The Court of Arbitration for Sport (CAS): Organisation and Jurisdiction in the Light of the Case Law of the Swiss Federal Tribunal

Master Thesis

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by

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Introduction

The Court of Arbitration for Sport (CAS) has a very, probably the most significant role and a still increasing importance in the sports world for both sports bodies and athletes. Although the CAS is after 34 years of its existence well-established and highly recognised its organisation, jurisdiction and procedure is still and constantly tested and challenged within the specific appeal proceedings according to Art. 190 f. PILA in front of the SFT as well as in front of other state Courts, the ECtHR, the CJEU or even the European Commission. These constant testing and challenging has established a unique and remarkable volume of jurisprudence and influenced the development of both the CAS as well as the world of organised sports the IFs. In total, it has been created a rather specific field of sports arbitration distinct from commercial or other arbitration that reflects the particularities of sports. It seems therefore appropriate and worthwhile to present, analyse and assess the actual status of organisation and jurisdiction in the light of the jurisprudence of the SFT, which is due to the statutory framework of the CAS the competent judicial body to review the jurisprudence of the CAS on a regular basis, whereas particular leading cases of other judicial bodies shall also be presented, if they are of particular relevance, probably even influencing the jurisprudence of the SFT itself like the decisions of the ECtHR.

The present thesis is structured according to the significant issues dealt with in the relevant case law of the SFT regarding the organisation and jurisdiction and certainly the review itself. With respect to the procedural focus of the present thesis the analysis of both the statutory framework as well as the jurisprudence will highlight the relevant aspects in case law structure. Recent landmark decisions, especially the decision of the ECtHR in the case of Adrian Mutu and Claudia Pechstein are also considered and analysed with regard to the possible consequences for the organisation, jurisdiction and proceedings of the CAS.

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List of Abbreviations

AIBA	"Body Internationale de Boxe Amateur"
AIOWF	"Body of the Winter Olympic International Federations"
ANOC	"Body of the National Olympic Committees"
Art.	"Article(s)"
ASA	"Body Suisse de l'Arbitrage"
ASA Bull	"Bulletin de l'Association Suisse de l'Arbitrage"
ASOIF	"Body of Summer Olympic International Federations"
ATF	"Judgement of the Swiss Federal Tribunal"
BBl.	"Bundesblatt" (Federal Bulletin)
BGG	"Bundesgerichtsgesetz" (Federal Statute of June 17, 2005, organizing the Federal Tribunal)
BK-IPRG	"Basler Kommentar zum IPRG"
CAS	"Court of Arbitration for Sport"
CAS Bull	"Bulletin of the Court of Arbitration for Sport"
CAS Code	"Code of sports-related Arbitration (in force as from January 1st, 2017)"
CC	"Swiss Civil Code of December 10, 2007"
CR-LDIP	"Commentaire romand, Loi sur le droit international privé - Convention de Lugano"
IOC	"International Olympic Committee"
CJEU	"Court of Justice of the European Union"
CO	"Swiss Code of Obligations of March 30, 1911"
CPC	"Swiss Civil Procedure Code of December 19, 2008"
DESG	"Deutsche Eisschnelllauf Gemeinschaft e.V."
DRC	"Dispute Resolution Chamber"
EC	"European Communities"
ECHR	"European Convention of Human Rights"
ECtHR	"European Court of Human Rights"

ECJ	"European Court of Justice"
Eds	"Editors"
ff. / f.	"following"
FEI	"Fédération Equestre Internationale"
FIBA	"International Basketball Federation"
FIFPro	"Fédération Internationale des Associations de Footballeurs Professionnels"
FIS	"Fédération Internationale de Ski"
FIFA	"Federation Internationale de Football Body"
ICCPR	"International Covenant on Civil and Political Rights"
ICAS	"International Council of Arbitration for Sport"
IBA	"International Bar Association"
i.e.	"id est"
IF	"International Federation(s)"
IOC	"International Olympic Committee"
INOC	"Comitato Olimpico Nazionale Italiano"
ISU	"International Skating Union"
IWF	"International Weightlifting Federation"
NF	"National Federation(s)"
N.	"Note"
No.	"Number"
NOC	"National Olympic Committee(s)"
NOCIRI	"National Olympic Committee of the Islamic Republic of Iran"
NYC	"New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958"
OC	"Olympic Charter"
OG	"Olympic Games"
p.	"page"
para.	"paragraph"

PILA	"Swiss Private International Law of December 18, 1987"
pp.	"pages"
RFEC	"Royal Spanish Cycling Federation"
SFT	"Swiss Federal Tribunal"
SPuRt	"Zeitschrift für Sport und Recht"
UCI	"International Cycling Union"
URBSFA	"Union Royale Belge des Sociétés de Football-Association"
UEFA	"Union of European Football Bodies"
UNCITRAL	"United Nations Commission on Trade Law"
vs.	"versus"
WADA	"World Anti-Doping Agency"
WADC	"World Anti-Doping Code"
WIPO	"World Intellectual Property Organization"
ZK-IPRG	"Zürcher Kommentar zum IPRG"

Bibliography

ADOLPHSEN JENS/NOLTE MARTIN/LEHNER MICHAEL/GERLINGER MICHAEL (Eds.), Sportrecht in der Praxis, Stuttgart 2011.

ADOLPHSEN JENS, Schiedsgerichtsbarkeit – Internationales Sportrecht, in: ADOLPHSEN JENS/NOLTE MARTIN/LEHNER MICHAEL/GERLINGER MICHAEL (Eds.), Sportrecht in der Praxis, Stuttgart 2011, 247 ff.

ANDERSON JACK (Ed.), Leading Cases in Sports Law, The Hague 2013.

ARROYO MANUEL(ED.), ARBITRATION IN SWITZERLAND - The Practitioner's Guide, Alphen aan den Rijin 2013.

AXTMANN JAN, Die Vorlageberechtigung von Sportschiedsgerichten zum Europäischen Gerichtshof nach Art. 267 AEUV, Beiträge zum Sportrecht, Berlin 2015.

BADDELEY MARGARETA, Thoughts on Swiss Federal Tribunal decision 129 III 445, Causa Sport (CaS) 1/2004, 91.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2010 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 4/2011, 307 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2011 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 3/2012, 193 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2012 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 1/2014, 3 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2013 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 3/2014, 212 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2014 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 3/2015, 115 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2015 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 3/2016, 219 ff.

BEFFA LUCA/DUCREY OLIVIER, Review of the 2016 Case Law of the Swiss Federal Tribunal concerning sports Arbitration, Causa Sport (CaS) 4/2017, 319 ff.

BERGER BERNHARD/KELLERHALS FRANZ, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006.

BERNASCONI MICHELE, The CAS *ad hoc* division at the 2012 London Olympic Games, in: RIGOZZI ANTONIO/SPRUMONT DOMINIQUE/HAFNER YANN (Eds.), Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, Basel 2012, 463 ff.

BERNASCONI MICHELE, International Sports Law and Jurisprudence of the CAS: 4th CAS & SAV/FSA Conference Lausanne 2012, Bern 2014.

BERNASCONI MICHELE, Arbitrating Disputes in a Modern Sports World: 5th Conference CAS & FSA/SAV Lausanne 2014, Bern 2016.

BLACKSHAW IAN S., 4 CAS 92/A/63 GUNDEL v FEI, in ANDERSON JACK (Ed.), Leading Cases in Sports Law, The Hague 2013, 65 ff.

BORN, GARY B., International Arbitration, Cases and Materials, 2nd edition, Alphen aan den Rijin 2015.

BORN, GARY B., International Arbitration, Law and Practice, 2nd edition, Alphen aan den Rijin 2016.

BRUNK AXEL, Der Sportler und die institutionelle Sportschiedsgerichtsbarkeit: zur Wirksamkeit erzwungener Schiedsvereinbarungen im Sport und dem Gebot unabhängiger und überparteilicher Rechtspflege am Beispiel des Tribunal Arbitral du Sport (TAS) und des Deutschen Sportschiedsgerichts (DSS), Lausanne 2015.

BRUNNER CHRISTOPH, Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit: eine Standortbestimmung nach dem Cañas-Urteil (BGE 133 III 235), AJP/PJA 6/2008, 738 ff.

BUCHER ANDREAS, Internationales Privatrecht, Basel 1991.

BUCHER ANDREAS (Ed.), Commentaire romand, Loi sur le droit international privé - Convention de Lugano, Basel 2011.

BÜCHELE MANFRED, Aktuelle Rechtsfragen im Radsport, Schriftenreihe zum Sportrecht an der Universität Innsbruck, Band 10, Innsbruck 2017.

CLASSEN CHRISTIAN, Rechtsschutz gegen Verbandsmassnahmen im Profisport (Sportrecht in Forschung und Praxis), Zürich 2014.

COCCIA MASSIMO: The Jurisprudence of the Swiss Federal Tribunal on Challenges against CAS Awards, in: BERNASCONI MICHELE (Ed.), International Sports Law and Jurisprudence of the CAS, 4th CAS & SAV/FSA Conference Lausanne 2012, Bern 2014, 169 ff.

DICKENMANN PHILIPP, Optimierungen in der TAS-Rechtsprechung, Folgerungen nach Ordre public-Urteil des Bundesgerichts, Causa Sport (CaS) 3/2010, 202 ff.

DERUNGS VITUS, Streitschlichtung vor dem Tribunal Arbitral du Sport, in: KLEINER JAN/BADDELEY MARGARETA/ARTER OLIVER (Eds.), Sportrecht, Band II, Bern 2018, 317 ff.

DRUML MATIJA, Sportgerichtsbarkeit: Vereinsstrafe, Vereinsgerichtsbarkeit und Schiedsgerichtsbarkeit im organisierten Sport, Schriftenreihe zum Sportrecht an der Universität Innsbruck, Wien 2017.

DUVAL ANTOINE/VAN ROMPUY BEN, Protecting Athletes' Right to a Fair Trial through EU Competition Law: The Pechstein Case, in: PAULUSSEN CHRISTOPHE/TAKÁCS TAMARA/LAZIĆ VESNA/VAN ROMPUY BEN (Eds.), Fundamental Rights in International and European Law Public and Private Law Perspectives, The Hague 2016, 245 ff.

FRITZWEILER JOCHEN/PFISTER BERNHARD/SUMMERER THOMAS (Eds.), Praxishandbuch Sportrecht, 3. Auflage, München 2014.

FURRER ANDREAS/GIRSBERGER DANIEL/MÜLLER-CHEN MARKUS, Handkommentar zum Schweizer Privatrecht, Internationales Privatrecht, 3. Auflage, Zürich 2016.

GIRSBERGER DANIEL/HEINI ANTON/KELLER MAX/KREN KOSTKIEWICZ JOLANTA/SIEHR KURT/VISCHER FRANK/VOLKEN PAUL, Zürcher

Kommentar zum IPRG, Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987, 2. Auflage, Zürich 2004.

HAAS ULRICH, Die Sportschiedsgerichtsbarkeit des Tribunal Arbitral du Sport (TAS), Zeitschrift für Europäisches Privatrecht (ZEuP) 1999, 355 ff.

HAAS ULRICH, Die Überprüfung von "Spielentscheiden" in der Rechtsprechung des Court of Arbitration for Sport (CAS), Causa Sport (CaS) 2/2007, 131 ff.

HAAS ULRICH, Die Streitbeilegung durch Schiedsgerichte im internationalen Sport, in GILLES PETER/PFEIFF.ER THOMAS (Eds.), Neue Tendenzen im Prozessrecht, Baden-Baden 2008, 9 ff.

HAAS ULRICH, Die "Berufungsfrist" in Schiedsverfahren vor dem Court of Arbitration for Sport (CAS) – Aktuelles und Wissenswertes für die Parteien, in: GRUNDEI ANDREAS/KAROLLUS MARTIN (Eds.), Berufssportrecht IV, Schwerpunkt Schiedsgerichtsbarkeit, Wien 2010, 133 ff.

HAAS ULRICH, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, in: WÜRTTEMBERGISCHER FUSSBALLVERBAND (Ed.), Justiz und Sportgerichtsbarkeit – Mit- oder Gegeneinander, Kooperation oder Clinch? Tagungsband des wfv-Sportrechtsseminars vom 26.-28. September in Wangen/Allgäu, Baden-Baden 2016, 72 ff.

HAAS ULRICH/DONCHI JULIA, Interim Measures of Protection in Arbitration and state Courts, in: BERNASCONI MICHELE (Ed.), International Sports Law and Jurisprudence of the CAS: 4th CAS & SAV/FSA Conference Lausanne 2012, Bern 2014, 85 ff.

HEINI ANTON, IPRG-Kommentar zum Bundesgesetz über das internationale Privatrecht, Zürich 1993.

HESS BURKHARD, The Development of Lex Sportiva by the Court of Arbitration for Sport, in: VIEWEG KLAUS (Ed.), Lex Sportiva, Beiträge zum Sportrecht, 1. Auflage, Berlin 2015., 59 ff.

HORN STEFAN, Die Anwendung des europäischen Kartellrechts auf den Sport, Beiträge zum Sportrecht, 1. Auflage, Berlin 2016.

HONSELL HEINRICH/VOGT NEDIM PETER/SCHNYDER ANTON K./BERTI STEFFEN V., Internationales Privatrecht, Basler Kommentar, 3. Auflage, Basel 2013.

HÜGI THOMAS, Sportrecht, Bern 2015.

JÖNSSON MARIANA, Streitschlichtung im Sport zwischen privater und staatlicher Gerichtsbarkeit, in: KLEINER JAN/BADDELEY MARGARETA/ARTER OLIVER (Eds.), Sportrecht, Band II, Bern 2018, 443 ff.

LARUMBE BEAIN KEPA, Cas Awards and Enforcement Issues, in: BERNASCONI MICHELE, Arbitrating Disputes in a Modern sports World: 5th Conference CAS & FSA/SAV Lausanne 2014, Bern 2016, 73 ff.

KLEINER JAN, Die Anfechtung von internationalen Schiedssprüchen des Court of Arbitration for Sport (CAS), in: KLEINER JAN/BADDELEY MARGARETA/ARTER OLIVER (Eds.), Sportrecht, Band II, Bern 2018, 337 ff.

KOLLER CHRISTIAN, Schiedsvereinbarung und Kartellrecht - Bemerkungen zum Urteil des OLG München vom 15.1.2015 in der Causa Pechstein, in: ANDREAS GRUNDEI/MARTIN KAROLLUS (Eds.), Berufssportrecht VII, Wien 2015, 1 ff.

KREN KOSTKIEWICZ JOLANTA, Internationales Privat- und Verfahrensrecht, Bern 2015.

NATER HANS, The CAS Ad hoc division at the Olympic Games, Procedural Issues and Case Law, in: RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), The Proceedings before the Court of Arbitration for Sport: CAS & FSA/SAV Conference Lausanne 2006, Colloquium, Berne 2007, 199 ff.

NETZLE STEPHAN, Die Praxis des Tribunal Arbitral du Sport (TAS) bei vorsorglichen Massnahmen, in: RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), The Proceedings before the Court of Arbitration for Sport: CAS & FSA/SAV Conference Lausanne 2006, Colloquium, Berne 2007, 133 ff.

MAVROMATI DESPINA: Review of CAS-Related Jurisprudence of the Swiss Federal Tribunal in: BERNASCONI MICHELE (Ed.), Arbitrating Disputes in a modern sports World, 5th CAS & SAV/FSA Conference Lausanne 2014, Bern 2016, 149 ff.

MAVROMATI DESPINA: National Disputes before CAS, in: BERNASCONI MICHELE (Ed.), International Sports Law and Jurisprudence of the CAS, 4th CAS & SAV/FSA Conference Lausanne 2012, Bern 2014, 149 ff.

MAVROMATI DESPINA/REEB MATTHIEU: The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den RIJN 2015.

MCARDLE DAVID, CAS 2009/A/1912–1913 Pechstein v International Skating Union, in: ANDERSON JACK (Ed.), Leading Cases in Sports Law, The Hague 2013, 209 ff.

MCARDLE DAVID: Dispute resolution in sport, athletes, law, and arbitration, London and New York 2015.

MURESAN REMUS/KORFF NIKLAS: Sportschiedsgerichtsbarkeit: Wie weiter nach dem «Pechstein-Urteil» des Landgerichts München?, Causa Sport (CaS) 3/2014, 199 ff.

MÜLLER CHRISTOPH, The Swiss Private International Law Statute (Chapter 12), in: ARROYO MANUEL (Ed.), Arbitration in Switzerland - The Practitioner's Guide, Alphen aan den Rijin 2013, 55 ff.

OSCHÜTZ FRANK, Sportschiedsgerichtsbarkeit, Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen und deutschen Schiedsverfahrensrechts, Berlin 2005.

PAULUSSEN CHRISTOPHE/TAKÁCS TAMARA/LAZIĆ VESNA/VAN ROMPUY BEN (Eds.), Fundamental Rights in International and European Law Public and Private Law Perspectives, The Hague 2016.

PATOCCHI PAOLO MICHELE/SCHERER MATTHIAS (Eds.), Swiss International sports Arbitration Reports (SISAR), Vol. 1, New York 2012.

PATOCCHI PAOLO MICHELE, Provisional Measures in International Arbitration, in: BERNASCONI MICHELE (Ed.), International Sports Law

and Jurisprudence of the CAS: 4th CAS & SAV/FSA Conference Lausanne 2012, Bern 2014, 55 ff.

PFISTER BERNHARD, Internationales Sportrecht in: FRITZWEILER JOCHEN/PFISTER BERNHARD/SUMMERER THOMAS (Eds.), Praxishandbuch Sportrecht, 3. Auflage, München 2014.

PONCET CHARLES /MAVROMATI DESPINA: 255 Translations of the opinions of the Swiss Supreme Court (Federal Tribunal) in international arbitration since 2008, www.swissarbitrationdecisions.com.

REICHERT BERNHARD/SCHIMKE MARTIN/DAUERNHEIM JÖRG (Eds.), Handbuch Vereins- und Verbandsrecht, 13th edition, Köln 2016.

REEB MATTHIEU (Ed.), Recueil des sentences du TAS, 1986-1998 = Digest of CAS Awards I, 1986-1998, Bern 1998.

REEB MATTHIEU (Ed.), Recueil des sentences du TAS II, 1998-2000 = Digest of CAS Awards II, 1998-2000, The Hague 2002.

REEB MATTHIEU (Ed.), Recueil des sentences du TAS III, 2001-2003 = Digest of CAS Awards III, 2001-2003, The Hague 2004.

RIGOZZI ANTONIO, L'arbitrage international en matière de sport, Basel 2005.

RIGOZZI ANTONIO/SPRUMONT DOMINIQUE/HAFNER YANN (Eds.), Citius, Altius, Fortius: Mélanges en l'honneur de Denis Oswald, Basel 2012.

RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), The Proceedings before the Court of Arbitration for Sport: CAS & FSA/SAV Conference Lausanne 2006, Colloquium, Berne 2007.

RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), CAS Jurisprudence and New Developments in International Sports Law, 3rd CAS & SAV/FSA Conference Lausanne 2010, Bern 2012.

RITTER THOMAS, Einheitliche Entscheidung gesellschaftsrechtlicher Beschlussanfechtungsklagen vor Schiedsgerichten unter Berücksichtigung der staatlichen Gerichtsbarkeit und statutarischer Schiedsklauseln, Zürich 2015.

RITZ PHILIP, Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht, Tübingen 2007.

SCHERRER URS/BRAEGGER RAFAEL, Vorsorgliche Massnahmen im Sport, in: in: KLEINER JAN/BADDELEY MARGARETA/ARTER OLIVER (Eds.), Sportrecht, Band II, Bern 2018, 471 ff.

SIMON GÉRALD, L'arbitrage des conflits sportifs, Revue de l'arbitrage 1995, 185 ff.

STUTZER HANSJÖRG/BÖSCH MICHAEL, Multiple Appointments of an Arbitrator: Does the Swiss Federal Supreme Court really see no Limit?, Arbitration Newsletter of November 14, 2012, http://thouvenin.com/wp-content/uploads/2013/11/20121114-Multiple-Appointments-of-an-Arbitrator_HJS_MBO.pdf.

VALLONI LUCIEN W./BLOCH DANIEL, Swiss Civil Procedure Code (CPC), Zürich 2010.

VAN DER HARST MARCO, The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law, in: PAULUSSEN CHRISTOPHE/TAKÁCS TAMARA/LAZIĆ VESNA/VAN ROMPUY BEN (Eds.), Fundamental Rights in International and European Law Public and Private Law Perspectives, The Hague 2016, 279 ff.

VIEWEG KLAUS (Ed.), Lex Sportiva, Beiträge zum Sportrecht, 1. Auflage, Berlin 2015.

VISCHER FRANK/OSER DAVID/HUBER LUCIUS, Internationales Vertragsrecht, Bern 2000.

VOSER NATHALIE/RIHAR PETRA, Swiss Supreme Court dismisses appeal to set aside CAS award for lack of jurisdiction, https: uk.practicallaw.thomsonreuters.com/8-506-7128, June 30, 2011.

WALTER HANS PETER, Rechtsmittel gegen Entscheide des TAS nach dem neuen Bundesgesetz über das Bundesgericht und dem Entwurf einer Schweizerischen Zivilprozessordnung, in: RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), The Proceedings before the Court of Arbitration for Sport: CAS & FSA/SAV Conference Lausanne 2006, Colloquium, Berne 2007, 155 ff.

WALHTER FRIDOLIN, Vorläufiger Rechtsschutz durch Schiedsgerichte, in: RIGOZZI ANTONIO/BERNASCONI MICHELE (Eds.), The Proceedings before the Court of Arbitration for Sport: CAS & FSA/SAV Conference Lausanne 2006, Colloquium, Berne 2007, 111 ff.

WITTMANN JOHANNES, Schiedssprüche des Court of Arbitration for Sport vor schweizerischen und deutschen ordentlichen Gerichten, München 2015.

WYSS LUCAS, Aktuelle Zuständigkeitsfragen im Zusammenhang mit internationalen kommerziellen Schiedsgerichten mit Sitz in der Schweiz, in: Jusletter 25. Juni 2012.

WONG VENUS VALENTINA, Streitbeilegung durch Schiedsverfahren: Court of Arbitration for Sport [CAS]/Tribunal Arbitral du Sport [TAS], in: NUNNER-KRAUTGASSER BETTINA/REISSNER GERT-PETER, Schlichtung und Schiedsgerichtsbarkeit im Sport, Wien 2011, 93 ff.

WÜRTTEMBERGISCHER FUSSBALLVERBAND V., Justiz und Sportgerichtsbarkeit - Mit- oder Gegeneinander, Kooperation oder Clinch?: Tagungsband des wfv-Sportrechtsseminars vom 26.-28. September, Schriften zum Sportrecht, Band 39, Baden-Baden 2016.

ZAGKLIS ANDREAS, Lex Sportiva – From Theory to Practice: Lessons to be Learned from the Jurisprudence of the Court of Arbitration for Sport (CAS) and of the Basketball Arbitral Tribunal (BAT), in: VIEWEG KLAUS (Ed.), Lex Sportiva, Beiträge zum Sportrecht, Berlin 2015, 179 ff.

ZEN-RUFFINNEN PIERMARCO, La nécessaire réforme du Tribunal Arbitral du Sport, in: RIGOZZI ANTONIO/SPRUMONT DOMINIQUE/HAFNER YANN (Eds.), Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, Basel 2012, 483 ff.

I. Historical Background and Regulations

1. The Court of Arbitration for Sport (CAS)

a) The Creation and Purpose of the CAS

The idea to establish an independent arbitral tribunal specializing in sports-related disputes and competent to render binding and internationally harmonised decisions was created in the early 1980s upon initiative of the former IOC president, Juan Antonio Samaranch. The initiative was predominately driven by two factors: the development of professional sport and the increase of international sports-related disputes which affected in primarily the IOC.[1] The initial impulse, however, was the so called "Two Chinas" dispute between the IOC and the NOC of Taiwan. Thus, the initial purpose was to protect or even exempt the IOC from state court jurisdiction and decisions.[2] Another, equally essential purpose was to establish an arbitral institution capable of settling international sport-related disputes and offering a flexible, quick and inexpensive procedure.

In 1983, the IOC being the promotor of the initiative and formal founder officially ratified the statutes of the CAS in Delhi, which came into force on June 30, 1984.[3] Thus, as a consequence of the close connection

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1 Court of Arbitration for Sport www.tas-cas.org/en/general-information/history-of-the-cas.html; OSCHÜTZ, 2005, 37 f; RIGOZZI, 2005, no. 216; BK-IPRG-HOCHSTRASSER/FUCHS, Introduction to Chapter 12, no. 287 ff.; BLACKSHAW, 2013, 66 ff.; MAVROMATI/REEB, 2015, 1 ff.; BRUNK, 2016, 219 f; DRUML, 2017, 129 f.

2 See RIGOZZI, 2005, no. 216; WONG, 2011, 93; 25; BRUNK, 2016, 219 f; DRUML, 2017, 130 (each with further references).

3 H.E. Judge Keba Mbaye, a Judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of the CAS (MAVROMATI/REEB, 2015, 1; BRUNK, 2016, 219 with reference).

to the IOC the CAS was established with its seat in Lausanne, Switzerland.[4] During the first years after its creation the international importance of the CAS was rather marginal, until in 1991 the regulations were amended and appeals in disciplinary disputes were admitted which lead to a significant increase of both importance and cases of the CAS.[5]

b) The Reform of 1994 and the Paris Agreement

In 1994 a major reform of the CAS was launched as a direct reaction to the decision of the SFT in the case of Elmar Gundel vs. FEI[6] which recognised the CAS indeed as a genuine arbitration tribunal but expressed relevant reservations, especially with regard to the close connection to the IOC[7]. Thus, the CAS Statute and Regulations were completely revised to make them more efficient and to modify the structure of the organisation, to make it – depending on the point of view – more or sufficiently independent of the IOC which had financed and dominated it since its creation. The major organisational change resulting from this reform was the creation of ICAS, a formally independent body with the function to manage the administration and financing of the CAS, thereby replacing the IOC.[8]

Capturing the ultimate aim of this major reform in a nutshell the preamble of the so called Paris Agreement of June 22, 1994, states that

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4 OSCHÜTZ, 2005, 39; RIGOZZI, 2005, no. 232 ff.

5 OSCHÜTZ, 2005, 37 f; DRUML, 2017, 131.

6 TAS 92/63, ATF 119 II 271.

7 In particular: the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statute; and the considerable power given to the IOC and its President to appoint the members of the CAS. In the view of the SFT, such links would have been sufficient seriously to call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it (ATF 119 II 271 at 279 f.).

8 OSCHÜTZ, 2005, 41; WONG, 2011, 93; www.tas-cas.org/en/general-information/history-of-the-cas.html.

"*with the aim of facilitating the resolution of disputes in the field of sport, an arbitration institution entitled the "Court of Arbitration for Sport" (hereinafter the CAS) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for international sports-related arbitration, called the "International Council of Arbitration for Sport" (hereinafter ICAS), under the aegis of which the CAS will henceforth be placed.*"[9]

c) The decentralised CAS offices and the ad hoc divisions

In 1996, ICAS being the competent body since the reform of 1994 created two permanent decentralised offices, the first in Sydney in Australia, and the second in Denver, in the United states of America with the aim to facilitate access to the CAS for parties domiciled in Oceania and North America; latter was transferred to New York in December 1999. These decentralised offices are attached to the CAS court office in Lausanne and are competent to receive and notify all procedural acts without having a formal impact on the legal structure or seat of the CAS which remains unchanged in Lausanne.[10]

Furthermore, with regard to the OG in Atlanta 1996, ICAS created a so-called CAS ad hoc division with the task of settling finally and within a 24-hour time-limit any disputes arising during the Olympic Games applying a specially created procedure, which was simple, flexible and

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9 MAVROMATI/REEB, 2015; 4; www.tas-cas.org/en/general-information/history-of-the-cas.html.

10 MAVROMATI/REEB, 2015, 6 f; www.tas-cas.org/en/general-information/history-of-the-cas.html.

free of charge.[11] However, here again, the protection of the interests of the IOC which obviously feared the US legal system could interfere with decisions taken by the sports bodies at the OG was the decisive momentum.[12] Nonetheless the immediate, competent and final resolution of disputes arising at the OG was certainly another not less important aim which was definitely achieved.[13]

d) The CAS today

Today, after more than 34 years of its existence the CAS is very well-established and highly recognised in the entire sports world and beyond, despite all challenges and criticisms along the way.[14] The organisation and proceedings of the CAS have been analysed and assessed continuously by several Supreme Courts and – according to the SFT being the

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11 This ad hoc division was composed of two co-presidents and 12 arbitrators who were in the Olympic city throughout the OG to ensure easy access to the ad hoc division for all those taking part in the OG (athletes, officials, coaches, federations, etc.). A total of six cases were submitted to the CAS ad hoc division in Atlanta (www.tas-cas.org/en/general-information/history-of-the-cas.html; MAVROMATI/REEB, 2015, 6 f.).

12 A relevant impact had certainly the legal fight between the IOC, US NOC and the IAAF on one side and the US track and field athlete Harry "Butch" Reynolds who was suspended for two years by the IAAF for alleged illegal drug use in 1990 on the other side. The US Supreme Court ordered the US NOC to allow him to participate in the 1992 U.S. Olympic trials. This injunction brought American law and equity into conflict with the rules of the IOC and the IAAF, which prohibited suspended athletes from competing. In fact, the IAAF threatened to suspend any athlete that competed against Harry "Butch" Reynolds.

13 Since 1996, ad hoc divisions have been created for each edition of the Summer and Winter OG. Ad hoc divisions were also set up for the Commonwealth Games since 1998, for the UEFA European Championship since 2000 and for the FIFA World Cup in 2006 and thereafter. See OSCHÜTZ, 2005, 52 f; BERNASCONI, 2012, 463; MAVROMATI/REEB, 2015, 6 f.

14 The CAS is also recognised under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations of April 24, 1986 as well as under the NYC.

competent court to review CAS awards upon appeal – the CAS is not less than a "*principal pillar of organised sports"*. In other words, "*the CAS being the guarantor of efficient dispute resolution in sports disputes and having a pivotal role in the overreaching interest in the fight against doping in sports*".[15] Moreover, it must be acknowledged that the CAS today has not only a pivotal role but seems to be without a viable alternative in the global dispute resolution mechanism in sports. However, the CAS is still developing: As a direct reaction to the deficiency of the appeal proceedings found by the ECtHR in the recent landmark decision in the case of Claudia Pechstein[16] ICAS announced *"furthermore, ICAS has already envisaged the possibility of having public hearings at its newer and much larger future premises at the Palais de Beaulieu in Lausanne."*

2. The CAS Code

a) CAS Statute and Regulations 1984

The original CAS Statute and Regulations were issued 1984 on the occasion of the creation of the CAS[17] and provided for just one type of proceedings.[18] The applicant was obliged to file his request with the CAS, accompanied by the arbitration agreement. The request was then

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15 SFT 129 III 445 p. 463; 4A_640/2010, judgement of April 18, 2011 at 3.3.1. p. 9; See VOSER/RIHAR, 2011, who remark critically that the justification given by the SFT seems somewhat alien to civil law principles as they are based on policy considerations.

16 ECtHR no. 67474/10, judgement of October 2, 2018.

17 According to these rules the CAS was composed of 60 members appointed by the IOC, the IF, the NOC and the IOC president (15 members each). The IOC president had to choose those 15 members from outside the other three groups. In addition, all the operating costs of the CAS were borne by the IOC.

18 In principle, the proceedings were free of charge, except for disputes of a financial nature, when the parties could be required to pay a share of the costs. See BRUNK, 2016, 219 f (with further references).

examined by a requests' panel, which ruled on the admissibility of the request, subject to a final decision by the panel of arbitrators which would then be competent to decide the dispute. The parties remained free to continue their claim in case of a rejection decision by the requests' panel.[19] Additionally, the rules provided for a consultation procedure open to any interested sports body. Through this consultation procedure, the CAS could give a legal opinion on a legal question concerning any activity related to sport in general.[20]

b) CAS Code 1994

The actual CAS Code was issued in 1994 as a constitutional document regarding the organisation and arbitration proceedings of the CAS. From a legal point of view, the CAS Code must be qualified as the binding procedural rules of the CAS being a private arbitral tribunal.[21] Thus, it has to comply with the superior statutory framework composed of international treaties, Swiss Law, as well as the fundamental principles of law such as fair trial and the right to be heard.[22] Any arbitration clause establishing the jurisdiction of CAS includes therefore the applications of the CAS Code.[23] The CAS Code was revised in 2003, 2010, 2012, 2013, 2016 and 2017, especially in order to incorporate certain long-

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19 MAVROMATI/REEB, 2015, 2, who note that the rules provided additionally for the possibility of conciliation, either at the proposal of the parties, or pursuant to a decision by the CAS president if the latter considered that the dispute was suitable to be resolved through conciliation.

20 The consultation procedure was abrogated in 2012; see MAVROMATI/REEB, 2015, 2.

21 From its nature the CAS Code is therefore not a piece of legislation but a code of arbitration for the CAS proceedings only (see MAVROMATI/REEB, 2015, 4 f; BK-HOCHSTRASSER/FUCHS, Introduction to Chapter 12, no. 288).

22 OSCHÜTZ, 2005, 263; BRUNK, 2016, 29 ff.; DRUML, 2017, 129.

23 Comparable to the ICC Rules of Arbitration which claim to be a neutral framework for the resolution of cross-border disputes for instance (https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/).

established principles of CAS case law or practices consistently followed by the arbitrators and the CAS court office.[24] The CAS Code is divided into two parts: The statutes of bodies working for the settlement of sports-related disputes (Art. S1 to S26) and the CAS Procedural Rules (Art. R27 to R70).[25] The actual edition of the CAS Code is in force as since January 1, 2017.[26]

II. The Organisation

1. The Bodies and Divisions

a) The International Council of Arbitration for Sport (ICAS)

The ICAS, a foundation under Swiss Law founded 1994, is composed of twenty members, experienced jurists appointed respectively co-opted for one or several renewable period(s) of four years in accordance with S4 CAS Code.[27]

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24 According to Art. S6 (1) the ICAS exercises the function of adoption and amendment of the CAS Code.

25 MAVROMATI/REEB, 2015, 4 ff.; www.tas-cas.org/en/arbitration/code-procedural-rules.html.

26 www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf.

27 Four members are appointed by the IF's, three by the ASOIF and one by the AIOWF, chosen from within or outside their membership (i); four members are appointed by the ANOC, from within or outside its membership (ii); four members by the IOC, chosen from within or outside its membership; four members are co-opted by the twelve members of ICAS mentioned before (i) and (ii), after appropriate consultation with a view to safeguarding the interests of the athletes and four members are co-opted by the sixteen members of ICAS mentioned before (i) and (ii), chosen from among personalities independent of the bodies designating the other members of the ICAS. See RIGOZZI, 2005, no. 235 ff. (with further references).

The ICAS is the governing body of the CAS, its' composition however is highly controversial, especially with a view to its competence to determine the closed list of arbitrators of the CAS.[28]

The major competences of the ICAS with regard to the relevant topics of the present thesis are the organisation of the CAS and its' arbitrators and panels, the appointment and removal of the arbitrators and mediators who constitute the list of CAS arbitrators[29] respectively the list CAS mediators[30] (Art. S3 (3) CAS Code) as well as the resolution of challenges against and removals of arbitrators in particular disputes (Art. S3 (3) CAS Code).

b) The Ordinary Division and the Appeals Division

The CAS consists of two divisions, an Ordinary Arbitration division for sole instance disputes and an Appeals Arbitration division for disputes resulting from final-instance decisions taken by sports bodies that have recognised the CAS as the supreme arbitral tribunal.[31]

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28 See BADDELEY, 2004, 91 f. (with further references) who addresses the problem of the dominant influence of the IOC as well as the IF's and NF's combined with the lack of influence of the athletes. MAVROMATI/REEB, 2015, 5 f. in contrast point out that the composition of the ICAS has always been an amalgam of sports lawyers/lawyers acting as sports officials and international arbitrators/high-level judges and has considerably changed over the years with eight new members and new major countries represented, such as Russia and China.

29 Since most of cases are football related two lists of arbitrators are published actually: a "general list" with 389 arbitrators officially listed (www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html) and a "football list" with 90 arbitrators officially listed (www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html).

30 Currently 60 mediators are officially listed (www.tas-cas.org/en/mediation/list-of-mediators.html). The mediation procedure is governed by the CAS Mediation Rules (www.tas-cas.org/en/mediation/rules.html).

31 See MAVROMATI/REEB, 2015, 6.

The Ordinary Arbitration division constitutes panels, whose competence is to resolve disputes within the ordinary procedure, whereas the Appeals Arbitration division constitutes panels, whose competence is to resolve disputes concerning the decisions of federations or other sports bodies insofar as the statutes or regulations of the said sports bodies or a specific agreement so provide.[32]

c) The Ad hoc divisions

For the resolution of any disputes covered by Rule 61 OC arising during the OG or during a period of ten days preceding the opening ceremony of the OG, ICAS establishes an ad hoc division of the CAS, the function of which is to provide for the resolution by arbitration of the disputes covered by means of ad hoc panels set up in accordance with specific procedure rules, issued particularly for the respective OG.[33] The ad hoc division consists of arbitrators appearing on a special list, a president, a co-president and a court office. The specific procedure rules provide for a simple, flexible proceeding which is free of charge and guarantees a decision within 24 hours.[34]

The jurisdiction of the ad hoc divisions derives independently from the respective regulations of the IF's and NF's directly from the arbitration clauses comprised in the OC as well as the entry forms of the respective OG to be signed by the participants.[35]

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32 Both divisions perform, through the intermediary of the respective president or her/his deputy, all other functions in relation to the efficient running of the proceedings pursuant to Art. R27 ff. CAS Code.

33 The creation was a full success and the ICAS installed them repeatedly for every OG since 1996 and above that upon request by the UEFA respectively the FIFA also for every European Football Championships since 2000 and every FIFA World Cup since 2014 (see MAVROMATI/REEB, 2015, 7).

34 See OSCHÜTZ, 2005, 52 f.; MAVROMATI/REEB, 2015, 6 f.; BERNASCONI, 2012, 463 ff.

35 See OSCHÜTZ, 2005, 53.

2. The Arbitrators and panels

a) List of Arbitrators

According to Art. S3 CAS Code the CAS maintains a list of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by panels composed of one or three arbitrators.

The procedure of appointment and listing of the arbitrators as well as the closed list of arbitrators are still highly disputed aspects, especially in the light of the inferior or – according to some opinions[36] – not existing influence of the athletes in both the composition of ICAS and as a consequence thereof the listing of the arbitrators.[37] The SFT, however, has assessed the closed list of arbitrators since 1993 several times and confirmed it not to be sufficiently discriminatory to interfere with the independence of the panels and fundamental principles of arbitration law, even at the time when it comprised only 60 arbitrators (1993) or 200 (2003).[38] According to the opinion of the SFT, which is shared by relevant authors in Switzerland the justification of the closed list is quality management.[39]

The argument of quality management by official appointment and listing of the arbitrators by the ICAS, however, appears in the light of the principles of arbitration, especially the parties' autonomy to select the arbitrator[40] as well as the fact that every party to an arbitration proceeding, especially when it comes to specific fields such as sports arbitration

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36 See BRUNK, 2016, 294 ff.; DRUML, 2017, 214 ff. (each with further references).

37 HAAS, 2016, 87 f; DRUML, 2017, 229 (each with further references).

38 AFT 119 II 271 at 3b; AFT 129 III 445 at 3.3.3.2.

39 AFT 129 III 445 at 3.3.3.2, supported by OSCHÜTZ, 2005, 101; RIGOZZI, 2005, no. 596 ff.; HAAS, 2016, 88.

40 See BORN, 2016, 130 ff. who presents an overview of relevant regulations and the only limited exceptions of this principle.

has a valid interest to appoint an expert in this field, not sufficiently convincing.[41] The ICAS could, by abolishing or modifying the closed list regime not only avoid future challenges of awards under this aspect, but also increase its credibility towards athletes and the sports community as such. A possible approach to satisfy all the interests involved could be to grant the parties autonomy to select their arbitrator who has certainly to meet abstract quality criteria, such as sports specific legal background, language skills, and to maintain the closed list only for the appointment of the third member and president of a panel. From the perspective of quality management and to maintain consistency of the jurisprudence, taking into consideration additionally the important role of the secretary general[42], a more liberal approach seems sufficient and appropriate.[43]

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41 DICKENMANN, 2010, 208 f, argues from a practitioner's point of view that despite of the closed list of arbitrators the clear majority of cases are dealt with by a small number of arbitrators, whereas the majority of the listed arbitrators are lacking sufficient experience as arbitrators in CAS proceedings which leads in his opinion to material quality deficits of the awards. The mere designation and listing of the arbitrators by the ICAS seems therefore not to be a sufficient the less necessary guaranty for the quality of the CAS and its proceedings.

42 According to Art. R59 (2) CAS Code the CAS Secretary General may, before the award is signed, make rectifications of pure form and also draw the attention of the panel to fundamental issues of principle. This submission requirement was also questioned by Claudia Pechstein and found inappropriate by the Munich Court of Appeal, namely in the light of the "forced" arbitration situation. HAAS, 2016, 89 f, on the contrary emphasises particularly that the provision in question gives only a right of inspection and notice and does not delegate any decision-making-power to the Secretary General.

43 The Munich Court of Appeal held in the case Claudia Pechstein that the quality management could also be granted by a definition of abstract quality criteria possible arbitrator has to meet (OLG München U 1110/14 = CaS 2015, 45).

b) Independence and Impartiality of the Arbitrators

The standard of independence and impartiality of the arbitrators as set out Art. S18 CAS Code[44] and underlined by Art. 180 (1) (c) PILA is an internationally recognised basic principle of arbitration which affects both the qualification of the arbitral tribunal or at least the validity of the award.[45]

However, neither the PILA nor the CAS Code provide for specific rules to assess the independence and impartiality of the arbitrator. Therefore, in order to verify the independence and impartiality of arbitrators, the SFT has acknowledged the relevance of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines")[46], a set of not binding guidelines that constitute a widely recognised standard in international arbitration and beyond.[47]

In the light of the fact that the designation as well as the closed list of CAS arbitrators was and is a highly controversial issue, the expectations and requirements regarding the independence and impartiality of the arbitrators must be high, probably even higher than in non-institutional arbitration because the characteristic parties' autonomy to select the arbitrator is limited. Therefore, the standard as provided in Art. S18 CAS Code and developed in the case law of the SFT is certainly justified.

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44 According to Art. S18 CAS Code CAS arbitrators must upon their appointment sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of the CAS Code. CAS arbitrators and mediators may not act as counsel for a party before the CAS.

45 See BORN, 2016, 138 ff.

46 IBA Guidelines on Conflicts of International Arbitration, adopted by resolution of the IBA Council on October 23, 2014 (https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918).

47 See also COCCIA, 2014, 178 f.

aa) Possible Conflicts of Interest

The SFT has dealt in several published decisions with particular aspects of the independence and impartiality, especially in the light of the characteristics of sports arbitration such as the closed list of arbitrators of the CAS, among those some leading cases that are worth to be presented and analysed:

aaa) Previous involvement

The SFT reaffirmed its case law regarding the previous involvement of an arbitrator in the high-profile case of Adrian Mutu vs. Chelsea Football Club Ltd in which the appellant challenged inter alia the independence of the arbitrator chosen by the respondent, because he presided the arbitral tribunal which issued the first award in favour of the respective club in the dispute between the parties, invoking para. 2.1.2 of the IBA Guidelines relating to when "*the arbitrator had a prior involvement in the dispute*".[48]

The SFT recalled its constant jurisprudence, especially with regard to the fact that a judge already acted in a case may give rise to a suspicion of bias. Acting in both cases is therefore according to the SFT admissible only if the judge, by participating in previous decisions concerning the same case, has not already taken a position as to certain issues for which he no longer appears to be free from any bias in future and accordingly the fate of the case appears already sealed.[49] To decide that issue, the facts, the procedural specificities and the specific issues raised at the various stages of the proceedings must be taken into account.[50] The same principle applies in the view of the SFT to the field of arbitration: an arbitrator's behaviour during the arbitral proceedings may

48 4A_458/2009, judgement of June 10, 2010 at 3.3.1.

49 4A_458/2009, judgement of June 10, 2010 at 3.3.3.2.

50 ATF 126 I 168 at 2 and cases quoted.

also cast doubt on his independence and impartiality. However, the SFT requires a strong showing of a risk of bias. Thus, case law states that procedural measures, whether right or inaccurate, are not sufficient per se to justify objective suspicion of bias of the arbitrator who issued them.[51] That remark also applies to the arbitrator who actively participated in a partial award, even an erroneous one.[52]

Finally, that SFT held as a matter of principle, in exceptional circumstances, it is not admissible to challenge a posteriori the regularity of the composition of the arbitral tribunal which issued the final award simply because its members already decided the matter by participating in interlocutory or partial awards.[53]

The standard established by the SFT, which considers beside the mere fact also the quality of the involvement ("*position as to certain issues*") is lower than the one established by the IBA Guidelines which consider a prior involvement in the dispute independently of its quality to be a waivable conflict of interest.[54]

In the light of the relevance of independence and impartiality, the respective international standard as well as the limited parties' autonomy of the to select the arbitrators the jurisprudence of the SFT regarding

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51 ATF 111 Ia 259 at 3b/aa p. 264 and judgements quoted.

52 ATF 113 IA 407 at 2a p. 409.

53 4A_458/2009, judgement of June 10, 2010 at 3.3.3.2 p. 13.

54 The IBA Guidelines distinguish non-waivable conflicts of interest exemplified in the "Non-Waivable Red List" that describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence (para. 2 (d) IBA Guidelines) and waivable conflict of interest exemplified in the "Waivable Red List" and acceptable, if (i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and (ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest (para. 4 (c) IBA Guidelines).

the standard of independence and impartiality of CAS arbitrators should be reconsidered.[55]

bbb) Professional or friendly Relationship or Membership

With regard to the professional relationship between an arbitrator and a party the SFT distinguishes between the different types of relationships considering its determinant factors, especially the type of assignment, the remuneration and the point in time carefully. This, because the SFT acknowledges that CAS arbitrators have to be on a closed list and must have legal training and recognized competence in the field of sport and such requirements almost necessarily imply that an arbitrator meeting them would occasionally have some contacts with one or several sport federations, or that he would have carried out some activities on behalf of one of them.[56]

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55 See also STUTZER/BÖSCH, 2012, 5, who point out correctly: "*Independence and impartiality of an arbitrator represent two of the core values of arbitration and must be preserved. It is, therefore, about time for the Swiss Federal Supreme Court to take a stricter approach in matters of independence of an arbitrator, even if this results in the annulment of an award which may be plausible and justified in its outcome.*"

56 4A_234/2010, judgement of October 29, 2010 at 3.4.4 p. 21 (with reference to ATF 129 III 445 at 4.2.2.2 p. 467): In this high-profile case involving Alejandro Valverde Belmonte as an appellant and 1. INOC, 2. WADA and 3. UCI as respondents the SFT held consistently with its case law that if the professional relationship involves only some specific assignments going back several years, as is the case here, carried out by a university professor who merely put his expertise at the service of the sport community in the general interest (*i.e.* codifying Anti-Doping Rules and reviewing their application) – a teacher whose great qualities the appellant himself emphasises – it must be presumed that when siting in an arbitral tribunal entrusted with deciding an appeal made by an athlete in a dispute with the World Sport Organization for which the arbitrator previously carried out some limited assignments, that arbitrator will have the capacity to raise above the contingencies relating to his appointment.

The same is true with regard to a friendly relationship between an arbitrator and the counsel of a party or the common membership in an association which according to the SFT does in principle not automatically disqualify the arbitrator as not independent or impartial.[57]

Rightly, the SFT considers particularly the disclosure of such a professional relationship between an arbitrator and a party within the statement of independence.[58] Nonetheless, the SFT held in another rather controversial judgement diluting this principle that arbitrators are not obliged to disclose possible conflicts of interest on facts they in good faith thought that the parties were aware of.[59]

However, if the possible conflict such as a consulting activity for one party has been duly disclosed or – according to the controversial opinion of the SFT – can be assumed to be known to the parties' counsels, it is the parties' obligation to challenge the respective arbitrator immediately, at least within the deadline of Art. R34 CAS Code.[60]

ccc) Breach of Confidentiality

The SFT acknowledged in accordance with the relevant legal writing that the breach of the duty of confidentiality imposed upon the arbitrators does not constitute, as a rule, a ground for appeal against an international arbitral award under Art. 190 (2) (a) PILA. However, the SFT

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57 4A_506/2007, judgement of March 20, 2008 at 3.3.1 and 3.3.2.2; see also COCCIA, 2014, 181 f. (with further references).

58 4A_234/2010, judgement of October 29, 2010 at 3.4.4 p. 19.

59 4A_110/2012, judgement of October 9, 2012. The SFT imposed instead on the parties' counsel a "duty of curiosity" (see in detail under Chapter II (2) (c) (cc) with further references).

60 See 4A_620/20121 judgment of May 29, 2013 at 3.4.1, 3.5, where the SFT clarified that the time limit of seven days according to R34 (1) CAS Code does not begin with the appointment of an arbitrator by a party, but only with the confirmation by the CAS according to R40.3 (1) first sentence CAS Code.

did not yet commit itself to the hypothesis of some authors[61] regarding the possibility of an appeal invoking a violation of the principle of equal treatment of the parties within the meaning of Art. 190 (2) (d) PILA if, due to an arbitrator's unilateral indiscretion during the proceedings, a party obtains information to its advantage in the evidentiary phase of the arbitration.[62]

The first opinion, although being consistent with the jurisprudence and the relevant opinions in the legal writing regarding the independence and impartiality of the arbitrators, is depending, however, on the threshold to be applied for the affirmation of a relevant conflict. Therefore, also the latter opinion expressed in the legal writing should be considered and adopted by the SFT. Furthermore, the established fact of an arbitrator's unilateral indiscretion during the proceedings and preference of one party seems to be a strong indication for the lack of independence and impartiality and therefore definitely a significant violation within the meaning of Art. 190 (2) (a) PILA.

bb) Constitution of the panel

The constitution of the panel can give reason to objections regarding the independence and impartiality. Two aspects are of particular practical interest and deserve an analysis in the light of the relevant jurisprudence of the SFT:

aaa) Sole Arbitrator

According to Art. R40.1 CAS Code the panel is composed of one or three arbitrators and unless otherwise specified in the arbitration agreement, the president of the division determines the number of arbitrators, taking into account the circumstances of the case. According to

61 RITZ, 2007, 189; BK-IPRG-WIRTH, Art. 189 no. 30 (with further references).

62 4A_510/2015, judgement of March 8, 2016 at 4.2 p. 5 (with further references).

MAVROMATI/REEB in CAS practice the determination by the president is the regular case, since the arbitration agreement rarely specifies the number of arbitrators.[63]

The SFT has dealt with several cases concerning the determination of a panel with a sole arbitrator instead of a panel with three arbitrators and held first of all that the very text of Art. R40.1 CAS Code shows that the intervention of the president of the division is only an alternative and that it should not take place when the parties agreed upon the number of arbitrators. Therefore, the president of the division disregarded the principle of autonomy appointed a sole arbitrator against the will of the parties stated in the arbitration agreement. In such a rather clear case of disregard of the parties' will, the final award, which is subject to an appeal to the SFT, was issued by a sole arbitrator irregularly appointed, because it should have been issued by a three-arbitrator panel. This is according to the SFT a deficiency falling within Art. 190 (2) (a) PILA.[64]

Furthermore, the SFT clarified that the appointment of a sole arbitrator instead of a three-arbitrator panel has to be challenged by raising a jurisdictional objection immediately in the arbitration proceeding, as to which the sole arbitrator himself has to decide according to R55 (4) CAS Code.[65]

Moreover, the SFT decided subsequently that even if the objection is raised timely, but the parties agree to the appointment of a sole arbitrator by signing the order of procedure without any reservations this issue may not be raised a posteriori.[66]

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63 See MAVROMATI/REEB, 2015, 264.

64 4A_282/2013 judgment of November 13, 2013 at 5.2.

65 4A_476/20121 judgment of May 24, 2013 with reference to 4P.40/2002, judgement of April 16, 2002, regarding a commercial arbitration according to the UNCITRAL Arbitration Rules where the appellant raised the relevant objection timely.

66 4A_282/2013 judgment of November 13, 2013 at 5.3.3.

Although the opinion of the SFT is convincing for cases of disregard of the parties' will, it does not clarify the situation in the absence of an agreement regarding the number of arbitrators, which is obviously the regular case in CAS proceedings. If in such a situation a sole arbitrator is appointed by the president of the division and afterwards validly objected by just one party, the remaining question will be according to which guiding principles the determination of the president of the division will be assessed. The provision "*taking into account circumstances of the case*" grants an enormous discretion and therefore, it seems appropriate, particularly with regard to the possible consequences of the deficiency to redefine this rule and incorporate a specific fallback rule in the CAS Code. In accordance with the fallback rule in Art. 360 (1) CPC[67], other civil law jurisdictions as well as the international model law a three-arbitrator panel could also be the fallback rule in the CAS Code.[68]

bbb) "Truncated Arbitral Tribunal"

The phenomenon of the so called "truncated arbitral tribunal" refers to the refusal to participate in deliberation, resigning or obstruction by an arbitrator and occurs occasionally.[69] The legal consequences of this phenomenon are in the absence of a clear ruling in the arbitration agreement controversial:

In a leading case the SFT dealt with the resignation of an arbitrator without cause: it held that in such a case the proceedings could not go on in the resigning arbitrator's absence without the agreement of the

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67 The (analogous) application of this provision in international arbitration (by way of reference in Art. 179 (2) PILA) respectively in national arbitration is excluded by the respective provisions of the CAS Code, since they do not qualify as "absence of an agreement" in the sense of the mentioned provisions.

68 See BORN, 2016, 133 (with further references).

69 See BORN, 2016, 150 (with further references).

parties and before a new arbitrator was appointed: consequently if the other arbitrators decide to continue the proceedings despite their colleague's resignation without being previously empowered by the parties to do so, the arbitral tribunal is no longer regularly constituted.[70]

However, the SFT subsequently clarified that such a situation should be distinguished from the constellation in which a party appointed arbitrator does not formally resign but refuses to collaborate or obstructs the proceedings, particularly by abstaining without valid reason to participate in the deliberations of the arbitral tribunal. In the latter case it is generally considered that the arbitral tribunal continues to be regularly constituted and that the recalcitrant arbitrator cannot obstruct the panel when a majority of its members decides to continue the proceedings and to issue an award, by circulating it among them as the case may be.[71]

In a further decision the SFT reflected the issue of the "truncated arbitral tribunal" and referred the relevant positions in the legal writing published in reaction to the aforementioned case law, which vary from the opinion that the "truncated tribunal" can validly deliberate without the participation of the arbitrator who was put under notice to continue his task by the competent authority as he resigned without cause on one side to the opposite that the resigning arbitrator must be substituted unless the parties agreed to the contrary or are subject to arbitration rules providing differently. The SFT however did not yet commit itself to one or the other opinion since in this case it was "*not necessary to examine this delicate issue any further*", because indeed the alleged resignation of arbitrator was not established.[72]

Although, it seems in principle possible to apply (by analogy) the principles of Art. R35 CAS Code, which provides for the removal of an

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70 ATF 117 Ia 166 at 6b f. p. 169 f.

71 ATF 128 III 234 at 3b/aa p. 238.

72 4A_386/2010, judgement of January 3, 2011 at 4.3.1 f p. 9 (with further references).

arbitrator in case of refusal to carry out or to fulfil her/his duties for this constellation, in the light of the fact that Art. 382 (2) CPC and many arbitration rules comprise specific provisions ("truncated-tribunal-clause") it seems appropriate to amend the CAS Code in order to resolve this problem and establish clear guidelines for the respective scenarios such as the refusal to participate in deliberation, the (formal) resignation or the obstruction of an arbitrator as well as the replacement in a specific arbitration.[73] In accordance with HOCHSTRASSER/FUCHS the effectiveness as well as the preventive character of such an explicit "truncated-tribunal-clause" within the arbitration rules has to be recognised.[74]

c) Challenge of Arbitrators

aa) Legal Framework

Art. 180 (1) (a) to (c) PILA defines conclusively the grounds for which an arbitrator may be challenged.[75] The parties are basically free to determine both the qualifications as well as the grounds for challenge as long as they are feasible and practical.[76]

Within this legal framework the CAS Code specifies the grounds, proceedings and consequences of the challenge of the president of either

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73 See Art. 15 of the AAA International Arbitration Rules, amended and effective June 1, 2014 (www.adr.org/sites/default/files/ICDR_Rules.pdf); Art. 14 of the UNCITRAL Arbitration Rules as revised in 2010 (www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf) and Art. 35 of the WIPO Arbitration Rules, effective from October 1, 2002.

74 BK-IPRG-HOCHSTRASSER/FUCHS, Introduction to Chapter 12, no. 231.

75 An arbitrator may be challenged (a) if he does not meet the qualifications agreed upon by the parties; (b) if there exists a ground for challenge provided by the rules of procedure agreed upon by the parties, or (c) if the circumstances permit legitimate doubts concerning his independence.

76 See BK-IPRG-Peter/Brunner, Art. 180 PILA no. 7 (with further references).

division (Art. S21 CAS Code) and an appointed arbitrator (Art. R34 CAS) defining circumstances that give rise to legitimate doubts with regard to her/his independence vis-à-vis one of the parties (president of the division) respectively her/his independence or her/his impartiality (arbitrator).[77]

Challenges against the president of either decision are determined by the ICAS who determines the procedure individually, whereas challenges against an arbitrator are determined by the ICAS Board, which has the discretion to refer the case to the ICAS. The challenge of an arbitrator must be lodged by the party raising it, within seven days after the ground for the challenge has become known in the form of a reasoned petition and will be ruled on by the ICAS Board or the ICAS after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments.

bb) Immediate Objection

According to the constant jurisprudence of the SFT the irregular constitution of the tribunal must be objected during the proceedings and within the deadline provided for by the applicable procedural rules (e.g. Art. R34 CAS Code).[78]

The SFT specified this obligation subsequently and held that objections to the composition of the arbitral tribunal must be raised at the earliest possible time. The party challenging an arbitrator must therefore raise

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77 Art. S21 (1) CAS Code imposes additionally the duty to pre-emptively disqualify herself/himself if, in arbitration proceedings assigned to her/his division, one of the parties is a sports-related body to which she/he belongs, or if a member of the law firm to which she/he belongs is acting as arbitrator or counsel.

78 4P_196/2003, judgement of January 7, 2003 at 3.2.1; 4A_234/2010, judgement of October 29, 2010 at 3.2.1.

the ground for challenge as soon as it becomes aware of it.[79] According to the SFT this rule derives originally from the general principle of good faith and it was incorporated into R34 of the CAS Code as well as in many other arbitration rules[80] and it applies to the grounds for challenge that a party was actually aware of, as well as to those which it should have been aware of by exercising proper attention.[81] The argument that the arbitral tribunal was irregularly composed is forfeited when it is not immediately raised.[82]

Furthermore the SFT clarified that the silence of the parties can be held as an agreement or the corresponding exceptions may be rejected as constituting contradictory behaviour, especially, when the parties are asked specifically and with a time limit to express their views to the proposed composition of the arbitral tribunal and, if necessary, to oppose it, the corresponding objections must be raised in a timely manner according to the general principle of good faith, pursuant to the case law of the SFT.[83]

cc) "Duty of Curiosity"

With regard to the challenge of arbitrators the SFT established a rather controversial jurisprudence opining that the parties' counsel should do the necessary research and investigation in order to detect any possible

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79 4A_620/2012, judgement of May 29, 2013 at 3.2; ATF 136 III 60512 at 3.2.2 p. 609.

80 See BORN, 2016, 146 f., who points out that most institutional rules require that challenges against arbitrators must be brought promptly or within a specified term following discovery of grounds for a challenge, whereas failure to comply will typically result in waiver.

81 Latter is controversial: see para cc) below.

82 ATF 136 III 605 at 3.2.2 p. 609; ATF 129 III 445 at 4.2.2 p. 465.

83 4A_620/20121 judgment of May 29, 2013 at 3.6 with reference to 130 III 66 at 4.3, p. 75 f.

grounds for challenge that could reasonably be expected to be discovered ("duty of curiosity").[84]

This opinion of the SFT has been heavily criticised[85] and cannot be shared at all since it reverses the fundamental duty of arbitrators to disclose their possible conflicts of interest into a duty of the parties' counsels to discover and investigate. Thus, it leads therewith to uncertainty, because the assumption or expectation of the parties' counsels' knowledge about the possible conflicts of an arbitrator is impractical and wrong. It neglects, moreover, that the duty to disclose possible conflicts of interest as a basic requirement of a fair trial, especially in arbitration, must be unconditional and independent from the assumed or expected knowledge of the parties' counsels.[86] Furthermore, in the light of the "small community"[87] in sports arbitration which increases the risk of possible conflicts of interest combined with the fact that the parties' counsels do regularly not have access to the files of other cases or even less to information about possible conflicting assignments or involvements of the arbitrators they may be assumed to know, but effectively they do not. This shows that the parties and their counsels do not even have the legal or factual means to comply with the assumed "duty of curiosity". Therefore, the imposition of such a duty must be rejected.

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84 4A_234/2010, judgement of October 29, 2010 at 3.4.2; 4A_110/2012, judgement of October 9, 2012 at 2.2.2 p. 11 f.

85 See COCCIA, 2014, 184, who rightly points out that the duty of a CAS arbitrator to disclose any such situation of multiple appointments appears to be clear both under the IBA Guidelines and Article R33 of the CAS Code and all CAS arbitrators should scrupulously comply with it; and STUTZER/BÖSCH, 2012, 3 ff., who summarize four "wrongs" of the decision.

86 See STUTZER/BÖSCH, 2012, 5; BORN, 2016, 141 f., who highlights particularly the unconditional disclosure obligations of the arbitrators as provided in many national laws and international rules.

87 See ATF 129 III 445 at 3.3.3 p. 454; COCCIA, 2014, 179 f.

3. The Qualification of the CAS

a) Preliminary Remark

The organisation of the CAS and its independence from the IOC in general as well as the appointment of the arbitrators and the constitution of the panels in particular have been and are still controversial issues since the question of independence and the related questions of the appointment of the arbitrators and constitution of the panels are of particular interest when it comes to the fundamental aspect of the qualification of the CAS as genuine arbitration tribunal in the sense of Chapter 12 PILA respectively Art. 6 ECHR and moreover in the light of relevant jurisprudence of the SFT and last not least the ECtHR.

The relevance of this issue is increased by the particularities of organised sports, which is characterised by the dependency of the athletes from the governing bodies as well as the imbalance of power resulting from the monopoly the IF's and NF's have in their respective field of sports.[88] It is therefore in my opinion not surprising that the qualification of the CAS as a genuine arbitral tribunal was and is still questioned and challenged, especially by athletes with the arguments that derive from this structural reality. This, although the original set up has been amended substantially and the former institutional deficiencies have been eliminated or – depending on the point of view – at least diminished.[89]

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88 KOLLER, 2015, 6 f. (with further references).

89 The case of Claudia Pechstein is a recent example: Pechstein challenged inter alia the qualification of the CAS as a genuine arbitral tribunal alleging the lack of independence of from the IOC and the respective IF, the closed list of arbitrators combined with the imbalanced influence in the composition of the list. See the detailed analysis of the judgment of the Munich District Court in the light of the relevant Swiss law and jurisprudence by HAAS, 2016, 87 ff.

In the light of the ongoing controversy[90] and the recent landmark decision of the ECtHR in the cases of Adrian Mutu and Claudia Pechstein the fundamental question of the qualification of the CAS as genuine arbitration tribunal deserves a deepened analysis reflecting the development of the relevant case law of the SFT.

b) Original Set Up

The founding fathers of the CAS intended to create a genuine arbitral tribunal, independent from the IOC and the IF's and NF's.[91] However, the original set up which construed the CAS as a factual division of the IOC with all the characteristic connections of dependency, especially economic and organic links between the governing body and the arbitral tribunal, made this intention – from a mere legal perspective – rather unrealistic.

c) Landmark Decisions

Despite all the critical aspects, the SFT confirmed, however, with certain reservations regarding the independence of the IOC expressed in the leading case of Elmar Gundel vs. FEI[92] the qualification of the CAS

90 See BRUNK, 2016, 238, who emphasis the aspect that neither the members representing the athletes' interests nor the independent members of the ICAS who are entitled to determine the composition of the list of arbitrators are appointed by an external body but co-opted by the already existing members.

91 Originally, the CAS should even refrain from dealing with disputes concerning "technical issues", among those any disputes regarding violations of regulations of the IF's and NF's. www.tas-cas.org/en/general-information/history-of-the-cas.html; OSCHÜTZ, 2005, 38; BRUNK, 2016, 220 f.

92 ATF 119 II 271.

as a genuine arbitral tribunal from the very beginning in several high-profile cases.[93]

Nonetheless, the qualification of the CAS as a genuine arbitral tribunal had to be assessed by the SFT in numerous cases under both the original Statute and Regulations 1984 as well as the CAS Code 1994 in its respectively applicable version. A selection of three high profile cases, among those the cases of Elmar Gundel vs. FEI and Larissa Lazutina/Olga Danilova vs. IOC, which are generally considered to be "the" landmark decisions when it comes to the qualification of the CAS as a genuine arbitral tribunal are worth to be presented with a focus on the legal reasoning of the SFT regarding this relevant aspect. The same applies to the case of Claudia Pechstein vs. ISU, which is of outstanding importance for the CAS form a procedural point of view, namely in the light of the recently issued landmark decision of the ECtHR:

aa) Elmar Gundel vs. FEI[94]

The SFT's decision in the case of Elmar Gundel vs. FEI is generally considered to be "the" landmark decision when it comes to the qualification of the CAS as a genuine arbitral tribunal under the regime of the CAS Statute and Regulations 1984.[95]

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93 The predominant opinion in the legal writing agreed with this qualification: see RIGOZZI, 2005, no. 628 (with further references).

94 ATF 119 II 271, TAS 92/63 award of September 10, 1992.

95 OSCHÜTZ, 2005, 40 f; BLACKSHAW, 2013, 69; BRUNK, 2016, 221 f. This qualification is obviously not because of the outcome, but the relevant reservations made by the SFT.

aaa) The CAS award of October 15, 1992

Elmar Gundel, a German horse rider filed in February 1992 an appeal with the CAS based on the arbitration clause in the FEI statutes, challenging a decision pronounced by the FEI. This decision, which sanctioned a horse doping case, disqualified the rider, and imposed a suspension and fine upon him.

The award rendered by the CAS on October 15, 1992 upheld the appeal partly and reduced the suspension from three months to one month. In its award the CAS highlighted the procedural aspects of its jurisdiction which was both founded in the statutes of the FEI as well as recognised by the parties.[96] The validity of a statutory arbitration clause by reference in the light of Art. 178 (1) PILA, however, which became an issue to be scrutinised by the SFT in future cases was at the time neither questioned by the parties nor addressed by the CAS.[97]

bbb) The SFT Judgement of March 15, 1993

Subsequently, Elmar Gundel filed an appeal with the SFT against the CAS award disputing primarily the validity of the award, which he claimed was rendered by an arbitral tribunal which did not meet the required conditions of impartiality and independence to be considered as a genuine arbitral tribunal under Swiss Law.[98]

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96 TAS 92/63 award of September 10, 1992 at 2. and 3 of the legal grounds.

97 See the leading case Nagel vs. FEI, 4C_44/1996, judgement of October 31, 1996 at 3, reported in REEB, 1998, 585 ff., where the SFT opined that from the acceptance of a statutory arbitration clause by reference without reservation by the athlete the consent of latter to the arbitration agreement can be "generally assumed". Reaffirmed in the case Stanley Roberts vs. FIBA, 4P.230/2000, judgement of February 7, 2001 at 2a, and many others.

98 ATF 119 II 271 at C. p. 275, TAS 92/63 award of September 10, 1992; www.tas-cas.org/en/general-information/history-of-the-cas.html.

First, it has to be emphasised that in the appeal proceedings before the CAS, neither the qualification of the CAS as a genuine arbitral tribunal nor its jurisdiction have been questioned by the parties. On the contrary, Elmar Gundel himself invoked the arbitration clause in the FEI statutes and filed the appeal with the CAS, whose award he subsequently challenged for not being issued by a genuine arbitral tribunal.[99]

The fundamental question raised by Elmar Gundel concerning the qualification of the CAS as a genuine arbitral tribunal in general and in particular the independence of the CAS was only brought forward in the appeal to the SFT, which did not discuss this critical procedural issue explicitly and in consideration of the principle of good faith and the prohibition of abuse of rights (as it was the case in subsequent decision related to this issue).[100]

However, the SFT found, although with relevant reservations, that the CAS was a genuine arbitral tribunal sufficiently independent from the parties, which freely exercised complete judicial control over the decisions of the bodies brought before it with appeal. The SFT noted critically the links existing between the CAS and the IOC and considered them to be taken sufficient seriously to interfere with the independence of the CAS, primarily in the event of the IOC's being a party to proceedings before it (which was indeed not the case this time).[101] Simultaneously, the SFT considered both the manner in which CAS's arbitrators were appointed (granting the parties a selection of an arbitrator out of at least fifteen persons belonging neither to FEI nor to other sports

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99 TAS 92/63 award of September 10, 1992 at 3. of the legal grounds.

100 ATF 119 II 271 at 3b at p. 277 ff. However, the SFT invoked this principle about ten years later in the leading case Larissa Lazutina/Olga Danilova, 129 III 445 at 3.1, p. 449 (with further references).

101 ATF 119 II 271 at 3b at p. 278 f., namely the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statute and the considerable power given to the IOC and its president to appoint the members of the CAS.

bodies) and other aspects of the applicable regulations guaranteeing in the view of the SFT the independence of the arbitrators, including the declaration of independence signed by each CAS member.[102] Finally, considering all the relevant aspects the SFT found that the CAS offered sufficient guarantees of arbitral independence, which are conditional for the valid exclusion of ordinary judicial recourse under the *lex arbitri*.[103]

bb) Larissa Lazutina/Olga Danilova vs. IOC

The SFT's decision in the case of Larissa Lazutina/Olga Danilova vs. IOC is generally considered to be "the" landmark decision when it comes to the qualification of the CAS as a genuine arbitral tribunal under the regime of revised CAS Code 1994.[104]

aaa) The CAS Award of November 29, 2002

In 2003 two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, were disqualified by the IOC after the 2002 Winter OG in Salt Lake City for doping offences. Moreover, the FIS suspended both athletes for two years.[105]

The appeal to CAS, calling for the IOC and FIS decisions to be overruled, was dismissed. Here again, in the appeal proceedings before the CAS neither the qualification of the CAS as a genuine arbitral tribunal nor its jurisdiction have been questioned by the parties, although the jurisprudence of the SFT regarding the principle of good faith and the

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102 OSCHÜTZ, 2005, 40 f., 98 ff.; BLACKSHAW, 2013, 70.

103 Nonetheless, the relevant reservations of the SFT expressed in the case Elmar Gundel vs. FEI concerned the lack of independence from the IOC and lead to fundamental reform of the CAS in 1994.

104 OSCHÜTZ, 2005, 40 f; BLACKSHAW, 2013, 69; BRUNK, 2016, 221 f.

105 CAS 2002/A/370 L. award of November 29, 2002; see also OSCHÜTZ, 2005, 102 f; BLACKSHAW, 2013, 70 f.

prohibition of abuse of rights concerning objections to the qualification or the jurisdiction of an arbitral tribunal has already been well-established at that time.[106]

bbb) The SFT Judgement of May 27, 2003

Larissa Lazutina and Olga Danilova consequently filed an appeal with the SFT against the CAS award disputing above all the qualification of the CAS as a genuine arbitral tribunal due to the lack of independence from the IOC.

First, and in contrast to the precedent Elmar Gundel vs. FEI the SFT invoked in this case the principle of good faith and the prohibition of abuse of rights and held that according to this principle, it is not allowed for formal means to be brought forward after an unfavourable result when they could have been raised earlier in the proceedings.[107]

However, although the SFT identified that the appellants failed to raise the respective objections in the proceedings before the CAS it assessed the CAS's independence in detail and exhaustively, analysing the current organisation and structure of both the ICAS and the CAS concluding that the CAS was not "*the vassal of the IOC*" and sufficiently independent of it, as it was of all other parties that called upon its services, including for decisions it issues in cases involving the IOC. The SFT confirmed therefore again that the CAS must be considered as genuine arbitral awards, comparable to the judgements of a state court. Thus, the SFT concluded that the CAS offered all the guarantees of independence

106 CAS 2002/A/370 L. award of November 29, 2002 at 1. of the legal grounds.

107 129 III 445 at 3.1 p. 449 (with further references).

and impartiality to be regarded as a genuine arbitral tribunal, even where the IOC was a party to its proceedings.[108]

Although the SFT acknowledged that there appears to be no viable alternative to this institution, which can resolve international sports-related disputes efficiently and inexpensively, it made again relevant reservations and stated that the CAS, with its current structure, can undoubtedly be improved. Thus, in the words of the SFT the CAS has to be considered as "*une institution perfectible*", especially with regard to the designation and listing of arbitrators. Nonetheless, the SFT appreciatively remarked with respect to the relevance and status of the CAS: *"Having gradually built up the trust of the sports world, this institution which is now widely recognised, and which will soon celebrate its twentieth birthday, remains one of the principal pillars of organised sport"*.[109]

cc) Claudia Pechstein vs. ISU[110]

Claudia Pechstein was one of the most successful winter sports athletes of all time. In the period between February 4, 2000 and April 30, 2009

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[108] See OSCHÜTZ, 2005, 99 agrees with this opinion and noted that in the legal literature (references to SIMON, 1995, 210 and HAAS, 1999, 368), who agrees especially with regard to the IOC being a defending party in CAS proceedings, because according to him the organizational deficits as addressed in the Elmar Gundel decision have been corrected completely within the 1994 reform. BRUNK, 2016, 226, 238 and 248 (with reference to BADDELEY, 2004, 91), on the contrary disagrees partly and mentions that the SFT was unable to eliminate all concerns regarding the links between the IOC and other major federations to the ICAS respectively the CAS. The "formal independence" from the IOC and other major federations as established by the 1994 reform and the subsequent amendments is according to him not enough.

[109] ATF 129 III 445 at 3.3.3.3 p. 462 f., reaffirmed in ATF 144 III 120 p. 126 (with further references) to the criticisms in the legal literature by BRUNK, 2016, 237 ff., 262 ff., 275 ff., 305 ff. et 343 f; ZEN-RUFFINEN, 2012, p. 483 ff.

[110] CAS 2009/A/1912-1913 award of November 25, 2009, ATF 4A_612/2009 judgment of February 10, 2010.

the ISU collected more than 90 blood samples from Claudia Pechstein in the course of its longitudinal blood profiling programme. Towards the end of the period, some of the blood screening results showed an irregular and abnormal pattern, outside of the parameters accepted by the ISU. Consequently, in March 2009, the ISU accused Claudia Pechstein of having used some form of blood doping constituting an anti-doping violation under the applicable ISU Anti-doping rules (rules in conformity with the World Anti-Doping Code). A subsequent ISU Disciplinary Commission found Pechstein guilty and imposed inter alia a two-year period of ineligibility.[111]

aaa) The CAS Award of November 25, 2009

On 21 July 2009, Claudia Pechstein, together with her NF (DSG), filed an appeal with the CAS. The CAS dismissed the appeal by Claudia Pechstein and her NF in an elaborate award of November 25, 2009 and upheld the decision of the Disciplinary Commission of the ISU with a modification regarding the begin of the period of ineligibility (two years as of February 8, 2009).[112]

111 Mc Ardle, 2013, 209; Koller, 2015, 3 f.

112 CAS 2009/A/1912-1913 award of November 25, 2009 at point 1. and 8.

Surprisingly, here again the jurisdiction of the CAS has been explicitly recognised by the parties in their briefs and in the CAS Order of Procedure they have signed without reservations[113]. This, although the jurisprudence of the SFT regarding the principle of good faith and the prohibition of abuse of rights concerning objections to the qualification or the jurisdiction of an arbitral tribunal has been reaffirmed and well-established in the meantime.[114]

bbb) The SFT Judgement of February 10, 2010

Claudia Pechstein consequently filed a civil law appeal on December 7, 2009 with the SFT challenging above all both the independence and impartiality of the CAS, as well as the violation of the right to a public hearing according to Art. 6 (1) ECHR, Art. 30 (3) Federal Constitution and Art. 14 (1) ICCPR, claiming inter alia the invalidity of the "forced arbitration" regime in organised sports.[115]

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113 See Point 3 of the legal grounds CAS 2009/A/1912-1913 award of November 25, 2009. This is especially remarkable, because Claudia Pechstein obviously intended and afterwards effectively filed a combined claim (declaratory relief and damages) against the NF and the ISU as joint defendants with the Munich District Court contesting inter alia the validity of the forced arbitration agreement and consequently the jurisdiction of the CAS. The Munich District Court, although dismissing the combined claim partially because of res iudicata and partially on the merits, agreed with the argument brought forward by Claudia Pechstein that forced arbitration agreements are invalid, but found however that Claudia Pechstein had failed to object to the jurisdiction of the CAS in the respective proceeding and therefore the respective deficit of the arbitration proceeding is remedied by the legal effect of the arbitration award which consequently has to be recognized (37 O 28331/12 judgment of February 26, 2014 at III. and IV.; see also KOLLER, 2015, 4 ff.).

114 ATF 136 III 60514 esp. 3.2.2, p. 609; 129 III 445 at 3.1, p. 449; 126 III 249 at 3c, p. 254.

115 4A_612/2009, judgement of February 10, 2010 at 3.1.1, 3.2, 3.3 and 4.

The SFT consequently recalled its relevant and well-established jurisprudence and stated in its respective judgement:

"The appellant herself appealed to the CAS and signed the Procedural Order of September 29, 2009 without raising objections with respect to independence or impartiality. Under these circumstances it is not compatible with the principle of good faith to raise the issue of impartiality of the Arbitral Tribunal applied for the first time before the Federal Tribunal in the framework of an appeal. The grievance of lack of independence of the arbitral tribunal asserted by the appellant is therefore not capable of appeal.".[116]

Nonetheless, the SFT took the opportunity to reassess and finally reaffirm the qualification of the CAS and stated consequently that the CAS must be regarded as a genuine arbitral tribunal. Moreover, the SFT reaffirmed that according to its case law the CAS is sufficiently independent of the IOC, which is why its decisions, even in matters which concern the IOC's interests, must be regarded as judgments comparable with those of a state court.[117]

However, consistent with its case law the SFT did not consider the denied public hearing as a significant deficiency of the arbitral proceeding and pointed out that in an appeal against an international arbitral award, according to Art. 190 (2) PILA, only the grounds for appeal set out in this provision may be invoked, but not directly a violation of the Federal Constitution, the ECHR or other treaties. Thus, the SFT reaffirmed that

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116 ATF 129 III 445 at 3.1 p. 449 (with further references);4A_612/2009, judgement of February 10, 2010 at 3.1.2, where the SFT held that *"if an arbitral tribunal proves deficient with respect to independence or impartiality, this is a case of illegal composition within the meaning of Art. 190 (2) (a) PILA. According to the principle of good faith, such an objection in arbitration proceedings must be made immediately, otherwise the right to invoke the ground for appeal is forfeited"*.

117 4A_612/2009, judgement of February 10, 2010 at 3.1.3; ATF 129 III 445 at the end 3 p. 448 ff. (each with further references).

the principles resulting from the Federal Constitution or the ECHR can be applied, where appropriate, in support of the guarantees given by Art. 190 (2) PILA.[118]

Overall, the decision of the SFT is consistent with its relevant case law, especially the precedent Larissa Lazutina/Olga Danilova vs. IOC, where the IOC was the respondent and not merely an interested third party. However, the approach as to the principle irrelevance of a violation of the Federal Constitution, the ECHR or other treaties is questionable and has to be reconsidered, especially in the light of the subsequent decision of the ECtHR.[119]

ccc) The ECtHR Judgement of October 2, 2018

Subsequently, on November 11, 2010, Claudia Pechstein filed a complaint with the ECtHR against Switzerland (no. 67474/10) claiming the violation of Art. 6 (1) and (2) of the ECHR.

In an elaborate decision of October 2, 2018, which was highly anticipated for about eight years, the ECtHR finally assessed the relevant legal questions as well as the jurisprudence of the SFT regarding the qualification, jurisdiction and proceedings of the CAS, in the light of Art. 6 (1) and (2) ECHR extremely carefully and confirmed finally not only the qualification of the CAS as a genuine arbitral tribunal but the dispute resolution mechanism in sports as such. Furthermore, the ECtHR confirmed the compliance of CAS proceedings with the standard of fair trial as provided in Art. 6 (1) and (2) ECHR with one single exception

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118 4A_612/2009, judgement of February 10, 2010 at 2.4.1 with reference to judgments 4P.105/2006 of August 4, 2006 at 7.3; 4P.64/2001 of June 11, 2001 at 2d/aa, ATF 127 III 429 ff.

119 See AFT 117 II 346 at 1b/aa p. 348: the SFT denied the violation of Art. 190 (2) (d) due to the denial of a public hearing, even if provided for in the respective arbitration rules, since the respective provisions do not have the quality of procedural principles in the sense of Art. 190 (2) (d).

regarding the denial of a requested public hearing without good cause. Thus, the ECtHR confirmed implicitly the well-established jurisprudence of the SFT regarding these questions (aside from the question of the right to a public hearing in sports arbitration).[120]

Moreover, the ECtHR clarified that disciplinary sanctions imposed by corporative bodies in whose framework the exercise of a profession takes place are "without doubt" civil rights in the meaning of Art. 6 (1) ECHR. Therefore, the CAS proceedings in question fall within the scope of Art. 6 (1) ECHR.[121]

The ECtHR assessed the existing dispute resolution mechanism of first and/or second instance, with a possible appeal, even limited, before a state court, as a last instance, and recognised that this form of non-state dispute resolution mechanism is appropriate in the area of international sport.[122]

Last not least, the ECtHR confirmed the legitimacy of the phenomenon of "forced arbitration" in the area of international sport, distinguishing it clearly from commercial arbitration and emphasising the lack of choice the athletes have in accepting an arbitration clause, if the guarantees of a fair trial of Art. 6 (1) ECHR are fully granted.[123] This clarification is of outstanding importance and highly appreciated since disciplinary cases are – seen from a procedural perspective – the core of sports arbitration, bearing in mind that its "raison d'être" and the lack of a viable alternative concerns not primarily ordinary disputes (e.g.

120 ECtHR no. 40575/10 and no. 67474/10, judgement of October 2, 2018 at 42 ff.

121 ECtHR no. 40575/10 and no. 67474/10, judgement of October 2, 2018 at 58.

122 HAAS, 2016, 104 ff., anticipated this result in its analysis of the relevant judgment of the Munich District Court in the Case of Claudia Pechstein, especially in the light of the relevant jurisprudence of the ECtHR.

123 ECtHR no. 40575/10 and no. 67474/10, judgement of October 2, 2018 at 95 ff., 104 ff., 113 ff.

employment) which could be dealt with by other arbitration tribunals or even state courts, but disciplinary disputes.

Finally, the ECtHR held that the public nature of the judicial procedures is a fundamental principle of Art. 6 (1) ECHR and such principle is especially applicable to sports arbitration proceedings on disciplinary or ethics disputes.[124] Consequently, the ECtHR found a violation of this principle in the case of Claudia Pechstein, because the CAS should have allowed a public hearing considering that the athlete had requested one and that there was no particular reason to deny it. Therefore, it awarded Claudia Pechstein a compensation of EUR 8.000,00.[125]

ddd) The Effects of the ECtHR Decision

The CAS issued a media release immediately after the publication of the ECtHR decision on October 2, 2018, stating inter alia that:

"The ECHR judgment is another confirmation, this time at a continental level, that CAS is a genuine arbitration tribunal and that such sports jurisdiction is necessary for uniformity in sport. The SFT already came to the same conclusion in 1993 and 2003; the German Federal Tribunal as well in 2016. While these procedures were pending before the ECHR

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124 This, in contraction to the relevant case law of the SFT which denied both the direct applicability of Art. 6 (1) ECHR as well as the mandatory requirement of a public hearing and found in the present case 4A_612/2009, judgement of February 10, 2010 at 4.1, that "*in view of the outstanding significance of the CAS in the field of sport, it would be that desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process only*".

125 ECtHR no. 40575/10 and no. 67474/10, judgement of October 2, 2018 at 175 ff. with reference to the relevant case law Diennet vs. France, September 26, 1995, § 33, series A no 325-A, B. et P. vs. United Kingdom, no. 36337/97 and no. 35974/97, § 36, CEDH 2001-III, Olujić vs. Croatia, no 22330/05, § 70, February 5, 2009, Martinie vs. France [GC], no 58675/00, § 39, CEDH 2006-VI, et Nikolova and Vandova c. Bulgaria, no 20688/04, § 67, December 17, 2013; Gautrin and others vs. France, May 20, 1998, § 43, Journal 1998-III).

(8 years), ICAS, the governing body of CAS, has regularly reviewed its own structures and rules in order to strengthen the independence and the efficiency of the CAS year after year. ICAS is now composed of a large majority of legal experts coming from outside the membership of sports organisations and has achieved an equal representation of men and women. The list of arbitrators has been increased and the privilege reserved to sports organisations to propose the nomination of arbitrators on the CAS list has been abolished. Furthermore, ICAS has already envisaged the possibility of having public hearings at its newer and much larger future premises at the Palais de Beaulieu in Lausanne. [126]

The announced improvement of the procedure in order to establish a proceeding that fully grants the guarantees of a fair trial of Art. 6 (1) ECHR is highly appreciated and with respect to the further development of both sports arbitration and possible challenges of CAS awards, especially regarding sanctions without alternative.

WITTMANN emphasised in this context even before the publication of the judgment in the case of Claudia Pechstein in the light of the decision of the ECtHR in the case Pavel Suda v. the Czech Republic[127] the inherent possibility of a successful claim for damages by an athlete against its NF or IF in front of a state court for a sanction which was imposed based on a CAS award that rendered in a proceeding that did

126 www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf.

127 ECtHR no. 1643/06, October 28, 2010.

not meet all the requirements of a fair trial in the sense of the jurisprudence of ECtHR and will therefore not be recognised.[128]

However, a claim for damages would have to be assessed even by a state court based on the substantive rules and regulations applied by the CAS (e.g. the WADA Code). Therefore, subject to a divergent result of the evidence the mere fact of a violation of procedural rights – which has to be avoided for the sake of recognition and credibility – will not lead automatically to this result. In my opinion appropriate and proportionate sanctions of sports bodies imposed on the base of binding regulations and after a fair trial in the sense of Art. 6 ECHR stand up to the assessment by state courts if they accept jurisdiction at all.[129]

III. The Jurisdiction

1. The Competence of the CAS

a) Lex arbitri

According to Art. 176 (1) the provisions of Chapter 12 PILA apply to arbitral tribunals with their seat in Switzerland, provided that at the time

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128 WITTMANN, 2015, 204 f. However, in this regard the interesting reasoning of the Munich District Court in the case of Claudia Pechstein is relevant: the court was of the opinion that even the deficit of an invalid arbitration clause is remedied by the legal effect of the arbitration award and consequently the award has to be recognized by the state courts based on the relevant treaties if the appellant failed to object to the jurisdiction of the CAS in the respective proceeding and the deficit of the arbitration proceeding which (37 O 28331/12, judgement of February 26 2014 at IV 2b f).

129 Moreover, also the objection of res iudicata would be relevant in such a constellation. Even the Munich District Court, although accepting its jurisdiction dismissed the combined claim of Claudia Pechstein partially because of res iudicata and partially on the merits arguing that the CAS award was legally binding and had to be recognised under the NYC (37 O 28331/12 judgment of February 26, 2014 at III. and IV.; see also KOLLER, 2015, 4 ff.).

when the arbitration agreement was concluded, at least one party's domicile or ordinary residence was not in Switzerland (international arbitration).

According to Art. 176 (1) PILA in international arbitration respectively Art. 353 (1) CPC in national arbitration the statutory provisions about arbitration apply to arbitration tribunals with their seat in Switzerland.

According to Art. R28 CAS Code the CAS has its seat in Lausanne, Switzerland and notwithstanding the CAS offices as well as the ad hoc divisions abroad which do not influence the legal seat of the CAS, the respective provisions of Swiss arbitration law are applicable to all CAS proceedings, independently of the location of the relevant panel.[130]

b) Procedural Rules

Corresponding with the legal framework the CAS Code determines the competence of the CAS primarily in Art. R27 CAS Code which provides for the application of the procedural rules "*whenever the parties have agreed to refer a sports-related dispute to CAS"*.[131]

According to Art. R37 (4) CAS Code in proceedings regarding provisional and conservatory measures the president of the relevant division or the panel shall issue an order on an expedited basis and shall first rule on the prima facie CAS jurisdiction. The division president may terminate the arbitration procedure if she/he rules that the CAS clearly has no jurisdiction.[132]

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130 The seat of the arbitral tribunal determines the "nationality" of its awards as well as the jurisdiction of the state courts competent to provide the possible assistance.

131 R27 has never been amended since its adoption in 1994; see MAVROMATI/REEB, 2015, 4 ff.; www.tas-cas.org/en/arbitration/code-procedural-rules.html.

132 According to MAVROMATI/REEB, 2015, 204 (with further references) the applicant has not to establish the CAS jurisdiction, but simply make it plausible.

According to Art. R47 CAS Code in appeal proceedings the CAS has jurisdiction regarding appeals against the decision of a federation, body or sports-related body or the CAS acting as a first instance tribunal, if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

According to Rule 61 (1) OC the decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the CAS. According to Art. 61 (2) OC any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS, in accordance with the CAS Code.

c) "Kompetenz-Kompetenz"

According to Art. 186 (1) (1^{bis}) and (3) PILA in international arbitration respectively Art. 359 (1) CPC in national arbitration the arbitral tribunal shall decide upon its own jurisdiction regardless of an action already pending before a state court or another arbitral on the same matter between the same parties.

Art. R39 (4) CAS Code (ordinary proceedings) and Art. R55 (4) CAS Code (appeal proceedings) provide for the competence of the CAS panel to rule on "*its own jurisdiction, irrespective of any legal action*

already pending before a state court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings".[133]

The principle of the so called "Kompetenz-Kompetenz" is a mandatory provision of the *lex arbitri*.[134] The competence to rule on *its own jurisdiction* is, however, relative and not absolute due to the fact that subsequent and final control lays with the SFT, which is entitled to review the competence and jurisdiction upon a civil law appeal according to Art. 190 (2) (b) PILA respectively any state court deciding on the recognition and execution *(exequatur*) of a CAS award.[135] Considering the particularities of the execution of CAS awards within the framework of the sports bodies the latter is not of practical relevance and therefore the competence of the CAS to decide upon its own jurisdiction is practically limited only by the review of the SFT according to Art. 190 (2) (b) PILA.

The SFT confirmed in several decisions the competence of the CAS to assess the question of arbitrability and – depending on the arbitration clause and the governing law – to declare a dispute non-arbitrable based on the fact that there is mandatory jurisdiction of the state courts. Furthermore, the SFT clarified that the arbitral tribunal is not expected to assess the risks of a subsequent non-enforcement of the arbitral award

133 Para. 4 was inserted in the 2012 revision of the CAS Code in accordance with MAVROMATI/REEB, 2015, 252, emphasize that the jurisdictional control by the CAS eventually comprise up to three stages: The control by the court office upon entry of the initial application, the control within the proceeding for provisional measures under Art. R39 CAS Code and the control in case of a request for a joinder or intervention.

134 MAVROMATI/REEB, 2015, 252.

135 BK-IPRG-SCHOTT/COURVOISIER, Art. 186 no. 3; MAVROMATI/REEB, 2015, 252 f., 489.

based on Art. V (2) (a) of the NYC.[136] Thus, the possible non-recognition or unenforceability is not relevant for the CAS to assess its own jurisdiction. This generally recognised principle in arbitration is especially appropriate within the structure of the dispute resolution mechanism in international sports where the recognition and enforcement of CAS awards is regularly executed by the sports bodies that have recognised the CAS as the supreme arbitral tribunal.[137]

The constant jurisprudence of the CAS is in line with the jurisprudence of the SFT and reaffirms the principle of "Kompetenz-Kompetenz" as a widely recognised principle in international arbitration and regarded as corollary to the principle of the autonomy of the arbitration agreement. However, the CAS rules on its own jurisdiction only upon objection by issuing an appealable award on jurisdiction in case of denial.[138]

d) Enforcement

With regard to the enforcement of CAS awards it must be noted first of all that the CAS itself has no enforcement power and no legal means to make the parties comply with its awards. This implies regularly the enforcement of CAS awards by other competent bodies, especially the sports bodies that have recognised CAS as the supreme arbitral tribunal.[139]

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136 4A_654/2011 judgment of May 18, 2012; 4A_388/2012 judgment of March 18, 2013, see MAVROMATI, 2016, 168 f.

137 LARUMBE BEAIN, 2016, 75.

138 See amongst others CAS 2017/A/5065, award of October 25, 2017; CAS 2015/A/4335, award of May 13, 2016; CAS 2015/A/4213, award of January 5, 2016; CAS 2013/A/3263, award of March 14, 2014; CAS 2013/A/3249, award of March 31, 2014; CAS 2009/A/1910, award of September 9, 2010; CAS 2005/A/952, award of January 24, 2006; CAS 2004/A/748, award of June 27, 2006 (each with further references to both jurisprudence and legal writing).

139 LARUMBE BEAIN, 2016, 75.

CAS awards are legally recognised and enforceable generally in accordance with the rules of international private law, and specifically under the provisions of the NYC.[140]

Furthermore, with regard to competence for the enforcement of monetary claims by sports bodies the SFT emphasised in the landmark decision of Francelino da Silva Matuzalem vs. FIFA[141] that a severe disciplinary sanction for unpaid claims (unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code) is not necessary to enforce damages awarded, because the appellant's previous employer can avail itself of the NYC to enforce the award, as most states are parties to that treaty, including Italy, which was the appellant's present domicile.[142]

The conclusion is therefore that the enforcement of CAS awards is bifurcated, the respective competences lay with sports bodies under the respective sports regulations on one side and the state courts under the NYC on the other side. Thus, notwithstanding the fact that the sports bodies enforce CAS awards regularly by disciplinary sanctions, the NYC is a relevant treaty in the field of international sports arbitration when it comes to the enforcement of CAS awards. Especially, when it comes to the enforcement of CAS awards against non-sport parties that are outside the disciplinary power of the governing sports bodies the competence lays exclusively with state courts according to the NYC.[143]

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140 See ADOLPHSEN, 2011, 281 f.; BLACKSHAW, 2013, 69; LARUMBE BEAIN, 2016, 75.

141 4A_558/2011 judgment of March 27, 2012 at 4.3.5.

142 4A_558/2011 judgment of March 27, 2012 at 4.3.4: it is important to note that the SFT did not question the enforcement regime of the sports bodies as such, but the specific severe disciplinary sanction imposed on the appellant and qualified it an obvious and grave violation of privacy and contrary to public policy (Art. 190 (2) (e) PILA).

143 See also LARUMBE BEAIN, 2016, 90.

2. Arbitrability

a) In general

According to Art. 177 (1) PILA in international arbitration every pecuniary claim respectively according to Art. 354 CPC in national arbitration every claim over which the parties can freely dispose may be the subject of arbitration. The scope of this provisions must be understood broadly, because the SFT and the relevant legal writing deem every claim that has an economic value to be pecuniary in the sense of Art. 177 (1) PILA respectively according to Art. 354 CPC.[144]

b) Sports-related Disputes

Within the aforementioned legal framework Art. R27 CAS Code determines the application of the procedural rules and therefore the jurisdiction of the CAS covering all "*sports-related disputes"*, provided the parties have agreed to refer them to the CAS.[145]

With regard to sports arbitration the SFT clarified that basically all the disputes arising in sports, including disciplinary disputes, except disputes that are purely related to the "rules of the game" or "field of play decisions" are arbitrable.[146] This opinion is in line with the arbitration friendly interpretation of 177 (1) PILA respectively Art. 354 CPC and

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144 ATF 118 II 353 at 3b p. 356; BK-IPRG-MABILLARD/BRINER, Art. 177 no. 17 (with further references).

145 According to Art. R27 CAS Code such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

146 ATF 119 II 271 and ATF 118 II 12 at 2b.

particularly relevant for disputes arising in sports that are not exclusively or primarily limited to pecuniary claims in a narrow sense.

c) Rules of the Game / Field of Play Decisions

The CAS, namely the ad hoc division of the CAS at the OG in Atlanta 1996, adopted in the case of M. vs. AIBA an even more distinguished approach as to the arbitrability of disputes that are purely related to the "rules of the game" or "field of play decisions" insofar as it confirmed the arbitrability due to the economic consequences of "rules of the game" or "field of play decisions" in principle, but limited its review to decisions that have been taken in violation of the law, social norms or general legal principles.[147]

The rules of the game or field of play doctrine as it stands was specified in numerous decisions[148] and recently summarized precisely by the CAS ad hoc Division at the OG in Rio 2016 in the case of Behdad Salimi & NOCIRI vs. IWF:

"CAS jurisprudence has consistently reaffirmed that CAS arbitrators do not overturn the decisions made on the playing field by judges, referees, umpires or other officials charged with applying the rules of the game unless there is some evidence, which generally must be direct evidence that the rule was applied in arbitrarily or in bad faith. CAS arbitrators are not specifically trained in the rules of any or all sports and do not have the advantage of being present to observe the events. It

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147 CAS ad hoc Division (OG Atlanta) 96/006, award of August 1, 1996 at 13. of the legal grounds; see also BK-IPRG-MABILLARD/BRINER, Art. 177 no. 17a.

148 See CAS 2015/A/4208, award of July 15, 2016 at 2.; CAS 2015/A/3880, award of July 29, 2015 at 3.; CAS 2014/A/3703, award of April 28, 2015 at 6.; CAS 2010/A/2090, award of February 7, 2011 at 2.; CAS 2005/A/991, award of April 30, 2006; CAS 2004/A/727, award of September 8, 2005 at 1.; CAS 2004/A/704, award of October 21, 2004 at 1. and 2; and HAAS, 2007, 131 f. who presents an analysis of the relevant case law, including the implicit balancing of interest when it comes to exceptions from the general principle of non-review.

would be unfair to a decision-maker as well as to athletes to interfere with decisions made by match officials, who are the technical experts, in these circumstances. Other practical reasons for the "field of play" doctrine include the prevention of constant interruptions of the game by appeals to a judge or an arbitrator."[149]

Therefore, the CAS emphasised in its well-established case law consequently that before a CAS panel will review a field of play decision, there must be evidence of bad faith or arbitrariness. Thus, the appellant must demonstrate evidence of preference for, or prejudice against a particular team or individual.[150]

The "rules of the game" or "field of play doctrine" was even incorporated in regulations of several IF's.[151] However, the CAS clarified in this context correctly that such regulations do not prevail over or limit the arbitration clauses in the statutes of the sport's governing bodies on a higher level such as the Olympic Charter.[152]

d) Conflict with foreign Law

A very important issue in this context is the possible conflict of a valid arbitration agreement in favour of the CAS with foreign procedural or substantive law, especially, if the foreign law excludes arbitration for the type of dispute generally (e.g. employment law). Neither the PILA nor the CAS Code provide a respective conflict rule for such cases.

149 CAS ad hoc Division (OG Rio) 16/028, award of August 21, 2016.

150 CAS 2004/A/727, award of September 8, 2005 at 2.

151 See for instance Rule 146.11 of the IAAF Competition Rules 2018/2019 (in force as from November 1st, 2017).

152 CAS 2008/A/1641, award of March 6, 2009 at 1.

aa) Jurisprudence of the SFT

The SFT emphasised repeatedly that the legislator consciously renounced adopting a conflict rule in order to avoid the difficulties in determining the applicable law that would be connected with such a solution.[153] Therefore the arbitrability of a claim has to be examined only according to Art. 177 (1) PILA in international arbitration respectively according to Art. 354 CPC in national arbitration, irrespectively of possible conflicting foreign provisions.

However, the SFT considered in its the case law the possibility to deny the arbitrability of a specific matter to the extent that foreign provisions provide for the mandatory jurisdiction of state courts should be taken into consideration only (but still) from the point of view of public policy (Art. 190 (2) (e) PILA).[154] Subsequently and more specifically, it pointed out that foreign law applicable to the dispute should not imperatively be taken into consideration when it adopts a more restricted approach of arbitrability. Moreover, the SFT repeated that, when dealing with the issue of arbitrability, the arbitral tribunal is not expected to assess the risks of a subsequent non-enforcement of the arbitral award based on Art. V (2) (a) NYC but rather the parties should assess and evade such risk.[155]

So far, the SFT did not upheld an appeal due to this ground, because the appellants either failed to raise the respective objection timely or to establish evidence regarding a mandatory provision of the foreign law

153 ATF 118 II 353 at 3a p. 355.

154 ATF 118 II 353 at 3c p. 357; judgment 4A_370/2007 of February 21st, 2008 at 5.2.2; 4A_654/2011 judgment of May 18, 2012 at 3.4; 4A_388/2012 judgment of March 18, 2013 at 3.3.

155 4A_388/2012 judgment of March 18, 2013 at 3.3 with reference to ATF 118 II 353 at 3c p. 357 and 3d p. 358; 4A_654/2011 judgment of May 23, 2012 at 3.4; ATF 118 II 193 E. 5c/aa p. 196; and the relevant legislative materials: BBl. 1983 I 460.

within the arbitration proceeding.[156] On the contrary: the SFT clarified by setting aside a CAS award regarding the denial of jurisdiction due to a mandatory provision in a foreign civil procedure code that a more limited approach of foreign law regarding the arbitrability is not per se a ground for the CAS to deny its jurisdiction.[157]

bb) Jurisprudence of the CAS

The jurisprudence of the CAS is in line with the aforementioned case law of the SFT and held in a case regarding the conflict of an arbitration clause with Russian labour law as the governing law of the contract in dispute that according to Article 191 PILA, mandatory provisions of a foreign law may be taken into account if the legitimate and manifestly preponderant interests of a party so require and if the circumstances of the case are closely connected with that law. However, on the other hand the national dispute resolution system established in Russia has to respect the directives of FIFA – there is equality of representation between clubs and players, there is the right of an initial appeal to the Players' Status Committee and a final appeal to CAS. All bodies are able to deal with breach of contract cases and are specialised in the specificity of sports when a state court might not be. Therefore, no preponderant interests of either party require a mandatory application of Russian labour law in the matter at hand.[158]

The CAS addressed the issue of a possible conflict between national law and international sport regulations as well in the case UCI vs. Landaluce and RFEC and issued an award in this respect in which it acknowledged the compelling necessity for IF's to have the power to

156 MAVROMATI, 2016, 169.

157 4A_388/2012 judgment of March 18, 2013 at 3.3 with reference to ATF 118 II 193 at 5c/aa p. 196.

158 CAS 2014/A/3642, award of April 8, 2015 at 1.

review the decisions of NF's as to doping, in order to prevent international competitions from being distorted by exceedingly lenient sanctions, which a national federation or a national state body could issue.[159]

cc) Case Study: RFC Seraing vs. FIFA

The actual high-profile case L'ASBL Royal Football Club Seraing ("RFC Seraing") vs. FIFA demonstrates that the conflict of an arbitration clause with foreign law can be resolved contradictory by the CAS on one hand and the foreign state courts on the other hand. Contradictory decisions regarding the acceptance of jurisdiction interfere with the interest of the globally harmonised dispute resolution mechanism in international sports, especially in the field of disciplinary disputes, which are essential to guarantee a level playing field. Moreover, the present case deserves particular attention, since the clause affected (Art. 67 (1) of the FIFA statutes, version 2015) concerns a multitude of arbitration cases and is similar from its content to numerous clauses in the statutes of IF's.

aaa) The FIFA Disciplinary Proceedings

First, the FIFA Disciplinary Committee imposed by way of a disciplinary measure dated September 4, 2015 on RFC Seraing, a member of the URBSFA, a transfer ban for four entire and consecutive registration periods as well as a fine of CHF 150.000,00 due to the breach of Art. 18bis and 18ter of the FIFA Regulations on the Status and Transfer of Players regarding third-party ownership of players' economic rights (the so called "third-party ownership" or "TPO").

RFC Seraing appealed this decision with the FIFA Appeal Committee which rejected the appeal and confirmed the appealed decision of the

[159] CAS 2006/A/1119 award of December 19, 2006.

FIFA Disciplinary Committee with its decision of appeal dated January 7, 2016.

bbb) The CAS Appeal Proceedings

RFC Seraing appealed this decision with the CAS which issued in its capacity as an appeal tribunal an award on the merits partially upholding the appeal by RFC Seraing on March 9, 2017 and confirming its own jurisdiction based on Art. R47 CAS Code and Art. 67 (1) of the FIFA statutes (version 2015).[160]

ccc) The SFT Appeal Proceedings

Finally, RFC Seraing challenged this award with a civil law appeal to the SFT challenging inter alia based on Art. 190 (2) (a) and (b) PILA both the qualification of the CAS as a genuine arbitral tribunal as well as the jurisdiction of the CAS. The SFT, invited by the appellant to reconsider its jurisprudence regarding these two issues, assessed and confirmed its case law in the light of the latest developments and jurisprudence of foreign state courts in a very elaborate decision confirming finally both the qualification of the CAS as a genuine arbitral tribunal as well as the jurisdiction, including football disputes regarding the TPO.[161]

ddd) The state Court Proceedings

RFC Seraing together with another applicant (Doyen Sports) filed equally applications for preliminary injunctions against the sports bodies involved (FIFA/UEFA/URBSFA/FIFPro) to legally overcome the transfer ban imposed by FIFA with the state courts in Brussels which

[160] RFC Seraing vs. FIFA, TAS 2016/A/4490, award of March 9, 2017 at 58 ff.

[161] 4A_260/2017 judgment of February 20, 2018.

had to decide first of all on the objection to their jurisdiction due to the arbitration exception based on the arbitration clause in Art. 67 (1) of the FIFA statutes (version 2015).

The Brussels Court of Appeal finally rejected the objection against its own jurisdiction to rule on the dispute and held that, in the light of Belgian law, the arbitration exception did not apply in this particular matter, because the arbitration clause in the FIFA statutes was not specific enough. In its decision it denied the validity of the arbitration clause in the FIFA statutes because according to its interpretation it did not relate to a "defined legal relationship" in the sense of Art. 1681 and 1682 (1) of the Belgian Code judiciare.[162]

In a first reaction to the decision of the Brussels Court of Appeal the ICAS pointed out in a respective media release that the problem lies only with the wording of the CAS clause in the FIFA statutes and such drafting issue did not affect the jurisdiction of CAS globally since the Brussels Court of Appeal neither expressed any objection nor reservation towards sports arbitration as a dispute resolution mechanism globally nor criticised the CAS system. The main difficulty according to ICAS is that one may potentially end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by CAS, enforceable in the rest of the world.[163]

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[162] Art. 1681 CJ: "Une convention d'arbitrage est une convention par laquelle les parties soumettent à l'arbitrage tous les différends ou certains des différends qui sont nés ou pourraient naître entre elles au sujet d'un rapport de droit déterminé, contractuel ou non contractuel"; Art. 1682 (1) CJ: "Le juge saisi d'un différend faisant l'objet d'une convention d'arbitrage se déclare sans juridiction à la demande d'une partie, à moins qu'en ce qui concerne ce différend la convention ne soit pas valable ou n'ait pris fin. A peine d'irrecevabilité, l'exception doit être proposée avant toutes autres exceptions et moyens de défense.".

[163] Media Release - statement of the ICAS regarding the case RFC SERAING/DOYEN SPORT/FIFA/UEFA/URBSFA (www.tas-cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf).

dd) Assessment

The sophisticated approach of both the SFT as well as the CAS is appropriate, since sports arbitration comprises regularly matters that fall according to foreign provisions within the mandatory jurisdiction of state courts, especially employment law disputes. It would be inconsistent and contrary to the structure of globalised sports if the CAS' jurisdiction would depend on the national regulations of the involved parties. Furthermore, it must be agreed with the opinion that the sports bodies are able to deal with these cases and are specialised in the specificity of sport when state courts might not be.[164]

However, it has to be noted that the problem of the decision of the Brussels Court of Appeal in the case RFC Seraing/Doyen Sports vs. FIFA/UEFA/URBSFA/FIFPro might be in reality more complex than the ICAS assumed in its first reaction, because it is not the mere requirement of the arbitration clause to be more detailed in order to be valid and support the arbitration exception, but the important fact that the state court reviewed the validity of the arbitration clause according to the *lex fori* instead of the *lex arbitri* or the *lex causae*. Moreover, it was not a question of arbitrability of a certain type of dispute but the degree of detail of a standard arbitration clause in statues of an IF which is an approach not yet sufficiently considered and clarified in the relevant case law of the SFT. Finally, the degree of detail of a standard arbitration clause in statues of an international sports body might probably never reach a level that defines all the legal relationships arising between the affected members. The approach of the Brussels Court of Appeal could in the end, if adopted by other state courts, countermine the concept of sports arbitration as a dispute resolution mechanism globally.

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[164] The approach is subject of a controversial debate in the legal writing: see BK-IPRG-MABILLARD/BRINER, Art. 177 no. 18 (with further references).

3. Arbitration Agreement

An absolute precondition for the jurisdiction of the CAS as an arbitral tribunal is a valid arbitration agreement that meets the requirements of Art. 178 PILA in international arbitration respectively Art. 357 CPC in national arbitration. Art. S1 1 CAS Code provides consequently for the prerogative of respective arbitration clauses in statutes, regulations, specific agreements.

a) Validity of the Arbitration Agreement

aa) Legal Nature and Interpretation

According to the predominant opinion in the legal literature arbitration agreements contain aspects of both procedural and substantive law: to substantive law that it is the source of obligations to act and to refrain from acting which two equal private law subjects have promised to assume towards each other with regard of the dispute resolution by arbitration (including cooperation in good faith in constituting and financing the arbitral tribunal and complying with its award) and to procedural law that it excludes the dispute covered by a valid arbitration from the jurisdiction of state courts (Art. 7 PILA) and the award results in an enforceable title.[165]

According to the SFT, which obviously emphasises the procedural aspect an arbitration clause or agreement must be understood as an agreement by which two or more determined or determinable parties agree to be bound to submit some existing or future disputes to an arbitral tribunal to the exclusion of the original jurisdiction of the state courts, according to a determined or undetermined legal order.[166] It is essential

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165 See MÜLLER, 2013, 56 (with further references).

166 ATF 130 III 66 at 3.1 p. 70.

that the parties should express the intention to let an arbitral tribunal, i.e. not a state court, decide certain disputes.[167]

The SFT clarified that in the absence of a factual concurring intention as to the arbitration clause, it must be interpreted according to the principle of reliance, i.e. the presumptive intention of the parties must be ascertained according to what the party receiving the statement could and should understand in good faith.[168] Moreover, the SFT made clear that to interpret an arbitration agreement, its legal nature must be taken into account; in particular it must be considered that renouncing access to the state court drastically limits legal recourses. According to the case law of the SFT, such an intent to renounce to the jurisdiction of state courts cannot be accepted easily, therefore restrictive interpretation is required in case of doubt.[169]

However, when the result of the interpretation establishes that the parties wanted to exclude their disputes from the state jurisdiction and to submit to a decision by an arbitral tribunal, but differences remain as to the conduct of the arbitral proceedings, the rule that a clause must be rendered as effective as possible is applicable in principle. According to that, an understanding of the contract must be sought which preserves the validity of the arbitration agreement to the extent possible (*in favorem validitatis*).[170]

bb) Standard of Evaluation

The SFT reviews the agreement of the parties to call upon an arbitral tribunal in sport matters with some "benevolence"; this is with a view

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167 ATF 138 III 29 at 2.2.3 p. 35; 129 III 675 at 2.3 p. 679 ff.

168 ATF 138 III 29 at 2.2.3 p. 35 ff.; 130 III 66 at 3.2 p. 71; 129 III 675 at 2.3 p. 680.

169 ATF 138 III 297 at 2.3.1 p. 36 ff.; 129 III 675 at 2.3 p. 680 ff.; 128 III 50 p. 58 at 2c/aa.

170 ATF 138 III 298 at 2.2.3 p. 36; 130 III 66 at 3.2 p. 71 ff.; 129 III 675 at 2.3 p. 681.

to encouraging quick resolution of disputes by specialised arbitral tribunals which, like the CAS, offer adequate guarantees of independence and impartiality.[171] Thus, the SFT applies different and – according to some authors[172] – inconsistent standards to evaluate the validity of an arbitration agreement depending whether the respective clause is stipulated in the statutes of a sports body or in an individual contract. Therefore, while the sports arbitral tribunal should follow a narrow approach in accepting the existence of an arbitration clause, it has more flexibility when interpreting the scope of such arbitration clause.[173]

The SFT stated that pursuant to Art. 178 (2) PILA, the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties or the law governing the dispute and in particular the law applicable to the main contract or, indeed, Swiss law. The provision quoted therefore institutes three alternate connections *in favorem validitatis*, without any hierarchy between them, namely: the law chosen by the parties, the law governing the dispute (*lex causae*), and Swiss law as the law of the seat of the arbitration.[174]

However, the SFT clarified in a particular case limiting its approach that the legally incorrect reference to the procedural situation in the case at hand which had to be considered by the parties regarding an appeal against a decision by the disciplinary committee to an arbitral tribunal in deviation from the available legal recourse to the ordinary courts does not constitute a valid arbitration agreement.[175]

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171 ATF 133 III 235 at 4.3.2.3 p. 244 ff. (with further references); 4A_640/2010 at 3.2.2; ATF 133 III 235 at 4.3.2.3 244 ff. (with further references). The "benevolence" jurisprudence was and is still controversial (see below chapter III.).

172 KLEINER, 2018, 360, who is supporting the distinction made by the SFT.

173 See 4A_244/2012 judgment of January 17, 2013 at 3 and 4.2.; 4A_388/2012 judgment of March 18, 2013 at 3.4.2 and 3.4.3. MAVROMATI, 2016, 170 f.

174 SFT 4A_90/2014 of July 9, 2014 at 3.2.1 with reference to ATF 129 III 727 at 5.3.2, p. 736.

175 4A_456/2009, judgement of May 3, 2010 at 3.3.2.

cc) Arbitration Clause by Reference

The arbitration clause by reference is the predominant form of arbitration agreement in organised sports, especially when it comes to arbitration clauses in statutes, regulations and entry forms of sports events (e.g. the OG).

The SFT opined in the leading and controversially debated cases Nagel vs. FEI and Stanley Roberts vs. FIBA that from the acceptance of a statutory arbitration clause by reference without reservation by the athlete the consent of latter to the arbitration agreement can be "generally assumed". Moreover, the SFT opined quoting the German Supreme Court (Bundesgerichtshof - BGH) that an athlete recognizes the relevant regulations by applying for a licence to participate in competitions organised by the respective body.[176]

The SFT argued that "benevolence" and liberalism of the case law considering the form of the arbitration agreement in sports arbitration also appears in the flexibility which characterizes the relevant case law of the SFT in this context, especially in the assessment of the validity of arbitration clauses by reference.[177] The SFT has accordingly found valid at times a general reference to the arbitration clause contained in the statutes of a federation.[178] The SFT confirmed in another decision its

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176 Nagel vs. FEI, 4C_44/1996, judgement of October 31, 1996 at 3, reported in Reeb, 1998, 585 ff. with reference to BGH II ZR 11/94, judgement of November 28, 1994; Stanley Roberts vs. FIBA, 4P.230/2000, judgement of February 7, 2001 at 2a.

177 Judgments 4A_548/2009 of January 20, 2010 at 4.1; 4A_460/2008 of January 9, 2009 at 6.2 and 4P.126/2001 judgment of December 18, 2001 at 2e/bb (each with further references).

178 Judgements 4A_460/2008 of January 9, 2009 at 6.2; 4P.253/2003 of March 25, 2004 at 5.4; 4P.230/2000 of February 7, 2001 at 2a; 4C.44/1996 of October 31st, 1996 at 3c; see ATF 133 III 235 at 4.3.2.3 p. 245; 129 III 727 at 5.3.1 p. 735 (all with further references).

approach with reference to the generalising opinion of TSCHANZ[179]: *"In other words, to recall the conclusion of another specialist in this field, there is practically no elite sport without consent to sport arbitration"*.[180]

Although the "benevolence" approach and liberalism of the case law of the SFT was and is subject to a controversial debate in the legal writing[181], the outstanding importance of the validity of an arbitration clause by reference is evident for the entire field of organised sports and therefore the consistent and clear case law to this crucial question has to be appreciated.

dd) Tacit Consent by Conduct

In a further decision reaffirming and clarifying its own case law the SFT concluded that the statutes or the regulations of a sporting body acknowledging the CAS as appeal body and stating that any appeal against a decision taken by a jurisdictional body as a last instance must be submitted to that arbitral tribunal, hinder the challenge of the CAS' jurisdiction, after the appellant made use of the procedures and legal remedies established by the same regulations. Furthermore, the SFT held that the appellant conclusively showed by his behaviour that he submitted to the regulations adopted by the sports body to decide disputes such as the one at hand.[182]

Thus, the SFT consequently declines a selective approach of an appellant who shows clearly that he is willing to accept the relevant statutes and regulations of a sports body by initiating the respective proceedings

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179 CR-LDIP-TSCHANZ, Art. 178, no. 149.

180 4A_428/2011 judgment of February 13, 2012 at 3.2.3.

181 BRUNK, 2016, 52 ff.; DUVAL/VAN ROMPUY, 2016, 248 f. (each with further references).

182 4A_548/2009 judgment of January 20, 2010 at 4.2.3.

on a federation's level. This opinion must be supported from a procedural as well as from a structural point of view because the dispute resolution mechanism in sports is an integral system which must be passed through either entirely or not at all.

Furthermore, the SFT has already decided in the same perspective and more generally that depending on the circumstances, a given behaviour may substitute for compliance with a formal requirement pursuant to the rules of good faith.[183]

The SFT even held, extending the personal scope of an arbitration agreement that a third party which involves itself in the performance of a contract containing an arbitration clause by doing so ratifies the arbitration clause by conclusive behaviour and makes known its intent to become a party to the arbitration agreement.[184]

ee) Pathological Clauses

Arbitration clauses that are incomplete, unclear, or contradictory are considered as pathological clauses.[185]

According to the case law of the SFT to the extent that pathological clauses do not concern mandatory elements of the arbitral agreement, namely the binding submission of the dispute to a private arbitral tribunal, they do not necessarily lead to invalidity. Instead, a solution must be sought by interpretation and if necessary by supplementing the con-

183 ATF 121 III 38 at 3, p. 45, confirmed by judgment 4P.124/2001 of August 7, 2001 at 2c.

184 ATF 134 III 565 at 3.2 p. 568; 129 III 727 at 5.3.2 p. 737.

185 4A_90/2014 judgment of July 9, 2014 at 3.2.2 with reference to WYSS, 2012, no. 96 to 107 as to the various types of pathological clauses; BEFFA/DUCREY, 2012, 196 f.; BEFFA/DUCREY, 2015, 116.

tract with reference to general contract law, which respects the fundamental intent of the parties to submit to arbitral jurisdiction.[186] Should no mutual intent of the parties be factually certain as to the arbitration clause, it must be interpreted according to the principle of trust, i. e. the putative intent is to be ascertained as it could and should have been understood by the respective parties according to the rules of good faith.[187] When interpretation shows that the parties intended to submit the dispute to an arbitral tribunal and – what is crucial – to exclude state jurisdiction, but with differences as to how the arbitral proceedings should be carried out, the rule that a contract should be given effect applies and an understating of the contract must be sought which will uphold the arbitration clause. Imprecise or flawed designation of the arbitral tribunal does not necessarily lead to invalidity of the arbitral agreement.[188]

The SFT reaffirmed and widened this case law with reference to the predominant opinion in the legal writing[189] substantially in the field of sports arbitration and opined that the expressly mention of "arbitral jurisdiction", "arbitral tribunal", "arbitrator", "arbitration clause" or similar wording or even the mention of CAS itself is not necessary, as long as it provides for alternate jurisdiction - in case at hand - of two international football bodies to decide a possible dispute under the contract and therewith excludes state jurisdiction definitely.[190]

Thus, according to the SFT an arbitration clause although being pathological, especially because of the absence of an explicit mention of the CAS, is regularly still valid and establishes effectively its jurisdiction if

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186 ATF 130 III 66 at 3.1 p. 71.

187 ATF 130 III 66 at 3.2 p. 71; 129 III 675 at 2.3 p. 680.

188 ATF 130 III 66 at 3.2 p. 71 ff.; 129 III 675 at 2.3 p. 681.

189 BK-IPRG-WENGER/MÜLLER, 2007, Art. 178, no. 32.

190 4A_246/2011 judgment of November 7, 2011 at 2.3.1: According to the SFT the wording in Art. 4 of the respective agreement "*the respective Commission of the football bodies FIFA or UEFA should have jurisdiction to decide the dispute*" is still sufficiently determined to be a valid arbitration clause in favour of the CAS.

the intent of the parties to submit the dispute to an arbitral tribunal and to exclude state jurisdiction is evident. This rather liberal opinion, although regularly criticised in the legal writing, is in line with the concept of dispute resolutions in international sports.[191] Moreover, in the light of the fact that most of the arbitration clauses applicable are laid down in statutes, entry forms and other official documentation, pathological clauses are a phenomenon primarily of individual contracts. There again it is reasonable to expect from the contracting parties, especially in international sports contract involving regularly high-value arrangements, to be aware of the internationally well-known dispute resolution mechanism in sports and to make an explicit and clear choice for or against this type of dispute resolution by including a valid arbitration clause and therewith excluding state jurisdiction.

ff) Contradictory Clauses

The rule that an arbitration clause must be rendered as effective as possible, which would maintain the validity of the arbitration clause[192] has its limits when it comes to the phenomenon of contradictory clauses in relevant agreements that are in dispute, each of the provisions providing for a different way of dispute resolution: arbitration or the exclusive jurisdiction of the CAS on one hand and the (non-exclusive) jurisdiction of the state courts on the other hand.

The SFT opined in a leading case that the CAS, even if it found the arbitration clause valid must examine the relationship between the two contradictory clauses. Especially with regard to the parties' intent to exclude state jurisdiction in order to remove the dispute from the state courts and submit it to the decision of an arbitral tribunal, the agreement

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191 See the overview of the different opinions in RIGOZZI, 2005, 832 ff.

192 ATF 138 III 299 at 2.2.3 p. 36; 130 III 66 at 3.2 p. 71 ff. (with further references).

must be interpreted according to the principle of reliance, especially if it does not show a clear hierarchy between the two clauses in conflict.[193]

The SFT held that in such a case and in the absence of a clear ruling regarding the prevailing provision or the relationship between the two contradictory contract provisions according to the principle of reliance, there is no clear expression of the intention of the parties in the contract or in the settlement agreement to remove the dispute from the state courts and submit it to an arbitral tribunal. Instead it must be assumed that the parties did not renounce the jurisdiction of the state courts but rather wanted to leave the ordinary legal recourse open. Thus, in such a constellation there is no valid arbitration clause and the CAS has no jurisdiction.[194]

In a similar case related to a coach of the national football team with the *lex causae* being Bulgarian law, where employment disputes are not arbitrable, the employment contract comprised in Art. 16 two contradictory clauses: one in favour of "the competent court" and the other in favour of the CAS.[195] After the case was brought twice before the Bulgarian state courts, which consequently confirmed their jurisdiction, the coach filed an appeal with the CAS. The sole arbitrator dismissed the case for lack of arbitrability of the dispute.[196]

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193 4A_244/2012 judgment of January 17, 2013 at 4.4.

194 4A_244/2012 judgment of March 18, 2013 at 4.5 and 4.6.

195 Art. 16 of the contract reads: "*The disputes concerning the interpretation of the meaning and the performance of the contract will be resolved amicably by agreement of the parties. In case an agreement is impossible to reach, the dispute shall be referred for resolving by the competent court. The parties to the contract recognize the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland as in this case the Statute and the regulations of BFU and the provisions of Bulgarian legislation will apply.*".

196 MAVROMATI, 2016, 169.

The SFT confirmed the award, though with a different reasoning reaffirmed first its case law regarding the conflict with foreign law applicable to the dispute which should not imperatively be taken into consideration when it adopts a more restricted approach of arbitrability. In the case at hand, however, the denial of jurisdiction derived from an interpretation of the agreement according to the principle of good faith which does not support the conclusion that the parties wanted to exclude the jurisdiction of state courts definitely and the appellant himself showed by filing simultaneously claims with Bulgarian state courts that even he himself did not interpret the clause in question in this manner. Therefore, according to the well-established case law regarding the interpretation of contracts in accordance with the principle of good face the arbitration clause was deemed to be invalid.[197]

The general principle that the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties or the law governing the dispute and in particular the law applicable to the main contract or, indeed, Swiss law as well as the interpretation *in favorem validitatis* is therefore limited when it comes to contradictory contract provisions. In this event the arbitration clause is deemed to be invalid if the jurisdiction of the state courts was obviously not excluded definitely. Thus, the removal of certain disputes from the jurisdiction of state courts and the submission of them to an arbitral tribunal must also in sports arbitration be clear and in case of contradictory clauses a clear hierarchy between the clauses must be stipulated. If doubts regarding the effective exclusion of the jurisdiction of the state courts remain, the arbitration clause is deemed to be invalid and the jurisdiction of the CAS must be denied. Therefore, it is the obligation of the party drafting the arbitration clause to safeguard the validity of the arbitration clause,

[197] 4A_388/2012 judgment of March 18, 2013 at 3.4.3 with reference to ATF 105 II 16 at 3a p. 19; 4A_538/2011 judgment of March 9, 2012 at 2.2; 4A_219/2010 judgment of September 28, 2010 at 1.

including a possible ruling of the hierarchy in case of contradictory clauses.

b) Scope of the Arbitration Agreement

As already demonstrated, the SFT established a case law avoiding the inconsiderate acceptance of the conclusion of an arbitration agreement if the issue is in dispute. However, once the principle of arbitration is established, the case law of the SFT is flexible as to the modalities of arbitration proceedings and as to the scope of the dispute covered by the arbitration clause. This broad interpretation is consistent with procedural efficiency and ensures an economy of procedure, but it could not imply a presumption in favour of arbitral jurisdiction.[198]

The issue as to the jurisdiction of the arbitral tribunal also includes the subjective scope of the arbitration clause. In its review process the arbitral tribunal must clarify which persons are bound by the arbitration clause.[199]

In sports arbitration with the CAS the extension of an arbitration clause to a non-signatory party as well as the multiparty dispute are of particular relevance, especially in doping cases where a multitude of parties have a right to appeal to CAS.[200]

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198 4A_562/2009 judgment of January 27, 2010 at 2.1 (with further references)

199 ATF 134 III 565 at 3.2 p. 567 (with further references)

200 According to Art 13.2.3 WADA Code in cases under Art. 13.2.1 WADA Code (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant IF; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the IOC or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the OG or Paralympic Games, including decisions affecting eligibility for the OG or Paralympic Games; and (f) WADA.

aa) Joint Defendants

In a case of joint defendants, the SFT pointed out that according to case law and legal writing, the presence of joint defendants does not affect the plurality of the cases and the parties. The joint defendants remain independent from each other. The behaviour of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others.[201] Among other consequences, this means that the *res judicata* effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants.[202]

Consequently, the SFT stated in the present that the CAS arrogated to itself a jurisdiction ratione personae that it no longer had because of the withdrawal of the appeal when it annulled a decision already. CAS could therefore not annul the FIFA decision also for the party who withdrew the appeal with the effect that the appealed decision became valid and binding for this party.[203]

bb) Extension of an Arbitration Clause to a Third Party

The SFT has long held that an arbitration clause may under certain circumstances also bind persons who did not sign the contract and are not even mentioned there.[204] Moreover, it accepted that the objective scope of an arbitration clause is extended to the beneficiary in case of a pure contract in favour of a third party within the meaning of Art. 112 (2)

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201 4P.226/2002, judgement of January 21, 2003 at 2.1.

202 4A_6/2014 judgment of August 28, 2014 at 3.2.2 (with further references to the relevant legal writing).

203 SFT 4A_6/2014 of 28 August 2014 at 3.2.2; MAVROMATI, 2016, 170.

204 ATF 134 III 565 at 3.2 p. 567 ff.; ATF 129 III 727 at 5.3.1 p. 735 and 5.3.2 p. 737: in case of the assignment of a claim, the simple or joint assumption of an obligation, the takeover of a contractual relationship and the performance of a contract containing an arbitration clause by a third party.

CO.[205] The extension of an arbitration clause to a non-signatory in certain situations is therefore widely accepted and confirmed by the SFT, therefore an arbitration agreement may bind even some non-signatories not even mentioned in it.[206] Besides that, the SFT even held that by a mere procedural step, a party adhered to an arbitration clause.[207]

The jurisprudence of the CAS is in line with this arbitration friendly jurisprudence of the SFT and regularly endorses a sophisticated interpretation of the scope of arbitration clauses in contracts, especially if they show a specific wording and establish rights and obligations among different parties. This is particularly relevant in multiparty disputes involving contracts signed by only a part of the parties to the dispute.[208]

This arbitration friendly approach of both the SFT and the CAS seems justified in the light of the fact that in professional sports more and more complex "corporate structures" are being involved in the performance of contracts, including the organisation of sports events. It is therefore reasonable to integrate the (factually) involved persons and enterprises entirely in the relevant dispute resolution mechanism in sports.

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205 4A_44/201114 judgment of April 19, 2011 at 2.4.1; CR-LDIP-TSCHANZ, Art. 178 no. 136.

206 ATF 120 II 155 at 3b/bb, p. 163 and ATF 128 III 50 at 2b/aa; 4P.126/2001 judgment of December 18, 2001 at 2e/bb, 4P.124/2001 judgment of August 7, 2001 at 2c and d.

207 Judgments 4C.40/2003, of May 19, 2003 at 4; and 4P.230/2000 of February 7, 2001 at 2.

208 See 4A_103/2011, judgement of September 20, 2011 at 3.2.2: The SFT confirmed in accordance with an opinion in the legal writing the extensive interpretation of the scope of an arbitration clause which comprised the wording "*any dispute related to the Licensing Agreement*" by the CAS interpreting them as meaning that notwithstanding its wording, restrictive at first sight, the arbitration clause in the aforesaid contract purported to govern also the disputes which could arise between the respondent and the appellant as to the performance of the sales agreements that they would enter into eventually, the object of which would be the boxing equipment referred to in the Licensing Agreement.

4. Objection to the Jurisdiction

a) Legal Framework

According to Art. 186 (2) PILA in international arbitration and Art. 359 (2) CPC in national arbitration the objection to the arbitral jurisdiction must be raised prior to any defence on the merits.

Within this legal framework Art. R39 CAS Code (ordinary proceedings) and R55 CAS Code (appeal proceedings) provide for the CAS court office or the panel, if already constituted, to rule on its own jurisdiction irrespective of any legal action already pending before a state court or another arbitral tribunal relating to the same object between the same parties only upon objection of the respondent.[209] When an objection to CAS jurisdiction is raised, the parties are invited to file written submissions on jurisdiction. The panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

b) Immediate Objection

According to the SFT the objection to the jurisdiction of CAS must be raised clearly and immediately, which means prior to pleadings on the merits. After the parties have expressed themselves on the merits, it is no longer possible to raise such issues at a later stage (neither is possible to challenge the final award based on these grounds).[210]

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209 An exception with modest practical relevance is the formal control of the CAS Court Office regarding the existence of arbitration agreement according to Art. R39 sentence 1 CAS Code. According to MAVROMATI/REEB, 2015, 245 f., in practice the CAS Court office tends to retain the claim unless there is a clear lack of jurisdiction, means that e.g. there is no arbitration clause at all referring to the CAS or that the parties are in no way contractually connected to the CAS dispute resolution mechanism or do have another dispute resolution mechanism provided for in the contract or the statutes of the federation.

210 MAVROMATI, 2016, 164 f.

The SFT held that it is a violation of good faith to raise a procedural objection or invoke a respective ground only in the framework of an appeal where the opportunity could have been given to the arbitral tribunal to remedy the alleged deficiency.[211] In particular, it is according to the SFT contrary to good faith and an abuse of rights for a party to keep a ground for appeal in reserve, only to postpone it in case of a disadvantageous outcome in the proceedings or a foreseeable loss of the case.[212]

Therefore, an appellant has to challenge CAS' jurisdiction in due course during the arbitral proceedings or the respective objection will be forfeited definitely for both the arbitral proceedings as well as the appeal proceedings with the SFT. This jurisprudence of the SFT is consistent with the international standard in arbitration.[213]

IV. The Review by the Swiss Federal Tribunal

1. The Competence of the SFT

The SFT has within the restricted framework established by the legislator through Art. 77 BGG in connection with Art. 190 (2) (a) to (e) PILA in international arbitration respectively Art. 393 CPC (a) to (f) in national arbitration the competence to review arbitral awards within the meaning of Art. 176 ff. PILA respectively Art. 353 ff. CPC upon appeal based on exhaustively listed grounds.

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211 ATF 119 II 386 at 1a p. 388.

212 ATF 136 III 60511 at 3.2.2 p. 609; 129 III 445 at 3.1 p. 449; 126 III 249 at 3c p. 254 and 4A_550/2012 of February 19, 2013 at 5 (each with further references).

213 See regarding the standard under der NYC Born, 2016, 398. See also Article V of the European Convention on International Commercial Arbitration of 1961, which provides that jurisdictional objections on the alleged non-existence or non-applicability of arbitration agreements must be raised prior to pleadings on the merits of the dispute. Later objections are precluded.

Furthermore, the SFT is competent for the revision of arbitral awards within the meaning of Art. 176 ff. PILA in international arbitration respectively Art. 396 ff. CPC in national arbitration. Since the PILA contains no respective provisions, the SFT filled the lacuna by granting the parties to an international arbitration the extraordinary legal remedy of revision, for which the SFT has jurisdiction.[214]

2. The Civil Law Appeal

a) Legal Framework

The ordinary legal remedy against CAS awards is the civil law appeal according to Art. 77 (1) (a) BGG in connection with Art. 190 to 192 PILA in international arbitration and to Art. 77 (1) (b) BGG in connection with Art. 389 to 395 CPC in national arbitration.[215]

CAS awards which qualify as appealable arbitral awards in the sense of the aforementioned provisions are subject to the review by the SFT, which is competent to review exclusively the compliance of the proceedings and the decision with respectively the violation of fundamental procedural and substantive law principles, namely:

- Final and interlocutory awards regarding the constitution and the jurisdiction of the CAS according to Art. 190 (2) (a) and (b), Art. 190 (3) PILA respectively Art. 393 (b) CPC and according to respectively Art. 392 (b) CPC;
- Final awards disregarding the matter in dispute (ultra, infra or extra petita) according to Art. 190 (2) (c) PILA respectively Art. 393 (c) CPC;

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214 ATF 134 III 286 at 2 p. 286 ff. (with further references), reaffirmed in 4A_144/2010 judgment of September 28, 2010 at 2.1.1.

215 See ZK-IPRG-HEINI, Art. 190, no. 11 ff.; BK-IPRG-PFISTERER, Art. 190, no. 21 ff.

- Final awards violating the principle of equal treatment of the parties or the right to be heard according to Art. 190 (2) (d) PILA respectively Art. 393 (d) CPC;
- Final awards incompatible with (procedural or substantive law) public policy according to Art. 190 (2) (e) PILA respectively arbitrary in their result according to Art. 393 (e) CPC;
- Final awards fixing excessive costs and compensations according to Art. 393 (f) CPC (in national arbitration only).

The SFT emphasises in its constant jurisprudence that according to Art. 77 (3) BGG it only examines the grievances raised and reasoned in the appeal brief.[216] As to the grievances based on Art. 190 (2) (e) PILA, the incompatibility of the arbitral award under review with public policy must be shown specifically. Criticism of an appellate nature is not admissible.[217]

b) Appealable Awards

aa) Final, partial and interlocutory Awards

According to the constant jurisprudence of the SFT a civil law appeal within the meaning of Art. 77 BGG in connection with Art. 190 to 192 PILA is admissible only against an appealable award.[218] An appealable award can be a (i) final award (putting an end to the arbitral procedure on meritorious or procedural grounds), or a (ii) partial award (disposing of part of a claim in dispute or of one of the various claims at hand or putting an end to the procedure as to some of the joint parties), or an

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216 ATF 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282; (with further references).

217 4A_612/2009, judgement of February 10, 2010 at 2.2; ATF 117 II 604 at 3 p. 606; ATF 119 II 380 at 3b p. 382.

218 4A_6/2014 of 28 August 2014 at 2.2.1.

(iii) interlocutory award (deciding one or several preliminary issues of merit or procedure). In order to decide if the decision is capable of appeal, the decisive factor is not its name but its content.[219]

According to Art. 190 (3) PILA respectively Art. 392 (b) CPC interlocutory awards are appealable under the grounds of Art. 190 (2) (a) and (b) PILA. Consequently, the SFT characterised the interlocutory decision in which an arbitral tribunal decides as to its jurisdiction or composition is subject to an immediate appeal to the SFT pursuant to Art. 190 (3) PILA under penalty of forfeiting the right to appeal it later.[220] The same principle applies to provisional measures, as referred to in Art. 183 PILA.[221]

bb) Procedural Decisions

In contrast, the SFT clarified that procedural decisions of the arbitral tribunal have to be qualified as mere procedural orders which can be modified or rescinded during the proceedings, such as an order staying the arbitration temporarily. These procedural decisions are principally not capable of appeal (unless they concern the decision on jurisdiction or the regularity of the composition of the CAS).[222]

Exceptionally, however, also procedural decisions are appealable, namely when the arbitral tribunal issuing them has implicitly decided

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219 ATF 116 II 80 at 2b, p. 83; ATF 130 III 755 at 1.2.1, p. 757; ATF 136 III 2006 at 2.3.3, p. 205, 597 at 4; ATF 123 III 414 at 1 p. 417; 4A_210/2008, judgement of October 29, 2008 at 2.1 (each with further references).

220 ATF 130 III 66 at 4.3, p. 75 and the cases quoted.

221 ATF 136 III 2008 at 2.3 (with further references).

222 4A_600/2008 judgment of February 20, 2009 at 2.3.

as to its jurisdiction and therefore actually issued an interlocutory decision on jurisdiction or as to the regularity of its composition within the meaning of Art. 190 (3) PILA.[223]

Furthermore, the SFT held that an appealable procedural decision may not necessarily be issued by the panel appointed to decide the case in dispute; it may also originate from the president of an arbitration division of the CAS issued, or even from the secretary general of the CAS.[224]

In contrast, however, it has to be noted that according to the SFT the decisions taken by the ICAS (ICAS Board) as to challenges according to Art. S21 and R34 CAS Code are not capable of a direct appeal according to Art. 190 (2) (a) PILA but can be appealed only with the final award of the arbitral tribunal itself.[225]

Moreover, the SFT clarified with reference to Art. 180 (3) PILA that the parties may determine the challenge procedure themselves, but when resort to a private body to decide the challenge, they may not appeal its decision directly to the SFT, but possible grievances according to Art. 190 (2) (a) PILA may be raised in an appeal against the arbitral award within the meaning of Art. 190 PILA.[226] Therefore, any decision relating to the challenge of a CAS arbitrator cannot be directly appealed to

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223 ATF 136 III 597 at 4.2; 4A_446/201410 judgment of November 4, 2014, at 3.1 (with further references); 4A_210/2008, judgement of October 29, 2008, at 2.1. with reference to ATF 123 III 414, at 1 p. 417: *"If there is no doubt that the arbitral tribunal did not limit itself to organising the rest of the proceedings but decided the issue of the stay, which, in principle, gives rise to an interlocutory decision."*.

224 Judgments 4A_282/2013 of November 13, 2013, at 5.3.2; 4A_126/2008 of May 9, 2008, at 2.

225 4A_644/2009 judgment of April 13, 2010 at 1. (with further references).

226 4A_620/2012, judgement of May 29, 2013 at 3.2; ATF 118 II 359 at 3b p. 360 f.

the SFT, but only with the appeal against the final or interim award on the merits.[227]

The case law of the SFT as to the crucial procedural question of appealability is consistent with the legal framework and the requirements of an efficient proceeding. However, in practice a party must either file a direct appeal (whenever admissible) or raise at least the respective objection or make the relevant reservation immediately in order to avoid the forfeiture of the right of appeal.

c) Grounds for Appeal

aa) In general

The grounds for appeal are stipulated exhaustively in Art. 190 (2) (a) and (b) PILA respectively Art. 393 (b) CPC and in Art. 190 (3) PILA respectively Art. 392 (b) CPC regarding interlocutory awards.

The SFT clarified that in an appeal against an international arbitral award, according to Art. 190 (2) PILA, only the grounds for appeal set out in this provision may be invoked, but not directly a violation of the Federal Constitution, the ECHR or other treaties, the various grievances of violations of corresponding provisions are not capable of appeal in principle.[228] The principles resulting from the Federal Constitution or the ECHR or other relevant treaties can be applied, where appropriate, in support of the guarantees given by Art. 190 (2) PILA; however, in light of the strict requirements for reasons (Art. 77 (3) BGG), it must be

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227 Consequently, the decision on the challenge has no binding effect whatsoever for the SFT, which claims accordingly free review whether or not the circumstance invoked to justify the challenge is such as to establish the grievance that the composition of the CAS containing the arbitrator under challenge was irregular, see ATF 118 II 359 at 3b; ATF 128 III 330 at 2.2 p. 332.

228 Judgements 4P.105/2006 of August 4, 2006 at 7.3; 4P.64/2001 of June 11, 2001 at 2d/aa, not published, ATF 127 III 429 ff.

shown in the appeal itself. Once this dispute resolution mechanism has been validly chosen, a party to the arbitration agreement may not validly submit, in the framework of a civil law appeal to the SFT against an arbitral award, that the arbitrators violated the ECHR even though its principles may occasionally be used to implement the guarantees it invokes on the basis of Art. 190 (2) PILA.[229]

With regard to the subject matter of the present thesis the two relevant grounds for appeal on which respective grievances regarding the composition, including the independence and impartiality of the arbitrators, as well as the jurisdiction of the CAS can be founded are Art. 190 (2) (a) and (b) PILA.

bb) Irregular Composition

According to Art. 190 (2) (a) PILA, an arbitral award can be challenged on the ground that "*a sole arbitrator was designated irregularly, or the arbitral tribunal was constituted irregularly*".

The SFT case law on this issue has adopted the predominant opinion in the legal writing and stated that Art. 190 (2) (a) PILA covers two grievances: the violation of the contractual provisions (Art. 179 (1) PILA) or legal rules (Art. 179 (2) PILA) as to the appointment of the arbitrators on the one hand and the failure to comply with the rules concerning

[229] Judgements 4A_404/2010 of April 19, 2011 at 3.5.3; 4A_43/2010 of January 29, 2010 at 3.6.1; 4A_320/2009 of June 2, 2010 at 1.5.3; 4A_612/2009 of February 10, 2010 at 2.4.1; 4P.105/2005 of August 4, 2006 at 7.3; 4A_238/2011 of January 4, 2012 at 3.2.1, reaffirmed in 4A_246/2014 of July 15, 2015 at 7.2.2.

impartiality and independence of the arbitrators (Art. 180 (1) (b) and (c) PILA), on the other.[230]

Accordingly, such ground may therefore be invoked if it is alleged that the appointment procedure provided for in the arbitration agreement or in the applicable arbitration rules was not complied with[231], or that an appointed arbitrator was not independent or impartial. Consequently, the appellant must establish either that respective provisions of the CAS Code regarding the constitution of the panel was violated or that a CAS arbitrator who was appointed was not (sufficiently) independent or impartial.[232]

According to an analysis by MAVROMATI presented in 2014 from the 125 appeals to the SFT (including appeals against interim or interlocutory awards) 26 appeals were based on Art. 190 (2) (a) PILA (as a sole

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230 4A_146/2012 judgment of January 10, 2013 at 3.2; 4A_282/2013 judgment of November 13, 2013 at 4. p. 5 (with numerous quotes and refences) and 4A_538/2012, judgement of January 17, 2013 at 4.3.2: he SFT stated that as a matter of principle and on the basis of the side note of section IV of chapter 12 PILA ("arbitral tribunal"), the regularity of the constitution of the arbitral tribunal means only the manner in which the arbitrators were appointed or substituted (Art. 179 PILA) and the issues concerning their independence (Art. 180 PILA).

231 See AFT 117 II 346 at 1b/aa p. 348: although the SFT held that arbitration rules do not have the quality of procedural principles in the sense of Art. 190 (2) (d), they are of relevance under Art. 190 (2) (a) with regard to the appointment procedure.

232 See COCCIA, 2014, 177, who emphasises with reference to the relevant legal writing that the difference between the notions of independence and impartiality has often been discussed in the legal literature, but no clear distinction seems to have been drawn persuasively. Moreover, he states that the first situation is unlikely to occur in CAS proceedings, only the latter situation can be considered as actually problematic.

ground or among other grounds).[233] However, no successful appeal has been filed until then based on this ground. Furthermore, she found that the most usual reason for challenging an arbitral award based on this provision is the (alleged) lack of impartiality and independence of the arbitrator(s).[234]

The SFT emphasises in its relevant jurisprudence[235] that similarly to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality.[236] Breaching that rule leads to an irregular composition of the arbitral tribunal pursuant to Art. 190 (2) (a) PILA.[237] In order to say whether an arbitrator presents such guarantees or not, reference must be made to the constitutional principles developed with regard to state courts.[238] However, the specificities of arbitration and particularly those of international arbitration must be taken into account when reviewing the circumstances of this issue.[239]

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233 Judgments 4P_217/1992 of March 15, 1993; 4P_267-270/2002 May 27, 2003, 4P_105/2006 of August 4, 2006; 4A_160/2007 of August 28, 2007; 4A_528/2007 of April 4, 2008; 4A_352/2009 of October 13, 2009; 4A_368/2009 of October 13, 2009; 4A_612/2009 of February 10, 2010; 4A_644/2009 of April 13, 2010; 4A_234/2010 of October 29, 2010; 4A_392/2010 of January 12, 2011; 4A_394/2010 of January 12, 2011; 4A_428/2011 of February 13, 2012; 4A_274/2012 of September 19, 2012; 4A_110/2012 of October 9, 2012; 4A_476/2012 of May 24, 2013; 4A_620/2012 of May 29, 2013; 4A_282/2013 of November 13, 2013; 4A_6/2014 of August 28, 2014.

234 MAVROMATI, 2016, 156 f.

235 4A_234/2010, judgement of October 29, 2010 at 3.2.1.

236 4A_620/2012, judgement of May 29, 2013 at 3.1; ATF 136 III 605 at 3.2.1, p. 608, ATF 125 I 389 at 4a; ATF 119 II 271 at 3b and further cases quoted.

237 ATF 118 II 359 at 3b.

238 ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361.

239 ATF 129 III 445 at 3.3.3 p. 454, mentioning especially the "small community" of arbitrators knowing each other respectively the parties from previous proceedings, which does not automatically lead to a lack of independence and impartiality. See also COCCIA, 2014, 179 f., who confirms the existence of the "small community" in international sports arbitration.

cc) Lack of Jurisdiction

According to Art. 190 (2) (b) PILA, an arbitral award can be challenged on the ground that "*the arbitral tribunal wrongfully accepted or denied jurisdiction*". The challenges of the jurisdiction of the CAS before the SFT based on Art. 190 (2) (b) PILA claiming a violation of Art. 177 or 178 PILA as well as the applied pattern of review by the SFT[240] can be categorised as follows:

- existence and scope of a (valid) arbitration agreement;
- arbitrability of the claim;
- exhaustion of internal remedies:
- application of the right code (PILA, CPC) or rules.

According to an analysis by MAVROMATI issued in 2014 Art. 190 (2) (b) PILA is one of the most frequently evoked grounds for annulment of the CAS awards. Until then, there have been attacked 34 CAS awards before the SFT based on Art. 190 (2) (b) PILA and five CAS awards successfully set aside for CAS' lack of jurisdiction.[241] According to her analysis the clear majority of appeals against CAS awards claim the erroneous acceptance of jurisdiction rather than the denial.[242]

d) Scope of Review

The SFT has divergent from the general principle of review which comprises both the competence to overrule a challenged decision as well as to decide on the merits a restricted competence when it comes to the

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240 SFT 4A_244/20121 of 17 January 2013.

241 MAVROMATI, 2016, 163.

242 A procedural explanation for this statistical finding might be the fact that the respective objection of an existing arbitration clause is usually to be raised and decided already in the ordinary court proceeding and therefore clarified bindingly for a subsequent arbitration proceeding.

review of arbitrational awards. Art. 77 (2) BGG restricts the competence of the SFT as a principle to the cassation of a challenged arbitrational award. However, an exception of this principle is, however, the constellation when the dispute concerns the jurisdiction or the composition of the arbitral tribunal: here the SFT decides on the merits and determines the jurisdiction or challenge to the composition of the arbitral tribunal definitely.[243]

Seized for lack of jurisdiction, the SFT reviews the legal issues, including the preliminary questions determining the jurisdiction or lack of jurisdiction of the arbitral tribunal unrestricted.[244] Yet, the SFT emphasised that this does not turn it into a Court of Appeal with the task to retry the case, but its review is limited to the mere examination whether the admissible grievances raised against the award are justified or not.[245] Also the parties are limited to state no other facts than those found by the arbitral tribunal – except for the exceptional cases reserved by case law – even though the facts may be established by evidence contained in the arbitration file.[246] Consequently, the SFT also reviews the factual findings only within the usual limits, even when addressing this grievance.[247]

The SFT consequently bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result of a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art.

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243 AFT 117 II 94 of 9 April 1991; ATF 136 III 605 at 3.3.4, p. 616 (with further references).

244 Leading cases: AFT 117 II 94 of April 9, 1991, 97; AFT 4P.298/2005 of January 19, 2006, no. 2.1.

245 AFT 134 III 565 at 3.1 (and the cases quoted).

246 Judgments 4A_682/2012, of June 20, 2013 at 3.2 and 4A_386/2010 of January 3, 2011 at 3.26 (with further references).

247 4A_682/2012, judgement of June 20, 2013 at 3.1 and 4.2.

105 (2) and of Art. 97 BGG). However, exceptionally the SFT may review the factual findings of the award under appeal when admissible grievances within the meaning of Art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is considered.[248] In order to claim an exception from the SFT being bound to the factual findings of the arbitral tribunal and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the documents that the corresponding factual allegations were already made in conformity with procedural rules in the proceedings in front of the arbitral tribunal.[249] The review of the findings of facts by the CAS comprises to the following two constellations:

- Findings of facts concerning the jurisdiction of the CAS that have been permissibly challenged within the appeal based on Art. 190 (2); or
- Exceptionally new facts are admissible within an appeal to the SFT[250].

The scope of review by the SFT is therefore rather limited which is an important factor that in consequence appreciates the CAS and its proceedings as an autonomous dispute resolution mechanism for sports. Moreover, in the light of the likewise autonomous execution mechanism for CAS awards within the structure of organised sports, especially by the IF's and the NF's, the state courts' control a posteriori is practically not existent and therefore the autonomy of this dispute resolution mechanism is much wider than in other fields of arbitration.

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248 ATF 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 (with further references).

249 4A_612/2009, judgement of February 10, 2010 at 2.3; ATF 115 II 484 at 2a p. 486; ATF 111 II 471 at 1c p. 473; (with further references).

250 ATF 129 III 727.

e) Forfeiture of Right to Appeal

The SFT clarified that a party finding of lack of jurisdiction (Art. 186 (2) PILA) or which considers itself harmed by a relevant procedural violation according to Art. 190 (2) PILA) forfeits its claims when it does not raise them in a timely manner in the arbitral proceedings and does not undertake all reasonable steps to remedy the violation to the extent possible.[251] When a party participates in an arbitration without questioning the composition or jurisdiction of the arbitral tribunal – although it had the opportunity to clear the issue before the award is issued – it forfeits not only the right to raise the objection but also the right to raise the corresponding grievances before the SFT.[252] If not done so immediately, and in accordance with the principle of good faith, the parties have no longer the right to raise arguments related to the incorrect constitution of the arbitral tribunal once they see that the outcome of the case is unfavourable.[253]

f) Waiver of Appeal

aa) In general

According to Art. 192 (1) PILA, if neither party has a domicile, a place of habitual residence or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral

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251 ATF 130 III 66 at 4.3 p. 75; 126 III 249 at 3c p. 253 f.; 119 II 386 at 1a p. 388 (each with further references).

252 SFT 4A_314/2012 of 16 October 2012 at 4; ATF 118 III 50 at 2c/aa p. 58: The SFT deducts from that on the basis of Art. 186 (2) PILA and relative case law that the challenge of CAS' jurisdiction raised by the appellant only in the civil appeal to the SFT is time barred; SFT 4A_476/2012 of 24 May 2013 at 3.2; ATF 130 III 66 at 4.3 (each with further references).

253 MAVROMATI, 2016, 155 f.

tribunal; they may also exclude an appeal only on one or several of the grounds enumerated in Art. 190 (2) PILA.

According to the case law of the SFT concerning international arbitration in general, a waiver of appeal is authorised with respect to all awards and all grounds of appeal.[254] However, the SFT held that it is usual to only accept waivers of appeal on a limited basis and that an indirect waiver is insufficient. This means a waiver which does not result directly from the arbitration agreement or a subsequent written agreement, but which appears in a separate, pre-existing document to which the parties refer. Therefore, the requirement that the waiver is the subject of an express declaration means that an arbitration rule making provision for such a waiver is invalid.[255]

Moreover, the SFT explained that, for a waiver of appeal in order to be valid, it deems it necessary but sufficient for the express declaration of both parties to show indisputably their common desire to exclude all appeals. The SFT pointed out that the precedent set by the aforementioned judgment has since been confirmed and there is no need to re-examine it here, despite the criticisms it has attracted from certain authors.[256]

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254 ATF 133 III 235 at 4.3.1 with further references to ATF 131 III 173 at 4.1 and 4.2; 4P.198/2005 judgment of October 31, 2005 at 2.2 (each with further references).

255 ATF 116 II 639 at 2c.

256 Judgments 4P.198/2005 of October 31, 2005 at 1.1, 4P.98/2005 of November 10, 2005 at 4.1; 4P.154/2005 of November 10, 2005 at 4 and 4P.114/2006 of September 7, 2006 at 5.2 with further references to authors criticising this case-law.

bb) In Sports Arbitration

With regard to the particularities of sports arbitration the SFT established with the leading case Guillermo Cañas vs. ATP Tour[257] a sophisticated approach regarding the validity of the waiver of appeal, within the meaning of Art. 192 (1) PILA developing and elaborating its case law:

However, the same definition does according to the SFT not appear sufficiently suitable to the specificities of sport arbitration, in particular to the recourse to the CAS by way of an appeal against a decision of a sport federation. As an appeal jurisdiction indeed, the CAS panel will issue a final award within the meaning of the definition recalled above – i.e. an award putting an end to the arbitral proceedings at hand. However, the proceedings between the parties on the merits will not necessarily be terminated by the award.[258]

The SFT, after having examined the objectives of the legislator and the *ratio legis* of Art. 192 PILA carefully, concluded that this provision was primarily intended to apply to international commercial arbitration and, in particular, to awards that need to be submitted to the exequatur judge. It is therefore according to the SFT unlikely that the legislator had international sports arbitration in mind, especially not disputes relating to the suspension of athletes, when adopting this provision. Indeed, since the IOC and most major international sports federations are based in Switzerland, the condition laid down in Art. 192 (1) PILA immediately excludes any waiver of appeal against awards issued in disputes involving such legal entities. Furthermore, sanctions imposed against athletes, such as disqualification or suspension, do not require any exequatur procedure in order to be enforced. Considered from a historical perspective, the SFT held that Art. 192 (1) PILA does therefore not appear to

257 4P.172/2006 judgment of March 22, 2007, ATF 133 III 235.

258 ATF 133 III 235 at 4.3.2.2, p. 243.

be designed to apply to appeals against awards issued in the field of sports sanctions.[259]

The SFT finally tried to find a counterbalance to that liberalism which characterises case law[260] relating to the form of arbitration agreements in international arbitration is also evident in the flexibility by establishing a strict case law when it comes to accepting waivers of appeal, since it states that such a waiver may not be made indirectly and does not, in principle, allow them to be used as a defence against an athlete.[261]

The SFT admitted that it might probably be rather illogical, in theory, to treat an arbitration agreement differently from an agreement to exclude all appeals in respect of form and consent. However, in spite of appearances, this difference in treatment is according to the SFT logical insofar as it promotes the swift settlement of disputes, particularly in sport, by specialised arbitral tribunals that offer sufficient guarantees of independence and impartiality[262], while at the same time ensuring that the parties, especially professional athletes, do not give up lightly their right to appeal awards issued by a last instance arbitral body before the supreme judicial authority of the state in which the arbitral tribunal is

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259 ATF 133 III 235 at 4.3.2.1: Moreover, the SFT pointed out that a waiver of appeal is based on an agreement between the parties, whether in the arbitration agreement or in a subsequent written agreement. It is especially important that the expression of the desire to exclude all appeals should not be invalidated by any form of constraint, since such an exclusion denies its author of the possibility of appealing any future award, even if it were to violate the fundamental principles of the rule of law, such as public policy, or essential procedural guarantees such as the proper composition of the arbitral tribunal, its jurisdiction, the equality of the parties or even the right to a fair hearing in an adversarial proceeding.

260 See with regard to the arbitration clauses by reference: ATF 129 III 727 at 5.3.1 p. 735 (with further references), and in the field of sports: judgments 4P.253/2003 of March 23, 2004 at 5.4, 4P.230.2000 of February 7, 2001 at. 2a and 4C.44/1996 of October 31, 1996 at 3c.

261 ATF 133 III 235 at 4.3.2.3.

262 Concerning the CAS, see ATF 129 III 445 at 3.3.3.3.

domiciled. In other words, this logic is based on the continuing possibility of an appeal acting as a counterbalance to the «benevolence» with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned.[263]

The jurisprudence of the CAS reflects this opinion of the SFT and goes even beyond stating in a particular preliminary award on jurisdiction and admissibility that in cases of unequal bargaining power – as in the case at hand – the stronger party cannot force upon the weaker party a waiver to seek judicial redress with a court (or an arbitral tribunal). Such a (forced) waiver of access to justice would lack the required voluntariness to stand up before Article 6 (1) ECHR.[264]

This approach seems reasonable and consistent in the light of the fact of both the "benevolence" jurisprudence of the SFT as well as that the possibility of an appeal within the enforcement proceeding according to the NYC. Latter is in the field of professional sport rather theoretical since the enforcement takes regularly place within the federation or sporting body concerned. Moreover, in conformity with the relevant opinions in the legal writing[265] it must be noted that the remedies under the NYC cannot be deemed to be an equivalent to the civil law appeal to the SFT. Only the appeal according to Art. 190 PILA allows the abolition of an arbitral award with effect *erga omnes*. This is of particular relevance in disciplinary proceedings with a multitude of involved parties and consequences that go far beyond the enforcement of the appeal concerned.

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263 ATF 133 III 235 at 4.3.2.3.

264 CAS 2013/A/3055, award of 17 June 2013 at 1. and 7.12.

265 BERGER/KELLERHALS, 2006, 1669, BRUNNER, 2008, 741; BK-IPRG-PATOCCHI/JERMINI, 2013, Art. 192 no. 55 ff.

3. Revision

a) Admissibility

In the light of the fact that PILA contains no provisions as to the revision of arbitral awards within the meaning of Art. 176 ff. PILA the SFT filled the lacuna by granting the parties to an international arbitration the extraordinary legal recourse of revision, for which the SFT has jurisdiction.[266] In contrast, Art. 396 to 399 CPC provide for specific rules regarding the revision of arbitral awards in national arbitration.

b) Grounds for Revision

aa) International Arbitration

According to Art. 123 (2) (a) BGG the revision in civil or public law matters may be sought if the petitioner subsequently discovers significant new facts or decisive evidence which he could not adduce in the previous proceedings to the exclusion of facts and evidence which emerged only after the award.[267]

The SFT held in a leading decision that new facts must be significant in the sense of suitable to change the factual basis of the award so that an accurate legal evaluation could lead to another decision. New evidence must either serve to prove the new significant facts on which the revi-

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[266] ATF 134 III 286 at 2 p. 286 ff. (with further references), reaffirmed in 4A_144/2010 judgment of September 28, 2010 at 2.1.1.

[267] ATF 118 II 199 at 4 p. 204; 4P.120/2002 judgment of September 3, 2002 at 1.1; ATF 134 III 45 at 2.1 p. 47, 286 at 2.1 p. 287: the SFT held that pursuant to the procedural rules of the previous Federal Statute organizing Federal Courts the parties could rely on the grounds for revision which would apply to the proceedings by analogy and this still applies in principle to the rules of the BGG, namely for the ground for revision according to Art. 123 (2) (a) BGG.

sion is based or that of facts which already known in the previous proceedings remained unproved to the petitioner's detriment. Should the new evidence prove factual allegations already made previously, the petitioner must show that he could not bring the evidence in the earlier proceedings. New evidence is significant when it is to be inferred that it could have led to another decision if the arbitral tribunal had been aware of it at the hearing.[268]

bb) National Arbitration

Art. 396 (1) (a) CPC comprises a ground for revision due to the discovery of significant new facts or decisive evidence corresponding with Art. 123 (2) (a) BGG. Furthermore, in national arbitration Art. 396 (1) (b) and (c) and (2) CPC provides for three additional grounds for revision, namely the criminal influence on the award, the invalidation of the alternative result of the proceedings (acceptance, withdrawal, settlement) and the violation of the ECHR according to a final judgement of the ECtHR (under further conditions as mentioned in Art. 396 (2) (b) and (c) CPC).

With regard to the here relevant issues of the composition and the jurisdiction of the CAS the revision in international arbitration seems limited to new facts or evidence regarding the lack of independence and impartiality of an arbitrator, provided they would have disqualified him definitely according to the standards established in the case law of the SFT. In national arbitration, however, besides the mentioned ground especially the violation of the ECHR according to a final judgement of the ECtHR is important if the violation is caused by a deficiency in the composition or the jurisdiction of the CAS.

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[268] ATF 127 V 353 at 5b p. 358 (with further references); 110 V 138 at 2 p. 141; see also ATF 121 IV 317 at 2 p. 322; 118 II 199 at 5 p. 205, reaffirmed in 4A_144/2010 judgment of September 28, 2010 at 2.1.2.

c) Decision

When the revision of an international arbitral award is sought the SFT must assess on the basis of the reasons contained in the award whether the facts are significant or not and if they would probably have led to a different decision had they been proved.[269] If the SFT upholds a request for revision it does not decide the matter itself but sends it back to the arbitral tribunal that decided it or to a new arbitral tribunal to be constituted.[270]

V. Summary and Conclusion

1. Qualification

As demonstrated, the CAS was originally construed as a genuine arbitral tribunal by its founding fathers, but this qualification was constantly challenged and tested by appellants. The SFT, however, has from the very beginning (with relevant reservations) and throughout the 34 years of its existence constantly confirmed this qualification of the CAS as a genuine arbitral tribunal. Although the appellants regularly failed to raise the relevant objections respectively make the relevant reservations during the CAS appeal proceedings as required according to the relevant jurisprudence, the SFT continuously reassessed and reaffirmed its opinion until today. Moreover, the SFT although remarking that CAS being "*une institution perfectible*" conceded already 2003 in the land-

269 4A_42/2008 judgment of March 14, 2008 at 4.1, ATF 134 III 286 ff.; 4P.102/2006 of August 29, 2006 at 2.1, reaffirmed in 4A_144/2010 judgment of September 28, 2010 at 2.1.2.

270 ATF 134 III 286, at 2 p. 286 ff. (with further references), reaffirmed in 4A_144/2010 judgment of September 28, 2010, at 2.1.1.

mark case of Larissa Lazutina/Olga Danilova vs. IOC that "*this institution which is now widely recognised (...) remains one of the principal pillars of organised sport*".[271]

Moreover, the ECtHR assessed in its decision of October 2, 2018 all the relevant legal aspects regarding the qualification and proceedings of the CAS as well as the respective jurisprudence of both the SFT and the CAS and confirmed their conformity with the applicable Art. 6 (1) ECHR. This decision must be qualified as a landmark decision for sports arbitration in general as well as the CAS in particular. More than that, fortunately the high-profile cases of Adrian Mutu and Claudia Pechstein concerned both an employment law dispute (incl. damages) on the one hand as well as a disciplinary dispute on the other hand. Therefore, the assessment and clarification are made for the main types of disputes in sports arbitration.

This "Solomonic" approach of the ECtHR, confirming the dispute resolution mechanism including the phenomenon of "forced arbitration" in the area of international sport on one hand and requesting the guarantees of a fair trial of Art. 6 (1) ECHR to be fully granted on the other hand seems absolutely appropriate and balanced. It considers both the interests of the sports organisations as well as the athletes. Furthermore, also the ECtHR acknowledged implicitly that state courts are not a viable alternative for an expedient, competent and harmonised dispute resolution in the area of sport in general and of disciplinary disputes in particular. The CAS may therefore be an "*une institution perfectible*",

[271] ATF 129 III 445 at 3.3.3.3 p. 463.

but even in the light of the relevant jurisprudence of the ECtHR without a viable alternative.[272]

It can therefore be concluded as to this issue that the controversial question of the qualification of the CAS is despite the ongoing debate in the legal writing definitely answered, at least under the *lex arbitri* in Switzerland and under the ECHR by the ECtHR on a continental level.[273]

2. Jurisdiction

Although the ECtHR confirmed the CAS dispute resolution mechanism, including the "forced arbitration" in sport, the controversy is in practice not definitely resolved, because the Brussels Court of Appeal rejected an objection against its own jurisdiction to rule on an interim measure in the high-profile case involving Doyen Sports/L'ASBL Royal Football Club Seraing ("RFC Seraing") on one side and FIFA/UEFA/URBSFA/FIFPro on the other side. In its decision it denied the validity of the arbitration clause in the FIFA statutes for because it does not relate to a *"defined legal relationship"* according to Art. 1681 and 1682 (1) of the applicable Code judiciare.[274] It is important to note that the requirement of a *"defined legal relationship"* is common in international arbitration legislation and was so far not interpreted in a narrow sense that would impose substantial limitations to the validity of

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272 See on the contrary DUVAL/VAN ROMPUY, 2016, 248, (with further references), who are in fundamental disagreement and emphasize: *"Conversely, forced arbitration is at the 'antipodes' of the conventional understanding of arbitration. It is thus understandable that the literature, the CAS, and the SFT have had difficulties in parting with that foundation. For many the CAS is an 'arbitration tribunal whose jurisdiction and authority are based on agreement of the parties'.* (…) *This consensual obsession is so entrenched in the subconscious of arbitrators, scholars, and judges that it is seen as an obvious necessity. (...) This has led the CAS and the SFT to develop specific legal strategies to circumvent the thinness of the consensual fundament of the 'agreement' to arbitrate in sport.*".

273 4A_102/2016, judgement of September 27, 2016.

274 Brussels Court of Appeal 2016/AR/2048, 2018/6348, 1227181 at 3.1.2. p. 15.

arbitration agreements but to emphasise the permissible scope of arbitration agreements.[275] It is therefore more than questionable, if the interpretation by the Brussels Court of Appeal will stand up to the probable challenge by the defendants.

However, even more important are the fact that the Brussels Court of Appeal unlike the Munich District Court in the case of Claudia Pechstein has not questioned the dispute resolution mechanism, including the "forced arbitration" in sport as such, but only the validity of a particular arbitration clause in the FIFA statutes for the present case, no more than the qualification of the CAS as a genuine arbitral tribunal. It is therefore – provided the interpretation by the Brussels Court of Appeal will stand up to the probable challenge – rather an issue for the FIFA to amend its regulations than for ICAS to amend its respective regulations.[276]

However, 34 years after the establishment of the CAS and 22 respectively 17 years after the leading decisions in the cases Nagel vs. FEI and Stanley Roberts vs. FIBA it can also be expected of athletes in organised sports, especially of professional athletes to be are aware of the relevant regulations regarding the dispute resolution mechanism in sports and to object or agree with reservations, if they want to safeguard their rights of challenge. Furthermore, the criticism in the legal writing as to the jurisdiction of the CAS provides admittedly valid arguments with regard to the critical aspects of the liberal "benevolence" approach of the SFT, but it fails in my opinion to describe the alternative scenario that

275 See BORN, 2016, 376 (with further references).

276 See ICAS in Media Release - statement of the ICAS regarding the case RFC SERAING/DOYEN SPORT/FIFA/UEFA/URBSFA www.tas-cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf.

would result in the absence of CAS arbitration based on arbitration clauses by reference or "forced arbitration".[277]

However, it must be clearly denied that the proceedings and the outcome in front of different state courts worldwide dealing with sports matters, especially regarding disciplinary disputes, would be satisfactory. If state courts worldwide would interfere with the harmonized system of eligibility, the fight against doping, the participation in international or national high-level competitions, the consequences would be disastrous for sports. The most likely scenario would be an inconsistent jurisprudence of different state courts interfering with the globally harmonised structures and standards of organised sports, which are essential to guarantee a level playing field and to safeguard of the core values of sports and fair competitions. Therefore, from a purely academic point of view some criticisms may well be justified, whereas from a practical point of view that considers the entire structure of organised sports as well as the well-established dispute resolution mechanisms in sports there is no viable alternative. Having said this, it should not discourage the sports bodies to continuously revise and improve both their organisations and their regulations.

3. Improvement

The ICAS and the CAS do feel obviously conformable and reassured, especially by the latest landmark decisions of both the SFT and the ECtHR. However, as already demonstrated after the first landmark decision of the SFT in the case of Elmar Gundel the responsible bodies

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[277] DUVAL/VAN ROMPUY, 2016, 249, 253, identify a "*consensual obsession entrenched in the subconscious of arbitrators, scholars, and judges that has led the CAS and the SFT to develop specific legal strategies to circumvent the thinness of the consensual fundament of the 'agreement' to arbitrate in sport*." According to them "*there is very little practical value, in the course of a short professional career, to start a multiyear litigation, with no certainty of success, to obtain, before a national court, eligibility to compete in sporting competitions.*".

should proof their adaptive capacity and well understanding of the remarks or reservations by the relevant courts in the respective decisions and anticipate possible annulments of future awards by amending their organisation and proceedings timely. This approach of a continuous revision and improvement of the own organisation and proceedings must be recognised and appreciated. It is especially important in order to maintain the credibility and recognition of the CAS not only by the state courts in Switzerland and abroad, but also by the athletes, the most affected parties in sports arbitration. The continuous improvement could also result in a more liberal approach regarding the composition of the panels in order to give the athletes more freedom of choice of their own arbitrator and avoid future challenges under this aspect as well.

Moreover, in the light of recent decision of the ECtHR in the case of Adrian Mutu and Claudia Pechstein emphasising the requirement to fully grant the guarantees of fair trial according to Art. 6 (1) and (2) ECHR in sports arbitration it should be considered to establish public hearings as a general principle. Furthermore, the interest of the media and the public, especially in high-profile cases, is factually diminishing the possibility of complete secrecy of the proceedings. It should therefore be adopted the public hearings as a principle and the non-public hearing upon request as an exception (corresponding to the recognised standard in state court proceedings). Full compliance with all the requirements of Art. 6 ECHR should be the aim of the CAS in order to confirm and consolidate its recognition and status as the "*principal pillar of organised sports"*.

Consequently, also the SFT should reconsider and reassess its case law gradually in the light of the aforementioned decision of the ECtHR, especially regarding the grounds for appeal that may be invoked: in sports arbitration a violation of Art. 6 ECHR (e.g. unjust denial of a public hearing) must be capable of appeal in principle, provided that the appellant raised the relevant objections or made the respective reservations timely in the CAS proceeding. Art. 190 (2) (d) PILA allows such an interpretation.