

Swiss Federal Tribunal Overturns Arbitration Award on Public Policy Grounds

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On April 13, 2010, the Swiss Federal Tribunal issued its decision in *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD*,¹ a dispute between two major European football clubs over compensation for a player who left his Portuguese club for a club in Madrid approximately three months into his contract. The court's decision annulled an arbitration award issued by the Court of Arbitration for Sport ("CAS")² in Lausanne, Switzerland on the grounds that the award violated procedural public policy under Article 190(2)(e) of the Private International Law Act ("PILA").³ Specifically, the Swiss court found that the award violated the principle of *res judicata*, insofar as it disregarded an earlier decision issued by the Commercial Court of the Canton of Zurich on June 21, 2004.⁴ This decision is notable as it marks the first time since the PILA took effect in 1989 that a court has overturned an arbitration award on public policy grounds.⁵

The Dispute

In 2000, three months after joining Sport Lisboa E Benfica – Futebol ("Benfica") from the Dutch football club AFC Ajax NV, Daniel da Cruz Carvalho ("Carvalho") terminated his four-season contract for cause, and joined Club Atlético de Madrid ("Atlético") two weeks later.⁶ On June 1, 2001 Benfica claimed compensation for training and promotion of Carvalho within the meaning of Article 14.1 of the 1997 FIFA Regulations for the Status and Transfer of Players, which was then in force.⁷ On April 26, 2002 the FIFA Special Committee awarded \$2.5 million to Benfica for the team's investments in Carvalho.⁸

Atlético challenged this award on an *ex parte* basis before the Commercial Court of the Canton of Zurich in June of 2002.⁹ On June 21, 2004, the Court voided the FIFA Special Committee decision based on a determination that the 1997 Transfer Regulation violated European and Swiss competition laws.¹⁰ Subsequently, FIFA entered into an agreement with Atlético to take the Zurich court's decision into consideration if faced with another claim by Benfica over the same matter.¹¹

Rather than challenge the Zurich court's decision, Benfica brought another claim before the FIFA Special Committee over its investment in Carvalho on October 21, 2004, seeking compensation in the amount of €3,165,928 (approximately \$3,983,050).¹² When the Special Committee rejected this claim on February 14, 2008, Benfica appealed the decision to the CAS on January 13, 2009.¹³

The CAS tribunal reversed the decision of the Special Committee and ordered Atlético to pay Benfica €400,000 for training and promotion. The Special Committee rejected Atlético's argument that the

Zurich Commercial Court decision had *res judicata* effect with regard to whether Benfica was entitled to compensation for its investment in Carvalho, reasoning that the Zurich Commercial Court's decision determined only "the legality of FIFA's regulations," but not the merits of Benfica's original claim.¹⁴ Further, the CAS tribunal ruled that because Benfica was not party to the Zurich proceedings, it was not bound by the Zurich Commercial Court's decision.

The Swiss Court Decision

Atlético appealed the award to the Swiss Federal Tribunal, and on April 13, 2010 that court issued its ruling. The Swiss Federal Tribunal¹⁵ disagreed with the Special Committee's analysis, and annulled its award on the grounds that the decision impermissibly ignored the principle of *res judicata*. The Swiss Federal Tribunal relied on Article 190(2)(e) of the PILA, which permits a court to set aside an arbitration award that is incompatible with public policy. The Court observed that public policy within the meaning of Article 190(2) consists of both procedural and substantive components,¹⁶ and observed that an arbitral tribunal breaches procedural public policy when its decision violates fundamental procedural principles, "the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by laws."¹⁷ The court found that the CAS tribunal's disregard of the "material legal force" of the decision of the Zurich Commercial Court constituted such a breach.¹⁸

To this end, the Swiss Federal Tribunal recognized that both proceedings necessarily adjudicated the legality of the FIFA Special Committee's decision as to Benfica's claim against Atlético for the training and promotion of Carvalho.¹⁹ Rather than merely "rescind" the obligation imposed by the Committee on Atlético, the Zurich court had voided that decision as resting on an invalid transfer regulation.²⁰ Thus, the CAS tribunal's subsequent award of €400,000 to Atlético ignored the earlier court decision, which definitively held any such compensation improper. The Swiss Federal Tribunal deemed irrelevant that the former judgment involved an "independent Swiss domestic procedure aiming to contest a decision rendered by a Swiss law association" under Article 75 of the Swiss Civil Code,²¹ rather than an arbitral proceeding.²² Nor did it matter that FIFA introduced arbitral review of its decisions after the Special Committee's original determination.²³ The bottom line was that the CAS tribunal "obtaining jurisdiction later could not examine anew an issue which had already been decided."²⁴

Conclusions

While this decision is the first by the Swiss Federal Tribunal to overturn an arbitration award based on public policy under Article 190(2)(e) of the PILA, its implications concerning the finality of arbitral determinations under Swiss law should not be overemphasized. The principle of *res judicata* is well-established as a part of Swiss public policy, as identified by the Supreme Court in Switzerland in *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*²⁵ And although it is unclear how the decision will be construed or applied by other courts in the future, the decision does not itself provide any indication that it establishes a "lower benchmark" for courts' exercise of substantive public policy to interfere with otherwise enforceable arbitration awards. As the PILA generally reflects a pro-enforcement national arbitration policy,²⁶ the Swiss Federal Tribunal's decision should be read conservatively to require a court to overturn an arbitration award only when rendered in disregard of an earlier adjudication of the same issue between the same parties, in accordance with the well-established principle of *res judicata*.



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- 1 Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD, Bundesgericht [BGer] [Federal Court] Apr. 13, 2010 (Switz.) [hereinafter Swiss Federal Tribunal Decision], available at <http://www.praetor.ch/docs/13%20avril%202010%204A%20490%202009.pdf> [hereinafter Club Atlético].
 - 2 Sport Lisboa E Benfica v. Club Atlético de Madrid SAD & FIFA, CAS 2009/A/1765, available at http://www.tas-cas.org/d2wfiles/document/4305/5048/0/AWARD%201765%20%20FINAL%20AWARD%202009-08-28_anon.pdf.
 - 3 Internationale Privatrecht [IPRG], Private International Law Act Dec. 18, 1987, SR 291, art. 190(2)(e) (Switz.). This Act is Switzerland's federal codification of private international law, which, in addition to governing issues of jurisdiction, recognition of judgments, and conflicts of law, "creat[ed] a new regime for international arbitrations taking place in Switzerland." Adam Samuel, The New Swiss Private International Law Act, 37 Int'l & Comp. L.Q. 681, 682, 689 (1988). In particular, Chapter 12 of the PILA governs arbitrations "if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties . . . was neither domiciled nor habitually resident in Switzerland." Internationale Privatrecht [IPRG], Private International Law Act Dec. 18, 1987, SR 291, art. 176(1) (Switz.).
 - 4 Swiss Federal Tribunal Decision, ¶ B.a.
 - 5 Tom Toulson, Swiss court breaks new ground on public policy, Global Arbitration Review, July 7, 2010, <http://www.globalarbitrationreview.com/news/article/28555/> [hereinafter Toulson].
 - 6 Swiss Federal Tribunal Decision, ¶ A.b.
 - 7 Swiss Federal Tribunal Decision, ¶ B.a.
 - 8 Id. The FIFA Special Committee is a judicial body authorized by the FIFA statutes to adjudicate disputes between members, clubs, players and other parties. FIFA Statutes, art. 59–60, available at http://www.fifa.com/mm/document/affederation/administration/01/09/75/14/fifa_statutes_072008_en.pdf.
 - 9 Id. Subsequent to the 2002 decision, FIFA amended its statutes to provide jurisdiction to the CAS, an independent arbitral authority, to resolve disputes between FIFA and its members. Thus, once a FIFA legal body renders a decision, either party to that decision can appeal to the CAS, which has sole jurisdiction to adjudicate unless a FIFA regulation specifies otherwise. FIFA Statutes, art. 62–64, available at http://www.fifa.com/mm/document/affederation/administration/01/09/75/14/fifa_statutes_072008_en.pdf.
 - 10 Id.
 - 11 Id.
 - 12 Swiss Federal Tribunal Decision, ¶ B.b.
 - 13 Swiss Federal Tribunal Decision, ¶ B.c.
 - 14 Id.

- 15 The Swiss Federal Tribunal, which is the Supreme Court in Switzerland, acts as an appellate court, reviewing cases decided by lower federal courts and cantonal (state) courts. Gregory M. Bovey, *The Swiss Legal System and Research*, Globalex, November 2006, <http://www.nyulawglobal.org/globalex/switzerland.htm>.
- 16 *Internationale Privatrecht [IPRG], Private International Law Act* Dec. 18, 1987, SR 291, art. 190(2)(e) (Switz.).
- 17 Swiss Federal Tribunal Decision, ¶ 2.1.
- 18 *Id.*
- 19 See Swiss Federal Tribunal Decision, ¶¶ 2.2.1, 2.2.2 (“In the two proceedings in front of the Zurich Commercial Court and in front of the CAS the legality of the decision of the FIFA Special Committee as to the Respondent’s claim against the Appellant as to the formation and promotion of [Carvalho] had to be adjudicated.”).
- 20 Swiss Federal Tribunal Decision, ¶ 2.2.2.
- 21 Article 75 of the Swiss Civil Code permits members of an association to challenge in court a decision of that association, which they believe violates the law. *Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code]* Dec. 10, 1907, SR 210, art. 75 (Switz.).
- 22 Swiss Federal Tribunal Decision, ¶ 2.2.2.
- 23 *Id.*
- 24 *Id.*
- 25 Toulson (citing *Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.*, Bundesgericht [BGer] [Federal Court] May 14, 2001 (Switz.)).
- 26 For instance, the PILA authorizes an arbitral tribunal to rule on its own jurisdiction and limits the grounds upon which to challenge an award. *Internationale Privatrecht [IPRG], Private International Law Act* Dec. 18, 1987, SR 291, art. 186(1), 190 (Switz.).