Arbitration Newsletter Switzerland

The Independence of CAS confirmed

On 8 March 2018 the Swiss Federal Supreme Court (the “Court”) published on its website a new decision in the field of international arbitration (the “Decision”) wherein it confirmed the Court of Arbitration for Sport’s (the “CAS”) independence from the Fédération Internationale de Football Association (“FIFA”).

The Decision, which was rendered by all five members of the First Civil Chamber on 20 February 2018, will be included in the Court’s publication of leading cases.

1 Facts

The dispute that led to the Decision circled around the topic of Third Party Ownership (TPO).

In 2015, the FIFA Disciplinary Committee sanctioned a Belgian football club (the “Club”) for violations of articles 18bis and 18ter of FIFA’s Regulations on the Status and Transfer of Players (“RSTP”). The FIFA Appeal Committee confirmed this decision in 2016, whereupon the Club filed an appeal with CAS. On 9 March 2017, CAS rendered its final award, substantially upholding the Appeal Committee’s decision.

On 15 March 2017, the Club filed an action with the Court requesting that the CAS decision be annulled. The Club relied on several grounds for the annulment of the CAS award, amongst others that it had been rendered by an improperly constituted arbitral tribunal in the context of article 190(2)(a) Swiss Private International Law Act (“PILA”).

According to the Club, CAS could not be considered as a genuine arbitral tribunal (“un véritable tribunal arbitral”) because of various reasons such as that FIFA is the dominant sport association in relation to CAS’ business volume and also finances CAS with significant contributions. As FIFA, according to the Club, is a major client of CAS, the mere prospect of losing this important business would influence CAS awards to the detriment of parties in dispute with FIFA. This risk would be even higher given that CAS’ employees and arbitrators would suffer, unlike state judges that are protected by their official status, a direct and negative impact on their private wealth in the event that FIFA were to renounce its CAS membership. Furthermore, the CAS Code requires the arbitrators to transmit the award to CAS’ Secretary General for review and this could then influence the outcome of the case during the scrutiny process.

FIFA and CAS, the latter acting through its Secretary General, rejected the Club’s arguments. In respect of CAS’ financial independence from FIFA, CAS disclosed that it received a yearly contribution of CHF 1.5 million from FIFA. However, according to CAS’ Secretary General, this must be considered as a modest contribution in the light of (i) CAS’ total annual budget of CHF 16 million and (ii) the fact that the entire Olympic movement (“l’ensemble du mouvement olympique”) contributes CHF 7.5 million annually. Furthermore, CAS’ Secretary General pointed out that the International Council of Arbitration for Sport (“ICAS”) as well as CAS itself has undergone, since 2011, numerous significant structural and regulatory changes, in particular by removing the quotas of arbitrators nominated based on proposals of the various sport entities. Today, any person meeting the criteria provided for in article S14 of the CAS Code may apply to become a CAS member. In addition, the composition of ICAS has also changed considerably over time, in particular by adding personalities from the legal world. Today, according to CAS’ Secretary General, the ICAS includes eight independent lawyers specialising in international arbitration, six judges, four professional sports managers and two law professors. Therefore, after 32 years

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1 BGE 4A_260/2017 of 20 February 2018, in French.
2 Article 18bis RSTP deals with the inadmissible third-party influence on clubs.
3 Article 18ter RSTP deals with the inadmissible third-party ownership of player’s economic rights.
of existence and more than 5,000 proceedings, the ICAS/CAS enjoys, according to CAS' Secretary General, a very broad trust and hence has no interest in "protecting itself" by placing itself under external influence.

In a detailed decision, the Court rejected the Club's arguments and confirmed that CAS is sufficiently independent from FIFA. As there were also no other reasons to annul the award, i.e. no violation either of the right to be heard or of public policy, the Court dismissed the Club's annulment action. These other grounds for the annulment action will not be addressed in this newsletter; instead we will focus only on the question of CAS' independence.

2 Considerations

The Court started by pointing to its landmark judgment "Lazutina" of 2003, where it had held, in essence, that (i) CAS is sufficiently independent from the International Olympic Committee as well as any other party using its services, and (ii) CAS' awards are to be considered as genuine decisions, comparable to decisions rendered by state courts. Since 2003, this judgment has been confirmed repeatedly by the Court, most recently in its decision in the Michel Platini case.

The Court next noted that the German Bundessgerichtshof, in its "Pechstein" judgment in 2016 and after a detailed review of the issue, had come to the conclusion that CAS was a genuine arbitral institution and was an independent and neutral body. After addressing other foreign judgments, which had been referred to by the parties, the Court held that it had no reason to reconsider its well-established case law. The Court would reconsider its previous findings only if there were compelling reasons why FIFA should be treated differently to other international federations in respect of CAS' independence. However, the Court found no such compelling arguments in the Club's submission sufficient to justify categorising FIFA differently to other sports organizations.

In relation to CAS' financial independence from FIFA, the Court held that FIFA's annual contribution of CHF 1.5 million to CAS represented less than 10% of the latter's budget of CHF 16 million. FIFA's contribution remains significantly below the CHF 7.5 million paid by the Olympic organisation. Moreover, the Court found it difficult to imagine to whom, other than sports organisations, CAS could turn to collect the necessary funds to pay its overheads. In particular, the Court held that it did not consider it a viable option to demand from the athletes and sports institutions equal contributions to CAS' funding since this would harm the former and result in their being denied access to CAS.

The Court then also pointed out that the Club did not proffer any evidence or statistical data, which would show that CAS would grant FIFA a preferential status in cases in which FIFA is a party.

Finally, the Court addressed article R59(2) of the CAS Code, which requires the arbitrators, in a process similar to the scrutiny of awards under the ICC Rules, to transmit the award to the CAS Secretary General who, before the award is signed, may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. According to the Court, this scrutiny process would not raise any doubts as to CAS' independence.

Therefore, the Court saw no reason not to consider CAS to be independent from FIFA and rejected the Club's annulment action.

3 Conclusions

This case is based on complex patterns of facts and arguments which, therefore, also led to a lengthy Decision, which certainly requires further analysis, going beyond the scope of this newsletter.

1. Whereas the previous leading cases on CAS' independence (Gundel, Lazutina, Pechstein) were primarily focused on the closed list of arbitrators and the (then) predominant position of the international federations and the role of international institutions in promoting arbitrators to such a closed list, the present case focuses primarily on the alleged financial dependence of CAS on FIFA (and the IOC). It is certainly interesting to have now more information in this respect: the CHF 1.5 million contributed by FIFA is about 9% of CAS' total budget of

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4 BGE 129 III 445.
6 BGE 4A_600/2016.
CHF 16 million. The contribution of the IOC, namely CHF 7.5 million, is already significantly more substantial, namely approx. 47%; FIFA and IOC together contribute 56% to the total budget. This in itself does not establish at all that CAS is the "long-arm" of FIFA and IOC. But we all know that independence is not a matter of proof but a matter of perception. How do the Russian athletes not admitted to the 2018 Olympic Winter Games by the IOC perceive the independence of CAS if they learn that the IOC is substantially funding the services of CAS? And, where do the remaining CHF 7 million of the total cost of CAS come from? Are they covered out of the costs paid by the parties or are there further funders?

2. The Court is obviously right in emphasizing that the standard financing of an arbitration, namely each party paying half of the advances on costs, could preclude athletes from having "their day in court". It follows that the present regime is more beneficial for the athletes. Nevertheless, it would at least be worthwhile giving some thought to whether this "sponsoring" of CAS by FIFA and IOC can be avoided. If e.g. every professional athlete registered in any federation paid a mere 10 cents per year all financial sorrows and potential related independence issues of CAS would probably disappear.

This should be a task for ICAS. In the CAS Secretary General’s submission he emphasized the changes ICAS and CAS had undergone in recent years. In doing so he maintained that, amongst other matters, out of the 20 members ICAS, the supervising board of CAS, eight members are independent lawyers specialized in the field of international arbitration ("8 avocats indépendants spécialistes de l'arbitrage internationaux"). If we look at the CVs of the ICAS members visible on CAS' website (www.tas-cas.org/en/icas/members.html) we are, however, unable to identify all of those eight arbitration specialists.7 But if ICAS is tasked to control and develop the arbitral services rendered by CAS8 it would certainly seem appropriate to have more experience and competence in international arbitration represented in ICAS.

3. The Decision tells us also that, whilst 65% of all CAS cases are football related, only 5% actually involve FIFA directly as a party. However, what is generally not known is the following: if a party starts proceedings against FIFA at CAS it will receive shortly thereafter a standard-form letter from the secretariat of CAS (!) stating that:

"[I] must inform you that, as a general rule, FIFA does not pay any arbitration costs in advance when it acts as a respondent in a procedure before CAS, which is admissible to CAS pursuant to art. R64, 2 of the code of sports related arbitration. This means that, according to the same provision of the code, the Appellant has to pay the entirety of the advance of costs."

Of course, FIFA has, as any other respondent, the right to refuse to fund the proceedings initiated against it but the fact that FIFA is not even requested by CAS to contribute to the funding so that the appellant is directly confronted with the obligation to fund the entire proceedings gives rise to second thoughts. In particular, the Court’s argument that CAS’ funding cannot, just as in commercial arbitration, be done by advancing the administrative costs and the fees of the arbitrators in equal shares by the parties, is at odds with FIFA’s behaviour because "as a general rule" it does not, as respondent, pay any of its share of the advance on costs, thereby putting at least those players and officials with low salaries or insufficient means into a difficult financial situation. This is regrettable: on the one hand FIFA pays CHF 1.5 million as an annual contribution but, when it comes to the funding of an actual case, it refuses to do so!

4. Nothing in the above commentary should, however, be construed as putting the function and the values of CAS fundamentally into question but

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7 With the exception of Carole Malinvaud, President of CAS’ Ordinary Division, heavily involved in commercial arbitration and well recognized in the international arbitration scene.

8 According to article S2 of the CAS Code, "[t]he purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS."
there is always room for improvement - or, to re-
main in the language of sport: "the race for quality
has no finish line!"

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Enclosure: BGE 4A_260/2017 of 20 February 2018

This newsletter is available on our website

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