Limited arbitrability of domestic employment disputes cannot be circumvented by submitting dispute to international arbitration (Swiss Supreme Court)

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In *decision 4A_7/2018*, the Swiss Supreme Court considered a request to set aside a decision rendered by a Swiss civil court based on the argument that the court lacked jurisdiction due to an arbitration clause included in the employment contract underlying the dispute.

Speedread

In a decision dated 18 April 2018, which was published on 4 May 2018 and is marked for inclusion in the official court reporter, the Swiss Supreme Court rejected a request by football club, FC Black Stars Basel to set aside a decision rendered by the civil court of Basel City awarding the former coach of the football club damages and compensation for wrongful dismissal.

The Supreme Court confirmed a previous landmark decision and held that the validity of arbitration clauses in domestic employment contracts is limited. The dispute in question related to mandatory claims under employment law, which cannot be submitted to arbitration. The court clarified that the limited arbitrability of disputes under domestic employment contracts cannot be circumvented by submitting such disputes to international arbitration, where there are no restrictions of the arbitrability of employment matters. (*Decision 4A_7/2018*.)

Background

The following provisions are relevant to this case:

- Article 177(1) of the Swiss International Private Law Act (PILA) regarding international arbitration, provides that any dispute of financial interest may be subject of arbitration.
- Article 354 of the Swiss Code on Civil Procedure (CPC) governing domestic arbitration, provides that any claim over which the parties may freely dispose may be the object of an arbitration agreement.

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- Article 353(2) of the CPC provides that the parties may exclude the application of the CPC provisions on arbitration by way of an express declaration to this effect in their arbitration agreement or a subsequent agreement, and instead provide for the applicability of the 12th chapter of the PILA on international arbitration.
- Article 337c of the Swiss Code of Obligations (CO) provides that an employee who has been dismissed with immediate effect without just cause is entitled to damages in the amount of his potential salary until the termination of employment relationship following the required notice period or the expiry of the pre-agreed duration. In addition, it lies within the court's discretion to award compensation in an amount of up to six months' salary.
- Article 341(1) of the CO provides that an employee may not waive claims arising from mandatory legal provisions during the period of his employment or within one month following the termination of employment.

Facts

In March 2015, the Swiss third-league football club, Black Stars Basel, appointed former Swiss professional footballer and television sports expert, Benjamin Huggel, as its new coach.

The employment contract contained a dispute resolution clause that provided that the parties should, as a first step, seek to settle any disputes in mediation proceedings before the monitoring and disciplinary commission of the Swiss Football Association. If no settlement could be reached, the parties unreservedly agreed to submit any disputes under their contract to arbitration before the Court of Arbitration for Sport (CAS).

In February 2016, following a disagreement between Huggel and the football club's director, the football club terminated his employment contract with immediate effect.

Huggel filed a claim for damages and compensation due to wrongful dismissal with the civil court of Basel City. With reference to the employment contract, the football club contended that the state court lacked jurisdiction, and did not further participate in the proceedings.

In a decision on 15 February 2017, the civil court of Basel City awarded Huggel damages and compensation due to wrongful dismissal, based on article 337c of the CO. A subsequent appeal by the football club was dismissed by the Basel appeals court.

The football club filed a request with the Swiss Supreme Court to set aside the Basel appeals court decision. The club again referred to the arbitration clause contained in the employment contract providing for the jurisdiction of the CAS, and submitted that the Basel City state court had lacked jurisdiction to render a decision on the matter.

Decision

The Swiss Supreme Court affirmed the jurisdiction of the Basel civil court and dismissed the football club's request.

The Supreme Court confirmed its landmark decision *DFT 136 III 467,* rendered in 2010, under the former legislation on state court forums and domestic arbitration, which has since been superseded by the CPC. Under the CPC, the validity of arbitration clauses in employment contracts is not all-encompassing.

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Contrary to international matters, where according to article 177(1) of the PILA, all disputes involving financial interests are arbitrable, domestic disputes can only be referred to arbitration where parties can freely dispose of the claims in question *(article 354 CPC)*.

However, the parties cannot freely dispose of mandatory employment law claims under article 341 of the CO, which includes claims related to the mandatory protective provisions for wrongful dismissal. Such claims can only be referred to arbitration by way of a separate arbitration agreement, following the expiry of a one-month period after the termination of the employment. In the present case, the parties had not concluded such post ad hoc arbitration agreement. Therefore, the coach's claims based on article 337c of the CO for wrongful dismissal were not arbitrable.

Comment

The main problem of limited arbitrability is that it leads to a parallel jurisdiction of state courts and arbitral tribunals for one and the same dispute. Accordingly, the first landmark decision on this issue, *DFT 136 III 467,* although approved of due to the underlying rationale of employee protection, also received some criticism. (For further discussion, see *Legal Update, Swiss Federal Tribunal clarifies scope of arbitrability in employment matters*). In view of these critical voices, the confirmation and clarification of the legal situation in the present decision is to be welcomed.

In this noteworthy and important obiter dictum, the Swiss Supreme Court, while considering employee protection and in deviation from certain voices in legal doctrine, held that the limitation on arbitrability for domestic employment disputes cannot be bypassed by using article 353(2) of the CPC and opting for the rules on international arbitration under the 12th chapter of the PILA to govern the arbitration agreement.

The Supreme Court's latest decision establishes a mandatory dual regime in Switzerland with regard to the arbitrability of employment matters. Although, while in the domestic setting the arbitrability of employment disputes is limited, financial disputes arising from employment contracts with employees residing abroad may still be comprehensively referred to arbitration.

Case

Decision 4A_7/2018.

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