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INTERNATIONAL AND COMPARATIVE SPORTS JUSTICE

Michele Colucci **and** ***Karen L. Jones*** **eds.**

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PART III

THE COMPARATIVE ANALYSIS
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INTRODUCTION

Sports justice is of paramount importance for any club, athlete, and any other person registered with a sports association. They all have rights and obligations that are peculiar in the sense that they are proper to the context of sport, and therefore are most appropriately granted or supervised by sports justice within an autonomous system.

In the name of their autonomy and the specificity of sport many associations around the world developed their own justice bodies. Some of them seem to be more effective than others but all share the same goal: to settle disputes, to mediate and to guarantee the correct interpretation of sporting rules and regulations.

This is not an easy task since the scope of sports justice is not always easy to describe. In fact ordinary justice maintains its place for granting and supervising certain rights and obligations that are not all so different from those protected by sports justice.

The lines of distinction become even more blurred when issues of individual or fundamental rights come into play.

This has become an interesting paradox, because sports justice and ordinary justice are not always discernible. One possible explanation may be found in the reality of certain countries where the two systems tend to converge.

This book is unique in that, for the first time, besides the Court of Arbitration for Sport, the sports justice systems of six international federations and twenty-three national federations as well as their relationship with ordinary justice, have been closely analysed.

The authors are all eminent scholars, sports lawyers and arbitrators who provide in-depth review and personal insights into the complexities of the topic.

The book is divided into three parts. The first covers the major international associations in football, soccer, basketball, handball, and Formula 1.

The second part focuses on the national sports justice systems and, in particular, on the general principle of sports justice as defined by the national Olympic Committees and by the football federations. Proper attention is given to the rules and procedures of the sports judicial bodies and to the relevant case law.

The last part gives an overview of all justice systems covered in order to identify the critical issues and relevant trends.

The aim is to provide all stakeholders with selected and detailed information in view of raising awareness of existing practices all over the world.

Brussels - The Hague, 30 September 2013

Michele Colucci *Karen L. Jones*

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SPORTS JUSTICE IN SWITZERLAND

by *Lucien W. Valloni*[*] and *Thilo Pachmann*[**]

SUMMARY: 1. Introduction – 2. Sports justice in general – 3. Judicial review of decisions of national sports federations – 4. Relevant NOC regulations – 5. Relevant football regulations – 6. Sports justice in doping cases – 7. The sports judicial bodies – 8. Conclusions

Abstract:

This article describes the system of sports justice in Switzerland with its main principles and its most important legal institutions. These main legal principles are of paramount importance for worldwide sports justice as they are constantly applied by the Court of Arbitration for Sport, which reviews the decisions not only of the national but also of international sports federations. The decisions of the Court of Arbitration for Sport are subject to appeal to the Swiss Federal Supreme Court, which makes the Swiss Federal Supreme Court the highest authority in worldwide sports justice. Due to the Swiss legal system, its jurisprudence has, unfortunately, not such a big effect for the implementation of basic legal principles in sports as it could and should have.

1. Introduction

Organized sport and therewith sports justice is of paramount importance in Switzerland. Many important bodies organize worldwide sports from Switzerland. Among others FIFA, IOC, UEFA, FEI, FIBA, FIVB and IIHF are all incorporated in Switzerland, which makes Swiss association law applicable for the relationship between the international sports federations and their foreign members.[1]

Furthermore, the World Anti-Doping Agency (WADA) and the Court of

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[1] Art. 1 and art. 155 lit. f Swiss Private International Law Act (PILA).

Arbitration for Sport (CAS) are domiciled in Switzerland.

For sports justice, the Court of Arbitration for Sport (CAS) has a worldwide importance as almost all international sports federations have an arbitration clause in their articles of association according to which their disputes are decided by CAS. CAS is an arbitral tribunal having its seat in Switzerland and consequently applying Swiss law. The arbitral awards of CAS are subject to judicial review by the Swiss Federal Supreme Court. Swiss sports justice is therefore very important for sports justice all over the world. As CAS is the subject of another chapter of this book, this chapter concentrates primarily (i) on the system of Swiss sports justice in general (see below para. 2 and 3) as well as (ii) the sports justice of the national sports federations (see below para. 4 to 6) and (iii) on the sports justice of the Swiss Federal Supreme Court (see below para. 7).

2. Sports justice in general

2.1 Autonomy and limits of sports justice

All sports federations in Switzerland are associations pursuant to art. 60 et seq. Swiss Civil Code (CC). They are autonomous legal entities. The form of association gives sports organizations the freedom for their internal organization.[2] Each association is free within the framework of Swiss law to legislate for itself and its members, to apply and to enforce such rules. This right also contains the right to sanction its members and to decide disputes between its members. Sports organizations make use of their autonomy when establishing, applying and enforcing their articles and regulations, as well as to uniformly regulate their respective sport.

However, the principle of autonomy of associations is particularly limited when it comes to judicial review because each member of an association has a compulsory right to appeal against decisions of the association at an independent court or an independent arbitral tribunal.[3] This appeal is a means to check all decisions of associations as to whether they comply with the law and the articles of association (see below para. 3.1). Furthermore, decisions of associations can be declared as null and void if they violate basic legal principles (see below para. 3.2). For this reason it needs to be differentiated between the *internal* sports justice of the sports federations and the *external* sports justice by independent courts or arbitral tribunals such as CAS.

2.2 Legal review of sporting rules

Together with the statutory rules, the articles of association form the corporate

[2] The autonomy of associations is an emanation of the human right to self-determination and is firmly anchored in Swiss law, giving the right to determine the articles of association as well as the right to self-manage. There is also a constitutional right to found associations, to become a member, to be a member and to participate in its activities.

[3] Art. 75 Swiss Civil Code.

constitution of the sports organization. They form the starting point for the regulations and decisions of the bodies of the association. The articles of association are complemented by the association's internal continuing practice. The articles, regulations and decisions are binding due to the collective consent when the association is founded or a member is joining the association.

According to the Swiss Federal Supreme Court, rules of private organizations do not have the same quality as rules of state law. They are not 'law' pursuant to art. 116 para. 1 and art. 187 Swiss Private International Law Act (PILA) and cannot be recognized as "lex sportiva transnationalis", as some authors argue.[4] Sports associations have to comply with the hierarchy of laws as well. In case of contradictory rules, mandatory statutory law prevails, followed by the articles of association and continuing practices (art. 36 paragraph 2 Swiss Civil Code), followed by non-mandatory statutory law (art. 63 paragraph 1 Swiss Civil Code). It is not clear whether autonomous rules of an association at a lower level, such as regulations, can prevail over non-mandatory statutory rules. This is in any case only possible if the articles of associations contain the foundation for such regulation.[5] Regulations and other rules of the association are therefore in principle at the bottom of the hierarchy.[6]

The possibility of *internal* judicial review of such sporting rules and their application depends on the extent to which the sports organization has used its autonomy and the extent to which it grants internal rights of appeal. It also depends on the rights granted in the articles of association and the statutory rights of the people who are affected by rules of the game. However, the sporting rules and their application can never exceed the given frame of the mandatory law. There is always the last resort of an *external* legal review by independent courts. By this means, the decision as well as the proceedings leading to the decision can be reviewed. Before the decision can be appealed against in courts outside the organization, it is mandatory to exhaust the possibilities within the organization.

2.3 Principles of sports justice

2.3.1 Principles of sports justice in general

Despite the law on associations being mostly capable of amendment of waiver, there are some important mandatory rules that have an impact on the autonomy of sports organizations.[7] These mandatory rules include the principles of equal treatment, legality and proportionality, which all follow from the principle that rights must not

[4] Cf. BGE 132 III 285, according to which the rules of international sports associations are only applicable as an agreement between two private parties, that is subordinated to state law.

[5] Cf. for example Heini/Portmann/Seemann, *Grundriss des Vereinsrechts*, N 58; Riemer, *Berner Kommentar*, art. 63 N 52.

[6] Cf. for example Heini/Portmann /Seemann, *Grundriss des Vereinsrechts*, N 58.

[7] Art. 63 para. 2 Swiss Civil Code.

be abused.[8]

According to the principle of *equality*, a sports organization has to treat its members equally, both in an absolute and in a relative sense when issuing rules and using discretion.[9] Pursuant to the principle of *legality*, all duties that sports organizations impose on their members must be based on a provision in the articles of association.[10] According to the articles of association, the person imposing such duties must at least be competent to define members' duties within a given framework. The principle of *proportionality* is one of the most important principles of Swiss company law.[11] Sports organizations have to act in a way which least infringes the rights of their members. Any infringement has to be appropriate and necessary and the reason and the result have to be balanced.

Further compulsory rules follow from *private law in general*,[12] *public policy* and *bona mores*.[13] Sports organizations may in particular be restricted to act with regard to sportspersons by art. 21 Swiss Code of Obligations, which protects against *exploitation*.[14] Amongst the most important limits are *privacy rights* according to Art. 27 ss. Swiss Civil Code and *competition law* according to the Swiss Cartel Act.[15] Many important limits to the autonomy of organizations are based on unwritten laws.[16]

2.3.2 Principles of sports justice in disciplinary cases

All disciplinary cases need to be handled according to the basic principle of *fair trial*.[17] In particular all members of an association have to be granted the *right to be heard*.[18] The right to be heard is the most important procedural principle in Swiss sports justice and it needs to be granted in any case even if the articles of association would allow an exclusion of the member without any reasons.

Further important principles in disciplinary cases include the following:

– the principle *nulla poena sine lege* does not allow the punishment of any

[8] Art. 67 para. 1 Swiss Civil Code; for more details see Fuchs, *Rechtsfragen der Vereinsstrafe*, 110 et seq.; Pachmann, *Corporate Governance in Sportverbänden*, 277 et seq.

[9] Pachmann, *Corporate Governance in Sportverbänden*, 279.

[10] Pachmann, *Corporate Governance in Sportverbänden*, 277 et seq.

[11] Pachmann, *Corporate Governance in Sportverbänden*, 279 et seq.

[12] Cf. thereto *inter alia* BGE 132 III 285, in which the shortening of the enforceability in accordance with the relevant FIFA regulations was considered to be a breach of the mandatory limitation period of (elected) Swiss substantive law (see art. 127 and art. 129 Swiss Code of Obligations). Consequently, the relevant provision was not applicable in the case at hand.

[13] Art. 19 para. 2 Swiss Code of Obligations.

[14] The sports organization shall only require services of an athlete that are in proportion to the contribution. Thus, when concluding an athlete's agreement this balance must be assured, provided there is an obligation to contract.

[15] Pachmann, C*orporate Governance in Sportverbänden*, 268 et seq.

[16] Riemer, *Berner Kommentar*, N 39 et seq., and N 41 to art. 63 Swiss Civil Code, N 42 and N 52 to art. 72 Swiss Civil Code.

[17] Art. 29 ss. Swiss Constitution and art. 6 European Human Rights Convention.

[18] Art. 29 para. 2 Swiss Constitution.

person without any sufficient legal basis in the articles of association of a sports federation;
– according to *ne bis in idem* it is not allowed to punish a member twice for the same action;
– the *prohibition of excessive formality* states that the sports federation is not allowed to enforce formal rules if they are materially not justified and to apply formal rules with excessive rigidity. It is a special form of denial of justice.

However, there are also other legal principles that do not fully apply in sporting cases. The presumption of innocence for example is, according to the jurisprudence of the Swiss Federal Supreme Court not applicable in doping matters, even though there are quite a few authors that are criticising this jurisprudence.[19] Because of the very close relationship between athletes and sports federations, rather a presumption of guilt applies once a forbidden substance is found in the body of an athlete. In such a case the athlete has of course the possibility to show that it was not his fault that the substance came into his body. Therewith, the principle of *fault based liability* – which is another important basic principle in Swiss sports justice – is sufficiently upheld.

3. Judicial review of decisions of national sports federations

3.1 Appeal

The most important corporate remedy to safeguard the rights of members is the right to appeal pursuant to art. 75 Swiss Civil Code. However, before a legal action can be taken, the internal legal means within the association have to be exhausted. Not only can members fight against breaches of law, but this right also guarantees that corporate life in general complies with the law and that the association is managed in accordance with statutory law and the articles of association.[20]

According to art. 75 of the Swiss Civil Code, decisions[21] that breach statutory law[22] or the articles of association can be challenged before a court by each member who has not given his or her consent within one month from when the member has become aware of the decision. However, CAS has reduced this mandatory statutory time limit to twenty-one days (R49 CAS Code). The appeal

[19] Decisions of the Swiss Federal Supreme Court 5P.83/1999 of 31 March 1999 C. 3d and 4P.105/2006 of 4 August 2006 C. 8. For more details see Valloni/Pachmann, *Sports Law in Switzerland*, N 335 ss.

[20] BGE 108 II 18.

[21] Although the law only mentions the resolutions of the general meeting of an association, other resolutions by organs of an association may also be challenged through the courts if they cannot be challenged within the association and if they concern rights of members of an association; BGE 108 II 18 et seq.; BGE 118 II 17 et seq.

[22] Cf. hereto *inter alia* decision of the District Court of VIII Bern-Laupen of 13 June 2008. *In casu* the court held that the 'foreigner provision' (restriction on the number of foreign players allowed to participate in the competition) of Swiss Athletics contravenes the Agreement with the EU on the Free Movement of Persons.

can refer to any breach of statutory law or the articles of association that in fact have an impact on the decision. This includes all explicit and implied rules of law, as well as all internal rules, including rules of the association and rules of the game.[23] In particular decisions referring to the right of the members or privacy rights under art. 27 and 28 Swiss Civil Code are included.[24] However, mere declarations by a director or employee of the organization cannot be the subject of an appeal.[25]

Contrary to the wording of art. 75 Swiss Civil Code, not only direct members of an association but also indirect members, i.e. the sports-men that are members of a club which is a member of a sports federation, have a right to appeal. The reason given for this by the courts is the special relationship between indirect members and the organization[26] on which they depend.

If an appeal is granted, the court will cancel the decision without replacing it.[27] The association is bound by the judgment; however, it can still exercise its autonomy within the limits of the decision. However, CAS proceedings include the so-called *de novo rule*. Under R57 CAS Code, CAS may replace the decision.[28]

3.2 Nullity of decisions

A decision by an association that is, formally or with regard to its content, gravely tainted is void. This is the case if the decision breaches mandatory rules of law, public policy, bona mores or privacy rights or if it is 'impossible'. In these cases, the claimant may at any time request that the court declares the decision void. However, the decision is only partially void insofar as the violated rule requires it to be void. There is no time limitation for this claim, but the claimant has to prove a sufficient interest.

3.3 Provisional measures

Provisional measures are very important in sports law. A recent decision[29] has clarified some open issues. According to the court, the state courts are mandatorily competent to issue provisional measures even if there is a clause for arbitration.

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[23] Portmann, *Schweizer Vereinsrecht*, N 279.

[24] BGE 120 II 369 et seq. cf. Scherrer, Aktuelle Rechtsfragen bei Sportvereinen, 46 et seq.

[25] The appealability of a decision is in particular questionable, if an individual or a subsidiary organ of the association simply states the intention of the association. Only if it is clear from the statement of the individual that the intention of the association is being stated, can a final decision of the association be assumed. In all other cases the letters are only considered as informal non-appealable statements. See Decision of the 1st Division of the District Court of Zurich CG030235 of 7 February 2005 and Decision of the Swiss Federal Supreme Court 4A_62/2009 of 23 June 2009.

[26] BGE 119 II 271 et seq.

[27] In principle, according to art. 75 Swiss Civil Code the judge has no authority to intervene in the order of jurisdiction of the association.

[28] This basically infringes the right to autonomy of the organization. Due to the limited grounds for appeals to the Swiss Federal Supreme Court, this violation could so far not be challenged successfully.

[29] Decision of the District Court of the Canton of Lucerne of 25 January 2010.

This is necessary due to the fact that the state has the monopoly of power. Therefore, provisional measures are the only way to break out of the appeal system which was built by the sports federations. This legal situation has not changed with the new CPC (see art. 374), even though it is basically possible that provisional measures are also granted by arbitral tribunals (as long as the requirements of art. 6 ECHR are fulfilled). At least the state courts are in parallel charge. Furthermore, it was confirmed that all internal rights of appeal have to be exhausted first (this is also the case for claims under art. 75 Swiss Civil Code), except if the provisional measures shall protect privacy rights. Such claims may be brought before a state court as soon as privacy rights have been infringed or even if such infringements are merely imminent.[30]

4. Relevant NOC regulations

Swiss Olympic is the national umbrella organization for sport as well as the National Olympic Committee for Switzerland at the same time. As an umbrella organization, Swiss Olympic combines 82 national sport associations with more than 22'600 clubs and around 2.8 million members.[31] Swiss Olympic's bodies include the sports parliament, the executive council, the foundation board of anti-doping, the disciplinary chamber for doping cases and the auditors.[32]

The member organizations are obliged to comply with the articles and regulations as well as the decisions of the sports parliament and the executive council of Swiss Olympic.[33] It follows that the power of Swiss Olympic, as the national Olympic committee and umbrella organization of the eighty-two national sports organizations is vast. However, the members (the national sports organizations) remain autonomous for their respective sports.[34]

For sports justice Swiss Olympic only plays a role with its *antidoping regulations* and its internal *disciplinary chamber for doping cases* (see below para. 6). Apart from the disciplinary chamber for doping cases there is no other internal organ that is taking care of Swiss Olympic's disputes. This means that all disputes between Swiss Olympic and its members as well as disputes between two or more members are, according to art. 10 of the articles of association of Swiss Olympic, directly subject to the *jurisprudence of CAS*.

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[30] *In casu*, a basketball player was prohibited from wearing a headscarf during the official games. The player then announced she would file an action for personal injury against her basketball organization, but requested preliminary measures in order to continue to take part in the official games. The court affirmed its competence in this case (despite the existence of an arbitration agreement), but it dismissed the request for preliminary measures, since the interests of the sports organization to conduct the official games according to the international rules takes precedence and the player also accepted the corresponding rules of the organization; decision of the District Court of the Canton of Lucerne of 25 January 2010.

[31] See www.swissolympic.ch.

[32] Art. 3.1 of the articles of association of Swiss Olympic.

[33] Art. 2.2.2 para. 2 of the articles of association of Swiss Olympic.

[34] Art. 2.2.2 para. 1 of the articles of association of Swiss Olympic.

5. *Relevant football regulations*

The Swiss Football Association (SFA) takes care of professional and amateur football in Switzerland.[35] SFA's bodies are the assembly of delegates, the council, the central board, the legal bodies – the Control and Disciplinary Commission and the Appellate Court – and the finance commission as well as the auditors. The assembly of delegates, the supreme body of SFA, consists of the three divisions, the professional Swiss Football League, the first league and the amateur league. Each delegate has one vote, resulting in the amateur associations dominating. The central board represents SFV vis-a-vis third parties and supervises all of SFV's activities. It has power to do everything that is not delegated to a different body by law or in the articles of association. The council is in charge of making special strategic decisions as well as the interpretation of the articles of association.

The Control and Disciplinary Commission (Kontroll- und Disziplinarkommission)[36] comprises one president and twelve members. The members are elected by the Assembly of Delegates. For the rest the commission constitutes itself (among other things the election of a president and two vice presidents). The different tasks of the commission are regulated in art. 35 para. 2 of the articles of association. That includes in particular the responsibility for all disciplinary cases, as long as they are not assigned to another institution or to the authority of the SFA. Furthermore, the Control and Disciplinary Commission supervises the transfers and qualification of players, controls the compliance with the amateur status and conciliates disputes from contracts with coaches. Finally, the Control and Disciplinary Commission decides protests and disciplinary cases regarding the Swiss Cup.

The Appellate Court (Rekursgericht)[37] comprises the president, three vice presidents, 21 judges and six to nine clerks. The members of the appellate court are elected by the assembly of delegates upon nomination by the central board. The Appellate Court is responsible for the treatment of appeals against decisions of the Control and Disciplinary Commission, the Technical Department and the Referees Committee, as far as it is not a final decision. The procedural details of the Control and Disciplinary Commission and the Appellate Court are regulated in the regulations on the administration of justice (Rechtspflegeordnung).[38]

As the members of the Control and Disciplinary Commission and the Appellate Court are elected by the members of the SFA, they are not considered to be independent tribunals. The decisions of the Appellate Court and all other final decisions of organs of the SFA can therefore be appealed to CAS according to art. 4 para. 1 articles of association of the Swiss Football Association in connection with art. 67 of the articles of association of FIFA.

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[35] See www.football.ch.

[36] Art. 35 of the articles of association of the Swiss Football Association.

[37] Art. 36 of the articles of association of the Swiss Football Association.

[38] Art. 35 para. 3 and art. 36 para. 5 of the articles of association of the Swiss Football Association.

In case of disputes between a player and a club SFA's Regulations on the Status of Non-Amateurs apply.[39] The SFA provides for a conciliation authority for all labour disputes between clubs and their non-amateurs (art. 6 para. 1). Subsequently, the state courts have jurisdiction over labour disputes. Employment-related cases of an international dimension can be brought before FIFA's Dispute Resolution Chamber. For disputes between clubs and players in relation to the maintenance of contractual stability the Control and Disciplinary Commission is competent (art. 7 para. 1). The Commission has the right to decide on compensation and to apply disciplinary measures. Claims need to be lodged within a time limit of 30 days commencing on the date of termination of the contract (art. 8 para. 1).

6. Sports justice in doping cases

The Anti-doping Foundation Switzerland[40] is responsible for the private fight against doping. Since 1 July 2008, it has been the independent competence centre of the fight against doping in Switzerland. The mission of Anti-doping Foundation Switzerland is the conduct of doping controls, information and prevention, applied research and development, national and international cooperation with other doping organizations and taking all other measures that target clean and fair sport.

Once the Anti-doping Foundation Switzerland has established a violation of the anti-doping regulations, the case is taken to the disciplinary chamber of Swiss Olympic. All Swiss sports federations acknowledged in their articles of association the competence of the internal disciplinary chamber of Swiss Olympic to punish athletes for violations of the anti-doping regulations.

The decision of the internal disciplinary chamber of Swiss Olympic can be appealed to CAS. Thereafter, the arbitral awards of CAS can only be appealed at the Swiss Federal Supreme Court pursuant to art. 389 et seq. CPC. As CAS is usually working as a domestic arbitral tribunal in such cases, the competence of the Swiss Federal Supreme Court is a little bit wider than in international cases. Pursuant to art. 393 cf. e CPC it is also possible to claim that the decision is arbitrary, based on an obviously wrong determination of the facts, or an obvious violation of the law or equity.

7. The sports judicial bodies

7.1 Internal Tribunals of the Federations

Many national sports federations have internal judicial bodies, like the Swiss Football

[39] See www.football.ch.

[40] Anti-doping Foundation Switzerland is funded one half each by the federal government and Swiss Olympic. The appointment of services is made through performance-related-mandates purchased by Anti-Doping Switzerland and Swiss Olympic, or the Federal Office of Sports. They form the basis for financing and determine the goals of the Anti-doping Foundation of Switzerland. The Foundation has no commercial purposes and does not aim for profit.

Association,[41] that review the decisions or the executive organs of the federations internally. However, these judicial bodies are neither independent courts nor independent arbitral tribunals, as their members are usually elected by the members of the federation. For this reason their decisions are always subject to an appeal or a declaration of nullity at an independent court or an independent arbitral tribunal (see above para. 3). The question whether their decision can be appealed at CAS or at an ordinary state court is answered based on the articles of association of the respective sport federation.

7.2 Sports justice of ordinary state courts

Only if the sports federation does not have an arbitration clause in their articles of association for the dispute at hand can the decision of the federation be judicially reviewed by ordinary state courts. Competent is usually the district court at the domicile of the sports federation is competent. The decision of the district court can be appealed at the upper court of the Canton and thereafter at the Swiss Federal Supreme Court. The past has shown that the ordinary state courts are often more willing to decide cases against the sports federations. This is one of the reasons why most sports federations have in the meanwhile introduced CAS as their independent arbitral tribunal in their articles of association.

7.3 Court of arbitration for sport

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).[42] 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 CAS' position as an independent arbitral tribunal, even in cases against the IOC.[43] 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,[44] or that two out of the three arbitrators as well as the legal counsel of the

[41] Control and Disciplinary Commission and the Appellate Court; see above para. 5.
[42] BGE 119 II 271.
[43] Decision of the Swiss Federal Supreme Court 4P.267/2002 of 27 May 2003.
[44] Decision of the Swiss Federal Supreme Court 4P.105/2006 of 4 August 2006, cons. 4.

opposing party were members of the same federation.[45] 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 CAS clerk – with a member of the arbitral tribunal.[46]

In its jurisprudence, the Swiss Federal Supreme Court has, thus, always backed up CAS as an independent institution for the resolution of sporting disputes. For this reason in Switzerland it is not possible to turn to the ordinary courts if the articles of association of the sports federations contain an arbitration clause regarding CAS. As a result, CAS is the most important instance for Swiss sports justice.

7.4 Swiss Federal Supreme Court

7.4.1 The sporting jurisprudence of the Swiss Federal Supreme Court in general

In general it must be pointed out that the appeals to the Swiss Federal Supreme Court in sports cases were very unsuccessful in the last few decades.

In *arbitration cases,* almost all appeals against CAS were dismissed.[47] The extremely restricted cognition of the Swiss Federal Supreme Court under art. 190 para. 2 PILA in international arbitral cases but also in domestic arbitral cases under art. 393 Swiss Civil Procedure Code (CPC) almost always proved to be insurmountable. Only in matters of jurisdiction, where the Federal Supreme Court is less restricted in its cognition, a larger number of decisions were 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 in an international arbitration case by the Swiss Federal Supreme Court.[48]

The jurisprudence of the Swiss Federal Supreme Court is only more effective in *ordinary appeals* against sporting decisions of ordinary Courts. In these cases the cognition of the Swiss Federal Supreme Court is much wider pursuant to art. 95 ss. CFSC. In the famous wrestler case the basis was laid for the famous "trust-liability" jurisprudence of the Swiss Federal Supreme Court.[49] In the recent Eddy Barea case for example, a football player was suspended from the first team because

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

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

[47] In international arbitration cases against CAS awards 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.

[48] 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.

[49] BGE 121 III 350 et seq. in which the Swiss Federal Supreme Court allowed an athlete to appeal against the selection decision of a federation despite the fact that the wrestler was not a direct member of the federation.

he did not follow the coach's instructions. Thereupon, Barea terminated the employment contract without previous notice. The Swiss Federal Supreme Court upheld Barea's behaviour. The club's reaction was considered as disproportional and violated the legitimate interests of Barea, as Barea's market value would have been substantially influenced without regular games and training. Therefore, Barea was able to terminate his contract without previous notice and ask for a compensation for personal suffering based on art. 49 in connection with art. 328 para.1 of the Swiss Code of Obligations.[50]

7.4.2 The sporting jurisprudence of the Swiss Federal Supreme Court in arbitral cases

The grounds for an appeal to the Swiss Federal Supreme Court are extremely limited in both domestic and international arbitration cases.[51] The legislator wanted to limit the possibilities to challenge arbitration awards in commercial arbitration. Unfortunately, the last few years have demonstrated that these restrictive statutory provisions are inappropriate for sports arbitration, as the sportspersons – contrary to business partners – do not voluntarily submit their disputes to CAS.[52] As a result, there is no way to fully review the CAS decision.[53] According to art. 190 para. 2 PILA only the following appeal grounds exist in international arbitration cases:[54]

a) *Wrongful Appointment of the Arbitral Tribunal*:[55] this provision guarantees the right for an independent judge according to art. 30 para. 1 of the Swiss Constitution and art. 6 para. 1 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.

b) *Lack of Jurisdiction of the Arbitral Tribunal*:[56] 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

[50] Decision of the Swiss Federal Supreme Court 4_A 53/2011 of 28 April 2011.

[51] This is basically true for domestic and international arbitration cases even though in domestic arbitration cases there are, according to art. 393 lit. e CPC, additional reasons to appeal; see below.

[52] 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.

[53] 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.

[54] For more details see Valloni/Pachmann, *Sports Law in Switzerland*, Kluwer Law International, 2011, 123 ss.; as well as Valloni/Pachmann, *The Role of the Swiss Federal Supreme Court in Sporting Disputes*, 7 ss.

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

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

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.[57] The generosity of the Swiss Federal Supreme Court is in particular given in cases of arbitration clauses by reference.[58] Nevertheless, the Swiss Federal Supreme Court has considered CAS as not competent in a few cases.[59] Moreover, within art. 190 para. 2 lit. b PILA, the violation of the *litis pendens* provision stated in art. 9 PILA may be censured.[60] 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.[61]

c) *Decisions Disregarding the Petita*:[62] 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.[63]

d) *Breach of the principle of equal treatment of the parties or the right to be heard*:[64] 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.[65] The parties are to be

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

[58] 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 arbitral tribunal.

[59] 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.

[60] BGE 127 III 279 C. 2a.

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

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

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

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

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

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.[66] 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.[67] However, this appeal ground is very restrictively applied.[68] 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*').[69] 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.[70]

e) *Breach of 'ordre public'*:[71] 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.[72] There are two possible categories of violations of public policy: Violations of substantive public policy and violations of procedural public policy. Examples for 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.[73] Examples for procedural public policy are the right to an impartial and unbiased expert appointed by

[66] BGE 129 III 445 C. 5.1.

[67] 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.

[68] 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.

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

[70] 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.

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

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

[73] BGE 116 II 634 C. 4.

the arbitral tribunal and the *res judicata* effect.[74] 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.[75]

In domestic arbitration cases there exist according to art. 393 lit. e CPC – in addition to the appeal grounds of international arbitral awards – further reasons to appeal a decision. It is possible to challenge domestic arbitral awards also because of (i) an arbitrary result, (ii) an apparently wrong determination of the facts, or (iii) an apparently wrong application of the law or equity. However, due to very good internal dispute resolution mechanisms of the sports federations and the jurisprudence of CAS there are not a lot of domestic cases which were appealed all the way up to 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.[76] Further, the Swiss Federal Supreme Court does not apply the law ex officio;[77] 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.[78] 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[79] without exception, the statutory requirements.

8. Conclusions

The system of sports justice in Switzerland basically provides a legal protection for all parties involved. Usually, the federations already have internal legal institutions that are able to settle most disputes. If these internal judicial organs are not able to settle the disputes there is always the possibility to review the decisions of federations by an independent tribunal. Depending on the articles of association of the federation this is either an ordinary court or an independent arbitral tribunal such as CAS. The decisions of the independent tribunals can thereafter be appealed at the Swiss Federal Supreme Court. As the cognition of the Swiss Federal Supreme Court is

[74] BGE 128 III 191 C. 4ª; decision of the Swiss Federal Supreme Court 4A_490/2009 of 13 April 2010.
[75] BGE 120 II 155 C. 6a; BGE 119 II 380 C. 3c.
[76] Art. 77 para. 2 and art 105 para. 2 CFSC.
[77] So called "Rügeprinzip" according to art. 77 para. 2 and art. 106 para. 1 CFSC.
[78] 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.
[79] See above footnote 6.

very limited in appeals against decisions of arbitral tribunals, the main principles of sports justice are not as effectively upheld as they should be. The Swiss Federal Supreme Court is only able to carry out its role as highest guardian of the main principles of sports justice in appeals against decisions of ordinary courts. This is, however, not very often the case as most federations have introduced CAS as independent arbitral tribunal in their articles of association.