« Resolutions by acclaim » in general assemblies of sports associations ?

by

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I. General rules regarding the resolution-making of the general assembly

Sports associations or federations, which have national federations as their members and which are domiciled in Switzerland, are associations within the meaning of Art. 60 – 79 CC. Within each organisation, the general assembly is the supreme corporate body of the association (Art. 64 CC). The general assembly drafts and adopts the statutes, including the allocation of powers (Art. 65 CC). The general assembly has the power to increase its own powers at will (Art. 65 CC) or to assign powers to the executive body and other bodies. The general assembly elects the committee and other bodies of the association. The rules regarding decision-making and elections in the general assembly are paramount to the function of the general assembly as the supreme body of the association and thus a major aspect of the association governance. These rules are intended to ensure that all members can exercise their membership rights properly and that the decision-making and the elections within the association are free of undue influences. In this respect, regard must also be had to Art. 75 CC. This article allows challenges to resolutions of the general assembly in court if such resolutions « infringe the law or the articles of association ». A certain formality and unambiguousness in the procedure of elections and decision-making is also necessarily required ; a member must be easily able to identify and determine whether a resolution of the general assembly is one which can be challenged in court.

The legal rules concerning this supreme body of the association are found in Art. 64 – 68 CC. These are very general and contain only a few formal rules such as the notice rules in Art. 67 par. 3 CC, the rules regarding conflicts of interests in Art. 68 CC and Art. 66 CC, which allows for written resolutions, where all members agree. As to the conduct of the assembly and the voting procedure, the code is equally very general. According to Art. 67 par. 1 CC « all members have equal voting rights at the general assembly » and according to par. 2 of the same rule « resolutions require a majority of the votes of the members present ».

So, what do the sentences « all members have equal voting rights at the general assembly » and « resolutions require a majority of the votes of the members present » mean and which procedural rules have to be applied to the general assembly ? In particular : are informal decision-making procedures, such as voting by acclaim possible ? In the first part, we will look at the rules which ensure the correct resolution-taking and elections at the assembly. These rules cover the proper notice rules and the rules regarding the voting procedure. In the second part, we will look at the legal consequences if formal decision-making rules are violated, whether such resolutions would have to be challenged in court according to Art. 75 CC or if they are null and void.

II. Rules regarding the taking of resolutions

A. Proper Notice

Art. 67 par. 3 CC provides : « Resolutions may be taken on matters for which proper notice has not been given only where this is expressly permitted by the statutes ». The rule that there must either be a proper notice or that such vote must be expressly permitted in the statutes is a mandatory rule[1].

The requirement of the « proper notice » is necessary to enable the members of the association to prepare themselves for the general assembly and also to decide whether they want to attend and participate in the resolution-making of the association : « *[F]erner gehört zum Stimm- und Wahlrecht auch das Recht zum Entscheid darüber, ob die Teilnahme an* der *Versammlung überhaupt erforderlich sei, d.h. ob das Stimm- und Wahlrecht im Einzelfall überhaupt ausgeübt werden solle oder nicht. Da all dies nur möglich ist, wenn das einzelne Vereinsmitglied im voraus weiss, worüber in einer bestimmten Versammlung entschieden werden soll, statuiert das Gesetz eine Pflicht des Vereins zu gehöriger Ankündigung der diesbezüglichen « Gegenstände », d.h. Traktanden* »[2].

The « proper notice » is a fundamental procedural condition for decision-making by the general assembly. The rules regarding « proper notice » allow only one exception, which is that proper notice is not needed « where this is expressly permitted by the statutes » (Art. 67 par. 3 CC). The term « expressly » shows that an implicit reference is not

1 HEINI ANTON/SCHERRER URS, Basler Kommentar, Zivilgesetzbuch I, Art. 1 – 456 ZGB, Honsell Heinrich et al. (Hrsg.), 4. Aufl., Basel 2010, Art. 67 N 19 : « [...] bei Einschränkungen erlaubt das Gesetz indessen nur eine Abweichungsmöglichkeit von der grundlegenden Ankündigungspflicht, nämlich wenn die Statuten es *ausdrücklich* gestatten. » ; RIEMER HANS MICHAEL, Berner Kommentar, Schweizerisches Zivilgesetzbuch, Das Personenrecht, 3. Abteilung, Die juristischen Personen, Zweiter Teilband, Die Vereine, Systematischer Teil und Kommentar zu Art. 60 – 79 ZGB, Bern 1990, Art. 67 N 74.

2 BK-RIEMER, *supra n. [1]*, Art. 67 N 73 ; see also BSK ZGB I-HEINI/SCHERRER, *supra n. [1]*, Art. 67 N 23.

enough. The correct decision-making procedure of the association requires that the members be made aware of upcoming votes by either a proper notice or by a clear and express norm in the statutes[3].

Both the statutory rules and the notice must be of such nature that they allow the member to decide if s/he wants to attend the general assembly. The rules are intended to prevent ambush-motions, which come unexpectedly. All members must be able to decide informed on whether they want to participate in the resolution-making process and must have the opportunity to prepare.

The notice rule also applies to adjournments. If a vote is adjourned, the members must be informed on the agenda item under which the vote would take place. If no precise timing is announced, for example by announcing that the agenda item will be discussed « later », the adjournment is defective for notice purposes as the members are not in a position to know when, if at all, the item would be brought before the general assembly. An undefined postponement is not a valid rescheduling.

Furthermore, in accordance with the general rules, the adjournment of certain points in the agenda, must be for valid reasons and may not be made arbitrarily[4].

B. Proper Conduct of the Assembly

1. General remarks, applicable rules

Apart from the sentence : « Resolutions require a majority of the votes of the members present » in Art. 67 par. 2 CC and the notice rules in Art. 67 par. 3 CC the Civil Code contains no rules on the conduct of the assembly and on how the voting procedure has to be conducted. A reason for this absence is the strong reference in association law to the principle of democracy. This principle can be seen in two ways : first the Civil Code refers to it explicitly in Art. 67 par. 1 CC (« All members have equal voting rights at the general assembly ») and second, by recalling the democratic environment in Switzerland when the association law was codified as a federal law in 1912. For this reason, the rules

3 BK-RIEMER, *supra n. [1]*, Art. 67 N 74 : Moreover, in order to be effective any express provision of the statutes allowing some specific decision to be taken without being noticed on the agenda must also clearly state who (a member of the board, any individual member, etc.) may introduce such item not noticed on the agenda ; see also BSK ZGB I-HEINI/SCHERRER, *supra n. [1]*, Art. 67 N 18 – 25.

4 BÖCKLI PETER, Schweizer Aktienrecht, 4. Aufl., Zürich 2009, § 12 N 100b ; DUBS DIETER, Das Traktandierungsbegehren im Aktienrecht, Zürich 2008, N 203.

regarding the taking of resolutions which are applicable for example to town-meetings or other public democratic institutions can be applied to the general assembly by analogy[5].

Even if the topic of the resolution is properly notified, the participants of the general assembly have to be made aware, that a resolution will be taken. « *Vor der Abstimmung verschafft sich der Vorsitzende eine Übersicht über die Anträge und schlägt die Reihenfolge, nach denen er abstimmen lassen will, vor* »[6]. The election procedure is a formal procedure. The chairperson must announce that a vote will take place ; this is so all members are aware of the planned vote and can (for example) request a secret vote if they object to an open vote : « *Ohne anderslautende Statutenbestimmungen werden Wahlen und Abstimmungen offen durchgeführt. Meist wird diese durch Handaufheben oder durch Aufstehen erfolgen. Ein Ordnungsantrag auf Durchführung einer geheimen Wahl oder geheimen Abstimmung mit Stimmzetteln kann aber jederzeit gestellt werden* »[7]. Some members might not always be in the assembly-room at the time and therefore the announcement of the vote should be made at some point beforehand, so that everybody can prepare for the vote[8]. This is especially the case if the voting follows lengthy discussions.

2. *Voting « by acclaim » ?*

Oftentimes, especially in smaller associations, the resolutions are not taken by a formal counting of votes, but « by acclaim ». A vote « by acclaim » means that instead of voting formally the members signal their consent indirectly, usually by applause (hence the term « by acclaim »).

This practice raises the question, whether such voting by acclaim is permitted under Swiss law and if it can replace formal resolution-taking ? If we analyze this « voting by acclaim »-practice in depth, we see that the so-called « voting by acclaim » is in fact not a form of voting, but only a form of acknowledging unanimity. It can only replace a formal voting process, for example in an election, if there is only one candidate and there is no necessity to formally elect such candidate or if all members are unanimous. A vote « by acclaim » cannot replace an election : « *Es finden keine eigentlichen Wahlen statt ; stattdessen werden die Richter [...] nur zur Akklamation vorgeschlagen* »[9].

5 BSK ZGB I-Heini/Scherrer, *supra n. [1]*, Art. 66 N 10.

6 Scherrer Urs, Wie gründe und leite ich einen Verein ?, 12. Aufl., Zürich 2009, N 73.

7 *Id.*, N 86.

8 BK-Riemer, *supra n. [1]*, Art. 65 N 28.

9 Livschitz Mark M., Die Richterwahl im Kanton Zürich, Diss. Zürich 2002, p. 255 (« there are no real elections, instead the judges are only nominated for acclaim »).

Acclaim is in conclusion not a form of voting in a democratic organization, but a reference to the absence of a democratic vote, which is permissible, if there is only one candidate or if all members are unanimous.

An acclaim is therefore only relevant, when it takes place in the context of a proper election or voting procedure and if unanimity is given. To argue for example, that applause after the presentation of names of candidates can be an election by acclaim is certainly wrong. « Voting by acclaim » thus works the same way as « normal » voting ; the only difference is that there is no counting of votes, because everybody agrees. Usually the president asks the assembly if anyone objects to a vote by acclaim. If somebody objects, a formal election has to take place, secret or open, depending on the rules set up within the association. This is also true, if no other objections are raised and if it is clear that a vast majority of the members consent. The reason for this is not only to ensure that all members can exercise their membership-rights properly but also to ensure unambiguousness, which is necessary corollary to right to challenge a resolution in court found in Art. 75 CC[10].

3. *Consent by silence ?*

The democratic principle requires that procedural rules are adhered to and that minorities can make their point in an effort to convince the potential majority of their ideas. The consent of each member to a specific decision can therefore only be assumed, if all members had the opportunity to signify their approval expressly through a legal and statutory procedure. For this reason, silence among the members after the question by the chairperson, « if anyone objects » can only be construed as unanimity if it is clearly beyond doubt that all members are aware, that their silence will have this effect. Therefore, it is necessary that the chairperson not only asks in this situation, whether « anyone objects », but also, that members are informed of the consequences of their silence and that any objection, even if only from one member, would necessitate a formal vote.

4. *Ambiguous situations*

According to Art. 75 CC each member has the right to challenge the resolution of the general assembly within one month of learning thereof. If, for example, the chairperson does not conduct a formal vote, but assumes an agreement by « acclaim » or another form of tacit approval, it is often unclear, whether there is a resolution of the

10 See *infra* II.B.4.

assembly (the voting by « acclaim » ; which would trigger the one month period of Art. 75 CC) or if instead it is a decision by the chairperson (that a formal vote would not be necessary) ; the latter of which would have to be challenged internally within the association before going to court.

The wording in Art. 75 CC « Any member who has not consented to a resolution [...] » also shows, that informal resolution-taking, such as votes by acclaim are only permissible, if all members agree to this informal procedure. If such informal procedures were permissible even in the face of minority disagreement, the right of the minority to challenge such resolutions would be frustrated. They would not know if they have to challenge a decision of the chairperson (internally within the association) or whether they would have to go to court, which in sports often means that they have to initiate a CAS-procedure. The right to challenge resolutions of the assembly thus requires formally correct and unambiguous situations.

III. Nullity or voidability

A. General remarks

If a resolution by the general assembly violates procedural or substantive law, the resolution is either « voidable » or « null and void ». The difference between « voidable » and « null and void » refers to the rule of Art. 75 CC, which entitles any member « to legally challenge, within a month of the day of which he had notice of it, the decisions which [...] are contrary to law or the statutes of the association »[11]. If the resolution is null and void, its nullity can be raised at any time, even if the one-month period of Art. 75 CC has lapsed : « *Die zentrale Bedeutung der fraglichen Unterscheidung liegt darin, dass anfechtbare Beschlüsse nach Ablauf der einmonatigen Anfechtungsfrist für den Verein und seine Mitglieder verbindlich sind bzw. der Mangel "geheilt" ist, während bei nichtigen Beschlüssen dieser Rechtsmangel auch noch später geltend gemacht werden kann* »[12].

A resolution of the general assembly is null and void, if it is afflicted with a severe deficiency, both procedural or substantive : « *Auf Nichtigkeit ist indessen zu erkennen, wenn ein Beschluss mit schwerwiegenden Mängeln behaftet ist, sei es in formeller oder materieller Hinsicht* »[13].

11 See referring to the voidability of the resolution BSK ZGB I-HEINI/SCHERRER, *supra n. [1]*, Art. 75 N 22 ; also BK-RIEMER, *supra n. [1]*, Art. 75 N 62.

12 BK-RIEMER, *supra n. [1]*, Art. 75 N 62.

13 HEINI ANTON/PORTMANN WOLFGANG/SEEMANN MATTHIAS, Grundriss des Vereinsrechts, aufgrund des 2005 erschienenen Werks : Das Schweizerische Vereinsrecht, Basel 2009, N 230.

The one-month period of Art. 75 CC is rather short. In Swiss domestic situations, which the legislator had in mind in 1912 when the norm was issued, the period is sufficient as the deadline is often easily met without great expense by a simple request for a settlement meeting ; the typical form of dispute resolution in this situation. In relation to international sports associations, however, the one-month-term is very short, when one considers that the resolution may have to be challenged at the CAS, and that the member (claimant) must also determine whether it wants to take the financial risk of such a procedure.

B. Violation of proper notice rules

It is generally accepted that the most severe deficiencies are those affecting the decision-making ability of the association. In these cases, particularly, if some members are not invited to or barred from participating in the assembly, the resolution is null and void. The same applies if the executive body withholds information which is necessary for members to exercise their voting rights effectively[14].

It has been shown that the correct decision-making of the association requires that the members are made aware of upcoming votes by either a proper notice or by a clear and express norm in the statutes[15]. Whether the members are not invited, or barred from participating, or whether a resolution takes place which has not been notified at all or which is not foreseen by an express norm in the statutes, the effect is the same : the resolution is null and void[16]. It cannot make a difference whether the member is barred by physical force from attending the assembly or whether she/he is deceived, for example led to believe no or no more elections would take place or that no more resolutions would be presented for voting.

C. « Non-Resolutions » ?

It has been shown, that informal forms of resolutions, especially votes by « acclaim » are only relevant, if they take place in the context of a proper election or voting procedure and if unanimity is given. If this is not the case, there is no resolution at all ; we may refer to these as « non-resolutions ». « Non-resolutions » are by definition « null and void » and not « voidable », they are not « resolutions » which would have to be challenged

14 HEINI/PORTMANN/SEEMANN, *supra n. [13]*, N 231 ; BSK ZGB I-HEINI/SCHERRER, *supra n. [1]*, Art. 75 N 36.

15 BK-RIEMER, *supra n. [1]*, Art. 67 N 73.

16 *Id.*, Art. 75 N 96.

in court. This is for example the case, if the resolution is not made by a formal general assembly, but by an informal meeting of members[17].

If we have an ambiguous situation[18] where it is unclear, whether there is a resolution of the assembly (which would trigger the one month period of Art. 75 CC) or a decision by the chairperson, which would have to be challenged internally, we have to assume nullity, not voidability. It cannot be that a member has to bear the risks arising from ambiguous situations for which that member was not responsible. This is especially true in international sports federations, which have access to legal counsel regarding the conduct of the assembly and where a preventive challenge in court or at the CAS would be costly and time-consuming.

The rules which assume nullity if proper notice requirements are violated, also have the function of controlling the executive body of the association by creating a strong incentive to adhere to these formal rules[19]. Nullity is also a sanction. The same is true in relation to « non-resolutions ». Here too, the consequence of nullity has the function to assure compliance with formal rules on resolution-taking ; including the avoidance of ambiguous situations which factually deprive the members of their right to challenge a resolution, since they cannot determine, if they have to challenge a decision of the chairperson (internally) or whether they would have to go to court.

D. Further Issues

1. Only voidable if there doubt about nullity ?

Since nullity is a stricter sanction than simply rendering the resolution voidable, it could be argued that if there is any doubt as to whether a decision is to be considered as capable of being challenged or as null and void, the former should be preferred. It is true that the threshold to assume nullity is higher than the threshold to assume that a decision is capable of being challenged. It is the logic of this statement that if the threshold to assume nullity is not met, the decision is capable of being challenged. But if, on balance, the decision-maker finds that the threshold for nullity is met, it is not correct to assume that the decision is only challengeable, only because the decision-maker is only 99% (and not 100%) sure about nullity.

17 BSK ZGB I-HEINI/SCHERRER, *supra n. [1]*, Art. 75 N 36.

18 See *supra* II.B.4.

19 HEINI/PORTMANN/SEEMANN, *supra n. [13]*, N 214 – 216 ; regarding limited companies MEIER-HAYOZ ARTHUR/FORSTMOSER PETER, Schweizerisches Gesellschaftsrecht, 10. Aufl., Bern 2007, § 16 N 183.

2. Claiming nullity as acting against good faith ?

Often, the members which are present at the assembly realise that procedural rules are not met, but decide to remain silent, for various reasons. First, in the case of mandatory rules, the principle of *venire contra factum proprium* is not applicable : it is not acting against good faith, if somebody later asserts that a certain clause in an agreement is null and void even if that person previously signed the agreement[20]. If for example the alleged decision of the general assembly is null and void for non-compliance with Article 67 para. 3 CC, which is a mandatory rule, the principle of *venire contra factum proprium* is not applicable.

Second, the previous behavior must be clear, to make the principle of *venire contra factum proprium* relevant. If a member has not explicitly expressed his/her [dis]approval of the decision taken (but has perhaps simply remained silent), it cannot be concluded from this alone that she/he agrees with the decision taken by acclamation. Such a member is entitled to claim nullity ; only if no member objected when asked by the chairperson, if there was unanimity would the silence deprive a later claim of nullity. If only one member protests that the conditions for a resolution by acclaim are not met, any and each member can claim nullity, even that member remained silent at the meeting. Not to make any objections alone is not a « *factum propium* ».

Further, there needs to have been detrimental reliance by the opposing party. A customary practice within the association can only be assumed if it has been applied over many years and if such practice is acknowledged by all involved parties (*opinio necessitatis*)[21]. In any event such a customary practice cannot contradict the statutes, unless reliance on the wording of the statutes would be abusive[22].

3. Principle of Proportionality

The principle of proportionality means that a legal consequence must be reasonable, considering the competing interests of the other party. Although this is a principle of public law, it can also be applicable in private law[23]. Its application to this question would necessitate an analysis of the interests at hand and relating them to each other. If, for example, the interests of the claimant are small, but the damage which would

20 HONSELL HEINRICH, Basler Kommentar, Zivilgesetzbuch I, Art. 1 – 456 ZGB, Honsell Heinrich et al. (Hrsg.), 4. Aufl., Basel 2010, Art. 2 N 44.

21 HEINI/PORTMANN/SEEMANN, *supra n. [13]*, N 56 ; RUSCH ARNOLD, Observanz und Übung, Erwirkung und Rechtsschein, Jusletter 18. September 2006, Rz. 18.

22 HEINI/PORTMANN/SEEMANN, *supra n. [13]*, N 56.

23 BSK ZGB I-HONSELL, *supra n. [20]*, Art. 2 N 21.

occur to the association if the alleged resolution was found to be null and void would be large, the principle of proportionality would weigh the two interests and – and if the interests of the claimant are disproportionate – deny nullity.

However we must include all interests at hand in this analysis. If the nullity also serves as a sanction[24] for non-compliance with formal rules regarding the taking of resolutions, we not only relate the personal interests of the claimant to the damage of the association if nullity is assumed, but also the general interest of the law that formal rules on resolution-taking should be observed.

4. Standing

Each member or member federation has standing to ensure that an association's internal rules and regulations regarding its decision-making and internal governance are enforced and that the decision-making of the general assembly is compliant with statutory rules and the member's membership (voting-) rights are respected.

Moreover, as a matter of Swiss law standing would not be an issue if the decision is null and void. The allegation that a decision is null and void can be raised by any member at any time, even if the member has previously adhered to the decision[25]. The only limits are set in the rules regarding the « abuse of rights » ; such a situation could be assumed, if for example the person, who is responsible for the nullity (for example as then-chairperson of the general assembly) claims nullity while all other members want the resolution to stand.

5. Relation to Rule 49 of the CAS-Code

According to rule R49, Time limit for Appeal, of the CAS-Code, the « limit for appeal shall be twenty-one days from the receipt of the decision appealed against ». In a recent decision[26] the CAS has ruled that the rule R49 applies even if the decision at stake is null and void. The CAS assumes that the rule, whereby nullity can be claimed at any time, is a procedural rule, which is superseded by the arbitration rules. This conclusion is – at least – questionable. The rules on nullity are not procedural rules, but substantive law. If the CAS does not admit claims regarding nullity after more than 21 days following the null and void resolution, the questions arises, whether ordinary courts would have to step in.

24 See *supra* C and D.1.

25 HEINI/PORTMANN/SEEMANN, *supra n. [13]*, N 229 ; BK-RIEMER, *supra n. [1]*, Art. 75 N 125 – 127.

26 CAS 2011/A/2360 English Chess Federation & Georgian Chess Federation vs. FIDE

IV. Conclusion

Informal voting such as voting by acclaim in general assemblies of sports associations is in conclusion not a form of voting in an association. Rather it is a reference to the absence of a democratic vote, which is permissible, if there is only one candidate or if all members are unanimous. A « vote by acclaim » is therefore only relevant, when it takes place in the context of a proper election or voting procedure and if unanimity is given.

Silence among the members after the question by the chairperson, « if anyone objects » can only be construed as unanimity if it is clear and beyond doubt, that all members are fully aware of the effect that their silence will have. For this reason, it is also necessary, that the chairperson informs the members of the consequences of their silence and that that any objection, even if only from one member, would necessitate a formal vote.

« Resolutions by acclaim » which are not compliant with these conditions are null and void. This means that they don't have to be challenged according to Art. 75 CC. Consequently if the resolution is null and void, its nullity can be asserted at any time, even if the one-month period of Art. 75 CC has lapsed, and each member of the association has standing to commence the appropriate proceedings.