



## SPORTS BRIEFING

### NOTES ON THE SWISS FEDERAL COURT'S PRACTICE REGARDING THE ADMISSIBILITY OF SPORTS LAW-RELATED MATTERS

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Awards of the Lausanne-based Court of Arbitration for Sport (CAS) can be challenged before the Swiss Federal Supreme Court (Federal Court) based on Article 190 of the Swiss Private International Law Act. Lately, the number of such challenged CAS awards has absolutely exploded and, given the growing case load of the CAS, this trend might be expected to further intensify. This shifts the focus to the Federal Court's handling of such cases and, in particular, its practice regarding admissibility: in two recent decisions concerning CAS awards, the Federal Court declared the respective appeal groundless because of a lack of current interest – in both cases, the prohibitive measures that the athletes appealed against had ended by the time the Federal Court was ready to give its ruling. In the following, we will elaborate on this disconcerting practice with respect to sports-related appeals and the legal questions it raises.

#### **The two decisions and their facts**

In July 2010, the Fédération Internationale de l'Automobile (FIA), motorsport's governing body, found a then 12-year-old go-karter from Poland guilty of doping. After a race in Munich, he was tested positive with the banned stimulant nikethamide – a substance also found in energy food. The minor was later punished with a two-year suspension, which he subsequently appealed before the CAS. In its decision of September 2011, CAS confirmed that the underage racer was subject to the FIA doping rules, but adjudicated the punishment as „excessive and disproportionate“ and

reduced the competition ban to eighteen months (CAS 2010/A/2268). In October 2011, the minor filed an appeal against the CAS award's ban at the Federal Court. On June 18, 2012, the Federal Court declared the appeal devoid of purpose (4A.636/2011) due to a lack of current interest, since the ineligibility period had already expired on January 18, 2012.

It is in this same spirit that on July 16, 2012, the Federal Court declared the appeal of FC Sion groundless for lack of current interest and upheld a CAS judgment passed in December 2011 (4A.134/2012). The UEFA had disqualified FC Sion from the Europa League 2011/12 because there were ineligible players in Sion's line-up at the qualification match against Celtic Glasgow. Because the 2011/12 season was already over at the time of the Federal Court's decision, the appeal was declared inadmissible due to a lack of current interest.

#### **Contestability of arbitral awards before the Federal Court**

As the Federal Court has often stated, a prerequisite to appeal arbitral awards issued in Switzerland is that the appellant needs a legally protected interest in having the challenged award set aside. An interest worthy of protection must be of practical use to the appellant by preventing him from harm of an economic, ideal, material or other nature caused by the decision under appeal. In addition, the interest has to be present, otherwise, the appellant has no standing to appeal. If the interest is present at the time

the appeal is filed but no longer when the decision is issued, the appeal becomes moot. To this general rule, there are exceptions, in particular, when the dispute underlying the decision under appeal may recur at any time under identical or similar circumstances and raises questions of important public interest, which are nearly impossible to adjudicate before they lose topicality.

### **The Federal Court's approach to the requirement of a present interest**

In both of the above cases, the Federal Court argued that the respective interim measure was already over and the annulling of the arbitral award (i.e. lifting the measure) would not place the appellant in a different position.

As the young go-karter did not participate in any races during his ban, the Federal Court said there were no annullments of results that could be overruled. There would have been a current interest in invalidating the disqualification of the race at which the driver was tested positive, but he had challenged the ban itself and not the disqualification.

In the case of FC Sion, the Federal Court argued that the Europa League season 2011/12 was already over at the time the court was ready to pronounce a judgment and there was no way it could reinstate the club in a completed tournament. Thus, the Federal Court declared the appeal groundless because there was no current interest in reversing the award.

### **Critique of the Federal Court's practice regarding the prerequisite of a current interest**

These examples show how strict the Federal Court is in interpreting the „current interest“ principle. On closer inspection, one could find serious and current interests in both cases. A minor go-karтер that has already served an 18-month doping suspension will have to deal with this stigma for the rest of his career. One need only think of the hard time he will have finding sponsors or of the fact that another doping offence would count as a case of recurrence and entail a more severe penalty. Besides these aspects

related to a hampered career in sports, a doping ban also affects personality rights such as the public image of an athlete. These interests remain; they are not just limited to the duration of the ban and then cease to exist.

If FC Sion would want to bring forward civil claims for damages against UEFA, it would first of all have to procure a judgment on the lawfulness of the disqualification. Thus, particularly (but not only) for doping bans, there are weighty interests that outlast the ineligibility period itself.

Should such interests still be negated, the Federal Court can nonetheless hear a case, as stated above, if it raises questions of fundamental or prejudicial importance that could occur again in the same or similar circumstances, and its nature prevents it from being decided before it loses relevance. Notably doping cases regularly end up before the CAS and can be appealed to the Federal Court from there. A judicial practice regarding such cases would be clarifying, relevant to many proceedings and of public interest. Bearing in mind the in-part lengthy complaints procedures within the associations involving several sport authorities, a decision of the Federal Court within the duration of the current interest (i.e. during the ban) can hardly ever be achieved. When filing an appeal to the Federal Court against measures that could lose practical relevance over time, one should always consider including elaborations about the general importance of the questions raised. The Federal Court did not really seem to consider this of its own motion in the cases presented here, even though both posed fundamental questions of law, the answers to which were of public interest. The cases were even picked up by the media.

The go-karтер's case raised the question whether minors can be subject to doping controls during insignificant youth competitions (in casu, an U-15 race) and, in particular, whether they can be sentenced to doping suspensions in the first place. The tough hand of the World Anti-Doping Agency Code was applied to the 12 year old without considering even the slightest basic elements of juvenile penal law of protection, education and development. The FC Sion case raised



cardinal questions relating to the still unresolved interplay of the jurisdictions of sport authorities and the State.

**Repercussions of this strict admissibility of sports-related affairs**

This narrow interpretation of the prerequisite of a current interest leads to a self-imposed limitation of the State's sovereignty claim over the world of sporting associations. An athlete can take action against far-reaching infringements of his personal rights by sports authorities only within the realms of their own system of arbitral courts. A review of a CAS decision by a State court is impeded by the fact that a current interest must be present both at the

time of the filing of an appeal and at the time when it is being decided. The appellant has no control over the latter and the Federal Court could, theoretically, let a case linger until a ban or some other prohibitive measure is over and then close the case by declaring it groundless. This hurdle combined with the financial risks of an appeal to the Federal Court could lead to a major deterrent effect for many athletes.

As a consequence, Switzerland tolerates a para-state legal system of sports organizations and renounces to a large extent to supervise the compatibility of this system with basic procedural guarantees provided by the Federal Constitution and the European Convention on Human Rights.

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