

CONSTITUTIONAL COURT'S AWARD NO. 230/2013

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The Portuguese Supreme Court rendered an award, on April 24th 2013, considering that the impossibility to appeal on the Court of Arbitration for Sport's decisions within compulsory arbitration constitutes a breach of the right of access to the courts and the right of effective jurisdictional review.

The Portuguese Constitutional Court was requested to preventively appreciate the constitutionality of article 8(1) of the annex to the Decree no. 128/XII when jointly applied with articles 4 and 5 of the same document.

This Decree no. 128/XII and respective annex, at this stage still a law project, envisages the creation of a Court of Arbitration for Sport ("CAS") with exclusive jurisdiction over disputes within the sporting legal system or related with sports' practice.

Article 8(1), subject to the requested constitutional analysis, establishes that the decisions rendered by the CAS are not subject to appeal and articles 4 and 5 determine the exclusive jurisdiction of the CAS for sport related disputes, including the ones arising from actions and omissions of the sporting federations, professional leagues and other sporting entities, as well as for the appeals of the decisions rendered by the disciplinary bodies of the federations and the Portuguese Anti-Doping Authority.

According to the motivation of this law project, the creation of the CAS is justified by the necessity of providing sport with a fast and specialized alternative dispute resolution mechanism. In pursuing this goal, the law project envisages to establish a self-regulating system for the sport's justice through a jurisdictional independent entity with exclusive competences, falling outside the state's jurisdictional system. This proposal seems to impose a private jurisdiction model similar to the one used by international entities, notably the ones governing professional football.

The Constitutional Court analysed the interests which the law project intends to protect and promote and confronted them with the constitutional interests which may potentially be harmed by its enactment (i.e. the CAS exclusive and final jurisdiction), and decided to declare unconstitutional article 8(1) in conjunction with articles 4 and 5 of the law project, insofar as it implies the impossibility to appeal to state courts of the CAS' decisions rendered under its compulsory arbitration jurisdiction.

The Constitutional Court stated that the intended exclusive jurisdiction arising from compulsory arbitration breaches the parties' constitutional right of access to the courts and the right of effective jurisdictional review, respectively foreseen on articles 20(1) and 268(4) of the Portuguese Constitution, a jurisdictional review.

The Constitutional Court further considered that the CAS could not guarantee its impartiality and independence. In effect, among other considerations, the Court stated that the manner in which the pre-determined list of CAS arbitrators was established did not guarantee their independence and impartiality, on the contrary, since the CAS arbitrators appointment was made by the sporting federations, professional leagues and other sporting entities, the same who, in all likelihood, would become parties to the proceedings under the exclusive jurisdiction of the CAS.

We believe the Constitutional award achieved a very positive outcome, since it led to the veto of the whole law project, which we believe comprised some serious irregularities and additional challenges to Portuguese arbitration. However, we hope that the Constitutional Court, in its eagerness to prevent a full autonomy of the sporting justice, particularly one without guarantees of independence and impartiality, did not end up *“throwing out the baby with the bathwater”*.

The Constitutional Court's position has been (ever since 1986) that the arbitral tribunals also exercise the jurisdictional mission foreseen on articles 202 and 209(2) of the Constitution, and may do so definitively, i.e. without being subject to a judicial appeal. We hope this understanding is not compromised by a less clear wording on this award – in effect this concern was already mentioned by two Constitutional Judges on their declarations of vote, both having stressed and confirmed the jurisdictional nature of the arbitral tribunals.

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