



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS & SAV / FSA SEMINAR | 30 September & 1 October 2022

NON-EXCLUSIVE JURISDICTION AND RELATED ISSUES

Andrea SHERPA-ZIMMERMANN | COUNSEL TO CAS

Non-exclusive jurisdiction & exceptions

- ✓ The non-exclusive jurisdiction
 - Provided for by the same source
 - Resulting from possibly conflicting rules
 - Choice of jurisdiction by the appellant / claimant
- ✓ The exceptions
 - Exception of lack of jurisdiction
 - > *stricto sensu* (ordinary procedures)
 - > previous instance (appeals procedures)
 - *Lis pendens*
 - *Res iudicata*



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The exception of lack of jurisdiction *stricto sensu*

(MAINLY) ORDINARY PROCEDURES

✓ Starting point

Article 178 PILA

« 1 The arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text .

2 As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.

3 The validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen.

4 The provisions of this Chapter apply by analogy to an arbitration clause in a unilateral transaction or in articles of association».



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The exception of lack of jurisdiction *stricto sensu*

-> materially valid under **Swiss law** if it contains the **following essential elements**:

« (i) the intention of the parties to submit their disputes to an arbitral tribunal, to the exclusion of a state court, (ii) the scope of the dispute(s) covered by the clause, and (iii) the determination of the chosen tribunal (see, SFT decision 4A_676/2014, 3.2.2 ; ATF 129 III 675 E. 2.3 ; TAS 2015/A/3959 par. 97) »

-> under Swiss law and in an international context « **any claim involving an economic interest may be submitted to arbitration** ».



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The exception of lack of jurisdiction *stricto sensu*

➤ Consequences:

In principle, any other state law or associative rules will not prevent the CAS from having jurisdiction.

Are these rules then any without impact?

No, because:

- Disciplinary procedures
- Possible enforcement problems



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The exception of lack of jurisdiction of the previous instance

APPEAL PROCEDURES

- ✓ Not a question of jurisdiction *stricto sensu*
- Preliminary but substantive issue
- Some difficulties specific to sport arbitration
 - Passive legitimation
 - The exception of lack of jurisdiction of the previous instance as a defence



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The exception of lack of jurisdiction of previous instance

➤ Passive legitimation

Is it necessary to designate the previous instance as co-respondent?

In principle **NO**, but this depends on the appellant's requests for relief

➤ Can the respondent allege the exception of jurisdiction ?

If the respondent has not appealed against the previous instance's decision, he cannot claim that the decision should be set aside for lack of jurisdiction



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The litispendency - *lis pendens*

- ✓ This question arises if the case is also pending before another jurisdiction:
 - ✓ In ordinary proceedings: application filed before CAS and before another state court (or another arbitral tribunal)
 - ✓ In appeals proceedings: appeal against a previous instance decision filed before CAS and before a state court (or another jurisdictional body)
 - ✓ In appeals proceedings: the first claim was brought before the instance whose decision is now appealed before CAS and before another jurisdictional body
- ✓ In all cases CAS must decide whether it can rule on the merits or if the CAS procedure shall be suspended



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The litispendency - *lis pendens*

- ✓ Article 9 PILA, «[w]hen an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland»
- ✓ Article 186 para. 1bis PILA, «[the arbitral tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless serious reasons demand the stay of the proceedings»
- ✓ Incorporated in -> R39 and R55 para. 4 of the CAS Code 2012



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The litispendency - *lis pendens*

Article 32 para. 3 CAS Code, «[t]he Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.»



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Conditions to be met in order to raise the *lis pendens* exception

- ✓ The two parallel proceedings -> the same parties -> same dispute
- ✓ The action before the state court or other arbitral tribunal must have been initiated prior to the one before the CAS (it is thus « already pending »)
- ✓ The party raising the *lis pendens* objection must prove that «serious reasons» justify the suspension of the proceedings before the CAS
- ✓ These conditions are cumulative



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Same parties and same cause of action

- ✓ There is no identity of parties and subject matter when a player brings a claim against a club before a state court and the club brings a claim against the player and his new club before FIFA
 - Art. 17 para. 2 RSTP speaks of « joint and several » liability, so the liability of the new club is not merely subsequent or accessory
 - According to the SFT (SFT 140 III 520, c. 3.2.2), the player and the new club are joint defendants - the presence of joint defendants does not affect the plurality of cases and parties
 - There are thus as many matters in dispute as there are couples of claimant/defendant (CAS 2020/A/7054; CAS 2018/A/5693 & 5694)
- ✓ Nor is there identity of subject matter when the club's claim before the state court relates to the payment of compensation for breach of contract and the player's claim before FIFA relates not only to the payment of such compensation, but also to outstanding salaries, and in addition challenges his de-registration



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«Substantive grounds»

- ✓ No definition in the PILA or in the CAS Code
- ✓ Elements to be assessed:
 - Risk of conflicting decisions
 - The state court or the other arbitral tribunal is supposed to issue a decision within a reasonable time
 - Protection of the rights of all parties
 - Chances of enforcement of the decision



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Res judicata

- ✓ Another jurisdiction has already ruled on the claim
- ✓ Is it an exception of lack of jurisdiction?
 - > Disputed in doctrine and the case law, but *a priori* it is rather a question of inadmissibility which is reviewed *ex officio* by the CAS
- ✓ The CAS approach -> refrains from deciding on the merits of the case if the conditions of application of the principle are fulfilled



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Res judicata

✓ The conditions:

- The same parties have submitted the same claim on the basis of the same facts («triple identity check»)
- The decision-making body must be competent to issue the decision
- An appropriate contradictory procedure must have been followed
- It must be a final decision on the merits of the dispute
- In the case of an arbitral tribunal, the decision must qualify as a real «arbitral award» capable of being recognized in Switzerland in accordance with the New York Convention (art. 194 PILA)



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THANK YOU FOR YOUR ATTENTION
&
A SPECIAL THANK TO MY COLLEAGUES
PAULINE PELLAUX & JEAN-PHILIPPE DUBEY!

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