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Arbitration in Sports and Competition Law

Association of European Competition Law Judges

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I. Introduction

Arbitration in sports as normal commercial arbitration

Special factual features
- making arbitration in sports special and
- bringing competition law into play, i. e.

- Need of speed
- International dimension

- Pyramidal, monopolistic structure of sporting associations
- Execution of awards by the sporting associations themselves
- Switzerland as seat of arbitration

I. Introduction

Two hypothesis

- Switzerland is not only a popular, but also a problematic forum for arbitration in competition law related issues.

- Arbitral Institutions should provide for public hearings in sport related arbitration.

II. Dispute Resolution in Sports - Special Factual Features

1. Special need of speedy decisions in sport related litigation

- Lack of possibility to appeal against an arbitration award
- Awards capable of being appealed to state courts only in very limited circumstances
- Arbitrators can be obliged to adopt a final decision within a couple of weeks

II. Dispute Resolution in Sports - Special Factual Features

2. International dimension of sporting competitions

- Competitions taking place all over the world, athletes coming from various countries
- Importance of neutral and uniform dispute solution
- Need of legal security

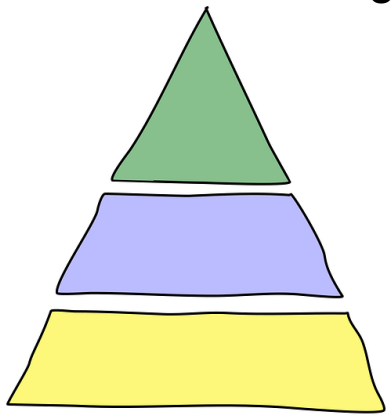
II. Dispute Resolution in Sports - Special Factual Features

3. Monopolistic pyramid structure of most sporting associations

- One single federation per sport (“Ein-Platz-Prinzip”)
- Governance of most sporting discipline by one or more umbrella organisations
- Sport clubs being the bottom of the pyramid, belonging to a national sport association, which operate under the umbrella of a continental federation, which forms part of the international federation, e. g.

Bayern München – DFB – UEFA – FIFA

- De facto obligation of athletes to submit themselves to CAS arbitration



II. Dispute Resolution in Sports - Special Factual Features

4. Execution of arbitral awards by the sporting associations themselves

- Little need for sporting associations to resort to state court intervention

- Many sanctions, e. g. the suspension of an athlete, being executed by the associations themselves

- De facto exclusion of CAS awards from state recognition procedures

Swiss Federal Court, Case *Association of Tennis Professionals*

« Par ailleurs, les sanctions infligées aux sportifs, telles que la disqualification ou la suspension, ne nécessitent pas de procédure d'exequatur pour être mises en œuvre. »

("Furthermore, sanctions imposed on sportspeople, such as disqualification or suspension, do not require an exequatur procedure to be implemented".)

II. Dispute Resolution in Sports - Special Factual Features

4. Execution of arbitral awards by the sporting associations themselves

Swiss Federal Court, 22 mars 2007 - *Association of Tennis Professionals*

« Par ailleurs, les sanctions infligées aux sportifs, telles que la disqualification ou la suspension, ne nécessitent pas de procédure d'exequatur pour être mises en œuvre. »

("Furthermore, sanctions imposed on sportspeople, such as disqualification or suspension, do not require an exequatur procedure to be implemented".)

II. Dispute Resolution in Sports - Special Factual Features

5. Switzerland as seat of arbitration

Rule 28 of CAS Rules:

“The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland.”

- Exclusive competence of the Swiss Federal Court for review of CAS awards (Art. 191 of Swiss Private International Law Act of 18 December 1987)

- Reluctance to setting aside an arbitral award for non-compliance with competition law (see below)

III. Geographic Limitation of the Arbitrability of Competition Law?

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985):

„[*H]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.*“

- “Second-Look-Doctrine”: Ex post public policy review by state courts either in the context of annulment or enforcement proceedings
- Securing the proper application of competition law by arbitral tribunals
- Allowing arbitral tribunals to decide disputes related to competition law

III. Geographic Limitations of the Arbitrability of Competition Law?

Swiss Federal Court, 8 March 2006 – Tensacciai:

« Les dispositions du droit de la concurrence, quel qu'il soit, ne font pas partie des valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique. »

(„Competition law provisions of any kind are not part of the essential and widely recognised values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order.“)

→ Neither possibility to challenge a CAS award for non-compliance with competiton law

→ nor of a review in the context of recognition and enforcement proceedings

III. Geographic Limitations of the Arbitrability of Competition Law?

ECJ, 23 December 2023 – International Skating Union's Eligibility rules:

About the findings of the Commission with regard to CAS arbitration:

„(225) It must be held […] that some of those findings, such as those relating to the ***lack of possibility of subjecting CAS awards to judicial review*** *to ensure compliance with the provisions of public policy of EU law, if necessary using the procedure laid down in Article 267 TFEU, are correct.*"

III. Geographic Limitations of the Arbitrability of Competition Law?

European Commission, 13.3.1978 - Campari

*"**[R]eview of arbitral awards for their compatibility with Articles 85 and 86**, inasmuch as these fail to be regarded as part of EEC public policy, **is not necessarily available in non-Member States** […]"*

European Commission, 24 May 2018 - Gazprom:

*"(178)The Commitments require the **arbitration proceedings to take place within the European Union**. This obliges the arbitral tribunals to **respect and apply EU competition law as a matter of public policy** irrespective of the private interest of the parties to the arbitration."*

IV. Need for a Public Hearing in Sport Related Arbitration

Balancing of three conflicting principles, i. e.

- the autonomy of monopolistic associations
- the principle of freedom of contract (Art. 102 TFEU and its German equivalent § 19 ARC)
- the right of access to effective justice (Article 6 ECHR),

Including the right to oral hearings.

IV. Need for a Public Hearing in Sport Related Arbitration

German Federal Constitutional Court, 22.6.2022 - Pechstein:

"The principle of publicity of oral hearings is an essential component of the rule of law […]. In the form of a procedural guarantee, the public nature of court hearings should serve to protect those involved in the proceedings against ***secret justice that is removed from public scrutiny****. If the normative design of the proceedings is to guarantee equally effective legal protection in accordance with the* ***minimum standards of the rule of law****, it must therefore be noted that the principle of publicity of oral proceedings, which is standardised in Article 6 (1) ECHR, is also part of the principle of the rule of law."*

IV. Need for a Public Hearing in Sport Related Arbitration

Link between the procedural requirement and arbitration in sports:

- Prohibition of the abuse of a dominant position (art. 102 TFEU resp. § 19 ARC):
- Requirement of submission to an arbitration clause by a monopolistic association

→ Requirement of special procedural rules and minimum legal standards

→ Possible sanction: Nullity of the arbitration clause

VI. Summary

Special factual features of sport related arbitration:

- Need of speed
- International dimension

- Pyramidal, monopolistic structure of sporting associations
- Execution by the sporting associations themselves
- Switzerland as seat of arbitration with little review of awards.

Two conclusions to be drawn:

- Switzerland is a popular, but problematic forum for arbitration in competition law related issues.
- Arbitral Institutions should provide for public hearings in sport related arbitration.

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Thank you for your interest and your attention!

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