# No foul play in arbitral award regarding football licensing

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## Introduction

In its decision dated March 2 2017(1) the Supreme Court considered whether an arbitral award rendered in connection with licensing for the Austrian First Division Football League (ie, the second highest professional division in Austrian football) had to be set aside because of an alleged infringement of public policy.

The arbitral award in question was rendered by the Permanent Neutral Arbitral Tribunal, whose jurisdiction is stipulated in the applicable licensing handbook issued by the Austrian Football Bundesliga, the association which grants football licences.

In the present decision, the Supreme Court dismissed the claimant's demand to set aside the arbitral award.

## Facts

The respondent in the annulment proceedings, the Austrian Football Bundesliga, is the governing body for football clubs in Austria. The respondent, among other things, organises the two highest professional football divisions in Austria and grants licences to compete in these divisions to eligible football clubs.

The so-called 'licensing handbook' stipulates the financial and sporting prerequisites for obtaining such licences, as well as the procedural steps to do so. By submitting a written licence application, the licensees accept the provisions stipulated in the licensing handbook, including an arbitration clause. All licence applications are reviewed by a special senate (Senate 5), whose decisions may be challenged before the so-called 'protest committee'. Both the senate and the protest committee are bodies of the Austrian Football Association.

Licensees may further challenge the protest committee's decisions by initiating arbitration proceedings before the Permanent Neutral Arbitral Tribunal. The Permanent Neutral Arbitral Tribunal is the Austrian Football Bundesliga's institutional arbitral tribunal. It is competent to hear disputes between the Austrian Football Bundesliga and football clubs that apply for a licence, among others things. The tribunal is generally composed of three arbitrators. The presiding arbitrator and any substitutes must hold a law degree and are elected for a four-year term in the Austrian Football Bundesliga's general meeting. In the general meeting, at least five arbitrators and substitutes must be appointed. The two co-arbitrators are selected from two separate lists, one of which is prepared by the executive board of the Austrian Football Bundesliga and the other jointly by the clubs of the two highest professional divisions in Austrian football. Each list must contain at least seven persons.

The claimant, an Austrian football club (redacted in the decision but evidently SK Austria Klagenfurt), applied for a licence for the First Division Football League for the 2016/2017 season. While the claimant met the sporting prerequisites, the senate questioned its financial viability and requested a bank guarantee securing payments by its main sponsor. However, the claimant's president refused to submit a bank guarantee, arguing that the creditworthiness of the claimant's sponsor must not be called into question. The senate subsequently refused to issue a licence to the claimant on the grounds that the funding for the 2016/2017 season was not secured.

The claimant lodged a complaint against the senate's decision with the protest committee and submitted two comfort letters (declarations of liability) issued by its president and main sponsor; however, the protest committee rejected the complaint.

The claimant then initiated arbitral proceedings before the Permanent Neutral Arbitral Tribunal and sought to prove the sponsor's financial means by submitting new documents (ie, land register excerpts) demonstrating its financial stability. The arbitral tribunal dismissed the claim because advancing new facts or arguments after expiry of the protest deadline stipulated in the licensing handbook is prohibited. The tribunal also argued that while the claimant had submitted declarations of liability along with its complaint to the protest committee, it failed to submit credit reports. The claimant should have been aware from previous licensing proceedings that these credit reports were necessary.

**Arguments**

The claimant argued in its annulment claim that the Permanent Neutral Arbitral Tribunal's arbitral award infringed procedural and substantive public policy. The prohibition on submitting new facts or arguments after expiry of the protest deadline impaired the parties' right to a fair trial and a free assessment of evidence. Moreover, the claimant challenged the independence of the arbitral tribunal and the short deadlines, and claimed that the respondent had a dominant position.

The respondent argued that its request to receive a bank guarantee was made in accordance with the licensing handbook and that the claimant's refusal to submit a guarantee thus led to the refusal to grant a licence. The respondent also contended that the prohibition on submitting new facts or arguments after expiry of the protest deadline was imposed equally on all licence applicants and was therefore legitimate. Further, the respondent held that the claimant had failed to assert the deficiency of the proceedings during the arbitral proceedings, thereby remedying any such defect.

**Decision**

In its decision, the Supreme Court first clarified that as the subject matter of the proceedings was the challenge to the arbitral award, contrary to the claimant's expectations, it could not assess whether the licence should have been granted. Rather, the Supreme Court had to assess whether the arbitral award should be set aside because of an alleged infringement of public policy.

The Supreme Court concluded that there was no infringement of procedural public policy. Contrary to the claimant's assertions, the arbitral tribunal considered the land register excerpts, but determined that they were legally irrelevant, because it had to assess only whether the decisions of the senate and the protest committee were in line with the licensing handbook and the respondent's statutes. The claimant failed to assert the deficiency of the proceedings or dispute the short deadlines during the arbitral proceedings. The court thus stated that the claimant could not assert these alleged deficiencies.

With regard to the purported infringement of the substantive public policy, the Supreme Court clarified that such an infringement presupposes a serious violation of the fundamental values of the Austrian legal system. Conversely, the Supreme Court could not assess whether the arbitral tribunal had correctly considered the relevant legal and factual questions in the case at hand, as a so-called '*révision au fond*' is not permissible under settled Austrian case law.

The Supreme Court nevertheless conceded *obiter dictum* that a plea for annulment must be assessed more diligently in a situation where a claimant was 'forced' to accept an arbitration clause because it was contracting with a monopoly.

However, even under this assumption, the court concluded that there was no reason to set aside the arbitral award in the present case. The Permanent Neutral Arbitral Tribunal was not supposed to give a new decision on the merits; rather, it had to assess whether the protest committee came to a decision based on the evidence available after conducting valid proceedings.

As a result, the Supreme Court concluded that the arbitral award did not infringe Austrian public policy and thus dismissed the claimant's demand.

**Comment**

The Supreme Court's decision is particularly interesting because the court had to tackle the sensitive issue of a possible infringement of substantive Austrian public policy in a situation where a party was forced to enter into an arbitration agreement with a dominant counterparty.

According to settled case law and prevailing legal opinions, the public policy exception must be applied only in the case of serious violations of the fundamental values of the Austrian legal system. Incidentally, Austrian courts are generally cautious when assessing or applying it.

This decision was made under special circumstances, as it related to football licensing and sports arbitration. Further, although the claimant did not challenge the arbitration clause itself, the well-known *Pechstein* case comes to mind. The German speed skater Claudia Pechstein, who had unsuccessfully challenged the decision of the Court of Arbitration for Sport (CAS) to suspend her for blood doping, subsequently claimed damages before the German courts. The Munich first-instance court held that the arbitration agreement concluded by Pechstein and the International Skating Union (ISU) was invalid because she had been forced to conclude it and therefore had not voluntarily agreed to arbitration. The Munich Appeals Court upheld the validity of the arbitration agreement, but found that the relevant CAS rules did not provide for a fair balance in the arbitrator selection process, as it favoured the sports bodies – in particular, as the majority of the CAS arbitrators were nominated by sports bodies. The case went to the German Federal Tribunal, which dismissed the arguments of both the first and second-instance courts.(2) The Federal Tribunal saw no misuse of ISU's dominant position, as the ISU took the interests of both sides into account. It also saw no structural imbalance, as the CAS was not integrated in any sports organisation.

In the present case, the Supreme Court did not tackle the serious question (which is also debated in Austrian legal literature) of whether the principle that submission to arbitration must be made voluntarily is violated in monopolistic situations. It also failed to elaborate on the claimant's allegation that the arbitral tribunal lacked independence. However, the Supreme Court gave the counterparty's dominant position weight. It held that an annulment claim based on substantive public policy must be assessed more strictly where a claimant was 'forced' to accept an arbitration clause when contracting with a monopoly. It thus cautiously opened the door to protect the weaker party – without offering any further guidance, except that the test in this case was negative. While the Supreme Court made no reference to *Pechstein*, the reasoning appears to take the Federal Tribunal's decision into account. It held that it saw no abuse of the dominant role of the sports body in the process and thus approved the arbitral tribunal's reasoning in this respect.

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**Endnotes**

(1) Docket 18 OCg 6/16f.

(2) BGH June 6 2016 Docket KZR 6/15.