Swiss Supreme Court confirms that Article 6(1) ECHR not directly applicable in setting aside proceedings

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Legal update: case report | **Maintained** | Switzerland

In *Decision 4A_486/2019*, the Swiss Supreme Court dismissed an application to set aside an award rendered by the Court of Arbitration for Sports clarifying, among other things, that Article 6(1) of the European Convention on Human Rights is not a standalone ground that can be invoked in setting aside proceedings.

Speedread

In a recently published French-language decision, the Swiss Supreme Court dismissed an application to set aside an award rendered by the Court of Arbitration for Sports (CAS) confirming, among other things, that Article 6(1) of the European Convention on Human Rights (ECHR) is not directly applicable as a separate ground to set aside an international arbitration award rendered in Switzerland.

The dispute involved two football clubs (V and W) that participated in the Turkish Süper Lig, the Turkish Football Federation (TFF) and the Fédération Internationale de Football Association (FIFA).

In July 2011, after the opening by the Turkish Public Prosecutor's Office of a criminal investigation in connection with a large-scale match-fixing scheme during the 2010/2011 season, the TFF investigated suspicions of match-fixing, and ultimately decided to prevent W from participating in the 2011/2012 edition of the Champions League. As a consequence, the Union des Associations Européennes de Football (UEFA) awarded W's vacant slot to V. However, the TFF considered that although some managers of W were implicated in the match-fixing scheme, the club itself could not be held liable for the scheme.

From 2011, V repeatedly sought to obtain a decision from the TFF, UEFA and FIFA to sanction W, with the aim of being awarded the title of champion of the 2011/2012 Süper Lig season in W's stead. The FIFA Disciplinary Committee and the FIFA Appeal Committee ultimately considered that V had no standing to sue and dismissed V's requests accordingly.

V filed an appeal to the Court of Arbitration for Sport (CAS) against these decisions. The CAS panel bifurcated the proceedings in order to address, in the first phase, TFF and W's procedural objections. A hearing was held and the objections relating to the subject matter admissibility, jurisdiction and standing to appeal were discussed. By a partial award, the CAS ruled that V had no legal standing and refrained from discussing the merits of the dispute. During the CAS proceeding, V requested a public hearing based on the *Mutu* and *Pechstein* v Switzerland *(Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018)*, but the request was dismissed.

V initiated setting aside proceedings before the Swiss Supreme Court against the award. The Swiss Supreme Court dismissed the application and underlined that a potential violation of Article 6(1) of the

ECHR could not be invoked as a separate plea in setting aside proceedings. *(Decision 4A_486/2019, 17 August 2020)*.

Background

Private International Law Act (PILA)

Article 190(2) of the PILA provides an exhaustive list of grounds on which the Swiss Supreme Court can set aside an international award including if the award is incompatible with public policy (*Article 190(2)(e)*).

According to the Supreme Court's case law, public policy under Article 190(2)(e) of the PILA comprises procedural and substantive public policy. An award is incompatible with procedural public policy if it disregards essential and broadly acknowledged principles to an extent that it contradicts a sense of justice and leads to the decision appearing incompatible with the rule of law. An award runs against substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent that it is no longer consistent with notions of justice and the system of values. Among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapacitated persons. The Swiss Supreme Court has declined to give an exhaustive definition of what is contrary to public policy.

Article 6(1) of the European Convention on Human Rights (ECHR)

Pursuant to Article 6(1) of the ECHR, in the determination of a person's civil rights and obligations, or of any criminal charge against that person, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. A judgment will be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security, or where the interests of juveniles or the protection of privacy so require, or where the court feels that that publicity would prejudice the interests of justice.

In the case of *Mutu* and *Pechstein v. Switzerland* (*Application nos. 40574/10 and 67474/10 (2 October 2018*) the European Court of Human Right (ECtHR) reiterated that the public character of proceedings constitutes a fundamental principle enshrined in Article 6(1) of the ECHR. In relation to *Pechstein*, the ECtHR found that there had been a violation of Article 6(1) of ECHR because Pechstein disputed the facts, and the sanction that was imposed on her carried a degree of stigma and was likely to adversely affect her professional honour and reputation, therefore, the proceedings before the CAS should have been held in public.

See *Legal update, CAS procedures compatible with right to a fair trial except for refusal of public hearing (European Court of Human Rights)*.

Article 75 of the Swiss Civil Code (CC)

Pursuant to Article 75 of the CC, any member of an association who has not consented to a resolution that infringes the law, or the articles of association, is entitled by law to challenge such resolution in court within one month of learning of it.

Article 75 of the CC is a provision of a mandatory nature. It applies to both direct and indirect members of an association and is of particular importance in the resolution of international sports disputes because the majority of the International Sports Federations (IFs) are seated in Switzerland and are constituted as associations of Swiss law (*Article 60 et seq. CC*). Therefore, Article 75 applies to them.

Facts

The underlying dispute involved, on the one hand football club (V) that was participating in the Turkish Süper Lig, the entity administering the club (a member of the Turkish Football Federation (TFF)) and another entity who had managed V until mid-2011 (together "the Appellants"), and, on the other hand, another football club (W) of the Türkish Süper Lig, the entity managing that club (also a member of the TFF), the TFF itself and the Fédération Internationale de Football Association (FIFA) (together "the Respondents").

In the 2010/2011 Süper Lig season, W was crowned champion of Turkey and qualified for the 2011/2012 UEFA Champions League, while V was ranked second.

In July 2011, several managers of various Turkish football clubs were arrested following a criminal investigation into a large-scale match-fixing scheme of Süper Lig games during the 2010/2011 season conducted by the Turkish Public Prosecutor's Office. The TFF investigated and decided to prevent W from participating in the 2011/2012 edition of the Champions League. UEFA awarded W's place to V.

In 2012, V filed an application with the TFF requesting that the TFF address the match-fixing case and award V the title in lieu of W. However, the TFF decided that the club itself could not be held liable. On appeal, the TFF arbitration panel confirmed the decision holding that V had no standing to challenge a decision refusing to sanction W.

Subsequent petitions to the TFF by V to annul the results of the matches and award V the Süper Lig title were rejected.

In 2012, V asked UEFA to impose sanctions concerning the match-fixing allegations in Turkey during the 2010/2011 season. UEFA initiated disciplinary proceedings against W, but not against the TFF, and it did not accept V's request to intervene in the disciplinary proceedings.

In 2013, the UEFA Appeals Body confirmed the exclusion of W from any of the next two UEFA competitions. The CAS confirmed the exclusion (*CAS 2013/A/3256*) and the Swiss Supreme Court dismissed a setting aside application against the CAS award (*Decision 4A_324/2014 (16 October 2014)*).

In 2014, UEFA rejected V's request that UEFA sanction the Süper Lig clubs and individuals who had committed match-fixing acts and take steps to ensure that V was awarded the Süper Lig championship title for 2010/2011.The CAS confirmed UEFA's decision that V lacked jurisdiction to intervene at the national level (*CAS 2015/A/4343*).

By July 2011, V had also informed FIFA of the match-fixing acts in Turkey, asking it to intervene. FIFA replied that, in view of the disciplinary procedure initiated by UEFA, its intervention would be inappropriate.

In 2017, V filed a complaint against the TFF and W with the FIFA Ethics Committee and the FIFA Disciplinary Committee asking it to investigate the match-fixing and TFF's failure to act. It requested sanctions against TFF and W, and that V be awarded the title and economic benefits of Süper Lig Champion for 2010/2011. In February 2018, FIFA declined to intervene and did not issue any formal decisions.

In April 2018, the FIFA Appeal Committee dismissed an appeal by V because the applicable rules of procedure conferred standing only on a party that took part in the first instance proceedings. Consequently, V had no standing to appeal.

In May 2018, V lodged an appeal with the CAS against the FIFA decision. It requested the CAS to order the TFF to sanction W and correct the ranking of the 2010/2011 championship so that V be ranked first. The appeal was directed against the TFF, W and FIFA.

The CAS ordered a bifurcation and decided to hold a hearing in March 2019 to discuss the TFF's and W's preliminary objections on admissibility, jurisdiction and V's lack of standing to appeal.

In October 2018, V requested that the March 2019 hearing be held in public arguing that the matters to be dealt with during the preliminary hearing were "complex legal questions", justifying that the proceedings be public. FIFA, the TFF and W objected to this request. The CAS panel eventually decided that in the absence of agreement between the parties, and to the extent that the preliminary hearing would deal only with legal and highly technical issues, it was not necessary that a public hearing be held. Further requests by V and the proposal that CAS publish the hearing date on its website were rejected by the CAS, who pointed out that it was under no obligation to publish the dates of all hearings on its website. V then requested, based on Article 6(1) of the ECHR, that the press be allowed to attend the hearing. In March 2019, the CAS confirmed its decision refusing to hold a public hearing.

The preliminary hearing was held on 15 March 2019 in Lausanne, in the absence of public and without retransmission. At the end of the hearing, V confirmed its objection regarding the non-publicity of the hearing.

In July 2019, the CAS panel declared the appeal admissible but dismissed it for lack of standing. The CAS panel did not consider the merits of the dispute.

Against this CAS award, the Appellants filed a setting aside application with the Swiss Supreme Court.

Decision

The Swiss Supreme Court dismissed the setting aside application on all of the grounds that the Appellants had put forward. Each of them is addressed in turn below.

Article 6(1) ECHR and procedural public policy

The Appellant alleged that by refusing to hold the preliminary hearing in public, the CAS had breached Article 6(1) of the ECHR because that provision forms part of procedural public policy (*Article 190(2)(e) PILA*).

The Swiss Supreme Court noted that the grounds to set aside an award are set out exhaustively under Article 190(2)(e) PILA. Therefore, Article 6(1) of the ECHR cannot be directly invoked as a further, separate ground, even though the principles deriving from Article 6(1) can be used, where appropriate, to shape the guarantees invoked under Article 190(2) PILA. As such, Article 6(1) of the ECHR cannot be a *sui generis* plea under Article 190(2) PILA.

A violation of the ECHR does not *per se* coincide with a violation of public policy within the meaning of Article 190(2)(e) PILA. The Appellants had failed to explain why the alleged violation of Article 6(1) of the ECHR would constitute a violation of procedural public policy.

Further, the court stated that the applicability of the procedural guarantees of Article 6(1) of the ECHR was excluded from the outset, because the Appellants were not affected in their "rights and obligations in a civil matter". The Appellants were mere whistle-blowers, whose rights were not affected because they were not holders of a right to initiate disciplinary proceedings against another club. They were not third parties directly affected by a possible disqualification of their competitor since they would not automatically benefit from W's disqualification. Thus, the dispute fell outside the *ratione materiae* scope of Article 6(1).

Finally, the Swiss Supreme Court held that even assuming Article 6(1) of the ECHR was applicable, the CAS panel had sufficiently explained, expressly referring to the *Mutu* and *Pechstein v. Switzerland* judgment, that the hearing of 15 March 2019 was of a preliminary nature and concerned only purely legal and highly technical issues, justifying an exception to the principle of the right to a public hearing within the meaning of the ECtHR's case law. It considered that the CAS panel's explanation was convincing and rejected the plea of a violation of Article 6(1).

Principle of good faith and substantive public policy

The Appellants argued that the TFF and FIFA's behaviour was contrary to good faith (*Article 2, CC*) and hence incompatible with substantive public policy (*Article 190(2)(e)*, PILA). In particular, they argued that given the vertical nature of the relationship between a sports club and the sports federations, the conduct of sports federations must be measured in the light of the legitimate expectations they create *vis-à-vis* their members. The Appellants contended that the competition rules of the Süper Lig (issued by the TFF) provided for sanctions in the form of loss of points in the championship in the event of proven acts of match-fixing and that they in good faith had expected the TFF to take such measures. The Appellants criticised FIFA for not having properly intervened with the TFF in order to check whether the latter had taken correct action in compliance with the principles of law, and in accordance with Article 70(2) of the FIFA Disciplinary Code (*FIFA DC*), which provides that:

"The judicial bodies of FIFA reserve the right to sanction serious infringements of the statutory objectives of FIFA (cf. final part of art. 2) if associations, confederations and other sports organisations fail to prosecute serious infringements or fail to prosecute in compliance with the fundamental principles of law. "
The Swiss Supreme Court explained that the CAS panel had concluded that, based on the applicable rules, a possible sanction against W would not have automatically led to V being awarded the title of champion of the Süper Lig, and that while FIFA has a discretionary right to intervene with the national federations, this did not qualify as an obligation. The court recalled its case law that the process of interpreting a sports federation's statutory provisions is not encompassed by the notion of material public policy and that it is not for the Swiss Supreme Court to review whether the arbitral tribunal correctly applied the law on the basis of which the standing to sue was denied. Therefore, the court concluded that the Appellants' expectation that FIFA would necessarily intervene at the national level with the TFF did not enjoy the protection of Article 2 of the CC. The Swiss Supreme Court further explained that a violation of Article 2 CC does not render the award - *per se* - incompatible with substantive public policy and that the Appellants had failed to prove that the alleged violation of Article 2 of the CC would also violate substantive public policy of Article 190(2)(e) PILA.

Corruption and substantive public policy

The Appellants argued that the challenged CAS award endorsed and gave effect to proven acts of corruption and thus contravened substantive public order within the meaning of Article 190(2)(e) PILA.

The Swiss Supreme Court considered that, on the one hand, the scope of the setting-aside proceedings did not include the question of whether acts of corruption had been committed and what disciplinary sanctions would have been most appropriate. Moreover, the Appellants were not entitled to take legal action based on the general interest to fight the scourge of corruption, as opposed to their own interests

On the other hand, the court explained that it was logical and correct, once the CAS panel had established that the Appellants lacked legal standing, not to deal with the Appellants' various pleas. Such a course of action did not amount to endorsing any acts of corruption on the part of the CAS panel.

Legal standing and right to be heard

The Appellants contended that FIFA had abused of its discretionary power under Article 70(2) of the FIFA DC because, assuming FIFA were not obliged to intervene at the national level even if serious violations of the FIFA Statutes had been committed, it would make Article 70(2) of the FIFA DC pointless. The CAS panel, by not examining the arguments on the merits raised by the Appellants before FIFA, notwithstanding its *de novo* decision-making power, had endorsed FIFA's refusal to initiate a disciplinary procedure and itself breached the Appellants' right to be heard.

The Swiss Supreme Court first stated that it was clear from a reading of the award that the CAS panel had considered the question of the Appellants' legal standing in depth prior to denying it. The court further explained that such a bifurcation of the proceedings is a matter of procedural economy which also exists in court litigation in Switzerland. In so doing, the CAS did not violate the Appellants' right to be heard. In any event, the Supreme Court underlined that even if the CAS panel had not ordered the bifurcation, it could still have validly waived the examination of the merits of the case, finding that the Appellants lacked standing. The court further concluded that an arbitral tribunal may disregard those arguments which are superfluous in view of the reasons adopted in its award and that the right to be heard does not confer a right to obtain any obiter dictum.

Article 75 SCC and the right to be heard

The Appellants argued that, as an indirect member of FIFA, V would benefit from the protection of Article 75 of the CC that would entitle V to challenge the decision taken by FIFA. According to the Appellants, by considering that a possible sanction against W would not automatically lead to the award of the title of champion to V, with the consequence that V's standing be denied, the CAS panel prevented the Appellants from having the legal and statutory conformity of the decision taken by FIFA reviewed by an independent judicial body. As a result of this allegedly too restrictive interpretation, V had been denied the legal protection to which it is entitled under Article 75 CC, in violation of its right to be heard *(Article 190(2)(d), PILA)*.

The Swiss Supreme Court considered that the Appellants' argument was inadmissible because indirectly seeking to obtain from the Swiss Supreme Court a review of the merits of the award.

Legal standing and violation of procedural public policy

As a final plea, the Appellants argued that the allegedly too restrictive interpretation of their standing, making FIFA's decision not subject to any judicial review, was in violation of their rights to an effective remedy and to a fair trial and therefore in violation of procedural public policy (*Article 190(2)(e), PILA*).

The Swiss Supreme Court found that the Appellants were in fact seeking an indirect re-assessment of their legal standing by the Swiss Supreme Court, which was not possible in setting aside proceedings.

Comment

This decision addresses important legal issues, not only for international sports arbitration, but for international arbitration in general.

First, it deals with the still unsettled debate under Swiss law of whether the ECHR can be directly invoked as a separate ground in a setting aside application before the Swiss Supreme Court after the *Mutu* and *Pechstein v. Switzerland* case. The Swiss Supreme Court clarifies here that the breach by a CAS panel of Article 6(1) of the ECHR cannot be invoked as such under Article 190(2) of the PILA and that a violation of the ECHR does not *per se* contravene public policy (*Article 190(2)(e), PILA*). The reasoning of the Swiss Supreme Court raises the following issues.

On the one hand, while it is certainly true that the ECHR, and in particular Article 6(1), do not count among the grounds exclusively listed under Article 190(2) of the PILA, in the *Mutu* and *Pechstein v Switzerland* case the European Court of Human Rights (ECtHR) made it clear that Article 6(1) was directly applicable in "forced" arbitrations, that is, arbitration to which a party did not give their free, licit and unequivocal consent. The ECtHR further explained that when the arbitration clause is contained in the statutes of an international sports federation, the arbitration qualifies as "forced" under its case law. In other words, every time that an arbitration qualifies as "forced" under the ECtHR's case law, Article 6(1) of the ECHR must be respected. The Swiss Supreme Court fell short of explaining how its case law of refusing to directly apply Article 6(1) is compatible with the *Mutu* and *Pechstein v Switzerland*.

On the other hand, the Swiss Supreme Court's argument that a violation of the ECHR is not *per se* contrary to public policy should not misinterpreted. An arbitral tribunal seated in Switzerland must comply with the guarantees of the ECHR. Under Article 190(2) PILA, the only way for the Swiss Supreme Court to control whether a CAS panel has respected these guarantees is through the plea of procedural public policy. This being said, in setting aside applications before the Swiss Supreme Court, it is insufficient for an applicant to argue that an argument that the arbitral tribunal upheld is contrary to public policy; it is rather also required that the result of the award must itself be incompatible with public policy. This is the reason why the Swiss Supreme Court considered that a violation of the ECHR *per se* does not necessarily amount to a violation of public policy under Article 190(2)(e) of the PILA.

The Swiss Supreme Court's refusal to directly apply the ECHR in international arbitration derives also from the Swiss legal concept that human (and constitutional) rights only apply in the vertical relationship between the state and an individual, but not in the horizontal relationship between individuals. However, this approach fails to totally convince in international sports arbitration, where the relationship between an athlete and an international sports federation is similar to the one between the state and an individual. In particular, the case law of the Swiss Supreme Court leads to the unfortunate situation where, despite the direct applicability of Article 6(1) of the ECHR pursuant to the case law of ECtHR (at a minimum under certain circumstances), any violation thereof cannot be reviewed by the Swiss Supreme Court even though this is the only judicial body having jurisdiction to review the awards issued by the CAS (because the CAS has its seat in Lausanne, Switzerland).

Irrespective of this unsettled debate, this judgment has certainly the merit of being the first decision of the Swiss Supreme Court after *Mutu* and *Pechstein v Switzerland* to clarify that even the right to a public hearing under Article 6(1) of the ECHR does not directly apply in setting aside proceeding before the Swiss Supreme Court. However, it must be recalled that in *Mutu* and *Pechstein v Switzerland*, the ECtHR considered that a public hearing was necessary because of the stigma to which Ms Pechstein was subject. Therefore, one may wonder if the decision of the Swiss Supreme Court in relation to the direct applicability of Article 6(1) would have been different if, instead of involving a football club not directly affected, the appellant had been an individual accused of an anti-doping violation or charges affecting their honour and image.

Second, the reference to the good faith principle of Article 2 of the CC and its compatibility with public policy is interesting as the violation of good faith regularly appears among the situations pertaining to substantive public policy in the definition given by Swiss Supreme Court. However, there is little case law on this. Therefore, the finding

that the violation of Article 2 does not make an award *per se* incompatible with substantive public policy seems noteworthy.

Third, this decision confirms the CAS' case law on legal standing and the necessity for the applicant to be directly affected by the challenged decision in order to have standing to sue.

Case: *Decision 4A_486/2019 (17 August 2020)* (Swiss Supreme Court).

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