Independence of CAS vis-à-vis its Funders and Repeat Users of its Services

Kluwer Arbitration Blog
May 25, 2018

Giulio Palermo (Archipel) and Anna Sokolovskaya

Please refer to this post as: Giulio Palermo and Anna Sokolovskaya, 'Independence of CAS vis-à-vis its Funders and Repeat Users of its Services', Kluwer Arbitration Blog, May 25 2018, http://arbitrationblog.kluwerarbitration.com/2018/05/25/independence-cas-vis-vis-funders-repeat-users-services/

In a recent case, the Swiss Federal Tribunal ("SFT") has once again been called to consider the question of independence of the Court of Arbitration for Sport ("CAS") vis-à-vis its funders and users. This note introduces the issue of funding and independence of CAS in the context of the SFT's prior case law and discusses why the SFT saw no reason to depart from it. It finally considers whether such position could change in the future.

I. Historical perspective on CAS's financial independence

For a decade after its establishment in 1984, CAS was financed almost exclusively by the International Olympic Committee ("IOC"). In the case of *Gundel* (ATF 119 II 271) of 1993, the SFT had to consider whether CAS was independent vis-à-vis the International Equestrian Federation ("FEI"). The SFT concluded that CAS enjoyed the required degree of independence from the FEI. However, as an *obiter dictum*, the SFT recognised that some objections to the independence of CAS could not be dismissed without further examination, in particular those based on the organic and economic links between CAS and the IOC (given that CAS was financed almost exclusively by the IOC at that time).

In light of *Gundel*, in 1994, the IOC and other international sports governing bodies signed the Agreement related to the Constitution of the International Council of Arbitration for Sport (the "Paris Agreement"). By virtue of this agreement, CAS was placed under the aegis of the newly created International Council for Sports Arbitration ("ICAS") that became responsible, inter alia, for the financing of CAS. Pursuant to Article 3 of the Paris Agreement, the IOC remained the biggest contributor of CAS but its proportion was reduced to 1/3.

Approximately ten years later, in its 2003 *Lazutina* judgment (ATF 129 III 445), the SFT was called to assess CAS's independence again. In light of the 1994 reform, the SFT decided that CAS was not *"the vassal of the IOC"* and was sufficiently independent of it, as well as of all other parties using its services. Moreover, the SFT also observed that *"[t]here appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively. [...]"* (English translation from CAS's website).

II. Challenge before the Swiss Federal Tribunal based on the alleged financial dependence of CAS on FIFA

On 20 February 2018, in case number 4A_260/2017, the SFT rejected a challenge of an award issued by CAS in disciplinary appeal proceedings between a Belgian football club (the "Club") and the

Fédération Internationale de Football Association ("FIFA") (the "Decision"). The challenge was based, inter alia, on the alleged financial dependence of CAS on FIFA, which, in the Club's opinion, had led to the award being issued by an improperly constituted arbitral tribunal within the meaning of article 190.2(a) of Swiss Public International Law Act.

To demonstrate the alleged financial dependence of CAS on FIFA, the Club argued that it was well-known that FIFA had become the dominant sports federation in terms of *"volume of business"* for CAS and that it financed CAS (alongside other sports federations and associations) by providing large financial contributions, so much so that the turnover of CAS came largely from this "big client".

In the Club's opinion, the mere prospect for CAS of losing this important client was capable of influencing CAS's decisions to the detriment of parties opposed in proceedings to FIFA. The Club also argued that, unlike judges in state courts, employees of CAS and arbitrators would see their personal gains diminished if FIFA were to renounce its affiliation with CAS.

FIFA argued that CAS's independence was a question generally considered closed in Swiss law as per case law described above. FIFA rejected the Club's assertion that CAS's arbitrators needed to "please" FIFA so that it continued to recognise the jurisdiction of CAS and so that their incomes and those of CAS's employees would not have to suffer.

Acting through its Secretary General, CAS also participated in the proceedings and opposed the Club's arguments, observing that only approximately 32% of CAS's cases involved FIFA and its contribution to CAS only amounted to CHF 1,500,000, which was a relatively modest contribution in comparison with the CHF 7,500,000 paid by the entire Olympic movement out of a total budget of CHF 16,000,000. The Secretary General also observed that, even if FIFA would decide to no longer provide recourse to CAS in its Statutes, CAS's very existence would not be called into question because the only consequence of a decrease in its revenues would be a reduction of its current size accompanied by a restructuring of its services.

The SFT decided that there was no reason to revisit its earlier, firmly established case law. Referencing the *Gundel* and *Lazutina* judgments and subsequent decisions, and making a distinction between the IOC, on the one hand, and sports federations, on the other, the SFT stated that, from the point of view of CAS's independence, CAS's links with sports federations (such as FIFA) had always been less problematic than CAS's links with the IOC. The SFT further observed that only compelling reasons could make it not equate FIFA with the other international sports federations. The SFT observed that the Club's submissions were not strong enough to justify a departure from the established case law and that there was not much force in the Club's argument based on FIFA's contributions to CAS's budget since those amounted to less than 10% thereof.

As for the willingness of the arbitrators and CAS's employees to seek to preserve their court by doing everything in their power not to lose a *"big client"* like FIFA, such an allegation assumed a very poor state of mind of those individuals and, in any event, the Club did not provide any evidence to that effect. Nor did the Club seek to demonstrate, by statistical analysis or in any other way, that there was a propensity by CAS to find in favour of FIFA whenever it was a party to arbitration proceedings before CAS.

The SFT rejected the Club's challenge of the arbitral award, including the Club's arguments about CAS's lack of financial independence from FIFA.

III. Conclusions

In light of the above, two broad conclusions can be made:

A. In its current form, CAS cannot be self-financing and, for the time-being, there are no better alternatives to the current funding model that would ensure its full financial autonomy

It is noteworthy that the disciplinary appeals proceedings before CAS (i.e. appeals against decisions that are rendered by international sport federations or sports bodies) do not require that parties pay CAS's and arbitrators' fees, save for a filing fee of CHF 1,000. Thus, since CAS itself bears these costs, it must have other sources of funding to sustain its operations. As envisaged by the Paris Agreement, different sports governing bodies have over the years been making contributions to CAS's budget.

In its 2003 *Lazutina* judgment, the SFT had observed that the particular model adopted for funding CAS was linked to a very hierarchical structure of sport – a feature that, especially in disciplinary proceedings before CAS, would see an individual athlete located at the bottom of the pyramid acting in opposition to a sports body located at the top, with contributory capacities of the parties to such disputes being too unequal in most cases.

This special feature of sports arbitration before CAS did not escape the attention of the SFT in the Decision either. The SFT, once again, contrasted the model adopted at CAS with the way commercial arbitrations were usually funded by disputing parties themselves and pointed out that, if the same were required in all proceedings before CAS, this would do nothing but harm athletes and deny them access to CAS.

B. Financial contributions to CAS's budget do not necessarily jeopardise its independence vis-à-vis its contributors. However, it is not clear whether a line exists (and, if so, where it lies) beyond which direct/indirect contributions by a single entity to CAS could be considered as jeopardising its independence

In its 2003 *Lazutina* judgment, the SFT had stated that there was no necessary cause-and-effect relationship between the method of financing of a judicial body and the degree of independence of the said body. Could this be interpreted to mean that the SFT considers questions of financing to be irrelevant for the question of independence and that, for this reason, the Club's arguments based on FIFA's budgetary contributions were redundant? It does not seem so. It rather seems to mean that the SFT would examine each funding relationship on its own merits and would require proof of any alleged lack of independence (rather than make assumptions to that effect).

In this vein, the SFT's Decision makes it clear that direct contributions (i.e. budgetary contributions) from entities that are also parties to proceedings administered by CAS do not, *per se*, strip the latter of its independence. As for the assessment of FIFA's specific level of funding, the conclusion reached in the Decision seems unsurprising: FIFA's annual contribution amounted to less than 10% of CAS's budget which is significantly below 1/3 that had already been "okayed" in the *Lazutina* judgment. Yet, it remains unclear what level of direct contributions between 1/3 and 100% of CAS's budget (as per *Lazutina* and *Gundel*, respectively) could be seen as potentially threatening CAS's independence.

As to indirect contributions (i.e. revenue stream from CAS's administrative fees collected in cases involving FIFA), they served as one of the bases of the Club's allegation of lack of financial independence of CAS. The SFT's dismissal of this argument was based on lack of evidence, in particular of a propensity by CAS to find in favour of FIFA. It remains nonetheless unclear what level of indirect contributions, per se or on top of direct contributions, could be seen as potentially threatening CAS's independence.