

THE COURT OF ARBITRATION FOR SPORT

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***Summary:** The CAS was created in order to achieve a jurisprudence in sport that is largely independent of ordinary jurisdiction. Through its design as an arbitral tribunal, it is intended to guarantee a worldwide equivalent jurisdiction in sports law. However, the CAS cannot exist completely autonomously alongside the state jurisdiction. By equating the decisions of arbitral tribunals with the rulings of state courts, it is necessary to.*

The state must guarantee a minimum standard with regard to the rule of law principles of procedure and the application of fundamental legal principles also in arbitration. Control mechanisms have been developed for this purpose, which will be examined in more detail below.

***Keyword:** Appeal, Arbitration for Sport, Court, history, Code, CAS, Organisation, sports law, sports court*

1. The history of the Court of Arbitration for Sport (CAS)

The CAS was the first international arbitration court in sport. The IOC (International Olympic Committee) decided in Rome in 1982 to draw up a concept for an international sports court.¹ In 1983 the IOC established the Court of Arbitration for Sport in New Delhi and on 30 June 1984 the newly established court commenced operations. According to Art. S1 and Art. R28 of the Rules of

¹ Simma 2004: 275

Procedure of the CAS, the so-called CAS Code, it has its seat in Lausanne, Switzerland. ²The IOC was founded for reasons of the increasing professionalisation of sport and the ever-increasing rejection of the amateur spirit of the Olympic movement. The aim was to create a flexible, inexpensive and effective court capable of resolving international disputes.

The founding fathers of the CAS had the idea that the CAS should mainly deal with commercial disputes arising in professional sports and which do not fall within the competence of the IOC or the associations. ³From the outset, there were arbitration rules which regulated the procedure and organisation of the arbitral tribunal. ⁴Initially, the CAS was not yet legally independent, but merely a department of the IOC, which was only autonomous internally. ⁵This means that he was financially and personally dependent on the IOC. With regard to the composition of the arbitral tribunal, a list of 40 arbitrators was created, which was later extended to 60, from which the parties had to choose an arbitrator.⁶ The nomination was made by the President of the IOC.

In 1993, the CAS was first recognised by a state court, the Swiss Federal Supreme Court, as a genuine arbitral tribunal in the so-called "Gundel ruling" albeit only for cases in which the IOC was not involved in the proceedings. Indirectly, the close "organizational and economic ties" between the IOC and the CAS were criticized. The Sports Court was financed directly by the IOC at that time. Furthermore, the IOC had exclusive power to change the arbitration rules.⁷

In 1994, as a reaction to the ruling of the Swiss Federal Supreme Court, reform of the CAS was decided in the so-called "Paris Convention".

² Martens 2004: 202.

³ Mbaye 1984: 411.

⁴http://www.tascas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf.

⁵ Oschütz 2005: 39.

⁶ Oschütz 2005 : 39

⁷ Mbaye1984 : 413.

In order to eliminate the problematic dependence on the IOC, the new "Conseil International de l'Arbitrage en matière de Sport" (ICAS) was set up as a supporting organisation,⁸ which has since been responsible for financing and organising the CAS.⁹ In addition, the procedural structure, procedural law and court organisation were reformed. On the one hand, the CAS was divided into two chambers, the "Ordinary Arbitration Division", and the "Appeals Arbitration Division" in order to achieve a clear separation between the decisions in the first instance and in the appellate instance - to appeal against decisions of the Association. On the other hand, the Arbitration Rules have also been revised and adapted to Swiss arbitration law on the basis of experience gained over the past few years¹⁰. A mediation division was created¹¹ In the course of time, the CAS Code has been amended several times, most recently on 01.07.2020¹². Thanks to the numerous reforms, more and more associations and federations recognised the CAS as a court of appeal. This and the increasing professionalisation of sport have led to a considerable increase in procedures. While only 2 cases were heard in front of the CAS in 1984, there were already 599 cases in 2016¹³.¹⁴ The ratification of the World Anti-Doping Code (WADC) certainly contributed to this. Finally, it provides for CAS as the final instance¹⁵.

Meanwhile there is a de facto obligation for the athletes to conclude an arbitration agreement with the CAS due to the design of the association rules and regulations and the WADC in many areas.

⁸ Martens 2004: 202

⁹ History of the CAS, available at <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>.

¹⁰ Oschütz 2005: 42

¹¹ <https://www.tas-cas.org/en/mediation/rules.html>

¹² <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>

¹³ https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf

¹⁴ Process statistics of the CAS, under http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2016.pdf

¹⁵ Art. 13 of the WADC, available at <https://wada-mainprod.s3.amazonaws.com/resources/files/2015-wadc-final-en.pdf>.

2. The State control of arbitrations

In principle, conflict resolution by means of arbitral tribunals results in the parties renouncing their right to a state judge, which they are generally entitled to under the constitution of their country, in favour of private jurisdiction. This is due to the principle of private autonomy, which enables the parties to determine the legal order which is to govern a dispute between them.

Decisions of arbitral tribunals are to be qualified as substantive case-law according to Swiss prevailing opinion.

However, the autonomy of arbitration cannot be unlimited. The constitutional order of the rule of law, which guarantees the individual a minimum standard of compliance with procedural rules in all court proceedings, whether private or state, also gives rise to a right of state control. Of course, this control must not go too far in order not to undermine the autonomy of the arbitral tribunal too much. This can be summed up by the sentence: "As much arbitral autonomy as possible and only as much state control as absolutely necessary".¹⁶

There are limited possibilities in Swiss law to review the arbitrations of arbitral tribunals again. On the one hand, the state reserves the right to carry out a follow-up inspection immediately after the proceedings (e.g. by Art. 190 para. 2 CPIL). On the other hand, there is the possibility of state post-control if the arbitration is to be enforced with state assistance (e.g. by Art. 193 para. 3 CPIL). If the state were to participate in the enforcement of the arbitration without any control of the arbitration, the rule of law would be violated.¹⁷

In addition, the UNICTRAL Model Law, which forms the basis for the legal provisions on international arbitration in Switzerland also provides for the possibility of state follow-up control, compare Art. 34 UNICTRAL-ML.¹⁸

¹⁶ Sonnauer 1992:7.

¹⁷ Schwab/Walter 2005: 10

¹⁸ UNICTRAL-Model law http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

I. Organisation

The CAS is an arbitration institution whose mission is to secure the settlement of sports. It entrusts arbitrators with the task of pronouncing an award. The CAS comprises two Divisions (the Ordinary Arbitration Division and the Appeals Arbitration Division), both placed under the responsibility of a Division President. Arbitration filed with the CAS is allocated to one or the other Division depending on the nature of the dispute between the parties.

A. The *Ordinary Arbitration Division* sets in operation Panels, whose task is to resolve all disputes subject to the ordinary arbitration procedure.

B. The *Appeals Arbitration Division* sets in operation Panels whose task is to resolve disputes subject to the appeals arbitration procedure. The term "Panel" is understood to mean the arbitrator or arbitrators with the task of pronouncing the award.

II. What are the Advantages of the Arbitration Procedure before the CAS

A. Internationality

Before the creation of CAS was the "shopping forum" the used legal way for the parties. Arbitration before the CAS allows this kind of disadvantage to be avoided:

- 1.) a single jurisdiction is provided for: the CAS, whose seat is in Lausanne;
- 2.) as a general rule, the parties themselves choose the applicable law;
- 3.) the procedure before the CAS is governed by an "International Code of Sports-related Arbitration" (which includes a set of "Procedural Rules"), which is universally applied;
- 4.) the working languages of the CAS are French and English, except in special circumstances. Finally, in a more general way, international agreements give arbitral awards greater international effectiveness than the decisions of ordinary courts.

B. Specialisation

Sports-related disputes are often complex and require specific legal knowledge which an ordinary judge will not necessarily possess. The CAS arbitrators, however, are chosen from a list of personalities appointed for their competence in legal matters and sound knowledge of the problems connected with sports activity. The fact that a decision is made by specialists facilitates the concrete settlement of a dispute, by offering a solution adapted to the sporting context.

C. Flexibility and simplicity

The Procedural Rules are designed in such a way as to avoid superfluous formalism, in order to facilitate access to the CAS. A party may seize the CAS by means of an application briefly stating reasons (ordinary procedure) or through a simple statement of appeal for which reasons must subsequently be given (appeals procedure). The opposing party (the defendant) then explains his position in a written answer. A second exchange of written submissions may be ordered. Finally, the parties are summoned to a hearing to be heard, for the taking of evidence (hearing of witnesses, experts' reports, etc.) and for the oral pleadings. The parties may freely choose their arbitrator(s) from a list published by the ICAS. The working languages of the CAS are English and French, both frequently used in the world of sport. However, the parties may agree to use another language during the proceedings. This flexibility allows the problems of translation to be avoided, as this considerably slows down proceedings before the ordinary courts.

The parties may appear themselves before the CAS or be represented by a person of their choice, who may or may not be a lawyer.

The arbitration procedure before the CAS allows the flexible resolution of a considerable number of disputes, and encourages the search for an amicable solution. Discussion between the parties is facilitated, and it is not uncommon for an arrangement to be found during the proceedings.

D. Fast proceeding

In the sports world more than elsewhere, the need for disputes to be settled rapidly is an obvious necessity. As an athlete's career is relatively short, he or she must be able to obtain a decision within a short space of time on a dispute with his or her federation, for example. In the same way, this federation must be able to know the outcome of the dispute quickly, in order to be able to adapt its rules without delay, if necessary. The Procedural Rules are sufficiently flexible for disputes to be settled within the time limit appropriate to the circumstances of each particular case.

Thus, in urgent cases, orders on interim measures or even awards may be pronounced very quickly. In the framework of the appeals procedure, the Procedural Rules fixes at four months from filing of the statement of appeal the deadline by which the award must be notified to the parties.

E. Single Instance

Ordinary procedures usually have several levels of jurisdiction (court of first Instance court of appeal supreme or constitutional court). The parties thus have the option of recourse to other courts if they disagree with the decision of the first judge. Sometime can elapse before all the judicial remedies are exhausted and the decision becomes final. When the CAS pronounces an award, however, this is immediately final and enforceable. Only very limited possibilities of appeal are given to the parties.

F. Confidentiality

Unlike ordinary procedures, the CAS arbitration procedure is private and therefore takes place without the public or the media knowing about it. In principle, the hearings are not public, and only the parties receive a copy of the arbitration decisions. This confidentiality helps to establish a calm atmosphere between the claimant, defendant and arbitrators, and encourages amicable settlements. Public

procedures are similarly not likely to encourage the parties to make compromises which could be interpreted as acquiescence.

G. It is not expensive

One of the CAS objectives is to make available to the members of the world sports family an instrument for settling disputes not only rapidly, but also at little cost. In the framework of the ordinary arbitration procedure, the parties pay the fees and expenses of the arbitrators (calculated according to the CAS schedule), a share of the CAS costs and the costs of witnesses, experts and interpreters. On the other hand, in the framework of the appeals procedure, the fees and expenses of the arbitrators and the CAS costs are paid by the CAS.

H. Mediation

Pursuant to Articles S2 and S6 paragraphs 1 and 10 of the Code of Sports-related Arbitration, the International Council of Arbitration for Sport adopts the present Mediation Rules (the "Rules")¹⁹.

CAS mediation is a non-binding and informal procedure, based on an agreement to mediate in which each party undertakes to attempt in good faith to negotiate with the other party with a view to settling a sports-related dispute. The parties are assisted in their negotiations by a CAS mediator. In principle, CAS mediation is provided for the resolution of contractual disputes. Disputes related to disciplinary matters, such as doping issues, match-fixing and corruption, are excluded from CAS mediation. However, in certain cases, where the circumstances so require and the parties expressly agree, disputes related to other disciplinary matters may be submitted to CAS mediation.

¹⁹ <https://www.tas-cas.org/en/mediation/rules.html>

References:

Simma Bruno

The Court of Arbitration for Sport, 2004, page 573 – 586

Martens, Dirk-Reiner, Court of Arbitration for Sport, the new journal for arbitration proceedings 2004, pp. 202 - 205;.

Mbaye, Keba, Une nouvelle institution d'arbitrage: Le Tribunal Arbitral du Sport (T.A.S.), Annuaire française du droit international 1984 (30), page 409 – 424

Oschütz, Frank, Sports Arbitration- The arbitration proceedings of the Tribunals Arbitral du Sport vor dem Arbitration Law, Berlin 2005

Sonnauer, The control of arbitration by the state courts, Cologne 1992

Schwab, Karl-Heinz / Walter, Gerd, Arbitration, Commentary, 7th edition, Munich 2005

<https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>

<https://www.tas-cas.org/en/mediation/rules.html>

Process statistics of the CAS, under http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2016.pdf

<https://www.tas-cas.org/en/mediation/rules.html>

UNICTRAL-Model law

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

Art. 13 of the WADC, available at [https://wada-mainprod.s3.amazonaws.com/resources/files/2015-wadc-final- History of the CAS](https://wada-mainprod.s3.amazonaws.com/resources/files/2015-wadc-final-History%20of%20the%20CAS.pdf), available at <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>.