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Enforcement of and challenges to CAS awards



REGULATION AND
ARBITRATION IN SPORT

Outline

- **Enforcement of CAS awards**
 - Private “enforcement”
 - Court enforcement
- **Challenges against CAS awards**
 - Action to set aside
 - Request for revision
 - Action against Switzerland in the ECtHR

Enforcement - New York Convention

- **Article V(1)**

- **Grounds to resist enforcement based on procedural defects (validity of the arbitration agreement, composition of the tribunal etc, ...)**

- **Article V(2)**

- **Substantive grounds to resist enforcement**

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is **not capable of settlement by arbitration under the law of that country**; or

(b) The recognition or enforcement of the award would be **contrary to the public policy of that country**.

Enforcement - New York Convention

- **CAS awards qualify as “foreign awards”**
 - **US No. 763, Chelsea Football Club Limited v. Adrian Mutu, United States District Court, Southern District of Florida, 10-24028-CIV-MORENO, 13 February 2012**
 - ❖ compensation for the unamortized portions of an acquisition fee, a signing bonus and an agent's fee included is not in violation of US public policy
 - **[2016] EWHC 71 (QB) Pencil Hill Ltd v. US Città di Palermo SpA, Queen's Bench Division, Manchester District Registry (Mercantile Court), 19 January 2016**
 - ❖ penalty clauses are generally unenforceable under English law but if CAS reduces them (according to Swiss law) the award does not violate public policy

Article 64 FIFA Disciplinary Code

1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a **sum of money** in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with **another decision (non-financial decision)** passed by a **body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision)**:
 - a) will be **fined** for failing to comply with a decision;
 - b) will be granted a **final deadline** by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;
 - c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, **points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;**
 - d) (only for associations) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, further disciplinary measures will be imposed. An expulsion from a FIFA competition may also be pronounced.

Article 64 FIFA Disciplinary Code

2.

If a club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.

3.

If points are deducted, they shall be proportionate to the amount owed.

4.

A ban on any football-related activity may also be imposed against natural persons.

5.

Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly.

CAS Case Law

TF 4P.240-2006

4.2

The Federal Supreme Court has not yet decided whether the state monopoly over law enforcement is a principle of public policy, and that question will remain open for present purposes as the award sought to be set aside, viz. the decision made by the FIFA Disciplinary Committee, does not actually represent the enforcement of a debt. The respondent does not, through the decision of its Disciplinary Committee, usurp the enforcement measures vested in the state to enforce debts, such as the sale of the collateral to secure a creditor's rights according to the provisions of the law on debt collection and bankruptcy.

Swiss Int'l Arb. L. Rep Case No. 1 (2007)

ATF 138 III 322 (*Matuzalem*)

Der Eingriff in die wirtschaftliche Freiheit des Beschwerdeführers mag geeignet sein, die Bereitschaft zur Zahlung und Bemühungen zur Aufbringung des geschuldeten Betrags zu fördern; wenn allerdings die Behauptung des Beschwerdeführers zutrifft, dass er jedenfalls den ganzen Betrag nicht zahlen kann, ist schon die Eignung der Massnahme zur Erreichung des unmittelbaren Zieles – nämlich der Bezahlung der Schadenersatzforderung – fraglich. Denn mit dem Verbot der bisher ausgeübten wirtschaftlichen und verwandter Tätigkeiten wird dem Beschwerdeführer die Möglichkeit genommen, durch Betätigung in seinem angestammten Beruf ein Einkommen zu erzielen, um seiner Verpflichtung nachzukommen. Die Vereinsstrafe ist aber jedenfalls zur Durchsetzung der verfügtten Schadenersatzforderung nicht erforderlich: Dem ehemaligen Arbeitgeber des Beschwerdeführers steht die Vollstreckung des Urteils des TAS vom 19. Mai 2009 auf dem Weg des New Yorker Übereinkommens vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (SR 0.277.12) offen, dem die meisten Staaten beigetreten sind und das insbesondere auch für den aktuellen Wohnsitzstaat des Beschwerdeführers Italien gilt.

LKK

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Action to set aside – Art. 190 PILA

Article 190

- ¹ The award is final from its notification.
- ² The award may only be annulled:
 - a. if the sole arbitrator was not properly appointed or if the Arbitral tribunal was not properly constituted;
 - b. if the Arbitral tribunal wrongly accepted or declined jurisdiction;
 - c. if the Arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
 - d. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
 - e. if the award is incompatible with public policy.

Procedural aspects

Article 190

- ³ **Preliminary awards** can be annulled on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the preliminary award.

Article 191

The sole judicial authority to set aside is the **Swiss Federal Supreme Court**. The procedure follows **Art. 77 of the Swiss Federal Statute** on the Swiss Federal Supreme Court of June 17, 2005.

Challengeable decisions

■ Final awards

- **CAS procedural orders terminating the proceedings**
 - Appeal manifestly belated (R49) or manifest lack of jurisdiction (R37)
 - Failure to pay advance on costs (R64.2; 4A_692/2016)
- **Even a simple letter (4A_222/2015)**

■ Partial awards

■ Awards on jurisdiction

■ Preliminary awards

- **For lack of jurisdiction and incorrect constitution**

Selected procedural issues

- **No automatic stay of the award – provisional measures**
 - But, FIFA will stay disciplinary proceedings
- **One shot, document-only proceedings**
 - 4 months to 1 year
- **Waiver (Art. 192 PILA)**
 - Only in “non-appeal” matters (ATF 133 III 235)
 - If provided for in writing and in *unambiguous* terms
- **Time limit (Art. 100 LTF)**
 - 30 days (no extension) from the notification of the *original* of the award
- **Standing to challenge**
 - *Actual* and personal interest in setting aside the award

Costs issues

1. Pour les contestations (recours et demandes) portant sur des affaires pécuniaires, l'émolument judiciaire prévu à l'art. 65, al. 3, let. b, LTF est fixé en principe comme il suit:

Valeur litigieuse en francs	Emolument en francs
0– 10 000	200– 5 000
10 000– 20 000	500– 5 000
20 000– 50 000	1 000– 5 000
50 000– 100 000	1 500– 5 000
100 000– 200 000	2 000– 8 000
200 000– 500 000	3 000– 12 000
500 000– 1 000 000	5 000– 20 000
1 000 000– 5 000 000	7 000– 40 000
5 000 000– 10 000 000	10 000– 60 000
supérieure à 10 000 000	20 000– 100 000

2. Dans les contestations non pécuniaires, l'émolument va de 200 à 5000 francs

- **Don't forget security for costs**
- **Legal costs**

Art. 190(2)(a)

- **Independence and impartiality of arbitrators**
 - Only if (unsuccessfully) challenged before ICAS
 - The list of arbitrators is not an issue anymore (4A_260/2017)
 - Objective standard
 - The CAS is much more prudent with recurrent appointments
 - A(n alleged) leak to the press does not affect the impartiality of the Panel (4A_510/2015)

Art. 190(2)(b)

- **Validity of the arbitration agreement**
 - **Arbitrability is not an issue – in particular labor disputes**
 - Fundamental for transfer disputes
 - Might be an issue at enforcement level
 - **Non-voluntary nature of the arbitration agreement is not an obstacle**
 - **Global reference is admissible**
- **Pathological arbitration clauses**
 - **Interpreted in a way that does not frustrate the parties' fundamental intention to arbitrate**

Art. 190(2)(c)

- ***Infra, ultra, extra petita***
 - Did not play a role in CAS related case law
 - Not a surprise
 - Scrutiny by CAS makes sure that no *ultra petita*
 - “reject any other prayer for relief” excludes *infra petita*

Art. 190(2)(d)

■ Right to be heard

- Right to comment on all the relevant facts to make legal arguments and to provide evidence
- Right to make submission (but not orally)
 - Right to public hearing (*Pechstein*, new CAS Code, R57)
- Right to minimal reasons (next slide)

■ Equal treatment

- Did not play a role in CAS related case law

Minimal reasoning requirements

- **Allows to dispute the reasoning of the award!**
 - Need to show that the Panel ignored an important argument
 - By reference to the award (4A_40/2017)
- **If the award is totally silent**
 - The Respondent has to prove that the omitted argument was not important
 - The Panel needs to file observations!

Surprising reasoning

- **Allows to dispute the reasoning of the award!**
 - Panel decided based on a reason that was not relied upon by the parties and
 - The parties could not anticipate the relevance of the Panel's argument (so-called “*effet de surprise*”)
- **Surprising nature is a matter of “appreciation” (4A_716/2016)**
- **If the Panel's reasoning is wrong as a matter of law, it will be easier to show that it was “surprising”**

Art. 190(2)(e)

■ Public policy

- Egregious breach of personality rights (*Matuzalem*)
- Excessive contractual penalties
 - Art.163 CO: Obligation to reduce
 - Mandatory but not necessarily public policy (4A_510/2015)
- Grossly disproportionate sanction (*nageuses chinoises*)

■ Procedural public policy

- Res judicata
- Excessive formalism

Consequences of ECtHR in *Pechstein*

- **Article 6(1) ECHR is fully applicable in CAS appeals proceedings**
 - At least in disciplinary matters
- **The Supreme Court will have to interpret Art. 190 PILA as covering the rights arising out of Art. 6(1)**
 - The majority of such procedural rights are already covered by Art. 190(2)(d) PILA
 - The others should be included in the notion of procedural public policy under Art. 190(2)(e) PILA

Revision of CAS Awards

- **Brought in by the Swiss Supreme Court**
- **If the award was procured through a criminal offence**
 - Only after the criminal proceedings are concluded
- **If decisive new facts or new evidence are discovered**
 - After the award
 - Could not have been discovered during the arbitration
- **Codified in the revision of Chapter 12 PILA**

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