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**SPORT ARBITRATION AND INTERIM MEASURES
– A SWISS GLANCE**

Abstract

This article highlights selected characteristics of Swiss international arbitration law focussing on interim measures in sports-related disputes. The key academic concern of the article is to identify whether under Swiss law the parties may waive the state courts' jurisdiction to grant interim relief in international arbitral proceedings and declare the arbitral tribunal as exclusively competent. The view held in this article favours the admissibility of the waiver based on mainly two arguments: the parties' autonomy and the lack of statutory limitations to the waiver. Further, this article deems that in *ad hoc* arbitral proceedings the waiver is not enforceable (but not null and void) as long as the tribunal has not been yet established. In such a case, the parties may exceptionally request interim relief with state courts. Seeking for an arbitral alternative to the said solution the article scrutinises whether in sports-related disputes the Court of Arbitration for Sport in Lausanne could be competent until the constitution of the *ad hoc* tribunal. Finally, the article examines the formal requirements for the waiver.

Keywords: International Arbitration, Interim Measures, Sports Law

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Introduction

This paper highlights selected characteristics of Swiss international arbitration law focussing on interim measures in sports-related disputes. Part 1 and Part 2 present peculiarities and pitfalls of Swiss international arbitration law and interim measures to readers not accustomed with it. A Polish party challenging a Swiss international arbitral award before the Federal Supreme Court of Switzerland (the “Supreme Court”) recently fell into such a pitfall (see Decision of the Supreme Court (the “SCD”) of 5 March 2015, 4A_698/2014). Part 3 debates the admissibility of an agreement to waive the state courts’ jurisdiction to grant interim relief.

The recent dispute between the Polish football club Legia Warsaw and the UEFA (at first also the Scottish football club Celtic FC), illustrates the significance of interim¹ measures in sports-related disputes.² On 8 August 2014, Legia Warsaw was sanctioned³ by the UEFA for fielding a suspended player in the 2014/15 UEFA Champions League.⁴ Having exhausted all legal remedies within the association, Legia Warsaw appealed to the Court of Arbitration for Sport in Lausanne, Switzerland, (the “CAS”). Legia Warsaw also applied for provisional measures (see Article R37 Code of Sport-Related Arbitration and Mediation Rules, Edition 2013; the “CAS Code”) requesting to be admitted to participate in the next rounds of the competition until the CAS has issued a final award on the merits. Legia Warsaw sought for interim measures as this was the only way it could be allowed to immediately participate in the next rounds of that year’s competition. The CAS dismissed, however, the application for provisional measures. Thereupon, Legia Warsaw requested on the merits, *inter alia*, that the decision of the UEFA Appeals Body be annulled and filed for damages, yet the CAS dismissed the appeal on 30 April 2015.⁵ Legia Warsaw refrained from challenging the award to the Supreme

¹ The terms “interim” and “provisional” are used synonymously hereinafter; cf. *Black’s Law Dictionary*, 10th Edition, St. Paul 2014, p. 937.

² See also Valentino Rossi vs. FIM, who filed an urgent application to stay the execution of the decision of the FIM Stewards and withdrew its appeal on the merits after interim relief was denied by the CAS, http://www.tas-cas.org/fileadmin/user_upload/Media_Release_4259_0511.pdf; http://www.tas-cas.org/fileadmin/user_upload/Media_Release_4259_1012.pdf. (access 21 July 2016).

³ Article 18 Regulations of the UEFA Champions League, 2014/15 competition; Article 21 UEFA Disciplinary Regulations, 2014 edition.

⁴ <http://www.uefa.org/disciplinary/index.html#> <http://www.uefa.org/disciplinary/index.html#> (access 21 July 2016).

⁵ CAS Media Release of 18 August 2014 of 30 April 2015, respectively.

Court according to Article 190 (2) Swiss Federal Statute on Private International Law of 18 December 1987 (the “PILS”).⁶

Part 1

International sport federations and sport arbitration – a choice for Switzerland based on legal considerations

Numerous and prominent sport federations are domiciled in Switzerland. They include the FIFA, the UEFA and the IOC – genuine dreadnoughts of sports. Federations domiciled in Switzerland are constituted as associations according to Articles 60 et seqq. Swiss Civil Code of 1 January 1912 (the “CC”).⁷ The associations choose the legal form of an association due to the extensive autonomy assigned by Article 23 Federal Constitution of the Swiss Confederation of 18 April 1999⁸ and by Article 60–79 CC, notably Article 63 CC. The autonomy derives mainly from the scarcity of mandatory provisions in the CC’s section on associations. Hence, sport federations domiciled in Switzerland are able to organize their structures and activities to a great extent upon their own discretion.⁹ The autonomy provided by Swiss law is one of the reasons why sport federations chose Switzerland as their seat.

The federations also enjoy considerable autonomy in judicial relief. In order to challenge an association’s resolution according to Article 75 CC, parties may file their appeal with either state or arbitral courts. The advantages of arbitration in sports-related disputes are, *inter alia*: First, parties are treated equally, irrespective of their nationality or place of residence – notably due to the CAS being a uniform and international sport arbitration institution and due to the application of the international *lex sportiva*. Second, the worldwide enforcement of arbitral awards is facilitated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (The New York Convention).¹⁰ Third, sport federations tend to enforce arbitral awards voluntarily if they

⁶ SR 291; AS 1988 1776.

⁷ SR 210; AS 24 233.

⁸ SR 101; AS 1999 2556.

⁹ Cf. the extensive rules and regulations of the FIFA, which can be deemed as a world-wide applying Lex FIFA.

¹⁰ SR 0.277.12; AS 1965 795.

submitted beforehand to arbitration;¹¹ hence, due to the monopolistic position of sport federations, provisional measures may be swiftly implemented – a key advantage of sport arbitration (cf. the powers of the UEFA in the Legia Warsaw Case). In addition, considerable procedural autonomy is assigned to the parties by Swiss arbitration law – i.e. the 12th Chapter of the PILS (the “12th Chapter”) on arbitration, which is the *lex arbitri* for international arbitral tribunals in Switzerland and which upholds the principle of party autonomy.¹² Thus, federations and related actors opt for arbitration to resolve international sports-related disputes.

As a large number of international sport federations are domiciled in Switzerland, it seems fairly consistent that sport arbitration courts are also seated there, e.g. the CAS or the Basketball Arbitral Tribunal (the “BAT”).¹³ However, the autonomies provided by Swiss laws, particularly arbitration laws, should not be underestimated when assessing the reasons why these institutions are seated in Switzerland. The said autonomies assigned by Swiss laws to sport federations, sport courts or parties to sports-related disputes redound to Switzerland’s advantage as a place for international sport arbitration.

Part 2

Selected characteristics and principles of the 12th Chapter of the PILS in view of interim measures

The 12th Chapter of the PILS – the arbitration-friendly “code in a code”

The 12th Chapter is an independent set of rules (the “code in a code”) even though it is formally embedded in the PILS. Further provisions of the PILS, notably the 1st Chapter on the general provisions, should not apply thereto.¹⁴ The 12th Chapter is arbitration-friendly. In addition, the Supreme Court ensures that arbi-

¹¹ P. Cavalieros, J. Kim, *Can the Arbitral Community Learn from Sports Arbitration?*, “Journal of International Arbitration” 2015, Vol. 32, Issue 2, pp. 237–260, p. 243. The majority of interim measures orders are complied with voluntarily, see <http://kluwerarbitrationblog.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop> (access 21 July 2016).

¹² According to Article 176 (1) PILS the 12th Chapter applies to arbitration, if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland; S. Pfisterer, A.K. Schnyder, *International Arbitration in Switzerland*, Zurich 2012, p. 11.

¹³ The BAT has its seat in Geneva, Switzerland.

¹⁴ S. Pfisterer, A.K. Schnyder, *International...*, p. 11.

tration-friendliness by its case law, construing lacunas in favour of arbitration.¹⁵ The “code in a code” and the arbitration-friendly interpretation can be deemed as principles of Swiss international arbitration law. They are taken into consideration hereinafter when construing lacunae related to interim measures.

Applicable arbitral procedure – Article 182 PILS – party autonomy

A further principle, the principle of freedom or party autonomy, derives from Article 182 PILS. The parties may exercise wide discretion and determine the arbitral procedure directly or by reference to a set of rules of arbitration. They may also submit the arbitral procedure to a procedural law of their choice. Regardless of the procedure chosen, the arbitral tribunal has to guarantee the fundamental principles of the equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.¹⁶ Although further restrictions might apply in view of Article 190 (2) PILS (i.e. the action for annulment of the arbitral award), their scope is rather limited (see *infra*). Article 6 (1) ECHR does not limit the liberties of parties or arbitrators as it is not directly applicable in international arbitration proceedings in Switzerland. However, it might be taken into consideration while construing the guarantees set out in Article 190 (2) PILS.¹⁷

This provision also allows sport arbitration institutions to set up suitable rules (and amend them) in order to incorporate the specificity of sport. Both the CAS Code and the BAT Rules¹⁸ vary in major points compared to rules on commercial arbitration (see the ICC Rules of Arbitration, in force as from 1 January 2012 [the “ICC Rules”], or the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution [the “SCAI”], Edition of June 2012 [the “Swiss Rules”]).¹⁹ For instance, the sport codes provide for the waiver of the state courts’

¹⁵ In contrast, the Polish Supreme Court in its Judgement of 5 February 2015, V CSK 231/14, rather hinders than facilitates arbitration.

¹⁶ “(...) il est loisible aux parties de régler la procédure arbitrale comme elles l’entendent,” SCD of 15 July 2015, 4A_246/2014, cons. 7.2.2.

¹⁷ “Une fois le choix de ce mode de règlement des litiges valablement opéré, une partie à la convention d’arbitrage ne peut pas se plaindre directement, dans le cadre d’un recours en matière civile au Tribunal fédéral formé contre une sentence, de ce que les arbitres auraient violé la CEDH, même si les principes découlant de celle-ci peuvent servir, le cas échéant, à concrétiser les garanties invoquées par elle sur la base de l’art. 190 al. 2 LDIP.” Ibidem.

¹⁸ The Arbitration Rules of the Basketball Arbitral Tribunal (the “BAT Rules”).

¹⁹ The Swiss Rules can be deemed as state-of-the-art, providing parties i.a. with provisions on ex-parte interim measures protection by an emergency arbitrator (see Article 26 (3) Swiss Rules).

jurisdiction for interim measures, assigning the power exclusively to the arbitral tribunals. Conversely, the codes of commercial arbitration provide for a choice.²⁰ The liberties provided by Article 182 PILS allow also construing lacunae in favour of arbitration (see *infra* Part 3).

General conditions for the granting of interim measures in sport arbitration – Articles 182 et seqq. PILS

Although Article 183 PILS governs the jurisdiction to grant interim measures, it does not explicitly stipulate further requirements for the granting of interim measures, except the condition that the requesting party shall provide security (para 3). Instead, Article 182 PILS applies and so do the liberties again. Hence, the parties may merely refer to a set of arbitration rules²¹ that stipulate the applicable conditions – see Article R37 (5) CAS Code. In the absence of choice or if the applicable rules feature lacunae, the following general conditions might apply according to doctrine:²² Request by the party (no *ex officio* power of the tribunal). *Prima facie* jurisdiction of the arbitral tribunal to rule on the merits – however this prerequisite should only apply if the parties or the applicable arbitration rules say so. *Prima facie* reasonable chances of success on the merits (*fumus boni juris*), according to the *lex causae*. Risk of substantial harm in the absence of protection (*periculum in mora*) – the requesting party must demonstrate that it is in imminent danger of being deprived of its claim and that such harm substantially outweighs the harm likely to result to the party against whom the measure is directed if the measure were to be granted – this prerequisite is a pitfall for many applications.²³ Finally, the decision must not prejudice the decision on the merits.

An additional condition must be met in Swiss sports arbitration proceedings: the condition of exhausted internal relief of the sport association. Pursuant to Article 75 CC, in order to appeal against a decision of a sport association or its body before a state or arbitral court, the internal legal reme-

²⁰ See Article R37 (3) CAS Code; Article 10.4 BAT Rules; Article 28 (2) ICC Rules; Article 26 (5) Swiss Rules.

²¹ Cf. C. Boog, *Commentary on Article 183 PILS*, in: *Arbitration in Switzerland: The Practitioner's Guide*, ed. M. Arroyo, Biggleswade 2013, N 11 et seqq.

²² See J.-F. Poudret et al., *Comparative Law of International Arbitration*, 2nd ed., London 2007, N 626.

²³ See B. Berger, F. Kellerhals, *International...*, N 1250 et seqq.

dies of the association must be exhausted (if there is such provided for in the regulations).²⁴

It is arguable whether parties must also exhaust the internal remedies when applying first only for interim relief.²⁵ Practitioners are advised to do so and so did Legia Warsaw. Also, the CAS Code stipulates that no party may apply for provisional or conservatory measures before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted (Article R37 (1) CAS Code). However, in cases of imminent danger, and if there is reasonable possibility that the association's body will not guarantee adequate relief, parties should be allowed to apply directly to either arbitral or state courts.²⁶ Still, all courts will dismiss the application for interim measures if the claim on the merits is not admissible (any longer; caveat *fumus boni juris*).²⁷

Alternative jurisdiction of state courts and arbitral tribunals for the granting of interim measures – Article 183 PILS

Article 183 PILS stipulates that the arbitral tribunal may, on motion of one party, order provisional or conservatory measures unless the parties have otherwise agreed. According to Swiss doctrine, the jurisdiction of the Swiss state courts at the seat of the arbitral tribunal derives directly from this *lex arbitri* provision and irrespective of whether one or all the parties to the arbitration are domiciled in Switzerland.²⁸ That view can be supported by the scope of Article 185 PILS, according to which the state judge at the seat of the arbitral tribunal shall have jurisdiction for any further judicial assistance. In addition, if the 12th Chapter is considered as a “code in a code” further provisions of the PILS notably Article 10 PILS, which governs in general the jurisdiction of the state courts' to grant interim measures in Swiss international private law, should not apply. However, besides the seat of the tribunal further fora should not be considered as *a priori* barred, particularly if a substantive connection can be established between the forum and the matter in dispute.

²⁴ Ibidem, p. 843.

²⁵ H. Roth, *Der vorsorgliche Rechtsschutz im internationalen Sportrecht*, in: *Preliminary Remedies in International Sports Law*, ed. U. Scherrer, Zurich 1999, p. 23.

²⁶ Cf. D. Mavromati, M. Reeb, *The Code...*, Article R37 N 13.

²⁷ Judgement of the High Court of Canton of Berne of 19 April 2012, ZK 12 51, cons. III.5.

²⁸ Cf. D. Sangiorgio, *Der vorsorgliche Rechtsschutz in der internationalen Schiedsgerichtsbarkeit nach Art. 183 IPRG*, Diss. Zürich 1996, pp. 83 et seqq.

Due to Article 183 PILS, an arbitration clause assigning to an arbitral tribunal sitting in Switzerland power to grant interim measures is not required but optional. On the other hand, parties wishing to limit or exclude the arbitral tribunal's powers should express their intent. They may do so explicitly in the arbitration agreement. Alternatively, as no requirements of form have to be fulfilled in order for the agreement to be valid (see *infra* "The formal requirements to the waiver"), they may do so implicitly either by referring to a set of arbitration rules,²⁹ or to a procedural law limiting the arbitral tribunal's powers, or by assigning exclusive jurisdiction to the state courts.³⁰ Whether the state courts' power to grant interim relief might be waived and exclusively assigned to the arbitral tribunal is subsequently addressed (see *infra* Part 3).

Objective Arbitrability – few limitations in view of interim measures – Article 177 (1) PILS

As aforementioned, the application for interim measures is contingent upon the claim's reasonable chances of success on the merits (*fumus boni juris*). However, the power of the arbitral tribunal is also contingent upon the objective arbitrability of the claim. Article 177 (1) PILS stipulates that any dispute of financial interest may be the subject of an arbitration. The criterion of financial interest is broadly construed, and the arbitrability of a claim is given if it is of any financial value for the parties. This straightforward criterion was purposely established by the Swiss legislator to foster Switzerland's position as a leading venue for international arbitration.³¹ The Supreme Court recently called to mind that this is a provision of substantive law (*lex arbitri*) and not a conflict-of-law provision.³² Under this provision, foreign mandatory or non-mandatory laws are not applicable and are not taken into consideration unless international public policy is violated.³³ Moreover, public policy is narrowly construed by the Supreme Court

²⁹ See Article R37 (3) CAS Code; Article 10.1 BAT Rules; Article 26 (1) Swiss Rules.

³⁰ B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., Bern 2015, N 1242.

³¹ R. Mabillard, R. Briner, *Commentary on Article 177 PILS*, in: *Basler Kommentar IPR*, eds. H. Honsell et al., 3rd ed., Basel 2013, N 8 et seqq.; see also I. Wildhaber, A. Johnson Wilcke, *Arbitrating Labor Disputes in Switzerland*, "Journal of International Arbitration" 2010, Vol. 27, Issue 6, p. 643.

³² SCD of 18 March 2013, 4A_388/2012 cons. 3.2.

³³ SCD 132 (2006) III 389, cons. 2.2.1.

and violations reluctantly admitted.³⁴ Hence, also the pitfalls of applications for interim measures under this provision are rather limited.

**Action for annulment – limited scope to challenge interim measures orders –
Articles 190 et seqq. PILS**

Arbitral awards may be reviewed only by the Supreme Court according to Article 191 PILS in connection with Article 77 Swiss Federal Tribunal Statute of 17 June 2005 (the “FTS”).³⁵ The action for annulment is an action in civil matters according to Article 72 FTS. Arbitral awards may be annulled only on limited grounds according to Article 190 (2) (a –e) PILS. A caveat that is often neglected by many parties who challenge the award on further grounds and which then are confronted with their challenges being declared as not admissible due to formal reasons by the Supreme Court. The award may be challenged if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted (a); if the arbitral tribunal wrongly accepted or declined jurisdiction (b); if the arbitral tribunal’s decision went beyond the claims submitted to it, or failed to decide one of the items of the claim (c); if the principle of equal treatment of the parties or the right of the parties to be heard was violated (d); if the award is incompatible with public policy (e). Accordingly, arbitral awards can only be annulled for procedural errors or if procedural or substantive public policy is violated. It is noteworthy that, pursuant to the Supreme Court, public policy has to be applied from an “international” or “universal” perspective – an *État de droit* perspective – and not a mere Swiss one.³⁶ The award’s substantive determinations cannot be reviewed. Moreover, Article 6 (1) ECHR is not directly applicable under Article 190 (2) PILS and the grounds for annulment are interpreted restrictively.³⁷ In addition, the ground of public policy is construed very narrowly and its violations

³⁴ So far only twice in history, i.e. since 1989, and in relation to 521 appeals of international arbitration awards with the Supreme Court.

³⁵ SR 173.110; AS 2006 1205. See also Article 77 (3), 42 (1), 100 (1), 103 (3), 105 (1) FTS.

³⁶ SCD 132 (2006) III 389, cons. 2.2.1: “(...) il y a violation de l’ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit.” Notwithstanding, the *État de droit* will be biased by a Swiss perspective, see R. Mabillard, R. Briner, *Commentary...*, N 18b.

³⁷ S. Pfisterer, A.K. Schnyder, *International...*, pp. 132 et seqq.

only reluctantly admitted by the Supreme Court.³⁸ The chances of success on grounds of public policy have been approx. 1% so far; this ground has been invoked approx. 173 times.³⁹

The motivation of the action for annulment is challenging in view of the pre-conditions set out by Article 77 (3) FTS and the related case law of the Supreme Court.⁴⁰ An appeal on grounds of Article 190 (2) (a) and (c–e) PILS requires qualified motivation stating not only which grounds are being invoked, but which reasoning in the award are being attacked and on which motivation. Only regarding ground (b) is it sufficient merely to criticise the legal reasoning of the arbitral tribunal. Additionally, an appeal on grounds (a) and (b) must be raised immediately, i.e. when the violation occurs (and as soon as the party invoking the violation becomes aware of it), as these grounds require that the parties could not have raised the appeal in an earlier stage of the proceedings.

The appeal must be filed within 30 days after the complete notification of the award. Hence, the time limit does not begin to run if only the operative part of the award is rendered (cf. Article R59 (3) CAS Code).⁴¹ Notwithstanding an appeal, the award may be enforced unless the Supreme Court grants suspensive effect. The *res judicata* effect is not affected by the appeal.

Whilst the Supreme Court examines all the grounds with unfettered powers of review, it is bound by the findings on the fact by the arbitral tribunal, unless a violation of procedural principles (d) or procedural public policy (e) is invoked.⁴² It is of no surprise, in view of the stated, that of 518 challenges to the Supreme Court only 31 awards were set aside – as of the time of this writing. The duration of the proceedings is short. The Supreme Court renders a decision approximately six months upon filing of the challenge.⁴³ It is understandable that Legia Warsaw did not lodge an appeal with the Supreme Court given the ambi-

³⁸ SCD of 18 March 2013, 4A 388/2012; see also SCD of 2 June 2010, 4A_320/2009 = the first SCD regarding the football player Matuzalem and see also the land mark decision regarding substantive ordre public violation SCD 138 (2012) III 322 = the second Matuzalem SCD.

³⁹ F. Dasser, P. Wójtowicz, *Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015*, “ASA Bulletin” 2016, Vol. 34, p. 286.

⁴⁰ See for an appeal that was not sufficiently motivated by a Polish appellant: SCD of 5 March 2015, 4A_698/2014, and the prerequisites for motivating stated therein.

⁴¹ See SCD of 16 October 2014, 4A_324/2014, cons. B.d. The CAS rendered its operative award on 28 August 2013 and the motivation was issued on 11 April 2014. The latter date set off the 30-day time limit for the appeal.

⁴² S. Pfisterer, A.K. Schnyder, *International...*, p. 140.

⁴³ F. Dasser, P. Wójtowicz, *Challenges...*, p. 286 et seqq.

guous circumstances of the case and the risk of further costs in view of a highly potential dismissal.

It is generally understood that Article 190 PILS is not applicable to decisions granting or rejecting requests for interim relief according to Article 183 (1) PILS as they are not “awards” in the sense of this provision. Consequently, requests according to Article 183 (1) PILS are not subject to any judicial control by Swiss courts.⁴⁴ Legal doctrine favours such a control in specific circumstances, though. For instance, if the arbitral tribunal wrongly accepts or declines its jurisdiction to grant interim measures parties should be allowed to challenge that decision on the ground of Article 190 (2) (b) PILS. Such a challenge is directly related to the scope of the jurisdiction of the tribunal and should indeed be allowed.⁴⁵

Part 3

Admissibility of an agreement to waive the state courts’ jurisdiction to grant interim relief – in general

According to Article 183 (1) PILS the parties may waive the arbitral tribunal’s power to grant interim relief. However, the opposite is not addressed by the provision’s wording, i.e. the admissibility of the waiver of the state courts’ jurisdiction. The matter has – as of the time of this writing – not yet been decided by the Supreme Court, but it has been addressed by a Swiss appellate court in a domestic sport dispute – both parties were domiciled in Switzerland. In the Judgement of the High Court of Canton of Berne of 19 April 2012, the Court applied the domestic provision on jurisdiction to grant interim relief, i.e. Article 374 Swiss Code of Civil Procedure of 19 December 2008 (the “CCP”),⁴⁶ and favoured the admissibility of the exclusive jurisdiction of the arbitral tribunal.⁴⁷ As Article 374 CCP is akin to Article 183 PILS with regard to wording and content, the findings of this judgement are hereinafter taken into consideration to construe Article 183 (1) PILS regarding the admissibility of the waiver.

⁴⁴ SCD 136 (2010) III 200.

⁴⁵ B. Berger, F. Kellerhals, *International...*, N 1698. Cf. also SCD 140 (2014) III 477, rather opening the scope of appeal in regard to jurisdiction.

⁴⁶ SR 272; AS 2010 1739.

⁴⁷ Judgement of the High Court of Canton of Berne of 19 April 2012, ZK 12 51, cons. III.2.f.

Whilst Swiss doctrine is referencing pros and cons of the admissibility of the waiver,⁴⁸ good reasons militate in favour thereof. First, the waiver is not explicitly excluded by Article 183 (1) PILS. Hence, the lacuna in the provision's wording allows for further interpretation. Second, the principle of party autonomy favours the admissibility. This principle applies in international and Swiss arbitration, see Article 182 PILS (see *supra*) and civil procedure law – cf. *ne procedat iudex ex officio*.⁴⁹ Hence, if the parties truly wish to waive the state courts jurisdiction, their wish should be respected.⁵⁰ This is, however, only true if the parties freely opted for the waiver⁵¹ and if the judicial interim relief is guaranteed by the designated arbitration body (which might not be the case in *ad hoc* arbitration, see *infra*). Third, the principle of equal legal treatment supports the admissibility. Notably athletes should be treated equally, irrespective of their nationality or domicile in order to safeguard fair competitions. To support this goal, the unification of the interim relief in sports-related disputes should be promoted – preferably by one or by different dispute resolution bodies applying the same rules and case law (*lex sportiva*).

Admissibility of an agreement to waive the state courts' jurisdiction to grant interim relief – in particular in *ad hoc* arbitration

Interim relief prior to the constitution of the arbitral tribunal

Exceptions must be made to the aforementioned general admissibility of the waiver. One concerns *ad hoc* arbitral proceedings prior to the constitution of the arbitral tribunal. In these cases, the tribunal first has to be constituted in order to be able to grant the request for interim measures. The granting by the designated and competent tribunal is, hence, not possible for the period the forum is not available, i.e. the tribunal not constituted. Unfortunately, emergency arbitrators

⁴⁸ U. Haas, J. Donchi, *Interim Measures of Protection in Arbitration and State Courts*, in: *International Sports Law and Jurisprudence of the CAS, 4th CAS & SAV/FSA Conference Lausanne 2012*, ed. M. Bernasconi, Bern 2014, pp. 85–115; S. Osterwalder, M. Kaiser, *Vom Rechtsstaat zum Richtersport? – Fragen zum vorsorglichen Rechtsschutz in der Sportschiedsgerichtsbarkeit der Schweiz*, „SpuRt“ 2011, No. 6, pp. 230–236.

⁴⁹ See Judgement of the High Court of Canton of Berne of 19 April 2012, ZK 12 51, cons. III.2.e.; see also: B. Berger, F. Kellerhals, *International...*, N 11 et seqq.

⁵⁰ Cf. SCD of 15 July 2015, 4A_246/2014, cons. 7.2.2.

⁵¹ Cf. the land mark “Cañas” SCD 133 (2007) III 235.

are not foreseen in *ad hoc* arbitral proceedings (at least not yet, see *infra*) – and, hence, cannot provide assistance. Conversely, emergency relief has been established by leading arbitration institutions.⁵² Thus, the parties cannot be obligated to observe the waiver in *ad hoc* arbitral proceedings prior to the constitution of the tribunal as this would result in a denial of the access to courts.

Nonetheless, even if the tribunal has not yet been established, an *ad hoc* arbitration clause providing for interim relief exclusively by arbitration should not be deemed as null and void⁵³ but incapable of being yet performed to its full scope, i.e. regarding the interim relief (cf. the concept of severability). The same applies *mutatis mutandis* if the waiver clause is considered as a separable stand-alone agreement. Hence, the entitled party may not invoke important grounds to rescind the contract but must still fulfil the arbitration agreement.⁵⁴

To heal the pathology, interim relief should be applied for to state courts according to Article 185 PILS (*juge d'appuis*) at the seat of the arbitral tribunal according to Article 183 PILS (again, further fora are not *a priori* barred). Accordingly, the request for interim relief addressed to a state court should not be deemed as a waiver of the arbitration agreement. The arbitral tribunal would remain competent to decide on the merits and to grant interim relief upon its constitution. Conversely, if a party lacks the financial means to conduct the arbitral proceedings, this party may resign on important ground and must not fulfil the arbitration agreement,⁵⁵ unless adequate legal aid is available (cf. Guidelines on Legal Aid before the Court of Arbitration for Sport, in force as from 1 September 2013).⁵⁶

No power of the CAS to grant interim relief in relation to *ad hoc* sport arbitration tribunals prior to their constitution – yet

If the parties to sports-related disputes intended to resort to only arbitration, also regarding the application for interim relief, and not to the state courts at all (not

⁵² I.a. the AAA, the ICC, the LCAI, the SCAI, the CAS and the BAT.

⁵³ Cf. B. Berger, F. Kellerhals, *International...*, N 1276.

⁵⁴ Cf. M. Guldener, *Schweizerisches Zivilprozessrecht*, Zurich 1979, p. 614; S. Pfisterer, *Commentary on Article 354 CCP*, in: *Berner Kommentar ZPO-III*, eds. H. Hausheer, H.P. Walter, Bern 2014, N 22.

⁵⁵ Cf. SCD of 11 December 2012, 2C_513/2012, cons. 3.1; SCD 120 (1994) I.a. 171, cons. 2a; S. Besson, *Arbitration and Human Rights*, “ASA Bulletin” 2006, Vol. 24, Issue 3, p. 406.

⁵⁶ Whether the legal aid provided by the CAS is adequate was left open by the Supreme Court in the causa “Sinkewitz” SCD of 11 June 2014, 4A_178/2014.

even to the *juge d'appuis* as aforementioned), a solution respecting the parties' intent to only arbitrate should be envisaged. Prior to the constitution of the *ad hoc* arbitral tribunal, parties could apply for interim measures to the CAS, as it is one of the globally most recognized sport arbitration institutions. Whether or not such a solution is admissible according to Swiss law and the CAS Code is being set out hereinafter.

The admissibility is primarily contingent on whether the joint consensus of the parties to submit their dispute to only arbitration encompasses the consensus to assign the jurisdiction to grant interim measures prior to the constitution of the *ad hoc* tribunal to the CAS.

The substantive requirements of consensus are generally governed by Article 1 (1) and Article 2 (1) Swiss Code of Obligations of 1 January 1912 (the "CO").⁵⁷ They apply irrespective of the qualification of the legal nature of the waiver of the state courts' jurisdiction. This issue has – as of the time of this writing – not yet been decided by Swiss case law.⁵⁸

According to Article 1 (1) and Article 2 (1) CO, an agreement is concluded when the parties agreed on all substantial elements. If no subjective consensus of the parties' will can be established, the respective declaration must be interpreted objectively, i.e. in the way in which it could and must be understood by the respective recipient in accordance with good faith.⁵⁹ Moreover, partial nullity (Article 20 [2] CO) is to be remedied to the extent possible by supplementing the contract on the basis of the hypothetical intent of the parties.⁶⁰

Accordingly, an arbitration agreement is concluded if the parties merely agree to submit a *claim* (dispute) to *arbitration*. Additional elements are not deemed as substantial, hence, the arbitration body does not have to be designated in order for the agreement to be valid. The arbitration body only has to be objectively determinable (*bestimmbar*) in order to establish the putative intent of the parties. Accordingly, an arbitration clause lacking the (correct) designation of the arbitral tribunal is pathological⁶¹ and has to be construed in order to uphold its

⁵⁷ SR 220; AS 27 317.

⁵⁸ See U. Haas, J. Donchi, *Interim...*, pp. 106–112; the Judgement of the High Court of Canton of Berne of 19 April 2012, ZK 12 51, considered the agreement as a mere procedure agreement.

⁵⁹ D. Mavromati, M. Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Alphen aan den Rijn 2015, Article R27 N 40.

⁶⁰ SCD of 7 November 2011, 4A_246/2011, cons. 2.1 et seqq., 2.3.2; <http://www.swissarbitrationdecisions.com/sites/default/files/7%20novembre%202011%204A%20246%202011.pdf> (access 21 July 2016).

⁶¹ It is the consensus that is pathological.

validity (the principle of utility).⁶² According to the Supreme Court, pathological clauses are construed in favour of arbitration.⁶³

If the parties agreed to submit their dispute to arbitration only, i.e. incl. interim relief, but omitted to designate the body competent prior to the constitution of the *ad hoc* arbitral tribunal, their agreement should be construed according to the aforementioned principles of good faith and hypothetical intent in order to determine the competent arbitral body.⁶⁴ As according to the Supreme Court a valid arbitration clause should be leveraged, arbitration sport institutions may be deemed as having jurisdiction to grant interim relief in *ad hoc* sports-related disputes.

This view can be supported by the wide autonomy granted to arbitration institutions to decide whether to hear a case or not. Their autonomy derives from the doctrine of *competence-competence* and its liberal application under the 12th Chapter. Some late tendencies in international arbitration – either considering international arbitration as an autonomous transnational order or construing the parties' consent to arbitrate very broadly – could also prove to be supportive.⁶⁵ Further, this concept is known to commercial arbitration. According to Article 1.1 ICC Rules for a Pre-arbitral Referee Procedure, in force as from the 1 January 1990, the “Rules concern... the «Pre-Arbitral Referee Procedure» which provides for the immediate appointment of a person... who has the power to make certain Orders prior to the arbitral tribunal or national court competent to deal with the case.” Finally, it is familiar to Swiss legal doctrine.⁶⁶

The CAS is generally recognized as a global sport arbitration institution, as the “sport’s ultimate umpire” and the “supreme court of world sport”,⁶⁷ hence its

⁶² SCD 130 (2004) III 66, cons. 3.2. Conversely, in SCD of 29 July 2015, 4A_676/2014 the joint intent of the parties to submit the claim to arbitration could not be established as the reference to the “International Chamber of Commerce in Zurich” was decided – due to the wording of the whole “arbitral” clause – to rather be a choice-of-law clause.

⁶³ SCD of 7 November 2011, 4A_246/2011, cons. 2.1. et seqq. Cf. the very far – too far? – reaching decision affirming arbitration SCD of 15 September 2015, 4A_136/2015.

⁶⁴ SCD of 7 November 2011, 4A_246/2011, cons. 2.3.2.

⁶⁵ See Judgement of the French Cour de Cassation, Arrêt n° 797 du 8 juillet 2015 (13-25.846); accord SCD of 7 November 2011, 4A_246/2011; A far reaching concept about consent and arbitration proceedings has been introduced by the Queen Mary professor Stavros Brekoulakis, see: A. Ross, R. Wooley: *Queen Mary professor challenges thinking on consent*, “GAR” of Tuesday, 5 May 2015, Article 33775.

⁶⁶ Cf. C. Boog, *Commentary on Article 183 PILS*, in: *Arbitration in Switzerland: The Practitioner’s Guide*, ed. M. Arroyo, Biggleswade 2013, N 27.

⁶⁷ See P. Cavalieros, J. Kim, *Can the Arbitral Community...*, p. 237.

role in resolving sports-related disputes, notably in filling lacunae, could be further fostered.⁶⁸ According to Article S1 and R.27 CAS Code, the CAS construes its jurisdiction broadly, declaring to be competent to resolve sports-related disputes. Thus, under the scope of Article 183 PILS, the CAS could be deemed as having jurisdiction to generally grant interim relief in *ad hoc* sports-related disputes prior to the constitution of the *ad hoc* tribunal, even if not being explicitly designated by the parties, provided that the parties opted for interim relief by arbitration only. However, the CAS declares itself only competent to grant interim relief if it has *prima facie* jurisdiction on the merits (see Article R37 (4) CAS Code) – although the wording of Article 183 PILS does not set such a prerequisite. Thus, in *ad hoc* proceedings prior to the constitution of the arbitral tribunal, a request for interim relief to the CAS has to be deemed as rather not admissible – yet. However, it could be if the CAS Code was amended or if the CAS accordingly construed the relevant provisions. In view of the liberties provided by Article 182 PILS (see *supra*) a (future) provision of the CAS Code akin to Article 1.1 ICC Rules for a Pre-arbitral Referee Procedure should be deemed as admissible.

The formal requirements for the waiver

Explicitly stated in writing according to case law

According to Swiss legal doctrine, no form requirements apply to the agreement limiting or excluding the power of the arbitral tribunal under the scope of Article 183 PILS.⁶⁹ Whether the same applies to the waiver of the state courts has been scarcely addressed by legal doctrine and case law.⁷⁰ Depending on the legal nature of the waiver, there are various solutions possible related to either Article 178 or 182 or 192 PILS (see *infra*).⁷¹ However, the waiver was considered by the Judgement of the High Court of Canton of Berne of 19 April 2012 as a mere procedural agreement, which in general additional form requirements do not apply

⁶⁸ However, the SCAI case Giedo van der Garde BV v. Sauber Motorsport AG (SCAI Case No. 300315ER-2014) shows that sport dispute can be – and are – also decided by commercial arbitration institutions. The SCAI award was enforced later on with the Australian Supreme Court of Victoria, VSC 80, 11 March 2015.

⁶⁹ B. Berger, F. Kellerhals, *International...*, N 1242.

⁷⁰ U. Haas, J. Donchi, *Interim...*, pp. 106–115.

⁷¹ Cf. SCD of 25 November 2015, 4A_643/2014 on the inadmissibility of the waiver of the Supreme Court's jurisdiction in state court proceedings.

to. However, the High Court ruled (rather laconically) that the waiver must be explicitly stated in writing in the arbitration agreement.⁷² Thus, it is the same form requirement with regard to the waiver of the action for annulment according to Article 192 PILS.⁷³ Therefore, parties should explicitly state in their arbitration agreement that only arbitral tribunals have jurisdiction to grant provisional measures if they so wish. Although the aforementioned judgement was rendered under the scope of Article 354 CCP, it can be applied in order to construe Article 183 PILS as both provisions are akin.

Scrutiny of the relevant provisions – no written form requirements

There are good reasons to object to the said findings of the Judgement of the High Court of Canton of Berne of 19 April 2012, particularly under the scope of Article 183 PILS. First, neither is there an explicit provision stipulating form conditions regarding the waiver of the state courts' jurisdiction under the 12th Chapter nor does Article 183 PILS in particular set any. Second, the 12th Chapter is in general liberal regarding form (see Article 178 PILS.) Third, the 12th Chapter and related case law are arbitration friendly and respect the parties' autonomy (see again Article 182 PILS), hence, facilitating arbitration.⁷⁴ Finally, the high barriers raised by Article 192 PILS are in so far justified as the rationale is to prevent that parties lose their constitutional right of having their case reviewed by an appeal body and by a state judge to at least a minimum extent. Parties cannot offhand forfeit or be deprived of these rights as the access to the state courts is guaranteed by Articles 29 et seqq. of the Swiss Constitution. Conversely, under the scope of Article 183 PILS, the consequences of the waiver are less onerous. First and foremost, the arbitral award might be reviewed by the Supreme Court on the merits thereby affecting the granted or denied interim measures. Hence, access to the state courts is not completely barred. Second, although Article 190 PILS does not stipulate that interim measures can be appealed against before the Supreme Court, it might be admissible in specific circumstances, notably if the jurisdiction of the arbitral tribunal (on the merits) is being disputed.⁷⁵ Third, as

⁷² Judgement of the High Court of Canton of Berne of 19 April 2012, ZK 12 51, cons. III.2.h.

⁷³ See the land mark “Cañas” decision SCD 133 (2007) III 235.

⁷⁴ Cf. on the other hand the Polish Supreme Court in its Judgement of 5 February 2015, V CSK 231/14.

⁷⁵ B. Berger, F. Kellerhals, *International...*, N 1698.

the arbitral tribunal only grants but cannot enforce interim measures, the latter are subject to (limited) scrutiny by state courts.

For all the reasons stated, no formal conditions apply. Moreover, this conclusion militates in favour of the waiver as a procedural agreement (Article 182 PILS).

Validity of the waiver by mere reference to a set of arbitration rules

Accordingly, and in line with the view set out in this article, if there is no explicit written reference in the arbitration agreement pursuant to which the parties waive the state court jurisdiction to grant interim relief, the arbitration clause must be interpreted according to the principle of good faith.⁷⁶ An arbitration clause referring to a set of applicable arbitration rules, which state the exclusive jurisdiction of the arbitral tribunal for provisional measures, may be construed as a waiver. For instance, the CAS Code and the BAT Rules stipulate that by submitting the dispute to the rules, the parties expressly waive any right to request interim relief from any state court.⁷⁷

Closing remarks

Swiss arbitration law and related case law of Swiss courts are arbitration-friendly. Additionally, Swiss courts acknowledge the specificity of sports-related disputes. They also acknowledge the significant role the dispute resolution bodies of the sports associations and the CAS play in sports-related disputes. Therefore, Swiss courts exercise restraint when reviewing the decisions of those institutions. Based on latest arbitration and sports-related developments, the international role of those institutions – particularly regarding the granting of interim measures, which are key in sports-related disputes – will not diminish.⁷⁸ *De lege ferenda* changes in Swiss arbitration law are expected within few years. Preparatory work for a revision of the 12th Chapter of the PILS has just commenced. Any amendments, however, regarding interim relief are not necessary, as the present relevant

⁷⁶ Cf. SCD 140 (2014) III 134, cons. 3.2.

⁷⁷ Article R37 (3) CAS Code, Article 10.4. BAT Rules.

⁷⁸ The Supreme Court deemed the Dispute Resolution Chamber of the FIFA a first and the CAS a second judicial instance (SCD of 28 August 2014, 4A_6/2014), which however is questionable in view of Swiss arbitration law; cf. also the request for provisional measures of Michel Platini partially upheld by the CAS on 11 December 2015, http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Platini_FIFA_1112_final.pdf (access 21 July 2016).

provisions (if adequately construed) and related case law suffice to provide parties with both lead and liberties.

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