

# Kluwer Arbitration Blog

## A primer on pathological arbitration clauses in Swiss law

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In a recent decision issued on 7 November 2011 on a request for annulment of a partial award on jurisdiction rendered by the Court of Arbitration for Sport (“TAS”), the Swiss Supreme Court recalled and applied its previous jurisprudence on the interpretation of pathological arbitration clauses (Case 4A\_246/2011).

The case arose out of a contract between a football club and an agent relating to the transfer of a player. The contract contained a dispute resolution clause which provided that “[t]he 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.” After a dispute arose between the parties, the agent initiated arbitral proceedings before the FIFA Players’ Status Committee, a body tasked with adjudicating disputes arising from transfers of professional football players. However, on the basis of its internal rules, the Committee declined jurisdiction on the grounds that the agent was a legal person and not a natural person. The agent therefore requested the Zurich High Court (Obergericht) to appoint an arbitrator, which it did. However, the sole arbitrator subsequently found that he did not have jurisdiction on the grounds that the parties had agreed to submit disputes to arbitration under the rules of a sports arbitral institution.

Finally, the agent initiated arbitration before the CAS. In a partial award issued on 17 March 2011, the CAS ruled that it had jurisdiction over the dispute. However, the football club appealed to the Swiss Supreme Court pursuant to Article 190(2)(b) of the Swiss Private International Law Act (“PILA”) to annul the partial award on the ground that the CAS had erroneously held that it had jurisdiction, one of only two grounds available to a party to challenge a partial award (Article 190(3) PILA).

The football club first disputed that the Parties had even agreed to exclude the jurisdiction of the State courts. However, the Supreme Court, interpreting the Parties intentions according to the principle of normative consensus (“Vertrauensprinzip”), found that this was not the case (para. 2.3.1). The Court noted that while the dispute resolution provision did not expressly mention arbitration, the use of the terms “competent instance” and “decide the dispute” could be understood in good faith to mean that any disputes would be decided by one of the two football bodies in a binding manner, to the exclusion of the State courts. According to the Court, the provision did not give rise to doubts which would warrant a restrictive interpretation of the Parties’ alleged intention

to exclude the jurisdiction of the State courts.

Of greater interest, however, is the manner in which the Court addressed the football club's arguments that the arbitration clause was defective to the degree that it was impossible to apply, or alternatively that it had been extinguished by the decision of the FIFA Commission not to accept jurisdiction.

The Court began by setting out the approach in Swiss law to pathological provisions in arbitration agreements, which it defined as provisions which are incomplete, unclear, or contradictory (para. 2.2.3). As the Court explained, as long as such provisions do not relate to essential elements of the arbitration agreement, such as the binding submission of disputes to an arbitral tribunal, they will not in and of themselves lead to its invalidity. Rather, Swiss law requires courts and tribunals to look for a solution, either through interpretation or if need be by means of completing the contract, which respects the fundamental will of the parties to submit their dispute to arbitration. In this sense, Swiss law imposes a broad approach to interpretation of pathological arbitration clauses, once the parties' intention to exclude State courts in favour of arbitration is established.

On this basis, the Court ruled that the fact that neither institution identified in the arbitration clause could have, according to their own rules, decided on a dispute between the parties, did not necessarily entail the nullity of the entire arbitration clause. According to the Court, the CAS had properly sought to determine whether the designation of the institutions was so essential to the arbitration agreement that the parties would not have agreed to submit their disputes to arbitration had they known that those institutions could not assert jurisdiction (para. 2.3.2). It further found that the CAS's determination that the parties would nevertheless have agreed to submit their disputes to arbitration was not based on abstract considerations but rather on concrete indications arising from the facts of the case. In particular, the CAS considered that the parties' designation of two alternative football associations in the arbitration clause indicated that they were not attached to one particular institution, and that, above all, they wanted to submit their dispute to an arbitral tribunal which was familiar with issues surrounding transfers of professional football players.

Having established that the institutions designated by the parties did not constitute essential conditions of their arbitration agreement, the Court turned to determining whether submitting the dispute specifically to the CAS was consistent with the Parties' intentions. In doing so, the Court sought to correct the partial nullity of the arbitration clause, to the extent possible, by means of filling in the missing elements. The test applied by the Court was to ask what the parties would hypothetically have agreed to had they been aware of the defects in their arbitration clause (para. 2.3.3). After a review of the facts, the Court concluded that the parties would have agreed to submit any disputes directly to the CAS. In reaching its decision, the Court was particularly influenced by the fact that, by designating FIFA and UEFA, both of which are based in Switzerland, the parties indicated their intention to submit their disputes to an arbitral tribunal with seat in Switzerland, and that they intended such disputes to be decided by a sports organisation which was familiar with the football transfer market. In this context, the Court took into consideration that decisions of the FIFA Players' Status Committee on transfers of players could in fact be appealed to the CAS.

In sum, the Supreme Court's decision in case 4A\_246/2011 is a good example of the broad and flexible pro-arbitration approach which has characterised the Court's jurisprudence on pathological arbitration clauses in cases in which the parties' intention to arbitrate is established. Despite being faced with an arbitration clause with clear references to two institutions which could not adjudicate

the parties' dispute, the Court did not find the clause to be invalid as a whole, but rather engaged in an exercise of filling in the missing elements in order to ensure that the fundamental intention of the parties to arbitrate their dispute was upheld. It is also noteworthy that in the first step of its analysis, namely establishing the intention of the parties to submit their dispute to arbitration, the Court did not consider the absence of the words "arbitration", "arbitral tribunal", "arbitrator", or similar terms in the dispute resolution clause (which it itself acknowledged in para 2.3.1), to be decisive.

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