

THE COURT OF ARBITRATION FOR SPORT TAS/CAS

*A paper
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This paper is about the international Court of Arbitration for Sport - or the CAS - that is domiciled in Lausanne, which is nicely located at the Lake of Geneva in the French speaking part of Switzerland.

I. THE INITIAL OBJECTIVES OF CAS

A basic question is why CAS has been established and what purposes it shall serve. It was the former president of the International Olympic Committee, Juan Antonio Samaranch from Spain, who had the initial idea to establish a separate and independent body that should serve as an international Supreme Court in the area of sport. His idea had been taken up and further developed and there was a common understanding that such Supreme Court for Sport shall have and pursue the following objectives:

1. It shall be easily accessible for athletes and other persons that are active in sports
2. It shall provide for simple procedural rules
3. It shall be available at reasonable costs
4. It shall be established as one single private body that is distinct and independent from national court systems,
5. and its cases shall be handled by specialised arbitrators,
6. so that, over time, a unified "lex sportiva" can emerge.

II. THE FOUNDATION OF CAS

The initiators pushed matters forward and the initial ideas were actually implemented. On June 30 1984 the International Olympic Committee IOC founded the CAS, and the first set of the CAS Procedural Rules were adopted. However, as the CAS was a completely new institution that first needed to be promoted within the sports community it should last until 1986 when the CAS determined the first case that had been brought to Lausanne. This first case was purely internal Swiss matter. It involved a Swiss Ice Hockey Club and the Swiss Ice Hockey League. The Swiss club had filed an appeal against a decision of the Ice Hockey League that had sanctioned the club's coach for misbehaviour. The CAS dismissed the appeal.

III. THE INDEPENDENCE OF CAS

In the early years of CAS' existence many parties, lawyers and legal writers expressed doubts whether the CAS was actually a true and independent court of arbitration. These doubts were particularly based on the fact that the CAS had been founded by the International Olympic Committee IOC and that CAS arbitration was and still is based on a closed group of arbitrators.

The main argument that could be heard was that in light of its history (meaning that the CAS had been founded by the IOC) and the closed group of arbitrators the CAS is too closely connected with the sports federations and that, therefore, the risk exists that the CAS arbitrators will not treat the cases and take into consideration the athletes' interests with the required degree of neutrality and independence.

In the so-called Gundel case an appeal had been brought before the Swiss federal Court against an award of the CAS. The appellant, a German rider, contended that the CAS was not an independent court of arbitration and that, therefore, its decision must be annulled. In 1993 the Swiss Federal Court, however, rendered its decision and rejected the appeal. The CAS award had been upheld and the Federal Court expressly confirmed that in the case at hand there were no doubts about the arbitrators' independence.

However, the Federal Court also expressed its concerns in respect of potential cases where the IOC could be one of the parties in a CAS proceeding. In such cases, the Federal Court found, independence and neutrality of the CAS would be doubtful.

IV. THE CAS REFORM OF 1994

As a consequence of this decision of the highest Swiss court the CAS organization was significantly reformed with the aim of ensuring full independence of the CAS, both in terms of financing as well as organization. To this end, the so-called International Council of Arbitration for Sport, the ICAS, was created and two distinct CAS divisions, the so-called ordinary arbitration division and the so-called appeals arbitration division, were founded.

Following this revision the Swiss Federal Court could, in the year 2003 in the so-called Lazutina case, confirm that the CAS was a completely independent and impartial arbitration court and that, in particular, the CAS was now also independent from the IOC. Larissa Lazutina from Russia was one of the most successful cross country skiers ever. At the 1998 Winter Olympic games in Nagano Japan, she won five medals including three gold medals. However, after the 2002 Winter Olympics in Salt Lake City she was banned from competition for a period of two years because of a positive doping test resulting from the Salt Lake City games. She had appealed against a CAS decision confirming the sanction and contended, among other things, that the CAS was not independent. However, she lost this race and the Swiss Federal Court rejected her appeal.

V. THE ADOPTION OF THE WADA CODE

The last important step in the history and development of the CAS followed also in 2003 when the WADA Code was adopted. The WADA is the World Anti-Doping Agency. Following the adoption of the new WADA Code, the CAS is now also the last instance tribunal for all international doping-related disputes. This was another important step in creating one worldwide last tribunal for sports matters. As we will see a little later, doping matters nowadays contribute to a significant part of the entire CAS workload.

VI. THE ICAS AND CAS STRUCTURE

At the CAS the entire Olympic movement is represented and involved. The sports world is involved through the ICAS whose main objective is to ensure the proper operation of the CAS, i.e. of the Court of Arbitration for Sport. The ICAS is composed of twenty members, all of which are high-level jurists. As you can see on the slide, the ICAS members are representing the Summer Olympic International Federations, the Winter Olympic International Federations, the IOC, the National Olympic Committees, and the Athletes. In addition, four members shall always be independent from these bodies so that the best possible mix of representatives can be ensured. The ICAS is the body that not only ensures proper operation of the CAS, but also adopts and amends the CAS Code which provides the procedural set of rules for all CAS proceedings. The ICAS also appoints the CAS arbitrators and it takes care of the financing of the CAS. It further appoints the CAS General Secretary and it supervises the activities of the CAS Court Office.

While the ICAS takes care of the operation of the CAS, the arbitration procedures are managed by the CAS and the CAS arbitrators. According to the CAS Code there shall always be at least 150 CAS arbitrators and 50 CAS mediators. CAS proceedings can be conducted, depending on the parties' decisions, either by one Sole Arbitrator or by a panel of three arbitrators. In respect of procedural matters the CAS arbitrators are supported by the CAS Court Office. Upon request of the panel, the CAS Court Office can also appoint an ad-hoc clerk.

VII. THE ORGANIZATION OF CAS

Since it had been established, the CAS organization has significantly grown, and, as you can see, the CAS has now a much larger size and is presently composed of 251 arbitrators representing 78 countries as well as 66 mediators. The CAS Court Office is run by the CAS Secretary General who currently works together with 8 legal counsel who take care of the administrative side of the CAS proceedings. Furthermore, the CAS Court office employs 7 secretaries.

VIII. THE COMPETENCES OF CAS

In a next step we should also know what kind of cases can be brought before the CAS. In particular, one should know whether there is a certain kind of limitation in respect of the topics that can be the subject matter of a CAS proceeding. The answer is simple and is: no. There is practically no limitation.

The only condition that must be fulfilled for a case to be brought before the CAS is that the matter must be somehow "sports-related". This term is to be understood very broadly. CAS cases can involve matters of principle relating to sport, they can involve matters of pecuniary or other interests brought into play in the practice of sport and, generally speaking, they can involve any matter that is somehow related or connected to sport. So if someone ever handles a dispute for a client and such dispute has a certain link of whatever nature to sport you can go to CAS.

But, of course, a claimant or appellant can only go to CAS if there is a valid arbitration agreement and if such arbitration agreement provides for a choice of the CAS rules. Such arbitration clause can be contained, for instance, in a specific arbitration agreement that the parties have signed with the aim of resolving a dispute that has already arisen. More often, however, the arbitration agreement is contained in a commercial contract or in the statutes or regulations of a federation, association or other sports-governing body.

If the CAS competence shall be derived from such statutes or regulations it must be ensured that the relevant athletes are actually bound by the arbitration clause. In daily CAS practice the question whether an athlete is bound by the arbitration clause often creates issues and athletes that defend a case - for instance a disciplinary or doping case - often contend that they are not obliged to go to CAS as they are not bound by the arbitration clause provided by the relevant statutes and regulations.

We can note, however, that the Swiss Federal Court that has some limited competence to review CAS decisions takes a rather liberal approach and usually widely recognizes validity of arbitration clauses embedded in a sports federation's statutes or regulations.

IX. THE GROUNDS FOR APPEAL AGAINST CAS AWARDS

As the CAS has its seat in Lausanne, i.e. in Switzerland, it is also subject to Swiss law. The most relevant procedural rules can be found in the twelfth chapter of the Swiss Act on Private International Law. This chapter provides a set of rules for international arbitration - and most cases that are brought before the CAS are international in the sense that at least one party is not domiciled in Switzerland. According to this Act, arbitration awards are, as a rule, final, and an appeal against an award can be filed with the Swiss Federal Court only for very limited reasons.

These reasons are that (i) the panel was constituted in an irregular way (for instance if it was not impartial), (ii) the arbitration tribunal wrongfully accepted its jurisdiction (for instance if there was no valid arbitration agreement), (iii) the arbitration tribunal decided on points which were not submitted or disputed or disregarded points that were the subject matter of the dispute, (iv) the right to be heard was violated or (v) the award is incompatible with public policy. It is important to know that this list is complete and there are no other grounds based on which a CAS award can be challenged before the Federal Court.

This means, in particular, that a CAS award cannot be challenged on the merits of the case. If a party that loses a case is of the opinion that the decision is not accurate it has practically no means to challenge the decision, unless, of course, it is able to prove that any of the foregoing reasons is given. So far, only eight appeals against an award of the CAS with the Swiss Federal Court were successful. In three cases the award was annulled due to lack of jurisdiction of the CAS. In three other cases the Federal Court determined that the right to be heard of a party was violated. And in two cases the Federal Court decided that the CAS award was against public order. All in all, we can, however, conclude that the Swiss Federal Court is following a "benevolence" approach and tries to refrain from interfering with CAS decisions whenever reasonably possible.

X. THE CAS PROCEDURES

The two most relevant types of CAS procedures are the so-called ordinary procedure and the so-called appeals procedure. The subject matter of an ordinary procedure can be any commercial matter that could, as a principle, also be brought to any other arbitration court, but is being brought to the CAS as it is somehow related to sports. On the other hand, the subject matter of an appeal procedure is a challenge of a decision rendered by a sports federation if the procedural rules of the federation provide that the CAS shall be the competent body to hear the case. Such arbitration proceedings typically relate to disciplinary matters and doping cases. We can say that today all international sports governing bodies that are part of the Olympic movement - and many other federations too - foresee that the CAS shall be competent.

In order to minimise litigation within the world of sports, the CAS also provides the option to go for mediation instead - or before - arbitration, and it further offers the possibility to obtain a legal opinion in respect of a particular legal problem and offers for that purpose the so-called consultation procedure.

While the mediation and consultation procedures do not terminate a dispute in the sense that an award on the merits of a case will be issued, the so-called ad hoc procedure which is the fifth type of CAS procedure will do so. The ad hoc procedure has been implemented to facilitate speedy decision making during important international games or championships. An example is the ad hoc division for the summer Olympic games 2012 in London.

XI. AN EXAMPLE FOR CAS AD-HOC PROCEDURE

The London 2012 CAS ad-hoc division had to render a number of decisions. One of them is a good example to explain the scope of review and, more generally, competence of sports courts and arbitration panels in sports matters. Such example is the women's triathlon event where on 6 August 2012 the Swiss athlete Nicola Spirig finished first and Swedish Lisa Norden was awarded silver.

This competition and the final result were special as both athletes crossed the line in the same time - 1.59.48, while the bronze medal winner finished shortly after in 1.59.50. Because of this tight result, on 9 August 2012, the Swedish team filed an appeal with the CAS ad-hoc division and requested that the ranking be changed to a tie between the two first athletes and that the Swedish athlete was awarded a gold medal too. On 9 and 10 August 2012 further briefs were exchanged and on 10 August 2012 at 6 pm a hearing took place before the CAS ad-hoc division.

Following the hearing, the CAS ad-hoc division, however, dismissed the appeal and decided not to award a second gold medal to Swedish athlete Lisa Norden. In order to come to its judgement, the CAS ad-hoc panel first discussed when, according to the relevant rules, an athlete actually finishes a triathlon race. The relevant rules of the International Triathlon Union ITU state that an athlete will be judged finished in the moment when - now listen carefully - any part of the torso reaches the perpendicular line extending from the leading edge of the finish line. In this context a torso is defined as the section of the body extending from the base of the neck to the base of the sternum.

The CAS ad-hoc panel then noted that according to the decision of the referee it was the Swiss athlete who had crossed the line first, meaning that her torso reached the perpendicular line extending from the leading edge of the finish line first. The CAS further explained that this was a so-called "field-of-play" decision and that the CAS is bound to a referee's judgement and his field-of-play decision. As the referee had furthermore not acted arbitrarily or in bad faith the CAS ad-hoc panel determined that it had no right and no reason to change this decision so that the Swiss athlete kept the gold and the Swedish athlete kept the silver medal.

XII. THE RULE OF LAW VS. THE RULE OF THE GAME

This reference of the CAS ad-hoc division to the so-called field-of-play principle leads us to another basic question in sports arbitration and litigation. To what extent shall a decision that has been taken during a game or other sports event be open for appeal.

For instance, should a referee's decision during a football game to award a penalty kick to one team shall be open for appeal? Or should giving a five minutes penalty in an ice hockey game to a team's defender shall be appealable? And what about a decision to sanction this player for violence with a five games suspension? The answer whether an appeal shall be possible or not cannot be the same in these three examples.

Why not? Because of the basic and very important difference between rules of the game and the rules of law. The so-called "rules of the game" are applied by a referee during a game or other sport event. The purpose of these rules of the game is to ensure a fair competition and they are aimed at regulating the athletes' conduct during a competition only. In other words, the rules of the game affect only the course of the competition itself, but do not affect the personality or other rights of an athlete beyond such competition. They are thus, once taken during an event, final. They do not have any legal effect.

On the other hand, "rules of law" are those rules that have a legal effect after the competition and that affects an athlete's personality or other rights. There is a common consensus that rules of the game or field-of-play decisions are not open to appeal, while decisions that apply rules of law are appealable.

This will mean for the three examples discussed above that awarding a penalty kick and sanctioning an ice hockey player with a five minutes sanction are rules of the game decisions, while sanctioning a player for five additional games is a rule of law decision where the athlete shall have, as a matter of principle, the right of appeal.

It is well known that in the legal field there is practically no rule without exception. The same is true in respect of the rule of the game or field-of play principle. It is a generally accepted principle that a decision that has been taken during a match or competition can be open for a challenge in very limited and very exceptional circumstances, in particular if such a decision appears to be taken in an arbitrary manner and where the decision would qualify as a serious breach of the principle of good faith. But otherwise, any field-of-play decision, even if it has been taken by mistake, is final and not open for appeal.

There is also a practical, non-legal, justification for this principle. Once a game or other sports competition is over, the result shall be valid. If any sporting result was open for challenge for any kind of alleged breach of rules of the game this would kill the special spirit of sports which lives from the momentum and where the athletes and the audience want to be sure that a result stands when they leave the stadium and will not be changed some days or some months later.

XIII. AN EXAMPLE FOR THE APPLICATION OF THE RULE OF THE GAME

However, one must acknowledge that in special cases application of this principle can be very hard for an athlete. But even though there are prevailing reasons for field-of-play decisions to be final. Let's take as an example the marathon race at the 2004 Summer Olympics in Athens. About 5 km before the end of the 42 km long race a spectator attacked the Brazilian athlete Vanderlei Cordeira de Lima who was leading the race. The spectator pushed de Lima aside and prevented him from running.

Only with the help of some other spectators and helpers de Lima could continue the race, but he had obviously lost his rhythm and a couple of seconds of time. Shortly after this incident two other athletes passed de Lima and de Lima finished third and won the bronze medal.

Still on the day of the race de Lima challenged the result and requested that a gold medal be awarded to him too. As this request was rejected by the relevant IOC bodies, the Lima filed an appeal with the CAS. On 8 September 2005 - i.e. one year after the marathon race - the CAS rendered its decision and dismissed de Lima's request. Although, all bodies involved in the proceedings, including the CAS, expressed a lot of sympathy and comprehension for the Lima, there was simply no rule in the relevant statutes and regulations of the International Association of Athletics Federations IAAF and of the IOC that would have allowed to follow the athlete's request and to award him a gold medal. The result of the race was a field-of-play decision and the CAS was not allowed to render any other decision.

Even if the athlete was stopped for a few seconds by this attack, nobody knows whether he would have been able to keep his pace without this incident and whether he would actually have finished first. Further, had the CAS admitted his appeal, it would have opened the door widely for future appeals of this kind where athletes would try to obtain a better result, and their means or weapons would no longer be endurance and power, but litigation and arbitration so that at the end it would probably not be the best or most skilful athlete but the smartest lawyer that would win the event.

XIV. THE AUTONOMY OF SPORTS FEDERATIONS AND APPEAL PROCEDURES

Under Swiss law it is widely recognized that sports federations enjoy a high degree of autonomy. The right to establish and join (and leave) a sport federation or association (and any other kind of association) is a constitutional right. This autonomy gives the federations, in particular, the right to (i) organize themselves in a manner the members deem appropriate and (ii) to administer the law and administer justice within the federation. This autonomy is far reaching and may be one important reason for many international sports federations to choose a domicile in Switzerland.

On the other hand, however, we should note that if a body of a sports federation administers justice and may be called "dispute resolution division" or "Appeals body" or the like it is usually not independent and does not form a court or an arbitration body in the real sense of the term. If such a judicial body of a sports federation renders a decision then the athlete affected by such decision has a constitutional right to have his case heard by a court, insofar as the decision affects the personality or other rights of the athlete.

This is in line with what we have heard before about rules of the game and rules of law. Rules of law decisions are open to appeal and the athlete may bring his case not only to appeal bodies within the relevant federation, but also to a judicial body outside the federation. This judicial body can either be a

state court or an arbitration tribunal if such tribunal is considered an impartial and "true" arbitration court. In the world of sport, at least international sport, such cases are usually brought to arbitration before the CAS.

XV. THE DISTRIBUTION OF CAS CASES

As regards real CAS practice one should note that three topics are nearly equally important: doping cases, contractual disputes and transfer issues. These top three are followed by so-called eligibility disputes. Eligibility is about an athlete's right to compete at a specific event, for instance at the Olympic games, or play for a specific national team. The remaining 10 percent relate to a variety of other issues, such as disciplinary sanctions. This would include, for instance, the suspension of a football player.

XVI. CAS CASES - SOME NUMBERS

CAS cases increased quite steeply since 1984. During the first five years there were approx. 5 cases per year. In the years 91 to 97 the CAS still had to only deal with about 15 cases per year. But then the situation changed very quickly and in 2008 the CAS rendered 318 decisions. No more recent data is available to the writer, but one may assume that in the past years the number of cases was still increasing which shows that the CAS has managed to establish itself as the one and only worldwide supreme court for sports.

XVII. THE ADVANTAGES OF GOING TO CAS / SUMMARY

Why is this the case? Why are so many cases brought before the CAS? One important reason is certainly the fact that the international sports federations agreed to have one single supreme body and their statutes and regulations provide that CAS shall be the competent last instance body. But there are some other good reasons why parties decide to go to the CAS.

The three most important reasons are, in the writer's personal view, the specialisation of the CAS arbitrators, the speed of the procedures and the low costs. At CAS there is a closed list of arbitrators and the parties are not allowed to propose or nominate any person as arbitrator who does not appear on such list. While this has sometimes been criticized with the argument that this closed list puts at risk independence and impartiality of the arbitrators (an argument that has been rejected by the Swiss Federal Tribunal), one has to note that this will contribute to a certain quality level in CAS jurisprudence as the ICAS may only call upon personalities who have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sports in general and a good command of at least one CAS working language.

In respect of speed one should note that according to the relevant rules in appeal proceedings the panel shall communicate the operative part of the decision within three months after the file has been transferred to the panel. Even if the president of the appeals arbitration division has the competence to extend this time limit and he so does in many cases, CAS proceedings are still pretty fast compared with other proceedings.

As regards cost, we first note that disciplinary cases of an international nature are free, except for an advance of CHF 500 that the appellant must pay at the beginning of the procedures. But beyond that no fees will be due in this kind of proceedings. In other cases the CAS will follow its table of cost which provides relatively moderate charges to be borne by the parties. In respect of attorney's fees the CAS Code provides a quite unique rule in that it says that the party that loses the case shall contribute to the costs of representation of the other party. Commercially, this is very important, particularly in commercial litigation in ordinary CAS proceedings.

An other rather unique rule is that the parties are free to decide who shall represent them before the CAS. In particular, they may elect persons that do not have a bar exam. Whether it is wise or not to nominate a representative that has not passed any bar exam is of course another question. But we should note that in principle the parties have full discretion in selecting a representative.

As regards language the proceedings are, as a matter of principle, conducted either in English or French. However, if the parties and the CAS so agree, the proceedings may also be conducted in any other language.

Another advantage is the flexibility of the procedure. The CAS Code has been designed so as to also have a toolkit if matters are very urgent. One of such tools is the so-called ad hoc division that shall ensure fast decision making at Olympic games. Another tool is the so-called expedited procedure which shall also address special needs in case of urgent matters that may occur outside Olympic games or other events for which an ad hoc division is established. An example would be the imposition of a sanction on a athlete just a few days before an important match or event. In such cases the athlete may have a prevailing interest in a very fast decision, and the CAS allows to also address such urgent matters and enables the CAS panel to render a decision very fast.

Last but not least I should mention that CAS awards are internationally recognized and enforceable in accordance with the relevant New York Convention of 1958.

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