



## Arbitration Newsletter Switzerland

# The Federal Supreme Court: Waiver of Annulment, Revision and Independence of the Arbitrator

In its most recent decision on arbitration<sup>1</sup>, the Federal Supreme Court had to deal with an action for annulment of a CAS award<sup>2</sup>.

### The Facts of the Case

As always, the decision published by the Federal Supreme Court is available in an anonymised form only, but as the CAS award is identified as being rendered on April 16, 2008, it is easy to trace this award on the website of CAS<sup>3</sup>. The following short summary is based on the facts as presented in the CAS award.

On April 15, 2005, Bruno Heiderscheid ("the Agent") a football agent in Paris, licenced by the Luxembourg Federation, entered into an agreement with the professional football player Franck Ribéry ("the Player"), ensuring the Agent the exclusive rights for transfer of the Player, with a 10% commission on the gross salary earned by the Player. On June 15, 2005, a transfer agreement was signed with Olympique de Marseille, however, without mentioning of the Agent as acting for the Player but rather identifying him as a representative of Olympique de Marseille. Thereafter, a number of additional documents were signed between Player and Agent, in particular, one dated November 30, 2005 for a duration of two years, i.e. up to November 30, 2007 ("the Agreement"), which

replaced any previous understandings reached between these parties<sup>4</sup>.

On May 2, 2007, the Player terminated the Agreement with the Agent. Against this, the Agent claimed outstanding commissions and on June 20, 2007, without payment by the Player, initiated proceedings against the Player at the CAS, based on Article 10 of the Agreement, which provides, amongst others, for French Law to be the substantive law of the case and a sole arbitrator of the CAS being exclusively competent to resolve any disputes arising out of the Agreement, whereby such decision should be final and not subject to any appeal<sup>5</sup>.

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<sup>4</sup> The dispute has no connection, whatsoever, with the subsequent transfer of the Player to Bayern München, cf. N 61-65 of the Award.

<sup>5</sup> "Le présent contrat est soumis au Droit Français.

Les parties s'engagent néanmoins à respecter les dispositions d' Ordre Public spécifiques relatives aux intermédiaires pour la recherche de travail et de la législation du pays dans lequel se déroulera l'opération donnant lieu à la mise en oeuvre du présent contrat ainsi que les dispositions contraignantes du Droit International et de Traités Internationaux applicables.

Tout litige portant sur la formation, l'interprétation, l'exécution ou la résiliation du présent contrat sera soumis à la formation de la Chambre d'Arbitrage Ordinaire du tribunal Arbitral du Sport (Tribunal Arbitral du Sport), dont le siège est à Lausanne (Suisse)

L'arbitrage sera confié à un arbitre unique désigné par la Président de la Chambre et se déroulera conformément au règlement de procédure du Tribunal Arbitral du Sport.

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<sup>1</sup> Decision 4A\_234/2008, rendered on August 14, 2008.

<sup>2</sup> CAS 2007/0/1310, rendered on April 16, 2008 ("the Award")

<sup>3</sup> [www.tas-cas.org / jurisprudence](http://www.tas-cas.org/jurisprudence)



Subsequently, the parties agreed on Maître Jacques Bertrand, Paris, to act as the sole arbitrator in this dispute. In his decision, rendered on April 16, 2008, the sole arbitrator held that the Agreement (between Agent and Player) was null and void and this even for two reasons: first, because under the relevant provisions of the "Code du Sport Français" the Agent would not qualify as admitted agent as he was exposed to certain criminal sanctions imposed under a final decision of the Court of First Instance in Brussels, dated February 4, 2000, which was in violation of Article 222-7 (2) of the Code du Sport Français and, second, because the Agent was acting as agent for both, Olympique de Marseille and the Player at the same time, which made the Agreement also to become null and void under the provisions of Article 222-10 of the Code du Sport Français.

Consequently, the Agent was then ordered to return the commissions obtained so far<sup>6</sup> and had to accept that no further claims were granted by the sole arbitrator for additional commissions.

Within thirty days from the receipt of such award, the Agent filed a request for revision, arguing that he had at the very day the CAS award was served upon him, learned about certain facts which would jeopardize the sole arbitrator's independence.

In particular, the Agent stated that he learned that the sole arbitrator was acting for an association representing professional football players, amongst others against the Agent<sup>7</sup>. Furthermore, the Agent found out that the sole arbitrator was representing various football players, amongst others a particular player of a Club where the Player's lawyer was serving as president as of that time. In addition, the agents of such player were also serving as agents of the Player in this case and, at the same time, such

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La sentence rendue par la Formation de l'Arbitrage sera définitive et exécutoire, et ne sera susceptible d'aucun recours.

L'Arbitrage se déroulera en Français."

<sup>6</sup> With the exclusion of one payment, which was not contested between the parties.

<sup>7</sup> The Agent was acting as representative of UNFP (Union Nationale de Footballer Professionnel).

agents were also acting for a former client of the sole arbitrator. Finally, the Agent brought forward that the sole arbitrator has been acting earlier as lawyer of the Player in arbitral proceedings at the CAS held in 2007 against a Club B, a fact which he, however, admitted having known already at the time of nomination of the sole arbitrator.

### **Revision of Arbitral Awards**

In a first step, the Federal Supreme Court recalls that the provisions of PILA do not contain provisions as to a revision of an arbitral award. Already under the former act on the federal judiciary, the Federal Supreme Court applied the rules applicable to revisions of judgments also to the revision of arbitral awards. In the present decision the Federal Supreme Court confirmed an earlier decision<sup>8</sup> where it applied the new provisions on the federal judiciary<sup>9</sup> and, in doing so, reconfirmed also its earlier position, namely that in granting a request for revision the Federal Supreme Court would not render, at the same time, a decision as to the merits of the case but rather remand the case to the arbitral tribunal or a new arbitral tribunal.

### **Waiver of Annulment and Revision**

In view of the wording of Article 10 of the Agreement where the parties waived their right for an action for annulment<sup>10</sup>, the Federal Supreme Court first had to determine whether such waiver would also embrace a request for revision of the award. In an earlier decision<sup>11</sup> it had apparently expressed its doubts whether the waiver of annulment also encompasses the revision. Though it again leaves the question

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<sup>8</sup> BGE 134 III 286.

<sup>9</sup> Art. 123 BGG.

<sup>10</sup> "La sentence rendue par la Formation de l'Arbitrage sera définitive et exécutoire, et ne sera susceptible d'aucun recours."

The decision rendered by the arbitral tribunal shall be final and enforceable and shall not be subjected to any appeal. (... translation)

<sup>11</sup> 4 P. 265/1996 (unpublished)



open, there is no doubt anymore that the Federal Supreme Court is of the view that a waiver of annulment does also include a waiver for a request for revision<sup>12</sup>.

### Independence of the Arbitrator

In dealing with the arguments raised by the Agent as to the lack of independence of the arbitrator, the Federal Supreme Court had first to restate that any concerns about the independence of an arbitrator must be raised immediately upon learning of such facts or, more important, immediately after such party could, exercising due care, have become aware of such facts. In doing so, the Federal Supreme Court made reference to the two most recent decisions as to that issue<sup>13</sup>.

Given the fact that the various professional involvements of the sole arbitrator are disclosed in his profile on the CAS website<sup>14</sup> and that he also

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<sup>12</sup> "Cette parenthèse fermée, il paraît difficile d'admettre qu'une partie ayant expressément renoncé à recourir, et donc à se prévaloir du motif prévu à l'art. 190 al. 2 let. a LDIP, puisse néanmoins saisir le Tribunal fédéral par la bande en invoquant le même motif, découvert avant l'expiration du délai de recours, dans le cadre d'une demande de révision, faute de quoi l'art. 192 LDIP deviendrait lettre morte."

This parenthesis closed it seems difficult to assume that a party having explicitly waived its right for annulment and thus waiving the rights provided for under Article 190 (2) (a) PILA could, nevertheless, apply to the Federal Supreme Court, invoking the same provision discovered prior to the expiration of the appeal period, in the frame work of a request for revision, which would render the provisions of Article 192 PILA to become a "lettre mort". (unauthorized translation) This conclusion comes rather by way of an *obiter dictum* and one might have preferred a more explicit reasoning by the Federal Supreme Court.

<sup>13</sup> 4A-506/2007 of March 20, 2008, and 4A\_528/2007 of April 4, 2008, both further dealt with in a previous arbitration newsletter ("Rex Sport Case").

<sup>14</sup> « Avocat de nombreuses associations syndicales (de sportifs ou d'entraîneurs). Membre de la Commission de Révision de la Charte du Football Professionnel de la Ligue

published a book, together with the counsel of the Player in the CAS proceedings, the Federal Supreme Court held that the Agent has forfeited his right to question the independence of the sole arbitrator. In doing so it explained again that in particular the appointment of a sole arbitrator requires "the most elementary precaution" to investigate the independence of such sole arbitrator. In no way can the appointing party simply rely on the declaration of independence furnished by such sole arbitrator.

### Conclusion

The decision of the Supreme Court as to its outcome does not give rise to any criticism. The Agent had, undoubtedly, not exercised the requisite care in investigating the independence of the sole arbitrator. It is clear, beyond any doubt, that the Federal Supreme Court assumes that "la plus élémentaire précaution" requires that a party undertakes adequate investigation to assure itself of the independence of an arbitrator. Checking public files, such as profiles available on websites, forms part of such elementary investigations. The benchmark for successfully questioning the independence of an arbitrator after its appointment is, therefore, and for good cause, high.

A second, more delicate issue is, however, whether a waiver of annulment does preclude the waiving party also from asking for a revision of the award. Contrary to the position now taken by the Federal Supreme Court, assuming that a valid waiver of annulment under Article 192 PILA does also automatically include a waiver of revision, caution should be exercised in this field. Whilst a party might indeed in advance accept the outcome of arbitral proceedings, such party might not extend such waiver to valid grounds for a revision, as their underlining grounds are of an entirely different nature. Assuming that new and highly relevant facts come to light belated only, be it as to the merits of the case or as to an arbitrator's independence, did the party confirming its waiver of annulment really want to waive also its right for revision? Doubts are justified.

The practical way out of this dilemma remains to have a party only on very particular circumstances sign a waiver for annulment in advance, in accordance with

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du Football Professionnel en tant que représentant de l'UNFP (Union Nationale des Footballeurs Professionnels). »



Article 192 PILA, given the very limited authority of the Federal Supreme Court to review the merits of the case<sup>15</sup> and bearing in mind the remarkable efficiency exercised by the Federal Supreme Court in rendering its decision on actions for annulment of arbitral awards<sup>16</sup>. A party might be well advised to abstain from such waiver of annulment at all or, if deemed appropriate, to at least seriously consider to explicitly state that such waiver does not include the right for revision of the award – a qualification explicitly provided for in Article 192 (1) PILA<sup>17</sup>.

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<sup>15</sup> Article 190 (2) (b): "If the award [is] incompatible with public policy."

<sup>16</sup> There is only one instance, the Federal Supreme Court, there is only one exchange of briefs, there are no oral hearings at the Federal Supreme Court and, in the particular case, it took the Federal Supreme Court only three months after the request for revision has been filed to publish its award – a time period which is not unusual at all for the Federal Supreme Court deciding upon revisions or action for annulment on arbitral awards.

<sup>17</sup> Article 192 (1) PILA: "If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190 (2).