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The application of antitrust legislation by Swiss courts in cases involving international sports governing bodies

1 Questions raised

Although a small country not belonging to the European Union (EU), Switzerland often draws international attention to itself in matters relating to competition sport as the host country to many international sports governing bodies (ISGBs), amongst them the most powerful ones : the IOC, FIFA, UEFA and CAS.

Competition sport creates litigation on and beyond the playing field, with the final decision usually taken on the basis of the ISGBs' regulations by national or international sports bodies. These regulations generally provide for appeals within the sports governing bodies or to outside judicial bodies, nowadays frequently the Court of Arbitration for Sports (CAS) or other arbitral tribunals. Such decisions can then be challenged in courts or before other public authorities, on a national or supra-national level, with the European Union (EU) authorities and the European court of Human Rights (ECourtHR) playing an important role. As concerns Swiss law, decisions by CAS can be challenged in most cases before the Swiss Federal Tribunal (SFT), the highest Swiss court, and subsequently before the ECourtHR.

Reviews by national and supra-national authorities have led to some important changes in the regulations of the ISGBs not compliant with mandatory law. Some of the decisions of the EU authorities have sent shock waves through the sporting world and have proven that mandatory law, and therefore EU antitrust law, the core subject of this publication, is also applicable to sports under the regulations of the ISGBs[1]. By contrast, and rather astonishingly, cases decided by the SFT might have give the opposite impression. And this impression is not wrong.

This phenomenon is the result of three essential factors : the legal status of the ISGBs as associations under Swiss law and the quasi-absence of supervision by public authorities of regulations of ISGBs (below 2), the priority given by law to self-regulation by the ISGBs combined with the general leniency of courts in favor of associations, especially in sports (below 3) and, finally, the hands-off regime enshrined in Swiss international private law as regards the review of arbitral awards (below 4). The result of these developments will be summed up in the last section of this paper (below 5).

[1] See in this regard, J. Kornbeck's introduction to this book, as well as Kornbeck Jacob, ISU-Fall entschieden : Loyalitätsklauseln als Kartellrechtsverstoß, Spurt (Francfort/FRG) 2018, 22; Heermann Peter W., Werbung mit Bezug zu Olympischen Spielen im Fokus des Kartellrechts und des sog. Olympiaschutzgesetzes, Wettbewerb in Recht und Praxis (Frankfurt) 2019, 834 seq.; Del Fabro Marco, Drei Jahre TPO-Verbot – die Verbände sind (weiterhin) gefordert, CausaSport (Zurich) 2018, 161 seq.

2 The legal status of the ISGBs set up under Swiss law as associations or foundations and their supervision by public authorities

Swiss law does not provide a special legal status for sports regulatory bodies and does not contain special provisions for such bodies. Not being set up by states and not executing state functions by delegation, ISGBs in Switzerland are not international organisations[2]. They resemble to a certain degree international *non* governmental organisations (ONGs)[3]. Therefore, ISGBs and other entities active in sports can be constituted (only) under one of the **legal forms** provided by **private law** and are subject to the relevant provisions of law.

The ISGBs established in Switzerland are nearly exclusively **associations** as per Articles 60 seq. Swiss Civil Code (CC)[4], with their titles most of the time including the terms "association" (e.g. International Boxing Association), "fédération" (e.g. Fédération Internationale de Football Amateur, International Ice Hockey Federation) or "union" (e.g. Union Cycliste Internationale, Union of European Football Associations). Physical persons or legal entities can be (founding) members of associations. The ISGBs' members are generally the next lower sports bodies, i.e. the continental SGBs or, if such entities do not exist, the national SGBs; the statutes can also provide for other entities or persons to be admitted as members. The 119 members of the **International Olympic Committee (IOC**) are all natural persons[5]. The organization set up by the IOC is nevertheless comparable to those of the other ISGBs since it acts as the "supreme authority" of other regulatory bodies, which are mostly legally independent entities, but "recognized" by it (National Olympic Committees, the organizing committees of the Olympic Games, the international federations, WADA, ICAS, etc.)[6]. The resources of ISGB associations are produced by their members and the lower echelons of the pyramids (yearly fees, license and participation fees, other dues) and – especially for the ISGBs in popular sports – by their commercial income, especially from media rights.

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[2] The statement in the statutes of some ISGBs that they are "international … organizations" might be misleading in this respect. As to WADA, see fn. 8. The private law nature of (I)SGBs does not exclude support of different kinds by public authorities to promote (youth, competition, clean, …) sports and sporting events. The qualification of ISGBs as private law entities is important also in other fields of law, especially as concerns tax law and penal law; cf. Cassani Ursula/May Philomène, La corruption dans l'attribution des compétitions sportives, in Le droit en question, ed. Leuba/Papaux van Delden/Foëx (Geneva/Zurich 2017), 351 seq., 353 f. See also Mbenge Makan Moïse, Le sport, l'Etat et le droit international : Réflexions cursives sur la perception de l'Etat dans les statuts des organisations sportives internationales, in Le droit en question, ed. Leuba/Papaux van Delden/Foëx (Geneva/Zurich 2017), 419 seq., 427.

[3] As the Swiss Federal Tribunal states in SFT 129 III 445, A.a. (IOC), 138 III 322, A.a. (FIFA). SFT decisions are in French, German or Italian and can be consulted on https://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm). Decisions marked this way are lead decisions of the SFT; decisions of lesser importance are presented by a number, the year of the submission of the cause to the SFT (f. ex. 4A_260/2017) and the date of the ruling.

[4] Cf. https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en. All Swiss legislation can be consulted on this website, in French, German and Italian, some also in English.

[5] Cf. art. 15 and 16 of the Olympic Charta (OC) which fulfills the function of statutes (https://olympics.com/ioc/documents/international-olympic-committee/olympic-charter). The IOC enjoys some privileges granted by the federal and cantonal authorities as to the status of foreign personnel and gets support of different kinds from relevant public authorities, but this does not change its legal status.

[6] See section 3 on the Fundamental Principles of Olympism, as well as part 1, sec. 3 OC.

Two major actors in international sports amongst the most powerful ISGBs in Switzerland are **foundations** under Articles 80 seq. SCC : ICAS and WADA. The **Foundation International Council for sport arbitration (ICAS)** is the umbrella organization of the **Court of Arbitration for sports (CAS)**[7]. CAS and ICAS have their seat in Lausanne, and for procedural purposes, all CAS-rulings, including the "ad hoc"-awards of the panels acting at the different locations outside Switzerland during the Olympic Games are formally issued in Switzerland, with the Swiss federal tribunal (SFT) as the only instance for appeals. The **Word Antidoping Agency (WADA)** is also a foundation set up in Lausanne in 1999 by governmental agencies and ISGBs under Articles 80 seq. SCC[8]. Foundations are generally established by physical or legal persons to dedicate assets to specific aims spelled out in the statutes (f.ex. the fight against doping, the development of youth sports or the creation of sports infrastructure). Foundations have no members, their organization is determined by the constituent(s) in the foundation deed and in the internal bye-laws and they are run by the "supreme organ" as determined by the statutes and are under the supervision of a federal or cantonal authority. The initial endowment by the constituent(s) can be complemented during the lifetime of the foundation by the constituent(s) or other sources. Both WADA and ICAS/CAS are examples of foundations with large inflows of funds every year. The regulations of ICAS and CAS, as well as the doping rules established by WADA, are recognized in all international sports affiliated to the IOC.

Associations and foundations are entities with **full valid legal status**, empowered to
- determine their internal structure, organization and governance,
- set up, own or recognize other legally independent entities (including commercial companies), a faculty widely used in the sports world, and
- conduct business with other ISGBs or any other private or public person or entity.

The rules and activities of associations and foundations are subject to **regular law**, which also means that they are subject to the **mandatory provisions of law** on setting up and running the entity. The content and the enforcement of mandatory law determine the autonomy of ISGBs, which is large under Swiss law as will be shown below in this section and in sections 3 and 4[9].

As concerns the **setting up of the regulations of the ISGBs and their subsequent modifications**, **controls by public authorities** are nearly absent. The regulations of associations not registered in the Commercial Register are not subject to control by any

[7] CAS was set up initially by the IOC as a financially and organizationally dependent entity, operational as of 1984. Responding to criticism expressed by the SFT in the case Gundel vs. FEI, SFT 119 II 271 (1993), of the organizational and financial proximity of the IOC, ICAS was created in 1994 in order to handle the running and the financing of CAS independently of the IOC. Half of the cost of the CAS is nevertheless financed by the ISGBs, with the other half covered by the fees paid by the parties in arbitration proceedings; subsidies are granted by public authorities for ICAS' and CAS's offices. For more details, cf. https://www.tas-cas.org/en/general-information/history-of-the-cas.html, and https://www.tas-cas.org/fileadmin/user_upload/ICAS_2020_Annual_Report_and_Financial_Statements_.pdf.

[8] WADA is still financed partly by governments. Its headquarters are presently in Montreal, but an office remains in Lausanne, Switzerland (https://www.wada-ama.org/en/who-we-are).

[9] For more detail than can be given in this paper on the autonomy of ISGBS in general, cf. Baddeley Margareta, The extraordinary autonomy of sports bodies under Swiss law : lessons to be drawn, The International Sports Law Journal ISLJ (The Hague/NL) 2020, 3.

public authority. Registration is required for some associations and for all foundations[10], leading to a summary control of the statutes and other required documents by the Registrar's office as to the presence of the mandatory contents. The compliance of rules pertaining to the sporting activities, f. ex. on transfers and qualification of players or teams, with Swiss and foreign antitrust law will not be checked by any authority.

The **legal situation** is therefore the following : regulations of ISGBs, as long as not set aside by a court, usually in the case of litigation between stakeholders of the sporting world, or invalidated by a competent public authority, will stand and apply to their internal bodies and their members. They will be passed on by the members to their own members (**trickling down effect** within the pyramid). By incorporation into contracts with third parties or by referral in the documentation of third parties, the ISGBs' regulations will also govern many other situations and persons of the sports world (**spill over effect**).

This state of affairs might give the impression that ISGBs are allowed altogether to ignore mandatory law and that they evolve in an **extra-legal space**, affording them immunity from state law. This impression is enhanced the fact that the global span of the activities governed with great efficiency by the ISGBs and the participants in each of the sports bodies pyramids, make international sport a **special phenomenon in international social relations**. The regulations of sports bodies are on the one hand subject to various national laws, but do not need, in most cases, enforcement by states' organs[11]. It follows unsurprisingly, that the economic and political power of ISGBs, combined with the large autonomy granted many of them by virtue of their legal status under Swiss law makes ISGBs reluctant to submit to ordinary national law or even supra-national law which does not satisfy, in their eyes, the needs of the organization of their sport.

The ISGBs have nevertheless been shown by **national and supranational public authorities** that, while they benefit from a certain leniency and comprehension of the specificities of high performance and international sport, mandatory law – amongst others antitrust law – applies to them too in the final count. The ISU case[12], and its predecessors, the Walrave, Dona, Bosman and Meca-Medina Maicen cases[13], on the European level, and Swiss cases –

[10] Registration is mandatory for all foundations and a condition for becoming a legal entity, while associations obtain this status as soon as their statutes are drawn up by the founding members (cf. Articles 60 SCC vs. 81 & 52 SCC).

[11] Rigozzi Antonio, L'arbitrage international en matière de sport, Basle 2005, 61 ff., 71 ff. ; see also the Dieter Baumann case (2000-2002), 93 f., for an example of the multiple sports and public authorities intervening in high level sports.

[12] Cf. Kornbeck, SpuRt 2018, (fn. 1) as well as Heermann Peter W., Sportschiedsgerichtsbarkeit 2019 – Eine Standortbestimmung, NJW 2019, 1560 seq., 1563 ff, with references; Kornbeck Jacob, What can sports governing bodies do to comply with EU antitrust rules while maintaining territorial exclusivity ?, ISLJ 2020, 203 seq., 218 ff., comparing this decision with several others, in particular the FIA-decision of 2001 (210 ff.).

[13] These decisions are summarized and put into perspective with the "TopFit" decision of the Court of Justice of the European Union, 13.6.2019 by Hessert Björn, Dunjic Ivan, Nationale Meisterschaften mit ausländischer Beteiligung im Lichte der EU-Rechtsprechung, CausaSport 2021, 185 seq., 187 ff., as well as by Rusa Agafonova in her contribution to this publication. See also Cherkeh Rainer, Daumann Frank, Renz Michael, The national league principle as a restraint of competition in European football, CausaSport 2021, 174 seq., 179 ff.

Perroud[14], Grossen[15] and Gasser[16] – leave no doubt as to this reality. Section 3 will explain the approach of Swiss courts and the latitude left for ISGB's self-regulation under Swiss law.

3 The challenges of decisions of ISGBs in Swiss courts : the importance of the liberal Swiss association law and of the approach of Swiss courts to sport

ISGBs decisions can be **challenged in ordinary courts** by their members, but also by "indirect members", i.e. the members of the members (lower-level SGBs, clubs, athletes), as per **Article 75 SCC**. The case can be brought for inobservance of the proper regulations of the ISGB, including the rules of WADA or other external bodies incorporated in the regulations or referred to by them – or of mandatory law. The submission to arbitration can be challenged on this basis or on grounds given in the International Private Law Act (PILA)[17] as discussed below in section 4. Each case will be heard as to its procedural and substantive merits by a first instance court, the decision of which can be appealed in a second level cantonal court, whose decision can in turn be challenged in most cases before the SFT as the final Swiss review court, with a further appeal to the European Court of Human Rights possible. Ordinary proceedings are possible also if the ISGB's regulation has been applied in a relationship based on **other provisions than the association law**, f. ex. employment law. Procedures before **other public authorities**, including the antitrust authorities, are possible as well.

The court will determine the applicable (national or supra-national) law and review the challenged decision in this light. Under association law, the **authority of the judge** as to the merits of the case submitted derives from and is determined by **Article 63 SCC** : primarily, the **regulations of the ISGB** will be the basis for the review of the challenged decision. Swiss law will apply only in a subsidiary function or to replace autonomous rules infringing **mandatory provisions** which can derive from association law or other legal provisions.

The most important rules of mandatory law for ISGBs are the following :
- Article 60 SCC provides that the **overall purpose** of ISGBs set up as associations must be "ideal", i.e. not profit-oriented. This conditions is generally met by the ISGBs despite of the commercial business conducted by them, since the proceeds of their commercial activities are used to fulfil their overall non-economic statutory purpose to organize and further their sport and their members, and to promote the ideals of sports in general.
- As to the other provisions of the ISGBs' statutes, drawn up by the founding members or modified subsequently by the General Assemblies, few **constraints** derive from the law as to their structure, their organization and the relation of the ISGB with its members : the **General Assembly of Members** is by virtue of Article 62 SCC necessarily the supreme organ of the association; several provisions impose minimal standards for **bookkeeping and auditing**; the right of members of **unencumbered exit** from the association, and they have

[14] SFT 102 II 211 (1976 – invalidity of excessive engagements).
[15] SFT 121 III 350 (1995 – principle of good faith and loyalty in contractual relationships and beyond for parties subject to the rules of the SGBs).
[16] References and a discussion in Baddeley (fn. 9), 7 ff.; Baddeley Margareta, L'association sportive face au droit (Geneva, 1994), 275 ff.
[17] Cf. https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en.

the **right to vote** in the General Assembly (but the voting rights may be different for the different categories of members).
- The most important mandatory provision of the SCC, which cannot be waived by the rules of the ISGB or by a convention other than a valid arbitral clause in the statutes or an arbitration agreement, is that by virtue of **Article 75 SCC**, members cannot be deprived by statutory provisions of their **right to challenge decisions of the association "in court"** for violations of the association's own regulations or mandatory law.
- Besides association law, the mandatory provisions of other legal texts (**Article 27 f. SCC** and laws on personality rights, employment contracts, torts law etc.) aim at protection the **essential rights of members or other persons implied**, such as due process, the unenforceability of excessive engagements by subordinate persons and entities, and the invalidity of sanctions causing excessive restraints of the persons or entities punished.
- ISGBs are subject to **penal law** and **tax law**[18].
- **Competition and antitrust law** applies to the ISGB's commercial activities or to their rules concerning the commercial activities of third parties reducing and restraining competition, albeit taking into account the specificities of sports[19]/[20].
- **Foreign law, including its mandatory provisions** may be applicable, following the provisions of private international law, to cases submitted to Swiss courts. Regarding **EU law**, it has to be kept in mind that Switzerland is not a member of the European Union although its laws are often compatible with EU law. EU law, including the principles and provisions of **antitrust legislation** will therefore only be applied on the basis of bilateral agreements or if the law applicable to a case is EU law[21].

The mandatory law described above leaves the ISGBs considerable room for **self-regulation** of all matters relating to the organization of their specific entity and their sport[22], amply used by the ISGBs for issuing the rules of the game and the competitions, on qualifications of athletes, concerning support personnel, clubs and materials, for the classification of results, but also for the suppliers, providers of publicity and sponsoring, ticket sales, media companies, entities involved in the measuring of performance, security and the IT equipment, etc.

The **autonomy** of sports bodies goes further however than the simple application of the mandatory law allows and that is granted to associations in other fields of activity thanks to **the interpretation of the law by Swiss courts**. This came about initially because sports have

[18] See Cassani (fn. 2), 351 ff., about the application of the provisions on corruption of the competition law (below fn. 20) to ISGBs, especially FIFA and the IOC, over the years. Heermann (fn. 1), see namely N 20 ff. in detail as to the special treatment discussed and sometimes granted sports organizations. Being subject to tax law also means that ISGBs may qualify for tax exemptions due to the public interest of their activities.
[19] The Swiss rules applicable are primarily the Federal Act on Cartels and other Restraints of Competition (Cartel Act) of Oct. 6, 1995 (current version in French, German, Italian and English : https://www.fedlex.admin.ch/eli/cc/1996/546_546_546/en), and the Act on Unfair Competition (Unfair competition Act) of Dec.19, 1988 (current version in French, German and Italian: https://www.fedlex.admin.ch/eli/cc/1988/223_223_223/fr).
[20] As outlined f. ex. In Cherkeh (fn. 13), 179 ff. For the detailed discussion of the application of Swiss antitrust provisions by antitrust authorities and the SFT see SFT 2C_44/2020, 3.3.2022 (publishing sector).
[21] Bellamy & Child, European Union Law of Competition, 7th ed. (Oxford 2013), N 16.103.
[22] Very clear on this subject and on the respective roles of the ISGBs and the courts : SFT 144 III 120 (2018), par. 5.3, and 4A_116/2016, 13.12.2016, par. 4.2.3 (violation of EU antitrust law).

historically been viewed as leisure activity not meant to be governed by law. This vision resulted in a self-imposed restraint by judges who will not review decisions taken on the basis of the "rules of the game", considered as irrelevant in law. In the early days of sports law cases before courts, all rules concerning the organization of their sports by the SGBs, including transfer and sanctioning rules, were refused review in court[23]. With the emergence, especially as of the 1980s, of professional sports and sporting activities becoming business for athletes, clubs, SGBs and other stakeholders, attitudes amongst judges changed. Today, only a remnant of the "rules of the game" still stands, i.e. the rules applied on the playing field by referees and the like, during the duration of one game.

Jurisprudence of the 1970s and 1980s **has corrected some legal flaws of the regulations of sports bodies**, mostly concerning procedures and transfer issues, which violated personality rights and workers' rights. As is well known especially from the cases listed above, the principles spelled out in the individual procedures have led not only to the setting aside of some specific decisions, but led to the modification of their rules by the (I)SGBs. This effect of the judicial review could have given antitrust law, although rarely the basis for the argumentation of the parties in litigation up until 1990, more visibility over time in the procedures before Swiss courts. This development became impossible due to the move of conflict resolution in sports away from state courts to arbitration.

4 The impact of arbitration on the application of law in the decisions and regulations of the ISGBs

Most of litigation in sports involving ISGBs and other important actors is dealt with nowadays by arbitration rather than appeals to ordinary courts. **Arbitration clauses** in favor of CAS and other arbitral bodies[24] set up by ISGBs and other sports regulatory bodies are mostly **integrated in statutes and contracts**. The SFT generally recognizes the submission of the parties to these clauses under the condition that the **requirement of independence and impartiality** is fulfilled by the CAS arbitrator or the CAS arbitral panel in each specific case. The SFT has confirmed several times that it holds this as fulfilled as concerns CAS and the CAS panels in general[25]. The European Court of Human Rights has agreed with the SFT's vision in the Pechstein affair[26]. Critical voices pointing out problem spots (forced arbitration, closed list of arbitrators, overpowering influence of the ISGBs, inadequacy of arbitration involving athletes and clubs opposing national SGBs or ISGBs, powers of the Secretary General of CAS, inadequate rights of appeal under PILA) have existed ever since CAS started

[23] Rigozzi (fn. 11), 403 ff., 421 ff., with references to jurisprudence and legal opinions; Baddeley (fn. 16), 112 ff., 344 ff.

[24] F.ex. the Basketball Arbitral Tribunal BAT, with its seat in Geneva (https://www.fiba.basketball/bat).

[25] Therefore, the requirement of Article 75 SCC guaranteeing members of associations a review of the association's decisions by a proper jurisdictional authority is satisfied, cf. SFT 144 III 120 (2018 – TPO case); SFT 129 III 445 (2003 - Lazutina). In the recent Sun Yang case (SFT 4A_318/2020, 22.12.2020), however, one arbitrator did not fulfil the requirement of impartiality and should have been rescinded; the award was annulled by the STF on the basis of Article 190 par. 2.a PILA.

[26] Pechstein and Mutu v. Switzerland, ECourtHR (2018), Nos. 40575/10 and 67474/10, par. 124 ff.

its operations and have not ceased despite some improvements over the years, but are not considered justified by the SFT[27].

As to the question raised in this paper, whether or not mandatory national or EU law, in particular antitrust regulations, are enforced in these proceedings, the answer is determined by the CAS rules as to the applicable law (a.), the awards of the panels (b.) and, in the final phase, the review of CAS awards by the SFT (c.)[28].

a. As to the **applicable law** in CAS procedures, the rules are complex and differ depending on the specific procedure requested. In the Ordinary procedures of CAS panels (R38 seq. CAS-Code), the parties chose the applicable law (R45 CAS-Code), which can also be – and very often is – the regulations of the ISGB concerned or *ex aequo et bono*; Swiss law is applied in the absence of a choice by the parties and in a subsidiary function. In Anti-doping procedures (A20 ADD-Rules) parties may choose "the applicable anti-doping regulation or the laws of a particular jurisdiction"; in the absence of such a choice by the parties, Swiss law is applicable. The regime is less liberal in the Appeal Arbitration Procedure (R47 seq. CAS-Code), where the regulations of the ISGB concerned are **primarily** applicable (R58 CAS-Code, A2 ADD-Rules). Finally applicable law in *ad hoc* arbitral proceedings during the Olympic Games is determined by the panel which chooses the most appropriate in its views of "the Olympic Charter, the applicable regulations, general principles of law and the rules of law" (Article 17 of the Arbitration Rules for the Olympic Games). These rules comply with the Articles 187 and 189 f. PILA.

b. It results from these rules that **CAS awards** will generally be based on the **regulations of the ISGBs**, including the WADA-Code[29], and that Swiss law will be applicable in many procedures as the most appropriate law or in a subsidiary function, since the ISGB involved is domiciled in Switzerland. Nevertheless, depending on the type of procedure before CAS and the contents of the regulations applied, very little room or even none might be left for the application of Swiss or other State law[30]. **EU antitrust law** which is not already integrated in the regulations of the ISGBs, f. ex. as a response to a decision by European authorities, as was the case after the Bosman case, can be taken into account by CAS as

[27] Heermann (fn. 12), 1562 ff.; Freeburn Lloyd, Forced Arbitration and Regulatory Power in International Sport – Implications of the Judgment of the European Court of Human Rights in *Pechstein* and *Mutu v. Switzerland,* Marquette Sports Law Review 2021, 287 seq., 293 ff., 297 ff., 303 ff. and 315 ff.; Baddeley (fn. 9); a remark by chief editor Scherrer, CausaSport 2020, 495 f., summing up the arguments ; Rigozzi (fn. 11), 727 ff.

[28] Execution of foreign awards could also lead to a review by Swiss courts. This is however of lesser relevance in sports since many of the decisions by ISGBs and of the arbitral authorities do not need the state's assistance for the execution of their decisions or of decisions of review bodies. In particular punitive suspensions, bans, withdrawals of licenses, but even fines, can generally be enforced within the pyramid (see f.ex. https://www.fiba.basketball/bat).

[29] Brägger Rafael, Die neue "Anti-Doping Division" des Court of Arbitration for Sport (CAS) und weitere Änderungen im CAS-Code 2019, CausaSport 2019, 11 seq., 18; Freeburn (fn. 26), 300 ff.; Rigozzi (fn. 11), 598 ff.

[30] As discussed by Brugger Fabian, Nur spärliche Anwendung des deutschen Rechts in internationalen Sportschiedsgerichtsverfahren, CausaSport 2020, 22, 27 f., and Freeburn (fn. 27), 300 ff., 318 ff. CAS awards may confirm the decision of the (I)SGB and nevertheless contribute by the remarks of the panel to improving the regulation applied; cf. concerning the UEFA financial fair-play rues : Peter Henry/Arn Jeanne, Gouvernance sportive : le système du fair-play financier de l'UEFA est-il correctement conceptualisé, in Le droit en question, ed. Leuba/Papaux van Delden/Foëx (Geneva/Zurich 2017), 429 seq., 441.

subsidiary or overriding mandatory law[31]. However, it is up to each party to prompt the panel to discuss all relevant arguments by spelling them out in their submissions. This is most important to note in view of the limited jurisdiction of the SFT as a review instance (below c).

In the case of an arbitral court established by an (I)SGB in a **different jurisdiction**, the validity of arbitration and the specific award, as well as the means of appeal depend on the national legislation which might make national or EU antitrust law applicable[32].

c. CAS awards are usually qualified as international awards under the provisions of **Chapter 12, Articles 176 ff. PILA** and are therefore subject to a **review by the sole SFT**[33]/[34]. Swiss arbitration law aims at attracting international arbitration proceedings to Switzerland by its liberal rules as concerns the arbitral procedures and the very high hurdles for an arbitral award to be set aside by a state review court. No special rules for arbitration in sports are provided in the law despite of the quite different circumstances compared to other types of arbitration.

The SFT does not act as an appeals court. The grounds on which a party's appeal of an award might be brought are listed in Article 190 par. 2.a-e PILA which leaves no room for a larger interpretation[35]. The **non-application or wrong application of rules of the law**, including the European Convention of Human Rights, the Swiss Constitution and international treaties[36] or of any other provision of law can only be argued in the light of

[31] SFT 144 III 120, par. B.b.a. (2018 – Seraign vs. FIFA). The latter option requires, as the CAS ruling in the TPO-case 2016/A/4490 says, the conditions of legality, adequacy and proportionality to be fulfilled. For the reluctance of CAS to do this in a high profile case in tennis, see Baddeley Margareta, The Puerta case, CausaSport 2006, 365 seq., 374.

[32] See f.ex. Beschluss des Oberlandsgerichts Frankfurt a.M., 23.6.2020, in CausaSport 2020, 458 seq., 468, 469, with a critical review by Bechtel Caroline, Das Ständige Schiedsgericht für die 3. Liga auf dem Prüfstand, CausaSport 2020, 472-473; Landrove Juan Carlos, Some thoughts on a procedural Issue related to Third-Party Ownership in Soccer, in Le droit en question, ed. Leuba/Papaux van Delden/Foëx (Geneva/Zurich 2017), 395 seq., 400 f. For references to commercial arbitration, cf. Bellamy & Child (fn. 21), N 16.099 ff.

[33] Article 119a of the Federal Act on the SFT (https://www.fedlex.admin.ch/eli/cc/2006/218/fr). If all parties are domiciled in Switzerland, the Swiss Code of Civil Procedure (CCP) applies, with less stringent rules for the review of awards. They in particular empower the review court to set aside awards containing arbitrary decisions by the panels, not only those violating public policy. For an example of such rather rare cases in sports : Platini vs. FIFA (SFT 4P.105/2006, 4.8.2006), commented by Haas Ulrich, Hohe Anforderungen an das Begründungsgebot, CausaSport 2020, 19-21. Parties to international arbitration can also agree on the review procedures of the CCP, but this only happens exceptionally and is of no practical relevance in sports.

[34] Waivers even of this possibility are allowed by Article 192 PILA except in the cases of the sports world; SFT 133 III 235, par. 4. This exception was introduced by the SFT in recognition of the dominant position of ISGBs of an athlete or lower entity of the pyramid or in a contractual relationship in many cases and the fact that many confirmed ISGB decisions will not be subject to any further judicial review since they can be executed withing the sports pyramid without the need of help from public authorities (suspensions, …; see also fn.28).

[35] SFT 4A_476/2020, 5.1.2021, par. 4 ; SFT 4A_612/2009, 10.2.2010, par. 2.4 (Pechstein). Procedural flaws (validity of the arbitration, the constitution of the panel, the possible impairment of one or several members of the panel, and the procedure before the panel) must be taken up with the panel without delay as they arise during the arbitral proceedings (Articles 178, 180 f., 182 par. 4, 186 par. 2 PILA). Raised too late, such issues cannot be grounds for the SFT to set the award aside, but the SFT, if it deems it to be an important question, express its opinion in *obiter dictum*. See f.ex. the Pechstein case, par. 4 on the desirability of public hearings.

[36] SFT 4A_612/2009, 10.2.2010, par. 2.4 (Pechstein). Pfisterer Stefanie, Art. 190 N 52, N 104, in Basler Kommentar Internationales Privatrecht, 4th ed. (Basle 2021).

Article 190 par. 2.e PILA. This means that an award infringing the law, be it mandatory or even supra-national law, will only be annulled if its overall result amounts to a violation of **public policy**. The SFT holds that this is given if and only if "the award disregards those essential and widely recognized values which, according to the prevailing values in Switzerland, should constitute the foundation of any legal order"[37]. Such a result does not flow necessarily from violations of **European competition and antitrust law**, in commercial and in sports matters, as examined in detail by the SFT; therefore it is probable that it will not be held contrary to public order if awards apply rules not respecting EU antitrust law[38].

Infringements of antitrust law can nevertheless be brought up in the submission to the SFT to be included in the SFT's evaluation of the merits of the case if the argument has been raised before the CAS ; the applicant must develop in sufficient detail why the CAS decision on this point contravenes the grounds of Article 190 PILA[39]. This has been omitted in general in the past[40]; the arguments of the applicants mostly focused on the validity of their submission to arbitrage, the independence and the impartiality of CAS, the violation of their right to be heard and of due process in general, and, as to substantive law, **the protection of personality rights**. It is true, alleging the violation of personality rights appears to be more promising in many cases, especially if sanctions are contested, since this argument centers around the indisputable intrinsic rights of persons as to their physical and psychological integrity, but also to a minimum of freedom in their decisions concerning the economic aspects of their lives. In the Matuzalem vs. FIFA case about the CAS panel confirming a very heavy fine and lifelong ineligibility of the player, the SFT held the violation of the economic freedom of the player to amount to a violation of substantive public policy and annulled the CAS award[41]. Arguments as to the infringement of antitrust legislation, had they been raised, would probably not have been as strong in the view of the SFT[42].

Strict rules for the review of awards aim generally to avoid that the advantages of arbitration are thwarted by extensive review of cases on antitrust grounds, but of course

[37] Bellamy & Child (fn. 21), N 16.102, discussing SFT 132 III 389, concerning a case of commercial arbitrage.
[38] SFT 144 III 120 (2018 – Seraign). Cf. in a non sports-related case : SFT 132 III 389, c. 3.2, with a discussion of this position, also in view of the relation of the jurisdictions of the SFT and the EU Court of justice in c. 3.3. The application of Swiss anti-trust law is subject to the above mentioned conditions if this argument is raised in a challenge to an award; cf. the overview of the situation by Deck Simon, 25 Jahre Kartellgesetz, jusletter (weblaw, Zurich) 11.10.2021, N 31 (no mention is made of cases concerning the sporting world submitted to the Swiss antitrust authorities). Bucher Andreas, Art. 190 N 141, in Commentaire romand, Loi sur le droit international privé – Convention de Lugano, ed. Bucher (Basle 2011).
[39] On the other hand, the SFT allows that, in its award, the panel may not discuss the violations argued by the parties individually, as long as they are taken into account indirectly (f. ex. STF 133 III 325, par. 5 – Cañas) The situation is similar in non-sports arbitration ; see Pfisterer Stefanie (fn. 36), Art. 190 N 52, 104. On a different subject, the application by CAS of English law in the Mutu-case, f.ex., was not reviewed by the SFT.
[40] SFT 4A_542/2021, 28.2.2022, par. 4. Commenting the inadequate argumentation in this respect in the Pechstein case : Scherrer Urs, Was es mit der Gerechtigkeit in Rechtsprechungsverfahren auf sich hat, CausaSport 2016, 297 seq.
[41] SFT 138 III 322 (2012); Matuzalem, a professional player, had been suspended for life and condemned, together with his club, to pay an € 11 mio. fine (plus interest). As per par. 4 of the SFT ruling, to be completely barred from exercising his profession, restricted Matuzalem's economic and personal freedom to a, for Switzerland, totally unacceptable degree; the acceptance by the player of the rules allowing the sanction, was an "excessive engagement", invalid by virtue of Article 27 par. 2 SCC.
[42] See also Heermann (fn. 27), 1563 ff., for detailed developments on the non-application of EU antitrust rules by the SFT and the possibilities of EU review bodies to refer to EU authorities.

reduce, maybe even cancel out totally the **protection of the weaker stakeholders,** in particular athletes and smaller clubs, against otherwise forbidden practices of the sports organizations[43]. Facing these limits of the internal conflict resolution schemes in sports, parties to a litigation with ISGBs resort to other ways of challenging the regulations and decisions of sports bodies. As said above, especially decisions by the European authorities are sought, with amongst the best known examples the TPO-case before the European Commission and Belgian courts and the intervention of German courts in the case of Claudia Pechstein.

5 Conclusion

As it has been shown in this paper, ISGBs in Switzerland are generally associations under Swiss law and as such are granted considerable autonomy to determine the rules applicable in their sports. The review by ordinary Swiss courts of the decisions of sports bodies applying these rules is limited. The review by the Swiss Federal Tribunal, on the basis of Article 190 par. 2 PILA, of decisions of ISGBs first examined by an arbitral body, in particular by CAS, are subject to even less scrutiny and lead to the setting aside of the challenged award only if it infringes the law and if this amounts to the violation of Swiss public policy.

In the view of the SFT, infringements of antitrust law are not as such contrary to Swiss public policy. Therefore, the impression that EU antitrust law is (rarely) enforced by Swiss courts is correct. This derives certainly primarily from the liberal regime of the ISGBs established as associations under Swiss law, but is greatly enhanced by the lack of control of these rules in the light of mandatory national, supra-national and international law, both by ordinary and by arbitral courts, as well as by the SFT as review jurisdiction of CAS awards. In other words, there might not be another viable alternative to CAS for the resolution of litigation in sport, but there is room for improvement and state courts can help to achieve it in matters relating to antitrust and many others.

Application of mandatory state law and in particular antitrust law is of immense importance in sports due to the sums at stake for the different actors of the sporting world. The decisions by the European Court of Human Rights and the EU authorities are therefore of utmost importance for the necessary corrections of the rules of ISGBs and other sports bodies which violate antitrust law. The situation in Switzerland could possibly be influenced too by (a more detailed) argumentation of aspects pertaining to antitrust regulations, before CAS panels and the SFT, by the counsels of the parties in litigation.

[43] For Bronte Le-Fevre Hannah, Ready, set, reform ? The future of sports arbitration, International Arbitration Law Review 2020, 199 seq., CAS is "the sport industry's most valuable player" and absolutely necessary for international sports, but internal reform of the CAS is necessary to preserve its legitimacy (210 f.). Freeburn (fn. 26), 321, considers Switzerland fails in its duty to protect athletes' human rights. This is in my view especially true when sanctions result from the autonomous regulations which are invalid under ordinary state law; cf. Baddeley Margareta, Le sportif, sujet ou objet ?, Revue de droit Suisse 1996, 139, 150 ff. It is, of course, up to the national legislators to provide more demanding rules for internal arbitration, as is the case f.ex. in Germany; Heermann (fn. 27), 1564.