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THE ARBITRATION COURT OF SPORT AND WINTER SPORTS: STRUCTURE AND OPERATION OF ORDINARY ARBITRAL CHAMBERS AND AD HOC CHAMBERS

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1. Introduction: the International sports justice system and TAS

As in any independent juridical order, as in a certain sense, the sport order can be considered, a control and justice mechanism in the inter-associative sphere, is an essential condition for the efficacy and operation of the system.

In fact, even regarding the International Sports sphere, based on the most extreme economics, justice bodies cannot be absent within the single F.S.I., in charge of solving controversies that arise between associates, affiliates, federations and Olympic committees.

The experience that I wish to describe today is somewhat unique and sets an example to follow also regarding the troubled operation of domestic sports justice, which we were able to discuss in the report drawn up in view of the previous European Juridical Forum on Snow.

First of all, it must be reminded that the essential problem regarding sports justice concerns independency, impartiality and functional independency of its own bodies.

Said problems are currently present and they constitute source of censures and criticisms, since they do not allow – even before public opinion – to consider the decisions made by such bodies not bound to the institutions that appointed them.

The *Tribunal Arbitral du Sport* was born in 1984 as a first response to the need to be able to guarantee an alternative instrument to the application of the function of state jurisdiction and at the same time, as arbitral body and as such detached from the parties involved.

In spite that until 1994 T.A.S. was controlled by CIO, after the decision taken by the Swiss Federal Court on 15.03.1993 that even if asserting the arbitral nature of the sports sentence, announced further independence by "detaching T.A.S." from the International Olympic Committee; the turning point was achieved with the Paris Congress of 1994 when the arbitral code on sport was adopted for the first time.

The most relevant novelty introduced by the reform was therefore the institution of a new body, the so called CIAS, with the purpose to ensure the management and operation of TAS, and in such a way fully substituting the CIO.

The arbitral system thus conceived after the reform, allowed TAS to reaffirm its independency and mainly the functional independency that allows constituting the most serious and reliable sports Court existing today.

For this purpose, moreover it must also be reminded that a case linked to the International Ski Federation allowed the Swiss Federal Court – a competent Judge to know about the appeals against sentences of arbitrations for invalidity reasons issued by TAS - to state the end of the genetic bond with CIO and therefore the strengthening of arbitral character of the proceeding and trial on the controversies submitted to its attention.

2. Brief notes on the operation of T.A.S.

The arbitral institution that we are discussing is based therefore on a system of provisions of statutory nature, the first 26 articles of which concern the organization of bodies and the other additional 43 articles regulate the carrying on of trials.

In brief, since it is not possible in this document to analyse in depth the single procedural rules – moreover, extremely simple – the presence of two arbitral chambers must be reminded: the ordinary and that of appeal, the latter disposing of greater investigation powers and in general almost dealing exclusively with controversies linked to doping as indicated in the WADA Code, which was re-elaborated and modified during the very recent third world conference on doping in sports, held in Madrid from 15 to 17 November 2007.

Instead, regarding the ordinary Chamber, it is appropriate to remind a list of controversies submitted for the decision of TAS.

In particular these are:

- sponsorship agreements between athletes and commercial companies;
- labour agreements;
- licence agreements for image use;
- agreements for the supply of sports equipment;
- civil liability of the organizer of sporting events;
- and controversies on the athlete's sports nationality.

In order to access the arbitral jurisdiction of TAS, the arbitral clause must be contained in the by-laws of international sports federations and Olympic committees, and the parties must comply with the content.

It must also be pointed out that regardless of the place in which hearings may be held, the arbitration by TAS is considered as a Swiss arbitral verdict: and this is also valid regarding *ad hoc* chambers.

It is also interesting to keep in mind that TAS during appeal has the power to emit provisional and conservative measures.

Instead, regarding the discipline relative to the applicable law, it must be distinguished between ordinary form and appeal.

Regarding the ordinary form, arbitrators must decide on the basis of the laws chosen by the parties, or in the absence of these laws, they will apply the Swiss laws.

In relation to the procedure of appeal, even if the parties have the faculty to select their own laws, it must be reminded that article R. 58 indicates, as an alternative, applicable the law of the country in which is located the Sports Federation the decision of which is impugned providing that the arbitrators must keep in consideration in any case the federal regulatory provisions.

A collection of principles of law concerning arbitral jurisprudence was therefore conceived, that has set out a real trans-national law on sport, better known as *LEX SPORTIVA* or more commonly *LEX LUDICA*.

3. Specifically: the experience of arbitration in Olympic games

The particular effectiveness of this system of justice, that allowed to solve more than one thousand cases from its establishment and that saw the exponential increase of arbitration cases brought forward by the parties (more than 200 only in 2006), was transposed through the creation of an *ad hoc* arbitral chamber for the solution of controversies arisen in view of the Olympic games, in compliance with what is set forth by art. 74 of the Olympic Chart itself.

The experience was so significant that CIAS then decided to extend the jurisdiction of TAS also to other great sporting events, among which the COMMONWEALTH games, the football World and European Championships must be remembered.

The first edition of the games that saw the establishment of an *ad hoc* Chamber (at that time dealing with six cases) was that of Atlanta; while since Nagano's edition in 1998, the Chambers were also instituted also in view of winter Olympic games and therefore they dealt with various controversies that saw the involvement of the International Ski Federation.

The requirements of speed and effectiveness of the proceeding foreseeing a pronouncement of the final decision within 24 hours from submitting the application ensure in all cases the compliance with laws by the parties, as condition of equity of the proceeding and therefore as condition for the compliance of the sovereign principle on the right to a fair hearing.

It is interesting to note that the sentence of the arbitral body can be rendered, despite considering the specific law of each State, based solely on its own rules relative of the sports system previously mentioned and moreover made reference.

Finally, last but not least, we must question the problem of international circulation of the decisions taken by TAS, keeping into consideration the New York Convention of 10 June 1958 for the recognition and application of the foreign arbitral sentences.

The independency from bodies that have concurred to its creation and that monitor the activity of TAS allows even more recognising as being effective the final arbitration decisions when conditions are present for granting the so-called *exequatur*.

This subject would deserve much greater importance but due to shortage of time, we are forced to omit.

4. The International Ski Federation and TAS

As well known, the International Ski Federation is an organization that foresees the single national federations as its members.

Within it, a body of justice is present, called "FIS Court" suitable of solving domestic controversies, within the limits previously mentioned.

A Council is also present, consisting by a President and four Vice Presidents, in charge – a really unique case – of deciding sanctions on cases of doping, the decisions of which must be submitted to TAS as set forth by art. 31.2 of the FIS by-law in its latest edition of June 2006.

In any case, it is envisaged in a residual and definitive way that all decisions made by bodies of the FIS justice can be appealed before TAS within 21 days from the date of their issuance.

Under no circumstance it is allowed to refer to additional sports bodies of justice, even though no "disciplinary" deterrent is foreseen, in case of violation of the previously mentioned bond of justice.

Therefore, FIS also gave force of law and elected the arbitral Court of Lausanne as last instance of justice in controversies of sport nature.

5. Conclusions

The appeal to the Court of Lausanne represents therefore an excellent instrument of settling international sports controversies, avoiding the presence and interference of actual state jurisdictions – as well defined by Vigoriti – *convitate di pietra* on this subject.

The success of TAS is due on one hand, to the competence and professional preparation of the arbitrators constituting the various judging boards, and on the other hand, to the very simple procedural rules that allow to “easily” access such form of sports jurisdiction.

If as a matter of fact until 1994 – before the constitution of ICAS - the cases submitted to the Court of Lausanne were only 76 in 8 years, during the following 12 years, 1,100 applications were submitted, thus testifying the success and effectiveness of the Arbitral Chamber.

Even Italy has recently decided to follow the path undertaken by TAS, by radically modifying the structure and competences of the Conciliation and Arbitration Chamber instituted at CONI, through the institution of a new body of justice (not yet operative) called Arbitral Court of Sport.

The choice of the 4 learned persons (among which the Vice President of the European Commission Mr Franco Frattini) called for the purpose of redrafting the Italian sports justice, after the paradoxes created by CONI's Chamber as arbitral board that was adopting administrative provisions (!), was that to privilege the arbitral nature of the verdict, thus introducing *ex novo* the principle of functional independency which, actually, on many occasions seemed to be lacking in CONI's Chamber, its previous formulation.

At present, it is hard to say if the new arbitral body will be able to make up some gaps of the inter-associative justice which, until it will not adopt an independent structure of its own - such as a federation of services of sports judges - it will never be *super partes*.

But the main road that has been traced seems to be the right one and therefore it is only right considering with confidence to this reform, shaped on the success of TAS, and by which the Italian sports order felt a need that could no longer be postponed.

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