The Role of the Swiss Federal Tribunal in Sports Disputes

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Overview

• Sports arbitration is Swiss arbitration
• Appeals against CAS Awards
• Limited appeal grounds (including learnings for CAS proceedings)
• Conclusion
Sports arbitration is Swiss arbitration (1)
Sports arbitration is Swiss arbitration (2)

• International Council of Arbitration for Sports (ICAS):
  – Foundation based in Switzerland
  – Furthering of sports arbitrations

• Court of Arbitration for Sport (CAS)
  – «Independant and impartial arbitral tribunal»
Sports arbitration is Swiss arbitration (3)

- Ad hoc chamber at the Olympic Games?
- Appeals against decisions of international sports federations?
- Ordinary sports arbitration?
Appeals against CAS Awards (1)

• Is there any legal recourse?
  – Swiss Federal Tribunal?
  – European Court for Human Rights (ECHR)?
  – European Court of Justice (ECJ)?
  – Ordinary Courts in home country?
 Appeals against CAS Awards (2)

- Appeals to the Swiss Federal Tribunal

**Total Number of Cases (542)**
1989 - 2016

- Decision on the merits: 75%
- Lack of admissibility: 15%
- Withdrawals: 10%
Appeals against CAS Awards (3)

- Number of appeals to the Swiss Federal Tribunal in recent years

Number of Cases per Year
2009 - 2016

<table>
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<tr>
<th>Year</th>
<th>Sports</th>
<th>Others</th>
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<tr>
<td>2009</td>
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<td>2016</td>
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Appeals against CAS Awards (4)

• Waiver of the right to appeal?
Appeals against CAS Awards (5)

- Waiver of the right to appeal in a monopoly system?
Appeals against CAS Awards (6)

• Cañas Decision of the Swiss Federal Tribunal (SFT 133 III 235):
  – Specificity of sports arbitration
  – Recognition of the vertical relation between the athlete and a powerful federation
  – Recognition of the non-consensual character of sports arbitration
  – Signed clause to exclude appeal right against CAS decisions is not valid
Appeals against CAS Awards (7)

• Recent development

Successful Appeals per Year
1989 - 2016

- others
- sports
Appeals against CAS Awards (8)

- Success rate at the Federal Tribunal

**Decision on the Merits**

1989 - 2016

Sports (111)

- Success rate: 91%
- Dismissal: 9%

**Decision on the Merits**

1989 - 2016

Others (296)

- Success rate: 93%
- Dismissal: 7%
Limited appeal grounds (1)

• The SFT is bound by the facts established. What does this mean?
  ➢ No legal recourse against obvious mistakes of the arbitral tribunal
  ➢ No way to bring in new facts
  ➢ No legal recourse against arbitrariness
Limited appeal grounds (2)

• The SFT does not decide the case instead of the arbitral tribunal – it annuls the award only
Limited appeal grounds (3)

• No application of the law ex officio - limited appeal grounds only:
  1. Wrongful appointment of arbitral tribunal (art. 190 para. 2 lit. a PILA)
  2. Incorrect decision on jurisdiction (art. 190 para. 2 lit. b PILA)
  3. Decision ultra, extra, or citra petitia (art. 190 para. 2 lit. c PILA)
  4. Breach of the principle of equal treatment of the parties or the right to be heard (art. 190 para. 2 lit. d PILA)
  5. Breach of the «ordre public» (art. 190 para. 2 lit. e PILA)
Limited appeal grounds (4)

Success of Appeal under 190 PILS (if admitted)
1989 - 2016

- Constitution: 51 approved, 2 dismissed
- Jurisdiction: 14 approved, 119 dismissed
- Ultra et infra petita: 2 approved, 62 dismissed
- Equal treatment / right to be heard: 10 approved, 192 dismissed
- Orde public: 2 approved, 183 dismissed
Wrongful appointment of arbitral tribunal (1)

- ICAS Composition and closed list of arbitrators?

- 4 "Independent" Members
- 4 IOC Representatives
- 4 NOC Representatives
- 4 "Athletes Representatives"
- 4 IF Representatives
Wrongful appointment of arbitral tribunal (2)

• Powers of the ICAS:
  – Appointment of the CAS arbitrators
  – Removing CAS arbitrators
  – Supervising the CAS Court Office
  – Deciding challenges against CAS arbitrators
  – Setting up the Panel
  – Choosing the President of the Panel
Wrongful appointment of arbitral tribunal (3)

• Choosing an arbitrator of the closed list of arbitrators
  – CAS «inner circle»
  – Hidden representations
  – Challenging the arbitrators (7 days!)

• Choosing the President of the Panel
  – How to get an independent president?
  – Challenging the President of the Panel (7 days!)
Wrongful appointment of arbitral tribunal (4)

- Jurisprudence of the SFT:
  - Multiple appointments of arbitrators by the same party?
  - Being on the (closed) list of arbitrators and being a counsel at the same time?
  - 2 arbitrators in the same Association as one of the parties’ counsel?
  - Representation by former CAS Counsel (who handled more than 400 cases)?
Wrongful appointment of arbitral tribunal (5)

• «It would be wise not to appoint me as arbitrator for an athlete in a doping case»
Wrongful appointment of arbitral tribunal (6)

• The jurisprudence of the SFT shows a very reluctant approach to ensure completely independent and impartial Panels

• This might lead to cases in other countries and at the ECHR where the awards of the CAS might be considered as not being taken by an independent and impartial arbitral tribunal
Incorrect decision on jurisdiction (1)

- «Arbitration clauses must not be admitted lightly»

- Despite such jurisprudence there is a «benevolence of the Federal Tribunal towards sports arbitration»
Incorrect decision on jurisdiction (2)

- Arbitration clauses by references?
- Arbitration clauses by requestion an international transfer certificate?
- Conflicting agreements on jurisdiction?
Incorrect decision on jurisdiction (3)

• The SFT has full power to review the question of the existence of an arbitration clause
• More chances for success
• However, objection against jurisdiction must be brought forward from the beginning
Decision ultra, extra or citra petitia (1)

- Panel awards more than the parties have requested
- Panel awards something different from what the parties have requested
- Panel does not decide about one of the parties’ requests.
Decision ultra, extra or citra petitia (2)

- The decision of the arbitration panel about issues not covered by the arbitration agreement, are not covered by this appeal ground
Violation of the right to be heard and equal treatment of the parties (1)

- Statistically the “best” normal appeal ground
- Taking parties by surprise by the law applied
- Blatant contradictions to the evidence in the file?
- Reasoning of the arbitral award?
- Right to have a materially correct decision?
Violation of the right to be heard and equal treatment of the parties (2)

• Immediate objections are necessary
• Violation of the right to be heard must have an effect on the result
• Forfeiture of the appeal ground possible
Violation of the right to heard and equal treatment of the parties (3)

• «Have you been satisfied with the conduct of the arbitral proceedings and have you been given the right to present your case properly?»
Violation of the right to be heard and equal treatment of the parties (4)
Violation of the right to be heard and equal treatment of the parties (5)

• Never ever say yes ...

• ... unless you are absolutely sure you will win the arbitration!
Violations of the public order (1)

• Application of the lex sportiva based on CAS rules:
  • Federations’ regulations and
  • law chosen by the parties or
  • (in the absence of such choice) law of the federations’ domicile (Swiss law)

• Mandatory Swiss law prevails
Violations of the public order (2)

- Violations of largely accepted values which prevail throughout the world and which need to be part of the fundament of every judicial rule:
  - Substantive law
  - Procedural law
Violations of the public order (3)

- Procedural law
  - Res judicata principle

- Substantive law
  - Pacta sunt servanda; personality rights; capability to act; prohibition against excessive binding
Violations of the public order (4)

- Violations of sporting public order?
- Violations of mandatory Swiss law?
- Violations of Swiss public order?
- Violations of foreign public order?
Violations of the public order (5)

• Violations of the ECHR?
• Not necessarily.

➤ EXTREMELY LIMITED REVIEW BY THE SWISS FEDERAL TRIBUNAL
Violations of the public order (6)

• Where is the level of the public order?

• Lifelong «slavery» due to a contractual penalty is fine – not being able to work for such penalty is prohibited.

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Conclusion (1)

- During the CAS proceedings:
  - Preparation of the appeal to the Federal Tribunal and the European Court for Human Rights
  - Need for immediate objections
  - Make it difficult for the Panel – they don’t want to be embarrassed by a successful appeal
Conclusion (2)

• The SFT has an important role in developing the CAS proceedings even if cases are not won at the SFT level
  ➢ Changes in the aftermath
Conclusion (3)

• Limited appeal grounds
• Benevolence towards sports arbitration
• Reluctance to interfere in sporting matters
  ➢ Lex sportive may be developed rather freely
Thank you very much for your attention!

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