

# CASE LAW

## A Introduction to the Case Law Section 1/2017

1. In 2015, the Australian Football League Anti-Doping Tribunal acquitted 34 Australian Rules football players of doping accusations. The World Anti-Doping Agency, WADA, appealed to the CAS. The CAS Tribunal examined the case *de novo*<sup>1</sup> found that the players had violated doping rules, and banned them for two years. The players challenged the award before the Swiss Federal Supreme Court claiming that the **CAS Tribunal exceeded its jurisdiction by conducting a *de novo* review**. The players argued that the applicable rules for the scope of review were those of the Australian anti-doping authority, edition 2010, which did not provide for full review. The 2015 edition did, but was not applicable according to the transitory rules. The Court found that the **challenge was inadmissible. The players, represented by counsel, had signed a procedural order explicitly and unreservedly accepting CAS jurisdiction** including article R57 of the CAS Code (2013 edition) which gave full review powers to the CAS Tribunal (“The Panel has full power to review the facts and the law”). In the Swiss Federal Supreme Court proceedings, the players argued that they had been coerced to sign the rules. Coercion and duress was a new argument and could not be raised in the Supreme Court proceedings. The Court added that even if the players had not been estopped from raising late jurisdictional objections, the challenge would have been rejected as meritless. In essence the dispute was about the **scope of an arbitration agreement**. The players’ argument was that, by operation of the transitory rules of the Australian Anti-doping rules, the CAS was not entitled to fully review the first arbitral award. The mandatory rule of the CAS Code provided for such power. The Supreme Court considered that the scope of any arbitration agreement had to be assessed in light of article 178 of the Swiss PIL Act. **If there really were a conflict between a mandatory provision in the competent arbitral institution’s rules (CAS) and a provision in the Australian anti-doping rules**, this could lead to a **partial impossibility of the arbitration agreement**. This does not necessarily result in the arbitration agreement becoming void or inoperable. The players had not argued that the scope of review of the CAS Tribunal was of such fundamental importance that they would not have entered into the arbitration agreement at all had they known that the CAS had power to review awards *de novo*.<sup>2</sup>

---

<sup>1</sup> On appeal arbitral tribunals see also the article by Tarkan GÖKSU, *Schiedsgerichtlicher Instanzenzug – Welches Verfahren bei Rechtsmitteln an ein Oberschiedsgericht?*, ASA Bull. 3/2016, p. 606.

<sup>2</sup> Swiss Federal Supreme Court, Decision 4A\_102/2016 of 27 September 2016, ASA Bull. 1/2017, p. 115 (excerpts). An English translation may be published in Swiss Int’l Arb. L. Rep.

2. 4A\_136/2016<sup>3</sup> is an interesting case as it relates to a recurring type of dispute: principal vs consultant under agency or **consultancy agreements**. In an ICC arbitration in Geneva, a consultant sought payment of its fees under three consultancy agreements governed by Swiss law. The fees were remuneration for assistance in putting together a tender for the procurement of construction works. The principal was awarded the construction contract and paid a large part of the fees owed to the consultant under the first two contracts. In 2008, the principal suspended payment stating that corruption investigations were under way against the principal's organisation by the **US DOJ and the UK Serious Fraud Office**. Moreover, the principal argued that the consultant had violated rules of conduct for external consultants (ethical and compliance rules) which were incorporated into the consultancy agreement. Finally, the principal argued that the **consultant had not provided proof of the services it had rendered**, a prerequisite for payment of the fees under the agreements. The arbitral tribunal found that the principal had not discharged its burden of proof for establishing **corrupt practices** by the consultant. As to proof of the services rendered, the arbitrators found that this requirement had been relaxed by the parties, as was demonstrated by the fact that the principal had paid the consultant under two of the three agreements without requesting any proof of actual services. They determined that the parties had modified their contract on this point, and ordered the principal to pay the remaining fees of the consultants under those two agreements. Under the third contract, however, no fees had been paid and the proof of services provisions were much more detailed. The arbitral tribunal rejected the consultant's claim for fees under this contract.

The principal sought to set aside the arbitral award before the Swiss Federal Supreme Court on the ground of public policy violation (art. 190(1)(e) PIL Act). According to the principal, payments ordered by the arbitral tribunal were incompatible with the principal's compliance rules. The Supreme Court rejected the argument, holding that **compliance rules established by private entities were not tantamount to public policy**.

As a second ground for annulment, the principal asserted a violation of its right to be heard (Article 190(2)(d) PIL Act). The principal complained that it had been **taken by surprise** by the arbitral tribunal's decision that in light of the parties' conduct the consultant did not have to prove services actually rendered. The arbitrators' deviation from the contractual requirement to provide proof of services was all the less foreseeable since the parties were not assisted by Swiss counsel in the arbitration, and since the arbitrators had

---

<sup>3</sup> Swiss Federal Supreme Court, Decision 4A\_136/2016 of 3 November 2016, ASA Bull. 1/2017, p. 129. An English translation may be published in Swiss Int'l Arb. L. Rep.

invited the parties to plead two specific questions of Swiss law that were entirely unrelated to the proof of services provision. The Supreme Court paid short shrift to this argument. Under Swiss law, arbitral tribunals can apply the law on their own motion (*jura novit curia*). They need to draw the parties' attention to legal issues only if they intend to rely on a legal provision or concept which would be totally unforeseeable for both parties. It is a mainstay of Swiss contract law that the **conduct of the parties can be relevant for the interpretation of a contract**. It was not sustainable to argue that the parties could not have foreseen that the arbitral tribunal would consider the fact that the principal had actually paid the consultant without asking for proof of services as being a relevant circumstance for the interpretation of the proof of services clause. **The (alleged) absence of Swiss counsel was not considered to be a valid excuse for (allegedly) not having been able to anticipate how Swiss law operated.**

3. A CAS Tribunal had ordered a football club (Club A) to pay various instalments to another club (Club B) for the transfer of a player. The payments ordered included a 10% contractual penalty, late payment interest on the penalty (5%), and 12% interest for late payment of instalments. The club sought to annul the awards taking the view that the combination of the penalty and two types of interest amounted to **punitive damages**, and a violation of public policy.<sup>4</sup> The Supreme Court rejected the request. It found that there had been previous awards ordering the payment of instalments to which the Club had not objected. In any event, penalties are admissible. Excessive penalties violate public policy and they can be reduced. However, 10% penalties are not excessive. As to interest, 5% is the default rate set by the law. Higher interest can be claimed if the debtor demonstrates that its damages are higher than 5% or that the parties agreed, which was the case. The Court distinguished punitive damages, which are imposed on a party, from penalties which were accepted by the parties when entering into a contract. The Court **left open the question whether punitive damages were incompatible with public policy *per se***, noting that this was not the view of the majority of legal writers.

4. The arbitration underlying decision 4A\_310/2016<sup>5</sup> involved a host of agreements and parties including a shareholders' agreement regarding the

---

<sup>4</sup> Swiss Federal Supreme Court, Decisions 4A\_536/2016 and 4A\_540/2016 of 26 October 2016, ASA Bull. 1/2017, p. 138 (the plaintiff had filed two separate requests to set aside two distinct arbitral awards. The Supreme Court joined the two annulment proceedings given that the two arbitration proceedings were closely related. It is unclear whether the awards had been rendered by the same CAS Tribunal).

An English translation may be published in Swiss Int'l Arb. L. Rep.

<sup>5</sup> Swiss Federal Supreme Court, Decision 4A\_310/2016 of 6 October 2016, ASA Bull. 1/2017, p. 145. An English translation may be published in Swiss Int'l Arb. L. Rep.

shares of an Iraqi company. In the arbitration, it was controversial whether a shareholder had signed the agreement in his personal capacity or also for the Iraqi company. **The arbitral tribunal found that it lacked jurisdiction as to the personal scope of the arbitration agreement.** It was not established that the parties meant to bind the Iraqi company. Hence it denied that it had jurisdiction over the company. The Supreme Court found that the arbitral tribunal had construed the arbitration agreement and the parties' intentions in accordance with the applicable Swiss law. The arbitration agreement could only be extended to non-signatories in specific circumstances, such as piercing of the corporate veil or involvement in the performance of the contract, but none of these had been demonstrated. Allegations that were raised in the Supreme Court proceedings about false testimony were late. They had been introduced as alleged grounds for review (revision) of the award (rather than for annulment).

5. Two Geneva lawyers brought a dispute over their partnership agreement before the *bâtonnier*, the head of the bar association, who did not preside over the matter diligently. After three years, the *bâtonnier* had issued an order rejecting both an invitation to resign and a request to suspend the arbitration to allow the parties to conduct **contractually foreseen mediation proceedings**. One of the lawyers (lawyer A) seized the Geneva court challenging the arbitrator. The court replaced the *bâtonnier* with another arbitrator and ordered that it was for the new arbitrator to decide whether any steps in the preceding proceedings had to be repeated. Lawyer A wrote to the new arbitrator, relying on a new Supreme court decision **ATF 142 III 296**<sup>6</sup> in which the **Court had enforced a pre-arbitral mediation agreement**. He requested that the new arbitrator declare the arbitration to be inadmissible ("irrecevable"). The new arbitrator responded in a letter that, according to the said decision, the sanction of a violation of the pre-arbitral mediation requirement is merely a suspension of the arbitration. If the parties wished, he would grant them time for the mediation and stay the arbitration. Lawyer A requested the Supreme Court to set aside the jurisdictional decision he considered to be contained in the letter. The Supreme Court confirmed that a letter or procedural order could be characterized as an award, but the arbitrator's letter did not contain a decision on jurisdiction or the mediation. It merely set out procedural directions which could not be challenged.<sup>7</sup>

6. The Swiss Rules of International Arbitration (2012) provide for **expedited proceedings** for low value disputes. According to article 42, awards must be rendered within 6 months from the date of the transmission

---

<sup>6</sup> Swiss Federal Supreme Court, 4A\_628/2015 (ATF 142 III 296, ASA Bull. 4/2016, p. 988).

<sup>7</sup> Swiss Federal Supreme Court, Decision 4A\_555/2016 of 10 October 2016, ASA Bull. 1/2017, p. 157.

of the file. In a matter to which article 42 applied, the party who had lost the arbitration sought to challenge the award before the Supreme Court on the ground of a one-day delay<sup>8</sup>. In a letter to the parties at the beginning of the proceedings, as well as in the procedural timetable, the arbitrator had stated that she had received the file on 24 August 2015. The award was notified on 25 February 2016. **The plaintiff argued that the arbitrator was *functus officio*, the arbitration clause no longer being valid *ratione temporis*** as of 24 February 2016. Indeed there had been a matter recently before the Court (ATF 140 III 75<sup>9</sup>) where an arbitrator had incurred excessive delays and ultimately even missed a last, agreed, time limit to issue his award. The award was annulled. The Supreme Court distinguished this case clearly from the one at hand where there was a delay of only one day, according to the plaintiff. In reality, there was no delay at all. The arbitrator demonstrated that the date of 24 August in her letter was a clerical error. She had received the file on 25 August 2015. The notification of the award on 25 February 2016 was therefore timely. The Court added that this would have been the case even if the file had been received on 24 August 2015. According to article 2(2) of the Swiss Rules “[a] period of time under these Rules shall begin to run on the day following the day when a notice, notification, communication, or proposal is received”. Had the file been received on 24 August, the time limit would have started to run the next day and expired on 25 February.

Finally, the Court rejected the arbitrator’s **request for a fee** recalling its standing case law that arbitrators cannot claim any payment for the time spent on submitting comments to the Court about the challenge.

7. Requests to set aside awards must be filed with the Supreme Court within 30 days of the receipt of the award. **Filings by fax are not valid.** In decision 4A\_214/2016,<sup>10</sup> the Supreme Court declared that a request was inadmissible because it had been filed late and by fax only.

8. 4A\_322/2016<sup>11</sup> results from a dispute where an engineer and the owner of a property, his client, quarrelled about CHF 17’000. The complications of the proceedings were manifestly disproportionate to the amount in dispute. **The arbitrator had to be appointed by the *juge d’appui*.** The arbitrator had to retain an expert. In the award, the arbitrator ordered the owner to pay the engineer. The owner sought to set the award aside before the

---

<sup>8</sup> Swiss Federal Supreme Court, Decision 4A\_188/2016 of 11 January 2017, ASA Bull. 1/2017, p. 162. An English translation may be published in Swiss Int’l Arb. L. Rep.

<sup>9</sup> ASA Bull. 3/2014, p. 617.

<sup>10</sup> Swiss Federal Supreme Court, Decision 4A\_214/2016 of 4 May 2016, ASA Bull. 1/2017, p. 169. An English translation may be published in Swiss Int’l Arb. L. Rep.

<sup>11</sup> Swiss Federal Supreme Court, Decision 4A\_322/2016 of 28 July 2016, ASA Bull. 1/2017, p. 172. An English translation may be published in Swiss Int’l Arb. L. Rep.

Supreme Court arguing that the tribunal was not properly constituted. In his view, the **arbitrator should have been a construction professional, not a lawyer**. The Supreme Court found that the **parties had not agreed on any specific profile or requirements** for the arbitrator or agreed to any rules, *ad hoc* or institutional, that provided for a specific appointment process. Therefore, the default appointment of the *juge d'appui* could not be questioned.

As a second prong of the annulment request, the owner argued that the arbitrator had violated his **right to be heard** by refusing to admit an expert report to rebut the report of the arbitral tribunal's expert. The arbitrator considered that the expert report offered by the owner was late. It was not a rebuttal report, but went beyond the scope of the tribunal's expert report. The Supreme Court held that **a party could not request a rebuttal opinion before it knew the principal opinion**. There was no proof, however, that the report which the tribunal refused was merely a rebuttal opinion and not a belatedly offered stand-alone report.

9. A Turkish and a German group had entered into a joint venture agreement, a share purchase agreement (SPA), and a distribution agreement. The German side terminated the distribution agreement. The Turkish parties considered that the SPA was closely related to the distribution agreement and was also terminated as a result of the termination of the distribution agreement. They initiated ICC arbitration under the SPA's arbitration clause. The parties agreed on a timetable with the ICC tribunal providing for a partial award on the issue of the interconnection of the two contracts. It was agreed in the procedural timetable that there would be a single round of written submissions, with expert and witness evidence. After it received the respondent's defence, the **claimants sought leave to file rebuttal submission with rebuttal witness statements. The arbitral tribunal refused** on the basis of the parties' agreement on a single exchange. In its partial award, the tribunal found that the contracts were not intertwined and did not form a contractual whole.

The claimants filed for an annulment of the award, asserting a violation of their right to be heard and their right to equal treatment. The Supreme Court rejected the challenge. It held that the parties had freely agreed with the arbitral tribunal to **restrict the number of written exchanges. The claimants had been aware of the risk that they would not be able to rebut the respondent's witness evidence**. This is indeed risky in particular if there is no hearing of witnesses where the evidence can be tested, as was apparently the case. The arbitrator had determined, by way of an anticipated assessment of the evidence tendered, that the rebuttal witness testimony offered by the claimants were not relevant for the outcome of the partial award. This may have been an

important factor for the Supreme Court as well, when it enforced the parties' agreement to have only one round of submissions.<sup>12</sup>

**10.** In decision 5A\_627/2015 of 2 September 2016,<sup>13</sup> the question was which rules applied to the **enforcement of a decision rendered by the Court of First Instance of the Dubai International Financial Centre (DIFC)** in Switzerland, namely: (a) Articles 25-27 of the PIL Act governing the enforcement of foreign court decisions; or (b) the provisions of the New York Convention on the enforcement of foreign arbitral awards. The Supreme Court did not agree with the lower court that this question could be left open. It found that it had to be decided as a preliminary issue as it could have an impact on the outcome of the enforcement procedure. The matter was remitted to the lower court for decision on this point.

**11.** 4A\_542/2015<sup>14</sup> is interesting only insofar as it reports an arbitral award with an **unusual operative part**.

The dispute concerned a plot of land that the owner had rented out to a lessee for 60 years with the right to erect a building. The rent was secured with a mortgage on the building. The mortgage was entered in the land register. The contract provided for arbitration. In the arbitration, the owner of the plot requested and obtained an increase of the rent. The increase of the rent called for an increase of the mortgage that secured the rent. In order to alter the mortgage in the land register both parties' consent was required. The owner therefore also asked the arbitral tribunal to order the lessee to provide the necessary statements evidencing consent.<sup>15</sup>

MATTHIAS SCHERER

---

<sup>12</sup> Swiss Federal Supreme Court, Decision 4A\_342/2015 of 26 April 2016, ASA Bull. 1/2017, p. 178 (excerpts). An English translation may be published in Swiss Int'l Arb. L. Rep.

<sup>13</sup> Swiss Federal Supreme Court, Decision 5A\_672/2015 of 2 September 2016, ASA Bull. 1/2017, p. 199. See also Catherine A. KUNZ, *Enforcement of Arbitral Awards under the New York Convention in Switzerland*, ASA Bull. 4/2016, p. 836.

<sup>14</sup> Swiss Federal Supreme Court, Decision 4A\_542/2015 of 16 February 2016, ASA Bull. 1/2017, p. 205.

<sup>15</sup> The relevant part of the award reads as follows:  
"3. Die Beklagte wird verpflichtet, innert einer Frist von drei Monaten nach Rechtskraft dieses Schiedsspruchs die erforderlichen Erklärungen in der gesetzlich vorgeschriebenen Form abzugeben, dass die im ersten Rang bestehende Grundpfandverschreibung [Baurechtzinspfand] als Maximalhypothek auf der Baurechtspartelle in der Höhe von CHF 465'632.10 eingetragen werden kann, und die allenfalls erforderlichen Rücktritte anderer Grundpfandgläubiger zu erwirken."

## A Introduction to the Case Law Section 2/2017

1. In a very peculiar case, the Swiss Federal Supreme Court set aside two domestic awards<sup>16</sup> that had been rendered without any arbitration agreement by an **arbitrator who had usurped his powers**.

A former employee raised claims against his ex-employer. In a letter addressed to the employer, he stated that the matter was arbitrable and that he would refer it to Mr. D.M. as a sole arbitrator, failing objections by the employer. The employer did not react, and D.M. started to act as arbitrator, issuing two awards. The employer did not participate in the arbitration, but objected to the arbitrator's jurisdiction and challenged the awards before the Swiss Federal Supreme Court. The Court recalled that, **in order to be valid, arbitration agreements must be in writing or otherwise documented** (Article 358 of the Code of Civil Procedure). Mere silence in response to an offer to arbitrate does not amount to an agreement to arbitrate, and the employer had not proceeded on the merits either. The Court described the arbitrator's conduct as bizarre, and declared the **awards null and void**.

2. A dispute between a Russian oligarch and a US company over the **construction of a Turkish bath in the oligarch's chalet in Gstaad** raised interesting legal issues, but is particularly memorable because of the cost of the hammam at issue – some USD 31 million. A Swiss company (A) had engaged the US company (B) to build the bath in the oligarch's house. The contract contained an arbitration agreement referring disputes to arbitration administered by the Swiss Chambers Arbitration Institution (SCAI) under the Swiss Rules. B sued A, the oligarch, and a Cypriot company (C) controlled by the oligarch for outstanding payments. C objected to the arbitration, pointing out that it had not signed the contract. The case took a surprising turn when one of B's three directors informed the SCAI that the arbitration had been initiated without his knowledge and consent and that it should be cancelled. Counsel to A and the oligarch immediately asked the SCAI to stay the arbitration until the **claimant's powers of representation** were established. The SCAI nevertheless appointed a sole arbitrator, who, after having heard the parties, rejected A/oligarch's request to discontinue or, alternatively, to stay the arbitration. He concluded that, under the applicable New York law, the **two directors were prima facie entitled to commence arbitration**; that B's internal operating agreement provided for arbitration under the American Arbitration Association (AAA) Rules such that he, the sole arbitrator, lacked jurisdiction; and that the stay of an

---

<sup>16</sup> Swiss Federal Supreme Court, Decisions 4A\_618/2015/4A\_634/2015 of 9 March 2016, ASA Bull. 2/2017, p. 362.

arbitration, and even more so, the discontinuation was only justified in extraordinary circumstances. The arbitrator therefore issued a decision (“Procedural order no. 4”), without prejudice to the parties’ right to request suspension if the circumstances changed, and rejected A’s request for a stay of the proceedings. A sought to set this decision aside. B took the view that this order could not be challenged at all, since it was not an award. The Swiss Federal Supreme Court recalled that only awards can be challenged, but that the title of a decision is not decisive. **Procedural orders can be challenged if they decide on jurisdictional issues.** The Court accepted that powers of representation of a party pertain to the scope of the arbitration agreement *ratione personae*. However, the arbitrator had not decided jurisdiction in a final manner. He had merely refused to stay the arbitration pending further examination of the claimant’s powers. The question of the validity of the arbitration, and the effect, if any, of the withdrawal from the arbitration by one of the three directors had not been determined in a final manner. In the circumstances, the procedural order was not tantamount to an award and could not be challenged. The challenge was therefore inadmissible.<sup>17</sup>

3. 4A\_69/2015 of 26 October 2015<sup>18</sup> arises from the **termination of a distribution contract**, whereby an Austrian company had appointed a Singaporean company as its exclusive distributor for watches and jewellery. The arbitral tribunal found that the termination was not valid, and ordered the principal to pay damages, including **damages for a court action that the principal had commenced in Singapore in violation of the arbitration agreement** in the distribution contract.<sup>19</sup> The principal challenged the award before the Swiss Federal Supreme Court, alleging a violation of its right to be heard. The principal asserted that the arbitral tribunal had overlooked certain decisive arguments. The Court found that this was not the case. **The arbitral tribunal had manifestly noted all arguments and was in any event not bound to discuss each and every argument in the award.** Finally, the Court noted that the principal, in its request to set aside the award, had expanded on the arguments that it had raised in the arbitration. Obviously, the arbitral tribunal could not be blamed for not considering arguments that had not been raised before it.

---

<sup>17</sup> Swiss Federal Supreme Court, Decision 4A\_446/2014 of 4 November 2014, ASA Bull. 2/2017, p. 370. xx. An English translation may be published in Swiss Int’l Arb. L. Rep. and is also available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>18</sup> Swiss Federal Supreme Court, Decision 4A\_69/2015 of 26 October 2015, ASA Bull. 2/2017, p. 382 (excerpt). An English translation may be published in Swiss Int’l Arb. L. Rep. and is also available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>19</sup> See also 4A\_444/2009 of 11 February 2010 for a similar case.

4. 4A\_678/2015 of 22 March 2016<sup>20</sup> is about a typical, moderately interesting sports dispute between a Brazilian football player and a Portuguese club concerning the latter's termination of the former's employment. The CAS ordered the club to pay damages and interest to the player. In its challenge of the award, the club argued that the arbitral tribunal had failed to decide whether the amount awarded was a gross or net amount. The Swiss Federal Supreme Court found that it was evident from a **good faith interpretation of the award** that this was a net amount, without deduction, and that, in any event, the club had not put forward a prayer for relief identifying the distinction as a point to be decided. The Court also ruled that **it was not improper for an arbitral tribunal to decide a prayer on a different or partially different legal basis (ultra petita)**.

5. In a 1980 framework agreement, two parties (D and E) organized the operation of a waste water treatment plant. The framework agreement provided for arbitration in Basel and contained a clause whereby the parties guaranteed that certain named affiliates and representatives of the parties would perform all obligations under the agreement.<sup>21</sup> In 1995, D group was restructured, and the chemical business was transferred into A (the respondent in the subsequent arbitration). In 1996, D and E merged into B (the claimant). In 2014, a dispute arose regarding the mothballing of the plant. B sued A. In the arbitration, A took the view that it was not bound by the arbitration agreement in the framework agreement and objected to the jurisdiction of the arbitral tribunal. B argued that A was bound by way of an umbrella agreement in the 1995 transfer contract. According to the umbrella agreement, the rights and obligations of the transferred business were transferred to A.<sup>22</sup> This included the **guarantee undertaking in the framework agreement as well as the arbitration agreement contained therein (as an ancillary right)**. A objected that this was no firm guarantee but merely a comfort letter-type of engagement (**Patronatserklärung**) with no real effect. Consequently, it could not have been transferred. Neither could the arbitration agreement apply, as it was merely an ancillary right to the alleged guarantee undertaking.

The arbitral tribunal found that the guarantee was effective, that it could be transferred – and was – and that the arbitration agreement therefore

---

<sup>20</sup> Swiss Federal Supreme Court, Decision 4A\_678/2015 of 22 March 2016, ASA Bull. 2/2017, p. 390. An English translation may be published in Swiss Int'l Arb. L. Rep. and is also available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>21</sup> "D. und F. garantieren sich gegenseitig, dass ihre genannten Tochtergesellschaften und deren Vertreter sämtliche ihnen in diesem Vertrag zugeordneten Pflichten erfüllen".

<sup>22</sup> "Assumption of Guarantees. A undertakes to assume as per the Closing Date all guarantees, letters of comfort and undertakings of similar nature of A. Affiliates".

applied to A. The Swiss Federal Supreme Court rejected the challenge filed against the award for excess of jurisdiction.<sup>23</sup> The Court recalled that **under certain circumstances, arbitration agreements can bind non-signatories** and parties that are not mentioned therein, for instance in case of an assignment of a contract or a claim.<sup>24</sup> The arbitral tribunal had not construed the guarantee undertaking arbitrarily and had not erred in **finding that it had been transferred to the respondent (A), and with it the arbitration clause as an ancillary right.**

In passing, the Court noted two points of relevance for parties engaged in annulment proceedings. First, new evidence is not allowed, e.g., chronologies of key event and maps one would typically see as **demonstrative exhibits in an arbitration hearing are not admissible before the Court.**<sup>25</sup> Second, **the request to set aside the award must be self-standing. References to submissions in the underlying arbitration will not be considered.**<sup>26</sup>

6. Three companies (A, C, D) joined forces for the development of a real estate project. The **consortium agreement** (Article 530 of the Code of Obligations) provided for domestic arbitration under the SVIT rules (*Schiedsgericht der Schweizer Immobilienwirtschaft*). The three partners retained an external company (B) to run their business. Subsequently a dispute arose. A commenced an arbitration against B and C and **sought the production of documents** showing how B had run the business. Both B and C objected to the arbitral tribunal's jurisdiction. B argued that it was not a party to the consortium agreement and its arbitration clause. C took the view that it was not the managing partner and was de facto unable to provide the documents sought by A. The arbitral tribunal declined jurisdiction over B, but admitted it vis-à-vis C, on a provisional basis.<sup>27</sup> A sought to annul the award, asserting that the arbitral tribunal had erred in declining jurisdiction over B (Article 393 lit. b of the Code of Civil Procedure). B and C were affiliated companies in so far as they had the same director with individual signature rights. According to A, it had been the partners' intention that the arbitration clause would apply to all related

---

<sup>23</sup> Swiss Federal Supreme Court, Decision 4A\_82/2016 of 6 June 2016, ASA Bull. 2/2017, p. 399. An English translation may be published in Swiss Int'l Arb. L. Rep.

<sup>24</sup> 4A\_82/2016 of 6 June 2016, para. 2.3.

<sup>25</sup> 4A\_82/2016 of 6 June 2016, para. 4.2. See also Swiss Federal Supreme Court, Decision 4A\_500/2015 of 18 January 2017, which confirms that legal opinions are however admissible.

<sup>26</sup> 4A\_82/2016 of 6 June 2016, para. 1.4

<sup>27</sup> This could have raised the question whether arbitral tribunals are entitled to make a provisional decision on jurisdiction, or rather must deal with all relevant elements in one decision if they wish to issue a preliminary award on jurisdiction.

companies entering into agreements with the consortium. The Swiss Federal Supreme Court<sup>28</sup> found that under Swiss arbitration law **non-signatories can be bound** in certain circumstances, e.g., if by their conduct, they demonstrate that they implicitly wish to be bound by a contract between other parties. However, there was no such immixing, and the arbitral tribunal had found that indeed the parties had not wished to make B a party to their consortium agreement. The fact that two parties have the same director does not allow lifting of the corporate veil.

7. Two Libyan parties were in dispute over a construction project that had been abandoned in the Arab spring upheavals. They had entered into a **FIDIC contract** containing an ICC arbitration clause and into a public works contract providing for jurisdiction of the Libyan courts. The parties were engaged in proceedings before the Libyan courts as well as before the arbitral tribunal in Switzerland. **The arbitral tribunal noted that the public works contract was a simulated contract, designed to obtain tax benefits.** It admitted jurisdiction under the FIDIC contract. The respondent tried to annul the award on the ground of a violation of the right to be heard and excess of jurisdiction. According to the respondent, the arbitral tribunal had not taken into account that the claimant was proceeding on the merits in the Libyan court proceedings and was therefore estopped from relying on the arbitration clause in the FIDIC contract. The Swiss Federal Supreme Court rejected the annulment request.<sup>29</sup> Although the Libyan court proceedings were mentioned in the Terms of Reference, there was no particular claim; **without a proper claim, the arbitrators were not required to investigate whether grounds existed as to why it should not have jurisdiction.** Pleadings by the respondent in the arbitration were introduced late, outside the time limits set in the procedural timetable. In the circumstances, there was no due process violation. A party that does not abide by the procedural timetable cannot invoke a violation of its right to be heard.

8. In 4A\_587/2015,<sup>30</sup> the Swiss Federal Supreme Court upheld an award in an employment dispute. The losing party challenged the award on the ground that **the arbitral tribunal had failed to wait for the outcome of parallel criminal proceedings.** Moreover, the arbitral tribunal **had refused**

---

<sup>28</sup> Swiss Federal Supreme Court, Decision 4A\_459/2016 of 19 January 2017, ASA Bull. 2/2017, p. 418. An English translation may be published in Swiss Int'l Arb. L. Rep.

<sup>29</sup> Swiss Federal Supreme Court, Decision 4A\_490/2016 of 6 March 2017, ASA Bull. 2/2017, p. 428. An English translation may be published in Swiss Int'l Arb. L. Rep.

<sup>30</sup> Swiss Federal Supreme Court, Decision 4A\_587/2015 of 15 February 2015, ASA Bull. 2/2017, p. 439 (excerpt and English translation). An English translation may be published in Swiss Int'l Arb. L. Rep.; See also Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, ASA Bull. 2/2017, p. 266.

**to hear witnesses** who had authored documents produced in the arbitration. The Court found that the arbitral **tribunal was not to blame for its anticipatory assessment of evidence.**

**9. Courtesy was fatal** to a request to set aside an arbitral award rendered in a CAS arbitration opposing FIFA and a Croatian football player. At the end of the hearing before a CAS tribunal, plaintiff's counsel stated, "We are very satisfied with the fact how we were treated by the Panel here; thank you very much, Mr. President!". In its decision 4A\_544/2014<sup>31</sup>, the Swiss Federal Supreme Court found that, in light of this statement, the player was estopped from arguing that he had not been treated fairly and had waived any right to invoke a violation of his right to be heard. He had asserted that the arbitral tribunal had not admitted questions regarding the credibility of FIFA's expert at the hearing. In any event the statement was inaccurate, as the arbitral tribunal had merely at some stage stopped questions regarding the expert's credibility, which was its privilege. The Court recalled that **the arbitral tribunal is entitled to conduct the examination of witnesses and experts, to impose time limits, and to allow or disallow questions**, e.g., because they are repetitive, or concern facts that have already been established.

**10.** A decision of 7 February 2017<sup>32</sup> confirms FIFA's jurisdiction over international employment law disputes according to Article 22(b) of the FIFA Regulations for the Status and Transfer of Players. A football player, a club and a third company entered into multiple employment agreements. Subsequently, the club failed to pay the player's salary, and the player terminated his contract and filed a claim before FIFA against the club. FIFA's internal dispute resolution body confirmed the plaintiff's claim. The club appealed FIFA's decision, arguing that FIFA's internal dispute resolution body lacked jurisdiction and that the CAS had sole jurisdiction over the dispute. However, the **Swiss Federal Supreme Court confirmed that the CAS can be the second-level appeal tribunal**, and thus rejected the club's appeal.

**11.** In decision 4A\_515/2012<sup>33</sup> the Swiss Federal Supreme Court addressed the issue of **subject-matter arbitrability of domestic**

---

<sup>31</sup> Swiss Federal Supreme Court, Decision 4A\_544/2014 of 24 February 2015, ASA Bull. 2/2017, p. 443 (excerpt). An English translation may be published in Swiss Int'l Arb. L. Rep. and is also available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>32</sup> Swiss Federal Supreme Court, Decision 4A\_492/2016 of 7 February 2017, ASA Bull. 2/2017, p. 452. An English translation may be published in Swiss Int'l Arb. L. Rep.; see also Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, ASA Bull. 2/2017, p. 266.

<sup>33</sup> Swiss Federal Supreme Court, Decision 4A\_515/2012 of 17 April 2013, ASA Bull. 2/2017, p. 464 (excerpts).

**employment law disputes.** The Court confirmed its jurisprudence<sup>34</sup> and found that only claims arising out of non-mandatory provisions of the Code of Obligations can be subject to arbitration. In the present case, the employment contract was governed by a collective employment agreement, and thus the arbitrability of the dispute was not an issue (although addressed by the Court). In the end, the award was annulled because the arbitrator had jurisdiction only over disciplinary measures and not over the termination of the employment relationship as such.

**12.** In decision 4A\_32/2016 of 20 December 2016,<sup>35</sup> a football club sought to set aside an award rendered by the CAS for **violation of public policy** pursuant Article 190 (2) lit. e of the PIL Act. A football player signed two employment contracts with two different clubs for the same time period. Later, the player registered with the second club and breached his contract with the first. FIFA's Dispute Resolution Chamber found that the player and his current club were jointly liable to indemnify the club with which the player had initially signed. They jointly had to pay USD 670'000, which was subsequently reduced to USD 620'000 by the CAS. Before the Swiss Federal Supreme Court, the club (not the player) invoked **Article 27(2) of the Civil Code and alleged a violation of the club's personality rights**. However, the Court ruled that only in the most shocking cases can Article 27(2) be relied upon as a violation of public policy. Moreover, fundamental rights must have been violated, as in the well-known Matuzalem case.<sup>36</sup> Neither the amount of the compensation owed nor the fact that both parties were found jointly liable violated substantive public policy, and thus the annulment request was rejected.

**13. Mergers & Acquisitions** disputes are often subject to arbitration. In a decision of 3 August 2016,<sup>37</sup> the Swiss Federal Supreme Court dealt with a complex corporate transaction that led to the challenge of a (domestic) award. Two groups of companies had established a joint venture company with the purpose of taking over a target company. To that end, they had entered into a **shareholders' agreement** which addressed how the parties

---

<sup>34</sup> Swiss Federal Supreme Court, Decision 4A\_71/2010 (136 III 467) of 28 June 2010, ASA Bull. 4/2010, p. 813; see also Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, ASA Bull. 2/2017, p. 266.

<sup>35</sup> Swiss Federal Supreme Court, Decision 4A\_32/2016 of 20 December 2016, ASA Bull. 2/2017, p. 473. An English translation may be published in Swiss Int'l Arb. L. Rep.; see also Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, ASA Bull. 2/2017, p. 266.

<sup>36</sup> Swiss Federal Supreme Court, Decision 4A\_558/2011 of 27 March 2012, ASA Bull. 3/2012, p. 591; see Laurence BURGER, *For the first time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy*, ASA Bull. 3/2012, p. 603.

<sup>37</sup> Swiss Federal Supreme Court, Decision 4A\_110/2016 of 3 August 2016, ASA Bull. 2/2017, p. 487 (briefly noted).

would deal with a direction from the antitrust regulator forcing them to make a public offer for minority shareholders. The dispute between the parties concerned the scope and interpretation of the shareholders' agreement. The challenge of the award before the Court was basically limited to the question of whether the arbitral tribunal had properly applied Swiss law on contract interpretation, and whether the award was arbitrary. Typically, this is a decision where the main interest is the factual matrix of the underlying arbitration, rather than the (predictable) outcome of the challenge.

MATTHIAS SCHERER

---

## A Introduction to the Case Law Section 3/2017

1. In Switzerland requests to set aside an arbitral award do not stay the enforceability of the award. The winning party may continue enforcement proceedings even during Supreme Court proceedings. Parties seeking to set aside an award therefore often try to obtain a stay of enforcement. The conditions for such a stay have not been set uniformly by the Supreme Court and have been object of widespread discussions. In a procedural order issued in 4A\_119/2017<sup>38</sup>, the Supreme Court outlined a new standard. **It is sufficient for obtaining a stay of enforcement that the defending party has its seat outside Switzerland.** This was the case in the proceedings at hand. The Supreme Court also noted that request to set aside was not utterly hopeless and that the respondent had not argued that it could not wait a few months until the Supreme Court had completed the annulment proceedings.

2. Decision 4A\_132/2016<sup>39</sup> arose from an **employment contract**<sup>40</sup> between a French football player and a football club in Cyprus. The player had wrongfully terminated the contract and was ordered by the CAS to pay certain amounts to his former employer. Before the Supreme Court, the player questioned the jurisdiction and impartiality of the arbitral tribunal. The Court flatly rejected the argument finding that the player had himself seized the CAS and had not raised issues regarding the fairness of the process. **He could not in good faith challenge the arbitral tribunal or process after the award had been rendered.**

When dealing with a challenge of an arbitral award, the Supreme Court does not review errors in the application of law or in the establishing of the facts of the case. The player complained that this **restricted scope of review** (*Kognition; Prüfungsbefugnis*) was a violation of the due process guarantee of article 6 ECHR. The Court found that the restriction applied to all arbitral awards rendered under the PIL Act, not only to sport arbitration awards.<sup>41</sup> This is accurate but misses the point. The Court could have added, as it has on many occasions in the past, that the ECHR is not directly applicable in context of Article 190 of the PIL Act.

Finally, the player complained that the arbitral tribunal had **disregarded mandatory provisions of Swiss and French employment law** regarding the payment of his monthly salary and the employee's right to

---

<sup>38</sup> Swiss Federal Supreme Court, Decision 4A\_119/2017 of 13 June 2017, ASA Bull. 3/2017, p. 618.

<sup>39</sup> Swiss Federal Supreme Court, Decision 4A\_132/2016 of 30 June 2016, ASA Bull. 3/2017, p. 623.

<sup>40</sup> For a recent study of employment law disputes and arbitration, see Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, ASA Bull 2/2017, p. 266.

<sup>41</sup> 4A\_132/2016, para 2.4.

terminate. This was in his view tantamount to a violation of substantive public policy. The Court rejected the argument, finding that a **violation of mandatory law provisions does not automatically amount to a public policy violation.**

3. A party wishing to challenge the jurisdiction of the arbitral tribunal has to do so before proceeding on the merits. In decision 4A\_156/2016<sup>42</sup>, the plaintiff freely admitted that it had not raised any jurisdictional objections, but argued that it should nevertheless be allowed to do so for the first time before the Supreme Court. The dispute involved claims between the owners of two neighboring gravel pits. The arbitral tribunal had decided claims based on a contract between the owners but also based on statutory rights enshrined in the Swiss Civil Code (*Nachbarrecht*). The plaintiff argued that the arbitral tribunal had no competence in respect of non-contractual matters and that he could not possibly have expected that the tribunal would treat the dispute as such. The Supreme Court rejected the argument. **The plaintiff had known from the beginning that its opponent had made contractual claims as well as extra-contractual liability claims** under article 673 of the Swiss Civil Code. The plaintiff ought to have challenged the arbitral tribunal's jurisdiction rather than proceeding to the merits stage of the arbitral proceedings.<sup>43</sup>

4. Case 4A\_173/2016<sup>44</sup> dealt with an award rendered under the Swiss Rules of International Arbitration in a dispute between investors and a financial intermediary ("trustee"). The trustee had lost the investors' funds in a **Ponzi scheme**. The sole arbitrator ordered the trustee to indemnify the investors. Before the Supreme Court, the trustee challenged the validity of the arbitration agreement. The Court considered that the **right to challenge was forfeited** because the trustee had merely objected to the arbitral tribunal's competence for extra-contractual claims in the arbitration.

The trustee further argued that the arbitrator was not impartial, predominantly on the basis of impressions gained during the settlement facilitating conference where the **arbitrator apparently had shared his provisional views of the case in no uncertain terms**. The Court found that the trustee's allegation of partiality of the arbitrator was made too late. In

---

<sup>42</sup> Swiss Federal Supreme Court, Decision 4A\_156/2016 of 23 August 2016, ASA Bull. 3/2017, p. 629.

<sup>43</sup> See also 4A\_173/2016 of 20 June 2016, ASA Bull. 3/2017, p. 634, where the plaintiff had challenged the arbitral tribunal's jurisdiction for non-contractual claims but not the validity of the arbitration agreement. The plaintiff was found to have forfeited the right to assert that the arbitration agreement was void.

<sup>44</sup> Swiss Federal Supreme Court, Decision 4A\_173/2016 of 20 June 2016, ASA Bull. 3/2017, p. 634.

fact, the trustee had even stated at the end of the conference that he would not rely on the provisional assessment to challenge the arbitrator.<sup>45</sup>

The trustee also complained that the arbitrator had omitted (*infra petita*) to decide a set off counterclaim. The Court found otherwise. On the one hand, the award, after adjudicating the claims, stated explicitly that all other claims were rejected. On the other hand, the set off was not a self-standing claim, but rather a defense.<sup>46</sup>

**5. Due process prohibits the surprising application of a law.** In case 4A\_202/2016<sup>47</sup>, a party accused the arbitral tribunal of a violation of the right to be heard. **The arbitral tribunal, deciding *ex aequo et bono*, had applied Swiss law even though the parties had exclusively pleaded the law of country X where all the parties were established.** The Supreme Court found that this was not unpredictable at all. The arbitration agreement gave the arbitrators discretion as to the applicable law<sup>48</sup>. Moreover, in a subsequent procedural order, signed by all parties, the tribunal had stated under the heading applicable law that it might refer to Swiss law.<sup>49</sup>

**6. According to R64.2 of the CAS Code, the CAS can terminate an arbitration if a party who has been duly invited to pay the entire advance on costs in substitution of the other party fails to do so.** That is precisely what the President of the Appeals Arbitration Division of the CAS did in a case<sup>50</sup> between the World Anti-Doping Agency (WADA), on the one side, and the United States Anti-Doping Agency (USADA) and a US gymnast (X) on the other. X/USADA did not pay the deposits requested by the CAS Court Office and WADA was asked to substitute itself to its opponents. WADA paid its own

---

<sup>45</sup> 4A\_173/2016 of 20 June 2016, para. 2.3. For an analysis of the role of arbitral tribunals as facilitators of settlements and the provisional assessment of cases (*Referentenaudienz*) see Hansjörg Stutzer, *Settlement Facilitation: Does the Arbitrator have a Role? The “Referentenaudienz” – the “Zurich-Way” of settling the Case*, ASA Bull. 3/2017, p. 589.

See also Decision 4P.108/1999 of 8 September 1999 in ASA Bull. 3/2017, p. 645. The plaintiff challenged the award on the ground that, when sharing their provisional assessment of the case with the parties (*Referentenaudienz*), the arbitrators had already made up their mind as to the outcome of the case; which the plaintiff considered established by the fact that they rejected any further pleadings after the collapse of the settlement negotiations.

<sup>46</sup> 4A\_173/2016 of 20 June 2016, para. 3.

<sup>47</sup> Swiss Federal Supreme Court, Decision 4A\_202/2016 of 3 August 2016, ASA Bull. 3/2017, p. 648.

<sup>48</sup> « The parties authorise the Arbitral Tribunal to assist them in reaching a settlement and, if it deems it appropriate, to decide *ex aequo et bono*. Applicable law should be X. law; the Arbitral Tribunal can also apply any rule of law that it will consider appropriate. »

<sup>49</sup> « In view of the discretion granted to the Panel by the Parties, of their written submissions and of the fact that they chose Swiss arbitrators, the Panel deems it appropriate to decide this case *ex aequo et bono* and to refer to Swiss law whenever it deems it appropriate. »

<sup>50</sup> Swiss Federal Supreme Court, Decision 4A\_692/2016 of 20 April 2017, ASA Bull. 3/2017, p. 657.

See also Decision 4A\_690/2016 of 9 February 2017, ASA Bull. 3/2017, p. 670, where the arbitration institution accepted a late payment, but nevertheless terminated the arbitration.

share on time but, due to an internal error, paid the respondents' shares only after the deadline had already expired. The President of the Appeals Division issued a termination order. WADA challenged the termination order before the Swiss Federal Supreme Court. The first question the Court had to resolve was whether a decision by an arbitration institution, as opposed to an arbitral tribunal, could be challenged at all. Indeed, Art. 190 of the PIL Act only mentions arbitral awards. The Court admitted that **a decision of an arbitration insitution can be tantamount to an arbitral award where it puts an end to the arbitration.**<sup>51</sup>

WADA took the view that the termination order violated its right to be heard. The Court found that WADA had been fully heard prior to the termination order and was merely complaining about the harsh sanction<sup>52</sup>. In a second line of argument, WADA challenged the order on the ground of procedural public policy, asserting that it was excessively formalistic. The Court left open **whether excessive formalism was tantamount to a public policy violation**, as it found that the CAS was justified to strike the case from the docket even though it had received full payment.<sup>53</sup> The Court said that a judicial body should apply its own rules strictly.

USADA was invited by the Supreme Court to comment on WADA's request to set the termination order aside but **missed the time limit** to do so. **It had handed over its submission to the Supreme Court to a US courier service** on the last day of the time limit when to comply it would have had to have posted it at a Swiss post office or handed it over to a Swiss embassy or consulate.<sup>54</sup>

7. Case 4A\_690/2016<sup>55</sup> concerned a dispute between a football player and a football club on the one hand, and two other clubs on the other. The FIFA Dispute Resolution Chamber had ordered the player and his club to jointly pay certain amounts to the other clubs for breach of an employment contract. The player and the club appealed to the CAS. In his appeal, the player included FIFA as a defending party. He subsequently **withdrew the appeal against FIFA**. The CAS panel rejected the club's appeal and struck the player's appeal from the record for having failed to pay the advance on costs. The player sought to set aside the award before the Supreme Court arguing that, by allowing FIFA to participate in the proceedings, the CAS had violated the principle of equality of arms. The Court found the player **had**

---

<sup>51</sup> 4A\_692/2016 of 20 April 2017, para 2.

<sup>52</sup> 4A\_692/2016 of 20 April 2017, para 5.

<sup>53</sup> 4A\_692/2016 of 20 April 2017, para 6.

<sup>54</sup> 4A\_692/2016 of 20 April 2017, para 4.

<sup>55</sup> Swiss Federal Supreme Court, Decision 4A\_690/2016 of 9 February 2017, ASA Bull. 3/2017, p. 670.

**not objected that FIFA continued to participate in the proceedings and could not complain about this later.**<sup>56</sup>

The player further criticized the CAS for having accepted the late payment of an advance on costs, and nevertheless striking the appeal for want of timely payment. In addition to being a violation of the rule of good faith, this was said to be excessively formalistic and a violation of procedural policy. The Court ruled that **enforcing formal requirements such as the timely payment of cost advances was not formally excessive.**<sup>57</sup>

Finally, the player requested legal aid. The Court confirmed that while excluded in the arbitration itself, in principle **legal aid is available for setting aside proceedings before the Supreme Court**, provided that the request had serious chances of success. This was not the case.<sup>58</sup>

**8.** The two cases above in which the failure to pay an advance on costs on time led to the premature end of the arbitration, can be contrasted with 4A\_405/2016<sup>59</sup>, where the **arbitral tribunal allowed a statement of claim filed one day after the time limit** set in the procedural timetable. The respondent took the view that the arbitral tribunal should have enforced the applicable Swiss Rules of International Arbitration strictly and had no discretion to allow the late submission of the statement of claim. It argued that the parts of the arbitration relating to the statement of claim should have been terminated. The Supreme Court found that granting a short extension to a party, even retroactively, was not a violation of the other party's right to be heard or of the principle of equality of arms, and also that the respondent had not shown that he had asked for and been denied a similar extension. As to the purported violation of the Swiss Rules, the Court found that the argument was not based on an accurate reading of the Rules, and that in any event the violation of procedural rules was not tantamount to a violation of the right to be heard as contemplated in article 190(2)(d) of the PIL Act.

**9.** In an arbitration under the rules of the *Schiedsgericht Bau + Immobilien des Hauseigentümerversands Schweiz*, the claimant withdrew its request for arbitration subject to reintroduction of the claims before the state courts when the defendant did not pay the advance on costs.<sup>60</sup> The Claimant asked the arbitral tribunal to order the defendant to pay the costs of the

---

<sup>56</sup> 4A\_690/2016 of 9 February 2017, para 3.

<sup>57</sup> 4A\_690/2016 of 9 February 2017, para. 4.

<sup>58</sup> 4A\_690/2016 of 9 February 2017, para. 5.

<sup>59</sup> Swiss Federal Supreme Court, Decision 4A\_405/2016 of 2 March 2017, ASA Bull. 3/2017, p. 680.

<sup>60</sup> Swiss Federal Supreme Court, Decision 4A\_570/2016 of 7 March 2017, ASA Bull. 3/2017, p. 685.

Whether the failure to pay a cost deposit leads to the forfeiture of the arbitration agreement was not discussed in this matter. It was addressed in other cases.

arbitration. The tribunal rendered a decision awarding costs against the defendant. The defendant had not been copied in on the claimant's application for cost and had not been invited to comment on the allocation of costs. The Supreme Court set the decision aside for violation of the defendant's right to be heard. It found that **arbitral tribunals do not have to hear the parties on the allocation of cost in each and every situation, but instead only when the allocation is uncertain.**

10. In August 2016, the International Paralympic Committee (IPC) suspended its member, the **Russian Paralympic Committee (RPC)**, in the wake of a doping scandal in Russia. Russian paralympic athletes were banned from the Olympic Games in Rio de Janeiro. A CAS arbitration ensued, which confirmed the sanction. The RPC sought to set the award aside, arguing that it offended public policy and due process. The CAS panel had ruled that the RPC had no standing to bring claims for its members (athletes), but that the athletes were free to assert claims themselves. The Supreme Court found that, despite the fact that the Olympic Games in Rio were over, the RPC still had a **legitimate interest (*schutzwürdiges Interesse*)** in challenging the award, since its membership remained suspended. The award was confirmed. There was no violation of public policy or the right to be heard. The Court recalled that **procedural or evidentiary rules applicable in criminal proceedings, such as the presumption of innocence, or established in the ECHR are not applicable in arbitration.**<sup>61</sup>

11. On 16 March 2016, the Supreme Court annulled an arbitral award rendered according to the UNCITRAL Rules (ATF 142 III 296<sup>62</sup>) and ordered the **stay of the arbitration until the parties had completed the contractual conciliation** that was a prerequisite for the arbitration. Once the conciliation had taken place, the arbitration resumed. In a procedural order, the arbitral tribunal stated that its earlier procedural orders remained applicable and were not affected by the award having been set aside. The procedural order was challenged before the Supreme Court. The Court recalled that **only an award can be challenged, procedural orders only being able to be challenged to the extent that they determine jurisdictional issues**, which was not the case here.<sup>63</sup>

12. In 4A\_116/2016,<sup>64</sup> a decision that drew considerable attention in the football world, the Swiss Federal Supreme Court analysed the validity of an agreement between a football club (Sporting Lisbon) and an investor

---

<sup>61</sup> Swiss Federal Supreme Court, Decision 4A\_470/2016 of 3 April 2017, ASA Bull. 3/2017, p. 693.

<sup>62</sup> ASA Bull. 4/2016, p. 988.

<sup>63</sup> Swiss Federal Supreme Court, Decision 4A\_524/2016 of 20 September 2016, ASA Bull. 3/2017, p. 703.

<sup>64</sup> Swiss Federal Supreme Court, Decision 4A\_116/2016 of 13 December 2016, ASA Bull. 3/2017, p. 708.

regarding the transfer of a football player (Argentine defender Marcos Rojo). The investor co-financed the transfer of the player to the Portuguese club in exchange for a share in future transfer revenues relating to that player. FIFA prohibited these so-called Economic Rights Participation Agreements or Third Party Ownership Agreements (“TPO”) in 2015. However, the prohibition was challenged by certain national federations. Marcos Rojo’s performances for Argentina at the 2014 World Cup in Brazil were outstanding and his market value soared. He was transferred to Manchester United for a transfer fee of £20 million.

Sporting Lisbon challenged the validity of the TPO before the CAS who rejected the claim. The CAS did not look into the sport-political controversy about financing players. The arbitrators explicitly reviewed only the facts of the case. The club seized the Swiss Federal Supreme Court with a request to annul the award on the ground of public policy violation. The request was rejected. **The club had asserted that the TPO had been prohibited by FIFA, violated the player’s individual rights and was usurious.** The Court found that FIFA had allowed for transitional rules which showed that TPOs were not considered to be of such gravity as to call for immediate prohibition, that the Spanish and Portuguese football leagues had challenged the prohibition, and that the club had entered into many TPOs before and benefitted from them. The Court also rejected the club’s argument that sport was governed by special rules of good faith and morals and refused to create a *lex sportiva*. The investor’s 75% share in the transfer fee was not excessive given that the investor had paid the same share to allow the initial transfer of the player to Sporting Lisbonne, nor did the TPO severely restrict the player’s individual rights (article 27 Swiss Civil Code). The Court left open **whether the club was entitled to raise the personal rights of a third party, the player, at all** but observed that the transfer to a larger club coupled with a salary increase could hardly be qualified as violation of the player’s dignity and personal rights.

**13.** Decision 4A\_520/2015<sup>65</sup> stems from a dispute over the sale of a bank. The **share purchase agreement** obliged the buyer to recapitalize the bank. The price was to be adjusted depending on the capital requirements to be set by the authorities (Core Tier 1 Ratio). The seller subsequently asked for a **price adjustment** of EUR 160 million. The buyer took the view that the price adjustment clause was null and void as it violated mandatory banking regulations (“*loi de police*”). The ICC arbitral tribunal enforced the price adjustment clause and explicitly refused to look into the public policy

---

<sup>65</sup> Swiss Federal Supreme Court, Decision 4A\_520/2015 of 16 December 2015, ASA Bull. 3/2017, p. 729. An English translation is available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

argument to the extent that several authorities in the bank's home country had approved the transaction. The buyer sought to set the award aside for violation of the right to be heard. The Swiss Federal Supreme Court noted that the **arbitrators had not disregarded the arguments raised by the buyer, but had instead considered them to be irrelevant.** Whether the arbitrators were legally right or wrong exceeds the Court's scope of review, except if it is demonstrated that the arbitrators' decision that a point is not relevant was itself taken in violation of due process rights.

14. In 4A\_65/2015,<sup>66</sup> the Supreme Court decided a controversial question: **whether in a domestic arbitration the refusal of the court at the place of arbitration (*juge d'appui*) could be challenged directly before the Supreme Court.** The Court admitted such a direct challenge. On the substance, it annulled the *juge d'appui's* decision and ordered her to nominate an arbitrator. The *juge d'appui* had wrongly found that there was no valid arbitration agreement and exceeded her scope of review. The Court also found that an arbitration clause in a contract can be invoked in certain circumstances by a **non-signatory**; for instance, a **creditor who had acquired contractual rights and obligations from the estate of an insolvent party** (art. 260 of the Debt Collection and Bankruptcy Code; 139 III 391 consid. 5.1). In the present case, the plaintiff had only subsequently become a party to the contract. The Court recalled that, when deciding whether or not to appoint an arbitrator, the *juge d'appui* had to examine only summarily whether there was a valid arbitration clause. Another question wrongly determined by the *juge d'appui* was whether former co-owners (***PPE/Stockwerkeigentümer***) were bound by a contract for works. The Court ruled that the *juge d'appui* should be guided by the principle *in dubio pro arbitro* and leave delicate issues of the scope of application and extension of a clause to the arbitral tribunal.

15. According to article 184(3) PIL Act in international arbitrations and article 375(2) CCP in domestic arbitration, the judge at the place of arbitration ("***juge d'appui***") can assist the arbitral tribunal or the parties in taking evidence. B. commenced arbitration proceedings against A, *Unione professionale svizzera dell'automobile, sezione Ticino* (an association of Swiss car repair shops) following the termination of contracts for roadside assistance. In the arbitration, A. requested that the Federal Road Authority, **who was not a party to the arbitration, should disclose certain**

---

<sup>66</sup> Swiss Federal Supreme Court, Decision 4A\_65/2015 of 28 September 2015 (141 III 444), ASA Bull. 3/2017, p. 737.

See also Sophie THORENS-ALADJEM, *Le juge d'appui en matière d'arbitrage interne et international*, ASA Bull. 3/2017, p. 530.

**documents**, namely offers received from two competitors in tender proceedings for roadside assistance in the Gotthard tunnel through the Alps. The Federal Road Authority was consulted but refused to produce the requested documents on the ground of confidentiality and privilege of the submissions and bids received in public tenders. A. turned to the *juge d'appui* in accordance with article 375(2) CCP. A. invoked the duty of third parties to assist with the gathering of evidence (article 160 CCP). The judge ordered the Federal Road Authority, after having heard its objections, to disclose the documents. The Authority challenged this order before the Supreme Court. The Court found that the challenge was inadmissible on two accounts: First, the **decision of the *juge d'appui* could not be challenged before the Supreme Court** since proceedings under Article 375(2) CCP are final and decided in one single instance. Second, the Authority had no standing pursuant to article. 76 cpv. 2 LTF.<sup>67</sup>

**16.** A party who applies to set aside an arbitral award has to show a **legitimate current interest** in the annulment of the award. Case 4A\_620/2015<sup>68</sup> constitutes a rare case where a request was inadmissible for want of such interest. A CAS tribunal had found that a football player had no interest nor standing to challenge a decision rendered by the Players' Status Committee. The Supreme Court also found that the player had no such interest.

**17.** On 21 February 2017, the French Cour de cassation set aside an award rendered under the UNCITRAL Rules and the bilateral investment treaty between Kirghizstan and Lettonia for public policy violation (**money laundering**).<sup>69</sup>

MATTHIAS SCHERER

---

<sup>67</sup> Swiss Federal Supreme Court, Decision 4A\_214/2012 of 10 January 2013, ASA Bull. 3/2017, p. 759. See also Sophie THORENS-ALADJEM, *Le juge d'appui en matière d'arbitrage interne et international*, ASA Bull. 3/2017, p. 530.

<sup>68</sup> Swiss Federal Supreme Court, Decision 4A\_620/2015 of 1 April 2016, ASA Bull. 3/2017, p. 763. An English translation is available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>69</sup> The decision can be found on the ITA Law site (<https://www.italaw.com/sites/default/files/case-documents/italaw8476.PDF>). See also Louis Christophe DELANOY, *Un jour noir pour le blanchiment : l'arrêt République du Kirghizistan (Cour d'appel de Paris) du 21 février 2017*, ASA Bull. 3/2017, p. 551.

## A Introduction to the Case Law Section 4/2017

1. In Switzerland, many industry or service sectors have established **collective employment agreements** negotiated between employers and labour unions (**Landesmantelvertrag, Gesamtarbeitsvertrag**). Usually the agreements establish joint committees to enforce the agreement. Decisions by the joint committees can often be referred to another dispute resolution body where employer and employees are represented. Such bodies can be arbitral tribunals. In case 5A\_877/2014<sup>70</sup> the Swiss Federal Supreme Court had to determine whether a decision by such a dispute resolution body was enforceable like a judgment in expedited enforcement proceedings (Definitive Rechtsöffnung, mainlevée définitive). The body (Berufliches Schiedsgericht) had confirmed a fine issued against the employer by a joint commission. The employer resisted enforcement of the award on the ground that he had accepted the jurisdiction of the dispute resolution body only on the condition that the fine would be reduced. Indeed, the **arbitration clause in the collective employment agreement was optional**, providing for the jurisdiction of either an arbitral tribunal or ordinary courts. Moreover, the employer argued that in any event the award was a nullity as it had been rendered by a **truncated tribunal (four instead of five arbitrators)** and was lacking instructions for appeal (Rechtsmittelbelehrung).

The Supreme Court held that the body was a proper arbitral tribunal and its decisions were arbitral awards subject to expedited enforcement. It followed that **any objection that could have been raised in annulment proceedings against the award itself would no longer be available in the enforcement proceedings (except for the nullity of the award)**. The grounds the employer raised in the enforcement proceedings could all have been raised in a challenge of the award and the employer had forfeited the right to resist enforcement on these grounds. In any event the Court found that the grounds were not valid. The employer had not seized the arbitral tribunal conditionally, and the award was not a nullity as a result of a wrong composition of the tribunal. **The law allows for instances where the number of arbitrators changes in the course of the proceedings** (refusal to cooperate; parties' agreement: Art 382 of the Federal Code of Civil Procedure). Further, the number of arbitrators was not in the list of mandatory requirements for awards (art. 384), nor were the existence of instructions for appeal (Rechtsmittelbelehrung).

---

<sup>70</sup> Swiss Federal Supreme Court, Decision 5A\_877/2014 of 5 October 2015, ASA Bull. 4/2017, p. 941.

2. A request to set aside an award has to be written in a Swiss national language. In 4A\_596/2015<sup>71</sup> a party who had filed a request in another language was invited to cure this defect. It filed a German translation by email on the last day of the deadline but failed to include a certified electronic signature (a requirement for email filings). Consequently, the request was out of time.

3. 5A\_978/2015<sup>72</sup> concerns arbitration proceedings between a trade union and one of its leaders who had been demoted. The parties had waived their right to seek the annulment of the award. The Supreme Court recalled that **in domestic arbitrations no advance waiver** of the right to challenge award before the Supreme Court is possible.

4. A Belize company (“Company”) sued a Jordanian investment fund A.Z. Investment Fund (“Fund”) for payment of a contractual penalty due under a share purchase agreement in the event the Fund failed to sell the Company certain shares of a Jordanian bank. The case was decided by an arbitrator sitting under the LCIA Rules in Zurich. The Fund first objected to the arbitral tribunal’s jurisdiction but subsequently proceeded to the merits for the purpose of obtaining a decision on the validity of the agreement. The Fund claimed successfully that **the agreement was invalid as one of the signatures had been forged**. The Company sought to set aside the award before the Swiss Federal Supreme Court<sup>73</sup>. The Fund observed that the arbitration clause in the agreement contained a **waiver agreement<sup>74</sup> pursuant to article 192 PIL Act**. According to that provision, parties that are not domiciled in Switzerland can exclude their right to appeal to the Supreme Court. The Company replied that the agreement had been found to be invalid, which finding included the alleged exclusion agreement. Moreover it argued that the Fund could not rely on the waiver because it had initially objected to the validity of the agreement and only proceeded to the merits at some later stage. The Supreme Court stated that this argument was blatant bad faith (**venire contra factum proprium**) given that the Company

---

<sup>71</sup> Swiss Federal Supreme Court, Decision 4A\_596/2015 of 9 December 2015, ASA Bull. 4/2017, p. 950. An English translation is available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

<sup>72</sup> Swiss Federal Supreme Court, Decision 5A\_978/2015 of 17 February 2016, ASA Bull. 4/2017, p. 952.

<sup>73</sup> Swiss Federal Supreme Court, Decision 4A\_500/2015 of 18 January 2017, ASA Bull. 4/2017, p. 959. An English translation is available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).

See also David CUENDET, Michael DAPHINOFF, *Vers une renonciation tacite au recours contre une sentence arbitrale (art. 192 al. 1 LDIP) ? Résumé et commentaire de l’ATF 143 III 55*, ASA Bull. 4/2017, p. 860.

<sup>74</sup> The terms were « The decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded... »

had argued in the arbitration that the agreement was valid. If it argued that the agreement was valid, it accepted that the waiver was valid as well.

Separately, the arbitrator had **rectified the designation of the respondent's name** from A.Z. Investment Fund to Z. Investment Fund, finding that the former was merely an administrative entity of the latter. The Supreme Court confirmed that this change had no impact on its standing to sue.<sup>75</sup>

The judgment also confirmed two rules important for parties engaged in proceedings before the Swiss Federal Supreme Court. **No new documents are allowed** (in the present case the Company tried to introduce documents that had been created after the award was rendered). However, **new legal opinions are admissible**.<sup>76</sup>

5. Croatia applied to the Swiss Federal Supreme Court to annul an award that dismissed claims of bribery against its former prime minister, alleging an undisclosed conflict of interest by its own appointee to the arbitral tribunal. The Court found that Croatia had waived its right to seek the annulment of the award (4A\_53/2017<sup>77</sup>). Indeed, the arbitration clause comprised a waiver agreement (“Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.”). Croatia argued that even if an ordinary annulment request was excluded, it could still seek to revise the award. The Court indeed admits that awards that are tainted by fraud can be revised, even if the time limit for an ordinary annulment has expired. **It is controversial whether a waiver agreement also catches requests for revision**. The Court left the question open because in any event, a revision was not available.

6. In 2016, former UEFA president **Michel Platini** was banned by FIFA for 6 years from all football-related activities. A CAS panel reduced the sanction by two years. Michel Platini sought to annul the award before the Supreme Court. He argued that the award was arbitrary and offended public policy. Arbitrariness is a ground for annulment only in domestic arbitration. FIFA (which is based in Switzerland) argued that the arbitration was international and the arbitrariness ground not available. Indeed, Michel Platini was residing in France when he accepted the relevant arbitration agreement (in the FIFA statutes) which is **the relevant point in time for the**

---

<sup>75</sup> Para B.

<sup>76</sup> Para 2.2.

<sup>77</sup> Swiss Federal Supreme Court, Decision 4A\_53/2017 of 17 October 2017, ASA Bull. 4/2017, p. 970.

**determination of the international nature of the arbitration.** Even though he later relocated to Switzerland, the arbitration was international and Platini could in principle not rely on grounds for annulment available only against domestic awards. One of Platini's lawyers in the arbitration had annotated by hand a procedural order circulated by the arbitral tribunal at a hearing setting out the applicable legal framework. He had struck out the reference to chapter 12 of the PIL Act and replaced it with a reference to the domestic arbitration regulation (Code of Civil Procedure). The arbitral tribunal had accepted this annotation. Before the Supreme Court, Platini's lawyers took the view that this annotation was an agreement opting out of the PIL Act in favour of the Code of Civil Procedure, which is possible under article 176(2) PIL Act. The Supreme Court found that this was not a formally-valid opting-out agreement between the parties and that in principle the PIL Act applied. However, given that FIFA had not objected to the tribunal's acceptance of the annotation, the Court considered that it was bad faith (*venire contra factum proprium*) for FIFA to object to the application of the Civil Procedure Code at this stage.

Platini argued that the CAS had applied arbitrarily the FIFA Code of Ethics. FIFA replied that according to the case law of the Court **only the application of statutory law can be examined, not private rules such as the Code.** The Court did not follow FIFA's argument and did not exclude the possibility that the violation of procedural rules could be relevant. However, it found no such violation and did not have to make a final determination of the question. The principle *nulla poena sine lege*, assuming that it applied at all to FIFA sanctions, was not violated. It also considered CAS awards as potentially relevant case law, nuancing thereby earlier findings that arbitral awards do not have the status of case law.<sup>78</sup>

MATTHIAS SCHERER

---

<sup>78</sup> Swiss Federal Supreme Court, Decision 4A\_600/2016 of 29 June 2017, ASA Bull. 4/2017, p. 982. An English translation is available on [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com).