



Arbitration Newsletter Switzerland

The Choice of Law provided for in Art. 116 PILA must be for a National Law

The Swiss Federal Supreme Court ("Supreme Court") has recently put on its website www.bger.ch a decision (4C.1/2005, in German) which - though not rendered in the context of an arbitration - contains considerations interesting to every practitioner involved in arbitration under the provisions of the Private International Law Act ("PILA").

Facts of the case

X AG, a Swiss Company, having its seat in St. Gall and represented by a FIFA agent initiated proceedings against Y AG, a company having its seat in Greece. The issue in dispute were outstanding payments, claimed by X AG for the transfer of a football player. The agreement between the parties defining the terms of this transfer had as to the applicable law the following provision:

"This agreement is governed by FIFA rules and Swiss Law."

X AG initiated proceedings at the Commercial Court of the Canton of St. Gall ("Commercial Court") for outstanding payments and Y AG did not participate in these proceedings. The Commercial Court interpreted the above choice of law clause in the sense that the parties had agreed, cumulatively, on two laws whereby the FIFA rules would prevail over Swiss Law. According to a FIFA regulation claims arising out of activities of players' agents have to be initiated within two years at the latest.

Though this particular FIFA provision has not been quoted in the decision of the Supreme Court the provision referred to must be Art. 22 (3) of the Licensed Players' Agents Regulations, which reads, based on the FIFA website, as follows:

"Complaints about the work of a players' agent shall be directed in writing to the national association

concerned or to FIFA within two years of the incident in question and in any case no later than six months after the players' agent concerned has terminated his activities as such."

Since those two years had already lapsed in the particular case, the Commercial Court rejected the claim of X AG for forfeiture (one may seriously question whether the FIFA regulation applied by the Commercial Court does really state what the Commercial Court actually read - but this is a different issue!). X AG was then filing an appeal at the Supreme Court, arguing that this decision does violate Art. 116 (1) PILA since the FIFA regulation could not be part of a valid choice of "law", as provided for in this article. Defendant did, again, not participate in the proceedings before the Supreme Court.

Arguments of the Supreme Court

The Supreme Court did first recall the wording of Art. 116 (1) PILA, namely:

"The contract shall be governed by the law chosen by the parties."

Such reference does cover both, mandatory and non-mandatory provisions, of the law chosen. Whether such choice of law can only encompass national law or also rules and regulations promulgated by non-government bodies is not stated in Art. 116 (1) PILA, an issue which has already been addressed in the drafting process of the PILA. The doctrine is not unanimous, one part is for a restricted application of Art. 116 (1) PILA only, namely that references can be to state law only whereas the other part is, at least under certain conditions, for a more liberal interpretation, provided the set of rules chosen has as to its completeness a comparable quality to national laws (a detailed quotation of the relevant authors is to



be found in consideration 1.2 of the decision of the Supreme Court).

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The Supreme Court then concluded that the rules and regulations of non-government bodies would always have to be subordinated towards state law and can deploy effect only in so far as national law leaves autonomy for individual regulations between the parties. Rules of international sport federations are not to be considered as "law" in the sense of Art. 116 (1) PILA and do also not have the status of a "*lex sportiva transnationalis*". Such rules of international federations can be relevant only in areas where the parties are at liberty to decide on their "own rules".

The provisions on the statute of limitations in the Swiss Code of Obligations ("CO") are part of the mandatory provisions of such code and can not be curtailed. The relevant Art. 127 CO reads as follows:

"After ten years, all claims for which the federal civil law does not provide otherwise are barred by the statute of limitations."

The provision in the FIFA regulation whereby claims arising out of transfers have to be initiated within two years would therefore abbreviate significantly such period. Consequently, the Supreme Court accepted the appeal and sent the case back to the Commercial Court for adjudication of the case under the relevant terms and provisions of the CO.

Personal Remark

The decision of the Supreme Court is clear. Parties operating under the provisions of the PILA do not enjoy a larger area of flexibility than state courts are granted under Art. 117 PILA, in short: "law" means national law! This excludes also a potential reference under Art. 116 (1) PILA to the famous *lex mercatoria*. Nevertheless, an arbitral tribunal acting under Chapter 12 PILA who includes in the national law it applies e.g. generally accepted terms of trade or principles of UNIDROIT, is at liberty to do so, provided that such law leaves, in the particular question, room for solutions deviating from its own provisions.

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