

# Kluwer Arbitration Blog

## Admitting illegally obtained evidence in CAS proceedings – Swiss Federal Supreme Court Shows Match-Fixing the Red Card

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In two almost identical German language decisions dated 27 March 2014 (Decisions [4A\\_362/2013](#) and [4A\\_448/2013](#)) the Swiss Federal Supreme Court (“Supreme Court”) considered that the reliance on an illegally obtained video recording in a CAS award does not violate public policy (these decisions are also summarized in the related [ITA Arbitration Reports](#)).

This post takes a closer look at the assessment of admissibility of illegally obtained evidence in sport arbitration. Such an assessment is generally undertaken by balancing the interest in finding the truth against the legal interests which were harmed when the evidence was obtained.

Both cases relate to a match-fixing scandal uncovered in the Ukraine in 2008. The football teams FC Karpaty and FC Metalist played against each other. FC Metalist won 4:0, whereas one goal was an own goal scored by FC Karpaty player A. who also received a red card in the further course of the match.

After rumors of match-fixing, the president of FC Karpaty launched an internal investigation and summoned A. to his office. A. revealed that X., the sport director of FC Metalist had called him on the night before the match and offered him money to lose the game. A. then called all key members of the team and together they decided to accept the offer. The next day a car appeared outside A.’s hotel and he was handed USD 110’000 in cash to be distributed among the players (the senior players received USD 10’000, the junior players USD 9’000 and the substitute players USD 1’000 each).

This conversation between the president of FC Karpaty and A. was secretly videotaped without A.’s knowledge.

In 2013, a CAS panel upheld a decision of the Ukrainian Football Federation’s Appeal Committee which relied on the above mentioned videotape and had imposed penalties on all persons involved in the match-fixing, including fines of USD 10’000 in addition to a 5-year long professional bans for A. and X.

A. and X. challenged the CAS award before the Swiss Federal Supreme Court on the ground that

the CAS award was in violation of public policy on the account of the reliance on the illegally obtained video recording.

An award is contrary to public policy pursuant to art. 190 para. 2(e) PILA if it violates a fundamental principle of substantive or procedural law. The inadmissibility of illegally obtained evidence is indeed a recognized principle in Swiss procedural law. It is an important aspect of the right to a fair trial as stipulated in art. 29 para. 1 of the Federal Constitution and art. 6 no. 1 ECHR. In Swiss domestic law, it can be found in art. 152 para. 2 of the Swiss Civil Procedure Code (CP) and in art. 141 of the Swiss Code of Criminal Procedure. The underlying rationale is that “legality must not be enforced by way of illegality”.

However, the admissibility of illegally obtained evidence is not ruled out in any event. There are situations which may warrant an exception. According to art. 152 para. 2 CP, “illegally obtained evidence shall be considered only if there is an overriding interest in finding the truth”. Domestic courts may admit such evidence if they consider that the interest of pursuing the truth overrides the legal interests harmed by the illicit obtaining of the evidence.

The Supreme Court in the present case confirmed that, just as in civil litigation, there is no strict rule excluding illegally obtained evidence in arbitral proceedings. Instead, the arbitral tribunal too must balance the interest of pursuing the truth against the violation of rights that the procurement of the evidence caused.

In this case, the Supreme Court found that the CAS had correctly weighed these two elements for each piece of evidence presented before it and concluded that the arguments brought forward by the petitioners were not conclusive of a violation of the Swiss procedural public policy.

Because it does not have authority to do so, the Supreme Court did not remark on how exactly the CAS weighed the interests i.e. which interests were taken into account and which criteria was used for weighing them against each other. However, the Supreme Court’s considerations allow for a deduction of certain elements which might have been relevant by the CAS.

Hereinafter we will examine the two sides of the balance and apply the criteria to determine the interests to the present case.

On one hand we have the “**pursuit of the truth**“. The law does not provide any further instructions on how to undertake this honorable quest. Therefore, it is left to the arbitrators’ wide discretion to decide how important the establishment of the truth is in a particular case. Based on the Supreme Court’s decision, one can imagine that the following consideration might have been taken into account by the CAS in the decision-making process:

1) The amount in dispute and the penalties at stake can contribute to the determination of the importance of finding the truth. The higher the amount in dispute, the more is at stake and the more important the pursuit of the truth. In the present case the imposed fine was only of the amount of USD 10’000. However, taking into account the 5 year professional ban leads to an increase in the amount in dispute due to the missed earning opportunity.

2) Arbitrators may also take into account whether the interested party has evidentiary difficulties i.e. whether the evidence in question is the only and crucial piece of evidence for the party carrying the burden of proof with regard to their claim. In this case, the Court considered that the CAS had made an individual and thorough assessment which even led to certain other illegally obtained

pieces of evidence being dismissed. However it is not stated why these other pieces of evidence were dismissed. The arbitrators might have reached a different conclusion if there had been other pieces of (legally obtained) evidence which were just as conclusive as the illegally obtained video recording.

3) Furthermore, in the context of sport the fight against corruption is vital. There is a big public interest to uncover corruption in connection with the highest national football leagues.

On the other hand we have the “**legally protected interests**” of the party in question. Here it depends on the rank of the affected interest and the intensity of the impairment.

1) Evidence which was obtained in violation of a person’s physical or mental integrity i.e. by using force or uttering threats is generally inadmissible. However if “only” a person’s property was affected i.e. if evidence was stolen, such evidence is often deemed admissible. The weighing of interests is especially difficult if a person’s right to privacy has been violated. In this case, the CAS made sure that A.’s videotaped confession had not been made under duress or undue pressure.

2) Arbitrators may also take into account whether or not the affected party displays an interest in defending its legally protected interests. First, the Court noted that A. and X. themselves relied on the video for their defense and that they did not demand that the video be declared inadmissible. Secondly, the Supreme Court further observed that during the arbitration, A. and X. had been fully entitled to contest the authenticity and/or materiality of the videotape. Their right to be heard was not violated at any stage. However A. and X. waited two years to oppose the admissibility of the videotape, which was considered to be too late.

A criterion which arbitrators must not use for its assessment is whether the illegally obtained evidence was obtained by the other party itself or a third party. Such circumstances do not have an influence on the pursuit of truth or the legally protected interests. Equally irrelevant to ascertain a violation of procedural public policy according to the Supreme Court were the arguments that A. subsequently withdrew its confession and that the Ukrainian prosecutor stopped its investigation on that case.

This case brings to mind the [Adamu award](#) rendered in 2012 where the CAS panel relied on a secretly taped video showing a member of the FIFA executive committee accepting money for his vote regarding the 2018 FIFA World Cup (see the interesting [article](#) by Dr. Gurovitts/T.Livschitz/D. Frenkel). Some of its key findings are also relevant here and relate to:

- The applicable rule of evidence to ascertain the admissibility of illicitly obtained evidence in CAS proceedings (see §§ 81-82 of the [Adamu award](#)) (in the case discussed above the Supreme Court didn’t really touch on this interesting topic);
- The violation of Swiss procedural public policy and the elements to be taken into consideration: in this case the CAS considered that “*the use of the Recordings in a disciplinary context did not lead to an “intolerable contradiction with the sentiment of justice” and is not “incompatible with the values recognized in a State governed by the rule of law”*” (see § 130 of the [Adamu award](#));
- The consideration of public interest: the CAS considered that there was a significant public interest to reveal corruption practices relating to such an important sport event as a FIFA World Cup (see § 101 of the [Adamu award](#)).

The latter point shows that compared to criminal or civil proceedings, in sport arbitration, where the public interest of fighting bribery and match-fixing is acute, arbitrators might be more inclined to favor fair play in sports over foul play in obtaining evidence.

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