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Swiss Federal Supreme Court sets aside CAS award for violation of the principle of procedural public policy

Georg von Segesser (von Segesser Law Offices) · Tuesday, August 17th, 2010

In a landmark decision of 13 April 2010 (4A_490/2009, published on 2 July 2010), the Swiss Federal Supreme Court confirmed that the principle of res judicata is part of procedural public policy, and it set aside a CAS award for violation of that principle. At first sight, the decision of the Federal Supreme Court seems to weaken the primacy of the arbitral tribunal to decide on its jurisdiction as stipulated under Article 186(1)bis of the Swiss Private International Law Act ("PILA"). A closer look on the decision however reveals that the case before the Federal Supreme Court was not only one concerning the principle of res judicata, but in particular one dealing with the erga omnes effect of a court decision annulling a resolution of an association (the FIFA).

The case originated in 2000, when a Portuguese soccer player terminated his contract with Sport Lisboa E Benfica (Benfica) and transferred to the soccer club Atlético de Madrid SAD (Atlético). Based on the then applicable FIFA Regulations for the Status and Transfer of Players (FIFA Rules), Benfica claimed in 2001 a compensation from Atlético. The FIFA Special Committee upheld the claim and awarded Benfica USD 2.5 million, which decision Atlético appealed to the Commercial Court of the Canton of Zurich (Commercial Court). On the basis that the FIFA Rules were void as violating antitrust laws, the Commercial Court annulled in a decision of 21 June 2004 the decision of the FIFA Special Committee. A few months later, Benfica again sought a decision from the FIFA Special Committee as to payment of a compensation by Atlético Madrid, but this time the FIFA rejected Benfica's claim. Benfica appealed the second FIFA decision to the CAS (i.e., not to the Commercial Court) as in the meantime the FIFA had introduced an arbitral review procedure for the decisions of the FIFA Special Committee. Notwithstanding the fact that Atlético opposed Benfica's appeal by, inter alia, relying on the res judicata effect of the earlier judgement of the Commercial Court, the CAS upheld the appeal in part and ordered Atlético to pay a compensation in the amount of EUR 400'000. Atlético filed a petition with the Federal Supreme Court claiming that the CAS award violated public policy as it disregarded the binding effect of the previous ruling of the Commercial Court.

The Federal Supreme Court followed Atlético's argumentation. By relying on previous case law, it confirmed that the principle of res judicata is part of procedural public policy and set aside the CAS award. The Supreme Court found that the proceedings in front of the Commercial Court did not involve an appeal against the first decision of the FIFA Special Committee, but the proceedings dealt with the annulment of a resolution of an association (the FIFA) under Article 75 of the Swiss Civil Code. Once a challenge of a resolution of an association is upheld and the resolution is annulled, this decision (as opposed to its rejection) has effect not only between the parties to the

proceedings (that is the FIFA and Atlético) but erga omnes, which consequently put an end to Benfica's claim for compensation on the ground of res judicata although Benfica was not a party to the proceedings before the Commercial Court. The fact that the FIFA subsequently introduced an arbitral review procedure for the decision of the FIFA Special Committee does not change the fact that the issue in front of the CAS had already been decided by the Commercial Court. In the same way as the Commercial Court would have been bound by its previous decision on the same issue, also the CAS obtaining jurisdiction for the second challenge could not examine anew an issue which had already been decided. The CAS award consequently disregarded the binding effect of the judgment of the Commercial Court.

Although this is not the first time that the Federal Supreme Court has held that the principle of res judicata is part of Swiss procedural public policy (see, e.g., the decision 4P.98/2005 of 10 November 2005, at consid. 5.1), this is the first time that the Federal Supreme Court has set aside an arbitral award on this basis. The Federal Supreme Court did so notwithstanding the fact that under Swiss law res judicata requires an identity of the parties in the previous and the subsequent proceedings which however was not the case in the proceedings before the Commercial Court and the CAS. Still, the decision should not be interpreted to open the door to the doctrine of "issue estoppel" known in the United States, under which, in certain circumstances, third parties may be precluded from re-litigating issues of fact and law that have been actually determined in the prior litigation. The Federal Supreme Court's decision has to be read in light of the singular issue of the erga omnes effect of the previous decision of the Commercial Court, a fact which seems has not been sufficiently stressed by the Supreme Court. Taking this particularity into consideration, it remains to be seen to what extent (if at all) this decision will have the effect of weakening the principle set out under Article 186(1)bis of the PILA.

Georg von Segesser / Patrick Rohn

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