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FACULTY OF LAW**

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**THE APPEAL AGAINST THE DECISIONS OF THE
COURT OF ARBITRATION FOR SPORT**

Dissertation to award the educational-and-scientific degree “Doctor” in
the Professional field 3.6. "Law", PhD Program “International Law and
International Relations”

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List of abbreviations

AJP	Allgemeine juristische Praxis, General legal Praxis
ASA	Arbitration association
ATP	Association of Tennis Professionals
CAS	Court of Arbitration for Sport
Chape	Chapter
CJREJC	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CPIL	Code on Private International Law
ECMR	European Court of Human Rights
ECA	The European Commission
ECHR	European Convention on Human Rights
EUCH	European Court of Justice
EU	European Union
FIBA	World Basketball Federation
FIDE	International Chess Federation
FIFA	World Football Association
FSC	Federal Supreme Court
FEI	International Equestrian Federation
IBA	International Bar Association

ICAS	International Court of Arbitration for Sport
I.e.	id est (= Latin for "that is")
IIHF	International Ice Hockey Federation
IOC	International Olympic committee
ICSID	International centre for the settlement of investment disputes
ICC	International Chamber of Commerce
ISSF	International Shooting Sport Federation
ISU	International Skating union
Let	Letter
M	Marginal
NR	Number
P	Page
SCC	Swiss civil code
SFT	Swiss Federal Tribunal
SFC	Swiss Federal Constitution
UEFA	Union of European Football association
UNICTRAL-LAW	The United Nations Commission on International Trade Law
NYC	UN-Convention on the Recognition and Enforcement of)Arbitral Awards of 10.06.1958 (New York Convention)

WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code
VS	Versus
Vol	Volume
ZBJV	Zeitschrift des Bernischen Juristenvereins, Jurnal of the Bernes Lawyers Association.
ZEup	Zeitschrift für Europäisches Privatrecht, Journal for European Private Law.
ZEuS	Zeitschrift für europarechtliche Studien, Journal
UIAA	Union Internationale des Associans d'Alpinisme in Bern
WBSC/CEB	World Baseball Softball Confederation in Lausanne and Confederation of European Baseball in Lausanne
FIBA	Fédération Internationale de Basketball in Mies
UIAA	Union Internationale des Associations d'Alpinisme in Bern
CEB	Confédération Européenne de Billard in Lausanne
FIBT	International Bobsleigh & Skeleton Federation in Lausanne
WA/IFA	World Archery Federation in Lausanne und International Field Archery Association in Lugano
AIBA	Association Internationale de Boxe Amateure in Lausanne
IIHF	International Ice Hockey Federation in Zürich
ISU	International Skating Union in Lausanne

FIE	Fédération Internationale d'Esgrime (FIE) in Lausanne
FAI	Fédération Aéronautique Internationale (FAI) in Lausanne
FIFA	Fédération Internationale de Football Association (FIFA) in Zurich
UEFA	Union of European Football Associations in Nyon
EPFFL	Association of European Professional Football Leagues
IGF	International Golf Federation in Lausanne
FIG/UEG	Fédération Internationale de Gymnastique in Moutier and Union Européenne de Gymnastique in Lausanne
IHF	International Handball Federation (IHF) in Basel
FIH	Fédération Internationale de Hockey in Lausanne
IISHF	International Inline Skater Hockey Federation in La Heutte
IJF	International Judo Federation in Lausanne
ICF	Internationaler Kanu Federation in Lausanne
IFSC	International Federation of Sport Climbing in Bern
EAA	European Athletic Association in Lausanne
FAI	Fédération Aéronautique Internationale (FAI) in Lausanne
WMF	World Minigolf Sport Federation in Bern
FIM	Fédération Internationale de Motocyclisme (FIM) in Mies

FEI	International Federation of Equestrian Sports in Lausanne
UCI/UEC Union	Cycliste Internationale in Aigle und Union Européenne de Cyclisme in Aigle
FISA	Fédération Internationale des Sociétés d’Aviron in Lausanne
FIDE	Fédération Internationale des Échecs in Lausanne
FINA	Fédération Internationale de Natation in Lausanne
IMGA	International Masters Games Association in Lausanne
FIS	Fédération Internationale de Ski in Oberhofen/Thunersee
ISMF	International Ski Mountaineering Federation in Lausanne
WDSF	World Dance Sport Federation in Lausanne
ITTF	International Table Tennis Federation (ITTF) in Lausanne
FIVB	Fédération Internationale de Volleyball in Lausanne
UWW	United World Wrestling in Corsier-sur-Vevey

Introduction

I. General Description of the Dissertation

1. Introduction

The outcome of a competition in sport is no longer just a question of the best sporting performance but has enormous economic significance. Sanctions imposed on a sports association, sports federation or against individual athletes, e.g., corruption, racism or in doping proceedings, can have a significant impact. So, there is an enormous need for legal protection for athletes, clubs, and sports organizations. Some legal systems are known to be more plaintiff-friendly. This means the court in such places tends to be friendlier to the person bringing the lawsuit and tends to give more significant awards. Often there is no solid legal connection to the court law. The sportsperson would make her thoughts and decide the best friendly court for her. Before establishing the Arbitration Court for Sport in Switzerland, "Plaintiff friendly jurisdiction" was open to the participants to protect themselves. Plaintiff-friendly jurisdiction is a term for the practice of litigants having their legal case heard in the court, though jurisdictions have attracted litigation even when there is little or no connection between the legal issues and the jurisdiction on which most likely they are to be litigated. The target of the plaintiff-friendly jurisdiction is to provide a favourable judgment. In order to avoid the danger of "Plaintiff friendly jurisdiction" due

to the international nature of high-performance sports and guarantee equal treatment of all participants in high-performance sports, the Court of Arbitration for Sport (CAS) was created in Switzerland. This is designed as an open arbitration court, and states have no influence on the international Court of Arbitration for Sport. The Court of Arbitration for Sport is an arbitral tribunal under the rules of the Swiss Federal Code on private international Law (CPIL). In the present study, the target is to reveal the procedural deficiencies of the Court of Arbitration for Sport and to provide suggestions to improve proceedings, if needed. In the present study, the mentioned exploration of the procedural deficiencies follows the logic of the Appeal grounds against the final decisions of the CAS according to Art. 190 of the Swiss Federal Code on International Privat law (CIPL).

2. Topicality and relevance of the research Work

On the one hand, after an overview of the literature regarding proceedings rules of the Court of Arbitration for Sport, they must be criticized because they show deficiencies. On the other hand, the Supreme Court of Switzerland seems to give the Court of Arbitration for Sport a vast space and autonomy in its award in sports law. The topicality of the topic of the dissertation is determined to improve the quality of the procedure rules of the Arbitration Court for Sport and to improve the quality of the decisions of the Supreme Court of Switzerland in sports law. This research aims to

enrich the law literature tools and facilitate further development and improvement in sports law. The importance and the relevance of the researched topic are given because the scientific exploration of proceedings rules deficiencies is critical in every judicial system. The present work is likely to be important for athletes, sports federations, legal practitioners, and lawyers specializing in sports law, as well as for scientific and legal training at universities and colleges in sports science and the legislature.

3. The Object and subject of the research

The Court of Arbitration for Sport, as an international organization, belongs to the law field of international private Law. The object of the research is the proceedings rules of the Court of Arbitration for Sport in General. The questionable proceedings rules of the Arbitration Court for sport are the subject of the research. The deficiencies of the proceeding rules of the Court of Arbitration for Sport will be investigated in this research. The subject of the research is the sum of legal problems in the proceeding rules of the Court of Arbitration for Sport. The subject will be investigated from the view of the appeal according to Art. 190 of the code on international private Law of Switzerland (CIPL). Art. 190 CIPL describes under which condition the appeal against the arbitration tribunal award is possible. In this work, the questionable proceedings rules of the CAS will be on deficiencies relating to Art. 190 CIPL scientifically investigated.

4. Problem Researched

The problem researched is the inconsistency between the existing standard of the proceedings of the Court of Arbitration and between the general proceeding's rules in Art. 190 CIPL. There is a gap in the literature. This study shall eliminate this gap in the literature. For example, are the Arbitration Agreements in Sports "imposed agreements" and not freely signed agreements? Or is choosing the arbitrator exclusively from the "closed list of the Arbitrators" righteous? This situation is inconsistency with the right of one party to choose her/his arbitrator freely. To avoid possible pendency or lack of Independence of the arbitrators, the standard must be demanded. Also, the standard for an independent Arbitrator is a problem. New Criteria for the Independence of the Arbitrators need to be studied. The Rules for choosing the Chairman of the Arbitration Court need to fulfil the standards. The newly created "Special Arbitrator list" does not bring the desired results. There are often so-called catch-all-clauses (for example: "All further or more far-reaching legal appeals are rejected"). It is controversial whether these clauses satisfy the required requirements of Art 190 CIPL. Those clauses are inconsistency with the desired award quality. A problem still under discussion is the lack of voluntariness in the arbitration agreement. The requirements of Art provide the public hearing. 6 (1) ECHR (European Convention on Human Rights), but the proceeding by the Court for

Arbitration for Sport is not public. There is a discrepancy between the ECHR and the Court of Arbitration for Sport (CAS) rules.

On the other hand, the Swiss Supreme Court is very restrictive in quashing CAS awards. The desired and the actual state require new standards and criteria. Also, the enforcement problem in other countries may arise if they are not considered arbitrable there. Finally, there are discrepancies between the Appeal waiver according to the Swiss Law and the interest of the Athletes, e.g. in Doping cases. The mentioned procedural problems will be scientifically investigated in this study.

5. Author's Argument

Most of the time, Law attempts to mould or change the existing social values and attitudes. Such a complex nature of Sports law and its operation requires a systematic approach to the understanding of sports law and its operational facets. The rules (code) of the Court of Arbitration for Sport and the CPIL (code on international private Law of Switzerland) do not operate in a vacuum. It has to reflect the social values, attitudes and behaviour of the Athletes and sports associations. The Athletes' and sports associations' social values and norms directly or indirectly influence the Court for Arbitration for Sport. Sports law also endeavours to mould and control these values, attitudes and behavioural patterns so that they flow in a proper channel. It attempts either to support the international Sportsystems or to change the

overall sports law situation or relationship by its formal processes. The Court of Arbitration for Sport also influences other parts of the international sport system. In this work, the proceedings rules of CAS will be scientifically analyzed, and improvement ideas will be suggested if needed. However, from the first view, it seems that the CAS proceedings rules have no shortcomings, and it seems from the surface the Federal Court of Switzerland offers proper legal protection for the parties in sports law. Thus, the deficiencies must be investigated. This study scientifically examines whether the thesis can be confirmed and draws the necessary scientific and practical conclusions.

6. Objective and Tasks of the Dissertation

The target of the first chapter., The Court of Arbitration for Sport's path towards a "world sports court" is to give the reader an understanding of the roots of the Arbitration Court for Sport and the development of the court. This understanding leads to a deep understanding of procedural problems.

The objective of the dissertation in Chapter two, the appeal against the final decisions of the CAS, is to examine and localize procedural problems in the proceeding rules of the CAS and to try to improve the proceeding of the CAS.

Chapter three, the revision and chapter four are about other remedies, and the objective is to briefly investigate the reasons for revision and the other remedy. The target of this work is the appeal as the main instrument against the awards of the Court of Arbitration for Sport.

The following scientific steps are to be taken:

1. Review of the Literature
2. Collection of Data
3. Analysis of Data in the area of the Court of Arbitration for Sport
4. Interpretation of Data
5. Improvement tools.

However, the Court of Arbitration for Sports law finding is not so easy. It systematically searches legal materials and statutory, subsidiary and judicial pronouncements. To make advancement in this scientific work of Law, one needs to go into the underlying principles or reasons of the Court for Arbitration for sport. This study will analyze and criticize the decisions of the federal supreme court of Switzerland regarding the procedural Law of the CAS. The Tasks are to analyze the different problems of the proceeding rules, e.g. the freedom of contract, the right to have an independent Arbitrator, the right to have an arbitrator, who participate in the process, or

the question of the legitimacy of the Appeal weaver. The mentioned procedural problems will be analyzed with the help of specialized literature. If needed, ideas for improvement will be suggested. To suggest reforms/developments in Sports law by undertakings the following:

- A. To investigate the gap between the procedural Law of the CAS and the actual practice of the Court of Arbitration for Sports law and the Supreme Court of Switzerland.
- B. To understand 'the effectiveness or impact of the Court of Arbitration for Sport.
- C. To determine whether Sports law serves the athletes' and sports associations' needs.
- D. To make suggestions for improvements in the proceedings law on concrete formulations and proposals.

After reviewing the literature on the subject, the next step is to identify and formulate the scientific problem and the thesis. The next step is to create the research Design of the scientific work. This means writing all the research points and examining them one by one. The Content of the Table shows the examined points in the research work. After reviewing the literature, the collected Data (Court decisions, Court Statutes, association statutes, International Law Treatment and enforcement and all other literature) has been analyzed. The Interpretation of the Data takes a lot of

energy and time because the sum of the literature is enormous. The Interpretation of the Data from the view of the procedural Law shows after deep scientific examination that the procedural Law of CAS has deficiencies. In this case, the author offered legal solutions for the problems.

7. Research Methodology

In this research, the following methods have been used:

Doctrinal Research: It is research into procedural rules, procedural principles, concepts or doctrines of the procedural Law of the Arbitration Court for Sports law. Classic interpretations method as teleological, analogous, textual and historical will be used in interpreting the procedural Law of the Court of Arbitration for Sport.

Theory research: Involves an inquiry into conceptual bases of procedural Law, principles or doctrines in sports law.

Reform-oriented Research-study and critical research.

8. Limitation of the Problematic Scope of the PhD. Work

The Substantive Law (substantive and property law claims) is not the subject of the present investigation nor the mediation procedure at the Court of Arbitration for Sport. The international dispute (Parties not domiciled in Switzerland) is dealt with in this research work.

II. The Size and the Structure of the Dissertation

The dissertation is structured into an introduction and five chapters, and a total of 215 pages, a table of content included. The references consist of 121 sources, foreign and internet sources, 543 footnotes.

The structure of the dissertation regarding the Appeal chapter (II) as the main target of the work follows the structure of Art. 190 CPIL. Also, the structure of the Revision (Chapter III) and other remedies (Chapter IV) follows the logic of CIPL.

The appeal is the primary weapon according to the CPIL and is the ordinary legal way of defence. The revision is an extraordinary legal possibility that is not bound by the 30-day challenging deadline. For the revision comes the 10-year regulation. In most cases, the revision can not be applied to the procedural rules, which are the subject of this dissertation. Procedural deficiencies cannot usually be discovered years after the trial. They must be challenged with the appeal within the 30-day deadline. The Revision and the other Remedies will be investigated shortly based on the mentioned.

The first chapter discusses the history of the CAS and why sports jurisdiction requires follow-up control by state courts. The understanding of history helps the reader to understand the procedural problems of the CAS

The second chapter, "The Appel against the decisions of the arbitration Court for sport, first takes a closer look at the means of contesting an action for annulment under Art. 190 (2) CPIL. Here, the object of dispute: "arbitral award" and the contestable claims will be examined. Then the appeal procedure: jurisdiction, procedural obstacles, formal requirements and suspensive effect will be investigated.

The next step will deal with the decision on the action for annulment by the Swiss Federal Supreme Court, its effect and its formal requirements.

The second chapter also examines the individual grounds for avoidance of Art. 190 (2) CPIL. Here, too, the practice of the Federal Supreme Court is viewed critically. First, the arbitral tribunal's composition in terms of Art. 190 (2) letter a CPIL will be discussed. The following points are examined in detail: the requirements for the appointment of the arbitral tribunal under the CPIL, the violation of the requirements of the party to the arbitrator, the lack of Independence within the meaning of Article 180 (2) letter c CPIL, the lack of Independence of the arbitral tribunal, the Independence of the arbitrators and the problem of the lack of participation of an arbitrator within the scope of Art. 190 Letter a. CPIL.

Secondly, it examines the ground for establishing jurisdiction or lack of jurisdiction within the meaning of Art. 190(2) letter (b) CPIL. Here, the Forfeiture of the right to complain and the examination competence of the

Swiss Federal Supreme Court, the incorrect legal basis of the proceedings, arbitrability and subject matter of the dispute and the requirements of the Swiss Federal Supreme Court Federal as the basis of the competence for the arbitral tribunal in the case of CAS as well as the decision of the Swiss Federal Supreme Court on the action for annulment according to Art. 190 letter b CPIL and the cassatory effect.

The third point looks closely at Article 190 (2) letter (c). This concerns decisions on points of dispute that have not been submitted to the arbitral tribunal or legal claims that have been left unjudged. Here the scope of the application and the problem of the so-called "catch-all-clauses" are taken apart.

The fourth point violates the principle of equal treatment of the parties and the right to be heard under Art. 190 para. 2 Letter d CPIL in sports law is examined. Here, the scope of the ground for avoidance in sports law and the two rights mentioned are examined. Several points of the fuss taken into account, Influence of Art. 182 (3) CPIL on the taking of evidence, surprising application of Law by the court, duty of the arbitral tribunal to state reasons, duty of the arbitral tribunal to make the proceedings public and the possibility to apply for legal aid.

The fifth point examines the violation of the public order within the meaning of Art. 190 (2)(e) CPIL. First, the scale of the public order is

examined, and then the defensive character of the norm and its procedural content (fair proceedings, obligation to state reasons, respect for the substantive legal force) is examined. The principle of "Not to be twice judged for the same case" in sports law is presented here based on the Federal Supreme Court case law. Subsequently, the substantive legal content is discussed and examined. Firstly, it is a matter of reviewing the basis of the decision established by the court and the fundamental matrilineal legal principles, such as the trust principle, violation of moral principles and prohibition of discrimination. Here the author of this research work will also look at the parts that are not reviewed as part of the public order within the meaning of Art. 190 para. 2 letter e CPIL.

Further, this research focuses on the relevance of mandatory international standards and the admissibility of special reservation clauses. Finally, it is to be examined whether one can speak of "order public" in sports law.

The sixth and last point is the possibility of excluding recourse to the courts under Art. 192 CPIL is examined. Here, the following points are examined from the perspective of sports law: The subject of renunciation, basic requirements and the federal court requirements regarding renunciation, and the international significance of the requirements.

The third chapter examines the legal possibility of reopening proceedings in sports law (revision, Art. 190a CIPL) shortly. The scientific target of this work is the appeal and not the revision. The deadline for the revision is ten years. Thus, the revision has less significance for the procedural rules. Next, the requirements for the audit must be addressed. Here the possible audit objects, responsibilities and deadlines are to be checked and then the individual audit reasons are examined. The following reasons for revision are examined: Subsequent discovery of substantial new facts or evidence, particularly in doping proceedings. The impact of the offence must then be examined. Finally, the effect, as well as the waiver of the revision, is examined

The fourth chapter examines shortly other possible remedies. At the end of this paper, the action for annulment of the arbitral awards and the explanation and justification of decisions are briefly discussed. This chapter is not the target of this scientific work, but it is necessary to have the circle of the remedies closed. The other remedies are also extraordinary; in most cases, the procedural deficiencies are not part of the examination. Thus, the shortness of the fourth chapter.

The fifth chapter describes the Conclusions and suggestions.

Chapter I. The history of the Court of Arbitration for Sport towards a “World Sport Court.”

1. The Court of Arbitration for Sport and the State Control of Arbitrements

The CAS was the first international arbitration court in sports. ¹The IOC decided in Rome in 1982 to create an international sports court concept.² 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 Procedure of the CAS, the so-called CAS Code, has its seat in Lausanne, Switzerland. ³The IOC was founded for 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 which do not fall within the competence of the IOC or the associations. ⁴From the outset, arbitration rules regulate the procedure and organisation of the

¹Adolphsen, in: Sports law in practice, Nr. 1061.

²Simma, in: FS-Seidl-Hohenveldern, p. 21.

³Martens, Journal for arbitration proceedings 2004, 202.

⁴Mbaye, in: *Annuaire française 1984*, p. 411.

arbitral tribunal. ⁵Initially, the CAS was not yet legally independent but merely a department of the IOC, which was only autonomous internally. ⁶This means that he was financially and personally dependent on the IOC. ⁷Concerning 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. ⁸ The President of the IOC made the nomination.

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", ⁹ albeit only for cases in which the IOC was not involved in the proceedings. ¹⁰ Indirectly, the close "organizational and economic ties" ¹¹between 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. ¹²

In 1994, as a reaction to the ruling of the Swiss Federal Supreme Court, a ¹³ reform of the CAS was decided in the so-called "Paris Convention".

⁵ CAS-Code (Code de l'arbitrage en matière de Sport), under http://www.tascas.org/fileadmin/user_upload/Code2020_1320corrections20finales20_en_.pdf.

⁶ Oschütz, *Sports arbitration jurisdiction*, p. 39.

⁷ Adolphsen, in: *Sport Law in Practice*, m.1063.

⁸ Oschütz, *Sports arbitration jurisdiction*, p. 39

⁹ STF 119 II 271 = ASA Bulletin 1993, p. 398

¹⁰ SFT 119 II 271, 279

¹¹ SFT 119 II 271, 280

¹² Mbaye, in: *Annuaire française* 1984, p. 413.

¹³ Convention relative à la constitution du Conseil International de l'arbitrage en matière de Sport (ICAS)“, Recueil du TAS II, p. 881.

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,¹⁴ which has since been responsible for financing and organising the CAS.¹⁵ 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", to achieve a clear separation between the decisions in the first and 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 based on experience gained over the past few years¹⁶. A mediation division was created¹⁷ over time; the CAS Code has been amended several times, most recently on 01.07.2020¹⁸. 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 sports have led to a considerable increase in procedures. While only 2 cases were heard in front of the CAS in 1984, there were already 957 cases in 2020¹⁹.²⁰The

¹⁴ Martens, Journal for arbitration proceedings 2004, 202

¹⁵ History of the CAS, available at <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>.

¹⁶ Oschütz, Sportschied jurisdiction, p. 42

¹⁷ <https://www.tas-cas.org/en/mediation/rules.html>

¹⁸ <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>

¹⁹ https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020_.pdf

²⁰ Process statistics of the CAS, under http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2020.pdf

ratification of the World Anti-Doping Code (WADC) certainly contributed to this. Finally, it provides for CAS as the final instance²¹.

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

2. The State control of arbitrations

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

Decisions of arbitral tribunals are to be qualified as substantive case-law according to the prevailing Swiss opinion.²²

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 law 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

²¹ Art. 13 of the WADC, available at <https://wada-mainprod.s3.amazonaws.com/resources/files/2020-wadc-final-en.pdf>.

²² Berger/Kellerhals, International arbitration in Switzerland, m. 1511.

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 necessary".²³

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 conduct a follow-up inspection immediately after the proceedings (e.g. by Art. 190 para. 2 CPIL). On the other hand, state post-control is possible if the arbitration is enforced with state assistance (e.g., Art. 193 para. 3 CPIL). If the state were to enforce the arbitrament without any control of the arbitrament, the rule of law would be violated.²⁴

In addition, the UNICTRAL Model Law, which forms the basis for the legal provisions on international arbitration in Switzerland,²⁵ also provides for the possibility of state follow-up control, compared to Article. 34 UNICTRAL-ML.²⁶

3. Summary of the Chapter

The CAS was created to achieve jurisprudence in the sport largely independent of ordinary jurisdiction. Through its design as an arbitral tribunal, it is intended to guarantee a worldwide equivalent jurisdiction in

²³ Sonnauer, p.7.

²⁴ Schwab/Walter, arbitral jurisdiction, Chap. 1, note 1

²⁵ Hochstrasser/Blessing, in: Basel Commentary on the- CPIL, Introduction Art. 176. m. no. 154.

²⁶ UNICTRAL-Model law http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

sports law. However, the CAS cannot exist entirely 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 concerning the rule of law, principles of procedure and the application of fundamental legal principles in arbitration. Control mechanisms have been developed for this purpose, which will be examined in more detail below.

Chapter II. Appeals against the decisions of the Court of Arbitration for Sport (CAS) in Switzerland

In chapter II. The compatibility of the proceedings rules of CAS with the law will be investigated. The Swiss legal system provides various possibilities to take action against an arbitrament of the CAS. First, there is the "ordinary" remedy of an action for annulment or rescission and the "extraordinary" remedy of an appeal. According to correct German terminology, these two possibilities could be described as "legal remedies" since they do not have a suspensive and devolution effect without further ado. Since no such conceptual distinction is made in Switzerland,²⁷ the term "appeal" will continue to be used in the following.

The Swiss legal system differentiates between an international dispute and an internal dispute. In the first case, the provisions of the applicable arbitration law are determined by the CPIL and the Swiss Code of Civil Procedure in the second case. Regarding the form of the appeal procedure, care must always be taken as to whether both parties are domiciled in Switzerland. Finally, it is discussed whether there is also the possibility of a declaratory action for nullity of the arbitrament in addition to these legal remedies.

²⁷ In French, for example, only "recours" is spoken of, compare the title of Art. 190 CPIL in French version; Art. 192 CPIL speaks in the German version of "waiver of remedies"; Walter/Bosch/Brönnimann, commentary CPIL, page. 210 distinguish between "legal remedy" and "Appeals."

This research explains how the action for annulment in front of the Swiss Federal Supreme Court is structured and which standard of review is to be applied. The work critically examines the jurisprudence of the Federal Supreme Court and analyses how the Federal Supreme Court found criticisms of the proceedings and the organisation of the CAS.

a) **The individual grounds for avoidance of Art. 190 para. 2 CPIL:**

Article 190 paragraph 2 CPIL lists five grounds for the challenge which may be put forward against an arbitrament in the course of the challenge proceedings. This list is exhaustive. Accordingly, an arbitrament may be contested if:

- b) a sole arbitrator has been unlawfully appointed, or the arbitral tribunal is composed contrary to regulations;
- c) the arbitral tribunal has wrongly declared that it has jurisdiction or does not have jurisdiction;
- d) where the arbitral tribunal has ruled on matters which it considers to have not been submitted or if it has been unjudged in the past;
- e) where the principle of equal treatment between the parties or of equal treatment between the principle of the right to be heard was infringed;
- f) if the decision is incompatible with the *Ordre public*.

The **individual grounds** are **not examined** by the court freely but only if they are requested in the proceedings by the party who appealed. In the second chapter of the research work, the individual law principles will be applied to CAS, analyzed, and examined, and, if needed, solutions will be offered. The main challenges and problems facing the CAS proceedings were discussed in this chapter revealed.

Contestation of the arbitrament

Under Swiss law, the CAS is treated as an arbitral tribunal. The Swiss legal system provides the appeal for the possibility of reviewing the decisions of the arbitral tribunal, which allows the state court to set aside the arbitrament if specific reasons exist.

It follows from the marginality to Art. 190 CPIL that its provisions are devoted to the "challenge" of arbitraments. Switzerland's Federal Supreme Court Act speaks of the admissibility of "appeals in civil matters" against arbitraments. Therefore, at least formally, the appeal against arbitraments is a subset of the civil law complaint, which is why one often speaks of an "arbitration complaint". Here, however, the term "action for annulment" results from the marginality of Art. 190 CPIL is preferred since this term clarifies that the effect "from now on" (Latin: *ex tunc*) of the arbitral award can be eliminated.²⁸

²⁸ Gétaz Kunz, waiver of appeal, p. 21.

Most arbitration proceedings in front of the CAS involve two parties, at least one of whom is not domiciled in Switzerland. The action for rescission, according to Art. 190 (2) CPIL, which is practically relevant for proceedings in front of the CAS, is dealt with.

1. The Object of contestation

An action can challenge not all decisions of the arbitral tribunal for annulment. Art. 190 para. 2 CPIL presupposes the contested decision is a so-called "genuine" arbitrament.²⁹

1.1. Definition of the term "arbitrament."

In Swiss law (called "decision" there) as well as in the UNICTRAL Model Law, the legislator uses the term "arbitrament". However, it is not defined in Swiss law; it merely contains provisions on form and content (see Art. 189 CPIL).³⁰The award is a decision of the arbitral tribunal. In arbitration proceedings, however, the court usually "decides" not only once but several times, e.g. whether it is competent or whether evidence is admissible. It is, therefore, necessary to define the concept of arbitrament. It must be distinguished from mere procedural orders which do not concern the subject-matter of the dispute.

²⁹ Berger/Kellerhals, International Arbitration in Switzerland, side note 1519.

³⁰ Berger/Kellerhals, International Arbitration in Switzerland, side note 1331.

One approach is to always proceed from an arbitrament when a decision is titled as such. In arbitration, however, the designation of the decision does not always correspond to its legal nature. Decisions are referred to as arbitraments, although they are mere procedural rulings, and conversely, arbitraments are referred to as merely an order or decree.³¹ The designation of a decision as an arbitrament by the arbitrators is, therefore, not a suitable criterion for qualifying it as such.³²

Instead, a "genuine" arbitrament requires a decision on a substantive motion or on a procedural or substantive preliminary or main question of the arbitral tribunal, which can no longer be challenged through the ordinary courts.³³ Consequently, an arbitrament - in Switzerland primarily referred to as a "decision" - does not always mean the end of the proceedings. According to the prevailing opinion, it can be divided into so-called final, partial, preliminary and interim decisions.³⁴

The distinction is significant when it comes to the contestability of the award.³⁵ In principle, all types of arbitration awards are possible before the CAS.³⁶

³¹ See Schmidt, *Journal for Arbitration Proceedings* 2013, 33.

³² Schmidt, *Journal for Arbitration Proceedings* 2013, 33.

³³ Schmidt, *Journal for arbitration proceedings* 2013, 37.

³⁴ *Berger/Kellerhals*, *International Arbitration in Switzerland*, side number. 1331.

³⁵ *Berger/Kellerhals*, *International Arbitration in Switzerland*, side number. 1332.

³⁶ *Kaufmann-Kohler/Bärtsch*, in: *The Court of Arbitration for Sport*, S. 94.

Final decisions are arbitrations that end the proceedings and can be procedural (e.g. jurisdiction) or material in nature so that one can distinguish between procedural and substantive decisions.

³⁷ Preliminary (withholding) and interim decisions do not conclude the process in whole or part and decide preliminary legal questions of a procedural or substantive-law nature with precedent effect. Partial decisions decide only a part of the legal dispute. This, however, finally and are comparable, therefore with a partial decision.³⁸

In principle, the form of the arbitration and the related proceedings may be freely agreed upon, even in front of the CAS (see Art. 189 para. 1 CPIL). However, this is usually done by referring to the CAS code, in which Art. R46 CAS Code, all the details of the making of an award are codified.³⁹ After that, an arbitration shall be made by majority decision. Should this not be possible, the President shall decide. The arbitration shall be made in writing, signed and dated and shall contain at least a brief statement of the reasons leading to the decision.

A decision or arbitration is, therefore, any final decision of the court on disputes concerning the claim, the admissibility of the claim, the jurisdiction

³⁷ SFT 130 III 76, 79.

³⁸ SFT 130 III 76, 79.

³⁹ Kaufmann-Kohler/Bärtsch, in: The Court of Arbitration for Sport, p. 91.

of the arbitral tribunal, as well as on individual means of attack and defence relating to the subject matter of the dispute.⁴⁰

1.2. Contestable arbitral awards

The final decision of an arbitral tribunal will most often be the subject of challenge. This already results from the law, according to Art. 190 para. 1 in connection with Para. 3 CPIL. Preliminary or interim decisions can only be challenged if the composition of the arbitral tribunal (Art. 190 para. 2 letter a CPIL) or the jurisdiction decision (Art. 190 para. 2 letter b CPIL) is to be challenged as erroneous, see Art. 190 para. 3 CPIL. The background to this regulation is that, according to Art. 186 (3) CPIL, the arbitral tribunal is to decide in advance on its jurisdiction and thus also on its correct composition.

The possibility of challenging the decision in front of the Federal Supreme Court shall settle disputes on these points quickly to avoid unnecessary proceedings in front of the arbitral tribunal.⁴¹ As a rule, partial decisions can also be challenged under Art. 190 (2) CPIL if they terminate the legal dispute relating to the part decided and thus comply with Art. 188 CPIL.⁴²

⁴⁰ SFT-diction from january 6 2020 Nr. 4A_287/2019 (The chines Swimmer Sun Yang againts the International Anti-Doping agency, WADA)

⁴¹ Walter/Domej, International Civil Procedure Law, P. 599.

⁴² Judgment from 21.02.2007, 4A_370/2007, C.2.3.1.

There is also the possibility that the arbitral tribunal may clarify a preliminary legal question with a decision (e.g. the existence of a contractual relationship), but the action contains a request for performance that goes beyond this (e.g. a claim from a contract). Particularly in the case of litigation involving lawyers from the Anglo-American area, such internal requests for a declaratory judgement often arise. However,⁴³ such decisions only have an ending effect if the action is entirely limited to requesting a declaratory judgment of the preliminary question.⁴⁴ Otherwise, it is not a partial decision to be assumed but an interim decision that can only be challenged under Art. 190 (3) CPIL.⁴⁵

Other decisions, however, such as procedural rulings (e.g. time limits or extensions of time limits for the submission of pleadings), cannot be challenged directly with the action for annulment. Even if they are passed in the form of a resolution, they can be amended at any time up to the end of the process and therefore do not make a final decision. Nevertheless, a defect in such decisions does not remain without consequences for the arbitral proceedings. The procedural order can be examined incidentally for errors in a possible action for annulment against the final decision.⁴⁶ For example, too short a time limit for

⁴³ Berger/Kellerhals, *International Arbitration in Switzerland*, para. 1528.

⁴⁴ Berger/Kellerhals, *International Arbitration in Switzerland*, para. 1529.

⁴⁵ STF 130 III 755, 758.

⁴⁶ Schütze, *Court of Arbitration*, 586.

commenting on a procedural order may lead to an infringement of the right to be heard. This would lead to setting aside the award in the appeal proceedings against the final decision.⁴⁷ The same applies to the issuing of interim injunctions or the ordering of precautionary measures. They can only be examined incidentally for possible grounds for setting aside in court in the appeal proceedings against the final decision.⁴⁸

Thus, all decisions of the arbitral tribunal are subject to review by a state court. Even if national law does not allow a direct review of the decision, any breach of the procedure will be considered incidentally in reviewing the award.

2. The contestation procedure

2.1. Competent court

According to Art. 191 para. 1 CPIL, the court responsible for the action for annulment, is the Swiss Federal Supreme Court.

2.2. Procedural obstacles

The action for rescission is only possible when the arbitral instance has been exhausted. It may only contain one of the complaints listed in Art. 190 para. 2 CPIL, and there may be no effective waiver of the challenge of the arbitral decision.⁴⁹

⁴⁷ Schütze, Court of Arbitration, at the place indicated

⁴⁸ STF 136 III 200, 203.

⁴⁹ STF 128 III 50, 52.

Whether the provisions of Art. 74 Para. 1 in conjunction with Art. Art. 51 Federal Supreme Court Act, below which no appeal is to be admissible, is also applicable to arbitration and has so far been left open by the Federal Supreme Court. Finally, Art. 77 (2) Federal Supreme Court Act refers to the procedural provisions applicable to an action for annulment and does not expressly exclude the limits of the amount in dispute.⁵⁰ However, the account must be taken of the unique nature of the arbitral procedure, which means that the appeal is the only remedy with which the arbitrament can still be challenged. In addition, Art. 77 (1) Federal Supreme Court Act stipulates that an appeal against arbitraments is possible under the requirements of the CPIL. However, there is no threshold for the amount in dispute. It is therefore argued here that the limits in Art. 74 para. 1 in conjunction with Art. 74 para. 1 Art. 51 Federal Supreme Court Act do not apply to arbitration proceedings.⁵¹

2.3. Formal requirements

The procedure is governed by Art. 77 (1) Federal Supreme Court Act. The rules on appeals in civil matters shall apply to the appeal procedure.

According to Art. 100 (1) Federal Supreme Court Act, an appeal period of 30 days after the opening of the arbitrament shall apply. It was kept very

⁵⁰ STF 22.12.2008, 4A_392/2008 E.2.3 = ASA Bulletin 2009, 547.

⁵¹ Corboz, in: Commentaire LTF, Art. 77, p. 67.

short due to the arbitration acceleration principle.⁵² The time limit can be run both begin with the written delivery of the arbitrament, as well as after the oral announcement of the arbitrament, depending on what the parties have agreed, see Art. 190 para. 1 in connection with Art. 189 para. 1 CPIL. According to Art. 48 FEDERAL SUPREME COURT ACT,⁵³ the deadline is met if the broad appeal has been filed with the Federal Supreme Court or handed over to Swiss Post. This means that the letter containing the complaint must bear at least the postmark of the day on which the time limit expires. According to Art. 47 (1) Federal Supreme Court Act, an extension of the time limit is impossible, but a reinstatement (restoration), according to Art. 50 (1) Federal Supreme Court Act.⁵⁴

While in proceedings in front of the CAS, the official language is generally either English, French or Spanish under R29 of the CAS Code, the statement of appeal can be written in any official Swiss language, i.e. in German, French, Reto-Roman, or Italian. The language in which the contested CAS award was made is irrelevant; see Art. 55 (1) Federal Supreme Court Act.⁵⁵ The arbitrament must be filed with the appeal, whereby the Federal Supreme Court does not require a translation into an official Swiss language (see Art. 55 para. 3 FEDERAL SUPREME COURT

⁵² Jermini, *contestation*, m. l 659.

⁵³ Berti/Schnyder, in: *Basel Commentary on the CPIL*, Art. 190, p. 6.

⁵⁴ *Netzle*, *Magazine for sport and law* 2011, 3.

⁵⁵ *Berger/Kellerhals*, *International Arbitration in Switzerland*, m. no. 1637.

ACT). Subsequently, as a rule, a so-called correspondence exchange, according to Art. 102 Federal Supreme Court Act is carried out, i.e. the counterparty(s) and the CAS are served with the complaint statement with a deadline for comments. An exception exists if the appeal can be settled on the grounds of Swiss Federal Constitutionious inadmissibility or unfoundedness in the simplified procedure according to Art. 108 Federal Supreme Court Act.⁵⁶In principle, it is not necessary to be represented by a lawyer. However, the lawyer must be entitled to represent parties in front of Swiss courts (see Art. 40 (1) Federal Supreme Court Act.⁵⁷

A further prerequisite for the trial is a legally protected recording of Art. 76 (1) b Federal Supreme Court Act.

2.4. Suspensive effect

However, according to Swiss law, it is possible to apply suspensive effect without request (Latin: *ex officio*) or at the request of a party, Art. 103 Federal Supreme Court Act. The Federal Supreme Court is also empowered to take precautionary measures under Art on the application or without request (Latin: *ex officio*). Art. 104 Federal Supreme Court Act to preserve existing conditions and safeguard threatened interests. It, therefore, has the same powers to issue orders as in proceedings for interim relief.⁵⁸

⁵⁶ *Netzle*, Magazine for sport and law 2011, 3.

⁵⁷ SFT from 22. March 2010, 4A_566/2009.

⁵⁸ *Berger/Kellerhals*, International Arbitration in Switzerland, m. no. 1642

2.5. Summary

The parties entitled to appeal are those previously involved in the legal dispute or who at least have a legally protected interest in annulling the decision. The action for annulment may only be brought in front of the Swiss Federal Supreme Court within 30 days of the CAS's arbitration decision. In principle, the action for rescission does not have a suspensive effect, but in the field of sports law, it is often the case that temporary suspensions or the obligation to pay fines are suspended.

3. The decision on the action for annulment and its effect

An appeal decision is issued after the appeal proceedings have been conducted. The investigation first presents the formal prerequisites for the decision and then deals with its effect.

3.1. Formal requirements

The appeal decision is usually taken without further hearing of the parties.⁵⁹ On average, the appeal procedure takes about four months from filing the appeal to the decision, whereby the duration can vary from about 60 to about 200 days.⁶⁰

The facts on which the arbitral decision is based are, in principle, binding for the appeal decision according to Art. 77 (2), 105 (2) Federal Supreme

⁵⁹ *Netze*, Magazine for sport and law 2011, 3.

⁶⁰ *Dasser*, ASA Bulletin 2010, S. 89.

Court Act. An addition or correction of the facts is impossible, even in the case of Swiss Federal Constitutionious inaccuracy or an infringement.

⁶¹According to Art, an exception exists if the findings of fact themselves show a defect. 190 para. 2 letter d CPIL (unequal treatment of the parties) or Art. 190 para. 2 letter CPIL (violation of the fundamental law principles: Latin Ordre public) and were therefore successfully challenged. ⁶²However, the Federal Supreme Court is free to order an additional taking of evidence on its initiative to clarify the facts of the case, see Art. 55 (2) Federal Supreme Court Act. ⁶³A supplementation or correction of the facts is only possible if it is shown with references to the file that corresponding factual claims have already been made in the pre-instance proceedings in conformity with the proceedings.⁶⁴

3.2. Effects of the decision

According to Art, if the Federal Supreme Court upholds the action for annulment, its decision has a cassational effect. 77 (1) FEDERAL SUPREME COURT ACT, i.e. the arbitrament is set aside and referred back to the arbitral tribunal for a new hearing composed of the same parties.⁶⁵ Something else shall apply if the Federal Supreme Court considers the

⁶¹ *Netze*, Magazine for sport and law 2011, 4

⁶² SFT 129 III 727, STF 128 III 50, 54; SFT 119 II 380, 383.

⁶³ *Berger/Kellerhals*, International Arbitration in Switzerland, marg. no. 1645.

⁶⁴ SFT from 03.05.2010, 4A_456/2009, STF 115 II 484, 486; 111 II 471, 47.

⁶⁵SFT128 III 50, 53.

arbitral tribunal to have no jurisdiction. ⁶⁶Then the legal dispute must be continued in front of the responsible ordinary court.

If the appeal is dismissed as inadmissible or deemed unfounded, the arbitrament shall be final in its validity (see Art. 190 para. 1 CPIL). At the same time, an order of suspensive effect, if any, shall be revoked, and the enforceability of the award shall no longer be suspended. This legal consequence takes effect by operation of law, i.e. the decision of the arbitral tribunal is not confirmed again by the decision of the Federal Supreme Court and is replaced by its decision. ⁶⁷

3.3. Appeal against the decision

No ordinary appeal may be lodged against the decision of the Federal Supreme Court.⁶⁸ There remains the extraordinary legal remedy of the revision, according to Art. 121-128 Federal Supreme Court Act and the supplementary or amending application.

An appeal is only possible if there is either a procedural defect within the meaning of Art. 121 Federal Supreme Court Act, e.g. if the court has been composed irregularly (Art. 121 letter a Federal Supreme Court Act) or if there are other grounds within the meaning of Art. 123 (1) and (2) letter a

⁶⁶ *Berger/Kellerhals*, International Arbitration in Switzerland, marg. no. 1654

⁶⁷ ASA Bulletin Vol.28 No. 3, 524

⁶⁸ *Berger/Kellerhals*, International Arbitration in Switzerland, marg. no. 1657.

Federal Supreme Court Act, since Art. 123 (2) letter b Federal Supreme Court Act only applies to criminal cases. The appeal shall be lodged with the Federal Supreme Court. According to Art. 124 (1) letter a Federal Supreme Court Act, the time limit for this is 30 days in the case of procedural defects within the meaning of Art. 121 Federal Supreme Court Act. In the case of defects within the meaning of Art. 123 Federal Supreme Court Act, it is 90 days, according to Art. 124 (1) letter Federal Supreme Court Act. Under Art. 128 Federal Supreme Court Act, the Federal Supreme Court then decides whether to overturn its previous decision and decide anew or reject the appeal.

According to Art, there is also the possibility of supplementing or correcting the decision. 129 (1) Federal Supreme Court Act in the event of ambiguity or incompleteness. However, this is only possible if the arbitral tribunal has not yet ruled on the matter again, Art. 129 (2) Federal Supreme Court Act.

4. The individual grounds for avoidance of Art. 190 para. 2 CPIL

Art. 190 para. 2 CPIL lists five grounds for the challenge which may be put forward against an arbitrament in the course of the challenge proceedings. This list is exhaustive.⁶⁹ Accordingly, an arbitrament may be contested if:

⁶⁹ STF 128 III 50, 53; STF 127 III 279, 282; STF 119 II 380, 383.

- a) a sole arbitrator has been unlawfully appointed, or the arbitral tribunal is composed contrary to regulations;
- b) the arbitral tribunal has wrongly declared that it has jurisdiction or does not have jurisdiction;
- c) where the arbitral tribunal has ruled on matters which it considers to have not been submitted or if it has been unjudged in the past;
- d) where the principle of equal treatment between the parties or of equal treatment between the principle of the right to be heard was infringed;
- e) if the decision is incompatible with the fundamental law principles (Ordre public).

It is impossible to make a general complaint that the arbitration violates fundamental rights or the ECHR (European Convention on Human Rights). The individual grounds are not examined without request (Latin: *ex officio*) but only if they are put forward in the proceedings by the party who appealed. In this respect, the Federal Supreme Court refers in its case-law to the duty to give notice of defects provided for in Article 106 (2) Federal Supreme Court Act for the infringement of fundamental rights. It should be noted in this context that the deficiencies submitted in the statement of claim are already attributable to one of the grounds for rescission under Art. 190 (2) CPIL, see Art. 77 (3) Federal Supreme Court Act.⁷⁰

⁷⁰ STF from 04.08.2006, 4P.105/2006, E.7.3

It is noticeable that the grounds for challenging Art. 190 para. 2 CPIL correspond to the grounds for refusing recognition of a foreign arbitrament in Art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, NYC⁷¹ and thus also to Art. 34 United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules.

4.1. Composition of the arbitral tribunal contrary to regulations (Art. 190 para. 2 letter a CPIL)

According to Art. 190 para. 2 letter a CPIL, an arbitrament might be set aside if the composition of the arbitral tribunal was irregular. This ground for annulment is an expression of the right to the statutory judge, which is derived from Art. 29, 30 Swiss Federal Constitution ⁷²and Art. 6 para. 1 ECHR. Accordingly, ⁷³the arbitral tribunal or the sole arbitrator shall comply with the agreed regulations or - in the absence of an agreement between the parties - with the statutory provisions.⁷⁴

Since arbitral decisions have the same effect as the jurisdiction of the ordinary courts, a quality comparable to that of a state judgment must be guaranteed concerning Art. 30 SWISS FEDERAL CONSTITUTION.⁷⁵

⁷¹ UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10.6.1958, hereinafter UNICTIRAL Arbitration Rules.

⁷² Swiss Federal Constitution

⁷³ *Berti/Schnyder*, in: Basel Commentary on the CPIL, Art. 190, marg. no. 25.

⁷⁴ STF 118 II 359, 361

⁷⁵ STF 119 II 271

4.2. General information

In principle, the irregular composition can be both structural and selective.⁷⁶ It may already emerge from the arbitration agreement and occur only at the time of appointment or later in the arbitration proceedings, e.g. during consultation and decision-making.⁷⁷ The Court of Arbitration is affected by Art. 190 para. 2 letter a CPIL, which made the contested decision. If the defective composition is cured in front of the hand, this ground for complaint shall no longer apply.⁷⁸ This is not the case if the court initially composed of irregular members has already issued binding and non-challengeable preliminary or interim decisions for the newly composed arbitral tribunal, which can only be challenged together with the final decision. In this case, it is possible, as an exception, to complain about the initially irregular composition via Art. 190 para. 2 letter a CPIL.⁷⁹

Ultimately, this ground for rescission is also concerned with the question of whether there is a "genuine" arbitral tribunal within the meaning of the CPIL or whether the influence of one party on the appointment of the arbitrators is so significant that one would rather have to speak of an association court.

⁷⁶ *Berti/Schnyder*, in: Basel Commentary on the CPIL, Art. 190.

⁷⁷ *Jermi*, Contestation, marginal no. 275.

⁷⁸ SFT 118 II 359, 360.

⁷⁹ *Jermi*, Contestation, marginal no. 278.

4.3. The prerequisites for the appointment of an arbitral tribunal under the CPIL

Rules on the composition of an arbitral tribunal can be found in Art. 179 and 180 CPIL. Art. 180 para. 1 letter a - c CPIL regulates the question of when an arbitral tribunal is composed contrary to regulations. The law sets out possible reasons for challenging an arbitrator.⁸⁰

The parties themselves may agree on the requirements to be met by an arbitrator. Therefore, the arbitrator cannot meet either the requirements directly agreed upon between the parties in the arbitration clause (Art. 180 para. 1 letter a CPIL) or the procedural law of an institutional arbitral tribunal (Art. 180 para. 1 letter b CPIL). In addition, there is the statutory ground for refusal in Art. 180 para. 1 letter c CPIL, according to which an arbitrator may be challenged for lack of independence.⁸¹

4.3.1. Rejection procedure

According to Art, if there is a reason for refusal against an arbitrator, a request for refusal. 179, 180 CPIL is required first. If no such complaint is filed, the right to make a complaint under Art. 190 para. 2 letter a CPIL has been forfeited, and the deficiencies can no longer be asserted in the appeal procedure. This results from the principle of process economy, which also

⁸⁰ Berti/Schnyder, in: Basel Commentary on the CPIL, Art. 190, marg. no. 28.

⁸¹ See Peter/Besson, in: Basel Commentary on the CPIL, Art. 180, marg. no. 7.

includes the principle of clarifying questions of court organisation as early as possible in front of the proceedings are continued.⁸² A rejection procedure often ends with an interim decision by the arbitral tribunal. Based on the above, this must be challenged separately in front of the Federal Supreme Court. You cannot wait for a final decision to be made.⁸³ Forfeiture shall not occur only when one party is aware of the reason for refusal. Instead, there are certain investigation obligations for the process participants⁸⁴.

4.3.2. Contestable decisions

The action for rescission, according to Art. 190 para. 2 letter a CPIL only permits the rescission of decisions of the arbitral tribunal itself.⁸⁵ This is particularly important for institutional arbitration tribunals such as CAS. In these cases, it is often not the arbitral tribunal that decides on its composition but an organ of the arbitral institution, Art. R40.1, R40.2, R53 and R54 CAS code⁸⁶. However, such decisions cannot be directly challenged with an action for annulment.⁸⁷ The same applies to ICAS decisions. Art. R34 CAS Code, the ICAS Board, decides on applications for rejection within the meaning of Art. 179, 180 CPIL. According to the wording of Art. 190 para. 2 letter a CPIL, this decision cannot be directly challenged by the Federal Supreme

⁸² STF 130 III 66, 75.

⁸³ Schnyder, *Causa Sport 2005*, 355.

⁸⁴ SFT 09.10.2012, 4A_110/2012 = *Journal for sport and law 2013*, 23 subsequent.

⁸⁵ Kaufmann-Kohler/Rigozzi, *Arbitrage*, marg. no. 807.

⁸⁶ <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>, Rules from 1.7.2020.

⁸⁷ Rigozzi, *Arbitrage international*, marg no. 1359.

Court.⁸⁸ Nevertheless, there are voices in the literature that calls for such decisions to be directly contestable in front of the Federal Supreme Court. Due to the principle of the rule of law, which also applies in arbitration proceedings, there must be the possibility of reviewing arbitrations and proceedings to ensure that they are harmless to the rule of law, which includes the impartiality of an arbitrator. Therefore, an incorrect decision on a rejection request cannot remain without the possibility of correction only because it was taken by a private arbitral institution and not by the arbitral tribunal itself.⁸⁹

The Federal Supreme Court ultimately heard these concerns. It has stated that a decision of an arbitration organisation can be challenged incidentally with the action for annulment against the (final) arbitration decision and that the independence of the arbitral tribunal is reviewed again there.⁹⁰ This was explicitly confirmed for ICAS decisions.⁹¹

4.3.3. Infringement of the parties' requirements of the arbitrator

The existence of a ground for refusal, according to Art. 180 para. 1 letter a or letter b CPIL leads to a contestable defect within the meaning of Art. 190 para. 2 letter a CPIL. The first of the two grounds for refusal (Art. 180

⁸⁸ Critical see Berti/Schnyder, in: BSK-CPIL, Art. 190, marg. no 29.

⁸⁹ See Walter/Bosch/Brönnimann, commentary CPIL, P. 112.

⁹⁰ SFT 118 III 359, 361.

⁹¹ SFT 136 III 605.

para. 1 letter a CPIL) depends on which individual agreements the parties have made on the requirements to be met by the arbitrators. The second (Art. 180 para. 1 letter b CPIL) covers the case in which the parties have submitted to arbitration rules that make particular demands on the selection of arbitrators. An "irregular" composition of the arbitral tribunal within the meaning of Art. 190 para. 2 letter, a CPIL exists if the parties or the arbitral institution have not observed the rules set by them. However, ⁹²not every disregard for the requirements of a referee must necessarily result in a refusal. The decisive factor is whether the regulations which have been disregarded concern the rule of law in arbitration proceedings. Article. 180, paragraph. 1 Point (a) and (b) of the CPIL, therefore, have restricted application in the context of Article 190 paragraph 2 (a) of the CPIL.⁹³

In proceedings in front of the CAS, the specific requirement for arbitrators is that they must be selected from a closed list of arbitrators. This system is not uncontroversial, as it is precisely the athletes who have virtually little influence on the composition of the list of referees. The closed list of arbitrators does not guarantee the impartiality or independence of the arbitrator. A deviation from the closed list of arbitrators does not automatically lead to a procedure that does not meet the rule of law requirements. Therefore, according to Art, it is theoretically conceivable that

⁹² Briner/Böckstiegel, *Contestation*, p. 104.

⁹³ SFT from 30. Jun 1994 = ASA Bulletin 1997, 99, 103.

the CAS may decide with arbitrators not on the closed list without this arbitration decision having to be revoked. 190 para. 2 letter a CPIL.

Furthermore, the statutes of the sports federations, which become part of the arbitration agreement through referral, often impose specific requirements on the referees. Articles 61 and 62 of its Statute, the Union of European Football Associations, UEFA stated that an arbitrator in proceedings involving UEFA must be a European resident. If an arbitrator does not fulfil this requirement and nevertheless takes part in the hearing, this violates UEFA's statutes but, according to the above case law, does not lead to a waiver, according to Art. 190 para. 2 letter a CPIL, since the residence of an arbitrator does not say anything about the constitutional quality of an arbitration procedure.⁹⁴

4.3.4. Lack of independence within the meaning of Art. 180 para. 2 letter c CPIL

Beyond the parties' requirements, the legislator requires that an arbitrator be independent, Art. 180 para. 2 letter c CPIL.

First, it is necessary to examine what lies behind "independence" in Art. 180 para. 2 letter c CPIL. The question is whether one interprets the term relatively narrowly or expects not only independence but also impartiality of

⁹⁴ Rigozzi, Arbitrage international, marg. no. 1356

the referee through a somewhat more comprehensive interpretation. Parts of the literature prefer to remain close to the provision's wording and assume that only the lack of independence leads to an irregular filling. According to this, independence is a set of objective circumstances that make the arbitrator appear autonomous. To allow independence and impartiality to be clearly distinguished from each other.⁹⁵ According to the Federal Supreme Court case law, this is not possible. A particular objective dependence of an arbitrator also means that he can no longer be impartial in his decision-making.⁹⁶ This argumentation is convincing, which is why both terms will be considered a common concept in the following.

Since in the field of sports law, not only the independence of individual arbitrators is always under discussion, but also the independence of the CAS itself, it is first examined which problems arise concerning the independence of the entire arbitral tribunal. Subsequently, the individual referees will meet the requirements in the light of Art. 190 para. 2 letter an in conjunction Art. 180 para. 2 letter c CPIL.

4.3.4.1 Lack of independence of the arbitral tribunal

It is controversial whether the CAS is an independent arbitral tribunal. Again and again, there are voices from athletes who complain that the sports

⁹⁵ Jermini, Contestation, marg. no. 314

⁹⁶ STF 136 III 605, 611, STF 136 III 605, 611, SFT from 31.07.2019 Nr. 4A_74/2019

federations have too much influence on the jurisdiction of the CAS. In the following, the institutional independence of the CAS will be discussed first, followed by a closer look at the modalities of its appointment.

4.3.4.2. Independence of the Arbitral Tribunal from the IOC

An arbitral tribunal can only be described as independent and "genuine" if it is not over-funded by an institution that regularly appears as a party before the court. In the early days of the CAS, it was often criticised that the IOC had too much influence on its jurisdiction. It was criticised, for example, that CAS was formally subordinated to the IOC at the beginning,⁹⁷ e.g. concerning the change in the procedural rules. Alternatively, concerning financing the work of the Court of First Instance.

The Federal Supreme Court ruled that a genuine, independent arbitration procedure may be conducted in front of the CAS, at least in proceedings, without the involvement of the IOC.⁹⁸ The Federal Supreme Court stated that the individual respondent association could only nominate a small number of arbitrators on the list and that there was a genuine choice for the athlete.⁹⁹ In addition, the athlete can challenge the referee nominated by the opponent, which also contributes to ensuring institutional independence.¹⁰⁰

⁹⁷ SFT 119 II 271.

⁹⁸ SFT 119 II 271, 279: In its decision, the Federal Supreme Court shared the view of the founding fathers that this was a genuine arbitral tribunal ("un tel avis peut être partagé"), although "not without a certain hesitation" ("non sans hésitation du reste").

⁹⁹ SFT 119 II 271, 279.

¹⁰⁰ SFT 119 II 271, 280.

Since the Federal Court raised doubts about whether the same would apply to proceedings involving the IOC, the CAS was fundamentally reformed and reorganised in 1994¹⁰¹. Finally, in future, the CAS should resolve disputes, e.g. regarding rule interpretation or doping offences, directly on-site at Olympic Games with an "ad hoc division", i.e. an ad hoc arbitral tribunal. In this situation, the IOC would, in any event, be a party to the proceedings. Therefore, a foundation (the ICAS) was founded, consisting of all circles related to the CAS (athletes, associations, IOC) and which took over the sponsorship for the CAS. Since then, ¹⁰²ICAS has exclusively decided on the amendment of the Rules of Arbitration or the rejection or dismissal of arbitrators. It exists according to Art. S 4 CAS code from twenty experienced lawyers. One-fifth of these are nominated by each of the circles involved in the sport. Accordingly, the IOC, the international sports federations, the national Olympic committees and the athletes may each nominate four referees. In addition, four additional members will be nominated by ICAS itself to be independent of any federation or athlete representation. The oversight of the arbitration by the IOC should thereby be removed.¹⁰³

This structural reform was a decisive factor in the Federal Supreme Court's clarification in 2003 that the CAS also had the necessary

¹⁰¹ SFT 119 II 271, 279 .

¹⁰² See Adolphsen, Doping Penalties, page 492.

¹⁰³ Also Mbayé, in: Reeb, Recueil du TAS I, p. XI.

independence when the IOC was involved in a legal dispute.¹⁰⁴ The supreme court mainly discussed the IOC's possible factual control and the sports organisations' one-sided financing. The Federal Supreme Court concluded that the new sponsorship created by ICAS in 1994 was no longer likely to exert too much influence on the part of the IOC.¹⁰⁵ Due to the composition of the members from the various interest groups, there was no longer any control for the IOC. According to Art, the ICAS is independent in its decisions and can not exert any influence on the current arbitration proceedings except through the decision on refusals by arbitrators. R 34 par. 2 CAS Code. There were, therefore, sufficient possibilities for the parties to contest a fair and independent procedure in front of the CAS.¹⁰⁶

The Federal Supreme Court also dealt with how the ICAS financing procedure affects the independence of the CAS. A portion of the revenue accruing to the international Olympic sports federations from exploiting media rights to the Olympic Games flows directly from the IOC to the Foundation.¹⁰⁷ The Court of First Instance considered this helpful practice since it ensures sufficient financing.¹⁰⁸ Nevertheless, the criticism continues to be levelled. There is a de facto dependence on the IOC through the current

¹⁰⁴ SFT 129 III 445.

¹⁰⁵ SFT 129 III 445, 455 f., STF no. 4A_292/2019 from Oktober, 16 201 , www.swissarbitrationdecisions.com, SFT-no. 4A-476/2012 frome May, 29 2013 in www.swissarbitrationdecisions.com, SFT no. 4A_476/2012 from May 24. 2013

¹⁰⁶ SFT 129 III 445.

¹⁰⁷ Martens, Journal for arbitration proceedings 2004, 203.

¹⁰⁸ STF 129 III 445, 460

financing system. Therefore, this procedure should be abolished, and instead, a new financing possibility should be created by increasing the fees.¹⁰⁹

However, this should be rejected. The Federal Supreme Court has correctly stated that the financing by the federations simultaneously relieves the athletes of the procedural costs. In litigation,¹¹⁰ the individual athlete often has fewer financial means than a sports organisation. Since the costs of the proceedings (costs for the arbitrators and any legal representation) are already relatively high, it does not seem reasonable to create an additional financial burden for the athlete by significantly increasing the court costs. In addition, the Federal Supreme Court rightly states that the form of financing does not yet say anything about the independence of a court since otherwise, all ordinary courts in disputes involving the state would also have to be regarded as not independent since the state also ensures their financing.

4.3.4.3. The problem of the closed list

In addition to the alleged dependence on the IOC, the system of a closed list of referees is repeatedly criticized.¹¹¹ It was argued that the associations had much more influence than the athletes in drawing up the list, which is why an independent appointment to the list of referees was not possible.¹¹²

¹⁰⁹ Downie, *Melbourne Journal of International Law*, Vol. 12, 22.

¹¹⁰ STF 129 III 445, 461.

¹¹¹ Adolphsen, *Doping Penalties*, p. 493 and 497.

¹¹² Röhricht, *Sports Arbitration*, p. 12.

In contrast, the proponents argue that there is now a wide choice of arbitrators¹¹³ (there are currently (June 2021) about 369 arbitrators on the list)¹¹⁴ and that the limited admission also serves to ensure the quality of the CAS' decisions.¹¹⁵

The Supreme court noted that the high number of arbitrators on the list led to a genuine choice for the parties and that the IOC did not overly influence the appointment procedure for the list.¹¹⁶ This decision also led to the Federal Supreme Court's treatment, and rejection of the last argument repeatedly put forward against the recognition of the CAS as a genuine arbitral tribunal.

However, this decision has not silenced the criticism of the closed system of the list of referees.¹¹⁷ Opening the list would help increase procedures' transparency and improve the CAS's image in legal circles.¹¹⁸ In addition, numerous institutional arbitration tribunals work with an empty list and function well.¹¹⁹

In addition, the criticism continues to be levelled at the fact that the associations are overweight in appointing referees to the list. Art. S14 CAS

¹¹³ Schlosser, in: FS-Zeuner, 467, 478

¹¹⁴ <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html>

¹¹⁵ Oschütz, Sports Arbitration, S. 101.

¹¹⁶ STP 129 III 445, 458.

¹¹⁷ Downie, Melbourne Journal of International Law, Vol. 12, S. 24.

¹¹⁸ Oschütz, Sports Arbitration, P. 420.

¹¹⁹ Downie, Melbourne Journal of International Law, Vol. 12, S. 24.

Code, only one-fifth of the referees is nominated to represent the interests of the athletes for whom the athletes have no right of nomination.¹²⁰

So far, however, ICAS has maintained a closed list of arbitrators, probably also due to the jurisdiction of the Federal Supreme Court. Although the number of referees rose from around 200 at the time to over 393 in the meantime, the previous system was not changed to an open list despite reforms in 2010, 2012 and, 2013, 2016, 2017, 2019, 2021¹²¹ There are even considerations of designating particular arbitrators for doping disputes in order to achieve the greatest possible equality of treatment in anti-doping jurisprudence, through the reform of Art. S14 Paragraph 1 and S.2 CAS Code, the prerequisite for compiling such "special lists" (Arbitrators' special list for doping cases or football) was created. ICAS should bear in mind that this reduces the number of potential arbitrators and, thus, the number of choices, even though the large choice was one of the critical arguments of the Federal Supreme Court not to object to the closed list system.

Since the latest reform projects indicate that ICAS intends to adhere to the previous method, it is recommended that ICAS incorporate the proposal of the courts and improve the structure of the list of arbitrators. The Federal Supreme Court criticized that it was impossible to see which referee was

¹²⁰ Adolphsen, Doping Penalties, p. 49

¹²¹ Cas-Tas website

nominated by which side (athletes, federation, IOC) on the list. ¹²²This could be included and make it easier for athletes to find "their" referee.

In addition, it should continue to be demanded that the system of the closed list of referees be abandoned. This would be another credible sign that ICAS is serious about making CAS a fully independent, supreme sports arbitral tribunal.¹²³

4.3.4.4 The procedure for the selection of the Chairman of the Arbitral Tribunal

The CAS usually meets as an arbitral tribunal with three arbitrators. According to Art. R 40.1 CAS Code, the parties shall have the right to determine whether the arbitral tribunal shall consist of one or three arbitrators. If no agreement can be reached, the President of the respective Chamber shall decide on the composition of the members. It should be noted that in appeal proceedings, according to Art. R 50 CAS Code, a sole arbitrator may be appointed only in exceptional cases. Otherwise, it is mandatory to negotiate in front of three arbitrators. In the so-called ordinary procedures, for example, disputes over sponsorship agreements, the parties are relatively free as far as the appointment procedure is concerned. ¹²⁴In appeal proceedings against decisions of associations or arbitrations of

¹²² SFT 129 III 445, 458.

¹²³ Adolphsen, Doping Penalties, p.494

¹²⁴ Oschütz, Sports Arbitration, S. 106

national sports arbitral tribunals, on the other hand, there are stricter rules on the appointment of arbitrators. According to Art. R48 para. 1, R53 CAS Code, the parties may each appoint one arbitrator. The Chairman of the Arbitral Tribunal shall be appointed by the President of the Appeal Chamber, see Art. R54 paragraph 2 CAS code. If exceptionally, the decision is to be taken in front of a single Judge, the latter shall be appointed by the President of the Chamber of Appeal, see Art. R54 paragraph 1 CAS Code.

According to Art. S6 para. 2 CAS Code is elected by ICAS, mainly composed of associations' representatives. As a result, in appeal proceedings concerning the legality of the decisions of the associations, of all cases, the associations are indirectly overweight in the appointment of the chairman of the arbitral tribunal. Consequently, the President of the Appeals Chamber has a vital role to play through his ability to appoint arbitrators.¹²⁵

This approach has led to criticism of the ICAS appointment procedure. Especially since the established case law of the CAS no longer justifies the concern about an inconsistent interpretation of the rules. Therefore it would be helpful for the arbitrators appointed by the parties to appoint the chairman, for example, within a time limit in the CAS rules.¹²⁶

¹²⁵ Oschütz, Sports Arbitration, p. 108.

¹²⁶ *Oschütz*, at the place indicated

At first sight, this proposal seems to make sense. However, it may happen that the associations indirectly - through the referee appointed - block the nomination of a chairman they do not weigh. This would have, so to speak, "through the back door" the same effect as the appointment of the chairman by ICAS itself.

It would therefore make more sense to have ICAS draw up a kind of "business distribution plan" every four years in advance, in which it is determined which arbitrator will chair which procedures. This is, for example, a common practice in ordinary jurisdictions. This would prevent it from remaining with the opaque appointment practice of the President of the Appeals Chamber. The selection of the chairmen is to be decided rumoured with the help of a "record" led by the secretary general of the CAS, on which it is to be noted how often a party appointed an arbitrator. In addition, it is presumed that this document should indicate how an arbitrator has decided in the respective proceedings, i.e. whether he has decided in a more association-friendly or athlete-friendly manner. However, since documentation remains hidden from other arbitrators and is probably only published in the narrowest circle, the current procedure for appointing arbitrators is given a non-transparent character. Regardless of the veracity of such rumours, a pre-established business allocation plan would, in any case, counteract the impression of an association-friendly nomination practice of the chairman.

4.4. Summary

1. The Federal Supreme Court correctly determined that the CAS is a genuine arbitral tribunal. Neither the organisation of the sponsoring company of the CAS nor its financing suggests any dependence on the IOC or the sports federations.
2. In the opinion of the Federal Supreme Court, the closed list of arbitrators is not an obstacle to recognition either. Many arbitrators on the list leave each party a sufficiently wide choice.¹²⁷ This may well be true from the point of view of the rule of law. Nevertheless, many athletes consider this regulation on selecting referees as a restriction.
3. The closed list of referee systems must therefore be abolished. An arbitral tribunal that is to be accepted by all parties requires a free choice of arbitrator. This would send a positive signal effect to the athletes. Moreover, an accurate list opening would have few practical consequences and be possible without significant difficulties.¹²⁸
4. Therefore, the latest trend to create so-called "special lists" in addition to the list of referees can be observed with scepticism. Such lists may not be binding but may only be regarded as

¹²⁷ Monheim, Sportsman rights, p. 189.

¹²⁸ Oschütz, Sports Arbitration, p. 102.

recommendations for referees with special qualifications in particular areas (e.g. in the field of doping sanctions).

5. Furthermore, it would be helpful to take up the proposal of the Federal Supreme Court and point out which arbitrator was included on the list of the whole proposal. This would make it easier for athletes to find an arbitrator they believe represents their interests.
6. To achieve the most excellent possible transparency, a business distribution plan should be drawn up in advance for two years, noting which arbitrator chairman is for which proceedings. 6. Furthermore, the controversial practice of appointing the chairman of the arbitral tribunal in appeal proceedings should be changed. It would even make sense to create a closed list of the potential chairmen of the arbitral tribunal. On the other hand, the selection of party-appointed arbitrators should be made possible without needing a list.

4.5. Independence of arbitrators

In addition to the institutional independence of the arbitral tribunal, each arbitrator in the specific proceedings must also be individually independent and impartial within the meaning of Art. 180 para. 1 letter c CPIL. This was even mentioned in the procedural law of the CAS with Art. R33 para. 1 CAS-Code again expressly regulated.

The concept of independence within the meaning of Art. 180 para. 1 letter c CPIL can be divided into an objective and a subjective component.¹²⁹ Objective means that no arbitrator may depend on a party, whereas subjective means mental independence, which is related to impartiality.¹³⁰ In addition, the formula generally applies that there must be considerable doubt about the independence of an arbitrator based on factually proven circumstances to fulfil the ground for refusal of Art. 180 para. 1 letter c CPIL.¹³¹

The judgment illustrates what the formula means in practice. Mere suspicions against an arbitrator's impartiality are insufficient, not even vague hints from submitted evidence. Instead, one must substantiate one's argument, which is why one doubts the arbitrator's independence, if not the absolute proof¹³².

In the following, we will first examine the general requirements for the independence of an arbitrator in the sports jurisdiction. It should be noted that the parties do not nominate the chairman of the arbitral tribunal. Therefore, the question of whether the chairman of the CAS should be subject to a stricter standard of independence is also addressed.

¹²⁹ Peter/Besson, in: Basel Commentary on the, Art. 180, marg. no. 12

¹³⁰ Peter/Besson, at the place indicated

¹³¹ Peter/Besson, in: Basel Commentary on the, Art. 180, marg. no. 13

¹³² SFT from 10.06.2010, 4A_458/2009, E.3.2.1 and 3.2.2, STF-Nr. 4A_530/2011 from Oktober 03 2011 in www.swissarbitrationdecisions.com

4.6. General requirements for the independence of an arbitrator in the sports jurisdiction

The legislator in Art. 180 para. 1 letter c CPIL has made it possible to challenge the arbitrator if circumstances give rise to justified doubts about his independence. Case law has developed various groups of cases in this respect. For example, the arbitrator may not have a subordinate relationship with a party, e.g., an employee.¹³³ Other forms of substantial economic ties between the arbitrator and the party may also give rise to such doubts.¹³⁴ However, the Federal Supreme Court has stated that the unique features of the sports jurisdiction must be taken into account when assessing independence¹³⁵.¹³⁶ The Federal Supreme Court emphasises that, due to the unique nature of sports jurisdiction, arbitrators can have previously worked for one of the parties on an ad hoc basis.¹³⁷

The Federal Supreme Court argues that the particularities of sports law mean that CAS arbitrators come into contact with sports organisations and lawyers specialising in sports law without having to doubt their independence. A restrictive interpretation would often lead to delays in the process and increase the challenge ability of an award. This would run counter to the meaning of sports arbitration and arbitration in general, which

¹³³ SFT of 09.02.1998 = ASA Bulletin 1998, 634, 645.

¹³⁴ STF 111 Ia 72, 74

¹³⁵ STF-129 III 445, 454

¹³⁶ STF 29.10.2010, 4A_234/2010 136 III 605

¹³⁷ STF 136 III 605, 612

is intended to enable a competent and, above all, rapid resolution of disputes.¹³⁸

The decision of the Federal Supreme Court is questionable. It correctly states that there is a manageable number of experts in the field of sports law. They deal with legal issues as arbitrators at CAS and, for example, as experts for associations. Nevertheless, two factors must be considered: In contrast to commercial arbitration, the parties in proceedings in front of the CAS have only a limited selection of arbitrators. Furthermore, arbitration in the field of sport is not voluntary, at least in the relationship between the athlete and the association, but is, in fact, "imposed" on the athlete.¹³⁹

The parties, in particular the athletes, are deprived of their legal judge by the arbitration procedure "dictated" by the associations. Therefore, it must be ensured that the arbitrators appointed by the parties do not have any party ties, which would make them appear as representatives of the parties. A higher degree of independence should therefore be demanded in sports law. To this end, it would help to introduce rules that create a certain standard of independence.¹⁴⁰

¹³⁸ STF 136 III 605, 614

¹³⁹ Rigozzi speaks of "arbitrage forcé"; on the problem of the lack of voluntariness of the arbitration agreement see page 58

¹⁴⁰ The problem also exists in arbitration courts such as the ICSID (International Centre for Settlement of Investment Disputes).

ICAS has recognised that due to the limited number of arbitrators, conflicts of interest can arise more quickly than in commercial arbitration, significantly as proceedings before the CAS increase.¹⁴¹

Therefore, with the reform of the ¹⁴²CAS Code of 2010, Art. S 18 para. 3 CAS Code prohibits arbitrators from acting as counsel in other proceedings before the CAS. This reform should be supported. It reduces the risk of possible conflicts of interest among the arbitrators and helps the CAS to achieve a more independent jurisdiction.

4.7. Applicability of the International Bar Association Guidelines for Determining Independence

Since the CAS Code only generally stipulates that the arbitrator must be independent, attempts have been made to adapt specific standards from commercial arbitration to the area of sports law. Concerning the CAS, for example, the Federal Supreme Court had to clarify to what extent violations of the IBA Guidelines on Conflicts of Interest in International Arbitration indicate a possible bias on the part of an arbitrator. These guidelines contain case constellations indicating an arbitrator's dependence or partiality.

¹⁴³Three lists with different constellations were created. Depending on the

¹⁴¹ Reeb, ASA Bulletin 2007, p. 74

¹⁴² <https://www.tas-cas.org/en/icas/code-icas-statutes.html>

¹⁴³ http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest

relevant list, the arbitrator shall not dismiss his appeal for the relevant proceedings. The red list contains cases in which an arbitrator himself is to challenge his appeal because he has a considerable conflict of interest in this procedure. There is also an orange list of cases in which the arbitrator should ascertain whether the reasons given in that list affect his independence. Finally, there is a green list with constellations harmless to independence.¹⁴⁴,¹⁴⁵ The Federal Supreme Court noted that the IBA Guidelines did not constitute a binding right. Therefore, it cannot automatically be concluded from an infringement that an irregular appointment within the meaning of Art. 190 para. 1 letter a CPIL exists. Instead, it is necessary to check on a case-by-case basis whether or not the infringement leads to irregular staffing.¹⁴⁶

According to the Federal Supreme Court case law, the IBA guidelines are, therefore, not necessarily an indicator of the bias of an arbitrator. Nevertheless, one could consider establishing a system similar to the IBA guidelines for proceedings in front of the CAS.¹⁴⁷ Arbitration in the field of sports must be subject to stricter standards of independence than in the field of voluntary arbitration because of its particularities. The CAS reform now makes Art. R33 para. 1 CAS Code also provides that the arbitrators must

¹⁴⁴ Coccia, Bulletin TAS 2013/2, p- 5.

¹⁴⁵ STF of 10.06.2010, 4A_458/2009, E.3.3.1.

¹⁴⁶ STF of 10.06.2010, 4A_456/2009 E.3.3.3.1; STF from 09.10.2012, 4A_110/2012, E.2.2.2

¹⁴⁷ Downie, Melbourne Journal of International Law, Vol. 12, p. 26

disclose all circumstances that may affect their independence.¹⁴⁸ In order to be able to classify such circumstances, the creation of a "CAS Directive determining independence" would be desirable. This would be a useful preventive measure to identify possible conflicts of interest during the proceedings. Irrespective of whether, according to the standard of the Federal Supreme Court, a ground for challenge according to Art. 190 para. 2 letter, a CPIL exists; it can thus be avoided at an early stage when proceedings are suspected of lacking the independence of the arbitrators.

4.8. Stricter independence requirements for the chairman of the arbitral tribunal

As a rule, the chairman of the arbitral tribunal is nominated by an officially neutral third party. The question arises whether the presiding arbitrator must meet higher requirements concerning his independence than the party-appointed arbitrators.

Neither the law in Art. 180 CPIL nor the CAS Code distinguish between the chairperson and the party-appointed arbitrators. In the past, the Federal Supreme Court also believed that party-appointed arbitrators and the chairperson should not be subject to different standards.¹⁴⁹ Following the entry into force of the CPIL, it has relativized its view and now leaves open

¹⁴⁸ Noth/Abegg, Causa Sport 2013, p. 114.

¹⁴⁹ STF 92 I 271, 277.

the question of whether higher requirements should be placed on the independence of the chairperson.¹⁵⁰ The legislator and parts of the literature advocate a different standard of assessment.¹⁵¹ Finally, the parties will seek an arbitrator they believe will best represent their interests in the dispute and, where appropriate, decide in their favour.¹⁵² This leads to the fact that in international practice, the party-appointed arbitrators are sometimes even regarded as indirect party representatives.¹⁵³ This makes it all the more critical for the autonomy of the entire arbitral tribunal that the chairman's independence is beyond question.¹⁵⁴ A stricter standard must therefore be applied to the chairman of the arbitral tribunal than to the arbitrators appointed by the parties.

For implementation in practice, it would be helpful to set clear limits in advance through directives as to when a chairman can be rejected or must himself point out his lack of independence. In this respect, the considerations of ICAS are to be welcomed, which takes up approaches from the literature¹⁵⁵ and plans to create a Special List of Presidents. This list should list arbitrators who can only act as chairmen.¹⁵⁶ This could also include the business, as mentioned earlier, distribution plan.

¹⁵⁰ STF 118 II 359, 362.

¹⁵¹ Bucher, in: commemorative publication, p. 599.

¹⁵² Bucher, in: commemorative publication, p. 599.

¹⁵³ Peter/Besson, in: Basel Commentary CPIL, Art. 180, para. 14.

¹⁵⁴ Lalive/Poudret/Reymond, Droit de l'arbitrage, Article 180, para 4.

¹⁵⁵ Rigozzi, Arbitrage international, paragraph. 575.

¹⁵⁶ Rigozzi/Hasler/Quinn, Jusletter of 03.06.2013, page. 5 with further proofs.

4.9. The problem of an arbitrator's lack of participation in the Art context. 190 para. 2 letter a CPIL

It is generally accepted in the prevailing doctrine that within the scope of the CPIL, all arbitrators must be obliged to participate in deliberations and voting.¹⁵⁷ Thus, it may also lead to an irregular composition if not all arbitrators participate in the proceedings or specific procedural steps.¹⁵⁸ The arbitrator cannot, however, justify a deficiency in the sense of Art. 190, para. 2, letter a CPIL by his absence from the decision. Otherwise, the arbitrator named by the parties would have the possibility of deliberately absent himself from the proceedings to prevent his party from taking an unfavourable decision and thus blocking the decision or forcing a different result. Instead, it is necessary that the arbitrator has been restricted in his participation rights by external influence and, therefore, cannot participate in the process.¹⁵⁹

In the context of sports arbitration, the Federal Supreme Court had to deal with the question of when a lack of participation by an arbitrator leads to the setting aside of a judgment. According to Art. 190 para. 2 letter a CPIL, the plaintiff complained that the arbitral tribunal had no longer been composed correctly when the judgment was pronounced since the arbitrator selected by

¹⁵⁷ Rüede/Hadenfeldt, arbitration law, p. 297.

¹⁵⁸ Solhchi, *Arbitration International* 1993, 303.

¹⁵⁹ STF 128 III 234, 238, STF 4A_292/2019 from 16/10/2019, STF 4A_628/2018 from 19/06/2019

him had already resigned and no longer participated in the deliberations on the grounds for the judgment. Therefore, his right to a correctly composed arbitral tribunal was violated. The Federal Supreme Court ruled on what happens if an arbitrator withdraws from the case during the proceedings. If an arbitrator resigns and no successor is appointed, an invalid award shall be made by an incomplete arbitral tribunal. However, a resignation can only be considered adequate if it is accepted by the other arbitrators or at least by the chairman of the arbitral tribunal. Otherwise, it is formally ineffective. If the arbitral tribunal does not grant the arbitrator's request for the challenge, the arbitrator must appeal the decision to the Secretary General of CAS. If he fails to do so, he may not provoke an invalid judgment simply by being absent from the deliberations if most of the arbitral tribunal members decide to proceed and issue an arbitration ruling. Finally, Art. R59 para. 1 CAS Code is the decision by the majority of arbitrators.¹⁶⁰

The decision of the Federal Supreme Court is to be welcomed as it ensures that the arbitral tribunal remains capable of acting if one of the three arbitrators attempts to prevent the award by resigning.

4.10. Summary

1. The complaint of irregular composition has an essential significance in the history of the CAS. It was the impetus for the first significant

¹⁶⁰ STF of 03.01.2011, 4A_386/2010 E.4.3.

reform of the CAS in 1994. In addition, an action for rescission under Art. 190 para. 2 letter a CPIL prompted recognition as a genuine arbitral tribunal by the state judiciary.

2. Since the 1994 ruling, no CAS award has been overturned because of the lack of independence of the arbitral tribunal. This shows that reforms after 1994 are going in the right direction. Nevertheless, there are still points that need to be reformed.
3. Although the controversial practice of the closed list of arbitrators is lawful in the opinion of the Federal Supreme Court, there is still criticism from various quarters of this condition. It is requested that the CAS list be opened to the effect that it should only be seen as a recommendation of suitable candidates.¹⁶¹ Opening the list would be desirable to give athletes a better opportunity to nominate their stakeholders in the respective procedures. At the very least, however, there should be an indication of which referee was proposed by which side for the list.
4. Contrary to the previous case law of the Federal Supreme Court, it must be demanded that a stricter standard of the independence of the arbitrators be applied in the sports jurisdiction. The fact that the procedure is "imposed" on the athletes and the closed list of referees

¹⁶¹ Krähe, *Journal for Sport and Law* 2012, 17.

requires ICAS to check carefully whether there are any economic or similar relationships between the parties and the referees.

5. It is, therefore, to be welcomed that the reform of the CAS Code in 2010, 2016, 2017 and 2019 has newly regulated that a party arbitrator may not have previously represented the same party as a lawyer in other proceedings. This rule should help to reduce conflicts of interest and doubts about the independence of arbitrators.
6. In addition, it would make sense for ICAS to set standards comparable to those of the IBA Guidelines for CAS referees. This allows the proceedings to be freed from the suspicion of influence by one of the parties at an early stage.
7. It is also advisable to create a business distribution plan for the appointment of the chairperson of an arbitral tribunal, which determines the competent judges from the outset, even in front of it is foreseeable which proceedings will be held be conducted in front of the CAS.

**5. Incorrect determination of jurisdiction or lack of jurisdiction
(Article 190 Parag. 2 letter b CPIL)**

A further ground for rescission exists, according to Art. 190 para. 2 letter b CPIL if the arbitral tribunal has incorrectly accepted its jurisdiction or lacks jurisdiction. The same shall apply if, despite a prior

complaint by a party, the jurisdiction is not examined at all or only insufficiently examined.¹⁶²

5.1. General information

The ground for challenging Art. 190 para. 2 letter b CPIL refers to the arbitral tribunal's competence to decide on the specific subject-matter of the dispute.¹⁶³ If this is incorrectly assessed, the arbitral decision may be appealed against.

The decision-making competence of the arbitral tribunal is based on two components:¹⁶⁴ On the one hand, the subject-matter of the dispute must be capable of arbitration, i.e. it must be allowed to be heard in front of an arbitral tribunal. On the other hand, there must be an effective exclusion of the ordinary jurisdiction in favour of personal jurisdiction. The latter is generally done through an arbitration agreement.

5.2. Forfeiture of the right to complain and examination competence of the Federal Supreme Court

According to Art. 186 para. 1 CPIL, the arbitral tribunal may decide on its jurisdiction. It also remains the case if another arbitral tribunal or a state court, irrespective of whether foreign or domestic, was first seized, see Art. 186 para.

¹⁶² STF 128 III 50, 54; STF 4P.226/2004, E.4.3.3 and E.5.

¹⁶³ STF130 III 125, 129.

¹⁶⁴ Berti/Schnyder, in: Basel Commentary CPIL Art. 190, marg. no. 36 and 38,

1 CPIL. By incorporating this provision into the CPIL, the arbitral tribunal in such a case no longer has to wait until the foreign court, or the other arbitral tribunal has ruled on the matter under Art. 9 CPIL but can immediately decide for itself whether or not it has jurisdiction over the dispute.¹⁶⁵ Thus, if a legal dispute is brought in front of a Bulgarian court simultaneously, the CAS does not have to wait until this court declares the CAS competent. Instead, he may, immediately after the proceedings have come in front of him, verify whether he is competent and, if so, negotiate on the merits.

Only in exceptional cases, when one of the parties does not participate in the proceedings or when the arbitrability of the subject-matter of the dispute is in dispute between the parties, shall the arbitral tribunal *ex officio* decide on its jurisdiction. However, the arbitral tribunal does not examine the jurisdiction *ex officio* but is only based on a plea by one of the parties (see Art. 186 (2) CPIL). Like the notice of vacancy, the plea of jurisdiction or lack of jurisdiction must also be raised before the main action is brought (see Art. 186 (2) CPIL). The right to object, according to Art. 190 para. 2 letter b CPIL shall otherwise be forfeited.

If the plea of lack of competence is not raised, a plea without complaint is to be assumed. This means that the arbitral tribunal may accept its jurisdiction at the latest if the parties enter into a hearing in front of the

¹⁶⁵ Müller, ASA Bulletin 2006, 648.

arbitral tribunal without a valid arbitration agreement but also without challenging this fact at the beginning of the proceedings.¹⁶⁶ This results from the principle of good faith that questions of court organisation should be clarified as early as possible. In addition, the aim is to relieve the arbitral tribunal and the ordinary courts of jurisdiction.¹⁶⁷

The party does not need to be aware of the legal consequence of its unscrupulous submission.¹⁶⁸ This is a risk not to be underestimated.

According to Art. 186 (3) CPIL, the arbitral tribunal usually issues an *ordonnance* in response to the complaint made in the proceedings. Art. 186 (3) CPIL must be challenged in front of the Federal Supreme Court under Art. 190 (2) (b) CPIL. In doing so, the court is not bound by the previous decision but may again comprehensively examine the question of jurisdiction. However,¹⁶⁹ the actual findings of the contested arbitral decision will only be reviewed if admissible complaints within the meaning of Art. 190 (2) CPIL are made against these findings of fact.¹⁷⁰ The decision on jurisdiction can constantly be challenged independently.¹⁷¹ This results from the fact that the preliminary decision affirming or denying jurisdiction has a binding effect on the parties, comparable to that of a final decision.¹⁷²

¹⁶⁶ Berti/Schnyder, in Basel Commentary on the CPIL, Art. 190, marg. no. 50.

¹⁶⁷ Schlosser, Law of international private arbitration, marg. no. 805

¹⁶⁸ Poudret/Besson, marg. no. 500

¹⁶⁹ STF Court 117 II 94, 96.

¹⁷⁰ STF 134 III 565, 567; STF 133 III 139, 141; STF 129 III 727, 733.

¹⁷¹ Netze, Magazine for Sport and Law 2011, 4.

¹⁷² Berger/Kellerhals, International Arbitration in Switzerland, para. 655

The following section examines the possibilities for challenging the arbitrament according to Art. 190 para. 2 letter b CPIL.

5.3. Incorrect legal basis for the procedure

The first possibility of a challenge, according to Art. 190 para. 2 letter b CPIL is given if the arbitral tribunal incorrectly assesses the legal basis for the decision-making authority. It is conceivable, for example, that the arbitral tribunal may refer to Chapter 12 of the CPIL concerning the proceedings, even though the parties had agreed on proceedings under the provisions of the Swiss Code of Civil Procedure according to Art. 176 (2) CPIL. As a result, the arbitral tribunal did not have jurisdiction since it could not have had jurisdiction as an international arbitral tribunal under the arbitration agreement.¹⁷³

5.4. Arbitrability of the subject-matter of the dispute

A further defect is, according to Art. 190 para. 2 letter b CPIL exists if the subject matter of the arbitral proceedings is not arbitrable. If that were the case, the arbitral tribunal would not have jurisdiction to settle the dispute.

¹⁷⁴Art determines the conditions for arbitrability. 177 para. 1 CPIL.

Accordingly, there must be a pecuniary dispute. This term is interpreted very broadly in the Swiss legal system, i.e. it includes not only claims for cash

¹⁷³ Schnyder, Causa Sport 2005, 355. STF 126 III 524.

¹⁷⁴ Briner, in Baseler commentary of the CPIL, Art. 177, marg. no. 14.

benefits but all claims that by their nature can be estimated in money or represent a monetary asset or liability.¹⁷⁵ With this economic viewpoint, especially in international sports law, there will probably be a property law dispute in most cases since, ultimately, every impairment of professional sports has an economic effect.¹⁷⁶ The arbitrability of the subject-matter of the dispute shall be determined by Swiss law. This may result in disputes that are not arbitrable under the law of the state in which the parties are domiciled being brought in front of the CAS.

A classic example of this problem in sports law is labour law disputes. In Several states, Labour law, for example, an arbitration agreement regarding such a legal dispute, is excluded. In Switzerland,¹⁷⁷ on the other hand, labour disputes within the scope of the CPIL are arbitrable without restrictions.¹⁷⁸ This may result in an invalid arbitration agreement on CAS, subject to some country law. Nevertheless, the jurisdiction of the CAS may be established through an undisputed submission of both parties to the arbitration proceedings.¹⁷⁹ Mandatory provisions of a foreign legal system that define arbitrability more narrowly are not to be observed by the CAS.¹⁸⁰ In arbitration proceedings, arbitrability is determined by local law. The CAS, as a

¹⁷⁵ Hand Commentary on Swiss Private International Law Art. 176-178, marg. no. 8.

¹⁷⁶ Oschütz, Sports Arbitration, page 152.

¹⁷⁷ Pfister, Journal for sport and law 2006, 137

¹⁷⁸ Oschütz, Sports Arbitration, p.161.

¹⁷⁹ Pfister, Journal for sport and law 2006, 139.

¹⁸⁰ SFT from 23.05.2012, 4A_654/2011 E.3.4.

Swiss arbitral tribunal, therefore, assesses the arbitrability according to the Swiss arbitration procedure right.¹⁸¹

According to Art. V para. 2 letter a YNC, the arbitrability of the subject-matter of the dispute in enforcement proceedings is determined under the law of the State in which enforcement is sought. There is a risk that the arbitrament of the CAS may not be enforced in the State where the parties are domiciled. The parties should consider this risk before commencing litigation in front of the CAS. Otherwise, there is a danger that they will win the legal dispute but will not receive an enforcement order against the opponent unwilling to pay, as the arbitral decision can be denied enforceability according to Art V para. 2 letter a YNC.

This means many legal disputes can be heard in Switzerland before an arbitral tribunal, although other legal systems exclude this. For example, according to the Swiss Federal Supreme Court case law, an arbitral tribunal may review contracts for compliance with European competition and antitrust law (Art. 101 Treaty on the Functioning of the European Union). However, this is, in principle, reserved to the European Commission according to Art. 104 The Treaty on the Functioning of the European Union (TFEU).¹⁸² This means that, under Swiss law, the CAS can theoretically examine contracts for compatibility with EU competition law, for example.

¹⁸¹ Hofmann, *Journal for sport and law* 2014, 26

¹⁸² SFT 118 II 193 to 105.

According to Art, the CAS has no right to refer the matter to the ECJ (European Court of Justice). 267 TFEU. Switzerland is not a member of the EU, and therefore a Swiss arbitral tribunal does not fall within the scope of Art. 267 TFEU, regardless of whether an arbitral tribunal is, in principle, subject to the obligation to produce a copy.¹⁸³

With the liberal interpretation of Art. 177 CPIL, the Federal Supreme Court is pursuing the line of opening Switzerland as a place of arbitration as far as possible to disputes of all kinds, which is why it would hardly be possible to successfully contest an arbitral decision due to the lack of arbitrability of the subject matter of the dispute.¹⁸⁴

The problem of whether a judgment has already been rendered on the subject-matter of the dispute in proceedings (*res iudicata*) does not concern the question of the fundamental arbitrability of the dispute and is therefore not contestable under Art. 190 para. 2 letter b CPIL.¹⁸⁵

5.5. The requirements of the arbitration agreement as the basis for the competence of the arbitral tribunal

The arbitration agreement shall, except in the case of an objection-less submission, form the basis for the jurisdiction of the arbitral tribunal. It always constitutes a contract, whether an arbitration clause or an arbitration

¹⁸³ Also European Court of Justice, Rs. 102/81 Nordsee/Mond.

¹⁸⁴ Berti/Schnyder, in: Basel Commentary on the CPIL, Art. 190, marg. nr. . 40.

¹⁸⁵ Berger/Kellerhals, Internationale Arbitration in Switzerland, marg. nr.. 1555

agreement. ¹⁸⁶According to the prevailing opinion in Switzerland, it is of varied legal nature with substantive and procedural law elements. 190 para. 2 (b) CPIL. For assessing the effectiveness of an arbitration agreement, substantive law is decisive mainly, irrespective of its legal nature. However, the practical relevance of this distinction is limited concerning Art. ¹⁸⁷

The leading case of application of Art. 190 para. 2 letter b CPIL is the review of the validity of the arbitration agreement. Although the term "arbitration agreement" is not defined in the CPIL, it is presupposed in Art. 178 CPIL. ¹⁸⁸ Jurisprudence has defined it as "a multilateral treaty in which two or more parties waive jurisdiction in respect of a particular, existing or future dispute and declare an arbitral tribunal competent". ¹⁸⁹Under Swiss law, a distinction is made between the arbitration agreement for disputes that have already arisen and the arbitration clause for future disputes, although the latter now prevails in sports law.

5.5.1. Law applicable to the assessment of the effectiveness

Each arbitration agreement is examined individually by the Federal Supreme Court as to its material effectiveness. Particularly in sports, it is contained in the main contract or the statutes of an association. ¹⁹⁰It is not

¹⁸⁶ Jermini, challenge, mar. nr. 356

¹⁸⁷ Jermini, Contestation, margin no. 356.

¹⁸⁸ Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 3.

¹⁸⁹ STF 130 III 66, 70, STF 4A_404/2010 from 04/19/2011, STF 4A_98/2011, STF 4A_398/2019 from 16/10/2018

¹⁹⁰ Rigozzi, Arbitrage International, marg. number 770.

decisive for the effectiveness of the arbitration agreement whether the contract or the statutes themselves are effective, see Art. 178 para. 3 CPIL. Instead, the arbitration agreement itself must satisfy the requirements of Art. 178 CPIL.¹⁹¹

The principle of favour validates the determination of effectiveness. Accordingly, the arbitration agreement must be effective in at least three ways.¹⁹² According to Art. 178 para. 2 CPIL, it must correspond either to the law chosen by the parties, to the law applicable to the dispute or Swiss law. It should be noted that the entire validity must derive from one of the three legal systems and not, in respect of each sub-question, from another of the three legal systems.¹⁹³

In the following, it will be analysed in more detail how the case law of the Federal Supreme Court on individual aspects of the substantive requirements of an arbitration agreement turned out to be.

5.5.2. Requirements for the form of the arbitration agreement

As the only formal requirement, it must be in writing, see Art. 178 para. 1 CPIL, whereby no signature of the parties is required.¹⁹⁴ The arbitration agreement, therefore, does not necessarily have to be concluded through a

¹⁹¹ Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 90.

¹⁹² Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 24

¹⁹³ Volken, in: Zurich Commentary on the CPIL, § 178, marg. nr. 53

¹⁹⁴ Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 15

separate contract but can also be made by reference to another document.¹⁹⁵ Not even a direct reference to the arbitration clause itself is necessary. Particularly in sports law, the actual contract (e.g. registration form for a competition) often contains only a reference to the arbitration clause enshrined in the association's statutes. It is sufficient to refer to a separate document in which the arbitration clause is fixed. The Federal Supreme Court has explicitly confirmed this in several decisions.¹⁹⁶ For example, it was considered permissible for a football association to refer to FIFA's statutes in its statutes and, at the same time to create a legally effective reference to the CAS arbitration clause contained in the statutes.¹⁹⁷

From a formal point of view, therefore, there is nothing to be said against an arbitration agreement by referral. In the context of the content review, it must be examined whether the arbitration clause was so surprising for one of the parties that it is ineffective.

5.5.3. Material validity and scope of the arbitration agreement

From a material point of view, an arbitration agreement must have been concluded based on concurrent declarations of intent. The other conditions for effectiveness, such as legal capacity and effective representation, must

¹⁹⁵ Adolphsen, Doping Penalties, p. 550.

¹⁹⁶ Recueil du TAS I, p. 577.

¹⁹⁷ SFT from 09.02.2009, 4A_460/2008 E.6.2. and SFT 18.04.2011, 4A_640/2010, E.3.3

be fulfilled.¹⁹⁸The respective Staff Regulations shall determine the relevant law according to Art. 33 f. CPIL (for natural persons) or Art. 154, 155 letter c CPIL (for companies).¹⁹⁹In addition, the general principles of civil law of the legal order under the law of which the substantive validity of the arbitration clause is assessed shall apply.²⁰⁰

The biggest problem with arbitration agreements in sports is the scope and validity of the arbitration agreement. It is often necessary to interpret whether a clause underlying a dispute gives rise to an effective jurisdiction agreement for an arbitral tribunal.

5.5.4. Generous interpretation of arbitration agreements by the Federal Supreme Court of Switzerland

In its case law, the Federal Supreme Court has established that the agreement must clearly state that the parties wish to submit the dispute to arbitration, excluding the ordinary courts. This may give the impression that the Federal Supreme Court is somewhat restrictive regarding recognising arbitration agreements. However, if one looks at the case law practice to date, it is striking that the Federal Court²⁰¹ is rather generous when interpreting arbitration agreements in favour of the CAS.²⁰²

¹⁹⁸ /Poudret/Reymond, Droit de l'arbitrage, Art. 178, marg. nr 14.

¹⁹⁹ SFT 138 III 714, 720.

²⁰⁰ Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 25.

²⁰¹ SFT133 III 235, 244.

²⁰² SFT 133 III 235, 245 a129 III 727, 735, SFT Nr. 4A_342/2019 from the January 6, 2020

For example, in the case of so-called "pathological clauses", i.e. clauses that are either unclear,²⁰³ incomplete or contradictory²⁰⁴.

The Swiss Federal Tribunal decisions show that the competence of the CAS can also be established with the aid of a supplementary interpretation of the contract of the arbitration agreement.

The generous interpretation of arbitration agreements by the Federal Supreme Court sometimes has far-reaching consequences²⁰⁵.

The Federal Supreme Court pointed out that the FIFA rules provide that FIFA and WADA may appeal to the CAS in doping matters against internal decisions of FIFA members (see Art. 61 paras. 1, 5 and 6 of the FIFA Statutes).

The decision shows how the international associations can enforce the legal route to the CAS via a regulatory chain "international association - national association - athlete".²⁰⁶ Nevertheless, this does not give the CAS any "universal competence" in sports law. In other disputes, there are no similar regulations. Decisions by national federations which do not concern doping cases cannot be readily brought in front of the CAS for review by the international federations. In the area of doping sanctions, Art. 13 WADA has

²⁰³ SFT 138 III 29, 35,

²⁰⁴ Girsberger/Ruch, in: FS-Bergsten, page 126

²⁰⁵ SFT of 09.01.2009, 4A_460/2008 = Causa Sport 2009, 7.

²⁰⁶ Martens, in: Sport unites our states, p. 106.

allowed the international federations to review doping cases in court in front of the CAS without being a party to the previous proceedings.²⁰⁷ In the area of doping, this means that thanks to the regulatory chain described above and with the help of WADA, doping sanctions can always be negotiated at the end of the last instance in front of the CAS. On the one hand, this is desirable in the sense of a uniform jurisdiction. On the other hand, it should also be an incentive for those responsible for reducing further the deficits mentioned above concerning the independence of the arbitral tribunal.

6. Limits of the jurisdiction of the CAS

Irrespective of the generally "benevolent" interpretation of arbitration agreements to the CAS, the Federal Supreme Court has already marked limits to the jurisdiction of the CAS in one case or another.

It becomes problematic, for example, if the WADC has not yet been integrated into the statutes of an association.²⁰⁸ The Federal Supreme Court has thus clarified that small written application forms, including arbitration agreements, are not binding for disputes beyond the competition.

Since the Federal Supreme Court could not recognize any other jurisdiction of the CAS either, it overturned the judgment.

²⁰⁷ Ramoni, in: Landmark Cases, p. 165.

²⁰⁸ SFT from 06.11.2009, 4A_358/2009 E.3.2.3

Contradictory clauses also pose a problem ²⁰⁹.

The supreme court decision mainly referred to the Swiss definition of determining an arbitration agreement. It noted that two conflicting clauses, such as the simultaneous existence of an arbitration agreement and an agreement on the place of jurisdiction in favour of the ordinary courts, did not indicate that the parties to the dispute had the same intention of excluding the ordinary courts of law in favour of an arbitral tribunal. If no further indications exist that the parties intend to exclude ordinary jurisdiction in favour of arbitration, no effective arbitration agreement can be accepted.

In part, it was concluded from this judgment that a restrictive interpretation of the arbitration agreement must always be given to the CAS if a court of association has not already ruled in a lower instance. As guaranteed by CAS, there would be no need to obtain a uniform review of the dispute. However,²¹⁰ it is incorrect to derive such a generalisation from that case-law. What is decisive is that, in the case of conflicting jurisdiction or arbitration clauses, it must be clear beyond the contractual provisions that the will to bring the dispute in front of an arbitral tribunal exists. This can be done, for example, by having already been heard in a lower instance in front of an association court without rebuke, which exclusively provides for appeals against the CAS.

²⁰⁹ SFT 17.01.2013, 4A_244/2012.

²¹⁰ Zimmermann, Causa Sport 2014, 20.

7. Content control of arbitration agreements and the problem of "imposed" arbitration in sport

As mentioned above, arbitration agreements in sports are often justified by reference to the Association's statutes in admission forms for membership of the Association. In addition, they are often included in the "Player Entry Forms". In both cases, the arbitration clause is unilaterally imposed by the associations as a condition of admission or participation. The question is, therefore, to what extent such clauses are subject to content review. There are always controversial discussions about this.²¹¹

7.1. Arbitration agreement

First, one could argue that an arbitration agreement, for example, by referring to the statutes, is surprising for the athlete. In Switzerland, this is controlled based on the principle of trust initially developed for the general terms and conditions.²¹² A distinction must be made between a specific reference to an arbitration clause contained in another document and a global reference to another contract or set of rules containing an arbitration clause.

The specific reference is unproblematic from this point of view.²¹³ The Federal Supreme Court has ruled that a specific referral does not violate the principle of trust. The arbitration agreement shows a clear will to resolve the

²¹¹ Rigozzi, Arbitrage international, margin number 811.

²¹² Wenger/Müller, in: Basel Commentary on the CPIL, Art. 178, marg. nr. 58.

²¹³ Rigozzi, Arbitrage international, marg. nr 822

dispute by arbitration, and it does not matter whether this is done in the same contract or by reference to a separate document.²¹⁴

At first glance, the global reference to a separate contractual or regulatory framework, which includes an arbitration clause, appears more problematic. There could be a danger that the athlete will not have to reckon with an arbitration clause, and therefore this clause is surprising for him.²¹⁵

For an arbitration agreement to be effective, the Federal Supreme Court requires that the athlete has positive knowledge of the arbitration clause, for example, if the athlete has previously conducted arbitration proceedings based on the clause in question. In this respect, the Association may assume that the person concerned repeatedly agrees to the arbitration clause following the principles of good faith.²¹⁶

If we now consider the conditions in sports, it is hardly conceivable that an athlete would be surprised by an arbitration clause. Since the introduction of the WADC at the latest, legal recourse to the CAS or a national sports arbitration court as a preliminary instance for legal disputes in the field of doping has been the absolute standard. One can certainly say that an arbitration clause for an athlete is to be regarded as "typical for the industry".

²¹⁴ SFT 110 III 54, 58; SFT 111 Ib 253.

²¹⁵ SFT from 31.10.1996, Az.: 4C.44/1996 (Nagel vs. FEI).

²¹⁶ See Haas, *Journal for European Private Law* 1999, 370.

According to the case-law of the Federal Court of Justice, a professional sportsperson may, therefore, not, based on the arbitration clauses customary in his sphere of business, invoke the fact that such an arbitration clause is surprising for him. ²¹⁷An Athlete will have to explain particular circumstances, why he was not aware of the arbitration agreement and why he did not have to reckon with it. In any case, professional sportsmen and sportswomen can be assumed to be aware of arbitration in sports.

7.2. The "Imposed" Arbitration

It is questionable to what extent the athletes have the option of resolving the conflict through arbitration or ordinary jurisdiction. The issue of voluntariness is particularly problematic in the case of the exclusion of due process of law. This results from the associations agreeing on arbitration clauses referencing the association's statutes.

The athletes, but also the clubs, are dependent on the monopoly position of the respective international sports federations to let them participate in the competitions. ²¹⁸After all, in the vast majority of sports, there is only one world sports federation and only one national sports federation for each country (the so-called "one-place principle"). ²¹⁹Therefore, athletes find themselves in a

²¹⁷ SFT 31.10.1996, Az.: 4C.44/1996 (Nagel vs. FEI).

²¹⁸ *Summerer*, in: Practical Handbook Sports Law, marg. nr. 281. 8

²¹⁹ Art. 10 S. 3 the FIFA Statutes: „*Only one association is recognised in each country*“. A current version of the FIFA Statutes in english is available at http://de.fifa.com/mm/document/affederation/generic/02/14/97/88/fifastatuten2013_d_english.pdf.

"structurally inferior situation" compared to sports federations. You have no choice but to accept the arbitration agreement to participate in prestigious competitions or leagues. Therefore,²²⁰ in most cases, the arbitration agreement is not likely to be voluntary.²²¹ Even the Federal Supreme Court has stated that in sports, there is a hierarchical relationship between the federations and the athletes, which reduces the freedom of choice of the athletes and, in this context, also speaks of forced arbitration.²²²

This raises the question of the extent to which this problem can withstand the "imposed" arbitration agreement of a content review. Finally, in the literal sense, an "agreement" is between two parties.

Most arbitration clauses in sports are to be assessed under Swiss law, which is why the investigation at this point deals with the problem of the lack of voluntariness, primarily from the point of view of the Swiss legal system.

7.3. Content control based on provisions of Swiss law

The arbitration agreement constitutes a contract that, according to substantive law, is to be examined for its effectiveness. Concerning voluntariness, this contract must be measured against the provisions of Swiss law protecting the parties' free will.

²²⁰ Jung, *Journal for European Law Studies* 2014, p.178.

²²¹ Baddeley, *Journal of Swiss Law* 115.2, 238.

²²² SFT 133 III 235, 243.

The first relevant provision is Art. 27 Swiss Civil Code.²²³ According to it, "no one (...) may wholly or partly renounce his right and capacity to act" (para. 1) or "deprive himself of his liberty or restrict it to an extent contrary to morality" (para. 2).

Art. 27 SCC is a classic protective provision in Swiss law that protects a party from excessive obligations.²²⁴ For this reason, the Federal Supreme Court has generally ruled on arbitration that an arbitration agreement is incompatible with Art. 27 CC if it opens the way to an arbitral tribunal against the will of a party that cannot guarantee independent jurisdiction. The waiver of state jurisdiction also affects the scope of protection of this provision.²²⁵

The right of personality under Art. 28 para. 2 CC is also affected by an "imposed" arbitration agreement.²²⁶ In sports law, the Federal Court had to deal with the voluntary nature of an arbitration agreement.²²⁷ It did not have to decide whether, in the specific case, the exploitation of an economic superiority infringed free rights since it considered itself bound by the findings of the lower court in this respect. However, it reiterated that an arbitration agreement is not per se invalid if one party exploits its social or economic considerations when concluding the arbitration agreement. Other circumstances are required, which

²²³ Swiss Civil Code (SCC).

²²⁴ Journal for European Private Law 1999, 372

²²⁵ SFT 85 II 489, 501

²²⁶ Baddeley, ZSR 115.2, 238; Oschütz, Sports Arbitration, p.237.

²²⁷ SFT, Recueil du TAS I, S. 577

make the arbitration agreement unreasonable for the losing party. This should even apply if the participation in sporting competitions, i.e. the professional practice of the athlete, is affected.

7.4. Influence of the ECHR on the arbitration agreement

In addition to Swiss law, the arbitration agreement must be measured against Art. 6 para. 1 ECHR. In the Federal Court case law, some decisions affirm the applicability of Art. 6 (1) ECHR and those that deny its applicability.²²⁸

The Swiss Federal Supreme Court initially assumed the ECHR did not bind those private arbitral tribunals because it only applied to state courts.²²⁹In recent judgments, this view has been partially abandoned, and the binding of private arbitral tribunals to Art. 6 para. 1 ECHR has been recognised.²³⁰In addition, however, there are still decisions in sports arbitration that reject the transfer of Art. 6 ECHR principles to arbitration.²³¹In one case against UEFA, the Federal Supreme Court held that Art. 6 ECHR did not apply to arbitration proceedings.²³²The jurisdiction of the Federal Supreme Court is, therefore, not uniform.

²²⁸ See Haas, the new journal for arbitration proceedings 2009, 74.

²²⁹ SFT 112 Ia 166, 168.

²³⁰ SFT 17.02.2000, 4P.168/1999, E.2a; SFT 126 III 249, 253.

²³¹ See Jung, Journal for European Law Studies 2014, S. 179.

²³² SFT 09.03.2006, 4P.64/2001, E.2d)aa).

In literature, there are voices in both directions.²³³ One view denies the applicability of Article 6 (1) ECHR to arbitration since the wording of the provision only covers a "court based on law", but the arbitral tribunal is a private institution.²³⁴ Other votes, however, follow the argument of the Federal Supreme Court that there is an obligation to Art. 6 (1) ECHR.²³⁵ Arbitral rulings are equal by law to judgments of ordinary courts, which is why arbitral proceedings must also include the exact requirements for an independent body of law.²³⁶ In addition, it is argued that the possibility of arbitration can be at least indirectly attributed to statutory provisions, which means that it must also fit into a state regulatory framework.²³⁷

Ultimately, the better arguments speak in favour of the application of the ECHR to sports arbitration. As described, the legal route to the CAS is, in fact, "imposed" on the athlete. It then makes no difference whether someone is referred by law to a particular jurisdiction for legal redress or whether the state leaves this to a "substitute legislator". In both cases, the state establishes a particular direct or indirect jurisdiction. However, this must then be measurable, according to Art. 6 para. 1 ECHR.²³⁸ This is also consistent with the case law of the European Court of Human Rights (ECHR). Thus, in a

²³³ Jung, *Journal for European Law Studies* 2014, p. 186.

²³⁴ Landrove, in: *Human Rights at the Center*, 2005, p. 74.

²³⁵ Jung, *Journal for European Law Studies* 2014, p. 191.

²³⁶ SFT 126 III 249, 253.

²³⁷ Haas, *the new journal for arbitration proceedings* 2009, 75.

²³⁸ Haas, *the new journal for arbitration proceedings* 2009, 75.

judgment, the ECHR stated that the principles of Art. 6 (1) ECHR must be observed in arbitration proceedings.²³⁹The ECHR confirmed this case law in its decision for private arbitration proceedings.²⁴⁰

It should be noted that the ECHR cannot be applied directly to arbitration. It obliges the contracting states alone, but not private third parties, i.e. no private arbitral tribunal.²⁴¹However, the state courts are obliged by the ECHR to ensure that the fundamental values of the ECHR are also observed in arbitration proceedings. Therefore, Art. 6 (1) ECHR has at least an indirect third-party effect on arbitration proceedings.

It is even partly²⁴² assumed that the ECHR directly affects arbitration proceedings. Finally, the review procedure before the national court is not a procedure concerning civil law claims or obligations. However, it merely checks that the procedural law and fundamental principles of law comply with the ECHR, as the supervisory body of the ECHR has minimal scope for ensuring compliance with the ECHR through supervision by the state courts' control. Finally, the review procedure in front of the State court is not a procedure relating to civil claims or obligations but is merely a review of compliance with the procedural law and fundamental principles of law; consequently, the ECHR, as the

²³⁹ Heermann, *the new journal for arbitration proceedings* 2014, 67.

²⁴⁰ Compare ECHR, Arrêt du 28 octobre 2010, Requête 1643/06.

²⁴¹ Cour d'appel de Paris (15.9.1998), *Rev. arb.* 1999,

²⁴² Haas, *Journal for European Law Studies* 2009, 77.

controlling body of the ECHR, has only a minimal ability to control compliance with the ECHR through a review by the State courts.²⁴³ This is not convincing. It is overlooked that the rescission procedure in front of the Federal Supreme Court also indirectly deals with civil law matters in dispute and only applies a narrow standard of review.

If the ordinary courts did not consider the importance of the ECHR, the way to the ECHR would, in any case, be open.²⁴⁴ The ECtHR made it clear that it reserves the right to review state control of arbitral decisions based on the ECHR.²⁴⁵

The Federal Supreme Court itself provided the correct solution for the application of the ECHR to arbitration in action for annulment against a decision of the CAS: The evaluations of the ECHR must be taken into account in the interpretation of the grounds for challenge, i.e. also within the framework of Art. 190 para. 2 letter b CPIL and thus in the review of the arbitration agreement.²⁴⁶

7.5. Balancing of interests

Whether an arbitration agreement unreasonably restricts a party's civil liberties and whether its right to a statutory judge is so violated must be determined by weighing the interests of the parties to the dispute.

²⁴³ Jung, p. 191.

²⁴⁴ Habscheid, in: FS-Henckel, page 348.

²⁴⁵ Besson, ASA Bulletin 2006, 404.

²⁴⁶ SFT 21.02.2008, Az. 4A_370/2007 E.5.3.1.

On the one hand, there is the athlete's right to their legal judge and freedom of decision. On the other hand, the IOC, WADA and the sports federations are interested in a uniform jurisdiction in sports, as otherwise, the principle of equal treatment contained in the Fair Play Principle cannot be observed.

Concerning the weighting of the athletes' freedom of action, voluntary agreements are becoming less critical in arbitration law. It fails to recognise that, by international standards, there is recent jurisprudence that continues to attach great importance to this prerequisite.²⁴⁷ In general, the decisive factor is whether the restriction of civil liberties by the "imposed" arbitration is acceptable to the athlete.

First of all, the specific characteristics of sports must be taken into account. It would have detrimental effects if, in principle, any arbitration clause that was not concluded voluntarily were to be declared invalid. Any athlete could bring an action in front of a court of law so that the particularities of the different legal systems and court proceedings create a disparate body of case-law.²⁴⁸ It is to be feared that national courts may be somewhat more lenient with the local "sports gods" than perhaps appropriate.²⁴⁹ Uniform jurisdiction regulation in favour of an arbitral tribunal counteracts such legal fragmentation.²⁵⁰

²⁴⁷ Oschütz, Sports arbitration, p. 241.

²⁴⁸ Adolphsen, Doping Penalties, p. 295.

²⁴⁹ Adolphsen, the new journal for arbitration proceedings 2004, 170

²⁵⁰ Adolphsen, in: Sports Law Congress, p.351

In addition, there are numerous arguments for why arbitration can also be a constructive construction for the athlete. ²⁵¹For example, due to its specialisation, a sports court has greater professional competence and a shorter duration of proceedings.²⁵²It should be noted that an Athlete may prefer the ordinary courts in a particular case. Thus, he can believe that his rights are better protected by "his" state judge. One cannot automatically assume that an arbitration agreement is in the athlete's interests.

On the other hand, it must be considered that there is a special relationship between the athletes and the federations. Both are interdependent. A World Cup or Olympics would not work without the athletes. Nevertheless, the athletes could hardly market themselves well if the international associations did not give them a stage to present themselves. Consequently, one can speak of a "social pact" between the federation and the athlete. The arbitration agreement in the field of sports jurisdiction is in the interest of athletes, albeit only "indirectly voluntarily" due to the social fabric of the sport.

This approach should be accepted in principle. In addition to protecting their freedom of action, athletes are interested in being treated equally in the international sports world. This works best with a sports jurisdiction that is equally binding for all. Therefore, conflict resolution through the CAS is also in the interest of the athletes. This approach was followed by the Federal

²⁵¹ Adolphsen, in: Sport law in practice, marg. nr. 1030..

²⁵² Adolphsen, in: Sport law in practice, margin number 1030.

Supreme Court, which considers an arbitration agreement effective even in the absence of voluntariness due to the rapid resolution of conflicts in front of the CAS and the expertise of the arbitrators.²⁵³

Nevertheless, the view that the existing arbitration clauses are generally practical cannot be entirely accepted here. The sports arbitration court indeed has more advantages than disadvantages for the athlete. However, it must not be forgotten that the athlete must waive his claim to justice under Art. 6 (1) ECHR.²⁵⁴ Through the arbitration agreement, he gives up the possibility of bringing an action in front of a state court that satisfies the rule of law requirements. Of course, he still can complain about specific procedural errors and violate fundamental legal principles in front of a state court via Art. 190 para. 2 CPIL. In this case, however, protection by the state judge is only possible to a limited extent. The second variant, a direct action in front of the state court, will fail because the association objects to the arbitration agreement.²⁵⁵

By excluding ordinary legal recourse with the aid of an imposed arbitration agreement, the athlete waives the conduct of proceedings in front of a state judge, but no waiver of his rights under Art. 6 (1) ECHR can be inferred from this. After all, the athlete has no choice but to accept the

²⁵³ SFT 133 III 235, 245.

²⁵⁴ Haas, *the new journal for arbitration proceedings* 2009, p. 79.

²⁵⁵ Habscheid, in: *FS-Henckel*, p. 349.

arbitration agreement. However, a waiver of the rights under Art. 6 (1) ECHR must be voluntary. Otherwise, it is not practical.²⁵⁶

Given this result, the question arises whether an arbitration agreement concluded involuntarily and, therefore, consistently violates Art. 6 (1) ECHR.

A solution to this question can be achieved through the case-law of the ECtHR. Initially, arbitration and the ECHR arose primarily in the context of legally ordered arbitration, i.e. "enforced" by the state. The ECHR considered this compatible with Art. 6 (1) ECHR as long as the principles laid down in the ECHR were not undermined.²⁵⁷ In a more recent decision, the ECtHR, for the first time, also dealt with the problem of "imposed" arbitration agreements between private parties. Accordingly, arbitration "imposed" on a party must fully satisfy the requirements of Art. 6 (1) ECHR. Otherwise, a state court may not deny its jurisdiction despite the existence of an arbitration clause since the right of access to a court guaranteed by Article 6(1) ECHR is then infringed.²⁵⁸ The ECHR points out here that Art. 6 (1) ECHR also acts as a protective provision for weaker market participants in this respect. The provision is intended to guarantee that they have adequate means of defence, including a court that satisfies the requirements of Article 6 (1) ECHR.²⁵⁹

²⁵⁶ EMRK/GG, Kap. 14 marg. p. 46.

²⁵⁷ ECHR, judgment of 08.07.1986, *Lithgow vs. The United Kingdom*, Application 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81.

²⁵⁸ ECHR, Arrêt du 28 octobre 2010, Requête 1643/06.

²⁵⁹ ECHR, Arrêt du 28 octobre 2010, Requête 1643/06.

The listed arguments and the case-law of the European Court of Human Rights allow the following conclusion: The mere obligation to conclude an arbitration agreement does not necessarily mean that the arbitration agreement violates the ECHR. ²⁶⁰Since there are both stronger sports associations with their monopoly position and weaker market participants (the athletes) ²⁶¹In sport - also according to the case law of the Federal Court - and therefore, one can speak of an "imposed" arbitration, stricter standards must apply to the arbitration procedure than in the case of a voluntary agreement. A violation of Art. 6 para. 1 ECHR can be avoided if the principles of Art. 6 para. 1 ECHR are observed in the arbitration proceedings themselves. This means that the arbitral tribunal must offer a standard comparable to that of a state court in terms of organisation, independence and design of the proceedings.

The Federal Supreme Court described the CAS as a sufficiently independent arbitral tribunal. However, there is still room for improvement concerning the organisation, design of the arbitral proceedings and the selection of arbitrators to create its own "sports jurisdiction" for the sport's legal system.

Correctly, the Federal Supreme Court must subject "imposed" arbitration agreements to a content review but must not declare them invalid because

²⁶⁰ Haas, *the new journal for arbitration proceedings* 2009, p. 79.

²⁶¹ SFT 133 III 235, 243.

they came about as a result of social or economic coercion. However, even more than in the case of "voluntarily" agreed arbitration proceedings, it must ensure that the CAS meets the requirements of the rule of law. In particular, care must be taken to ensure that the court is sufficiently independent and impartial, that the principles of fair trial are respected and that the trial is, in principle, open to the public. If this cannot be guaranteed, the award must be quashed, as the arbitration agreement disproportionately discriminates against the athlete. Concerning Art. 6 (1) ECHR, this standard is higher than for a "normal" arbitral tribunal.

7.6. Decision of the Federal Supreme Court on the action for annulment according to Art. 190 para. 2 letter b CPIL and causal effect

Typically, a decision of the Federal Supreme Court has a causal effect. 190 para. 2 letter b CPIL. However, a case constellation is conceivable in which this would not be sufficient. In the case of an action for annulment, according to Art. Suppose the appellant successfully challenges a decision in which the arbitral tribunal wrongly declares that it has no jurisdiction. In that case, the appellant seeks not only the annulment of the decision but also the determination of the actual jurisdiction of the arbitral tribunal.²⁶²

Therefore, in this case, according to settled case law and the prevailing

²⁶² Berger/Kellerhals, *International Arbitration in Switzerland*, para. 1565.

doctrine, the Federal Supreme Court can, in the interest of legal certainty, determine the consequences of the annulment and, with the aid of a determination in the appeal decision, regulate the jurisdiction.²⁶³ The arbitral tribunal declared competent must then meet again in the same composition and decide on the case's merits.²⁶⁴

7.7. Summary

1. With Art. 190 para. 2 letter b CPIL, one can object to the lack of arbitrability of the subject matter of the dispute or the invalidity of the arbitration agreement.
2. Due to the very arbitration-friendly law of Switzerland, no constellations are conceivable in which the subject matter of the dispute must be regarded as incapable of arbitration. Even labour disputes are arbitrable under Swiss law. The enforcement problem in other countries may arise if they are not considered arbitrable there. This should be taken into account by the parties when conducting litigation in front of the CAS.
3. Concerning the arbitration agreements, the Federal Supreme Court shows itself as generous. The interpretation is often very arbitration-friendly, so arbitration is also possible. Clauses are deemed valid by reference.

²⁶³ STF 117 II 94, 96.

²⁶⁴ STF 117 II 94, 96.

4. In its more recent case law, the Federal Supreme Court has attempted to show the CAS jurisdiction its limits and, in certain constellations, has not accepted an arbitration agreement.
5. Since almost every association has its way of regulating the legal process of the CAS, decisions of the Federal Supreme Court that denied the jurisdiction of the CAS nevertheless tend to represent individual case solutions. Therefore, the federations should draw up their arbitration clauses as precisely as possible and inform the athletes of their rights and the possibilities for resolving disputes. The nature of the proceedings (e.g., whether an internal lower instance of the association is still planned in front of the CAS) should be specified as precisely as possible in the arbitration agreement. The CAS as the final instance should also be mentioned by name in the arbitration clause, and, in addition, the way through ordinary jurisdiction should be expressly excluded. This minimises the risk that the arbitration decision will be overturned due to the lack of jurisdiction of the CAS, which is always associated with high costs and a significant loss of time.
6. In sports law, there are hardly conceivable constellations in which an athlete can claim that the arbitration clause would surprise him. Meanwhile, the legal way to the CAS has established itself in most sports associations, especially in association penalties, and can

therefore be described as typical for the industry. Therefore, an athlete must know that he regularly submits to arbitration when signing a contract or conditions of participation.

7. A problem still under discussion is the lack of voluntariness in the arbitration agreement. The Federal Supreme Court has recognised that "forced" arbitration proceedings can frequently occur in sports law. In this respect, the previous view of the highest court in Switzerland that the lack of voluntariness of the arbitration agreement does not lead to its invalidity cannot be entirely accepted. Although the sports jurisdiction may, in principle, be unilaterally determinable due to the unique features of the sport, higher standards must also be set for sports arbitration jurisdiction, taking into account Art. 6 (1) ECHR. Consequently, an "imposed" arbitration agreement is only effective if the arbitral tribunal called upon it fully meets the requirements of Art. 6 (1) ECHR. The CAS still has some catching up to do in this respect.
8. If the Federal Supreme Court has to deal with the jurisdiction of an arbitral tribunal within the framework of Art. 190 para. 2 letter b CPIL, it may, in contrast to the other grounds for challenging Art. 190 para. 2 CPIL, exceptionally decide on the jurisdiction of an arbitral tribunal through a decision shaping the law. The decision must not be a mere cassation decision.

8. Points of a dispute have been decided which have not been submitted to the arbitral tribunal, or legal claims have been left unjudged (Art. 190 para. 2 letter c CPIL)

According to the German wording of Art. 190 para. 2 letter c CPIL, this ground for rescission can be used to challenge the fact that the arbitral tribunal has ruled on points of dispute which were not submitted to it or if legal claims remained unapprised.²⁶⁵ Art. 190 para. 2 letter c CPIL does not apply if the arbitration agreement does not establish the competence of the arbitral tribunal for a specific point in dispute which has been judged.²⁶⁶ This is not immediately apparent from the German and Italian wording of the version, but the prevailing opinion is that the French wording is decisive for the interpretation²⁶⁷. According to the principle, “the court may not decide more than it has been asked to, that claims which the parties have not made the subject of arbitration may not be decided.”²⁶⁸

8.1. Scope of application

Art. 190 para. 2 letter c CPIL covers the cases in which the court awards more than has been applied for (e.g. interest on the proceedings, although not applied for), awards something other than has been applied for (reduction instead of damages) or has left legal claims unapprised.²⁶⁹

²⁶⁵ SFT 116 II 639, 641.

²⁶⁶ SFT 116 II 641, SFT 120 II 175.

²⁶⁷ SFT 116 II 639, 642.

²⁶⁸ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. no. 1570.

²⁶⁹ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. no. 1571.

Especially in the field of doping, CAS referees should be careful not to violate the principle that a court may not decide more than it has been asked to. For example, in one case, the CAS denied the athlete who was taking action against his ban on doping all the prizes he had won in addition to confirming the sanctions, even though the other side had merely requested the dismissal of the action.²⁷⁰ This was a violation of Art. 190 para. 2 letter c CPIL. The CAS may not impose a higher ban its motion if the association merely dismisses the action. If in the opinion of the parties, the arbitrament is based on a different legal assessment than that put forward by them, this does not lead to any contestability under Art. 190 para. 2 letter c CPIL. As long as the other legal assessment does not change the subject-matter of the dispute, the disposition maxim will not be violated²⁷¹. Therefore, the principle of "court knows" also applies to the arbitral tribunal.²⁷²

An exception to the "court knows the law" principle shall be made if the parties agree to limit the application of the law to specific claims (e.g. only contractual, not statutory) and thus limit the jurisdiction of the arbitral tribunal to apply the law. If contrary to the agreement between the parties, the court nevertheless uses claims excluded by the parties to substantiate its decision; it exceeds its jurisdiction. However, in this case, the ground of appeal is lack of jurisdiction according to Art. 190 para. 2 letter b CPIL is

²⁷⁰ CAS arbitration award of 09.06.2006, 2006/A/1046.

²⁷¹ SFT 120 II 172, 175

²⁷² Kellerhals/Berger, in: FS-Wiegand, p.387.

given.²⁷³ A different assessment must be made if the restriction was only made unilaterally by one party, e.g. one party explicitly asserts claims only on specific legal grounds (e.g. contract). If the arbitral tribunal were to disregard this request, the principle of “a court may not decide more than it has been requested” would be violated and a challenge, according to Art. 190 para. 2 letter c CPIL would be possible.²⁷⁴

Whether there is a formal denial of justice must be decided on a case-by-case basis. The arbitral tribunal may, at its discretion, decide on particular legal issues in advance by partial arbitration. The only prerequisite is that the previously adjudicated question of law can be decided separately from the others.²⁷⁵ In order to determine whether a ground for challenge exists, a distinction must therefore be made between whether only a partial arbitrament has been made (in which case there is no ground for the challenge) and whether the court has left specific claims unapprised (in which case challenge is possible).²⁷⁶

8.2. The catch-all clauses

Especially in the case law of the CAS, there are often so-called catch-all-clauses (“All further or more far-reaching legal appeals are rejected”).²⁷⁷ It

²⁷³ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. no. 1574

²⁷⁴ SFT 0.04.1992, 4P.273/1991, E.2a.

²⁷⁵ Rüede/Hadenfeldt, *Schiedsgerichtsrecht*, S. 284.

²⁷⁶ Jermini, *Contestation*, marginal no. 430-439.

²⁷⁷ CAS-award from 03.10.2012, 2012/A/2804.

is controversial whether these clauses, which are kept quite general, might not lead to the ground for setting aside Art. 190 para. 2 letter c CPIL since they suggest the suspicion that inevitable legal complaints have not been dealt with sufficiently in the course of reaching a decision. In one decision, the Federal Supreme Court considered it permissible to apply a confident lump-sum approach to many applications.²⁷⁸ In that case, the operative part of CAS's judgment was that it upheld the action in so far as it was not inadmissible. In the opinion of the Federal Supreme Court, this represented an excellent incident-related rejection of all inadmissible applications. In a recent decision, it had to deal specifically with the catch-all clauses of the CAS. The Federal Supreme Court regarded them admissible since international arbitration has no obligation to substantiate an arbitrament. Therefore it cannot be objected that the allegedly ignored submissions are not legally assessed in the reasons for the decision.²⁷⁹

In some cases, arbitral tribunals applying these clauses must specify these flat-rate dismissals. The defeated parties should otherwise be entitled to appeal against the decision based on Art. 190 para. 2 letter c CPIL. In most cases, the sweeping wording of the tenor will result in more or different awards than were intended by the winning party.²⁸⁰ This is countered by the fact that the CAS must be granted a particular lump-sum treatment due to the

²⁷⁸ SFT 05.03.2010, 4A_524/2009, E.3.2.

²⁷⁹ SFT from 10.12.2012, 4A_635/2012 E.4.2.

²⁸⁰ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. no. 1097.

frequent confrontation with numerous, partly Swiss Federal constitutionally unfounded claims. ²⁸¹This would typically already be apparent from the grounds of the arbitrament that the arbitral tribunal has taken note of the arguments put forward. It is true that, as a rule, the operative part is decisive for interpreting an arbitrament. In disputes, however, the reasons for the decision may be used for interpretation, which is why the overall view cannot lead to erroneous arbitruments with defects, according to Art. 190 para. 2 letter c CPIL. In such cases, a mandatory examination of all claims and motions in the operative part would be an excessive formal requirement.

8.3. Summary

1. The ground for challenging Art. 190 para. 2 letter c CPIL is of secondary importance. So far, no CAS award has ever been overturned for this reason.
2. Particularly in the area of appeals against doping suspensions, CAS referees should ensure that they do not violate the principle that “a court may not decide more than it has been asked to” by imposing a harsher penalty than the association. This risk exists in particular when the federation requests the dismissal of an athlete's appeal.
3. The practice of the CAS in the case of so-called "catch-all-clauses"

²⁸¹ Netzle, Magazine for sport and law 2011, 5.

gives cause for discussion. Ultimately, according to the view expressed here, this procedure is harmless and must not provide any possibility of challenging an arbitral decision. The case law of the Federal Court has also confirmed this.

9. Infringement of the principle of equal treatment of the parties and of the right to be heard (Art. 190 para. 2 letter d CPIL)

According to its wording, the ground for challenging Art. 190 para. 2 letter d CPIL ensures compliance with certain procedural principles. The parties in arbitration are indeed free in the organisation of their litigation, see Art. 182 para. 1 CPIL. Nevertheless, there is a minimum standard that must be maintained. Finally, the arbitrament is treated as a judgment of the state jurisdiction.²⁸²Therefore, Art. 182 para. 3 CPIL and Art. 190 para. 2 letter d CPIL also lays down two minimum procedural provisions which must be observed: equal treatment of the parties and the right to a fair hearing. CPIL is one of the most frequent grounds for challenging international arbitrations in Switzerland, even though the success rate is only about four percent.²⁸³

²⁸² Rüede/Hadenfeldt, Arbitration law, p. 40, 47.

²⁸³ ASA Bulletin 2010, p. 87.

9.1. Scope of the ground for avoidance

First of all, it must be clarified how far the provision goes. While according to the wording of the French version, only a complaint, according to Art. 190 para. 2 letter d CPIL is possible if the hearing injury occurred in the contradictory proceedings. The German and Italian versions do not contain this restriction. The Swiss Federal Supreme Court uses the French version of Art. 190 para. 2 letter d CPIL to determine the scope of the ground for rescission.²⁸⁴ In its view, Art. 190 para. 2 letter d CPIL is thus congruent with Art. 182 para. 3 CPIL. According to this provision, only violations committed during the adversarial proceedings can be pleaded.

Some literature criticises this restriction since the German and Italian versions of Art. 190 para. 2 letter d CPIL does not provide for such a restriction, which is why violations of these principles can also be subsumed under the regulation outside the process²⁸⁵.

When Art. 190 CPIL was created, the legislator intended to restrict the possibilities of rescission. However, this is achieved precisely by the French version since errors outside the adversarial procedure under Art. 190 para. 2 letter d CPIL are not taken into account. A teleological approach is used to counteract this appropriately.

²⁸⁴ SFT 117 II, 346, 347f.; SFT 4P.267/2002, E.5.1., STF 4A_74/2019 from 31/07/2019, STF 4A_80/2017 from 25/2017, STF 4A_688/2016 from 24/07/2017

²⁸⁵ Heini, in: Zurich commentary on the CPIL, Art. 190 marg. no. 32.

9.2. Principle of equal treatment of the parties

The first of the two principles guaranteed by Art. 182 para. 3 CPIL and Art. 190 para. 2 letter d CPIL is equal treatment of the parties. The procedure must guarantee each party equality of arms, i.e. give the same opportunity to put forward means of attack or defence in the procedure and to present the respective legal position. Thus,²⁸⁶ the Federal Supreme Court may not grant or refuse anything to one party and not to the other party. An example of this would be if only one party were allowed to be represented by a lawyer.²⁸⁷ The case law, however, differentiates concerning equal treatment, whether the facts are comparable.

9.3. Right to be heard

The right to be heard in arbitration proceedings is congruent with the constitutional right provided for in Art. 29 para. 2 Swiss Federal Constitution. Like the claim under the Swiss Constitution, Art. 182 para. 3 CPIL and Art. 190 para. 2 letter d CPIL protect the right to be heard, but not how it is granted.²⁸⁸

Infringement of this principle must be pleaded immediately in the proceedings. Otherwise, it can no longer be pleaded in the appeal proceedings. The time at which the infringement was detected shall be taken into account.²⁸⁹

²⁸⁶ SFT 116 II 639, 643; SFT 117 II 346, 347.

²⁸⁷ Walter/Bosch/Brönnimann, commentary on the CPIL, p. 223.

²⁸⁸ Walter/Bosch/ Brönnimann, Commentary of CPIL, p. 222.

²⁸⁹ Geisinger/Frossard, in: International Arbitration in Switzerland, p. 148.

For the scope of application of the provision, the formula of the Federal Supreme Court is used to determine whether the contested facts are to be subsumed under Art. 190 para. 2 letter d CPIL: Accordingly, the right to be heard allows each party to present its position, to participate in the proceedings and to examine the counterparty's submissions in the adversarial proceedings, to comment on them and to attempt to refute them with its submissions and evidence.²⁹⁰

9.3.1 Right of the parties to express their views and to participate in the proceedings

As can be inferred from the formula of the Federal Supreme Court, each party in the arbitral proceedings is granted the right to be heard, to participate in the proceedings and to present its point of view. Therefore, ²⁹¹the arbitral tribunal must ensure that the parties are sufficiently informed of the arbitral proceedings and, in addition, attempt to enable them to participate in oral proceedings reasonably through appropriate summons and summons deadlines. ²⁹²It is always crucial that the parties have the opportunity to express their views. On the other hand, the parties do not need to use this option.

From Art. 190 para. 2 letter d CPIL no right to an oral statement in front of the arbitral tribunal can be derived.²⁹³ In order to be heard, it is sufficient for the

²⁹⁰ SFT 116 II 639, 643.

²⁹¹ Poudret, in: FS-Lalive, P. 610.

²⁹² Jermini, Contestation, marginal no. 459.

²⁹³ Berger/Kellerhals, International Arbitration in Switzerland, marg. no. 1582.

party to be allowed to submit written observations. This shall apply even if the Arbitration Rules are obliged to enable an oral statement to be made.²⁹⁴ The parties must be able to present their view of the dispute in front of the arbitral tribunal. There is no right to express an opinion in any particular way.

In order to present its point of view, the party will usually file requests for evidence or make legal submissions. The Commission will also submit applications as to the substance of the dispute and the costs involved. It should be noted here that Art. 190 (2) letter d CPIL does not give any right to an application regarding the allocation of costs. Exceptions shall be made if the arbitral tribunal or the Rules of Arbitration provide for separate applications for costs²⁹⁵. In the opinion of the Federal Supreme Court, the parties are "in good faith" that a decision on costs will only be made after a prior application has been filed.

The ruling also highlights a problem when the CAS makes cost decisions. Typically decide according to Art. R64.5 CAS Code the arbitrators of the CAS at their discretion on the allocation of costs. Therefore, parties do not have the right in principle to file cost questions or requests for evidence or the like. If, however, a request for evidence of costs is made in the agreement, the arbitral tribunal shall at least decide whether or not to comply with it and may not leave that request unapprised. In this regard, the Federal Supreme Court notes that the CAS and ICAS will be required to recognise the

²⁹⁴ SFT 117 II 346, 348.

²⁹⁵ SFT 17.03.2011, 4A_600/2010.

significance of Art in the future. R64.5 CAS Code gives the judges a framework for exercising discretion concerning the cost issue.²⁹⁶

9.3.2. The right to consideration of the parties' arguments

If it decides by the arbitral tribunal, it has to be noted that any legally relevant arguments of the parties are considered in the decision.²⁹⁷ If a party bases its request on several grounds, the arbitral tribunal shall examine each of these arguments' afire accuracy. In contrast to Art. 190 para 2 letter c CPIL, it means that the arbitral tribunal would indeed be no correct desire total undecided, but is not, is dealing with all the legal arguments that support the true desire²⁹⁸.

10. Effect of Art. 182 para. 3 CPIL the taking of evidence

The right to be heard is to be performed, resulting in the Discovery in a specific manner. So, Art. 183 para. 3 CPIL²⁹⁹ example, no violation was given because the statement does not log a witness but was only held by tape recording.³⁰⁰ In international arbitration law, there is no legal provision for this purpose. This allows you to make any demands on the design of evidence, as long as the process conducted by ear claim or fundamental procedural principle is consistent, and both parties can present evidence and give their opinion.³⁰¹

²⁹⁶ Beffa/Ducrey, Causa Sport 2012, 199.

²⁹⁷ Bucher, new arbitration, parag. 196.

²⁹⁸ SFT 133 III 235.

²⁹⁹ SFT from 29.07.2010, 4A_43/2010.

³⁰⁰ SFT from 29.07.2010, 4A_43/2010.

³⁰¹ SFT 28.05.1998, 4P.10/1998 E.

Frequently been seen before, but the relevant arbitration rules allow admission of evidence only under certain conditions. For example, parties in proceedings before the CAS, in Art. R55 CAS Code to respect deadlines set for the production of evidence. Otherwise, according to Art, their application for evidence right is forfeited, and no complaint. 190 para. 2 letter d CPIL possible.³⁰²

The participation rights approve that the party is not entitled to honour their existing inventories with the help of evidence in the process of facts legally. Instead, the principle “the court knows the law” applies. It is granted to the arbitral tribunal to assess the facts themselves put forward legally.³⁰³

Interprets the arbitration result of evidence wrong, so there is a manifestly false or contrary to the record statement before. This does not lead readily to a ground of avoidance under Art. 190 para. 2 letter d CPIL.³⁰⁴ Based on the decision on erroneous findings, this is initially not about art—190 par. 2 letter d CPIL material to reprimand error of law.³⁰⁵ A ground for avoidance is only given when also making a formal denial of justice exists.³⁰⁶ This means that the wrong taking of evidence results from the infringement of the parties' participation rights, and, for example, the referee inadvertently overlooks a party's submission.³⁰⁷

³⁰² SFT 05.08.2013, 4A_274/2013 E.3.2. = ASA Bulletin 2013, 894-899.

³⁰³ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. 1587.

³⁰⁴ Berger/Kellerhals, *International Arbitration in Switzerland*, parag. 1585

³⁰⁵ SFT 127 III 576, 578.

³⁰⁶ SFT 121 III 331, 333.

³⁰⁷ SFT 127 III, 576, 579.

11. Surprising proper application of the court

The right to be heard are the parties also to comment on the court's legal opinion if it differs from their right. ³⁰⁸In addition, the arbitral tribunal must be aware that its legal reasoning does not appear in the decision as a surprise to the parties and is not unpredictable. ³⁰⁹For example, the court may not be based on a contract clause or its decision, which was not previously discussed by the parties or the court itself.

The arbitral tribunal must allow the parties before deciding to deal with hitherto unmentioned legal arguments if it wants to base its decision on this. This is justified mainly by the peculiarities of arbitration. Since arbitration awards are verifiably limited, you cannot subsequently such as dealing in state court proceedings through appeals, even with the new allegations put forward in legal arguments. This makes it necessary to extend the procedural guarantees in arbitration. It must, for parties at all, the decision made to underlying these legal arguments opportunity to comment.

12. Reason duty of the arbitral

It is disputed whether the court under Art. 182 para 3 CPIL is obliged to justify its decision shortly. ³¹⁰Parts of the literature argue that a duty to give reasons for the elementary requirements is one of the arbitration awards and

³⁰⁸ SFT 114 Ia 97 (guiding principle); SFT 116 V 182, 187.

³⁰⁹ SFT 130 III 35, 40.

³¹⁰ SFT 116 II 373, 375.

is mandatory. However, ³¹¹when lit with the prevailing view in Switzerland to the French text of Art. 190 para. 2 d CPIL considers relevant, and the auditory claim is limited to the contradictory procedure. The reasoning which follows the contradictory procedure is not included in it.³¹²

Furthermore, the requirements for arbitral awards within the meaning of Art. 190 CPIL are governed by Art. 189 CPIL. They are taken in the process and the form agreed upon by the parties (para. 1). Eventually, they must be drawn in writing, reasons, dated and signed (para. 2). In case of decisions by Swiss courts, the reasons for the arbitral award may be waived and cannot be regarded as an indispensable claim.³¹³

Ultimately, however, it should be clear to the Court of Arbitration: If expressly agreed in the statutes or in advance that decisions are possible, without notice, it may result in individual cases without the risk of a defect in the sense of Article 190 paragraph 2 letter. d CPIL without it. However, if nothing is agreed upon, the court should exercise restraint to justify loose decisions.

13. Public trial

Also under discussion is whether the right to be heard is the appropriate party to insist on a public trial.

³¹¹ Berti/Schnyder, in: Basel Comment on CPIL, Article 190, parag. 65.

³¹² SFT 116 II 373, 375.

³¹³ SFT 134 III 186, 187.

Following the procedures of CAS, the methods are basically according to Art. R43 CAS code is not public, and the public can be admitted into the proceedings only with both parties' consent or by the president's order.³¹⁴The Federal Court is the opinion that Art. 30 para. 3 Swiss Federal Constitution and Art. 6 para. 1 ECHR did not apply to procedures for voluntary arbitration and referred in this connection rely on its consistent case.³¹⁵

This decision of the Federal Court is not correct. As already explained, species Article 6 (1) ECHR has no direct effect on third parties to the arbitration, but it is indirectly taken into account. The Federal Court held that doping disputes are, as a rule, so-called "Imposed" arbitration. In such cases, the ECHR has determined that the arbitration with the requirements of Art. 6 para. 1 ECHR fully satisfy the needs.³¹⁶Consequently, in this case, the Federal Court would have CAS Rules of Procedure incompatible with Article 190(2)(d) of the CPIL. Had the Swiss Federal supreme Court recognised the problem that "given the paramount importance of CAS³¹⁷ in the field of sport in confidence in the independence and fairness of decision making would be desirable if a public hearing were held at the request of the Athlete concerned".³¹⁸

³¹⁴ SFT from 10.02.2010, 4A_612/2009, E.4.1.

³¹⁵ SFT 4.08. 2006, 4P.105/2006, E. 7.3; SFT from 11.06.2001, 4P.64/2001, E. 2d/aa.

³¹⁶ European court of justice for human rights, Arrêt du 28 octobre 2010, Requête 1643/06.

³¹⁷ Tribunal Arbitral du Sport (French) = CAS

³¹⁸ SFT 10.02.2010, 4A_612/2009, E.4.1.

The counter-argument of the advocates of a secret hearing is not convincing. They argue that a public hearing is a security risk since the athletes and clubs usually have numerous supporters who could disturb the peace of the proceedings.³¹⁹ In order to avoid this, precautions can be taken through admission controls and the allocation of spectator numbers. Particularly against the background of the ECHR decision, the regulation of the publicity of the proceedings must be in the CAS Arbitration Rules should be reconsidered, and the hearings should, in principle, be made available to the public.

The argument that the public would only participate in the "sensationalism" of processes and performing this is not a legal interest worthy of protection is also not convincing.³²⁰ When association sanctions punish athletes or teams, there is often much public interest in how and whether it comes to these offences. Moreover, there are also articles of association of an interest that strengthens confidence in the jurisdiction of the sports jurisdiction. Finally, the sanction should be against an athlete by the consumer, the audience that is accepted and not gives the impression that the articles of association will be applied arbitrarily.

³¹⁹ Settlements for example Coccia, Bulletin TAS 2013/2, p. 15.

³²⁰ But Monheim, Athletes' Rights, p. 243.

14. The possibility of a legal aid application

At the beginning of the activity of the CAS, no expense in appeal cases in principle be required, but an introductory fee of 1,000 CHF, see. Art. R65.2 para. 2 CAS Code. This regulation was increasingly softened so that, according to Art. R65.2 para. 1 CAS Code in conjunction with Art. R65.1 CAS code only appeals against sanctions by international sports federations will be charged.³²¹ This means that there can be more and more relying situations where it is hardly possible financially for athletes or even associations to lead an appeal to CAS. Finally, the cost of managing (100.00 to 25,000 Swiss francs³²²) and especially for the referees are then (the current hourly rate is the amount in dispute depending on 300-500.00 Swiss francs³²³) by the parties to bear themselves. This can quickly cause costs to a five-digit level, which is not affordable for many athletes. Indeed, he should not have any problems raising such a sum plus the cost of his lawyer, a well-paid football player. In less popular sports, however, this could lead to a de facto legal shutout against certain decisions because economic reasons not to appeal to CAS are possible.

In practice, the question is whether this issue may be the subject of an action for annulment. Finally, it may in cases where is the path to the CAS

³²¹ See Rigozzi/Hasler/Quinn, Jusletter of 03.06.2013, p. 17.

³²² <https://www.tas-cas.org/en/arbitration/arbitration-costs.html>

³²³ <https://www.tas-cas.org/en/arbitration/arbitration-costs.html>

too significant a financial burden, let alone come to arbitral awards, which can then be appealed to the Federal Court.

In principle, the right to be heard, by Art. 190, para. 2 letter d CPIL is protected, including the right to judicial protection, regardless of their financial situation. In this regard, the CAS did not meet the requirements of a rule of law arbitration,³²⁴ although it should provide an equivalent to the due process procedures due to the definite difference in coercion. Finally, even in art. 29 par. 3 of the Swiss Constitution explicitly demands regulated legal aid for the Swiss court. This also led to criticism from the literature, which on several occasions urged the creation of appropriate regulations.

Meanwhile, the ICAS has responded according to his competence based on Art. S6 letter 2 no. 9 CAS code to settle the "Guidelines of Legal Aid before the Court of Arbitration for Sport" was created, which became effective on 01.09.2013 into force.³²⁵ Although there already exist possibilities to apply for legal aid. The ICAS did not openly communicate this; therefore, most practitioners were unknown.³²⁶ Meanwhile, the newly created guidelines are even available on the website of the CAS. It is to be welcomed that the ICAS fixes a grievance that many athletes would have been denied access to the arbitration court.

³²⁴ This also concludes Oschütz, Sportschiedsgerichtsbarkeit, p. 392.

³²⁵ Available at <http://www.tas-cas.org/en/arbitration/legal-aid.html>.

³²⁶ Rigozzi/Hasler/Quinn, Jusletter of 03.06.2013, p. 5 .

The ground of avoidance of Art. 190 para. 2 letter d CPIL is formal according to the case of the Federal Court nature. A violation of the arbitral award is, therefore, to be set aside regardless of the prospects of success of the appeal on the merits in each case.³²⁷ Consequently, this principle is not decisive in the strict application of whether the auditory injury impacted the result of the arbitral award.

For this reason, some literature demands that this case law be abandoned and that in future, it should be decisive for an annulment whether the violation of the right to be heard was causal for the outcome of the arbitral proceedings; otherwise, the procedure would be unnecessarily delayed.³²⁸

In practice, the formal nature of the right to be heard has already been considerably relativized. For example, there is a claim to the evidence collection only if it is relevant to the decision.³²⁹

In the end, however, the formal nature of the right to be heard should be maintained. Finally, the legal challenge often provides the only possible appeal against the last instance arbitral award. However, the practice has to ensure that no unnecessary procedural delays arise. However, a further restriction is not necessary, as required by parts of the literature. It must be checked whether the violation of the right at all concerned to be heard

³²⁷ SFT 121 331, 334; SFT f 20.09.2005, 4P.48/2005.

³²⁸ Berger/Kellerhals, *International Arbitration in Switzerland*, parag. 1593.

³²⁹ STF 116 II 639, 644.

considerable procedural component. For example, if an offered evidence is not considered, it is first necessary to examine whether it can affect the case proceedings. This procedure is sufficient to preclude proof requests, which were Swiss Federal Constitutionally not leading to new insights and therefore not considered by the arbitral tribunal a defect in the sense of Art. 190 para. 2 letter d CPIL justified and may delay the procedure unnecessarily.

15. Summary of points 9. to 14.

1. The ground of avoidance of Art. 190 para. 2 letter d CPIL has already led several times to the setting aside an arbitral award of the CAS.
2. It should be noted that only violations of the right to be heard and equal treatment with Art. 190 par. 2 letter d CPIL alleging can already be used in adversarial proceedings.
3. In practice is often criticized in the legal challenge that the Evidence of Art. 190 para. 2 letter d CPIL contrary. Here, however, the case-Swiss makes high demands. For example, a piece of evidence must be named within the prescribed time limits by the arbitral tribunal. Also, contrary to the record or erroneous findings of fact does not lead quickly to a violation of Art. 190 para. 2 letter d CPIL.

4. More often, however, a CAS arbitration decision was set aside if the court had not sufficiently considered the parties' legal arguments. Especially in the surprising application of the law, the CAS has to consider that in arbitral proceedings, the arbitral tribunal has an increased duty to inform the parties since it is no longer possible to take control of the content against arbitral awards of the CAS.
5. The ECHR suggests that the proceedings before the CAS should, in principle, be public and that only in justified individual cases should a non-public hearing be scheduled. Furthermore, this would bring more transparency to the entire sports jurisdiction. This is provided by the requirements of Art. 6 (1) ECHR.
6. The newly created possibility of legal aid is to be welcomed. This gives financially weaker athletes or federations, in particular, the opportunity to conduct sports court proceedings.
7. If an error is found which meets the requirements for a ground for setting aside under Art. 190 (2) letter d CPIL, the setting aside proceedings against arbitral awards of the CAS may well be successful. It should be noted, however, that this will not necessarily change the outcome of the new arbitral award to be issued. Instead, the CAS will often make up for

the missed procedural steps but make the same decision on the case's merits.³³⁰

16. Violation of the fundamental principles of law (Ordre public) (Art. 190 par. 2 letter e CPIL)

The fifth ground of challenge is the complaint of breach of the Ordre public (fundamental principle of law). 190 para. 2 letter e CPIL. For this to happen, "fundamental principles of law must be violated, and therefore the judgement per se must be incompatible with the rule of law and values. The Federal Supreme Court, in its long-standing case law, defines when a decision is incompatible with the Ordre Ordre within the meaning of Art.³³¹

In principle, Art. 190 (2) letter e CPIL creates the possibility to challenge the arbitral award in substantive law. In addition, it is now generally accepted that the ordre public has procedural content, as the wording of Art. 190 para. 2 letter e CPIL does not exclude this.³³²

16.1. Measure of the Ordre public

The provision of Art. 190 para. 2 letter e CPIL is, according to generally accepted opinion, not to be equated with the Swiss Ordre public according to Art. 19 para. 2 OR (Swiss Code of Obligations). Instead, it is an

³³⁰ Compare Dickenmann, Causa Sport 2010, 208.

³³¹ SFT 116 II 634, 636, STF 4A_540/2019 from 07/05/2019, STF 4A_502/2017 from 25/06/2018.

³³² SFT 126 III 249, 252.

international *Ordre public*, i.e. a selection of standards that apply in international relations.³³³

However, it is not clear according to which directive the content of the *ordre public* is determined, i.e. whether a Swiss or an international standard applies to it.³³⁴ The Federal Supreme Court and prevailing doctrine tend to use an international standard.³³⁵ Although Swiss law must remain the starting point for the concretisation of international law, international law is the basis for the definition of international law within the framework of Art. 190 para. 2 letter e CPIL. Function of the *Ordre public* to be considered.³³⁶ It is not decisive whether the arbitral award is contrary to principles of Swiss law, but it should be based on principles that, from the Swiss point of view, underlie every legal system.³³⁷ This solution deserves approval. It best contributes to the enforcement of the legislator's will to limit the possibilities of appeal.

Furthermore, in Article 190(2)(e) of CPIL, the adjective "Swiss" has deliberately been omitted from the wording.³³⁸ Nevertheless, logical reasons and a teleological interpretation also support the Federal Court's view and the prevailing doctrine. An international arbitral tribunal must often apply the substantive law of a country other than Switzerland. However, this means

³³³ Lalive/Poudret/Reymond, *Droit de l'arbitrage*, Art. 190, parag. 5a.

³³⁴ Berger/Kellerhals, *International arbitration in Switzerland*, marg. note 1597.

³³⁵ SFT 120 II, 155, 166, SFT 132 III, 389, 393..

³³⁶ Berti/Schnyder, in: *Basel Commentary on CPIL*, Art. 190, parag. 72.

³³⁷ SFT120 II, 155.

³³⁸ Heini, in: *Zurich commentary on the CPIL*, Article 190, parag. 41.

that it must primarily observe the *Ordre public* of the other legal system when making its decisions. In such cases, it would not be fair. The arbitral tribunal's decision will then be measured against the Swiss *Ordre public* in the setting aside proceedings. The arbitral tribunal's decision will then be measured against the Swiss *Ordre public* in the setting aside proceedings.³³⁹ Especially in the area of sports jurisdiction, this is a constellation frequently encountered. Often disputes with no local connection to Switzerland are brought before the CAS.

Therefore, controlling the arbitral award through a universal *Ordre public* seems more appropriate. However, jurisdiction will not be able to be done entirely without looking through "Swiss spectacles" since the Federal Supreme Court is located in Switzerland and judges generally complete their legal training in Switzerland.

Furthermore, it must be rejected that for the intervention of the *Ordre public* to take place, the facts of the case must show a special internal relationship,³⁴⁰ as some parts of the literature demand.³⁴¹ Finally, the fact that the CAS is based in Lausanne (otherwise, the CPIL would not be applicable) means that any legal dispute before the CAS has a sufficient connection to Switzerland.³⁴² This applies all the more in international sports arbitration.

³³⁹ SFT 120 II, 155, 168.

³⁴⁰ SFT 120 II 155, 167.

³⁴¹ Walter/Bosch/Brönnimann, Comment CPIL, p. 229.

³⁴² Berti/Schnyder, in: BASEL Comments on CPIL, Art. 190, parag. 76.

There, the idea of fair play is a predominant principle, which would be violated by unequal treatment of disputes relating to Switzerland and international disputes.

16.2. Defence character of the standard

The concept of *Ordre public* in Art. 190(2)(e) CPIL is defined negatively (compare the wording of the provision, "incompatible with *ordre public* ").³⁴³In this respect, the Swiss legislator wanted to create an approximation to the requirements for the enforceability of an international arbitral award (compare Art. V, para. 2 (b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The aim was to ensure that only those grounds for the challenge against the decision are available, which are also possible as objections in enforcement proceedings.³⁴⁴Based on this history of origins, it is generally recognized that the provision of the *ordre public* is purely defensive and constitutes a mere incompatibility clause.³⁴⁵The decisive factor is whether the arbitral award violates the *ordre public* in its result and whether not only the statement of reasons in itself indicates a violation.³⁴⁶The *ordre public* contravention must therefore result

³⁴³ Compare Heini, in: ZURICH Commentary on CPIL, Art. 190, parag. 39.

³⁴⁴ Heini, in: Zurich commentary on the CPIL, Article 190, parag. 40.

³⁴⁵ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1595, SFT 126 III 249, 253.

³⁴⁶ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1595. Kellerhals, Pages 118-122; Schulthess, *Ordre public*, P. 18.

from the provisions of the arbitral decision ³⁴⁷, if necessary, in conjunction with the statement of grounds.³⁴⁸

16.3. Procedural content

Art. 190 (2) (e) CPIL, through its procedural content, can remedy procedural defects that Art does not cover. 190 (2) (a-d) CPIL as incompatible with the *Ordre public*.³⁴⁹

An arbitral award is incompatible with the procedural *ordre public* if fundamental, and generally recognised procedural principles are violated, and the legal and value system applicable in the cultural states is thereby infringed. The aforementioned defensive character of the norm must be taken into account.³⁵⁰ Thus, this possibility of annulment is not intended to force the parties to a particular procedure by indirectly creating a "minimum procedural order" but rather represents a pure compatibility clause.³⁵¹ The reason is that the legislator wants to leave the parties in arbitration a relatively free choice of procedure. A comprehensive interpretation would oppose this.³⁵² An example is a case decided by the Federal Court: The independence and impartiality of court-appointed experts fall within the scope of protection of the right to a fair trial according to Art. 6 para. 1

³⁴⁷ Jermini, *Contestation*, parag. 514-51.

³⁴⁸ SFT 120 II 155, 167.

³⁴⁹ SFT 117 II 604, 606.

³⁵⁰ SFT 103 Ia 531, 532.

³⁵¹ SFT 126 III 249, 253

³⁵² SFT from 30.12.1994 = ASA Bulletin 1994, 217, 221.

ECHR.³⁵³ Nevertheless, in the event of a violation of this provision, the ground for setting aside Art. 190 (2) letter, a CPIL, cannot be invoked since this provision only applies to the respective arbitrators. However, the scope of protection of this fundamental right is one of the fundamental procedural principles, so it can be challenged via Art—190 (2) letter e CPIL.³⁵⁴

Regarding content, Art. 190 (2) letter e CPIL deals with the so-called formal denial of justice, whereby the grounds for challenge of Art limit the scope of application. 190 (2) letter a-d CPIL.³⁵⁵ This means that only such violations are to be objected to via Art—190 para. 2 letter e CPIL that are not already covered by the other four grounds. The following will explain which fundamental legal principles belong to public procedural law *ordre public*.

16.3.1. Fair procedure

The principles of a fair trial, such as those laid down in Article 6(1) ECHR, are recognised as general principles of law. Thus, the principle of good faith in the proceedings applies, i.e. contradictory conduct of the court or a party can be challenged according to Art. 190 para. 2 letter e CPIL.³⁵⁶ In principle, the influence of criminal acts on reaching a judgment would also

³⁵³ SFT 125 II 541, 544.

³⁵⁴ SFT 126 III 249, 253 STF 4A_312/2017 from 27/11/2017.

³⁵⁵ Schulthess, *Ordre public*, p. 19.

³⁵⁶ Lalive/Poudret/Reymond, *Droit de l'arbitrage*, Article 190, parag. 6.

violate the principle of a fair trial. The influence of criminal acts on reaching a verdict cannot be challenged as a violation of the *Ordre public* under Art. 190 para. 2 letter e CPIL. (2). However, the Swiss legislator has created regulations within the revision framework.

16.3.2. Obligation to state reasons

According to Art, it is still controversial whether an arbitral award issued without justification can be challenged. 190 (2) letter d CPIL. This discussion is also being conducted within the framework of Art. 190 (2) letter e CPIL, i.e. whether an arbitral award without justification is compatible with the procedural *ordre public*.³⁵⁷ For the answer, the above argumentation can be taken up again. Since it is possible to waive the statement of grounds under Swiss law, it cannot be counted among the fundamental procedural principles of arbitral proceedings. Moreover, according to the view expressed here, the *Ordre public* has an international dimension. In international comparison, it is striking that it is not necessarily part of the procedural standard that arbitral awards contain a statement of reasons.³⁵⁸ Therefore, the obligation to state reasons cannot be regarded as a fundamental principle of law and is not part of the *Ordre public*.

³⁵⁷ Berger/Kellerhals, *International Arbitration in Switzerland*, parag. 1617.

³⁵⁸ Walter/Domej, *International Civil Procedure*, p. 604.

16.4. Respect for the substantive law

It has been disputed whether it contradicts the Ordre public of Art. 190 (2) letter e CPIL for the arbitral tribunal to rule on a dispute that has already been decided or did not consider earlier arbitral awards or judgements when answering a preliminary legal question.³⁵⁹Initially, the Federal Court left this open. Recent case-law has now endorsed the view that disregarding the substantive law is contrary to the procedural ordre public since the commandments “not to be judged twice for the same case” and “the already judged matter” must be recognised as fundamental principles of procedural law.³⁶⁰The substantive force of the decision is, in principle, limited to the content of the dispositif, and the grounds of the decision may be invoked only in so far as they can help to clarify the scope of the operative part.³⁶¹

16.5. Application of the principle “already decided disputes and has grown in legal force” in sports law

For the assessment of the nature of the matter in dispute is not essential which legal nature had the previous method, but whether the decision was made on the same dispute and had grown already acquired legal force.

³⁵⁹ Jermini, Contestation, parag. 604.

³⁶⁰ SFT 127 III 279, 283, SFT 128 III 191, 194, STF 4A_312/2017 from 27/11/2017.

³⁶¹ SFT 128 III 191, 195, SFT 125 III 8, 13, SFT 123 III 16, 18.

16.6. Validity of the principle “not twice in the same case judged” in sports law in the light of federal case law

The *ne bis in idem* are used mainly in public sanction law, such as criminal law application.³⁶²

Due to the hierarchical organizational structure of competitive sports now also in the field of doping sanctions, a discussion of whether there is a prohibition of double jeopardy comes into play.³⁶³ During the CAS Swiss Federal Constitutionally emanates from the application of the principle, the Federal Court has left the question open.³⁶⁴ In sports jurisdiction, the applicability of this principle must be assumed in principle since the interests involved are comparable to those of criminal proceedings. On the one hand, legal certainty should prevail after the conclusion of the arbitration proceedings, and on the other hand, the athlete is also interested in no longer being prosecuted for a specific offence after the legally binding conclusion of proceedings.³⁶⁵ Indeed, it must be possible to facilitate reopening the case compared to criminal proceedings so that doping offenders can be punished retroactively.

If one wants to claim a violation of the principle “not to be judged twice for the same subject” in the area of doping, one must consider whether the

³⁶² Schmidt-Aßmann, in: Maunz/Dürig, GG, Art. 103, parag. 257.

³⁶³ Lüer, *ne bis in idem*, p. 172.

³⁶⁴ SFT 03.01.2011, 4A_386/2010 E.9.3.1.

³⁶⁵ Lüer, *ne bis in idem*, page 198.

second set of proceedings deals with the same subject matter of dispute as in the preliminary proceedings. This is not the case if the conduct has consequences not only under criminal law but also under civil, administrative or disciplinary law, and these are also to be sanctioned³⁶⁶³⁶⁷.

Irrespective of whether or mentioned principle applies to bans on doping, multiple sanctions for a doping offence are possible, provided that the respective ban has a different protective effect than the previous one.

16.7. Material and legal

The reason for contesting the breach of Ordre public also allows restricting the award in substantive legal terms check. A statement of reasons which violates the substantive law of the ordre public only leads to a setting aside if the arbitral award also violates the ordre public in qualitative terms. How far this check can go can be answered by defining the protection zone. The ground of challenge of Art. 190 Abs. 2 letter e CPIL may be used to contest violations by the arbitral tribunal of fundamental principles of proceedings law.³⁶⁸

Up to now, the ground of objection of Art. 190 para. 2 letter e CPIL has been one of the most frequently raised grounds for avoidance^{369 370}.

³⁶⁶ Maunz/Dürig, GG, Art. 103, parag. 257.

³⁶⁷ SFT 03.01.2011, 4A_386/2010 E.9.3.2.

³⁶⁸ SFT 132 III 389, 392.

³⁶⁹ Dasser, ASA Bulletin 2007, p. 454.

³⁷⁰ SFt 10.06.2010, 4A_458/2009 E.4.4.2.

Within the framework of Article 190 para. (2) CPIL can only penalise specific procedural and substantive infringements in the award to a minimal extent.

The ground for challenge to Article 190(2) of the e CPIL is often used as an opportunity to have alleged material-legal errors corrected in the Federal Court. However, these desires fail due to the strict Conditions for a review of compatibility with the Ordre public under Art. 190 para. 2 letter e CPIL.

16.8. Review of the grounds of the decision established by the Court of First Instance

The arbitral tribunal shall determine which law it must base its decision on. Often, the parties make a choice of law pre-determined according to which that law is to be applied in the process. In Art. S.1 R 45 and R58 CAS-code. This is even required as a rule. This leads to the discussion of whether an error in this regard allows the possibility of a complaint under Art. 190 para. 2 CPIL.

In part, the determination of the applicable law will be considered a matter of substantive law, which is why the only ground for avoidance Art. 190 par. 2 letter e CPIL comes into consideration.³⁷¹

³⁷¹ Rüede/Hadenfeldt, Arbitration law, page 347.

In part, it is argued that such an infringement does not infringe on the *Ordre public* but instead constitutes a problem of jurisdiction, i.e. if the Arbitral Tribunal disregards the choice of law, a complaint against Article 190 para. (2) letter b CPIL would be granted.³⁷²

In some cases, in the event of a choice of law by the parties, a violation of the right to be heard is presumed since any severe violation of the parties' rights is contrary to Art. 190 para. 2 letter d CPIL.³⁷³

It is correct that the question of whether the arbitral tribunal incorrectly determined the applicable law may only be reviewed by the federal courts through Art. 190, para. 2 letter e CPIL.³⁷⁴ If the legal basis is wrongly determined, this constitutes an incorrect application of the law on the merits and is, therefore, of a substantive nature.

The complaints, according to Art. 190 para. 2 letter b or d CPIL does not apply to such cases. Otherwise, the meaning and purpose of Art. 190 para. 2 letter e CPIL would be undermined. This ground of avoidance to the only minimal way represents reviewing arbitration law in substantive ways. Therefore, an incorrect application of the law on the part of the tribunal does not lead to cancellation of the award unless this violates fundamental principles of law and, thus, public *Ordre*.³⁷⁵

³⁷² Berti/Schnyder, in: Basel Comment on CPIL, Article 192, parag. 39 and 67 .

³⁷³ Heini, in: Zurich commentary on the MER ZUM CPIL, Article 187, parag. 13.

³⁷⁴ Walter, ZBJV 1990, 171.

³⁷⁵ SFT 116 III 634, 636.

Within the scope of Art. 190 (2) letter e CPIL, it is even harmless if the arbitral tribunal decides based on equity considerations, although there was a choice of law by the parties, as long as a result did not differ substantially from the outcome and the agreed law would have led.³⁷⁶

16.9. Fundamental substantive legal principles

The ordre public is a set of different fundamental principles of law.³⁷⁷ The question arises as to which principles must be regarded as so essential that they must, in any case, be observed by the arbitral tribunal. Over time, the Federal Court has already decided on many points whether or not they are part of the Ordre public. In particular, these are the principle of “compliance with the contract”, the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of the incapacitated person where this list may not be considered to be exhaustive.³⁷⁸

³⁷⁶ Lalive/Poudret/Reymond, Droit de l'arbitrage, Art.190, parag 6.

³⁷⁷ SFT 116 III 634.

³⁷⁸ STF of 10.06.2010 4A_458/2009 E. 4.1.

16.10. Compliance with the contract, “the contract must be kept.”

The principle “the contract must be kept” has been recognized as an essential early public principle of the *Ordre*.³⁷⁹ The exact content is determined depending on the circumstances.³⁸⁰

It should be noted that the principle of compliance with the contract is not already infringed if, contrary to the parties' view, the court affirms or denies a contract. On the contrary, although the arbitral tribunal has affirmed a contractual relationship between the parties, it must refuse enforcement or, if reversed, force the parties to comply with a contractual obligation, whether or not the parties probably one of them has been denied before.³⁸¹ That is why the Federal Court has not been able to find that this principle has been violated in several proceedings against arbitration decisions of the CAS.³⁸² For example, CAS can assess a contract and the facts found in it in a different legal way from one of the parties.³⁸³ Even when the CAS derived a solution from a contract that was not regulated there at all, the Federal Court denied a violation of the principle of compliance with the contract. CAS came to this solution by interpreting the contract. The principle of the “Contract must be kept” does not authorise the Federal Court to assess whether the arbitral tribunal has correctly interpreted a contract

³⁷⁹ Jermini, challenge, paragraph 572.

³⁸⁰ Geisinger/Frossard, in: Kaufmann-Kohler, *Arbitration*, p. 151.

³⁸¹ SFT 24.11.2003, 4P.202/2003 E.5-

³⁸² Please also compare Rigozzi, *Journal of International Dispute Settlement* 2010, p. 252.

³⁸³ SFT of 23.08.2008, 4A_176/2008 E.5.2.

clause.³⁸⁴ Both examples underline how restrictively this principle is applied in practice by the Federal Court. A substantive correction of the arbitral tribunal's contract interpretation can no longer be achieved.

16.11. The principle of trust

The principle of trust, known as the "principle of good faith", is, according to the prevailing opinion, part of any legal order.³⁸⁵ For this reason, it is also an international *Ordre public* under Art. 190 para. 2 letter e CPIL.³⁸⁶ There are various manifestations, such as the prohibition of abuse of rights³⁸⁷.

Arbitration clauses agreed upon by reference to association statutes do not violate the *Ordre public*. Finally, the content review of the arbitration agreement on Article 190(2) of Letter b of the CPIL examines whether the arbitration agreement principle of trust is compatible.

16.12. Violation of moral principles

The definition of the Federal Court describes the *Ordre public* as a whole fundamental principle of international law and world order.³⁸⁸ Especially the latter, in particular, suggests the violation of moral principles in the

³⁸⁴ SFT 21.02.2008, 4A_370/2007 E.5.5.

³⁸⁵ UN-Purchase right, Article 7, parag. 25.

³⁸⁶ SFT 117 Ib 337, 340.

³⁸⁷ SFT 08.06.2007, 4A_17/2007, E.5.

³⁸⁸ SFT 121 III 331, 333.

context of Art. 190 para. 2 letter e CPIL may lead to cancellation of the award. It must be a morality that has a universality in international commerce.³⁸⁹ To this end, the Federal Court held that Violation is given against the *Ordre public* if one party is condemned by arbitration to participate in money laundering or bribery.³⁹⁰ In its findings, it is crucial that the arbitral tribunal recognized this and considered it proven, yet precipitated such an award. Otherwise, the award may be cancelled not because the Federal Court has no jurisdiction to review the findings of fact on their actual accuracy again.³⁹¹

16.13. Prohibition of discrimination

The prohibition of discrimination must be by the arbitral tribunal and observed by a state court.³⁹² The Federal Court interpreted this principle as very restrictive. After that, only discrimination on the grounds of origin (both origin and nationality) due to health, sexual preference, and political views is prohibited.³⁹³ In the area of doping sanctions, it always comes back to differences in treatment among athletes. The penalties for comparable offences in about often fall out quite differently. Nevertheless, this does not

³⁸⁹ Jermini, challenge, parag. 583.

³⁹⁰ 119 II 380, 384

³⁹¹ SFT of 14.12.2004, 4P.208/2004, E.6.2.

³⁹² SFT 116 II 634, 636.

³⁹³ SFT of 14.06.2000, 4P.12/2000, E. 5.a

constitute discrimination under the jurisdiction of the Swiss Federal Court in the rule³⁹⁴.

The Federal Court recognizes true that any doping offence must be considered individually. For each doping offence, various reasons for mitigating punishment and longer sentences must be considered in the specific case. In criminal cases, there may be too different penalties for the same offence by case.

16.14. No ingredients of substantive *Ordre public* within the meaning of Art. 190 para. 2 letter e CPIL

Principles that do not have an internal dimension do not belong to the international *Ordre public* because they are not equally important in all legal systems or because they do not belong to the Swiss *Ordre public*. Therefore, for example, was a violation of *Ordre public* denies in the limitation of private law claims because the statute of limitations in many countries is regulated differently.³⁹⁵

16.15. The relevance of international intervention standards

In international arbitration practice, the referees must multiply with international mandatory rules, for example, dealing with EU competition law. It is questionable whether disregarding these rules must be considered

³⁹⁴ Rigozzi, *Journal of International Dispute Settlement* 2010, p. 253.

³⁹⁵ SFT of 13.03.1992 = ASA Bulletin 1992, 366.

a violation of the *Ordre public*. Looking at the existing case-law of the Federal Court, the answer is incorrect because the regulations do not constitute a part of any fundamental legal values.³⁹⁶ For example, you cannot transfer standards of EU competition law must be included in other countries like the Gambia or China.

16.16. The admissibility of special reservation clauses

It is questionable whether mandatory national law, which is not predominantly in international comparative law, counts on public *Ordre*. For example, the issue of the admissibility of fines, which go beyond the mere loss compensation, was (so-called. Punitive damages) mentioned. According to Art. 135 para. 2 and Art. 137 para. 2 CPIL, it is illegal under Swiss private international law to award such penalties. In the Anglo-American world, however, the admissibility of which is generally accepted. Now,³⁹⁷ if an international arbitral tribunal sitting in Switzerland, a party ascribes such claims for damages, the question arises whether this decision *Ordre public* or contrary.

The problem must be solved because of the international character of Art. 190 para. 2 letter e CPIL. The *Ordre public* must be "universal" and applicable to all jurisdictions. Therefore, a legal prohibition, which is not

³⁹⁶ SFT 132 III 389, 392.

³⁹⁷ Lüke, Punitive Damages, page 141.

predominantly in international comparison, leads to a fundamental principle of law, according to a ground of avoidance. Art. 190 para. 2 letter e CPIL.³⁹⁸

In summary, the international character of the *Ordre public* limits its scope of protection compared to the Swiss *Ordre public*. Some defects which, from a Swiss point of view, constitute an infringement of the (then Swiss) *Ordre public*, are harmless from international Visibility.³⁹⁹

16.17. The admissibility of current practice in the area of doping sanctions

In doping penalties, athletes have repeatedly complained about the reversal of the burden of proof (so-called strict liability) provided in the WADC, as it violates Swiss principles of culpability. In that regard, the Federal Court held that those principles did not form part of the *Ordre public* within the meaning of Article 190(2) of the e CPIL.⁴⁰⁰ Nor is the principle in *dubio pro reo* violated since the doping sanctions are based on private law rules, and therefore the question of the burden of proof can be settled within the framework of private autonomy.⁴⁰¹

According to the Federal Court, the rules stand up to content control. Admittedly, the doping bans interfere with the right to personality under Art.

³⁹⁸ Berti/Schnyder, in: BASEL Comments on the CPIL, Art. 190, parag.81.

³⁹⁹ Berger/Kellerhals, International Arbitration in Switzerland, parag.1604.

⁴⁰⁰ SFT 4 August 2006, 4P.105/2006, E.8.2.

⁴⁰¹ Rigozzi, Journal of International Dispute Settlement 2010, p. 253.

28 para. Civil Code. However, these are justified by overriding public interests, such as the cleanliness of sports or the preservation of the role of role models for young people.⁴⁰²

There is nothing to the jurisprudence of the Federal Court against the rules to combat doping. However, it remains worth considering if you want to leave this regulatory power of sports federations virtually limitless. Finally, these tend to be inferior in the fight against doping's strictest standards.⁴⁰³ Although an effective fight against doping is in the interest of the whole sport, it must also ensure that the doping rules for athletes remain understandable and must be observed.⁴⁰⁴

16.18. existence of a "sports law" Ordre public?

The case-law applies the concept of Ordre public very restrictively and restricts it to a few fundamental legal principles. Most of these principles have been worked out through economic arbitration.⁴⁰⁵ For this reason, the literature partly demands that the case law install a concept of public policy shaped by sports law and, for example, the principle of fair play is a fundamental value of the legal order.⁴⁰⁶ This is not unusual since the concept

⁴⁰² SFT of 04.08.2006, 4P.105/2006, E.8.2., SFT 134 III 193, 203.

⁴⁰³ Reissinger, Causa Sport 2010, p. 9

⁴⁰⁴ Heermann, Magazine for Sport and Law 2009, 234.

⁴⁰⁵ Jermini, Contestation, marginal number 539-599

⁴⁰⁶ Compare Rigozzi, Arbitrage international, marg. 1441.

of ordre public is always somewhat influenced by the area in which it is being applied.

The application of the general Ordre public is hardly conceivable in the court arbitration Proceedings. Can hardly occur violations of fundamental legal principles of universal jurisdiction to day. Therefore, in substantive terms, could Art. 190 par. 2 letter e CPIL come in sports arbitration hardly used.⁴⁰⁷In addition, the current rules give the judges complete freedom as they decide on the merits, which could lead to arbitrary results.⁴⁰⁸

The extent to which the design of a sports law Ordre public should go is debatable. While one part only seeks a less restrictive application,⁴⁰⁹ others call for a complete redefinition of the ordre public in the field of sport. This should allow the Federal Court to review the arbitral awards to see whether they also respect the fundamental rights of athletes from a substantive point of view.⁴¹⁰

The concept of the ordre public is interpreted in a very natural way. So far, only once has an arbitration decision of an international arbitral tribunal been overturned for the violation of the Ordre public, although this was a decision of the CAS.⁴¹¹

⁴⁰⁷ Walter, in: Rigozzi/Bernasconi, CAS Conference 2006, p. 165.

⁴⁰⁸ Rigozzi, Journal of International Dispute Settlement 2010, p. 254

⁴⁰⁹ Rigozzi, Arbitrage international, parag.1452..

⁴¹⁰ Baddeley, Causa Sport 2007, p. 161.

⁴¹¹ SFT 138 III 322 = Magazine for sport and law 2012, p. 109.

Restriction of personal freedom, as it is substantiated in Art. 27 of the Civil Code.⁴¹²

The Federal Court's first detail is the fundamental guarantee of the right to personal freedom to the fundamental principles of law and thus to *Ordre public* within the meaning of Art. 190 para. 2 letter e CPIL could be expected. It should also be professional freedom derived from the right to personal freedom and personal fulfilment and can also be regarded as a fundamental legal principle. This not only grants protection against interference of the state but also against interference by private persons.⁴¹³ Also, sports Clubs and organisations must adhere to these principles in their statutes and decisions.

Thus, it was a severe intervention, like a life-long prohibition, only with *Ordre public* compatibility if the association interests outweigh the associated engagement in the right to privacy of the soccer player. The Federal Court took this regard detail legality of the procedure before and denied even a need for a penalty to enforce the claim for damages.⁴¹⁴ In addition, the Federal Court carried out a balancing of interests in its decisions. A long-life punishment seriously interferes with an athlete's rights. Such punishment would effectively mean the end of a career and thus lead

⁴¹² SFT 138 III 322, 327.

⁴¹³ SFT 138 III 322, 328.

⁴¹⁴ SFT 138 III 322, 329.

to disbarment.⁴¹⁵The Federal Court concluded that the CAS ruling is from 29.06.2011, a clear and severe violation of privacy, so it is publicly incompatible with the Ordre and according to Art. 190 para. 2 letter e PIL should be repealed.⁴¹⁶

The judgment shows that the concept of Ordre public need not necessarily be wholly redefined to allow substantive control under sports law.⁴¹⁷It will be necessary in any case in transfer disputes or other economic disputes in connection with the sport, no specific sports law embossing of Ordre public-term to its protective effect to unfold. In these matters, it is all about civil issues, so that one no sport quite specific determination of Ordre public needs. Moreover, the disputes are usually performed by voluntary arbitration agreement before the CAS. The parties are aware that, following the award, they will only have the appeal to the Swiss Federal Court with its restrictive application of the Ordre public.⁴¹⁸

However, this should be seen differently regarding association penalties and sanctions. On the one hand, internal law is applied in this area, and the arbitrators of the CAS carry out judicial training.⁴¹⁹In some cases, there is even talk of a *lex Sportiva*, i.e. one of its legal systems.⁴²⁰Irrespective of

⁴¹⁵ SFT 138 III 322, 330.

⁴¹⁶ SFT 138 III 322, 331.

⁴¹⁷ Rigozzi, *Journal of International Dispute Settlement* 2010, p. 254

⁴¹⁸ Corboz, *La semaine judiciaire* 2002, p. 30

⁴¹⁹ Compare Loquin, in: Rigozzi/Bernasconi, p. 85

⁴²⁰ Oschütz, *Sports Arbitration*, p. 351.

whether or not sports law is regarded as a separate legal order, a different standard of control is required than for other law areas, as the "rule" of international arbitration. On the other hand, as has already been pointed out several times, sports arbitration is forced on the athletes by the federations. As a result, the requirements of Article 6(1) of the ECHR must apply to the arbitration procedure. In addition, they can be extended to the control.⁴²¹ The demand for a less restrictive approach must apply even more to sports arbitration. Especially in the area of doping sanctions, it is possible for Unequal treatment so that one athlete "only" gets a one-month ban and the other is banned for four years for a similar situation. This difference in treatment is a matter for the athletes. The Federal Court should be able to regulate this, if necessary.⁴²² This would have several advantages: first of all, the quality of the arbitration decisions could be increased since the increased control would encourage the arbitrators to make well and well-founded arbitration decisions. This would favour the further legal training of association law through the CAS and demonstrate the limits of controversial regulations, such as indirect evidence in the field of doping. In addition, this would help to give arbitration more recognition among athletes.⁴²³ After all, what is the point of helping athletes if, according to the view expressed here, they are entitled to a procedure which meets the requirements of Article 6(1)

⁴²¹ Schnyder/Dreifuss, in: commemorative publication Geimer, p. 974.

⁴²² Rigozzi, Arbitrage international, paragraph 1454

⁴²³ Rigozzi, Journal of International Dispute Settlement 2010, p. 254

of the ECHR, but ultimately the result is insufficient in terms of content and law⁴²⁴.

16.19. Summary

1. The CAS was the first international arbitral tribunal based in Switzerland whose arbitral award was quashed by the Swiss Federal Supreme Court due to violating the procedural ordre public under Art. 190 para. 2 letter e CPIL. However, due to the facts of the case, the disregard for the substantive validity of the decision was instead an individual case decision. Nevertheless, this annulment has consequences. The CAS, unlike in the case of procedural errors under Art. 190 (2) letter d CPIL cannot simply make up for its omission and again decide the same way. Instead, the arbitral tribunal must now observe the principle of “the already judged subject” in such cases and, in a new hearing, reject the claim entirely.⁴²⁵

2. The principle of “not to be judged twice in the same subject” is to be seen when the Federal Court is forced to decide on the applicability of this principle in the matter of doping penalties. After being taken here, it would hardly be able to avoid affirming the applicability of the prohibition of double jeopardy in this area.

⁴²⁴ Orth, Magazine for sport and law 2014, p. 134.

⁴²⁵ Dickenmann, Case Sport 2010, 208.

3. In summary, the ground for the challenge in Article 190(2)(e) CPIL is applied very restrictively. It must be set aside if a judgment is "absolutely incompatible" with the international public order. In practice, the Federal Supreme Court upholds arbitral awards that it considers legally questionable.⁴²⁶ Until the beginning of 2012, the possibility of setting aside an international arbitral award for violating the substantive law *ordre public* was only theoretical, as no action for avoidance on this ground has ever been successful.⁴²⁷

4. This has been criticized in the literature, as it was feared that the difference in the place of arbitration in Switzerland suffers a quality disadvantage by these restrictive applied control laws because the referee can virtually adopt impunity "erroneous" judgments.⁴²⁸ However, it should be mentioned that the number of arbitrations that take place in Switzerland, yet continues to increase. However, the restrictive application of avoidance reason⁴²⁹ brings, according to Art. 190 para. 2 letter e CPIL disadvantages. Referees are tempted to place less care in their arbitral awards on the day when no accurate control is more to be feared. Therefore, the Federal Court should reconsider its restrictive practice since the number of arbitrations is rising not only in Switzerland

⁴²⁶ Schnyder/Dreifuss, in commemorative publication Geimer, p. 977.

⁴²⁷ Hofmann, Magazine for sport and law 2012, 112.

⁴²⁸ Schnyder/Dreifuss, in commemorative publication Geimer, p. 974.

⁴²⁹ http://www.tas-caSeiteorg/fileadmin/user_upload/CAS_Statistics_2018.

but as a whole, and other countries have now recognized the economic factor of arbitration.⁴³⁰It is expected otherwise that increasingly other arbitration courts are more visited than Switzerland.

5. Athletes have no choice in the rule and must take legal action against CAS. Here it would be desirable that the Federal Court on the specificities of the law takes into consideration for athletes to provide better control. 5. This is urgently recommended to the Federal Supreme Court, at least in association and doping penalties.

17. possibility of legal exclusion under Art. 192 CPIL

The Swiss regulations on international arbitration court exhibited in Art. 192 para. 1 CPIL the particularity of agreeing on a waiver of the legal challenge as a remedy in advance. For this, it is necessary that both parties not have a territorial link to Switzerland⁴³¹⁴³². In the literature, the scheme is assessed differently. Some authors criticize the fact that they would bring more disadvantages than advantages and is questionable from a legal policy point of view, as it would limit the individual unreasonably rights⁴³³.

In international comparison, this regulation is a unique feature. In most states, such a waiver is not possible.⁴³⁴It requires various conditions to

⁴³⁰ Besson, ASA Bulletin 2003, p. 463.

⁴³¹ Patocchi/Jermini, in: Basel Comment on THE CPIL, Article 192, parag. 12.

⁴³² Poudret/Besson, parag. 839.

⁴³³ Walter, Magazine for sport and law 2008, p. 134.

⁴³⁴ Kunz, Waiver of Appeals, p. 35-68.

renounce the right of appeal effectively. Neither party shall have their headquarters in Switzerland, and the waiver must be formally effective and satisfy the principle of certainty. First, however, seeks to determine what can be excluded precisely with the appeal waiver.

17.1. Purpose of the appeal waiver

The objective scope of the agreement is limited to the wording of the "Challenge of the arbitral awards" (Art. 192 para. 1 CPIL). All kinds of actionable arbitral awards, preliminary, intermediate, and part Final arbitration awards, must be counted.⁴³⁵ As a "challenge" in terms of Art. 192 para. 1 CPIL, the arbitration complaint is understood by the Swiss federal court. Other remedies, such as a set in the arbitration agreement second instance, are not included⁴³⁶.

Art. 192 para. 1 CPIL opens the possibility of either eliminating the challenge or just giving up some challenging substrates, such as the complaint of jurisdiction.⁴³⁷ According to the prevailing opinion, a restriction on individual types of arbitral awards (for example, waiver of notification of interim and preliminary decisions) is impossible⁴³⁸.

⁴³⁵ Berger/Kellerhals, *International Arbitration in Switzerland*, parag 1683.

⁴³⁶ Brunner, *AJP* 2008, 739.

⁴³⁷ SFT of 10.11.2005, 4P.98/2005, E.4.2, STF 143 III 260, 266.

⁴³⁸ Berger/Kellerhals, *International Arbitration in Switzerland*, marg. 1683.

Sometimes it is necessary for arbitration that the arbitration let the state judge join in the procedure. For example, according to Art. 184 2 CPIL taking of evidence or according to para. Art. 185 CPIL in other cases. To score in such cases, the state judges' decisions also opposed the appeal.⁴³⁹This cannot be waived under Article 192 of the CPIL since the provision's wording is based only on decisions of the arbitral tribunal.⁴⁴⁰

Subjectively, the waiver applies only to the parties that have agreed to it.⁴⁴¹Nevertheless, as with arbitration agreements,⁴⁴²the observed subjective scope of the arbitration agreement principles generally can also be transferred to the waiver: Applies the arbitration clause even for a not directly involved the third party, a waiver contained therein for that is binding.⁴⁴³

A unique feature is to be noted that only the Federal Court to deal with the effectiveness and extent of the waiver should not have the arbitral tribunal⁴⁴⁴.

⁴³⁹ Markus, ASA Bulletin 2013, p. 504.

⁴⁴⁰ Basel Comments on the CPIL, Art. 185, para. 19.

⁴⁴¹ Kaufmann-Kohler/Rigozzi, Arbitrage, parag.764.

⁴⁴² Berger/Kellerhals, International Arbitration in Switzerland, parag. 491-532

⁴⁴³ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1687

⁴⁴⁴ Berger/Kellerhals, International Arbitration in der Schweiz, parag. 1686

17.2. The effects of renunciation

It is a complete, effective waiver agreement, and the Federal Court does not open the procedure. This is to be considered by the Federal Court on its initiative.⁴⁴⁵

By dispensing but not every opportunity is lost to review the award. Alternatives depend on whether the award is to be enforced in Switzerland or abroad.

Suppose the award is enforced abroad in States Parties to NY Convention a check according to Art. V New York Convention not possible, citing recognition for refusal.⁴⁴⁶ It should be noted that the review of the arbitral award has no equivalent to the cancellation procedure verification possibility.⁴⁴⁷ Comparing the text of the non-enforcement of the New York Convention and the CPIL, it is found that the cancellation and recognition for refusal are mainly identical. There are differences, however, in terms of the effect of each control option.

If the cancellation procedure over arbitration is successful, there is, according to Art. V para. 1 letter e York Convention an enforcement obstacle in all contracting states, which has a “by every” state effect.⁴⁴⁸ In contrast,

⁴⁴⁵ SFT of 07.06.2006, 4P.114/2006.

⁴⁴⁶ Compare Swiss Federal Gazette. 1983 I 263, 465.

⁴⁴⁷ Patocchi/Jermini, in: Basel Comment on the CPIL, Article 192, parag. 44 and 55.

⁴⁴⁸ Brunner, AJP 2008, 741.

the recognition and enforcement refusal apply only in the relevant state where enforcement is to be operated. This means that the execution refusal does not prevent a country that the award is still enforced in another country.⁴⁴⁹This may make it necessary to defend themselves in various states against enforcement.⁴⁵⁰

It should be noted, however, that the plea of Art. 190 para. 2 CPIL are in some respects not entirely congruent with the refusal reasons of Art. V New York Convention.⁴⁵¹For example, in CPIL, only procedural violations after trial can be reprimanded, while Art. V para. Letter c New York Convention granted a hearing at any time.⁴⁵²As regards the assessment of the difference in the capability of the subject article or the question of the appropriate jurisdiction of the ECA (The European Commission), the New York Convention places a more stringent criterion as the CPIL.⁴⁵³

Art. 192 para. 2 CPIL is beyond reason to need for correction. The wording of Art. 192 para. 2 CPIL, according to the New York Convention, is only applicable to a complete abandonment of the arbitration complaint. As stated above, waiving only to individual contesting grounds of Art is also possible. 190 para. 2 CPIL limit. The wording of no more control in such a case for the excluded pleas would be possible.

⁴⁴⁹ Patocchi/Jermini, in: Basel Comment on THE CPIL, Art. 192, parag. 56

⁴⁵⁰ Brunner, AJP 2008, 741.

⁴⁵¹ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1691.

⁴⁵² Habscheid, waiver of appeal, p. 21.

⁴⁵³ Poudret/Besson, parag. 784, 786, 840.

17.3. Basic requirements

The next step is to present the conditions necessary for a waiver of appeal under Article 192 of the CPIL.

17.3.1. No headquarters in Switzerland

According to Art. 192 para. 1 CPIL, the parties are not allowed to have their 'seat' in Switzerland, which means that the parties, neither domicile nor habitual residence, must have an office in Switzerland.⁴⁵⁴ Consequently, according to Art, any local reference leads to Switzerland with one of the parties to exclude the possibility of a waiver. 192 para. CPIL⁴⁵⁵.

The relevant date for the existence of this condition is the agreement of the waiver, which can be otherwise bypassed again by a subsequent seat displacement or by opening a branch of the waiver according to the prevailing doctrine.⁴⁵⁶

17.3.2. Formal requirements

The waiver may, according to Art. 192 para. 1 CPIL will be included in the arbitration agreement or subsequently agreed upon. If the waiver is already stated in the arbitration agreement, the requirements of Art. 178 para. 1 CPIL regarding the arbitration agreement applies to him, and it is enough

⁴⁵⁴ Kaufmann-Kohler/Rigozzi, Arbitrage, parag. 750

⁴⁵⁵ Lalive/Poudret/Reymond, Droit de l'arbitrage, Article 192, parag. 2

⁴⁵⁶ Kaufmann-Kohler/Rigozzi, Arbitrage, parag. 749a.

that a "form of transmission [in written that enables the detection [...] through written text."⁴⁵⁷This applies prevailing opinion analogously to the subsequent waiver agreement that it did not apply the more stringent requirements for literacy according to Art. 13 SCC (Swiss Civil code).⁴⁵⁸This view must be upheld since there is no reason to set higher at a later agreed waiver requirements, as anchored to an already in the arbitration agreement.

The written form requirement must be maintained in terms of time until the opening of the arbitration decision. A waiver is then for everyone informally⁴⁵⁹. The "indirect waivers" have been agreed upon either in the arbitration agreement or in a separate text but were deposited in another, existing prior to the arbitration agreement document⁴⁶⁰.

17.3.3. Requirement of determination

The law requires in Art. 192 para. 1 CPIL is an "explicit statement" that includes the waiver. This was initially interpreted strictly by the Swiss Federal Court very much. The supreme court later changed its praxis.⁴⁶¹The Federal Court saw it in this Decision as necessary but sufficient that much is clear from the declaration of the will to renunciation of any appeal.⁴⁶²This change of direction was based on two arguments: first, Art. 190 would be an

⁴⁵⁷ Kaufmann-Kohler/Rigozzi, Arbitrage, parag. 752.

⁴⁵⁸ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1675.

⁴⁵⁹ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1674.

⁴⁶⁰ SFT of 06.06.2007, 4A_18/2007, E.3.2.

⁴⁶¹ SFT 131 III 173.

⁴⁶² SFT 131 III 173, 178.

explicit reference to Article 192 formalistic and would take many existing waiver agreements invalidate and, on the other such an agreement to facilitate a waiver.⁴⁶³This recent judgment of the Federal Court was subsequently confirmed many times.⁴⁶⁴

The law change was approved mainly in the teaching because you did not consider it compatible with strict requirements on the waiver as the wording.⁴⁶⁵At the same time, it warned about loosening the requirements for a waiver too much. It was loud but also a criticism that the restrictive interpretation is more appropriate.⁴⁶⁶The new law raises many questions for practice. For example, are found in arbitration agreements often provisions that want to see the award as "final and binding". If these already a valid appeal waivers?⁴⁶⁷

Ultimately results in the jurisdiction of the Federal Court since the appeal waiver is only possible for foreigners. It may well be that this regulation of the content of Art. 190 para. 2 CPIL is not known. In addition, it can be avoided that the Federal Court, on purely formal grounds, must disregard the parties' clear intention.⁴⁶⁸

⁴⁶³ SFT 131 III 173, 177.

⁴⁶⁴ SFT 133 III 235, 241.

⁴⁶⁵ Patocchi/Jermini, in: Basel Comment on CPIL, Art. 192.

⁴⁶⁶ Compare Brunner, AJP 2008, 745.

⁴⁶⁷ Please compare Dasser, Jusletter of 09.05.2005, p. 4.

⁴⁶⁸ Patocchi/Jermini, in: Basel Comments on the CPIL, Article 192, parag. 14.

The Federal Court, however, has taken up the criticism that warned against too great a relaxation of the conditions. Recent case law continues to emphasize that, given the scope of the waiver, the will to exclude the respective appeal clearly must be reflected.⁴⁶⁹

In summary, this means that, even with the recent case law of the Federal Court, no waiver agreements are still possible, which are only indirectly concluded by reference to any arbitration rules or only a generally formulated waiver, e.g. that the award is "final", "final and binding".⁴⁷⁰

The case-law of the Federal Court can therefore be regarded less as a 'relaxation' of the formal conditions but makes it possible, without significant formal barriers, to interpret a contractual provision under the parties' will.

17.3.4. Material requirements

The waiver is an agreement between the waiving parties and therefore has to meet the general material requirements such that there must be matching declarations of intent.⁴⁷¹ It is controversial law under which the waiver should be examined for its substantive effectiveness since Art. 192 para. 1 CPIL does not make any statement in this regard.

⁴⁶⁹ SFT 134 III 260, 263; SFT of 21.08.2008, 4A_194/2008, E.2.1.

⁴⁷⁰ Kaufmann-Kohler/Rigozzi, Arbitrage, parag. 756-758

⁴⁷¹ SFT 133 III 235, 240.

One view sees the resignation as ancillary to the arbitration agreement and will, therefore, applicable law analogous to Art. 178 para. 2 CPIL determine.⁴⁷² The reason is that the waiver constituted an ancillary to the arbitration agreement; therefore, the law applicable to the arbitration agreement must also apply to the waiver.⁴⁷³

The other view, however, is that the waiver should always be measured against Swiss law. Even though the waiver ancillary agreement to the arbitration agreement, the same legal consequences would not arise. The waiver waives the jurisdiction of a Swiss state court, which is why the substantive law of validity should be measured against Swiss law.

There is no reason why a waiver under Swiss law should be examined for its substantive-legal validity if the parties have expressly provided for a different legal order for this purpose. Arbitration is, after all, an outflow of private autonomy in which the parties can determine the applicable law themselves, in addition to the procedural arrangements.

In the area of doping penalties, an arbitration agreement is effectively imposed so that there is no absolute agreement between the parties. In practice, there will usually be no concrete choice of law agreement. However, the waiver of the appeal is always based on Article 192 of the

⁴⁷² Berger/Kellerhals, *International Arbitration in Switzerland*, parag. 1671.

⁴⁷³ Berger/Kellerhals, *International Arbitration in Switzerland*, parag. 1671.

CPIL, i.e. a provision of Swiss law. Therefore, in the absence of an express party agreement, it seems reasonable to assess the substantive validity under Swiss law.

17.3.5. The Supreme court opinion and its influence on the requirements of an appeal waiver

The Federal Court had to decide whether it was allowed to take action. In the process, the Federal Court examined whether the waiver had been validly agreed upon formally and substantively.

17.3.5.1. New requirements for waiver of appeal in sports jurisdiction

The Federal Court held that the waiver of the appeal formally met the requirements of Article 192 (1) of the CPIL. It showed an explicit renunciation of the player since the necessary declaration of intent was part of the agreement he signed.⁴⁷⁴

However, the waiver did not stand up to substantive examination. The Federal Supreme Court relied on two arguments in this respect.

First of all, it focused on the purpose and purpose of the waiver of appeal in arbitration. According to the legislator's conception, that provision was

⁴⁷⁴ SFT 133 III 235, 240.

created to avoid a double review of the arbitration decision by the appellate court and the respective enforcement judges. Finally, under the Court of Article 192 (2) of the CPIL, an award is subject to any event in the context of the enforcement of the review under the NYC. The peculiarity of the specific supreme court case was that it was a matter of imposing a doping ban. In the case of suspensions and disqualifications imposed on athletes, the arbitration decision is already enforceable on its part. There is no need for a separate enforcement procedure.

Consequently, a supervisory authority would be lost due to a waiver of appeal in such a situation. This prompted the Federal Court to do so, Art 192 CPIL in cases involving association penalties, teleologically reduce. Such cases are excluded from the provision, i.e. no prior waiver is possible. Accordingly, in the view of the Federal Court, the waiver of appeal in the appeal case is ineffective.⁴⁷⁵

In addition, the Federal Court also carried out a content review of the exclusion agreement. It concluded that the waiver agreement signed by the athlete was not based on any free expression of will. The Federal Court justified this because, in sports, the associations have a kind of "monopoly position" An athlete who wants to compete with competitors is indirectly forced to accept the rules and statutes established by the association. In the

⁴⁷⁵ SFT 133 III 235, 242.

opinion of the Federal Court, this is mainly due to the hierarchical structure of the competitive sport. Unlike contractual relations, the relationship between athletes and sports federations is vertical at the national and international levels. This means that the athlete does not influence the competition conditions. He must accept them - and thus, the arbitration clause with the agreed waiver of appeal - nolens volens, well or bad. As a result, the Federal Court lacked voluntary waiver, so the waiver agreement was ineffective.⁴⁷⁶

17.3.5.2. The question is how this decision is to be assessed by the Federal Court

First is the historical-teleological reduction of Art. 192 CPIL must be assessed. The Federal Court based in that regard to the ratio legis of Art. 192 CPIL. The waiver should be able to prevent by the appeal court and the judge by a double check of the arbitral award⁴⁷⁷⁴⁷⁸. Therefore, the conclusion of the Federal Court seems more than consistent that from a historical-teleological point of view, Art. 192 CPIL does not apply to arbitral decisions in the area of sports law which, by themselves, are enforceable.

Likewise, the result of the review is understandable. As stated above, an effective appeal waiver requires two declarations of intent. Here, however,

⁴⁷⁶ SFT 33 III 235, 242.

⁴⁷⁷ SFT 133 III 235, 242.

⁴⁷⁸ AJP 2008, 748.

it is necessary, due to the particular hierarchical situation in competitive sports, a content checks whether and to what extent the declarations voluntarily came about. Ultimately, the equality of arms must be observed in the court proceedings, which a forced renunciation appeal in sports arbitration would violate.

In addition, earnings in the face of personal rights of Art. 28 of the Civil Code and protection from excessive binding under Article 27 para. 2 Swiss Civil Code are understandable.⁴⁷⁹The athlete only has the opportunity to participate in competitions if he accepts the terms of the associations. He is given a choice whether he consents to interference in its self-determination, his physical integrity and his private life or if he gives up his profession. Both mean a significant impairment of his rights.⁴⁸⁰According to Art. 28 para. 2 of the Civil Code, such an impairment only be justified by explicit consent of the individual or an overriding interest on the part of the association organs, resulting in both cases leading to a proportionality test should be applied.⁴⁸¹

On the one hand, the association gets faster legal certainty by an appeal waiver.

⁴⁷⁹ Brunner, AJP 2008, 747.

⁴⁸⁰ Landlord/Aebi-Müller, ZBJV 2001, 348.

⁴⁸¹ Brunner, AJP 2008, 747.

On the other hand, the athlete is violated by the imposed renunciation of his right of personality since he is either entitled to a control body or has to renounce his professional practice.

Therefore, protecting the athlete's right to personality outweighs the association's interests. In sports, such a waiver of appeal does not stand up to Article 27 of the Swiss Civil Code.⁴⁸²

According to the view expressed here, an imposed arbitration agreement is only permitted to a limited extent since it deprives the athlete of his right to the state judge. Therefore, a stricter standard must apply to waiving any remedies since it deprives the athlete of the last opportunity to seek legal protection before the state judge.

For the first time, the issue of "forced" arbitration was adequately analysed. The decision of the Federal Court is, therefore, expressly to be supported. The Federal Court should also change its reasoning in evaluating arbitration agreements in sports because of the recent ECHR case law.

17.3.5.3. Consequences of this decision for international arbitration in Sport

The main message of the judgment is clear: An appeal waiver, according to Art. 192 CPIL is very difficult and legally feasible in the penalties and

⁴⁸² Including Brunner, AJP 2008, 747.

sanctions Association range. It can not be agreed through references to the clauses in the regulations,^{483, 484}. Nevertheless, the decision should not apply to all disciplines of the sport alike.⁴⁸⁵The headquarters of international sports federations are often located in Switzerland, like⁴⁸⁶

- FIFA
- UEFA
- IOC
- FIS
- UCI
- Union Internationale des Associans d'Alpinisme (UIAA) in Bern
- Fédération Internationale de l'Automobile (FIA) in Genva,
- World Baseball Softball Confederation (WBSC) in Lausanne and Confederation of European Baseball (CEB) in Lausanne
- Fédération Internationale de Basketball (FIBA) in Mies
- Union Internationale des Associations d'Alpinisme (UIAA) in Bern
- Confédération Européenne de Billard (CEB) in Lausanne
- International Bobsleigh & Skeleton Federation (FIBT) in Lausanne
- World Archery Federation (WA) in Lausanne und International Field Archery Association in Lugano
- Association Internationale de Boxe Amateure (AIBA) in Lausanne
- World Bridge Federation (WBF) in Lausanne
- European Curling Federation in Bern
- International Ice Hockey Federation (IIHF) in Zürich
- International Skating Union (ISU) in Lausanne
- Fédération Internationale d'Escrime (FIE) in Lausanne
- Fédération Aéronautique Internationale (FAI) in Lausanne
- Fédération Internationale de Football Association (FIFA) in Zurich,
- Union of European Football Associations (UEFA) in Nyon,
- Association of European Professional Football Leagues (EPFL)
- International Golf Federation (IGF) in Lausanne

⁴⁸³ Baddeley, Causa Sport 2007, 160.

⁴⁸⁴ Causa Sport 2004, 106.

⁴⁸⁵ Compare Netzle, Magazine for sport and law 2007, 118.

⁴⁸⁶

https://de.wikipedia.org/wiki/Sport_in_der_Schweiz#Weltsportverb%C3%A4nde_mit_Sitz_in_der_Schweiz

- Fédération Internationale de Gymnastique (FIG) in Moutier and Union Européenne de Gymnastique (UEG) in Lausanne
- International Handball Federation (IHF) in Basel
- Fédération Internationale de Hockey (FIH) in Lausanne
- International Inline Skater Hockey Federation (IISHF) in La Heutte
- International Judo Federation (IJF) in Lausanne
- Internationaler Kanuverband (ICF) in Lausanne
- International Federation of Sport Climbing (IFSC) in Bern
- European Athletic Association (EAA) in Lausanne
- Fédération Aéronautique Internationale (FAI) in Lausanne
- World Minigolf Sport Federation (WMF) in Bern
- Fédération Internationale de Motocyclisme (FIM) in Mies und FIM Europe in Mies
- International Federation of Equestrian Sports (FEI) in Lausanne
Union Cycliste Internationale (UCI) in Aigle und Union Européenne de Cyclisme (UEC) in Aigle
- Fédération Internationale des Luttes Associées (FILA) in Lausanne
IRV in Bern
- Fédération Internationale des Sociétés d’Aviron (FISA) in Lausanne
- Fédération Internationale des Échecs (FIDE) in Lausanne
- Fédération Internationale de Natation (FINA) in Lausanne
- International Masters Games Association (IMGA) in Lausanne
- Fédération Internationale de Ski (FIS) in Oberhofen am Thunersee
- International Ski Mountaineering Federation (ISMF) in Lausanne
- Fédération Internationale de Médecine du Sport (FIMS) in
- World Dance Sport Federation (WDSF) in Lausanne
- International Table Tennis Federation (ITTF) in Lausanne
- ITU in Lausanne
- Fédération Internationale de Volleyball (FIVB) in Lausanne
- United World Wrestling (UWW) in Corsier-sur-Vevey

In this case, the question does not arise whether a previously agreed waiver of appeal still endures. It can emphasize⁴⁸⁷ that the decision now

⁴⁸⁷ Walter, Magazine for sport and law 2008, p. 137

applies uniformly in cases of "forced" Arbitration in Sports that a pre-agreed appeal waiver is ineffective.

This raises the question of whether this reduction should not be extended to all cases where enforcement of the arbitration decision and, thus, possible follow-up of the YNC is excluded. In particular, it is necessary to consider the case of a judgment dismissing the action. The prevailing doctrine agrees in that regard that, in the event of an effective waiver, the applicant is no longer able to make any infringements of the law in Article 190(2) letter a-e CPIL.⁴⁸⁸ In such cases, there are no alternatives to the enforcement recognition procedure, such as a hostile action for recognition or a finding of invalidity of the arbitration decision.⁴⁸⁹ So there is no possibility of a follow-up check. If, however, a waiver of appeal were allowed in such cases, the losing plaintiff would no longer have the opportunity to have the judgment reviewed for gross procedural and substantive errors. It would be in a much worse position than the one whose award has yet to undergo the recognition procedure under the YNC. This led to voices calling for the teleological reduction of Article 192(1) CPIL to be extended to all cases where a follow-up review of the award is not possible within the framework of the YNC. The problem here is that in practice, the lawsuits often do not lead to a complete dismissal of the claim, but the

⁴⁸⁸ Poudret/Besson, marg. 839.

⁴⁸⁹ Brunner, AJP 2008, p. 748.

plaintiff often gets part of the claim right, and the claim is only dismissed for the rest. The defendant could then turn to the enforcement judge because of the waiver of appeal. Plaintiff no longer has the possibility of follow-up control regarding the subject matter. However, an extension of teleological reduction also brings problems. The procedure is considerably complicated, and in the event of a partial subject of the applicant's application, the possibility of legal protection is shifted in his favour.⁴⁹⁰ On the other hand, it should be noted that the applicant must otherwise decide concerning the subject of the case without protection.

It is questionable whether an interpretation in conformity with the ECHR would lead to an extension of the teleological reduction of Art. 192 CPIL.⁴⁹¹ It is herein in part to conclude that, in cases where there is no longer any possibility of control over an award based on a waiver of appeal, that award or the subsequent waiver of appeal contrary to Article 6(1) sentence 1 of the ECHR⁴⁹².

This view is supported by the fact that the plaintiff has no further opportunity for subsequent control in the event of a failure in the event of a validly agreed waiver of appeal. Nevertheless, one should not generally reduce Art. 192 para. 1 CPIL teleologically if no enforcement proceedings

⁴⁹⁰ Patocchi/Jermini, in: BASLER COMMENT ON THE CPIL, Art. 192, parag. 55.

⁴⁹¹ Brunner, AJP 2008, 749

⁴⁹² Brunner, AJP 2008, 749

are conducted. Instead, it makes sense to focus on the individual case, particularly the circumstances in which the arbitration agreement was concluded, the role of the parties in the proceedings and the gravity of the alleged infringement.⁴⁹³ Finally, it can also be inferred from the case law of the ECtHR that the Member States are concerned with the rules governing how to award an award by state courts, a further discretion is granted.⁴⁹⁴

The Federal Court has cited as the main argument for the invalidity of the waiver means the relationship between athletes and the association that the appeal waiver does not correspond to the free will of the athlete. After all, in sports, the conditions are dictated unilaterally by the associations. Nevertheless, a waiver of an appeal shall not be impaired by coercion. The athlete is ultimately denied by not rechallenging the arbitral award before a court due to violating fundamental legal principles.⁴⁹⁵

17.4. Summary

1. The Supreme Court of Switzerland makes it clear that an appeal waiver in the sports arbitration before the CAS in the relationship between athletes and dressing (associations) should not be agreed upon. He is unlikely to stand up in the supreme court. Because of the questions raised by the Federal Tribunal issues, the rest of the

⁴⁹³ Besson, ASA Bulletin 2006, 405.

⁴⁹⁴ Schott, in: Sutter-Somm/Hasenböhler/Leuenberger, Commentary on the Code of Civil Procedure, Article 396, parag. 19

⁴⁹⁵ STF 133 III 235, 244.

international arbitration practice should be apart from a pre-arranged appeal waiver. Even without such a waiver is no risk that the arbitration process is substantially delayed by filing an annulment. Finally, the hurdles are still high for the annulment of an arbitration decision.⁴⁹⁶ As a result, the prospects of a legal challenge are low⁴⁹⁷.

2. The legal challenge, according to Art. 190 para. 2 CPIL is the "classic" appeal against decisions of an international arbitration court in Switzerland. Responsible is the Swiss Federal Court.
3. The grounds for annulment referred to in Article 190(2) of the CPIL are exhaustive. Severe defects do not result in annulment but must be brought within the same time limit as the action for annulment. They result in the award being annulled.
4. Of the five grounds for annulment, the first four are procedural defects. Only the plea of incompatibility with the public order can be considered in very to a limited extent, a substantive correction of the arbitral award. In addition, this complaint also has procedural content.
5. It is possible to waive the action for rescission under Art. 192 para. 1 CPIL. According to case law, which has changed in the meantime, it is necessary to clarify that all legal remedies are waived. It is not

⁴⁹⁶ Note Netze, Magazine for sport and law 2007, p. 118.

⁴⁹⁷ Dasser, ASA Bulletin 2010, p. 85.

necessary to specifically mention the action for rescission. Nevertheless, in order to avoid disputes, it is recommended that such waiver agreements always mention the respective remedy with the relevant provision. The waiver may be agreed upon for all grounds for cancellation or limited to individual complaints.

6. If an effective waiver is agreed upon, the arbitral award shall not remain without control. Art. 192 para. 2 CPIL ensures that even in the case of enforcement in Switzerland, a subsequent review is still carried out in the recognition proceedings. On the one hand, the grounds for refusal of recognition of the UN Convention are to be applied restrictively to the extent that they do not exceed the grounds for annulment of Art. 190 (2) CPIL goes beyond the content of this provision, i.e. lead to a stricter standard. On the other hand, contrary to the wording of Art. 192 para. 2 CPIL, in the case of a partial renunciation of specific grounds for setting aside, the UN Convention is to be applied in the recognition procedure.

Chapter III. The possibility of the revision (resumption) of the process

In addition to the annual appeal of the legal challenge to the federal court, Swiss law provides the revision of yet another possibility of a subsequent review of the award. The revision allows for a retrial. It is an extraordinary remedy that should correct a final decision based on incorrect facts or results from criminal acts. With this regulation, the legislature intended to create a balance of interests. Shall apply, on the one hand, the principle of the law and of legal certainty, which is the goal as soon as possible definitively to end a dispute. On the other hand, a faulty foundation judgment must not be maintained according to the principles of the rule of law.⁴⁹⁸

To resolve this conflict, an extraordinary appeal has been created that allows a re-examination of the facts in minimal exceptional cases.⁴⁹⁹

The application is also to be distinguished as in the annulment, which was adopted by the procedure of the CPIL between internal and arbitration decisions.

⁴⁹⁸ SFT 118 II 199, 200.

⁴⁹⁹ Freiburghaus/Afheldt, in: Sutter-Somm/Hasenböhler/Leuenberger, commentary code of civil procedure, Art. 328, parag. 4.

1. Revision of international arbitral awards

1.1. The revision regulation in Art. 191a CIPL

Chapter 12 CPIL, which is to be applied for international arbitration awards, regulate the revision in Art. 190a CPIL.

1.2. Possible revision objects

According to the ruling of the Federal Court, those awards are reversible and are binding on the arbitral tribunal.⁵⁰⁰ Binding action unfolds first all decisions that arise in legal force. This is true in any case, final and partial awards.⁵⁰¹ This is different for primary and intermediate decisions. Here it should be noted that the protest has not been subject to re-examining the decisive question of law. There is such an exception, and it lacks the necessary for the revision binding effect.⁵⁰² Process orders and measures of inquiry are without binding effect since they can be changed again in the further course of the process. Therefore, they are not reversible.⁵⁰³

The definition of the reversible award means that with the revision decisions of the tribunal can be challenged, against which an action for annulment under Art. 190 para. 2 CPIL is not possible. An interim decision on the applicable law binds the Court of Arbitration final so that revision

⁵⁰⁰ SFT 122 III 492, 493, SFT of 02.02.2006, 4P.237/2005 E 3.2; SFT of 29.08.2006 4P.102/2006 E 2.

⁵⁰¹ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1798

⁵⁰² SFT 02.02.2006, 4P.237/2005 E 3.2.

⁵⁰³ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1798

may challenge it. However, a dispute with the help of a legal challenge is only possible if a final award has been issued.⁵⁰⁴

Furthermore, actions of the parties terminating the proceedings, such as the settlement, the withdrawal of the claim and the acknowledgement, are reversible. These so-called decision surrogates have the same effect as an arbitral judgment.⁵⁰⁵ However, they are not open to challenge with the appeal, as they do not have the same quality as an arbitral judgment.⁵⁰⁶

1.3. Jurisdiction, procedure and time limit

Before more precisely discussing the possible revision reasons, first, the process conditions of the revision will be worked out.

1.4. Competent court

For the CAS decision is the CAS responsible for the revision. The revision is an instrument of resumption and, therefore, fundamentally to be applied to the CAS.⁵⁰⁷ This means that it should be assessed by the same body which adopted the contested decision.

It is the argument that the Federal Court can better decide on the revision because its organisation is not convincing. So, proceedings before the State

⁵⁰⁴ Müller, in: *new journal for arbitration proceedings* 2007, 64, 66.

⁵⁰⁵ Roesler, in: *Stämpfli's Handkommentar code of civil procedure*, Article 328, parag. 12

⁵⁰⁶ Compare Gehri, in: *Gehri/Kramer, Zivilprozessordnung*, Art. 329, parag. 6

⁵⁰⁷ Compare Müller, *new journal for arbitration proceedings* 2007, 64, 67.

Judges also have specific weaknesses. Their proximity to the dispute and their professional competence often better decide whether the reason for the revision directly impacts the award's outcome.⁵⁰⁸ In addition, institutional arbitral tribunals such as CAS can decide on revision issues after the arbitration has been completed. For example, the CAS has an organisational structure with ICAS that makes it possible to re-occupy the arbitral tribunal if an arbitrator is prevented or no longer wants to be a member of the arbitral tribunal.

Moreover, it is difficult to argue that the arbitral tribunal's mandate would end with the award. In many arbitration rules, competence for specific questions of explanation or correction of the award is assigned to the arbitral tribunal.⁵⁰⁹ In such cases, its mandate remains beyond the award's adoption.⁵¹⁰

2. Revision reasons

According to Art. 190a, the revision can be inserted when the arbitration has been influenced by an offence and according to a new case of the subsequent discovery of significant facts or conclusive evidence that would change the decision.

⁵⁰⁸ Rigozzi/Schöll, Revision, p. 16.

⁵⁰⁹ Müller, new journal for arbitration proceedings 2007, 64, 67.

⁵¹⁰ Müller, new journal for arbitration proceedings 2007, 64, 67.

Other reasons for revision should not be applicable in international arbitration. These are covered but already by the pleas of Art. 190 para. 2 CPIL (mainly letters a, c and e). The Federal Supreme Court decided that these grounds for setting aside must be asserted with the action for annulment and not with the appeal. This is consistent. Otherwise, the strict exclusion periods of the action for annulment will be circumvented, thus, the principle of bringing the dispute to an end as soon as possible.

In the following, the individual reasons for revision are examined in more detail.

2.1. Subsequent discovery of substantial new facts or evidence

The first possible ground for appeal is if a party learns substantial facts or discovers decisive evidence that it could not produce in the previous proceedings.

Only those facts and evidence discovered subsequently but already existed at the time of the trial may be considered.⁵¹¹ These are called "false novenas".⁵¹²

There are voices in the literature who demand that the appearance of the expert evidence and the party's presentation be withdrawn since a party's

⁵¹¹ STF118 II 199, 204.

⁵¹² Rigozzi/Schöll, Appeal, p. 22

arguments are possible from the beginning of the proceedings.⁵¹³This is to be agreed upon. Another applies to the documentary evidence: It is conceivable that a document already existing at the time of the trial could be subsequently that was previously unknown.

Exceptionally, evidence that has arisen after the trial may be taken into account where it serves to prove a fact that arose before the original proceedings were concluded or relate to a fact that, although known in the original proceedings, remained unproven.⁵¹⁴

The evidence or the fact was only capable of consideration when it was impossible for the party they put forward in the previous process. This means, on the one hand, the respective party has a subjective point of actual ignorance of the existence of facts or evidence.⁵¹⁵Secondly, it must have been impossible to establish the fact or evidence from an objective point of view. It must have been impossible to make a particular fact or evidence timely identify and introduce it to an objective third party with the necessary care.⁵¹⁶The fact or evidence must also be significant and alter the outcome of the arbitration for the process.⁵¹⁷To this end, the reviewer bears the burden of proof⁵¹⁸.

⁵¹³ STF 118 II 199, 204.

⁵¹⁴ Müller, new Journal for Arbitration Proceedings 2007, 64, 68

⁵¹⁵ Berger/Kellerhals, International Arbitration in der Schweiz, Parag. 1770

⁵¹⁶ Commentary Civil Procedure Code, Art. 328, marg. no. 14.C

⁵¹⁷ Commentary code of civil procedure, Art. 328, parag. 15.

⁵¹⁸ SFT 29.08.2006 4P.102/2006 E. 2.1 and 4.1.

2.2. The ground for annulment of the subsequently discovered facts in the field of doping penalties

This results in the area of doping penalties to the following consideration:

The athlete, a banned substance or flashy blood levels were observed in the body, has to prove that he has this not taken intentionally. Thus, there is a burden of proof to the detriment of the convicted athlete. Due to the short duration of proceedings before the CAS, he will hardly succeed in some cases in teaching appropriate evidence of his innocence. With a doping ban, the career of an athlete suffers at the same time irreparable damage. Even if he returns to competitive sports, he will not get the reputation he enjoyed before the doping offence.

For this reason, it would be desirable if one creates an excess of the statutory recovery against decisions of CAS in the field of doping, thus can be opened in exceptional cases, the process again. They should be the athletes who have been wrongly convicted of doping and the possibility of rehabilitation. This should easily allow the resumption of the proceedings, particularly expert reports produced after the fact.

2.3. The action of criminal acts

The second revision ground under CIPL is fulfilled if a criminal offence to the party's detriment has influenced the award. According to the rule, a

criminal court conviction is unnecessary. The evidence may be provided in other ways where criminal proceedings are not feasible. This means that the occurrence of the statute of limitations or a possible impossibility of criminal prosecution does not preclude this ground for appeal.⁵¹⁹ Criminal offences are only deemed to be offences punishable by Swiss law.⁵²⁰ The most relevant offences are forgery of documents, the offences of testimony (e.g. false testimony in the trial) and bribery. The offence must be causal for the outcome of the arbitration, i.e. without it, and the process would have been different.⁵²¹ The burden of proof lies with the party conducting the audit. This will not be easy in practice, as the party required to provide evidence has little access to the necessary evidence. For the substantiation of the appeal, it is sufficient if the objective elements of the offence are proven.

2.4. New discovered circumstances about the independence and impartiality of the arbitrator

If one party discovered evidence that an arbitrator infringed his obligation to be independent and impartial, then the revision is open.

⁵¹⁹ SFT, 28.09.2010, 4A_144/2010.

⁵²⁰ SFT 07.12. 2009, 4A_612/2009 = Causa Sport 2009, 368-369.

⁵²¹ SFT of 10 February 2010, 4A_612/2009 = Causa Sport 2010, 185.

2.5. The revision decision and its effect

According to Art, the decision on the revision and the annulment. 190a only cassatory effect and not as a revision of a Federal Court decision, reformatory effect.⁵²²If the revision request is accepted, the arbitration is cancelled, and the process to the original arbitration is remitted.⁵²³Are not all Judges available or do not exist, the arbitral tribunal's more general substitution rules must be observed.⁵²⁴

If the appeal is granted, this does not bind the arbitral tribunal to which the case is referred.⁵²⁵The revision court only a hypothetical review and establish, where appropriate that the arbitration would have been different concerning the fact, the evidence, or the omission of the offence.⁵²⁶After that, the arbitral tribunal may decide whether the likelihood decision applies to the Federal Court or whether the subsequently discovered facts or evidence in the original arbitral award change anything⁵²⁷. The time limit for the revision is ten years from the CAS award. Within 90 Days of exploring the Revisions reasons, the Revision request must be submitted.

⁵²² SFT of 29.08.2006, 4P.102/2006.

⁵²³ Compare Müller, new journal for arbitration proceedings 2007, 64, 65.

⁵²⁴ Commentary code of civil procedure, Art. 328, parag. 21.

⁵²⁵ Lalive/Poudret/Reymond, Droit de l'arbitrage, Art. 42 Swiss concordance on arbitration, paragraph 2a

⁵²⁶ Freiburghaus/Afheldt, in: Sutter- Somm/Hasenböhler/Leuenberger, commentary code of civil procedure, Art. 328, paragraph 22.

⁵²⁷ Rüede/Hadenfeldt, arbitration law, 360.

2.6. Waiver possible revision?

As already mentioned above, in international arbitral proceedings under Art. 192 (1) CPIL, it is possible under certain conditions to agree in advance on a waiver for the appeal of the action for avoidance.

The majority of the doctrine believes that Art. 192 CPIL does not apply to the revision since when this provision was introduced as a legal remedy, only Art. 190 (2) CPIL was known and not the revision introduced later by the judicial finding and at since 2021 by the legislator in Art. 190a CIPL.⁵²⁸

If the Revision as a legal institution were already validly waived before the defects were known, there would be the danger that, due to the lack of a possibility of control, one would already submit to an arbitral award with such defects in advance.⁵²⁹

The idea of the possibility of arbitration, according to Art. 192 CPIL is to ensure better efficiency of arbitration. Considering the Federal Supreme Court case law on appeal, it is striking that the appeal rarely delays proceedings, as it is usually dismissed on the grounds of inadmissibility. It is often difficult to establish the causality that if the reason for revision had been known, a different decision would have been made. Consequently,

⁵²⁸ Commentary code of civil procedure, Art. 328, parag.h 21

⁵²⁹ Berger/Kellerhals, Internationale Schiedsgerichtsbarkeit in der Schweiz, parag. 1813.

there is no need to waive this right of Revision. Ultimately, a waiver of the appeal must be rejected.

In addition, it must be emphasized that the waiver of appeal under Art. 192 CPIL is exceptional, both under Swiss law and in international comparison. It seems questionable to make this exception to the analogy of the rule in international arbitration proceedings. Revision and action for annulment represent different legal remedies. Therefore, from a systematic point of view, extending the Appeal waiving to the revision of the law is unnecessary.

Chapter IV. Other remedies

The following presents further possible legal remedies, and their practical relevance is discussed.

1. Action for a declaration of invalidity of an arbitral award

It is disputed whether the pleas only lead to the contestability of the award. Partly is being considered in the literature, severe deficiencies void to view the award as incurable and can confirm this court with a declaratory action.⁵³⁰ This possibility would indeed be no appeal as such, but the result would also eliminate the legal effects of the award result.

In the opinion of the literature, for nullity to be assumed, there must be such a severe deficiency that the arbitral award must be considered a "legal nullum".⁵³¹ In the literature, the following deficiencies were considered particularly serious: Arbitral awards on non-arbitrable disputes,⁵³² decisions of an arbitral tribunal after the expiry of the agreed term of office, and arbitral awards that violate the Ordre public.⁵³³ Those infringements are not subject to the time limit for appeal but may always be the subject of an action for a declaratory judgment, irrespective of any previous appeal proceedings.⁵³⁴

⁵³⁰ Schott, in: Sutter-Somm/Hasenböhler/Leuenberger, Commentary on the Code of Civil Procedure, Article 396, parag. 10

⁵³¹ Roesler, in: Stämpflis Handkommentar code of civil procedure, Art. 329, parag. 13.

⁵³² Freiburghaus/Afheldt, in: Sutter-Somm/Hasenböhler/Leuenberger, commentary code of civil procedure, Art. 328, parag. 25

⁵³³ Schott, in: Sutter-Somm/Hasenböhler/Leuenberger, commentary, Art. 396, parag.16

⁵³⁴ SFT 123 I 283, 286, STF 4A_396/2017 from 16/10/2018, STF 4A_398/2017 from 16/10/2018

The opposing view rejects this theory because the defects mentioned are all entitled to challenge under Art. 190 (2) CPIL and are, therefore, not fatal errors.⁵³⁵ A party must complain within the statutory period if it wishes to complain about such a defect. Otherwise, it forfeits its right to have the defect remedied.⁵³⁶ Furthermore, the principle of legal certainty and the protection of the prevailing party requires that the arbitral award be given permanent force after a certain period. The parties need certainty that the arbitral award is final and that the dispute is resolved. Ultimately, a temporary possibility of challenge serves to restore legal peace. Therefore, there must not be an unlimited possibility to give notice of severe defects.⁵³⁷ In addition, it is argued that the deficiencies in the enforcement proceedings must be re-examined, and recognition and enforcement of the arbitral award may be refused based on the deficiencies (Article V UN Convention, YNC).

Moreover, if the subject matter of the dispute is not arbitrable, the “already judged matter” principle cannot be invoked before the state judge since, in such a case, the arbitral award has no legal force.⁵³⁸ It is also argued that the wording of Art. 190 CPIL is clear. The arbitral award is final and can only be challenged if the reasons based on Art. 190 (2) CPIL are present.

⁵³⁵ Compare Rigozzi/Schöll, Revision, p. 13.

⁵³⁶ Rigozzi/Schöll, Revision, page 13

⁵³⁷ Berger/Kellerhals, International Arbitration in Switzerland, parag. 1656.

⁵³⁸ Habscheid, in: commemorative publication Keller, 585.

If the legislator had wanted an unlimited action for a declaration of invalidity to be possible in exceptional cases, he could have regulated this.⁵³⁹

The Federal Supreme Court itself has endorsed the view that the possibility of an action for a declaration of nullity of an arbitral award should be accepted.⁵⁴⁰In principle, this is to be agreed to. Severe deficiencies may make the arbitral decision contestable and invalid. It should be possible to assert such deficiencies indefinitely. However, these defects would have to be so severe that speaking of an arbitral award is no longer possible.

The practical significance of this dispute is likely to be minor for sports arbitration and especially for the CAS.⁵⁴¹As the cases brought before the Federal Supreme Court show, there is certainly room for improvement in the arbitration proceedings. However, none of the deficiencies brought forward would lead to the invalidity of an arbitral decision. For example, a violation of the right to be heard by ignoring a request for evidence does not mean that one can no longer speak of an arbitral award.

Since the hurdles for the invalidity of an arbitral award are very high and since, in practice, it will never be possible to affirm the invalidity of an arbitral award, the parties are recommended to enforce their objections to the arbitral award through the challenge procedure described above.

⁵³⁹ Heini, in: Zurich commentary on the CPIL, Art. 190, parag.54

⁵⁴⁰ Habscheid, in: commemorative publication Keller, 586.

⁵⁴¹ Schlosser, RIPS, parag. 756.

2. Explanation and correction of arbitral awards

There are no provisions in the CPIL on issues relating to the explanation and correction of arbitral awards. It was discussed whether the Federal Supreme Court or the arbitral tribunal itself is responsible for this or whether there is a ban on supplementing and correcting awards.⁵⁴² The Federal Court of Justice has now closed this legal loophole. Accordingly, the arbitral tribunal itself is responsible for the declaration and correction of an award.⁵⁴³

After the President of the respective Board has first examined whether the request is admissible, he shall hand over the arbitration decision to the arbitral tribunal, which issues the award for clarification of ambiguities or rectification or reject the request. According to Art. R63 CAS Code may apply within 45 days of adopting the award's arbitration decision explanation and correction. This is also laid down in the Cas Arbitration Rules.

In terms of content, this possibility will not change anything. It provides a long way to remove any ambiguities after adopting the arbitration decision.

⁵⁴² Jermini, Contestation, parag. 815.

⁵⁴³ Berger/Kellerhals, Internationale Schiedsgerichtsbarkeit in der Schweiz, parag. 1656.

Chapter V. Conclusions and suggestions

The analysis confirms that the existing conceptual deficit of the CAS proceeding must be revised. Several legal points for successfully implementing the CAS proceedings Rules have been defined. It was scientifically necessary not only to show the analysis results but also to present possible solutions. New suggestions for the CAS-Proceeding and the Federal Supreme Court allow to improve not just the proceeding quality of the CAS but also support the Federal Supreme Court in implementing new standards in sports law.

1. The Court of Arbitration for Sport is a fundamental institution for modern international competitive sports. It ensures a uniform interpretation of the Law of sports associations. If legal recourse to the state court were made possible, there would be a risk of inconsistent interpretation and application of sports law due to the different legal systems. Such a development would also not be in the athletes' interest. There is nothing left to do but to push forward constructive legal development and reforms of the Court of Arbitration for Sport.

2. The arbitral award of the Court of Arbitration for Sport does not have to be the last word in sports court proceedings. There are possibilities to have the arbitration proceedings reviewed by a state judge. According to Art. 190 para. 2 CPIL, one can appeal to the Swiss Federal Supreme Court and lodge an action for rescission. A decision on an analysis of the Court of Arbitration for Sports law and the decisions of the Swiss Federal Supreme Court in sports arbitration cases reveals that, at first glance, arbitration proceedings before the Court of Arbitration for Sport appear to satisfy the general requirements of the rule of proceedings law in most of the cases. A

closer look at the individual appeals reveals doubts about the rule of Law of the CAS proceedings rules.

3. The current doubts about the rules of Law of the proceedings should be removed as soon as possible. The arbitration proceedings before the Court of Arbitration for Sport must be further reformed to guarantee a procedure based on the rules of Law.

It would make sense finally to abolish the system of the closed list of referees and to allow a free choice of referees. The closed list of arbitrators does not guarantee the impartiality or Independence of the arbitrator. The athletes have virtually little influence on the composition of the list of referees. The associations had much more influence than the athletes in drawing up the list, which is why an independent appointment to the referee's list was impossible. Opening the list would help increase procedures' transparency and improve the CAS's image in legal circles.

In appeal proceedings concerning the legality of the decisions of the associations, the associations are indirectly overweight in the appointment of the Chairman of the arbitral tribunal. Furthermore, the chairpersons of the arbitral tribunal for sport should no longer be determined by the International Court of Arbitration for Sport, but a schedule of responsibilities should be created in advance; this could, for example, be a separate list of arbitrators suitable for the chairmanship.

Arbitration in the field of sport is not voluntary, at least in the relationship between the athlete and the association, but is, in fact, "imposed" on the athlete. A higher degree of Independence should therefore be demanded in sports law. The parties, particularly the athletes, are deprived of their legal judgment by the arbitration procedure dictated by the associations. A stricter standard must therefore be applied to the Chairman

of the arbitral tribunal than to the arbitrators appointed by the parties. For implementation in practice, it would be helpful to set clear limits in advance through directives as to when a chairman can be rejected or must himself point out his lack of Independence.

Concerning Art. 6 (1) ECHR, this standard should be higher than for a "normal" arbitral tribunal. In particular, care must be taken to ensure that the court is sufficiently independent and impartial, that the principles of fair trial are respected and that the trial is, in principle, open to the public. If this cannot be guaranteed, the award must be quashed, as the arbitration agreement disproportionately discriminates against the athlete.

4. The Court of Arbitration for Sport must continue to work to become more independent. Initially undertook the Court of Arbitration for Sport critical structural reforms in 1994. However, after that, reforms have been made only sparsely. There is dependence on the IOC through the current financing system. Therefore, this procedure should be abolished, and instead, a new financing possibility should be created. In order to counteract the suspicion against individual arbitrators that they are not sufficiently impartial or independent, it would be helpful to refer to other arbitral tribunal guidelines on the Independence of arbitrators, for example, a separate "Court of Arbitration for Sport Guideline for Determining Independence". This should also take into account the specificities of sport. The design of the procedure must also be based on constitutional standards. For this reason, it should be demanded that the oral proceedings before the Court of Arbitration for Sport should, in principle, be made accessible to the public.

5. But it is not only the Court of Arbitration for Sport that needs to undergo several reforms; the appellate courts, primarily the Swiss Federal Supreme Court, must also reconsider their jurisprudence. The grounds for

challenge of Art. 190 (2) CPIL should be interpreted less restrictively. According to the Swiss Federal Supreme Court, the substantive review of sports arbitral awards is only possible within very narrow limits. In the area of sanctions by the federations, however, proceedings before the Court of Arbitration for Sport have drastic consequences for the athletes. The Federal Supreme Court must redefine the fundamental proceedings principles concept in sports law by recognizing particular principles of the sport. In addition, the concept of the fundamental principle of proceedings Law should be interpreted less restrictively than others in legal disputes. On the one hand, a grossly erroneous arbitral award can still be corrected afterwards, and, on the other hand, a less restrictive application would also indirectly lead to an improvement in the Court of Arbitration for Sport proceedings. Finally, the arbitrators are thus motivated to improve the arbitral award.

6. It is also possible to try to have the arbitral award reviewed subsequently in the own state courts. First, there is the possibility of appealing the arbitral award to Art. V YNC (Convention on the Recognition and Enforcement of Foreign Arbitral Award, the so-called New York Convention). However, most sports court decisions are already enforceable, so the possibility of subsequent review is generally ruled out.

7. There is a structural imbalance between the two parties, so there is no voluntary renunciation on the part of the sportsperson. Protecting the athlete's right to personality outweighs the association's interests. In sports, a waiver of appeal does not stand up to Article 27 of the Swiss Civil Code. According to the view expressed here, an imposed arbitration agreement is only permitted to a limited extent since it deprives the athlete of his right to the state judge. As a signatory state of the ECHR, Switzerland must guarantee compliance with the ECHR. A waiver of the right under Art. 6 para. 1 ECHR can only be effective if it is voluntary. In the area of doping

penalties, it is impossible to waive any legal remedies in advance under Art effectively. 192 CPIL. The doping penalties are similar to the decisions in criminal Law. The accused cannot be forced to renunciation his right to appeal. Thus the sportsperson in doping cases cannot be forced to a waiver in advance.

At present, the arbitration proceedings before the Court of Arbitration for Sport do not yet satisfy the requirements of Art. 6 para. 1 ECHR (Imposed agreements). Given the recent ECHR case law, the Federal Court should change its reasoning in evaluating arbitration agreements in sports. Therefore, a much stricter standard must apply to the waiver of any remedies since it also deprives the athlete of the last opportunity to seek legal protection before the state judge to rethink.

From a legal point of view, it is now time for reforms to do justice to its reputation as a "world sports court" and to organize itself in such a way that the proceedings meet the requirements of the rule of Law.

Explanation of Latin terms

Ad hoc	existing for a particular purpose
Lex	law
Res iudicata	Already decided the case and grew in force
Ordre public	The fundamental principle of law and society
Lex Sportiva	Sports law
Pacta sunt servanda	The agreement must be kept
ne eat iudex ultra petitia partium	A court may not decide more than it has been asked to
Ne bis in idem	it has forbidden to be judged twice in the same case
iura novit curia	The court knows the law
Ex post facto	Afterwords
Erga omes	by everyone, absolute by everyone

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