

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central
and South America by *Aspen*
Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries
by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1010-9153
© 2010, Association Suisse de l'Arbitrage
(in co-operation with Kluwer Law International, The Netherlands)

This journal should be cited as ASA Bull. 2/2010

The ASA Bulletin is published four times per year.
Subscription prices for 2010 [Volume 28, Numbers 1 through 4] including postage
and handling: EUR230/USD307/GBP169 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.

For further information please contact our sales department
at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For advertisement rates please contact our marketing department
at +31 (0) 172 641525 (Marina Dordic) or at marketing@kluwerlaw.com.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval
system, or transmitted in any form or by any means, mechanical, photocopying,
recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner.
Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th
floor, New York, NY 10011, United States of America.
E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

Printed on acid-free paper

ASA BULLETIN

Founder/Chair of the Advisory Board: Professor Pierre LALIVE
Editor: Matthias SCHERER

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
e-mail: sales@kluwerlaw.com

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias Scherer, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).

'FIFA shall be the sole arbiter' – a valid arbitration clause under Swiss law

TINA WÜSTEMANN, MANUEL ARROYO*

I Introduction

In an international *ad hoc* arbitration, in which the authors represented Claimant,¹ a controversy arose as to whether a dispute resolution clause providing for FIFA as the competent adjudicator could still be invoked before an arbitral tribunal after FIFA expressly refused to intervene.

II Origin and Background of the Dispute

After Claimant, a UK match agent, had organized over 30 matches with the participation of Respondent's national football team over a decade, the parties decided to establish a new contractual basis for their cooperation and concluded an agreement in 2000 (hereinafter referred to as "the Agreement"). Pursuant to the Agreement, Respondent, a non-UK national football association, awarded to Claimant the exclusive right to organize football matches of Respondent's national team abroad. The Agreement contained the following dispute resolution clause:

"FIFA shall be the sole arbiter of any dispute arising from the non-observation by the parties of this [Agreement]."

Subsequently, the parties got into a disagreement over certain financial claims of Claimant arising from the organization of two football games, for which Respondent had committed itself directly to the foreign club/organizer. Moreover, Respondent had dishonored a commitment to another game to be organized by Claimant. In Claimant's view, Respondent thereby breached the terms of the Agreement.

Claimant referred the matter to FIFA, requiring FIFA to act as arbitrator. However, FIFA replied that it was not in a position to intervene in this matter. In its reasoning, FIFA held that it could only intervene if the dispute was between a national football federation and a FIFA licensed match

* Tina Wüstemann, Attorney-at-Law, LL.M., Partner, Bär & Karrer AG (Zurich), www.baerkarrer.ch, email: tina.wuestemann@baerkarrer.ch; Manuel Arroyo, Attorney-at-Law, Dr.iur., LL.M., Bär & Karrer AG (Zurich), www.baerkarrer.ch, email: manuel.arroyo@baerkarrer.ch. The Authors acted as counsel for the Claimant in the case being discussed in this article before the Zurich High Court and in the arbitration.

¹ For confidentiality reasons, the identity of the parties and the amount in dispute will remain undisclosed in this article. So will the date of issuance and case number of the below-mentioned England High Court decision.

agent. FIFA further stated that according to Article 4(2) of the newly adopted FIFA Match Agent's Regulations, only natural persons could be licensed as match agents, while Claimant was a legal entity.²

Prior to instigating formal proceedings before the English High Court of Justice, Claimant invited Respondent, amicably, to appoint an arbitral tribunal. In particular, Claimant proposed three names of potential arbitrators. In its reply, Respondent made a settlement offer for a fraction of the amount demanded by Claimant, while not commenting on Claimant's proposal to appoint an arbitral tribunal.

III Procedural History

Following advice from English counsel, Claimant brought a motion for the appointment of an arbitral tribunal before the English High Court of Justice in London. Respondent, on its part, refused to take part in the proceedings. In its judgment, the English High Court of Justice declined jurisdiction to appoint an arbitrator, concluding that – in light of the dispute resolution clause in question – it appeared that the parties had contemplated that arbitration should take place in Switzerland, and not in England.³

Consequently, Claimant retained Swiss counsel and requested the High Court of the Canton of Zurich to appoint an arbitral tribunal based on Article 179(3) of the Swiss Private International Law Statute (PILS). The Zurich High Court, on a *prima facie* basis, confirmed that the clause in dispute constituted a valid arbitration agreement in terms of Article 178 PILS.⁴ This was also the view of the arbitral tribunal which was constituted following the Zurich High Court decision.⁵

² At the time of conclusion of the Agreement, Claimant as a legal entity was a duly licensed FIFA match agent, but this was no longer the case under the amended regulation.

³ In the judgment rendered in 2007, the English High Court of Justice held that the jurisdiction of the High Court of Justice in relation to the appointment of an arbitrator under Article 18 of the English Arbitration Act 1996 hinges on two (alternative) conditions: (i) that either the seat of the arbitral tribunal is in England, Wales or Northern Ireland; or (ii) where no seat of the arbitration has been designated, that there be a connection with England and Wales or Northern Ireland. With regard to the first criteria, the judgment noted that the clause at issue did not refer to a seat of arbitration, but only referred to "FIFA", which had its seat in Zurich, Switzerland. The Court, despite declining jurisdiction as appointing authority for lack of a sufficient connection with England, Wales or Northern Ireland (under Article 18 English Arbitration Act), found that the dispute resolution clause in question, on the face of it, constituted an agreement to arbitrate, and noted that if arbitration was to take place, it should be in Switzerland.

⁴ See below at V.

⁵ See below at VI.

IV Summary of the Parties' Positions

A The agreement to arbitrate

Preliminary remarks

The main bone of contention throughout the dispute was whether the parties intended to submit disputes in relation to the Agreement to arbitration. Respondent in essence argued that the parties intended to designate FIFA, and only FIFA, as the competent authority to resolve any dispute, while Claimant rejected this proposition.

Claimant first made reference to the prerequisites for arbitration agreements under Swiss law in order to undermine Respondent's attempt to cast doubt on the existence of an agreement to arbitrate. Pursuant to the case law of the Swiss Federal Supreme Court, two conditions must be met as regards the validity of an arbitration agreement: (i) the arbitration agreement must manifest the intention of the parties to refer a dispute to arbitration, to the exclusion of state court jurisdiction;⁶ (ii) the agreement must be sufficiently specific to determine which current or future disputes shall fall within the scope of the arbitration agreement.⁷ These two prerequisites are deemed to be the only *essentialia negotii* of an arbitration agreement under Article 178 PILS.⁸ The second condition being obviously met in the present case,⁹ it all came down to establishing the parties' intention to provide for arbitration, i.e. private adjudication,¹⁰ to the exclusion of state court litigation.

Further, Claimant underscored that Swiss law favors the validity of arbitration clauses and the possibility to appoint an arbitral tribunal – especially in connection with unclear or pathological arbitration clauses.¹¹ Therefore, the refusal of FIFA to act as "arbiter" in the present dispute did

not mean that the dispute resolution clause of the Agreement had become invalid or inoperable. The contrary was the case, Claimant submitted, given that under Swiss law an arbitration clause containing a partially impossible content (here FIFA acting as arbitrator) does not render an arbitration clause invalid in its entirety.¹² According to the authorities, the impossible or inoperable part must either (i) be substituted in a way to ensure the validity of the clause as a whole, or (ii) be deleted without replacement, or (iii) be replaced by a complementary provision.¹³

The term "sole arbiter"

In both the Zurich High Court proceedings and the subsequent arbitration, Respondent maintained that the parties had agreed on conciliation, not arbitration. In support of this proposition, Respondent argued that the term 'arbiter' meant 'conciliator', and not 'arbitrator'. Claimant in turn countered that Respondent's proposition found no support in the language of the clause in dispute. Moreover, Claimant asserted that such translation of the term 'arbiter' would not make sense, for the parties had agreed on arbitration in several agreements entered into before and after the Agreement at issue.

In summary, Claimant referred to various recognized dictionaries¹⁴ to demonstrate that the term 'arbiter' meant arbitrator in legal English. Claimant also invoked the relevant Zurich¹⁵ and Federal Supreme Court¹⁶

⁶ Cf. Supreme Court decision [BGE/ATF] 130 III 66 cons. 3.1.

⁷ Cf. Supreme Court decision [BGE/ATF] 130 III 66 cons. 3.1.

⁸ WERNER WENGER, *International Arbitration in Switzerland*, S. Berti et al. [eds.], Basel/Geneva, 2000, N 28 at Art. 178 PILS. This was also the position of the Zurich High Court (cf. para. 2.5, p. 19: "[...] notwendiger Inhalt einer Schiedsabrede ist allein, dass die Parteien ihren Willen zum Ausdruck bringen, eine oder mehrere Rechtsstreitigkeiten durch ein Schiedsgericht beurteilen zu lassen.>").

⁹ As mentioned, the relevant dispute resolution clause referred to "any dispute arising from the non-observation by the parties [...]."

¹⁰ Cf. cons. 3.1 of Supreme Court decision [BGE/ATF] 130 III 66: "private Jurisdiktion".

¹¹ Claimant, in this context, stressed that, provided it is clear that the parties have submitted a dispute to arbitration, the case law of the Swiss Federal Supreme Court commanded that an arbitration clause be applied, even if it is subject to interpretation or if it is pathological (Supreme Court decision [BGE/ATF] 130 III 66 cons. 3.1 and 3.2; BGE/ATF 110 Ia 59 cons. 4), which approach is approved by Swiss commentators (cf., e.g., BERNHARD BERGER/Franz KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, N 424 at p.145; WERNER WENGER/CHRISTOPH MÜLLER, *Basler Kommentar IPRG*, Honsell/Vogt/Schnyder/Berti (eds.), Basel 2007, N 56 at Art. 178 PILS).

¹² Article 20(2) Swiss Code of Obligations, which so provides for contracts in general, applies to arbitration agreements by analogy (Supreme Court decision [BGE/ATF] 130 II 66 cons. 3.3.3).

¹³ Cf. WENGER/MÜLLER, *op.cit.*, N 54 et seqq. at Art. 178 PILS, which approach corresponds to the established Swiss Federal Supreme Court case law: in similar terms Supreme Court decision [BGE/ATF] 130 III 66 cons. 3.1, 3.2, 3.3 [esp. 3.3.3, with reference to BGE/ATF 110 Ia 59]; cf. also BERGER/KELLERHALS, *op.cit.*, N 552-553 at pp. 191-192, who favor the *favor negotii* (i.e. *favor validitatis*) interpretation through an analogous application of Art. 20(2) Swiss Code of Obligations to arbitration agreements in case of partial invalidity, as applied by the Supreme Court since its 1984 decision BGE/ATF 110 Ia 59 cons. 3a.

¹⁴ Reference was, inter alia, made to the following dictionaries: (i) *Collins English Dictionary*, 4th ed., 1998, p. 76: "1 a person empowered to judge in a dispute; referee; arbitrator. 2 a person having complete control of something. [15th century: from Latin, of obscure origin]"; (ii) *The New Webster Encyclopedic Dictionary of the English Language*, 1980, p. 43: "[Latin, an arbiter, umpire, judge.] A person appointed or chosen by parties in controversy to decide their differences; one who judges and determines without control; one whose power of deciding and governing is not limited; an arbitrator."; (iii) *Dictionary of Commercial, Financial and Legal Terms*, R. Herbst/R. Ammann, 5th ed., 1998, p. 61, which translates the English word 'arbiter' into German and French as follows: "Unparteiischer; Schiedsrichter / arbitre; arbitre-juge."; (iv) *Wörterbuch der Rechts- und Wirtschaftssprache*, Romain/Bader/Byrd, Teil 1, Englisch-Deutsch, 5th ed., Munich 2000: "arbiter: Schiedsrichter, Schiedsgutachter"; (v) *Langenscheidts Handwörterbuch Englisch*, Teil I, Englisch-Deutsch, 1996: "arbiter [...] s. 1. Schiedsrichter m; 2. fig. Richter m; 3. fig. Herr m, Gebieter m [...]".

¹⁵ Cf. Zurich Appellate Court decision ("Entscheid der Appellationskammer des Obergerichtes des Kantons Zürich") of 24 September 1887, reproduced in "Schweizer Blätter für Handelsrechtliche Entscheidungen", Volume VI., No. 19 (15 October 1887), pp. 289 et seqq., cons. 6 at p. 294: "Der hier erörterte Unterschied zwischen den verschiedenen Arten der schiedsrichterlichen Tätigkeit war schon dem römischen Rechte nicht unbekannt. Das heutige Recht hat diesen Unterschied noch

case law, according to which 'arbiter' in its original Latin meaning stands for arbitrator (*Schiedsrichter*). As a result, by utilizing the term 'arbiter', the parties meant just that, i.e. arbitrator, and thereby reached a *factual consensus* as to referring any prospective disputes to arbitration – to the exclusion of both state court litigation and conciliation. But even if the parties had not actually agreed on having their dispute referred to arbitration in terms of reaching a *factual consensus* ("faktischer Konsens"), an interpretation based on the principle of good faith ("Vertrauensprinzip") would lead to the conclusion that the parties agreed on arbitration as dispute resolution method ("normativer Konsens"), because a reasonable third party in the situation of Respondent could and should have understood the term 'arbiter' as meaning 'arbitrator', and not 'conciliator'. Indeed, pursuant to the established practice of the Swiss Federal Supreme Court, where a factual consensus cannot be established, the parties' declarations of intent must be construed according to the principle of good faith, i.e. based on their wording, the context and all circumstances in the way that they could and had to be understood in good faith by a reasonable third party.¹⁷

Regarding the *wording* as an element of interpretation, the Swiss Federal Supreme Court has repeatedly held that there is no reason to depart from the literal meaning of the text adopted by the parties where there is no serious ground to believe that it does not reflect their intention.¹⁸

schärfer ausgebildet. Während nach den modernen Gesetzgebungen, auch nach dem zürcherischen Recht, allerdings im Gegensatz zum römischen Recht, der Entscheid des eigentlichen Schiedsrichters, welcher einen wirklichen Rechtsstreit entscheidet (arbiter) einem rechtskräftigen Urteil gleichsteht und mit den gegen ein solches zulässigen Rechtsmittel angefochten werden kann, kommt dem Entscheide eines Dritten, welcher nur beauftragt wird, irgend eine für einen Rechtsstreit erhebliche Tatsache festzustellen (z.B. den Preis einer Ware, einen entstandenen Schaden oder einzelne Faktoren desselben) und dadurch erst eine taugliche Grundlage für den Rechtsstreit und ein allfälliges gerichtliches Verfahren zu schaffen (arbitrator), solche Wirkung niemals zu." [emphasis added]

¹⁶ Cf. Supreme Court decision [BGE/ATF] 7 586 of 10 September 1881, cons. 10 at p. 607: „Wenn nun aber demgemäss feststeht, dass den Schiedsrichtern durch Art. 4 des Vertrages vom 5. Mai 1879 lediglich die Vornahme einer Preisbestimmung oder Taxation, über welche die Parteien sich nicht verständigen konnten, übertragen ist, so muss die Frage aufgeworfen werden, ob überhaupt in der angeführten Vertragsbestimmung ein eigentlicher Schiedsvertrag liege, oder ob derselbe nicht vielmehr lediglich als eine Vereinbarung, dass die Bestimmung des fraglichen Preises der Festsetzung durch ein arbitrium boni viri überlassen werde, zu betrachten sei, mit anderen Worten, ob derselbe sich als Vertrag über die *Einsetzung von Schiedsrichtern (arbitri) oder von blossen Schatzungsmännern (arbitratores)* qualifiziere.“ [emphasis added]. This word usage was reaffirmed in Supreme Court decision (BGE/ATF) 26 II 758 of 30 November 1900, cons. 2 at p. 765.

¹⁷ Cf. Supreme Court decision 4C.72/2007 of 24 April 2007, cons. 2.2; Supreme Court decision [BGE/ATF] 132 III 626, cons. 3.1; and Supreme Court decision [BGE/ATF] 133 III 61, cons. 2.2.1.

¹⁸ Cf. Supreme Court decision [BGE/ATF] 133 III 61, cons. 2.2.1: « Il n'y a cependant pas lieu de s'écarter du sens littéral du texte adopté par les cocontractants lorsqu'il n'existe aucune raison sérieuse de penser qu'il ne correspond pas à leur volonté. »; concurring Supreme Court decision

If a reasonable third party (objectively) would and could have understood 'arbiter' as meaning 'arbitrator', the Arbitral Tribunal would thus have to find jurisdiction even in the event it concluded that no factual consensus was reached between the parties. Claimant stressed that under Supreme Court case law this conclusion could be held against Respondent even if it were established that Respondent actually understood 'arbiter' as not meaning 'arbitrator'.¹⁹

The further element of interpretation of the *concomitant circumstances*, which include the parties' conduct prior to and after the conclusion of the disputed agreement,²⁰ was additionally invoked by Claimant to corroborate the foregoing.

B The conduct of the parties as an additional means of corroboration

History of the Agreement and its dispute resolution clause

As regards the genesis of both the Agreement and the dispute resolution clause, it was not disputed between the parties that the first draft of the Agreement, much like the later drafts and the final version, contained the same wording of the dispute resolution clause at issue. As a result, this clause was not discussed between Claimant and Respondent when negotiating and signing the Agreement.

The parties agreed on arbitration in *earlier* contracts

As stated above, when determining the intentions of the parties to a contract, the wording of the disputed clause as well as the context and all circumstances, including the parties' conduct prior to concluding the contract, must be taken into account under Swiss law. Significantly, the parties had agreed on arbitration already in contracts preceding the Agreement. In summer 1999, i.e. less than a year *prior* to the execution of the Agreement, Claimant brokered an invitation by Respondent addressed to a national football team in

[BGE/ATF] 130 III 417, cons. 3.2; and Supreme Court decision [BGE/ATF] 129 III 118, cons. 2.5).

¹⁹ Supreme Court decision [BGE/ATF] 133 III 61, cons. 2.2.1: « Le principe de la confiance permet d'imputer à une partie le sens objectif de sa déclaration ou de son comportement, même si celui-ci ne correspond pas à la volonté intime de l'intéressée. »; concurring Supreme Court decision [BGE/ATF] 130 III 417, cons. 3.2. For the sake of completeness, it should be noted that an arbitration agreement, as any other contractual agreement, is to be construed pursuant to the general rules of contract interpretation under Swiss law (cf. Supreme Court decision [BGE/ATF] 132 III 626, cons. 3.2; Supreme Court decision 4A_452/2007 of 29 February 2008, cons. 2.3).

²⁰ Cf. Supreme Court decision [BGE/ATF] 132 III 626, cons. 3.1 *in fine*.

view of a match on Respondent's territory. For that purpose, the parties entered into an agreement which included the following wording:

"Article 7. Arbitration

Any dispute or interpretation regarding a football matter shall be referred to FIFA, whose decision shall be final as sole arbiter on such matters."

Claimant emphasized that the mentioned clause had been proposed by Respondent, and Respondent had expressly proposed that the FIFA decision should be final. Conversely, Claimant further argued, in conciliation proceedings the parties may at any time bring the proceedings to an end by simply abandoning them, without having to fear any negative consequences, which is definitely not what the parties intended to provide for in the dispute resolution clause of the Agreement. In fact, the possibility of abandoning an ongoing conciliation (without having to fear any negative consequences) is one of the characteristics which distinguishes conciliation from both state court litigation and arbitration.²¹ In conciliation, *"a solution is only proposed to the parties for their adoption, but cannot be imposed on them"* so that conciliation and mediation are *"clearly distinguishable from arbitration by the absence of a binding solution"*.²² In Claimant's view, it followed that the dispute resolution method envisaged by the parties for any prospective disputes was undoubtedly not a conciliation process.

Moreover, the above-mentioned 1999 agreement was signed by the General Secretary of Respondent, i.e. the same person who signed the Agreement. The 1999 agreement unequivocally used the caption 'Arbitration' for its dispute resolution clause. This made it plain that the parties undoubtedly intended to refer any dispute to and agreed on arbitration, Claimant submitted.

The parties agreed on arbitration in later contracts

The parties also agreed on referring prospective disputes to arbitration in contracts that were executed after the Agreement was concluded in 2000.

²¹ Cf. GABRIELLE KAUFMANN-KOHLER/ANTONIO RIGOZZI, *Arbitrage International – Droit et pratique à la lumière de la LDIP*, Bern 2006, pp. 5-6, N 26: « C'est le caractère non-contraignant du processus – une partie a le droit de refuser la transaction et peut même quitter la médiation/conciliation en cours de route – qui distingue ces méthodes du procès étatique ou de l'arbitrage. Ceux-là sont au contraire contraignants – une partie ne peut pas s'y soustraire – et aboutissent à une décision tranchant le litige. On dit que le médiateur/conciliateur propose et que le juge/arbitre impose. »; concurring DANIEL GIRSBERGER/NATHALIE VOSER, *International Arbitration in Switzerland*, Zurich 2008, p. 10).

²² JEAN-FRANÇOIS POUDRET/SEBASTIEN BESSON, *Comparative Law of International Arbitration*, 2nd ed., Zurich 2007, N 13, first and last paragraph at p. 11 and 13 respectively; concurring: JULIAN D.M. LEW/LOUKAS A. MISTELIS/STEFAN M. KRÖLL, *Comparative International Commercial Arbitration*, The Hague/London/New York 2003, N 1-45; GIRSBERGER/VOSER, *op.cit.*, p. 10.

Under Swiss law, the conduct of the parties *after* the disputed agreement was concluded may be taken into account to establish the real intentions of the parties, while it is irrelevant in the framework of the good faith interpretation.²³ In the case at hand, various supplemental agreements were concluded in view of certain matches within the framework of the Agreement itself. For purposes of illustration, Claimant put in three agreements concerning a total of four matches of Respondent's national football team against other national teams, all of which fell within the broader scope of the Agreement. Importantly, in their last provision, at an easily visible place and immediately before the signature of Respondent's General Secretary, those agreements provided for the following dispute resolution method:

"F.I.F.A. shall be requested as the sole arbitrator of any disputes arising from the non-observations by the Parties of this Agreement."

All those clauses utilized the term 'sole arbitrator' to exclude the jurisdiction of the state courts, and they were all signed on behalf of Respondent by one and the same person, i.e. its General Secretary. Therefore, it seemed that the parties expressed for their contractual relationships in general and for the Agreement in particular – although under varying designations such as 'arbiter', 'arbitrator' or 'arbitration' – the intent to designate FIFA as arbitrator. In other words, these were two parties that invariably preferred arbitration to state court litigation as a matter of principle, Claimant stressed.

Further arguments

No requirement to hold a hearing under Swiss law

Respondent further contended that Article 5 of the FIFA Procedural Rules for the Players' Status Committee, which provides that the proceedings are conducted solely in writing, demonstrated that the procedure under these Rules was *"not in any way akin to arbitration proceedings"*. In particular, Respondent asserted that proceedings conducted only in writing *"do not fulfil the minimal standards for arbitration proceedings to be held between two parties, in particular the right to be heard in contradictory proceedings, as guaranteed by Article 182 para. 3 PILS. Arbitration proceedings are characterized by guaranteeing these rights in order to put them on the same level as proceedings before an ordinary court."*

²³ Cf. Supreme Court decision [BGE/ATF] 132 III 626, cons. 3.1: „Nachträgliches Parteiverhalten ist bei der Auslegung nach dem Vertrauensprinzip nicht von Bedeutung; es kann allenfalls auf einen tatsächlichen Willen der Parteien schliessen lassen.“; concurring: Supreme Court decision [BGE/ATF] 129 III 675, cons. 2.3; in same terms WENGER/MÜLLER, *op.cit.*, N 55 in fine at Art. 178 PILS.

Claimant countered that Respondent did not cite any authorities in support of its proposition, and that there is no requirement under Swiss law to have a hearing in which oral argument and witness or expert testimonies are presented – neither in arbitration nor court proceedings. Under Supreme Court case law, the parties' right to be heard is limited to presenting their respective case *in writing* and does *not* accord them the *right to be heard orally or present witness testimony*. Contrary to Respondent's contentions, it is thus not necessary under Swiss law that an oral hearing be held or witnesses be heard in arbitration proceedings.²⁴

Accordingly, the Swiss Rules of International Arbitration, which can be taken as reflecting Swiss best practice standards,²⁵ expressly provide for so-called documents-only proceedings, and the arbitrators may decide that such proceedings be conducted even where one of the parties explicitly requested a hearing.²⁶

No necessity to utilize the terms "arbitration" or "final"

Respondent also asserted that the supplemental agreements concerning four football matches falling within the scope of the Agreement did "*not have any caption such as 'arbitration'. Nor do they contain the word 'final'.*" Claimant retorted that under Swiss Supreme Court case law there is neither an obligation to utilize the caption '*arbitration*' nor the word '*final*' in order for an arbitration agreement to be valid in terms of Article 178 PILS.²⁷ Moreover, the Swiss Rules of International Arbitration do not contain the

word '*final*' in the model clause. Nor do the Swiss (or the ICC) Rules demand that the caption '*arbitration*' be applied for there to be a valid arbitration clause, Claimant argued.

Claimant disputed the existence of a "*typical wording*" for arbitral clauses given that the freedom of contract types ("*vertragliche Typenfreiheit*") applies to arbitration agreements as well. The alleged "*typical wording*" could therefore have no bearing at all on the contractual relationship between the parties or on the interpretation of the arbitration clause at issue, especially as to the question whether the parties intended to arbitrate their disputes under the Agreement. In addition, the arbitration clause under scrutiny did include the word '*arbitrer*' so that the clause – even if one were to follow Respondent's proposition on the allegedly typical wording – did, indeed, contain a term which is typically to be found in arbitration clauses.

Claimant further contested that the hierarchy of agreements be decisive regarding the question as to whether the parties agreed to arbitrate their disputes. Later contracts constitute a conduct of the parties, which according to the relevant Swiss Supreme Court practice may be taken into account as a means to establish the factual intentions of the parties, without there being any rule of interpretation establishing that subsequent agreements have no bearing on construing a hierarchically higher, previous agreement.²⁸

Nonviability of bringing proceedings before Respondent's state courts

In light of the concluded arbitration agreement in conjunction with Art. II(3) of the New York Convention of 1958, Claimant was not in a position to initiate litigation proceedings before the state courts at the seat of Respondent. Moreover, the parties clearly intended to avoid that either party would have to sue (or could be sued) before the state courts of the other party's place of incorporation. For this reason, the jurisdiction of the state courts to resolve any disputes was certainly not what the parties had contemplated and intended at the time of concluding the Agreement. On the contrary, the various arbitration clauses included in the parties' contracts demonstrated that the parties intended to exclude the jurisdiction of any state court. Had they intended to provide for state court litigation, as argued by Respondent, they could have used a forum selection clause. The whole purpose of agreeing on an alternative dispute resolution method was to avoid that either party may sue the other before its own home state courts. Had the

²⁴ Cf. Supreme Court decision [BGE/ATF] 134 I 140 cons. 5.3: „Indessen räumt Art. 29 Abs. 2 BV – entgegen der Auffassung des Beschwerdeführers – keinen Anspruch auf eine mündliche Anhörung ein.“; BGE/ATF 130 II 425 cons. 2.1: « Le droit d'être entendu découlant de l'art. 29 al. 2 Cst. ne comprend pas le droit d'être entendu oralement [...], ni celui d'obtenir l'audition de témoins. » The right to be heard in terms of Art. 182(3) PILS corresponds to the constitutional right provided for at Art. 29(2) Swiss Constitution (cf. BGE/ATF 4A_2/2007 of 28 March 2007, cons. 3.1: "Der Anspruch auf rechtliches Gehör entspricht – mit Ausnahme des Anspruchs auf Begründung – dem in Art. 29 Abs. 2 BV gewährleisteten Verfassungsrecht."; concurring BGE/ATF 130 III 35 cons. 5; BGE/ATF 127 III 576 cons. 2c).

²⁵ Cf. MANUEL ARROYO, in: T. Sutter-Somm et al. (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, Zurich 2010, N 24 at Art. 381 ZPO.

²⁶ See Art. 15 para. 2 Swiss Rules; TINA WÜSTEMANN/CESARE JERMINI, in Zuberbühler/Müller/Habegger (ed.), *Swiss Rules of International Arbitration, Commentary*, Zurich, 2005, N. 12-13 at Art. 15. In the framework of expedited proceedings, the Swiss Rules further grant the parties the (generally given) right to provide for documents-only proceedings (cf. Art. 42 para. 1 lett. c Swiss Rules; FABRIZIO LA SPADA, in Zuberbühler/Müller/Habegger (ed.), *Swiss Rules of International Arbitration, Commentary*, Zurich, 2005, N. 11 at Art. 42).

²⁷ See above at IV.A.1; cf. also Swiss Supreme Court decision [BGE/ATF] 130 III 66 cons. 3.1, with references to the views of concurring legal commentators; cf. in particular WERNER WENGER, *International Arbitration in Switzerland*, S. Berti et al. [eds.], Basel/Geneva, 2000, N 30 at Art. 178 PILS: "It is not necessary to explicitly exclude the jurisdiction of the state courts or to submit explicitly to the award as being final, binding and enforceable."

²⁸ Cf. Swiss Supreme Court decision [BGE/ATF] 132 III 626, cons. 3.1; concurring BGE/ATF 129 III 675, cons. 2.3.

parties anticipated that FIFA would decline to act, they would certainly not have wished to refer any potential dispute to the state courts.

V The Zurich High Court, on a *prima facie* basis, confirmed that the clause in dispute constituted an arbitration agreement

As stated above, Claimant initiated appointment proceedings before the High Court of the Canton of Zurich. To begin with, the Court set a peremptory deadline to Respondent to raise any objections as to the constitution of the arbitral tribunal, failing which the Court would assume that Respondent acknowledged the Court's duty to appoint the arbitral tribunal. Besides, a peremptory deadline was set to Respondent to designate a co-arbitrator, failing which the Court would appoint an arbitrator of its own choice. This time, and probably due to the two peremptory deadlines set by the Court as well as the negative consequences deriving from non-participation, Respondent decided to take part in the proceedings. It is only at that point that Respondent objected to the dispute being arbitrated, while it had previously never contested nor questioned that the dispute was to be resolved through arbitration.²⁹

In late 2008, the High Court – after a full-fledged and double exchange of briefs – allowed Claimant's application for the appointment of the Arbitral Tribunal, thereby dismissing Respondent's objection in a thoroughly reasoned 24-page decision. Above all, the Court found that – contrary to Respondent's allegations – it could not be said, on a *prima facie* basis, that no arbitration agreement had been concluded. Rather, it had to be assumed that the parties entered into an arbitration agreement in terms of Article 178 PILS,³⁰ and that by signing the Agreement they had to count on Zurich being the seat of arbitration given that the seat of FIFA is Zurich.³¹

The Court held that the agreed-upon duty of the parties to the Agreement to submit their disputes to FIFA had retroactively become impossible due to FIFA's refusal to act as arbitrator. Nonetheless, the Court stressed, Claimant was not responsible for this retroactive inoperability of the agreed-upon dispute resolution clause. As a consequence, the mutual contractual duty of both parties

²⁹ For a summary of the main reasoning and findings of the High Court, see *Blätter für Zürcherische Rechtsprechung* (ZR), vol. 109, April/2010, No. 17, Zurich, pp. 77-80.

³⁰ Cf. High Court decision of 4 November 2008, reproduced in *Blätter für Zürcherische Rechtsprechung* (ZR), vol. 109, April/2010, No. 17, Zurich, pp. 77-79, cons. 2.

³¹ Cf. High Court decision of 4 November 2008, reproduced in *Blätter für Zürcherische Rechtsprechung* (ZR), vol. 109, April/2010, No. 17, Zurich, pp. 79-80, cons. 3.

to have FIFA decide the dispute as *sole arbiter* had lapsed, the Court found. Yet this did not mean that it was the intention of the parties to have only FIFA act as the instance to settle the dispute. Nor did this mean that the agreement had become void. In the Court's view, it was for Respondent to prove that this legal consequence had to apply, and it had failed to do so.³²

VI The Arbitral Tribunal's Interim Award

The Arbitral Tribunal, composed of Sébastien Besson (chairman), Gino B. Koenig and Antonio Rigozzi, found jurisdiction and thus rejected Respondent's lack of jurisdiction plea after extensive pleadings and witness examinations.

In the Tribunal's view, the key issues to be decided were (i) whether the parties intended to submit their disputes to arbitration and, if so, (ii) whether the designation of FIFA was an essential element of their intention to have their disputes resolved through arbitration.

In summary, the Arbitral Tribunal concluded that the term "*arbiter*" as a rule meant "*arbitrator*", and not "*conciliator*". In addition, the Tribunal stated, the adjective "*sole*" was typically to be found in arbitration clauses drafted in English. As a result, according to the Arbitral Tribunal, the parties in utilizing "*sole arbiter*" intended to oust state court jurisdiction.

Further, the Tribunal referred to the contracts preceding and following the Agreement and went on to hold that the circumstances surrounding the conclusion of the Agreement confirmed the literal interpretation of the dispute resolution clause in the Agreement so that the parties' intention, indeed, was to arbitrate their disputes.

The Tribunal subsequently delved into assessing whether FIFA was a subjectively essential element for the parties, rendering the arbitration clause invalid due to FIFA's non-intervention. Reference was first made to the views of Swiss legal scholars and case law pursuant to which the identity of the arbitrator generally is not considered an essential element of an arbitration agreement. On the contrary, under Swiss law, the parties are presumed to choose arbitration as such and not because of the identity of the arbitrator, the Tribunal underscored.³³ At the witness hearing, the Tribunal held, it had become clear that the parties made reference to FIFA in view of the

³² Cf. High Court decision of 4 November 2008, reproduced in *Blätter für Zürcherische Rechtsprechung* (ZR), vol. 109, April/2010, No. 17, Zurich, pp. 78-79, cons. 2b.

³³ Express reference was made to a Decision of the Cantonal Court of Vaud (reported in *Journal des Tribunaux* 1988, vol. III, p. 16: « *Les parties sont présumées choisir la procédure d'arbitrage pour elle-même et non à cause de la personne des arbitres.* ») and to POUDET/BESSON, *op.cit.*, N 392.

involvement with football matters, but that the witnesses in essence stated that FIFA was not an essential element, the key factor being arbitration. The witnesses declared that FIFA at the time appeared as the best, but not the only possible choice for settling the dispute. Importantly, Respondent's witness – who at the time had negotiated the Agreement – affirmed that the parties' intention was to first apply to FIFA for the resolution of a dispute, and if FIFA declined to act, *the parties would have had to find another choice*.

In light of such witness testimony and the concomitant circumstances, the Arbitral Tribunal concluded that FIFA was not a subjectively essential element of the parties' agreement to arbitrate, while arbitration and the exclusion of state court jurisdiction were. FIFA was the preferred arbitral body at the time of contract conclusion, though it was not essential in and of itself so that FIFA's refusal to intervene did not render the arbitration agreement void. In closing, the Arbitral Tribunal affirmed that it was the appropriate adjudicator for replacing FIFA to resolve the dispute. Zurich being the headquarters of FIFA, the Tribunal deemed it appropriate that this be the seat of the arbitration.

VII Concluding Comments and Lessons to be drawn

Given the impossibility of predicting the future, parties should be aware of the risks involved in choosing an institution as adjudicator whose primary function is not to act as dispute resolver. Such institution (here FIFA) will pay little or no regard as to whether an amendment of its internal regulation might trigger the non-operability of dispute resolution clauses entered into under prior regulation. In other words, in contrast to arbitral institutions such as the ICC or the LCIA, this kind of organization will not provide for transitional or other provisions ensuring the future effectiveness of agreements concluded formerly. Clauses of this type may thus prove a rude awakening for the party relying on the exclusive competence of the institution originally selected as adjudicator. Equally, the present case provides a useful illustration of the difficulties that can ensue if parties do not clarify from the outset what is to happen in case the chosen institution, for whatever reason, refuses to intervene. Overcoming these difficulties unsurprisingly turned out to be both time-consuming and costly in the present case. This case should consequently be a stark reminder to parties designating a non-arbitral institution in dispute resolution agreements.

At the same time, the case provides comfort to parties insisting on arbitration as the agreed-upon dispute resolution method since the arbitrators rightly concluded that bringing proceedings before the state courts at the seat

of Respondent was not a viable option. As pointed out, suing one another before any state court was exactly what the parties had intended to avoid by agreeing on the discussed alternative dispute resolution clause. Both the Zurich High Court decision and the arbitrators' interim award reaffirm the arbitration-friendly approach of Swiss courts and arbitral tribunals having their seat in Switzerland.

In fact, the principle of *favor negotii/validitatis* militated against considering the parties' agreement entirely inoperable just because one of the two core elements (i.e. FIFA) had become unachievable. In other words, the main intention (i.e. arbitration) was not vitiated by FIFA's unreadiness to hear the case. Primarily, however, the Tribunal found that a *factual* consensus had been reached between the parties, which finding automatically rendered the jurisdictional award unchallengeable before the Supreme Court, for this is a question of fact which the Supreme Court is not empowered to review.³⁴

Lastly, the award is also justified in that a party doing business internationally cannot keep concluding dispute resolution clauses with the caption '*arbitration*' or the term '*arbitrer*' for years, and then, once a dispute arises, all of a sudden turn around and say, "*Sorry, that's not what we actually meant, we wanted conciliation or, in default of it, litigation before our home courts.*"

³⁴ Only the question whether a *normative consensus* was reached is a question of law open to review in challenge proceedings before the Supreme Court (cf. Supreme Court decisions [BGE/ATF] 132 III 268 cons. 2.3.2; 126 III 25 cons. 3c; 125 III 305 cons. 2b).