

## Applicable Law in Sport-related Disputes and the influence of Swiss Law

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### *Introduction*

Say a sports-related dispute arises between one party from Country A and another party from Country B. The contract that binds them states that a dispute arising from the contract shall be decided by an arbitral tribunal with its seat in Country C. Do any of these countries' laws even apply in such a case?

The answer, as tends to be the case with many legal questions, is: *it depends*. This article will briefly define and discuss what are some of the practical considerations that go into the analysis of the applicable law in a sports arbitration proceeding, first with a general introduction into the sources of applicable law, followed by a more targeted discussion about some of the peculiarities that have arisen in the jurisprudence of the Court of Arbitration for Sport ("CAS") regarding applicable law.

"Applicable law" here refers to the law applicable to the *merits* of the sports dispute, as opposed to the *procedure*.<sup>1</sup> As the parties to a sports dispute can come from different places, so can the law applicable to the dispute. In many cases, the source(s) of applicable law of the dispute at hand will be identified by way of an agreement between the parties or some other easily identifiable manner, but it may very well be the case that there has been no indication by the parties to this end, at which point it is necessary to look to the rules of the arbitration tribunal to determine what exactly the arbitrator may do to remedy the situation.

### *Sources of Applicable Law: The Straightforward Cases*

The most straightforward source of applicable law in an arbitration proceeding is a choice of law agreement between the parties. A clause in the relevant contract to the effect of "Any dispute arising from or relating to this contract shall be decided under the laws of Country X/FIFA rules and regulations/rules and regulations of the Country Y Federation" expresses such an agreement. However, this example is by no means the only type of choice of law agreement that may exist. For instance, the prevailing view at the CAS is that the form of a choice of law agreement is not subject to any particular requirements: neither the Code of Sports-related Arbitration ("CAS Code") nor the PILA provide any such requirements, thereby allowing the

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<sup>1</sup> Procedural law tends to be defined by the parties' choice in procedural law or the parties' choice in the arbitral tribunal. See e.g. Private International Law Act of 1987 ("PILA") art. 182, CAS Code art. R27, ICC Rules of Arbitration art. 6 ("ICC Rules").

recognition explicit as well as tacit agreements. On the other hand, some arbitration rules, such as the ICC Rules, may call for a more direct choice of law by requiring “consciousness and will” of the parties.<sup>2</sup> In the end, whether express or implied, the arbitral tribunal hearing the case will respect agreements on the choice of law, for the general consensus in arbitration is to favor the choice of the parties involved in the dispute.<sup>3</sup>

Another common source of law in sports disputes is the applicable regulations of the association or federation who governs the sport at issue or, in case of appeals, the association or federation who rendered the decision being challenged. In addition, arbitrators will often draw from generally accepted principles of law that are recognized across legal systems, such as the principles of non-retroactivity and proportionality in a disciplinary case or the *contra proferentem* rule in interpreting a contract; essentially, references to the *lex sportiva*, which is considered as a sort of transnational law, are accepted.

### ***No specific agreement: Where It Can Get Problematic***

Yet, suppose a practitioner find himself or herself in a case where there is no agreement on the choice of law, explicit or implied, there are no regulations or national law clearly referenced, and there is no first instance decision to consult. What then?

There is a plethora of ways to ascertain the applicable law in a dispute, many requiring a deeper analysis of the circumstances of the case than the more obvious sources identified in the preceding section.<sup>4</sup> To narrow down the analysis and since we are discussing about sport-related disputes, we shall focus on sports disputes before the CAS.

A great deal of sports disputes are resolved at the CAS, which makes for a comprehensive case study of issues concerning the applicable law in sports disputes, both for the easy cases and the trickier ones. This section is dedicated to understanding articles R45 and R58 and how their construction has led to some thought-provoking decisions regarding the applicable law, with additional attention devoted to one issue in particular: the seemingly inevitable role of Swiss law in a sports-related dispute.

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<sup>2</sup> ICC Rules Art. 21(1).

<sup>3</sup> See e.g. PILA art. 187(1): The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice according to the law with which the action is most closely connected. See also, *inter alia*, similar provisions in UNCITRAL Model Law Art. 28, Swiss Rules of Arbitration Art. 33, ICC Rules Art. 17(3).

<sup>4</sup> See e.g. PILA art. 176 and 187, Swiss Federal Code of Civil Procedure art. 353, New York Convention art. 1(1), CAS Code arts. R45 and R58, among others.

## The CAS Approach: Leave (Practically) Nothing to Chance

Although article R45 applies to procedures before the Ordinary Division and article R58 applies to those before the Appeal Division, and there are specific differences in how each article is drafted, the analysis under the latter applies *mutatis mutandis* to the former with respect to the express and tacit choice as well as the form of the choice of law.<sup>5</sup>

The basic rule in article R45 of the CAS Code is that “[t]he Panel shall decide the dispute according to the rules of law chosen by the parties, or in the absence of such a choice, according to Swiss law.” As an additional option, article R45 contemplates the parties authorizing the Panel to decide the dispute *ex aequo et bono*.

The law chosen by the parties, a common feature of both articles R45 and R58, may be express or implied. While cases with an express choice of law are fairly straightforward (see *ut supra*), the CAS has exercised a fair amount of freedom in interpreting the circumstances of a case in order to find that there was an *implicit* agreement. For example, one Panel considered that the fact that the parties refer to the same law in their written submissions is evidence of a tacit choice of law.<sup>6</sup> In another case, the Panel concluded that there was an implicit choice of law from the total elements of the case, in which they considered the fact that the parties’ domicile was in France, the object of the dispute was registered in France, and that there was an overall lack of any international element as sufficient justification to find the parties had implicitly chosen French law.<sup>7</sup> Yet another Panel determined that the parties’ implicit choice of law was clear from the circumstances, namely, the parties’ conduct during the proceedings.<sup>8</sup> In that case, it was the fact that the parties had presented arguments based on the Olympic Charter, anti-doping rules and relevant CAS jurisprudence. There are some authors who argue that a tacit choice of law is quite limited and circumstances such as the place of arbitration, the place of residence or nationality of the parties or the choice of procedural law do not automatically entail a choice of law on the merits, but the case law cited here would suggest the CAS sometimes disagrees with such a position.<sup>9</sup>

As further proof of the emphasis placed on the parties’ choice and the liberties the CAS may take in identifying such a choice, CAS panels have held

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<sup>5</sup> Despina Mavromati & Matthieu Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, Wolters Kluwer Law & Business, p. 350 fn. 1 (2015).

<sup>6</sup> CAS 2008/A/1558 & 1578 *WADA v. SANEF & J. & FEI v. SANEF*, para. 6.11; 2010/O/2064, para. 4.

<sup>7</sup> CAS 2006/O/1127 *I. & FS.A.S. v. C. Sarl*, para.75.

<sup>8</sup> CAS 2002/O/373 *COC & Beckie Scott v. IOC*, paras. 11-14.

<sup>9</sup> A. Bucher & P. Tschanz, International Arbitration in Switzerland (Basel: Helbing & Lichtenhahn, 1988), p. 99.

on more than one occasion that an agreement on the choice of law may occur at any point before *or once the proceedings have begun*.<sup>10</sup>

Moreover, the parties' choice of law is by no means limited to the laws of one country, instead allowing for the application of transnational law: generally accepted legal principles such as those discussed above of *lex sportiva*. Interestingly enough, the CAS has excluded Swiss private international law from the mix.<sup>11</sup> Equally as interesting is the principle of *dépeçage*, recognized and accepted by the CAS, which permits the parties' freedom in the choice of law to go as far as being able to apply distinct rules to different objects of the arbitration agreement.<sup>12</sup> In fact, in one case, the Panel applied Paraguayan law to the contracts signed between a football player and a club, as both parties were Paraguayan, the contracts were drafted in Paraguay and they made explicit references to Paraguayan law. Moreover, the Panel applied Swiss law subsidiarily for all issues not covered under the FIFA regulations since it was the law of the country in which FIFA was domiciled. Finally, the Panel applied Swiss law to a contract between the Paraguayan player and a Swiss club due to the fact that the player was to render his services as a professional football player in Switzerland for a Swiss club that was subject to the rules of the Swiss football federation.<sup>13</sup>

The parties are free to choose the law that will be applicable to the merits in case of dispute, however they must consider and assess that their choice can be limited by the notion of Public Policy. Indeed, the choice of law by the parties to a sports dispute is kept in check by being required to comply with the *ordre public*; specifically, a "transnational public order."<sup>14</sup> The CAS, for instance, has confirmed that compliance with Swiss Public policy is also relevant and has specifically been safeguarded under art. 190 (e) of the PIL, which states that an award issued by a Swiss tribunal can be attacked if it is "incompatible with Swiss public policy".<sup>15</sup> This implies that even when foreign law -different to Swiss Law- is applicable to the merits, the fundamental principles of law recognized in Switzerland must be respected<sup>16</sup> by the CAS panels.

Failing an agreement by the parties on the applicable law, which seems rather difficult considering the numerous ways the CAS has gone about to

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<sup>10</sup> CAS 2007/A/1322 *G. Giannini et al v. S.C. Fotebal Club 2005 S.A.*, para. 8.2 ("A choice of law made during the course of the proceedings is perfectly lawful under Swiss arbitration law."); CAS 2006/A/1024 *FC Metallurg Donetsk v. Lerinc*, para. 6.5.

<sup>11</sup> CAS 2003/O/486 *Fulham FC v. Olympique Lyonnais*, para. 8.

<sup>12</sup> CAS 2006/A/1082 & 1104 *Real Valladolid CF SAD v. B. & FC Cerro Porteno*, para. 52(f).

<sup>13</sup> CAS 2005/A/878 *Club Guarani v. G. & Club FC St. Gallen AG*.

<sup>14</sup> Meaning, a sense of public order that transcends Swiss public order. CAS 2005/A/983 & 984 *Club Atletico Penarol v. C. Suarez, C. Barrotti & Paris Saint-Germain*, para. 26-28.

<sup>15</sup> CAS 2010/A/2128 *CS Chimia Brazi v/ SCCS Unirea Urziceni* para 107 and ff.

<sup>16</sup> Decision of the Swiss Federal Tribunal, ATF 120 II 167 et seq.

identify a choice of law agreement before, the default rule is to apply Swiss law.<sup>17</sup>

As a final possible source of law under article R45, if the parties authorize the Panel, it may decide the dispute *ex aequo et bono*, which is the rather uncommon situation in which the Panel decides a dispute in equity<sup>18</sup>; one would be hard-pressed to find a published CAS award in which this situation arose.

We now turn to article R58, a decidedly more complex article than article R45. Article R58 discusses four ways to potentially establish the applicable law to the merits while establishing a hierarchy among them. The main, and therefore most common, source of law in an appeals proceeding is the applicable regulations of the sports organization that issued the decision under appeal. The choice of law by the parties is demoted to “second place,” so to speak, as it meant to be applied subsidiarily pursuant to the language and structure of article R58. Naturally, this change in the relative importance of the parties’ choice is due to already having a clear indication of the context and scope of the dispute: the decision(s) from the previous instance(s). However, once again, the choice of law agreement may be express (as to the whole controversy or, curiously, only part of it<sup>19</sup>) or implied<sup>20</sup>, it may be agreed upon before or during the proceedings<sup>21</sup>, and the parties may choose to draw from the regulations of a sports federation, national law, transnational law, and the like, subject to the limitation of not running afoul of “international and universal public order.”<sup>22</sup>

Should there be no agreement on the choice of law between the parties, article R58 allows the Panel to refer to the law of the federation, association or the sports-related body. This clause of the article has appeared to be somewhat problematic in cases where the association who rendered the

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<sup>17</sup> CAS 2006/O/1172 *M. v. P.*; CAS 2008/O/1601 *H. v. B.* More on the applicability of Swiss law later on.

<sup>18</sup> CAS 2010/O/2156 *T. v. R.*, para. 6.1. See also Mavromati & Reeb, fn. 4 at 355.

<sup>19</sup> CAS 2012/A/2750 *Shakhtar Donetsk v. FIFA & Real Zaragoza SAD*, para. 88 (Panel applied Spanish law to a specific question related to insolvency proceedings as the law of the country where the insolvency is established, and the FIFA Regulations and, subsidiarily, Swiss law, for the remaining issues).

<sup>20</sup> For example, for a Panel to recognize an implied choice in law from the parties’ behavior, the parties’ assent must “emerge through the parties’ conclusive acts that they agreed on the applicable law when they entered into the disputed contractual relationship.” CAS 2006/A/896 *Fulham FC (1987) Ltd. v. FC Metz*, para. 8.6. The Panel may also admit an implicit choice of law agreement from the parties reference to the same law in their submissions (see footnote 5; CAS 2006/A/1024 *FC Metallurg Donetsk v. Lerinc* para. 6.7), they reference a set of arbitration rules that set forth a method for determining the applicable law (CAS 2010/A/2187 *Calenda v. Sport Lisboa e Benfica Futebol, SAD*, para. 8.2), they choose a forum (CAS 2006/A/1180 *Galatasaray SK v. Frank Ribery & Olympique de Lyon*, para. 7.10), or their affiliation to an international federation (by way of affiliation to their national federation (CAS 2005/A/983 & 984 *Club Atletico Penarol v. C. Suarez, C. Barrotti & Paris Saint-Germain*).

<sup>21</sup> See footnote 9.

<sup>22</sup> ATF 4P.278/2005 of 8 March 2006, *X. SpA* (ATF 132 III 389), at 2.2.2.

appealed decision based it upon the regulations of the relevant international federation, such as, for instance, USADA rendering a decision based on the WADA Code. A strict adherence to the language of article R58 in this respect would lead to a rather odd result: in the example cited, it would lead the CAS to apply US law to the decision rendered by USADA on the basis of the WADA Code. The CAS's response to this peculiar situation has been to side-step the literal application of article R58 a bit and apply the relevant sports regulations, and, subsidiarily, the law of the seat of the sports-related body who issued the applicable regulations rather than the law of the seat of the association who issued the appealed decision.<sup>23</sup>

Finally, article R58 grants the Panel the residual authority to determine the law and allows them to potentially decide the dispute according to the rules of law it deems appropriate, and provide its reasons. We use the term "residual" for two reasons. First, this wording is a far cry from the freedom granted to a Panel upon the parties' authorization to decide the dispute *ex aequo et bono*. Second, the structure of article R58 is such that the applicable sports regulations are of the highest order and the law chosen by the parties is subsidiary, and only if there is no agreement on the choice of law may the arbitrators venture into the application of the law of the seat of the federation or the law they deem appropriate. Panels have rarely used this residual authority which seems to be presented as a last resort or an instrument to solve situations where the arbitrators consider that the law (or rules of law) of the seat of the federation that has issued the appealed decision are not to be applied<sup>24</sup>. In such cases the Panel shall give reasons for their decision.

#### Why does sports arbitration seem to invoke Swiss law so often?

The preceding discussion is littered with references to Swiss law such that the importance of Swiss law in sports arbitration is evident. For starters, the CAS has its seat in Switzerland. Additionally, the IOC, FIFA, UEFA and many other sports federations are not only based in Switzerland but also establish the applicability of Swiss law as subsidiary to the parties' chosen law.<sup>25</sup> In this respect, Swiss law provides that, independent of any international aspect of the dispute (including the case where the proceedings physically take place outside of Switzerland), Swiss law applies when the venue of the arbitral tribunal is in Switzerland and at least one party, when entering the arbitration agreement, was neither domiciled in nor a resident of Switzerland.<sup>26</sup> Hence, international federations based in Switzerland are obligated to apply Swiss law in a substantial amount of cases. If we then add

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<sup>23</sup> CAS 2002/A/403 & 408 *Pantani v. UCI & FCI v. UCI*, para. 45. See also Antonio Rigozzi & Erika Hasler, "Commentary on the CAS Procedural Rules - Article R58: Law applicable to the merits," *Arbitration in Switzerland – The Practitioner's Guide* (M. Arroyo ed., Kluwers 2013), p. 1050.

<sup>24</sup> TAS 2013/A/3250, *B. Co v. P.* award of 25 February 2014

<sup>25</sup> The prime example being article 66(2) of the FIFA Statutes.

<sup>26</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 3rd ed. (New York, 2014), p. 1695.

the obligation to apply Swiss law under article R45, it becomes clear that there is a significant possibility a dispute before the CAS having little or nothing to do with Swiss law will nonetheless be resolved under Swiss law. In addition, even in cases where the parties have concluded an express choice of law different than Swiss Law, Swiss Public policy<sup>27</sup> is to be taken into consideration by the CAS Panels.

Thankfully, it appears that many cases before the CAS arrive with a well-defined applicable law (or at least the circumstances receive a liberal interpretation to encourage finding an established applicable law), which balances out the aforementioned possibility, and we would be remiss not to point out that a stable source of law such as this provides a great deal of clarity and legal certainty that sports arbitration may lack at times.

The lesson here is that a prior agreement on a choice of law between the parties will eliminate a great deal of uncertainty and legal analysis once the dispute arises. In addition, so long as the parties stay within the realm of reason and public order, they have the ability to craft said agreement as they please.

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<sup>27</sup> Swiss Public policy is violated if an arbitral award violates the fundamental legal principles and is therefore incompatible with Swiss Law and values (CF Decision Tribunal Federal, ATF 117 II 606 et seq. and Decision Tribunal Federal in SJZ 1963, 340)