Swiss Supreme Court sets out requirements to validly opt out of rules governing domestic arbitration in favour of those governing international arbitration

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In *Decision 4A_540/2018*, the Swiss Supreme Court ruled for the first time on the validity of an agreement between the parties to a domestic arbitration to opt out of the provisions of the Civil Code of Procedure, governing domestic arbitrations, in favour of those governing international arbitration, Chapter 12 of the Swiss Private International Law Act.

Speedread

In a recently published French-language decision, slated for publication in the official court reporter, the Swiss Supreme Court ruled for the first time on the requirements that must be met in order for parties to a domestic arbitration to opt out of the provisions of Part 3 of the Civil Code of Procedure (CPC) in favour of those governing international arbitration, as set out in Chapter 12 of the Swiss Private International Law Act (PILA).

The legal regime that applies to an arbitration seated in Switzerland is of great importance given the broader grounds for setting aside an award provided in Article 393 of the CPC compared to those set out in Article 190(2) of the PILA.

In this case, the parties to a Court of Arbitration for Sport (CAS) arbitration had signed an Order of Procedure, upon the CAS' proposal, which provided that "the provisions of Chapter 12 [PILA] shall apply, to the exclusion of any other procedural law".

Referring to its case law relating to Article 176(2) PILA, the Swiss Supreme Court found that, in order to be valid, an opting-out agreement had to, among other things, expressly exclude the application of the CPC. However, the Supreme Court found that it was not necessary that the parties expressly refer to the exact legal provisions they intend to exclude. The parties' intent to exclude Part 3 of the CPC, clearly and unambiguously, can result from the wording used in their (written) agreement. Here, the wording "to the exclusion of any other procedural law" was sufficient. Accordingly, the opting-out provision contained in the Order of Procedure was valid.

In its decision, the Swiss Supreme Court did not rule on the question of when the parties can conclude an opting-out agreement without the consent of the arbitrators. However, the Supreme Court appears to find problematic that a panel could be forced to arbitrate a dispute based on a different set of rules than those that applied when it was appointed. (*Decision 4A_540/2018 (7 May 2019)*.)

Background

While international arbitration is governed by Chapter 12 of the Swiss Private International Law Act (PILA), Swiss domestic arbitrations are (in principle) governed by Part 3 of the Swiss Civil Procedure Code (CPC) (based on Articles 353 et seq. of the CPC).

Article 353 of the CPC provides:

> "(1) The provisions of this Part apply to proceedings before arbitral tribunals seated in Switzerland, unless the provisions of Chapter 12 of the PILA apply.
>
> (2) The parties may exclude the application of this Part by making an express declaration to this effect in the arbitration agreement or in a subsequent agreement and, instead, agree that the provisions of Chapter 12 PILA apply. The declaration must be in the form specified in Article 358 CPC".

In this regard, Article 358 of the CPC provides:

> "The arbitration agreement must be done in writing or in any other form which permits it to be evidenced by a text".

Article 176 of the PILA reads:

> "(1) The provisions of this Chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

> (2) The parties may exclude the application of this Chapter by making an express declaration to this effect in the arbitration agreement or in a subsequent agreement and, instead, agree that the provisions of Part 3 of the CPC apply.
>
> (3) The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators".

For further information on arbitration in Switzerland, see *Practice note, Arbitration in Switzerland*.

Facts

A dispute arose between the Fédération Internationale de Football Association (FIFA), which has its seat in Switzerland, and its former General Secretary, Mr Jérôme Valcke (who is mentioned by name in the Swiss Supreme Court's decision).

While not expressly mentioned in the decision, Mr Valcke (a French national) was appointed as FIFA General Secretary in 2007. At that time, he was domiciled in Switzerland. In his capacity as General Secretary, he was bound by the arbitration clauses contained in the FIFA Code of Ethics and the FIFA Statutes.

In 2015, Mr Valcke was accused of breaching the FIFA Code of Ethics, which led FIFA to initiate disciplinary proceedings against him. At the end of those internal proceedings, FIFA's Appeal Committee held that Mr Valcke had breached various Articles of the FIFA Code of Ethics and banned him from taking part in any football-related activity at both national and international level for a period of ten years, starting on 8 October 2015. Mr Valcke was also fined CHF 100,000. He appealed against this decision before the Court of Arbitration for Sport (CAS), seeking annulment of the decision or, alternatively, for a reduction of the sanctions imposed on him.

In the course of the arbitral proceedings, the CAS sent an "Order of Procedure" to the parties, who signed it without expressing any reservation. The Order contained the following provision:

> "In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the 'Code'). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute ('PILS') shall apply, to the exclusion of any other procedural law".

Subsequently, Mr Valcke argued that, despite the abovementioned provision, the arbitration was domestic rather than international, given that both parties were domiciled or seated in Switzerland when they entered into the arbitration agreement. In his view, the Order of Procedure did not contain a valid opting-out of the relevant provisions of the CPC in favour of those of the PILA.

The CAS panel, composed of three arbitrators, rejected the appeal and found that "the practical effect of characterizing the present arbitration as domestic or international is generally limited and, in this particular proceeding, essentially insignificant". Considering that this point only had a potential future effect on the applicable standard of review in the event that the award is appealed, the panel made no ruling on this issue (see *CAS 2017/A/5003*).

Mr Valcke filed a motion to set aside the award before the Swiss Supreme Court. In his motion, Mr Valcke argued that the arbitration was domestic in nature (rather than international), so that he could rely on the grounds for setting aside mentioned in Article 393 of the CPC (which are broader than those set out in Article 190(2) of the PILA). Mr Valcke complained that the award breached his right to be heard, was arbitrary, and violated procedural and substantive public policy.

Decision

The Supreme Court dismissed the motion to set aside the award.

The court first held that the arbitration was international in nature by virtue of the parties' agreement, as expressed in the Order of Procedure. On that basis, the Swiss Supreme Court also rejected all of the arguments raised by Mr Valcke, to the extent that they were admissible.

The Supreme Court started its reasoning by stressing the importance of distinguishing domestic and international arbitration: it recalled that the grounds for setting aside an award are significantly more restrictive in international arbitration. In particular, Article 190(2) of the PILA, which is exhaustive, does not provide that arbitrariness is a valid ground to set aside an award.

The Supreme Court then recalled that, pursuant to Article 176(1) of the PILA, an arbitration is international if it is seated in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. Conversely, an arbitration is to be characterised as domestic if the arbitral tribunal is seated in Switzerland and if the provisions of Chapter 12 of the PILA do not apply (*Article 353(1), CPC*). In the present case, it was undisputed that, at the time of the conclusion of the arbitration agreement, both parties were seated/domiciled in Switzerland.

Therefore, the main question was whether, based on the Order of Procedure, the parties had validly opted out of the provisions of the CPC in favour of those of the PILA. According to Article 353(2) of the CPC (which mirrors Article 176(2) of the PILA), the parties may exclude the application of the CPC by making an express declaration to this effect in the arbitration agreement or in a subsequent agreement and, instead, agree that the provisions of Chapter 12 of PILA apply. The declaration must be in writing or in any other form which permits it to be evidenced by text (*Article 358, CPC*).

The Supreme Court referred to its case law on Article 176(2) of the PILA prior to the entry into force of the CPC (in particular *Decisions 116 II 721*, paragraph 4 [French] and *115 II 393*, paragraph 2.b.bb [German]). In those decisions, the Swiss Supreme Court held that, in order to validly opt out of the provisions of the PILA in favour of the (then applicable) inter-cantonal Concordat on Arbitration of 27 March 1969, the following three requirements had to be met:

- The parties must expressly exclude the application of federal law.

- They must agree that the cantonal rules on arbitration will exclusively apply.
- The parties must conclude their agreement in writing.

The Swiss Supreme Court found that the entry into force of the CPC did not bring any significant changes to these requirements. On that basis, it held that nothing prevented the case law relating to Article 176(2) PILA from being applied, mutatis mutandis, to an opting-out under Article 353(2) of the CPC. Accordingly, it was not sufficient that the parties agree that the provisions of the PILA will exclusively apply: it is also necessary that they expressly exclude the provisions of the CPC on domestic arbitration. The Swiss Supreme Court also recalled, in passing, a recent decision, in which it held, obiter, that an opting-out pursuant to Article 353(2) of the CPC did not allow the parties to elude the rules on arbitrability set out in the CPC (which are more stringent than those of the PILA, in particular in relation to employment relationships) (see *Decision 144 III 235*, paragraph 2.3.3). In other words, where parties opt-out in the sense of Article 353(2) of the CPC, the arbitrability of the parties' dispute will still be examined in light of Article 354 of the CPC instead of Article 177 of the PILA.

The Swiss Supreme Court found that the Order of Procedure constituted a valid opting-out in the sense of Article 353(2) of the CPC. More specifically, the Supreme Court found that the wording "to the exclusion of any other procedural law" was sufficiently clear to conclude that the parties had intended to exclude the provisions of Part 3 of the CPC. In doing so, it referred to its case law regarding the parties' agreement to waive their right to appeal under Article 192 of the PILA (see, in particular, the landmark ruling in *Decision 131 III 173*, paragraph 2.2.1). Pursuant to these decisions, the parties' express (written) statements clearly and unambiguously showed their intent to waive any annulment proceedings without expressly referring to Articles 190 and/or 192 of the PILA. It found that a contrary solution would be unnecessarily formalistic and would disregard the parties' intent on a purely formal ground. Considering that the consequences of a waiver in the sense of Article 192 of the PILA are more far-reaching than those of an opting-out pursuant to Article 353(2) of the CPC, here the Supreme Court found that it would be unjustified to set stricter requirements for an opting-out agreement than for a waiver under Article 192 of the PILA.

In other words, when the wording used by the parties clearly shows their intent to submit their dispute to the provisions of Chapter 12 of the PILA instead of those of Part 3 of the CPC, it is not necessary that they expressly refer to either Chapter 12 of the PILA or to Part 3 of the CPC (though the Swiss Supreme Court mentioned that such an express reference would be desirable in order to avoid uncertainty). In this case, although it did not expressly refer to Part 3 of the CPC, the wording used in the Order of Procedure ("to the exclusion of any other procedural law") clearly showed that the parties intended to exclude those provisions. Therefore, it was a valid opting-out pursuant to Article 353(2) of the CPC.

The Supreme Court then went on to examine whether this opting-out, which had been agreed after the parties exchanged written submissions in the arbitral proceedings, had been concluded timely. As per Article 353(2) of the CPC, it can be included either "in the arbitration agreement or in a subsequent agreement." The Supreme Court undertook a comprehensive review of the scholarly opinions expressed on this issue and found that although there is a broad consensus that parties can agree on an opting-out at any time, some scholars specify that, once the arbitral tribunal has been constituted, it must also agree to the opting-out.

The Supreme Court found that "the practical importance of this issue is limited". It held that, given the few differences between Part 3 of the CPC and Chapter 12, an opting-out will generally not have any effect on the proceedings before the arbitral tribunal (as was held by the CAS panel).

The Supreme Court further stressed that an opting-out was consensual in nature. Any inconvenience (in terms of time and costs) will only result from the parties' own choice. It noted that the real problem regarding the time limit to agree on an opting-out lay in the relationship between the arbitral tribunal and the parties. Allowing the parties to change the applicable legal framework at any stage of the arbitration without the agreement of the arbitrators

would amount to forcing them to arbitrate a dispute according to a different set of rules than those that applied at the time they were appointed.

The Supreme Court left this issue open in this case, considering that the opting-out provision had been suggested by the CAS itself. Therefore, it could not be argued that the arbitral tribunal did not agree to it and the opting-out had been concluded timely according to Article 353(2) of the CPC.

As a result, the Supreme Court examined the grounds for setting aside invoked by the petitioner in light of Article 190(2) of the PILA and found that the petitioner's arguments pertaining to the alleged arbitrariness of the award were inadmissible. It ultimately rejected all of the other arguments raised by the petitioner.

Comment

The decision is noteworthy in a number of respects.

First, the Supreme Court has ruled for the first on the requirements that have to be met in order to validly opt out of the provisions of Part 3 of the CPC in a domestic arbitration. In its decision, the Supreme Court has given clear priority to the parties' intent (provided it is expressed clearly and unambiguously) over more standardised wordings and express references to specific legal provisions. In this context, it has confirmed its stance to favour substance over form when interpreting a procedural agreement between private parties.

Second, the Supreme Court confirmed that, where parties opt-out of the rules on domestic arbitration pursuant to Article 353(2) of the CPC, the arbitrability of the dispute will still be examined in light of Article 354 of the CPC, instead of Article 177 of the PILA.

Finally, while it ultimately left the issue open, the Swiss Supreme Court appears to be receptive to the argument that, once constituted, the arbitral tribunal needs to agree to an opting-out in the sense of Article 353 of the CPC (and, conversely, of Article 176(2) of the PILA).

Case

Decision 4A_540/2018 (7 May 2019) (Swiss Supreme Court).

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