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by Dr. Lucien W Valloni[1] and Dr. Thilo Pachmann[2]

Introduction

The most important institution for the resolution of sporting disputes is the Court of Arbitration for Sport (CAS), which is domiciled in Lausanne, Switzerland. From a legal point of view, CAS and its ad hoc Chamber during the Olympic Games are arbitral tribunals, to which, in international cases, the articles 187 ss. of the Swiss Private International Law Act (PILA) of December 18, 1987 apply, and, in domestic cases[3], the articles 353 ss. of the Swiss Civil Procedure Code (CPC) apply.[4] As such, the Swiss Federal Supreme Court is the main[5] place for the legal challenge of all[6] CAS arbitral awards. The decisions of the Swiss Federal Supreme Court are final.[7] The Swiss Federal Supreme Court and its jurisprudence are, therefore, very important for all sporting disputes worldwide. The article at hand will outline the role of the Swiss Federal Supreme Court in sporting disputes.

Independence of CAS in the jurisprudence of the Swiss Federal Supreme Court

In the famous Gundel case, the Swiss Federal Supreme Court recognised CAS as a true court of arbitration (and not an organ of the International Equestrian Federation).[8] Still, the Swiss Federal Supreme Court in an obiter dictum drew the attention of CAS to the close links of CAS to the International Olympic Committee (IOC). In the aftermath of this decision, CAS was reorganised and its independence from the sports organizations strengthened. Subsequent to this, the Swiss Federal Supreme Court has always upheld the position of CAS as an independent arbitral tribunal, even in cases against the IOC.[9] Its decisions are, therefore, internationally enforceable arbitral awards according to the New York Convention.

Surprisingly, during the entire time of its existence, there has not been one single case from CAS that was set aside by the Swiss Federal Supreme Court due to the lack of impartiality of one of the arbitrators, even though there were, in fact, a lot of cases in which the independence of the arbitrators was at least questionable. The Swiss Federal Supreme Court considered it in particular as unproblematic that an arbitrator and a counsel of one of the parties sit together on another CAS Panel[10], or that two out of the three arbitrators as well as the legal counsel of the opposing party were members of the same federation[11]. Furthermore, it was not found problematic that the legal counsel of one of the parties had worked closely together – in the CAS ad hoc division or as a CAS clerk – with a member of the arbitral tribunal.[12]

In its jurisprudence, the Swiss Federal Supreme Court has, thus, always backed up CAS as an independent institution for the resolution of sporting disputes. This has probably been the most important influence of the Swiss Federal Supreme Court in the sporting world.

Appeal grounds at the Swiss Federal Supreme Court

The grounds for an appeal to the Swiss Federal Supreme Court are, particularly in international arbitration cases[13], extremely limited. One of the essential aims that the legislature pursued when regulating international arbitration was to reduce to a minimum the possibilities to challenge arbitration awards. However, the legislature did this in consideration of commercial arbitration, and not sports arbitration. The last few years have demonstrated that these restrictive statutory provisions are inappropriate for sports arbitration, as the sports persons do not voluntarily submit their disputes to CAS[14] and as there is no way to fully review the CAS decision, which in appeal procedures completely replaces the appealed decision of the sports federation.[15] However, according to art. 190 para. 2 PILA – also in sports cases – only the following appeal grounds exist in international arbitration cases:[16]

a Wrongful appointment of the arbitral tribunal[17]
This provision guarantees the right for an independent judge according to art. 30 para. 1 of the Swiss Constitution and art. 6 para. 1 of the European Convention on Human Rights. The condition for invoking this appeal ground is that the respective breach of the regulation (lack of independence or impartiality) could not have been addressed earlier in the proceedings. The parties have to challenge an arbitrator as soon as they take notice thereof. However, as already outlined, the jurisdiction of the Swiss Federal Supreme Court is not very strict in this regard. [18]

b Lack of jurisdiction of the arbitral tribunal[19]
With this objection, the arbitrability pursuant to art. 177 PILA and the formal and/or substantive validity of the arbitration agreement pursuant to art. 186 para. 2 PILA may be contested. However, the Swiss Federal Supreme Court stated recently that the arbitration agreement between two parties in sports disputes is considered in its jurisprudence with a "certain goodwill" in favor of the arbitration agreement's validity.[20] The generosity of the Swiss Federal Supreme Court is, in particular, given in cases of arbitration clauses by reference.[21] Nevertheless, the Swiss Federal Supreme Court has considered CAS as not competent in a few cases.[22] Moreover, within art. 190 para. 2 lit. b PILA, the violation of the *litis pendens* provision stated in art. 9 PILA may be censured.[23] All objections to jurisdiction of CAS have to be addressed already during the CAS proceedings. An appeal against jurisdiction pursuant to art. 190 para. 2 lit. b PILA must be taken against the first correctly inaugurated, challengeable decision, otherwise

it will be forfeited. An appeal is not only possible against partial arbitral decisions and final arbitral decisions but also against preliminary and intermediate decisions.[24]

c Decisions disregarding the petita[25]
This objection ground – the arbitral tribunal awards more than the parties have requested *(ultra petita)*, or the arbitral tribunal awards something different to what the parties have requested *(extra petita)*, or the arbitral tribunal does not decide on one of the parties' requests – represents a particular aspect of the parties' right to be heard and prohibits the arbitral tribunal from including claims in its arbitral award on which the parties could not take a position either in fact or in law.[26]

d Breach of the principle of equal treatment of the parties or the right to be heard[27]
The Swiss Federal Supreme Court considers the right to be heard protected under art. 190 para. 2 lit. d PILA to correspond to the right protected under art. 29 para. 2 of the Swiss Constitution.[28] The parties are to be granted equal chances to present their arguments in the sense of art. 182 para. 3 PILA. The arbitral tribunal shall ensure the equality of arms and non-discrimination.[29] Each party has the right to comment on the facts and the legal arguments; to file motions to take evidence; to participate in the evidence taking or at least to comment on the result of the taking of evidence; and to participate in hearings.[30] However, this appeal ground is very restrictively applied.[31] According to the Swiss Federal Supreme Court, the right to be heard does not contain a right for a materially correct decision (prohibition of the *"révision au fond"*).[32] In any case, it is crucial that the objection is already raised in the arbitration proceedings, since otherwise, if brought forward for the first time to the Swiss Federal Supreme Court, the assertion will be forfeited.[33]

e Breach of "ordre public"[34]
A decision is incompatible with the *ordre public*, i.e. public policy, if it misconceives the essential and largely accepted values that prevail in Switzerland and that are part of the foundations of every judicial ruling.[35] There are two possible categories of violations of public policy: violations of substantive public policy and violations of procedural public policy. Examples of substantive public policy violations are the principles of *pacta sunt servanda*, prohibition of abuse of rights, the principle of trust and good faith and the prohibition of discrimination. The Swiss Federal Supreme Court is very restrictive in the application of this appeal ground. Even the incorrect application of mandatory laws or the violation of human rights do not per se constitute a breach of public policy; the breach of public policy has to affect the decision itself.[36] Examples of procedural public policy are the right to an impartial and unbiased expert appointed by the arbitral tribunal and the res judicata effect.[37] However, the lack of a justification of the decision does not constitute a breach of public policy and there is no autonomous right to rescind the arbitral award because of blatantly wrong establishment of the facts.[38]

Limited cognition of the Swiss Federal Supreme Court

In addition to these limited appeal grounds, the Swiss Federal Supreme Court's authority to reassess arbitral awards is also very limited under Swiss law.

The Swiss Federal Supreme Court does not have the authorization to correct or complete the facts of the case *ex officio*, and the Swiss Federal Supreme Court is bound by the facts as established by CAS.[39] Further, the Swiss Federal Supreme Court does not apply the law *ex officio*;[40] the parties have to argue which law applies and how the law should be applied. Finally, the Swiss Federal Supreme Court is basically not authorized to decide the case instead of CAS.[41] It has only a function as a court of cassation. The Swiss Federal Supreme Court can only annul the CAS decision.

Also, with respect to sports arbitration, which in contrast to ordinary arbitration is affected by a serious imbalance between the parties, the Swiss Federal Supreme Court still follows, almost[42] without exception, the statutory requirements.

Reluctance of the Swiss Federal Supreme Court to interfere in sporting disputes

In general it must be pointed out that appeals to the Swiss Federal Supreme Court regarding sports arbitration cases pursuant to art. 77 of the Code of the Federal Supreme Court (CFSC) were very unsuccessful in the last few decades. Almost all appeals were dismissed.[43] The extremely restricted cognition of the Swiss Federal Supreme Court under art. 190 para. 2 PILA almost always proved to be insurmountable. Only in matters of jurisdiction, where the Federal Supreme Court is less restricted in its cognition, were a larger number of decisions rescinded.

CAS has, thus, a very wide discretion due to the conception of international arbitration in Switzerland. The decisions of CAS are very difficult to challenge by means of an appeal to the Swiss Federal Supreme Court. Even substantively false decisions that clearly suffer from an inner conflict and are arbitrary will not be annulled by the Swiss Federal Supreme Court.[44]

However, this basic legal set up has just recently been shaken. It seems as if the Swiss Federal Supreme Court might be taking a more active role in sporting disputes.

The Matuzalem decision – a turning point in the role of the Swiss Federal Supreme Court?

On 27 March 2012, for the first time in more than twenty years, an international arbitral award was annulled by the Swiss Federal Supreme Court for a breach of substantive public policy.[45] The Swiss Federal Supreme Court overruled a CAS award in which the decision of the FIFA Disciplinary Committee was confirmed. The decision had found the Brazilian football player Francelino da Silva Matuzalem and the Spanish football club Real Zaragoza guilty of breaching their obligations towards the Ukrainian football club Shakhtar Donetsk. Among other consequences of this, pursuant to the applicable FIFA regulations, Matuzalem would automatically have been banned from any activity in connection with football.

In 2004, Matuzalem entered into a five year employment contract with Shakhtar Donetsk. After three years, Matuzalem terminated his contract and signed a contract with Real Zaragoza, which undertook to hold him harmless from any claims that might arise from the termination without just cause of his contract with

Shakhtar Donetsk. Based on article 17 of the Regulations on the Status and Transfer of Players, CAS ordered Matuzalem and Real Zaragoza to pay to Shakhtar Donetsk compensation of € 11,858,934 plus interest at 5% from July 2007. An appeal against this decision was filed by Matuzalem and Real Zaragoza before the Swiss Federal Supreme Court. This appeal was rejected on 2 June 2010.[46] However, the Swiss Federal Supreme Court considered the extremely punitive[47] calculation of the compensation only as a "compensation for damages". Of course Matuzalem was subsequently not able to pay such an amount of compensation, and he will also not be able to pay such compensation over the course of his career.[48] Unfortunately, also Real Zaragoza was – due to financial difficulties – not able to pay the awarded compensation amount to Shakhtar Donetsk.

For this reason, Shakhtar Donetsk initiated disciplinary proceedings against Matuzalem and Real Zaragoza with FIFA. Based on article 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee found Matuzalem and Real Zaragoza guilty and condemned both to pay a fine of CHF 30,000 within a final deadline. If such payment were not to be made within 90 days, Shakthar Donetsk could demand in writing from FIFA that a ban on taking part in any football related activity would be imposed on Matuzalem and/or six points be deducted from the first team of Real Zaragoza in the domestic league championship. Such a ban and/or such a deduction of points would be imposed without further formal decisions of the FIFA Disciplinary Committee until the total outstanding amount had been fully paid. The appeal filed by Matuzalem and Real Zaragoza against the decision of the FIFA Disciplinary Committee was turned down by CAS on 29 June 2011. Only Matuzalem appealed against the CAS decision.

In its decision, the Federal Supreme Court first reaffirmed that the free development of an individual must not only be respected by the State but also by monopolistic private individuals, such as sports federations. The Federal Supreme Court held that any decision of such a sports federation must be consistent with the fundamental values in Switzerland. These fundamental values of public policy have so far not been exhaustively defined in Swiss jurisprudence. One of these fundamental values is the provision of article 27 para. 2 Civil Code – the so called *excessive commitment* provision – which is considered by the Federal Supreme Court as a substantial part of any moral and legal system. Thus, the violation of this principle leads to a violation of substantive public policy if personality rights are obviously and seriously violated. Taking into consideration article 27 para. 2 Civil Code, the Federal Supreme Court found that the worldwide ban of a professional football player for an unlimited time because of his inability to pay a certain amount of money to his former club is a breach of substantive public policy. Instead of promoting compliance with the decision, the "punishment" in reality renders the payment completely impossible, because the player would never be able to earn enough to pay off his obligations. Such a punishment was, furthermore, considered as unnecessary, as under the New York Convention it would be quite easy to enforce the decision.

This landmark decision could well be the turning point for the role of the Federal Supreme Court in sporting disputes. Already in 2010, the Federal Supreme Court annulled another international arbitral award in a sporting dispute because a res judicata had not been taken into account.[49] However, the reason for that decision was "only" a violation of procedural public policy. The continuing criticism of the jurisprudence of the Federal Supreme Court regarding sporting disputes may finally have had some effect.

In connection with the appeal to the Swiss Federal Supreme Court, it is also possible to ask for provisional measures to obtain immediate legal relief in urgent cases.

Provisional measures in front of the Swiss Federal Supreme Court

In principle, the appeal to the Swiss Federal Supreme Court has no suspensive effect. However, even though not very many appeals to the Swiss Federal Supreme Court have been successful in the past, the Swiss Federal Supreme Court has in several cases, and, in particular, in doping cases, granted suspensive effect pursuant to art. 103 para. 2 CSFC.

In the Pechstein case, the Swiss Federal Supreme Court even ordered for the very first time a positive order pursuant to art. 104 CFSC. The International Skating Union was ordered to allow Claudia Pechstein to participate in the Salt Lake City qualifying race for the Olympic Games in Vancouver.[50] Such provisional measures are granted if cumulatively:

- time is of the essence;
- an irrevocable detriment is about to occur; and
- there is *prima facie* a positive forecast regarding the merits of the case.

The proceedings before the Swiss Federal Supreme Court provide sports persons with sufficient legal protection in urgent cases, so that their right to continue their professional activities is ensured until the final decision of the Swiss Federal Supreme Court is rendered.

Concluding remarks

Through its jurisprudence, the Swiss Federal Supreme Court has turned CAS into a worldwide recognized independent arbitral tribunal. As such an arbitral tribunal, under Swiss law, CAS enjoys a very wide discretion for its decisions. Appeals to the Swiss Federal Supreme Court are only possible based on a few appeal grounds and the cognition of the Swiss Federal Supreme Court is very narrow.

However, it seems as if the Swiss Federal Supreme Court has lately started taking a closer look at CAS decisions and is willing to protect not only the interests of the sporting world, but also the interests of sports persons. This is confirmed by the fact that the Swiss Federal Supreme Court has also been willing to act very quickly if provisional measures are necessary to protect the interests of the persons affected. The appeal to the Swiss Federal Supreme Court can, hence, be turned into a very powerful legal instrument.

The Swiss Federal Supreme Court is hopefully beginning to live up to its role as the guardian of the ultimate limits of the autonomy of the sporting world.

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[3] Arbitral proceedings between WADA and a sportsperson residing in Switzerland are domestic cases, as WADA is a foundation with its registered seat in Switzerland (only its offices are in Canada); see also *Pachmann, Corporate Governance und Sportverbände* (thesis, Zurich 2007), p.54.

[4] The appeal procedure to the Swiss Federal Supreme Court is – apart from the appeal grounds pursuant to art. 393 CPC – basically the same in international and domestic cases.

[5] In domestic cases, according to art. 390 CPC, it is possible to introduce the upper Cantonal Court as an appeal instance instead of the Swiss Federal Supreme Court. In international cases, according to art. 191 PILA the Swiss Federal Supreme Court is the only appeal instance.

[6] Even though the PILA provides in art. 192 para. 1 that the appeal of a decision to the Swiss Federal Supreme Court may be excluded, the Swiss Federal Supreme Court held in the Cañas decision that such an exclusion in sports cases is not permissible because of the monopolistic position of the sports organizations and the unilateral imposition of the arbitration clause; BGE 133 III 235.

[7] The decisions of the Swiss Federal Supreme Court cannot be appealed any further. The only remaining legal action after a decision of the Swiss Federal Supreme Court is an appeal to the European Court for Human Rights. Such an appeal is, however, not directed against the decision itself, but rather against Switzerland and its legal system.

[8] BGE 119 II 271.

[9] Decision of the Swiss Federal Supreme Court 4P.267/2002 of 27 May 2003.

[10] Decision of the Swiss Federal Supreme Court 4P.105/2006 of 4 August 2006, cons. 4.

[11] Decision of the Swiss Federal Supreme Court 4A_506/2007 of 20 March 2008 cons. 3.3.2.2.

[12] BGE 129 III 445, 467; decision of the Swiss Federal Supreme Court 4A_176/2008 of 23 September 2008, cons. 3.3.

[13] According to art. 393 lit. e CPC it is – in addition to international arbitral awards – possible to challenge domestic arbitral awards also because of:
- an arbitrary result;
- an apparently wrong determination of the facts; or
- an apparently wrong application of the law or equity.

[14] If the sportsperson refuses to submit to sports arbitration, the sportsperson cannot perform his or her occupation. The equality between the parties, which is a characteristic of commercial arbitration, does not apply in sports.

[15] CAS fully reviews the decision of the sports federation and decides *de novo* (R57 CAS Code). Therewith, a completely new decision of the sports federation comes into place, which is not subject to a full legal review.

[16] For more details see Valloni/Pachmann, *Sports Law in Switzerland* (Kluwer Law International, 2011), p. 123 ss.

[17] Art. 190 para. 2 lit. a PILA.

[18] See above Independence of CAS in the Jurisprudence of the Swiss Federal Supreme Court.

[19] Art. 190 para. 2 lit. b PILA.

[20] Decision of the Swiss Federal Supreme Court A_640/2010 of 18 April 2011.

[21] See for example the decision of the Swiss Federal Supreme Court 4A_460/2008 of 9 January 2009, where the Swiss Federal Supreme Court affirmed the opinion of CAS that a professional football player is bound to the articles of association of the FIFA by accepting the articles of association of his national association. He therewith accepts CAS as the arbitral tribunal.

22 In the *Gert Thys* case (decision of the Swiss Federal Supreme Court 4A_456/2009 of 3 May 2010) CAS simply based its competence on a fax from the anti-doping administrator to the legal representative of the athlete, wherein it assumed the competence of CAS. In the eyes of CAS, this fax was an offer for the conclusion of an arbitration agreement, which the athlete accepted implicitly. Fortunately, the Swiss Federal Supreme Court held that CAS was not allowed to assume such an implicit arbitration agreement. The fax just expressed the wrong opinion of CAS regarding its jurisdiction.
In the case of the ice hockey player *Florian Busch* (decision of the Swiss Federal Supreme Court 4A_358/2009 of 6 November 2009.) CAS based its competence on an application form that was signed by every player for the Ice Hockey World Championships, which the participants had to sign every year. However, the Swiss Federal Supreme Court held that the arbitration clause is only valid for disputes in connection with the respective World Championship; the arbitration clause could not be considered as a general arbitration agreement.

[23] BGE 127 III 279 C. 2a

[24] Art. 190 para. 3 PILA; BGE 120 II 155.C. 3b bb.

[25] Art. 190 para. 2 lit. c PILA.

[26] BGE 120 II 172 C. 3a; BGE 116 II 80 C. 3a.

[27] Art. 190 para. 2 lit. d PILA.

[28] BGE 127 III 576; BGE 119 II 388; BGE 117 II 347; BGE 116 II 85.

[29] BGE 129 III 445 C. 5.1.

[30] In the Decision 4A_400/2008 of 9 February 2009, the Swiss Federal Supreme Court had to judge a case in which a player's agent pleaded a violation of the right to be heard because the CAS based its decision on a legal argument that was unforeseeable for the parties. According to the considerations of the Swiss Federal Supreme Court, the parties have to be heard regarding all legal questions and legal provisions on which the arbitral tribunal intends to base its decision if their determinative effect was not foreseeable for the parties in any other way. See also BGE 116 II 639 C. 4c.; BGE 117 II 346 C. 1a; BGE 130 III 35 C. 5; BGE 133 III 235.

[31] There is no right to be heard on the Panel's legal qualification of a case; BGE 4A_42/2007. And there is also no right to make oral representations to the arbitral tribunal; BGE 117 II 346 C. 1b aa. It does not include the right to receive a reasoned international arbitration decision; BGE 134 III 186 C. 6.1, 187. The blatantly contradictory fact finding or the non-consideration of evidence does *not per se* constitute a breach of the right to be heard; if, however, the fact finding or the consideration of evidence constitutes a formal denial of justice, the right to be heard is breached: decision of the Swiss Federal Supreme Court 4A_18/2008.

[32] BGE 127 III 576 C. 2b.

[33] BGE 126 III 254; BGE 119 II 388; BGE 116 II 644 and Decision of the Swiss Federal Supreme Court 4P.103/1989 of 23 October 1989 C. 2c.

[34] Art. 190 para. 2 lit. e PILA.

[35] BGE 132 III 389 C. 2.2.3.; BGE 120 II 155.

[36] BGE 116 II 634 C. 4.

[37] BGE 128 III 191 C. 4ª; decision of the Swiss Federal Supreme Court 4A_490/2009 of 13 April 2010.

[38] BGE 120 II 155 C. 6a; BGE 119 II 380 C. 3c.

[39] Art. 77 para. 2 and art 105 para. 2 CFSC.

[40] So called "Rügeprinzip" according to art. 77 para. 2 and art. 106 para. 1 CFSC.

[41] Art. 77 para. 2 and art. 107 para. 2 CFSC. Only in cases regarding the jurisdiction of CAS is the Swiss Federal Supreme Court allowed to render a reformatory decision.

[42] See above footnote 6.

[43] The appeals were only successful in the Cañas decision (BGE 133 III 235) and the decisions of the Swiss Federal Supreme Court 4A_400/2008 of 9 February, 4A_358/2009 of 6 November 2009, 4A_490/2009 of 13 April 2010, 4A_456/2009 of 3 May 2010, 4A_600/2010 of 17 March 2011, and 4A_558/2011 of 27 March 2012.

[44] See for example decision of the Swiss Federal Supreme Court 4A_612/2009 of 10 February 2010 as well as the limited appeal grounds outlined above.

[45] Decision of the Swiss Federal Supreme Court 4A_558/2011 of 27 March 2012.

[46] Decision of the Swiss Federal Supreme Court 4A_490/2009 of 13 April 2010.

[47] Order of the Swiss Federal Supreme Court dated 7 December 2009 in the matter of 4A_612/2009.