Decisions of private bodies and institutions cannot be challenged under Art. 190 PIL Act – Really?

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In the case reported above (Swiss Supreme Court Decision 4A_282/2013 of 13 November 2013, ASA Bull. 1/2014, p. 89), which concerns a sport arbitration conducted under the CAS Rules, the relevant arbitration agreement provided for three-member arbitral tribunal. The President of the CAS Arbitration Division (an administrative body) nevertheless decided to refer the matter to a sole arbitrator. The losing party challenged the award issued by the sole arbitrator on the ground of a wrong composition of the arbitral tribunal (Art. 190(2)(a) PIL Act). The central findings of the decision pertain to the scope of application of this provision of the PIL Act. The Court ruled that Art. 190(2)(a) permits challenges not only based on lack of independence or impartiality of an arbitrator but also on the ground of violation of agreed appointment modalities, such as the number of arbitrators, or their qualifications or designation. Somewhat hidden in the body of the judgement is the Court's elaboration on another, equally important, issue: whether a decision of the President of the Arbitration Division can be subject to a direct challenge before the Swiss Federal Supreme Court under Art. 190(2). The Court held (para. 5.3.2) that, according to the Court's established case law, the plaintiff should not have waited to challenge the award but ought to have sought to set aside the decision of the President of the Arbitration Division to appoint the sole arbitrator. In other words, the failure to challenge the initial decision of the President entailed the loss of the right to challenge the award. In this judgement, the Court mentions two earlier cases in which it had ruled that **decisions of (other) CAS bodies could be referred directly to the Court pursuant to Art. 190(2) PIL Act**.[1]

The Court goes on to point out that **this jurisprudence is inconsistent with its well established case law** according to which decisions of the International Council of Arbitration for Sport (ICAS) on another aspect of the constitution of the arbitration tribunal, namely challenges of arbitrators, are not eligible for a direct request to set aside under Article 190(2) PIL Act. The remark is very valid, and a clarification would have been warranted, but

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1 4A_600/2008, ASA Bull. 3/2009, p. 568, referring to 4A_126/2008, ASA Bull. 3/2008, p. 596.

in this decision, the Court merely notes that, while its case law had been criticized by some Swiss scholars, it needs not be revisited in the present case (because the request to set aside the award was rejected in any event).

It seems indeed difficult to reconcile the two sets of cases. Based on the terms of the law (Art. 190 PIL Act), only *awards* are eligible for challenge before the Supreme Court[2]. By definition, *awards are issued by arbitral tribunals*. As the Court recognizes[3] the President of the Arbitration Division is not an arbitral tribunal. Logically, this means that (i) his decisions, whatever their form or name, are not awards and cannot be challenged, and (ii) the plaintiff was right to challenge only the sole arbitrator's subsequent award on the ground of the wrong composition of the arbitral tribunal. Decisions of private bodies and institutions such as the ICC Court or the ICAS cannot be challenged. This is indeed well established case law:

> « De jurisprudence constante, la décision prise par un organisme privé, telle la Cour d'arbitrage de la Chambre de Commerce Internationale (CCI), au sujet d'une demande de récusation d'un arbitre, ne peut pas faire l'objet d'un recours direct au Tribunal fédéral (ATF 118 II 359 consid. 3b confirmé encore récemment in arrêts 4A_348/2009 [ASA Bull. 4/2010, p. 772] du 6 janvier 2010 consid. 3.1 et 4A_256/2009 [ASA Bull. 3/2010, p. 552] du 11 janvier 2010 consid. 3.1.2).

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[2] The Court recalls this fundamental principle at the very outset in a standard finding which is found in numerous Supreme Court decision on requests to set aside arbitral awards : « Dans le domaine de l'arbitrage international, **le recours en matière civile est recevable contre les décisions de tribunaux arbitraux** aux conditions fixées par les art. 190 à 192 LDIP » (4A_282/2013 of 13 November 2013, para. 2).

[3] 4A_282/2013 of 13 November 2013, para. 5.3.2 : « **Qu'elle émanât du président de la Chambre arbitrale ordinaire plutôt que d'une Formation arbitrale** n'avait rien d'insolite, étant donné que celle-ci n'était pas encore constituée; cela n'empêchait pas qu'il s'agissait bien d'une décision susceptible de recours au Tribunal fédéral (arrêt 4A_600/2008 du 20 février 2009 consid. 2.3 et l'arrêt cité). Il est vrai, toutefois, que, selon la jurisprudence, les décisions prises par le CIAS sur demandes de récusation ne peuvent pas être attaquées directement devant le Tribunal fédéral par un recours en matière civile fondé sur l'art. 190 al. 2 let. a LDIP (arrêt 4A_644/2009 du 13 avril 2010 consid. 1 et les références). Il pourrait donc y avoir quelque incohérence à ouvrir un tel recours contre une décision prise en cours de procédure par **un autre organe de l'institution d'arbitrage -en l'occurrence, le président de la Chambre arbitrale ordinaire** - et qui intéresse, elle aussi, la composition de la Formation arbitrale, sauf à revenir sur la jurisprudence précitée, comme le préconise une partie de la doctrine par souci d'économie de la procédure et pour préserver la logique du système mis en place par le législateur (cf. BERTI/SCHNYDER, op. cit., n° 29 ad art. 190 LDIP; Anton HEINI, in Zürcher Kommentar zum IPRG, 2e éd. 2004, n° 20a ad art. 190 LDIP). »

> Le CIAS est une fondation de droit privé soumise au droit suisse (ATF 129 III 445 consid. 3.3.1 p. 451). En vertu des art. S6 ch. 4 et R34 du Code de l'arbitrage en matière de sport, la récusation d'un arbitre est de la compétence exclusive de cet organisme privé qui peut exercer cette fonction par l'intermédiaire de son Bureau. Conformément à la jurisprudence précitée, les décisions prises par le CIAS sur demandes de récusation ne peuvent donc pas être attaquées directement devant le Tribunal fédéral. Elles ne pourront être revues que dans le cadre d'un recours dirigé contre la sentence, motif pris de la composition irrégulière du tribunal arbitral (art. 190 al. 2 let. a LDIP). »[4]

The Court actually refers to the above cited decision when pointing to the inconsistency in its own case law. The Court further refers to BERTI/SCHNYDER in the second edition of the Basler Kommentar IPRG (Art. 190, para. 29). These authors advocate that, for reasons of procedural efficiency, decisions by private arbitration institutions regarding the composition of the arbitral tribunal should be open to a direct challenge. This is arguable and, in certain instances, even desirable, but it is not supported by the standing case law of the Supreme Court. Incidentally, in the third edition of the Basler Kommentar IPRG (2013), the new author covering Art. 190 (Stefanie PFISTERER) approves the absence of any direct recourse against decisions issued by a private body that is not an arbitral tribunal (Art. 190, para. 30 f.)

Essential questions therefore remain: should an institution's decisions in relation with the composition of the arbitral tribunal be open to a direct challenge before the Supreme Court? Would the Supreme Court envisage applying Art. 190(2) PIL Act to decisions issued by bodies other than arbitral tribunals? Or is the Supreme Court, to the contrary, now inclined to reverse the approach in two earlier cases in which it had admitted a direct challenge?

The two cases referred to by the Supreme Court[5] in fact appear to be isolated and do not elaborate in depth on the reasons why a decision by an ICAS body should be subject to a direct challenge. Instead, both judgments focus on the nature of the decisions, rather than on the entity that had issued them.

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4 Decision 4A_644/2009 of 13 April 2010, ASA Bull. 1/2011, p. 107.

5 Decision 4A_600/2008 of 20 Februar 2009, ASA Bull. 3/2009, p. 568, which refers to Decision 4A_126/2008, ASA Bull. 3/2008, p. 596.

In the first case, the Supreme Court analysed a letter in which the Secretary General of the CAS had informed an appellant that its appeal against a FIFA Dispute Resolution Chamber decision was formally flawed and had not been corrected within the time limit that the CAS had set to this end. Consequently, the appeal was deemed to have been withdrawn. The Court found that this letter was a decision that could have been challenged directly before the Supreme Court.[6]

In the second case, the Deputy President of the CAS Appeals Arbitration Division had applied Rule 64(2) of the CAS Code according to which an appeal is deemed to be withdrawn in case of failure by the appellant to pay the full cost advance in a timely manner.[7] In the proceedings before the Supreme Court, the CAS remarked that the Deputy President of the CAS Appeals Arbitration Division was not an arbitral tribunal. Yet, the Supreme Court considered that the Deputy President's decision could be challenged, as the arbitral tribunal had not yet been constituted and given that the decision was tantamount to a final decision on admissibility ("*recevabilité*"):

> « 2.3 Dans sa réponse au recours, le TAS fait valoir que la décision attaquée n'est pas une sentence arbitrale, en ce sens qu'elle n'a pas été prise par une Formation arbitrale mais par le Président suppléant de la Chambre arbitrale d'appel, lequel est un membre du Conseil International de l'Arbitrage en matière de Sport (CIAS) que cet organisme élit pour remplacer le Président en cas d'empêchement (art. S6.2 du Code) et remplir les fonctions qui sont dévolues à celui-ci, telle la constitution de la Formation (art. R52 du Code).
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> A ne considérer que son intitulé (Order), la décision attaquée pourrait être une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance; comme telle, elle ne pourrait pas être déférée au Tribunal fédéral (cf. ATF 122 III 492 consid. 1b/bb). Toutefois, pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du prononcé entrepris, mais le contenu de celui-ci. De ce point de vue, il n'est pas douteux que, dans sa décision, le TAS ne s'est pas borné à fixer la suite de la procédure. Il y constate que l'avance de frais requise n'a pas été faite dans le délai fixé à cet effet et en tire la conséquence que prévoit l'art. R64.2 du Code, c'est-à-dire la fiction irréfragable du retrait de l'appel. Son prononcé s'apparente

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6 4A_126/2008 of 9 May 2008, ASA Bull. 3/2008, p. 596.

7 4A_600/2008 of 20 February 2009, ASA Bull. 3/2009, p. 568.

> à une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Qu'il émane du Président suppléant de la Chambre arbitrale d'appel plutôt que d'une Formation arbitrale, laquelle n'était du reste pas encore constituée, n'empêche pas qu'il s'agit bien d'une décision susceptible de recours au Tribunal fédéral (dans ce sens, cf. l'arrêt 4A_126/2008 du 9 mai 2008 consid. 1)."[8]

Both **decisions of the Supreme Court accepting a direct challenge of decisions issued by administrative bodies as if they were arbitral awards appear to amalgamate two distinct criteria** that every decision must meet in order to be eligible for a challenge before the Supreme Court. First, it must be issued by an arbitral tribunal. Second, it must be an award, rather than a simple procedural order or a direction. The decision has to put an end to the proceedings or resolve a claim in a final manner. These prerequisites are however cumulative.

A decision that puts an end to a dispute or a claim does not become an award unless it is issued by an arbitral tribunal. In these two decisions, the Supreme Court admitted (rightly it would seem) that the decision, in its result, was functionally equivalent to an award in that it put an end to the dispute. The Court indeed applies a similar approach when it is called to determine whether an arbitral tribunal's procedural directions are open to direct challenge. What matters is the content, not the title or form of the decision. Thus, the Supreme Court has allowed the challenge to a procedural order for the stay of an arbitration where the order did not merely contain directions for the further course of the arbitration, but included a decision regarding the arbitral tribunal's subject-matter jurisdiction.[9]

However, **even if a decision is functionally equivalent to an award, it remains necessary to determine whether the other requirement is met, i.e., whether it is made by an arbitral tribunal** or by an administrative body. If the latter, there is no recourse to the Supreme Court, even if de facto the decision puts an end to the relevant arbitration, although in most instances the party concerned will still be able to introduce the claim in a new arbitration (as the case may be before

[8] 4A_600/2008 of 20 February 2009, ASA Bull. 3/2009, p. 568.

[9] See, inter alia, Decision 4A_210/2008 of 29 October 2008, ASA Bull. 2/2009, p. 309, consid 2.1; Decision 4A_370/2007 of 21 February 2008, ASA Bull. 2/2008, p. 334; Decision 4A_614/2010 of 6 April 2011, ASA Bull. 1/2013, p. 71; Decision 4A_428/2011 of 13 February 2012, ASA Bull. 2/2012, p. 431; Decision 4A_582/2009 of 13 April 2010, ASA Bull. 3/2010, p. 598; Decision 4A_210/2008 of 29 October 2008, ASA Bull. 2/2009, p. 309, consid 2.1, referring to Decision 4A_370/2007 of 21 February 2008, ASA Bull. 2/2008, p. 334.

arbitrators appointed by the *juge d'appui* at the place of arbitration) or to refer the dispute to a competent state court.

Thus, there is no recourse to the Supreme Court against a decision of the ICC Court not to put the arbitration in motion for want of an applicable arbitration agreement (Art. 6(4) ICC Rules), or to consider a claim to be withdrawn in the absence of full payment of the relevant cost advances (Art. 36(6) ICC Rules), or against a decision of the Arbitration Court of the Swiss Chambers' Arbitration Institution not to administer a case in application of Art. 3(12) of the Swiss Rules. Why should CAS/ICAS bodies be treated any differently? On any view, a clarification of the Supreme Court's approach with regard to decisions issued by bodies other than arbitral tribunals would be most welcome by practitioners.