

ADMISSIBILITY OF ILLEGALLY PROCURED EVIDENCE IN CAS PROCEEDINGS - SOME COMMENTS TO THE ADAMU DECISION

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Basic principles of admissibility of evidence: In Swiss civil proceedings the principle applies that legality may not be enforced by way of illegality. Art. 152 para. 2 of the Code on civil procedure (CP) provides that illegally procured evidence is only admissible in civil proceedings if the interest in truth-finding prevails. This provision is to be applied *ex officio*. The procurement of evidence is illegal if it infringes a legally protected interest (*Rechtsgut*), without there being any justifying reasons. It is in this respect irrelevant whether the evidence was procured by the party using the evidence in the particular court proceeding in question or by any third party.

A video recording constitutes a certificate in the sense of art. 177 CP and is, therefore, in general considered admissible evidence. However, if in a given case the video was recorded without the consent of the person concerned such person's personality rights protected by arts. 179^{ter} and 179^{quater} of the Swiss Criminal Code (CC) would be infringed. Arts. 179^{ter} and 179^{quater} of the CC stipulate criminal sanctions and prohibit the unauthorised recording of conversations and the violation of secrecy and privacy by way of recording devices. Lacking any justifying circumstances, such video recording would be deemed to be procured illegally. If the potentially violating act had been committed abroad one would have to assess whether such act would be illegal under the laws of the jurisdiction concerned too.

When assessing the admissibility of illegally procured evidence, a court must weigh the interest in protecting the legally protected interest that was infringed by the procurement of the evidence against the interest in the truth-finding. The interest in the truth-finding depends on what principle governs the proceeding and the amount in dispute. If the proceeding is governed by the principle of judicial investigation (*Offizialmaxime*), the interest in the truth-finding has a higher significance than in proceedings governed by the principle of party presentation (*Verhandlungsmaxime*), i.e. where the parties need to present the court with the facts of the case as opposed to the court investigating such facts *ex officio*. In civil case procedures the proceeding is usually (with certain exceptions) not governed by the principle of judicial investigation, as a result of which the interest in the truth-finding must be deemed lower. On the other hand, attention must be paid to the fact that the higher the amount in dispute, the higher the interest in truth-finding. If the amount in dispute must be deemed high then this fact would support a higher evaluation of the interest in truth-finding.

The interest in protecting the legally protected interest (*Schutzinteresse des Rechtsguts*) is assessed based on the rank of the legally protected interest infringed, the intensity of the infringement and the possible duty to cooperate on the part of the party whose legally protected interest was infringed. In this respect, the physical and mental integrity are, as a rule, of higher import than material values such as property.

Application of these principles in CAS proceedings: CAS enacted separate procedural rules in its Code of Sports-related Arbitration. These apply in sports related disputes submitted to CAS (Rule 27 CAS Code). Rule 44 CAS Code regulates the proceeding before CAS, however no provisions on the admissibility of illegally procured evidence are made, notwithstanding that the question of admissibility of illegally procured evidence also applies in arbitral proceedings. Art. 152 para. 2 CP is, thus, not directly applicable in proceedings before CAS. Even in domestic arbitration, where the CP is generally of

relevance, the general provisions of the CP do not apply directly, unless the parties have explicitly agreed so. The Swiss Private International Law Act (PILA) that applies to international arbitration proceedings in Switzerland does equally not contain any provisions on admissibility of illegally procured evidence (see arts. 182 et seq. PILA). Thus, also in international arbitration proceedings the parties would need to explicitly agree on an analogous application of the CP in order for art. 152 para. 2 CP to apply. However, the right to a fair proceeding does generally apply also in arbitral proceedings. Pursuant to the Swiss Federal Supreme Court, the right to a fair proceeding is derived from art. 29 para. 1 of the Swiss Constitution and art. 6 no. 1 of the European Convention on Human Rights (ECHR). The inadmissibility of illegally procured evidence constitutes part of a fair proceeding. Based on scholarly writing it is appropriate that arbitral tribunals in Switzerland apply the principle developed in criminal law, according to which illegally procured evidence is only admissible if the interests in truth-finding prevail of those of the legally protected interests infringed (which also applies based on the CP). Partly, scholarly writing also advances that international public policy would establish a barrier to the admissibility of illegally procured evidence (see also art. 9 IBA Rules of Evidence).

The Adamu-Decision of CAS: In this case CAS has extensively dealt with the question of admissibility of evidence before CAS in its award *CAS 2011/A/2426* of 24 February 2012. In this case, English journalists had offered money to a member of the FIFA executive committee, Amos Adamu, to buy his vote in connection with the awarding of the 2018 FIFA World Cup. The journalists secretly recorded Mr. Adamu when he accepted the money. Three journalists provided the video to FIFA, which imposed disciplinary sanctions against Mr. Adamu.

In its award CAS first clarified in connection with the admissibility of the video as evidence that sanctions imposed by sporting associations in disciplinary proceedings are a matter of civil law and not of criminal law. If disciplinary sanctions are imposed by a sports association as opposed to by a State, CAS held the ECHR not to be applicable *per se*. However, certain guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR were nevertheless held to be indirectly applicable even before an arbitral tribunal, because Switzerland would have to ensure that its judges, when reviewing a CAS award (upon appeal or at the stage of enforcement), would verify that parties to an arbitration are guaranteed a fair, independent and impartial proceeding. The procedural principles of art. 6 no. 1 ECHR would form part of Swiss public policy and CAS would therefore have to adhere to the fundamental principles of a fair proceeding and all facets of Swiss procedural public policy. CAS further held that pursuant to the general duties of good faith and respect for the arbitral process a party to an arbitration was not permitted to cheat the other party and illegally obtain evidence. Should that happen, the evidentiary materials thus obtained could be deemed inadmissible by the arbitral tribunal. In the particular case before CAS, FIFA had, however, not violated its duties of good faith, because it had not prompted or supported the English journalists to illegally record the conversation. Moreover, according to CAS there was a significant public interests to uncover corruption in connection with such an important sports event as the 2018 FIFA World Cup. According to CAS the fact that Mr. Adamu had even one year later not filed suit against the journalists spoke furthermore against the argument that the recording was illegally procured.

CAS further held that the illegal procurement of evidence would not *per se* exclude admissibility thereof in an arbitral proceeding. With reference to the Valverde case (TAS 2009/A/1879) CAS reiterated its view that it would not be bound by the procedural rules of the Swiss civil and criminal courts. Pursuant to the Swiss Federal Supreme Court admissibility of illegally procured evidence would depend on various circumstances, e.g. the nature of the infringement, the interest in truth-finding, the evidentiary difficulties for the interested party and the possibility to obtain the (same) evidence in a

lawful manner. These principles are stipulated in art. 152 para. 2 CP. These principles would, however, apply to CAS solely as a source of inspiration, because CAS would not be bound by the rules of evidence applicable before State courts. Swiss public policy would only be violated if the decision would be incompatible with the sentiment of justice, to the effect that the decision would be incompatible with the values recognized in a State governed by the rule of law.

On this basis CAS concluded that pursuant to art. 182 para. 1 PILA the parties had declared the FIFA rules applicable. Pursuant thereto, evidence would not be admitted in case human dignity would be violated. Given that Mr. Adamu had not been threatened and no force had been applied, his human dignity had not been violated as a result of which the videos were held to be admissible (para. 79 et seq.). Lastly, CAS pointed out that there was no violation of personality in the sense of art. 28 of the Swiss Civil Code given that in the particular case at bar the public interests vis-à-vis the private interests of Mr. Adamu prevailed.

Comments: As CAS has confirmed disciplinary proceedings must indirectly adhere to the procedural guarantees set out in art. 6 no. 1 ECHR. It follows from the right to a fair proceeding and the duties of good faith stipulated by art. 6 no. 1 ECHR that illegally procured evidence may only be admitted if the interests in the truth-finding prevail over those of the legally protected interests infringed. Under the circumstances of the Adamu case CAS has weighed the interest in favour of truth-finding. However, we believe that in other cases a secretly recorded video may well lead to an infringement of personality rights which is of such high intensity that it will make the video inadmissible for purposes of evidence. We believe that admissibility of such kind of video recordings will very much depend on the particularities of each and every case and that under different conditions a video taken without the knowledge of the person concerned may not be admissible, such as e.g. in cases where there would have been other means to prove the relevant fact and/or where the person concerned may have been coerced or deceived to make a certain confession in front of the (hidden) video. In other words, in other cases there may be a number of good arguments to advance that the admission of a video before CAS (or before another competent arbitration or state court) would violate the fundamental principle of fairness in the sense of art. 6 no. 1 ECHR which must be weighed higher than the interest in truth-finding.