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Enforcement of CAS awards: A general review of the available options and its particularities

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Preamble

The Court of Arbitration for Sport (CAS) has its seat in Lausanne, Switzerland, and is governed by the Swiss Act on Private International Law (LDIP) and, in particular, by Chapter 12, which regulates international arbitration.

Perhaps one of the most important advantages that sports arbitration has over classic commercial arbitration is the facility of enforcement of sports arbitration awards.

Although the option of enforcing a sports arbitration award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is always available to parties, it is in practice almost never necessary to pursue this course of action, as sports governing bodies have sufficient internal authority and enforcement mechanisms to impose the awards against their members. In this respect it is interesting to note that the Swiss Supreme Court has explicitly upheld such "private enforcement systems" by deciding that a CAS award confirming the

imposition of a FIFA sanction against a football club on the grounds that it did not comply with a FIFA Disciplinary Committee decision was consistent with public policy.

Nevertheless, as explained below, this "private enforcement" is not always exempt from difficulties, which makes it necessary to refer to the New York Convention as a possible alternative.

The "private enforcement" by FIFA

FIFA could use its internal disciplinary power to enforce CAS awards. Internationally, as we all know, the CAS was established for the purpose to surpass the difficulties within the context of the sports system. As the CAS' independence has been recognized by the Swiss Federal Court, for this reason, its decisions can be recognized and implemented based on the New York Convention (CNY). This tribunal has been established and operates within the context of the sport system and is governed by the Swiss Act on Private International

Law (LDIP) and, in particular, by the chapter which regulates international arbitration.

Precisely and within the purpose of this task, we will focus this analysis on the "federative way" in enforcing CAS awards. This issue is of importance because through their statutes the international sports bodies expressly recognize that the resolution of sports differences is to be conducted by the CAS.

Thus, all disputes relating to sports are referred to this arbitration panel on the basis of the statutes of international federations, constituting a safety valve ensuring the implementation of law in sports disputes in general. In this manner, the international federations can oblige, indirectly but clearly to the national federations that are their members to include a clause that recognize the CAS as a competent body to resolve sports disputes which may arise.

An award of the CAS has its own complexity at the time of execution due to its international character. On this basis, this federative way assumes that the awards of the CAS

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do not need a judicial execution for compliance. Proceedings regarding these awards are often executed through disciplinary sanctions within the Sports pyramid, using the dominant and monopolistic position of the Fédération Internationale de Football Association (FIFA).

Therefore, this internal execution *via* football associations [the football execution] uses sporting sanctions applied in cases where the debtor fails to comply with what the CAS has indicated its award. No doubt, this practice of self-execution by federation or association of awards is very effective since, in most cases, the disciplinary sanction associated with the failure to award brings immediate and serious consequences which are more than the enforcement of the award through the CNY.

In spite of everything that we have said so far, we are certain that FIFA can enforce awards rendered by the CAS in an appeal procedure, but what happens with the enforcement of awards that deal with decisions rendered in the ordinary procedure of the CAS? Precisely, the own CAS made a ruling on the aforementioned issue and addressed it.⁴⁵⁴

Despite the amended Article 64 of the FIFA Disciplinary Code (FCD), what would happen with those disputes lodged directly at the CAS remains unclear. According to this tribunal, the enforcement is governed by the FCD in Article 64 which said:

"Section 8. Failure to respect decisions

Article 64: 1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a

committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision)" [...].

>> FIFA can enforce awards rendered by the CAS in an appeal procedure, but what happens with the enforcement of awards that deal with decisions rendered in the ordinary procedure of the CAS?

However, the CAS noted that although Article 64 of the FDC is of a disciplinary nature, as it foresees in a fine to be paid to FIFA in case of failure to comply with an award, the wording of Article 64 is sufficiently clear and leaves no space for interpretation. As such, there would be no loophole that would need to be covered by a longstanding practice. Therefore, disciplinary sanctions could not be requested under the FDC in case of the failure to comply with a CAS Ordinary award.

In this way and applying the above article, the CAS held that this Article covers not only the measure of the sanction but also the definition of what constitutes an infringement. It continued by stating that the non-compliance under application of the *Lex Mitior* Principle, ceased to be a disciplinary offence under the amended FDC edition 2011.

In this regard, we note that Article 64 of the FDC explicitly confirms the practice that the FIFA Disciplinary Committee follows according to which it only enforces CAS awards which were passed within an appeal procedure following a decision passed either by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision. In other words and as general rule, the FIFA Disciplinary Committee is not in a position to enforce a decision rendered by the CAS in an ordinary arbitration procedure, *i.e.* as a first instance.

Consequently, the failure to comply with a CAS "Ordinary" award no longer allows for disciplinary sanctions against the concerned club, player, etc.

Which is the way forward in regards to CAS Ordinary awards?

In this sense, it is also important to note that, while clubs will no longer face disciplinary sanctions from FIFA, the Associations with which players and/or clubs are affiliated remain subject to such disciplinary sanctions. From this point of view, the Federations would be the competent entities to enforce the mentioned decision (CAS Ordinary awards).

More specifically, FIFA, when asked to enforce an Ordinary award, has taken the position that federations, according to the FIFA Statutes, are obliged to ensure that their registered members comply with awards rendered by the Court of Arbitration for Sport, failing which the federation itself may face disciplinary sanctions. As such, Ordinary awards (not taking into account the New York Convention) might still be enforced through FIFA, albeit by means of sanctions against federations, which thereby have a strong incentive to compel their members to comply.

⁴⁵⁴ CAS 2012/A/2817 Fenerbahçe S.K. v. FIFA & Roberto Carlos

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There is no doubt that this conclusion derives from Article 13 par. 1 lit of the FIFA Statutes⁴⁵⁵, according to which members have to comply fully with the Statutes, regulations, directives and decision of FIFA bodies at any time, as well as the decisions of the Court of Arbitration for Sport passed on appeal on the basis of Article 66 par. 1 of the FIFA Statutes⁴⁵⁶.

Bearing in mind this interpretation, the associations should take the appropriate steps to enforce the CAS decisions (Ordinary) reminding that according to Article 68 par. 1 of the FIFA Statutes⁴⁵⁷, the member associations of FIFA shall agree to recognize the CAS as an independent judicial authority and ensure that their own members comply with decisions passed by it.

Finally, this legal route is supported by Article 146 par. 2 of the FIFA Disciplinary Code⁴⁵⁸ which states that the associations shall, without exception, incorporate Article 64 of the FIFA Disciplinary Code into their

own regulations in accordance with their internal association structure.

Enforcement according to the New York Convention

As the Swiss Federal Supreme Court reminded in the *MATUZALÉM* case⁴⁵⁹, CAS awards may be enforced in other States that are parties to the New York Convention on the recognition and enforcement of foreign arbitral awards.

The New York Convention resulted from an international effort to make arbitration a more certain and efficient means of resolving international disputes.

However, as far as we know, only a few CAS Ordinary awards have actually been enforced in a Member State.⁴⁶⁰

The New York Convention, with 156 signatory states, provides in Article IV the formal procedure for requesting arbitral award enforcements:

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

On the other hand, Article V establishes the limits to the admissibility of such recognition and enforcement:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling

⁴⁵⁵ "13 Members' obligations. 1. Members have the following obligations:

a) to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 66 par. 1 of the FIFA Statutes; [...]"

⁴⁵⁶ 66 Court of Arbitration for Sport (CAS) 1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agents. 2. The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law.

⁴⁵⁷ 68 Obligation 1. The Confederations, Members and Leagues shall agree to recognize CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.

⁴⁵⁸ 146 Associations' disciplinary codes (...) 2. The associations shall, without exception, incorporate the following mandatory provisions of this code into their own regulations in accordance with their internal association structure: art. 33 par. 6, art. 42 par. 2, art. 58, art. 63, art. 64, art. 99 par. 2 and art. 102 par. 3. Pursuant to art. 146 par. 3, the associations do, however, have some freedom with regard to the fines stipulated in art. 58 and art. 64 [...].

⁴⁵⁹ In its decision dated 27 March 2012 (case no. 4A_558/2011), the Federal Supreme Court first reaffirmed that the free development of an individual must not only be respected by the state but also by monopolistic private individuals, such as sport federations. The Federal Supreme Court held that any decision of such a sport federation must be consistent with the fundamental values in Switzerland. These fundamental values of public policy are not exhaustively defined in Swiss jurisprudence. One of these fundamental values is the provision in article 27 par. 2 Swiss Civil Code – the so called excessive commitment – which is considered by the Federal Supreme Court as a substantial part of any moral and legal system. Thus, the violation of this principle leads to a violation of substantive public policy if the personality rights are obviously and seriously violated.

⁴⁶⁰ Judgement of 30 May 2012 of the Superior Court of Justice of Catalonia (First Section, num. 97/2012, de 30 mayo, JUR 2012\248238), where one of the parties was not member of FIFA (IMFC LICENSING, B.V.), which sought recognition of a CAS award rendered in a case against R.C.D. ESPANYOL DE BARCELONA, S.A.D. A Judgment of the Thessaloniki 1st Instance Court issued on 2014 declared enforceable a CAS decision in Greece. In this case, referred by Prof. A. ANTHIMOS in his article about "Recognition and enforcement of a CAS decision in Greece" (*Lex Sportiva Journal*, Vol. II, Issue I, 2014), a Bulgarian football player sought damages against a football club located in Thessaloniki on the basis of a contract of employment between the parties. The club refused to pay a certain amount with regard to wages and lease expenses. The Court of Arbitration for Sport issued its decision in 2009, according to which the club was obliged to pay the amount of EUR 60,840 for wages, lease expenses and arbitration costs to the player.

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within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

>> The public policy exception is [...] one of the most controversial exceptions to the enforcement of arbitral awards, causing judicial inconsistency and therefore unpredictability in its application.

This last limit, the public policy exception is, as one might easily guess, one of the most controversial exceptions to the enforcement of arbitral awards, causing judicial inconsistency and therefore unpredictability in its application.

The "international public policy" test

The International Law Association's Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (ILA Resolution⁴⁶¹) endorses a narrow approach to the public policy exception - namely, the refusal of enforcements under the public policy exception in exceptional circumstances only.

As stated by the European Court of Justice in *Eco Swiss China Time Ltd - v- Benetton International NV* (1999): "[...] it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances."

The ILA Resolution seeks to facilitate the finality of arbitral awards in accordance with the New York Convention's primary goal of facilitating the enforcement of arbitral awards. The courts of many countries refer to this as the New York Convention's "pro-enforcement policy", which demands a narrow approach to the public policy exception.

In the context of enforcement of arbitral awards, the legislatures and courts of a number of countries have sought to qualify or restrict the

scope of public policy by applying the test of "international public policy".

There have been attempts to define the contents of "public policy" and "international public policy" but no precise definition is possible. The most oft-quoted comment in arbitration case law is that of Judge Joseph SMITH in *Parsons & Whittemore* (US Court of Appeals, 1974) in which he stated that enforcement of a foreign award should be denied "only where enforcement would violate the forum state's most basic notions of morality and justice."

That intention is very similar to the underlying objective of the New York Convention. In *Krombach v. Bamberski* (2000), the European Court of Justice stated: "Recourse to the public policy clause in Article 27, point 1 of the Convention can be envisaged only where recognition or enforcement of the judgment in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. [...] [T]he infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order."

International public policy, which includes both substantive and procedural violations, can be broken down into three categories: fundamental principles, *lois de police* and international obligations.

However, some aspects of international public policy may fall into more than one category. For example, bribery and corruption are generally considered to be *contra bonos mores*, and most courts will refuse to uphold agreements relating to corruption even when the parties

⁴⁶¹ International Law Association New Delhi Conference (2002), Committee on International Commercial Arbitration: Final Report of the Committee on the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards.

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and the acts of corruption are all foreign. Corruption might also be prescribed in legislation and have the status of *lois de police*. The State might also owe an obligation to other States not to allow corruption as a result of signing the OECD 1997 Convention on Combating the Bribery of Foreign Officials in International Transactions.

Fundamental principles

According to Recommendation 2(a) of the ILA Resolution "A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration."

Following the said Resolution, a clear example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights (especially in civil law countries). Other examples that are cited by courts and commentators include: *pacta sunt servanda*; prohibition against uncompensated expropriation; and prohibition against discrimination. The prohibition of activities that are *contra bonos mores* also comes within this category, for example the proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia.

Public policy rules

Recommendation 3(a) of the ILA Resolution states "An award's violation of a mere 'mandatory rule' (i.e. a rule that is mandatory but does not form part of the State's international public policy so as to

compel its application in the case under consideration) *should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.*"

An example of procedural public policy is the requirement that tribunals be impartial. Other examples of breaches of procedural public policy that are cited include: the making of the award was induced or affected by fraud or corruption; breach of the rules of natural justice; and the parties were on an unequal footing in the appointment of the tribunal. There could also be a breach of procedural public policy in enforcing an award that is inconsistent with a court decision or arbitral award that has *res judicata* effect in the enforcement forum.

Regarding the unequal position in the appointment of the tribunal, the recent *PECHSTEIN* case⁴⁶² is particularly interesting (OLG Munich, 15 January 2015, no. U 1110/14 Kart, *Pechstein v. International Skating Union*).

⁴⁶² In 2009, Olympic Gold medallist skater Claudia PECHSTEIN tested positive for a banned substance. The International Skating Union (ISU) banned her from competing for two years.

Pursuant to an arbitration clause in her athlete agreement, appeals against ISU decisions must be brought before the CAS. In two CAS appeals, she was unsuccessful, the CAS upholding her two year suspension (see CAS 2009/A/1912 P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU) and CAS OG 10/04 Claudia Pechstein v. DOSB & IOC).

PECHSTEIN applied for judicial review to the Swiss Federal Tribunal, but those appeals were dismissed (see Swiss Federal Tribunal, 10 February 2010, Case 4A_612/2009 and Swiss Federal Tribunal, 28 September 2010, Case 4A_144/2010).

Subsequently, PECHSTEIN brought a damages proceeding against the ISU in a German civil court – the *Landesgericht* of Munich. The *Landesgericht* held that the arbitration clause was invalid, however PECHSTEIN was precluded (*res judicata*) from challenging the CAS' jurisdiction.

PECHSTEIN appealed to the *Oberlandesgericht* of Munich, which upheld the appeal. However, the ISU has indicated that it will appeal to the German Federal Court, whose decision will be final and binding.

The *Oberlandesgericht* of Munich allowed the appeal, determining that the CAS awards were invalid on public policy grounds under Article V (2) of the New York Convention. *Inter alia*, the court found that because of the specific procedural rules applicable in CAS arbitration, the sports federations have a decisive and predominant influence on the selection of the individuals who can be chosen as arbitrators. The court's finding on this point was that the CAS procedure with regards to the selection and appointment of arbitrators may not be neutral and thus may have an effect on the issues of impartiality and independence.

It is widely accepted that procedural public policy should not include manifest disregard of the law or the facts. Procedural public policy rules overlap with the requirements of due process, prescribed in Article V.1, b) of the New York Convention.

An example of a public policy rule is anti-trust law (including, in particular European Union competition Law, Article 81 EC). In this regard, the *PECHSTEIN* decision is once again extremely interesting. The *Oberlandesgericht* of Munich explained that the ISU holds a monopoly in the market of international ice speed skating competitions. Under this premise, the court held that the ISU is deemed to have a dominant market position, for the purposes of the German Law against Restraints on Competition. According to this law, a company that has a dominant market position is prohibited from requiring the other party to agree to provisions that deviate from those that would likely prevail in case of a functioning competitive environment.

As anti-trust laws are part of public policy, to accept the enforcement of a CAS award would mean that there would not only be a violation of German anti-trust laws (and

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consequently abuse of the ISU's dominant position in the market), but effectively, a violation of German public policy.

This approach clearly conflicts with Swiss Federal Supreme Court criteria followed in the *CAÑAS* case (Swiss Federal Supreme Court, 22 March 2007, Case 4P.172/2006, par. 4.3.2.2). In this case, the Swiss Federal Supreme Court recognized and tolerated the athlete's reduced consent to arbitration (under Article 2 of the Player's Consent and Agreement to ATP Official Rulebook) in order to be able to practice tennis as a professional. It is moreover *"based on the continuing possibility of an appeal acting as a counterbalance to the 'benevolence' with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned."* In other words, the application of *ex post* reviews of CAS awards by the Federal Court is a *sine qua non* to its acceptance of an athlete's reduced consent to arbitration.

Other examples that are often cited are: currency controls; price fixing rules; environmental protection laws; measures of embargo, blockade or boycott; tax laws; and laws protecting parties presumed to be in an inferior bargaining position (e.g. consumer protection laws).

International obligations

According to Recommendation 4 of the ILA Resolution, *"A court may refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum State of its obligations towards other States or international organisations."* According to the ILA Resolution, an example of an international obligation is a United Nations Security Council resolution imposing sanctions. Such resolutions

are immediately binding on Member States of the United Nations (pursuant to Chapter V, Article 25 of the United Nations Charter).

The State must also respect the obligations in international conventions it has ratified.

The Swiss notion of substantive public policy

The Swiss notion of substantive public policy is violated when an arbitral award cannot be reconciled with the essential and widely recognized system of values that from a Swiss perspective should be part of any legal order.

In the aforementioned *MATUZALÉM* case (Swiss Federal Supreme Court, 27 March 2012, Case 4A_558/2011), the Federal Court overruled a CAS award for being an excessive restriction of *MATUZALÉM*'s economic freedom and therefore contrary to the Swiss notion of substantive public policy. The Federal Court stated that:

"4.3.5 The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) ZGB. Should payment fail to take place, the award under appeal would lead not only to the Appellant being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of the world football federation or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy (Art. 190 (2) (e) PILA)."

The EU notion of substantive public policy

From a European Union Law perspective, it must be taken into consideration that enforcing arbitral awards like CAS awards by Member States' courts may affect the internal market.

The Court of Justice already dealt with this topic and introduced a broad notion of public policy in the already mentioned *Eco Swiss* case (ECJ, 1 June 1999, Case C-126/97) by ruling that Article 101 of the Treaty on the Functioning of the European Union (TFEU), TFEU may be regarded as a public policy matter in the sense of Article V(2)(b) of the New York Convention.

In the *MANFREDI* Case (CJEU, 13 July 2006, Joined Cases C-295/04 to C-298/04), the Court further stated (par. 31): *"Articles ... [101-102 TFEU] are a matter of public policy which must be automatically applied by national courts [...]"*.

Finally, competition law is not the internal market's only fundamental provision. It could be extrapolated that the Court relied on a wide notion of public policy in *Eco Swiss*. For instance, the fundamental provisions of free movement may be applicable in a CAS award's enforcement proceedings and could, in principle, qualify as public policy matters in exceptional circumstances. If, for example, enforcement proceedings of the *MATUZALÉM* CAS award were sought before Member States' courts, a violation of the freedom of workers (he played for S.S. Lazio between 2008 and 2013) or service providers (for instance personal sponsorship or endorsement deals) could be invoked to bar the recognition and enforcement of the award. •