



ATHLETES: BETWEEN MANDATORY SUBMISSION TO THE COURT OF ARBITRATION FOR SPORT (CAS) AND THEIR RIGHT TO EFFECTIVE REMEDY

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Right to effective remedy

The right to effective judicial protection is enshrined in Article 8 of the Universal Declaration of Human Rights on 10 December 1948 a defined as the right of access to the courts for protection against acts that violate the rights by the constitution or by law. The European Convention on Human Rights and Fundamental Freedoms drafted in 1950 says that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law to decide disputes concerning the rights and obligations of a civil nature or the soundness of any criminal charge against them. Thereof, it grants everyone the right to a remedy before a national authority when their rights and freedoms are violated. The Charter of Fundamental Rights of the European Union also grants everyone the right to effective remedy protection and to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

In Spain, the Constitution in its Article 24.1 proclaims that all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate

interests, and in no case may there be a lack of defence. The majority of European Constitutions are pronounced similarly and so set out in its provisions; for example, the Portuguese in Article 20, or the Italian in its Article 24.

Therefore, we could define the right to an effective remedy, to due process, as the right that any individual has to a fair and impartial hearing in defence of their rights and freedoms within a reasonable time, and in no case may there be a lack of defence. Being deprived of their right to defence, as we shall see can come from both, the lack of access to court or its abnormal operation; both during the development process and the eventual execution of the judgment. Before implementing it, the state cannot remain inoperative to the detriment of one party.

The importance of this right was underlined by the European Court of Human Rights in 1970 stating that *“In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision”*. The jurisprudence of this Court also emphasizes that the Convention guarantees not only theoretical

and illusory rights, but the practical and effective ones, so that the States, through its legislative, executive and judicial branches, which are required to remove obstacles to the effective exercise of this right. Today is by far the most invoked right by Europeans in their actions before the European Court of Human Rights.

Effective Remedy and Arbitration

Although the right to an effective remedy has an inalienable nature, this does not preclude in the legitimate and voluntary renunciation of this exercise in pursuit of eventual profits which are more advantageous for the interested party than the ones that might result from its exercise. Through arbitration, natural or corporate persons submit, prior agreement, the decision of one or more arbitrators, which have arisen or which may arise in matters of its unrestricted lawfulness. Both the European Court of Human Rights and the Spanish Constitutional Court has had occasion to rule on the matter stating that this waiver must be explicit, clear, strict and unambiguous. Even though the safeguard must be given in good faith, it has declared that the waiver may be inferred from the conduct of the persons entitled. It is not lawful to deduce it from a not sufficiently expressive behaviour or mood to resign. The mandatory imposition to arbitration has been considered contrary to the right to effective remedy.

Similarly, it is required that in the process the principles of equality, hearing, examination/cross examination and taking of evidence are respected, and that the appeal against the arbitration award is not limited to a purely external control, without going into the matter of the procedure. All of this in agreement with the standards mentioned above, the law of the countries member of the European Union and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York June 10, 1958.

Court of Arbitration for Sport (CAS)

CAS is a Swiss arbitration body court subjected to its laws. Its creation was largely due to the necessity of an independent arbitration tribunal specialized in sport which facilitates the settlement of sport-related disputes, through arbitration or mediation, by means of procedural rules adapted to the specific needs of the sport world. It was conceived by International Olympic Committee (IOC) President Juan Antonio Samaranch. It was established on June 30, 1984 under the jurisdiction of the committee. The IOC not only financed the CAS almost entirely, but it could also change its regulations and elect its members.

In 1992, a horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS on the basis of the arbitration clause in the FEI statutes, challenging a decision pronounced by the federation. This decision, which followed a horse doping case, disqualified the rider, and imposed a suspension and fine upon him. The award rendered by the CAS found partly in favor of the rider. Unhappy with the CAS decision, Elmar Gundel filed a public law appeal with the Swiss Federal Tribunal. The appellant primarily disputed the validity of the award, which he claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration

court. The Federal Tribunal recognized the CAS as a true court of arbitration. In its judgment, it drew attention to the numerous links which existed between the CAS and the IOC.

The IOC responded to this award with the creation of the International Committee of Arbitration for Sport in 1994, so it becomes the parent body of the CAS.

In regards to their general rules, affecting the scope of this article, the CAS is governed by its regulations, which may be modified by itself. The language of the proceedings before it, can only be English or French. Arbitrators are designated by the International Council of Arbitration for Sport. Finally, they can be part of arbitrage, bodies or associations that were not in the proceedings at first instance before the body or corresponding sports federation.

The CAS can act in three different ways: resolving disputes within its jurisdiction through ordinary arbitration; acknowledging the appeals of disciplinary tribunals, federations, sports associations and sports; or as a result from a specific agreement; and finally, acting as a mediator.

For what concerns with this article, we will only refer to those submission of disputes to the CAS decisions concerning federations, associations or organizations related to the sport, as a result of the provisions in its laws or regulations. These awards are a priori irrevocable and executory. They have disciplinary consequences within the sports federation or agency whose athlete is part of, without the need of any ordinary procedures by the courts or to enforce them in any other state.

Nevertheless, these awards may be recourse to the Swiss courts by the five causes stated in the Private International Law Act Switzerland (art. 190.2):

- Where the tribunal is incorrectly constituted.
- Where it has wrongly declared itself to have or not have jurisdiction.
- Where the award is ultra or infra petita.
- Where due process was violated.
- Where the award violates public policy.

Characteristics of the submission to CAS arbitration by International Federations.

After analyzing the rules of the international federations of football, basketball, athletics, tennis and cycling, all of which are clear and conclusive concerning the submission to the CAS about any dispute arising in the context of the aforementioned sports. They all exclude to recourse to the ordinary courts, except in very specific cases. Furthermore, all CAS awards are considered final.

The International Football Association enforces – not authorizes – to its Confederations, Leagues and members to sanction the non-compliance to this submission. Moreover, it is particularly interesting that FIFA requires them to acknowledge CAS as an independent tribunal.



Analysis and Conclusions

In the light of this article; it can be said that both the willing to submission to CAS from athletes and the functioning of this court, **the regulations of sports arbitration are far from meeting the requirements of the legislation of the countries member of the European Union, as well as the European and international legislation themselves.** All this is based on the argument that sports are outside the countries' legal systems; which means there is a "sporting exception" that justifies it.

However, far from admitting this sports exception, some state courts have had the occasion to rule on this matter, considering CAS as contrary to the European Convention on Human Rights or public order. Among other things, the absence of the autonomy of the athlete; the prohibition to address the ordinary courts; the language of the procedure; the intervention of

a third party not present in first instance in order to request severe penalties; or lack of submission from national judges awards.

In our opinion, the convenience of the existence of an international court of arbitration to pronounce binding decisions in sports-related disputes is beyond doubt. However, **we cannot share the international federations' determination to impose athletes to the submission to the jurisdiction of CAS, citing "sporting exception".**

Therefore, we understand that determination should be aimed at bringing the regulation of international sports arbitration to the aforementioned provisions; thus, safeguarding the right to effective remedy to athletes.

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BIBLIOGRAPHY

- Jan Łukomski "Arbitration clauses in sport governing bodies' statutes: consent or constraint? Analysis from the perspective of Article 6(1) of the European Convention on Human Rights" *International Sport Journal*.04/04/2013. pags. 60-70
- Hornsby contra Greece. Judgment of European Court of Human Rights. 03/19/1997
- Delcourt vs. Belgium. Judgment of European Court of Human Rights. 01/17/1970
- Bramelid and Malmström vs. Sweden. European Commission of Human Rights.12/12/1983
- José Antonio Moreno Molina "TUTELA JUDICIAL EFECTIVA". University of Castilla-la Mancha (Spain)
- Judgment of the Constitutional Court of Spain 174/1995.11/23/1995
- Judgment of the Constitutional Court of Spain 136/2010.12/02/2010
- www.tas-cas.org
- Gustavo Albano Abreu "La independencia del TAS y el caso Messi" *Revista de Derecho del Deporte* 12/12/12.
- Alberto Segura/Javier Vázquez "El arbitraje en el deporte; el TAS y la seguridad jurídica". www.diariojuridico.com 04/10/2001
- Juan Valdés Escalona "Motivos de recurso de los laudos del Tribunal de Arbitraje Deportivo ante el Tribunal Federal Suizo". www.legaltoday.com 11/29/2012
- FIFA Statutes
- FIBA Statutes
- IAAF Constitution
- ITF Statutes
- UCI Constitution
- "Wickmayer / Malisse". Judement du Tribunal de Première Instance de Brussels. 12/14/2009
- «SA SPORTING DU PAYS DE CHARLEROI». Jugement du Tribunal de Commerce de Charleroi. 05/15/2006.
- «Heras». Judgment of the Superior Court of Justice of Castilla y Leon. 06/14/2011