Around the World

Switzerland

SWITZERLAND: ARBITRATION IN SPORTS CASES

Discussion of Decision 4A _246/2011 (=138 III 29) dated November 7, 2011 by the Swiss Federal Supreme Court

Arbitral tribunals; Arbitration clauses; Choice of law; Enforcement; Foreign awards; Sports; Switzerland; Validity

Facts

In February 2003, a football club (Club) and a football agency (Agency) concluded an agreement regarding the costs of a transfer of a football player. The said agreement contained the clause "The competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent".

The parties ended up in disagreement on the financial consequences of the said transfer and also the transfers of other players. In September 2008, the Agency filed a claim with the FIFA Players' Status Committee, requesting that the Club be ordered to pay a certain six-figure sum to the Agency based upon the agreement concluded in February 2003. By letter of December 10, 2008, the FIFA Players' Status Committee declined jurisdiction in the matter at hand based on its procedural rules as the Agency was a corporation and not an individual. This decision was confirmed by FIFA on January 15, 2009 and remained unchallenged.

On February 25, 2009, the Agency requested the Zurich High Court to nominate an arbitrator. The Zurich High Court, on October 20, 2009, decided that there was sufficient evidence for the existence of an arbitral clause and nominated a sole arbitrator. The said sole arbitrator, however, also declined jurisdiction by decision of April 13, 2010. He stated that, while the parties had obviously agreed that an arbitral court specialised in sports law should be seized with the matter, there was no indication in the arbitral clause that a sole arbitrator should be competent to render a decision. The Agency appealed this decision to the Federal Supreme Court (FSC) which stayed the proceedings pending the decision discussed hereafter.

Parallel to appealing the sole arbitrator's decision to the FSC, the Agency re-filed its claim with the Court of Arbitration for Sports (CAS) on May 14, 2010. The Club immediately contested the competence of the CAS. The CAS, however, declared itself competent by interim decision dated March 17, 2011, limited to the part of the claim which was based on the February 2003 agreement. The Club consequently appealed this decision to the FSC.

Held

The FSC laid out the elements which are, pursuant to Swiss law, to be fulfilled by an arbitral clause in order to be valid, being: (a) the intent of the parties to submit their dispute to arbitration instead of to state court litigation; and (b) the designation of the dispute matter to be submitted to the arbitral tribunal. Any other elements, such as the seat of the arbitral tribunal, the rules regarding the composition of the tribunal, the designation of an arbitral organisation, the choice of the language and rules for the proceedings etc. are not required to be explicitly agreed upon in an arbitral clause for it to be valid. There is an exception in case one of the parties—recognisably to the other party—would not have concluded the agreement without explicitly determining one or more of these elements. In that case, (c) such elements are required to be agreed upon as well. Any elements additional to (a)–(c)

above having remained undetermined were to be construed in a way respecting the validity of the arbitral clause and reflecting the hypothetical intent of the parties.

The FSC confirmed that the arbitral clause contained in the February 2003 agreement fulfilled the minimal requirements (a) and (b) for the validity of the clause. Any other elements were to be construed. By agreeing to submit any disputes arising from the said agreement to a FIFA or UEFA Commission, the parties had clearly declared their intent to address a Swiss institution which was not a state court but well-familiarised with the dispute matter, offering a judicial panel of more than one arbitrator. There is no evidence that any of the parties might have considered an explicit designation of a specific arbitral court as conditio sine qua non for the arbitral clause (c) had they known that FIFA and UEFA (which was not addressed at all in the case at hand as it does not offer any potentially competent decision body) were not competent for a dispute between the parties. Therefore, the Agency acted in conformity with the arbitral clause contained in the February 2003 agreement by submitting its dispute with the Club to the CAS.

The FSC further discussed the Club's argument that the arbitral clause was void due to impossibility since both committees mentioned were not competent. However, it did not pursue this line of argumentation. It confirmed the CAS view pursuant to which not the entire arbitral clause was void but only the designation of FIFA or UEFA. The remainder of the clause was, pursuant to the FSC, correctly upheld by the CAS which was allowed to construe the hypothetical intent of the parties had they known in advance that a part of the arbitral clause was impossible to apply.

Discussion

This decision reflects Switzerland's general arbitration-friendliness. Even though it is not recommended to step onto the battlefield of pathological arbitration clauses, parties which cannot avoid doing so can trust in an arbitration-friendly attitude of the Swiss courts. The intent of the parties to avoid litigation before state courts is respected if it can be safely established. Clauses like "arbitration in Switzerland" or "jurisdiction: Zurich, no public courts" would be—even though they definitely are not recommended to be worded this way—expected to be upheld and construed as to the elements which were not determined within the clauses.

The decision discussed here differs slightly from "usual" disputes about pathological arbitration clauses as to the fact that the respective clause neither mentions the term "arbitration" nor explicitly excludes the jurisdiction of the state courts. Under the circumstances given, however, the decision seems correct. The reference to FIFA or UEFA allows the safe assumption that litigation before state courts was, although implicitly only, clearly excluded.

The Swiss Private International Law Act which contains the legal basis for international arbitration in Switzerland states that any arbitral clause is valid if it conforms either to the law chosen by the parties or to Swiss law. In the case at hand, none of the parties requested that the validity be reviewed based on any chosen law. None of the courts (CAS and FSC) discussed the validity under such law either.

The decision does not offer any information on which law was applicable. Neither does it state whether this law was applicable by an explicit choice of law clause. Therefore, the following comment does not necessarily concern the case at hand but is aimed to warn any parties to a dispute about a pathological arbitration clause about a possible trap. Even though Switzerland's arbitration-friendliness is to be welcomed generally, it might lead to problems if enforcement has to take place in another place of the world where arbitration is not as well recognised.

Almost 150 states are members to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the so-called New York Convention (NYC). Article V(I)(a) of the NYC states that "Recognition and enforcement of the award may be refused […] only if […] the said [arbitral] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." This clause can lead to the unsatisfactory situation in which there is a final Swiss arbitral award based on an arbitration clause which is valid under Swiss law, but that such final award cannot be enforced at the domicile of the losing party because the arbitral clause is considered invalid under the law chosen by the parties for the main agreement by the courts of the place of enforcement. Therefore, any party which is a party to a dispute about a potentially pathological arbitration clause is well-advised to familiarise itself with the requirements of an arbitral clause pursuant to the law chosen by the parties for the main agreement and the leading cases in the jurisdiction of the place of enforcement before even initiating arbitration in order to avoid any negative surprises in the enforcement stage.

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