



# Bulletin TAS CAS Bulletin

Séminaire Budapest octobre 2019  
Budapest seminar October 2019



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## Editorial

This special issue of the CAS Bulletin follows the CAS seminar held in Budapest, Hungary, on 24 & 25 October 2019, attended by more than 260 CAS members.

The type of seminar held in Hungary takes place every four years and is intended for all CAS members i.e. arbitrators and mediators, in order to provide them with ongoing training and emphasize recent developments in the field of sports arbitration. In general, the program of the seminar covers current topics of interest to the CAS members such as recent developments in regulatory and case law including procedural and substantive issues. As part of the continuing education program, workshops are also organized for CAS members during the seminar. In this respect, in Budapest, workshops were set up for mediators and members of the Anti-Doping Division (ADD) established on 1st January 2019.

During the CAS seminar, the various presentations were given by CAS arbitrators and CAS counsels. The articles included in this special issue of the CAS Bulletin have all been written by CAS arbitrators as a result of the presentations made at the seminar and cover the following issues: at the substantive level, Luigi Fumagalli analyses the meaning of the right to be heard with a view to heal the "*due process paranoia*"; In the regulatory field, András Gurovits examines the modifications of the PILA and its implications for sport arbitration; Ulrich Haas deals with the Revision of the World Anti-Doping Code 2021, and; Gérald Simon analyses the European Convention on Human Rights and arbitration. In the area of jurisprudence, Juan Pablo Arriagada proposes a review of the CAS jurisprudence in football matters; Matt Mitten addresses a review of jurisprudence in anti-doping matters; Pascal Pichonnaz

reviews the jurisprudence of the Swiss Federal Tribunal; Jacques Radoux analyses the CAS jurisprudence in procedural matters, and finally; Carol Roberts proposes a review of CAS jurisprudence in eligibility matters.

I wish you a pleasant reading of the Budapest issue.

Estelle de La Rochefoucauld  
CAS counsel, Editor-in-chief CAS Bulletin

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**Articles et commentaires**  
**Articles and Commentaries**



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## Jurisprudence Football Matter II Part. Art. 17 RSTP

Juan Pablo Arriagada\*

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### I. Introduction

Art. 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) regulates the “Consequences of terminating a contract without just cause”. But this rule is immersed in a more general context, which is the stability of contracts between clubs and players.

If we look into the work of FIFA sport resolution bodies and CAS, we will find that the number of disputes regarding contract termination between players and clubs and the consequences thereof, is continuously increasing. So, articles 13 to 17 of the RSTP have become very well known rules in the world of football and within the work of CAS.

The RSTP were implemented by FIFA in 2001, after the landmark Bosman decision rendered by the European Court of Justice, which ruled in favor of the Belgian player, thus introducing the concept of freedom of movement.

One of the crucial pillars of the RSTP is the contractual stability principle, which is contained in some specific rules.

Article 13 establishes that principle, stating that a contract between a professional player and a club may only be terminated by mutual agreement or upon its expiration.

Articles 14 and 15 allow either party to unilaterally terminate the contract with “*Just Cause*” or “*Sporting Just Cause*”.

And Article 17 regulates the “*Consequences of terminating a contract without just cause*”.

It is important to note that the aim of the regulations is the maintainance of contractual stability between clubs and players and respect for the *pacta sunt servanda* principle.

Since the RSTP entered into force, the main focus of discussion with respect to the termination of contracts has been (i) to establish what is to be considered “just cause” and (ii) how to calculate the amount of compensation due in cases in which a contract was terminated with or without just

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cause. Regarding both issues FIFA opted for an open approach and did not provide a clear and unequivocal answer in its regulations, leaving room for the deciding bodies to create their own jurisprudence on the matter.

We will touch on both topics, explaining briefly their content and then we will review what the most uniform criteria held by CAS Panels are.

## II. Just cause

FIFA introduced the concept of so-called just cause termination to cover situations where it was too much of a strain on one of the parties to respect the contractual relationship for the entire contractual term. As a result, there are no consequences in the case of termination with just cause, and the terminating party is not obligated to pay compensation to the other party, nor can sporting sanctions be imposed on the party.

The review of several CAS awards allows us to identify perhaps the most common issues which have been repeatedly discussed.

### A. Application of Swiss Law

The first topic is the application of Swiss Law when CAS Panels have assessed the concept of just cause.

As was mentioned before, Article 14 RSTP does not define the concept of just cause.

It is only the Commentary on the RSTP that states the following with regard to the concept of “just cause”:

- a) The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case.
- b) Behaviour that is in violation of the terms of an employment contract still cannot justify by itself the termination of a contract for just cause.

- c) However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

Therefore CAS Panels following the guidelines of Art R58 of the CAS Code, have arrived at a subsidiary application of Swiss law.

Consequently, different CAS Panels have examined the application of the Swiss Code of Obligations and examined the concept of good cause.

Its article 337(2) provides that

*“good cause is any circumstance, which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice”.*

We can quote a common reasoning used by different awards:

***“In its established legal practice, CAS has therefore referred to Swiss Law in order to determine the purport of the term “just cause”. Only if there is a valid reason it is possible to terminate a contract prior to expiry of the term agreed”.***

And it’s possible to mention the following awards in that sense:

- 2006/A/1180 (§ 25 of the abstract<sup>1</sup> published on the CAS website)
- 2014/A/1062 (§ 18 abstract)
- 2016/A/4846 (§ 175 abstract)
- 2017/A/5465 (§80)
- 2017/A/5374 (§65-66 abstract)
- 2018/A/5771-5772 (§125)

### B. Severity of the breach

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<sup>1</sup> From now on mentioned as “abstract”.

Another frequent topic is the one related to the severity of the breach when estimating whether or not there is just cause.

The CAS has adopted the jurisprudence of the Swiss Federal Tribunal, according to which an employment contract may be terminated immediately for good reason when the main terms and conditions under which it was entered into are no longer implemented.

The clear criterion set out by CAS Panels, following the jurisprudence of the SFT is that ***“only material breaches of a contract can possibly be considered as just cause, or in other words the breach of the contract must have a certain level of severity in order to be admitted as “cause”<sup>2</sup>.***

And of course, it is possible to find different kinds of breaches, depending on the content of the obligations assumed by both parties. The most common facts alleged by parties as just cause to terminate a contract are:

- No payment of salaries and bonuses
- Reiterated late payment of salaries and bonuses
- Unilateral change to labor conditions
- Relegation of the player from training with first team to training with the second or youth team.
- Not providing return air tickets to the player

Aside from the facts, what it is important for CAS Panels, is the severity of the breach and this must be ruled on a case by case basis.

The reference awards are:

- 2006/A/1180 (§ 21)
- 2013/A/3091, 3092 & 3093 (§189)
- 2014/A/3706 (§82-83)
- 2014/3771 (§120)

- 2016/4884 (§65 abstract)
- 2017/A/5402 (116 abstract))
- 2017/A/5465 (92-94 abstract)
- 2018/A/6017 (§110)

### C. Warning prior to termination

Following with the concept of just cause, the need for a warning by the terminating party, prior the contract termination is an element which has been very well analyzed by CAS Panels.

The idea behind this matter is:

***“for a party to be allowed to validly terminate an employment contract, it is often required that it has provided the other party with adequate notice, in order for the latter to have the opportunity to comply with its obligations, if it consents to the just cause”.***

However, it is not required under all circumstances.

The related awards are:

- 2009/A/1956 (§25 abstract)
- 2014/A/3771 (§119)
- 2018/6017 (§107-109)

### D. Loss of trust

This concept is linked to the previous one. The trust relation between parties is one of the cornerstones of the labor relationship. Accordingly, its loss enables the parties to terminate the contract with just cause.

The criterion held by CAS in this regard has been:

***“Only particularly gross misconduct by one of the parties that affects mutual trust between them, may justify the immediate termination of the contact”.***

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<sup>2</sup> SFT 127 III 153



For this issue we found the following awards:

- 2014/A/3706
- 2017/A/5180 (§96 abstract)
- 2017/A/5402 (§115 abstract)

It is necessary to mention a relevant change on this matter:

FIFA has made some amendments to the RSTP which came into force on 1 June 2018. Among others article 14 was modified, adding a second paragraph; and a new art. 14 bis was incorporated to the Regulations. A new Article 14 para. 2, enabling a party to terminate their contract with “just cause” where there has been abusive conduct (e.g. where a player has been forced to train alone or been subject to a form of economic duress).

The new para. 2 enables a party to terminate their contract with “just cause” where there has been abusive conduct.

The new article 14bis, enables a player to unilaterally terminate their employment contract if their club unlawfully fails to pay their wages for two months – provided a 15-day period of written notice is first given to the club by the players.

These new provisions essentially codified in some manner the existing CAS jurisprudence and in doing so, FIFA has tried to create more certainty.

### **III. Consequences of the termination with or without just cause**

As we previously have said if either a club or player unilaterally terminates their contract without “Just Cause”, Article 17 provides the consequences for the terminating party and any person involved in the breach.

Art. 17 set out some general guidelines which must be taken into account by the deciding bodies, when calculating the amount of compensation to be paid by a party in breach.

Because they are general rules, their interpretation has been made openly by deciding bodies, but over the years it has been possible to observe two different approaches applied by CAS.

If the contract does not encompass a buyout-clause, Article 17 underlines that the compensation is to be calculated in accordance with the various criteria set out in the same provision. However, the objective of the calculation is not mentioned in the Article. According to some CAS case law, applying Swiss Law, the aggrieved party must – as a general rule – be placed in the position he would be if the breach of the contract had not occurred.

Pursuant to Article 17(1) the compensation shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.

There have been many cases regarding this issue, and we will list the main topics or arguments discussed within that framework.

#### **A. Purpose of Art. 17**

The first matter refers to the aim of art. 17.

**Criterion:** *the purpose of Article 17(1) FIFA RSTP is basically to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player.*

The related awards are:

- 2005/A/876 (§17)
- 2007/A/1358 (§90)
- 2007/A/1359 (§92)
- 2008/A/1519-1520 (§80)
- 2017/A/4935 (§175)
- 2018/A/6017 (§125)

## **B. Liquidated damages/Penalty clauses**

According to Article 17 para. 1 of RSTP the party has to be compensated for the damages caused by the unlawful termination of an employment contract.

Contractual penalties, meaning that a penalty must be paid in the case of breach of contract, are not expressly recognized by the RSTP. But art. 17 implicitly allows for such clauses by virtue of itself, since it states “...unless otherwise provided for in the contract”.

It is important to say that under Swiss law this kind of clause is deemed valid and enforceable save that a judge or arbitrator has the power to reduce the amount of contractual penalty to the extent that it is considered to be excessive.

The related awards are:

- 2016/A/4843 (§128)
- 2017/A/4935 (§177)
- 2018/A/5861 (§125, §128)
- 2018/A/5607 (§113)
- 2018/A/6017 (§122-§124)

## **C. Reduction of contractual penalty for proportionality**

On the basis of Swiss law we said that penalty clauses are valid and enforceable. But, at the same time, under Swiss law the deciding body has the power to reduce the amount of contractual penalty to the extent that it is considered to be excessive.

And this principle has been taken into account by CAS Panels.

**Criterion: A liquidated damages clause may be considered as “excessively high” under article 163(3) SCO if there is a manifest contradiction between justice and fairness on the one hand and the liquidated damages on the other hand. However, penalty clauses may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor insofar**

**as the penalty clause also includes a punishment aspect.**

The related awards are:

- 2010/A/2202 (§28)
- 2015/A/4057 (§56 abstract)
- 2016/A/4517 (§65 abstract)
- 2017/A/5304 (§75 abstract)
- 2018/A/5861 (§136 and ff.)

## **D. Compensation according positive interest**

According to Article 17 para. 1 RSTP a party has to be compensated for the damages caused by the unlawful termination of an employment contract.

The rule says if there is no provision within the contract, the deciding body must take into account the factors mentioned in the same rule.

This comment is perhaps for arbitrators who are not very involved in this kind of disputes: The consequences of terminating a contract without “just cause” are provided for by Article 17 of the RSTP – namely, compensation payments and sporting sanctions (e.g. restrictions on playing for players, transfer bans for clubs, etc.). The cases of Andy Webster, Francelino Matuzalem and Morgan De Sanctis are all well-known examples of where FIFA and subsequently CAS decided on compensation payable to the player’s former club, to be paid jointly by the new club and the player.

The question is: how should the compensation be calculated?

Considering the development of the CAS jurisprudence, we can say that compensation should be calculated under the positive interest principle.

**The criterion is: In principle the harmed party should be restored to the position in which the same party would have been if**

**the contract had been properly fulfilled (principle of the so-called positive interest).**

The reference awards are:

- 2007/A/1298 (§115 & ff.)
- 2008/A/1519-1520 (§85 & ff.)
- 2009/A/1880-1881 (§72 & ff. abstract)
- 2012/A/2698 (§138 abstract)
- 2013/A/3411 (§90 & ff abstract)
- 2014/A/3575: (§75 abstract)
- 2015/A/4046-4047 (§112)
- 2016/A/4843 (§127)
- 2018/A/6017 (§126)

#### **E. Discretion of the Panel when establishing the amount of compensation**

In line with the abovementioned, the matter regarding the discretion which the Panel has when establishing the amount of compensation, has come up frequently within the scope of the legal discussions.

**Criterion: *The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and the jurisprudence.***

The related awards are:

- 2006/A/1100 (§84.1)
- 2007/A/1299 (§134)
- 2008/A/5607 (§110)
- 2009/A/1880-1881 (§76, §77)
- 2010/A/2145 (§74, §86)
- 2018/A/6017 (§126)

#### **F. List of criteria set forth in art. 17 is not exhaustive**

Always in connection with the matter related to the calculation of the compensation, according to Article 17.1 RSTP, a primary role is played by the parties' autonomy. In fact, the criteria set out in that rule apply "*unless otherwise provided for in the contract*". So, if the parties have not agreed on a specific amount, compensation has to be calculated "***with due consideration***" for:

- the law of the country concerned,
- the specificity of sport,
- any other objective criteria, including in particular
  - the remuneration and other benefits due to the player under the existing contract and/or the new contract,
  - the time remaining on the existing contract up to a maximum of five years,
  - the fees and expenses paid or incurred by the former club (amortised over the term of the contract), and
  - whether the contractual breach falls within a protected period.

Are these factors or parameters exhaustive ?

The answer based on the criteria established by CAS case law is that they are not exhaustive.

According to CAS jurisprudence, it is for the judging authority to carefully assess, on a case by case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation under Article 17.

CAS precedents indicate that while each of the factors set out in Article 17 or in CAS jurisprudence may be relevant, any of them may be decisive on the facts of a particular case.

**Criterion: While the judging authority has a "*wide margin of appreciation*" or a "*considerable scope of discretion*", it must not set the amount of compensation**

**in a fully arbitrary way, but rather in a fair and comprehensible manner.**

The reference awards for this topic are.

- 2008/A/1519-1520 (§77 & ff.)
- 2009/A/1880-1881 (§72 & ff.)
- 2010/A/2145 (§59 & ff.)
- 2017/A/4935 (§177)
- 2018/A/5607-5608 (§109)

### **G. Specificity of sport**

One of the factors listed by art. 17 of the RSTP that has generated much discussion within the context of contractual disputes is the specificity of sport.

No definition is found in the FIFA Regulation. The importance of this concept was recognized already in 2000 in the European Council's Declaration on the specific characteristics of sport and its social function in Europe.

The specificity of sport refers to the inherent characteristics of sport which set it apart from other economic and social activities.

Because it is an undetermined concept, it has been usually invoked by parties to claim damages regarding termination agreements.

The idea behind the application of the specificity of sport is very well established in CAS 2007/A/1298-1299-1330 (§ 131 and ff):

***“The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football”.***

Additionally we can mention the following awards:

- 2007/A/1358 (§104-§105)
- 2008/A/1519-1520 (§153-§154)
- 2008/A/1568 (§6.46-§6.47)
- 2008/A/1644 (§139)
- 2013/A/3411 (§118)
- 2018/A/5607 (§146 & ff.)

An important note must be made here, because most cases in which the specificity of sport has been considered for granting compensation for damages refer to claims filed by clubs against players. But there is a specific case in contrary; a claim filed by the Uruguayan player Sebastian Ariosa against the Paraguayan club Olimpia. **(CAS 2015/A/3871)**

### **Facts**

From 17 January 2011 until 31 December 2015, Mr. Ariosa was employed by Club Olympia, under a player contract governed by Paraguayan Law.

In 2013 he was diagnosed with cancer. Later that year, in June 2013, the parties agreed that the club owed the player eight months' salary. In December 2013, while the player was undergoing chemotherapy treatment for cancer, the club suspended his contract ostensibly because he was unable to perform his obligations to play.

After further correspondence between the parties, the player rejected the club's position and terminated the contract in response to the club's actions. The club then, in turn, rejected the player's termination and demanded that he returned to the club to start training, despite the fact that he was still undergoing chemotherapy treatment. The club also informed the player that it had deposited two months' salary with the Paraguayan FA, which required the player to issue an invoice before it could be released.

As an individual rather than a company, the player could not issue such an invoice, so could not access that deposited salary.

#### FIFA DRC Decision

In February 2014, the player lodged a claim before the DRC, claiming breach of contract for the non-payment of his salary, termination by the club without “just cause” and sought an award for those non-payments and compensation for the remaining value of his contract as well as “*moral damages*”, “*specificity of sport*” and medical expenses.

On 20 August 2014 the DRC ruled in favour of the player, awarding him sums for the non-payments and the remaining value of his contract. However, the DRC rejected the heads of loss sought for “*moral damages*”, “*specificity of sport*” and medical expenses since they were not sufficiently proven.

#### CAS Decision

Both parties then appealed to CAS. On the one hand, the club sought to overturn the finding that the player’s contract had been terminated without just cause. On the other hand, the player sought compensation for

“*moral damages*” and “*specificity of sport*” as well as contractual unpaid bonuses.

CAS rejected the club’s appeal but upheld the player’s appeal. The bonuses were awarded since under the terms of the player contract the player was entitled to them.

The CAS Panel also found possible to apply the “*specificity of sport*” criterion to a claim filed by a player against a club, which is in line with CAS 2007/A/1298, 1299 & 1300.

That approach has been used previously by CAS for the benefit of clubs in response to termination without just cause by players, such that it is now generally the case that the player will need to pay to his former club compensation to reflect his market value. This head of compensation was there to reflect damages to the player as a stakeholder in the sport rather than damages to him as a person, which would fall under “*moral damages*”.

Applying that approach to the case, the CAS Panel found that the club’s “*exceptional and severe conduct*” was contrary to “*the needs and spirit of football*”, especially given the player’s vulnerable stage of life. It then found it appropriate to award him 10% of the value of the contract for this particular head of loss.

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# The right to be heard: what does it really mean? Information to heal the “*due process paranoia*”

Luigi Fumagalli \*

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- I. Overview
  - II. The right to be heard in CAS proceedings: the overall regulatory context
  - III. Physiology and Pathology. The respect of a fundamental right and the insurgence of the disease. The critical situations
  - IV. The therapy
    - A. Understanding the SFT
    - B. Understanding the ECtHR
  - V. The recovery
- 

*Paranoia is an instinct or thought process believed to be heavily influenced by anxiety or fear, often to the point of irrationality. Paranoid thinking typically includes beliefs of conspiracy concerning a perceived threat towards oneself. Paranoia is a central symptom of psychosis.<sup>1</sup>*

*Treatment of paranoia is usually via cognitive behavioural therapy, a short-term, goal-oriented psychotherapy treatment that takes a hands-on, practical approach to problem-solving. Its goal is to change patterns of thinking or behaviour that are behind people’s difficulties, and so change the way they feel.<sup>2</sup>*

## I. Overview

There is no doubt: the “right to be heard” is a fundamental right, recognised by the European Convention on Human Rights (ECHR), as well as by Swiss law. It is a part of the broader concept of the “right to a fair trial”: its respect marks the conduct of adjudication proceedings (before a State court or an arbitral tribunal) as “just”. It is therefore more than obvious that the “product” of such proceedings (the judgment, the award) cannot stand scrutiny (and can therefore be nullified), if that right is disregarded. In arbitration, a violation of

the right to be heard may lead to the setting aside of the award, or to the denial of its enforcement. And rightly so, because no justice is done if that fundamental right is not respected.

The awareness of the importance of respecting this right may however have some unwarranted implications, or side effects. The fear of risking to adopt decisions which might adversely affect the right to be heard of a party (with the ensuing fateful consequences for the award) might lead the arbitrators to take decisions heavily influenced by anxiety or fear, even to a point of irrationality, and, as a result, grant unreasonable procedural requests, causing inefficiencies, delays and additional costs: the claim of a party “to be heard” might be perceived as a threat to (or an attack on) the arbitrator’s control of “his” proceedings. The fear of violating a fundamental right, or the instinctive reaction to a perceived threat, might be described as the symptoms of a disease known in the legal literature as the “*due process paranoia*”.

Focus is on CAS proceedings. As it will be seen, there are several instances in arbitration

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<sup>1</sup> Vyas, Khan, ‘Paranoid Personality Disorder’, *The American Journal of Psychiatry Residents’ Journal* 11

(1 January 2016), 8-11, <https://doi.org/10.1176/appi.ajp-rj.2016.110103>.

<sup>2</sup> Martin, ‘In-Depth: Cognitive Behavioral Therapy’, 17 May 2016, <http://psychcentral.com/lib/in-depth-cognitive-behavioral-therapy/>.

at the Court of Arbitration for Sport (CAS), in which insurgence of such disease is possible: “critical situations” exist in which CAS arbitrators are most likely exposed to infection. However, the examination of the jurisprudence of the Swiss Federal Tribunal and of the European Court of Human Rights (which is most relevant, from the point of view of arbitration at CAS) can show that respect of the right to be heard is of paramount importance, but also that such “*paranoia*” is not justified. The awareness of that jurisprudence is a *remedy* to the disease, fighting its symptoms: it might induce a change in patterns of thinking or behaviour that are behind the arbitrator’s difficulties and lead to an informed approach to the legitimate claim of a party to be heard.

The aim of this paper, therefore, is not to analyse in general terms the theoretical foundations in arbitration of the right to be heard<sup>3</sup> or to consider its ramifications, but to deal with some specific situations likely to occur in the course of CAS arbitration, relating to the right to be heard and exposing arbitrators to “*due process paranoia*”. Treatment is therefore explored, by conducting a sort of “*cognitive behavioural therapy*”, (i.e., “*a psychotherapy treatment that takes a practical approach to problem-solving*”), which shows that in CAS proceedings “*due process paranoia*” is hardly justified, if only some precautions are adopted.

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<sup>3</sup> The topic has been made the object of several important studies, which explored, chiefly with respect to the European Convention on Human Rights, the limits to the application of the “right to a fair trial” contemplated by its Article 6 to arbitration, and the possibility that by freely opting for arbitration the parties waive some of the guarantees provided under such right. The matter, with respect to CAS proceedings, has been considered also by the European Court of Human Rights in its well know decision of 2 October 2018, in the case of *Mutu and Pechstein v. Switzerland* (applications No. 40575/10 and No. 67474/10). That decision is not explored here. Indeed, the Court’s reasoning is relevant to the issue of the right to be heard only to the extent it confirms that all requirements under Article 6(1) of the ECHR are to be respected in CAS arbitration, and there was no doubt (even before that judgment was rendered)

The first section of this presentation, after this overview, summarizes the legal framework behind the notion of right to be heard justifying its relevance in CAS proceedings. The next section introduces the issue of “*due process paranoia*” and examines how the right to be heard may induce it. In that respect, a list of critical situations is offered, exemplifying situations in which “*due process paranoia*” can be experienced in CAS arbitration. Finally, a set of possible solutions is provided. This article will thus conclude by having demonstrated that in CAS proceedings, “*due process paranoia*” is barely justified as precautions can be implemented: the right to be heard must be respected, but without anxiety and fear.

## **II. The right to be heard in CAS proceedings: the overall regulatory context**

The right to be heard is an obvious feature of every dispute settlement system wishing to be defined as “fair”. The principle underlying it applies therefore to court proceedings as well as to arbitration. It certainly applies also to CAS arbitration. Indeed, no arbitration can be defined to be fair if the parties’ right to be heard is not respected.

The right to be heard, in fact, is a part of the right to a fair trial, as recognised by Article 6 of the European Convention on Human Rights (ECHR).<sup>4</sup> It falls within the scope of

that the “right to be heard” (a part of those requirements) had to be observed in CAS proceedings, without any possible derogation. In general terms on the relations between arbitration and the “right to a fair trial” under the ECHR see Benedettelli, ‘Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience’, (2015) 31 *Arbitration International*, 631–659; Besson, ‘Arbitration and Human Rights’ (2006) 24 *ASA Bulletin*, 395–416; Jaksic, ‘Procedural Guarantees of Human Rights in Arbitration Proceedings—A Still Unsettled Problem?’, (2007) 24 *Journal of International Arbitration*, 159–171.

<sup>4</sup> The ECHR guarantees the respect in the Contracting States of the fundamental rights, such as the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of expression, and the

application of its Article 6(1), which covers both civil and criminal proceedings (under which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law); and is mentioned by Article 6(3), applicable to criminal proceedings (providing that everyone has the following minimum rights: to be informed promptly of the nature and cause of the accusation; to have adequate time and facilities for the preparation of his defence; to defend himself; to examine witnesses against him and to obtain the attendance and examination of witnesses against him).

In that respect, it is to be noted that it is acknowledged in the ECHR system that the requirements inherent in the concept of a “fair hearing” are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. Indeed, it is recognised that the requirements of Article 6(1) as regards cases concerning civil rights are less onerous than they are for criminal charges. However, two points have to be noted: with respect to civil cases, inspiration can be drawn from principles applicable to criminal cases; and the core tenets of the right to a fair trial (including chiefly the right to be heard) cannot be sacrificed even in civil cases. In civil cases, too, the parties to the proceedings have the fundamental right to present the observations which are relevant to their case, and this right can be seen as effective only if

their observations are actually “heard” by the adjudicator. In addition, the concept of a fair trial in civil cases comprises the fundamental right to adversarial proceedings, *i.e.* to have knowledge of and the right to comment on all evidence adduced and observation filed, with a view to presenting his case to the court. In other words, it may be submitted that the ECHR mandates a fully-fledged respect of the right to be heard before Swiss courts and tribunals.

The right to be heard is recognised not only as a fundamental principle in the ECHR. It is also expressly mentioned in Swiss law, and chiefly by the Swiss Federal Constitution of 18 April 1999, at its Article 29(2), as part of the general procedural guarantees, under which “*each party to a case has the right to be heard*”.<sup>5</sup>

In the international arbitration context, then, the “right to be heard” is mentioned by Article 182(3) of the Swiss Federal Act on Private International Law of 18 December 1987 (PILA),<sup>6</sup> which expressly states that “irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in adversarial proceedings”.<sup>7</sup> In other words, the mandatory nature of the guarantee to be reserved to the right to be heard does not allow departures: the parties and/or the tribunal can define, directly or by reference, the procedural rules applicable to the arbitration, but in any case the right to be heard must be respected.

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prohibition of discrimination. The ECHR is supplemented by various Additional Protocols, which extend the catalogue of protected rights. The Convention was opened for signature in Rome on 4 November 1950. Switzerland ratified it in 1974. Switzerland signed Protocol No. 1 and ratified Protocols No 6, 7 and 13. In general terms, on Article 6 of the ECHR, see Jacobs, White, *The European Convention on Human Rights*, 7<sup>th</sup> ed., Oxford, 2017; Schabas, *The European Convention on Human Rights: A Commentary*, Oxford, 2015, 264. Additional indications as to the actual meaning of the right to be heard as defined in the case-law of the European Court of Human Rights will be given below, at Section IV.

<sup>5</sup> The constitutional basis of the right to be heard is underlined by the CAS jurisprudence defining its scope and enforcing it also in an “arbitration” context. See below, Section IV.

<sup>6</sup> CAS arbitration proceedings are indeed most likely to be governed by the provisions set by Chapter 12 of the PILA, since the seat of CAS arbitration is in Switzerland (Article R28 of the Code) and in the majority of cases at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland (Article 176(1) of the PILA).

<sup>7</sup> Lalive, Poudret, Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, 353-354.



As a result, and consistently with this approach, disrespect of such right leads to the annulment of the award. Under Article 190(2)(d) of the PILA an award may be annulled if the principle of equal treatment of the parties or the right to be heard is violated.<sup>8</sup> In that respect, it is to be underlined that the mere observance of the applicable procedural rules is not sufficient, since the right to be heard must be in any case respected.

Corresponding provisions, then, can be found, with respect to domestic arbitration, in the Swiss Code of Civil Procedure,<sup>9</sup> at Article 373(4), dealing with the conduct of the arbitration and the procedural rules applicable thereto, and at Article 393(d), setting the grounds for the annulment of the award.<sup>10</sup>

It is to be noted, finally, that the disrespect of the right to be heard may lead to a denial of enforcement abroad of an arbitral award under the New York Convention of 10 June 1958: enforcement can be refused if the party against which it is sought proves that said party was unable to present its case (Article V(1)(b) of the Convention), or if the award is contrary to the public policy of the country of enforcement (Article V(2)(b) of the Convention).<sup>11</sup>

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<sup>8</sup> Kaufmann-Kohler, Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2<sup>e</sup> éd., Berne, 2010, 512-522.

<sup>9</sup> The provision on arbitration set by the Swiss Code of Civil Procedure apply the proceedings before arbitral tribunals based in Switzerland, unless the provisions of the PILA apply (Article 353(1) of the Swiss Code of Civil Procedure. For an interesting discussion as to the applicability of the PILA or of the Code of Civil Procedure in a CAS arbitration see the judgment of the Swiss Federal Tribunal in the *Platini* case: SFT, 29 June 2017, 4A\_600/2016, at § 1.1.

<sup>10</sup> Article 373(4): “The arbitral tribunal must guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings.” Article 393: “An arbitral award may be contested on the following grounds: ... (d) the principles of equal treatment of the parties or the right to be heard were violated.”

<sup>11</sup> Van den Berg, *The New York Arbitration Convention of 1958*, Deventer-Boston, 1981, 306-310, underlining, for the purposes of the New York Convention, that the equal opportunity to be heard does not imply that

### III. Physiology and Pathology. The respect of a fundamental right and the insurgence of the disease. The critical situations

The importance of the principle and the duty to respect it also in CAS proceedings opens the door to abuse and is suitable to give rise to difficult questions that a CAS Panel has to face. In several instances, in fact, arbitrators (in CAS proceedings in the same way as in “ordinary” commercial arbitration cases) have to deal with, and decide on, competing arguments advanced by the parties, invoking their right to be heard in support of their requests; or have to decide on issues directly dealing with the parties’ requests “to be heard”.

The perceived danger that the award could eventually be set aside or refused enforcement for the violation of the right to be heard leads to the insurgence of a new disease affecting arbitrators, which has been identified as “*due process paranoia*”.<sup>12</sup> The symptoms of such disease are clear: they consist in the “*perceived reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully*”.<sup>13</sup> It is to be noted that arbitrators are more

in each and all cases an oral hearing must take place, that short time limits for the preparation of a defence are generally not a violation of the right to be heard, and that denials of requests to postpone a hearing because of the unavailability of a witness do not lead to the refusal of enforcement of the award. In essence, the principle of due process implies that the tribunal informs a party of the arguments and evidence adduced by the other party and allows it to express its position on them. However, a violation of the due process requirement is a ground for denial of enforcement only in the most serious cases.

<sup>12</sup> See Berger, Jensen, ‘Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators’, (2016) 32 *Arbitration International*, 415-35; Polkinghorne, Gill, ‘Due Process Paranoia: Need We Be Cruel to Be Kind?’, (2017) 34 *Journal of International Arbitration*, 936.

<sup>13</sup> Gerbay, ‘Due Process Paranoia’, *Kluwer Arbitration Blog*, 6 June 2016, <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process->

exposed than judges to such disease, as they might have the feeling to owe a special duty to the parties (from which they derive their function), and therefore to accept every request they submit. The very perception of the role played by the arbitrators, in other words, might be affected: their “services” are perceived as due not to perform a “*judicial function*” (or an equivalent thereto), but to act on behalf and under the threat of the parties.

What are these specific aspects? It is in fact to be underlined that the right to be heard comes into play and has to be respected (according to its true scope) whenever a decision (and chiefly the final award) is to be rendered: the *de novo* power of review of the dispute which a CAS Panel enjoys,<sup>14</sup> in fact, does not mean that the Panel can consider and decide the dispute without hearing the parties on the points decided.

With respect to the issues in which the right to be heard is a “sensitive” matter, we may identify several different situations:<sup>15</sup>

i. requests for extension of deadlines. Under Article R32, second paragraph of the Code of Sports-related Arbitration (the Code), the deadlines indicated by the Code itself (and therefore with the exception of the time limit for the statement of appeal, which is a part of the arbitration agreement) can be extended upon application on justified grounds and after consultation with the other party. It is often the case that requests for extension are justified by reference to the need to guarantee the applicant’s right to be heard, in light of the complexity of the case, the need to consult experts, absence, illness, professional obligations of the counsel or of the party. But extensions may be detrimental to the speedy resolutions of the case and the right of the other party to have the case efficiently

tried. In which cases is an extension warranted? What role plays the right to be heard (of both parties)?

- ii. requests for evidentiary measures, for instance when, after the cut-off date indicated by Article R56 of the Code, a party wishes to introduce a new document or a new witness, by alleging that, without that new evidence, its right to state (and prove) its case would be impaired; and the other party submits that its right would be affected if the evidence is accepted. The same situation would occur also with respect to the late introduction of new claims, or the submission of unsolicited briefs. Are requests to be granted always if the “right to be heard” is invoked?
- iii. requests concerning the setting of the hearing date, or its rescheduling once set, due to the parties, counsel, witnesses or experts’ unavailability. Is in any case the date of the hearing (where, by definition, the parties are heard) to be set according to the parties’ wishes, if otherwise a party, its counsel, witnesses or experts would not attend?
- iv. questions regarding the proper scope of the *iura novit curia* principle in CAS arbitration. To what extent are the arbitrators allowed to “know the law” beyond the parties’ submissions? Are the parties to be heard on the application of the rules that the Panel finds to be relevant?

In addition to the foregoing examples, there is another situation, which can be “singled out” to give an indication, by contrast, of a case where the right to be heard might be “fundamentally” affected. It concerns the issues regarding the effective service of the statement of appeal, in the event of default of appearance. In several situations, in fact, it could not be entirely clear whether the

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paranoia/.

<sup>14</sup> It is in fact well known that under Article R57 of the Code, a CAS Panel hearing a case on appeal is not limited to considerations of the evidence that was adduced before the first instance body and can

consider all new evidence produced before it.

<sup>15</sup> On all the provisions mentioned below see the comments and indications in Mavromati, Reeb, *The Code of the Court of Arbitration for Sport. Commentary, Cases and Materials*, Alphen aan den Rijn, 2015.

communication from the CAS Court Office serving the appellant's appeal has been properly received by the respondent. In that situation, peculiar rules of the sporting entity might come into play, providing for service to the national association as an "agent" of the athlete. Is that sufficient?

#### IV. The therapy

##### A. Understanding the SFT

Understanding the point of view of the Swiss Federal Tribunal (the SFT) is the key to treat the disease. A few words about the actual meaning of the right to be heard in the Swiss jurisprudence shows that the "*due process paranoia*" is largely unjustified. Up to a point, at least.

Under Swiss law, the right to be heard in contradictory proceedings combines two aspects:<sup>16</sup>

- i. the right to be heard as properly defined, which gives each party the right to state its arguments as to the facts and the law on the disputed matter, to submit the necessary evidence, to participate in the hearings and to be represented before the Tribunal; and
- ii. the right to contradict, which gives each party the right to express its views on the evidence and arguments brought by the other party, as well as to rebut the other party's evidence by submitting contrary evidence.

In that regard, it is stressed that the right to be heard, as guaranteed by Articles 182(3) and 190(2) of the PILA, is not different from that contained in constitutional law.<sup>17</sup> Thus, in the field of international arbitration, it has been found that, on its basis, each party has

the right to express its views on the facts essential for the decision, to submit its legal arguments, to propose evidence on pertinent facts, to participate in the hearings, and to access the record. However, the right to be heard calls for regulation: even though it cannot be derogated from by the parties when setting the rules applicable to the procedure, it must be exercised according to the relevant rules of procedure.

As a result, it has been held that the right to produce evidence must be exercised timely and according to the applicable formal rules.<sup>18</sup> Therefore, the arbitral tribunal can refuse to examine evidence, without violating the right to be heard, if the evidence proposed is unfit to ground a persuasion, if the fact to be proven has already been established or is irrelevant, or, lastly, if the tribunal, assessing the evidence in advance, reaches the conclusion that it is already convinced and that the result of the evidentiary measure would not modify its conclusion.<sup>19</sup> In other words, the right to be heard does not include the right to demand an evidentiary measure which is unfit to prove a fact. In this last respect, it is also to be underlined that the SFT would not review an assessment of evidence by anticipation.

In the same way, a party cannot argue a violation of its right to submit evidence because the evidence proposed by the other party (which it opposed) was not administered.<sup>20</sup> In addition, there is no possible violation of the right to be heard with respect to the evaluation of the evidence: the arbitrators are free to find an expert opinion more persuasive than another.<sup>21</sup> In any case, the right to be heard does not include the right to a materially correct decision.<sup>22</sup>

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<sup>16</sup> SFT, 4 September 2003, 4P.100/2003.

<sup>17</sup> The point is underlined in nearly all decisions of the SFT dealing with the matter: see 7 January 2011, 4A\_440/2011; 17 February 2011, 4A\_402/2010; 17 March 2011, 4A\_600/2010; 19 September 2012, 4A\_274/2012; 8 October 2014, 4A\_199/2014. On the right to access the record: SFT, 24 February 2015, 4A\_544/2014.

<sup>18</sup> SFT, 7 January 2011, 4A\_440/2010; 28 February 2013, 4A\_576/2012.

<sup>19</sup> SFT, 17 March 2011, 4A\_600/2010; 19 September 2012, 4A\_274/2012; 1 October 2012, 4A\_312/2012; 24 February 2015, 4A\_544/2014.

<sup>20</sup> SFT, 3 January 2011, 4A\_386/2010.

<sup>21</sup> SFT, 21 March 2013, 4A\_522/2012.

<sup>22</sup> SFT, 25 July 2017, 4A\_89/2017.

With regard to the aspects involving evidentiary issues, it is to be noted that the right to be heard does not encompass an unlimited right, in time and substance, to interrogate an expert called by the other party. As a result, a tribunal is not prevented, in principle, from putting time limits on the interrogation by a party or from refusing certain questions, if already asked, irrelevant, or unnecessary.<sup>23</sup>

A difficult question, then, arises whenever a party, presenting a witness in support of its case, submits that there are reasons not to disclose the identity of such witness. Such request impacts on the other party's right to rebut such evidence, to assess the credibility of such witness and eventually to cross-examine him. However, it was held that anonymous witness statements do not breach the right to be heard, when they support the other evidence provided to the court. According to the SFT,<sup>24</sup> if the applicable procedural code provides for the possibility to prove facts by witness statements, a party cannot be prevented from relying on anonymous witness statements. However, the use of such statements must be subjected to strict conditions: the right to be heard and to a fair trial must be ensured through other means, namely by cross examination through audio-visual protection and by an in-depth check of the identity and the reputation of the anonymous witness by the court.

The right to be heard, then, principally relates to findings of fact. The right of the parties to be questioned on legal issues is recognised only in a limited way. In fact, State courts and arbitral tribunals freely assess the legal significance of facts and may decide on the basis of rules other than those relied upon by the parties (*iura novit curia*). Therefore, and unless the arbitration agreement restricts the task of the tribunal to consider only the legal

grounds raised by the parties, the parties do not have to be heard specifically as to the scope to be recognised to rules of law. However, the parties have to be heard whenever the tribunal considers basing its decision on a rule or a legal consideration which was not discussed during the proceedings and of which the parties could not anticipate the relevance.<sup>25</sup> However, what is unforeseeable is a matter of discretion. For this reason, the SFT shows restraint in applying the rule, in order to avoid that the argument of "surprise" is used to obtain a substantive review of the challenged award.

Even though mainly relating to factual issues, the right to be heard does not imply that the tribunal is obliged to draw the attention of the parties to the facts which are decisive for the judgment. The obligation to respect it does not compel the arbitrators to inform a party that the evidence adduced is not sufficient to establish a decisive fact and to do so before issuing an award.<sup>26</sup> In a non CAS case, the appellant before the SFT argued that the tribunal had granted its request to produce exhibits partially blanked out in order to avoid revealing the identity of the beneficiary of some commissions paid; and yet, without advising the parties in advance of the lack of evidentiary value of the exhibits filed, the Tribunal held that they were not sufficient to prove that the commissions paid related to the project at stake. Yet, the SFT found no violation of the party's right to be heard.

The right to be heard, then, does not require an award to be reasoned. However, it imposes on the arbitrators a minimal duty to examine and address the pertinent issues.<sup>27</sup> This duty is breached when, even inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some factual allegations, arguments, evidence and offers of evidence submitted by

<sup>23</sup> SFT, 24 February 2015, 4A\_544/2014.

<sup>24</sup> 2 November 2006, 6S.59/2006.

<sup>25</sup> SFT, 30 September 2003, 4P.100/2003; 9 February 2009, 4A\_400/2008; 10 December 2010, 4A\_10/2010; 26 May 2014, 4A\_544/2013; 21 March

2015, 4A\_634/2014; 27 January 2017, 4A\_716/2016.

<sup>26</sup> SFT, 9 January 2008, 4A\_450/2007.

<sup>27</sup> SFT, 10 December 2012, 4A\_635/2012; 2 September 2014, 4A\_606/2013; 6 May 2015, 4A\_426/2014.

one of the parties that are important to the decision to be issued.<sup>28</sup> At the same time, there is no obligation to discuss all the arguments: an implicit denial of irrelevant issues is possible and justified.<sup>29</sup>

The party considering that it was disadvantaged by a violation of the right to be heard must raise the argument immediately, otherwise it forfeits the right to claim the violation later. Good faith, in fact, requires that the tribunal is given the opportunity to correct the alleged violation.<sup>30</sup>

## B. Understanding the ECtHR

Such jurisprudence corresponds, by and large, to the principles that can be derived from the case law of the European Court of Human Rights (ECtHR) with respect to the ECHR. Also this jurisprudence, while confirming that the right to be heard is a fundamental right, protected by the ECHR, show that no “*paranoia*” is justified.

The ECtHR has always emphasised the prominent place held in a democratic society by the right to a fair trial, of which the right to be heard is a part.<sup>31</sup> This guarantee, indeed, “is one of the fundamental principles of any democratic society, within the meaning of the Convention”.<sup>32</sup> Therefore, and *inter alia*, the desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle.<sup>33</sup>

It is to be noted that the ECtHR has stressed the importance of appearances in the

administration of justice; it is important to make sure that the fairness of the proceedings is apparent. The ECtHR made it clear, however, that the standpoint of the persons concerned is not in itself decisive; the misgivings of the individuals before the courts with regard to the fairness of the proceedings must be capable of being held to be objectively justified.<sup>34</sup>

As a result, it is stressed that the parties to the proceedings have the right to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are actually “heard”, that is to say duly considered by the trial court.<sup>35</sup> In other words, the “tribunal” has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.<sup>36</sup> However, while the parties have the right to present the observations which they regard as relevant to their case, Article 6(1) of the ECHR does not guarantee a litigant a favourable outcome.<sup>37</sup>

The concept of a fair trial comprises the fundamental right to adversarial proceedings. This is closely linked to the principle of equality of arms.<sup>38</sup> It is to be noted that the requirements resulting from the right to adversarial proceedings are in principle the same in both civil and criminal cases.<sup>39</sup> The right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court’s decision.<sup>40</sup>

<sup>28</sup> SFT, 22 March 2007, 4P.172/2006.

<sup>29</sup> SFT, 10 December 2010, 4A\_10/2010; 7 April 2014, 4A\_564/2013; 25 July 2017, 4A\_80/2017.

<sup>30</sup> SFT, 7 January 2011, 4A\_440/2011; 3 October 2011, 4A\_530/2011; 19 September 2012, 4A\_274/2012; 1 October 2012, 4A\_312/2012; 24 February 2015, 4A\_544/2014; 6 May 2015, 4A\_426/2014.

<sup>31</sup> *Airey v. Ireland*, No. 6289/73, § 24 ECHR 1979; *Stanev v. Bulgaria* [GC], No. 36760/06, § 231, ECHR 2012.

<sup>32</sup> *Pretto and others v. Italy*, No. 7984/77, § 21, ECHR 1983.

<sup>33</sup> *Niederöst-Huber v Switzerland*, No. 18990/91, § 30,

ECHR 1997.

<sup>34</sup> *Kraska v. Switzerland*, No. 13942/88, § 32, ECHR 1993.

<sup>35</sup> *Donadze v. Georgia*, No. 74644/01, § 35, ECHR 2006.

<sup>36</sup> *Kraska v. Switzerland*, No. 13942/88, § 30, ECHR 1993; *Perez v. France* [GC], No. 47287/99, § 80, ECHR 2004.

<sup>37</sup> See *Adronicou and Constantinou v. Cyprus*, No. 86/1996/705/897, §201, ECHR 1997.

<sup>38</sup> *Regner v. Czech Republic* [GC], No. 35289, §146, ECHR 2017.

<sup>39</sup> *Werner v. Austria*, No. 21835/93, § 66, ECHR 1997.

<sup>40</sup> *Ruiz-Mateos v. Spain*, No. 12952/87, §63, ECHR 1993; *McMichael v. United Kingdom*, No. 16424/90, § 80,

However, the ECHR does not lay down rules on evidence as such.<sup>41</sup> The admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts.<sup>42</sup> The same applies to the probative value of evidence and the burden of proof: it is also for the national courts to assess the relevance of proposed evidence.<sup>43</sup>

In addition, Article 6(1) of the ECHR does not explicitly guarantee the right to have witnesses called, since the admissibility of witness evidence is in principle a matter of domestic law. However, the proceedings in their entirety, including the way in which evidence was permitted, must be “fair” within the meaning of Article 6(1). For instance, where courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant’s ability to present arguments in support of his case.<sup>44</sup>

In that framework, the ECtHR allowed the use of “protected” or “anonymous” witnesses in criminal cases, provided procedural safeguards are adopted.<sup>45</sup> More specifically, it was held that Article 6(1) of the ECHR does not require that the interests of the witnesses must be taken into consideration. However, the interests of the

witnesses (with regard to their life, liberty and security) may be protected by other provisions of the ECHR (*e.g.*, Article 8). This means that States must organise criminal proceedings in a way that these interests are not unjustifiably put in danger. The relevance of the right to a fair trial implies that the interests of the defence must be balanced against those of the witnesses. In any case, a conviction cannot be based either solely or to a decisive extent on anonymous statements; the party should not be prevented from testing the witness’ reliability, and the evidence derived should be treated with extreme care.

Finally, it is to be noted that the guarantees enshrined in Article 6(1) include the obligation for courts to give sufficient reasons for their decisions.<sup>46</sup> A reasoned decision shows the parties that their case has truly been heard. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions.<sup>47</sup> The reasons given must be such as to enable the parties to make effective use of any existing right of appeal.<sup>48</sup> Actually, Article 6(1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument.<sup>49</sup> However, where a party’s submission is decisive for the outcome of the proceedings, it requires a specific and express reply.<sup>50</sup> The courts are therefore required to

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ECHR 1995; *Vermeulen v. Belgium*, No. 19075/91, § 33, ECHR 1996; *Lobo Machado v. Portugal* [GC], No. 15764, § 31, ECHR 1996; *Kress v. France* [GC], No. 35594/98, §74, ECHR 2001.

<sup>41</sup> *Montovanelli v. France*, No. 21497/93, § 34, ECHR 1997.

<sup>42</sup> *Moreira de Azevedo v. Portugal*, No. 11296/84, §§ 83-84, ECHR 1990; *García Ruiz v. Spain* [GC], No. 30544/96, §28, ECHR 1999.

<sup>43</sup> *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], No. 38433/09, §198, ECHR 2012.

<sup>44</sup> *Wierzbicki v. Poland*, No. 24541/93, §45, ECHR 2002.

<sup>45</sup> *Doorson v. The Netherlands*, No. 20524/92, ECHR 1996; *van Mechelen and others v. The Netherlands*, No. 21363/93 21364/93 21427/93 and 22056/93, ECHR

1997; *Krasniki v. Czech Republic*, No. 51277/99, ECHR 2006; *Balta and Demir v. Turkey*, No. 48628/12, ECHR 2015.

<sup>46</sup> *H. v. Belgium*, No. 8950/80, §53, ECHR 1987.

<sup>47</sup> *Suominen v. Finland*, No. 37801/97, §36, ECHR 2003; *Carmel Saliba v. Malta*, No. 24221/13, § 73, ECHR 2016.

<sup>48</sup> *Hirvisaari v. Finland*, No. 49684, § 30, ECHR 2001.

<sup>49</sup> *Van de Hurk v. The Netherlands* [GC], No. 16034/90, § 61, ECHR 1994; *García Ruiz v. Spain* [GC], No. 30544/96, § 26, ECHR 1999; *Perez v. France* [GC], No. 47287/99, § 81, ECHR 2004.

<sup>50</sup> *Ruiz Torija v. Spain*, No. 18390/91, § 30, ECHR 1994; *Hiro Balani v. Spain*, No. 18064/91, § 28, ECHR 1994.

examine the litigants' main arguments.<sup>51</sup>

## V. The recovery

The above summary of the principles stated by the SFT, corresponding to the indications given by the ECtHR, confirms that “*due process paranoia*” is not justified.

Respect of the right to be heard is a serious matter in arbitration, since the parties must be put in the material condition to state their case, *i.e.* to express their views on the facts essential for the decision, to submit their legal arguments, to propose evidence on pertinent facts, to participate in the hearings, and to access the record. For instance, and as a condition which must be necessarily be satisfied for such purposes, it is mandatory for a CAS Panel to verify that the service of the submissions (and mainly of the statement of appeal – but not only) is effective. In that regard, it is to be noted that CAS Panels were in general particularly careful in verifying (primarily in order to determine the timeliness of the appeal) the internal procedures followed for the service of the decision appealed from, and chiefly so when internal rules exist (such as in the FIFA system: procedural rules applicable before the Dispute Resolution Chamber; the Disciplinary Code) providing for the notification to a player/club through the national association.<sup>52</sup> In the absence of a specific power of attorney (appointing the national association as an agent to receive

service) those rules can barely be followed for the service of a CAS appeal.

Adequate consideration, then, is to be paid to the parties' expectations that their case is fully considered with specific attention. However, it does not imply that all procedural requests are granted, for fear of having the final award set aside. Indeed, the SFT would not set aside an award for “procedural” decisions based on a wise exercise of discretion. The discretion that the Code largely recognises to CAS Panels.

In any case, a careful arbitrator should always consider whether the request constitutes a legitimate and justified exercise of the party's procedural rights, or is an unreasonable move, intended to create delays and to interfere with the proper adjudication mechanism. In that framework, the arbitrator should evaluate the purpose of the measure requested, the opportunities given or already enjoyed by the moving party, and counterbalance the request with the rights and expectations (chiefly to an efficient conduct of the arbitration) of the other party.

The experience shows that CAS Panels diligently exercised the discretion enjoyed under the applicable rules:<sup>53</sup> For instance, requests for extension of time limits are normally granted, if they are not in bad faith, if they do not excessively delay the procedure and are in conformity with the principle of proportionality; hearings (irrespective of, and

<sup>51</sup> *Buzescu v. Romania*, No. 61302/00, §67, ECHR 2005; *Donadze v. Georgia*, No. 74644/01, § 35, ECHR 2006.

<sup>52</sup> CAS 2008/A/1456, *Yaw Hammond v. Polis Di-Raja Malaysia FC*: in the case, the notification of the FIFA decision had been made to the national football association on the basis of a power of attorney appointing the national association for such purposes, and could therefore be understood as made upon the represented; CAS 2010/A/2258, *FK Dac 1904 a.s. v. Mate Dragicevic*: the notification to the national association was considered to be insufficient; CAS 2011/A/2506, *Yassine Chikhaoui v. Stéphane Canard*, confirming the need of personal delivery (or that service reaches the sphere of control of the addressee); CAS 2012/A/2915, *Club Atlético Boca Juniors v. Birmingham City FC*: the breach by the national association of the obligation to forward the document

received for service constitutes a breach to the right to be heard of the club; CAS 2013/A/3135, *PAS Giannina 1966 v. Stéphane Demol*; CAS 2014/A/3656, *Olympiakos Volou FC v. Carlos Augusto Bertoldi & FIFA*; CAS 2014/A/3807, *Qingdao Jonoon FC v. Gustavo Franchin Schiavolin*; CAS 2016/A/4814, *Free State Stars Football Club v. Daniel Agyei*; CAS 2017/A/5019, *Abdul Aziz Yusif v. Ismaily SC*: the delay caused by the national association in forwarding to the athlete the decision issued by the international federation cannot be held against the athlete, unless it is established that the federation must be considered as an agent for the athlete.

<sup>53</sup> See Mavromati, Reeb, *The Code of the Court of Arbitration for Sport. Commentary, Cases and Materials*, Alphen aan den Rijn, 2015, for the indications of the pertinent CAS jurisprudence.



beyond, the *Pechstein* jurisprudence)<sup>54</sup> are normally held whenever a party so requests, on the basis of decisions (to hold a hearing or not) adopted taking into account the financial constraints of the parties, the urgency of the case and the risk of violation of the right to be heard (*e.g.*, giving the appellant the possibility to reply at the hearing to the respondent's answer) (but no reasons are necessary for a denial: it is sufficient to indicate that the Panel deems itself sufficiently informed); precautions are (or may be) adopted to avoid surprises with respect to the identification of the applicable law;<sup>55</sup> flexibility is shown with respect to the existence of the "exceptional circumstances" mentioned at Article R56 of the Code for the late submission of evidence; deposition of anonymous witnesses can be allowed, but

only subject to strict conditions.<sup>56</sup>

To conclude, the usual, final question at the conclusion of the hearing (*i.e.*, whether the parties are satisfied as to the conduct of the arbitration or have any remark with respect to their respective right to be heard) has an important role, as it allows the Panel to deal (possibly immediately) with any issue that might have arisen.<sup>57</sup>

In any case, caution and wisdom are the key elements, taking in mind that CAS arbitrators provide services not only in the interest of the parties, but also of the sporting system. Avoid "paranoid thinking" and find the exact balance is not easy, but it is part of the art of the arbitration.

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<sup>54</sup> See above footnote 3.

<sup>55</sup> In a case in which the parties disputes whether law A or B applied, instead of issuing an interim award or another formal decision, a letter could be sent, informing the parties that the Panel has come to the provisional conclusion that law A applied, and therefore the parties are invited to make submissions on its basis, but that, at the same time, the Panel would hear at the hearing submissions also regarding the applicability of law B, and that the Panel, if it came to the conclusion that law B applied instead of law A, would adopt all proper measures to ensure that the parties' right to be heard also on the basis of such other law be respected.

<sup>56</sup> CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA*; CAS 2011/A/2384, *Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC)* & CAS 2011/A/2386 *World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC*. In such cases, it was noted that, when facts are based on anonymous witness statements, the right to be heard guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution is affected. However, those statements do not breach this right, when they support the other evidence provided to the Panel. The Panels found support in the jurisprudence of the SFT, according to which, if the applicable procedural code provides for the possibility to prove facts by witness statements, the court's power to assess the witness statements would be infringed if a party was prevented

from relying on anonymous witness statements. Reference was also made to the case law of ECHR, which recognized the right of a party to rely on anonymous witness statements and to prevent the other party from cross-examining the witness if interests worth of protection (*e.g.*, the personal safety of the witness) are at stake. The use of anonymous witness statement, although admissible, is however subject to strict conditions: the right to be heard and to a fair trial must be ensured through other means, namely by cross-examination through "audiovisual production" and by an in-depth check of the identity and reputation of the witness by the court; and the award must not solely or to a decisive extent be based on the statements of the anonymous witness. In any case, an abstract danger to the witness' interests is insufficient. There must be a concrete or at least a likely danger. In addition, the measures ordered by the Tribunal must be adequate and proportionate in relation to all interests concerned: the more detrimental the measure is to the procedural rights of a party, the more concrete the threat to the protected interests of the witnesses must be.

<sup>57</sup> In other words, such question should not be understood as a way of "trapping" the party, and of depriving it or the possibility to raise subsequently a criticism to the Panel, but as a genuine effort to allow a prompt remedy to any violation that (even inadvertently) may have been committed.



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# The Revision of the World Anti-Doping Code 2021

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## I. Introduction

The World Anti-Doping Code (“WADC”) was enacted for the first time in 2003 and entered into force on 1 August 2004. It has been revised three times since. Every version of the WADC was driven by a specific theme (“Leitmotiv”). In the WADC 2003 it was the attempt to harmonize the existing anti-

doping rules across all sports and countries. The basic tone underlying the 2009 revision process was to strike a better balance between the need for harmonization and the principle of proportionality in respect of the consequences imposed for an anti-doping

rule violation (“ADRV”). The 2015 reform<sup>1</sup> proceeded in the shadow of the “Armstrong” doping scandal and focused upon improving the means of intelligence gathering, getting a better grip on athlete support personnel, and increasing deterrence.<sup>2</sup> The most recent revision process of the WADC (which started in 2017 and finished with the World Anti-Doping Conference in Katowice in November 2019) stood in the spray of the so-called Russian doping scandal, i.e. the question of how to confront structural and centrally orchestrated non-compliance with the applicable anti-doping rules. The objective was also to ensure the WADC is still fit for purpose on fast evolving or new questions such as retesting, substances of abuse, compliance monitoring, etc.

Compared to previous reviews, stakeholder participation in the various consultation rounds<sup>3</sup> for the WADC 2021 was lower. In particular, there was less feedback on major principles. Instead, much of the feedback concentrated on issues of practical application, since a majority of the stakeholders thought that the WADC 2015 had overall worked well. In total there were 211 submissions (appr. 700 hundred pages), most of which came from the sports movement and the national anti-doping organizations (“NADOs”) or regional anti-doping organizations (“RADOs”).<sup>4</sup> These submissions resulted in over 3000 changes compared to the WADC 2015. Because it is impossible to present all these changes in this short overview, the article will focus only on some – rather randomly picked – amendments that may be interesting from an

adjudicatory perspective, in particular before the Court of Arbitration for Sport (“CAS”).

## II. The World Anti-Doping Program

### A. The hierarchy / layers of norms

The basic structure of the World Anti-Doping program with its three layers has remained unchanged in the revision process. At the top of the hierarchy is the WADC. The WADC 2021 clarifies that the second layer is constituted of the International Standards and the Technical Documents. The latter are defined as documents adopted and published by the World Anti-Doping Agency (WADA) from time to time containing mandatory technical requirements on specific anti-doping topics as set forth in the International Standard for Laboratory. Technical Documents are an instrument that allows WADA to react swiftly to certain (local or global) problems in the field of anti-doping,<sup>5</sup> without following the more lengthy process of changing the International Standards.<sup>6</sup> Technical Documents have already existed in the past. The new version of the WADC merely acknowledges the standing practice and incorporates these regulations into the existing hierarchy of norms within the World Anti-Doping Program.

### B. The International Standards

The WADC 2021 increases the number of International Standards. They serve the purpose to flesh out certain requirements of the WADC in order to ensure a more harmonized approach among Anti-Doping

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<sup>1</sup> Cf. for an overview HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19 seq.

<sup>2</sup> Cf. HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19, 24

<sup>3</sup> December 2017 to March 2018, June 2018 to September 2018 and December 2018 to March 2019. Between May 2019 and September 2019 WADA allowed for further and continued stakeholder feedback.

<sup>4</sup> Cf. for a statistic, 2021 World Anti-Doping Code and International Standard Framework Development and

Implementation Guide for Stakeholders, p. 3 seq. ([https://www.wada-ama.org/sites/default/files/resources/files/worldconferencebackgrounder\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/worldconferencebackgrounder_0.pdf)).

<sup>5</sup> For an overview of the existing Technical Documents, cf. [https://www.wada-ama.org/sites/default/files/resources/files/td2019\\_index\\_v4.0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/td2019_index_v4.0.pdf).

<sup>6</sup> The *International Standards* may be revised from time to time by the WADA Executive Committee after reasonable consultation with the *Signatories*, governments and other relevant stakeholders.

Organizations (“ADOs”). Henceforth, the following International Standards need to be distinguished:

- International Standard for Code compliance (ISCCS)<sup>7</sup>,
- International Standard for Testing and Investigations (ISTI),
- International Standard for Therapeutic Use Exemptions (ISTUE),
- International Standard for the Protection of Privacy and Personal Information (ISPPPI),
- International Standard for Laboratories (ISL),
- International Standard for Education (ISE) and
- International Standard for Results Management (ISRM).

The ISE and the ISRM are new. A whole set of provisions that in the past were to be found in Art. 7 of the WADC 2015 have now been moved to the (new) ISRM, which has streamlined and shortened the WADC 2021 considerably.<sup>8</sup>

### C. The Athletes’ Anti-Doping Rights Act

The WADC 2021 also refers to a (new) document that does not form part of the three layers of the Anti-Doping Program. It is entitled Athletes’ Anti-Doping Rights Act (“AADRA”).<sup>9</sup> It is a document approved by the WADA Executive Committee upon the recommendation of the WADA Athletes Committee. The AADRA compiles in one place (and in a non-exhaustive manner) those Athletes’ rights that are specifically identified in the WADC and International Standards, as well as other agreed-upon principles of best practice with respect to the

overall protection of Athletes’ rights in the context of anti-doping (Art. 20.7.7). The AADRA is divided into two parts. The first part is declaratory in nature and lists (in a non-exhaustive manner) the existing Athletes’ rights in the context of anti-doping. The second part of the AADRA contains “recommended Athlete rights”. These rights do not exist universally within anti-doping, nor are they rights under the WADC or the International Standards. However, they are rights that “*Athletes encourage Anti-Doping Organizations to adopt and implement within their own organizational structures to further enhance the fight against doping, the integrity of the system, and Athlete rights within that system*”. It is to be expected that the AADRA will eventually develop into a legal document to which adjudicatory bodies will refer.

### D. The Mandatory character of the WADC and the International Standards

The WADC and the International Standards are mandatory (cf. Introduction to the WADC) and must be implemented by each signatory. Furthermore, Art. 23.2.2 WADC 2021 imposes on the signatories a duty to implement certain provisions of the WADC without substantive change (Art. 23.3.3). The WADC also provides that signatories may not add provisions which change the effect of those articles that need to be implemented without material change. The purpose of this provision is to prevent signatories from undermining the level of harmonization across sports.<sup>10</sup> In the past, sports organizations have frequently tried to bypass this rule, in particular by qualifying their doping-related provisions as eligibility rules and thereby preserving their autonomy beyond the reach of Art. 23.3.3 WADC. It is rather obvious that, in order to assess

<sup>7</sup> For a detailed analysis, see HAYNES, WADA’s International Standard for Code Compliance by Signatories: A Primary Assessment, [2018] I.S.L.R issue 4, p. 59 et seq.

<sup>8</sup> For an overview over the changes related to results management, see also MORTSIEFER Revision des Welt Anti-Doping Code (WADC 2021) – Ein Überblick, SpuRt 2020, p. 10, 11 seq.

<sup>9</sup> <https://www.wada-ama.org/en/resources/anti-doping-community/athletes-anti-doping-rights-act>.

Cf. also MORTSIEFER Revision des Welt Anti-Doping Code (WADC 2021) – Ein Überblick, SpuRt 2020, p. 10, 11.

<sup>10</sup> HAAS, Ex-Doper willkommen?, jusletter 2. April 2012, no. 4.

whether or not a sports organization has complied with Art. 23.3.3 WADC 2021, the labelling of the respective rules (“anti-doping rules” or “eligibility rules”) is irrelevant. Instead, a substantive approach must be taken. Art. 23.3.3 WADC 2021 prohibits signatories to intrude objectively into its regulatory sphere (e.g. ADRV, Prohibited List, sanctioning regime). Even though this starting point is uncontested,<sup>11</sup> CAS panels in the past have struggled with where to draw the dividing line between anti-doping and eligibility rules.<sup>12</sup> Mostly, panels have looked at the purpose, the nature, or the effect of a rule in order to qualify it either as an eligibility or a (doping-related) disciplinary rule. In CAS 2011/O/2422, no. 33 seq., the Panel held as follows:<sup>13</sup>

*“qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question... a common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete... In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete’s prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a*

*competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour”.*

Difficulties may not only arise when distinguishing anti-doping rules from eligibility rules, but also when looking at provisions designed to protect the health of athletes or to preserve the reputation of a specific sport.<sup>14</sup> The new WADC 2021 is sensitive to this issue and specifically states that Art. 23.3.3 WADC does not preclude the signatories from enacting “*safety, medical, eligibility or Code of Conduct rules*”. However, such rules may not be anti-doping rules in disguise, as would evidently be the case if such provisions were included in the anti-doping regulations of the sports organization and/or were to apply to the sanctioning regime for ADRVs<sup>15</sup>.

### III. The Personal Scope of Application

#### A. The Persons bound by the WADC

Whether an individual has obligations under the WADC depends upon two prerequisites. First of all the (rules implementing the) WADC must impose obligations on the individual in question. Secondly, the individual must have submitted to the WADC. In most instances this will occur by submission through contract.<sup>16</sup> While no

<sup>11</sup> Cf. CAS 2012/A/3055 (11.10.2013) *Riis Cycling A/S v. the Licence Commission of the UCI*, no. 8.21.

<sup>12</sup> HAAS, Ex-Doper willkommen?, jusletter 2. April 2012, no. 16 seq.

<sup>13</sup> CAS 2011/O/2422 (4.10.2011) *USOC c. IOC*, no. 33 seq.; see also CAS 2007/O/1381 (23.11.2007) *RFEC & Alejandro Valverde c/ UCI*, no. 75 et seq.; CAS 2012/A/3055 (11.10.2013) *Riis Cycling A/S v. the Licence Commission of the UCI*, no. 8.21 et seq.; CAS 2017/A/5498 (3.7.2019) *Vitaly Mutko v. IOC*, no. 50; contra CAS OG 18/03 (9.2.2018) *Alexander Legkov, Maxim Vylegzhanin, Ergeniy Belov, Alexander Bessmertnykh, Engenia Shapovalova, Natalia Matveeva, Aleksandr Tretiakov, Elena Nikitina, Maria Orlova, Olga Fatkulina, Alexander Rumyantsev, Artem Kuznetsov, Tatyana Ivanova, Albert Demchenko, Sergei Chudinov v. International Olympic Committee*, no. 7.3 et seq.

<sup>14</sup> Cf. CAS 2018/A/5615 (25.3.2019) *Jared Higgs v. Bahamas Football Association (BFA)*, no. 134 et seq.; CAS

2019/A/6089 (21.8.2019) *Stefan Luitz v. Fédération Internationale de Ski (FIS)*, no. 69 et seq.

<sup>15</sup> CAS 2019/A/6089 (21.8.2019) *Stefan Luitz v. Fédération Internationale de Ski (FIS)*, no. 69 et seq.

<sup>16</sup> SULLIVAN, *The World-Anti Doping Code an Contract Law*, in Haas/Healey (Eds.) *Doping in Sport and the Law*, 2016, p. 70: “If it stands for a broader proposition that a sporting organisation’s rules apply to a person who, by his or her actions, brings himself or herself within the purview of those rules, even though not contractually bound by them, then it seems inconsistent with legal principle. On what basis can it be said that ‘rules’ are enforceable against strangers when there is no relevant contractual, proprietary or statutory power? As Denning LG, as he then was, put it colourfully but accurately: ‘The jurisdiction of a domestic tribunal ... must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as parliament authorizes it or the parties agree to it’”. In some instances, an athlete could be

written form is required for such contractual submission, it is nonetheless recommended – for evidentiary purposes – to execute the agreement in a document (e.g. a license agreement for one or several seasons). Since there is no written form requirement, a submission agreement may also be executed implicitly.<sup>17</sup> What is required, though, is the presence of specific facts from which it can be inferred that a person intended to bind him- or herself contractually vis-à-vis an ADO. According to CAS jurisprudence it does not suffice, that a person “*by becoming a more or less renowned sports physician and treating or advising professional athletes ... automatically agrees to be bound by the ... [WADC]. If one were to follow this line of argument, the ... [person] – by the mere fact of becoming a sport physician – would have agreed to be bound by every existing anti-doping rule of this world. Not only does it appear completely fictitious ... [in] addition, it should be noted that one of the essentialia negotii of a contract is that the parties are aware of the identity of their contractual partners. If one were to follow Respondent’s submission not only would the Appellant have entered (tacitly) into submission agreements with all anti-doping organisations around the world, but also ITF would have executed – tacitly – contracts with all sports physicians around the world. Such intent, however, cannot be followed ...*”<sup>18</sup>

The new WADC 2021 imposes on ADOs and signatories a duty to cast the net wide to involve all individuals that need to be bound to the WADC. This follows from the amended Introduction to the WADC 2021, which reads as follows:

*“Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. Athletes, Athlete Support Personnel or other Persons (including board members, directors, officers, and specified employees and volunteers of Signatories, and Delegated Third Parties and their employees) accept these rules as a condition of participation or involvement in sport and shall be bound by these rules.*

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submitted to the WADC (or comparable rules of NADO) by national law, cf. CAS 2018/A/5853 (2.7.2019) *FIFA v. Tribunal Nacional Disciplinario Antidopaje & Damián Marcelo Musto*, no. 96 et seq.

*Each Signatory shall establish rules and procedures to ensure that all Athletes, Athlete Support Personnel or other Persons under the authority of the Signatory and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant Anti-Doping Organizations”.*

The comment to this paragraph (fn. 6) makes it clear that, where the WADC requires someone other than an athlete or ASP to be bound by it, such persons would of course not be subject to sample collection, testing or the corresponding ADRVs and sanctioning regime. However, they could be responsible for a violation of Articles 2.5 (Tampering), 2.7 (Trafficking), 2.8 (Administration), 2.9 (Complicity), 2.10 (Prohibited Association) and 2.11 (Retaliation) WADC 2021. The signatories’ obligation to draw their board members, directors, officers and other employees under the umbrella of the WADC is reiterated in Art. 20 WADC 2021 (cf. 20.1.7, 20.2.7, 20.3.4, 20.4.8, 20.5.10, 20.6.5). Unfortunately, this obligation was not included in the provision on roles and responsibilities of the Regional Anti-Doping Organizations (Art. 21.4 WADC). As this is most likely due to an oversight the *lacuna* should be filled by applying the above provisions by analogy.

In the various consultation rounds there was a controversy on whether or not persons working for a sports organization (either as a board member, director, official, employee or volunteer) could validly be bound to the WADC and, more specifically, be disciplined according to the WADC in case of breaches.<sup>19</sup> There was concern that this would be a problematic approach under various national laws, in particular, national labor law. It is for this reason that the obligation to contractually submit persons (other than athletes and ASP) to the WADC is subject to the limitations of national law. It appears, however, that – at

<sup>17</sup> SULLIVAN, *The World-Anti Doping Code and Contract Law*, in Haas/Healey (Eds.) *Doping in Sport and the Law*, 2016, pp 68 seq.)

<sup>18</sup> CAS 2016/A/4697 (3.2.2017) *Elena Dorofeyeva v. International Tennis Federation*, no. 87.

<sup>19</sup> Cf. 2021 Code revision – fifth draft, p. 27 seq.



least from a Swiss law perspective – no conflicts arise from labor law when implementing the above obligation and applying the WADC to this set of persons.<sup>20</sup>

## B. Different types of Athletes

The primary focus of the WADC is on the athletes. The WADC submits them to a tight corset of obligations and disciplinary consequences in case of breach. However, already in the past the WADC did not treat all athletes alike. Instead – throughout the different version of the WADC – it differentiated between national and international-level athletes (e.g. in the context of TUEs, appeals or registered testing pools). Irrespective of this differentiation, it is commonly acknowledged that the duties under the WADC are not particularly apt for recreational athletes. The WADC 2015 granted the ADOs discretion as to whether they want to apply the WADC to athletes beyond those competing on a national or international level. However, if an ADO decided to do so, the WADC did not allow for any discretion in adapting the sanctioning regime to these lower ranked athletes. The WADC 2015 provided in that respect as follows (see Appendix 1 Definitions):

*“An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of ‘Athlete’. In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyze Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by*

*any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied”.*

The WADC 2021 has improved this situation by introducing the new category of so-called “Recreational Athletes”. The concept of recreational athletes only applies to persons who participate in sport in lower categories than international and national-level athletes. In order to prevent abuse, the WADC 2021 sets certain criteria that must be fulfilled for athletes to qualify as recreational (see Appendix 1 Definitions). In order to take into account for the fact that recreational athletes, in principle, do not receive the same level of anti-doping education as higher-level athletes, the WADC 2021 allows for lighter sanctions involving ADRVs according to Art. 2.1., 2.2., 2.3 or 2.6.

## IV. Anti-Doping Rule Violations

### A. Presence of a prohibited substance

Art. 2.1 WADC (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample”) has been modified. The provision now specifically refers to the “Technical Documents” (see supra) and thereby highlights that these documents must be consulted, because they may contain important information on decision limits<sup>21</sup>, reporting thresholds<sup>22</sup> or with respect to the evaluation of the presence of certain substances. The changed wording is not materially different, but consistent with past practice.<sup>23</sup>

### B. Tampering

Adverse Analytical Finding shall be reported, as defined in the International Standard for Laboratories.

<sup>22</sup> Cf. Art. 4.0 TD2019MRPL.

<sup>23</sup> Cf. CAS 2016/A/4596 (1.3.2017) *Fédération Internationale de Football Association (FIFA) v Saudi Arabian Olympic Committee & Saudi Arabian Anti-Doping Committee & Mohammed Mohammed Noor Adam Hansawi*, no. 114; CAS 2016/A/4632 (1.12.2016) *Alexei Lovchev v. International Weightlifting Federation*, no. 33.

<sup>20</sup> Cf. CAS 2018/A/5003 (27.7.2018) *Jérôme Valcke v. FIFA*, no. 151 et seq.; HAAS/METTLER, *Schiedsgerichtliche Streitigkeiten an der Schnittstelle zwischen Arbeits- und Vereinsrecht*, in Müller/Rudolph/Schnyder/von Kaenel/Waas (Eds) *Festschrift für Wolfgang Portmann*, p. 237 et seq.

<sup>21</sup> A Decision Limit is the value of the result for a threshold substance in a Sample above which an

Tampering and attempted tampering has been an ADRV ever since the WADC 2003. The term tampering is defined in the Appendix 1 Definitions. According thereto tampering is an “*intentional conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organization or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organization or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.*” The footnote to the comment adds an important clarification, which is essential to restrict the rather broad conception of the term tampering. It provides that actions taken as a part of a person’s legitimate defense to an anti-doping rule violation charge shall not be considered tampering. This restriction has been devised by CAS panels<sup>24</sup> and has now been incorporated into the new WADC.

In individual cases it may be difficult to assess whether a conduct displayed by an athlete or other person remains within the boundaries of legitimate defense. CAS jurisprudence indicates that the bar beyond which legitimate defense is exceeded should not be set too low. The mere fact that an athlete lies or does not state the truth when facing a results management process for an alleged ADRV is still within the boundaries of legitimate defense. The threshold is only exceeded once there is a further element of deception that puts the administration of justice fundamentally in danger.<sup>25</sup>

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<sup>24</sup> CAS 2015/O/4128 (26.10.2016) *International Association of Athletics Federation (IAAF) v. Rita Jeptoo*, no. 147 et seq.; CAS 2017/A/4973 (15.12.2017) *Drug Free Sport New Zealand v. Karl Murray*, no. 129 et seq.; very restrictive *UKAD v. Mark Dry*, National Anti-Doping Panel, Decision on Appeal, 25 February 2020.

### C. Prohibited Association

Art. 2.10 WADC (Prohibited Association by an Athlete or Other Person”) was introduced for the first time in the WADC 2015.<sup>26</sup> Its purpose is to prohibit any association in a sport-related capacity with an athlete support person (“ASP”) who is serving a period of ineligibility (or would be serving a period of ineligibility if he or she were bound by the WADC). In the past, in order for this provision to apply, an anti-doping organization (“ADO”) had to advise the athlete that his or her association with an ASP was prohibited before charging the athlete with an ADRV.<sup>27</sup> In the future, this is no longer required (albeit not excluded). Henceforth an ADO may commence results management proceedings against an athlete if the latter knew about the disqualifying status of the ASP with whom he or she associated.

### D. Acts that discourage or retaliate against reporting

A new ADRV was introduced in Art. 2.11 WADC 2021. The provision acknowledges that information from whistleblowers is vital in the fight against doping. It therefore discourages all action by others (be it athletes or other persons) to prevent whistleblowers from coming forward. Whoever does so commits an ADRV. The provision only protects whistleblowers insofar as they revert and provide information to the anti-doping organizations. In other words, a whistleblower turning to the public or press will not enjoy the protection of the WADC in case of threat or retaliation. However, in such circumstances local statutory provisions on the protection of whistleblowers may step in. Furthermore, the provision only applies to whistleblowers acting in good faith.

<sup>25</sup> CAS 2017/A/4973 (15.12.2017) *Drug Free Sport New Zealand v. Karl Murray*, no. 143.

<sup>26</sup> HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19, 30.

<sup>27</sup> Cf. *IAAF v. Athlete X*, Decision of the Disciplinary Tribunal 21 October 2019, no. 38, 43.

## V. The Prohibited List

### A. Substances prohibited in-competition only appearing in trace amounts in competition

The majority of stakeholders remained in favor of the existing regime that differentiates between substances that are prohibited at all times and substances that are prohibited in competition only.<sup>28</sup> This “split list” has existed ever since the WADC came into force in 2003 and has been – at least in the past – a target of criticism. The general rule is as follows: If a substance (prohibited in-competition only) appears in an athlete’s in-competition test sample, it is an adverse analytical finding (“AAF”), irrespective of when the substance was taken.<sup>29</sup> This approach has become increasingly problematic as WADA-accredited laboratories have developed abilities to detect ever more minuscule amounts of a prohibited substance. Thus, there is an increasing danger for a substance that may be lawfully taken out-of-competition to show up in a sample taken during competition, resulting in an ADRV.<sup>30</sup> This problem cannot be tackled adequately on the level of consequences, because – with respect to disqualification – the WADC follows the strict liability approach. As stakeholders were not prepared to call this principle into question it proved impossible to agree on any regulatory solution. However, a special working group appointed by WADA in order to address this problem is considering to introduce a new Technical Document containing reporting

<sup>28</sup> Cf. HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19, 20 et seq.

<sup>29</sup> Cf. also CAS 2013/A/3327 (11.4.2014) *Cilic v. International Tennis Federation & 2013/A/3335 International Tennis Federation v. Cilic*, no. 75; CAS 2018/A/5768 (11.9.2019) *Dylan Scott v. International Tennis Federation*, no. 106.

<sup>30</sup> CAS 2013/A/3327 (11.4.2014) *Cilic v. International Tennis Federation & 2013/A/3335 International Tennis Federation v. Cilic*, no. 75.

<sup>31</sup>Cf. e.g. CAS 2017/A/5061 (15.12.2017) *Samir Nasri v. Union des Associations Européennes de Football (UEFA)*.

thresholds for certain substances which are prohibited in-competition only.

### B. Specified Methods

The new Art. 4.2.2 WADC provides for the possibility that the Prohibited List may qualify certain prohibited methods as “specified”. This change is of some importance, in particular with regard to the sanctioning regime, because ADRVs related to specified substances (and, henceforth, specified methods) carry lighter sanctions. In the past, prohibited methods were never “specified” within the meaning of Art. 4.2.2 of the WADC. Consequently, an intravenous infusion of more than 100 ml (per 12 hours) more or less routinely carried a 4-year period of ineligibility according to Art. 10.2.1.1 WADC, since intravenous infusions hardly ever occur non-intentionally. This consequence may be very harsh in individual circumstances.<sup>31</sup> The new provision allows for a more nuanced approach. However, it remains to be seen what prohibited methods, if any, the WADA List Expert Group<sup>32</sup> will qualify as “specified” in the future.

### C. Substances of Abuse

Another important change relates to the new category of prohibited substances called “Substances of Abuse”. The concept of “Substances of Abuse” failed to find a majority among stakeholders in the revision process for the WADC 2015,<sup>33</sup> and initially met with opposition in the 2021 review, as well.<sup>34</sup> Eventually, however, it was supported by a majority of stakeholders, in particular athletes’ unions. The new category of

<sup>32</sup> <https://www.wada-ama.org/en/prohibited-list-expert-group>. Apparently the Group met in January and decided not to qualify any prohibited methods as “specified” for the 2021 Prohibited List.

<sup>33</sup> Cf. HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19, 22.

<sup>34</sup> Cf. MORTSIEFER Revision des Welt Anti-Doping Code (WADC 2021) – Ein Überblick, SpuRt 2020, p. 10, 12.



“Substances of Abuse” is designed to cover substances that are frequently abused in society outside the context of sport. It will be the mandate of the WADA List Expert Group to identify pertinent substances from the substances included on the Prohibited List. These substances carry a significantly lower period of ineligibility (cf. Art. 10.2.4). A typical substance of abuse within the above meaning could be cocaine. Cocaine is a non-specified stimulant prohibited in-competition only. There are a number of CAS decisions dealing with cocaine cases. A cursory overview shows that there is no uniform approach. Under the previous versions of the WADC periods of ineligibility ranged from 18 months<sup>35</sup> to two years<sup>36</sup> and up to four years<sup>37</sup>. The reason for this unsatisfactory situation was that ADRVs involving cocaine did not fit easily into the mechanics of the WADC 2015.<sup>38</sup> Furthermore, ADOs do not want to spend money to solve a societal problem (addiction).

## VI. Periods of ineligibility

The provisions on ineligibility (paired with the rules on ADRVs) are probably the most relevant provisions from an adjudicatory perspective. The overall structure of the provision on periods of ineligibility (Art. 10 WADC) has remained the same in the WADC 2021. Art. 10 WADC 2021 continues to differentiate between the various types of ADRVs, i.e, whether it is a first or second ADRV, whether the ADRV was committed intentionally, or to what extent fault and non-fault related reductions apply. However, there are a couple of amendments aiming to add

more flexibility to the sanctioning regime, both up and down the scale of severity.

### A. Substances of Abuse

In the past the chief problem with ADRVs related to “social drugs” was that they did not fit with the mechanics of the WADC (see *supra*). In most cases these substances are ingested intentionally by the athletes (within the meaning of Art. 10.2.3 WADC). Accordingly, absent any exceptional circumstances, ADRVs of this type are likely to end up with a 4-year period of ineligibility under the WADC 2015. Another issue adding to the problem was that a lot of international federations adhered to a rather comprehensive concept of “in-competition”, making it even more difficult for athletes to obtain lighter sanctions. The majority of the stakeholders of the 2021 review process were dissatisfied with this situation because social drugs like cocaine in most instances are not consumed to enhance sporting performance, but because of a drug use or addiction issue. Thus, the question bears asking whether the WADC is the proper instrument to battle the social problem of drug abuse. Be it as it may, the majority of stakeholders advocated a more flexible approach with respect to ADRVs that involve “Substances of Abuse”. The newly introduced Art. 10.2.4 WADC 2021 operates as a *lex specialis*, dedicated to cases of presence (Art. 2.1) and use (Art. 2.2) of a Substance of Abuse.

The provision differentiates between ingestion and use, whether in-competition (Art. 10.2.4.1) or out-of-competition (Art. 10.2.4.2). If the ingestion or use occurred out-

<sup>35</sup> CAS 2016/A/4416 (7.11.2016) *Fédération Internationale de Football Association (FIFA) v. Confederación Sudamericana de Fútbol & Brian Fernández*; UCI Anti-Doping Tribunal ADT 2.2015 *UCI v. Luca Paolini*.

<sup>36</sup> CAS 2017/A/5078 (21.8.2017) *Roman Eremenko v. UEFA*.

<sup>37</sup> CAS 2019/A/6110 *Liam Cameron v. UK Anti-Doping Limited (UKAD)*; CAS 2017/A/5144 (1.3.2018) *FIFA v. CONMEBOL & José Angulo Caicedo*.

<sup>38</sup> Cf. SCHNEIDER, *Recreational Drugs in Sport: the issue of cocaine*, CAS Bulletin 2018/02, p. 26 et seq.;

RIGOZZI/HAAS/WISNOSKY/VIRET, *Breaking down the process of determining a basic sanction under the 2015 World Anti-Doping Code*, Int. Sports Law J (2015) 15:3, 15:35 et seq.; HAAS, *The WADA Code 2015 – The Most Relevant Changes*, in Bernasconi (Ed) *Arbitrating Disputes in a Modern World*, 5<sup>th</sup> Conference CAS & FSA/SAV Lausanne 2014, 2016, p. 39, 54 seq. The only exception was made for marijuana, see comment to the definition of “No Significant Fault or Negligence” in the WADC 2015 (p. 142).

of-competition and was unrelated to sports performance, the ADRV carries – in principle – a flat 3-month period of ineligibility that can be further reduced in case the athlete completes an approved substance of abuse treatment program. If, instead, the ingestion or use occurred in-competition and the athlete can establish that it was unrelated to sport performance, the ingestion or use will not be qualified as intentional for the purposes of Art. 10.2.1 WADC. Furthermore, it should be noted that the new WADC defines the term in-competition very restrictively. According thereto the in-competition period commences at 11.59 p.m. on the day before the competition in which the athlete is scheduled to participate, and continues through to the end of the competition and the sample collection process related to such competition (cf. Annex 1 Definitions).

### **B. Reintroduction of the concept of Aggravating Circumstances**

The concept of “aggravating circumstances” had been implemented for the first time in the WADC 2009,<sup>39</sup> was then abolished in the WADC 2015, and resurfaces today in the WADC 2021. The wording of the new provision is very similar to the old Art. 10.6 WADC 2009 by allowing for an increase of the otherwise applicable period of ineligibility by an additional period of up to two years “*depending on the seriousness of the violation and the nature of the aggravating circumstances*”. The provision is designed for ADRVs that are committed intentionally. This follows from the fact that, in order for the provision to apply, the person in question must have “knowingly” committed the ADRV. Art. 10.4 WADC 2021 cannot be applied to ADRVs that fall under Article 10.2.4 WADC (Substances of Abuse). Furthermore, the

provision is not applicable to ADRVs according to Art. 2.7–2.9, Art. 2.11 WADC 2011, since the respective period of ineligibility allows already for sufficient discretion to take account of the individual circumstances of a given case (cf. fn. 44).

CAS panels should apply this provision judiciously. This follows from a historical perspective. Under the WADC 2009 the provision had little practical significance<sup>40</sup> and, in addition, the standard period of ineligibility was two years. In case of aggravating circumstances it could be raised to four years. Under the WADC 2021, however, the standard sanction (for intentional doping) is already four years. The increase provided for in Art. 10.4 WADC 2021, thus, may escalate the sanction to six years. This is a lot more than under the WADC 2003, which provided for a standard sanction of two years (with no possibility of increase). All in all, the range of sanctions for the most common ADRVs has tripled over the course of 15 years.

Finally, the aspect of proportionality needs to be taken into account. This is particularly true in cases where an athlete was successful in deceiving the anti-doping authorities over a long period of time and, thus, gained a particularly relevant advantage. Such cases, which will be sparked mostly by retesting of existing samples or time-consuming profiling (e.g. through an athlete biological passport), appear to be well-suited for Art. 10.4 WADC 2021, at least at first sight. If the detected ADRV dates back a couple of years in time the overall effects of the sanctions imposed on the athlete might severely conflict with the principle of proportionality, because in addition to the period of ineligibility one must also take account of Art. 10.10 WADC 2021.<sup>41</sup> The provision states that “*all other*

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<sup>39</sup> HAAS/BOCCUCCI, The New Regime of Sanctions for Anti-Doping Rule Violations Under the World Anti-Doping Code 2009, in Rigozzi/Bernasconi (Eds) CAS Jurisprudence and New Developments in International Sports Law, 3<sup>rd</sup> CAS & SAV/FSA Conference Lausanne 2010, 2012, p. 66 et seq.

<sup>40</sup> Cf. HAAS, Mögliche Ansatzpunkte für eine Reform des Welt-Anti Doping Code, in Rigozzi/Sprumont/Hafner (Eds) Citius, Altius, Fortius, Mélanges en l’honneur de Dennis Oswald, 2012, p. 627, 639 et seq.

<sup>41</sup> Cf. for a detailed analysis of the provision, MANNINEN/NOWICKI, “Unless Fairness Requires

*competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes*". When added to the period of ineligibility, this retroactive effect of Art. 10.10 WADC 2021 may easily result in consequences exceeding timeframes of 8 years. Some CAS panels in the past have been reluctant to accept such severe consequences in light of the principle of proportionality. In the case of Ekaterina Sharmina the sole arbitrator found as follows:<sup>42</sup>

*"Even considering that the Athlete herself, by using a sophisticated plan, scheme and tactics in order to hide the use of a prohibited substance or prohibited method, was responsible for this disadvantage as to the application of ... [Art. 10.10 WADC], the Sole Arbitrator, nevertheless, holds that only the application of a fairness exception will strike a balance of proportionality between the legitimate aims of deterrence and the fight against doping and the means used for such purpose. To apply ... [Art. 10.10] literally would clearly lead to an excessive sanction prohibited by Article 6 of the ECHR"*.

In order to evade conflicts with the principle of proportionality, CAS panels tend to leave certain competitive results untouched, making use of the "fairness exception" in Art. 10.10 WADC.<sup>43</sup> This attempt to come in line with the principle of proportionality is questionable. It would serve justice (and the interests of the defrauded competitors) much better to reduce the period of ineligibility (i.e., not to apply aggravating circumstances) and disqualify all competitive results of the athlete instead. This is all the more true considering what little difference it makes for the athlete's

future career whether the ban lasts four years or six, since either way it will be the end of his or her career. Also, the deterrent effect of imposing an additional two years is rather small. Thus, whenever a panel finds that the overall effects of the consequences imposed on an athlete (ineligibility and disqualification) are excessive, disqualification of all competitive results should be given preference over the imposition of the maximum period of ineligibility, in order to comply with the principle of proportionality.

### C. Fault-related reductions

#### a) The Framework

Under the WADC 2021 the level of fault remains the most important criterion to determine the length of the period of ineligibility. This is especially true for the most commonplace ADRV (Presence of a Prohibited Substance), which is dealt with in Art. 2.1. Art. 10 WADC differentiates (leaving aside aggravating circumstances) between the following, mutually exclusive,<sup>44</sup> levels of fault:

- intentional (Art. 10.2.1, 10.2.3),
- simply negligent (Art. 10.2.2),
- no significant fault and negligence ("NSF") (Art. 10.6) and
- no fault and negligence ("NF") (Art. 10.5).

These four categories are distinct and different and must be examined separately. This clearly follows from the structure of the WADC and also from the simple fact that the conditions for these different fault-related concepts differ substantially. Thus, if an adjudicatory panel examines whether or not

Otherwise" – A Review of Exceptions to Retroactive Disqualification of Competitive Results for Doping Offenses, CAS Bulletin 2017/02, p. 7 e seq.

<sup>42</sup> CAS (29.11.2016) 2016/O/4464 *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Ekaterina Sharmina*, no. 190

<sup>43</sup> Cf. also CAS 2017/O/4980 (4.8.2017) *International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Svetlana Vasilyeva*, no. 92 et seq.

<sup>44</sup> RIGOZZI/HAAS/WISNOSKY/VIRET, Breaking down the process of determining a basic sanction under the 2015 World Anti-Doping Code, Int. Sports Law J (2015) 15:3, 15:14.

an athlete acted intentionally (within the meaning of Art. 10.2.1, 10.2.3), it needs to assess whether the athlete engaged “in conduct which they knew constituted an ... [ADRV] or knew that there was a significant risk that the conduct might constitute or result in an ... [ADRV] and manifestly disregarded that risk”.<sup>45</sup> When making such assessment it is not a mandatory requirement that the athlete shows how the prohibited substance entered his or her system. This results from the clear wording of the provision.<sup>46</sup> The same is true, however, when looking at the genesis of the provision as is indicated in the decision CAS 2018/A/5768:<sup>47</sup>

“The drafting team of the WADC 2015 had contemplated at the time to introduce such requirement [requirement to prove the source of the prohibited substance] into Art. 10.2 of the WADA Code and had requested a supplementary expert opinion by Judge Jean-Paul Costa on this issue, i.e. the new draft wording. The latter stated in his expert opinion as follows:

“Une telle preuve est difficile à rapporter. Ce durcissement est-il excessif? On peut éprouver des doutes à cet égard, car une preuve impossible aboutirait à un renversement de la charge de la preuve ou à l’institution d’une présomption quasi-irréfragable de violation des règles antidopage. [...] J’en conclus donc, non sans quelque hésitation je l’admets, que la nouvelle rédaction du projet de révision peut être considérée comme acceptable, étant bien entendu précisé que ce seront les juridictions compétentes en cas de litige qui auront à apprécier les éléments de preuve fournis par les parties, et à les peser”.

free translation: *Such proof [how the substance entered the body]<sup>48</sup> is difficult to provide. Is such aggravation excessive? One could have doubts in this respect, because an impossible proof either leads to a reversal of the burden of proof or to the irrefutable assumption of an anti-doping rule violation [...] I conclude, thus, not without some hesitation, that this new text of the draft may be considered acceptable, subject however that it will be for the competent jurisdiction in the individual case to assess the elements of evidence adduced by the parties.*

*In view of Judge Jean-Paul Costa’s concerns (“I conclude, thus, not without some hesitation”), the redaction group went back to the initial text of the draft (which corresponds to the final text enacted) and acknowledged that whilst the route of the ingestion of the prohibited substance is an important fact in order to establish whether or not an athlete acted intentionally, it should not be a mandatory condition to prove lack of intent on the part of the athlete. To conclude, therefore, the Panel finds that – unlike in the context of NSF or NF – the source of the prohibited substance is not an absolute pre-condition of establishing lack of intent (see 2016/A/4534, CAS 2016/A/4676 and CAS 2017/A/5178)”.*

The situation is very different if the adjudicatory panel assesses whether or not an athlete acted with NF or NSF. It clearly follows from the applicable provisions that here – unlike in the context of Art. 10.2.3 WADC – the athletes must establish how the prohibited substances entered their system (see Appendix 1 Definitions).<sup>49</sup> So far CAS panels have always stuck to this mandatory requirement and have consistently denied reductions based on NSF (or NF) if the

<sup>45</sup> Cf. in detail RIGOZZI/HAAS/WISNOSKY/VIRET, Breaking down the process of determining a basic sanction under the 2015 World Anti-Doping Code, Int. Sports Law J (2015) 15:3, 15:22 et seq.

<sup>46</sup> CAS 2018/A/5580 (8.3.2019) *Blagovest Krasimirov Bozhinovski v. Anti-Doping Centre of the Republic of Bulgaria (ADC) & Bulgarian Olympic Committee (BOC)*, CAS Bulletin 2019/02, p. 57; CAS 2016/A/4534 (16.3.2017) *Mauricio Fiol Villanueva v. Fédération Internationale de Natation (FINA)*, CAS Bulletin 2017/02, p. 42, 43; very problematic CAS 2019/A/6313 (6.3.2020) *Jarrion Lawson v. International Association of Athletics Federations*, no. 77 where the Panel

– inter alia – mixed up the requirements for proving “No Fault” and no intentional doping, while the previous instance (Disciplinary Tribunal, 24 May 2019) got it right.

<sup>47</sup> CAS 2018/A/5768 (11.9.2019) *Dylan Scott v. International Tennis Federation*, no. 137 seq.; CAS 2017/A/5178 (15.3.2018) *Tomasz Zielinski v. International Weightlifting Federation (IWF)*, no. 87 et seq.

<sup>48</sup> Inserted for better understanding.

<sup>49</sup> RIGOZZI/HAAS/WISNOSKY/VIRET, Breaking down the process of determining a basic sanction under the 2015 World Anti-Doping Code, Int. Sports Law J (2015) 15:3, 15:42.

athlete failed to prove the origin of the AAF.<sup>50</sup> The obvious purpose of this additional condition is to allow reductions of the otherwise applicable period of ineligibility only in exceptional circumstances, and only based on established facts (and not speculation). Thus, the threshold for proving the route of ingestion should not be set too low.<sup>51</sup> Mere difficulties in substantiating the athlete's case or in providing evidence certainly do not suffice to shift the burden of proof to the ADO or to apply a low standard of proof. This would run counter to the provisions on burden of proof (Art. 3 WADC), the purpose of which is to allocate the "normal" risk associated with proving a fact. Even in exceptional circumstances, where proving a fact is saddled with particular difficulties, either because the other party contributed to these difficulties or because of the nature of the fact (e.g. negative fact), there are more adequate solutions for coping with the evidentiary problem than reversing the burden of proof or lowering the standard of proof. Such difficulties should be primarily addressed either by lowering the standard of substantiation or by imposing a duty of cooperation on the other party.<sup>52</sup>

b) The amendments introduced by the WADC 2021

The WADC 2021 has slightly changed the wording in Art. 10.2.3 with respect to the definition of "intentional". In the WADC 2015 the introductory sentence to this article

provided that the term "intentional" was "*meant to identify those athletes who cheat*". This sentence has been deleted in the respective provision of the WADC 2021. In addition, the concept of NSF (in Art. 10.6) has been significantly broadened. Art. 10.6.1.3 provides that – irrespective of the substance involved – so-called "protected persons" and "recreational athletes" enjoy a more favorable sanctioning regime in case the ADRV was committed with NSF (ranging from a reprimand up to two years).

Both "Protected persons" and "recreational athletes" are defined terms. There were some discussions in the run-up of the new WADC as to whether the different treatment within the "minors" category (protected and non-protected) was compatible with the Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989, hereinafter "the Convention"). The Convention provides in Art. 2 (1) that "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*". Art. 2 (1) of the Convention forbids discrimination based on the "status" of the child. Age is certainly a status criterion pertaining to children. However, it would be wrong to think that Art. 2 (1) of the

<sup>50</sup> Cf. CAS 2015/A/3925 (10.8.2015) *Traves Smikle v. Jamaica Anti-Doping Commission*, no. 129; CAS 2016/A/4626 (20.9.2016) *World Anti-Doping Agency (WADA) v. Indian National Anti-Doping Agency (NADA) & Mbaskar Meghali*, no. 53; CAS 2018/A/5853 (2.7.2019) *FIFA v. Tribunal Nacional Disciplinario Antidopaje & Damián Marcelo Musto*, no. 138; CAS 2006/A/1032 (3.7.2006) *Sesil Karatancheva v. International Tennis Federation*, no. 116 et seq.; CAS 2011/A/2384 & 2386 (6.12.2012) *WADA & UCI v. Alberto Contador Velasco & RFEC*, no. 493; see also ROCHEFOUCAULD, CAS jurisprudence related to the elimination or reduction of the period of ineligibility for specified substances, CAS Bulletin 2013/2, p. 18, 20 seq.; **contra** CAS 2019/A/6131 (6.3.2020)

*Jarrion Lawson v. International Association of Athletics Federations*, no. 60, where the panel concedes that the athlete did not meet the burden how the prohibited substance entered his system, but nevertheless applied the concept of No Fault based on a "broadened enquiry" (no. 78) and the application of "common sense" (no. 65, 90).

<sup>51</sup> This appears to be the case in CAS 2019/A/6131 (6.3.2020) *Jarrion Lawson v. International Association of Athletics Federations*, no. 73 et seq.

<sup>52</sup> CAS 2011/A/2384 & 2386 (6.12.2012) *WADA, UCI v. Alberto Contador Velasco & RFEC*, no. 253 et seq.; CAS 2018/A/5853 (2.7.2019) *FIFA v. Tribunal Nacional Disciplinario Antidopaje & Damián Marcelo Musto*, no. 139.

Convention unconditionally requires that all minors be treated equally. The provision merely tries to rule out that similar situations are treated differently or that different situations are treated similarly without any objective and justifiable grounds. The expert opinion provided by Judge Costa clearly demonstrates that there are good reasons to differentiate between different age groups among minors based on sporting experience and sporting level.<sup>53</sup> Hence, when proving NSF (or NF), “protected persons” and “recreational athletes” are exempted from establishing how the prohibited substance entered their system (see Appendix Definitions).

#### D. Multiple violations

The regime on multiple violations has been considerably revised. Under the previous versions of the WADC one only needed, in principle, to distinguish between a first and a second violation. A second violation carried a harsher sanction than the one applicable to a stand-alone violation. In order to differentiate whether a given ADRV constituted a first or second violation within the above meaning, Art. 10.7.4.1 WADC 2015 provided as follows:

*“For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7, or after the Anti-Doping Organization made reasonable efforts to give notice of the first anti-doping rule violation. If the Anti-Doping Organization cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction”.*

The above principle has been maintained in the WADC 2021 (cf. 10.9.3.1). A second

violation (carrying a harsher sanction) only applies if the timeline between the two ADRVs was interrupted by a notification of the Results Management authority. In all other cases, the various acts will be regarded as a single first ADRV that must be assessed according to the provision carrying the more severe sanction (including aggravating circumstances). The WADC 2021 has introduced two exceptions to the above rule:

- If the ADO establishes that an athlete committed a violation of tampering (Art. 2.5) in connection with the Doping Control process for an underlying asserted ADRV, the violation of Art. 2.5 WADC (that under the old rules would have to be qualified as a second violation) shall be treated as a stand-alone first violation and the period of ineligibility for such violation shall be served consecutively with the period of ineligibility, if any, imposed for the underlying anti-doping rule (Art. 19.9.3.3).
- If the ADO establishes that an athlete committed an additional ADRV prior to notification, and that the additional violation occurred 12 months or more before or after the first-noticed violation, then the period of ineligibility for the additional violation shall be calculated as if the additional violation were a stand-alone first violation and this period of ineligibility is served consecutively with the period of ineligibility imposed for the earlier-noticed violation.

Finally, it should be noted that the formula to calculate the length of a period of ineligibility for a second ADRV has changed considerably (Art. 10.9.1.1 WADC 2021). Basically, the new formula will establish a range within which the adjudicatory body fixes the length of the sanction based on the athlete’s degree of fault (related to the second ADRV).<sup>54</sup> Consequently, no further fault-

<sup>53</sup> [https://www.wada-ama.org/sites/default/files/resources/files/avis\\_2019\\_code\\_mondial\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/avis_2019_code_mondial_en.pdf).

<sup>54</sup> This range can be significant, if – e.g. – in the case CAS 2019/A/6148 (28.2.2020) *WADA v. Sun Yang & FINA*, the Panel would have applied the new rules



related reductions according to Art. 10.6 WADC can apply. However, the athlete is free to avail him- or herself of non-fault related reductions (Art. 10.9.1.3 WADC).

## VII. The Organization of the Adjudicatory Process

### A. The two instances

The adjudication process in the WADC provides, in principle, for two instances. The first instance hearing is the task of the ADO responsible for the Results Management (cf. Art. 8 WADC 2021). The second instance depends on whether the case arises from the participation of an athlete in an “international event” or, in other words, whether the athlete concerned is an “international-level athlete”.<sup>55</sup> In such circumstances the second, i.e. the appellate instance is the CAS (Art. 13.2.1 WADC). In all other cases the first instance decision may be appealed to an appellate body in accordance with the rules established by the National Anti-Doping Organization (“NADO”).

The WADC 2021 provides that in particular circumstances the two-instance process may be replaced by a single hearing before the CAS (cf. Art. 8.5 WADC). This possibility existed already under the previous version of the WADC, but was hardly ever used. In the future it will be easier to shorten the lengthy two-step process. The new article now provides that ADRVs “*asserted against International-Level Athletes, National-Level*

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under the WADC, the range would have been between 51 months and eight years.

<sup>55</sup> The differentiation may not always be easy, cf. CAS 2018/A/5853 (2.7.2019) *FIFA v. Tribunal Nacional Disciplinario Antidopaje & Damián Marcelo Musto*, no. 90 et seq.

<sup>56</sup> Cf. on the application of the ECHR in the context of CAS arbitration, CAS 2010/A/2311 & 2312 (22.8.2011) *Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W.*, no. 6.13 et seq.; CAS 2011/A/2384 & 2386 (6.12.2012) *WADA & UCI v. Alberto Contador Velasco & RFEC*, no. 172 et seq.; see also Haas, Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures, 2012 I.S.L.R., Issue 3, p. 43 et seq.

*Athletes or other Persons may, with the consent of the Athlete or other Person, the Anti-Doping Organization with Results Management responsibility, and WADA, be heard in a single hearing directly at CAS*”. Under the WADC 2015 all parties with a right to appeal according to Art. 13.2.3 WADC needed to agree on a single hearing before the CAS. Such an agreement was in most instances impossible to obtain in a timely manner.

### B. The differing standards of independence

The WADC 2021 has clarified the standards of independence that apply to the adjudicatory bodies. According thereto different standards apply to the first and the second instances. The background for this differentiation is to be found in Art. 6 (1) of the European Convention on Human Rights (“ECHR”).<sup>56</sup> According to this provision only one instance needs to comply with all procedural guarantees of Art. 6 (1) ECHR (including the principle of independence). This requirement is always met if a final appeal to the CAS is possible, since the CAS has been found to be a true and independent arbitral tribunal<sup>57</sup> which, in addition, respects the athletes’ right to a public hearing (cf. Art. R57 (2))<sup>58</sup>. If the appellate body established by the rules of a NADO is competent to (finally) decide the case, Art. 13.2.2 WADC 2021 ensures that the same standards are met at the local appellate level. Otherwise, the athlete or other person has a right to appeal the first instance decision directly to the CAS.

<sup>57</sup> ECtHR (2.10.2018) Applications nos. 40575/10 and 67474/10 *Mutu and Pechstein v. Switzerland*, no. 138 et seq.

<sup>58</sup> The provision states that “[a]t the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public”. This provision was introduced on 1.1.2019 following the above cited decision of the ECtHR.

The WADC 2021 seeks to improve the procedural rights of the parties by imposing some minimum requirements of independence already on the first instance. According thereto, the first instance body must – at minimum – be “operationally independent” as per the definition in Appendix 1 Definitions of the WADC.

### **C. The Organization of the adjudicatory body at the first instance level**

According to Art. 8 WADC 2021, the ADO with Results Management responsibility must provide for a hearing process. It is within the ADO’s discretion how to design the “court organization” at the first instance level. The ADO may provide that the hearing process takes place under its roof. In effect, it would manage all aspects of Results Management. Alternatively, the ADO may also decide to delegate the hearing process to another (independent) entity or service provider (cf. Art. 8.1 ISRM). Irrespective of how the ADO chooses to go forward, it must comply with the WADC’s requirements of operational independence. Furthermore, even if the ADO delegates its adjudicatory functions to a service provider, it will remain responsible for the (outcome) of the hearing process. This follows from Art. 20 WADC 2021, which provides as follows: *“Each Anti-Doping Organization may delegate aspects of Doping Control ... for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the Code”*. As a direct consequence the standing to be sued will never be held by the hearing body having issued the decision, but by the party that avails itself of the decision. In case the athlete lodges the appeal, this will always be the ADO with Results Management responsibility. This is true irrespective of whether the ADO itself issued the first instance hearing decision or whether it delegated the adjudicatory process to a third entity.

### **D. The CAS ADD and the WADC 2021**

The Anti-Doping Division of the Court of Arbitration for Sport (“CAS ADD”) has been established to hear and decide anti-doping cases as a first-instance authority pursuant to the delegation of powers from the IOC, the International Federations of sports on the Olympic program (Olympic IFs), the International Testing Agency (ITA) and any other signatories to the WADC (cf. Art. A1 CAS ADD Rules). Thus, the CAS ADD acts as a service provider predominantly for those International Federations that want to delegate their first instance hearing process.<sup>59</sup> The CAS ADD was created in 2019, along with its governing Arbitration Rules (the “CAS ADD Rules”). The CAS ADD Rules provide, in principle, that decisions of the CAS ADD are taken by a sole arbitrator (cf. Art. A14 (3) CAS ADD Rules). Since the CAS ADD acts as a first instance, appeals against the sole arbitrator’s decision can be lodged with the CAS appeals arbitration division (cf. Art. 21 (5) CAS ADD Rules). What parties are entitled to appeal follows from Art. 13.2.3.1 WADC 2021. The panel formed in the context of the CAS appeals arbitration division then acts as the second and final (appeal) instance (as provided for in Art. 13.2.1 WADC 2021).

In accordance with the CAS ADD Rules the parties to the dispute may also agree to have a three-member panel instead of a sole arbitrator. In such case Art. 15 CAS ADD Rules provides that the parties *“forgo their right of appeal before the CAS Appeals Division, subject to Article 13.2.3 e) and f) of the WADC (2015 edition). In such circumstances, the CAS ADD Office shall inform the entities retaining a right of appeal pursuant to the above-mentioned WADC provisions to give them the opportunity to intervene in the CAS ADD procedure or to waive their right of appeal”*. Apart from the fact that the reference to the WADC 2015 in the CAS

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<sup>59</sup> As of 1 April 2021, 11 International Federations have delegated their first instance adjudicatory process in anti-doping matters to the CAS ADD.



ADD Rules will have to be adapted to the proper (new) provision of the WADC 2021, there remains a conflict between the CAS ADD Rules and the WADC 2021. Art. 15 CAS ADD Rules, in essence, provides for a single hearing before the CAS in case of a three-member panel. However, the conditions for such a single hearing under the CAS ADD Rules significantly differ from Art. 8.5 WADC 2021. While a single hearing before the CAS according to Art. 8.5 WADC 2021 is only possible – e.g. – with WADA’s consent,<sup>60</sup> no such consent is necessary under Art. 15 CAS ADD Rules. Instead, according to the CAS ADD Rules it suffices that the parties to the dispute agree on a three-member panel, which will then (with or without the intervention of WADA) finally resolve the dispute. This conflict between the applicable rules needs to be resolved in favor of the WADC.

## VIII. The Adjudicatory Process

### A. Fairness at the first instance

The WADC provides that first instance hearings must be fair and permit a resolution of the dispute within reasonable time (Art. 8.1 WADC 2021). What is to be considered “fair” and “reasonable” is described in the ISRM. Thus, e.g., in order to be “fair” the hearing process shall be accessible and affordable (Art. 8.8. lit. b ISRM), the charged persons shall have the right to challenge the appointment of any hearing panel member (Art. 8.5 ISRM) and must be informed in a fair and timely manner of the asserted ADRV.<sup>61</sup> Furthermore, charged persons must be granted the right to be represented by counsel (at their own expense), have access to the relevant evidence and be accorded the

right to call and examine witnesses and experts (Art. 8.8 lit. d ISRM). In addition, the charged persons shall have the right to request a public hearing (Art. 8.8 lit. e ISRM). As for the reasonable time frame within which the hearing process must be concluded, the comment to Art. 8.8 lit. c ISRM provides that, save in complex matters, the decision should be issued no later than 2 months after the hearing closes. Furthermore, Art. 4.2 ISRM provides that the whole Results Management process starting with the notification of the AAF to the athlete (Art. 5.1.2 ISRM) until the issuance of the first instance decision should be concluded within six months (Art. 4.2 ISRM). This is ambitious. The ISRM also carefully describes the mandatory contents of the decision to be issued (Art. 9.1 ISRM). A breach of the above procedural rules will be relevant under compliance aspects (Art. 24 WADC 2021).

### B. The *de novo* principle

Whether any procedural principles have been breached at the first instance is of less importance in the context of appeal proceedings, since appellate proceedings are – according to the WADC (Art. 13.1.1) and the CAS Code (Art. R57 (1) – proceedings *de novo*. It is due to this principle that, according to constant CAS jurisprudence, procedural failures committed at the first instance “fade to the periphery” before the CAS.<sup>62</sup> The reference in the WADC to the *de novo* principle serves to push back all attempts to limit the scope of review before the CAS.<sup>63</sup> The scope of review, however, must be distinguished from the matter in dispute itself, which cannot be altered by the CAS panel. Art. R57 (1) CAS Code, in particular, does not grant panels a “carte blanche” to change the object of the

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<sup>60</sup> Cf. also Art. 7.6.2 of the ISRM that provides that the agreement of WADA is within its “entire discretion” and that in case WADA does not agree “the case shall be heard by the Results Management Authority’s hearing panel at first instance”.

<sup>61</sup> For the details see Art. 7.1 ISRM.

<sup>62</sup> CAS 94/129 (23.5.1995) *USA Shooting & Quigley v. International Shooting Union (UIT)*, no. 59; CAS 98/208 (22.12.1998) *N., J., Y., W., v. FINA*, no. 10; CAS

98/211 7.6.1999) *B. v. FINA*, no. 8. CAS 2006/A/1177 (28.5.2007) *Villa FC v. B.93 Copenhagen*, no. 19.

<sup>63</sup> HAAS, Background to the World Anti-Doping Code 2015, in Haas/Healey (Eds), *Doping in Sport and the Law*, 2016, p. 19, 37.

appeal.<sup>64</sup> There have been attempts to apply a narrower understanding to the object of the appeal and thereby to limit the CAS' mandate to review the facts and the law of the case. This is why the WADC 2021 describes the interplay between the de novo principle and the object of the appeal in greater detail. Art. 13.1.1 WADC 2021 clarifies that panels may fully review the matter in dispute before the first instance. Within the boundaries of the matter in dispute, the mandate of the CAS is not limited to the evidence, arguments and claims made before the first instance. Instead, CAS panels may look at new facts, evidence or even claims provided that the "cause of action", i.e. the core of the matter in dispute as defined by the underlying facts of the case, remains the same.<sup>65</sup>

### C. Coordination of the parties with a right to appeal

In order to better coordinate parties with a right to appeal against a first instance decision, Art. 13.2.3.3 WADC 2021 (newly) provides that all "*parties to any CAS appeal must ensure that WADA and all other parties with a right to appeal have been given timely notice of the appeal*". Party coordination has become even more important under the new WADC, since according to Art. 15 WADC 2021 CAS decisions will enjoy *erga omnes* effects, binding Signatory ADOs irrespective of whether or not they were parties to the CAS proceedings. Whether Art 13.2.3.3 WADC 2021 will achieve its coordinating purpose also depends on how this rule is going to be enforced. It appears questionable, however, what the consequences are in case an appealing party does not comply with its obligation. Art. 13 WADC 2021 does not provide for any direct consequence. If a party that is a signatory to the WADC fails to comply with this obligation, issues of non-compliance may arise (Art. 24 WADC). Whether a duty to notify also rests on the

athlete (that is, a party to the proceeding within the meaning of Art. 13.2.3.3 WADC 2021) seems rather questionable. In my view the new provision should be read as imposing such an obligation on ADOs only. This understanding would also be in line with Art. 10.3 lit. d ISRM, which only targets the ADO "*that is party to an appeal before CAS*" to promptly provide the CAS award to all other ADOs that would have been entitled to appeal under the Code.<sup>66</sup>

### D. Settlements embodied in a CAS award

With respect to appeals before the CAS Art. 10.3 lit c ISRM provides that "*[n]o settlement embodied in an arbitral award rendered by consent of the parties as per R56 of the ... [CAS Code] shall be entered into by an ... [ADO] without WADA's written approval. Where the parties to the CAS proceedings are envisaging settling the matter by way of a settlement embodied in an arbitral award rendered by consent of the parties, the ... [ADO] that is a party to the proceedings shall immediately notify WADA and provide it with all necessary information in this respect*". The purpose of this provision is to prevent abusive behavior of the parties to the proceedings that might result in an award that is incompatible with the WADC and that has worldwide *erga omnes* effects. Whether and to what extent the provision achieves its goal is an open matter, as is the question who its addressees are. From its wording it is apparent that the obligation to seek WADA's approval does not rest on the athlete, but on the ADO which is a party to the proceedings. But does the provision also oblige CAS panels to check and validate whether such approval has been obtained and whether or not the approval granted by WADA actually covers the terms of the settlement agreement? I am inclined to answer this in the negative. A CAS panel is solely bound by the requests of the parties (subject to the limits of the *ordre public*).

<sup>64</sup> Cf. CAS 2018/A/5693 & 5694 (13.10.2019) *Riga FC v. FC Partizan & FIFA*, no. 140.

<sup>65</sup> See also RIGOZZI/HASLER, in Arroyo (Ed.) *Arbitration in Switzerland*, 2<sup>nd</sup> ed. 2018, Art. 57 CAS Code no. 8 et seq.

<sup>66</sup> The term ADO covers also WADA, cf. Appendix 1 Definitions of the WADC.

Thus, whether or not there is (adequate) approval by WADA is not an issue for the panel to examine. If, however, an ADO enters into a settlement agreement in the form of a consent award without WADA's approval, this would be a compliance issue (Art. 24 WADC) and would have to be treated accordingly. Furthermore, there are also other ways of party collusion aimed at bringing about a wrong decision. An ADO may for instance merely acknowledge an appeal filed by an athlete, but abstain from defending its first instance decision properly, not show up at the hearing and thereby provoke an award by default. Would all these (hidden settlement) attempts fall within the scope of Article 10.3 lit. c ISRM? Furthermore, there remains the possibility for a party to withdraw its appeal filed against a first instance decision in return for an out-of-court settlement with the other party. In such circumstances, the prerequisites of Art. 10.3 lit. c ISRM would not be fulfilled, because the settlement was not embodied into a CAS award.<sup>67</sup>

#### **E. Challenging analytical methods or decision limits approved by WADA**

The WADC comprises a number of rules of proof. According to one of them, contained in Art. 3.2.1 WADC 2021, analytical methods and decision limits approved by WADA are presumed to be scientifically valid. The provision has been slightly amended in comparison to the WADC 2015. In the previous WADC version the presumption was only valid if WADA's approval of the analytical methods and decision limits relied on consultations within the relevant scientific

community *and* a peer review, whereas the new provision only requires *either* a consultation with the scientific community *or* a peer review. Hence, the prerequisites for the presumption have been set somewhat lower.

Athletes, on their part, may of course rebut the presumption. However, the WADC requires that certain procedural requirements be fulfilled. According thereto, the athlete must notify WADA of the challenge and the basis of the challenge. In case they fail to do so, the objection against the presumption will not be taken into account. The provision acknowledges that an ADO may not be best placed to defend an analytical method of a laboratory that has been approved by someone else, i.e., by WADA. In order to prevent a "proxy war" in case an analytical method is challenged, the provision puts WADA on guard to defend its analytical methods and decision limits. Furthermore, in order to guarantee equal treatment of all athletes that are subject to the same analytical methods and decision limits, the provision wants to ensure that the same level of information is available to the adjudicatory body irrespective of the parties involved. The amended rule makes it clear that WADA, once it has been notified, may take adequate steps to defend its analytical methods and decision limits, i.e. by intervening in the procedure, appearing as an *amicus curiae* or providing evidence in any other manner (via one of the parties involved). Furthermore, unlike the previous version of the WADC, the new provision firmly states that all these various forms of "participation" in the proceeding are available not only at the CAS level, but also at the first instance level.

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<sup>67</sup> Cf. also CAS 2016/A/4502 (12.8.2016) *Patrick Leeper v International Paralympic Committee*, where the appeal was settled out of court.

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## Modifications of the PILA: implications for sport arbitration

Dr. András Gurovits, CAS arbitrator

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- I. The Swiss *lex arbitri*
  - II. What are the reasons for the revision of the 12<sup>th</sup> Chapter of the PILA?
  - III. Scope of application of the PILA (Article 176 para. 1 PILA)
  - IV. Form of the Arbitration Agreement (Article 178 PILA)
  - V. Constitution of the Arbitral Tribunal (Article 179 PILA)
  - VI. Appointment of Arbitrators (Article 180 PILA)
  - VII. Challenge and Removal Procedure (new Articles 180a and 180b PILA)
  - VIII. Principles of the arbitration procedure (Article 182 PILA)
  - IX. Provisional or Conservatory measures (Article 183 PILA)
  - X. Applicable Law (Article 187 PILA)
  - XI. Corrections, Explanations and Additions (Article 189a PILA)
  - XII. Motions to set aside the Award (Article 190 PILA)
  - XIII. Revision (Article 190a PILA)
  - XIV. Waiver to file an appeal or revision (Article 192 PILA)
  - XV. Submissions in the English language (Article 77 Federal Tribunal Act)
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### I. The Swiss *lex arbitri*

The statutory framework for international arbitration in Switzerland, thus also for most cases brought before the International Court of Arbitration, is set out in the 12<sup>th</sup> chapter of the Swiss Private International Law Act (PILA). *Pro memoria*, it shall also be mentioned here that Switzerland has a dual system for arbitration: while international arbitration is subject to the provisions of the 12<sup>th</sup> chapter of the PILA, the statutory framework for domestic arbitration is set out in the 3<sup>rd</sup> part of the Swiss Code of Civil Procedure (CPC).

As a consequence, and unless the parties have otherwise agreed, a case between two Swiss parties that has been brought before the Court of Arbitration for Sport (CAS) is subject to the CPC, while a case involving at least one non-Swiss party is governed by the PILA. Article 176 para. 1 PILA as currently in force provides that the provisions of the 12<sup>th</sup> Chapter shall apply to arbitral tribunals domiciled in Switzerland if at the time of conclusion of the arbitration agreement at least one party was not domiciled or

habitually resident in Switzerland. The creation of a uniform arbitration law in the sense of a *code unique* (covering both, international and domestic arbitration) was deliberately waived by the Swiss legislator.

The contemplated revision of the Swiss *lex arbitri* that is being discussed in this article will focus on international arbitration only, and according to the legislator's intentions the CPC shall only be amended insofar as this is required to ensure consistency with the terminology used in the PILA.

### II. What are the reasons for the revision of the 12<sup>th</sup> Chapter of the PILA?

The PILA came into force in 1989. Thirty years after its adoption, the 12<sup>th</sup> chapter of the PILA continues to be recognized as an innovative arbitration law of great quality. It is appreciated as a clear and concise law, which gives the parties great autonomy and flexibility in procedural design. This notwithstanding, triggered by a motion of the Swiss Parliament, the legislation governing international arbitration shall be revised. Therefore, in October 2018, the Swiss

Federal Council released a draft bill for the proposed amendment of the PILA.

The contemplated revision pursues three main goals: First, it shall keep track of the practice of the Swiss Federal Tribunal and clarify open questions; second, it shall strengthen party autonomy; and third, it shall increase user-friendliness of the PILA by incorporating a number of innovative provisions that are aimed at further optimizing the Swiss law on international arbitration.

This article will discuss the most relevant proposed amendments to the law. In the Appendix to this article the reader will find the (unofficially translated) English version of the proposed new legal text.

### **III. Scope of application of the PILA (Article 176 para. 1 PILA)**

Article 176 para. 1 PILA currently provides that the provisions of the 12<sup>th</sup> chapter apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The Swiss Federal Tribunal, however, has interpreted this provision to state that in order to assess whether an arbitration is international or domestic the circumstances at the time when the proceedings are initiated, and not at the time when the arbitration agreement was concluded shall be considered.

In the interest of legal certainty, Article 176 para. 1 PILA shall now be supplemented by the term “*parties to the arbitration agreement*”. By this addition the legislator wants to clarify that the question whether the PILA applies and, thus, whether the arbitration is international is to be answered exclusively on the circumstances of the parties at the time of the conclusion of the contract, and not at the time when the arbitration proceeding is initiated.

This new rule will also have an impact on sports arbitration before the CAS. It will mean that in all cases where the arbitration agreement is concluded between several parties and where at least one party at the time of the conclusion of the arbitration agreement is not domiciled in Switzerland, the arbitration will be deemed “international” and the PILA will apply.

To be complete, we should also mention that despite this change, the parties will, as under the current law, continue to have the right of opting out, which means that they may agree that the CPC shall be applicable instead of the PILA (and vice versa).

### **IV. Form of the Arbitration Agreement (Article 178 PILA)**

Two proposed changes relate to the form of the arbitration agreement. The first change is really a minor one. Article 178 para. 1 PILA currently provides that an arbitration agreement is valid if it is made in writing, by telegram, telex, facsimile or in another form of transmission that allows the agreement to be evidenced by text. To mention telegram and telex is outdated today. The draft, therefore, foresees a shorter and more modern regulation and states that the arbitration agreement must be made in writing or in another form which allows proof by text.

The second change is more relevant, in particular, for sports arbitration. The current law does not expressly mention that arbitration clauses that are not contained in a bilateral (or multilateral) contract, but in the articles of association or statutes of a corporation or association, can be valid. While this principle is recognized in Swiss legal practice and doctrine as well as in the constant practice of the CAS, it is provided for in the PILA. Therefore, and for the sake of clarity, a new paragraph 4 shall be added to Article 178 of the PILA that will expressly provide that arbitration clauses provided for in the statutes of a corporation or federation shall be admissible.

## **V. Constitution of the Arbitral Tribunal (Article 179 PILA)**

Two further proposed changes relate to the constitution of the arbitral tribunal.

First, Article 179 PILA shall be revised in order to provide a more comprehensive and detailed rule in respect of appointment, removal and replacement of an arbitrator. As these revised statutory rules on appointment, removal and replacement of an arbitrator shall continue to apply only if the parties have not set out their own rules in their arbitration agreement, the revised Article 179 PILA will not have a direct effect on CAS proceedings because Articles R40.2 and R.50 of the Code on Sports-related Arbitration (CAS Code) as currently in force deal with the appointment of the arbitrators and Articles R35 and R36 of the CAS Code deal with their removal and replacement.

The second proposed change of Article 179 PILA is about the disclosure obligations of the arbitrators. The current law is silent in this respect. Although current legal doctrine holds that members of an arbitral tribunal are bound by certain disclosure obligations that result from their duty of independence and impartiality, a new paragraph 6 of Article 179 PILA shall expressly stipulate that arbitrators must immediately disclose all circumstances which may give rise to legitimate doubts as to their independence or impartiality. According to the draft bill, this obligation shall apply throughout the entire arbitration procedure. Once entered into force, Article 179 para. 6 PILA will be consistent with Article R33 para. 1 of the CAS Code which expressly provides that an arbitrator shall immediately disclose any circumstances which may affect his or her independence with respect to the parties.

## **VI. Appointment of Arbitrators (Article 180 PILA)**

Further amendments are proposed in relation to the appointment of arbitrators and reasons

for challenge. Article 180 para. 1 PILA currently provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to her or his independence. According to constant court practice and prevailing legal doctrine, it is undisputed that not only doubts as to the *independence* but also to the *impartiality* of an arbitrator may constitute a ground for challenge. With the planned adjustment, this principle shall now be explicitly anchored in the law. Article 180 PILA will, thus, be consistent with Article R33 CAS Code which also requires that every arbitrator must be impartial and independent from the parties.

Another contemplated amendment is about finding out grounds for a challenge of an arbitrator. Pursuant to the contemplated revision of para. 2 of Article 180 PILA, a party may only challenge an arbitrator whom it has appointed or in whose appointment it has participated on grounds of which, despite due care, that party only became aware after the appointment of the arbitrator. By this amendment the legislator intends to transpose the current case-law into the wording of the PILA and clarify that not the actual knowledge of a party, but its possible knowledge if due attention was given, shall be decisive when assessing whether or not such party may challenge an arbitrator.

Will this deviate from the CAS Code? The author does not think so. Although Article R34 para. 1 CAS Code provides that a challenge shall be brought seven days after the ground for the challenge has become known, it is a well-accepted principle also under the CAS Code that the parties shall act in good faith when an arbitrator is being appointed. In accordance with this principle, the parties are supposed to know (or search for) information that is easily acceptable and do a conflict check concerning the arbitrators that are to be appointed. This means that also under the CAS rules not only the *actual* knowledge but also the *possible* knowledge counts.



## **VII. Challenge and Removal Procedure (new Articles 180a and 180b PILA)**

The current law does not set out the details of the procedure where an arbitrator shall be challenged or removed. The Federal Council intends to change this and the proposed new law foresees in new Articles 180a and 180b PILA a more detailed statutory framework on the challenge and removal of arbitrators.

The legislator, however, wants these new provisions to respect party autonomy so that they shall only apply if the parties have not otherwise agreed. Given that Articles R34 para. 2 and R35 CAS Code as currently in force already regulate the challenge and removal procedures, the contemplated new provisions under the PILA on the challenge and removal of arbitrators will not have a direct implication on international arbitration before the CAS. Article R35 CAS Code, for example, already provides that an arbitrator may be removed if he or she refuses to or is prevented from carrying out his or her duties or if he or she fails to fulfill the duties pursuant to the CAS Code within a reasonable time.

## **VIII. Principles of the arbitration procedure (Article 182 PILA)**

According to Article 182 PILA as currently in force, the parties may, directly or by reference to specific rules of arbitration, determine the arbitral procedure and they may subject the arbitration procedure to a procedural law of their choice. It is a well-known fact that parties involved in arbitration before the CAS accept, by virtue of Article R27 CAS Code, the specific rules of arbitration of the CAS, i.e. the CAS Code, and that, by virtue of Article R28 CAS Code, they accept Swiss law as the *lex arbitri*.

Article 182 PILA as currently in force further provides that, regardless of the procedure chosen, the arbitral tribunal must ensure equal treatment of the parties and must also ensure their right to be heard. This fundamental principle applies to all

arbitration proceedings, including arbitration proceedings before the CAS pursuant to the CAS Code.

The envisaged revision of the PILA shall introduce a new para. 4 of Article 182 that shall clarify the parties' duties in case of a violation of their procedural rights. According to the law currently in force, an appeal against an arbitral award can be lodged with the Swiss Federal Tribunal if the principle of equal treatment or the right to be heard has been violated, and according to the standard practice of the Swiss Federal Tribunal such appeal shall only be heard if the party concerned has immediately claimed such violation during the arbitration proceedings. The Federal Tribunal holds that it would be contrary to good faith if a violation of the procedural rules is not challenged in the arbitration proceedings and is only asserted in the appeal proceedings.

In the interest of legal certainty, the Federal Council deems it is appropriate to anchor the above fundamental procedural principle directly in the law. Accordingly, a party who continues the arbitral proceedings without immediately complaining about a violation of the procedural rules can no longer assert this violation, neither in the ongoing arbitral proceedings nor in the appeal proceedings. This principle also applies in international sports arbitration, including in international arbitration before the CAS.

## **IX. Provisional or Conservatory measures (Article 183 PILA)**

Another change in the law will relate to provisional and conservatory measures. Today, pursuant to Article 183 para. 1 PILA, the arbitral tribunal may, unless the parties have otherwise agreed, order provisional or conservatory measures if a party so requests. The corresponding rule in the CAS Code is Article R37 which provides that the CAS shall have the competence to order provisional or conservatory measures. In addition, based on this Article R37 the parties not only agree that the CAS shall have the



right to order provisional or conservatory measures, but the parties also waive their right to request any such measures from state authorities or tribunals.

The problem is, however, that the arbitral tribunal has usually no means of coercion to enforce the execution of its measure, and therefore the non-observance of the provisional or conservatory measure by the affected party may have no consequence. This rule is, thus, so-called *lex imperfecta*.

For this reason, para. 2 of Article 183 PILA currently provides that the arbitral tribunal may request the assistance of the state court if the party concerned does not voluntarily comply with the measures ordered by the tribunal. According to the contemplated change, Article 183 para. 2 PILA shall now expressly state that not only the arbitral tribunal but also the parties shall have the right to request the assistance of the state court if the party concerned does not voluntarily comply with the measure.

In the author's view it is questionable whether this revised Article 183 para. 2 PILA will also have to apply in CAS proceedings. The reason is that according to Article R37 para. 3 CAS Code the parties expressly waive their rights to request provisional or conservatory measures from the state courts. This could also be understood that Article R37 CAS Code provides a comprehensive rule in respect of the involvement of the state courts and does not allow the parties to seek assistance if a party does not voluntarily comply with the measure ordered by the arbitral tribunal. In the author's personal opinion, however, a party should have the right to seek assistance from the state court and the contemplated new Article 183 para. 2 PILA should also apply in CAS proceedings which would mean that a party to a CAS proceeding should have the right to seek assistance from the state courts if the other party does not comply with a measure rendered by the CAS panel.

#### **X. Applicable Law (Article 187 PILA)**

Another contemplated change is about the applicable law.

Para. 1 of Article 187 PILA in its German version currently provides that the arbitral tribunal shall decide the case according to the law chosen by the parties. According to the Federal Council's proposed change of this rule, the German version shall be adapted to be in line with the current French legal text, which speaks, more precisely, of the "rules of law", and not like the German version of the "law", chosen by the parties.

With this change of the statutory text it will become crystal clear that the parties may not only choose a national legal system to govern their relationship, but may also agree on the application of non-governmental rules of law. The application of such non-governmental rules is particularly important in arbitration proceedings before the CAS where matters are often to be reviewed in the light of the statutes and regulations of a specific sports governing body as is also clearly reflected in Articles R45 and R58 CAS Code.

#### **XI. Corrections, Explanations and Additions (Article 189a PILA)**

The next proposed change is the introduction of a new Article 189a dealing with the correction, explanation of or additions to an arbitral award. Even if there is no explicit regulation to date (nor is there any relevant provision in the CAS Code), the courts and legal doctrine consider the correction, explanation and supplementation of arbitral awards to be admissible in international arbitration proceedings. In the interest of legal certainty, however, the new Article 189a PILA shall codify this practice.

The purpose of the *explanation* of the arbitration decision is to eliminate ambiguities in the operative part of the award. The *correction* serves to correct editorial or calculation errors. And an *addition* may be requested if the arbitral tribunal has not

assessed all requests or prayers for relief. If the arbitral tribunal approves the request for an explanation or correction, the decision of the arbitral tribunal is supplemented by such decision of the arbitral tribunal and will be, therefore, subject to challenge pursuant to Article 190 para. 2 PILA. The addition gives the arbitral tribunal the opportunity to issue an additional arbitral decision on claims which have been requested in the claim but were not dealt with by the arbitral tribunal in the previous judgement.

The arbitral tribunal may render a correction, explanation or addition on its own initiative or at the request of a party. The time limit shall be 30 days from the date of the formal notification of the arbitral award.

These new rules will also be applicable in CAS proceedings. According to the proposed law they will, however, only apply if the parties have not otherwise agreed in their arbitration agreement.

### **XII. Motions to set aside the Award (Article 190 PILA)**

Currently, the time limit for challenging awards in international arbitration before the Swiss Federal Tribunal Court is laid down in Article 100 para. 1 of the Swiss Federal Tribunal Act.

In the interest of user-friendliness, the appeal period shall now also be set out in the 12<sup>th</sup> Chapter 12 of the PILA. Therefore, Article 190 PILA will be supplemented by a new para. 4 which provides that the time limit for appeal is 30 days from the date of formal notification of the award. As the appeal period of 30 days that is currently applicable will not change, this amendment will not have any direct impact on awards rendered by a CAS panel.

### **XIII. Revision (Article 190a PILA)**

The draft also foresees the introduction of a new Article 190a that shall deal with the extraordinary legal remedy of the so-called

revision. The revision aims at correcting decisions that have become legally binding and against which no appeal can be lodged anymore in case of subsequent discovery of new facts and evidence because the appeal period has already lapsed.

Although the PILA does currently not provide any rules on the revision of arbitral awards it is undisputed in legal practice and doctrine that a revision of international arbitral awards is possible if the circumstances so require. In the interests of legal certainty and legal clarity, the draft of the revised PILA suggests to expressly cover the legal remedy of revision in the new Article 190a.

According to such proposed draft, a party shall have the right to request the revision of a decision if that party subsequently learns of substantial facts or finds decisive evidence which it was unable to produce in the earlier proceedings despite due attention. Excluded from this will be facts and evidence which arose only after the issuance of the award.

A revision, on the other hand, may also be lodged if criminal proceedings have shown that the award was affected by a crime to the detriment of the party concerned.

Finally, a revision is also possible if a ground for challenge of an arbitrator was only discovered after the conclusion of the arbitral proceedings.

The request for revision of an arbitral award must be submitted within 90 days of the discovery of the ground for revision. This notwithstanding, after the expiry of a period of ten years since the award became final, the revision can no longer be requested, unless a crime has had an adverse effect on the decision.

### **XIV. Waiver to file an appeal or revision (Article 192 PILA)**

It is a well-known fact that the current law allows the parties to lodge an appeal against

an award in international arbitration on certain limited grounds (only). If none of the parties is domiciled or has its habitual residence in Switzerland they are also allowed to waive such right of appeal. With the contemplated introduction of the so-called revision the question comes up whether such waiver right shall also extend to the legal remedy of revision.

The draft law foresees the following future solution in this respect: If none of the parties is domiciled or habitually resident in Switzerland, the parties may exclude in advance the possibility of an appeal or revision on the grounds of subsequently discovered new substantial facts or evidence and the discovery of a ground for challenge of an arbitrator only after the conclusion of the proceedings. On the other hand, it will not be possible for the parties to waive the right for revision if criminal proceedings have shown that the arbitral award had been affected by a crime to the detriment of the party concerned.

#### **XV. Submissions in the English language (Article 77 Federal Tribunal Act)**

English is the predominant language in arbitration proceedings. In view of its

importance for arbitration, the Swiss Federal Tribunal already follows a generous practice and does not regularly require translations of documents and enclosures filed in English in appeal proceedings against arbitral awards in arbitration procedures.

The draft of the PILA goes one step further here. Despite partial criticism in the consultation process the proposed revised law adds a new paragraph 2bis to Article 77 of the Federal Tribunal Act. This new provision shall allow the parties in appeal and revision proceedings to submit legal briefs (and not only exhibits thereto) in the English language.

This innovative new rule is intended to reduce the translation efforts for the parties and to enable the use of English as widely as possible for arbitration proceedings in Switzerland, including in proceedings before the Swiss Federal Tribunal. This amendment will, however, have no effect on the language of the proceedings and the judgment, which in these cases will continue to be governed by the current rules. As this proposed amendment was met with resistance from the Federal Tribunal, it remains to be seen whether this provision will actually be included in the revised law.

Appendix: Unofficial convenience translation of the new legal text of the revised PILA

**I The Federal Act of 18 December 1987 on Private International Law shall be amended as follows:**

Replacement of expressions of the 12<sup>th</sup> chapter of the PILA:

1 In Articles 183 para. 3 and 185, “judge” shall be replaced by “court”.

2 In Article 176, para. 3, “arbitrator” shall be replaced by “arbitral tribunal”, with the necessary grammatical adjustments.

3 In Articles 180 para. 1 and 181, “arbitrator” shall be replaced by “member of the arbitral tribunal”, with the necessary grammatical adaptations.

4 In Article 189, para. 2, “President” shall be replaced by “President [in male or female form]” with the necessary grammatical adaptations.

5 In Article 190 para. 2, “sole arbitrator” is replaced by “sole arbitrator [in male and female form]”.

Proposed amendments of specific provisions of the 12<sup>th</sup> chapter of the PILA

*Art. 176 paras. 1 and 2*

1 The provisions of this Chapter shall apply to arbitral tribunals domiciled in Switzerland if at least one party to the arbitration agreement was not domiciled, habitually resident in Switzerland at the time of conclusion.

2 The parties may extend the application of this chapter by a statement in the arbitration agreement or in a subsequent agreement and agree on the application of the third part of the ZPO<sup>3</sup>. The declaration shall take the form provided for in Article 178, paragraph 1.

*Art. 178 title, paras. 1 and 4*

III. Arbitration agreement and unilateral arbitration clause

1 The arbitration agreement shall be made in writing or in any other form which permits proof by text.

4 The provisions of this chapter shall apply mutatis mutandis to an arbitration clause provided for in a unilateral legal transaction or in the articles of association.

*Art. 179*

IV. Arbitral tribunal  
1. Appointment and replacement

1 The members of the arbitral tribunal shall be appointed or replaced as agreed by the parties. Unless otherwise agreed by the parties, the arbitral tribunal shall consist of three members.

2 If there is no agreement or if the members of the arbitral tribunal cannot be appointed or replaced for other reasons, the state court at the seat of the arbitral tribunal may be seized. If the parties have not determined a seat or have only agreed that the seat of the arbitral tribunal shall be in Switzerland, the state court first seized shall have jurisdiction.

3 If a state court is entrusted with the appointment or replacement of a member of the arbitral tribunal, it shall grant that request unless a summary examination shows that there is no arbitration agreement between the parties.

4 At the request of a party, the state court shall take the necessary measures to appoint the arbitral tribunal if the parties or members of the arbitral tribunal fail to comply with their obligations within 30 days of being requested to do so.

5 In the case of multiparty arbitration, the state court may appoint all members of the arbitral tribunal.

6 A person to whom a position of arbitrator is offered shall immediately disclose the existence of circumstances which may give rise to legitimate doubts as to his independence or impartiality. This obligation shall remain in force throughout the proceedings.

*Art. 180 title, para. 1 letters b and c, 2 and para. 3*

2. Challenge  
a. Reasons

1 A member of the arbitral tribunal may be challenged:

c. if circumstances exist which give rise to justified doubts as to his independence or impartiality.

2 A party may only challenge a member of the arbitral tribunal who appointed him or whose appointment he participated in for reasons of which he only became aware after his appointment despite having applied due care.

3 If, despite due care, a ground for refusal is discovered only after the conclusion of the arbitration proceedings, the provisions on revision shall apply, unless another remedy is available.

*Art. 180a new*

b. Proceedings

1 Unless otherwise agreed by the parties, the request for a challenge shall be made in writing and substantiated to the challenged member of the arbitral tribunal within 30 days of becoming aware of the reason for the challenge and shall be communicated to the other members of the arbitral tribunal.

2 The requesting party may, within 30 days of filing the request, request the challenge with the state court. The state court makes the final decision.

3 During the challenge procedure, the arbitral tribunal may continue the procedure without excluding

the challenged member of the arbitral tribunal up to and including the decision, unless the parties have agreed otherwise.

*Art. 180b new*

3. Removal

1 Any member of the arbitral tribunal may be dismissed by agreement of the parties.

2 If a member of the arbitral tribunal is unable to carry out his duties within a reasonable time or with due care, and if the parties have not agreed otherwise, a party may, within 30 days of becoming aware of the reason for dismissal, demand in writing and on the basis of that reason, the dismissal from the state court. The state court makes the final decision.

*Art. 181*

V. Legal  
pendency

*The arbitration shall be pending as soon as a party with a legal request invokes the member or members of the arbitral tribunal specified in the arbitration agreement or, if the agreement does not designate a member of the arbitral tribunal, as soon as a party initiates the procedure for the appointment of the arbitral tribunal.*

*Art. 182 paras. 1 and 4*

1 The parties may regulate the arbitral proceedings themselves or by reference to arbitral rules of procedure; they may also subject them to a procedural law of their choice.

4 A party who continues the arbitral proceedings without immediately challenging a breach of the rules of procedure which has been recognized or which can be recognized with due attention shall not be entitled to claim the same at a later date.

*Art. 183 para. 2*

2 If the person concerned does not voluntarily submit to the ordered measure, the arbitral tribunal or a party may request the assistance of the state court, which shall apply its own law.

*Art. 184 paras. 2 and 3*

2 If state legal assistance is necessary for the conduct of the evidence proceedings, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the cooperation of the state court at the seat of the arbitral tribunal.

3 The state court shall apply its own law. On request, it may apply or take into account other forms of procedure.

*Art. 185a new*

5. Participation of the state court in foreign arbitration proceedings

1 *An arbitral tribunal domiciled abroad or a party to foreign arbitration proceedings may request the cooperation of the state court at the place where a precautionary or protective measure is to be enforced. Article 183 paragraphs 2 and 3 shall apply mutatis mutandis.*

2 *An arbitral tribunal domiciled abroad or a party to foreign arbitration proceedings with the consent of the arbitral tribunal may request the cooperation of the state court at the place where the taking of evidence is to take place. Article 184 paragraphs 2 and 3 shall apply mutatis mutandis.*

*Art. 187 para. 1*

1 The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, in the absence of a choice of law, with the rules of law with which the dispute is most closely connected.

*Art. 189a new*

4. Correction, explanation and addition

1 Unless the parties have agreed otherwise, either party may apply to the arbitral tribunal within 30 days

of the opening of the decision for the correction of this drafting and calculation error in the decision, the explanation of certain parts of the decision or an additional arbitral decision on claims which were requested in the arbitral procedure but not dealt with in the award. Within the same period of time, the arbitral tribunal may make corrections, explanations or additions on its own initiative.

2 The request shall not inhibit the time limits for appeal. With regard to the corrected, explained or supplemented part of the decision, the time limit for appeal shall run anew.

*Art. 190 title and para. 4:*

IX. Final validity, rescission, revision

4 *The appeal period shall be 30 days from the opening of the decision.*

*Art. 190a new*

2. Revision

1 A party may request the revision of a decision if:

a. it subsequently learns of or finds evidence which it was unable to produce in the previous proceedings despite due attention; facts and evidence which arose only after the arbitral decision are excluded;

b. criminal proceedings have shown that an offence committed to the detriment of the party concerned has affected the arbitral award; a conviction by the criminal court is not necessary; if the criminal proceedings cannot be carried out, the evidence may be produced in another way;

c. a ground for refusal was only discovered after the conclusion of the arbitration procedure and no other remedy is available.

2 The petition for appeal must be submitted within 90 days of discovery of the ground for revision. After ten years of the decision having become final a revision may no longer be submitted, except in the case referred to in Article 190a, paragraph 1, letter b.

*Art. 191*

3. Sole appeal instance

The only appeal instance is the Swiss Federal Tribunal. The proceedings are governed by Articles 77 and 119b of the Federal Court Act of 17 June 2005.

*Art. 192 para. 1*

1 If none of the parties is domiciled or habitually resident in Switzerland, they may, by means of a statement in the arbitration agreement or in a subsequent agreement, exclude in whole or in part appeals against arbitral decisions; a revision pursuant to Article 190a paragraph 1 letter b may not be waived. The agreement shall take the form provided for in Article 178, paragraph 1.

*Art. 193 paras. 1 and 2*

*1 Each party may, at its own expense, deposit a copy of the decision with the national court at the seat of the arbitral tribunal.*

*2 At the request of a party, the State court shall issue a certificate of enforceability.*

## II

Amendments to other decrees are set out in the Annex.

## ANNEX

### **Amendment of other decrees**

The following federal laws are amended as follows:

#### 1. Federal Act of 17 June 2005 on the Swiss Federal Tribunal

*Art. 77 para. 1 introductory sentence, para. 2bis*

1 An appeal in civil matters shall be admissible against decisions of arbitral tribunals irrespective of the amount in dispute:

2bis Legal documents may be submitted in English.

*Art. 119a*

1 The Federal Supreme Court shall hear applications for appeal against decisions of arbitral tribunals in international arbitration under the conditions laid down in Article 190a of the Federal Act of 18 December 1987 on Private International Law.

2 Articles 77 paragraph 2bis and 126 shall apply to the appeal procedure. Unless the Federal Supreme Court finds the appeal to be manifestly inadmissible or unfounded, it shall submit it to the other party and to the arbitral tribunal for comments.

3 If the Federal Supreme Court approves the request for appeal, it shall set aside the arbitral award and refer the case back to the Arbitral Tribunal for reassessment or make the necessary findings.

4 If the arbitral tribunal is no longer complete, Article 179 of the Federal Act on Private International Law shall apply.

#### 2. Swiss Federal Act on Civil Procedure

[...]



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# A Brief Review of CAS Doping Jurisprudence Issues

Matthew J. Mitten\*

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- I. Introduction
  - II. Proof of Anti-doping Rule Violation (ADRV) by Non-Analytical Positive (NAP)
  - III. Retesting of athlete samples from Olympic Games and 1<sup>st</sup> two CAS ADD awards
  - IV. Athlete rebuttal of presumed intentional violation if ADRV does not involve a Specified Substance
  - V. Proof of No Fault or Negligence to eliminate standard Period of Ineligibility
  - VI. Proof of No Significant Fault or Negligence to reduce standard Period of Ineligibility and determination of reduced period
  - VII. Period of disqualified competition results, period of ineligibility start date, and credit for a provisional suspension
  - VIII. CAS review of International Federation (IF) Retroactive Therapeutic Use Exemption (TUE) decisions
  - IX. Concluding remarks
- 

## I. Introduction

Since the 2015 World Anti-Doping Code (WADC) became effective on 1 January 2015, there have been hundreds of published Court of Arbitration for Sport (CAS) awards interpreting and applying its provisions to a wide range of unique factual circumstances. A book or very lengthy article would be required to discuss all of the numerous issues resolved by CAS adjudication; some of the most important ones are summarized in the “Leading Cases” section of the CAS Bulletin or discussed in various articles published in it<sup>1</sup>. This short article briefly discusses recent illustrative CAS jurisprudence regarding the above issues under the 2015 WADC (or, in a few cases, the 2009 or 2003 WADC), which

were the subject of the author’s presentation during the General Programme of the CAS Seminar in Budapest, Hungary on October 24, 2019<sup>2</sup>.

## II. Proof of Anti-doping Rule Violation (ADRV) by Non-Analytical Positive (NAP)

Read together, Articles 3.1 and 3.2 of the 2015 WADC provide that an ADRV “*may be established by any reliable means, including admissions,*” to the “*comfortable satisfaction*” of CAS panel/sole arbitrator.

In CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova*, the International Association of Athletics Federations (IAAF)<sup>3</sup>

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<sup>1</sup> See, e.g., Estelle de La Rochefoucauld, *A Brief Review of the Procedural and Substantive Issues in CAS jurisprudence related to some Russian Anti-Doping Cases*, 2018/1 at 21; Markus Manninen & Brent J. Nowicki, “*Unless Fairness Requires Otherwise*”: *A Review of Exceptions to Retroactive*

*Disqualification of Competitive Results for Doping Offenses*, CAS Bulletin 2017/2 at 7; Despina Mavromati, *Application of the 2015 WADA Code through the example of a recent CAS Award (Sharapova v. ITF)*, CAS Bulletin 2016/2 at 7.

<sup>2</sup> I want to express my gratitude to Jean Phillipe Dubey, Brent Nowicki, and Jeff Benz for their assistance in identifying the leading CAS awards addressing these issues.

<sup>3</sup> The IAAF changed its name to World Athletics in 2019.

charged Mariya Savinova-Farnosova, a Russian athlete specializing in the 800 meters event, with an ADRV (specifically, use or attempted use of a prohibited substance or method) based on her abnormal Athlete Biological Passport (ABP) values and admissions that she had used Parabolan, testosterone, and rHGH in conversations with Yuliya Stepanova (a Russian athlete whistle blower), which she covertly and illegally recorded. The IAAF brought this ADRV disciplinary action as a first instance CAS Ordinary Division proceeding because there was no Russian entity with jurisdiction to do so after its November 2015 suspension of the All Russia Athletics Federation's membership based on a World Anti-doping Agency (WADA) independent commission report finding extensive doping in Russian athletics.

In her defense, the athlete contended that this evidence is insufficient to establish that she committed an ADRV. None of her 28 blood samples from August 2009-March 2015 tested positive for an Adverse Analytical Finding (AAF) for any prohibited substance or method, and she asserted that the only abnormalities in her ABP were caused by her pregnancy. She also asserted that the unauthorized recordings of her conversations with Ms. Stepanova were inadmissible as evidence in the CAS proceeding because they were obtained illegally in violation of Russian and Swiss law, the European Convention of Human Rights, her privacy and procedural rights, and the principle of good faith.

The Sole Arbitrator determined that the “reasonably good quality” recordings<sup>4</sup> and transcripts of the athlete's admissions are

reliable means of evidence of her ADRV pursuant to Article 3.2.<sup>5</sup> In accordance with the balancing test established by the Swiss Federal Tribunal and European Court of Justice, he ruled that this evidence is admissible even if illegally obtained because “*the interest in finding the truth must prevail over the interest of the Athlete that the covert recordings are not used against her in the present proceedings*”<sup>6</sup>. He noted that “*the interest in discerning the truth about systematic doping in Russia was of utmost importance to keep the sport clean and to maintain a level playing field among athletes competing against each other*”<sup>7</sup> as well as that “*the fight against doping is not only of a private interest, but indeed also of a public interest*”<sup>8</sup>. Because “*doping in Russia is widespread and has been systematically supported by coaches, clubs and government-affiliated organisations, the interest in finding the truth must prevail and the Athlete should not be allowed to invoke the principle of good faith as a defence against gathering illegally obtained evidence*”<sup>9</sup>.

Following established CAS jurisprudence, the Sole Arbitrator determined that “*the ABP is a reliable and accepted means of evidence to assist in establishing anti-doping rule violations,*” but “*that from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP it cannot automatically be deduced that an anti-doping rule violation has been committed*”<sup>10</sup>. In other words, “*the abnormal doping values may not necessarily be explained by doping*” and there must be convincing evidence that “*the abnormal values are caused by a ‘doping scenario’. . . from a qualitative interpretation of the experts and possible further evidence*”<sup>11</sup>. He found that the athlete's abnormal ABP was caused by a “*doping scenario*” because of its “*markedly higher HGB values in samples that were taken before three major competitions (the European Championship in Barcelona, the World*

<sup>4</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 108.

<sup>5</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 89.

<sup>6</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 106.

<sup>7</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 103.

<sup>8</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 104.

<sup>9</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 105.

<sup>10</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* paras. 133 and 137.

<sup>11</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 138.

*Championship in Daegu and the Olympic Games in London)*<sup>12</sup>, which was corroborated by her admissions in the recorded conversations with Ms. Stepanova. Although none of the evidence was itself sufficient to prove blood doping, he determined that all of the evidence established that the athlete engaged in blood doping to his comfortable satisfaction.

Based on his analysis of all the evidence, the Sole Arbitrator concluded that the athlete used multiple prohibited substances from 26 July 2010 through 19 August 2013 (the day after the World Championship in Moscow) pursuant to a “sophisticated doping plan or scheme over a protracted period of time”<sup>13</sup>.

The athlete appealed the Sole Arbitrator’s award to the CAS Appeals Division<sup>14</sup>, which upheld his determination regarding her ADRV:

*“[E]ven if all scenarios other than doping can be excluded (on a balance of probability), this does not suffice for the Panel to be comfortably satisfied that the Athlete committed blood manipulation. Instead, the use of a prohibited substance or method must – in addition – be a plausible and likely explanation of the values obtained for the Panel to positively assume that the Athlete doped. Such assessment must be made based on all evidence before the Panel”<sup>15</sup>.*

*“The Panel finds that all evidence on file points in the direction that blood manipulation by the Athlete is the only remaining and – when assessed individually – also the only plausible and likely explanation for the Athlete’s abnormal blood values. Blood manipulation is common in endurance sport. Contrary to what the Appellant submits there is a significant correlation between the sporting calendar of the Athlete and the variances observed in her blood values. This results from a comparison of the in-competition with the out-of-*

*competition testing results. These variances observed support the doping scenario, i.e. that the Athlete submitted to blood manipulation in preparation for the competitions. . . . [B]ased on all the evidence available to this Panel, it is convinced with the required degree of proof that a doping scenario is the only possible cause of the Athlete’s abnormal blood values”<sup>16</sup>.*

*“Before this Panel – unlike before the first-instance proceedings – the Athlete has not contested the admissibility of the recordings. For the sake of good order, the Panel would like to state that the recordings are admissible evidence and refers insofar to the grounds exposed in the first-instance proceedings to which it fully adheres”<sup>17</sup>.*

### **III. Retesting of athlete samples from Olympic Games and 1<sup>st</sup> two CAS ADD awards**

*Nesta Carter v IOC*<sup>18</sup> illustrates the lawful broad scope of the International Olympic Committee’s authority to order retesting of athlete urine or blood samples from prior Olympic Games for the presence of prohibited substances. Nesta Carter, a member of the Jamaican 4x100m relay team that won the gold medal at the Beijing Olympics, provided an August 22, 2008 sample that was tested by the Beijing laboratory and found to be negative for any prohibited substances. In March and June, 2016, his sample was retested by the Lausanne laboratory pursuant to the IOC’s request, and on 3 June 2016, he was notified it tested positive for methylhexanamine (MHA), a stimulant not specifically named in the WADA 2008 Prohibited List that has a similar structure and effects as the listed stimulant tuaminoheptane. On 25 January 2017, the IOC Disciplinary Commission determined that Mr.

<sup>12</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 154.

<sup>13</sup> See CAS 2016/O/4481, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 178.

<sup>14</sup> CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF*.

<sup>15</sup> See CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF* para. 120.

<sup>16</sup> See CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF* para. 123.

<sup>17</sup> See CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF* para. 125.

<sup>18</sup> CAS 2017/A/4984.

Carter had committed an ADRV, disqualified him from the Beijing Olympic Games 4x100m relay event, and ordered that he return his gold medal.

In his appeal, the athlete requested that the IOC Disciplinary Commission's decision be set aside because the IOC did not specifically request that his sample be tested for MHA and that the Lausanne laboratory simply used its standard "Dilute and Shoot" sample retesting process. He contended that the ADRV charge against him breached the principle of legal certainty because MHA was not listed in the WADA 2008 Prohibited List. The athlete also contended that this charge should be dismissed because the IOC's "justification for the re-testing regime is to enable re-testing where scientific methods have developed since the time of the original test such that a prohibited substance could be detected by those methods where it could not have been previously"<sup>19</sup> and that Beijing laboratory had the capability to detect MHA in athlete samples in August 2008. In addition, he asserted that because athlete samples have been routinely tested for MHA since 2010, the IOC's delay in retesting Beijing Olympic Games samples for MHA until 2016 prejudiced him and warranted dismissal of the ADRV charge against him.

Ruling that "Article 6.5 of the IOC ADR provides a broad and discretionary power to the IOC to test for any and all prohibited substances at any time within the statute of limitation period [8 years under the 2003 WADC]", the CAS Panel upheld the IOC Disciplinary Commission's determination<sup>20</sup>. It confirmed the validity of the laboratory's "Dilute and Shoot" sample screening process and found that the IOC did not intend "to prevent the Lausanne Laboratory [from reporting] any prohibited substance which was part of the in-competition menu" of prohibited substances for the

*Beijing Olympic Games*<sup>21</sup>. The Panel rejected the athlete's breach of legal certainty defense: "[A]ll stimulants were and are prohibited. There is a great number of stimulants, and they cannot all be listed by name. Therefore, the list of prohibited stimulants provides a list of named stimulants, which are typically the ones often detected, as well as a 'hold all basket'"<sup>22</sup>.

The Panel found that the IOC's rules for retesting athlete samples "send a message to all participants at the Olympic Games, that they have the fundamental duty not to use any prohibited substance", which "is an absolute duty and is not linked with the detectability of a substance"<sup>23</sup>. "In the end, what truly counts is not whether a substance is detected or not in a specific analysis performed at a given time in a given laboratory but whether it is present or not"<sup>24</sup>. It explained that the IOC's Olympic Games "re-analysis program is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute of limitation period found to have competed with a prohibited substance in their bodily systems"<sup>25</sup>.

Consistent with *Nesta Carter v IOC*, the first two CAS Anti-doping Division cases concluded that valid laboratory re-analysis of Olympic Games samples finding the presence of prohibited substances supported the determination of an ADRV by the particular athletes resulting in invalidation of their respective competition results. In 2019/ADD/1, *IOC v Mikalai Novika*, the Sole Arbitrator found that the October 2018 re-analysis of a Belarusian weightlifter's 2012 London Olympic Games samples revealed the presence of Dehydrochloromethyltestosterone (an anabolic steroid), which constitutes an ADRV invalidating his 12<sup>th</sup> place finish in the men's 85 kg weightlifting event. In

<sup>19</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 112.

<sup>20</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 109.

<sup>21</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 99.

<sup>22</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 152.

<sup>23</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* paras. 123 and 124.

<sup>24</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 127.

<sup>25</sup> See CAS 2017/A/4984, *Nesta Carter v IOC* para. 140.

2019/ADD/2, IOC v Ruslan Nurudinov, the same Sole Arbitrator found that the November 2018 re-analysis of an Uzbekistani weightlifter's samples revealed the presence of the same prohibited substance, which constitutes an ADRV invalidating his 4<sup>th</sup> place finish in men's 105 kg weightlifting event at the London Olympic Games.

#### **IV. Athlete rebuttal of presumed intentional violation if ADRV does not involve a Specified Substance**

Article 10.2.1.1 of the 2015 WADC provides for a Period of Ineligibility of 4 years if the ADRV does not involve a Specified Substance unless the Athlete proves that the ADRV is “not intentional” by “a balance of probability” (2015 WADC Article 3.1). If the Athlete does so, the presumptive Period of Ineligibility is reduced to 2 years pursuant to Article 10.2.2. Article 10.2.3 defines “intentional” as “conduct which [an Athlete] knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk”.

Applying these WADC provisions, in CAS 2018/A/5583, *Joshua Taylor v. World Rugby*, the CAS Panel held that a 19-year rugby player who tested positive for a metabolite of dehydrochloromethyl-testosterone (“DHCMT”) as part of the World Rugby U20 Championship Out of Competition testing program proved he did not commit an intentional ADRV. He established that the likely source of this prohibited substance was Deca-Plexx, a contaminated product he took for vanity reasons ten months before his positive test. He wanted to look good for a high school beach party and was not playing rugby while recovering from a broken ankle.

<sup>26</sup> See CAS 2018/A/5583, *Joshua Taylor v. World Rugby* para. 87.

<sup>27</sup> See CAS 2018/A/5583, *Joshua Taylor v. World Rugby* para. 88 (vi).

The Panel observed that “[e]stablishment of source does not by itself prove negative intent although it may be a powerful indicator of the presence or absence of intent”<sup>26</sup>. It concluded that the evidence “he took Deca-Plexx to enhance his body image not his sporting performance [...] was entirely convincing”<sup>27</sup> and proves no intent to commit an ADRV.

In contrast, two other cases determined that the athlete failed to rebut the presumption that testing positive for a prohibited non-specified substance constitutes an intentional ADRV.

In CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency*, a professional weightlifter who won the gold medal in the men's 85 kg category at the 2012 London Olympic Games, tested positive for nandrolone during the 2016 Polish Weightlifting Championships. The athlete was unable to establish the probable source of this prohibited substance, but claimed he “has never knowingly and dishonestly acted to gain an unfair sporting advantage”, “would never knowingly use such an easily detectable prohibited substance before the Olympic Games”, and “fulfilled his whereabouts obligations and underwent a significant number of anti-doping controls”<sup>28</sup>. He also contended that his lack of an intent to use this prohibited substance was proven by a polygraph test and three negative anti-doping tests for nandrolone (which is detectable for a lengthy period of time after its use) soon after his positive test and that if taking it “was done with the aim to gain a sporting advantage [.] one would need multiple doses thus making it detectable for a period of 18-24 months”<sup>29</sup>.

The Sole Arbitrator recognized that “[a] line of CAS cases have held that in order to meet the athlete's burden that the violation was not intentional [.] the athlete must necessarily establish how the substance entered his/her body”, but that “a number of other

<sup>28</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* para. 141.

<sup>29</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* para. 141.



CAS awards held differently, relying in particular on the wording of the new version of the 2015 WADC, the language of which should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent<sup>50</sup>. Regarding the later CAS jurisprudence, he noted that these awards required “truly exceptional circumstances” to prove “lack of intent without establishing the origin of the prohibited substance”<sup>51</sup>.

Observing that the athlete “cannot merely rely on protestations of innocence, lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or [his] clean record”<sup>52</sup>, to do so, the Sole Arbitrator concluded: “The totality of the evidence presented is not sufficient to establish, on the balance of probability, that the Athlete had no intention to cheat whatsoever [and] are not indicative of exceptional circumstances that might negate the presumed intentionality of the violation”<sup>53</sup>.

In CAS 2018/A/5784, *WADA v. Chinese Taipei Olympic Committee, et al.*, an out-of-competition doping control found the presence of exogenously administered anabolic steroids in a Chinese female weightlifter’s system. The athlete asserted she did not commit an intentional ADRV because the prohibited substance was in Flovone, a supplement she took for severe menstrual problems based on her physician’s recommendation. Even if this product was its source, the Sole Arbitrator determined that her ADRV was “indirectly intentional within the meaning of Article. 10.2.3 of the [2015] WADC] (*viz.*, the Athlete ‘knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk)’<sup>54</sup>. She used Flovone, whose

label stated “in major letters circled with a golden ring that it contains DHEA”, which is an anabolic steroid, for one week without reading it or “making any relevant check” such as an Internet search<sup>55</sup>. The Sole Arbitrator concluded: “A language barrier is no defense to an athlete meeting the basic standard of conduct of all athletes. If she could not understand the ingredients label, then she either had to find someone who did or simply not take the substance. She cannot hide behind her native language as a way of avoiding her responsibilities”<sup>56</sup>.

## V. Proof of No Fault or Negligence to eliminate standard Period of Ineligibility

Article 10.4 of the 2015 WADC provides: “If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated”.

The 2015 WADC defines No Fault or Negligence as follows: “The Athlete or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1 [presence in sample], the Athlete must also establish how the Prohibited Substance entered his or her system”.

It is extremely difficult for an athlete to prove no fault or negligence for an ADRV, and *WADA v Gil Roberts*<sup>57</sup> is one of the rare cases in which it has been proven. Gil Roberts, an American 200m and 400m sprint athlete who was a member of the 4x400m relay team that

<sup>50</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* paras. 137 and 138.

<sup>51</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* para. 139.

<sup>52</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* para. 139.

<sup>53</sup> See CAS 2018/A/5584, *Adrian Zieliński v. Polish Anti-Doping Agency* para. 144.

<sup>54</sup> See CAS 2018/A/5784, *WADA v. Chinese Taipei Olympic Committee* para. 67.

<sup>55</sup> See CAS 2018/A/5784, *WADA v. Chinese Taipei Olympic Committee* para. 69.

<sup>56</sup> See CAS 2018/A/5784, *WADA v. Chinese Taipei Olympic Committee* para. 70.

<sup>57</sup> CAS 2017/A/5296.

won the gold medal during the 2016 Rio Olympic Games tested positive for probenecid, a prohibited specified substance in the category of diuretics and masking agents, during an out-of-competition doping control. He alleged his ADRV resulted from passionately kissing his girlfriend, Luis Salazar, for approximately three hours immediately before providing his urine sample during the doping control, and that he did not know or suspect that kissing her could cause a positive test for probenecid. She was taking Moxylong capsules, which she did not know contained probenecid, that were purchased in India for her sinus infection. Mr. Roberts did not know she was taking Moxylong or see her take any of this medication. A laboratory test of her one remaining Moxylong capsule established that it contained probenecid. WADA did not contend that his ADRV was intentional, but asserted that “*the Athlete and his lay witnesses have concocted a false story to explain an adverse analytical finding*”<sup>38</sup>. The parties’ scientific evidence was conflicting regarding whether the likely source of probenecid in the athlete’s system was prolonged contaminated kissing of his girlfriend.

Relying on *Gasquet*<sup>39</sup>, which concluded “[i]t was simply impossible for [a tennis player], even when exercising the utmost caution, to know that in kissing [a previously unknown woman in a nightclub multiple times], he could be contaminated with cocaine”, the CAS Panel determined: “to be satisfied that a means of ingestion, is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred”<sup>40</sup>.

It found:

*“The Panel finds itself faced with compelling factual evidence and, at best, conflicting scientific evidence that acts as a double-edge sword in determining the truth. Put simply, in its assessment, the scientific evidence fails to take this storyline below the requisite Gasquet threshold. Therefore, the Panel reverts to the non-expert evidence and finds itself sufficiently satisfied that it is more likely than not that the presence of probenecid in the Athlete’s system resulted from kissing his girlfriend Ms. Salazar shortly after she had ingested a medication containing probenecid”*<sup>41</sup>.

The CAS Panel concluded that “*the Athlete has established the origin of the prohibited substance on a balance of probabilities*”, “*even with the exercise of the utmost caution [he] could never have envisioned that kissing his girlfriend of three years would lead to an adverse analytical finding for trace amounts of a banned substance that he was not familiar with*”, and he “*acted without fault or negligence*”<sup>42</sup>.

#### **VI. Proof of No Significant Fault or Negligence to reduce standard Period of Ineligibility and determination of reduced period**

Article 10.5.1.1 (“Specified Substances”) of the 2015 WADC provides: “*Where the anti-doping rule violation involves a Specified Substance, and the Athlete (...) establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete’s or other Person’s degree of Fault*”.

Article 10.5.1.2 (“Contaminated Products”) provides: “*In cases where the Athlete (...) can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete’s (...) degree of Fault*”.

<sup>38</sup> See CAS 2017/A/5296, *WADA v Gil Roberts* para. 55.

<sup>39</sup> CAS 2009/A/1926, *International Tennis Federation v. Richard Gasquet*; CAS 2009/A/1930, *WADA v. ITF & Richard Gasquet*.

<sup>40</sup> See CAS 2017/A/5296, *WADA v Gil Roberts* para. 52.

<sup>41</sup> See CAS 2017/A/5296, *WADA v Gil Roberts* para. 83.

<sup>42</sup> See CAS 2017/A/5296, *WADA v Gil Roberts* para. 84.



Article 10.5.2 (“Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1”) provides: “If an Athlete (...) establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, (...) the otherwise applicable period of Ineligibility may be reduced based on the Athlete[’s] (...) degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. (...)”

The 2015 WADC defines *No Significant Fault or Negligence* as follows: “The Athlete or other Person’s establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system”.

Pursuant to Article 10.5.1.1, 10.5.1.2, or 10.5.2, an athlete must prove no significant fault or negligence for an ADRV by a balance of probability (as well as the source of the prohibited substance) to obtain any reduction of the standard or otherwise applicable period of ineligibility. The following cases illustrate that determination of whether the athlete’s fault or negligence is “significant” requires a detailed fact specific inquiry.

In CAS 2017/A/5320, *USADA v Ryan Bailey*, a 28-year-old experienced athlete who competed at an international level in both athletics and bobsledding, tested positive for dimethylbutylamine (DMBA), a stimulant that is a specified substance whose usage is prohibited in-competition. Asserting a “mistaken assumption that his teammates were as

responsible as he had been with respect to their supplement choices”<sup>43</sup>, the athlete contended he had no significant fault for his ADRV because he took two supplements (“Hyde” and “Weapon X”) during a bobsled competition supplied by two similarly situated teammates who also tested positive for DMBA and accepted a 16-month suspension proposed by the United States Anti-doping Agency (USADA).

The CAS Panel found his “*fault is significant*”<sup>44</sup> because he was “*an elite-level international athlete with over 10 years of anti-doping education [who] ought to have mentored the less-experienced athletes, not blindly followed their lead*”<sup>45</sup>. It determined that his conduct was “*well below the standard of expected of such an Athlete*”, which “*demonstrated extreme carelessness or recklessness in failing to take even the most basic steps to avoid an ADRV*”<sup>46</sup>. For example, he “*did not ask anyone for assurances that the substances he ingested were “safe”, did not do any research of his own, and in fact, did not even take the most basic step of reading the product label before taking it*”<sup>47</sup>. It concluded his conduct does not warrant a finding of no significant fault or negligence justifying any reduction of the standard 2-year suspension for an ADRV involving a specified substance pursuant to Article 10.5.1.1.

Consistent with *Chinese Taipei Olympic Committee*, the CAS Panel rejected the athlete’s contention that his attention deficit hyperactivity disorder, which periodically resulted in a lack of focus, hyperactivity, or impulsivity, warranted a reduction in his sanction:

*“An athlete who suffers from a disability or impairment that prevents him or her from complying with primary WADC obligations should either not compete at all or ensure that he is accompanied by a responsible adult when he or she takes any supplement or medicine, or*

<sup>43</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 107.

<sup>44</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 111.

<sup>45</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 107.

<sup>46</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 112.

<sup>47</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 112.

*take other appropriate measures, including medically recommended measures, to achieve compliance. Mr. Bailey took no such steps*<sup>48</sup>.

*Joshua Taylor v. World Rugby*<sup>49</sup> illustrates that an athlete's youth, inexperience playing sport, and lack of doping education are relevant (but not dispositive) factors in determining the existence of no significant fault or negligence for an ADRV. The CAS Panel found that a 19-year rugby player's "level of fault is significant or considerable"<sup>50</sup> for his ADRV; therefore, no reduction of the standard 2-year suspension for his unintentional use of a non-specified substance was warranted under Article 10.5.1.2:

*"While there is a greater obligation on the part of the experienced high-level athlete who has received anti-doping education on numerous occasions, to undertake due diligence, that does not absolve the young, inexperienced athlete at the other end of the spectrum from taking any steps whatsoever. The Panel is unable to identify any steps that the Appellant took in discharge of his duty to avoid the presence in his system of prohibited substances. In the Panel's view, the Appellant acted in a careless manner in consuming supplements without undertaking any form of research and demonstrated a perplexing lack of curiosity for someone who entertained the prospect of one day playing professional rugby"*<sup>51</sup>.

In CAS 2016/A/4371, *Lea v. USADA*, the CAS panel was bound to accept an American Arbitration Association anti-doping panel's implicit determination that a professional cyclist did not have significant fault or negligence for an in-competition positive drug test for oxycodone (a specified substance) caused by taking one tablet of Percocet as a sleep aid late at night approximately 12-12½ hours before a morning race the next day

(which was not appealed by either party)<sup>52</sup>. A long-time trusted sports medicine physician (who had participated in national cycling competitions) had prescribed Percocet, a permissible out-of-competition medication he knew contained oxycodone, for pain relief on non-riding days during multi-day cycling competitions, which was foreseeably used by cyclists as a sleep aid. The physician did not warn the athlete about the risk of a positive in-competition drug test even if Percocet was taken "out-of-competition" (defined by the 2015 WADC as "twelve hours [or longer] before a Competition in which the athlete is scheduled to participate").

The cyclist was generally aware that metabolites of Percocet's ingredients, including oxycodone, might remain in his system beyond this medication's period of therapeutic effectiveness, which is approximately four hours. USADA's Science Director testified that oxycodone metabolites can remain in one's system 24-72 hours after ingestion, but there was no record evidence that the IF for cycling, USADA, or WADA websites or the GlobalDRO.com (the primary Internet resources athletes should check to obtain information about products or substances before taking them) contained this information. There also was no record evidence that any of these resources warned that oxycodone or its metabolites could remain in an athlete's system longer than 12 hours after ingesting it and result in a positive in-competition test even if medication containing it is taken out-of-competition.

The CAS panel generally adopted and modified the *Cilic*<sup>53</sup> guidelines for determining an athlete's degree of fault based on objective and

<sup>48</sup> See CAS 2017/A/5320, *USADA v Ryan Bailey*, para. 105.

<sup>49</sup> CAS 2018/A/5583.

<sup>50</sup> See CAS 2018/A/5583, *Joshua Taylor v. World Rugby* para. 96.

<sup>51</sup> See CAS 2018/A/5583, *Joshua Taylor v. World Rugby* para. 94.

<sup>52</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 89.

<sup>53</sup> CAS 2013/A/3327, *Cilic v. International Tennis Federation* & CAS 2013/A/3335, *International Tennis Federation v. Cilic*.

subjective elements with a corresponding range of sanctions for ADRVs involving specified substances. To promote consistency in applying Article 10.4 of the 2009 WADC to determine sanctions for ADRVs involving specified substances, *Cilic* divided the maximum 2- year period of ineligibility into three categories of fault: 0-8 months for a “light degree of fault” with a standard sanction of 4 months; 8-16 months for a “normal degree of fault” with a standard sanction of 12 months; and 16-24 months for a “significant or considerable degree of fault” with a standard sanction of 20 months. Because Article 10.5.1.1 of the 2015 WADC requires the athlete to prove “no significant fault or negligence” to obtain any reduced sanction, *Lea* used the following terminology: 0-8 months for a “light degree of fault”, 8-16 months for a “moderate degree of fault”, and 16-24 months for a “considerable degree of fault” with the same “standard” sanctions in each category<sup>54</sup>.

The CAS panel determined:

*“The dispositive inquiry in determining an appropriate, consistent, and fair sanction is his degree of fault for not taking reasonable steps to determine the length of time oxycodone is likely to remain in his system after ingesting it. There is no evidence that Appellant could have obtained reliable, scientifically accurate information from any of the above-referenced Internet resources normally consulted by athletes. Nor is there record evidence he could have obtained reliable information from a general Internet search because, as Dr. Fedoruk testified, the length of time metabolites of oxycodone are likely to remain in one’s system ‘is a challenging question’ and the length of time for clearance is different based on the particular individual’s metabolism and genetics”*<sup>55</sup>.

Applying the objective element (“*what standard of care could have been expected from a reasonable person in the athlete’s situation*”), the CAS Panel

characterized the cyclist’s “*level of fault for not taking objectively reasonable action such as asking his physician the length of time oxycodone is likely to remain in his system after ingesting it as ‘moderate’ fault*”<sup>56</sup>. After considering the subjective mitigating factors (particularly that his “*level of awareness has been reduced by a careless but understandable mistake*” and that he “*has taken [Percocet] over a long period of time without incident*”)<sup>57</sup>, it determined that “*the totality of circumstances regarding [the cyclist’s ADRV] is an ‘exceptional case’ in which the ‘subjective elements are so significant that they move [him] not only to the extremity of a particular category, but also into a different category altogether’*”<sup>58</sup>.

The CAS Panel concluded that the cyclist’s level of fault is “*light*” and after considering CAS anti-doping jurisprudence with similar facts, it imposed a six-month period of ineligibility, which is two months longer than the “*standard*” four-month suspension in this category of fault.

In CAS 2016/A/4887, *Abmad Ibrahim v. West Asia Regional Anti-doping Organization (WARADO)*, during an in-competition doping control, a young Lebanese professional basketball player tested positive for a high concentration of THC (a specified substance) from his permissible out-of-competition use of marijuana the evening before the game. It was undisputed that his ADRV was not intentional, so he was subject to the standard two-year period of ineligibility. Pursuant to the WADA Reference Guide, he did not have significant fault or negligence for his marijuana usage because it clearly was unrelated to sports performance. FIBA filed an amicus brief asserting that his two-year suspension imposed by a WARADO Doping Hearing Panel was disproportionate to sanctions imposed on other basketball players for in-competition positive tests for THC (the FIBA Disciplinary

<sup>54</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 90.

<sup>55</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 94.

<sup>56</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 95.

<sup>57</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 97.

<sup>58</sup> See CAS 2016/A/4371, *Lea v. USADA* para. 96.

Tribunal's average suspension was three months).

Applying Article 10.5.1.1 and relying on *Lea*, the CAS Panel found that the athlete's degree of fault is in the "light degree category which usually leads to a ban of 0-8 months"<sup>59</sup> and concluded: "the Appellant's age and behavior would show for a ban of three months, however, the proximity of the consumption to the game and the cannabis concentration found in the sample show for a ban of four months. Therefore, the Panel finds that the athlete's fault is a 'standard' case of light degree of fault and the appropriate sanction is a ban of four (4) months"<sup>60</sup>.

In CAS 2018/A/5546, *José Paolo Guerrero v. FIFA* & CAS 2018/A/5571, *WADA v. FIFA & José Paolo Guerrero*, a professional football player tested positive for the presence of cocaine metabolite, a non-specified substance whose usage is prohibited in-competition, in his system. Its source was coca tea that he drank in the team's Visitors room in its hotel two days before the football competition in which he provided a positive sample. He mistakenly assumed that all food and drink served therein was subject to the same strict protocols as in its private dining room to ensure that nothing contained any prohibited substances. Before drinking the tea, he did not ask team officials about the Visitors room food and drink protocols; nor did he inquire about or inspect the tea bags. It was undisputed that his ingestion of this prohibited substance occurred out-of-competition in a context unrelated to sport performance; therefore, he was subject to being suspended for a maximum period of two years pursuant to Article 10.2.3 of the 2015 WADC.

The player contended he should serve no period of ineligibility. FIFA asserted a 6-month period was appropriate, and WADA requested a 22-month period.

The CAS Panel determined the player's fault for his ADRV "was not significant"<sup>61</sup>. It concluded he had "light" fault based on the modified *Cilic* guidelines<sup>62</sup>, which would subject him to a suspension of 0-8 months. However, Article 10.5.2 precluded his otherwise applicable two-year period of ineligibility from being reduced to less than one-half of its length (i.e., one year). The Panel imposed a suspension of 14 months on the player, but with the following caveat:

*"Were the Panel unconstrained by the [2015 WADC] as to sanction and empowered to determine the appropriate period of ineligibility ex aequo et bono, it could entertain with some sympathy the argument advanced by FIFA that such period should be no more than 6 months suspension in light of [several mitigating factors in the player's favour, including that his ADRV resulted from his consumption "of an ordinary drink which contained, contrary to his reasonable belief, a prohibited substance"]"*<sup>63</sup>.

*"[T]he CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC. . . [because it is] the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end [and] has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction"*<sup>64</sup>.

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<sup>59</sup> See CAS 2016/A/4887, *Ahmad Ibrahim v. WARADO* para. 59.

<sup>60</sup> See CAS 2016/A/4887, *Ahmad Ibrahim v. WARADO* para. 62.

<sup>61</sup> See CAS 2018/A/5546, *José Paolo Guerrero v FIFA* para. 81.

<sup>62</sup> See CAS 2018/A/5546, *José Paolo Guerrero v FIFA* para. 82.

<sup>63</sup> See CAS 2018/A/5546, *José Paolo Guerrero v FIFA* para. 84.

<sup>64</sup> See CAS 2018/A/5546, *José Paolo Guerrero v FIFA* paras. 86 and 87.

## VII. Period of disqualified competition results, period of ineligibility start date, and credit for a provisional suspension

*USADA v Ryan Bailey*<sup>65</sup> and *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa*<sup>66</sup> provide good examples of the appropriate application of the following 2015 WADC provisions.

Article 9: *[An ADRV] in Individual Sports in connection with an In-Competition test automatically leads to disqualification of the result obtained in that Competition (...) including forfeiture of any medals, points and prizes.*

Article 10.8: *[I]n addition to the automatic disqualification of the results in the Competition which produced the positive Sample (...) all other competitive results (...) from the date a positive Sample was collected (...) through the commencement of any Provisional Suspension (...) shall, unless fairness requires otherwise, be disqualified (...)*

Article 10.11: *Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision (...)*

10.11.2 *Where the athlete (...) promptly (which, in all events, for an athlete means before the athlete competes again) admits the [ADRV] after being confronted with [it] by the anti-doping organization, the period of Ineligibility may start as early as the date of Sample collection (...) [W]here this Article is applied, the athlete (...) shall serve at least one-half of the period of Ineligibility going forward from the date the athlete (...) accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.*

10.11.3.1 *If a Provisional Suspension is imposed and respected by the athlete (...), then the athlete (...) shall receive a credit for such period (...) against any period of Ineligibility which may ultimately be imposed.*

In *USADA v Ryan Bailey*, the athlete's 10 January 2017 in-competition sample tested positive for DMBA, a specified substance whose usage is prohibited in-competition, which subjected him to a two-year period of ineligibility. He subsequently competed in two bobsled competitions until being notified that his "A" sample tested positive for DMBA. On 29 January 2017, he admitted his ADRV and accepted a provisional suspension. On 23 August 2017, a AAA anti-doping panel disqualified his competition results from 10-29 January 2017 and imposed a 6-months suspension beginning on 10 January 2017 that ended on 9 July 2017 because it found he had no significant negligence or fault and only a light degree of fault for his ADRV.

Pursuant to Articles 9 and 10.8, the CAS Panel upheld the disqualification of the athlete's competition results from 10-29 January 2017. Because it found that he did have significant fault for his ADRV, the Panel imposed a 2-year suspension. In its 30 November 2017 Operative Award, in accordance with Article 10.11, the Panel determined that his 2-year period of ineligibility started on 30 November 2017 and provided credit for the period of the suspension he already served from 29 January – 9 July 2017 pursuant to Article 10.11.3.1.

In *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa*, a Kenyan long distance runner's 6 June 2015 in-competition sample tested positive for nandrolone. He accepted a 6 July 2015 provisional suspension, but competed in nine events from 28 February 2016—26 February 2017. In its 17 November 2017 Operative Award, the Panel disqualified all of his competition results from 6 June 2015 to date and suspended him for 4 years beginning on 17 November 2017. It provided "no credit for any time he claimed to have been provisionally suspended"<sup>67</sup> because "where an athlete breaches a period of provisional suspension, he loses the entirety of the credit for such suspension (i.e., both the period before and after

<sup>65</sup> CAS 2017/A/5320.

<sup>66</sup> CAS 2017/A/5175.

<sup>67</sup> See *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa* para. 80.

any breach'<sup>68</sup>. The Panel explained: "To permit otherwise, would undermine the purpose of the provisional suspension rule"<sup>69</sup>.

*IAAF v ARAF & Mariya Savinova-Farnosova*, a first instance CAS Ordinary Division doping case, and its subsequent appeal to the CAS Appeals Division also provide illustrative guidance in determining the appropriate start date for an athlete's period of ineligibility and period of disqualified competition results.

In *IAAF v ARAF & Mariya Savinova-Farnosova*<sup>70</sup>, in his 10 February 2017 award, the Sole Arbitrator concluded that the athlete used multiple prohibited substances from 26 July 2010 through 19 August 2013, disqualified her competition results during this time period, and imposed the maximum four-year period of ineligibility beginning on 24 August 2015 (the date the IAAF provisionally suspended her). Applying Rule 40.10 of the IAAF Rules (which in relevant part is substantially identical to Article 10.11 of the 2015 WADC), he explained: "for practical reasons and in order to avoid any eventual misunderstanding in the calculation of the period of ineligibility, the period of ineligibility should start on 24 August 2015, the date of commencement of the date of the provisional suspension and not the date of the award"<sup>71</sup>.

In *Mariya Farnosova v IAAF & ARAF*<sup>72</sup>, the CAS Panel upheld the Sole Arbitrator's sanctions and explained why they do not violate the principle of proportionality:

*"The combined effects of such sanction[s] are severe, considering that its effective length is close to seven years and that the ADRV in question is a "first violation". However, it must also be kept in mind that*

*disqualification and ineligibility serve different purposes. Disqualification is intended to reinstall a level playing field, i.e. to neutralize the illegal advantage obtained by an athlete in competition over his or her competitor. The period of ineligibility, in contrast, serves as a deterrent for the athlete concerned and for all other potential offenders. Thus, disqualification and period of ineligibility cannot be simply added together when assessing the overall proportionality of the sanction. The more competitions have been distorted, the longer the period of disqualification must be in order to prevent that harm is being done to the (undoped) competitors"*<sup>73</sup>.

*"In the case at hand, the Panel finds that the overall effects of the sanction are still proportionate considering the specificities of the case. The Athlete has distorted multiple high level competitions, damaged numerous other athletes and has breached the applicable rules on many occasions using multiple different substances and did so in full knowledge of the circumstances. The overall integrity of athletics has suffered heavily from the Athlete's behaviour. Such behaviour, thus, warrants a serious sanction. Therefore, the Panel finds that in light of the specific circumstances of this case the boundaries of public policy are not trespassed, even though technically speaking this is a first ADRV"*<sup>74</sup>.

### VIII. CAS review of International Federation (IF) Retroactive Therapeutic Use Exemption (TUE) decisions

In CAS 2016/A/4772, *Diego Dominguez v. Fédération Internationale de l'Automobile (FIA)*, despite granting his request for a prospective TUE, the FIA denied a driver's application for a retroactive TUE for two products containing amphetamine after his positive in-competition test for this prohibited substance because it does not satisfy the "criteria to grant [it] on the basis of fairness"<sup>75</sup>. But the FIA did not specify

<sup>68</sup> See *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa* para. 79.

<sup>69</sup> See *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa* para. 79.

<sup>70</sup> CAS 2016/O/448.

<sup>71</sup> See CAS 2016/O/448, *IAAF v ARAF & Mariya Savinova-Farnosova* para. 181.

<sup>72</sup> CAS 2017/A/5045.

<sup>73</sup> See CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF* para. 138.

<sup>74</sup> See CAS 2017/A/5045, *Mariya Farnosova v IAAF & ARAF* para. 139.

<sup>75</sup> See CAS 2016/A/4772, *Diego Dominguez v. FIA* para. 14.

any reasons for its refusal to provide a retroactive TUE.

The Panel determined that an IF must provide a reasoned decision for its refusal to grant a retroactive TUE because an athlete has a legitimate expectation to understand the denial, which affects his legal rights and defense of an alleged ADRV, and WADA needs to review its refusal. Concluding that a denial based only on fairness criteria does not provide the required reasoning, the Panel set aside the FIA's decision and referred the driver's application for a retroactive TUE back to the FIA for reconsideration and a reasoned decision in due course.

The Panel held that an athlete's right to CAS review of an IF's retroactive TUE decision under Article 4.4.7 of the 2015 WADC is not violated if the IF's rules effectively preclude *de novo* consideration of the IF's fairness assessment, which provides appropriate deference to the IF's exercise of discretion given its sport-specific expertise and experience. It concluded that "*CAS cannot replace its assessment of fairness*" for that of an IF's TUE Committee, but that "*appeals may still be permitted on the ground that the decision was arbitrary, grossly disproportionate, irrational or perverse or otherwise outside of the margin of discretion, or taken in bad faith or [violated the athlete's] due process rights*"<sup>76</sup>.

## **IX. Concluding remarks**

The foregoing review of CAS jurisprudence provides a primer regarding several frequent issues in doping cases, including proof of ADRV violations by NAP evidence; rebuttal of presumed intentional ADRVs; proof of no fault or no significant fault; determination of the appropriate period of ineligibility less than a presumptive standard sanction; and determination of the proper period of

disqualified competition results and period of ineligibility start date. It also identifies and describes two other CAS awards resolving important WADC issues. *Nesta Carter v IOC* determined that the IOC has broad authority retest athlete samples from prior Olympic Games for the presence of prohibited substances. *Diego Dominguez v. FLA* held that an IF must provide reasons for denying a retroactive TUE and is an example of one of the rare instances in which a CAS panel will not exercise *de novo* review over an IF's decision in a doping matter.

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<sup>76</sup> See CAS 2016/A/4772, *Diego Dominguez v. FLA* para. 102.



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## Case law of the Swiss Federal Tribunal on Challenges against CAS awards (2015-2019)

Prof. Dr. Pascal Pichonnaz\*

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- I. Requirement for the Federal Tribunal to have jurisdiction
    - A. An international arbitration
    - B. The requirements for a valid opting-out
    - C. The nature of the decision challenged
    - D. Parties need to provide an interest to the appeal
    - E. The language of the submissions (Article 42 FTA)
    - F. Grounds for challenges – (Art. 190(2) PILA)
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  - III. The decisions according to the grounds for challenge
    - A. Improper appointment of an arbitrator or improper constitution of the tribunal
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    - E. Procedural and substantive public policy
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- 

This paper considers four years of case law of the Federal Tribunal (Supreme Court of Switzerland, on challenges against the Court of Arbitration in Sport (the CAS) awards. This represents a total of 69 decisions<sup>1</sup>, even although four appeals were withdrawn by the

appellants. I will however focus only on some of the cases, even although all of them will be mentioned in a way or another. This paper follows a previous one on the same subject made by distinguished colleagues<sup>2</sup>.

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([pascal.pichonnaz@unifr.ch](mailto:pascal.pichonnaz@unifr.ch)). I am deeply indebted and grateful to Prof. Dr. ANDREW STEVEN, former Scottish Law Commissioner, Professor at Edinburgh Law School, and to IAN LAING, Counsel at Lombardi Associates Ltd, in Edinburgh, for their help in revising the language of my contribution; obviously, the remaining language mistakes are all mine.

<sup>1</sup> I have counted the cases from 1.1.2016 to 31.12.2019.

<sup>2</sup> See BARAK E./KOOLAARD D., Lessons to be drawn from the jurisprudence of the Swiss Federal Tribunal regarding appeals against arbitral awards, in particular CAS awards, in: Bernasconi M./Rigozzi A. (eds), *International Sport Arbitration*, 6th Conference CAS & SAV/FSA Lausanne 2016, Bern 2018, p. 5-24; MCLIN A. (2015), *Evian Seminar 9 October 2015, unpublished presentation*; MAVROMATI D., Review of CAS-related jurisprudence of the Swiss Federal Tribunal, in: Bernasconi M. (ed.), *Arbitrating Disputes in a Modern Sports World*, Colloquium of the 5th Conference CAS & SAV/FSA Lausanne 2014, Bern 2016, p. 149-214; COCCIA M., *The Jurisprudence of the Swiss Federal Tribunal on Challenges Against CAS awards*, CAS Bulletin 2/2013, p. 2-17; COCCIA M., *The Jurisprudence of the Swiss Federal Tribunal in appeals against CAS awards*, in: Bernasconi M. (ed.), *International Sports Law and jurisprudence of the CAS*, Colloquium of the 4th Conference CAS & SAV/FSA Lausanne 2012, Bern 2014, p. 169-208.

After some introductory remarks on the requirements for the Swiss Federal Tribunal to have jurisdiction on challenges against the CAS awards (I.), I will mention some statistics (II.), and then look at the decisions according to the various grounds available to challenge the CAS awards (III.).

### **I. Requirement for the Federal Tribunal to have jurisdiction**

Chapter 12 of the Private International Law Act (hereafter: PILA<sup>3</sup>) applies also to Arbitration in sports. For the Federal Tribunal to have jurisdiction over an appeal against a CAS award the requirements of Article 176 PILA must be satisfied.

#### **A. An international arbitration**

Pursuant to Article 176 para. 1 PILA, “[i]he provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland”. With CAS, the seat of the arbitration is in Switzerland, which does not lead to any difficulties with the first requirement. The second requirement of one party having neither its domicile nor habitual residence in Switzerland is also usually satisfied. Indeed, on the one hand a lot of sports federations have their seat in Switzerland, but on the other hand athletes or the other party involved often have their domicile or seat outside of Switzerland. This leads therefore frequently for the dispute to

qualify as an international arbitration pursuant to Article 176 PILA.

#### **B. The requirements for a valid opting-out**

However, if both parties have their seat or domicile in Switzerland<sup>4</sup>, the arbitration proceedings are considered to be domestic and fall under Article 353 seq. of the Swiss Code of Civil Procedure (hereafter CCP<sup>5</sup>). Article 353 para. 2 CCP, however, allows parties to domestic arbitration proceedings to **opt-out the rules of the Swiss civil procedure** in favour of Chapter 12 PILA. However, even if the domestic arbitration is governed by Chapter 12 PILA in terms of such opting-out, the arbitrability of any dispute continues to be assessed pursuant to Article 354 CCP, and not pursuant to Article 177 PILA. The Federal Tribunal has recently stated in a not uncontroversial *obiter dictum* in a case dealing with a purely domestic employment contract that it is not possible to opt-out of the Swiss civil procedure rules to circumvent the restrictions as to the arbitrability of an employment contract (Article 354 CCP in conjunction with Article 341 para. 1 Code of obligations)<sup>6</sup>. The reason for this lies in the idea of *fraus legis* and Article 2 para. 2 Swiss Civil Code (hereafter CC<sup>7</sup>), which means that the hurdle to admit such result is quite high.

In the 2019 *Valcke* case<sup>8</sup>, the Federal Tribunal examined whether an opt-out had been validly agreed. In January 2016, the employment contract of the former FIFA General Secretary was terminated with

<sup>3</sup> The Private International Law Act (Systematic Collection, Nr 291) can be retrieved on the site of the Federal Administration, <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>.

<sup>4</sup> Decision of the FT, 4A\_600/2016, 29.6.2017, *Platini*, recital. 1.1.1; DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.2.

<sup>5</sup> The Swiss Code of Civil Procedure (Systematic Collection, Nr 272) can be retrieved on the site of the Federal Administration, <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>.

<sup>6</sup> Decision of the Federal Tribunal (hereafter: DFT) 144/2018 III 235 recital 2.3.3; for a discussion of the case, see among others Rudolf R., Die privatrechtliche Rechtsprechung des Bundesgerichts im Jahr 2018, ZBJV/RJB 2018 p. 816-819.

<sup>7</sup> The Swiss Civil Code (Systematic Collection, Nr 210) can be retrieved on the site of the Federal Administration, <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>.

<sup>8</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*.

immediate effect due to a breach of the Code of Ethics in several respects (among other complaints, facilitating the acquisition of World Cup tickets for several editions of the tournament in exchange for participation in a resale scheme from which he financially benefitted, use of a jet for private purposes, offering media rights at a below-market price in order to convince a voter during the renewal of the FIFA President). On appeal against a CAS award rejecting his appeal against the FIFA Appeal Committee decision, Mr Valcke challenged the decision that the requirements for an international arbitration within the meaning of Article 176 PILA were met in his case. However, he had signed a Proceeding Order, which stated in particular that “[t]he parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the “Code”). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law”<sup>9</sup>.

Following its case-law, the Federal Tribunal set out three requirements for the **validity of an opting out clause**: (a) the application of Part III of CCP must be expressly excluded; (b) the exclusive application of Chapter 12 PILA must be agreed upon; and (c) the express statement of the parties must be in writing<sup>10</sup>. After a thorough analysis, the Federal Tribunal held that the wording contained in the procedural order, signed by the appellant, was sufficient for a valid opting out<sup>11</sup>. The “*exclusion of any other procedural law*” without express reference to Article 353 seq. CCP is sufficient, as it is also in the case of

waiver of the right to appeal<sup>12</sup>, which impacts more on the rights of the parties.

The same applies to an opting out of *Article 176 para. 2 PILA*, which reads as follows: “*The parties may exclude the application of this chapter by an explicit declaration in the arbitration agreement or by an agreement at a later date and agree on the application of the third part of the CPC*”<sup>13</sup>; no express mention of the articles is necessary if the common will of the parties is clear from the text<sup>14</sup>. This argument was also used in the *Valcke* case, because the decision of the appellant was effective, especially as he was assisted by lawyers.

As to the question whether it was not too late to opt out at this stage of the proceedings, the Federal Tribunal recalled that it had left the question undecided in relation to Article 176 para. 2 PILA<sup>15</sup>. It then held that, in view of the slight differences between both proceedings (international and domestic), apart from the right to appeal, and taking into account the fact that opting out is of consensual nature, it must be *possible to opt out almost at any time*, provided that the arbitrators agree, since this also has an impact on the party-arbitrator relationship<sup>16</sup>. In this case, the CAS had suggested the opting out, which meant that the arbitrators were in agreement with it. The opting out in favour of international arbitration was therefore valid.

### C. The nature of the decision challenged

According to Article 77 para. 1 let. a Federal Tribunal Act (hereafter: FTA<sup>17</sup>) in relation to Article 190 PILA, a challenge is possible against “an award of an arbitral tribunal”<sup>18</sup>. It

<sup>9</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.4.1.

<sup>10</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.3.3.

<sup>11</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.6-1.7.

<sup>12</sup> DFT 143/2017 III 589 recital 2.2.1; DFT 134/2008 III 260 recital 3.1.

<sup>13</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.3.2.

<sup>14</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.6.1.3; DFT 115/1989 II 390 recital

2b/bb; FT, Decision 4A\_254/2013, 19.11.2013, recital 1.2.3.

<sup>15</sup> ATF 115/1989 II 390, recital 2b/cc.

<sup>16</sup> DFT 145/2019 III 266 (4A\_540/2018), 7.5.2019, *Valcke*, recital 1.6.2.2.

<sup>17</sup> The Federal Tribunal Act (Systematic Collection, Nr 173.110) can be retrieved on the site of the Federal Administration, <https://www.admin.ch/opc/fr/classified-compilation/20010204/index.html>.

<sup>18</sup> See FT, Decision 4A\_222/2015, 28.1.2016, *Bruyneel*, recital 3.3.1.

can be a *final award*, which ends the arbitral proceedings on a procedural or substantive ground, a *partial award*, which deals with a part of a claim or one of the claims, or which ends the proceedings with regards to part of the parties, a *preliminary or interim award*, which solves one or several preliminary questions on the merit or on procedures. However, *provisional or conservatory measures*, or decisions rejecting such measures, cannot be set aside.

*Provisional orders*, pursuant to Article 186 para. 3 PILA, rejecting a claim for lack of jurisdiction can, however, be appealed on the grounds of irregular composition of the Tribunal or lack of jurisdiction of the Tribunal pursuant to Article 190 para. 2 let. b PILA.

The *type of decision is not decisive*. The Federal Tribunal decides what is the real nature of the decision to be appealed and (re)classifies it accordingly if necessary. In the *Bruyneel* case of 2016<sup>19</sup>, the Managing Counsel and Head of Arbitration had addressed a letter to the parties indicating that USADA had jurisdiction over results management and the AAA disciplinary authority over some athletes, and that the final decision would be made by the CAS. On Appeal, the Federal Tribunal had to decide whether such decision was to be classified as a preliminary order pursuant to Article 186 para. 3 PILA.

From a formal point of view, the means of communication of the decision were unusual, since the decision was communicated through a letter, without indication of any ground for the decision, and without signature by the President of the Court. From a substantive point of view, the letter itself indicated that the decision was a *partial decision on the merit* and not a preliminary decision on jurisdiction of CAS. Though not bound by

this classification, the Federal Tribunal held that it could not completely ignore it, particularly given the absence of grounds in the decision. Finally, the Federal Tribunal considered that the decision by the arbitral body (set in place by the CAS) was an order on jurisdiction pursuant to Art. 190 para. 3 PILA. Thus, that decision was not a “*partial decision on a substantive issue*” as decided by the arbitral body, but a *preliminary or interim award*, according to which the body had solved a preliminary question on the merit<sup>20</sup>. The preliminary question decided on the merit was whether USADA had jurisdiction to manage results and, as a consequence, whether the AAA Tribunal had disciplinary powers in relation to the appellant and other persons. It was therefore indeed a preliminary measure, since a negative answer to the question would have caused the CAS to annul the AAA decision without going into the merits. Indeed, the CAS formation could not do this without impliedly and *prima facie* accepting its own jurisdiction on the matter<sup>21</sup>. However, the arbitral body had decided to accept its jurisdiction only provisionally and wanted to deal with it only definitively in the final award, derogating from Article 186 para. 3 PILA for reasons of procedural efficiency. According to the Federal Tribunal, this was admissible as long as there was no abuse of rights, for instance by deferring the decision, though knowing that there is no jurisdiction. Therefore, the Federal Tribunal held that the decision could not be appealed<sup>22</sup>.

According to the *Sunderland* case of 2019, a challenge against a **termination order** is also possible<sup>23</sup>. In that case, the Appellate body of the CAS issued a termination order because the appeal submission was sent only by email and not in seven paper copies pursuant to Article R31 CAS Code. The challenge against

<sup>19</sup> FT, Decision 4A\_222/2015, 28.1.2016, *Bruyneel*, recital 3.3.1.

<sup>20</sup> FT, Decision 4A\_222/2015, 28.1.2016, *Bruyneel*, recital 3.3.2.

<sup>21</sup> FT, Decision 4A\_222/2015, 28.1.2016, *Bruyneel*, recital 3.3.3.

<sup>22</sup> FT, Decision 4A\_222/2015, 28.1.2016, *Bruyneel*, recital 3.3.2-3.

<sup>23</sup> See FT, Decision 4A\_54/2019, 11.4.2019, *Sunderland AFC*, recital 2.1; see also for decisions on that point in decisions against CAS awards, FT, Decision 4A\_690/2016, 9.2.2017, *Pape Diakhaté*, recital 4.2; FT, Decision 4A\_238/2018, 12.9.2018, *Club Al Hilal*, recital 5.3-5.6; FT, Decision 4A\_556/2018, 5.3.2019, *José da Costa* recital 6.5

this order was possible, but was then rejected on the substance, given that there was no excessive formalism requiring the parties to comply with Article R31 CAS Code, since that provision was the result of a compromise between various interests<sup>24</sup>.

#### **D. Parties need to provide an interest to the appeal**

The Federal Tribunal may decide on the subject-matter only if there is a **“a protected interest”** in setting aside the award, pursuant to Article 76 para. 1 let. b FTA. This requires an actual, practical and concrete interest<sup>25</sup>.

There were *doubts* about the existence of an actual interest when a suspension for doping was almost over and no suspensive effect of the award had been requested<sup>26</sup>. The Federal Tribunal held that there was *no actual interest* by the mere fact that the party envisaged pursuing a claim for damages later<sup>27</sup>.

Even in sport matters, (*financial*) *judicial assistance* may be granted for proceedings before the Federal Tribunal<sup>28</sup>.

#### **E. The language of the submissions (Article 42 FTA)**

Pursuant to Art. 42 para. 1 FTA, all submissions in case of a challenge against a CAS award must be written in an official language. This includes German, French and Italian, as well as Romansh for matters arising between the Federal State and Romansh-speaking people (Article 70 para. 1 Fed. Cst.). If the submission is not written in an official language, the Federal Tribunal may refer it

back to its author; in this case, it shall set an appropriate time limit for the author to remedy the irregularity and shall inform him that, failing this, the submission will not be taken into consideration (Art. 42 para. 6 FTA).

Despite the permissive wording of the first part of the sentence in Art. 42 para. 6 FTA (“may”), the Federal Tribunal is, in principle, not free to declare a submission filed in a language other than an official language inadmissible from the outset. On the contrary, to avoid any excessive formalism, the Tribunal has to set an appropriate time limit for the author of the submission to translate it<sup>29</sup>. Such rule suffers some exceptions, in particular in cases of abuse of rights<sup>30</sup>.

In the 2018 case of *Toju Jakpa*<sup>31</sup>, there was a request for a review of the decision of the Federal Tribunal following a challenge to a CAS award. The first appeal to the Federal Tribunal had been written in French, but the request for a review was in English. The Federal Tribunal held that there was an abuse of rights and rejected the request outright. The situation was indeed unusual, since the main decision by the Federal Tribunal was in French, given that the attorney who made the submission was from the Canton of Vaud<sup>32</sup>. The request for a review was filed in English by the athlete himself, who offered to translate the submission into French with “Google translate”<sup>33</sup>. The Federal Tribunal decided not to consider the request for a review in English without giving an additional time period to remedy the irregularity<sup>34</sup>.

<sup>24</sup> See below p.89.

<sup>25</sup> FT, Decision 4A\_620/2015, 1.4.2016, *Hatem Ben Arfa*, recital 1.1; FT, Decision 4A\_426/2017, 17.3.2018, *Etoile Filante de Garoua*, recital 3.1; FT, Decision 4A\_560/2018, 16.11.2018, *FIFA (Guerrero)*, recital 2.1 «also personal interest».

<sup>26</sup> FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 3

<sup>27</sup> FT, Decision 4A\_56/2018, 30.1.2019, *Margarita Goncharova*, recital 4.2.4.

<sup>28</sup> FT, Decision 4A\_690/2016, 9.2.2017, *Pape Diakhaté*, recital 5.1.

<sup>29</sup> See FT, Decision 4A\_510/2017, 9.11.2017; DFT 143/2017 IV 117 recital 2.

<sup>30</sup> See FT, Decision 4A\_510/2017, 9.11.2017, recital 9.

<sup>31</sup> FT, Decision 4F\_8/2018, 14.3.2018, *Toju Jakpa*.

<sup>32</sup> See FT, Decision 4A\_592/2017, 5.12.2017, *Toju Jakpa*.

<sup>33</sup> FT, Decision 4F\_8/2018, 14.3.2018, *Toju Jakpa*, recital 2.1.

<sup>34</sup> FT, Decision 4F\_8/2018, 14.3.2018, *Toju Jakpa*, recital 3.2.

## **F. Grounds for challenges – (Art. 190(2) PILA)**

Pursuant to Article 190 para. 2 PILA, there are only five grounds for setting aside an arbitral award before the Federal Tribunal.

*The award may only be set aside:*

*a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;*

*b) if the arbitral tribunal wrongly accepted or declined jurisdiction;*

*c) if the arbitral tribunal's award went beyond the claims submitted to it, or failed to decide one of the items of the claim;*

*d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;*

*e) if the award is incompatible with public policy.*

I will present the case law for each of those categories in Part III *below*.

The Federal Tribunal has, however, stressed in several decisions that it is not possible to invoke a *breach of the European Convention on Human Rights*, since the grounds for setting aside an award are exhaustively enumerated by Article 190 para. 2 PILA<sup>35</sup>.

### **II. Some statistics**

Based on analysis carried out by Felix Dasser and P. Wojtowicz, published in the ASA Bulletin in 2018<sup>36</sup>, and taking into account the figures given to me by the CAS Secretariat<sup>37</sup>, I can give some figures in relation to the challenges against CAS awards.

Between 2008 and 2017, the Federal Tribunal issued 145 decisions against CAS awards, this represents approx. 45% of all decisions (323)

<sup>35</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semanya*, recital 3.2; FT, Decision 4A\_384/2017, 4.10.2017, *Yassine Bensghir*, recital 4.2.1; FT, Decision 4A\_178/2014, 11.6.2014, recital 2.4.

<sup>36</sup> DASSER F./ WOJTOWICZ P. (2018), *Challenges of Swiss Arbitral Awards, Updated Statistical Data as of 2017*, ASA Bull. 1/2018, p. 276 ss.

issued by the Federal Tribunal during that period against arbitral awards<sup>38</sup>. In 2018, there were 16 decisions by the Federal Tribunal in relation to challenges against CAS awards, and 19 decisions in 2019.

The likelihood of success given the various appeal routes may be summarized as follows:

Between 1989 and 2017 decisions on the merits on challenges against CAS awards amount to 126 cases, of which only 10 decisions (7,94%) led to a partial or full setting aside, and 116 consisted of a dismissal<sup>39</sup>. In the period which I have considered (2016-2019), there were 65 decisions on the merits, out of which only two decisions (i.e. 3 %) consisted in a partial (1) or full (1) setting aside of CAS awards. This shows that the likelihood of success when challenging a CAS award is very low. This is the result of both the quality of CAS awards issued, and also the tendency of the Federal Tribunal to set aside arbitral awards, and in particular CAS awards, only when this is fully justified.

### **III. The decisions according to the grounds for challenge**

Since decisions by the Federal Tribunal are presented according to the grounds for challenge, those decisions may be mentioned several times, given that parties usually invoke more than one ground for setting aside a CAS award. However, I do not mention all decisions for each ground, given that decisions on some grounds of challenge do not add anything to the understanding of such ground of challenge.

#### **A. Improper appointment of an arbitrator or improper constitution of the tribunal**

<sup>37</sup> I thank Dr Jean-Philippe Dubey, Head of Scientific Department, CAS, for his generous help in obtaining those figures.

<sup>38</sup> DASSER/WOJTOWICZ (2018), p. 278.

<sup>39</sup> DASSER/WOJTOWICZ (2018), p. 280.



Pursuant to Article 190 para. 2 let. a PILA, the award may be set aside “if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted”.

The independency of the CAS has been challenged in the past based on this ground.

In a decision of 20 February 2018 (“RFC Seraing”), DFT 144/2018 III 120<sup>40</sup>, a case which concerned a dispute between a football club affiliated to the Royal Belgian Football Association (URBSFA) and FIFA, the Federal Tribunal was asked to analyse the validity of Third Party Ownership Agreements (“TPO”), concluded between the football club and a third-party investor. In a previous case, the Federal Tribunal had upheld a TPO agreement (*Sporting Clube Portugal*<sup>41</sup>). Today, these agreements are prohibited by FIFA’s Regulations on the Status and Transfer of Players<sup>42</sup>, in order to limit the influence that actors outside the football world can exert on football. Accordingly, the agreements in question had been sanctioned by the Disciplinary Committee of FIFA. Ultimately, the CAS upheld the decision made by the Disciplinary Committee<sup>43</sup>.

The football club challenged the CAS award in the Federal Tribunal and sought the quashing of the decision, arguing that the CAS was not an independent tribunal. The Federal Tribunal considered declaring the challenge inadmissible on grounds of estoppel (*venire contra factum proprium*) because the club had filed an appeal with the CAS, without reservation, and then denied in front of the Federal Tribunal that the CAS is a proper arbitral tribunal. Ultimately the

Federal Tribunal agreed to hear the case, but rejected the argument that the decision should be quashed<sup>44</sup>.

This was however an occasion for the Tribunal to reaffirm the independence of CAS, following its own findings in the leading case of *Lazutina*<sup>45</sup>. It recalled the evolution of the case law in this respect<sup>46</sup>. It is worth quoting some of those statements.

First in recital 3.4.1, the Federal Tribunal held the following: “In the landmark *Lazutina* case of 27 May 2003, the Federal Tribunal concluded that the CAS is sufficiently independent from the International Olympic Committee (IOC), as of all parties calling on its services, that its decisions in cases involving this body can be considered as genuine awards, similar to those of State courts<sup>47</sup>. In recital 2.1. of that decision<sup>48</sup>, the Federal Tribunal already stated, with reference to a first judgment of 15 March 1993 concerning the relationship between the International Equestrian Federation (FEI), on the one hand, and the CAS in its original organisation dating back to 30 June 1984, on the other hand<sup>49</sup>, that it is ‘undoubtedly true that the contested decisions have the status of sentences in so far as they were rendered in cases against the FIS [International Ski Federation]’. This means that, at all times, the Federal Tribunal has considered less problematic, from the point of view of independence, the links established by international Olympic Summer (in this case, the FEI) or Winter (in this case, the FIS) sports federations with the CAS, than those which unite this arbitral tribunal and the IOC. So we do not see, *prima facie*, why it should be otherwise today”<sup>50</sup>. In the 2003 *Lazutina* case, the Federal Tribunal had recognised that it is “undoubtedly true that the contested decisions have the status of awards in so far as they were rendered in cases against the International Ski Federation (FIS)”<sup>51</sup>.

<sup>40</sup> FT, Decision 4A\_260/2017, 20.02.2017, *RFC Seraing*, recital 3.4.1, for the full version.

<sup>41</sup> FT, Decision 4A\_116/2016, 13.12.2016, *Sporting Clube de Portugal Futebol SAD*.

<sup>42</sup> Art. 18bis and 18ter Regulations on the Status and Transfer of Players (RSTP); FIFA Circular 1464 (TPO) of 22 December 2014.

<sup>43</sup> Decision CAS 2014/O/3781, *Sporting Clube de Portugal Futebol SAD v. Doyen Sports*.

<sup>44</sup> DFT 144/2018 III 120.

<sup>45</sup> DFT 129/2003 III 445.

<sup>46</sup> DFT 144/2018 III 120, 4A\_260/2017 *RFS Seraing*, recital 3.4.1.

<sup>47</sup> DFT 129/2003 III 445, recital 3.3.4.

<sup>48</sup> DFT 129/2003 III 445, recital 3.2.

<sup>49</sup> DFT 119/1993 II 271, *Gundel*.

<sup>50</sup> DFT 144/2018 III 120, 4A\_260/2017 *RFS Seraing*, recital 3.4.1.

<sup>51</sup> DFT 129/2003 III 445, recital 3.3.4.



Since then, the law as set out in of the *Lazutina* case has been applied in many subsequent decisions, in particular in those where one or the other International Federation appeared as a party<sup>52</sup>. The analysis of the Federal Tribunal has been confirmed by the German Supreme Court (*Bundesgerichtshof*) in its 7 June 2016 *Claudia Pechstein* decision<sup>53</sup>.

The Federal Tribunal also mentions in its decision of 2018 the various reforms taken on by CAS, its financial relationship with FIFA and concludes that there is no reason to open again the discussion of a line of cases firmly established<sup>54</sup>. The Federal Tribunal holds merely that only compelling reasons could push it not to assimilate FIFA with the other International Federations in terms of its independence from CAS, but it did not find sufficiently strong arguments in the appellant's brief to justify making FIFA a special case in this respect<sup>55</sup>. It continued by stating that "*as a judicial authority, called to rule on appeals in international arbitration cases, the Federal Tribunal does not have the task of reforming this institution (i.e. CAS) itself, nor of recasting the regulations governing it, but only of ensuring that it achieves the level of independence required for it to be assimilated to a state court*"<sup>56</sup>.

In further cases, the Federal Tribunal had to decide whether there was an **improper appointment** of an arbitrator or **constitution** of the tribunal body.

In *Ruann Visser*<sup>57</sup>, the Federal Tribunal holds that the revocation of an arbitrator cannot be brought directly to the Federal Tribunal. It can only be brought to the Federal Tribunal in connection with an appeal against the first award that is appealed. Similarly, the appointment of an arbitrator by an organ of the CAS is not an award and cannot be appealed directly, it can only be appealed in connection with the first award<sup>58</sup>.

In *Clube Atletico Mineiro*<sup>59</sup>, the Federal Tribunal holds that the fact that an arbitrator divulges information in breach of his or her duty of confidentiality does not provide a ground for setting aside the award based on partiality of the arbitrator. The breach of duty of confidentiality was in this case only a hypothesis made by the appellant, but the Federal Tribunal holds that even if that would have been true, the setting aside would not have been granted<sup>60</sup>.

In *FC Bunyodkor*, a decision of 2017, the Federal Tribunal held that FIFA dispute board is not an arbitral tribunal, which implies that one cannot bring the case directly to CAS, since one needs a decision of the association<sup>61</sup>.

## B. Jurisdiction and arbitral clauses

Pursuant to Article 190 para. 2 let. b PILA, the award may be set aside "*if the arbitral tribunal wrongly accepted or declined jurisdiction*". This provision relates primarily to

<sup>52</sup> FT, Decision 4P.149/2003, 31.10.2003, recitals 1.1; FT, Decision 4P.172/2006, 22.3.2007 [=DFT 133/2007 III 235] recital 4.3.2.3; FT, Decision 4A\_548/2009, 20.1.2010, recital 4.1 [with FIFA as a party]; FT, Decision 4A\_612/2009, 10.2.2010, recital 3.1.3; FT, Decision 4A\_640/2010, 10.4.2011, recital 3.2.2 [with FIFA as a party]; FT, Decision 4A\_246/2011, 7.11.2011 [= DFT 138/2012 III 29] recital 2.2.2; FT, Decision 4A\_428/2011, 13.2.2012, recital 3.2.3; FT, Decision 4A\_102/2016, 27.9.2016, recital 3.2.3.

<sup>53</sup> German Supreme Court (BGH Kartellsenat), Decision of 7 June 2016, KZK 6/15, n. 23: "Der CAS ist ein 'echtes' Schiedsgericht im Sinne der Zivilprozessordnung und nicht lediglich ein Verbandsgericht"; n. 25: "Der CAS stellt eine solche unabhängige und neutrale Instanz dar"..

<sup>54</sup> DFT 144/2018 III 120, 4A\_260/2017 RFS *Seraing*, recital 3.4.3.

<sup>55</sup> DFT 144/2018 III 120, 4A\_260/2017 RFS *Seraing*, recital 3.4.2.

<sup>56</sup> DFT 144/2018 III 120, 4A\_260/2017 RFS *Seraing*, recital 3.4.2.

<sup>57</sup> FT, Decision 4A\_146/2019, 6.6.2019, *Ruann Visser*, recital 2.5.

<sup>58</sup> See also a decision in a SCAI Arbitration, FT, Decision 4A\_546/2016, 27.1.2017, recital 1.3.

<sup>59</sup> FT, Decision 4A\_510/2015, 8.3.2016, *Clube Atletico Mineiro*.

<sup>60</sup> FT, Decision 4A\_510/2015, 8.3.2016, *Clube Atletico Mineiro*, recital 4.2.

<sup>61</sup> FT, Decision 4A\_492/2016, 7.2.2017, *FC Bunyodkor*, recital 3.3.3.

pathological arbitration clauses and their ambit.

There have been a number of decisions by the Federal Tribunal on these issues in the last four years in relation with CAS awards. According to the *Bellchambers* case<sup>62</sup>, the arbitration agreement must meet the requirements of Article 178 PILA.

With regard to the formal requirement (Art. 178 para. 1 PILA), the Federal Tribunal has held that *“in sport matters, it examines the agreement of the parties to appeal to an arbitral tribunal with a certain ‘goodwill’; this is with the aim of promoting the rapid settlement of disputes by specialized courts which, like the CAS, offer sufficient guarantees of independence and impartiality (DFT 138/2012 III 29 r. 2.2.2; DFT 133/2007 III 235 r. 4.3.2.3). The generosity that characterizes the jurisdiction of the Federal Tribunal in this area is particularly evident in the assessment of the validity of arbitration clauses by means of references”*<sup>63</sup>. Indeed, agreements between athletes and their Federation generally refer in relation to the resolution of disputes to the arbitration clauses contained in the by-laws of such Federation. Those arbitration clauses by reference are not unique to sport, but in this field they are particularly important. This explains the very positive approach of the Federal Tribunal in favour of their validity.

It remains the case that these arbitration clauses contained in by-laws of Federations need sometimes to be interpreted. In that respect, the Federal Tribunal makes the following distinction: *“interpreting articles of association, the methods of interpretation may vary depending on the type of company concerned. The*

*interpretation of the articles of large corporations is based on statutory interpretation methods. For the interpretation of the statutes of small companies, preference should be given to methods of interpreting contracts, such as objective interpretation according to the principle of trust”*<sup>64</sup>. This distinction applies also in sport matters: *“the Federal Tribunal has interpreted the statutes of major sports associations, such as UEFA, FIFA or LAAF, in particular their clauses relating to questions of jurisdiction, as a legislative act”*, as held by the Federal Tribunal in the *FIM* case of 2018<sup>65</sup>, which confirmed also what had been said in the *Platini* case<sup>66</sup>. In this latter case, the Federal Tribunal had to interpret provisions of a lower rank than bylaws of sport associations of a large size, such as FIFA; it did so by using interpretation methodology applied for legislative acts<sup>67</sup>. This means that those provisions shall be interpreted according to the principle of *pragmatic pluralism*.

According to the interpretation methodology applied by the Federal Tribunal in relation to statutes, there are two main elements to follow while interpreting a statute<sup>68</sup>:

- 1) **The pluralistic approach**, which means that the interpreter shall take into account multiple factors in its analysis; the literal, historical, systematic and teleological interpretation approaches must all be taken into consideration. It is not possible to stop at the wording or rely only on the purpose of the provision (teleological approach).
- 2) **The pragmatic approach**, which means that there is no predefined hierarchy between all the interpretation factors that have to be taken into account. As such,

<sup>62</sup> FT, Decision 4A\_102/2016, 27.9.2016, *Bellchambers*, recital 3.2.3.

<sup>63</sup> FT, Decision 4A\_102/2016, 27.9.2016, *Bellchambers*, recital 3.2.3.

<sup>64</sup> DFT 140/2014 III 349, recital 2.3

<sup>65</sup> FT, Decision 4A\_314/2017, 28.5.2018, *FIM*, recital 2.3.1; see also FT, Decision 4A\_490/2017, *Tatyana Chernova*, recital 3.3.2; and already FT, Decision 4A\_392/2008, 22.12.2008, recital 4.2.1; on the evolution of such case law, see among others LUDWIG/BRÄGGER, *Auslegung von Vereinssatzungen am Beispiel von Art. 5 Abs. 1 der*

*UEFA-Statuten*, in *causa sport 2017* p. 19 seq., n. 3.3. p. 21.

<sup>66</sup> FT, Decision 4A\_600/2016, 29.6.2017, *Platini*, recital 3.3.4.1.

<sup>67</sup> FT, Decision 4A\_600/2016, 29.6.2017, *Platini*, recital 3.3.4.1.

<sup>68</sup> See for recent decisions explaining the methodology, FT, Decision 4A\_328/2019 recital 3.3.2; DFT 142/2016 III 102 recital 5; DFT 142/2016 III 695 recital 4.1.2; DFT 141/2015 III 53 recital. 5.4.1; DFT 141/2015 III 444 recital 2.1.

the wording is not more important than other elements, especially given the multilingualistic approach of Swiss statute<sup>69</sup>.

A recent case decided by the Federal Tribunal summarizes in German the **pragmatic pluralism of methods** as follows: “*A statute must first and foremost be understood from its own perspective, i.e. according to the wording, system, meaning and purpose of the regulation. The interpretation must be based on the ratio legis, which the court must, however, not determine according to its own subjective values, but according to the requirements and regulatory intentions of the legislator on the basis of the usual elements of interpretation. In interpreting the statute, the Federal Tribunal follows a pragmatic pluralism of methods and, in particular, refuses to subject the individual elements of interpretation to a hierarchical order of priority*”.<sup>70</sup>

Furthermore and pursuant to Article 178 para. 2 PILA, the Federal Tribunal assesses the **validity** of the content and the scope of an arbitration clause “*according to the parties’ choice of law applicable to the dispute, in particular the law applicable to the main contract or Swiss law*”<sup>71</sup>.

On the **scope of such arbitration clauses**, the period considered has two interesting cases:

1° *FIM case*<sup>72</sup>. In its decision, the Federal Tribunal analysed in depth the arbitration clause in the FIM bylaws. It found that, contrary to the bylaws of other sport

associations (such as FIFA) and the non-mandatory Swiss law of associations, FIM bylaws also allow non-members to challenge decisions of FIM bodies before the CAS. The Federal Tribunal accepted the validity of such content and held that the CAS had *ratione personae* jurisdiction to decide the dispute between two federations seeking to be designated as the national federation for FIM, pursuant to the *Einplatzprinzip* (one-place principle). It then dismissed the challenge against the CAS award.

2° *Tatyana Chernova case*<sup>73</sup>. This Russian athlete had been excluded from competing for doping by a single CAS arbitrator. The ban was upheld by the CAS acting as an appellate body at the request of the International Association of Athletics Federations (IAAF). The athlete then challenged both decisions before the Federal Tribunal. She argued that the CAS had no jurisdiction *ratione temporis*, as the Russian Federation had not yet initiated disciplinary proceedings. The Federal Tribunal confirmed, however, that an International Sports Federation has the right to submit a request for arbitration directly to the CAS when the National Federation was unable or unwilling to conduct a doping investigation.

The *Bellchambers* case raised another interesting issue<sup>74</sup>. The Federal Tribunal had to decide whether the CAS could decide the case with a full power of review and *de novo*. This was despite the fact that the 2010 edition of AFL Anti-Doping Code was applicable

<sup>69</sup> On this, see among others PICHONNAZ P., Legal Interpretation in Multilingual States: An Opportunity, *Journal of Comparative Law [JCL]*, 12:2 (2017), 124 seq.; PICHONNAZ P., L’effet rétroactif du changement de jurisprudence : quelques réflexions à l’aune du pluralisme méthodologique, in : A. Rumo-Jungo/P. Pichonnaz/B. Hürlimann-Kaup/Ch. Fountoulakis (edit.), *Une empreinte sur le Code civil, Mélanges en l’honneur de Paul-Henri Steinauer*, Berne 2013, 47 seq.

<sup>70</sup> DFT 142/2016 III 102/106 recital 5: “Ein Gesetz muss in erster Linie aus sich selbst heraus, das heisst nach Wortlaut, Systematik, Sinn und Zweck der Regelung verstanden werden. Auszurichten ist die Auslegung auf die ratio legis, die das Gericht allerdings nicht nach seinen eigenen, subjektiven

Wertvorstellungen, sondern nach den Vorgaben und Regelungsabsichten des Gesetzgebers aufgrund der herkömmlichen Auslegungselemente zu ermitteln hat. Das Bundesgericht befolgt bei der Gesetzesauslegung einen pragmatischen Methodenpluralismus und lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen”.

<sup>71</sup> FT, Decision 4A\_102/2016, 27.9.2016, *Bellchambers*, recital 3.2.3 ; see also DFT 140/2014 III 134 recital 3.1.

<sup>72</sup> FT, Decision 4A\_314/2017, 28.5.2018, *FIM*, recital 2.3.2.5; see also ASA Bull. 3/2018 738 seq.

<sup>73</sup> FT, Decision 4A\_490/2017, 2.2.2018, *Tatyana Chernova*, recitals 3.3.3-3.3.4.

<sup>74</sup> FT, Decision 4A\_102/2016, 27.9.2016, *Bellchambers*.

and the CAS was acting as a body of appeal (Art. 17 AFL Anti-Doping Code 2010). The CAS appellate body had decided with full cognition pursuant to Art. 20.1 AFL Anti-doping Code 2015, which provides for such full cognition. In other words, the question was whether there was a retroactive application of the new anti-doping code of 2015 to cases which occurred before its coming into force. The Federal Tribunal accepted that the CAS could retroactively apply the new 2015 Anti-Doping Code (Article 20.1 of the AFL 2015 Anti-Doping Code), which provides for full cognition, as long as the parties signed the “procedural order” referring to R57 CAS-Code (2013) and the various procedural orders applied the full power of cognition. Therefore, the parties assisted by counsel should have reacted immediately if they had intended to oppose it. Full cognition was therefore admitted by the parties and the Federal Tribunal saw nothing against it<sup>75</sup>.

The *Ezequiel Schelotto* case<sup>76</sup> is one of two decisions in the period under review where the Federal Tribunal overturned a CAS award. It dealt with an arbitration clause in a players’ brokerage contract. It had to interpret the arbitration clause according to the general principle of contract interpretation, i.e. (a) by examining the subjective intention of the parties, and (b) if it was not possible to identify or fix this intention, to interpret the arbitration clause according to an objective interpretation based on the principle of good faith, i.e. according to what a reasonable reader put in the same situation would understand<sup>77</sup>. Furthermore, the Federal Tribunal emphasised that if there is a subjective agreement in favour of exclusive arbitration proceedings, but if it is unclear which proceedings have to be followed, the “utility principle” must be applied, giving an

interpretation which can maintain the validity of such clause<sup>78</sup>.

In the case in question, neither a subjective intention nor an objective interpretation according to the principle of good faith could lead to arbitration, since the dispute resolution clause referred to two football bodies (FIFA and the Argentine Football Association), but also to the jurisdiction of the State courts in Buenos Aires. There was therefore no exclusivity in favour of arbitration; no solution to the absence of exclusivity could be deduced from the pathological clause either<sup>79</sup>. The Federal Tribunal found that there was no discussion in the award about the parties’ real intentions and the role which the two professional bodies were meant to play. The CAS Panel had interpreted the clause according to the principle of good faith but had come to a wrong conclusion; this dispute resolution clause was not an arbitration agreement for lack of exclusivity.

A further decision is interesting as to the issue of **parallel jurisdiction** (State and CAS)<sup>80</sup>.

An athlete suspected of doping obtained an injunction from the local state court at the seat of the arbitration (Lausanne) prohibiting the analysis of her urine samples. In the parallel CAS arbitration, an award was rendered ordering further tests of the samples. Based on the award, the court in Lausanne lifted the injunction. On a challenge by the athlete against the decision by the Lausanne local court and the subsequent Court of Appeal decision in Vaud, the Federal Tribunal confirmed that the Lausanne Order prohibiting further analysis had not to remain in place until the CAS’ decision on the merit was reached. The Federal Tribunal thus correctly gave

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<sup>75</sup> FT, Decision 4A\_102/2016, 27.9.2016, *Bellchambers*, recital 3.4.

<sup>76</sup> FT, Decision 4A\_432/2017, 22.1.2018, *Ezequiel Schelotto*.

<sup>77</sup> DFT 144/2018 III 93, recital 5.2.

<sup>78</sup> FT, Decision 4A\_432/2017, 22.1.2018, *Ezequiel Schelotto*, recital 3.2, see also ASA Bull. 1/2019 189.

<sup>79</sup> FT, Decision 4A\_432/2017, 22.1.2018, *Ezequiel Schelotto*, recital 3.2.

<sup>80</sup> FT, Decision 4A\_324/2018, 17.7.2018, recital 3.3; also in ASA Bull. 2/2019 476.

preference to the CAS arbitration panel over the State court, but at the same time respected the State Court decision which had decided to lift its order. It is not certain that the solution would have been the same if the local court had not lifted its order.

### C. Ultra, extra and infra petita issues

Pursuant to Article 190 para. 2 let. c PILA, the award may be set aside “*if the arbitral tribunal’s award went beyond the claims submitted to it, or failed to decide one of the items of the claim*”. This provision pertains to the relation between the relief sought by the parties and the orders rendered by an arbitral tribunal.

During the period under review, there were only a few cases dealing with this issue.

The first is the aforementioned case of the International Motorcycling Federation (FIM)<sup>81</sup>. Among other complaints, FIM argued that the CAS had exceeded its jurisdiction (*ultra petita*) by finding, in its award, the existence of a formal denial of justice (paragraph 3 of the operative part) and by inviting FIM to rule within nine months on the application for membership of one or the other federation in compliance with the Respondent’s right to be heard (paragraph 4 of the operative part). However, the newcomer Kuwaiti federation had asked to be admitted as an affiliated member to the exclusion of the current Kuwaiti affiliated member, as well as for an order for the current Kuwaiti federation to immediately cease all activity linked to the powers of FIM in Kuwait, and to pay damages. The newcomer Kuwaiti federation had not specifically requested in its prayers for relief that FIM decides on one or other application for membership. Yet, the Federal Tribunal rightly rejected FIM’s argument, by considering that the CAS was entitled to

grant less than what had been sought by a party<sup>82</sup>.

This decision was in line with the principle of autonomy of sports federations, and with CAS case law, according to which it is not for the CAS to take the place of the competent body of an international federation in order to decide on the merits of the application for affiliation of a national federation<sup>83</sup>. In the present case, the CAS Panel referred the case back to the FIM in order to respect the freedom of association of that international federation (sentence, n. 11.5) and to best preserve its rights, in particular its autonomy, by not upsetting the order of competences in the processing of applications for membership of a Motorcycle National Federation (FIM). Moreover, in challenging this dismissal, which was partly decided in its favour, the Federal Tribunal said that the federation had an attitude that seemed difficult to reconcile with the rules of good faith<sup>84</sup>. Finally, in view of the principle rendered by the adage *a maiore minus*, the Federal Tribunal held that the Panel ruled neither *ultra* nor *extra petita* by acting as it did, i.e. by granting less to the association than it sought. To require that a decision must be taken within a certain period of time was of lesser effect than deciding on the exclusion of one and therefore the acceptance of the other federation, but it was of the same nature. The award was therefore not *ultra petita*.

In the *Benfica* case<sup>85</sup>, the employment contract of a Brazilian player had been terminated without notice because he had not returned from Brazil on time after his holidays. The challenge by the football club was related to the fact that the CAS had allegedly failed to rule on one of the prayers for relief, namely: “*to declare that the remuneration to be paid under the employment contract is net*”. The CAS did not expressly decide whether the amount to be

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<sup>81</sup> FT, Decision 4A\_314/2017, 28.5.2018, *FIM*; see also ASA Bull. 3/2018 738 seq.

<sup>82</sup> FT, Decision 4A\_314/2017, 28.5.2018, *FIM*, recital 3.2.1.

<sup>83</sup> Judgment of 15 July 2015 in CAS 2004/A/776, *Federacio Catalana de Patinatge v. FIM. International Roller Sports Federation*, n. 49.

<sup>84</sup> FT, Decision 4A\_314/2017, 28.5.2018, *FIM*, recital 3.2.2.

<sup>85</sup> FT, Decision 4A\_678/2015, 22.3.2016, *Benfica*.

paid was net or gross. However, the Federal Court held that an implicit decision is sufficient; thus, “*by deciding that the respondent had to pay the amount without deduction, the arbitral panel meant that it was a net amount*”<sup>86</sup>. Therefore, according to the Federal Tribunal, the prayer for relief had been at least implicitly decided, which was sufficient.

In the *Tommy Wicking* case<sup>87</sup>, the Federal Tribunal held that the CAS arbitral panel had neither violated the requirements of Article 190(2)(c) PILA by deviating from the wording of the prayer for relief, nor by interpreting such a prayer for relief according to the submission<sup>88</sup>.

#### **D. The right to be heard and the principle of equal treatment**

Pursuant to Article 190 para. 2 let. d PILA, the award may be set aside “*if the principle of equal treatment of the parties or the right of the parties to be heard was violated*”. This provision has been invoked in many cases during the period under review, but only a couple of them should be mentioned here.

##### a) The right to be heard

According to the Federal Tribunal, the right to be heard has the same content in international arbitration as it has in Swiss (domestic) constitution law, apart from the duty to explain a decision<sup>89</sup>.

According to the case-law of the Federal Tribunal, the right to be heard encompasses the right for the parties to be able to express themselves on all important facts for the award, to present their legal case, to provide evidence on any important factual allegation in an apt, timely and formally suitable manner<sup>90</sup>, to be present at the hearing and to have access to the file of the case.

Several decisions by the Federal Tribunal have held that Article 190(2)(d) and 182(3) PILA *do not establish a duty to give a full motivation*<sup>91</sup>. However, there is at least a minimal duty for the arbitrators to examine and discuss the main points leading to the outcome of the case<sup>92</sup>.

Any complaint regarding the right to be heard has, however, to be *raised immediately in the proceedings*, or at least the plaintiff has to take all measures to comply with this requirement. If this is not done, a later appeal cannot raise the issue<sup>93</sup>. These requirements apply similarly in relation to *recusal of arbitrators*, as recalled in the *RFC Seraing* case<sup>94</sup>.

A party which complains about the right to be heard has to have presented its facts in an *apt, timely and formally suitable manner*.<sup>95</sup>

Even if the right to be heard does not require the arbitral award to give a full explanation; there is, however, a minimal duty for the arbitral tribunal to examine and deal with the

<sup>86</sup> FT, Decision 4A\_678/2015, 22.3.2016, *Benfica*, recital 3.2.2.

<sup>87</sup> FT, Decision 4A\_284/2018, 17.10.2018, *Tommy Wicking*, recital 3.2.2.

<sup>88</sup> FT, Decision 4A\_284/2018, 17.10.2018, *Tommy Wicking*, recital 3.3.2.

<sup>89</sup> FT, Decision 4A\_568/2015, 10.12.2015, *Juan Manuel Iturbe*, recital 3.1; FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 5.2.1.

<sup>90</sup> FT, Decision 4A\_316/2017, 2.8.2017, recital 3.2.2: « the right to be heard does not allow reopening the issue of assessment of the weight of evidence ».

<sup>91</sup> DFT 134/2008 III 186 recital 6.1; FT, Decision 4A\_568/2015, 10.12.2015, *Juan Manuel Iturbe*, recital 3.1; FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 5.2.1

<sup>92</sup> DFT 142/2016 III 360 r. 4.1.2; FT, Decision 4A\_568/2015, 10.12.2015, *Juan Manuel Iturbe*, recital 3.1; FT, Decision 4A\_494/2018, 20.02.2018, *RFC Seraing*, recital 4.1; FT, Decision 4A\_540/2018, 7.05.2019, *Valcke*, recital 2.1.

<sup>93</sup> DFT 144/2018 III 120 recital 4.1; FT, Decision 4A\_54/2019, 11.4.2019, *Sunderland AFC*, recital 3.1; FT, Decision 4A\_438/2018, 17.1.2019, recital 4.3; FT, Decision 4A\_12/2017, 19.9.2017, recital 4.1 not published in DFT 143/2017 III 578; FT, Decision 4A\_668/2016, 24.7.2017, *Daniel Opore*, recital 3.1; FT, Decision 4A\_690/2016, 9.2.2017, *Pape Diakhaté*, recital 3.1.

<sup>94</sup> FT, Decision 4A\_260/2017 *RFC Seraing* = DFT 144/2018 III 120. recital 4.1.

<sup>95</sup> FT, Decision 4A\_170/2017 22.5.2018, *Etoile Filante de Garona*, recital 4.2.

relevant issues. This duty is then breached “when inadvertently or by misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the award to be made. It is incumbent on the party who allegedly has had their rights infringed to demonstrate, in its appeal against the award, how inadvertence on the part of the arbitrator(s) prevented it from being heard on an important point”<sup>96</sup>. This wording shows a certain change in the line of case law. Indeed, since a decision of 2016, the Federal Tribunal has partially transformed the purely formal nature of the right to be heard into a right of a more substantive nature, which imposes on a party a duty to show the impact of the breach of such right to be heard on the outcome of the case<sup>97</sup>. It has said the following:

“No doubt the right to be heard is a constitutional guarantee of a formal nature. However, since it does not constitute an end in itself, where it is not clear what influence its infringement may have had on the proceedings, there is no need to set aside the contested decision (DFT 143/2017 IV 380, recital 1.4.1, and the decisions cited). This case-law also applies, *mutatis mutandis*, to international arbitration (Decision 4A\_247/2017 of 18 April 2018, recital 5.1.3). Thus, in addition to the alleged violation, the party allegedly injured by an inadvertence of the arbitrators must show, on the basis of the reasons set out in the contested award, that the elements of fact, evidence or law which it had regularly advanced, but which the arbitral tribunal failed to take into consideration, were of such a nature as to influence the

*outcome of the dispute (DFT 142/2017 III 360, recital 4.1.3 and the judgment cited)”<sup>98</sup>.*

In the *Sara Errani* case, a tennis player had objected to the fact that the arbitral tribunal had taken into account events that occurred after the hearing, when issuing a retroactive doping ban. In addition, the arbitral tribunal had promised to issue the award quickly, but it took more than seven months to do it. The Federal Tribunal held that there was no proof that this promise had been made and there was also no complaint by the athlete when the deadline was passed<sup>99</sup>. On the substance, the Federal Tribunal recognised that the arbitral tribunal did not hear the parties in relation to the post-hearing events on which it had relied in the award, but the athlete failed to show any impact on the outcome.

In the *Claudio Bumba* case<sup>100</sup>, the CAS arbitrator had dealt with an interesting issue which was no longer in dispute before the Federal Tribunal. He dismissed a call by the Israeli club, which had gone bankrupt, to end or stay the arbitration<sup>101</sup>. The main issue before the Federal Tribunal was linked to the right to be heard and to the fact that one party was claiming that two formal mistakes had been made in converting an amount into a specific currency for delivering a bank cheque. One party was challenging the CAS award claiming that the CAS Panel had not properly taken into account its objections. The Federal Tribunal emphasised that a mere inadvertence is sufficient to breach the right

<sup>96</sup> FT, Decision 4A\_494/2018, 25.6.2019, *Global Sports Partners*, recital 4.1; FT, Decision 4A\_540/2018, 7.05.2019, *Valcke*, recital 2.1; DFT 142/2016 III 360 r. 4.1.2.

<sup>97</sup> DFT 142/2016 III 360 r. 4.1.3; DFT 143/2017 IV 380; FT, Decision 4A\_478/2017, 2.5.2018, *Arman-Marschall Silla*, recital 3.2.2; FT, Decision 4A\_578/2017, 20.7.2018, *Claudio Bumba*, recital 3.1.2; FT, Decision 4A\_592/2017, 5.12.2017, *Toju Jakpa*, recital 4.1.2; FT, Decision 4A\_540/2018, 7.05.2019, *Valcke*, recital 2.1; FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 5.2.2; FT, Decision 4A\_318/2018, 4.3.2019, *Guerrero*, recital 4.1.2

<sup>98</sup> FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 5.2.2 ; see also ASA Bull. 2/2019 451.

<sup>99</sup> FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani*, recital 5.6 and 5.7.

<sup>100</sup> FT, Decision 4A\_578/2017, 20.7. 2018, *Claudio Bumba*, recital 3.3.1.2.

<sup>101</sup> FT, Decision 4A\_578/2017, 20.7. 2018, *Claudio Bumba*, pt. B.a.; see ASA Bull. 3.2018 for extracts of arbitral decisions on request for stay and GROSELJ L., *Stay of arbitration proceedings – Some examples from arbitral practice*, ASA Bull. 3/2018, p. 560 seq. On the impact of insolvency on arbitration agreements see GRAF K., UMBACH-SPAHN B., *Berücksichtigung ausländischer Schiedsurteile in der Insolvenz – Lehren aus den Bundesgerichtsentscheiden in Sachen Swissair*, ASA Bull. 4/2018, p. 822 seq.; BERGER B., *Insolvenz und Schiedsvereinbarung in der Schweiz*, ASA Bull. 4/2018, p. 834 seq.



to be heard only if the relevant party was entirely prevented from making its arguments and adducing the evidence necessary for a specific question to be decided by the arbitral tribunal. This was not the case here, however; the party could have brought all the evidence and arguments; they were not prevented by the Tribunal but remained surprisingly silent about the cheque and the mistake in conversion<sup>102</sup>. The Federal Tribunal therefore dismissed the case.

In the *CONMEBOL* case<sup>103</sup>, an issue about the right to be heard was raised. The South American Football Federation (CONMEBOL) became entangled in criminal investigations in a number of countries. A BVI company terminated a contract with CONMEBOL alleging that it had been frustrated and that CONMEBOL was in breach of the anti-corruption provisions in the contract; it alleged moreover that the corruption had damaged the public image of CONMEBOL. When it challenged that termination in the CAS, CONMEBOL was successful. A CAS panel found that the termination was invalid, since the corruption probes were known when the parties signed the contract. The BVI company had therefore accepted the risk that the alleged corruption had an adverse impact on the venture's profitability. This risk had materialised. Moreover, the alleged corruption had not prevented CONMEBOL from performing the contract. The BVI company challenged the award before the Federal Tribunal. It argued that the arbitral tribunal had failed to consider events of corruption that occurred after the conclusion of the contract. The Tribunal found that the arbitral tribunal had not ignored this argument but had considered that these events were irrelevant for the *clausula rebus sic stantibus* argument to be applied<sup>104</sup>.

<sup>102</sup> FT, Decision 4A\_578/2017, 20.7. 2018, *Clandiu Bumba*, recital 3.3.1.2 and 3.3.2.

<sup>103</sup> FT, Decision 4A\_494/2018, 25.06.2019 *Conmebol*, recitals 4.2 and 4.6, see also ASA Bulletin 2019 704.

<sup>104</sup> FT, Decision 4A\_494/2018, 25.06.2019 *Conmebol*, recital 4.6.

<sup>105</sup> FT, Decision 4A\_202/2016, 3.8.2016, *Leopard SA*, recital 4.1.

The following passage in the 2016 *Leopard SA* case<sup>105</sup> shows that the Federal Tribunal remains conscious not to admit easily an infringement of the right to be heard: *“In response to a party who believed that it had uncovered a relaxation of the case law [linked to the right to be heard] in the sense of broadening control based on the denial of formal justice in relation to the failure to deal with an argument in the award, the Federal Tribunal indicated that this was not the case. On the contrary, pointing out that there is a growing tendency for many appellants to invoke this aspect of the guarantee of the right to be heard in the hope of indirectly obtaining an examination of the merits of the contested sentence, the First Chamber of Civil Law recalled that the Federal Tribunal is not a court of appeal and that the legislature consciously and voluntarily restricted its power of examination when it entrusted it with deciding on appeals in international arbitration matters”*<sup>106</sup>

In relation to the **argument of surprise** or legal arguments referred to by arbitral tribunals without having been pleaded by the parties, it is important to recall what the Federal Tribunal stated in both the *Sara Errani* and the *Legkov* cases<sup>107</sup>:

*“In Switzerland, the right to be heard relates mainly to the establishment of facts. The right of the parties to be questioned on legal questions is only recognised in a limited way. As a general rule, according to the adage iura novit curia, State or arbitral tribunals freely assess the legal scope of the facts and may also rule on the basis of rules of law other than those invoked by the parties. [...] Exceptionally, the parties should be questioned by the judge or the arbitral tribunal, when it intends to base its decision on a provision or legal consideration that was not raised during the proceedings and whose relevance could not be assumed by the parties (DFT 130/2004 III 35, recital 5). Moreover, knowing that what is unpredictable is a matter of appreciation,*

<sup>106</sup> FT, Decision 4A\_202/2016, 3.8.2016, *Leopard SA*, recital 3.1.2; see also FT, Decision 4A\_520/2015, 16.12.2016, recital 3.3.1, last part.

<sup>107</sup> FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani* recital 5.2.3 ; FT, Decision 4A\_382/2018, 15.1.2019, *Legkov* recital 3.1.2; see also FT, Decision 4A\_318/2018, 4.3.2019 *Guerrero*; FT, Decision 4A\_202/2016, 3.8.2016 *Leopard SA*, recital 3.1.

*the Federal Tribunal is therefore restrictive in applying the rule on this ground and because it is necessary to take into account the particularities of this type of procedure by avoiding the argument of surprise being used to obtain a material examination of the award by the Tribunal*<sup>108</sup>.

As stated by the Federal Tribunal, a duty on the Tribunal to ask questions about the applicable provisions and legal norms is only *exceptional*; it is therefore not surprising that this argument has only very rarely been accepted by the Federal Tribunal<sup>109</sup>. Most of the time such argument has been rejected<sup>110</sup>. As stated by the Federal Tribunal, the low rate of acceptance of such arguments has not deterred parties from trying to invoke these very often in international arbitration<sup>111</sup>.

In the period under review, the Federal Tribunal, however, accepted in one case that the right to be heard was infringed. This was in the *Arman-Marschall Silla* case<sup>112</sup>. The arbitrator had received a second submission modifying or correcting the first prayers for relief, especially as to the parties to the prayers. This had a direct effect on the commencement of the sanction to be ordered. The Federal Tribunal therefore held: *“It is thus abundantly clear that the arbitrator, when setting the starting point of the sanction imposed on the athlete, had in mind only the reply memorandum of 25 March 2017 and lost sight of the existence of the second memorandum of 2 June 2017 or considered – wrongly, however – that the conclusions reached by the appellant in it did not differ, on the points in dispute, from those he had formulated at the foot of that one. In any event, it appears from these observations that the arbitrator ignored the elements*

*that the appellant had regularly put forward in support of one of his subsidiary submissions, without it being possible to convince himself that he would have implicitly refuted them. It goes without saying that these elements were important for the resolution of the dispute. Indeed, assuming that they are accepted, the arguments which they support will have to be accepted, which means that the suspension imposed on the appellant will end earlier than the expiry of this sanction as it results from the operative part of the CAS award*”<sup>113</sup>. The CAS award was therefore (partially) set aside.

In *Daniel Opare*, the Federal Tribunal reminded the parties that they had a *“duty to raise the complaint immediately, otherwise it would be considered as being against the principle of good faith”*<sup>114</sup>. More importantly however, it held that *“the remark that the sole arbitrator or the Panel has taken into account all the arguments of fact and law submitted by the parties, which they have given to him at the end of the judgment hearing, constitutes a stereotypical formula which is found in most CAS awards and which has no more value than a clause of style (decision 4A\_730/2012 of 29 April 2013, recital 3.3.2). On this point, the appellant is right, but it is also the only element of the statement of reasons for the grievance in question that can be credited to him”*<sup>115</sup>.

In other words, the common expression that *the sole arbitrator or the Panel has taken into account all the arguments of fact and law submitted by the parties* has no legal value; especially, it cannot be construed as removing the right to be heard.

## b) The right to equal treatment

<sup>108</sup> FT, Decision 4A\_424/2018, 29.1.2019, *Sara Errani* recital 5.2.3; see also FT, Decision 4A\_382/2018, 15.1.2019, *Legkov* recital 3.1.2.

<sup>109</sup> FT, Decision 4A\_478/2017, 2.5.2018, *Arman-Marschall Silla* (accepted); DFT 130/2004 III 35 consid. 6.2; FT, Decision 4A\_400/2008, 9.2.2009, recital 3.2 (accepted).

<sup>110</sup> FT, Decision 4A\_716/2016, 26.1.2017, recital 3.2 ; FT, Decision 4A\_136/2016, 3.11.2016, recital 5.2 ; FT, Decision 4A\_322/2015, 27.6.2016, recital 4.4 ; FT, Decision 4A\_324/2014, 16.10.2014, recital 4.3 ; FT, Decision 4A\_544/2013, 26.05.2014 recital 3.2.2 and many others”.

<sup>111</sup> FT, Decision 4A\_525/2017, 9.8.2018, recital 3.1 *in fine*: “Vrai est-il, toutefois, que la retenue qu’il s’impose de longue date face à un tel argument n’a guère eu d’effet dissuasif sur les auteurs potentiels de recours en matière d’arbitrage international”.

<sup>112</sup> FT, Decision 4A\_478/2017, 2.5.2018, *Arman-Marschall Silla*.

<sup>113</sup> FT, Decision 4A\_478/2017, 2.5.2018, *Arman-Marschall Silla*, recital 3.3.3 (my emphasis).

<sup>114</sup> FT, Decision 4A\_668/2016, 24.7.2017, *Daniel Opare*, recital 3.1.

<sup>115</sup> FT, Decision 4A\_668/2016, 24.7.2017, *Daniel Opare*, recital 3.2.2.

The right to equal treatment was not considered by many of the cases in the period under review. It is worth mentioning only the *Alexei Louchev* case<sup>116</sup>. The equal treatment of the parties is guaranteed by Article 190(2)(d) and Art. 182(3) PILA. The Federal Tribunal held that “*the right to equal treatment requires that the arbitral tribunal treats the parties equally at all stages of the instructional procedure (including any hearing, excluding the deliberation of the judgement) and not to grant to one party what is denied to the other. Both parties must be given the same opportunity to represent their point of view in the proceedings*”<sup>117</sup>. In the *Alexei Louchev* case, the Federal Tribunal stated that the “*third analysis of the sample allowed by the CAS was based on its appreciation that it was possible pursuant to Art. 3.2 IWF ADP, and in favour of the athlete*”<sup>118</sup>. This was therefore not an infringement of the right to equal treatment.

### E. Procedural and substantive public policy

Pursuant to Article 190 para. 2 let. e PILA, the award may be set aside “*if the award is incompatible with public policy*”.

Decisions of the Federal Tribunal dealing with the compatibility of CAS awards with public policy<sup>119</sup> are numerous. During the period under review, this argument has not been successful, neither on the aspect of procedural public policy (*below 5.1*), nor on the aspect of substantive public policy (*below 5.2*). It is true that it needs a considerable amount for an award to be contrary to public policy (*ordre public*). According to the Federal Tribunal, “*an award is incompatible with ordre public if it ignores the essential and widely recognized values which, according to the prevailing conceptions in Switzerland, should constitute the basis of any legal system*”<sup>120</sup>.

<sup>116</sup> FT, Decision 4A\_80/2017, 25.7.2017 *Alexei Louchev*, recital 3.1.2.

<sup>117</sup> DFT 142/2016 III 360 recital 4.1.1.

<sup>118</sup> FT, Decision 4A\_80/2017, 25.7.2017 *Alexei Louchev*, recital 3.1.2.

<sup>119</sup> I prefer to use the expression « public policy » for the French “*Ordre public*” rather than “public order” which one may also find in relation with Article 190(2)(e) PILA.

Public policy may cover two different aspects: (1) substantive public policy and (2) procedural public policy.

#### a) Substantive Public policy

The Federal Tribunal on only one occasion has held that there has been a violation of **substantive public policy** in sport matters, in the well-known case *Matuzalem*<sup>121</sup>. However, it may still be useful to present some of the cases which considered that element during the period under review.

In the recent *Caster Semenya* case<sup>122</sup>, the Federal Tribunal had to examine whether the CAS award was contrary to substantive public policy. It held the following: “*An award is contrary to substantive public policy when it violates fundamental principles of substantive law to such an extent that it is no longer reconcilable with the decisive legal order and value system (DFT 144/2018 III 120, recital 5.1). It is not sufficient that a ground chosen by an arbitral tribunal offends public policy; it is the result of the award that must be incompatible with public policy (DFT 144/2018 III 120, recital 5.1). The incompatibility of the award with public policy, referred to in art. 190 para. 2 let. e PILA, is a more restrictive concept than that of arbitrariness (DFT 144/2018 III 120, recital 5.1; 4A\_94/2018; 4A\_318/2018, 4.3.2019 recital 4.3.1; 4A\_600/2016, 29.6.2017 recital 1.1.4). The annulment of an international arbitral award on this ground of appeal is extremely rare (DFT 132/2006 III 389, r. 2.1)*”<sup>123</sup>.

Extremely rare, more restrictive than arbitrariness and only accepted if the result (and not only the justification) of the award is incompatible with public policy, the ground of substantive public policy nevertheless needs some explanation as to its

<sup>120</sup> DFT 144/2018 III 120, recital 5.1 (my emphasis); FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 2.

<sup>121</sup> DFT 128/2002 III 322.

<sup>122</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*.

<sup>123</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 2 (my emphasis).

content. In *RFC Seraing* (DFT 144/2018 III 120)<sup>124</sup>, the Federal Tribunal provides a good account of its content:

*“These principles [substantive public policy] include, in particular, contractual fidelity, respect for the rules of good faith, prohibition of abuse of rights, prohibition of discriminatory or spurious measures, and protection of persons who are civilly incapable. As the adverb “in particular” makes clear, the list of examples thus drawn up by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, despite its permanence in the case law relating to art. 190 para. 2 let. e PILA. It would also be tricky, even dangerous, to try to identify all the fundamental principles that would certainly belong there, at the risk of forgetting one or the other. It is therefore preferable to leave it open”.*<sup>125</sup>

Other cases have also mentioned prohibition of forced labor<sup>126</sup> or breach of the principle of respect of human dignity<sup>127</sup> as aspects of substantive public policy. Important breaches of personality rights (CC 27[2]) are also part of this concept; such breach has been rejected in *RFC Seraing* (DFT 144/2018 III 120)<sup>128</sup>, but accepted in the *Matuszalem* case<sup>129</sup>. A definition and list of principles can also be found in a case of alleged discrimination against para-athletes<sup>130</sup>.

With regard to the *principle of good faith*, the Federal Tribunal said the following<sup>131</sup>:

*“It is inferred from the principle of good faith that parties must not suffer any loss as a result of an incorrect indication of the legal remedies (DFT 117/1991 Ia 297, recital 2; 421, recital 2c). However, a party can only avail itself of this protection if it relies in good faith on such an indication. This is not the case of a party who realized*

*the mistake or should have realized it by paying the attention required by the circumstances. Only gross procedural negligence can defeat the protection of good faith. The protection of good faith ceases only if a party or its lawyer could have become aware of the inaccuracy of the indication of the legal remedies simply by reading the statutory provisions. On the other hand, they are not expected to consult the relevant case law or doctrine in addition to the statute. To determine whether there is gross negligence or not is to be assessed on the basis of the concrete circumstances and legal knowledge of the person concerned. Evidently, the requirements for lawyers are higher: they are always expected to carry out a cursory examination of the indications of the legal remedies (decision 5A\_704/2011 of 23 February 2012, recital 8.3.2 and the precedents cited; see also the decision of the ECtHR of 5 October 2017 in the case of *C. v. Switzerland*, § 21-30)”.*

In this case, the indication of the time frame for an appeal wrongly mentioned 21 days. However, since the party did not rely on it, the Federal Tribunal rejected the contention of breach of the good faith principle<sup>132</sup>.

The reluctance of the Federal Tribunal to admit any contravention of substantive public policy is linked to a concern which was expressed again in the *Caster Semenya* case<sup>133</sup>: *“The Federal Tribunal cannot be assimilated to a court of appeal which would oversee the CAS and would freely verify the validity of the international arbitration awards rendered by this judicial body [...]. This is not the role of the country’s supreme judicial authority when it is seized of an appeal within the meaning of art. 77 para. 1 FTA in which the incompatibility of the contested sentence with public*

<sup>124</sup> FT, Decision 4A\_260/2017, 20.02.2017, *RFC Seraing*, recital 3.4.1, for the full version.

<sup>125</sup> DFT 144/2018 III 120 (= FT, Decision 4A\_260/2017, 20.02.2017, *RFC Seraing*), recital 5.1 (my emphasis); one finds a similar wording in FT, Decision 4A\_116/2016, 13.12.2016, *Sporting Clube Portugal*, recital 4.1.

<sup>126</sup> FT, Decision 4A\_370/2007, 21.2.2008, recital 5.3.2.

<sup>127</sup> DFT 138/2012 III 322 recital 4.a.

<sup>128</sup> DFT 144/2018 III 120 recital 5.4.2; also rejected in FT, Decision 4A\_600/2016, 29.6.2017, *Platini*,

recital 3.7.3; FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 3.2 *in fine*; FT, Decision 4A\_318/2018, 4.3.2019, *Paolo Guerrero*, recital 4.5.4.

<sup>129</sup> DFT 138/2012 III 322.

<sup>130</sup> FT, Decision 4A\_470/2016, 3.4.2017, *Russian Paralympic Committee*, recital 4.1.

<sup>131</sup> FT, Decision 4A\_170/2018, 22.5.2018, *Etoile Filante de Garoua*, recital 6.2.1.1.

<sup>132</sup> FT, Decision 4A\_170/2018, 22.5.2018, *Etoile Filante de Garoua*, recital 6.2.1.2.

<sup>133</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 2.

*policy is invoked, as reflected in the definition of this concept*".<sup>134</sup>.

Behind this statement, there is the belief that despite the absence of a real *lex sportiva*, CAS and sport disputes should have a large autonomy, as it appears from another passage of the same *Caster Semenya* case<sup>135</sup>:

*"While the particularities of sports arbitration have certainly been taken into account by federal case law in the treatment of certain specific procedural questions, such as the waiver of recourse (DFT 133/2007 III 235 recital. 4.3.2.2 p. 244), it does not follow, however, that the same must be done with regard to the general plea of incompatibility of the award with substantive public policy, unless a genuine lex sportiva is created by the praetorian route, which could raise problems from the point of view of the division of powers between the legislative and judicial branches of the Confederation, since the legislature has not adopted specific rules on sports arbitration (Decision 4A\_312/2017 of 27 November 2017, recital 4.3.2.2 p. 244), but only in the case of a general plea of incompatibility of the award with substantive public policy (FT, Decision 4A\_312/2017 of 27 November 2017, 3.3.2; FT, Decision 4A\_116/2016 of 13 December 2016 recital 4.2.3; FT, Decision 4A\_488/2011 of 18 June 2012 recital 6.2)".<sup>136</sup>*

Concretely, the Federal Tribunal has *rejected the plea for contravention* of substantive public policy in a number of issues throughout the years, and not only during the period under review: excessive penalties<sup>137</sup>; excessive commission of agents and contractual

penalties (CO 163 and CO 417), by stating that *"even if Article 163(3) CO is of domestic public policy, it is not of the same nature than Art. 190(2)(e) PILA which "aims only at sanctioning violation of the prohibition of discriminatory measures or of depriving of rights nature"*<sup>138</sup>. In the case of *AS Roma*, the football club had challenged the CAS award on the ground that it had upheld an excessive fee which was due to an intermediary. The intermediary had arranged for the transfer of a player to the club for a negotiated fee of EUR 3.1 million, which was ten times the player's annual salary. The Federal Tribunal acknowledged that the amount of the fee was "impressive" (recital 3.3.4.2.). Ultimately, it held, however, that, in light of all circumstances, the player's salary was not the sole yardstick to assess the agent's fee, overall the fee was not excessive, and the club's belated complaint bordered on bad faith<sup>139</sup>.

The whole interpretation process of a contract or the statutory interpretation of a private body<sup>140</sup>, the whole rules on burden of proof<sup>141</sup>; the contention of simulation, fraud or duress<sup>142</sup>, as well as competition law<sup>143</sup> are also excluded from the assessment of substantive public policy.

*The level of scrutiny applied by the Federal Tribunal.* In the *Stade Brestois 29* case<sup>144</sup>, an issue of joint and several liability of Art. 50 CO was at stake. The Federal Tribunal holds that *"it is not sufficient under Art. 190(2)(e) PILA to establish the contrariety between the award and the*

<sup>134</sup> See also FT, Decision 4A\_116/2016, 13.12.2016, *Sporting club Portugal*, recital 4.2.3; FT, Decision 4A\_604/2010, 11.4. 2011, recital 3.2.1; FT, Decision 4A\_458/2009, 10.6 2010, recital 4.4. 2.

<sup>135</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 2.

<sup>136</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 2; see for a similar citation FT, Decision 4A\_508/2017, 29.1.2018, *Al Ittihad Club*, recital 3.3.2.

<sup>137</sup> FT, Decision 4A\_600/2016, 29.6.2017, *Platini*, recital 3.7.3-3.7.3; FT, Decision 4A\_508/2017, 29.1.2018, *Al Ittihad Club*, recital 3.3.3, ASA Bull. 2/2019 375; FT, Decision 4A\_318/2018, 4.3.2019, *Paolo Guerrero*, recital 4.5.2.

<sup>138</sup> FT, Decision 4A\_312/2017, 27.11.2017, *AS Roma*, recital 3.3.3 – ASA Bull. 2/2019 503; FT, Decision

4A\_536/2016, 26.10.2016, *Clube Atlético Mineiro*, recital 4.3.2; FT, Decision 4A\_116/2016, 13.12.2016, *Sporting Clube Portugal*, recital 4.2.3; FT, Decision 4A\_508/2017, 29.1.2018, *Al Ittihad Club*, recital 4.4.

<sup>139</sup> FT, Decision 4A\_312/2017, 27.11.2017, *AS Roma*, recital 3.3.4.2.

<sup>140</sup> DFT 144/2018 III 120 (= FT, Decision 4A\_260/2017, 20.02.2017, *RFC Seraing*), recital 5.1 *et alia*.

<sup>141</sup> FT, Decision 4A\_668/2016, 24.7.2017, *Daniel Opore*, recital 4.3.2.

<sup>142</sup> FT, Decision 4A\_94/2018, 17.1.2019.

<sup>143</sup> Confirmed by DFT 144/2018 III 120 (= FT, Decision 4A\_260/2017, 20.02.2017, *RFC Seraing*), recital 5.2.

<sup>144</sup> FT, Decision 4A\_32/2016, 20.12.2016, *Stade Brestois 29*, recital 4.3.

*various provisions on Swiss law. Even if the Federal Tribunal knows Swiss law (applicable to the case as subsidiary applicable law), it will not review with full cognition the application of Swiss law, but keep a similar attitude as if the applicable law would be the one of a foreign law”.*

The principle of *clausula rebus sic stantibus* has often been invoked in relation to substantive public policy and the principle of contractual fidelity. However, a breach of the principle of *pacta sunt servanda* can only exceptionally be considered as a contravention of the substantive public policy; even a breach of the principle of *imprévision* (*clausula rebus sic stantibus*) cannot be such a contravention, as shown in several cases<sup>145</sup>.

In *AS Roma*, the Federal Tribunal stresses that it does not want to substitute itself for the arbitrators. It nevertheless held that “*the potential of a player is not an unforeseeable event*”<sup>146</sup>, discussing therefore a matter of substance.

In *Global Sports Partners*<sup>147</sup>, the Federal Tribunal provided a good summary of its position in this regard. It stated:

*“The principle pacta sunt servanda, in the restrictive sense given to it by the case law relating to art. 190 para. 2 let. e PILA, is violated only if the arbitral tribunal refuses to apply a contractual clause while admitting that it binds the parties or, conversely, if it requires them to comply with a clause which it considers not to be binding on them. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision by contradicting the result of its interpretation of the existence or content of the disputed legal act. On the other hand, the interpretation process itself and the legal consequences that are logically drawn from it are not governed by the principle of contractual fidelity, so they cannot be*

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<sup>145</sup> FT, Decision 4A\_312/2017, 27.11.2017, *AS Roma*, recital 3.3.4.2 ; FT, Decision 4A\_494/2018, 25.6.2019, *Global Sports Partners*, recital 5.2.3; FT, Decision 4A\_318/2017, 28.8.2017, *Al-Masry SC* recital 4.2; FT, Decision 4A\_494/2018, 25.06.2019 *Conmebol*, recital 5.2.3.

<sup>146</sup> FT, Decision 4A\_312/2017, 27.11.2017, *AS Roma*, recital 3.3.4.2.

<sup>147</sup> FT, Decision 4A\_494/2018, 25.6.2019, *Global Sports Partners*, recital 5.2.3. – ASA Bull. 3/2019 704.

*open to the claim of a breach of public policy. The Federal Court has repeatedly pointed out that almost all disputes arising from the breach of contract are excluded from the scope of protection of the pacta sunt servanda principle (FT, Decision 4A\_404/2017, 26.7.2018, recital 4.1; FT, Decision 4A\_56/2017, 11.1.2018, recital 4.1; FT, Decision 4A\_370/2007, 21.2.2008, recital 5.5)”*.<sup>148</sup>

The Federal Tribunal has also held that *a breach of the European Convention on Human Rights* cannot be invoked as an independent ground (see *supra*). As for personality rights, human rights could provide a basis for a contravention of substantive public policy, but only in extreme cases<sup>149</sup>

## b) Procedural Public policy

According to the Federal Tribunal case law, “*a violation of procedural public policy is a violation of fundamental and generally accepted procedural principles, the non-observance of which is in an intolerable contradiction to the sense of justice, so that the decision appears to be incompatible with the legal and value system applicable in a constitutional state (DFT 141/2015 III 229 recital 3.2.1 et al.). This procedural guarantee is subsidiary to the other grounds of appeal under Art. 190 para. 2 PILA (DFT 138/2012 III 270 recital 2.3)”*.<sup>150</sup>

The subsidiary character of this ground of appeal means that parties usually invoke both the right to be heard (due process) under Article 190(2)(d) PILA and the contravention of procedural public policy under Article 190(2)(e) PILA. This often does not leave much ambit for the latter ground. During the period under review, no cases challenging CAS awards have been set aside for breach of

<sup>148</sup> FT, Decision 4A\_494/2018, 25.6.2019, *Global Sports Partners*, recital 5.2.3 (my emphasis). See also FT, Decision 4A\_318/2017, 28.8.2017, *Al-Masry SC* recital 4.2.

<sup>149</sup> FT, Decision 4A\_248/2019, 29.7.2019, *Caster Semenya*, recital 3.2; FT, Decision 4A\_384/2017, 4.10.2017, *Yassine Bensghir*, recital 4.2.1.

<sup>150</sup> FT, Decision 4A\_54/2019, 11.4.2019, *Sunderland AFC*, recital 4.1.

due process or other aspects of procedural public policy.

In the *Claudiu Bumba*<sup>151</sup>, the Federal Tribunal held that the procedural public policy guarantee is not only subsidiary to the other grounds, but the case law is very restrictive regarding allegations of due process violations. This case provides, however, some guidelines to the parties to test whether there is a breach of due process<sup>152</sup>: (1°) a party has to *show when and how* a breach of due process violation had been raised, in compliance with the applicable procedural rules, the relevant fact; (2°) it has to *establish that allegations* on this point *were proven* or had not been challenged; and then (3°) that these allegations had nevertheless *escaped the arbitral tribunal's attention*.

This case involved a player terminating his employment contract for just cause. An Israeli football team had offered to pay the player's salary arrears by cheque. The player had refused to pick up the cheque and insisted on payment to his bank account by a certain day. However, the payment arrived two days late. By then, the player had terminated for "just cause" under article 14 of the FIFA Regulations on the Status and Transfer of Players. In the arbitration, he sought damages equivalent to his salary for the ordinary duration of the contract. The arbitrator equated "just cause" to "justes motifs" (good cause) mentioned in Article 337 Swiss Code of Obligations. He acknowledged that the club's late payment was in breach of the contract and that, under Swiss law, payment by cheque does not discharge the debtor unless this payment method is accepted by the creditor<sup>153</sup>. He nevertheless concluded that the player was not entitled to terminate the contract. Indeed, the arbitrator noted that payment by cheque was not unusual for the parties, that the player knew that the club wanted to continue his employment and that he left Israel as soon

as he received the outstanding payment in his account. The arbitrator emphasised the duty to act in good faith in all circumstances, which imposes a "*duty to bear in mind the interests of the other party and to weigh those interests against the interests of the first party*". In this case, such weighing of interests would have required the player, in the arbitrator's opinion, to take the cheque and verify whether the cheque was honoured before terminating the contract. The player sought to annul the award before the Supreme Court, complaining about a breach of his right to be heard. The arbitrator had allegedly missed crucial evidence and arguments. In particular, he had wrongly assumed that the amount of the cheque was higher than the amount actually due to the player. The arbitrator admitted that the award contained certain typographical errors, but that they were not decisive for his findings.

The Court recalled its restrictive approach in previous case law regarding allegations of due process violations. It is not admissible for a party to rely on facts that are not established in the award itself, unless it can show that they are wrong precisely because the arbitral tribunal breached due process. The player had not proven any of the criteria required by the test, in consequence thereof the challenge was rejected.

In some cases linked to procedural public policy, the Federal Tribunal has been asked to decide whether **excessive formalism** is a breach of such procedural public policy. The question has remained unanswered, since the Federal Tribunal held that the specific rules were strict but that they were the result of a compromise between different interests, which justifies the formalism of the rule.

In the *AMA* case, the Tribunal held that there was no breach of public policy, even in case of excessive formalism, although keeping open the issue whether in case of

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<sup>151</sup> FT, Decision 4A\_578/2017, 20.7.2018, *Claudiu Bumba* – ASA Bull. 4/2018, p. 936.

<sup>152</sup> FT, Decision 4A\_578/2017, 20.7.2018, *Claudiu Bumba*, recital 3.3.1.2.

<sup>153</sup> FT, Decision 4A\_578/2017, 20.7.2018, *Claudiu Bumba*, pt B.b.



severe infringements of the prohibition of excessive formalism, a breach of public policy could be admitted<sup>154</sup>.

Two other cases were linked with excessive formalism. In the *Sunderland AFC* case, the CAS issued a termination order because the appellant had filed its appeal only by electronic means, instead of filing 7 hard copies, pursuant to Article R31 para 3 CAS Code. The Federal Tribunal considered that it was perfectly correct not to give additional time for filing those seven hard copies (no *Nachfrist*)<sup>155</sup>. There was no excessive formalism to apply strictly those rules which strike a compromise between the difficulty to access postal services abroad and the need for procedural security. The Federal Tribunal reached the same conclusion in other decisions<sup>156</sup>. It decided in a similar way also, when a party filed its appeal by fax<sup>157</sup>.

#### IV. Conclusion

This overview of around 75 decisions by the Federal Tribunal on challenges against CAS awards shows a number of interesting aspects as to the position of the Federal Tribunal. First, the Federal Tribunal is conscious that even if there is no *lex sportiva* as such in its case law, there should be significant autonomy for the CAS, being an independent body, whose decisions are awards like any

other arbitral tribunal. This point is stronger, given the structural organization of the CAS.

Second, the Federal Tribunal is fully aware that by assessing the challenges against CAS awards, it should not undertake the same level of scrutiny as it would for Swiss decisions applying Swiss law, even if Swiss law is often the applicable law. The scrutiny is similar to that used to assess decisions applying foreign law. This shows again an important concern of the Federal Tribunal not to become a further court on the merit, but rather the guardian of a limited number of very restrictive grounds of appeal.

Finally, despite the clear statements by the Federal Tribunal indicating to the parties that it will not review the merits of cases, especially not through the ground of breach of substantive public policy, numerous challenges are brought to the Federal Tribunal on this ground...in vain. The very low percentage of successful challenges is certainly evidence of the great reluctance of the Federal Tribunal to set aside CAS awards, but it is also a sign that the proceedings and the work of CAS panels and arbitrators are of good quality and reliable.

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<sup>154</sup> FT, Decision 4A\_692/2016, 20.4.2017, *AMA*, recital 6.1.

<sup>155</sup> FT, Decision 4A\_54/2019, 11.4.2019, *Sunderland AFC*, recital 4.2.2.

<sup>156</sup> FT, Decision 4A\_238/2018, 12.9.2018, *Club Al Hilal*, recital 5.5 and 5.6.

<sup>157</sup> FT, Decision 4A\_556/2018, 5.3.2019, *José da Costa*, recital 6.5; FT, Decision 4A\_690/2016, 9.2.2017, *Pape Diakhaté*, recital 4.2.

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## Revue de jurisprudence en matière procédurale

Jacques Radoux\*

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### I. Introduction

La présente revue de jurisprudence se veut la continuation de celle présentée, il y a 4 ans, par le Prof. Avv. Luigi Fumagalli et qui est parue dans le bulletin du TAS 2016/1. Elle ne portera que sur la compétence du TAS (à savoir le pouvoir de statuer sur une affaire, “jurisdiction” en anglais) ainsi que la recevabilité (qui se rapporte à l'exercice de ce pouvoir dans un cas donné, “admissibility” en anglais) et n'abordera pas la question du droit applicable. Elle contiendra, pour chacun de ces deux aspects, d'une part, un bref rappel – illustrés par des jurisprudences récentes – des éléments essentiels au sujet desquels tant la jurisprudence que la doctrine semblent désormais bien établies et, d'autre part, une étude plus approfondie de quelques sentences récentes qui permettent de faire ressortir plus clairement certains des problèmes auxquels les formations peuvent être confrontées lors du traitement des affaires qui leur sont soumises, en particulier : (i) comment interpréter une clause d'arbitrage - pathologique ou non - et (ii) comment il convient d'apprécier l'absence d'intérêt digne de protection d'un appelant.

D'emblée, il importe de préciser que le choix de n'aborder que la compétence et la recevabilité est principalement guidé par le fait que, à l'instar du service et du retour au tennis, ces deux aspects procéduraux sont

abordés, en principe, dans chaque affaire, l'exception étant constitué par un ace, à savoir si le TAS n'a pas de compétence et qu'il n'est donc pas nécessaire d'aborder la recevabilité. Ces deux aspects sont donc essentiels pour mener à bien une procédure arbitrale, qu'elle soit ordinaire ou d'appel.

Toutefois, alors même que ces deux aspects se retrouvent dans quasiment chaque procédure d'arbitrage, les conséquences qui en découlent sont nettement distinctes. En effet, si la compétence du TAS n'est pas remise en cause par les parties au litige, la formation ne peut examiner celle-ci d'office. Ce n'est que lorsque le défendeur fait défaut que la formation doit vérifier sa compétence d'office<sup>1</sup>, sachant que sa décision sur ce point peut, en tout état de cause, être révisée par le

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\* Référendaire à la Cour de justice de l'Union européenne (Luxembourg) et arbitre au TAS.

<sup>1</sup> TAS 2017/A/5246.

Tribunal fédéral suisse (ci-après le “TF”)<sup>2 3</sup>. En revanche, les questions de recevabilité, qui peuvent être soulevées par la Formation elle-même à condition d’avoir respecté le droit d’être entendu des parties, ne sont pas susceptibles d’être revues par le TF.

Toutefois, il est largement admis que la distinction entre ce qui relève de la compétence et ce qui relève de la recevabilité n’est pas toujours chose aisée<sup>4</sup>.

## II. Sur la compétence

### A. Les bases établies

Le TAS connaît deux sortes de procédures arbitrales : les procédures ordinaires (article R27 du Code de l’arbitrage en matière de sport, ci-après “le Code”) et les procédures d’appel (Article R47 du Code). Un point commun entre ces deux procédures est qu’il faut une clause d’arbitrage valable<sup>5</sup> pour que le TAS puisse se déclarer compétent, sachant que la formation détient la compétence pour statuer sur sa propre compétence (“Kompetenz-Kompetenz”) conformément à l’article 186 al.1 LDIP et tel que prévu à l’article R55 al.4 du Code.

Ainsi, en l’absence d’une clause d’arbitrage valable une formation se déclarera incompétente pour connaître du litige (voir,

par exemple, sentence CAS 2016/A/4888 et ordonnance sur requête d’effet suspensif TAS 2017/A/5360). L’arbitre unique dans la première de ces deux affaires ayant, en substance, relevé que (traduction libre) : *“la simple participation d’un individu ou d’une entité à une activité sportive ou au monde sportif ne suffit pas pour attribuer une compétence au TAS pour statuer sur le litige qui peut les opposer à l’organisation sportive en charge de l’activité en question”*<sup>6</sup>.

Conformément à l’article R47 du Code, qui reprend dans le cadre de la procédure d’appel les principes de l’article R27 du même Code<sup>7</sup>, trois conditions doivent être cumulativement remplies pour que le TAS soit compétent<sup>8</sup> :

- (i) il faut que les parties aient consenti à cette compétence ;
- (ii) il doit exister une décision de la fédération, association ou organisme sportif, et
- (iii) il faut que l’appelant ait épuisé les voies de recours internes.

Toujours en relation avec la première condition relative à l’existence d’une clause d’arbitrage valable, il convient de préciser qu’une telle clause peut être trouvée à plusieurs endroits et que l’acquiescement à cette clause peut se faire sous différentes formes. Ainsi, la clause peut se trouver, notamment,

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<sup>2</sup> Aux termes de l’article 186 al. 2 de la Loi fédérale sur le droit international privé (ci-après « LDIP »), l’exception d’incompétence doit être soulevée préalablement à toute défense sur le fond. C’est un cas de duplication du principe de la bonne foi, ancré à l’article 2 al. 1 du Code civil suisse, qui régit l’ensemble des domaines du droit, y compris l’arbitrage (TF 4A\_682/2012 du 20 juin 2013, consid. 4.4.2.1). Cette règle implique que le tribunal arbitral devant lequel le défendeur procède au fond sans faire de réserve est compétent de ce seul fait. Dès lors, celui qui entre en matière sans réserve sur le fond (« Einlassung ») dans une procédure arbitrale contradictoire portant sur une cause arbitrale reconnaît, par cet acte concluant, la compétence du tribunal arbitral et perd définitivement le droit d’exciper de l’incompétence dudit tribunal (ATF 128 III 50 consid. 2c/aa et les références). Il résulte de ce constat que le tribunal arbitral ne peut trancher la question de sa compétence que si celle-ci est contestée, sauf lorsque l’absence de contestation

immédiate découle du défaut d’une partie (ATF 120 III 155 consid. bb).

<sup>3</sup> En revanche, la légitimation passive ne peut être contrôlée par le TF. Si celle-ci est acceptée voire même reconnue par le défendeur elle s’impose à la formation, même si celle-ci a des doutes sur cette légitimation (CAS 2014/A/3639 para. 59 et s).

<sup>4</sup> Mavromati/Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, Kluwer 2015, R27, n° 80; and Fumagalli, *Bulletin TAS* 2016/1, p. 17.

<sup>5</sup> Voir l’article 178 LDIP pour les conditions.

<sup>6</sup> “The mere participation of an individual, or of an entity in the sporting world is not sufficient to ground the power of CAS to decide on a sports-related dispute opposing them to a sport organization” (CAS 2016/A/4888, para 37).

<sup>7</sup> Voir, TAS 2017/A/5360, para 17.

<sup>8</sup> Voir, CAS 2016/A/4888, para. 32, et CAS 2017/A/4950 & 4951, para. 133.

- dans un contrat<sup>9</sup> ;
- dans une réglementation à caractère général auquel le contrat renvoie ;
- dans la réglementation sportive applicable à laquelle l'on se soumet suite à l'adhésion à cette association<sup>10</sup> ou bien suite à la demande d'un athlète ou d'un coach d'être admis à une compétition organisée sous les auspices réglementaires de la fédération<sup>11</sup> ;
- dans une loi nationale à laquelle les règlements et statuts renvoient<sup>12</sup> sachant que dès lors que la compétence du TAS repose sur une disposition législative nationale et que la clause d'arbitrage conférant compétence au TAS ne découle donc pas d'un acte privé, le TAS ne peut plus être considéré comme tribunal arbitral selon le droit suisse, mais doit être considéré comme tribunal spécial prévu par la loi.

En revanche une référence trop indirecte, par exemple à l'article 57 des statuts de la FIFA, qui prévoit que la FIFA reconnaît les recours au TAS, ou bien à l'article 59 de ces mêmes statuts, qui instaure une l'obligation pour les associations membres de prévoir dans leurs statuts, notamment, la compétence du TAS ou d'une autre instance arbitrale indépendante, ne suffit pas pour attribuer compétence au TAS<sup>13</sup>. Ceci étant, l'on peut observer que les obligations prévues dans ces dispositions des statuts de la FIFA sont occasionnellement retenues par des formations lors de l'interprétation des clauses d'arbitrage qui leur sont soumises<sup>14</sup>.

À supposer que l'on ait trouvé une clause d'arbitrage ou une disposition réglementaire prévoyant la compétence du TAS qui soit compréhensible, encore faut-il s'assurer que les parties aient librement acquiescés à ladite clause. Un tel acquiescement peut se faire, notamment, par courrier ou échange de courriel<sup>15</sup>. Il a été jugé que l'appréciation du point de savoir si une personne a librement acquiescé à une clause d'arbitrage doit, eu égard à la position de faiblesse dans laquelle les athlètes se trouvent vis-à-vis des organismes sportifs, se faire "avec parcimonie"<sup>16</sup>. En s'appuyant sur la décision du Bundesgerichtshof allemand (BGH) dans l'affaire Pechstein<sup>17</sup> et la jurisprudence du TF<sup>18</sup> selon laquelle il convient d'examiner le caractère consensuel de l'arbitrage en matière sportive avec "bienveillance", la formation en question a considéré que, en l'occurrence, les conditions pour un acquiescement valable à l'arbitrage devant le TAS étaient réunies. À cet égard, il est permis de penser que la Cour de justice l'Union européenne, à supposer qu'elle soit un jour appelée à statuer sur la question, pourrait, en suivant un raisonnement similaire à celui adopté dans son arrêt du 18 juillet 2006, Meca-Medina<sup>19</sup>, être amenée à aboutir au même constat que le BGH et la Cour européenne des droits de l'homme<sup>20</sup>.

S'agissant de la deuxième condition visée à l'article R47 du Code, à savoir l'existence d'une décision rendue par une fédération, association ou organisme sportif, il convient de relever que cette notion couvre également "l'absence de décision" si cette absence s'analyse comme un déni de justice formel<sup>21</sup>.

<sup>9</sup> Voir, CAS 2017/A/5065, même si la clause en question ne visait pas le TAS.

<sup>10</sup> Voir, CAS 2017/A/5209 et CAS 2018/A/5853, para 84.

<sup>11</sup> Voir, TAS 2016/A/4778.

<sup>12</sup> Voir, CAS 2017/A/5209.

<sup>13</sup> CAS 2017/A/4950 & 4951, para. 145 et 147, et jurisprudence citée CAS 2005/A/952.

<sup>14</sup> TAS 2016/A/4778, para 63 à 65, et TAS 2018/A/5994, para. 64.

<sup>15</sup> CAS 2017/A/4949, para. 97, qui confirme la décision de « première instance » rendue par dans l'affaire CAS 2016/O/4469.

<sup>16</sup> CAS 2017/A/4949, para. 87.

<sup>17</sup> Décision du 7 juin 2016, KZR 6/15.

<sup>18</sup> 4P.172/2006 du 22 mars 2007, cons. 4.2.2.3., ainsi que 4A\_428/2011, du 13 février 2012, cons. 3.2.3.

<sup>19</sup> Arrêt du 18 juillet 2006, Meca-Medina, C-519/04P, ECLI:EU:C:2006:492.

<sup>20</sup> Arrêt du 2 octobre 2018, Affaire Mutu et Pechstein, requêtes n<sup>os</sup> 40575/10 et 67474/10.

<sup>21</sup> CAS 2017/A/5187, et Mavromati/Reeb, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Kluwer 2015, R47, n<sup>o</sup> 25).

Une énumération de ce qui caractérise une décision peut être trouvée dans certaines sentences du TAS<sup>22</sup> dans lesquelles il est rappelé, en référence à d'autres jurisprudences, que: [traduction libre]

- la forme de la communication est sans pertinence pour déterminer sa qualification en tant que décision. La circonstance que ladite communication intervienne sous forme de lettre n'exclut pas qu'il puisse s'agir d'une décision sujette à appel ;
- en principe, pour qu'une communication constitue une décision, elle doit contenir un "ruling" - décision - par laquelle l'organe dont elle émane à l'intention d'affecter la situation légale du destinataire de la décision ou d'autres parties;
- une décision est partant un acte unilatéral envoyé à un ou plusieurs destinataires et qui a pour intention de produire des effets juridiques à l'égard de ceux-ci ;
- pour être une décision, une communication doit être adressée à une partie et basée sur une "*animus decidendi*", c.à.d. la volonté de l'organe en question de statuer sur un certain point. Une simple information, qui ne contient aucun "ruling" ne pouvant être qualifiée de décision au sens susmentionné;
- il peut ainsi y avoir décision si un organe statue sur la recevabilité d'une demande sans se prononcer sur le fond<sup>23</sup>.

<sup>22</sup> CAS 2017/A/5157 et CAS 2018/A/5746.

<sup>23</sup> "- the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal;  
- in principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties;  
- a decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects;  
- an appealable decision of a sport association or federation is normally a communication of the association directed to a party and based on an 'animus

Toutefois, il importe de relever que le doute quant au caractère décisionnel d'une lettre peut résulter du fait que la lettre se termine par une formule dite "rhétorique", du genre [traduction libre] "[e]nfin, nous tenons à préciser que ce qui précède est de nature purement informative et, partant, sans préjudice de toute décision quelconque"<sup>24</sup> (FIFA) ou bien "[v]euillez être informés que cette lettre est de nature purement informative et ne saurait être considérée comme une décision"<sup>25</sup> (CAF). Il convient, dans un tel cas de procéder à une appréciation circonstanciée de l'*animus decidendi* de l'organe ayant émis ladite lettre au regard du principe de bonne foi prévu à l'article 2 du Code Civil suisse (CC) et du précepte "*venire contra factum proprium*"<sup>26</sup>.

En ce qui concerne la troisième condition prévue à l'article R47 du Code, à savoir l'épuisement des voies de recours, il semble que la vérification de son respect ne soulève plus trop de problèmes. Ceci n'empêche toutefois pas qu'encore tout récemment des formations ont eu à se prononcer sur ce sujet, en adressant l'argument selon lequel l'obligation d'actionner d'abord la procédure de plainte interne à un certain organisme sportif serait, au regard des expériences précédentes vécues devant l'organe en question, constitutif de formalisme excessif<sup>27</sup> ou constatant qu'une procédure de "révision" d'une décision devant le même organe constitue une voie de recours extraordinaire alors que l'article R47 du Code

decidendi', i.e. an intention of a body of the association to decide on a matter [...] A simple information, which does not contain any 'ruling', cannot be considered a decision;

- there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility of a request, without addressing the merits of such request."

<sup>24</sup> « Finally, we would like to point out that the foregoing is of a purely informative nature and, therefore, without prejudice to any decision whatsoever. » (CAS 2018/A/5746).

<sup>25</sup> TAS 2019/A/6291, para. 101.

<sup>26</sup> CAS 2015/A/4203.

<sup>27</sup> CAS 2016/A/4818.

ne vise, ainsi que le TF l'a reconnu, que le voies de recours ordinaires<sup>28</sup>.

## **B. Les apports de la jurisprudence récente sur l'interprétation des clauses d'arbitrage**

Ainsi qu'il a déjà été évoqué, il n'est pas toujours chose aisée d'y voir clair en ce qui concerne l'existence ou non d'une clause d'arbitrage valable au bénéfice du TAS. À titre d'exemple, à un moment donné, l'article 99 du Code Disciplinaire de la Fédération Algérienne de Football (ci-après "la FAF"), intitulé "Recours au TAS international", était libellé comme suit: "*Le non-respect des dispositions prévues par l'article 104 du règlement des championnats de football professionnel entraîne les sanctions suivantes : - Suspension de l'équipe seniors pour la saison en cours et rétrogradation du club en division inférieure ; - Deux (02) ans de suspension fermes de toutes fonctions officielles pour les personnels concernés du club ; - Deux cent mille dinars (200 000 DA) d'amende pour le club*". Au même moment, l'article 100 dudit règlement des championnats de football professionnel, intitulé "Tribunal Arbitral de Sport International", prévoyait que "*[L]es décisions effectives du TAS Algérien concernant les clubs, sont définitives et non susceptibles de recours devant toute structure d'arbitrage étrangère. [...] Néanmoins la FAF se réserve le droit de faire appel des décisions du TAS Algérien auprès du TAS de Lausanne*". En outre, aux termes de l'article 68 des Statuts de la FAF, intitulé "Tribunal arbitral du sport de Lausanne", "*[L]es décisions du tribunal arbitral d'Alger concernant les clubs et les joueurs sont définitives et non susceptibles de recours devant toute structure d'arbitrage étrangère. Néanmoins, la FAF*

<sup>28</sup> CAS 2018/A/5595, para. 52 et renvoi à Mavromati/Reeb, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Kluwer 2015, R47, n° 33.

<sup>29</sup> Voir, la sentence CAS 2017/A/5065, para. 67, selon laquelle une clause pathologique contient une ou plusieurs des caractéristiques suivantes: "a) if it is vague or ambiguous as regards private jurisdiction or contains contradicting provisions; b) if it fails to mention with precision the institution which will appoint the arbitral body chosen by the parties; c) if it fails to produce procedural mandatory consequences for the parties in the event of a dispute; d) if it fails to exclude the intervention of state courts in the

*se réserve le droit de faire appel des décisions du tribunal arbitral d'Alger auprès du TAS de Lausanne*".

Comment convient-il de procéder dans une telle situation ou lorsqu'on est confronté à une clause "pathologique" au sens où l'entend le TF, c'est à dire "*incomplète, imprécise ou contradictoire*"<sup>29</sup>?

Parmi les sentences récentes, il y en a deux, à savoir TAS 2016/A/4778 et CAS 2017/A/5284, qui décrivent de manière particulièrement compréhensible les voies à suivre afin d'arriver à bon port<sup>30</sup> lorsque la clause d'arbitrage se trouve soit dans un contrat, soit dans une réglementation d'un organisme sportif. Le point de départ commun aux deux sentences est le constat que, dans la mesure où le siège de l'arbitrage est en Suisse, l'examen de l'existence d'une clause d'arbitrage valable se fait selon le droit suisse (lex arbitri) et, plus précisément, au regard des conditions figurant à l'article 178 LDIP qui se lit comme suit:

*"(1) Quant à la forme, la convention d'arbitrage est valable si elle est passée par écrit, télégramme, télex, télécopieur ou tout autre moyen de communication qui permet d'en établir la preuve par un texte.*

*(2) Quant au fond, elle est valable si elle répond aux conditions que pose soit le droit choisi par les parties, soit le droit régissant l'objet du litige et notamment le droit applicable au contrat principal, soit encore le droit suisse.*

*[...]"*

settlement of the disputes, at least before the issuance of the award; e) if it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and f) if it does not permit the putting in place of a procedure leading under the best conditions of efficiency and speed to the rendering of an award that is susceptible of judicial enforcement".

<sup>30</sup> Cheminement également décrit dans Arroyo, Arbitration in Switzerland, The Practitioner's Guide, Kluwer 2018, Noth/Haas, Article R27, para. 10, et dans Kaufmann-Kohler/Rigozzi, International Arbitration, Law and Practice in Switzerland, Oxford University Press 2015, p. 127 et suiv.

Or, conformément au droit suisse, plus particulièrement les articles 1<sup>er</sup>, paragraphe 1, et 2, paragraphe 1, du Code des Obligations (ci-après le “CO”), un contrat ou accord est parfait lorsque les parties ont, réciproquement et de manière concordante, manifesté leur intention commune sur les points essentiels du contrat ou de l'accord en question. Les éléments objectivement essentiels (*essentialia negotii*) pour une clause d'arbitrage sont l'intention

- (i) de parties déterminées,
- (ii) d'exclure la compétence des juridictions étatiques en
- (iii) soumettant à un tribunal arbitral déterminable
- (iv) un litige déterminable<sup>31</sup>.

Si l'intention des parties sur un de ces points est douteuse, il convient de procéder à l'interprétation de cette intention. Dans la première des deux affaires, qui avait trait à un contrat de travail, l'arbitre unique a rappelé que, conformément au droit suisse, cette interprétation de l'intention se fait selon les règles générales d'interprétation telles que prévues à l'article 18, para. 1, du CO, de sorte qu'il convient d'abord de rechercher la volonté réelle et commune des parties sur base de l'ensemble des circonstances factuelles de l'affaire<sup>32</sup>.

Si la volonté réelle et commune des parties ne peut toujours pas être déterminée, il conviendra d'interpréter les déclarations des parties selon le principe de la confiance (“*Vertrauensprinzip*”, “*rules of good faith*”, “*principle of mutual trust*” ou “*principle of confidence*”) en application duquel il faut rechercher comment les déclarations des parties devaient ou pouvaient être comprises

<sup>31</sup> CAS 2017/A/5284, para. 98, « The points objectively essential (*essentialia negotii*) for an arbitration agreement are the intent of i) determined parties ii) to exclude the jurisdiction of state courts by iii) submitting to a determinable arbitral tribunal iv) a determinable dispute (ATF 142 III 239 at 3.3.1; 138 III 29 at 2.2,3; 130 III 36 at 3.1; 129 III 675 at 2.3).»

<sup>32</sup> CAS 2017/A/5284, para. 103.

de bonne foi en fonction de leur libellé, du contexte dans lequel elles ont été émises et de l'ensemble de circonstances caractérisant l'affaire, sachant qu'un libellé à première vue clair peut être infirmé sur base du contenu d'autres dispositions, de l'objectif poursuivi par les parties ou d'autres circonstances<sup>33</sup>.

Toutefois, lors de cette interprétation, il y a lieu de tenir compte de la nature légale de la clause arbitrale et du fait qu'une renonciation aux juridictions étatiques a pour conséquence que les voies de recours sont fortement réduites. Ainsi, la volonté de renonciation ne saurait être admise facilement. En revanche, une fois l'existence de ladite clause établie, il n'existe aucune raison de procéder à une lecture restrictive de celle-ci. Au contraire, l'on doit, dans un tel cas, considérer que les parties ont souhaité attribuer au tribunal arbitral en question une compétence complète<sup>34</sup>.

Dans l'affaire en question, CAS 2017/A/5284, l'arbitre unique, après un examen détaillé des différentes circonstances pertinentes de l'espèce, est arrivé à la conclusion que les parties avaient l'intention de confier la compétence à une instance arbitrale interne à la fédération en cause et que la circonstance que cette instance n'ait jamais été créée ne pouvait être interprétée comme conférant une compétence au TAS pour connaître de l'affaire.

Dans la seconde affaire mentionnée, à savoir l'affaire TAS 2016/A/4778, dans laquelle la clause d'arbitrage en question figurait dans la réglementation d'un organisme sportif, l'examen des conditions matérielles n'a pas soulevé de problème particulièrement épineux. L'examen des conditions formelles prévues à l'article 178 (1) de la LDIP n'a pas

<sup>33</sup> CAS 2017/A/5284, para 104, et référence à ATF 140 III 134, cons. 3.2.

<sup>34</sup> CAS 2017/A/5284, para. 105, et référence à ATF 140 III 134, cons. 3.2. Voir aussi, Kaufmann-Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland*, Oxford University Press 2015, p. 128.



davantage soulevé de problème majeur dès lors que leur respect n'était pas remis en cause par les parties. Dans ces conditions, et au vu de la jurisprudence du TF, l'arbitre unique a estimé être *“dispensé d'analyser de manière détaillée si et dans quelle mesure l'Appelant est lié par les règles et règlements de l'Intimée et si la convention d'arbitrage y contenue remplit les conditions de forme énoncées à l'article 178 (1) LDIP”*.

En revanche, se posait encore la question de savoir si les statuts, qui prévoyaient la compétence du TAS, exigeaient de surcroît la conclusion d'une *“convention d'arbitrage spécifique”*. En vue de répondre à cette question, il convenait donc de procéder à l'interprétation desdits statuts. À cet égard, l'arbitre unique, tout en relevant que conformément à l'article 178 (2) LDIP il convient d'appliquer – d'abord et avant tout – les principes de droit suisse régissant l'interprétation d'une convention d'arbitrage, a souligné que, conformément au droit suisse, les statuts et règlements d'une fédération sont, en principe, interprétés conformément aux principes applicables à l'interprétation d'un texte de loi plutôt que des contrats<sup>35</sup>.

L'arbitre unique a pris la peine de rappeler que, selon la jurisprudence du TAS, *“l'interprétation des statuts et des règles d'une association sportive se fait plutôt de manière objective et commence avec le libellé de la disposition à interpréter. L'instance judiciaire – dans le présent cas, la formation – doit déterminer le sens de la règle, ayant égard à son langage ainsi qu'à sa construction grammaticale et sa syntaxe. Dans cet examen, la formation devra aussi identifier les intentions (interprétées de manière objective) de l'association qui a rédigé la règle ; et la Formation peut aussi prendre en considération tout contexte historique pertinent qui illumine sa déduction ainsi que le contexte régulateur tout entier dans lequel la règle s'inscrit”*<sup>36</sup>.

### III. Sur le Recevabilité

<sup>35</sup> TAS 2016/A/4778, para 73. avec une référence à BSK-ZGB, Heini/Scherrer, Art. 60 SCC n° .22 ; BK-ZGB, Riemer, Systematischer Teil n° 331, et à la jurisprudence ATF 114 II 193, E. 5a.

### A. Les bases

Pas de surprise ici : les problèmes de recevabilité se posent principalement au regard du respect par les parties du délai de recours ou d'appel (21 jours, article R49 du Code). D'autres questions peuvent néanmoins se présenter en relation avec le respect des conditions prévues à l'article R48 du Code, telles que le paiement du droit de greffe.

S'agissant de la computation des délais, et alors même que la jurisprudence y relative est désormais bien établie, il arrive que des fédérations, même de grande taille, tendent, de manière directe ou indirecte, à vouloir interpréter les textes en leur faveur. Une belle illustration d'un tel comportement nous est fournie dans l'affaire CAS 2017/A/5524. L'appel devait être introduit dans les 21 jours de la communication de la motivation de la décision appelée, motivation qui devait elle-même être demandée dans les 10 jours de la réception du dispositif de cette même décision. Or, c'est au niveau du calcul de ce dernier délai que la fédération internationale en cause a excipé de l'irrecevabilité de l'appel en s'appuyant sur une interprétation de ses textes que d'aucuns pourraient qualifier de tendancieuse. L'arbitre unique, tout en rejetant l'interprétation préconisée par ladite fédération, a pris le soin de préciser, d'une part, qu'en droit suisse, gouvernant la procédure arbitrale devant le TAS et la procédure devant la fédération concernée, un délai de recours doit être considéré comme respecté s'il est établi que la requête ou la demande est envoyée avant l'expiration du délai en question (Article R32 et Article 143 du Code de Procédure civile suisse)<sup>37</sup>. Il a indiqué, d'autre part, que l'interprétation préconisée par ladite fédération entraînerait une inégalité de traitement entre les membres de cette dernière en fonction de leur résidence, sachant que la durée d'un

<sup>36</sup> TAS 2016/A/4778, para 73 avec référence à CAS 2010/A/2071.

<sup>37</sup> CAS 2017/A/5524, para. 116.

acheminement par poste peut sensiblement varier en fonction de la distance séparant l'association membre du siège de la fédération internationale ou de la qualité et de la vitesse de services postaux.

D'autres exemples récents ayant eu trait à la computation des délais peuvent être trouvés dans les affaires :

- CAS 2018/A/5596, dans laquelle une partie soutenait ne pas avoir reçu une communication par fax alors que la fédération internationale en question détenait un rapport de fax qui indiquait que ledit fax avait été envoyé avec succès, or dans un tel cas la charge de la preuve que le fax n'a pas été reçu incombe au destinataire ;
- CAS 2018/A/5820, dans laquelle les appelants ont entrepris un certain nombre de démarches auprès de la fédération après avoir reçu la décision appelée, mais n'ont pas attaquée ladite décision dans le délai de 21 jours prévu à cet égard à l'article R49 du Code. Partant, et au vu du fait que les parties appelantes n'ont pas pu établir l'existence d'un estoppel empêchant la fédération défenderesse d'invoquer la tardivité de l'appel, il convenait de le déclarer irrecevable ;
- CAS 2018/A/5857 & 5861, dans lesquelles la formation a jugé que au vu des circonstances de l'espèce, à savoir que la déclaration d'appel avait été envoyée par fax un jeudi, la veille de l'échéance du délai

d'appel de 21 jours, et que le vendredi était un jour férié, le premier jour ouvrable après l'écoulement du délai était donc un lundi. Dès lors que les originaux de la déclaration d'appel ont été déposés le lundi, l'appel était introduit dans le délai prévu ;

- CAS 2018/A/5898, dans laquelle la formation a retenu que la fédération internationale en question ne pouvait, alors que le délai pour demander la communication des motifs d'une décision avait expiré, de sorte que ladite décision était devenue finale à l'égard des parties et de ladite fédération, faire renaître un délai d'appel en notifiant à une partie les motifs en question. Le délai d'appel n'est pas à la disposition de la fédération internationale et cette dernière ne peut donc pas changer ledit délai au détriment des parties intéressées<sup>38</sup>.

## **B. Les apports de la jurisprudence récente sur l'intérêt à agir**

Si la plupart des aspects liés à la recevabilité d'une affaire ne semblent pas poser de réel problème, il apparaît qu'il y en a un qui, du moins pour des juristes qui ne sont pas formés en droit suisse, peut sembler étonnant : à savoir la distinction qu'il convient de faire entre l'intérêt à agir de l'appelant (requérant), qui doit être examiné au stade de la recevabilité<sup>39</sup> et avant que le tribunal n'entre en matière<sup>40</sup>, et la légitimation

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<sup>38</sup> CAS 2018/A/5898, para 67: "For the reasons above, the Panel finds that FIFA could not revive the 21-day time limit to lodge an appeal against the Appealed Decision. Allowing FIFA to revive the time limit to appeal a decision without good reason would endanger the legal certainty pursued with a statutory time limit to appeal and would, thus, go against the very purpose of deadlines for appeal. Such time limit to appeal is there in the interest of all stakeholders and is not at the free disposal of FIFA. The latter has no autonomy to alter or change the deadlines for appeal to the detriment of other stakeholders. Indeed, in the matter at hand, the Player would be particularly unjustly prejudiced, because he was of the legitimate understanding that FIFA's decision of 23 October 2017 not to notify the grounds of the Appealed Decision became final and binding."

<sup>39</sup> Voir dans différents domaines TF 2C\_154/2018, cons. 1.2 ; 2C\_1095/2018, cons. 1 , et Tribunal fédéral administratif B-3553/2019, cons. 2.2.

<sup>40</sup> Même si dans l'affaire CAS 2017/A/5258, para. 95, l'on peut lire: « Reverting to the issue of standing, there is considerable force in the CAF's argument that the Club lacks standing to challenge the Appealed Decision because it omitted to lodge a formal appeal against the decision of the LFF Executive Board dated 4 June 2017 and that, in consequence of the LFF decision becoming final and binding upon the Club and its competitors in the Libyan Premier League, the Club lost any legal interest it might otherwise have to challenge the Appealed Decision. However since, in light of the reasoning set out above, the Club's appeal would in any event have to be dismissed, the Panel does not deem it necessary to address this issue in more detail. »

active ou passive (qualité pour agir), qui constitue une question de fond. Si, du moins aux yeux de l'auteur, les raisons qui amènent à ce traitement différent ne s'imposent déjà pas avec une évidence manifeste, l'appréciation du point de savoir si l'appelant a ou non un tel intérêt à agir semble encore plus difficile à faire ainsi que le prouve une lecture de différentes sentences ayant abordé le sujet et qui laissent à penser que la notion en question est à contenu variable, du moins en ce qui concerne sa composante terminologique<sup>41</sup>. Toutefois, des explications concernant le pourquoi de ce traitement différent et des précisions sur la manière d'apprécier les différents éléments dont il convient de tenir compte pour établir l'intérêt à agir de l'appelant ou du recourant peuvent être trouvées dans les sentences CAS 2016/A/4602 et CAS 2017/A/5054.

Dans la première de ces deux sentences, qui contient en outre une analyse didactique de la légitimation active de l'appelant, l'on peut lire, en substance que, en principe, une requête est inadmissible si elle est dépourvue d'intérêt à agir ainsi que le prévoit l'article 59 (2) lit a. du code de procédure civile suisse. Partant, un intérêt à agir raisonnable est une condition pour accéder à la justice, une juridiction ne devant rentrer en matière que si le recourant a un intérêt à agir suffisant quant à la décision à intervenir. Si la requête ne sert pas les objectifs du recourant, les ressources judiciaires ne doivent pas être gaspillées sur l'affaire. Cette exigence sert à

protéger les intérêts publics, à savoir réduire la charge de travail des juridictions en éliminant les "litiges inutiles", l'intérêt public étant démontré par le fait que les juridictions examinent cette exigence procédurale de leur propre initiative. Même si les aspects d'intérêt public ne sont pas aisément transposables aux procédures arbitrales, il conviendrait de déclarer un recours ou une demande irrecevable si le recours ou la demande en question ne sert clairement pas les intérêts de l'appelant. Dans le cas d'espèce, la formation a finalement considéré qu'un tel intérêt à agir existait<sup>42</sup>.

Dans la seconde sentence, qui s'inscrit dans la même ligne de pensée, il est précisé que dans la mesure où l'exigence de l'existence d'un intérêt à agir détermine si, dans un cas concret, le demandeur a accès à la justice, la barre ne doit pas être mise trop haute<sup>43</sup>. Dès lors qu'il s'agit d'une question procédurale, elle s'apprécie, en l'espèce, selon les règles de droit suisse. En revanche, l'arbitre ne s'est pas appuyé sur le droit de procédure civile suisse, estimant que devant un tribunal arbitral le seuil pour l'appréciation de l'intérêt à agir doit être peu élevé, alors que l'exigence, devant les juridictions étatiques, de l'existence dudit intérêt découle de la volonté de protéger ces juridictions des litiges inutiles afin de pouvoir gérer au mieux leur charge de travail et ainsi protéger les deniers publics.

S'agissant de la question de savoir ce qu'il convient d'entendre par "litige inutile",

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<sup>41</sup> P.ex. TAS 2014/A/3860, TAS 2015/A/3930, TAS 2017/A/5147, TAS 2017A/5259, TAS 2017/A/5382 ainsi que CAS 2014/A/3602, CAS 2015/A/3910, CAS 2015/A/4095, CAS 2017/A/5287.

<sup>42</sup> CAS/A/2016/A/4602, para. 48 et 49:  
« 48 In principle, a request is inadmissible, if it lacks legal interest ("Rechtsschutzinteresse", "interet à agir"). This condition of admissibility is explicitly provided for in Art. 59 (2) lit. a of the Swiss Code of Civil Procedure ("CCP"). Thus, a reasonable legal interest is a condition for access to justice. A court shall only be bothered to decide the merits of a request, if the applicant has a sufficient legal interest in the outcome of the decision. If – on the contrary – the request is not helpful in pursuing the applicant's

final goals, the scarce judicial resources shall not be wasted on such matter.

<sup>49</sup> The condition of sufficient legal interest serves first and foremost public interests, i.e. to restrict the case load for the courts by striking "purposeless" claims from the court's registry. This public interest is clearly evidenced by the fact that the courts examine this (procedural) condition *sua sponte* (Art. 62 CCP). Even if aspects of public interest before state courts are not easily transferable *mutatis mutandis* to arbitration proceedings (cf. Girrsberger/Voser, International Arbitration, 3<sup>rd</sup> ed. 2016, no. 1194), this Panel holds that a claim shall be deemed inadmissible if it clearly does not serve the purpose of the Appellant. »

<sup>43</sup> Voir, dans le même sens, Arroyo, Arbitration in Switzerland, The Practitioner's Guide, Kluwer 2018, Noth/Haas, Article R27, para. 7.

l'arbitre unique a considéré qu'il convenait de distinguer entre les affaires amenées devant une juridiction étatique et celles soumises à une institution privée, telle que le TAS, à laquelle les parties ont donné mandat et dont elles couvrent entièrement les charges. Dans le second cas, l'existence d'un intérêt à agir devrait uniquement être nié au cas où l'appelant ou le recourant ne tirerait aucun avantage à obtenir une décision allant dans le sens de sa requête. Tel fut le cas dans l'affaire en objet et l'arbitre unique a donc jugé que l'appel était irrecevable.

Ces deux sentences ont, tout récemment, été reprises par d'autres formations qui ont été amenées à se prononcer sur l'intérêt à agir du recourant. Ainsi, dans les affaires jointes TAS 2019/A/6132 & 6246, la formation, après avoir rappelé le contenu de l'article 59 CPC, a indiqué partager l'appréciation d'autres formations arbitrales<sup>44</sup>, selon lesquelles cette disposition, qui est applicable mutatis mutandis aux procédures d'arbitrage devant le TAS, requiert l'existence, dans le chef de l'appelant, d'un intérêt concret, légitime et personnel ("the appellant's interest must be concrete, legitimate, and personal"), voire d'un intérêt juridique raisonnable ou suffisant ("reasonable legal interest", "sufficient, legal interest") pour pouvoir accéder à la justice, dès lors qu'il ne saurait être attendu d'une juridiction qu'elle entre en la matière si le demandeur n'a pas d'intérêt juridique suffisant à la solution de la décision à intervenir. Toutefois, cette formation a ajouté que s'il est vrai que la condition relative à l'existence d'un intérêt juridique suffisant semble être principalement inspirée par des considérations d'intérêt public, il n'en demeure pas moins que des considérations d'économie de procédure, qui est un principe général du droit suisse, trouvent, ainsi qu'il ressort de la jurisprudence du TAS<sup>45</sup>, également à s'appliquer dans le cadre d'une procédure arbitrale devant ce dernier et

justifient donc cette exigence dans les procédures arbitrales.

La formation en question a en outre relevé que la jurisprudence du TAS, selon laquelle l'existence d'un tel intérêt digne de protection est reconnue s'il existe un intérêt tangible de nature financière ou sportive<sup>46</sup>, s'inscrit dans la ligne directe de celle des juridictions étatiques suisses dont il ressort par ailleurs que l'intérêt de l'appelant à voir la décision qui lui fait grief revue doit être actuel et pratique<sup>47</sup>, la résolution de questions juridiques abstraites sans pertinence pour le cas d'espèce n'étant pas susceptible de fonder un intérêt digne de protection.

La formation a, enfin, précisé qu'il appartient à l'appelant ou au recourant d'apporter les éléments permettant de conclure à l'existence d'un intérêt suffisant, et ce selon les règles procédurales applicables en matière de présentation des faits et preuves. Dans le cas d'espèce, la formation a conclu que l'appelante était restée en défaut d'établir l'existence d'un intérêt légal suffisant pour attaquer les décisions appelées.

Ces développements ont été repris, à l'identique, par la formation en charge de l'affaire TAS 2019/A/6348 qui, à l'issue de l'examen visant à savoir si l'appelant avait démontré avoir un intérêt digne de protection, a jugé que l'appelant avait bel et bien un intérêt à agir contre une décision du comité exécutif d'une fédération dès lors qu'il n'était pas établi que l'annulation d'une décision d'un organe disciplinaire de la même fédération, requise dans une procédure parallèle devant le TAS, allait avoir une incidence sur ladite décision du comité exécutif. D'après cette formation, l'existence d'une telle incertitude justifiait la conclusion que l'appelant avait un intérêt digne de protection pour faire également appel contre la décision du comité exécutif, de sorte que l'appel a été déclaré recevable.

<sup>44</sup> Plus précisément CAS 2016/A/4903 et CAS 2016/A/4602.

<sup>45</sup> TAS 2009/A/1928 & 1929.

<sup>46</sup> CAS 2008/A/1674 et CAS 2013/A/3140.

<sup>47</sup> BGE 120 Ia 258.

S'il est vrai que, à première vue, ces deux récentes sentences semblent être en légère tension avec celle rendue dans l'affaire CAS 2017/A/5054, il n'en demeure pas moins que lesdites sentences ne contiennent aucun indice permettant de conclure que les formations en question aient voulu prendre le contrepied de ce qui a été dit dans l'affaire CAS 2017/A/5054. Ces légères différences

me semblent plutôt montrer que si, sur cette problématique délicate, la jurisprudence du TAS est certes encore en train d'évoluer, elle se trouve néanmoins déjà en voie d'uniformisation, uniformisation qu'il appartiendra aux formations futures de mener à bout afin d'assurer une sécurité juridique maximale aux parties engagées dans une procédure devant le TAS.

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## A Review of recent CAS decisions regarding eligibility

Carol Roberts\*

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- I. The Eligibility of Athletes to Compete
    - A. The Rio Olympics
    - B. Pyeongchang 2018 Winter Games
  - II. The Eligibility of Clubs to Participate in Competitions
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- 

### I. Eligibility of Athletes to Participate in an Event/Competition

In December 2014, WADA established an Independent Commission, chaired by Richard Pound, to investigate allegations of doping in Russian athletics. The Commission's report, issued November 9, 2015, confirmed the existence of widespread cheating through the use of doping substances and methods to ensure, or enhance the likelihood of, victory for athletes and teams. The Commission found that the cheating was done by the athletes' entourages, officials and the athletes themselves.

The Report recommended, among other things, that the IAAF (recently rebranded as World Athletics) suspend the All-Russian Athletics Federation (ARAF). In addition to suspending ARAF, the IAAF amended its rules so that athletes associated with suspended Federations were ineligible to participate in international competitions. At the same time, the IAAF enacted rules allowing individual athletes who could clearly and convincingly demonstrate that they were not tainted by the Russian system because they were out of the country and subject to other effective drug testing, to apply for permission to compete as a neutral athlete.

Although the ARAF had the right to challenge its suspension, it did not do so and expressly accepted the IAAF's decision.

However, the Russian Olympic Committee and 68 athletes challenged the IAAF's amended Rules before CAS. (*Russian Olympic Committee, Lyukman Adams et. al v. IAAF* (2016/O/4684))<sup>1</sup>

The Panel upheld validity and enforceability of the IAAF Rules. The Panel determined that:

*"...National federations are members of international federations, and have the duty to respect the obligations deriving from such membership; athletes participate in organized sport, as controlled by an international federation, only on the basis of their registration with a national federation, which is a member of the international federation in question".* (para 119)

The Panel held that it was a fundamental principle of law that members of associations had an obligation to ensure that they satisfied conditions of membership in the association. As the ARAF did not dispute its suspension, it could not meet its IAAF membership obligations and enter athletes into the Olympic Games. The Panel held that the Rule was a proportionate means of encouraging national federations to comply

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\* Canadian lawyer, and an arbitrator and mediator with the Sport Dispute Resolution Centre of Canada, an arbitrator with UK Sport Resolutions, and an arbitrator and mediator with CAS.

<sup>1</sup> See CAS Database.

with rules designed to protect and promote clean athletes, fair play and the integrity of sport.

Finally, the Panel also determined that the Competition Rules rendering athletes affiliated to a suspended IAAF federation member ineligible was not a sanction because they allowed individual athletes who were members of a suspended federation an opportunity to compete if they could meet certain conditions. (in other words, the rules provided the athletes with an opportunity or “pathway” to eligibility).

In May 2016, WADA appointed Professor Richard McLaren to investigate allegations of doping at the 2014 Winter Games in Sochi made by Dr. Grigory Rodchenkov, the former director of the Moscow Laboratory. (the “McLaren Report”) Part One of the McLaren report, which was published just prior to the 2016 Rio Olympics, revealed the existence of an institutionalized system of doping in Russia. Part Two of Professor McLaren’s report, which was published in December 2016, identified over 1000 athletes competing in summer, winter and Paralympic sports who “*can be identified as being involved in or benefiting from manipulations designed to conceal positive doping tests*”. Because Professor McLaren had no mandate to prosecute the athletes, the IOC then established two disciplinary Commissions. The Schmid Commission, which was responsible for establishing facts based on documented and independent evidence, confirmed the involvement of Russian government officials in the violations of the WADC. The Oswald Commission was responsible for investigating alleged violations of individual Russian athletes identified by Professor McLaren. The Oswald Commission issued its first report on November 1, 2017, and its second report on November 28, 2017. These Disciplinary Commission reports informed the IOC’s decisions regarding the participation of Russian athletes at the 2016 Rio Olympics and the 2018 Pyeongchang Olympic Games.

## A. The Rio Olympics

Following the publication of Part One of the McLaren report and the *Adams* decision, the IOC decided it would not accept the entry of any Russian athlete into Rio Olympics unless such athlete could satisfy their International Federation that they had met certain specified criteria, including out-of-competition testing and “reliable adequate international tests”. The IOC’s decision collectively deprived Russian athletes of the presumption of innocence. However, each affected athlete had the opportunity to rebut the application of collective responsibility.

The Russian Olympic Committee approved a number of Russian athletes for the 2016 Rio Olympics according to criteria established by the International Federations and the IOC.

A number of Russian athletes challenged their ineligibility (see (*Yulia Efimova v. ROC, IOC & FINA* (OG 16/004), *Ivan Balandin v. FISA & IOC* (OG 16/12) and *Natalia Podolskaya & Alexander Dyachenko v. ICF* (OG 16/19)).

Of the International Federations, only the World Rowing Federation (FISA) and IAAF imposed supplementary independent anti-doping testing requirements to the criteria established by the IOC. In *Daniil Andreinکو et. al v. FISA & IOC* (OG 16/011), 16 athletes challenged FISA’s decision to declare them ineligible to compete because they had not undergone a minimum of three anti-doping tests in a WADA lab other than the Moscow laboratory. The *ad hoc* Panel held that FISA’s decision to require that testing be conducted by laboratories outside Russia was “consistent and fully compliant with the wording and spirit of the IOC’s decision” that the tests be reliable and adequate.

The International Weightlifting Federation took an entirely different approach, suspending all Russian weightlifting athletes from the Olympic Games. In *Russian Weightlifting Federation v. International Weightlifting Federation* (CAS OG 16/009) the



*ad hoc* Panel upheld the IWF’s decision based on the powers of the IWF Executive Board to “take such action as it deems fit to protect the reputation and integrity of the sport”.

The IOC’s individual athlete approach contrasted to the approach taken by the International Paralympic Committee (“IPC”). The IPC suspended the Russian Paralympic Committee’s (RPC) membership in the IPC “with immediate effect on the basis of its inability to fulfill its IPC membership responsibilities and obligations, in particular, its obligation to comply with the IPC Anti-Doping Code and the WADA Code”. As a consequence of this decision, the RPC lost its right to enter athletes into IPC sanctioned events, including the Paralympic Games.

The RPC challenged the assertion that it had failed to comply with its IPC membership obligations before CAS (*Russian Paralympic Committee v. International Paralympic Committee* 2016/A/4745). The Panel confirmed the decision of the governing Board of the IPC to suspend the RPC’s membership and dismissed the appeal. Following the dismissal, the IPC received 227 requests from individual Russian para-athletes asking the IPC to exercise its discretion to enter them as “neutral” athletes in the 2016 Paralympic Games. The IPC noted that as a result of the CAS decision, the RPC had no ability to enter athletes at the 2016 Paralympic Games and that the IPC would not exercise its discretion to enter the athletes as neutral athletes. 34 of the 227 athletes appealed the IPC’s decision. (*Margarita Goncharova et. al v. International Paralympic Committee* 2016/A/4770) The Panel concluded that it had no jurisdiction to hear and decide the appeals in the absence of any contractual basis to do so.

## **B. Pyeongchang 2018 Winter Games**

In November and December 2017, the Oswald Commission issued decisions finding a large number of Russian athletes had committed ADRVs through their participation in the state organized doping

scheme and declared those athletes ineligible to participate in future editions of the Games. 39 athletes appealed to CAS. In its February 1, 2018 Operative award, the Panel found that the IOC had not met its burden of establishing, to the Panel’s comfortable satisfaction, that the athletes had committed ADRV’s. (see, for example, *Ivan Skobrev v. IOC*, 2017/A/5502)

On December 5, 2017, acting on the Schmid Commission’s recommendations, the IOC suspended the Russian Olympic Committee and established a two-step process to determine which Russian athletes could compete as an “Olympic athlete from Russia”. That process eventually produced a list of 169 athletes.

32 Russian athletes who were not in the list of 169 invited athletes and whose appeals to CAS regarding ADRV findings had been upheld (at the time of the hearing, the reasons had not yet been issued) made a request to the IOC to be invited to participate at the Games. The IOC declined to invite the athletes, who then appealed to the CAS *ad hoc* Court. (*Victor Abn et. al. v IOC CAS OG 18/02* and *Legkov et. al v. IOC CAS OG 18/03*)

The *ad hoc* Panel held that the IOC process was an eligibility decision rather than a sanction. The Panel noted that participation in the Olympic Games is not a right: Rule 44.3 of the Olympic Charter expressly states that “nobody is entitled to any right of any kind to participate in the Olympic Games. Athletes who satisfied citizenship criteria were entitled to be nominated by their National Olympic Committee (“NOC”) to the IOC to participate in the Olympic Games. The ability of an athlete to participate in the Games is the sole purview of the IOC and governed by IOC Rules.

The Panel held that the process was designed to protect the rights of individual Russian athletes who were not implicated in state-sponsored doping by affording them a pathway to participation.

Effective April 1, 2018, the date of the *WADA Implementation of Standards for Code Compliance for Signatories*, WADA has the power to determine sanctions on any organization responsible for adopting, implementing or enforcing anti-doping rules within their authority, including National Anti-Doping Organization, National Federation, National Olympic or Paralympic Committee, for violations of the WADA Code. The Standard prescribes the obligations of the signatories as well as a range of potential consequences for non-compliance with the WADA Code, and the principles to be applied to determine any appropriate sanction. Those sanctions include the signatory's country being ruled ineligible to host an Olympic or Paralympic Games, World Championships or other international event and suspension of recognition by the Olympic movement. (Part Two, Section 11)

RUSADA has challenged WADA's Executive Committee's December 9, 2019 decision that it be declared non-compliant with the World Anti-Doping Code for a period of four years for manipulating doping data. WADA has imposed a number of sanctions, including banning Russian athletes from competing in a number of international events for the next four years, including the 2020 and 2022 Olympics and the 2022 World Cup and barring Russian individuals from sitting on boards and committees of international sport organizations. This case will be the first to be decided under the amended provisions.

## II. Eligibility of Clubs to Participate

### A. Eligibility of a club found to be involved in match fixing activities to participate in UEFA competition<sup>2</sup>

*Klubi Sportiv Skenderbeu v. UEFA*  
(2006/A/4650)

Klubi was an Albanian Football Club which attracted the attention of UEFA's Betting Fraud Detection System. That system identified more than 50 Klubi matches where the results were allegedly manipulated for betting purposes. After reviewing all of the evidence available to it, UEFA was "more than convinced" that match-fixing activities had taken place and declared the Club ineligible to participate. The Club appealed to CAS.

The Panel held that the UEFA Appeals Body decision was designed to protect UEFA's reputation and integrity and did not constitute a disciplinary decision.

UEFA identified four Club matches that occurred in 2015 in which unusual activity occurred, including inexplicable conduct of some players. UEFA relied on the UEFA Betting Fraud Detection System (BFDS) reports which were corroborated with video footage. The Panel noted that analytical information from BFDS was valuable, particularly if corroborated by further evidence, as it was in this case. There was evidence of suspicious activity by players, suspicions raised by an opponent following the match and the fact that a prominent Asian bookmaker removed the Club from live markets before the end of the game. The Panel found that the conclusion reached by the BFDS was fully justified.

According to UEFA Rules, there was no requirement to find the Club directly culpable in order for it to be declared ineligible to participate; the behaviour of one or more players causes the "indirect involvement" of a club. The Club was therefore at least indirectly involved in match-fixing activities and UEFA has proven its case to the Panel's comfortable satisfaction. The Panel upheld UEFA's decision to declare the club ineligible.

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<sup>2</sup> See also *Lao Toyota Football Club v. AFC*  
(2018/A/5500)

Phnom Penh Crown Football Club v. AFC  
(Asian Football Confederation) (2016/A/4642)

In an attempt to eradicate match manipulation, the AFC statutes were amended in 2010 to permit the AFC to refuse the admission of any club “*directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at a national or international level*”.

Phnom Penh, a Cambodian football team, obtained a recording which it believed implicated a number of coaches and players in manipulating matches in an effort to have the head coach dismissed. The club successfully persuaded the discipline committee to suspend the coaches, but the players were exonerated. The AFC refused to admit the club to participate in the AFC 2017 Cup on the basis of the above referenced rule.

The Football Federation of Cambodia appealed the decision, arguing that the Club was being sanctioned, in essence, for taking appropriate steps for the protection of the game.

The Panel held that the rule in question was not strictly a disciplinary provision as it did not involve a finding of a breach of any specific regulation. Therefore, it did not lead to the imposition of a sanction for a breach.

The Panel found that the actions of the coaches were not attributable to the Club, but rather, aimed at furthering their own interests in a corrupt manner – indeed, it was the Club which was the victim of the coaches’ activity. Consequently, they could not be found to be agents of the Club. The match-fixing was not as it is typically regarded, which is colluding with another team or gamblers, but it was certainly, nevertheless, designed to influence the outcome of matches. There was no evidence the officers or executives of the

club approved or even knew of the activity. There was no basis on which the club could be refused admission.

### III. Eligibility of Individuals to Participate in Elections<sup>3-4</sup>

Gordon Derrick V. FIFA (2016/A/4579)

Mr. Derrick, the President of the Caribbean Football Union, announced his candidacy for President of Confederation of North, Central America and Caribbean Association Football (“CONCACAF”). The President of CONCACAF also served *ex-officio* as a Vice-President of FIFA. Both the CONCACAF and FIFA positions required candidates for council to successfully pass eligibility checks. Although Derrick disclosed that he had been found guilty of an infringement of FIFA statutes and Code of Ethics by the FIFA ethics committee<sup>5</sup> and was currently under investigation for a possible violation of FIFA Code of Ethics in regards to alleged mismanagement of FIFA funds, CONCACAF found him eligible to stand for office. However, FIFA concluded that Derrick could not be admitted as a candidate to the office of Vice-President or any office on FIFA Council. Derrick challenged FIFA’s decision.

The Panel considered that FIFA’s decision demonstrated at least *prima facie* evidence of violations of serious provisions of FIFA’s Code of Ethics, and in particular, mismanagement of FIFA funds.

Relying on CAS decisions 205A/A/4311 and 2011/A/2426, the Panel stated:

“... *it is the Panel’s understanding that every person with significant duties in organizations related to sports should have an impeccable record*”. (para. 86)

The panel held that high-ranking officials of sport organizations must in all circumstances

<sup>3</sup> My thanks to Jean-Philippe Dubey, CAS Counsel for his assistance

<sup>4</sup> See also *Amr Mustafa Kamel El-Saeid v. EOC & Ahmad Abdu Khalil Baghdady & ESC* (2017/A/5475)

<sup>5</sup> in connection with the Mohammed Bin Hammam scandal (2011/A/2625)

appear as completely honest and beyond suspicion and

*“... Moreover, due to the recent events that happen in the past years with respect to football organizations, and in particular with FIFA, it has become necessary to increase and enhance the check and controls of the potential high officials that operate in these organizations”. (para 87)*

Panel agreed with FIFA’s decision that Derrick did not meet the necessary requirements to become Vice-President of FIFA. The Panel also found that because the Audit Committee’s task was not to decide whether a candidate had violated the Code of Ethics but to determine whether the candidate had an impeccable integrity record, the decision was an administrative, not a disciplinary one. As an administrative decision, the Panel concluded that the principles of proportionality and presumption of innocence should not be applied.

*Karim Ibrahim v. IAAF* (2018/A/5785)

Mr. Ibrahim, a former member of the IAAF Council, was found by an Independent Enquiry Committee (“IEC”) to have misappropriated allowances meant for athletes. The Committee also determined that Mr. Ibrahim was involved in inciting some athletes to evade anti-doping controls, and that he was aware that some athletes were taking performance enhancing substances. As a result of those findings, Mr. Ibrahim was banned from any role in the Federation for a period of six years.

The IAAF Constitution established a Vetting Panel to determine whether applicants for an IAAF Office were eligible. All applicants had to satisfy an “integrity check” conducted by the Vetting Panel. The vetting rules empowered the Panel to determine whether there was reason to believe the person was unable to meet the high standards of conduct and integrity required of an IAAF official. Those standards included, but were not limited to, whether the applicant was

considered to be of good character and reputation, taking into account whether the person was, or had been, the subject of an investigation or disciplinary action in any sporting context or whether the person’s credibility, integrity, honesty or reputation had been questioned or adversely affected.

When considering a run for IAAF office, Mr. Ibrahim completed a vetting disclosure form. The Vetting Panel ultimately found that Mr. Ibrahim was not eligible for office. In doing so, the Panel noted that its task was not to assess whether the IEC report was correct but whether Mr. Ibrahim met the *“high standards of conduct and integrity required of an IAAF Official”* and was of *“good character and reputation”*. The vetting panel noted that Mr. Ibrahim had been found to be deeply involved in the cover-up of doping control evasions, and that he had failed to disclose any of the circumstances in his vetting form.

The Vetting Panel found that Mr. Ibrahim had been the subject of a public controversy and that there was a serious likelihood of damage to the reputation of Athletics and/or the IAAF. The panel determined that Mr. Ibrahim had been involved in an investigation that resulted in *“extremely adverse factual findings”* being made against him and in which *“his credibility, integrity honesty and reputation were all deeply impinged”*. The vetting Panel also determined that Mr. Ibrahim was found to have lied to and misled the IEC, mismanaged funds and supported efforts to avoid doping detection. As a consequence, the Panel found that he did not meet the high standards of conduct and integrity required of an IAAF official.

Mr. Ibrahim challenged the IAAF Vetting Panel’s decision. The Sole Arbitrator found that the vetting rules, which were designed to ensure and protect the management and reputation of the IAAF, were not disciplinary in nature. He determined that the decision made under the vetting rules were based on Mr. Ibrahim’s current eligibility, and the fact that he had not been sanctioned for his past activities were due to jurisdictional and

procedural complications. The Sole Arbitrator found that the principle of non-retroactivity did not generally apply to eligibility schemes, since they were designed not to sanction people, but protect the reputation and integrity of the sporting organizations.

*Bernard Guidicelli v. ITF* (2018/A/5987)

Guidicelli, a French national, held a number of positions, including that of President, within the Federation Française de Tennis (“FFT”). In September 2015, he was elected to the Board of Directors of the International Tennis Federation (“ITF”).

In his capacity of a director of the FFT, Guidicelli became involved in efforts to eradicate the re-sale of preferential tickets for matches organized by the FFT. Guidicelli suspected that a former player named Gilles Moreton was involved in that scheme. Moreton stood as a candidate for the office of President of a regional tennis league. During a press conference, a newspaper reporter asked Guidicelli about Moreton’s candidacy. Guidicelli stated that he did not approve of it and referred to Moreton’s involvement in the ticket re-selling scheme. The statement was published in a newspaper, and Moreton brought proceedings alleging defamation. In September 2017, Guidicelli was found guilty of the criminal offence of public defamation. Guidicelli appealed, but withdrew his appeal after reaching a settlement with Moreton.

ITF became aware of Guidicelli’s conviction in March 2018. At that time, the ITF Constitution prohibited anyone who had been convicted of a criminal offence from being a member of the Board of Directors. The Constitution was amended in August 2018 to prohibit an individual from being a member of the Board if they had been convicted of a criminal offence where the offending conduct would constitute a criminal offence in the majority of the jurisdictions in which the sport was played, where the individual received a custodial

sentence, or in the opinion of an independent expert appointed by the Board, the conviction meant that the continued presence of the member on the Board would bring the ITF into disrepute.

The ITF President engaged an independent expert to provide an opinion as to whether Guidicelli’s conviction would bring the ITF into disrepute. The independent expert concluded that it would, and that Guidicelli would be ineligible for membership on the Board for 4 years from the date of conviction.

The ITF decided to remove Guidicelli from the Board (the “removal decision”) according to the provisions of the Constitution as they read in July 2018, and declared him ineligible for a Board position for four years from the date of conviction (the “ineligibility Decision”). Shortly after the decision was taken, Guidicelli “withdrew” from all his ITF responsibilities.

Guidicelli challenged both the removal decision and the ineligibility decision (the interpretation and application of both the original and amended provisions of the Constitution)

The decision involved principles of statutory interpretation. After reviewing the minutes of the Board meeting in which the wording of the Article in question were discussed, the sole arbitrator held that the wording of the Constitution, which provided that a conviction for any criminal offence, regardless of gravity, automatically disqualified a director from office. He found no basis to conclude that such a threshold was *per se* disproportionate, irrational or absurd. He found that Guidicelli’s position on the board was automatically vacated as of the date of conviction and confirmed the ITF’s “removal decision”.

The Arbitrator then considered the interpretation and application of the amended clause, which was adopted 11 months after Guidicelli’s conviction and

came into force 16 months after the conviction. The Arbitrator concluded that the amended clause did not apply to Guidicelli, since he was no longer a member of the Board when it came into effect. Given that the Clause referred only to the matter of removal from the Board and did not refer to the eligibility of an individual for nomination, appointment or election to the Board, the sole arbitrator found that the ITF Board had no legal basis to make the ineligibility decision.

The Sole Arbitrator concluded that it was possible that Guidicelli could be re-appointed or re-elected to the Board in the next election, at which time the ITF would need to consider afresh the application of the amended clause on Guidicelli's 2017 conviction.

#### **IV. Conclusion**

CAS jurisprudence suggests that if a sport governing organization has a robust constitution, including the power of the organization to take measures to protect the reputation and integrity of the sport, and the sport organization acts fairly and in good faith in taking steps to declare individuals, whether they are athletes, coaches or elected officials, ineligible to participate in the organization for reasons relating to the organization's goals, CAS will defer to the sport organization's decision. On the other hand, if the sport governing organization disciplines an individual for a specific breach of their obligations, the standard of proof is much higher and the odds of a successful challenge to that decision is much greater.

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## L'applicabilité de la Convention européenne des droits de l'homme aux arbitrages du TAS: réflexions sur le sens et la portée de l'arrêt de la Cour Européenne des Droits de l'Homme du 2 octobre 2018 *mutu et pechstein*

Gérald Simon\*

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- I. L'applicabilité directe des garanties de l'article 6.1 CEDH aux arbitrages du TAS
    - A. Des litiges à caractère civil
    - B. Nature privée de la justice arbitrale
    - C. La nature du consentement à l'arbitrage
  - II. Le TAS conforté dans son autorité juridictionnelle
    - A. Le TAS, un "vrai" tribunal indépendant et impartial
    - B. La soumission du TAS au principe de la publicité de la procédure judiciaire
  - III. La question de l'opposabilité de l'ensemble des droits garantis par la convention européenne aux arbitrages du TAS
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*"Justice must not only be done, it must also be seen to be done"*. Cet adage anglais, et que cite l'arrêt commenté<sup>1</sup>, paraît bien avoir servi de trame à la Cour européenne des droits de l'homme pour juger de l'affaire Mutu/Pechstein. C'est en effet du sentiment de la justice, et spécialement de celle rendue par le TAS, qu'il était ici question.

L'affaire avait pour origine des sanctions prises contre deux sportifs: l'un, Adrian Mutu, footballeur professionnel de nationalité roumaine, avait vu le contrat qui le liait au club de Chelsea rompu à la suite d'un contrôle antidopage positif à la cocaïne, le joueur étant par la suite condamné par la Chambre de résolution des litiges de la FIFA à indemniser le club à hauteur de...17,173,990 euros! L'autre, Claudia Pechstein, de nationalité allemande,

patineuse de vitesse 5 fois championne olympique, avait été suspendue pendant deux ans par la fédération internationale - l'International Skating Union (ISU) - pour fait de dopage à la suite de tests sanguins. Le TAS ayant confirmé ces sanctions, les recours formés par les deux sportifs devant le Tribunal Fédéral suisse furent également rejetés. En dernier ressort, ils saisirent la Cour européenne en alléguant que les sentences du TAS avaient été rendues en violation du droit au procès équitable tel qu'énoncé à l'article 6.1 de la Convention européenne des droits de l'homme<sup>2</sup>. Ils soutenaient notamment que le TAS ne présentait pas les caractères d'indépendance et d'impartialité requis par ladite disposition, Claudia Pechstein soulevant au surplus la violation du droit à une audience publique en raison du refus

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<sup>1</sup> Cour européenne des droits de l'homme, 2 oct. 2018, *Mutu & Pechstein c. Suisse*, n° 40575/10 et 67474/10, § 143, p. 44.

<sup>2</sup> Article 6.1 CEDH: "Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit

*être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice".*



opposé à sa demande de publicité de l'audience devant le TAS.

La validité des arbitrages du TAS étant contestée de cette manière, la Cour de Strasbourg était ainsi amenée à se prononcer, pour la première fois, sur l'applicabilité de la Convention européenne des droits de l'homme à cette catégorie de litiges ; en d'autres termes sur le fonctionnement de la justice arbitrale du sport, spécialement au regard des principes d'impartialité et d'indépendance.

Il ne fait plus de doute désormais que les garanties du droit au procès équitable énoncées à l'article 6.1 CEDH s'imposent aux formations du TAS, du moins lorsque le consentement à l'arbitrage apparaît comme forcé ou équivoque **(I)**. En même temps, l'arrêt de la Cour conforte le TAS dans sa mission arbitrale **(II)**. Malgré tout, la question demeure ouverte de savoir si, au-delà du droit au procès équitable, ce sont l'ensemble des droits, en particulier substantiels, garantis par la Convention qui sont également opposables **(III)**.

### **I. L'applicabilité directe des garanties de l'article 6.1 CEDH aux arbitrages du TAS**

L'examen au fond par la Cour des griefs des requérants fondés sur l'absence d'indépendance et d'impartialité du TAS et, s'agissant du recours de Mme Pechstein, de la violation du droit à une audience publique, imposait au préalable d'établir que de tels arbitrages remplissaient bien les conditions d'applicabilité de l'article 6.1 CEDH.

Pour que les recours puissent être déclarés recevables devant la Cour européenne des droits de l'homme, un double obstacle devait être levé tenant d'une part, au caractère du litige **(A)** et, d'autre part, à la nature privée de la justice arbitrale **(B)**. L'applicabilité directe de l'article 6.1 CEDH est en outre conditionnée par certaines caractéristiques dans lesquelles l'arbitrage est consenti **(C)**.

### **A. Des litiges à caractère civil**

Aux termes de l'article 6.1 CEDH, les litiges doivent porter sur des droits et obligations à caractère civil ou sur des décisions *en matière pénale*. Même si les sanctions disciplinaires et leur contentieux, comme c'était le cas dans cette affaire, peuvent s'apparenter à une sorte de coloration pénale, elles ne relèvent cependant pas de la matière pénale dans la mesure où elles émanent d'instances privées. En revanche, la jurisprudence de la Cour européenne considère que les droits et obligations présentent un caractère civil, au sens de l'article 6.1 CEDH, dès lors qu'est en question la situation privée d'une personne, notamment d'un point de vue patrimonial.

En l'espèce, l'atteinte au patrimoine du joueur Mutu ne faisait pas de doute, compte-tenu du montant de l'indemnité – plus de 17 millions d'euros – qu'il devait acquitter auprès du club. La suspension de deux ans à l'égard de la patineuse présentait également un caractère civil dans la mesure où, concernant une sportive professionnelle de renommée mondiale, la sanction mettait en jeu, ainsi que le souligne l'arrêt, le droit de pratiquer une profession<sup>3</sup>. C'est donc en se fondant sur les conséquences personnelles de la décision que la Cour, avec raison, déduit sa nature civile. On peut se demander si cette déduction ne vaut que pour les sportifs professionnels, revenant ainsi à exclure du bénéfice de l'article 6.1 CEDH les sportifs amateurs. A notre sens, une telle analyse serait trop restrictive: le déroulement d'une carrière sportive n'est certes pas réservé aux seuls professionnels et une sanction prise à l'égard d'amateurs est de nature à porter atteinte à leurs droits de sportifs, notamment si elle affecte leur participation à des compétitions importantes. Nous pensons donc que le caractère civil sera établi dès lors que la décision sera susceptible d'affecter la carrière du sportif indépendamment de son statut professionnel ou amateur.

<sup>3</sup> Cour européenne des droits de l'homme, 2 oct. 2018 précité, § 58, p.26.

## B. Nature privée de la justice arbitrale

L'obstacle le plus sérieux à l'applicabilité de l'article 6.1 CEDH était lié à ce que le TAS est juridiquement une entité émanant d'une fondation de droit privé, en l'occurrence le Conseil International de l'Arbitrage Sportif (CIAS).

Aux termes de la Convention européenne des droits de l'homme en effet, les recours devant la Cour sont ouverts aux particuliers contre les États parties à la Convention<sup>4</sup>, disposition longtemps interprétée comme réservant les recours contre les décisions des autorités et juridictions publiques des États et les excluant, par conséquent, contre celles rendues par les instances privées que sont les juridictions arbitrales. Cette interprétation essentiellement formaliste a été parfaitement formulée en 2003 par le professeur Gabrielle Kaufmann-Kohler qui s'exprimait ainsi: *under the classic concept of human rights the purpose of human rights is to protect the individual from the State, as the holder of public power. Human rights are not, from a classical perspective, intended to apply directly to private relations between individuals. It should be deducted from this view that human rights only apply to disciplinary proceedings carried out by sports governing bodies that act by virtue of a delegation of power from the State*<sup>5</sup>. C'est précisément sur cette interprétation que se sont fondées les formations du TAS et du Tribunal Fédéral pour exclure l'applicabilité de la Convention européenne, et spécialement son article 6.1, aux arbitrages du TAS. La sentence A. Diakite résume très clairement cette position: *“En ce qui concerne la Convention Européenne des Droits de l'Homme (CEDH), dont se prévaut expressément l'Appelant, la Formation arbitrale souligne également que, par principe, les droits fondamentaux et les garanties de procédure accordés par les traités internationaux de protection des droits de l'homme ne sont pas censés s'appliquer directement dans les rapports privés entre particuliers et donc ne sont pas applicables dans les*

*affaires disciplinaires jugées par des associations privées. Cette façon de voir est en harmonie avec la jurisprudence du Tribunal fédéral suisse, qui, dans le cadre d'un recours formé contre une décision du TAS, a précisé que “le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas applicables” (Arrêt du Tribunal fédéral du 11 juin 2001, Abel Xavier c. UEFA, consid. 2d, reproduit dans Bull. ASA 2001, p. 566; partiellement publié aux ATF 127 III 429)*<sup>6</sup>. Certes, l'inapplicabilité directe de la CEDH aux arbitrages était tempérée par l'applicabilité des garanties de l'ordre public procédural dont le non-respect est, aux termes de l'article 190.2, lett. e), susceptible d'entraîner l'annulation de la sentence en cas de recours devant le Tribunal Fédéral, comme le soulignait la même sentence Diakite: *“La Formation arbitrale est consciente du fait que certaines garanties procédurales découlant de l'article 6.1 CEDH (...) sont indirectement applicables même devant un tribunal arbitral, d'autant plus en matière disciplinaire. La Confédération suisse doit veiller à ce que (...) les juges s'assurent que les parties à l'arbitrage aient pu bénéficier d'une procédure équitable, menée dans un délai raisonnable par un tribunal indépendant et impartial”*<sup>7</sup>.

C'est cette position, même ainsi tempérée, qui est remise en cause par l'arrêt de la Cour qui énonce: *“Si les autorités d'un État contractant approuvent, formellement ou tacitement, les actes des particuliers violant dans le chef d'autres particuliers soumis à sa juridiction les droits garantis par la Convention, la responsabilité dudit État peut se trouver engagée au regard de la Convention”*<sup>8</sup>. Les arbitrages du TAS étant soumis au contrôle du Tribunal Fédéral, le refus de celui-ci d'en vérifier la validité au regard de l'article 6.1 est susceptible d'entraîner la responsabilité de la Suisse, en tant que partie à la Convention. La Cour, invalide ainsi la thèse de l'inapplicabilité de principe de la CEDH en raison de la nature privée de l'arbitrage.

<sup>4</sup> article 34 CEDH.

<sup>5</sup> Citée par CAS 2009/A /1957, 5 juil. 2010, FFN c. LEN, n° 16.

<sup>6</sup> TAS 2011/A/2433, 8 mars 2012, A. Diakite c. FIFA, n° 23.

<sup>7</sup> Ibid. n° 24.

<sup>8</sup> Cour européenne des droits de l'homme, 2 oct. 2018 précité, § 64 p. 27.

L'ouverture d'un recours possible contre une sentence du TAS devant la juridiction étatique qu'est le Tribunal Fédéral fonde de ce chef la compétence *ratione personae* de la Cour européenne et l'applicabilité de l'article 6.1 CEDH.

### **C. La nature du consentement à l'arbitrage**

On le sait, l'arbitrage est un contrat. Il suppose donc, comme tout contrat, que les parties aient donné leur consentement à l'arbitrage. En matière sportive, le consentement à l'arbitrage du TAS repose pour l'essentiel sur l'organisation pyramidale du sport: en adhérant aux statuts et règlements d'une fédération internationale qui elle-même a inséré une clause en faveur du TAS, les différents membres sont ainsi supposés avoir donné leur consentement à l'arbitrage. Cette insertion est généralement regardée comme constituant une clause d'arbitrage par référence couramment admise dans le droit du commerce international et parfaitement licite dès lors que le consentement est considéré comme "éclairé". Dans le système sportif, la manière dont le consentement à l'arbitrage est ainsi obtenu fait souvent question. Les contempteurs du système contestent qu'un tel mécanisme puisse valoir consentement, en particulier pour les athlètes obligés d'y adhérer sauf à renoncer à être engagés dans les compétitions sous l'égide de leur fédération. Autrement dit, le consentement à l'arbitrage ainsi obtenu ne serait ni libre, ni éclairé. Et c'est bien ce à quoi conclut la Cour: relevant que la patineuse n'avait d'autre choix, en vertu des statuts de l'ISU, que de consentir à l'arbitrage ou de renoncer à sa carrière, la Cour qualifie le consentement de forcé; de même, s'agissant du footballeur, bien que dans son cas le recours à l'arbitrage n'était pas obligatoire, la Cour juge son consentement "équivoque" du fait du rejet de sa demande de récusation d'un des arbitres. La conséquence que les juges de Strasbourg tirent de ce consentement forcé et/ou équivoque à l'arbitrage est essentiel: dans ce cas, l'arbitrage n'étant plus considéré comme

volontaire doit répondre aux exigences de l'article 6.1 CEDH, c'est-à-dire que les sentences doivent être rendues par un "*tribunal indépendant et impartial, établi par la loi*", au sens de la jurisprudence de la Cour européenne. Le droit au procès équitable, au sens de la Convention européenne devient ainsi directement applicable aux arbitrages du TAS dont le consentement est ainsi obtenu, ce qui vise quasiment la totalité des arbitrages d'appel, lesquels constituent eux-mêmes la grande majorité des sentences du TAS.

Il reste que, de cette manière, la Cour européenne avalise le système de la justice arbitrale en matière sportive, contrairement à la cour d'appel de Munich qui, saisie par Claudia Pechstein, avait jugé que le recours au TAS dans ces conditions était constitutif d'un abus. Sans doute, et contrairement à l'arbitrage volontaire qui peut valoir renonciation à l'exercice de droits garantis par l'article 6, notamment le droit d'accès à un tribunal et la publicité des débats, l'arbitrage forcé impose-t-il l'application de l'ensemble des droits garantis par cette disposition. Mais en même temps la Cour déclare que l'arbitrage forcé n'en demeure pas moins un arbitrage.

Une telle énonciation ne peut que renforcer la légitimité du TAS.

## **II. Le TAS conforté dans son autorité juridictionnelle**

Le rejet sur le fond des griefs visant le manque d'indépendance et d'impartialité ont certainement eu pour effet d'asseoir davantage l'autorité du TAS comme juridiction suprême du système sportif **(A)** même s'il a dû conformer certains aspects de la procédure aux exigences de l'article 6.1 CEDH **(B)**.

### **A. Le TAS, un "vrai" tribunal indépendant et impartial**

Pour répondre sur le fond aux garanties de l'article 6, le TAS devait apparaître comme un "vrai" tribunal, au sens de la Convention

européenne, c'est-à-dire, sur le plan institutionnel, être un tribunal établi par la loi et au fonctionnement obéissant aux principes d'indépendance et d'impartialité.

En premier lieu, pour considérer que le TAS est un "tribunal", la Cour se fonde sur une acception purement matérielle de la notion de juridiction. Soulignant qu'un tribunal, au sens de l'article 6, "*ne doit pas être nécessairement une juridiction de type classique, intégrée aux structures judiciaires ordinaires mais est caractérisé au sens matériel, par son rôle juridictionnel ; trancher, sur la base de normes de droit, avec plénitude de juridiction et à l'issue d'une procédure organisée, toute question relevant de sa compétence*", autant d'attributs qui caractérisent effectivement les procédures devant le TAS. Ensuite, la Cour souligne, dans des développements qui pourraient s'apparenter à une sorte d'*obiter dictum*, le rôle majeur de l'arbitrage du sport particulièrement adapté aux réalités et aux spécificités du monde sportif. L'arrêt énonce ainsi: "*En ce qui concerne le cas spécifique de l'arbitrage sportif, il y a un intérêt certain à ce que les différends qui naissent dans le cadre du sport professionnel, notamment ceux qui comportent une dimension internationale, puissent être soumis à une juridiction spécialisée qui soit à même de statuer de manière rapide et économique (...). Le recours à un tribunal arbitral international unique et spécialisé facilite une certaine uniformité procédurale et renforce la sécurité juridique. Cela est d'autant plus vrai lorsque les sentences peuvent faire l'objet d'un recours devant la juridiction suprême d'un seul pays, en l'occurrence le Tribunal Fédéral suisse, qui statue par voie définitive*"<sup>9</sup>.

On a le sentiment qu'aux yeux de la Cour, le TAS, par sa place et sa fonction, est un des piliers de ce qui ressemble à un "état de droit du sport"! Comme les sentences peuvent faire l'objet d'un recours devant le Tribunal Fédéral pour des motifs énumérés par la Loi fédérale sur le Droit International Privé (LDIP), tout cela permet à la Cour de conclure que "*par le jeu combiné de la LDIP et de la jurisprudence du Tribunal Fédéral, le TAS a les*

*apparences d'un tribunal établi par la loi au sens de l'article 6.1 CEDH*"<sup>11</sup>.

Il fallait en second lieu que la Cour examine si le TAS était véritablement un tribunal indépendant et impartial au sens de l'article 6.1 CEDH, appréciation toujours délicate car elle repose sur une démarche à la fois subjective (prise en compte de la conviction personnelle et du comportement de tel ou tel arbitre) et objective (composition du tribunal, mode de désignation de ses membres durée du mandat, etc.). Si les requérants contestaient tous deux l'indépendance et l'impartialité du TAS, ils ne le faisaient pas sur le même plan: Adrian Mutu mettait en cause l'impartialité subjective de deux des arbitres de la formation du TAS l'ayant jugé tandis que Claudia Pechstein soutenait que le TAS n'était ni indépendant ni impartial en raison de sa structure même, laquelle favorisait les fédérations sportives au détriment d'une représentation équilibrée des intérêts des athlètes, en particulier eu égard au fait que le TAS était financé par les fédérations sportives, que la composition de la liste des arbitres élaborée par le CIAS surreprésentait lesdites fédérations et que la sentence était soumise avant son prononcé au secrétaire général du TAS, lui-même nommé par le CIAS, qui avait la possibilité d'attirer l'attention de la formation sur des questions de principe. Ainsi selon la patineuse c'est par son organisation même que le TAS n'apparaissait objectivement ni indépendant ni impartial.

Ces griefs furent rejetés, à l'unanimité des 7 membres composant la Cour pour le cas Mutu, celui-ci n'ayant pas apporté la preuve suffisante de ses allégations à la soi-disant partialité des arbitres dans leur comportement, mais seulement à la majorité pour le cas Pechstein, 2 juges ayant considéré, de manière dissidente et en accord avec les allégations de la patineuse, que le TAS ne satisfaisait pas dans sa structure les exigences d'indépendance et d'impartialité. La majorité de la Cour, tout en reconnaissant la réalité du

<sup>9</sup> Cour européenne des droits de l'homme, 2 oct. 2018 précité, § 139 p. 43.

<sup>10</sup> Ibid., § 98 p. 34.

<sup>11</sup> Ibid., § 149 p. 45.

poids des fédérations sportives sur la composition du TAS ne l'a pas pour autant jugé suffisant à établir la preuve de l'absence d'indépendance et d'impartialité. L'arrêt énonce ainsi: *“Si la Cour est prête à reconnaître que les organisations susceptibles de s'opposer aux athlètes dans le cadre des litiges portés devant le TAS exerçaient une réelle influence dans le mécanisme de nomination des arbitres en vigueur à l'époque des faits, elle ne peut pas conclure que, du seul fait de cette influence, la liste des arbitres était composée, ne serait-ce qu'en majorité, d'arbitres ne pouvant pas passer pour indépendants et impartiaux, à titre individuel, objectivement ou subjectivement, vis-à-vis de ces organisations”*<sup>12</sup>. La Cour aboutit donc à la conclusion suivante: *“le TAS, lorsqu'il fonctionne comme instance d'appel extérieure aux fédérations internationales, s'apparente à une autorité judiciaire indépendante des parties”*<sup>13</sup>.

Il convient de reconnaître que le raisonnement de la majorité de la Cour n'a pas davantage convaincu les commentateurs de l'arrêt<sup>14</sup> que les deux juges dissidents. Même si l'analyse de la majorité peut prêter à discussion et qu'il est sans conteste que, surtout à l'époque, le poids des fédérations internationales et du CIO dans la composition de la liste des arbitres était déterminant, il nous semble en revanche réducteur de considérer le monde du sport en deux camps opposés qui seraient celui des organisations sportives et celui des athlètes. C'est oublier que devant le TAS, les litiges peuvent opposer les fédérations internationales ou le CIO non seulement aux athlètes mais aussi aux clubs, voire aux fédérations nationales. L'influence dans la composition de la liste des arbitres ne saurait donc se mesurer à la soi-disant existence d'une bipolarité constitutive d'intérêts opposés. Bien souvent des athlètes, opposés à leur fédération nationale sont défendus par la fédération internationale au nom de l'intérêt général du sport !

<sup>12</sup> Ibid. § 157 p. 47.

<sup>13</sup> Ibid. § 157 p. 47.

<sup>14</sup> Parmi eux, le professeur Mathieu Maisonneuve note ainsi: *“Exiger que des considérations structurelles prouvent un manque d'indépendance et d'impartialité personnelles des juges est un non-sens s'agissant du droit à un*

Il reste que la Cour ayant rejeté le 4 février 2019<sup>15</sup> la demande de Mme Pechstein de saisir la Grande Chambre, l'arrêt du 2 octobre 2018 est définitif, confirmant ainsi l'indépendance et l'impartialité structurelles du TAS.

## **B. La soumission du TAS au principe de la publicité de la procédure judiciaire**

La Cour a été en revanche unanime pour considérer que le rejet par le TAS confirmée par le Tribunal fédéral de la demande par Mme Pechstein d'une audience publique viole directement les dispositions de l'article 6 qui énoncent que *“le jugement doit être rendu publiquement”*. L'arrêt de la Cour rappelle en effet que la publicité des audiences, qui est un principe fondamental, *“par la transparence qu'elle donne à l'administration de la justice aide à atteindre le but de l'article 6.1: le procès équitable, dont la garantie compte parmi les principes fondamentaux de toute société démocratique”*<sup>16</sup>. La Cour souligne cependant que des dérogations au principe sont possibles en vertu de ladite disposition conventionnelle, au vu des particularités de la cause. L'accès peut être interdit au public pour des motifs de moralité, de protection de l'ordre public, ou de celle des mineurs ou de la vie privée.

Dans le cas Pechstein, la Cour ayant jugé que les conditions pour déroger au principe de publicité n'étaient pas remplies, le refus de tenir une audience publique a été constitutif d'une violation de l'article 6, entraînant de ce chef la condamnation de la Suisse.

Le code de procédure du TAS a été révisé en ce sens. Le nouvel article R 57 du code dispose désormais que *“lors de l'audience, les débats ont lieu à huis clos, sauf accord contraire des parties. A la demande d'une personne physique partie à la procédure, une audience publique devrait être*

*tribunal indépendant”* (“Le TAS et le droit au procès équitable”, RTDH 2019, n° 119, p. 699).

<sup>15</sup> V. communiqué de presse du TAS du 5 févr. 2019.

<sup>16</sup> Cour européenne des droits de l'homme, 2 oct. 2018 précité, § 175 p. 50.

*accordée si l'affaire en question est de nature disciplinaire. Une telle demande peut toutefois être refusée dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, lorsque la publicité serait de nature à porter atteinte aux intérêts de la justice, lorsque la procédure ne porte que sur des questions de droit ou lorsqu'une audience publique a déjà eu lieu en première instance”.*

La mise en conformité du TAS à l'article 6.1 CEDH ne s'est pas fait attendre!

### **III. La question de l'opposabilité de l'ensemble des droits garantis par la convention européenne aux arbitrages du TAS**

En vérité, si l'arrêt Mutu/Pechstein est perçu simplement comme imposant l'application directe du droit au procès équitable aux arbitrages du TAS présentant un caractère forcé il ne devrait pas entraîner des modifications majeurs dans le fonctionnement de l'arbitrage si ce n'est, comme il vient d'être dit, l'obligation de la publicité des audiences.

En effet si, théoriquement l'arbitrage volontaire peut valoir renonciation à l'application de tout ou partie des droits garantis par l'article 6, il ne saurait signifier vouloir être l'objet d'une sentence qui ne serait pas rendue par une formation arbitrale indépendante et impartiale: d'une part, parce qu'en ce cas il y aurait violation du code de l'arbitrage en matière sportive qui impose le respect de l'indépendance et de l'impartialité et d'autre part, parce qu'il y aurait violation de l'ordre public procédural suisse, tel qu'interprété par le Tribunal fédéral pouvant entraîner de ce fait l'annulation de la sentence en cas de recours devant ledit Tribunal.

Comme l'écrivait Antonio Rigozzi dans sa thèse sur l'arbitrage en matière sportive publiée en 2005 *“la question n'est pas tellement de savoir si la CEDH s'applique directement ou indirectement à l'arbitrage, mais plutôt celle de savoir à quelles garanties procédurales on peut valablement renoncer en concluant une convention d'arbitrage, et à quelles conditions”*<sup>17</sup>. Nous sommes désormais fixés sur ce plan.

La question demeure en revanche de savoir si l'ensemble des droits garantis par la Convention, en particulier les droits substantiels sont opposables aux procédures arbitrales. Nul doute en effet que nombre de ces droits garantis sont concernés par l'organisation et le fonctionnement du système sportif: qu'il s'agisse de l'interdiction du travail forcé, visé à l'article 3, du droit au respect de la vie privée et familiale garanti par l'article 8, de la liberté de pensée, de conscience et de religion énoncée à l'article 9, de la liberté d'expression (article 10) ou encore de la liberté de réunion et d'association (article 11), nombreux sont les droits et libertés qui sont l'objet de restrictions pour les sportifs et dont le non-respect est sanctionné disciplinairement<sup>18</sup>.

Précisément, par un arrêt du 18 janvier 2018, la Cour avait examiné le bien fondé, notamment au regard de l'article 8 CEDH relatif au respect de la vie privée et familiale, de l'obligation de localisation des athlètes relevant d'un groupe cible tel que transcrit dans le code du sport français en application du code mondial antidopage, considérant que l'atteinte à ces droits poursuivaient des buts légitimes<sup>19</sup>. Ce faisant, la Cour avec raison effectuait un contrôle au fond d'une disposition législative française en matière sportive.

Il est donc tentant de penser que l'applicabilité directe de la Convention européenne aux arbitrages du TAS ainsi

<sup>17</sup> A. Rigozzi, *L'arbitrage international en matière de sport*, Helbing & Lichtenhahn, 2005, n° 908, p. 473.

<sup>18</sup> V. notamment l'étude de M. Maisonneuve, *Le TAS et les droits fondamentaux des athlètes*, RDLF 2017, chron. n°9.

<sup>19</sup> Cour européenne des droits de l'homme, 18 janv. 2018, *FNASS et a. c. France*, n° 481581/11 et 77769/13.

énoncée dans l'arrêt du 2 octobre 2018 doit s'étendre au-delà de l'article 6.1 CEDH et viser la Convention dans son ensemble dans la mesure où la Suisse a adhéré à cet ensemble. Telle est en tout cas l'opinion du professeur Maisonneuve qui écrit à propos de l'arrêt du 2 octobre: *“Le raisonnement suivi par la Cour pourrait inciter les arbitres et le Tribunal fédéral à formellement appliquer la CEDH, notamment concernant les droits substantiels qu'elle consacre”*<sup>20</sup>.

Le Tribunal fédéral ne semble cependant pas disposé à faire un tel pas. Dans l'ordonnance rendue le 29 juillet 2019, donc

postérieurement à l'arrêt de la Cour européenne, dans le cadre de l'affaire Caster Semenya, la juge fédérale rappelle que *“dans plusieurs arrêts, le Tribunal fédéral a considéré que la Convention européenne des droits de l'homme ne s'applique pas directement à l'arbitrage. En effet, la violation des dispositions de cette convention ne compte pas au nombre des griefs limitativement énumérés par l'article 190 al. 2 LDIP”*<sup>21</sup>.

La voie semble ouverte à d'autres recours devant la Cour européenne des droits de l'homme !

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<sup>20</sup> M. Maisonneuve, *Le TAS et le droit au procès équitable*, précité, RTDH 2019, n° 119, p. 695.

<sup>21</sup> Trib. Féd., ord. 29 juil. 2019, 4A\_248/2019.