "[f]inally and in any event, one cannot admit the good faith of a party that, such as the plaintiff, after totally disregarding the appeal proceeding, subsequently seizes on an alleged flaw affecting such proceeding with the only aim to obtain the annulment of an award that it does not like."<sup>57</sup>

## VII

### THE PARTIES' RIGHT TO BE HEARD AND PUBLIC POLICY SUPREME COURT

December 6, 2012

#### X. \_\_\_ Club v/ Z. \_\_\_ Club and Fédération Internationale de Football Association (FIFA) (4A\_276/2012)

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International arbitration. – Sport arbitration (CAS). – Swiss law. – Violation of Public policy. – Material public policy. – Pacta sunt servanda. – Procedural public policy. – Onus to allege facts and to produce evidence. – PIL Act Art. 190(2)(e). – Art. R51 of the Sport Arbitration Code. – Art. 17 of the Regulations of the Status and Transfer of Players.

*The issue of whether the principle according to which the onus lies with the parties to allege the facts and produce the evidence (Verhandlungsmaxime) belongs to the procedural public policy remains unsettled.*

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OBSERVATIONS. – 1. A football player entered into a contact with one club while he was still under contract with another. In the proceedings before the CAS, the arbitrators had to assess the impact of a

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<sup>56</sup> Ground 4.4.3.2.

<sup>57</sup> Ground 6.2.

settlement agreement entered into by the player and the two clubs. The CAS considered that the parties were free to waive any financial claims raised by either of them, as they had done in the settlement agreement, but were prohibited from evading the disciplinary system put in place by the FIFA by entering into a settlement agreement that contradicted the facts. In its challenge to the Supreme Court, the plaintiff argued that the arbitrators had admitted the binding nature of the settlement agreement with respect to the pecuniary claims, but had denied such nature when deciding on the disciplinary penalties, and therefore had violated the *pacta sunt servanda* principle.

2. The Supreme Court reiterated that the *pacta sunt servanda* principle is violated only when an arbitral tribunal refuses to apply a contractual provision which it considers binding on the parties or, conversely, when the arbitral tribunal finds that a provision is not binding, but then demands compliance therewith.<sup>58</sup> The Supreme Court considered that when arbitrators make their own assessment of a settlement agreement and find it to be binding only with regard to certain claims, there is no violation of the *pacta sunt servanda* principle or internal incoherence in the reasons of the award.<sup>59</sup> The Supreme Court further confirmed that, in any event, the internal incoherence of the reasons of an award does not fall within the definition of substantive public policy.<sup>60</sup> Finally, the Supreme Court did not take position on the plaintiff's argument that procedural public policy includes the principle that the parties must allege facts and produce relevant evidence (*Verhandlungsmaxime*).<sup>61</sup>

## SUPREME COURT

December 10, 2012

A. \_\_\_ S.p.A. v/ B. \_\_\_ (4A\_635/2012)

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International Arbitration. – Sport arbitration (CAS). – Swiss law.  
– Award *Infra petita*. – Violation of the right to be heard. – Minimal duty to examine and address pertinent issues. – Reasoned award (no, but mi-

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<sup>58</sup> Ground 3.1.

<sup>59</sup> Ground 3.2.

<sup>60</sup> *Ibid.*, referring to Supreme Court, 4A\_150/2012, July 12, 2012, ground 5.2.1.

<sup>61</sup> Ground 4.2.2.

nimal duty to examine and address pertinent issues required). – PIL Act Art. 190(2)(c) – PIL Act Art. 190(2)(d).

*Although an award need not be reasoned, sufficient reasons must be given in order to comply with the right to be heard (confirmation of line of decisions).*

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OBSERVATIONS. – 1. Further to a football club’s failure to pay fully for a player which it had purchased from another club, the latter successfully commenced proceedings before the FIFA Players’ Status Committee. The respondent’s appeal to the CAS was partially admitted. In its challenge to the Supreme Court, the respondent argued that the arbitral tribunal had decided *infra petita*, and that it had violated its right to be heard.

2. The Supreme Court rejected the challenge. Considering that an international arbitral award need not be reasoned, the Supreme Court held that it cannot be inferred from the omission to address a claim in the reasons of an award that this claim was ignored by the arbitrators and thus that the arbitrators decided *infra petita*.<sup>62</sup> However, the Supreme Court pointed out that the right to be heard “*imposes on arbitrators a minimal duty to examine and address the pertinent issues*” and that “[*t*his duty is breached if the arbitral tribunal fails to take into account, inadvertently or due to a misunderstanding, some statements, arguments, evidence and offers of evidence adduced by the parties that are important for the decision to be issued.”<sup>63</sup>

## SUPREME COURT

April 17, 2013

X. \_\_\_ Limited v/ Y. \_\_\_ Limited (4A\_669/2012)

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International Arbitration. – Commercial arbitration. – Seat of arbitration in Switzerland. – Swiss law. – Violation of the right to be heard. – Failure to take evidence into account. – Partial annulment of

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<sup>62</sup> Ground 4.2.

<sup>63</sup> Ground 5.2.

award (possible, but denied here). – PIL Act Art. 190(2)(d). – Federal Tribunal Statute Art. 107(2) *cum* Art. 77(2).

*The Supreme Court annulled an arbitral award on the grounds that the arbitrator had failed to explain why, in the damage computation, it had not taken into account the deductions submitted by a financial expert and by the respondent (violation of the right to be heard). It also confirmed that an award may be annulled in total or in part.*

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**OBSERVATIONS.** – 1. The dispute referred to arbitration pertained to a tripartite framework agreement, the purpose of which was to transfer to the claimant all the rights that the respondent had previously conceded to a third party for the sale of nickel products. The framework agreement was governed by English law and contained an arbitration clause, according to which any dispute had to be submitted to a sole arbitrator in Zurich. The framework agreement was never executed. In the arbitration, the claimant sought compensation for the lost profits arising out of the non-delivery of the nickel products. The respondent argued that the framework agreement had to be considered as a letter of intention with no binding effect on the parties. In the final award, the sole arbitrator held that the framework agreement was binding on the parties, and therefore ordered the respondent to compensate the claimant for its lost profits. The respondent challenged this award before the Supreme Court on the grounds that the sole arbitrator had breached its right to be heard because it failed to address four arguments that the respondent had submitted in its briefs, which resulted in an incorrect damage calculation.<sup>64</sup>

2. The Supreme Court reiterated the well-established principles to be applied when examining an asserted violation of the right to be heard, according to which the arbitrators' minimum duty to examine and address the pertinent issues "*is breached if, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some statements, arguments, evidence and offers of evidence adduced by the parties that are important for the decision to be issued*" and, if an award entirely omits such pertinent issues, "*it is upon the arbitrators or the*

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<sup>64</sup> Ground 3.2.

respondent to justify this omission in their observations on the challenge.”<sup>65</sup> Applying these principles, considering that the sole arbitrator mentioned in the final award the deductions to the nickel sale price that were submitted by a financial expert and the respondent, but then omitted to take these deductions into account in the damage calculation, giving no explanation in this respect, the Supreme Court partially admitted the respondent’s challenge.<sup>66</sup> Although mentioning the possibility to annul partially arbitral awards if the issue appealed is independent from the others, it annulled the final award in its entirety because there was only one disputed claim in the present case.<sup>67</sup>

4. At the end of the decision, contrary to the rule according to which the Supreme Court only annuls the challenged award and remands the case to the arbitral tribunal for a new decision (the cassatory nature of the challenge),<sup>68</sup> it provided its own calculation of the lost profit.<sup>69</sup> It may thus be questioned whether the Supreme Court went beyond this cassatory nature by providing its own damage calculation.

## SUPREME COURT

April 29, 2013

**X. \_\_\_ v/ The International Association of Athletics Federations and  
Z. \_\_\_ (4A\_730/2012)**

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International Arbitration. – Sport arbitration (CAS). – Swiss law. – Accelerated proceeding. – Violation of the right to be heard. – Stereotyped formula (not sufficient to exclude such a violation). – Violation of procedural public policy. – Two-stage communication of the award. – PIL Act Art. 182(3). – PIL Act Art. 190(2)(d).

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<sup>65</sup> Ground 3.1. For further details please see Note F. Spoorenberg, D. Franchini, “Four recent Supreme Court arbitration decisions provide legal guidance”, *ILO Newsletter*, February 27, 2013.

<sup>66</sup> Ground 3.2.1.

<sup>67</sup> Ground 3.3.

<sup>68</sup> The Supreme Court allows an exception to such a cassatory nature only in relation to the plea of incorrect decision on jurisdiction (ATF 128 III 50, ground 1b; ATF 127 III 279, ground 1b; ATF 117 II 94, ground 4).

<sup>69</sup> Ground 5.

*The mere statement in an award whereby all relevant facts, arguments and evidence submitted by the parties have been taken into account, but only those necessary to explain the reasoning have been restated, does not suffice to preclude a violation of the parties' right to be heard.*

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OBSERVATIONS. – 1. The case pertained to a dispute that arose after an athlete had allegedly evaded anti-doping control organized by the International Association of Athletics Federations (“IAAF”). The IAAF challenged the local athletics federation’s decision to clear the athlete before the CAS, which upheld the IAAF’s challenge, annulled the local athletics federation’s decision and imposed a two-year ban on the athlete. The athlete challenged the CAS’ award before the Supreme Court on the grounds that the arbitrators had ignored the subsidiary argument developed in his written submission and thus had violated his right to be heard.

2. Referring to the well-established principles to be applied when examining allegations of violation of the right to be heard, the Supreme Court first reiterated that the right to be heard is a right of formal nature, the infringement of which entails the annulment of the decision irrespective of the challenging party’s chance of obtaining a different ruling.<sup>70</sup>

3. In the award, the arbitrators stated that they had taken into account all the facts, arguments and evidence submitted by the parties during the proceedings, but that only those arguments and evidence necessary to explain their reasoning would be restated. The Supreme Court found such a stereotyped formula, which it qualified as a *clause de style*, insufficient to preclude any violation of the right to be heard, when arbitrators omit to consider some of the statements, arguments, evidence and offers of evidence of the parties that are material for the decision to be issued.<sup>71</sup> However, considering that in the instant case, the defendant had established in its written submission before the Supreme Court that the argument ignored by the arbitrators was actually not material to

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<sup>70</sup> Ground 3.1, referring to Supreme Court, 4A\_360/2011, January 31, 2012.

<sup>71</sup> Ground 3.3.2.

resolve the dispute, the Supreme Court denied any breach of the right to be heard and dismissed the challenge.

5. The Supreme Court also confirmed that a party referring its case to an accelerated arbitration proceeding cannot subsequently complain, in a challenge against the final award, about the restricted opportunities to argue its case and the shorter deadlines, within the limits of the parties' right to be heard and to an equal treatment.<sup>72</sup> The Supreme Court further held that a two-stage communication of an award (dispositive part – full motivation) does not affect the unity of the final award.<sup>73</sup>

VIII  
POST-AWARD MECHANISMS  
SUPREME COURT  
December 14, 2012  
A. \_\_\_ v/ X. \_\_\_ (4A\_198/2012)

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International Arbitration. – Sport arbitration (Basketball Arbitral Tribunal, “BAT”). – Swiss law. – Waiver of reasoned award (no waiver of possibility to challenge award). – Breach of contract (no ground for challenge). – Violation of the right to be heard. – Equal treatment of the parties. – PIL Act Art. 190(2). – ECHR Art. 6(1). – PIL Act Art. 190(2)(d). – PIL Act Art. 182(3). – Art. 3.2 of the Arbitration Rules of the BAT.

*The waiver to receive a reasoned award does not entail a waiver to challenge such an award.*

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OBSERVATIONS. – 1. In the framework of a dispute between a professional basketball player and his agent, the BAT ordered the player to indemnify his agent in an award of which only the dispositive part was notified to the parties. Without requesting the BAT to provide a reasoned award, the player filed a challenge against such an award with the Supreme Court.

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<sup>72</sup> Ground 3.2.2.

<sup>73</sup> Ground 5.

2. Referring to numerous scholars, the Supreme Court held that the waiver to request a reasoned award is not to be taken as a waiver to challenge this award.<sup>74</sup> The Supreme Court further confirmed that neither a breach of contract nor a violation of the ECHR are grounds for challenging an international arbitral award, since such violations are not included in the exhaustive list of grounds provided in PIL Act Article 190(2).<sup>75</sup> Finally, the Supreme Court recalled that it is contrary to good faith to raise an alleged violation of the right to be heard or any other procedural flaw in the challenge, if such an argument could and should have been made in the arbitration proceedings.<sup>76</sup>

## SUPREME COURT

June 3, 2013

X. \_\_\_ v/ Y. \_\_\_ SNC (4A\_666/2012)

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International Arbitration. – Commercial arbitration. – Swiss law. – Revision of arbitral award. – Dies a quo of the time period to apply for revision (sufficient knowledge). – Federal Tribunal Statute art. 123(2)(a). – Federal Tribunal Statute Art. 123(1). – Federal Tribunal Statute Art. 124(1)(d). – Federal Tribunal Statute Art. 46.

*The Supreme Court rejected a request for revision against an arbitral award on the grounds that the applicant had not complied with the applicable time period. If the request for revision is based on the discovery of new pertinent facts or conclusive evidence, the dies a quo of such a time period is the day on which the applicant has sufficient knowledge of the ground for revision. If the request for revision is based on the establishment by a criminal proceeding that the award was influenced by a crime or criminal offence, the dies a quo starts to run from the knowledge of the enforceable award or of the existence of the crime and the evidence proving it.*

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<sup>74</sup> Ground 2.2.

<sup>75</sup> Ground 3.1. See also Supreme Court, 4A\_238/2011, January 4, 2012, ground 3.1.2, commented in the previous note published by Mr. Frank Spoorenberg and Ms. Isabelle Fellrath in the Journal of International Trade and Arbitration Law 2013 (Volume 2, Issue 2), pp. 211-214.

<sup>76</sup> Ground 3.2.1, referring to Supreme Court, 4A\_530/2011, October 3, 2011, ground 2.2.

OBSERVATIONS. – 1. In the context of a request for revision against an arbitral award (and its rectification) issued by an ICC arbitral tribunal, the Supreme Court reiterated that Chapter XII of the PIL Act does not contain any rule governing requests for revision against arbitral awards and that the grounds for revision contained in Federal Tribunal Statute Article 123 apply to the revision of arbitral awards.<sup>77</sup>

2. The Supreme Court further reiterated that the request for revision must be filed with the Supreme Court within ninety days from the discovery of the ground for revision, under penalty of forfeiture. In this respect, it explained that, if the ground for revision is the subsequent discovery of pertinent facts or of conclusive evidence (Federal Tribunal Statute Art. 123(2)(a)), the discovery implies that “*the applicant has sufficiently sure knowledge of the new fact to be able to invoke it, even if he is not able to provide a decisive piece of evidence; a mere assumption is not sufficient. Regarding the conclusive evidence, the applicant must have a document establishing it or sufficient knowledge to request its taking. The applicant has to establish the circumstances necessary for the verification of compliance with the aforesaid time period.*”<sup>78</sup> If the ground for revision is based on the establishment by a criminal proceeding that the arbitral award was influenced by a crime or criminal offence (Federal Tribunal Statute Art. 123(1)), the time period to request a revision starts to run from the knowledge of the enforceable award or, if this is no longer possible, from the knowledge of the existence of the crime and the evidence proving it.<sup>79</sup>

3. Based on these principles, and considering that it was not justified to postpone the *dies a quo* of the time period to file the request for revision until the date of notification of the rectified award since the grounds for revision invoked by the applicant had nothing to do with the rectification of the award, the Supreme Court rejected the request for revision.<sup>80</sup>

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<sup>77</sup> Ground 3.1.

<sup>78</sup> Ground 5.1, referring to Supreme Court, 4A\_222/2011, August 22, 2011, ground 2.2.

<sup>79</sup> *Ibid.*

<sup>80</sup> Ground 5.5.2.