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ULUSLARARASI TİCARET VE TAHKİM HUKUKU DERGİSİ
JOURNAL OF INTERNATIONAL TRADE AND ARBITRATION LAW

Yıl 2015 Cilt 4 Sayı 1
Year 2015 Volume 4 Issue 1

Bu dergi yılda iki sayı olarak yayınlanan hakemli bir dergidir.
This is a peer-reviewed bi-annual journal.
Dergiye yapılan atıflarda "UTTDER" kısaltması kullanılmalıdır.  
_for citations please use the abbreviation: "JITAL"

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Bahariye Cad. Çam Apt. No: 63 D. 6 Kadıköy – İstanbul  
Tel: (216) 449 04 85 – 449 04 86 Faks: (216) 449 04 87  
İnternet adresi: www.legal.com.tr / E-posta: legal@legal.com.tr
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ORDERING FORM FOR THE LEGAL LAW JOURNALS

SUBSCRIPTION FORM FOR THE LEGALBANK LAW DATABASE
Uluslararası Ticaret ve Tahkim Hukuku Dergisi
Journal of International Trade and Arbitration Law

"Hakemli Dergidir" / "Peer reviewed Journal"

Yıl 2015 Cilt 4 Sayı 1
Year 2015 Volume 4 Issue 1

Yayın Sahibi / Publisher: Legal Yayıncılık A.Ş. adına Sahibi ve Genel Yayın Yönetmeni/On Behalf of Legal Yayıncılık INC. Publisher and Executive Editor
Av./Atty. Lütfüürrahman BAŞÖZ

Sorumlu Yazi İşleri Müdürü / Responsible Manager: Av./Atty. Ramazan ÇAKMAKCI

Yayımının Adı / Name of Publishing Company: Legal Yayıncılık A.Ş.
(Sertifika No. / Certificate No. 27563)
Tel.: 0 216 449 04 86

Basımının Adı / Printed by: Net Kütüphane Tanıtım ve Matbaa San. Tic. Ltd. Şti (Net Copy Center)
(Sertifika No./Certificate No. 13723)
Tel. 0212 249 40 60

Başıldığı Yer / Place of Publication: İnönü Cad. Beytilmeshi Sk. No: 23/A Ginmişsuyu/Beyoğlu-Istanbul

Basım Tarihi / Publication Date: 2015

Yönetim Yeri / Place of Management: Bahariye Cad. No: 63/6 Kadıky/Istanbul
Tel.: (216) 449 04 85 – 449 04 86
Faks (Fax): (216) 449 04 87
(Sertifika No./Certificate No. 16191)

E-posta / E-mail: legal@legal.com.tr

URL: www.legal.com.tr

Yayın Türü / Type of Publication: Bu dergi yılda iki sayı olarak yayımlanan yerel, süreli hakemli bir hüuk dergisidir/ This is a national peer-reviewed law journal published bi-annually

ISSN: 2146-9717
ANNOTATIONS AND SUMMARIES OF DECISIONS OF THE SWISS FEDERAL SUPREME COURT ISSUED IN 2013 AND 2014 CONCERNING INTERNATIONAL ARBITRATION

İSVİÇRE FEDERAL MAHKEMESİ’NİN 2013-2014 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

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past twelve months\(^1\) in connection with international commercial 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 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 2014. As a result, the tendency has remained unchanged: only a few awards were annulled in the course of 2014. The Supreme Court issued 34 decisions on challenge of international awards and only five challenges were partially or fully successful.

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).\(^4\)

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\(^1\) Cases until October 2014 (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).

\(^2\) 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/en/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/jurisdiction/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.
II

THE ARBITRATION AGREEMENT

SUPREME COURT

November 19, 2013

A. ___ v/ B. ___ (4A_254/2013)


The requirements to opt-out of the PIL Act as the lex arbitri in international arbitration in favor of the relevant sections of the Swiss Code of Civil Procedure are strict. The mere reference to cantonal law in the arbitration agreement does not comply with the requirement of a clear written declaration to exclude the application of Swiss law of international arbitration, even if it could be established that the parties’ intention was to exclude the application of the latter. The arbitrators’ decision on their fees cannot be challenged (unlike their decision on the allocation of the arbitration costs among the parties).

OBSERVATIONS. – 1. The dispute arose out of a contract for the management of a law firm containing an arbitration agreement in favor of a sole arbitrator seated in Zurich. At the time of the conclusion of the agreement, one of the parties thereto was an individual having his domicile outside Switzerland. The arbitration agreement also provided that the Swiss Concordat on Arbitration would govern the arbitration proceedings. Following the parties’ failure to pay the requested (additional) advance on costs, the sole arbitrator appointed to resolve the dispute closed the proceedings, set the arbitration costs at CHF 85,000 and ordered the claimant to pay the remaining balance thereof. The claimant
challenged this decision before the Supreme Court on the grounds that the arbitration costs were excessive and that they had to be split among the parties.

2. The Supreme Court first clarified that in order to opt-out of the PIL Act within the meaning of PIL Act Article 176(2) the choice of law must (i) be explicit, (ii) provide that the cantonal provisions on arbitration (as from January 1, 2011, the Third Part of the CPC) apply exclusively and (iii) be made in writing. The Supreme Court held that it was not sufficient, as in the case at hand, to provide for the application of the Swiss Concordat on Arbitration in the arbitration agreement without any reference to the PIL Act to exclude the application of the latter. Consequently, the Supreme Court found that the parties had not validly opted-out of the PIL Act and thus that the arbitrator’s decision was an international arbitral decision to which Chapter XII of the PIL Act remained fully applicable.

3. Then, after pointing out that PIL Act Article 190(2) does not provide for a ground for challenge against excessive arbitrator’s fees, the Supreme Court confirmed its previous decision that Chapter XII of the PIL Act does not entitle arbitrators to issue binding decisions on their fees. According to the Supreme Court, such decisions are merely non-binding invoices which describe the arbitrator’s claim resulting from the contract between the arbitrator and the parties (receptum arbitrii). Since they require an assessment of the facts, disputes arising from such decisions have to be brought before a court of first instance or before another arbitral tribunal, not before the Supreme Court.

4. Finally, the Supreme Court confirmed that, unlike decisions on the arbitrator’s fees, decisions on the allocation of costs between the parties may be challenged because they relate to the relationship be-

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5 Ground 1.2.3.
6 Ground 1.2.4.
7 Ibid. The Supreme Court rejected the applicant’s reliance on CPC Article 393 lit. f on the grounds that the CPC was not applicable.
8 Ground 2.2, referring to ATF 136 III 597, ground 5.2.1.
9 Ibid.
10 Ibid.
the parties (as opposed to their relation with the arbitrator). However, since the applicant had not invoked any ground for challenge listed in PIL Act Article 190(2) in respect of the costs’ allocation, the Supreme Court did not enter into the merits of the applicant’s argument.

SUPREME COURT
April 7, 2014


The Supreme Court partially set aside an arbitral award on the grounds that the arbitral tribunal had wrongly denied jurisdiction over the non-signatory parent of a party to the arbitration agreements on which the arbitration proceeding was based. The parent was deemed a party to the arbitration agreements based on the principle of good faith.

OBSERVATIONS. – 1. The dispute arose out of three contracts for the delivery of a factory for the production of aluminum sheets entered into between X and YE (belonging to the Y Group). Each contract was governed by Swiss law and contained an arbitration clause in favor of an arbitral tribunal to be constituted pursuant to the ICC Rules in Geneva. The project was suspended and the parties entered into negotiations. During these negotiations they agreed that a specific division of YE’s parent (i.e. YG) would carry out the project instead of YE, a member within this division would be responsible for the project, and YG would provide X with an irrevocable guarantee. The division was subsequently acquired by Y, which also belonged to the Y Group. YE started arbitration proceedings against X to obtain the payment of outstanding in-

11 Ground 3.1, referring to ATF 136 III 597, ground 5.2.1.
12 Ground 3.2. The Supreme Court rejected the applicant’s reliance on CPC Article 393 lit. e on the grounds that the CPC was not applicable.
voices. X then brought counterclaims against both YE and Y. In the final award, the arbitral tribunal found that it had no jurisdiction over Y. X challenged this award before the Supreme Court.

2. First, the Supreme Court recalled that there are exceptions to the principle that only the parties to the main contract are bound by the arbitration agreement contained therein such as: the assignment of a debt, the assumption of a debt, or the transfer of a contractual relationship. An exception may also be made if a third party takes part in the performance of the contract to such an extent that one may infer from this participation the third party’s intent to be bound by the arbitration agreement. Similarly, when there is confusion between their activities, a parent and its subsidiary may exceptionally be assimilated to each other. Such may be the case if a parent creates the appearance to be bound by an arbitration agreement that results in the other party’s erroneous understanding that it entered into a contract with the parent instead of the subsidiary thereof, or with both of them.

3. The question was then whether any of these situations existed in the case that the Supreme Court had to review so that the arbitration agreements should have been extended to Y. Based on the interpretation of a letter referring to the complete transfer of responsibility for the project from YE to YG’s division (which reflected X’s express intent that YE be replaced by another company), and considering the unlikelihood of a parent being the representative of its subsidiary, the Supreme Court rejected the arbitral tribunal’s finding that YG was simply a representative of YE. Considering further the confusing organization of the Y Group, the Supreme Court also acknowledged that X should not be blamed for its failure to identify its actual contractual partner and it found no sufficient evidence that YE’s liabilities had been transferred to YG.

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13 Ground 3.2, referring to ATF 129 III 727, grounds 5.3.1 and 5.3.2.
14 Ibid.
15 Ground 3.2, referring to ATF 137 III 550, ground 2.3.2.
16 Ground 3.5.3.1.
17 Ground 3.5.3.3.
18 Grounds 3.5.4.1 to 3.5.4.4.
5. The Supreme Court then relied on the legal opinion of two experts that if the existence of a tripartite agreement between X, YE and YG or the cumulative assumption of debt by YG were denied, X’s right to act directly against YG should still be admitted based on the principle of good faith. According to the experts, X was entitled to understand in good faith that it had a contractual relation with YG based on YE’s and YG’s conduct. This understanding, according to the experts, was sufficient to extend the original relationship between X and YE to YG and thus to allow X to bring claims against YG before the arbitral tribunal.\(^\text{19}\) Without further explanation as to why the experts’ view should be followed in the case at hand, the Supreme Court concluded that the principle of good faith required YG to be deemed bound by the contracts and the arbitration agreements.\(^\text{20}\)

6. Consequently, the Supreme Court found that the arbitral tribunal had been wrong to deny jurisdiction over Y based on the finding that YG was not bound by the arbitration agreements.\(^\text{21}\) Since the arbitral tribunal had not determined whether it had jurisdiction over Y but simply stopped its reasoning upon finding that YG was not a party to the arbitration agreements, the Supreme Court remanded the case to the arbitral tribunal for a new decision on this issue.

7. This decision constitutes one of the few cases in which the Supreme Court has set aside an arbitral award, albeit partially. Although recognizing that the arbitral tribunal’s decision to deny jurisdiction over Y may turn out to be right, the Supreme Court seemed to blame the arbitral tribunal for not having completed its reasoning. The practical lesson here is that if companies of the same group are involved in the performance of a project, but the parties’ intent is that only one of these companies shall be a party to the agreements underlying the project, this intent should be expressly indicated in these agreements.

\(^{19}\) Ground 3.5.5.1.1.

\(^{20}\) Ground 3.5.5.1.2.

\(^{21}\) Ground 3.6. The applicant’s additional argument that the arbitral tribunal had violated its right to be heard was rejected by the Supreme Court (ground 4).
SUPREME COURT
February 27, 2014
X. ___ v/ A.Y. ___ AG and B.Y. ___ Inc. (4A_438/2013)


Further to the principle of autonomy of arbitration agreements, once it is established that such an agreement exists, it must be assumed that the parties intended to give the arbitral tribunal jurisdiction encompassing all the potential claims in connection with the main agreement, including those resulting from the latter’s termination. The parties’ intent to limit the temporal scope of an arbitration agreement must be admitted only if this intent clearly results from the parties’ unequivocal agreement. Therefore, parties intending to derogate from the rule that the jurisdiction of an arbitral tribunal is not affected by termination of the main agreement should expressly say so.

OBSERVATIONS. – 1. Further to the termination of a patent license agreement by the licensee, the licensor started an ICC arbitration proceeding in Zurich, seeking the payment of royalties and the prohibition of manufacturing and selling in violation of the patent. The licensee objected to the arbitral tribunal’s jurisdiction, arguing that the dispute did not fall under the scope of the arbitration clause. In the licensee’s contention, the arbitration clause could not extend to disputes arising after the termination of the license agreement. The objection was overruled in a preliminary award that the licensee challenged before the Supreme Court, seeking that this award be annulled and the arbitral tribunal’s jurisdiction to decide the dispute be denied.

2. As a rule, if successful, a challenge of an award results in the Supreme Court’s setting aside this award (“cassatory” nature of the challenge). However, when the challenge pertains to the jurisdiction or the constitution of the arbitral tribunal, the Supreme Court may decide
itself by way of an exception to the "cassatory" nature of the challenge proceedings.\textsuperscript{22}

3. The Supreme Court also confirmed its well-established practice that arbitration agreements must be construed in accordance with the general principles of contract interpretation.\textsuperscript{23} When interpreting an arbitration agreement, it must not be admitted lightly that the parties waived their right to seize state courts in favor of arbitration, but once the existence of an arbitration agreement has been established there is no reason to interpret it restrictively. Rather, it must be assumed that the parties intended to provide the arbitral tribunal with broad jurisdiction.\textsuperscript{24}

4. Based on these principles, and referring to the broad wording of the arbitration clause in the case at hand, the Supreme Court held that in accordance with the principle of trust, the parties' hypothetical intent must have been to submit to the exclusive jurisdiction of the arbitral tribunal all the claims resulting from the license agreement. More precisely, relying on the principle of autonomy of arbitration agreements, the Supreme Court made it clear that arbitration clauses worded comprehensively, as in the case at hand, must include claims resulting from both the conclusion and validity of the main agreement and the termination thereof.\textsuperscript{25} Consequently, the Supreme Court held that the licensor's claims were within the scope of the arbitration clause.

5. The Supreme Court also had to deal with the licensee's argument that the arbitral tribunal had ceased to have jurisdiction further to the termination of the license agreement on the basis of two specific provisions contained therein. Considering the broad arbitration clause and the absence of any temporal restrictions in these provisions, the Supreme Court held that the parties' intent to limit the temporal scope of the arbitration clause to disputes arising before the termination of the

\textsuperscript{22} Ground 2.3, referring to ATF 136 III 605, ground 3.3.4. For further details please see F. Spoorenberg, D. Franchini, "Violation of right to be heard and partial annulment", ILO Newsletter, May 22, 2014.

\textsuperscript{23} Ground 3.2.

\textsuperscript{24} Ground 3.2, referring to ATF 138 III 29, grounds 2.3.1 and 4.4 and to ATF 116 Ia 56, ground 3b.

\textsuperscript{25} Ground 3.3.2, referring to Supreme Court, 4A_452/2007, February 29, 2008, ground 2.5.1.
license agreement was not established. Therefore, the Supreme Court found that the arbitral tribunal had rightly admitted its jurisdiction and thus dismissed the challenge.

III

THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

SUPREME COURT
November 13, 2013

Club X. ___ SA v/ Z. ___ (ATF 139 III 511; 4A_282/2013)


The ground for challenge based on PIL Act Article 190(2)(a) is not limited to the grievance of the arbitrators’ lack of independence and impartiality, but includes the possibility to invoke a breach of the parties’ agreement on the tribunal’s constitution. Such a challenge must be brought immediately.

OBSERVATIONS. – 1. The dispute arose out of a consultancy agreement between a Spanish company and a football club, whereby the former agreed to provide services to the latter in view of securing the renewal of a player’s contract with the club. The consultancy agreement contained an arbitration clause providing for a three-member panel of the Court of Arbitration for Sport (“CAS”). Further to the filing of a request for arbitration by the Spanish company, and to the club’s refusal of the company’s suggestion to appoint a sole arbitrator, the president of the Ordinary Arbitration Division within the CAS (“OAD”) appointed a sole arbitrator to resolve the dispute. The sole arbitrator awarded the

26 Grounds 3.3.3 to 3.3.5.
company’s claim. The club challenged the award on the ground that the arbitral tribunal was not properly constituted.

2. The club asserted a breach of PIL Act Article 190(2)(a) because the award had been issued by a sole arbitrator instead of the three-member panel which the arbitration agreement required. The Supreme Court recalled that, according to the majority of scholars, the ground for challenge relating to the arbitral tribunal’s improper constitution is not limited to the lack of independency or impartiality of arbitrators, but extends to the breach of the parties’ agreement on the tribunal’s constitution.\(^\text{27}\) In line with two previous decisions,\(^\text{28}\) the Supreme Court held that this majority view should prevail because “those who waive in advance, by entering into an arbitration agreement, the right of constitutional [...] and conventional nature [...] that their case be heard by a tribunal established by law [...] may reasonably expect that the members of the arbitral tribunal or the sole arbitrator, not only offer sufficient guarantees of independence and impartiality, but also meet the requirements that the parties have determined by mutual agreement (number, qualifications, method of appointment) or that result from arbitration rules adopted by them, or even from legal provisions that apply subsidiarily.”\(^\text{29}\)

3. Moreover, the Supreme Court considered that this view has the advantage of being consistent with New York Convention Article V(1)(d), according to which recognition and enforcement of an arbitral award may be refused if the composition of the arbitral tribunal was not in accordance with the parties’ agreement.\(^\text{30}\) Thus, the Supreme Court


\(^{29}\) Ground 4.

\(^{30}\) Ibid.
accepted to assess whether the arbitration agreement in the case at hand required that the arbitral tribunal be composed of three members. Referring to Article R40.1 of the Sport Arbitration Code, which provides that the OAD’s president shall determine the number of arbitrators if the arbitration agreement contains no rule in this respect, and considering that in the present case the arbitration agreement contained such a rule, the Supreme Court found that the OAD’s president had breached the arbitration agreement. The Supreme Court further found that this breach constituted a ground for challenge under PIL Act Article 190(2)(a).  

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

5. The settlement of the discussion about the scope of PIL Act Article 190(2)(a) is of practical importance. It is now well settled that a breach of the parties’ agreement about the constitution of the arbitral tribunal is within the scope of this provision. Consequently, it is now

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31 Ground 5.2.
32 Grounds 5.3 and 5.4.
33 Ground 5.3.2. More precisely, the Supreme Court referred to a decision in which it had held that decisions on arbitrators’ challenge issued by a private institution (gremium) (as opposed to an arbitral tribunal) such as the International Council of Arbitration for Sport may not be challenged directly (Supreme Court, 4A_644/2009, April 13, 2010, ground 1).
also settled that a challenge based on such a breach must be brought immediately. As to the decision against which this immediate challenge must be brought, the Supreme Court has consistently held that it is the first decision by which the arbitral tribunal confirms, even implicitly, its constitution. 34

6. However, in this decision, the Supreme Court seemed to move towards blaming the applicant for not having acted even before the arbitral tribunal was in place, and more particularly for failing to challenge the president’s decision setting the number of arbitrators. 35 This apparent blame should not be overestimated. First, the Supreme Court itself acknowledged that providing for such an obligation would go against its previous decisions. 36 Second, this apparent blame was made in the context of sports arbitration and in relation to the CAS’s specific rules. Its scope would thus be limited. Indeed, the Supreme Court generally held that decisions of arbitral institutions cannot be directly challenged; they can be reviewed only in the context of a setting aside proceeding to be lodged against the award itself. 37 Consequently, the Supreme Court has consistently refused to consider direct challenges of the decisions pertaining to arbitrators’ appointment or challenge issued by the ICC Court. 38

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34 AT130 III 76, ground 3.2.1; Supreme Court, 4P.168/1999, February 17, 2000, ground 1b.
35 Ground 5.3.2.
36 Ibid.

The Supreme Court annulled an arbitral award on the ground that the sole arbitrator had exceeded its jurisdiction ratione temporis by issuing the final award after the date set by the parties and the arbitrator.

OBSERVATIONS. – 1. The dispute arose out of two contracts for the lease of an aircraft containing an arbitration agreement providing for ad hoc arbitration, a sole arbitrator and Geneva as the place of arbitration. The contracts were governed by Swiss law. The lessor started arbitration and a sole arbitrator was appointed by the Geneva courts (the Tribunal of First Instance). After an undisputed long delay in the issuance of the final award, the parties and the sole arbitrator agreed on a final deadline, beyond which the arbitrator would resign. This deadline was September 2, 2013. The final award was notified to the respondent on September 3 and to the claimant on September 4 (after an unsuccessful attempt of notification on September 3). The claimant challenged this award before the Supreme Court on the ground that “no award was validly rendered by the arbitral tribunal during its existence, it being specified that [the] tribunal has ceased to exist on September 2, 2013 at 5:00 pm.”

2. The Supreme Court first examined whether the final award was issued after the termination of the sole arbitrator’s assignment. It found in the affirmative because the parties’ agreement that the arbitration contract would terminate ipso facto on September 2, 2013 at 5:00 pm if any of them had not received the final award by this time was estab-
lished and the arbitrator could not, in good faith, understand this agreement differently.\textsuperscript{39}

3. Then, the Supreme Court dealt with the consequences of this procedural defect and, in accordance with the majority of the Swiss scholars, it found that it was an issue of jurisdiction \textit{ratione temporis} falling under PIL Act Article 190(2)(b).\textsuperscript{40}

3. Finally, the Supreme Court rejected the defendant's objection that the applicant had abused its rights by disputing the validity of the final award with the sole purpose of obtaining the annulment of an award with which it was dissatisfied.\textsuperscript{41}

4. The Supreme Court thus annulled the final award. However, instead of returning the case to the Geneva Tribunal of First Instance for the constitution of a new arbitral tribunal, the Supreme Court invited the parties to make the necessary steps required by the annulment of the final award.\textsuperscript{42}

\textbf{SUPREME COURT}

\textbf{July 7, 2014}

A. ____ SA v/ B. ____ SA (4A_124/2014)


\textsuperscript{39} Ground 3.2.2.

\textsuperscript{40} Ground 4.1, referring among others to Berger/Kellerhals, \textit{op. cit.}, N. 917; Rüede/Hladenfeldt, \textit{Schweizerisches Schiedsgerichtsrecht}, 2\textsuperscript{nd} ed., 1993, p. 371. The Supreme Court also referred to its decision of November 13, 2013, 4A_282/2013, ground 4, in which it had found that proper constitution of an arbitral tribunal or proper appointment of a sole arbitrator within the meaning of PIL Act Article 190(2)(a) must be understood as the manner in which the arbitrators have been appointed or replaced and the issues concerning their independence (also commented herein, pp. 10 et seq.).

\textsuperscript{41} Ground 4.2.

\textsuperscript{42} Ground 4.3.
The pre-arbitration procedure before the dispute adjudication board ("DAB"), as per Article 20 of the General Conditions of the International Federation of Consulting Engineers (FIDIC) 1999, qualifies as a mandatory pre-arbitration step. However, such a mandatory step cannot be relied on in case of an excessive delay in the constitution of the DAB and if insisting on this duty would violate the principle of good faith.

Observations. – 1. The dispute arose out of two contracts for work entered into between a construction company and a state company for the restoration of a national road. The contracts incorporated the FIDIC General Conditions, Article 20 of which reads, in its relevant parts, as follows:

20.2 – Appointment of the Dispute Adjudication Board
(1) Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4. [...] 
20.6 – Arbitration
(1) Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration [...] 
20.8 – Expiry of Dispute Adjudication Board’s Appointment
If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB’s appointment or otherwise [...] 

b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

The Supreme Court's summary does not indicate the law governing the contracts. Five years after conclusion of the contracts, the construction company communicated to the state company its intention to refer a claim to a DAB in accordance with the FIDIC General Conditions. Sixteen months after this communication, the DAB still was not operative. The construction company then filed a request for arbitration with the ICC and a three-member arbitral tribunal was appointed, with its seat in Geneva. The state company objected to the arbitral tribunal’s jurisdiction on the grounds that the construction company had not complied with the pre-arbitration step provided by the FIDIC General Con-
ditions. In a partial award issued by majority, the arbitral tribunal found that it had jurisdiction to decide the construction company’s claim, declared this claim admissible and rejected the state company’s objection to jurisdiction. The state company challenged this decision before the Supreme Court on the grounds that the arbitral tribunal had no jurisdiction.

2. The Supreme Court first confirmed that in the absence of any other ground for challenge that could encompass the violation of a pre-arbitration step, such a violation must be assessed in light of PIL Act Article 190(2)(b) (i.e. lack of jurisdiction). However, in doing so, the Supreme Court did not intend to give any indication as to the nature of the sanction that the violation of a mandatory pre-arbitration step should trigger.43

3. According to the Supreme Court, PIL Act Article 178(2)44 also applies to pre-arbitration dispute resolution mechanisms.45 The Supreme Court considered that it would be inappropriate and would unnecessarily complicate the resolution of the parties’ dispute to submit the agreement on the pre-arbitration phase and that on the subsequent arbitration to different laws.46

4. The Supreme Court then turned to the question of whether the DAB procedure was a mandatory pre-arbitration step. This question must be solved by applying the principles governing contract interpretation mutatis mutandis.47 Relying on the meaning of the term ‘shall’ in Article 20.2(1) of the FIDIC General Conditions and on the conclusion that it should not suffice that a DAB is not operative to bypass the pre-arbitration step, the Supreme Court found that the DAB procedure is indeed a mandatory pre-arbitration step.48 The Supreme Court further

43 Ground 3.2. See also Supreme Court, 4A_46/2011, May 16, 2011 and 4A_18/2007, June 6, 2007. For further details please see F. Spoorenberg, I. Fellrath, “Supreme Court confirms benchmarks on pre-arbitration conciliation duties”, ILO Newsletter, August 18, 2011.
44 This provision governs the validity of arbitration agreements by reference to the law chosen by the parties, to the law governing the subject matter of the dispute or to Swiss law.
45 Ground 3.3.
46 Ibid.
47 Ground 3.4.1.
48 Grounds 3.4.3.1, 3.4.3.2 and 3.4.3.3.
found that it must not be inferred from the absence of any specific deadline for the referral to the DAB in the FIDIC General Conditions that the pre-arbitration procedure before this board is only an option at the parties’ discretion.49

5. However, the Supreme Court found that the arbitral tribunal’s decision to deny jurisdiction was right, based on the principle of good faith. According to the Supreme Court, the DAB system was conceived mainly for the constitution of a permanent DAB to resolve disputes in the course of a specific project. Therefore, the applicant’s insistence in obtaining a decision from an ad hoc DAB, which would have been operative after the end of the works, was questionable.50 Further, based on the principle of good faith and considering the delay in the DAB’s constitution, the Supreme Court found that the defendant could not be blamed for having initiated arbitration proceedings, notwithstanding the mandatory DAB procedure.51

6. This decision provides guidance to parties bound by the FIDIC General Conditions in respect of the DAB pre-arbitration step. It also provides guidance to arbitrators required to interpret Article 20 of the FIDIC General Conditions. However, as in its previous decisions on pre-arbitration conciliation steps,52 the Supreme Court did not resolve the question of whether non-compliance with a pre-arbitration step is an issue of jurisdiction or admissibility. More particularly, it did not specify whether an arbitral tribunal having sustained an objection based on a mandatory pre-arbitration step should stay the arbitration until the parties comply with this step, deny jurisdiction or consider a liability claim for violation of the mandatory pre-arbitration step.

49 Ground 3.4.3.4. In this respect, the Supreme Court referred to a previous decision in which it had found that the absence of any time limit for conciliation was an indication of its optional nature (Supreme Court, 4A_18/2007, June 6, 2007). The Supreme Court made clear that this finding was made in the context of a much less restrictive pre-arbitration conciliation obligation and that it must be relativized in the context of the sophisticated DAB procedure.

50 Ground 3.5.

51 Ibid.

SUPREME COURT
August 28, 2014
A. ___ v/ Club B. ___ (4A_6/2014)

International arbitration. – Sport arbitration (CAS). – Swiss law. –
Definition of challengeable awards. – Preliminary awards. – Limited
grounds for challenge. – Jurisdiction of the CAS. – Joinder of parties. –
Res judicata effect to be examined separately for each joined party. –
Arbitral award partially annulled. – PIL Act Art. 190(3). – PIL Act Art.
190(2)(a). – PIL Act Art. 190(2)(b). – Art. R47(1) of the Sport Arbitra-
tion Code. – Art. 24 of the Regulations on the Status and Transfer of
Players.

The Supreme Court partially annulled an arbitral award on the
ground that the CAS lacked jurisdiction. In addition to the grounds listed
in PIL Act Article 190(2)(a) and (b), preliminary awards may be chal-
lenged on the grounds listed in PIL Act Article 190(2)(c) to (e), but only
to the extent that these grounds are strictly limited to issues concerning
the constitution or the jurisdiction of the arbitral tribunal.

OBSERVATIONS. – 1. This decision provides a detailed definition
of the types of arbitral awards against which a challenge may be brought.
However, the Supreme Court made it clear that this definition was pro-
vided with respect to international commercial disputes and thus that it is
not sufficiently adapted to awards rendered by the CAS.53 The Supreme
Court held that while the CAS as an appellate body may render a final
award putting an end to the arbitration, this award will not necessarily
end the proceedings on the merits between the parties, for example if the
CAS annuls the disputed decision and remands the case to the lower
instance for a new decision. In this case, the CAS’s award does not
qualify as a final award, but as a preliminary award.54

2. Based on this reasoning, the Supreme Court held in casu that the
award by which the CAS had remanded the case to the Dispute Resolu-
tion Chamber of the FIFA (“DRC”) was a preliminary award on a pro-

53 Ground 2.2.1.
54 Ibid.
cedural issue (i.e. the defendant’s right to be heard).\textsuperscript{55} Pursuant to PIL Act Article 190(3), such an award may only be challenged for irregular constitution of the arbitral tribunal (PIL Act Art. 190(2)(a)) or for incorrect decision on jurisdiction (PIL Act Art. 190(2)(b)). A challenge of a preliminary award based on the other grounds listed in PIL Act Article 190(2)\textsuperscript{56} is available only if and to the extent that such grounds are strictly limited to issues directly related to the constitution or the jurisdiction of the arbitral tribunal.\textsuperscript{57} In the case at hand, the applicant had raised the pleas of ultrapetita and public policy with no connection whatsoever to the plea of lack of jurisdiction. Therefore, the Supreme Court dismissed the ultrapetita and public policy pleas.

3. Regarding the merits of the jurisdictional plea, the Supreme Court was bound to analyze the effects of the withdrawal of one of the two appeals that had been lodged with the CAS on the remaining appeal proceedings. The Supreme Court held that the two appealing parties formed an actual simple and passive joinder (consorité matérielle simple passive) and thus remained independent from each other, so that the conduct of one of them did not affect the legal situation of the other.\textsuperscript{58} Therefore, the Supreme Court found that the withdrawal of its appeal by one of the joined parties (one of the consorts) had no impact on the appeal proceedings between the other consort (which had continued its appeal) and the applicant, notwithstanding the risk that the appeal authority, i.e. CAS, issue a decision conflicting with the DRC’s decision that had res judicata effect between the consort that had withdrawn its appeal and the applicant.\textsuperscript{59} As a consequence of this res judicata effect, the CAS could not annul the operative part of the DRC’s decision that pertained exclusively to the dispute between the applicant and the consort that had withdrawn its appeal. Therefore, the Supreme Court found

\textsuperscript{55} Ibid.

\textsuperscript{56} These grounds are decision beyond claims or failure to answer claims (i.e. infra petita or ultrapetita), violation of equal treatment or the right to be heard and incompatibility with public policy.

\textsuperscript{57} Ground 2.2.3, referring to Supreme Court, 4A_74/2014, August 28, 2014, ground 3.1. This decision was rendered on the same day as the decision at hand.

\textsuperscript{58} Ground 3.2.2.

\textsuperscript{59} Ibid.
that the CAS had exceeded its jurisdiction to this extent and thus partially annulled the award.

V

THE PARTIES’ RIGHT TO BE HEARD AND PUBLIC POLICY

SUPREME COURT

March 3, 2014

A. __ v/ Z. __, Fédération Internationale de Football Association (FIFA) and X. __ (4A_304/2013)


The removal of a football player from the list of authorized foreign players by its (former) club does not constitute a violation of the player’s personality rights and personal freedom in the circumstances where such a removal lasted for five games and the player continued to train and to receive his salary.

OBSERVATIONS. – 1. This decision is of interest because it provides a summary of the Supreme Court’s well-established practice in respect of material and procedural public policy. The Supreme Court made it clear that the circumstances referred to in its previous decisions in order to define material public policy within the meaning of PIL Act Article 190(2)(e) are not exhaustive.60 It also confirmed that the burden of proof is not an issue falling under such a definition.61

2. This decision also provides guidance to football clubs in respect of the question as to the circumstances under which deregistration of a football player is likely to be considered as a breach of the contract be-

60 Ground 5.1.1, referring to ATF 132 III 389, ground 2.2.1.
61 Ground 5.2.3.
tween this player and the club. The Supreme Court seemed to suggest that this question will depend on the specific circumstances of the case and arbitrators must assess whether deregistration would reduce the player’s value and endanger his career.\footnote{62} Since the Supreme Court confirmed that the violation of a player’s personality rights and personal freedom might be contrary to material public policy,\footnote{63} arbitrators must be careful in carrying out this assessment.

**SUPREME COURT**

May 27, 2014

A. ___ v/ B. ___ (4A_508/2013)


This decision provides detailed guidance on the principle of res judicata and does not close the door to an assessment of the party-identity requirement that is not strictly formalistic. The Supreme Court confirmed an arbitral award which had denied the res judicata effect of a foreign court decision on the ground that the foreign court had not analyzed (and could not analyze) the question submitted to the arbitrators.

**OBSERVATIONS.** – 1. The dispute arose out of a contract for work entered into between a state company for railway transport and a construction company for the construction of a bridge located in V. The contract contained an arbitration clause. Subsequently, the parties entered into Amendment 1 with the intention of increasing the contract price. In the context of court proceedings started by the state prosecutor for transport (acting on behalf of V), for the purpose of invalidating

\footnote{62} Ground 5.2.2.

\footnote{63} Ground 5.2.2, referring to ATF 138 III 322, grounds 4.3.1 and 4.3.2, commented in the previous note published by F. Spooarenberg and I. Fellrath in the Journal of International Trade and Arbitration Law 2013 (Volume 2, Issue 2), pp. 208-211.
Amendment 1 on the ground that the person representing the state company had no powers to bind the company, the High Commercial Court of V declared that Amendment 1 was void. In parallel to these court proceedings, the construction company had started arbitration proceedings against the state company in order to obtain, among other things, a declaration that Amendment 1 was valid and binding. In its final award the arbitral tribunal declared that Amendment 1 was valid and binding on the parties. The state company challenged this decision before the Supreme Court on the ground that the arbitral award violated procedural public policy because it ignored the res judicata effect of the decision of the High Commercial Court of V.

2. The Supreme Court first stated that if an arbitral tribunal seated in Switzerland is seized of a claim which is identical to a claim between the same parties that has been finally resolved by a foreign court decision, the tribunal must declare this claim inadmissible to the extent that the foreign decision may be recognized in Switzerland. Failure to do so would constitute a violation of public policy. The Supreme Court then stated that a foreign decision is recognized in Switzerland if it complies with PIL Act Article 25 which includes, among other things, the requirement that the foreign authority or court had jurisdiction. Referring to a previous decision, the Supreme Court held that this requirement is not met if the foreign court issues a decision notwithstanding an arbitration objection duly raised by the respondent. In that case, the Supreme Court had held that the assessment of the foreign court’s indirect jurisdiction must be made by reference to New York Convention Article II(3). This finding was criticized by Swiss scholars, who held that this question should be resolved by reference to Swiss law, namely Article 7 and Chapter XII of the PIL Act. However, the Supreme Court did not have to examine these criticisms in detail, since it rejected the res judicata objection for reasons other than the lack of indirect jurisdiction.

3. The requirement that the claims be identical must be applied in accordance with the lex fori, thus in Switzerland with the principles de-
veloped by the Supreme Court. According to the Supreme Court, the scope of the res judicata effect (subjective, objective and temporal) varies from one legal system to another. However, on the one hand, a foreign decision must not have broader effects in Switzerland than it would have if it had been issued by a Swiss court. Consequently, if the res judicata effect extends to the reasoning of the judgment according to the law of the state where the judgment was issued, in Switzerland such a res judicata effect shall be limited to the sole dispositive part. On the other hand, a foreign decision has no broader effect in Switzerland than it has under the legal system from which it originates.

4. As to the objective scope of the res judicata effect, the Supreme Court reiterated that this effect applies to a claim that is identical to one brought in earlier proceedings terminated by an enforceable decision. When ascertaining the objective identity, Swiss courts must not be formalistic. Both the prayer for relief and the factual background must be contemplated. For instance, there would be res judicata effect if a claim were contrary to a claim decided in a previous proceeding or if a claim were to qualify as a preliminary question in a proceeding but had been decided as the principal claim in a previous proceeding. The res judicata effect extends to all facts that existed at the time of the first judgment (whether known or unknown by the parties), to the exclusion of facts that occurred after the last date on which, in the previous proceeding, the parties were authorized to make allegations.

5. As to the subjective scope of the res judicata effect, the Supreme Court reiterated that this effect applies only if the parties are the same as those in earlier proceedings, irrespective of their role in the two proceedings or of the presence of additional parties in the earlier proceedings (provided that the parties to the second proceeding participated in the earlier proceedings).

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69 Ground 3.2.
70 Ibid.
71 Ground 3.3.
72 Ibid.
73 Ground 3.4.2. In this respect, the Supreme Court also held that the parties to two proceedings are not different just because they did not benefit from the same procedural guarantees in both the proceedings, or because a third party involved in the
6. Based on these principles, the Supreme Court found that, from a formalistic viewpoint, it was difficult to deny the identity of the parties to the state proceedings and the parties to the arbitration proceedings, as the arbitrators had done. However, the Supreme Court considered whether in such specific circumstances a less formalistic approach, based on a thorough analysis of the situation and the parties' role in the previous proceedings would have been advisable.\textsuperscript{74} Such an analysis may be warranted in specific circumstances where a mere formalistic approach would allow maneuvers intending to torpedo the second proceeding. In this case the parties to the arbitration proceedings were different from the parties to the previous court proceedings because the state prosecutor was a party in the latter but not in the former.\textsuperscript{75}

7. The Supreme Court did not have to draw a conclusion from the absence of the state prosecutor in the arbitration proceedings. It rejected the challenge on the ground that the authority of the High Commercial Court of V was limited to the question of whether the person representing the state company had the powers to enter into Amendment 1. More precisely, the court had not considered whether the state company's behavior following the conclusion of Amendment 1 could be construed as a ratification of this amendment, as the arbitral tribunal found. Therefore, according to the Supreme Court, there was no identity between the claims submitted in the state proceedings and those submitted in the arbitration proceedings.\textsuperscript{76}

\textsuperscript{74} Ground 4.2.1.
\textsuperscript{75} \textit{Ibid}.
\textsuperscript{76} Grounds 4.2.2.1 and 4.3.
POST-AWARD MECHANISMS

SUPREME COURT

January 21, 2014

X. ___ Ltd v/ Société Z. ___ (4A_250/2013)

International arbitration. — Commercial arbitration. — Enforcement of foreign arbitral award in Switzerland. — Defenses based on New York Convention and/or Swiss law. — No review of the merits. — Art. 5(4), 29(2) and 184(3) of the Swiss Federal Constitution. — Art. 30a and 81(1) of the Swiss Debt Enforcement and Bankruptcy Law. — CPC Art. 320(a).

— New York Convention Art. V.

The Supreme Court confirmed the enforcement of a foreign arbitral award on the ground that the asserted violations of the international sanctions against Iran were not sufficiently substantiated to establish a violation of Swiss public policy.

OBSERVATIONS. — 1. This decision upheld a decision to enforce in Switzerland a foreign arbitral award rendered in a case involving Iranian and Israeli companies.

2. The applicant unsuccessfully argued that the enforcement would violate Swiss public policy. In this respect, the Supreme Court reiterated its well-established principle that courts enforcing arbitral awards in Switzerland may only address the limited defenses based on the New York Convention and/or on Swiss law, whereas there can be no review of the merits of the case at the enforcement stage.