

# For the first time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy

Laurence Burger

(<sup>1</sup>)

On 27 March 2012, the Swiss Supreme Court set aside a CAS award in the matter *Silva Matuzalem v FIFA*, holding that the ban on any football-related activity imposed on Matuzalem was contrary to Swiss Public Policy. (<sup>1</sup>)

This decision is of major importance since it constitutes the second decision in which the Swiss Supreme Court annuls a CAS award on grounds of public policy. The first decision was rendered in the context of the dispute opposing Club Atlético de Madrid to Sport Lisboa E Benfica and FIFA, in April 2010. (<sup>2</sup>)

It is however the first time that the Supreme Court annuls an award for violation of Swiss substantive public policy (violation of personality rights as provided by Article 27 of the Swiss Civil Code), by opposition to a violation of the procedural public policy (violation of principle of *res judicata*).

This case arose out of the termination by Matuzalem of his employment agreement with the Ukrainian Club FC Shakhtar Donetsk in order to join the Real Saragossa Club. Following a claim by FC Shakhtar Donetsk, FIFA's Dispute Resolution Chamber condemned Matuzalem and Real Saragossa to pay damages in an amount of EUR 6.8 million for breach of contract. The Court of Arbitration for Sport annulled part of the FIFA decision and condemned jointly Matuzalem and the Real Saragossa to damages in an amount of EUR 11,858,934. An appeal of this decision was dismissed by the Swiss Supreme Court.

Matuzalem and Real Saragossa did not pay the damages. As a result, the case was brought before the Disciplinary Commission of the FIFA, who informed both parties that a disciplinary proceeding was brought against them because of the non-payment, and that the sanctions provided for by Article 64 of the FIFA Disciplinary Code would be imposed on them. As neither Matuzalem nor Real Saragossa were able to pay, they were given a fine and granted a final deadline to pay the damages combined with the [page "603"](#) additional penalty that if payment was not made by the deadline "the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva (...). Such ban will apply until the total outstanding amount has been fully paid (...)". Matuzalem and Real Saragossa challenged this decision before the CAS, who confirmed it.

Matuzalem and Real Saragossa then brought a challenge of the CAS decision to the Swiss Supreme Court on the grounds of a violation of the right to be heard and a violation of public policy. The Supreme Court dismissed the first claim but admitted the second. Matuzalem argued that being imposed an unlimited and worldwide prohibition to exercise his profession because of his failure to pay the damages constituted a violation of his rights of personality pursuant to Article 27 of the Civil Code.

Personality rights are protected under Swiss law as fundamental rights. As such, a person can only give up by contract part of his or her freedom as long as it is not arbitrary, that he or she does not annihilate his or her economic freedom or reduces it to such an extent that it endangers the foundation of his or her economic existence. These limitations apply to contractual relationships but also to statutes and regulations of corporations. Penalties imposed by associations can only be upheld as long as they do not violate the personality rights of their members. The Supreme Court pointed out that this is particularly true when the association is the controlling association for the particular profession or sport. For these types of association, the Supreme Court not only examines the validity of the penalty from the abuse of rights angle, but also if there is a valid ground for the penalty. Measures taken by sports associations which impair seriously the economic development of individuals are only allowed when the weight of the interest of the association prevails over the intrusion of the personality.

In this case, the Supreme Court paid particular attention to the fact

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## Jurisdiction

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› Switzerland

## Court

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› Federal Supreme Court of Switzerland, 1st Civil Law Chamber

## Arbitrators/Judges

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› Klett, Chair  
› Corboz, Judge  
› Rottenberg Liatowitsch, Judge  
› Kolly, Judge  
› Kiss, Judge

## Case date

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› 27 March 2012

## Case number

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› 4A\_558/2011

## Parties

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› Claimant, Francelino da Silva Matuzalem, c/o Gianpaolo Monteneri, Monteneri sports law & management lic  
› Defendant, Fédération Internationale de Football Association (FIFA)

## Key words

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## Applicable legislation


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## Source

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that Matuzalem alleged that he was not in a position to pay the fine. The Supreme Court noted that the professional ban prevented the appellant from obtaining the income necessary to pay the fine. Moreover, given that damages had been granted by the first CAS award, the Supreme Court held that there was no necessity for a disciplinary sanction, given that Shakhtar Donetsk had the possibility to seek enforcement of this award pursuant to the New York Convention.

As a result, the Swiss Supreme Court held that the fine was illegal, and that the professional ban, which jeopardized the foundations of the economic existence of Matuzalem without a justification from the point of view of the  [page "604"](#) FIFA or its members, constituted a violation of Matuzalem's personality rights which was incompatible with Swiss public policy.

As indicated above, the ground for the setting aside of the CAS award in this case, violation of the material public policy, is found at Article 190 (2) (e) of the Swiss Private International Law Statute. According to the case law of the Swiss Supreme Court:

Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants ; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables. <sup>(3)</sup>

In translation :

*An award is contrary to material public order when it violates the fundamental principles of substantive law to such a point that it is not reconcilable with the legal order and the decisive system of values; these principles are in particular the contractual trust, the respect of the rules of good faith, the interdiction of the abuse of right, the prohibition of discriminatory or expropriatory measures and the protection of legally incapable persons.*

In contrast, procedural public is defined by the Swiss Supreme Court as follows:

L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable ; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit. <sup>(4)</sup>

 [page "605"](#)

In translation :

*Procedural public order guarantees to the parties the right to an independent judgment on the conclusions and the facts brought before the arbitral tribunal in accordance with procedural law; there is a violation of procedural public order when fundamental principles generally acknowledged have been breached, which leads to an unbearable contradiction with the nature of justice, so that the decision appears incompatible with the values of a State existing under the Rule of law.*

A violation of the procedural public policy was precisely sanctioned in the case opposing Club Atlético de Madrid to Sport Lisboa E Benfica and FIFA. In 2000, a football player from Portugal terminated his employment agreement with the Lisbon club Sport Lisboa E Benfica and signed up with the Spanish club Atlético de Madrid SAD, claiming a training and transfer indemnity from Atlético based on the 1997 FIFA Rules. The FIFA Special Committee upheld the claim and awarded Benfica USD 2.5 million. Atlético appealed this

decision before the Commercial Court of the Canton of Zurich, which annulled the Special Committee decision on the ground that the 1997 FIFA Rules violated antitrust laws.

A few months after the Zurich Court's decision was rendered, Benfica, which had not been a party to the challenge to the Zurich court, sought another decision concerning the same player and the same transfer from the FIFA Committee. FIFA rejected the claim, and this decision was brought before the CAS, because the FIFA had introduced a new procedure pursuant to which the CAS was competent for challenges of decisions of the Special Committee. The CAS upheld Benfica's challenge and condemned Atlético to pay EUR 400,000 as compensation. Atlético filed a challenge before the Swiss Supreme Court for violation of public policy on the ground that the CAS award disregarded the binding effect of the Zurich court's decision.

The Swiss Supreme Court upheld Atlético's challenge and set aside the CAS Award on the grounds that the principle of *res judicata* is part of the procedural public policy of Switzerland.

It was not at the time the first time that the Supreme Court had held that the principle of *res judicata* is part of the Swiss procedural public policy. By the same token, it is not the first time that the Supreme Court considers that a violation of Article 27 CC constitutes a violation of substantive public policy. But it is the first time that the Supreme Court annuls awards for these reasons.

Two questions arise out of both decisions. First, do they signal a reinforcement of the control of arbitral awards by the Swiss Supreme Court. [page "606"](#) Second, what other public policy grounds could, if violated, lead to the annulment of an award?

With respect to the Matuzalem decision, the first question can easily be answered by no. Indeed, the Supreme Court had already indicated that it did consider a serious and clear violation of Article 27 CC as a violation of public policy. <sup>(5)</sup> It is therefore nothing new, and it only depended upon an egregious enough violation for an award to be set aside on this ground.

The answer is however not as clear in the case of the Benfica/Atlético Madrid decision. According to the case law of the Supreme Court relating to *res judicata*, the principle is that there cannot be two contradictory judicial decisions on the same claim and between the same parties which are equally and simultaneously enforceable. <sup>(6)</sup> In the Benfica/Atlético Madrid decision, the parties in the first proceeding were different from the second proceeding: the Zurich court proceedings opposed Atlético to the FIFA, while the Supreme Court proceedings opposed Atlético to Benfica and the FIFA. Therefore, the reasoning followed by the Supreme Court, which held that the Zurich court's decision had *res judicata* effect because it concerned the annulment of a resolution of an association and such annulment applied *erga omnes* and not only between the parties to the dispute, albeit arriving at a just decision, seems to have been carefully designed to support the outcome of the decision. It does therefore reveal an increased control of arbitral awards. It would however be incorrect to draw a general rule from this decision.

Are violations of other public policy grounds likely to lead to annulment of awards? In order to answer this question, one must look at the different principles that are usually identified as constituting public policy. This list is however not exhaustive as the Supreme Court refuses to list all principles that constitute public policy, for fear of wrongly excluding one. <sup>(7)</sup>


Are however typically part of the substantive public policy the principle of *pacta sunt servanda*, the principle of good faith and the prohibition of abuse of rights, the prohibition of discriminatory and spoliatory measures and of expropriation without compensation, the protections afforded by ECHR provisions, and Article 27 CC. Do not constitute a violation of substantive public policy manifestly wrong findings of facts, violations of the applicable law, wrong interpretations of contracts, arbitrary assessment of evidence, [page "607"](#) contradictory awards and decisions in equity. <sup>(8)</sup> Are part of the procedural public policy the principle of *res judicata* and that of *ne bis in idem*.

The Swiss Supreme Court is not an appellate court; as such it cannot review alleged violations of Swiss statutory law in the award. <sup>(9)</sup> Public policy as protected by Article 190(2) (e) is only a reserve clause, which means that it only has only a negative, protective effect and does not function as a norm. <sup>(10)</sup>


The threshold for the violation of the principle of *pacta sunt servanda* is quite high. According to the Swiss Supreme Court, "there can

only be a violation of the principle of *pacta sunt servanda* if the tribunal admits the existence of a contract but refuses to order compliance with it, based on irrelevant reasons or inapplicable legal provisions; or, on the contrary, denies the existence of a contract but nevertheless grants a contractual obligation".<sup>(11)</sup> However, the process of interpretation of the legal relationship in dispute and the legal conclusion drawn from it, are not subject to the principle of *pacta sunt servanda* and therefore not subject to a claim of violation of public policy.<sup>(12)</sup> As a result, most disputes arising out of a breach of contract does not fall with the principle of *pacta sunt servanda*, as foreseen by Article 190(2) lit.e.<sup>(13)</sup>

A further application of the principle of *pacta sunt servanda* is the *clausula rebus sic stantibus*, latin for "things thus standing". According to this principle, a fundamental change of circumstances that was never contemplated by the parties might justify a modification of an agreement. The *clausula rebus sic stantibus* is in essence an escape clause from the *pacta sunt servanda* principle. There again, the breadth of review of the Court when confronted with a *clausula sic stantibus* argument is very limited, as the Court which does not function as an appeal court cannot review the arbitrators' fact findings and discuss the requirements of application of the *clausula*.

The principle of good faith and the prohibition of abuse of rights (Article 2 CC) encompass many scenarios such as, for instance, the failure to disclose during negotiations facts which were obviously relevant for its decision-making and which the other party could not and did not know,<sup>(14)</sup> the  page "608" termination for good cause of long-term contracts,<sup>(15)</sup> and conducts which, however lawful, are useless and in clear ignorance of preponderant interests of the aggrieved party. There also, the threshold to show a violation is very high. The violation of good faith is often considered as a last resort clause under Swiss law. Therefore, it is fairly unlikely that the Swiss Supreme Court would annul an award based on this ground absent a conduct which, as indicated above, clearly ignores the preponderant interests of the aggrieved party, appears to be contradictory or is based on a wrongly obtained right. Only the blatantly unbearable deprivation of the protection of the law by an award can be corrected by this principle.<sup>(16)</sup>

An expropriation without compensation has been considered a violation of public policy by the Supreme Court in a case where a State expropriated the assets of a company without taking into account its liabilities.<sup>(17)</sup> In another case, the Supreme Court indicated that the decision of an arbitral tribunal with respect to the fees to be reimbursed to the successful party would not lead to an annulment of the award for violation of public policy if such fees were only excessive; a fee allocation could only constitute a violation of public policy if it were far out of proportion compared to the necessary costs incurred by the winning party for the defense of its rights, taking into account all the circumstances of the case, so as to violate in a shocking manner the most essential principles of the relevant legal order.<sup>(18)</sup>

Provisions of the ECHR are not directly applicable in arbitration. However, the principles underlying these provisions can be used when examining the grounds for setting aside pursuant to Article 190(2).<sup>(19)</sup> The right to a fair trial, for instance, is protected by Article 6 ECHR, which has been raised in connection with the fact that an arbitrator and the counsel of the other party sat together in another arbitral tribunal. The Supreme Court dismissed the claim as constituting only a subjective conjecture without objective motivation.<sup>(20)</sup> The European Court of Human Rights has avoided giving an abstract enumeration of criteria of what constitutes a fair trial. Each case has to be assessed individually, and what counts is the picture which the  page "609" proceedings as a whole present.<sup>(21)</sup> However, the jurisprudence of the ECHR is sufficiently well mapped out at this stage to allow for the annulment of an award on this ground.

The Court had already indicated that an excessive violation of Article 27 CC, such that the obliged party is at the mercy of the other party's arbitrariness and its economic freedom is totally negated or limited to an extent that the bases of its economic existence are in danger, would lead to an annulment of the award.<sup>(22)</sup> This has now happened with the Matuzalem decision.

Therefore, while the principle of *res judicata* and the violation of Article 27 CC were probably the most likely candidates for an annulment of an award by the Supreme Court, the annulment of awards on other public policy grounds is however not excluded, in particular if the challenged award violates the fundamental principles of substantive law to a point that is no longer compatible with the

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  - 3 ATF 132 III 389 (8 March 2006), ASA Bull. 2/2006 p. 363
  - 4 *Id.*
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