Arbitration in Switzerland

The Practitioner's Guide

EXCERPT

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Chapter 15
The CAS Procedural Rules

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Part I: Introduction to the CAS Code[1]

I HISTORY, STRUCTURE AND FUNCTIONING OF THE CAS

On the eve of the 1980 Winter Olympic Games in Lake Placid, the International Olympic Committee (IOC) was sued before the US courts in relation to a conflict regarding the flag under which the Taiwanese athletes were going to compete. This premiere in Olympic history led the IOC to envisage the creation of a specialized arbitral tribunal, which would have jurisdiction to hear sports disputes and could render awards having the same binding force as the decisions of state courts. Around the same time, athletes in various countries began to challenge their doping suspensions before the national courts. The damages claimed were so high that, had they been awarded, they could have meant the bankruptcy of the sports-governing bodies which had issued the challenged decisions. It is against this background that the statutes creating the Court of Arbitration for Sport (CAS) were ratified, in 1983.[2] The CAS's *primary aim was to avoid the intervention of State courts*, by resolving sports disputes through a specialized tribunal within the family of sport. **1**

Today, sports arbitration is a seemingly ever-growing industry,[3] and the CAS as an institution has become known worldwide, in particular because of the highly visible activity of its Ad Hoc Divisions at the Olympic Games[4] and its rulings in several important cases involving top athletes or clubs. Under the supervision of the Swiss Federal Supreme Court, the CAS has evolved, over the years, in both its structure and functioning. It now truly stands, on a global level, as *the most effective forum to protect athletes' rights*. **2**

Indeed, in its well-known *Lazutina* decision of 2003 the Swiss Supreme Court defined the CAS as "*one of the main pillars of organized sport"* and emphasized the fact that there is *"no viable alternative to this institution, which can resolve international sports-related disputes expeditiously and inexpensively*".[5] In the same decision, the Court described the history, structure and basic functioning of the CAS as follows: "*The CAS was officially created on 30 June 1984, when its Statute came into force. Its function was to resolve sports-related disputes and its headquarters were established in Lausanne. An independent arbitral institution without legal personality, it was originally composed of 60 members, 15 appointed by the [International Olympic Committee] IOC, 15 by the [International Federations] IFs, 15 by the [National Olympic* **3**

1 The authors would like to acknowledge the invaluable contributions of William McAuliffe and Brianna Quinn, senior associates, and Juliette Platania, paralegal (all of *Lévy Kaufmann-Kohler*), Lauren Pagé, Charlotte Perret, Fanny Hostettler and Eléonore Gallopin (all previously with *Lévy Kaufmann-Kohler*), and Barbara Abegg (previously with *TIMES Attorneys*) and Simone Huser, associate (of *TIMES Attorneys*).

2 The CAS became operational when its statutes entered into force, in June 1984. Cf., e.g., M'Baye, *Une nouvelle institution d'arbitrage, le Tribunal Arbitral du Sport*, Annuaire Français de Droit International, 1984, pp. 409–424; Reeb, The Court of Arbitration for Sport: History and Operation, *CAS Digest III*, pp. xxvii-xxxv; Rigozzi, paras. 230–250.

3 Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, *Valparaiso University Law Review 2001*, pp. 357–359.

4 For a comprehensive analysis of the Ad Hoc Division's work, see Kaufmann-Kohler, *Arbitration at the Olympics*, The Hague, Kluwer Law International, 2001.

5 BGE 129 III 445 para. 3.3.3.3; *Yearbook Comm. Arbitration XXIX (2004)*, p. 207.

Committees] NOCs and 15 by the IOC President. The operating costs of the CAS were borne by the IOC, which was entitled to modify the CAS Statute. In a judgment issued in 1993, the Federal Supreme Court expressed reservations concerning the CAS' independence vis-à-vis the IOC on account of the organizational and financial links between the two bodies. It thought that the CAS needed to become more independent of the IOC. This judgment led to a major reform of the CAS. The main developments were the creation of the International Council of Arbitration for Sport (ICAS) in Paris on 22 June 1994 and the drafting of the Code of Sports-related Arbitration (hereinafter the Code), which entered into force on 22 November 1994. A private-law foundation subject to Swiss law (Art. 80 et seq. CC), the ICAS, whose seat is established in Lausanne (Art. S1 of the Code), is composed of 20 members, namely high-level jurists appointed in the following manner (Art. S4 of the Code): four members by the Summer Olympic IFs (3) and Winter Olympic IFs (1), chosen from within or from outside their membership; four members by the Association of the NOCs (ANOC), chosen from within or from outside its membership, four members by the IOC, chosen from within or from outside its membership, four members by the twelve members listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; four members by the sixteen members listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS. The members of the ICAS are appointed for a renewable period of four years. Upon their appointment, they must sign a formal declaration of their independence (Art. S5 of the Code). The ICAS members may not appear on the list of arbitrators of the CAS nor act as counsel to one of the parties in proceedings before the CAS; under certain circumstances, they must spontaneously disqualify themselves or [they] may be challenged (Art. S5 and S11 of the Code). According to Art. 3 of the Agreement related to the constitution of the ICAS, the foundation is funded through deductions made by the IOC from the sums allocated to the following bodies as part of the IOC's revenue from the television rights for the Olympic Games: 4/12 by the IOC, 3/12 by the Summer Olympic IFs, 1/12 by the Winter Olympic IFs and 4/12 by the ANOC. The tasks of the ICAS include to safeguard the independence of the CAS and the rights of the parties (Art. S2 of the Code). Its various functions include adopting and amending the Code, managing and financing the CAS, drawing up the list of CAS arbitrators who may be chosen by the parties, deciding on the challenge and removal of arbitrators and appointing the Secretary General of the CAS (Art. S6 of the Code). The CAS sets in operation panels which have the task of resolving disputes arising within the field of sport. It is composed of two divisions, each headed by a president who takes charge of the first arbitration operations before the panel of arbitrators is appointed: the Ordinary Arbitration Division and the Appeals Arbitration Division (Art. S12 of the Code). The former deals with cases submitted to the CAS as the sole instance (execution of contracts, civil liability, etc.), while the latter hears appeals against final-instance disciplinary decisions taken by sports bodies such as federations (e.g., suspension of an athlete for doping, violence on the field of play or abuse of a referee). The CAS has at least 150 arbitrators, who are not assigned to one particular division (Art. S13 and S18 of the Code). The ICAS draws up the list of arbitrators, which is updated and published (Art. S15 of the Code). It calls upon personalities with legal training and who possess recognized competence with regard to sport, while respecting the following distribution (Art. S14 of the Code) and ensuring, wherever possible, fair representation of the different continents (Art. S16 of the Code): one-fifth are selected from among the persons proposed by the IOC, the IFs and the NOCs respectively, chosen from within its/their membership or from outside;

one-fifth are chosen from among persons independent of these bodies; and, finally, one-fifth are chosen after appropriate consultations with a view to safeguarding the interests of the athletes. Only the arbitrators included on the list – they appear on the list for a renewable period of four years (Art. S13 of the Code) – may serve on panels (Art. R33, R38 and R39 of the Code). When they are appointed to a panel, they must sign a formal declaration of their independence (Art. S18 of the Code). Incidentally, arbitrators must immediately disclose any circumstances likely to affect their independence with respect to any of the parties (Art. R33 of the Code). They may be challenged if the circumstances give rise to legitimate doubts over their independence. Challenges, which are in the exclusive power of the ICAS, must be brought immediately after the ground for the challenge has become known (Art. R34 of the Code). If three arbitrators are to be appointed, in the absence of an agreement, each party appoints one arbitrator, one in the request and the other in the response, and the President of the panel is selected by the two arbitrators or, if they do not agree, by the President of the Division (Art. R40.2 of the Code). Any arbitrator selected by the parties or by other arbitrators is only deemed appointed after confirmation by the President of the Division. Once the panel is formed, the file is transferred to the arbitrators for them to investigate the case and render their award. In 1996, the ICAS created two permanent decentralized offices in Australia and the United States of America. In the same year, a specific new institution was established: the CAS ad hoc division. This is a temporary arbitral body, created by the ICAS under the terms of Art. S6(8) of the Code for certain major sports events such as the Olympic Games, Commonwealth Games and European Football Championships. For each ad hoc division, the ICAS appoints a team of arbitrators which is usually based at the site of the event concerned so that it can meet at any time during a fixed period. Special arbitration rules make provision for a simplified procedure for the formation of panels and the settlement of disputes [the Ad Hoc Rules]. In principle, decisions must be made within twenty-four hours of the application being filed. Having originally comprised 60 members, the CAS now has around 200 arbitrators. According to its Secretary General, all Olympic IFs have recognized its jurisdiction, which indicates that, over the years, it has become an indispensable institution in the world of sport".[6] Since this decision was rendered, the number of CAS arbitrators has grown to about 350,[7] Ad Hoc Divisions have been constituted also for other events, such as the FIFA World Cups and the CAS Statutes have been amended and adjusted, in particular as to the way in which the CAS list of arbitrators is compiled. This notwithstanding, some elements remain which cause some discomfort and still provide the basis for allegations of so-called 'institutional bias' on the part of the CAS. In the meantime, the highest German civil court, the *Deutsche Bundesgerichtshof (BGH)*, has concluded in the *Pechstein* case that the CAS is a genuine *("echtes")* court of arbitration within the meaning of the German code of civil procedure and not just a federation's adjudicative body.[8] In particular, the BGH expressly stated that the CAS is an independent and neutral authority *("unabhängige und neutrale Instanz")*.[9] This is the first time that a highest civil court of a country other than Switzerland has

6 BGE 129 III 445 para. 3.3.1; *Yearbook Comm. Arbitration XXIX (2004)*, p. 214.

7 < http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html > ; cf. also Coates, Message of the ICAS President, *CAS Bull. 2012/1*, p. 1 referring to a list of almost 300 arbitrators.

8 BGH decision of 7 June 2016 – KZR 6/15, para. 23: *"Der CAS ist ein ‚echtes' Schiedsgericht im Sinne der Zivilprozessordnung und nicht lediglich ein Verbandsgericht"*.

9 BGH of 7 June 2016 – KZR 6/15, para. 24 *et seq*. Pechstein announced that she had appealed against this decision to the Federal Constitutional Court (*Bundesverfassungsgericht*).

confirmed CAS' capacity as a true arbitration court, fulfilling the applicable legal requirements that correspond to high, internationally recognized standards.

II THE CAS'S STRUCTURAL INDEPENDENCE

4 In *Lazutina*, the Swiss Federal Supreme Court had already held that the CAS constitutes a 'true' arbitral tribunal, which "*is sufficiently independent vis-à-vis the International Olympic Committee (IOC), as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered as true awards, equivalent to the judgments of State courts*".[10] Despite this clear ruling, the so-called 'structural independence' of the CAS has been and is still questioned on various grounds including (A.) the fact that the parties are not completely free to choose 'their' arbitrator, as they are required to appoint an individual from the list of CAS arbitrators, but also because of the ways in which (B.) the list of arbitrators is compiled and (C.) the CAS is financed.[11] That said some progress has been made, and more may come; the CAS's history shows that it is a constantly growing and evolving institution, capable of adapting to the needs and expectations of its constituencies (D.).

A The Closed List of Arbitrators

5 One of the main features of CAS arbitration is that only the individuals listed on the 'CAS list of arbitrators' can be appointed to act as arbitrators (see Arts. R38, R39 and R48 of the Code). *The list is mandatory*:[12] if a party appoints an arbitrator who is not on the list, the CAS will fix a new time limit to rectify the appointment or will appoint an arbitrator in lieu of the non-compliant party.[13]

6 The 'CAS list of arbitrators' is available on the internet and now contains almost 400 names from all continents and legal backgrounds.[14] The Swiss Federal Supreme Court has held that the list is *sufficiently long to ensure that the parties have a proper choice* among different names for prospective arbitrators, even taking into account the nationality, language and sports practiced by the appellants (all factors which, according to the Supreme Court should in any event be duly "*put into perspective*").[15] In practice, the main problem with this closed list is that it allows sports-governing bodies to justify the recurrent appointment of arbitrators, in particular in areas of law requiring specialization, such as doping disputes. However, this is an issue that can and should be dealt with in the context of challenge proceedings under the Code.[16]

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10 BGE 129 III 445; *Yearbook Comm. Arbitration XXIX (2004)*, p. 225.

11 For a critical review, cf. Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 Loy. U. Chic. L.J. 2005, pp. 1205–1274; available at < https://pdfs.semanticscholar.org/c4d0/3710015e087fd77a240f6419ece3a31985f6.pdf > .

12 Mavromati/Reeb, para. 6 at R40.

13 Cf. CAS 2011/O/2574, *UEFA v. Olympique des Alpes – FC Sion*, Decision by the Deputy President of CAS Ordinary Arbitration Division of 14 October 2011.

14 See < http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html > . There is a separate list with almost 100 names, from which parties are required to select arbitrators in football disputes for cases involving FIFA, also available on the CAS website, at < http://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html > .

15 BGE 129 III 445 para. 3.3.3.2.

16 Cf. Art. R33, paras. 3 *et seq*.

From a structural point of view, the issue is whether the *limitation of the parties' freedom to appoint their own arbitrator is acceptable*. According to the Swiss Supreme Court, it is justified by *the need to guarantee the celerity of the proceedings and consistency in the case law*.[17] While it is undeniable that these are admirable and worthwhile objectives, they could possibly be served even better by opening up the list of arbitrators and, in parallel, creating a list of presidents who would not only possess "*full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language*", but also have no connection whatsoever with the sports establishment.[18] This suggestion has been endorsed in recent works by commentators,[19] and is increasingly accepted as the inevitable solution by some of the most prominent CAS arbitrators.[20] 7

B The Way in Which the CAS List of Arbitrators is Compiled

Under the present rules (closed list of arbitrators), the crucial question remains how the list is actually compiled. Indeed, the *Swiss Supreme Court's case law requires that none of the parties should have an overriding influence* on the composition of the list of arbitrators. This was precisely the reason why, in *Gundel*, the Court stated that as the list of arbitrators was compiled exclusively by the IOC, the CAS would not have qualified as a true arbitral tribunal in a dispute involving the IOC.[21] Hence, one of the main aims of the 1994 reform was to reduce the CAS's dependence from the IOC. 8

As a consequence of that reform, from 1994 onwards, *the list is compiled by the ICAS*, from among persons proposed according to the following criteria: one fifth of the arbitrators appearing on the list is designated upon proposal by the IOC, two fifths upon proposal by the international federations and national Olympic committees, and the last two fifths are chosen among persons who are independent from the bodies having proposed the other names, in order to safeguard the interests of the athletes. In 2012, Art. S14 of the Code was modified to replace the above-mentioned criteria by a sentence opening up the base from which the proposed names for the list will be drawn. Thus, as from 1 January 2012, the ICAS was to compile the CAS List of arbitrators by "*call[ing] upon personalities […] whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs*". The amendment seemed to respond to the mounting criticism regarding what some have referred to as the 'institutional bias' of the CAS. While this was clearly a step in the right direction, *the interests of other important stakeholders, in particular athletes and clubs, were still not sufficiently considered by this solution*. In the course of the 2016 revision of the Code, a further step in the right direction was made by another amendment to Art. S14 which now reads, in relevant part, as follows: (italics by the authors): "including by the IOC, the IFs, and the NOCs and *by the athletes' commissions of the IOC, IFs and NOCs".* An additional desirable measure to increase transparency in this respect would be that the short CVs of CAS 9

17 BGE 129 III 445 para. 3.3.3.2.
18 Rigozzi, para. 575.
19 Cf. Maisonneuve, para. 256.
20 Cf. Martens, *The Role of the Arbitrator in CAS Proceedings*, document distributed during the 2011 Seminar for CAS Arbitrators in Montreux, on file with the authors.
21 BGE 119 II 271 para. 3b.

arbitrators that are posted on the CAS website also indicate by which stakeholder they were proposed for inclusion in the list. The same suggestion was made by the Swiss Supreme Court, already in the *Lazutina* decision,[22] but has never been implemented despite promises to do so by the late president of the CAS.[23]

10 What the 2012, 2013, 2016 and 2017 revisions did *not* change are the modalities of appointment of the ICAS members, which are often perceived as a further element compounding the CAS's 'institutional bias' problem. Art. S4 of the Code still provides that the ICAS is composed of twenty members, all of whom are directly or indirectly appointed by the Olympic sports-governing bodies, with no influence from the clubs and athletes. *From a structural point of view, the sports-governing bodies can still exercise a preponderant influence on the CAS* through the ICAS. Indeed, the ICAS is not only in charge of compiling the CAS lists of arbitrators, but will also decide any challenge that an athlete or a club could bring, for instance, on the ground that an arbitrator (originally selected by the ICAS to be included in the list) does not appear to be sufficiently independent from the sports-governing body that appointed him (from the list compiled by ICAS) in a given case.[24] A similar *structural imbalance* exists as far as the appointment of panel presidents is concerned. Indeed, in all disputes concerning decisions taken by sports-governing bodies, the President of the panel is directly appointed by the President of the CAS Appeals Division,[25] who is a member of the ICAS. These issues form part of the questions currently submitted to the European Court of Human Rights' scrutiny in the *Pechstein* case.[26] While the existing residual imbalance should not constitute a sufficient reason to question the structural independence of the CAS, the actions currently pending before the Strasbourg Court might encourage the ICAS to go the extra mile in adjusting the Code so as to definitively eliminate the grounds for such concerns. After all, while endorsing the current CAS system, the Swiss Supreme Court's *Lazutina* decision expressly noted that the *CAS was still "perfectible" as an institution*.[27] Ten years and several Code revisions after this statement, nothing substantial has been changed to the very feature of the CAS that prompted the Lausanne judges to add this caveat in their otherwise generously supportive opinion.

C The Financing of the CAS

11 The CAS system is *partially financed by the filing fees and arbitration costs paid by the parties*,[28] *with the remaining, substantial, part being financed by the sports-governing bodies* (the IOC (1/3), the National Olympic Committees (NOCs) and International Federations (IFs) (2/3)).[29] In *Lazutina*, the Swiss Supreme Court

22 BGE 129 III 445 para. 3.3.3.2.

23 M'Baye, as per the press release published by the CAS on the day the *Lazutina* award was issued (cf. Rigozzi, p. 296).

24 Cf. Art. R34.

25 Cf. Art. R54(2).

26 *Pechstein v. Switzerland*, Application number 67474/10, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117166. The applicant essentially alleges a violation of Art. 6 § 1 (right to a fair hearing) and Art. 6 § 2 (presumption of innocence) of the Convention.

27 BGE 129 III 445, para. 3.3.3.3.

28 Cf. Art. R64.1.

29 According to Art. 3 of the 1994 Paris Agreement establishing the ICAS, the financing of this foundation, which is drawn from the royalties received by the IOC for the television broadcasting rights relating to the Olympic Games, is provided by the IOC (4/12), by the Olympic

convincingly explained that recourse to financing by the sports governing bodies was the inevitable consequence of the fact that athletes have to bear no or only moderate costs for CAS proceedings, but also, more generally, that there was no correlation between the financing of an arbitral institution and the structural independence of the latter when one of the entities financing the system is a party to an arbitration. In the words of the Court, *"[t]his is illustrated, for example, by the fact that State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the ground that they are financially linked to the State"*.[30] Any fair analysis of the CAS's financing should not overlook the fact that the system is also financed to a significant extent *by the CAS arbitrators themselves*, who accept to act in that capacity for a fee that, for many among them, is significantly lower than those they could charge in standard commercial arbitration proceedings or in their usual law practice.

D Outlook

12 The successive amendments made to the CAS Code have progressively reduced the CAS's institutional links with the sports-governing bodies. Promisingly, the ICAS President indicated some time ago that consultations had been conducted by ICAS with *"[a]ll major stakeholders and users of CAS"*, which would be *"very likely to lead to further amendments to the Code"*.[31] It is submitted that when such *consultations will be open to all users/stakeholders and conducted in a transparent way, the CAS's actual and/or perceived problem of 'institutional bias' will be definitively eliminated*. In any event, it would be overly simplistic to assess the independence of the CAS only in abstract terms. As noted by the Swiss Supreme Court in *Lazutina*, the CAS has shown by the actions of its arbitrators that it was not a 'vassal' court, passively submitted to the will of the sports establishment.[32] This is a crucial aspect, and it should be emphasized, particularly in light of the challenges currently pending before the Strasbourg Court. The obvious fact that the system can be improved[33] does not mean that it is not sufficiently independent to qualify as a genuine arbitral system as now also confirmed by the German *Bundesgerichtshof* in the Pechstein case.[34]

International Federations for the summer sports (3/12) and for winter sports (1/12), as well as by the Association of National Olympic Committees (4/12).

30 BGE 129 III 445 para. 3.3.3.2. Moreover, as pragmatically noted by the Swiss Supreme Court, "*on a more general level, it is also hard to imagine that any other possible structure could ensure the financial autarchy of the CAS […]"*. The remaining criticisms in this respect fail to address these aspects and the suggested alternative financing schemes are, it is submitted, simply unrealistic (cf., e.g., Prof. Zen-Ruffinen's proposal to have the CAS financed out of the Swiss Federal Budget, as reported in *Le Temps* of 18 December 2011).

31 Cf. Coates, Message of the ICAS President, *CAS Bulletin 2011/2*, p. 2.

32 BGE 129 III 445 para. 3.3.3.3; *Yearbook Comm. Arbitration XXIX (2004)*, p. 207.

33 Cf. para. 10 above, footnote 23.

34 Cf. para. 3 above.

III MAIN FEATURES OF CAS ARBITRATION

A Which Procedure for What Kind of Disputes?

13 According to Art. S1 of the Code, the CAS's main purpose is to "*resolve sports-related disputes through arbitration […]*". CAS panels will hear *only disputes relating to sports*.[35] In practice, disputes submitted to the CAS can be divided into two categories: (i) commercial and contractual disputes (e.g. sponsoring, image rights or employment contracts), and (ii) disputes relating to decisions rendered by sports organizations, in particular disciplinary disputes.

14 Commercial sports disputes are assigned[36] to panels of the *Ordinary Arbitral Division*. They are decided pursuant to the General Provisions of the Procedural Rules in the CAS Code (Arts. R27 to R37), and to the Special Provisions Applicable to the Ordinary Arbitration Procedure (Arts. R38 to R46 of the Code; hereinafter, the "*[CAS] ordinary procedure*"). In substance, the CAS ordinary procedure does not differ from that stipulated in other standard commercial arbitration rules, and is characterized by a great deal of procedural autonomy for the parties.[37] In principle, both the proceedings and the award are confidential.[38]

15 Disputes concerning decisions by sports-governing organizations are assigned to panels in the *Appeals Arbitration Division*. Such cases are decided pursuant to the General Provisions of the CAS Code (Art. R27 to R37) and to the Special Provisions Applicable to the Appeals Arbitration Procedure (Arts. R47 to R59 of the Code; hereinafter, the "*[CAS] appeals procedure*"). These provisions limit party autonomy in various ways, including by setting a series of time limits for each step of the proceedings, e.g. for filing a statement of appeal and the for the appointment of arbitrators.[39] The final award – which as a rule is not confidential – must be delivered within three months after transfer of the file to the panel.[40]

16 This latter feature of the appeals procedure can be explained by the fact that it was originally reserved for *disciplinary disputes*, in which the award must be delivered quickly. The archetypal disciplinary disputes are those related to *doping*. The World Anti-Doping Code (WADA Code), which is mandatory for all federations that are members of the Olympic Movement, provides that the CAS has jurisdiction to hear all doping disputes involving athletes competing at an international level.[41]

17 The other main type of disputes that is most commonly resolved in CAS under the appeals procedure are appeals from *decisions issued by FIFA*, the world governing body for football, which has its own internal judicial system, in particular *under the FIFA Regulations on the Status and Transfer of Players*. Disputes within the ambit of these regulations typically arise from the termination of the employment contracts

35 Cf. Art. R27, paras. 19–20 below.
36 Cf. Art. S20.
37 For an overview, cf., e.g., Kaufmann-Kohler/Bärtsch.
38 Cf. Art. R43, para. 7 below.
39 Cf. Arts. R48, R49 and R53.
40 Cf. Art. R59(5).
41 Cf. Art. 13 WADA Code. In Switzerland, the jurisdiction of the CAS has been extended to disputes involving athletes competing at a national level (Art. 13.2.1 of the Statutes relating to doping of Swiss Olympic, available in French and German at: < http://www.antidoping.ch/en/glossary/swiss-olympic-doping-statute >).

of players or coaches, or the transfer of players between clubs. As a consequence of such transfers, remuneration is generally payable to the player's previous club(s), either pursuant to contractual agreements between the parties or according to the complex series of regulations that apply to football transfers, both in a national and international context.[42]

B The *Lex Arbitri*

Pursuant to Art. R28 *ab initio* of the CAS Code, "*[t]he seat of the CAS and of each Arbitration Panel ('Panel') is in Lausanne, Switzerland*".[43] The same applies to the panels of the CAS Ad Hoc Division(s), e.g., for the Olympic Games (cf. Art. 7 of the Ad Hoc Rules). This means that all *CAS arbitration proceedings are governed by Swiss arbitration law*, which is widely regarded as being 'arbitration friendly'. It also means that actions to set aside against awards rendered by the CAS can only be filed with the Swiss Federal Supreme Court, which ensures that there is procedural consistency between all CAS cases. 18

Chapter 12 of the PILS applies in all CAS cases where at least one party has its domicile or habitual residence outside Switzerland (international arbitration), provided the parties have not excluded its application and agreed to the application of part 3 of the ZPO (governing domestic arbitration);[44] if none of the parties has its domicile or habitual residence outside Switzerland, *part 3 of the ZPO* will apply.[45] That said, an opting-out provision was enacted in the ZPO to avoid the inevitable unequal treatment due to the application of two different legal regimes governing arbitration in cases that are virtually identical but for the domiciles or places of habitual residence of the parties involved.[46] To our knowledge, however, sports-governing bodies have not (yet) varied their regulations to take advantage of this opportunity. 19

C Parties' Representation

As explicitly acknowledged by the Swiss Supreme Court, it is a consequence of the small world of international arbitration that individuals often find themselves working alongside each other in different cases.[47] In particular, the fact that an arbitrator in one CAS arbitration was at the same time sitting in another CAS panel together with counsel to one of the parties to the first arbitration did not, in itself, suffice to question his impartiality.[48] It was therefore all the more remarkable that shortly after the Supreme Court rendered the decision just referred to, the ICAS issued a circular to the attention of CAS arbitrators recommending that they renounce acting as a counsel 20

42 Cf., e.g., Haas, *Football Disputes between Players and Clubs before the CAS*, in: Bernasconi/Rigozzi (eds), Football Disputes, Doping and CAS Arbitration, Bern: Editions Weblaw, 2009, pp. 215–246, and Fumagalli, *Disputes between Clubs before the CAS*, in: Bernasconi/Rigozzi (eds), Football Disputes, Doping and CAS Arbitration, Bern: Editions Weblaw, 2009, pp. 251–269.

43 Cf. Art. R28, para. 2 below.

44 Cf. Orelli, above commentary on Art. 176 PILS (Chapter 2), paras. 21–32.

45 Cf. Art. 353(1) ZPO – provided the parties have not agreed to exclude the applicability of the ZPO and agreed that the provisions of Chapter 12 PILS shall apply instead (so-called *opting out*; Art. 353(2) ZPO).

46 Cf. Art. 353(2) ZPO. Rigozzi/Hochuli, *Die Internationalität der Schiedsgerichtsbarkeit in Sportstreitigkeiten*, *Jusletter of 27 November 2006*, paras. 24–25.

47 BGE 129 III 445 para. 3.3.3.

48 BGer. 4P.105/2006 para. 4.

before the CAS in order to avoid creating an appearance of imbalance between the parties appearing before a CAS panel.[49] With the 2010 revision of the Code, a new Art. S18(3) has been adopted. According to this provision, "*CAS arbitrators and mediators may [no longer] act as counsel for a party before the CAS*". Contrary to the recommendations expressed in the earlier circular, which were not necessarily taken too seriously by all CAS arbitrators at the time, the new Art. S18(3) is binding.[50]

21 That said, *the rule targets only the arbitrator himself, not the other members of his law firm*.[51] As a result, law firms with lawyers who are on the list of CAS arbitrators may still benefit from advantages such as having access to unpublished CAS case law and other non-public data and information.[52] In the event an arbitrator were to breach his or her duties under Art. S18, the ICAS has the power to sanction such conduct, including by a temporary or permanent suspension.[53]

22 Notwithstanding this provision, it remains unclear whether a CAS arbitrator who also acts as counsel in CAS proceedings can be challenged on this ground.[54] In the light of the above-mentioned jurisprudence of the Swiss Supreme Court, this *may not constitute a ground for disqualification* for lack of independence or impartiality within the meaning of Art. 33 of the Code.[55] Therefore, it would seem that Art. S18(3) is more aimed at preserving the credibility and image of the CAS as an institution, than at actual avoiding conflicts of interest.[56]

IV THE CAS CODE

23 The CAS Code, or more precisely the "*Code of Sports-related Arbitration and Mediation Rules*", consists of several different sets of rules, namely The Statutes of the Bodies Working for the Settlement of Sports-related Disputes; the CAS Procedural Rules; the CAS Mediation Rules and the Arbitration Rules for the Olympic Games. These rules are all *published on the CAS website*.[57] They are also customarily issued in the form of a small green booklet in both the working languages of the CAS, French and English.[58] The CAS Code was *amended in 1994, 2004, 2010, 2011, 2012, 2013, 2016 and 2017*. Clearly, the trend in recent years appears to be towards more frequent revisions. While this is not problematic in itself, the nature of the changes made and the manner in which they are decided may give rise to some concerns. In particular, it is difficult to avoid having the impression that the process is somewhat piecemeal and reactive (consisting of incremental adjustments to take into account,

49 Rigozzi, *Jusletter of 13 September 2010*, para. 8.
50 Rigozzi, *Jusletter of 13 September 2010*, para. 9.
51 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 93; Reeb, *CAS Bull. 2010/1*, p. 32; Rigozzi, *Jusletter of 13 September 2010*, para. 9.
52 Critical on this Rigozzi, *Jusletter of 13 September 2010*, para. 9.
53 Art. S19(2).
54 Rigozzi, *Jusletter of 13 September 2010*, para. 11.
55 BGer. 4P.105/2006 para. 4.
56 Rigozzi, *Jusletter of 13 September 2010*, para. 11.
57 See <http://www.tas-cas.org> under the clickable terms "ICAS", "Arbitration" and "Mediation".
58 Cf. Art. R29, para. 7 below. However, no such "hard copy" version was made available for the 2012 and 2016 amendments.

for instance, recent jurisprudential developments), rather than being implemented as a systematic review.[59]

The "*Statutes of the Bodies Working for the Settlement of Sports-related Disputes*" (Arts. S1-S26 of the Code) govern the organization of ICAS and the CAS. Arts. R27-R70 are the CAS's "*Procedural Rules*" properly speaking: they lay down the rules governing CAS arbitration procedures, whether they are conducted as ordinary or as appeals proceedings. The "*Arbitration Rules for the Olympic Games*" are specific arbitration rules applying to disputes arising during the Olympic Games.[60] Finally, in 1999, the CAS has adopted a set of *Mediation Rules*, which were revised and amended in 2013 and 2016.[61] **24**

The CAS Statutes, Arbitration and Mediation Rules are complemented by several "*Appendixes*".[62] Appendix I contains standard clauses recommended by the CAS to those who wish to include a reference to arbitration/mediation by the CAS. **25**

The wording of these *standard clauses* for submission to the CAS ordinary arbitration procedure is as follows: **26**

> *Arbitration clause to be inserted in a contract*
>
> "Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of sports-related arbitration."
>
> Optional explanatory phrases
>
> "The Panel will consist of one [or three] arbitrator(s)."
>
> "The language of the arbitration will be […]"
>
> *Arbitration agreement concluded after the dispute has arisen*
>
> [Brief description of the dispute]
>
> The dispute will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and settled definitively in accordance with the Code of sports-related arbitration.
>
> Alternative 1
>
> The Panel set in operation by the Court of Arbitration for Sport will consist of a sole arbitrator designated by the President of the CAS Division concerned.

59 Critical also Noth/Abegg, Neuerungen im CAS-Code 2013, *Causa Sport 2013*, pp. 112, 117.

60 As explained on the CAS website, "*since 1996* [at the Atlanta Olympic Games], *ad hoc divisions have been created for each edition of the Olympic Summer and Winter Games. Ad hoc divisions were also set up for the Commonwealth Games since 1998, for the UEFA European Championship since 2000 and for the FIFA World Cup in 2006*". At the very latest since the Olypmpic Summer Games 2012, the names of the members of the Olympic CAS Ad Hoc Division are published by the CAS in advance (see e.g. regarding the Summer Games 2016: <http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Rio_2016_ad_hoc.pdf>).

61 Cf., e.g., Blackshaw, *Sport, Mediation and Arbitration*, The Hague: T.M.C. Asser Press, 2009, pp. 46–69.

62 Appendixes I to IV.

Alternative 2

The Panel set in operation by the Court of Arbitration for Sport will consist of three arbitrators. Each party designates the following arbitrator :

Claimant: Mr/Mrs [insert the name of a person included on the list of CAS arbitrators (see Annex I)];

Defendant: Mr/Mrs [insert the name of a person included on the list of CAS arbitrators (see Annex I)];

These two arbitrators will designate the President of the Panel within 30 days following the signature of this agreement. If no agreement is reached within this time limit, the President of the Division concerned will designate the President of the Panel."

27 *With regard to the appeals procedure*, the following alternative wordings are recommended, depending on the circumstances:

1. Arbitration clause to be inserted within the statutes of a sports federation, association or other sports body

"Any decision made by [insert the name of the disciplinary tribunal or similar court of the sports federation, association or sports body which constitutes the highest internal tribunal] may be submitted exclusively by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of sports-related arbitration. The time limit for appeal is twenty-one days after the reception of the decision concerning the appeal."

2. Acceptance of the arbitration clause by athletes

It is important that athletes expressly accept in writing this clause of the statutes. They may do so either by means of a general written declaration applicable to all future disputes between them and the sports federation, association or other sports body (see section a below), or by a written declaration limited to a specific sports event (see section b below).

a. Standard general declaration

"I the undersigned […] accept the statutes of [name of the federation], in particular the provision which foresees the exclusive competence of the Court of Arbitration for Sport."

b. Declaration limited to an event

"Within the framework of my participation in [name of the event], I the undersigned […] accept that any decision made by the highest internal tribunal in relation to this event may be the object of appeal arbitration proceedings pursuant to the Code of sports-related arbitration of the Court of Arbitration for Sport in Lausanne, Switzerland. I accept the competence of the CAS, excluding all recourse to ordinary courts."

Note: The validity of the clause excluding recourse to ordinary courts is not recognized by all national legal systems.

> Federations and organizers are recommended to check the validity of this clause within their own legal system.

Appendix II, setting out the CAS "*Schedule of Arbitration Costs*" is also of great practical importance.[63] This appendix contains rules regarding the CAS Court Office fee, the institution's administrative costs and the arbitrators' and ad hoc clerks' costs and fees. **28**

V CONCLUDING REMARKS

Since its creation more than thirty years ago, the Lausanne-based Court of Arbitration for Sport has experienced significant changes, not only in its structure and organization, but also in terms of the volume and nature of the workload it handles.[64] The CAS's arbitration rules, commented in the following pages, enable the CAS and its panels to fulfill their day-to-day mission of resolving the disputes brought before them, whilst giving life to this unique institution, at the pinnacle of the world-wide dispute-settlement system for sports. To our knowledge, our commentary in the first edition of this Practitioner's Guide of 2013 was the first article-by-article commentary to be published on the CAS rules: in it, we attempted to provide *a first systematic discussion of the workings and specificities of CAS arbitration, in particular from the point of view of its users*. In the meantime a second article-by-article commentary on the CAS rules was published[65] and no doubt that further commentaries and further new editions like this one will appear, reflecting the growing attention devoted to the CAS by both academics and practitioners. Hopefully, this closer scrutiny of the CAS's rules, practice and procedures will help bring about the reforms needed to reaffirm its legitimacy and consolidate its status as the 'supreme court of world sport'.[66] **29**

63 Cf. also Arts. R64 and R65 below.

64 Cf. the statistics of the CAS since its inception, available at < http://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016.pdf > .

65 Mavromati Despina/Reeb Matthieu, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, 2015 Kluwer Law International BV, The Netherlands.

66 BGE 129 III 445 para. 3.3.3.3.

Part II: Commentary on the CAS Procedural Rules

A. General Provisions (Arts. R27 – R37)

Article R27: Application of the Rules

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.

I PURPOSE OF THE PROVISION

Article R27 defines what rules apply if the parties agree to submit a dispute to the CAS. Furthermore, the provision specifies the requirements in order for the CAS to be competent and, consequently, the jurisdiction of the CAS to apply.[1] Finally, this provision indicates the two types of proceedings under the CAS Code: ordinary arbitration proceedings and appeal arbitration proceedings.[2] 1

II CONTENT OF THE PROVISION

A Applicability of the CAS Code

According to Art. R27(1), first sentence, the procedural rules contemplated in Arts. R27-R70 (the CAS Code) apply in all cases in which the parties have agreed to refer their sports-related disputes to the CAS.[3] This provision clarifies that arbitration proceedings at the CAS cannot be conducted under procedural rules other than those of the CAS Code. Nevertheless, special ad-hoc rules apply in case of ad-hoc arbitration proceedings at the Olympic Games, i.e., the "Arbitration Rules for the Olympic Games", which have been specifically drafted for the Olympics.[4] 2

1 CAS 2002/O/422, *Besiktas v. FIFA & SC Freiburg*, Award of 10 March 2003, para. 4.
2 See also Art. S12(3). The consultation proceedings (advisory opinion) have been discontinued in the course of the 2012 revision of the CAS Code effective as of 1 January 2012.
3 Confirmed by CAS jurisprudence, e.g., CAS 2008/A/1644, *M. v. Chelsea Football Club Ltd.*, Award of 31 July 2009, para. 10.
4 Cf. Reeb, pp. 177–186.

3 The CAS Code is amended or supplemented from time to time.[5] As a consequence, the question may arise as to which version should govern a given arbitration case before the CAS. If the arbitration agreement does not answer this question, the version in force at the time of the initiation of the arbitration proceedings shall be applicable, because, most often, the parties agree on the relevant institution in recognition of its reputation as an arbitral institution and not because of the specific provisions of its rules at the time of the conclusion of the arbitration agreement.[6] This means that the current rules, i.e., amended as of 1 January 2017, apply in principle to all procedures initiated by the CAS on or after 1 January 2017, even if another version of the CAS Code was in force at the time the arbitration agreement was concluded.[7]

4 The CAS Code may also apply independently of whether or not the CAS is competent to decide the dispute. For example, the parties may agree on an ad-hoc tribunal applying the CAS Code. If, however, the parties have agreed to the competence of the CAS, the latter will always apply the CAS Code. The question may arise whether or not the parties are entitled to deviate from, or substitute some of the provisions of the CAS Code. This is, in principle, admissible wherever the CAS Code (specifically) provides for the respective autonomy of the parties (e.g. time limits, Art. R49). In all other instances, one will have to differentiate between mandatory and non-mandatory provisions. Mandatory provisions are rules of the CAS Code on which "the arbitration system itself is built".[8] Accordingly, the CAS has a legitimate interest in upholding them without any changes.[9] Examples of such "mandatory" rules are the number of arbitrators assigned to an individual case, the "closed" list of CAS arbitrators who may be appointed to a case, the seat of the arbitral tribunal, the provision on costs of CAS proceedings, the scrutiny of the CAS award by the Secretary General (R59(2)), or the official languages of the CAS. The parties cannot opt out of such provisions and at the same time submit the dispute to the CAS. If the parties wish to deviate from such (mandatory) rules they must resort to ad-hoc arbitration instead. It may be difficult in an individual case to establish whether or not a specific provision of the CAS Code is mandatory. In essence, those provisions of the CAS Code are to be considered as mandatory that pertain to the "well-functioning" of the CAS as an arbitral institution. To state an example, the CAS has held that the "prohibition" of counterclaims in appeal arbitration proceedings is mandatory and that the parties cannot deviate from it.[10]

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5 The CAS Code has been subject to seven revisions in recent years, i.e. the 2017 revision effective as of 1 January 2017, the 2016 revision effective as of 1 January 2016, the 2013 revision effective as of 1 March 2013, the 2012 revision effective as of 1 January 2012, the 2011 revision effective as of 1 January 2011, the 2010 revision effective as of 1 January 2010, and the 2004 revision effective as of 22 November 2004. For an overview on the 2013 revision, see Noth/Abegg, Neuerungen im CAS-Code 2013, Causa Sport 2013, pp. 112–117; Rigozzi/Hasler/Quinn, The 2011, 2012 and 2013 Revisions to the Code of Sports-Related Arbitration, *jusletter 3 June 2013*; on the 2012 revision see, e.g., Reeb, *CAS Bull 2012/1*, pp. 30–37; Kraehe, *SPuRt 2012*, p. 17. For an overview on the 2010 revision see, e.g., Rigozzi, *Jusletter 13 September 2010* or Reeb, *CAS Bull. 2010/1*, pp. 30–33.

6 BGer. 4P_253/2003 para. 5.4.

7 Cf. also Art. R67, first sentence. The procedures which are pending on 1 January 2017 remain subject to the rules in force before 1 January 2017, unless both parties request the application of the amended rules, cf. Art. R67, second sentence.

8 Beloff/Netzle/Haas, in Lewis/Taylor, para. E3.65.

9 CAS 2012/A/2943, *Bulgarian Chess Federation v. FIDE*, Award of 8 April 2013, para. 8.38.

10 CAS 2012/A/3031 *Katusha Management SA v. UCI*, Award of 15 February 2013, (referring to TAS 2010/A/2101), paras. 75–82.

In case the parties have modified, or deviated from, a mandatory provision of the CAS Code, the question arises what consequences follow therefrom. According to Swiss legal doctrine, where the parties deviate from the fundamental rules of an arbitral institution, such modified rules, if agreed-upon, shall not be considered null and void. However, the arbitral tribunal may nonetheless refuse to administer proceedings if the applicable procedural rules substantially deviate from the rules of the relevant institution.[11] In case of doubt, thus, the parties will preferably stick to the mandatory provisions of the CAS Code rather than having their case not administered and dealt with by the CAS. Where the agreement of the parties does not touch upon any mandatory provision of the CAS Code, questions of this kind need not be considered.[12] 5

The parties' autonomy to deviate from the CAS Code may not only be restricted by mandatory provisions of the CAS Code, but also by mandatory provisions or principles of international law (in particular Art. 6 ECHR) and/or by Art. 182(3) PILS and Art. 373(4) ZPO. Agreements on procedural issues, – existing, for instance, in the rules and regulations of a sport federation – thus, must not violate the principle of equal treatment, the principle of fair proceedings, the right to be heard or the principle of access to justice. This may require that a CAS Panel review the procedural agreement of the parties, in particular in cases of unequal bargaining power.[13] On this basis, rules derogating from the CAS Code by (a) imposing an extremely short deadline of appeal or (b) a unilateral requirement for a member to reveal third-party funding when bringing proceedings against an association; or by (c) requiring security for costs from every member bringing an appeal against a federation, regardless of their financial situation; or (d) providing for unequal rights to claim costs in proceedings may be declared null and void, depending on the manner in which they were drafted and on whether or not there are good reasons of administration of justice to justify such rules.[14] Furthermore, it should be noted that the formal requirements for an arbitration agreement to be valid are not applicable to procedural agreements. 6

In case the CAS Code contains a lacuna or remains silent on a specific issue, Swiss procedural law (ZPO) does not apply by default (unless the parties have agreed otherwise).[15] Instead, the procedure is to be determined by the Panel sitting in the matter at hand (Art. 182(2) PILS). In exercising its discretion how to fill the procedural lacuna, the Panel may look at principles of Swiss procedural law as a source of inspiration.[16] However, caution should be exercised when applying principles of Swiss civil procedure. This concerns, inter alia, the requirement for a party to have a "legal interest" ("Rechtsschutzinteresse", "intérêt légitime") when asking for declaratory relief.[17] The respective threshold in Swiss civil procedure is particularly 7

11 Kaufmann-Kohler/Rigozzi, paras. 6.53 et seq.
12 CAS 2012/A/2943, *Bulgarian Chess Federation v. FIDE*, Award of 8 April 2013, para. 8.39.
13 Beloff/Netzle/Haas, in Lewis/Taylor, para. E3.66.
14 CAS 2012/A/2943, *Bulgarian Chess Federation v. FIDE*, Award of 8 April 2013, paras. 8.44–8.55; CAS 2008/A/1782, *Volandri v. ITF*, Award of 30 March 2009, para. 70; CAS 2012/A/3031, *Katusha Management SA v. UCI*, Award of 15 February 2013, para. 68.
15 Beloff/Netzle/Haas, in Lewis/Taylor, para. E3.61.
16 CAS 2009/A/1879, *Alejandro Valverde Belmonte v. CONI et al.*, Award of 16 March 2010, para. 135.
17 The legal interest – according to recent jurisprudence by the Swiss Federal Supreme Court – is a matter of procedure governed by the *lex fori*, BGer 5A_88/2011, para. 4.

high,[18] first and foremost due to public interests, i.e., to restrict the case load for the courts. This is clearly evidenced by the fact that the courts examine this (procedural) condition *sua sponte*. However, it is obvious that such aspects of public interest are of little concern in an arbitration proceeding and that, in general, conditions provided for in civil procedure cannot always be applied mutatis mutandis to arbitration.[19]

B Jurisdiction of the CAS

1 The Power of CAS Panels to Decide on Their Jurisdiction

8 According to Art. 186(1) PILS and Art. 359 ZPO, arbitral tribunals have the power to decide on their own jurisdiction (so called *competence-competence*). This principle belongs to the mandatory rules of the Swiss *lex arbitri*,[20] and may be considered an internationally recognized standard.[21] Since the 2012 revision of the CAS Code, effective as from 1 January 2012, it has been enshrined in Arts. R39 and R55 of the CAS Code. However, this principle was already expressly recognized by CAS jurisprudence before this revision.[22] The Panel may decide on its jurisdiction in an interlocutory decision (Art. 186(3) PILS or Art. 359(1) ZPO) or in the final award.[23]

9 Pursuant to Art. R27(1), the CAS may affirm its jurisdiction provided there is a valid arbitration agreement referring the sports-related dispute to the CAS. The arbitration agreement is valid[24] if (i) the parties have agreed on the essential elements (*essentialia negotii*), (ii) the formal requirements regarding the agreement are met, (iii) the subject-matter of the dispute can effectively be submitted to arbitration (objective arbitrability),[25] and (iv) the parties had the capacity to enter into a binding arbitration agreement (subjective arbitrability[26]).[27] The main effect of a valid arbitration agreement is to exclude the jurisdiction of State courts in favor of dispute

18 For a comparative analysis of the (very strict) Swiss jurisprudence with reference to Art. 88 CCP, see Haas, in FS Gottwald, 2014, pp. 215 et seq.

19 Cf. Girsberger/Voser, *2016*, para. 1194.

20 Kaufmann-Kohler/Rigozzi, paras. 5.09 *seq*; Mavromati/Reeb, Art. R27, para. 23 et seq.; Poudret/Besson, para. 462; Berger/Kellerhals, para. 670.

21 Berger/Kellerhals, paras. 664 and 666.

22 E.g., CAS 2009/A/1910, *Telecom Egypt Club v. EFA*, Award of 9 September 2010, para. 2; CAS 2005/A/952, *Cole v. FALP*, Award of 24 January 2006, para. 3; CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 6.

23 Beloff/Netzle/Haas, in Lewis/Taylor, para. E3.50.

24 The validity of the arbitration agreement must be examined separately from the validity of the main contract (principle of separability), cf. Art. 178(3) PILS and Art. 357(2) ZPO stating that the validity of an arbitration agreement may not be challenged on the grounds that the main contract between the parties is not valid.

25 Cf. Art. 177(1) PILS and Art. 354 ZPO. According to Art. 177(1) PILS all pecuniary claims are arbitrable. In general, the pecuniary nature of a claim is interpreted rather liberally (including disciplinary matters, BGer 4P.172/2006, para. 3.2), Girsberger/Voser, *2016*, para. 1924. It is common ground among legal scholars that the rules on arbitrability belong to the mandatory rules of the applicable *lex arbitri*, cf. Berger/Kellerhals, paras. 208 et seq.; as all CAS arbitrations have their seat in Switzerland, arbitrability is exclusively governed by the Swiss *lex arbitri*. For details regarding objective arbitrability see Rigozzi, *ASA Bull. 2003*, pp. 501–537.

26 This requirement is of particular importance with regard to athletes who are under age.

27 Regarding these requirements cf. Kohler-Kaufmann/Rigozzi, para. 5.01; Berger/Kellerhals, paras. 344 et seq.; Girsberger/Voser, *2016*, paras. 274 *et seq*.

resolution before an arbitral tribunal.[28] The examination of the Panel concerning its jurisdiction is not restricted by the "theory of double relevancy".[29] The Swiss Federal Supreme Court has explicitly stated that this theory, which limits a court's scope of review, is not applicable in the context of arbitration.[30]

2 Essentialia Negotii *of an Arbitration Agreement*

In an agreement establishing the jurisdiction of the CAS the parties need to express a mutual assent to submitting any disputes between them to the CAS.[31] Thus, the essential elements (*essentialia negotii*) of such an agreement are the following:[32] (i) It has to unambiguously mention that the parties wish their disputes to be settled by arbitration, and (ii) it has to define the scope of the disputes to be submitted to arbitration, either by specifying the disputes or by generally referring any dispute in connection with a particular relationship to arbitration. Furthermore, the arbitration agreement has to refer to the CAS as the competent court.[33] Whether the above conditions are fulfilled must be established according to the conflict of law provision in Art. 178(2) PILS, which deals with the substantive validity of the arbitration agreement. Inasfar as Swiss law applies the contents of the agreement has to be determined by interpretation.[34] According thereto, the arbitral tribunal must first determine the real intent of the parties (Art. 18 para. 1 CO). If it is not possible to establish such a real and common intent, the agreement is to be construed objectively, according to the so-called principle of mutual trust, namely to identify the meaning that the parties could and should give, according to the rules of good faith, to their mutual declarations of intention.[35] In addition to the minimum requirement in terms of content, the arbitration agreement should preferably also govern the language of the arbitration as well as the number of arbitrators and the procedure for their appointment.[36] 10

28 Berger/Kellerhals, para. 494; Girsberger/Voser, *2016*, paras. 494 et seq.; Kaufmann-Kohler/Rigozzi, para. 3.32.

29 Principle according to which whenever the decision on jurisdiction/admissibility of the claim pre-judges the outcome of the dispute on the merits, the full legal review of the doubly relevant facts must be performed at the stage of the decision on the merits only, BGE 122 II 252; BGE 119 II 66, para. 2a.

30 BGE 131 III 153, para. 5.1.

31 Cf. Art. 178(2) PILS; BGer. 4P.253/2003 para. 5.3; BGer. 4A_548/2009 para. 4.2.2. The lack of an athlete's consent does not per se invalidate an arbitration agreement that results from the athlete's participation in sporting activities, BGE 133 III 235 (*Canas v. ATP*) para. 4.3.2.3; regarding arbitration agreements by reference, see also the following paragraph and Art. R47, paras. 26–29 below.

32 Cf. BGE 129 III 675, para. 2.3; BGer 4A_246/2011, para. 2.1 et seq.; CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, para. 97.

33 Cf. BGer. 4P.253/2003 para. 5.1; BGE 130 III 66 para. 3.1; cf. also Mavromati, *CAS Bull. 2011/1*, p. 33. With regard to the form requirements concerning the *essentialia negotii* see the following paragraph.

34 BGE 130 III 66, para. 3.2; Poudret/Besson, para. 304.

35 BGE 130 III 66, para. 3.2; BSK-IPRG/Gränicher, Art. 178 para. 52a; Mavromati/Reeb, Art. R27, para. 69; CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, para. 95.

36 Cf. Berger/Kellerhals, para. 306; Kaufmann-Kohler/Rigozzi, para. 3.24.

a Referral to the CAS as Competent Court

11 Under Swiss law, the parties are presumed to choose arbitration as such and not because of the identity of the arbitrator. Hence, the identity of the arbitrator is generally not considered an essential element of an arbitration agreement. Instead, it suffices that the arbitral tribunal is determinable.[37] In cases in which the CAS is not explicitly mentioned in the arbitration agreement, or where an institution is mentioned that will not or cannot exercise arbitral functions, it may become necessary to interpret the arbitration agreement in order to assess whether or not the parties wished to confer jurisdiction to the CAS. The Swiss Federal Supreme Court has held that a clause providing that the *"competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent"* ultimately confers jurisdiction to the CAS.[38] The Swiss Federal Supreme Court reasoned as follows: *"Without breaching federal law the CAS found that the Parties wanted to submit their dispute to an arbitral tribunal sitting in Switzerland, which would know sport law particularly well. The designation of FIFA as well as UEFA suggests that the Parties wanted to have a sport body decide their possible disputes under the transfer contract, which would be familiar with transfers in the business of international football. It must be noticed in particular that the CAS can review FIFA decisions concerning the transfer of players on appeal and the Appellant itself acknowledges that an appeal to the CAS would have been allowed against the decision of the FIFA Committee for the Status of Players if it had accepted jurisdiction in the case at hand. On the basis of these circumstances it must be assumed that the Parties would have submitted the possible disputes arising from their transfer agreement […] to the CAS, which regularly addresses transfers of football players, had they known that the bodies mentioned in article 4 would not have jurisdiction."* Similarly, a CAS Panel found that a clause stating that "*In case of litigation of the Contract, the case shall be submitted to CFA or FIFA for arbitration"* conferred jurisdiction to the CAS.[39] Of course, all these problems can be avoided from the outset if the parties use the standard arbitration clause, which can be found in the appendices of the CAS Code as well as on the CAS website.[40]

b Consent to Arbitrate

12 As a mandatory requirement of an arbitration agreement the parties need to unambiguously express the wish that their disputes be settled by arbitration and, thus,

37 BGer 129 III 675 para. 2.3; BGer 4A_246/2011 paras. 2.1 et seq.; BSK-IPRG-Gränicher, Art. 178 para. 30; Berger/Kellerhals, para. 285; cf. also CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, para. 99.

38 BGer 4A_246/2011, para. 2.3.3; see also Mavromati/Reeb, Art. R27, para. 41.

39 CAS 2015/A/3910, *Ana Kuže v. Tianjin TEDA FC*, Award of 20 November 2015, paras. 82 et seq.; see also the case CAS 2015/A/3959 *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, where the following clause was contained in the contract: *"The parties agree that any difficulty arising among them because of the application, performance, default, validity, invalidity, interpretation or other difficulty arising herefrom shall be resolved by the Fédération Internationale de Football Association (FIFA) as an arbitrator ex aequo et bono or amiable compositeur. There shall be no remedies against the decision thereof and the parties undertake to abide by the ruling rendered by such association, to which they grant due competence."*

40 Mavromati/Reeb, Art. R27, para. 37.

to the exclusion of state courts.[41] According to Art. R27(1), second sentence, such wish may be expressed either in the form of an arbitration clause contained in a contract or in regulations, or in the form of a later arbitration agreement (ordinary arbitration proceedings); such an agreement may further exist based on statutes,[42] regulations or a specific agreement to the effect that any appeal against a decision by sports-related bodies is to be brought before the CAS (appeal arbitration proceedings).

13 With regard to whether there is a will of the parties to arbitrate, the Swiss Federal Supreme Court has repeatedly stated that, as a principle, it applies a "benevolent" standard in sports arbitration, in order to encourage the speedy resolution of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS.[43] However, it should be noted that the same "benevolence" does not apply to sports arbitration in general. So far the Swiss Federal Supreme Court has only expressed "benevolence" in two case groups. One case group concerns the arbitration clause by (general) reference.[44] The central issue here is, whether or not there is (unambiguous) consent between the parties to resort to arbitration.[45] This question must be resolved through the principle of good faith.[46] According to the Swiss Federal Supreme Court, arbitration is the typical dispute resolution mechanism of the sports industry, which must be taken into account when determining the will of the parties.[47] Accordingly, the Swiss Federal Supreme Court has found that "*a general reference to the FIFA Rules [in the Statutes of a National Federation] and thus to the appeal rights of FIFA and WADA contained in the FIFA Statutes [to the CAS] is sufficient to establish the jurisdiction of the CAS …*".[48] Thus, the threshold to assume consent to arbitrate in a sports context is particularly low with regard to arbitration clauses by reference.[49]

14 The other case group where the Swiss Federal Supreme Court has shown "benevolence" deals with so-called "forced arbitration clauses".[50] It is a characteristic feature of sports arbitration that one of the parties to the arbitration agreement (e.g. a club or an athlete) has no free choice whether to accept the arbitration clause or not. Instead, due to the monopolistic structure within sport, the contracting party may only choose to submit itself to arbitration or else not to participate in a particular sport altogether. This may be a particularly hard choice for an athlete who exercises his or her sport professionally. However, the Swiss Federal Supreme Court has found that notwithstanding the unequal bargaining power between the parties in such cases there is – in a sports context – still sufficient "consent" to arbitrate, provided that

41 BGE 130 III 66, para. 3.1: "Another general condition for an arbitration agreement is the clarity and certainty with respect to the private jurisdiction …"; see also Art. 178 paras. 50 et seq.; Berger/Kellerhals, para. 289.

42 For a typical example of such statutes see, e.g., the FIFA Statutes, Arts. 66–68, UEFA Statutes, Arts. 60–63 and IOC Statutes, Art. 61.

43 BGer 4A_428/2011, para. 3.2.3, BGer. 4A_246/2011 para. 2.2.2; BGer. 4A_548/2009 para. 4.1; BGer. 4A_460/2008 para. 6.2; Rigozzi, paras. 832 et seq.

44 Mavromati/Reeb, Art. R27, para. 50 et seq.

45 See Art. 178 PILS paras. 61 *et seq*. ; Berger/Kellerhals, paras. 455 et seq.

46 See Art. 178 PILS para. 61; Mavromati/Reeb, Art. R27, para. 43.

47 BGer 4A_428/2011, para. 3.2.3: "*In other words, following the conclusions of another specialist in this area of law, there is in essence no elite sport without consent to arbitrate.*"

48 BGer 4A_60/2008, para. 6.2.

49 Haas, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, Bull ASA 4/2014, 707, 709.

50 Cf. Haas, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, Bull ASA 4/2014, 707, 711 *et seq*.

the arbitral institution is independent from the parties.[51] The Swiss Federal Supreme Court justifies its reasoning by a balancing of the parties' interests and finds that the advantages of sports arbitration are in the parties' interest of administering justice.

c Defined Scope of Dispute

15 The arbitration agreement must specify the subject-matter of the dispute, in terms of either the object or the legal relationship in dispute.[52] It follows from this prerequisite that global submissions to arbitration such as "all legal disputes which arise out of current and future legal relationships" are not permissible. Moreover, it also follows that it must be determinable and foreseeable whether or not a certain dispute is covered by an arbitration clause. Various problems in this respect may arise in connection with Art. 61(1) of the Olympic Charter (OC), which reads as follows: "*The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).*" The meaning of the phrase "in certain cases" is hard to construe. The provision seems to convey that the decisions of the IOC are either "final" or that they may be resolved – inter alia – by the CAS. This is already a misconception, because all disputes are resolved at a final level either before the CAS or by a state court. In one way or the other, there must be access to justice for persons concerned by an IOC decision. In essence, Rule 61(1) OC thus regulates whether a dispute over an IOC decision ends up before the CAS or before state courts. Furthermore, there is no obvious understanding of the phrase "certain cases". In particular, it is unclear what aspect determines the competent forum: is it the "nature" of the decision, the sporting body issuing it, or rather the importance or size of the dispute? Certainly, Rule 61(1) OC cannot be interpreted to mean that either party – the IOC or its opponent in a particular dispute – may unilaterally choose whether to bring the case before the CAS. Rule 61(1) OC fails to identify the disputes that qualify as a "*certain case*" subject to CAS review. Since, therefore, the disputes covered by the arbitration clause cannot be determined, the clause does not qualify as a valid arbitration clause.[53]

3 Formal Requirements

16 The CAS Code does not set out whether an arbitration agreement needs to be in writing, or whether another form, such as an oral agreement, would be accepted under CAS rules. In *WADA v. NSAM & Cheah & Ng & Masitah*,[54] the Panel held that "an agreement to arbitrate may be concluded explicitly or tacitly and may result from the content of the pleadings submitted by the parties". In any event, the validity of an arbitration agreement must be determined in accordance with Art. 178(1)

51 BGE 133 III 235, para. 4.3.2.2; see also Haas, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, ASA Bull. 4/2014, 707 et seq.; Beloff/Netzle/Haas, in Lewis/Taylor, para. E3.47; Girsberger/Voser, *2016*, para. 1928; *contra* Lukomski, Int Sports Law J 2013, 60 et seq.

52 See Art. 178 PILS paras. 48, 51 *seq*.

53 CAS 2011/A/2576, *Curacao Sport and Olympic Federation v. IOC*, Award of 31 August 2012, paras. 6.15 et seq.

54 CAS 2007/A/1395, *WADA v. NSAM & Cheah & Ng & Masitah*, Award of 31 March 2008, para. 51.

PILS[55] (international arbitration) and Art. 358 ZPO (domestic arbitration), which require an agreement in writing. Under the PILS, the understanding of the criterion "written form" is generally very broad, meaning that any kind of written expression of the parties will be capable of meeting the requirements of Art. 178(1) PILS. The formal requirements in Art. 178(1) PILS only apply to the essential elements of the arbitration agreement (*essentialia negotii*, supra para. 10).[56]

The parties' written statements may be expressed in one or in several documents.[57] 17
For instance, an arbitration agreement may result from an exchange of letters between parties.[58] No personal signature is required in order to conform to the written form requirement under the PILS.[59] Even a simple reference to a document containing an arbitration clause may suffice to assume the existence of a valid arbitration agreement (arbitration agreement by reference).[60] An oral agreement satisfies the form requirements under the PILS only if it is subsequently confirmed in writing.[61] The form requirement includes all essential elements of the arbitration agreement.[62] If the CAS is referred to by an incorrect or imprecise denomination or description ("falsa demonstration non nocet"), this does not invalidate the arbitration agreement.[63]

The Swiss Federal Supreme Court has furthermore highlighted – not only in the 18
context of sports arbitration – that in certain circumstances the principle of good faith can substitute the formal requirements provided for in Art. 178(1) PILS.[64] This is particularly true in cases in which non-signatories are bound to an arbitration agreement (e.g. universal successor,[65] individual successor, contract to the benefit of third party,[66] etc.).[67] For the non-signatory to be thus bound it is sufficient, in this kind of situations, that the arbitration agreement comply with Art. 178(1) PILS between the contracting parties only.[68] The principle of good faith may substitute the formal requirements also in other instances,[69] notably, e.g., if the appellant sends its

55 This provision is a substantive rule of Swiss private international law and a mandatory provision of the Swiss *lex arbitri*, Berger/Kellerhals, para. 418 *seq*.
56 Girsberger/Voser, *2016*, para. 339.
57 Mavromati, *CAS Bull. 2011/1*, p. 33. Cf. CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 241, where the statutes in conjunction with an entry form for a supranational league were considered as a binding arbitration clause.
58 CAS 2008/O/1483, *AHF, KzHF, KHA v. IHF*, Award of 20 May 2008, para. 4.
59 Girsberger/Voser, *2016*, para. 341; Berger/Kellerhals, paras. 422; Mavromati/Reeb, Art. R27, para. 30.
60 BGer. 4P.230/2000 para. 2a; BGer. 4P.253/2003 para. 5; BGer. 4A_460/2008 para. 6.2; regarding the well-known issues of the validity of arbitration agreements by reference, cf. Netzle, *ASA Special Series no. 11*, pp. 50–53; for examples of corresponding CAS jurisprudence, cf., e.g., Mavromati, *CAS Bull. 2011/1*, pp. 36–37.
61 Berger/Kellerhals, para. 426; it is, however, disputed whether the confirmation must be made by both parties or whether unilateral confirmation suffices, Girsberger/Voser, *2016*, paras. 343 *seq*; cf. also Kaufmann-Kohler/Rigozzi, para. 3.71.
62 Kaufmann-Kohler/Rigozzi, para. 3.58.
63 BGer. 4A_246/2011 para. 2.2.3 and 2.3, where the further context of the arbitration agreement allowed to interpret the "FIFA Commission, or the UEFA Commission" as the CAS.
64 BGer 4A_428, para. 3.2.3; BGE 129 III 727, para. 5.3.1.
65 CAS 2015/A/3910, *Ana Kuže v. Tianjin TEDA FC*, Award of 20 November 2015, para. 97; Berger/Kellerhals, para. 540; BSK-IPRG-Gränicher, Art. 178 para. 76.
66 BGer 4A_627/2011, para. 3.2.
67 Berger/Kellerhals, paras. 537 et seq.
68 See Berger/Kellerhals, para. 539.
69 Mavromati/Reeb, Art. R27, paras. 46 et seq.

statement of appeal to the CAS within the time limit.[70] Likewise, filing a cross-appeal is deemed an acknowledgement of CAS jurisdiction. The jurisdiction of the CAS is also established by signing the Order of Procedure stating that the CAS shall be competent to decide on the case.[71] However, a party appointing an arbitrator is not prevented from objecting to CAS jurisdiction provided the party expressly reserves such a right. A decision of a federation stating that this decision may be appealed before the CAS within 20 days of receiving notification is considered an offer to conclude an ad-hoc arbitration agreement.[72] Participation in a competition organized by a federation which in its regulations stipulates that any dispute shall be resolved by arbitration (= offer in writing) was considered an acceptance of the offer.[73]

4 Sports-related Disputes

19 Only sports-related disputes are covered by the CAS Code.[74] Such disputes must be of a private-law nature.[75] It is for the Court to assess whether a dispute is sports-related or not.[76] The IOC understanding of the concept of sports reflects the core notion of sports in the meaning of Art. R27.[77] However, sports that are not recognized by the IOC may also be covered by Art. R27. Difficult questions may arise with regard to leisure and entertainment activities such as bungee jumping, mental exercise competitions, e-games or card games.

20 In general, the CAS has a very broad understanding of sports and sports-relations.[78] Chess is also considered a sport in the meaning of the CAS Code.[79] The CAS also affirmed a sports-relation in a case in which an architect was commissioned by a boats company to participate in the development of sports boats;[80] whether the CAS is indeed the right platform for such purely commercial matters has been questioned by some authors.[81]

5 Lack of Funds

21 Even though the costs of an arbitration proceeding before the CAS are fairly low compared to commercial arbitration, the question may arise whether or not an arbitration agreement is inoperative from the perspective of an athlete because of lack of funds. In legal literature some advocate a right for a party's unilateral termination

70 CAS 2002/O/422, *Besiktas v. FIFA & SC Freiburg*, Award of 10 March 2003, para. 25.
71 Oschütz, p. 274; Netzle, *ASA Special Series no. 11*, p. 53.
72 Cf., e.g., CAS 2003/O/482, *Ortega v. Fenerbahce & FIFA*, Award of 5 November 2003, para. 4; CAS 2003/O/486, *Fulham FC v. Olympique Lyonnais*, Award of 15 September 2003, para. 3.
73 CAS 2009/A/1910, *Telecom Egypt Club v. EFA*, Award of 9 September 2010, para. 9.
74 Art. R27(2).
75 Oschütz, p. 83.
76 See in detail Mavromati/Reeb, Art. R27, paras. 88 et seq.
77 Cf. Rochat, *ASA Special Series no. 11*, p. 12 who considers the criteria of IOC's understanding of the notion of sports as relevant; similar Oschütz, p. 84.
78 Cf. McLaren, p. 37, the topics that the CAS addresses have constantly expanded to include a wider array of issues and sports; Sternheimer/Le Lay, *CAS Bull. 2012/1*, pp. 49, 52; cf. also Girsberger/Voser, *2016*, para. 1923.
79 Cf. CAS 2004/O/657 – unpublished decision regarding a chess player.
80 CAS 92/O/81, *L v. Y. SA*, Award of 30 November 1992, para. 3.
81 E.g., Rigozzi, paras. 933 and 934; in support of CAS Sternheimer/Le Lay, *CAS Bull. 2012/1*, p. 56.

of the arbitration agreement if it has proven to be unable to pay the arbitration costs, in order to avoid denial of access to justice for such party.[82] Unlike in state court proceedings there is, in principle, no (mandatory) legal aid before arbitral tribunals (either by direct application of the respective rules in civil procedure or following from the principle of equal treatment of the parties or on ordre public grounds).[83] In order to ensure that lack of funds does not jeopardize access to justice, the CAS Code provides for legal aid. According to Art. S6(9) ICAS is responsible for creating "*a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means*". The guidelines on legal aid[84] and the legal aid application form can be downloaded from the CAS website.[85] In the majority of the requests filed, the applicant is granted legal aid in some form or another.[86]

C Categories of Proceedings Before the CAS

Article R27(1) states that the CAS Code differentiates between two types of arbitration proceedings, i.e., ordinary arbitration proceedings, which are governed by Arts. R38-R46, and appeal arbitration proceedings, which in turn are governed by Arts. R47-R59.[87] Ordinary arbitration proceedings are – in most cases – similar to commercial arbitration;[88] whereas appeal arbitration proceedings are of a different, sports-specific nature. However, also ordinary arbitration proceedings may be very sport specific. For instance, Art. 8.5 of the World Anti-Doping Code provides that an anti-doping rule violation asserted against an athlete may, with the consent of the athlete, the anti-doping organization with results management responsibility, WADA and any other anti-doping organization that would have a right to appeal a first instance hearing decision, be heard directly at CAS with no requirement for a prior decision by the sports body. Such first instance CAS proceedings in doping matters would sometimes be conducted as ordinary arbitration[89] sometimes as appeals arbitration procedures.[90] In recent years, most CAS proceedings have been appeal proceedings.[91] **22**

Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to the appropriate division.[92] The assignment is made on the basis of the Request for Arbitration / Statement of Appeal, i.e., at a very early stage of the proceedings in which the Respondent has not yet been heard.[93] Thus, the assignment is made depending on the subject matter in dispute (in particular the requests) as submitted **23**

82 Berger/Kellerhals, para. 633; see also Kaufmann-Kohler/Rigozzi, para. 3.187; left undecided in BGer 4A_178/2014, para. 4.
83 BGer 4A_178/2014, para. 4.
84 http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_ENG_.pdf.
85 http://www.tas-cas.org/fileadmin/user_upload/Legal20Aid20Form20_English_.pdf.
86 See the statistics in Mavromati/Reeb, para. VI C.
87 Cf. also Arts. S3(2) and S20(1).
88 Oschütz, p. 50; Kaufmann-Kohler/Bärtsch, p. 85; Sternheimer/Le Lay, *CAS Bull. 2012/1*, p. 52.
89 See for such an example CAS 2015/O/4128, *IAAF v. Rita Jeptoo*.
90 See for such an example CAS 2016/A/4707, *Alex Schwazer v. IAAF, NADO ITALIA, FIDAL & WADA*.
91 In the year 2013, 58 CAS cases concerned ordinary proceedings and 349 CAS cases appeal proceedings, cf. < http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf. > .
92 Art. S20(2), first sentence.
93 Haas/Köppel, Abwehransprüche des Sportlers gegen (angeblich rechtswidriges) Verbandsverhalten vor dem Court of Arbitration for Sport (CAS/TAS), in jusletter 16 July 2012, paras. 31 seq.

to the CAS by the Appellant/Claimant.[94] If the subject matter ("*Streitgegenstand*") concerns an appeal against a decision of a sports organization, then the case will be assigned to the Appeals Arbitration Division, unless the validity/lawfulness of the contested decision is a purely preliminary question ("*Vorfrage*") of the dispute. The term "appeal" should be construed widely as it covers declaratory relief as well as modificatory relief ("*Gestaltungsklagen*").[95] Thus, in order for the matter to be assigned to the Appeals Arbitration Division, the appeal against the decision must be the core of the dispute.[96] This will not apply, for instance, if the Claimant files a request for damages based on the alleged unlawfulness of a decision issued by a sports organization. If the Claimant / Appellant files several requests pertaining to both divisions, the CAS Court Office may assign all claims to the Appeals Arbitration Division for reasons of procedural efficiency, provided that there is a factual or legal connection between the various claims. As a matter of principle, the assignment of the CAS Court Office may not be contested by the parties.[97] However, the parties may ask the CAS Court Office to reconsider its decision and the Court Office may agree to do so.[98] If both parties wish and agree to submit their dispute to the other Division, the CAS Court Office should modify its decision in any event.[99] Furthermore, in the event of a change of circumstances during the procedure, i.e. after the commencement of the proceedings, the CAS Court Office may re-assign the arbitration to the other division.[100] However, there is no "change of circumstances", if – in the course of the appeal proceedings – the Panel comes to the conclusion that based on the factual submissions of the parties there is in fact no decision that the Appellant is entitled to contest. In such circumstances the Panel may neither reject the appeal for lack of jurisdiction,[101] nor dismiss the appeal as inadmissible.[102] Since the CAS Court Office's assignment of the case to either of the two divisions is binding (on the parties and also on the arbitral tribunal)[103] and includes the applicability of the respective procedural rules, the Panel must dismiss the appeal on the merits.[104]

94 Haas/Köppel, in jusletter 16 July 2012, para. 22.
95 Haas/Köppel, in jusletter 16 July 2012, para. 35.
96 Haas/Köppel, in jusletter 16 July 2012, para. 35.
97 Art. S20(2), second sentence; cf. CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 2.
98 Kaufmann-Kohler/Bärtsch, pp. 74–75.
99 Kaufmann-Kohler/Bärtsch, p. 75.
100 Art. S20(2), third sentence.
101 Haas/Köppel, in jusletter 16 July 2012, para. 30.
102 Haas/Köppel, in jusletter 16 July 2012, paras. 31 *et seq*.
103 CAS 2004/A/748, *Russian Olympic Committee (ROC) & Viatcheslav Ekimov v. International Olympic Committee (IOC), United States Olympic Committee (USOC) & Tyler Hamilton*, Award of 27 June 2006, para. 2: "*The Panel notes that, pursuant to Article S20 of the Code, the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard the arguments put forward by the parties with respect to the characterization of this arbitration as an "appeal" or an "ordinary" arbitration. As the Court Office assigned this case to the Appeals Arbitration Division, the Panel must follow the set of Code provisions applicable to the appeal arbitration procedure."*
104 See CAS 2014/A/3744&3766, *Nigerian Football Federation v. FIFA*, Award of 18 May 2015, para. 196.

Article R28: Seat

The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.

I PURPOSE OF THE PROVISION

The purpose of Art. R28 is to establish rules for determining both the seat of arbitration proceedings at the CAS and the location for the conduct of such proceedings.[1] 1

II CONTENT OF THE PROVISION

A Seat

According to Art. R28, first sentence, all CAS arbitrations have their seat in Lausanne, Switzerland.[2] Unlike the rules of most other arbitral institutions,[3] the CAS Code does not provide for autonomy of the parties to choose the seat of their arbitration. This provision is mandatory.[4] This rule also applies to the ad-hoc Division at Olympic Games.[5] The reason for this is that in order to establish uniform applicability of the sports-related rules and regulations, there is a need for a single *lex arbitri* to apply in all cases, since the *lex arbitri* determines the competent courts with jurisdiction in relation to the arbitration.[6] 2

In order to facilitate access to CAS in North America and Oceania the ICAS, in 1996, created two decentralized offices, one in Denver, which has since been moved to New York, and one in Sydney.[7] However, also for decentralized proceedings, the seat of the arbitration is in Lausanne, with only the management of the proceedings taking place abroad.[8] 3

B Location for the Conduct of Proceedings

It is common that hearings, consultations and/or other meetings are held at convenient places other than the seat. Thus, the fact that the CAS Code establishes the seat in Lausanne in no way obliges the Panel to hold the hearing or deliberate in Lausanne.[9] As a principle, such convenient places may be within or outside Switzerland. The 4

1 Mavromati/Reeb, Art. R28, paras. 1, 4.
2 Cf. also Art. S1(3).
3 Cf references with Girsberger/Voser, *2016*, para. 1931.
4 Rigozzi, paras. 408 and 430; Oschütz, pp. 79–80; Mangan, *ArbInt. 2009*, p. 594; Reeb, *Role and Functions*, p. 37.
5 Art. 7 Arbitration Rules for the Olympic Games; Rigozzi/Hochuli, *Jusletter 27 November 2006*, para. 1.
6 Girsberger/Voser, *2016*, para. 1931.
7 Reeb, *Role and Functions*, p. 34.
8 Mavromati/Reeb, Art. R28, para. 18. This was also recognized by the New South Wales Court of Appeal (Australia), CA 40650/00, in Digest of CAS Awards II, pp. 783 et seq.
9 Mavromati/Reeb, Art. R28, para. 17.

authority to determine such place lies with the President of the Panel.[10] However, decisions must not be made arbitrarily or based on personal preferences unrelated to the arbitration. The choice of location ought to be justified by the circumstances of the case such as the residence/seat of the parties, arbitrators, witnesses and experts, or legal or factual travel restrictions affecting the parties; the main priority must be to ensure that the proceedings can be carried out efficiently and economically. Furthermore, such a decision should consider the risk that conducting the proceedings in different legal systems may give rise to inconvenient conflict-of-law situations.

5 According to the express wording of this provision, the parties must be consulted before settling on a location. The parties' agreement to hold hearings at specific places or to limit the President's discretion to some specific places should be respected, as a principle. Barring such an agreement by both parties, hearings may even be held at places to which one of the parties explicitly objects (provided, of course, that the respective choice is justified by the circumstances of the case).

6 In the event of hearings being held at places other than the seat of the CAS, the President may issue appropriate directions concerning the hearings,[11] particularly with regard to the place and time schedule.

C Consequences of the Seat

7 Article R28 governing the seat of arbitration has some major legal consequences:[12] First of all, the seat of arbitration determines the *lex arbitri*. As the seat of CAS arbitrations is always in Switzerland, Swiss arbitration law invariably applies to CAS proceedings.[13] Chapter 12 of the PILS (international arbitration) applies in all CAS cases where at least one party has its domicile or habitual residence outside Switzerland, provided the parties have not excluded its application and opted for the application of part 3 of the ZPO.[14] If no party has its domicile or habitual residence outside Switzerland, Part 3 of the ZPO (domestic arbitration) applies, unless the parties have excluded its applicability and agreed that Chapter 12 of the PILS shall apply instead.[15]

8 Second, the seat establishes the jurisdiction of local state courts to review the award. Hence, the judicial control of all CAS awards falls within the exclusive jurisdiction of the Swiss Federal Supreme Court.[16] In international arbitration,[17] such control is limited to the exhaustive list of grounds in Art. 190(2) PILS.[18] This also applies

10 Art. R28, second sentence.
11 Art. R28 at the end.
12 Kaufmann-Kohler/Rigozzi, para. 2.23; Kaufmann-Kohler/Bärtsch, pp. 78–81; Girsberger/Voser, *2016*, paras. 597 et seq.; cf. also Rochat/Cuendet, pp. 60–61 and McLaren, p. 38 emphasizing the first two consequences mentioned here.
13 Rigozzi/Hochuli, *Jusletter 27 November 2006*, para. 2; Mavromati/Reeb, Art. R28, para. 21; Poudret/Besson, paras. 134–135.
14 Art. 176(2) PILS.
15 Art. 353(2) ZPO.
16 Art. 191 PILS; see Mavromati/Reeb, Art. R28, para. 22.
17 For domestic arbitration cf. Art. 393 ZPO.
18 Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 3–5. For an overview on challenged awards of the CAS, see, e.g., Rigozzi, *JIDS 2010*, pp. 217–265; Netzle, *CAS Bull. 2011/2*, pp. 19–26.

to cases in which the challenged decision has been rendered abroad and to cases where the proceedings have taken place abroad.[19]

Third, the seat of the arbitration determines access to local state courts for judicial assistance in support of the arbitration.[20] 9

Fourth, the seat of the arbitration determines the "nationality" of the arbitral award pursuant to the New York Convention.[21] 10

Finally, the seat of the arbitration has also an impact on the jurisdiction of the Panel to issue provisional measures,[22] since Art. 183(1) PILS provide that "*unless the parties have agreed otherwise, the arbitral tribunal may enter provisional or conservatory orders at the request of one party*". 11

19 Rigozzi, para. 1299.
20 Although available, aid by the state courts is rarely resorted to in practice, Kaufmann-Kohler/Bärtsch, p. 80.
21 Mavromati/Reeb, Art. R28, paras. 28 *et seq*.
22 See Mavromati/Reeb, Art. R28, para. 34; for further details see commentary to R37.

Article R29: Language

The CAS working languages are French and English. In the absence of agreement between the parties, the President of the Panel or, if she/he has not yet been appointed, the President of the relevant Division, shall select one of these two languages as the language of the arbitration at the outset of the procedure, taking into account all relevant circumstances. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the Panel agree otherwise.

The parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree. If agreed, the CAS Court Office determines with the Panel the conditions related to the choice of the language; the Panel may order that the parties bear all or part of the costs of translation and interpretation. If a hearing is to be held, the Panel may allow a party to use a language other than that chosen for the arbitration, on condition that it provides, at its own cost, interpretation into and from the official language of the arbitration.

The Panel or, prior to the constitution of the Panel, the Division President may order that all documents submitted in languages other than that of the proceedings be filed together with a certified translation in the language of the proceedings.

I PURPOSE OF THE PROVISION

1 The purpose of Art. R29 is to establish rules concerning the language of CAS arbitration proceedings. In particular, it defines French and English as the official working languages of the CAS[1] and governs how the language in which arbitration proceedings are conducted before the CAS must be determined. The provision was amended in 2016. Para. 2 of Art. R29 now incorporates a standing practice at the CAS according to which if "*a hearing is to be held, the Panel may allow a party to use a language other than that chosen for the arbitration, on condition that it provides, at its own cost, interpretation into and from the official language of the arbitration.*"

2 The choice of the language is important. It may impact on the costs of the proceedings (e.g. costs of translations) and the conduct of the procedure in general, since there might be links between the language determined and the legal traditions of a certain involved legal system / country.[2]

II CONTENT OF THE PROVISION

A In General

3 Particularly in international sport arbitrations, where parties often have a different cultural and linguistic background, establishing the language to be used in the proceedings at the CAS is one of the key issues to be addressed at the very outset of the arbitration.

1 See also Arts. R69 and S24 stating that the English and French texts of the CAS Code are authentic and that in the event of any divergence, the French text shall prevail.

2 Mavromati/Reeb, Art. R29, para. 4.

Establishing the relevant language is primarily a matter for the parties, but where they fail to settle on a language, the CAS shall do so. This principle is in line with Art. 182(1)(2) PILS and Art. 373(1)(2) ZPO. 4

1 Decision by the Parties

Article R29 provides that, in principle, the parties may agree on the applicable language. Where a language has not yet been chosen in the arbitration agreement, the parties should agree on the applicable language at the earliest possible stage, preferably before the appointment of the arbitrators, as an early choice of language facilitates the selection of suitable arbitrators and counsels and avoids the need of their subsequent replacement due to lack of language skills.[3] Therefore, a request for arbitration or a statement of appeal should, preferably, also address the question of which language to use in the procedure before the CAS. 5

Neither the CAS Code nor Swiss law imposes specific requirements regarding the parties' agreement on the language of the proceedings. Since the language is a procedural matter and not an essentialia of the arbitration agreement (see Art. R27 paras. 10 *et seq.*), Art. 178(1) PILS does not apply and the parties may conclude the agreement in writing, orally or tacitly. 6

The parties may request that the CAS procedure be conducted either in one of the CAS' two working languages or in another language. The two working languages are – according to Art. R29(1) – the traditional languages of the Olympic Movement, i.e. French and English.[4] If the parties agree on another language (than English or French), such choice will become binding only with the consent of the Panel and the CAS Court Office.[5] In addition to English and French, CAS arbitration proceedings have also been conducted in Spanish, German and Italian.[6] The great majority of arbitration proceedings at the CAS are, however, held in English.[7] Additional costs resulting from the choice of a non-working language are to be borne by the parties, as a principle.[8] In this respect Art. R29(2) provides that the "Panel may order that the parties bear all or part of the costs of translation and interpretation". 7

The choice of more than one language for the arbitration is not excluded under the CAS Code. Hence, the parties may agree, for instance, that two or more languages may be generally used in the proceedings or that the written submissions, oral pleadings and/or examination of the witnesses shall be in different languages.[9] In any event, it is highly recommended to define a prevailing language for the event of any version conflicts between the various languages. 8

3 Mavromati/Reeb, Art. R29, para. 2.
4 Mavromati/Reeb, Art. R29, para. 1.
5 Art. R29(2), first sentence; critical in this respect Crespo, in Rigozzi/Bernasconi. p. 35.
6 Mavromati/Reeb, Art. R29, para. 9.
7 Mavromati/Reeb, Art. R29, para. 7, see also the Annex IV B. It is worth noting that English is not an official national language in Switzerland and that an appeal brief to the Swiss Supreme Court must be submitted in one of Switzerland's official languages, i.e., German, French, Italian or Rumantsch Grischun, Art. 42(1) BGG and Art. 70(1) FC.
8 Cf. Art. R29(2), second sentence.
9 Mavromati/Reeb, Art. R29, para. 25. However, multilingual arbitration is not recommended if it delays the procedure and increases its costs; this is mostly the case if two or more languages are accepted without specific rules and restrictions or if the arbitrators do not have a good command in both or all languages. Cf. also Mavromati, *CAS Bull. 2012/1*, p. 44.

2 Decision by the CAS

9 Where the parties are unable to agree on the language of the arbitration proceedings, the competent President shall select one of the two official languages, taking into account all "relevant circumstances".[10] Such decision will take the form of an "order on language"[11] and is not (separately) appealable to the Swiss Federal Supreme Court.[12] However, in extreme cases of arbitrariness the choice of language may infringe on the principle of due process, or the parties' right to be heard or their right to equal treatment, all of which can constitute a ground for setting aside the award rendered in the dispute.[13]

10 The relevant circumstances to be taken into account by the CAS include the nationality and language of the parties, the language previously used between the parties (namely, the language of the contract), the language applied by the body that took the appealed decision, the language in which an appeal has been filed, the language of the law governing the merits, the place where the dispute has arisen, and the language skills of the arbitrators (if the language is chosen after the arbitrators' appointment) and those of other important people involved, such as witnesses.[14]

11 In any event, the principle of equal treatment of the parties must be respected.[15] Therefore, the parties must have the opportunity to set out their point of view on the issue of the language of the arbitration proceedings before the decision is taken. The principle of equal treatment does not, however, require that each party has the right to present its case in its own language.

12 According to the wording of this provision, the President of the Panel or, prior to his appointment, the President of the relevant Division, shall select which of the two working languages shall apply.[16] It makes good sense that the CAS Code vests the President of the relevant Division with the competence to decide on the language for as long as the Panel has not been appointed. However, once the Panel is constituted, it is preferable for the entire Panel and not only its President to decide on the language of the procedure, given the importance of this issue throughout the proceeding.

B Meaning of the Relevant Language

13 Generally, the language chosen as described will be used for the entire proceedings. This follows from the last sentence of Art. R29(1), according to which "the proceedings shall be conducted exclusively in that language, unless the parties

10 Art. R29(1), second sentence. In the course of the 2013 revision, the English wording of this provision was changed from "pertinent circumstances" into "relevant circumstances"; by contrast, the French version has remained unchanged and still states "pertinentes" circumstances; according to the authors' views, the recent change of the English wording is not of material nature.

11 Mavromati/Reeb, Art. R29, para. 3.

12 Mavromati/Reeb, Art. R29, para. 16.

13 Mavromati/Reeb, Art. R29, para. 5.

14 Mavromati/Reeb, Art. R29, paras. 18, 20–24; see also Rochat/Cuendet, pp. 61–62; Mavromati, *CAS Bull. 2012/1*, pp. 42–44 with reference to unpublished CAS jurisprudence; Lazareff, *Language*, pp. 23–26. Further, cf. CAS 2009/A/2014, *AMA v. RLVB & Iljo Keisse*, Award of 6 July 2010, paras. 39–42.

15 Cf. Art. 182(3) PILS; Art. 373(4) ZPO.

16 Art. R29(1), second sentence.

and the Panel agree otherwise". Consequently, all official documents, the parties' submissions, exhibits, letters and correspondence with the CAS Court Office as well as the conduct of the hearing shall be in the language chosen by the parties.[17] As a principle, this rule also applies to the award to be rendered by the Panel. It is rather evident that if the name of a party is being used in a translated version to match the language of the proceedings, this does not affect or amend the original claim provided there can be no doubt with respect to the identity of said party.[18]

The CAS Code is silent on what to do with written statements submitted in a language other than the language of the proceedings as agreed by the parties or selected by the CAS. According to CAS practice the filing of documents in a language other than the language chosen will not be declared inadmissible automatically. Instead, the CAS Court Office or the Panel will set a short deadline to file a translation of such a submission.[19] Denying such possibility could constitute excessive formalism, which is forbidden by Swiss Constitution (Art. 29).[20] However, in case the deadline is not met, such a submission may be disregarded. 14

Oral statements made in a language other than the selected procedural language must also be translated, unless the parties and the Panel accept the oral statement as presented. 15

C Translation of Documents

In case certain documents have been submitted in the proceeding in a language other than the agreed-upon language of the proceedings, the Panel (or, prior to the constitution of the Panel, the Division President) may order that the documents be submitted together with a "certified translation into the relevant language of the proceedings" (Art. R29(3)). The Panel has the option, but not an obligation to ask for a "certified translation".[21] It may also order that all documents submitted in languages other than that of the arbitration proceedings be filed together with a "loose" translation into the language of the proceedings.[22] However, the Panel may be inclined to order a "certified translation", if the other party objects to the filing of "loose translations" or contests the accuracy of the latter.[23] The Panel, in any event, will then examine whether or not the objection by the other party is made in bad faith or is disproportionate.[24] In case the party does not comply with the order to produce translations, the Panel, in principle, can decline to consider 16

17 Mavromati/Reeb, Art. R29, para. 1; Mavromati, *CAS Bull. 2012/1*, p. 39.

18 CAS 2010/A/2311 & 2312, *Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. Wesley Lommers*, Award of 22 August 2011, para. 8.1.

19 Mavromati, *CAS Bull. 2012/1*, p. 45; Mavromati/Reeb, Art. R29, para. 30; see also CAS 2003/O/460, *VFB Admira Wacker Mödling v. FIFA & Gornik Zabrze SSA*, Preliminary Decision dated 7 July 2003, para. 4.5.

20 BGer. 4A_600/2008 para. 5.2.2; see also CAS 2008/A/1621 *Iraqi Football Association v. FIFA & Qatar Football Association*, Award of 29 September 2008, para. 61; CAS 2014/A/3703 *Legia Warszawa SA v. UEFA*, Award of 28 April 2015, paras. 90 *et seq*.

21 CAS 2007/A/1207, *Parma FC v. Portsmouth City FC*, Award of 21 August 2007, para. 19; CAS 2009/A/1897, *PAS Giannina 1966 Footballl Club v. Derek Décamps,* Award of 23 November 2010, para. 3.13; Mavromati/Reeb, Art. R29, para.26.

22 Mavromati, *CAS Bull. 2012/1*, p. 41.

23 Mavromati/Reeb, Art. R29, para. 26.

24 See also Mavromati/Reeb, Art. R29, para. 28.

the documents.[25] In certain individual cases the Panel may deem it sufficient to only order the relevant parts of the documents in question to be translated (and filed together with the original text). When considering to obtain translations, the Panel should balance the need for such translations against any costs and delay this may cause.[26] The more important the document in question appears to be, the more likely the Panel will request that translations be submitted. Finally, – if all arbitrators sufficiently understand the original language in which a document is drafted – the Panel may accept the document on file even without a translation into the language of the proceedings.[27]

17 The burden of translation work as well as the respective costs are to be borne, as a principle, by the party filing the document in question.

D Interpreters

18 Interpreters may be retained for hearings in order to translate for parties, witnesses or experts who do not master the language of the arbitration proceedings. Interpreter costs are at the expense of the party requesting them.[28]

25 CAS 2008/A/1641, *Netherlands Antilles Olympic Committee v. IAAF & USOC*, Award of 6 March 2009, para. 80; Mavromati/Reeb, Art. R29 para. 26.

26 Cf. CAS 2007/A/1207, *Parma FC v. Portsmouth City FC*, Award of 21 August 2007, para. 21. A Panel may rule that it is not necessary to order the production of certified translations if the Panel can understand the contents of the documents and if the fact that certain documents were produced in another language did not put the other party at a disadvantage in the proceedings, nor deprive it of its right to be heard, e.g., because the other party's attorney understands all documents.

27 Mavromati/Reeb, Art. R29, para. 11.

28 Art. R64.3.

Article R30: Representation and Assistance

The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office.

I PURPOSE OF THE PROVISION

The purpose of this provision is to establish the rules regarding the representation and assistance of the parties in CAS proceedings. The right to representation and assistance is derived from the right to be heard.[1] 1

II CONTENT OF THE PROVISION

According to Art. R30, first sentence, the parties have the right to be represented or assisted by other persons of their choice, during the entire (or part of the) arbitration proceedings. However, there is no obligation to appoint a representative, i.e., a counsel or other person authorized to act on behalf of a party in the proceedings.[2] In practice, sport organisations (e.g. clubs) are frequently represented by their head of legal department or by the chairman / president.[3] Nevertheless, in most cases it is strongly recommended to retain a counsel who is familiar with the relevant sports law and the CAS rules. The representatives are usually, but not necessarily, lawyers.[4] 2

Under the CAS Code and the PILS, lawyers admitted to the Swiss bar do not hold a monopoly with regard to the representation of parties at CAS.[5] However, due to the great importance of Swiss law in CAS proceedings,[6] it is often critical to be supported by a counsel who is familiar with Swiss law. 3

The contact details of any appointed representative need to be communicated to the other party, the CAS Court Office and the Panel.[7] Any later changes in the representative's contact details need to be communicated to the CAS Court Office without delay.[8] Similarly, if the power of representation is revoked, this must be communicated within the meaning of Art. R30.[9] In case a party has several representatives the question may arise whether or not contact details of all representatives need 4

1 BGE 117 II 346 para. 1a; Berger/Kellerhals, para. 1169.
2 CAS 2007/A/1417, *Perner v. ÖSV*, Award of 25 January 2010, paras. 57–58; see also Mavromati/Reeb, Art. R30, para. 17.
3 Mavromati/Reeb, Art. R30, para. 2.
4 Cf. Girsberger/Voser, *2016*, para. 949.
5 However, only lawyers admitted to the Swiss Bar or lawyers authorized by an international treaty to practice in Switzerland may represent parties in actions to set aside arbitral awards before the Swiss Federal Supreme Court, cf. Art. 40 BGG.
6 Cf. Arts. R45 and R58.
7 Art. R30, second sentence; since the 2013 revision of the CAS Code this explicitly includes the email address as communication by email has become quite common at CAS, cf. Art. R31.
8 Cf. Art. R31(1), second sentence at the end.
9 Mavromati/Reeb, Art. R30, para. 14.

to be communicated. In the light of the purpose of this provision, i.e. to establish the precise date and time of notification of each document to the individual party, it suffices that the details of the leading counsel are communicated.[10] It is open to question whether this rule also applies to persons assisting a party. The better arguments speak for a literal application of Art. R30.[11]

5 There is in principle no limit to the number of persons representing a party. In particular during the hearing a party may be represented or assisted by as many counsel as they want. However, it is up to the Panel to organize the hearing schedule and to allocate time to the various parties. Good administration of justice may, thus, well require that not all representatives will be allowed to speak at the hearing.[12]

6 Under the CAS Code edition 2004, Art. R30, third sentence, stated that a "power of attorney may be provided". In the course of the 2010 revision of the CAS Code the wording of this provision was changed into a "power of attorney must be provided". Under the 2013 revision, the wording was changed again and now states the parties "shall provide written confirmation of such representation".[13] The modified wording now conforms to the first sentence of Art. R30, according to which not only attorneys but also other persons may represent parties at CAS. Moreover, the new wording makes clear that power of representation must be provided in writing, i.e. that oral declarations are not sufficient. In addition, the term "confirmation" implies that if a submission is made without proof of representation, a respective confirmation may still be submitted at a later stage.

7 The power of attorney shall be produced spontaneously and not at the request of a party or the Panel.[14] However, Art. R30 is silent on *when* such written confirmation must be submitted to the CAS Court Office. Also, Art. R48 of the CAS Code, dealing with the (mandatory) requirements of the statement of appeal, does not explicitly list the power of attorney. Thus, it appears that the power of attorney does not need to be attached to the statement of appeal in order to comply with the time limit in Art. R49 to file the appeal.[15]

8 A question may arise as to the validity of a request for arbitration / appeal in case it was filed by a representative lacking due authorization. In principle, such procedural acts are not void from the outset, but may be authorized by the represented party *ex post*.[16] That such authorization is effective *ex tunc* is corroborated by the jurisprudence of the Swiss Federal Supreme Court as well as by Swiss legal literature.[17]

10 Mavromati/Reeb, Art. R30, para. 5.
11 Mavromati/Reeb, Art. R30, para. 4.
12 Mavromati/Reeb, Art. R30, para. 6.
13 Before the 2010 revision, no power of attorney or written confirmation of representation was explicitly required by Art. R30; this was also confirmed by CAS jurisprudence, CAS 2002/A/395, *UCI v. D and FCI*, Award of 19 November 2002, para. 3.
14 Mavromati/Reeb, Art. R30, para. 14.
15 CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, para. 132.
16 CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club*, Award of 27 November 2015, para. 133.
17 BGer 4A_150/2013, para. 3.2; Staehelin/Schweizer, in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), Kommentar zur Schweizerischen Zivilprozessordnung, para. 28 at Art. 68.

If a party does not have the financial means to be represented by a lawyer before the CAS, it may file a request for financial aid to the CAS (for detail, see the below commentary on Art. R48).[18] 9

18 For details see Mavromati/Reeb, Art. R30, paras. 23 et seq.

Article R31: Notifications and Communication

All notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office. The notifications and communications shall be sent to the address shown in the arbitration request or the statement of appeal, or to any other address specified at a later date.

All arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt.

The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit, as mentioned above.

Filing of the above-mentioned submissions by electronic mail is permitted under the conditions set out in the CAS guidelines on electronic filing.

The exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified; the CAS Court Office may then forward them by the same means. Any other communications from the parties intended for the CAS Court Office or the Panel shall be sent by courier, facsimile or electronic mail to the CAS Court Office.

I PURPOSE OF THE PROVISION

1 The purpose of Art. R31 is to establish rules with regard to communications between the CAS, the Panel and the parties, from the beginning to the conclusion of arbitration proceedings at the CAS. The provision was amended in 2016 with the aim of facilitating electronic communication with the CAS Court Office.

II CONTENT OF THE PROVISION

A The Terms Used

2 The provision speaks of "notifications" and "communications". Both terms are not defined in the CAS Code. However, it follows from Art. R31(2) that the term "notification" describes the communication of Panel decisions to the parties ("*[a]ll arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified*"). The term "communication", in turn, is used for submissions of the parties to the CAS Court Office / Panel.[1] Thus, the request for arbitration, the statement of appeal and any other written submission (cf Art. R31(3)) are "communicated" to

1 Mavromati/Reeb, Art. R31, para. 1.

the CAS Court Office by the parties. The same is true for counterclaims lodged by a party and any other letters addressed to the CAS.[2]

B Coordination through the CAS Court Office

Article R31 provides that all notifications and communications from the CAS or the Panel to the parties, and conversely from the parties to the CAS or the Panel, shall take place via the CAS Court Office.[3] Hence, in arbitrations before the CAS, written communications may not be exchanged directly between the parties and the Panel, but always through the institution's court office. This communication system may not appear to be the most efficient, but it facilitates control of the information flow between the parties and the Panel. **3**

C Form of Notifications

The arbitral awards, orders and other decisions of the CAS or the Panel shall be notified according to Art. R31(2) to the parties in any form permitting proof of receipt.[4] In the 2013 revision of the CAS Code it was clarified that this includes courier, facsimile and electronic mail, but that this list of notification means is not exclusive. The question may arise what the phrase "other decisions" intends to include, i.e. whether or not this leaves any communication at all that may be sent to the parties without permitting proof of receipt. The correct view holds that regular exchange of correspondence between the CAS Court Office and the parties does not fall under "other decisions" and, thus, can be sent by regular mail.[5] **4**

Notifications must be sent to the address specified by the parties. The relevant addresses of the parties and representatives (if any) follow from the information given in the request for arbitration or statement of appeal or derive from any other address specified at a later date (Art. R31(1)). Any change in the address of a party or representative must be communicated to the CAS without delay, as communications sent to the previously indicated address shall be deemed to have been made properly. There should, in principle, be only one address for each party.[6] **5**

The question arises whether the "ok" status on the fax transmission sheet is sufficient evidence that the communication was actually received by a party. Swiss jurisprudence appears to be rather reluctant when it comes to accepting notification by fax as a reliable means of communication.[7] **6**

2 Mavromati/Reeb, Art. R31, para. 3.
3 Art. R31(1), first sentence and Art. R31(3), first sentence.
4 Art. R31(2).
5 Mavromati/Reeb, Art. R31, para. 10.
6 Mavromati/Reeb, Art. R31, para. 15.
7 BGer 4A_392/2010, paras. 2.3.1 et seq.

D Form of Communications

1 The Principle: Filing by Courier

7 Before the 2013 revision of the CAS Code, Art. R31(3), first sentence stated that "all communications" from the parties to the CAS or the Panel had to be sent by "courier or facsimile". According to the new wording of this provision, "[t]he request for arbitration, the statement of appeal and any other written submissions" must be filed by "courier delivery" (i.e., postal or delivery services).[8] This is a major change as it means that filing submissions only by facsimile (or email) does not meet the formal requirements of the CAS Code anymore.[9] For communications other than the submissions mentioned in Art. R31(3) sentence 1, the means of either courier, facsimile or electronic mail suffices (Art. R31(5) last sentence). The list of these three means of communication seems to be exhaustive (unlike the list in Art. R31(2)). It is unclear – at least at first glance – which kind of communications is covered by the term "submission" contained in Art. R31(3). However, if read in conjunction with Art. R44.1, the term "any other submission" in Art. R31(3) clearly refers to additional rounds of submissions concerning the matter in dispute (e.g. reply, rejoinder or, for instance, a statement regarding new evidence filed at a later stage due to exceptional circumstances pursuant to Art. R56). The requirement to dispatch files by courier does not apply to exhibits to the written submissions. Exhibits may be filed via electronic mail according to Art. R31(5), provided that they are clearly referenced in the written submissions (sent by courier) and that each exhibit can be clearly identified. In such case the CAS Court Office will forward them to the other party and the arbitrators only electronically.

8 Since the 2013 revision, the CAS Code allows submissions not only in printed form, but also saved on digital media.[10] The CAS Code does not specify the term "digital medium" and one may expect that it is to be understood broadly (at least as long as its meaning is not further clarified by the CAS). Thus, it encompasses any customary digital medium such as CD-ROM or USB-stick. Importantly, the data contained on the digital medium must be saved in one of the common formats, for instance, pdf or Word.

2 The Exception: Filing by Electronic Mail Along with Courier

9 In addition, the CAS Code now permits under certain conditions the filing of submissions by electronic mail. The conditions are set out in the CAS guidelines on electronic filing, which are published on the CAS website.[11] Accordingly, the submission initiating the CAS proceedings (Request for Arbitration / Statement of Appeal) must be filed by facsimile or courier. In order to benefit from the e-filing system, a respective request of a party needs to be consented to by all other parties.

10 Correspondingly, the communications referred to in Art. R31(3) may be transmitted in advance by electronic mail to the official CAS e-mail address. However, even

8 Art. R31(3), first sentence.
9 As also expressed by Art. R31(3), second sentence.
10 Art. R31(3), first sentence, effective as of 1 March 2013.
11 < http://www.tas-cas.org/en/e-filing/e-filing.html > . See also Stocker, in Bernasconi, Arbitrating Disputes in a Modern Sports World, 2016, 113 et seq.

upon receipt of the electronic mail, the filing is only valid if the written submission (along with the necessary copies) is dispatched in hardcopy by courier within the first subsequent business day of the relevant time limit.

The CAS Code (still) does not provide for any rule regarding cases where briefs are submitted in a timely fashion, but the exhibits do not arrive within the time limit for technical reasons (e.g., due to server problems or because the maximum size for attachments has been exceeded). As a principle, the party using such a form of communication bears the risk of such failure. However, it is desirable for the CAS to adopt a pragmatic approach and accept the attachments at a slightly later stage, unless there are clear indications of abuse. In any event, where documents are successfully transmitted and available to the other party only after a delay, the CAS, as appropriate, shall grant some extra time to such party. 11

E Receipt of Communications

The CAS Code does not define what constitutes receipt of communication.[12] Presumably, it embraces the "objective-receipt theory" and, thus, considers any communication as validly received if said communication has been physically delivered to the addressee, whether to him personally or to someone at his residence or place of business such as a secretary.[13] 12

F Copies of Submissions

A party filing a written submission must file one copy for each party, each arbitrator and the CAS itself.[14] This applies equally to submissions in printed form (hardcopies) and submissions stored on digital devices.[15] Non-compliance with this rule may have the consequence that the CAS does not proceed with the arbitration. Despite the clear wording of this provision, i.e. "shall not proceed",[16] this very strict consequence is neither compulsory nor automatic; in other words: "not to proceed" is an optional choice rather than an obligation of the CAS. 13

12 With regard to when, i.e., at what point in time a communication is deemed to have been received, cf. Art. R32, paras. 2 – 4.

13 This understanding corresponds to the express wording of some important arbitration rules such as Art. 2(2)(3) UNCITRAL Rules or Art. 2(1) Swiss Rules and to the corresponding principles applicable under Swiss civil law (cf. "*Empfangstheorie*" and "*Zugangsprinzip*" in German).

14 Art. R31(3), first sentence. In the event that the number of arbitrators is not defined in the arbitration agreement, at least one copy, but preferably three copies should be filed for the arbitrator(s).

15 Beloff/Netzle/Haas, para. E3.70.

16 The CAS Code edition 2004 did not yet contain this provision. This rule was adopted only with the 2010 revision of the CAS Code, at which time it read "CAS will not proceed".

Article R32: Time Limits

The time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location of their own domicile or, if represented, of the domicile of their main legal representative, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the location from where the document is to be sent, the time limit shall expire at the end of the first subsequent business day.

Upon application on justified grounds and after consultation with the other party (or parties), either the President of the Panel or, if she/he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General without consultation with the other party(-ies). The Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.

I PURPOSE OF THE PROVISION

1 The purpose of Art. R32 is to provide guidance and clarity with regard to time matters,[1] in particular the calculation (Art. R32 (1)) and extension (Art. R32 (2)) of time limits and the suspension of arbitration proceedings (Art. R32 (3)).

II CONTENT OF THE PROVISION

A Time Limits under the Code

2 The provision refers to "time limits fixed under this Code", i.e. provisions in which the CAS legislator defines time limits.[2] This may concern deadlines already fixed in the Code itself as, for example, in Art. R34(1) (seven days), Art. R37(4)(6) (ten days), Art. R40.2(2) (fifteen days) or Art. R51(1) (ten days). In addition, also time limits fixed by the Panel (in application of the Code and, thus, "under the Code") fall within the scope of Art. R32. Examples of provisions where the Code confers power upon the Panel to fix deadlines within its discretion are, e.g., Arts. R39, R40.2 and R44.1.

3 Whether the time limit for filing an appeal under Art. R49 is already a "time limit fixed under the Code" is questionable. The time limits for appeal are fixed, in principle, in the statutes or regulations of the federation, association or sports-related body

1 Cf. CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, para. 34.
2 Mavromati/Reeb, Art. R32, para. 2.

concerned and, not strictly speaking, "under the Code".[3] The twenty-one-day deadline provided for in Art. R49 only applies by default. Consequently, R32(2) provides that any time limits provided for in the Code may be extended with the exception of the one provided for in Art. R49. Nevertheless, Art. R32(1) should be used as an interpretative tool when calculating the time limits under Art. R49 (see below B).[4]

B Calculation Of Time Limits

1 Law Applicable to the Calculation of the Time Limit

The calculation of time limits has to be performed first and foremost on the basis of Art. R32. However, the question may arise what law to apply subsidiarily in case of a lacuna in the rules. It is submitted *inter alia* that the law subsidiarily applicable is the law of the place of receipt[5] or the *lex arbitri*.[6] The second view is preferable and should be followed consistently as it leads to uniform results and allows for the application of the European Convention on the Calculation of Time Limits, to which Switzerland is a signatory.[7] 4

2 Dies a Quo

The time limits established under the CAS Code begin (*dies a quo*) on the day following the day of receipt of the respective communication.[8] This is, by the way, in line with Swiss law (cf. Art. 132 CO, 77(1) CO).[9] The question of when a communication is deemed to have been received follows Swiss law (see supra para. 4). Accordingly, receipt means that the communication must have come into the sphere of control of the party concerned (or of his/her representative or agent authorised to take receipt) and that the party concerned must also have a (reasonable) possibility of taking note of the notification by the CAS.[10] This is not the case, if notification made to the 5

3 CAS 2003/A/643, *Superstar Rangers FC v/ Sport Lisboa e Benefica Futebol SAD*, Award of 1 February 2005, para. 7.

4 CAS 2013/A/3165, *FC Volyn v. Issa Ndoye*, Award of 14 January 2014, paras. 44–47; CAS 2004/A/574, *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 69; CAS 2003/A/643, *Superstar Rangers FC v/ Sport Lisboa e Benefica Futebol SAD*, Award of 1 February 2005, para. 7; CAS 2008/A/1705, *Grasshopper v/ Club Alianza de Lima*, Award of 18 June 2009, paras. 8.3.3 et seq.; Mavromati/Reeb, Art. R32, para. 15; Haas, *SchiedsVZ 2011*, pp. 1, 8 seq.

5 CAS 2004/A/574, *Associacao Portuguesa de Desportos v. Club Valencia*, para. 70, describing it as "place of delivery".

6 CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.6; see also CAS 2010/A/2354, E*lmir Muhic v. FIFA*, Award of 24 August 2011, para. 37; for further references, see Art. R49, para. 7 below.

7 European Convention on the Calculation of Time Limits of 16 May 1972 (*Europäisches Übereinkommen über die Berechnung von Fristen* in German, SR 0.221.122.3); cf. Art. R49, para. 7 below; as to the meaning of *receipt of communication*, see Art. R31, para. 12 above.

8 Art. R32(1), first sentence.

9 Cf. CAS 2010/A/2354, *Elmir Muhic v. FIFA*, Award of 24 August 2011, para. 37; CAS 2007A/1364, *WADA v. FAW and James*, Award of 21 December 2007, paras. 6.1 et seq.; CAS 2006/A/1153, *WADA v/ Assis & FPF*, Award of 24 January 2007, para. 41; see also Mavromati/Reeb, Art. R32, para. 18; Haas, *SchiedsVZ 2011*, p. 9.

10 CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 60; CAS 2006/A/1153, *WADA v/ Assis & FPD*, Award of 24 January 2007, para. 40.

address of the party's federation instead of the party's address.[11] Whether the party concerned actually took note of the content of the communication, is not decisive.[12] The burden of proof of having received a communication at a certain point in time lies with the party so claiming.[13]

3 Dies at Quem

6 The time limits under the CAS Code are deemed to have been met (*dies ad quem*) if the party's communication is sent before midnight on the last day on which said time limit expires.[14] In the course of the 2013 revision of the CAS Code, it has been clarified that the term "midnight" refers to the time at the location "where the notification has to be made". Since the notification (cf. Art. R31 para. 4 et seq.) has to be made to the address of the party, the time zone of that party is decisive for whether or not the communication has been sent before midnight.[15]

7 If the communication is to be sent by Swiss postal services, it is decisive that it be committed to a Swiss postal office (or courier) before the deadline has expired and that said timely posting can be proven, for instance by acknowledgement of receipt from the post office.[16] The burden of proof of having sent the communication within the set time limit rests with the party filing the submission.

4 Official Holidays and Non-working Days

8 Official holidays and non-working days that occur during the relevant time period are included in the calculation of time limits under the CAS Code, meaning that they do not extend the time limit.[17] However, the time limit will be extended if its last day falls on an official holiday or a non-business day.[18] This, also, is consistent with Swiss law.[19] Again, the CAS Code specifies that it is the place from which the notification is made, i.e. the place from which the communication to the CAS is sent, which governs whether or not the last day of the deadline is an official holiday or non-business day.[20] In such a case, the time limit shall expire at midnight of the first subsequent business day.[21] As the parties may be located in different countries, their official business days may vary. Under Swiss law, Saturday does not count as

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11 CAS 2012/A/2839, *C.A. Boca Juniors v. FIFA*, Award of 26 July 2013, paras. 71 et seq.
12 CAS 2006/A/1153, *WADA v/ Assis & FPD*, Award 24 January 2007, para. 40; see also CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 60.
13 Mavromati/Reeb, Art. R32, para. 13.
14 Art. R32(1), third sentence. Confirmed in CAS 2009/A/1895, *Le Mans Union Club 72 v. Club Olympique de Bamako*, Award of 6 May 2010, para. 10.
15 *Contra*: Mavromati/Reeb, Art. R32, para. 17; left undecided in CAS 2013/A/3274, *Mads Glasner v. Fédération Internationale de Natation (FINA)*, Award of 31 January 2014, paras. 52 et seq.
16 CAS 2001/A/343, *Union Cycliste Internationale (UCI) v. H.*, Award of 28 January 2002, para. 9.
17 Art. R32(1), second sentence.
18 See also CAS 2015/A/3910, *Ana Kuže v. Tianjin TEDA FC*, Award of 20 November 2015, para. 53; see also CAS 2012/A/2839, *C.A. Boca Juniors v. FIFA*, Award of 26 July 2013, para. 70.
19 Mavromati/Reeb, Art. R32, para. 18; Haas, *SchiedsVZ 2011*, p. 9.
20 CAS 2014/A/3864, *AFC Astra v. Laionel da Silva Ramalho & FIFA*, Award of 31 July 2015, paras. 43 et seq.; *contra*: Mavromati/Reeb, Art. R32, para. 17.
21 Art. R32(1), fourth sentence; cf. also Arts. 3 and 5 European Convention on the Calculation of Time Limits of 16 May 1972 (SR 0.221.122.3).

a working day.[22] Thus, if the end of a time limit falls on a Saturday or Sunday, the time limit expires on Monday only.[23] It will fall to the party claiming entitlement to an extension of time to establish that the last day of the time limit was a holiday or non-working day pursuant to the applicable law, and that the day of its submission is the first subsequent business day.

C Extension of Time Limits

Except for the time limit for filing the statement of appeal,[24] time limits may be extended if the party's application is based on justified grounds, if the circumstances of the case so warrant, and if the initial time limit has not yet expired.[25] In any event, a consultation with the other party is always required (in particular in order to avoid a violation of the right to be heard). The extension is, in practice, rather short (usually 3 days).[26] In certain instances the time limit may be suspended until the other party has expressed itself upon the request.[27] That said, providing for the possibility to extend time limits does not mean that time limits under the CAS Code are not meant to be of absolute, binding character.[28] Granting extensions should be the exception rather than the rule. However, if a reasoned request is made on time, the CAS is likely to grant the extension.[29] The same is true if the request for extension is accepted by the other party.[30] If – despite being consulted – the other party remains silent, such silence will be interpreted as tacit acceptance.[31] 9

Article R32 does not define the expressions "justified grounds" and "circumstances so warrant". "Justified grounds" refers to the grounds invoked by the applicant, i.e., the party requesting an extension. This usually requires that there be no fault on the part of the applicant (e.g., in case of illness or important professional engagements of the applicant or his representative, delays in obtaining evidence from third parties or experts, difficulties to contact and consult with the applicant who is abroad – e.g. at a tournament –, or the complexity of the case).[32] The "circumstances" refer to the arbitration and the actual case; they warrant an extension if, from an objective point of view, no specific urgency interferes with the extension sought. At the end of the day the justified grounds have to be balanced with the principle of good administration of justice, in particular delays in the procedure, the principle of equal 10

22 CAS 2004/A/574, *Associacao Portuguesa de Desportos v. Club Valencia*, para. 69; Mavromati/Reeb, Art. R32, para. 18.
23 Cf. CAS 2006/A/1175, *D. v. International DanceSport Federation*, Award of 26 June 2007, paras. 10–11.
24 Art. R32(2), first sentence; cf. BGer. 4A_126/2008 para. 2; CAS 2008/A/1561, *Luke Michael v. Australian Canoeing*, Award of 29 September 2008, para. 3. However, there may be cases involving good faith that may allow for remedy in case the deadline in R47 is missed, see Haas, *SchiedsVZ 2011*, pp. 10 *et seq*.
25 Art. R32(2), first sentence.
26 Mavromati/Reeb, Art. R32, para. 24.
27 Mavromati/Reeb, Art. R32, para. 24.
28 BGer. 4A_600/2008 para. 4.2.1.2.
29 Cf. Oschütz, p. 271, stating that in practice a first extension will always be granted even if there is no special reasoning.
30 See for an example, CAS 2011/A/2576, *Curacao Sport and Olympic Federation v. IOC*, Award of 31 August 2012, para. 3.4.
31 Mavromati/Reb, Art. R32, para. 24.
32 See CAS 2011/A/2621, *David Savic v. Professional Tennis Integrity Officers*, Award of 5 September 2012, para. 3.7; Mavromati/Reeb, Art. R32, para. 23 (with many examples).

treatment of the parties and the principle of proportionality.[33] In assessing the weight of the various grounds, the President of the Panel (or the Division President) has a wide margin of discretion.[34] In particular, requests for an extension in order to wait for the outcome of parallel criminal proceedings are problematic.[35] No extension, in principle, can be granted if the request is filed after the original deadline has already expired (see also below para. 13). However, in exceptional circumstances a new deadline may be fixed with the agreement of all other parties.

11 Requests for the extension of time limits are quite frequent in CAS proceedings. They may be filed by any of the parties.[36] Extensions are usually dealt with by the President of the Panel (or in case the Panel has not yet been appointed, by the President of the respective Division). Depending on whether or not the other party has objected to the extension, the President of the Panel will either give a brief explanation in the letter granting the extension or refer to the reasoning in the award.[37] Sometimes, requests are made just shortly before the expiry of the time limit as the party claims to have discovered an element requiring further action that cannot be accomplished within the remaining time.[38] Such cases require swift decisions. Therefore, the CAS Code contemplates that, except as regards the time limit for the statement of appeal, any request for a first extension of up to five days may be decided by the CAS Secretary General, notably without consulting the other party.[39]

12 Article R32 does not exclude the possibility that several subsequent requests for extension may be lodged by the same party and eventually granted. This is possible in particular where the grounds are not caused by the requesting party itself, where new circumstances have arisen, or where the opposing party agrees to a further extension. In any event, the grounds put forward by the requesting party should be more significant to justify a second extension. However, if the opposing party does not object, a further extension will be granted liberally.

13 It has been submitted that even in situations in which the time limit has already expired, a party may nonetheless request the reinstatement of the time limit.[40] In essence, at least partly, this is provided for in case of late filing under Art. R56. In any case, CAS should grant such reinstatement only in exceptional circumstances, failing which legal certainty would be undermined. Such exceptions require that (i) the party was objectively prevented from acting on time by extraordinary circumstances (e.g., by accident or illness), (ii) the party did not cause the extraordinary circumstances through its own fault, that (iii) the party immediately act as soon as he/she is able to do so, and (iv) such reinstatement be proportional in relation to previous proceedings and the interests at stake.

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33 CAS 2010/A/2235, *UCI v. Tadej Valjavec & Olympic Committee of Slovenia*, Award of 21 April 2011, para. 71; Mavromati/Reeb, Art. R32, para. 25.
34 CAS 2010/A/2235, *UCI v. Tadej Valjavec & Olympic Committee of Slovenia*, Award of 21 April 2011, para. 71.
35 CAS 2008/A/1528 & 1546, *UCI & CONI v.Gianpaolo Caruso & Italian Cycling Federation*, Award of 21 January 2009, para. 3.4 *seq*.
36 Mavromati/Reeb, Art. R32, para. 22.
37 See also Mavromati/Reeb, Art. R32, para. 24.
38 Rigozzi, *Jusletter 13 September 2010*, para. 17.
39 Art. R32(2), second sentence.
40 Rigozzi, *Jusletter 13 September 2010*, para. 18.

Where a party does not make use of Art. R32 and does not request an extension, it may not argue at a later stage that it did not have enough time to prepare the arbitration, and that as a consequence its right to be heard was violated.[41] 14

D Suspension (Stay) of the Arbitration

Apart from Art. 186(1bis) PILS, there is no specific statutory provision as to the power of the Panel to stay arbitral proceedings. However, the power of the Panel to do so follows (indirectly) from Art. 182(2) PILS, according to which the arbitral tribunal is competent to decide on questions of procedure unless the parties have agreed otherwise. Hence, a Panel has – in principle and absent any contrary agreement to the by the parties – full discretion when ruling on a request for a stay.[42] In conformity with this principle of Art. 182(2) PILS, Art. R32(3) provides that the arbitration "may" be suspended on "justified grounds". Thus, the Panel (or the Division President) enjoys a wide margin of discretion when deciding on the request for a stay. In doing so, the Panel is not bound by the prerequisites enshrined in Art. R37, since a suspension of the arbitration procedure is not a provisional measure within the meaning of Art. R37.[43] Pursuant to the clear wording of this provision a suspension may not be ordered *ex officio*. The provision in Art. R32(3) must be distinguished from Art. R39(4) and Art. R55(5), which adopt the provision in Art. 186(1bis) PILS practically verbatim for parallel (civil) proceedings.[44] 15

Article R32(3) does not specify the meaning of the term "justified grounds". A suspension is justified where, from an objective point of view, the granting of a stay facilitates establishing the proper decision, prevents contradictory decisions and/or increases efficiency. Upon receipt of a request for a stay from one party, a consultation with the other party is required.[45] The other party's agreement or lack of objection to the request for suspension is no *conditio sine qua non*, but usually facilitates the granting of the request.[46] In exercising its discretion the Panel will balance the conflicting interests of the parties, in particular the right of access to justice, with due consideration to equal treatment of the parties.[47] Grounds for suspending an arbitration might exist where the interlocutory award issued by the Panel according to Art. 186(1) PILS is appealed to the Swiss Federal Supreme Court, where a decision on legal aid or the language of the proceeding (Art. R29) is pending, and where proceedings to challenge an arbitrator, conciliation talks, or 16

41 BGer. 4A_612/2009 para. 5.1.2.
42 Poudret/Besson, para. 581.
43 See also CAS 2008/A/1528 & 1546, *UCI & CONI v. Caruso & FCI*, Order on Provisional Measure of 22 August 2008, paras. 5.1 et seq.
44 Mavromati/Reeb, Art. R32, para. 31.
45 Art. R32(2) by analogy.
46 Cf. CAS 2008/A/1531, *Federaciòn Boliviana de Futbol v. FIFA*, Procedural order of 12 June 2008; CAS 2011/A/2678, *IAAF v. RFEA & Francisco Fernandez Pelaez*, Award of 17 April 2012, paras. 64 et seq.; CAS 2008/A/1564, *World Anti-doping Agency (WADA) v. International Ice Hockey Federation (IIHF) & Florian Busch*, Award of 23 June 2009, p. 8, where WADA requested that the appeal procedure be stayed until the National German Court of Arbitration for Sports rendered its final decision on the appeal filed by WADA, which appeal was pending before the National German Court of Arbitration for Sports, a request to which the IIHF agreed; see also Mavromati/Reeb, Art. R32, para. 17.
47 Cf Berger/Kellerhals, para. 1183.

proceedings for the replacement of an arbitrator are pending.[48] In principle, the mere fact that a proceeding relating to the same subject matter is pending before civil courts is not – as such – a sufficient ground to suspend the arbitration proceedings. This follows already from Art. 186(1bis) PILS.

17 The discretion conferred upon the Panel (or the Division President) to decide on the request for a suspension is not limitless, however. Restrictions follow from Art. 182(3) PILS, according to which due consideration must be given to the parties' right to be heard and to the principle of equal treatment. The Swiss Federal Supreme Court has acknowledged that – beyond the aforementioned principles – restrictions to the Panel's discretion may apply where there are "mandatory reasons" for suspending arbitral proceedings.[49] Such "mandatory reasons" may follow from the notion of *ordre public* or other basic procedural notions.[50]

18 No issue of public policy arises – e.g. – in a case of parallel proceedings between civil courts and arbitration. Even if the CAS is the second court seized and the matter in dispute is identical in both proceedings, no mandatory stay applies to the arbitral procedure (cf. Art. 186(1bis) PILS, which basically excludes the *lis pendens* rule). Furthermore, it is also established in Swiss jurisprudence that the principle "*le pénal tient le civil en l'état*",[51] according to which a criminal procedure takes precedence over a civil procedure, is not part of the Swiss *ordre public*.[52] This follows – *inter alia* – from Art. 53 of the Swiss Code of Obligations (hereinafter referred to as "CO") that specifically provides for the principle of independence between criminal and civil proceedings. Thus, the fact that criminal investigations are (allegedly) pending does not constitute a mandatory ground for a stay of the arbitral proceedings. Only in very rare circumstances has the Swiss Federal Supreme Court contemplated a mandatory ground for a suspension, where *"questions material to the outcome of the arbitral proceedings that are beyond the competence of the arbitral tribunal must be clarified"*.[53] Likewise, a mandatory stay based on the right to be heard will only be warranted in exceptional cases. It has been observed that continuing rather than suspending the arbitration may prevent a party from introducing evidence that might have been obtained otherwise. Though this is true, it does not warrant a mandatory stay of the arbitral proceedings as can be deduced from the following jurisprudence of the Swiss Federal Supreme Court: *"[C]ases in which difficulties of a probative nature arise do not fall into this category [of a mandatory stay];*[54] *the possibility of absence of proof is inherent to civil procedure ; the rules on the burden of proof then achieve their true significance. In order to ease the consequences of this rigid solution,*

48 Mavromati/Reeb, Art. R32, para. 28; Berger/Kellerhals, para. 1184.

49 BGer 4P.64/2004 para. 3.2.

50 BGE 127 III 279 para. 2 a/b.

51 For a (detailed) analysis of this principle stemming from French law, cf. Cour d'appel Paris (23.3.2002) Rev. Arb. 2002, 971 et seq.; Cour d'appel Paris (20.6.2002) Rev. Arb. 2002, 792 et seq.; Chilstein, Droit pénal et arbitrage, Rev. Arb. 2009, 3, 44 *et seq*.

52 BGE 119 II 386 para. 1c; cf. also BGer 4A_604/2010, *ASA Bull. 2013*, 89, 95; Poncet/Macaluso, in: *Festschift Kellerhals*, 2005, pp. 65, 70 et seq.; Berger/Kellerhals, paras. 1185–1186; Poudret/Besson, para. 583; Belohlavek, Arbitration Vol II, 2009, para. 1397; see also CAS 2010/A/2298, *Jae Joon Yoo v. AIBA*, Award of 12 July 2011, paras. 7.1–7.3.

53 BGer. 4P.64/2004 para. 3.2: "*A mandatory ground may be acknowledged where circumstances occur that affect the legal existence or the legal capacity of a party or if questions material to the outcome of the arbitral proceedings that are beyond the competence of the arbitral tribunal must be clarified."*

54 Inserted for better understanding.

the legislator provides that a party that was prevented from presenting conclusive evidence in due time may file an action for revision; this measure is also available in the ambit of procedures according to articles 176 et seq of the PILA, even though not expressly provided for."[55] In case insolvency proceedings are opened over the estate of a party to the proceedings, the correct view holds that – irrespective of where this party is domiciled – Art. 207(1) SchKG is not applicable, since this provision only applies to proceedings pending before (Swiss) state courts.[56] Furthermore, the provision is not part of the Swiss *ordre public*.[57] However, the right to be heard may warrant that the proceedings be suspended, if the administrator taking over the estate needs additional time to familiarize himself with the file.[58]

Article R32(3) makes it clear that an arbitration proceeding cannot be suspended indefinitely. Instead, suspension can only be granted "for a limited period of time". **19**

55 BGE 119 II 386 para. 1b ; cf. also Poncet/Macaluso, in: *Festschrift Kellerhals*, 2005, pp. 65, 72.

56 The question is, however, disputed in legal literature, cf. Berger/Kellerhals, paras. 1187 seq.; see also BGE 130 III 769 para. 3.2.3. where the courts specifically stated that the provision is only applicable to courts and authorities in Switzerland ("*nur gegenüber Richtern und Behörden im Inland*").

57 Poudret/Besson, para. 584; Lévy, *Insolvency in Arbitration – Swiss law*, in: Financial Capacity of the Parties – A Condition for the Validity of Arbitration Agreements?, edited by the German Institution of Arbitration (DIS), Frankfurt a. M., 2004, p. 102.

58 Lévy, *Insolvency in Arbitration – Swiss law*, in: Financial Capacity of the Parties – A Condition for the Validity of Arbitration Agreements?, edited by the German Institution of Arbitration (DIS), Frankfurt a. M. 2004, p. 103.

Article R33: Independence and Qualifications of Arbitrators

Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties.

Every arbitrator shall appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code, shall have a good command of the language of the arbitration and shall be available as required to complete the arbitration expeditiously.

I PURPOSE OF THE PROVISION

1 The provision deals with the independence and qualifications of CAS arbitrators. The delivery of fair and "right" decisions requires independent and qualified arbitrators. The purpose of Art. R33 is to ensure that arbitrators acting in CAS proceedings are independent and sufficiently qualified. In case of lack of independence, an arbitrator may be challenged in accordance with Art. R34. In case of insufficient qualifications, an arbitrator may be removed pursuant to Art. R35.

2 This provision does not cover the institutional/structural independence of the CAS.[1] The Swiss Federal Supreme Court has confirmed the said independence with regard to sports federations[2] and the IOC,[3] and has stated that the CAS provides adequate guarantees for an independent and impartial dispute resolution process.[4]

II CONTENT OF THE PROVISION

A Independence Of Arbitrators

1 The Terms "Independence" and "Impartiality"

3 According to Art. R33(1), every arbitrator needs to be "impartial and independent".[5] No universally accepted definitions of these two terms exist, but it is customarily stated that independence relates to external factors, in particular externally perceptible connections of a financial, social or other kind, whereas impartiality relates to internal factors (state of mind), in particular actual or possible bias on the part of an arbitrator with regard to the dispute or one of the parties.[6] It is apparent that these two concepts partially overlap,[7] and looking at the heading of Art. R33 which

1 Cf. Introduction above, para. 4, and Rigozzi, *ZSR 2013 III*, 301 et seqq.
2 BGE 119 II 271 para. 3b.
3 BGE 129 III 445 para. 3; BGer. 4A_612/2009 para. 3.1.3.
4 BGE 138 III 29 para. 2.2.2.
5 Cf. also Art. S18(2): Upon their appointment, the CAS arbitrators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality.
6 E.g., Mavromati/Reeb, Art. R33, para. 8; Berger/Kellerhals, para. 783; Girsberger/Voser, *2016,* para. 652 et seq. Impartiality is assumed as long as the contrary cannot be proven, cf. BGer. 4A_586/2008 para. 3.1.1.
7 Mavromati/Reeb, Art. R33, para. 8: "closely linked".

mentions only independence, and at Art. R34 according to which an arbitrator can be challenged on the basis of lack of independence or impartiality, it is clear that the broader term independence also encompasses impartiality. It is noteworthy that before the 2013 revision of the CAS Code, the wording of Art. R33(1) only mentioned independence, but not impartiality.[8] However, it seems to be universally accepted that arbitrators have to be both independent and impartial in the aforementioned sense.[9] Moreover, under the PILS, both the lack of independence and the lack of impartiality are grounds on which an award can be set aside.[10] Against this background, there are no doubts that the CAS Code required impartiality already before the CAS Code revision of 1 March 2013.[11] In other words: Impartiality has always been covered by the notion of independence and the said amendment to Art. R33 is just a clarification of formal nature. (Accordingly, also throughout the following commentary on this provision the use of the term independence usually includes impartiality).

Independence means not only that the arbitrator is *de facto* not dependent, but also **4** that he does not convey the impression that he might be dependent, i.e. that he does not give raise to legitimate doubts about his independence.[12] This must be assessed from an objective third-party perspective and not from the subjective party view.[13] Said third party is a hypothetical party and not an arbitrator. Naturally, also the personal view of the arbitrator concerned and his "clean conscience" are not decisive factors of the test. However, in order to admit legitimate doubts as to an arbitrator's impartiality or independence these doubts have to appear founded in objective findings. Conversely, subjective impressions are not sufficient to induce a lack of independence/impartiality, unless they are based on concrete, i.e. objective facts.[14]

2 The Legal Standard

The Swiss Federal Supreme Court has ruled that, as a starting principle, arbitral **5** tribunals must present the same guarantees of independence as state courts.[15] Thus, the decisions of the Swiss Federal Supreme Court in relation to Art. 30(1) of the Swiss Constitution serve as a starting point. However, the Swiss Federal Supreme Court has equally ruled that when assessing the independence of an arbitrator one should also take into account the particularities of international arbitration.[16] One of its particularities is that arbitrators and counsels have frequent contacts due to their economic and professional background and the private nature of arbitration

8 See Mavromati/Reeb, Art. R33, para. 7.
9 See IBA Guidelines, Part I(1); see also, e.g., Raeschke-Kessler, *ASA Bull. 2008*, p. 6; Girsberger/Voser, *2016*, paras. 652 et seq.
10 Cf. BGE 136 III 605 para. 3.3.2. Same: Art. 367(1)(c) CCP. See also Art. 30 FC.
11 Of the same view Rochat/Cuendet, p. 55; Kaufmann-Kohler/Bärtsch, p. 76.
12 Art. R34(1) sentence 1. See also BGer. 4A_586/2008 para. 3.1.1; Rigozzi, para. 947; Oschütz, p. 119; Kaufmann-Kohler/Bärtsch, pp. 76–77; cf. further Art. R34, para. 3 below.
13 BGer. 4P.105/2006, para. 4; BGer. 4A_458/2009, para. 3.1; see also CAS 2002/A/370, *L v. IOC*, Award of 29 November 2002, p. 4; CAS 2011/O/2583, ICAS Board Decision of 21 February 2012, para. 29; Rigozzi, para. 947; De Witt Wijnen, p. 60; IBA Guidelines, Part I (2)(b).
14 BGE 129 III 445 para. 3.3.3; BGer. 4A_586/2008 para. 3.1.1; BGer. 4A_506/2007 para. 3.1.1; see also CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 49; see Mavromati/Reeb, Art. R33, para. 18.
15 BGE 136 III 605 para. 3.2.1; BGE 125 I 389, para. 4a; BGer. 4A_586/2008 para. 3.1.1; BGer. 4A_506/2007 para. 3.1.1.
16 BGer 4P.4/2007 para. 3.1; BGer. 4A_506/2007 para. 3.1.1.

and that these contacts should not by themselves justify a challenge brought against them.[17] This is all the more true in an arbitration environment that is characterized by a closed list of arbitrators and by special expertise of the arbitrators, as is the case in sports law.[18]

6 The IBA Guidelines on Conflicts of Interest are a useful tool in determining whether or not a specific arbitrator is sufficiently independent and/or impartial.[19] Even though the IBA Guidelines have since their first issuance in 2004 gained wide acceptance in the arbitration community, it must be kept in mind that they are not actually legal provisions and, therefore, do not override national law.[20] Their purpose, rather, is to assist parties (and arbitrators), in assessing whether or not there is sufficient impartiality.[21] The IBA Guidelines themselves expressly provide that they should be applied employing common sense and no unduly formalistic interpretation.[22] The ICAS[23] as well as the Swiss Federal Supreme Court[24] frequently refer to the IBA Guidelines.

3 Same Standard for Chairman and Co-arbitrators

7 It has been long disputed among scholars whether, in international arbitration, the independence standards applicable to a sole arbitrator or chairman differ from those applicable to a party-nominated co-arbitrator.[25] However, the Swiss Federal Supreme Court has in the meantime confirmed that the application of a different standard to co-arbitrators is not permissible in international arbitration.[26] This rule also applies to CAS arbitrations.

4 Applying the Standards in the Individual Case[27]

8 When assessing an arbitrator's independence, all circumstances must be considered. Independence (and impartiality), thus, must be assessed based on the individual circumstances.[28]

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17 BGE 129 III 445 para. 4.2.2.2; BGer. 4A_586/2008 para. 3.1.2; see also BGer. 4P.224/1997 para. 3.

18 BGE 129 III 445 para. 4.2.2.2.

19 See also Mavromati/Reeb, Art. R33, para. 33 et seq.

20 CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 50.

21 Cf. IBA Guidelines Introduction (6).

22 IBA Guidelines Introduction (6).

23 Cf e.g. CAS 2009/A/1879, ICAS Board Decision of 23 November 2009, para. 31; see also CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 40 et seq.

24 BGer. 4A_506/2007 para. 3.3.2.1: „precious working tool"; BGer. 4A_506/2007 para. 3.3.2.2.

25 In favour of an equal standard, e.g., Kaufmann-Kohler/Rigozzi, paras. 4.106–4.124; Berger/Kellerhals, para. 784; Girsberger/Voser, *2016*, para. 707; for a lower standard, e.g., Peter/Besson, paras. 13–14 at Art. 180; Vischer, paras. 7–8 at Art. 180; Oschütz, p. 127.

26 BGE 136 III 605 paras. 3.3.1 et seq. This is also in line with the IBA Guidelines, cf. IBA Guidelines, Part I (5); see also Mavromati/Reeb, Art. R33, paras. 14 et seq; Girsberger/Voser, *2016*, para. 1939.

27 See for a whole range of examples and jurisprudence of CAS / ICAS, Mavromati/Reeb, Art. R33, 19 et seq.

28 CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 49; CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 16; CAS 2010/A/2070, ICAS Board Decision of 3 August 2010, para. 8; CAS 2009/A/1879, ICAS Board Decision of 23 November 2009, paras. 25 et seq.; Mavromati/Reeb, Art. R33, para. 17.

An arbitrator's independence needs to exist, first and foremost, in relation to the parties.[29] Thus, any close and direct links (as opposed to normal and ordinary contacts) between an arbitrator and a party, such as economic subordination (e.g. working relations, companies' administration), family or personal links may objectively cast doubt on an arbitrator's independence and impartiality.[30] Furthermore, the aforementioned principles also apply to the relationship between arbitrators and party counsels.[31] However, in such case – since the link to the party is only indirect and in light of the particularities of arbitration – a higher threshold must be required to assume a lack of impartiality and/or independence.[32] Therefore, friendship between an arbitrator and a party's counsel does not as such justify a challenge.[33] The same is true if an arbitrator sits in the same law firm as a party's counsel, provided that they do not share funds and revenues.[34] In an equal sense, the fact that an arbitrator and a party's counsel are sitting together as co-arbitrators in another pending case is not a sufficient basis to objectively justify a challenge.[35] The same is true if counsel and arbitrator are members in the same academic, social or professional association.[36] In international arbitration the question may arise if and to what extent barristers' chambers within the English legal system are to be seen on a par with law firms. This is answered predominantly in the affirmative.[37] Conversely, factors that are not based on a relationship to a party or a counsel, but are rooted solely in the arbitrator's personality, such as e.g. nationality, domicile/residence, gender, religion, ethnic and cultural background or other factors that are inseparably inherent in the arbitrator's person are, as a principle, not in themselves a reason to assume lack of independence.[38] However, if such an aspect of personal background is at the core of the dispute (e.g., in a dispute regarding the exclusion of an athlete allegedly motivated by racism), it may exceptionally become relevant. In any event, shared nationality or residence in the same country does not amount to a lack of independence.[39] 9

Further to independence in relation to the parties and counsels, independence must also exist in relation to third parties with an interest in the outcome of the arbitration and towards panel-appointed experts and witnesses whose statements 10

29 CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 49; Mavromati/Reeb, Art. R33, para. 19.

30 BGer. 4A_586/2008 para. 3.1.2; CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 49.

31 CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 18; Kaufmann-Kohler/Rigozzi, para. 4.115.

32 BGer. 4A_586/2008 para. 3.1.2; see also CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 18.

33 BGer. 4A_586/2008 para. 3.1.2; BGer. 4P.292/1993 para. 4.

34 BGer. 4A_586/2008 para. 3.1.2; BGer. 4P.224/1997 para. 3.

35 BGer. 4A_586/2008 para. 3.1.2; BGer. 4P.105/2006 para. 4.

36 BGer. 4A_506/2007 para. 3.3.2.2.

37 Cf. CAS 2012/A/2697, ICAS Board Decision of 26 June 2012 published in 2012 ISLR 3, 50 et seq.

38 CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 14; CAS 2009/A/1893, ICAS Board Decision of 29 November 2009, para. 17 published in Mavromati/Reeb, Art. R34, Annex V (A); cf. also Rigozzi, para. 947; cf. also BGer. 4A_160/2007 para. 5, regarding the Israeli passport of an arbitrator.

39 Swiss Federal Supreme Court decision of 16 May 1983 (*République arabe d'Egypte v. Westland helicopters Ltd. et al.*), *ASA Bull. 1984*, p. 206; CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 14.

are decisive for the outcome of the arbitration.[40] Especially, direct links, such as economic dependency, family or close personal links or ongoing contractual relationships may be grounds to successfully challenge an arbitrator.[41] However, to a certain degree, links, encounters and relations may exist without threatening the arbitrator's independence.

5 Further Examples

11 There is no exhaustive list of grounds for challenging an arbitrator.[42] An arbitrator's involvement in other pending or prior arbitration proceedings in itself has no impact on his independence, even where the cases and relevant issues are/were similar.[43] An arbitrator who sat in a Panel that confirmed a breach of contract was considered to be independent in a subsequent second arbitration dealing with damage claims based on the said breach of contract.[44] An arbitrator's self-description as a hardliner in doping matters, made in the course of other proceedings, is too vague and general to cast serious doubts on his independence.[45] An arbitrator's publications on specific legal questions do generally not suffice to vindicate doubts concerning his independence unless the proceedings appear predetermined due to such publications. The simple fact that an arbitrator has been nominated several times by international sports bodies is not per se sufficient to disqualify him.[46] However, where the nomination of an arbitrator by a party is quasi-systematic, his independence may be indeed questioned.[47] The Swiss Federal Supreme Court found WADA's nomination of an arbitrator who participated as an independent expert in the revision of the World Anti-Doping Code (never representing, nor being instructed by or under the supervision of WADA) to be acceptable.[48] Apparently, however, a director or official of a party or its affiliated party is not fit to serve as arbitrator.[49] The fact that an arbitrator and counsel to one of the parties have sat together on another panel does not constitute grounds for challenging the arbitrator's independence;[50] nor, similarly, does the

40 Cf. Rigozzi, para. 952; Kaufmann-Kohler/Rigozzi, para. 4.119.

41 CAS 2011/A/2384, ICAS Board Decision of 4 May 2011, para. 2.7; CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 17.

42 BGE 129 III 445 para. 4.2.2.2.

43 De La Rochefoucauld, *CAS Bull. 2011/2*, p. 29; CAS 2008/A/1644, ICAS Board Decision of 11 February 2009, para. 22; CAS 2008/A/1557, ICAS Board Decision of 28 May 2009, para. 24; CAS 2010/A/2070, ICAS Board Decision of 3 August 2010, para. 4.

44 BGer. 4A_458/2009 para. 3.3.3.2; rightly critical Beffa/Ducrey, *CaS 2011*, p. 309.

45 BGer. 4A_612/2009 para. 3.2.

46 CAS 2007/A/1288, ICAS Board Decision of 18 July 2007, para. 22. In this regard see Guidelines Part II orange list footnote 5, where it states as follows: "*It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.*"; cf. also Mavromati/Reeb, Art. R33, paras. 27 et seq.

47 Rigozzi, *JIDS 2010*, p. 238. Cf. also CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012.

48 BGE 136 III 605 para. 3.4.4; see also CAS 2009/A/1879, ICAS Board Decision dated 23 November 2009, paras. 28 et seq.

49 Cf. BGE 111 Ia 72 para. 2; Art. S21(1), second sentence. Depending on the nature of the dispute, being a stakeholder of a company may also affect the arbitrator's independence, in particular if the stakeholder holds a substantial part of the shares.

50 BGer. 4P.105/2006 para. 4.

fact that the arbitrator and counsel to one of the parties had both been members of the same Ad Hoc Division of CAS at the Olympics.[51] In addition, the fact that a representative of a party has worked as CAS Counsel for several years and during this time established relationships with CAS arbitrators that went beyond normal professional acquaintance will generally not suffice to challenge an arbitrator.[52] The same applies if an arbitrator and a counsel to one of the parties both worked at different branch locations of the same law firm 4 or 5 years previously.[53] Past or prior normal (business) relationships are not per se problematic unless some financial or social ties remain, in particular for purposes of acquiring new mandates.[54] As the circle of lawyers active in sports law is rather small, customary professional contact amongst the arbitrator and counsel is inevitable and a certain degree of friendship developed on the basis of professional intercourse is acceptable.[55] Even a friendship between an arbitrator and a party's counsel is not necessarily sufficient to assume that the arbitrator is not independent; additional reasons must pertain to draw such a conclusion.[56] Difficult questions may arise if the dispute concerns the interests of an entire industry ("*Brancheninteressen*") and the arbitrator appears to be a representative of or otherwise connected with such industry.

12 In general, one may state that the Swiss Federal Supreme Court is fairly liberal in assessing arbitrator independence and only rarely admits a challenge.[57] This is true for both commercial and sport arbitration.[58] Some authors submit that a particularly low threshold is applied in relation to challenges of arbitrators in CAS proceedings, and lament that the impression arises that "the peculiarities of sports arbitration are used by the Swiss Federal Supreme Court as an excuse or justification for a more relaxed approach to the concepts of independence and impartiality in sports arbitrations than in commercial arbitrations."[59] These reproaches are neither true nor substantiated. Instead, the jurisprudence of the Swiss Federal Supreme Court shows a balanced and justified approach in assessing whether allegations of partiality are based on subjective distrust or on objective indicators of bias.[60]

51 BGE 129 III 445 para. 4.2.2.2.
52 BGer. 4A_176/2008 para. 3.3 at the end.
53 CAS 2011/O/2583, ICAS Board Decision of 21 February 2012, para. 33.
54 Cf. BGer. 4P.188/2001 para. 2d; see also CAS 2006/A/1095, ICAS Board Decision of 8 August 2006, para. 2.1; CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 17.
55 Cf. Poudret/Besson, para. 419; CAS 2008 (undisclosed case number), ICAS Board Decision of 11 February 2009, para. 22; CAS 2007/A/1322, ICAS Board Decision of 19 September 2007, para. 17.
56 BGer. 4P.105/2006 para. 4. Cf. however BGE 92 I 271 para. 5, where the Swiss Federal Supreme Court ruled that an arbitrator who was appointed by a party representative and whose wife worked as a juridical member of staff at the law firm of the representative was not independent.
57 Beffa, *ASA Bull. 2011*, pp. 598–599 and 606; Leemann, *ASA Bull. 2011*, pp. 31–32; Kaufmann-Kohler/Rigozzi, para. 4.114.
58 BGer. 4A_506/2007 para. 3.1.1: the particularities of sports arbitration "*do not justify as such the application of less demanding standards to sports arbitration than in commercial arbitration*."
59 Beffa, *ASA Bull. 2011*, p. 604.
60 *Contra*: the rather superficial analysis in Beffa/Ducrey, *CaS 2011*, p. 311, which in addition does not correctly state the facts of the various cases.

6 No Acting as Counsel and Arbitrator

13 According to Art. S18(3), CAS arbitrators may not act as counsel for a party before the CAS.[61] This provision, adopted in 2010, is the result of several years of debate on the question of whether or not the functions of an arbitrator and counsel may be combined.[62] This rule targets only the arbitrator himself, not the other members of his law firm.[63] As a result, law firms with lawyers who are on the list of CAS arbitrators may still benefit from advantages such as having access to unpublished CAS case law and other non-public data and information.[64] Art. S18 does not prevent a CAS arbitrator from writing an expert opinion on a specific question of law for one of the parties in a proceeding in which he or she is not involved as an arbitrator, or from being called as an expert witness or as a normal witness in such a CAS proceeding.

14 In the event of an arbitrator not complying with Art. S18, the ICAS has the power to take particular measures against him with respect to his function as a CAS arbitrator, including temporary or permanent suspension.[65] However, it is not quite clear what the immediate consequences of a breach of Art. S18(3) would be on the respective arbitration procedure. If, e.g., a CAS arbitrator appears in a CAS proceeding (in which he or she is not an arbitrator) in the capacity of counsel for one of the parties, the question arises whether he or she, even without being removed from the list, may nevertheless continue to represent the party's interests before the CAS and, if so, what consequences this would take on the respective arbitral award.

B Disclosure of Circumstances Affecting Independence

15 Arbitrators are under a duty to make reasonable enquiries to investigate any facts or other circumstances that might affect their independence.[66] Before the 2013 revision of the CAS Code, Art. R33 stated that arbitrators must disclose any circumstances "likely" to affect their independence.[67] As this did not adequately describe the required degree of care, the amended provision now states that arbitrators are obliged to disclose any circumstances that "may" affect their independence. This amendment is welcome and the principle "if in doubt, disclose" should be heeded invariably.[68] The duty to disclose applies to arbitrators and ad-hoc clerks,[69] but not to the parties' counsels in respect of their party-appointed arbitrators (however, in order to avoid a later overruling the counsel should disclose if the arbitrator fails to do so). It must be kept in mind that the threshold for facts to be disclosed is much lower than the threshold to assume an actual lack of independence and impartiality. Consequently, a fact that has been disclosed by the arbitrator does not per se give rise to a justified challenge. Conversely, the fact that the arbitrator failed to disclose a fact (that should have been disclosed) is only an element to be taken into account

61 The arbitrators may not be members of the ICAS either (cf. Art. S5(3)).
62 See the instructive analysis of Mavromati/Reeb, Art. R33, para. 37.
63 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 93; Reeb, *New Code*, p. 32; Rigozzi, *Jusletter 13 September 2010*, para. 9.
64 Critical on this: Rigozzi, *Jusletter 13 September 2010*, para. 9.
65 Art. S19(2).
66 Cf. IBA Guidelines, Part I (7)(c).
67 Art. R33(1) of the CAS Code edition 2012.
68 See also Guidelines, Part I (3)(d).
69 Cf. also Guidelines, Part I (5)(b).

when assessing the arbitrator's independence and impartiality, but does not – per se – indicate a lack of independence and/or impartiality.[70]

An arbitrator must be independent during the entire arbitration proceedings, i.e., until the final award is rendered or the proceedings are otherwise terminated.[71] To prevent long delays at a later stage of the arbitration, any potential issues should be disclosed at the outset of the proceedings.[72] Arbitrators should make full disclosure when they sign the "Arbitrator's acceptance and statement of independence", a standard document of the CAS, upon their nomination. This standard document invites prospective appointees to set out any facts or circumstances that might be susceptible to compromise their independence. Should an arbitrator become aware of circumstances potentially affecting his independence at a later stage, he must immediately disclose them, in addition to providing reasons for not having done so earlier.[73] 16

C Closed List of Arbitrators

Only arbitrators who appear on the list drawn up by the ICAS may be appointed for CAS arbitration proceedings.[74] The ostensible purpose of this mandatory list is to ensure that only qualified arbitrators are appointed, in particular people with recognized competence in sports law and a good knowledge of sports in general.[75] The exhaustive nature of the list of CAS arbitrators has been approved by the Swiss Federal Supreme Court.[76] 17

The list of the CAS arbitrators is available on the CAS website. Currently, the list contains the names of over 350 arbitrators from all over the world. In reality most cases at the CAS are decided by a rather small number of arbitrators;[77] whereas the other listed arbitrators act only in a few cases, if at all. As a result, a considerable number of the listed arbitrators have little experience of CAS arbitration.[78] 18

Despite the fact that the CAS's closed list is to be deemed lawful, some authors have voiced criticism in that respect. According to them, the closed list entails the recurring appointment of arbitrators, which may raise a variety of difficult questions regarding independence. In addition, the critics advocate that by opting for a closed list, many highly-qualified lawyers with great experience in arbitration and profiles that would perfectly match certain specific CAS cases are excluded merely for not being on 19

70 Mavromati/Reeb, Art. R33, para. 43.
71 De La Rochefoucauld, *CAS Bull. 2011/2*, p. 30; cf. IBA Guidelines, Part I (1).
72 Cf. the Arbitrator's Acceptance Form that all arbitrators are required to complete, in Mavromati/Reeb, Art. R33, Annex V (A).
73 Cf. Rigozzi, para. 973; Rochat/Cuendet, p. 59.
74 Art. R33(2). Regarding the closed list, see also Introduction above, paras. 5–7.
75 De La Rochefoucauld, *CAS Bull. 2011/2*, p. 31; cf. Art. S14.
76 BGE 129 III 445 para. 3.3.3.2. However, the closed list calls for stricter standards of independence and impartiality, cf. Rigozzi, *JIDS 2010*, p. 239. Cf. also CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 263, where the CAS states that sports law is a kind of arbitration subject to the exception provided in point 3.1.2 of the IBA Guidelines.
77 Cf. CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 211, where the CAS Secretary General testified that only 1/3 of the arbitrators are regularly appointed. These arbitrators are without any doubt highly qualified lawyers.
78 Dickenmann, *CaS 2010*, p. 208.

the list.[79] Finally, some criticize that the closed list applies to all CAS arbitrations irrespective of the questions at stake. However, not all matters in the sports world require very specific and technical expertise. Hence, the alleged need in the sports world for such a list seems somewhat forced, all the more considering that other, likewise complex, industries, such as the pharmaceutical industry apparently do not have a need for a closed list, despite requiring very specific and technical knowledge.

20 Criticism and concerns within the arbitration community should always be taken seriously. However, effective criticism relies on in-depth analysis, which – unfortunately – is sometimes missing. It is true that other industries and arbitration institutions, such as the ICC, function well without closed lists and are able to handle complex cases. However, the decisive difference is that one of the core elements of the sports industry is the equal treatment of all stakeholders. Unlike the parties in other industries, a sporting club or an athlete have only submitted themselves to the rules and regulations of a sports organization under the condition that their competitors are bound exactly the same way. Thus, there is – very different from other industries – a certain need for the rules and regulations forming the legal basis of the industry to be applied in a harmonized and consistent manner. Of course one could debate what tools are most appropriate to achieve consistency; in particular, whether or not the publication of awards is already sufficient or whether, in addition to this, there ought to be a closed corpus of jurists deciding these matters at the highest level. It appears rather obvious, though, that there are no easy and straightforward solutions and that there is a need for fair debate that takes into account the very needs of this particular industry.[80]

D Qualifications of Arbitrators

21 In addition to the requirement of familiarity with sports law and sports, arbitrators must have a good command of the language of the arbitration;[81] this refers to both oral and written language skills.

22 Moreover, arbitrators must be available during the entire duration of the arbitration so that it may be expeditiously conducted and completed.[82]

79 Cf. Oschütz, p. 101.

80 Cf. also Girsberger/Voser, *2016*, paras. 1942 et seq. Regarding a possible new scheme that seems increasingly accepted, see Introduction above, para. 7.

81 Art. R33(2).

82 Art. R33(2), at the end.

Article R34: Challenge

An arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the ICAS Board, which has the discretion to refer a case to ICAS. The challenge of an arbitrator shall be lodged by the party raising it, in the form of a petition setting forth the facts giving rise to the challenge, which shall be sent to the CAS Court Office. The ICAS Board or ICAS shall rule on the challenge after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments. Such comments shall be communicated by the CAS Court Office to the parties and to the other arbitrators, if any. The ICAS Board or ICAS shall give brief reasons for its decision and may decide to publish it.

I PURPOSE OF THE PROVISION

Article R34 deals with a challenge to an arbitrator whose independence or impartiality is questioned by a party.[1] The party's right to challenge an arbitrator's legitimacy is an instrument intended to ensure the integrity of the arbitration process. 1

This provision applies to any arbitrator, i.e., the sole or presiding arbitrator or any co-arbitrator. In addition, it also applies to ad-hoc clerks.[2] 2

II CONTENT OF THE PROVISION

A Requirements for Challenge: Legitimate Doubts about Independence

Not every kind, but only legitimate doubts about the independence or impartiality of an arbitrator constitute grounds to challenge an arbitrator.[3] Doubts are legitimate where a reasonable and informed third party would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties (see Art. R33 para. 15).[4] Although this test is an objective one,[5] there are no absolute grounds for challenge. 3

1 This provision corresponds to Art. 180(1)(c) PILS and Art. 367(1)(c) ZPO.
2 Cf. Art. R40.3(3), second sentence.
3 Cf. Art. R34(1), first sentence. In the event a party is of the view that an arbitrator does not fulfill the qualifications required according to Art. R33(2), the arbitrator may not be challenged based on Art. R34; however, in such a case, the arbitrator may be removed based on Art. R35, first sentence.
4 Cf. IBA Guidelines, Part I(2)(c); see also Art. 180(1)(c) PILS.
5 Cf. BGer. 4P.105/2006 para. 4; BGer. 4A_458/2009 para. 3.1; CAS 2002/A/370, *L v. IOC*, Award of 29 November 2002, p. 4; Rigozzi, para. 947; De Witt Wijnen, p. 60; IBA Guidelines, Part I(2)(b).

4 In questioning the independence of arbitrators, the parties may refer to the IBA Guidelines (see Art. R33 para. 6).[6] However, these guidelines are not legally binding.[7]

B Time Limit, Form and Procedure for Challenges

5 In principle, the right to challenge a member of the Panel may be invoked at any time throughout the arbitral proceedings.[8] Art. R34, however, holds that the challenge has to be brought within seven days after the grounds for the challenge have become known[9] or could have become known in case of due diligence.[10] This also means that a party entertaining a certain suspicion as to the independence or impartiality of an arbitrator is obliged to initiate its own enquiries.[11] Keeping grounds for a challenge "in reserve" is not allowed. The right to challenge an arbitrator expires after seven days.[12] However, it appears that the ICAS (Board) has allowed a late filing of the challenge in certain circumstances, provided that the person requesting the challenge acted in good faith.[13]

6 Even if not expressly stated in the CAS Code, it is acknowledged that a challenge under Art. R34 may only be made by the parties,[14] not by others, in particular not by the arbitrators.[15] The arbitrators only have the option of initiating a removal procedure under Art. R35.

7 Pursuant to Art. R34(2), second sentence, the challenge must be sent in the form of a written petition to the CAS Court Office. The latter will then grant the challenged arbitrator as well as the other arbitrators the possibility to enter observations.[16] The challenge will then be forwarded to the ICAS Board, which may decide, at its discretion, to refer it to the ICAS, i.e., the plenum.[17] Challenges fall under the exclusive competence of the ICAS Board or ICAS, respectively.[18] This means that such a challenge may not be raised before the Panel.[19]

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6 BGer. 4A_506/2007 para. 3.3.2.2; CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 215.
7 BGer. 4A_458/2009 para. 3.3.3.1.
8 Berger/Kellerhals, para. 869.
9 Art. R34(1), second sentence.
10 BGE 129 III 445 para. 4.2.2.1; BGer. 4A_506/2007 para. 3.1.2; BGer. 4A_176/2008 para. 3.3; Kaufmann-Kohler/Bärtsch, p. 78.
11 Cf. BGer. 4P.188/2001 para. 2c; Berger/Kellerhals, paras. 881–882; Mavormati/Reeb, para. 68.
12 BGer 4A_612/2009 para. 3.1.2, stating that according to the principle of good faith challenges have to be raised immediately, otherwise the right to challenge is forfeited. Cf. also BGE 129 III 445 para. 3.1.
13 Cf. Mavromati/Reeb, Art. R34, para. 69.
14 Cf. Mavromati/Reeb, Art. R34, para. 75: *"the lodging of a petition by a party is […] an admissibility criterion"*.
15 Mavromati/Reeb, Art. R34, para. 76.
16 Mavromati/Reeb, Art. R34, para. 62.
17 Art. R34(2), first sentence; see also Mavromati/Reeb, Art. R34, para. 61.
18 This was the express wording of Art. R34(2), first sentence, edition 2012 of the CAS Code. In the course of the 2013 revision of the CAS Code this express wording was deleted; however, the exclusive competence is still implied by this provision. See also Art. S6 no. 4.
19 Cf. CAS 2002/A/370, *L. v. IOC*, Award of 29 November 2002, p. 4; *CAS 2011/A/2384 & CAS 2011/A/2386, UCI v. Alberto Contador & RFEC/WADA v. Alberto Contador & RFEC*, Award of 6 February 2012, p. 11.

Upon receipt of a challenge, the ICAS (Board) forwards a copy of the challenge to the other parties and invites them to provide any comments in writing within a specific time limit.[20] This is an expression of the right to be heard. The comments shall be communicated by the CAS Court Office to the other parties and arbitrators.[21] It is then at the discretion of the ICAS (Board) to determine any further appropriate or necessary procedural steps such as a hearing or telephone conference. When rendering the decision, the ICAS (Board) succinctly provides "brief reasons" for its decision.[22] The ICAS may decide to publish its decisions on challenge in order to enhance transparency and predictability.[23] 8

The CAS Code does not specify whether arbitral proceedings must be stayed or may be continued while a challenge is pending. The PILS is silent on this issue, too; whereas the ZPO states that the tribunal, including the challenged arbitrator, may continue the proceedings and render an award, unless the parties agree to the contrary.[24] In the authors' view, the tribunal is well advised to balance all interests at stake and to consider all the circumstances of the case. In particular, the following factors speak for a continuation of the proceedings: where the challenge appears unfounded, where the challenge is raised at a late stage of the proceedings (i.e., after the hearing), where the parties have agreed on an expedited procedure, or where there is a special urgency (e.g., regarding participation in an event that takes place soon). By contrast, if the challenge appears well-founded, if it is raised at an early stage of the proceedings (i.e., before the hearing), and/or if there is no special urgency, it is worth waiting until the decision on the challenge is taken. In any event, if the challenge is successful, the Panel must wait until the challenged arbitrator is replaced.[25] 9

C Decision and its Consequences

The decision of the ICAS (Board) is final, i.e., it is not subject to further review by another committee. No direct appeal against the challenge decision is available before a state court, either, since the decision of the ICAS Board does not qualify as an award.[26] It is only possible to review the decision in the course of proceedings to set aside the award within the restricted limits of Art. 190 PILS.[27] 10

If the ICAS (Board) concludes that legitimate doubts exist as to the independence or impartiality of an arbitrator, the arbitrator will be replaced pursuant to Art. R36. 11

The challenged arbitrator's tasks generally end with the communication of the decision of the ICAS (Board). 12

20 Art. R34(2), third sentence.
21 Art. R34(2), fourth sentence.
22 Art. R34(2), fifth sentence.
23 Mavromati/Reeb, Art. R34, para. 79.
24 Art. 369(4) ZPO.
25 Cf. Art. R36.
26 Cf. Art. 179(1) PILS; BGE 118 II 359 para. 3b; BGer. 4A_644/2009 para. 1; Mavromati/Reeb, Art. R34, para. 80; Peter/Freymond, para. 29 at Art. 180 PILS.
27 BGer. 4A_644/2009 para. 1; Beffa, *ASA Bull. 2011*, p. 602.

Article R35: Removal

An arbitrator may be removed by the ICAS if she/he refuses to or is prevented from carrying out her/his duties or if she/he fails to fulfil her/his duties pursuant to this Code within a reasonable time. ICAS may exercise such power through its Board The Board shall invite the parties, the arbitrator in question and the other arbitrators, if any, to submit written comments and shall give brief reasons for its decision. Removal of an arbitrator cannot be requested by a party.

I PURPOSE OF THE PROVISION

1 Article R35 deals with the removal of an arbitrator who does not fulfill the duties or requirements contemplated in the CAS Code, including those in Art. R33(2).[1] In case of doubts about the independence of an arbitrator, Arts. R33(1) and R34 apply.

II CONTENT OF THE PROVISION

A Requirements for Removal: Non-fulfillment of Duties

2 According to this provision, various situations justify the removal of an arbitrator, in particular the following ones:[2] First, an arbitrator may be removed if he is not willing to carry out his duties despite being in a position to do so. Second, an arbitrator may be removed if he is prevented from carrying out said duties, whether *de facto* or *de jure*. Such situations arise, for example, in the case of illness, imprisonment or judicial declaration of insanity. Third, an arbitrator may be removed if he carries out his duties without due care or if he violates his arbitral contract so severely that the conduct of fair proceedings is jeopardized. Fourth, an arbitrator may be removed if it turns out that he does not meet the requirements expected from the arbitrators, for instance, that he has insufficient command of the language of the proceedings. Fifth, an arbitrator may be removed if he fails to fulfill his duties within a reasonable time. The phrase "within a reasonable time" was added in the 2012 revision of the CAS Code, effective as of 1 January 2012, in order to make sure that procedures are conducted in an expeditious manner. This is in line with Art. 29(1) FC requiring that any judicial proceedings in Switzerland, including arbitration proceedings, must be adjudicated within a reasonable time. Removal of arbitrators under the CAS Code should remain exceptional and only be admitted with good cause.[3]

B Time Limit, Form and Procedure for Removal

3 Unlike Art. R34, Art. R35 does not provide for any specific time limit to request removal of an arbitrator. This seems appropriate because the reasons for removal may vary and require an individual assessment. However, the principle of good faith defines some limits.[4]

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1 This corresponds to Art. 180(1)(b) PILS and Art. 367(1)(b) ZPO.
2 Cf. Rigozzi, para. 964.
3 Oschütz, p. 121; Berger/Kellerhals, para. 927.
4 Girsberger/Voser, *2016*, para. 813. Cf. also Art. 180(2) PILS and Art. 367(2) ZPO.

In the 2013 revision of the CAS Code, sentence 4 was added to Art. R35. According to this new provision, the removal of an arbitrator cannot be requested by a party.[5] However, it remains unclear who may initiate a procedure for removal – is it the other arbitrators, members of ICAS, the Division President and/or the General Secretary? At a first glance, the adoption of this new provision seems regrettable because it reduces the parties' rights. Certainly, this new provision does not exclude that a party files a request with the ICAS that it shall examine whether the requirements for the removal of an arbitrator are met due to some specific reasons. Furthermore, the parties (along with the other arbitrators) are invited to file comments on the case at stake.[6] 4

Removals lie within the sole power of the ICAS, which may delegate its powers to the ICAS Board.[7] This power is exclusive although the wording of Art. R35 does not say so explicitly. Thus, such a challenge may not be raised before the Panel. 5

The ICAS (Board) shall, in writing, invite the other parties, the arbitrator in question and the other arbitrators to comment in writing with respect to the removal in question.[8] This is an expression of the right to be heard. Once it has decided upon the issue, the ICAS (Board) shall provide brief grounds for its decision.[9] 6

The CAS Code does not specify whether the arbitral proceedings must be stayed or may be continued while an examination of the requirements for removal is pending. As in the case of a challenge to an arbitrator, the tribunal is well advised to balance all interests at stake and consider all the circumstances of the case. The following speaks for a continuation of the proceedings: where the request appears unfounded, where the request is raised at a late stage of the proceedings (i.e., after the hearing), where the parties have agreed on an expedited procedure or where there is a special urgency (e.g., regarding participation in an event). By contrast, if the request appears well-founded, if it is raised at an early stage of the proceedings (i.e., before the hearing), if the examination of the requirements for removal appears to last only short time, and/or if there is no special urgency, it is worth waiting until the decision on the request is taken. In any event, if the request is admitted, the Panel must wait until the arbitrator thus removed has been replaced.[10] 7

C The Decision and its Consequences

The decision of the ICAS (Board) on removal is final, like the decision on a challenge pursuant to Art. R34.[11] 8

Where an arbitrator is removed based on Art. R35, said arbitrator shall be replaced in accordance with the provisions applicable to his appointment.[12] 9

The arbitrator's tasks generally end with the communication of the decision of the ICAS (Board). 10

5 Mavromati/Reeb, Art. R35, para. 12.
6 Mavromati/Reeb, Art. R35, para. 12.
7 Art. R35, second sentence. See also Art. S6 No. 4; cf. also Mavromati/Reeb, Art. R35, para.10.
8 Art. R35, third sentence.
9 Art. R35, third sentence at the end; cf. Art. R34(2), fifth sentence.
10 Cf. Art. R36, para. 11 below.
11 Cf. Art. R34, para. 10 above.
12 Art. R36.

Article R36: Replacement

In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the provisions applicable to her/his appointment. If, within the time limit fixed by the CAS Court Office, the Claimant/Appellant does not appoint an arbitrator to replace the arbitrator it had initially appointed, the arbitration shall not be initiated or, in the event it has been already initiated, shall be terminated. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement.

I PURPOSE OF THE PROVISION

1 Article R36 governs the replacement of an arbitrator due to his resignation, death, successful challenge or removal and establishes rules regarding the proceedings following such a replacement.

II CONTENT OF THE PROVISION

A Grounds for Replacement

2 The provision mentions four grounds for replacement: resignation, death, successful challenge and removal. However, this list is not exhaustive, i.e., there are also other grounds for replacing an arbitrator, in particular revocation.

3 The CAS Code contains specific rules regarding the challenge and removal of an arbitrator,[1] but not concerning the death or resignation of an arbitrator. Art. R36 instead implies that an arbitrator's mandate may also be terminated for other reasons, such as death or resignation. Some aspects of these forms of termination are worth pointing out:

1 Resignation

4 Where the initiative to terminate the arbitrator's mandate comes from the arbitrator himself, one speaks of the resignation of an arbitrator.[2] Both Chapter 12 of the PILS and Part 3 of the ZPO are silent on the issue of an arbitrator's resignation. In line with international arbitration[3] and the Swiss Federal Supreme Court's case law,[4] and absent any specific agreement between the parties, the resignation of an arbitrator from ongoing arbitration proceedings in the CAS should be admissible only in exceptional circumstances, i.e., for good cause shown (*wichtiger Grund*). In particular, considering that arbitrators have to be chosen from a closed list and that it might be difficult to find someone both capable and available, it is important not to approve good cause too readily. Good cause criteria include, among others, serious health

1 Cf. Arts. R34 and R35.
2 Mavromati/Reeb, Art. R36, para. 5.
3 Berger, *ASA Bull. 2002*, pp. 12–14; Bucher, *ASA Bull. 2002*, p. 419; Mavromati/Reeb, Art. R36, paras. 9 et seq.
4 BGE 117 Ia 166 para. 6c.

problems or other exceptional circumstances that make it, objectively, extremely difficult or impossible for the arbitrator to continue the mandate.[5] In addition, it is generally recognized that the fact of being challenged by a party justifies the arbitrator's resignation.[6] Moreover, resignation can be admitted if both parties agree to it. However, even if an arbitrator resigns without just cause, the other arbitrators cannot continue the arbitration proceedings as a "truncated arbitral tribunal", without the prior consent of the parties.[7] The absence of the parties' consent is a ground for the annulment of a "truncated" tribunal's award according to Art. 190(2)(a) PILS.[8] No issues of a "truncated arbitral tribunal" arise where an arbitrator's offer to resign has been refused by the CAS without the arbitrator opposing such refusal.[9]

Under Art. R36, the replacement of an arbitrator may result not only from the arbitrator's resignation for good cause, but also if good cause is found lacking.[10] However, a distinction is to be made between an arbitrator's resignation and a situation where an arbitrator, though not formally resigning, refuses to cooperate or obstructs the proceedings by refusing to participate in the deliberations of the tribunal without valid grounds. In situations such as this, the arbitral tribunal remains regularly constituted and the uncooperative arbitrator cannot prevent the continuation of the proceedings.[11] 5

In the event of a resignation, it seems appropriate to assume that the arbitrator's tasks only end upon the formal confirmation of the notice of resignation by the ICAS (Board).[12] 6

2 Death

In case of an arbitrator's death, his or her task ends *eo ipso*. Replacement proceedings may begin as soon as the death has been verified and confirmed. In case an arbitrator is reported missing, the further course of proceedings must be decided on a case-by-case basis. 7

3 Revocation

An arbitrator must also be replaced if the parties have agreed to revoke his mandate (revocation or dismissal);[13] for instance, because all parties have lost confidence in the arbitrator or because said arbitrator has obviously become incapable of fulfilling his functions. Likewise, the fact that one party's challenge against an arbitrator is accepted by the opposing party amounts to an agreement on revocation. 8

5 Berger/Kellerhals, para. 935; Girsberger/Voser, *2016*, paras. 787 *et seq*.
6 Cf. e.g. CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 96.
7 BGer. 4A_386/2010 para. 4.3.1.
8 BGer. 4A_386/2010 para. 4.3.1.
9 BGer. 4A_386/2010 para. 4.3.2.
10 BGE 117 Ia 166 para. 6c; nuanced Berger/Kellerhals, para. 944; *contra*: Girsberger/Voser, *2016*, para. 792.
11 BGE 128 III 234 para. 3b/aa; see also Mavromati/Reeb, Art. R36, para. 11.
12 As the ICAS (Board) is competent for challenges and removals (cf. Art. R34 para. 7 above and Art. R35 para. 5 above), it is also competent for the confirmation of such notice of resignation.
13 Cf. Art. 179(1) PILS.

9 The agreement on revocation is not subject to any formal requirements.[14] However, in order to avoid any misunderstanding it is recommended to conclude such agreement expressly and in writing. In the authors' view the agreement on revocation does not require the acceptance by the CAS/ICAS as the parties' preference takes priority.[15] The dismissed arbitrator himself is not entitled to any legal remedies against his revocation by the parties'.[16]

10 In the event of revocation, the arbitrator's task ceases upon formal communication of the parties' revocation by the ICAS (Board)

B Replacement Procedure

11 Neither Chapter 12 of the PILS nor Part 3 of the ZPO nor the CAS Code provide for the stay of arbitral proceedings during the replacement procedure. As the arbitral tribunal is not properly constituted as long as the seat of an arbitrator remains vacant, the arbitration proceedings must be suspended until the replacement has been successfully completed by the appointment of a substitute arbitrator.[17] Otherwise, any procedural act by such an incomplete tribunal may subsequently be challenged on grounds of irregular composition of the tribunal.[18] Only where both parties expressly agree that the remaining arbitrators should carry on with the conduct of the arbitration, is a continuation of the proceedings lawful and proper.[19]

12 According to Art. R36, first sentence, the replacement of an arbitrator shall be performed "in accordance with the provisions applicable to his appointment". This would appear to mean that the new arbitrator ought to be appointed in accordance with Arts. R40 and R53-R54. Although this is, in principle, correct, an overly strict application of said rule may not be appropriate in each case. For instance, in cases where a party-appointed co-arbitrator has been revoked or has resigned the mandate without good cause, it is not necessarily justified for the party who appointed the original co-arbitrator to be entitled to reappoint the new arbitrator. Therefore, it is crucial to consider and accommodate the case-specific context and reasons for a replacement and to depart from the rule if necessary.

C Consequences of Replacement

13 In principle, once the new arbitrator has been appointed, proceedings shall continue without repetition of any procedural steps and actions taken by the Panel prior to the replacement.[20] The rationale for this rule is mainly to avoid additional costs and procedural delays. However, the Panel must depart from this rule if both parties prefer to repeat certain parts of the proceedings. The same applies if a repetition is

14 Berger/Kellerhals, paras. 920–921; Girsberger/Voser, *2016*, para. 803.
15 This seems to be in line with most other arbitration rules that address this question, e.g. Art. 10(4) LCIA Rules, Art. 15(4) SCC Rules or Art. 8(3) ICDR Rules; *contra* Art. 15(1) 2012 ICC Rules.
16 Berger/Kellerhals, para. 923; Girsberger/Voser, *2016*, para. 805.
17 Berger/Kellerhals, para. 952; Girsberger/Voser, *2016*, para. 790.
18 Art. 190(2)(a) PILS; BGE 117 Ia 166 para. 6c; Berger/Kellerhals, para. 952.
19 Cf. BGer. 4A_386/2010 para. 4.3 asking, but not answering this question.
20 Art. R36, second sentence.

needed for the new arbitrator to be able to meet the requirements of his function.[21] This may be true, in particular, if the replacement occurs after the hearing was held. Absent any agreement by the parties, the better arguments speak in favor of repeating this procedural step in order to allow the new arbitrator to fully exercise his or her function.[22] In any event, all interim, interlocutory or partial awards issued prior to the replacement of the arbitrator remain valid and bind the new arbitrator as well.[23] In the event of a repetition, the parties should not be allowed to adduce new evidence, unless all parties agree otherwise.

21 Cf. also Mavromati/Reeb, Art. R36, para. 15.
22 See also in more detail Mavromati/Reeb, Art. R36, paras. 21, 23.
23 Mavromati/Reeb, Art. R36, para. 15.

Article R37: Provisional and Conservatory Measures

No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted.

Upon filing of the request for provisional measures, the Applicant shall pay a non-refundable Court Office fee of Swiss francs 1'000.–, without which CAS shall not proceed. The CAS Court Office fee shall not be paid again upon filing of the request for arbitration or of the statement of appeal in the same procedure.

The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the Panel may, upon application by a party, make an order for provisional or conservatory measures. In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.

Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party (or parties) to express a position within ten days or a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order on an expedited basis and shall first rule on the *prima facie* CAS jurisdiction. The Division President may terminate the arbitration procedure if he rules that the CAS clearly has no jurisdiction. In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is subsequently heard.

When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).

The procedure for provisional measures and the provisional measures already granted, if any, are automatically annulled if the party requesting them does not file a related request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Article R49 of the Code (appeals procedure). Such time limits cannot be extended.

Provisional and conservatory measures may be made conditional upon the provision of security.

I PURPOSE OF THE PROVISION

1 In sports arbitration, even the most expedited procedures may not always keep pace with the *tight schedule of competitions*, exposing parties to uncertainty in the interim before a final award. Art. R37 enables the CAS to order the provisional measures

that may be necessary to temporarily protect the parties' rights or to regulate the situation between them pending the outcome of the proceedings.

Article R37 *principally deals with jurisdictional issues* (II.). It is silent with respect to the types of provisional measures the CAS may order (III.), but since the 2013 revision it specifies the substantive and procedural requirements that must be met for such measures to be granted (IV. and V.). The other issues that should be addressed briefly in connection with interim relief orders made by the CAS are the handling of the costs related to these orders, whether they are subject to appeal and the modalities of their enforcement (VI.). 2

II JURISDICTION – AUTHORITY TO ORDER PROVISIONAL MEASURES

A The Legal Basis for CAS Jurisdiction

Under Swiss law, both Art. 183(1) PILS (applying to international arbitrations) and Art. 374(1) ZPO (applying to domestic arbitrations) recognize arbitral jurisdiction to order provisional measures, unless the parties provide otherwise. Art. R37 confirms that *CAS arbitrators can order provisional and conservatory measures*. It also provides that such measures may be ordered by the arbitral institution pending the constitution of the panel (B.) and that by submitting their dispute to CAS arbitration the parties are deemed to have waived their right to request such measures from the state courts (C.). 3

B Provisional Measures Prior to the Constitution of the Panel

Article 183(1) PILS provides (as does Art. 374(1) ZPO) that the "*arbitral tribunal may […] order provisional [or conservatory] measures*", which can be taken to imply that until the moment the arbitral tribunal is constituted, jurisdiction to issue such orders lies exclusively with the state courts.[1] For its part, Art. R37 (third paragraph) of the CAS Code provides for "*CAS jurisdiction" to order provisional measures even before the constitution of the panel as it grants the authority to order such measures to "the President of the relevant [CAS] Division" until the file is transferred to the panel*. Up until the 2010 edition of the Code, provisional measures could only be requested as from the filing of the Request for arbitration (Art. R38) or the Statement of Appeal (Art. R48). As amended in the following (2013) edition, Art. R37's first paragraph's wording now conveys that requests for provisional measures can be made *immediately after the notification of a final decision* by a sports federation, even before the filing of an appeal with the CAS, the only requirement being the exhaustion of "all internal legal remedies provided for in the rules of the federation or sports-body concerned". 4

Although the President of the relevant CAS division is clearly not an "arbitral tribunal" within the meaning of Art. 183(1) PILS and Art. 374(1) ZPO, it is generally accepted that the parties are free to confer the power to order interim measures on the arbitral institution. The same principle underlies provisions such as Art. 29 (2012) ICC Arbitration Rules, establishing the so-called "Emergency Arbitrator" 5

1 See Boog, above commentary on Art. 183 PILS (Chapter 2, Part II), paras. 27–28.

procedure.[2] It is submitted that the *President of the relevant CAS Division* can be considered *sufficiently independent from the parties to order provisional measures*.[3]

6 An important question raised by Art. R37 is *whether a party can seek an order for interim relief from the panel after a request to that effect was dismissed by the Division President*. The chance to get a "second bite at the apple" is relevant, especially in sports disputes, since a decision dismissing a request for provisional measures may in fact result in the disposal of the entire dispute.[4] CAS panels have been quite reluctant to reconsider applications that had already been dismissed by the Division President, unless the applicant could show that there had been new developments since that decision[5] or if important facts which existed at the time of the decision were unknown to the applicant.[6] Absent such circumstances, CAS panels tend to consider that hearing the same application again would effectively turn the panel into an appeal body reviewing the decisions of the Division President. It is submitted that since decisions on provisional measures are mere procedural orders,[7] this approach is too rigid. If, for instance, the application was originally dismissed on the ground that the applicant's interests were found not to outweigh those of the other parties involved, and the panel were to disagree with such an assessment of the balance of interests, there would be no reason to prevent the panel from ordering the provisional measures sought by the applicant.[8] The panel should in any event remain free to lift any provisional measures ordered by the Division President if it subsequently finds that the relevant prerequisites were not met or are no longer satisfied. After all, the panel will be in a much better position to assess the chances of success of the claim on the merits. More generally, a party could also argue that the reference to the "arbitral tribunal" in Art. 183 PILS and Art. 374 ZPO grants a statutory right to have an application for provisional measures heard by the panel itself.

C Waiver of the Concurrent Jurisdiction of State Courts in Appeals Proceedings

7 It is unanimously accepted that under Art. 183 PILS (and Art. 374 ZPO) arbitral tribunals and state courts have concurrent jurisdiction to grant interim measures. According to Art. R37 (third paragraph), in agreeing to submit to arbitration *under the CAS Code the parties expressly waive their rights to request any such measures from state authorities or tribunals*. Originally, this waiver was limited to appeals

2 For a commentary on this provision, cf. Boog, Chapter 17 below (Part II), Art. 29 ICC Rules.

3 The reservation made in the previous edition of this commentary, noting that it would be preferable for the then President of the Appeals division (who also served as an IOC Vice President) to step down and have his deputy decide the application in cases involving the IOC, no longer applies given that, according to her CV, the current Division President does not sit on the board of a sports-governing body (< http://www.tas-cas.org/en/icas/the-board.html >).

4 Rigozzi, *Provisional Measures*, p. 220. For example (in a 'reverse' scenario), the Italian Cycling Federation dropped arbitration proceedings against the Italian rider Roberto Menegotto after the CAS provisionally lifted his suspension due to manifest procedural irregularities (CAS 97/169, *Menegotto v. FIC*, Order of 15 May 1997, *CAS Digest I*, p. 539).

5 CAS 2005/A/916, *AS Roma v. FIFA*, Order of 23 August 2005, p. 3, para. 4.

6 CAS 2005/A/916, *AS Roma v. FIFA*, Order of 23 August 2005, p. 3, paras. 10–11.

7 Meaning that – by definition – they do not dispose of claims and defenses in a final manner, can be revoked or amended at any time, and thus are not binding on the tribunal (BGE 136 III 200 para. 2.3.1).

8 Cf. also Mavromati/Reeb, Art. R37, para. 16 in fine, expressing their agreement with this point of view.

proceedings, but the 2013 version of the Code extended it to ordinary arbitration proceedings. The scope of the waiver has also been expanded (*ratione temporis*) in connection with appeals proceedings, since, as just seen, the CAS now has jurisdiction to hear requests for provisional measures as from the notification of the decision under appeal. This change was meant to prevent parties from circumventing the waiver by seizing the state courts before the expiry of the time limit for appeal and then relying on the *perpetuatio fori* principle.[9]

Is such a waiver of the parties' right of access to the state courts valid and enforceable? 8
That is, can a party challenge the jurisdiction of the state courts relying on Art. R37? The short answer to this question is yes, as it is generally accepted that, at least in international arbitration, the parties can validly agree to exclude the jurisdiction of state courts even for provisional measures.[10] Commentators consider that, to be valid, the waiver must be "explicit and specific".[11] Art. R37 (third paragraph) is both explicit and specific.[12] As far as CAS ordinary proceedings are concerned, the waiver does not appear to be problematic. The issue is more complicated with respect to CAS appeals proceedings as the waiver forms part of the rules imposed by the sports-governing body. It is submitted that the enforceability of Art. R37's waiver is not impaired by the fact that it is non-consensual in nature. In other words, the case law developed by the Swiss Federal Supreme Court with respect to waivers under Art. 192 PILS does not apply to Art. R37's waiver of state courts' jurisdiction to hear requests for provisional measures.[13] Indeed, while the waiver of the parties' right to file an action to set aside before the Supreme Court *deprives* them of the only remedy available against the arbitral award, a waiver of the right to request provisional measures in state courts constitutes in fact the *selection* of one particular remedy (recourse to the CAS) in a setting where the parties have a choice between alternative remedies (the CAS or the national courts). Accordingly, it is submitted that *while the waiver of state court jurisdiction to issue provisional measures is valid as such, it is enforceable only to the extent that it does not deprive*

9 This is in effect what FC Sion attempted to do in the judicial saga opposing it to FIFA, the ASF and UEFA before the Vaud and Valais courts between 2011 and 2012. For an account of these various proceedings and the issues raised by them see Anderson, *The FC Sion Case and its Effects, Part One*, World Sports Law Report May 2012, pp. 8–10, and Id., *The FC Sion Case and its Effects, Part Two*, World Sports Law Report, June 2012, pp. 8–11.

10 Cf., e.g., Kaufmann-Kohler/Rigozzi, paras. 6.105–6.108, with further references.

11 Von Segesser/Boog, p. 125.

12 Cf. Patocchi, *Provisional Measures*, p. 68. For a more in-depth discussion of the formal requirements for a valid waiver of the courts' concurrent jurisdiction to grant interim relief (noting in particular that much depends on the requirements for an agreement to be deemed 'express'), cf. Haas/Donchi, pp. 106–114.

13 See Baizeau, above commentary on Art. 192 PILS (Chapter 2, Part II), paras. 30–33. If one were to apply such case law to Art. R37, then the waiver would be unenforceable because it would qualify as an indirect waiver, i.e., a waiver contained in the arbitration rules and not in the arbitration agreement or a separate agreement between the parties, (cf. BGer. 4P.62/2004 para. 1.2 (*Federación costarricense de triatlón* (*FECOTRI*) *v. ITU & CNOC*), *ASA Bull. 2005*, p. 485), but also because, despite the wording of Art. R37, the athlete cannot be considered as having consented to (CAS) arbitration and thus to Art. R37 of the Code (cf. BGer. 4P.172/2006 (X. (*Cañas*) *v. ATP Tour*), partially reproduced in BGE 133 III 235; *ASA Bull. 2007*, p. 592; *Swiss Int'l Arb.L.Rep2007*, p. 65). However, for the reasons outlined in this short commentary, the waiver of state court jurisdiction to set aside an award is different in nature from the waiver of state court jurisdiction to hear applications on provisional measures.

a party of the protection that is offered by the state courts or, to put it otherwise, only to the extent that arbitration is capable of providing effective relief.[14]

9 Of course, state courts will consider declining their jurisdiction only if the respondent objects to it on the ground that it has been validly waived under Art. R37. In such cases, the state courts should, as a matter of principle, decline jurisdiction and invite the applicant to file his request with the CAS. This is what the District Court of Zurich did in a decision of 16 August 2005 in the matter of *Dorthe v. IIHF*, giving full deference to the waiver in Art. R37 despite the fact that the applicant was challenging the jurisdiction of the CAS.[15] More recently, the validity of the waiver was upheld by the High Court of the Canton of Berne in the *FC Sion v. ASF* case – a domestic case decided under Art. 374 ZPO – on the ground that party autonomy plays a paramount role in arbitration and that the *CAS meets the constitutional requirement of effective relief* ("*Anspruch auf effektiven Rechtsschutz*") also with respect to provisional measures, *as it is a permanent arbitration institution, which can issue provisional measures even pending the constitution of the arbitral tribunal*.[16] We agree with these decisions inasmuch as they consider that the waiver is valid as such, but, as mentioned, would submit that the waiver should be declared unenforceable if one party can establish that the CAS system is, under the circumstances, not in a position to provide effective relief.[17]

10 One scenario in which a state court could consider that the waiver is unenforceable is when the applicant asserts that the *CAS will not be in a position to grant the requested relief in time*.[18] It is submitted that this argument should not prosper generally, as the CAS has shown that it is capable of notifying all the relevant parties by fax and that, by granting very short time limits, it can decide within days if not hours.[19] Moreover, the CAS has the power to issue *ex parte* orders if needed.[20]

11 In reality, the only instances in which state courts should assert jurisdiction despite the waiver contained in Art. R37(3) are those where it is clear that only they have

14 In similar terms, see now also Mavromati/Reeb, Art. R37, para. 13.

15 In its decision of 16 August 2005, the District Court of Zurich declined jurisdiction to order provisional measures in a matter that, according to the respondent, should have been decided by the CAS in the framework of appeals proceedings. The Court held that since the CAS Code granted CAS the jurisdiction to order provisional measures within the meaning of Art. 183(1) PILS, the request was inadmissible.

16 Decision by the Obergericht of the Canton of Bern of 19 April 2012, reported in CaS 2012, p. 171, setting aside the lower decision by the Regionalgericht Bern-Mittelland (CIV 12 75 WUN of 14 February 2012, paras. 26 and 29, reported in CaS 2012, p. 79).

17 For a detailed analysis of these decisions and the waiver issue in general, see Rigozzi/Robert-Tissot, *"Consent" in Sports Arbitration: Its Multiple Aspects, ASA Special Series n°41, Sports Arbitration : A coach for Other Players, 2015*, pp. 83–93.

18 This is why, for instance, the Munich *Oberlandesgericht* held, in the well known Stanley Roberts case, that the waiver did not operate to preclude the jurisdiction of the courts, particularly when the CAS could not offer swift relief. However, it must be emphasized that this ruling was made on the basis of the (inaccurate) submission by the respondent party (FIBA) that the CAS was "capable of issuing a decision within 15 days", which the Munich court found to be much too slow, OLG München, Judgment of 26 October 2000, U (K) 3208/00, *SpuRt 2/2001*, p. 65.

19 Cf. below, paras. 39 and 40. As an example where orders for provisional measures were issued by the CAS, upon hearing both parties, by the following day, cf., e.g., CAS 2014/A/3744, *N. v. FIFA*, Order of 26 September 2014.

20 Cf. below, paras. 37–39, and Haas/Donchi, p. 104. This in turn raises the delicate question whether state courts should address the issue *sua sponte* when they are seized with an *ex parte* request (on this question, see also Haas/Donchi, p. 113).

the authority to issue and/or, if necessary, the power to enforce the order that is being sought. However, contrary to what was held by the lower court in the above-mentioned *FC Sion v. ASF* (domestic) case, the fact that formally the CAS does not have the power to enforce its own orders is not decisive. While it is true that in domestic cases the enforcement of CAS orders through the state courts (Art. 374(2) ZPO) may appear as an "unnecessary roundabout way",[21] in international cases such a "detour" through the local courts will be almost inevitable – in theory – each time that an order (whether issued by a (foreign) court or by the CAS) must be enforced abroad.[22] This is why the fact that the sports-governing bodies generally comply voluntarily with CAS orders[23] is of pivotal importance, particularly in international matters. Accordingly, it is submitted that a *state court should assert jurisdiction only if the applicant can establish that, under the circumstances, it is very unlikely that the respondent will spontaneously comply with the CAS order*.[24]

III TYPES OF PROVISIONAL MEASURES AVAILABLE

12 The types of interim measures that an arbitral tribunal can order are primarily determined by the *lex arbitri* and the procedural rules agreed upon by the parties. Arts. 183 PILS and 374 ZPO, as well as R37 of the CAS Code do not specify or restrict in any way the types of provisional measures tribunals can order. Therefore, it is generally accepted that the CAS, just as arbitral tribunals in general, has *wide discretion* in this respect and may order any measures it deems appropriate in a particular case, subject to any limitations set forth in the parties' agreement and mandatory provisions of law.[25]

13 Swiss law customarily distinguishes between three non-exhaustive categories of provisional measures: (i) *conservatory measures* ("*Sicherungsmassnahmen*", " *mesures conservatoires*"), aimed at maintaining the status quo during the arbitration proceedings so as to secure the enforcement of the final award, including measures to safeguard evidence, (ii) *regulatory measures* ("*Regelungsmassnahmen*", " *mesures de réglementation*"), aimed at regulating the relationship between the parties pending

21 Regionalgericht Bern-Mittelland, Decision CIV 12 75 WUN of 14 February 2012, para. A. 26 (speaking of an "*unnötigen Umweg*").

22 Cf. also Haas/Donchi, p. 105.

23 See Mavromati/Reeb, Art. R37, para. 53, stating that *"in almost 30 years from the CAS' creation, the CAS has never had problems concerning the non-execution/non-compliance with an order granting provisional measures"*.

24 Tribunal Cantonal, canton de Vaud, Order CM11.033798 of 27 September 2011, pp. 15–16. In this second decision related to the above- mentioned *FC Sion v. UEFA* dispute, the Vaud court held that the exclusion of the jurisdiction of state courts "could result in practical difficulties that may be hard to overcome", and that there was an actual risk that UEFA, "which did not comply with the [Vaud court's] ex parte order on provisional measures, may maintain the same stance, meaning that enforcement measures may be required; in this respect, while the CAS is vested with the necessary *jurisdictio*, it does not possess the *imperium* required to order such measures [reference omitted] and would thus have to request the assistance of the courts, which in turn may delay the proceedings to an extent that is hardly compatible with the requirement of expeditiousness which is inherent to applications for interim relief" (loose translation from the French original). As an aside, the unfolding of this case has shown that the courts' power to decide that non-compliance with their orders shall constitute a criminal offence provides no guarantee that the relevant sports-governing bodies will indeed abide by the said orders, let alone do so without delay.

25 Boog, *Interim Measures*, p. 432.

the final award, and (iii) so-called *performance measures* ("*Leistungsmassnahmen*", "*mesures d'exécution anticipée provisoires*"), aimed at obtaining the enforcement on an interim basis of all or a portion of the claim on the merits.[26] In sports disputes, the stay of a decision under appeal is the most commonly requested provisional measure. When it is aimed at authorizing an athlete or a club to participate in a competition, this measure is not only conservatory and regulatory in nature, but also, to some extent, akin to interim performance.

14 An order for interim performance directing the payment of a sum of money is not available in the CAS as it would be tantamount to a *freezing order* (*Arrest, séquestre*), a measure that is only within the competence of the state courts.[27] On the other hand, in appeals proceedings, there is *no need to file a request to stay monetary decisions* issued by the relevant sports-governing body (e.g. a decision condemning a player or a club to pay a certain amount): the request would in any event be dismissed, as the CAS has consistently held that under Swiss law pecuniary claims cannot be enforced by the competent Swiss authorities as long as an appeal on the merits is pending.[28]

IV (SUBSTANTIVE) PREREQUISITES FOR GRANTING PROVISIONAL MEASURES

15 Since the Code's 2013 revision, Art. R37(5) enunciates the *prerequisites to be satisfied in order for the CAS to grant interim relief,* which were developed in the CAS case law,[29] in line with the criteria stipulated in Art. 14(2) of the CAS Ad Hoc Division Rules,[30] but also the practice generally followed in international commercial arbitration.[31] Art. R37(5) provides that an order for provisional measures can be granted where the applicant is at risk of irreparable harm (A.), there is a likelihood that the claim will succeed on the merits (B.), and the balance of the interests at stake tips in favor of the applicant (C.).

16 The *CAS jurisprudence consistently states that these three prerequisites are cumulative*.[32] However, it also makes room for some flexibility, in that the CAS will

26 BGE 136 III 200 para. 2.3.2.

27 CAS 2011/O/2545, *P. Calcio v. S.*, Order of 26 October 2011, paras. 33–41.

28 CAS 2004/A/780, *Maicon Henning v. Prudentopolis & FIFA*, Order of 6 January 2005, p. 10, paras. 6.1–6.3; CAS 2011/A/2433, *D. v. FIFA*, Order of 1 June 2011, p. 4, paras. 13–14, noting that in order to be stayed, a decision must be enforceable ("*pour être suspendue, une decision doit être executable*"), which is not the case of a monetary order in an award subject to appeal. See also CAS 2011/A/2543, *Gymnova v. FIG*, Order of 14 November 2011, para. 8, with further references; CAS 2014/A/3765, *Club X. v. D. & FIFA*, Order of 17 November 2014, paras. 5.3–5.5.

29 See, among many others, CAS 97/169, *Menegotto v. FIC*, Order of 15 May 1997, *CAS Digest I*, p. 540, para. 1.

30 The CAS Ad Hoc Division Rules comprise the set of special procedural rules which are adopted (with slight amendments from one edition to the next) to apply to disputes arising during important international competitions, such as the Olympic Games and the Commonwealth Games. Art. 14(2) CAS Ad Hoc Rules provides that: "when deciding whether to award any preliminary relief, the President of the ad hoc Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community".

31 Cf. Patocchi, *Switzerland*, p. 903, referring to "general principles of civil procedure".

32 See, *ex multis*, CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, pp. 10–11, para. 41. More recently, CAS 2011/A/2473, *A. Club v. Saudi Arabian Football Federation* (*SAFF*),

generally take all the circumstances of the case into account when considering the application. As a result, although each of the prerequisites is relevant, any one of them may be decisive on the facts of a given case.[33] In other words, the CAS "*retains the measure of discretion necessary to evaluate the situation in a comprehensive manner*, using the above-mentioned requirements as guidance, it being understood that the strict application of fixed criteria is neither desirable nor useful, as it may give rise to more difficulties than it will actually resolve in terms of predictability".[34]

A Irreparable Harm

Irreparable harm is defined as any *damage that cannot be fully compensated if the applicant succeeds on the merits*.[35] Despite the inevitably fact-specific nature of irreparable harm, it is possible to identify some common lines of reasoning with regard to this notion in the jurisprudence of the CAS. 17

Suspensions or bans partially served before the hearing on the merits frequently satisfy the irreparable harm prerequisite. For instance, denying a football player the opportunity to play during four months due to a suspension would cause irreparable harm if the appointed panel were to subsequently set aside the suspension.[36] The CAS acknowledges that the months lost to a suspension can never be recovered and that the impact of disciplinary suspensions is compounded by the relative brevity of most athletic careers.[37] In this respect, it seems clear that the risk of irreparable harm will be deemed established if an athlete is at risk of serving the entire period of suspension before an award is rendered on the merits of his or her 18

Order of 17 June 2011, p. 5, para. 6.3, with the references, and CAS 2014/A/3642, *Erik Salkic v. Football Union of Russia & PFC Arsenal*, Order of 5 August 2014, para. 27. For this reason, there are a number of decisions (in particular the more recent ones) where the Division President or the Panel, having established that the application failed to meet one of the three substantive prerequisites, stated that, for reasons of procedural economy it would dispense with the analysis of the other two (cf., e.g., CAS 2014/A/3765, *Club X. v. D & FIFA*, Order of 17 November 2014, para. 5.8).

33 CAS OG 02/004, *COA v. ISU*, Order of 14 February 2002, *CAS Digest III*, p. *593*. More recently, cf., e.g., CAS 2015/A/4259, *R. v. FIM*, Order of 26 November 2015, para. 52.

34 Cf., e.g., CAS 2011/A/2489, *P. et al. v. FIFA*, Order of 8 July 2011, pp. 7–8, para. 25, loose translation from the French original. More recently, see, e.g., CAS 2014/A/3541, *B. v. FIFA*, Order of 13 May 2014, para. 5.3.

35 CAS 2006/A/1141, *M.P. v. FIFA & PFC Krilja Sovetov*, Order of 31 August 2006, p. 6, para. 19, citing BGE 126 I 207 para. 2. As noted in CAS 2014/A/3541, *N. v. FIFA*, Order of 13 May 2014, paras. 5.5–5.14, the notion of irreparable harm within the meaning of Art. R37(5) of the Code is specific to the CAS rules and must be interpreted in line with CAS jurisprudence, not by reference to the case law of the state courts dealing with analogous requirements. While conceptually appealing, this distinction should not be overstated as it is obvious that the underlying issues are very similar. Indeed, in numerous cases the CAS has referred to the case law of the Swiss Supreme Court on the definition of irreparable harm (cf., e.g., CAS 2012/A/2862, *FC Girondins de Bordeaux v. FIFA*, Order of 20 August 2012, para. 22, with further references; CAS 2012/A/3031, *Katusha Management v. UCI*, Order of 25 January 2013, para. 6.6).

36 CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.5. Cf. also CAS 2006/A/1137, *Cruzeiro Esporte Clube v. FIFA & PFC Krilja Sovetov*, Order of 17 August 2006, cited by Mavromati/Reeb, Art. R37, para. 41 (where a club that was precluded from registering new players, at both the national and international levels, for several months from the date of notification of the FIFA DRC decision was deemed to be at risk of suffering irreparable harm).

37 CAS 2008/A/1453, *Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA*, Preliminary decision of 8 February 2008, p. 7, para. 15. More recently, cf., e.g., CAS 2015/A/3925, *Traves Smikle v. JADCO*, Order of 13 March 2015, paras. 6.8–6.9.

appeal.[38] Moreover, an athlete's *inability to compete in a major competition* often entails damage that is difficult to remedy.[39] World championships and the Olympic Games evidently qualify as major competitions.[40] For other competitions, it should be up to the applicant to demonstrate the importance of the event for his or her career.[41] For instance, the CAS held that the *Giro d'Italia* is a major competition for an Italian rider.[42] The less important or "iconic" the competition at stake, the higher the bar will be set in this regard.[43] Be that as it may, on some occasions the CAS has gone against this general approach by holding that the economic, emotional and psychological hardship that results from the inability to compete in important events is an unavoidable consequence of every suspension of a professional athlete from competition.[44]

19 *Damage to reputation* and *loss of opportunity* may also constitute irreparable (or hardly reparable) harm, to the extent that they are difficult (if not impossible) to quantify.[45] The CAS has considered such risk to be self-evident in a situation where a football club was prohibited from participating in the (then) UEFA Cup.[46] However, damage to reputation may not amount to irreparable harm if, in the circumstances, it is inevitable. For example, if an official is accused of corruption, the suspicions relayed in the media are not likely to dissipate until the rendering of the final decision, meaning that provisional measures cannot in any event provide protection against them.[47]

20 Financial losses are not considered "irreparable" if they can be fully compensated by an award of damages at the end of the proceedings.[48] *Pecuniary damage* is relevant

38 Mavromati/Reeb, Art. R37, para. 32, referring to CAS 2005/A/958, *R. v. UEFA*, Order of 9 November 2005.

39 Cf., e.g., CAS 2015/A/3925, *Traves Smikle v. Jamaica Anti-Doping Commission (JADCO)*, Order of 13 March 2015, paras. 6.8–6.10, with references, adding that "the same holds true if an athlete is unable to compete in qualifying events necessary to compete in such major events". On this latter point, cf., however, CAS 2008/A/1480, *O. Pistorius v. IAAF*, Order of 10 March 2008, referred to by Mavromati/Reeb, Art. R37, para. 36 (noting that participation in the IAAF competitions in the run up to the Olympic Games would not automatically entail that the applicant would be eligible for the Games). Similarly, cf., e.g. CAS 2015/A/4282, *K. & M. v. IOC*, Order of 7 March 2016, paras. 51–52.

40 Cf., e.g., CAS 2011/A/2615, *Thibaut Fauconnet v. International Skating Union (ISU)* & CAS 2011/A/2618, *International Skating Union (ISU) v. Thibaut Fauconnet*, Order of 28 November 2011, para. 9.

41 CAS 2001/A/328, *F. v. International Sports Organization for the Disabled* (*ISOD*) *et al.*, Order of 3 August 2001, p. 2.

42 CAS 97/169, *Menegotto v. FIC*, Order of 15 May 1997, *CAS Digest I*, p. *542*, para. 10.

43 Cf. e.g., CAS 20127A/3031, *Katusha Management SA v. UCI*, Order of 25 January 2013, concerning the team's exclusion from a UCI WorldTour competition, the Santos Tour Down Under 2013, which was "important to obtain points for the UCI World Tour ranking, […] one of the main criteria for the registration of a team for the subsequent season", where the Deputy President of the Appeals Division held that the Appellant had "failed to establish that the immediate execution of the challenged decision would prejudice its rights in any manner" (paras. 3.4 and 6.10).

44 CAS 2005/A/990, *Pobyedonostsev v. IIHF*, Order of 19 January 2006, p. 4, para. 8.2. See also Mavromati/Reeb, Art. R37, para. 33.

45 CAS 2011/A/2543, *Gymnova v. Fédération Internationale de Gymnastique (FIG)*, Order of 14 November 2011, para. 14.

46 CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 10, para. 43.

47 CAS 2011/A/2433, *D. v. FIFA*, Order of 1st June 2011, p. 5, paras. 19–21.

48 CAS 2006/A/1187, *British Skeleton v. FIBT*, Award on Interim Measures of 30 January 2007, p. 7, para. 31. More recently, cf. e.g., *Africa Sports d'Abidjan v. Fédération Ivorienne de Football*

per se only if the applicant can establish that the resulting loss is impossible or very difficult to recover.[49] In all other instances, it *must be coupled with some form of moral damage or damage to a sporting interest*. For instance, the CAS will take notice, without deeming it conclusive in itself, of the fact that an athlete has a financial interest in competing in a major event[50] or that a club's inability to participate in an important event could result in lost revenue or financial jeopardy.[51] However, the CAS has held that financial losses suffered by football clubs due to a prohibition from signing new players during a transfer window,[52] or resulting from the potential loss of investment in a player due to a decision refusing his international transfer certificate,[53] were quantifiable and could thus be indemnified if the club succeeded on the merits.[54]

21 An applicant may also refer to the *interests of third parties* in cases where others will suffer negative consequences if the CAS does not grant the interim measures sought. For instance, a football agent appealing a decision which suspended his license during two transfer periods emphasized the interests of his clients.[55] Along the same lines, a football club argued that if it were prevented from signing players during the transfer period, the resulting loss of financial sponsorship could jeopardize its future, which in turn would affect the interests of the football association it belonged to, and more generally football at the national level.[56]

22 Other considerations may also be factored into the CAS's analysis, such as the *length of time between the issuing of an order on provisional measures and the scheduled hearing*. The point is self-evident when the hearing is delayed as it is obvious that this would compound harm to the applicant. In the case of an early hearing, the situation may be more complex. For instance, in a case where the stay of an athlete's suspension from competition is requested, the applicant can claim that this will result only in a short-term infringement of the adverse party's interests,[57] but the Panel could also consider that, in the circumstances, the applicant would only miss a limited number of competitions, and thus reject the application on the basis that the potential harm to the applicant would be comparatively limited.[58]

& USC Bassam, Order of 29 June 2012, para. 23.

49 CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 5, paras. 6.4–6.6.

50 CAS 2001/A/328, *F. v. International Sports Organization for the Disabled* (*ISOD*) *et al.*, Order of 3 August 2001, p. 3. In particular, the CAS has underscored that while the inability to participate in an important competition may indeed entail the loss of an opportunity, "there cannot be any security for a professional [athlete], even if [he or she] belongs to the best ones, to win a competition and the respective prize money", so that "the fact of perhaps losing prize money during a period of time does not create *per se* irreparable harm" (CAS 2011/A/2479, *Patrik Sinkewitz v. UCI*, Order of 8 July 2011, para. 8, referring to CAS 2008/A/1569).

51 CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 6, para. 7.10.

52 CAS 2005/A/916, *AS Roma v. FIFA*, Order of 25 July 2005, p. 4, paras. 18–19.

53 CAS 2011/A/2376, *S. Football Club LLC v. FIFA*, Order of 13 April 2011, p. 10, para. 44.

54 Similarly, the CAS has held that because the "UEFA rules have clear provisions with respect to prize money related to UEFA competitions", which "would constitute a strong basis to assess any potential financial damage" suffered by the Appellant as a consequence of its elimination from the third qualifying round of the UEFA Champions League playoffs for having fielded an ineligible player, such harm could not be considered irreparable (CAS 2014/A/3703, *Legia Warszawa v.UEFA & Celtic Football Club*, Order of 1 September 2014, para. 6.14).

55 CAS 2007/A/1198, *Piveteau v. FIFA*, Order of 23 January 2001, p. 7, para. 30.

56 CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 6, para. 7.10.

57 CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.7.

58 CAS 2005/A/951, *Cañas v. ATP*, Order of 18 November 2005, p. 3, para. 13.

23 In light of the foregoing, applicants should take care to submit specific arguments about the harm that will arise given the particular factual scenario, and to demonstrate that such harm extends beyond mere recoverable financial ramifications. Although this is not always spelled out in the relevant CAS jurisprudence, *the applicant need only make a showing that the risk of suffering irreparable harm is plausible* by alleging and bringing *prima facie* evidence of such risk.[59] The application should not be dismissed on the mere ground that the applicant was unable to quantify precisely the potential amount of damage.[60] It is also worth noting that, according to the CAS's commentary to the Code, "even if the Division President is not convinced that the applicant would suffer irreparable harm, he [or she] will normally consider that such condition is met if the [opponent] does not [object] thereto".[61]

B The Likelihood of Success on the Merits

24 The definition of the "likelihood of success" criterion has been subject to fluctuating terminology, reflecting the *debate as to whether a positive or negative standard should be applied*, such that the claim must be "likely to be well-founded" or, rather, "not obviously ill-founded". The positive standard was applied in the older CAS decisions, which required "reasonable chances of success".[62] However, more recent CAS decisions tend to favor the negative standard, considering that an application is likely to succeed if "it cannot be definitely discounted"[63] or if its chances of success are higher than the chances that it will be dismissed.[64] This reasoning, as will be seen below, is informed by the concern that it is necessary, at the stage of provisional measures, to *avoid trespassing into the merits of the case*.[65] Be that as it may, the fact that, again, there is *no definitive, monolithic standard* in this respect enables arbitrators to exercise their discretion on a case by case basis.

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59 CAS 2008/A/1525, *A. FC v. HFF & O. FC*, Order of 21 April 2008, p. 18, para. 71. That said, as underscored in several decisions, the risk of irreparable harm should be actual and real, not just hypothetical (cf., e.g., CAS 2013/A/3139, *Fenerbahçe SK v. UEFA*, Order of 3 May 2013, paras. 6.5 and 6.6; CAS 2014/A/3861, *I. v. CTU & FMF*, Order of 29 January 2015, para. 38). Cf. also Mavromati/Reeb, Art. R37, para. 36, with further references.

60 On the other hand, as noted by Mavromati/Reeb, Art. R37, para. 30, the burden lies solely on the applicant to establish the fulfilment of this requirement (in other words, the Panel is not obliged to order additional evidentiary measures or to ascertain the existence of a plausible risk of irreparable harm where the applicant fails to make the required *prima facie* showing). Cf., e.g., CAS 2008/A/1631, *AS RCK v. FAF*, Order of 20 August 2008, para. 17; CAS 2008/A/1621, *IFA v. FIFA & QFA*, Order of 27 August 2008, para. 11 (with a further reference to the order rendered in CAS 2007/A/1317, *Matt Fogarty & Dean Schoppe v. Badminton World Federation*).

61 Mavromati/Reeb, Art. R37, para. 43, referring to CAS 2012/A/2729, *W. Mazzarri v. UEFA*, Order of 13 March 2012.

62 Cf., e.g., CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 9, para. 40.

63 See, among many others, CAS 2006/A/1100, *Eltaib v. Club Gaziantepspor*, Order of 14 July 2006, p. 7, para. 30, and, more recently, CAS 2013/A/3052, *S. et al. v. A. et al. & COP*, Order of 12 June 2013, para. 99.

64 *A contrario*, cf. CAS 2006/A/1162, *Iglesias v. FILA*, Order of 16 October 2006, para. 24. Cf. also Mavromati/Reeb, Art. R37, para. 45 in fine, with further references.

65 In CAS 2008/A/1631, *RCK v. FAF*, Order of 20 August 2008, paras. 13–16, the Panel, which was called to render an urgent decision on provisional measures, held that, given the numerous questions raised by the factual record before it, as well as the lack of information and evidence at that stage in the proceedings, and considering that the applicant's arguments appeared to be grounded on reasonably plausible allegations, the 'likelihood of success' test ought to be considered satisfied.

Considering that the final decision on the merits is for the panel to make, the Division President will be *most reluctant to rule that the action on the merits does not appear to have the required chances of success*, unless the case is totally farfetched or, in appeals cases, if it is easy to determine that the time limit for appeal has clearly elapsed.[66] Understandably, the arbitrators are even more cautious. Thus, when they come to the conclusion that the required likelihood of success is not established, they will generally strive to emphasize that *"the Panel expressly does not state at this stage a final opinion on the ultimate outcome of the case […] which will be decided after a full hearing on the merits of the case"*.[67] 25

Given the flexibility available to arbitrators, establishing an inverse correlation between irreparable harm and the likelihood of success would ensure the greatest fairness to applicants. In other words, the more severe the irreparable harm is, the lower the "likelihood of success" threshold should be.[68] Since varying standards exist, one can only advise applicants to expand as much as possible on their case on the merits and to *support their arguments with sufficient proof in order to* "*make summarily plausible*" that the claim is likely to succeed.[69] Failing to adequately address the "likelihood of success" prerequisite may jeopardize a party's chances of obtaining interim relief.[70] 26

It is submitted that in those cases where the interim relief sought amounts to an order imposing, on a provisional basis, the performance of the ruling requested on the merits, in particular where a request to be *provisionally admitted into a specific competition* is at issue, the CAS should require a *higher standard of likelihood of success*, both as to the existence of the relevant facts and as to the merits of the applicant's case.[71] 27

C The Balance of Interests (or Convenience)

The third pre-requisite that is examined by the CAS when hearing applications for interim relief is generally referred to as the "balance of interests" test. This criterion aims at *comparing the hardship* that will be caused to the applicant if the interim relief is not granted with the disadvantages the adverse party and any relevant third parties will suffer if the relief is granted, i.e., whether it would do "greater harm 28

66 CAS 2011/A/2489, *P. et al. v. FIFA*, Order of 8 July 2011, pp. 7–8, paras. 26–29. In CAS 2008/A/1677, *Alexis Eman v. Club Al Ittihad Tripoli*, Order of 15 December 2008, paras. 15–18, the Division President concluded that the 'likelihood of success' test was not met on the ground that the Applicant had directed his appeal against a Respondent that lacked standing to be sued in respect of the claim at issue. See also CAS 2012/A/2981, *CD Nacional v. FK Sutjeska*, Order of 19 December 2012, paras. 6.5–6.11.

67 Cf., e.g., CAS 2006/A/1187, *British Skeleton v. FIBT*, Award on Interim Measures of 30 January 2007, p. 7, para. 32.

68 In similar terms, see Mavromati/Reeb, Art. R37, para. 44.

69 CAS 2001/A/324, *Addo & van Nistelrooij v. UEFA*, Order of 15 March 2001, p. 5, CAS Digest III, p. 631.

70 CAS 2003/O/486, *Fulham FC v. Olympique Lyonnais*, Award of 19 December 2003, p. 4, para. 18. Cf. also Mavromati/Reeb, Art. R37, para. 46, with further references.

71 The same line of reasoning is reflected in the Swiss Supreme Court's case law, cf., e.g., BGE 131 III 473 paras. 2.3 and 3.2.

to grant the preliminary relief than to deny it".[72] This requirement is also applied by state courts.[73]

29 On several occasions, the CAS has confirmed that granting the stay of a sanction under appeal does not undermine the sports-governing body's interest in maintaining the sanction's deterrent effect, by underscoring that if it is subsequently upheld, the sanction will merely be postponed in time, not cancelled.[74] The CAS has also held that the irreparable harm resulting for an athlete or club from the immediate execution of a sanction may override a sports-governing body's general interest in maintaining contractual stability,[75] preserving the integrity of a competition,[76] or ensuring "fair-play" and the proper behavior of sport professionals.[77] However, such generalizations merely serve as examples since the balance of interests test will always turn on the specific facts of a given case. Consequently, the main principle which can be extrapolated from the jurisprudence is that *once the applicant's risk of suffering irreparable harm is established, sports-governing bodies must provide specific reasons why the immediate execution of the sanction is necessary*. Although the CAS supports sporting regulators in the exercise of their disciplinary powers, their position is clearly seen as "distinct from [that of] a private party at risk of suffering irreparable damage if a stay is not granted".[78]

30 On the other hand, and as noted above with respect to the likelihood of success criterion, it is submitted that when the requested provisional measures seek the *ex ante* enforcement, on an interim basis, of all or part of the claim on the merits, in particular when a request to be provisionally admitted into a specific competition is at issue, the CAS should be particularly prudent in its analysis before concluding that the interests of the appealing club[79] or athlete(s) outweigh those of the other parties involved.[80] The scope of the balance of interests is potentially wider in sports- than in commercial arbitration, enabling arbitrators to consider the *interests of parties that are not involved in the proceedings*. Inspiration again emanates from Art. 14(2) of the CAS Ad Hoc Division Rules which compares the interests of the applicant to those of the opponent as well as "other members of the Olympic Community". This broad scope illustrates that, in the large majority of sports disputes, the granting of provisional measures can have far-reaching consequences. For example, the CAS

72 CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 15, para. 70.
73 Cf., e.g., Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, p. 23, at VIII.c.aa.
74 Cf., e.g., CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.6. Cf. also Mavromati/Reeb, Art. R37, para. 48, with reference to CAS 2006/A/1137, *Cruzeiro Esporte Clube v. FIFA & PFC Krilja Sovetov*, Order of 17 August 2006. See also CAS 2007/A/1370 & 1376, *FIFA v. STJD & CBF & Dodô; WADA v. STJD & CBF & Dodô*, Order of 10 December 2007, para. 7, holding that "a relatively short delay in the imposition of a sanction (if such was the outcome of the appeal) would not […] by any means harm FIFA's stance against doping" (in a case where FIFA had appealed against a decision by the Brazilian Football Federation's Superior Tribunal de Justiça Desportiva acquitting the Player of an anti-doping rule violation, and was seeking the immediate suspension of the player pending the appeal).
75 CAS 2004/A/780, *Maicon Henning v. Prudentopolis & FIFA*, Order of 6 January 2005, p. 9, para. 5.12; CAS 2008/A/1674, *Al-Hilal Al-Saudi Club v. FIFA*, Order of 12 December 2008, para. 26.
76 CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, pp 15–16, paras. 71–74.
77 CAS 2007/A/1198, *Piveteau v. FIFA*, Order of 23 January 2001, pp. 7–8, paras. 33–35.
78 CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 7, para. 7.13.
79 Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, p. 23, at VIII.c.aa.
80 Tribunal Cantonal, canton du Valais, Order of 16 November 2011, p. 13, at 4.a at the end. In similar terms, cf. CAS 2015/A/4259, *R. v. FIM*, Order of 5 November 2015, para. 53.

found that granting the provisional reinstatement of an athlete following a positive doping test based on unproven and contradictory facts could be seriously detrimental to the sports-governing body and to other competitors if the applicant's suspension was later to be upheld.[81] Concern for the interests of other athletes has also led the CAS to consider, as a general rule, that stays of doping sanctions must be granted "parsimoniously".[82] Indeed, to our knowledge a stay against an anti-doping related ban has been granted only in instances where "the Respondent has in effect conceded that in these circumstances it would be appropriate to grant a stay of execution".[83]

31 The same type of "sport specific" reluctance to order measures that will affect third parties can be observed in cases where *the granting of the relief sought could disrupt the smooth organization of an event or championship*. For instance, in a case concerning the relegation of a club, the CAS explicitly noted the concern that greater damage would be suffered by the football federation and the other football clubs which were trying to qualify for the following year's tournament.[84] In this regard, it is submitted that given the importance of the wider sports community, it is for the respondent sports-governing body and, if necessary, the CAS *sua sponte* to draw attention to, and duly take into consideration, such third party interests.[85]

32 In weighing the interests at stake in disciplinary cases where the stay of a sanction is sought, the CAS also takes into account the nature, purpose and intended terms of application of the sanction, as there may be circumstances where postponing its execution may make a significant difference. Similarly, the applicant's procedural conduct will also be examined in the context of the balance of interests test. For instance, in a case where the regulations called for the automatic application of the sanction in "the next competition" of a championship (which also happened to be the final competition of the season), the CAS arbitrator held that the applicant's choice

81 CAS 2005/A/951, *Cañas v. ATP*, Order of 18 November 2005, p. 3, paras. 12–13.

82 CAS 2005/A/958, *R. v. UEFA*, Order of 9 November 2005, p. 3, para. 8, free translation from the French original.

83 CAS 2014/A/3571, *Asafa Powell v. JADCO*, Order of 7 July 2015, para. 7.1; CAS 2014/A/3571, *Sherone Simpson v. JADCO*, Order of 7 July 2015, para. 7.1.

84 CAS 2008/A/1525, *A. FC v. HFF & O. FC*, Order of 21 April 2008, pp. 19–20, para. 78. For a counter-example, where the Sole Arbitrator found that, *in casu*, the measure sought by the club (admission in the first division of the national football championship) would not entail the relegation of another team, but only require that the calendar of competitions be adjusted and the other teams play against one more opponent, possibly for a limited time, see CAS 2011/A/2399, *FICA v. FHF*, Order of 28 April 2011, paras. 17–19 (referring to the similar situation in CAS 2008/A/1631, *RCK v. FAF*, Order of 20 August 2008). State courts appear to be less concerned by such "sport specific interests" (thus, there was no discussion of any arguments relating to the disruption of the competition and the damage caused to other clubs in the decisions rendered in the *FC Sion* saga, whether in the case brought by the Club against UEFA in the courts of the canton of Vaud (cf. in particular Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, at p. 23, simply dismissing "*les difficultés d'ordre organisationnel auxquelles (l'intimée) serait confrontée*" (freely translated: "the organizational difficulties the respondent would have to deal with"), without taking into account the interests of the other clubs), or in the case brought by the six players of the Club before the courts in the canton of Valais (Order issued by the Juge I des Districts de Martigny and St-Maurice, *Glarner and others v. SFL ASF, FIFA & FIFA TMS*, C2 11 228, on 3 August 2011). What the state courts appear to do in such cases is to emphasize the fact that the order sought is akin to a measure ordering *ex ante* specific performance and thus requires higher chances of success on the merits to be granted (cf. above, para. 27 and footnote 71, and also Tribunal Cantonal, canton du Valais, Order of 16 November 2011).

85 Rigozzi, *Provisional Measures*, p. 229.

to seek the stay of the sanction rather than initiating an expedited procedure to have immediate clarity on the merits of the dispute shifted the balance of interests to his disadvantage.[86] Waiting until the last minute to file an application for provisional measures also adversely affects the balance of interests on the applicant's side, in particular if the order is requested on an *ex parte* basis.[87]

V PROCEDURAL QUESTIONS

33 As a preliminary matter, it bears to point out that, as the text of Art. R37(3) makes clear, provisional measures are ordered only "upon application by a party". Further, arbitral tribunals can entertain applications for preliminary relief only if they have jurisdiction to hear the merits of the case.[88] Hence, an application for provisional measures before the CAS should include, in addition to "brief reasons establishing *prima facie*"[89] the three substantive prerequisites just discussed, the necessary elements to enable the CAS to review its jurisdiction (A.), namely the basis for such jurisdiction (e.g., arbitration clause in a contract; relevant stipulation in the applicable regulations), and, in appeals cases, proof that the internal legal remedies have been exhausted.[90] In cases of extreme urgency, the CAS can order provisional measures *ex parte*, i.e. without hearing the party against whom the measure is sought (B.). Finally, applicants must take note of the fact that, if they file a request for provisional measures prior to the request for arbitration (Art. R38) or statement of appeal (Art. R48), they will need to file their initiating submissions shortly thereafter, failing which any provisional measures as may have been granted will be revoked, and/or the interim relief proceedings will be discontinued. (E.). Respondents, for their part, should be aware of the consequences if they fail to submit their position on a request for provisional measures when invited to do so (C.); they should also keep in mind that the CAS has the possibility of making an order for interim relief conditional upon the provision of security (D.).

A Prima Facie Examination of CAS Jurisdiction

34 It is self-evident that arbitrators can order provisional measures only if they have jurisdiction to hear the merits of the dispute. Art. R37 was amended in 2010 to make it clear that this requirement also applies before the arbitrators are appointed and the panel constituted: "[t]he President of the relevant Division or the Panel shall issue

86 CAS 2015/A/4259, *R. v. FIM*, Order of 26 November 2015, para. 53, p. 21. Cf. also CAS 2013/A/3094, *HFF v. FIFA*, Order of 2 April 2013, para. 7.8, noting that the "parties must do all they can to assist themselves and the CAS when looking for provisional measures", and that "the Appellant did not take the chance to cancel the sanction [in the expedited proceedings the CAS and the Respondent were prepared to conduct, which the Appellant declined to participate in], instead concentrat[ing] on postponing it, which the Panel determines would undermine the deterrent effect and harm the interests of the Respondent […] to a degree in excess of the interests of the Appellant". For another case where the Panel suggested, in view of the circumstances (in particular the limited outstanding period of suspension to be served by the Appellant), to hold expedited proceedings on "all aspects of the appeal" rather than ruling (only) on the Appellant's request for a stay before turning to the merits, see CAS 2013/A/3151, *Jonathon Millar v. FEI*, Award of 7 October 2013, para. 41.

87 CAS 2016/O/4779, *IFAF & W. & TAFF v. N & M*, Order of 14 September 2016, para. 5.5.

88 Rigozzi, para. 1147.

89 Mavromati/Reeb, Art. R37, para. 14.

90 As seen, this latter requirement is stated expressly in Art. R37(1).

an order within a short time and shall rule first on the CAS jurisdiction". Art. R37 was further amended in 2013 to expressly stipulate that the CAS should undertake only a "*prima facie*" analysis of jurisdiction, specifying that "[t]he Division President may terminate the arbitration procedure if he/she rules that the CAS clearly[91] has no jurisdiction". In general, *the Division President will be very cautious before dismissing an application on jurisdictional grounds*.[92] When satisfied that there is *prima facie* jurisdiction, the Division President usually explicitly notes in his or her decision that "the final decision on jurisdiction will be made by the Panel".[93]

Article R37 does not apply the "clearly no jurisdiction" standard to the panel's analysis. While it would certainly be preferable for the panel to conduct a more complete, and even final, examination of jurisdiction, more often than not the specific circumstances of a case, the pressure of time constraints, and the limited information available at the stage of interim relief proceedings will mean that a jurisdictional determination can only be made on a *prima facie* basis.[94] In practice, the panel will defer its final decision on jurisdiction to a later stage (often the final award) if it does not have sufficient information and evidence when seized with an application for interim relief.[95] In sum, given the fundamental importance of jurisdictional issues, *the panel should verify its jurisdiction as accurately as possible under the circumstances*[96] and applicants would be well-advised to make thorough submissions on jurisdiction already at the stage of a request for provisional measures.[97] **35**

Neither the panel nor, *a fortiori*, the Division President should terminate the arbitration on jurisdictional grounds in an *ex parte* order.[98] **36**

91 The fact that the 2013 edition of the Code substituted the original adverb "manifestly" with "clearly" constitutes a mere cosmetic change and should not be taken as a lowering of the applicable standard. Indeed, the French version of the Code remained unchanged and still uses the word "*manifestement*".

92 CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 3, para. 4.2. In this case the Division President preferred to dismiss the request for preliminary measures for lack of irreparable harm despite the fact that CAS jurisdiction was more than doubtful (as it then became apparent with the Award issued in CAS 2011/A/2472, *A. v. SAFF* on 12 August 2011). Similarly, demonstrating that the threshold for the respondent to establish that the CAS lacks jurisdiction is indeed very high before the (Appeals) Division President, cf. CAS 2016/A/4914, *L. v. UCI*, Order of 12 January 2017, paras. 12–15. For a case where the President of the Appeals Division found that there was "manifestly no arbitration agreement between the parties to refer the present dispute to the CAS", cf. CAS 2006/A/1140, *Sportul Studentesc v. RFF*, Order of 14 September 2006, para. 4.3, noting that the dispute at hand was purely domestic and therefore not covered by the rule providing for CAS jurisdiction in the RFF Statutes, which only concerned disputes featuring *"an element of extraneity"*. See also Mavromati/Reeb, Art. R37, para. 22.

93 Cf., e.g., CAS 2011/A/2376, *S. Football Club LLC v. FIFA*, Order of 13 April 2011, pp. 8–9, para. 36; CAS 2011/A/2541, *B. v. AFC*, Order of 30 September 2011, para. 4.2; CAS 2014/A/3642, *Erik Salkic v. FUR & PFC Arsenal*, Order of 5 August 2014, paras. 12 and 16.

94 Cf., e.g., CAS 2008/A/1631, *RCK v. FAF*, Order of 20 August 2008, paras. 3–11.

95 CAS 2011/A/2376, *S. v. FIFA*, Order of 13 April 2011, pp. 8–9, para. 36.

96 Cf. CAS 2008/A/A/1631, *RCK v. FAF*, Order of 20 August 2008, para. 3.

97 In appeals proceedings, when the appellant seeks the stay of the decision under appeal, the request should be made at the latest together with the statement of appeal (cf. Art. R48, paras. 16–17 below). On the issue of CAS jurisdiction, see Arts. R39 for ordinary proceedings and R47 for appeals proceedings. See also Mavromati/Reeb, Art. R37, paras. 20–22.

98 After all, the respondent could accept CAS jurisdiction even though it is not provided for in the applicable sporting regulations or in the arbitration clause contained in the underlying contract.

B *Ex Parte* Orders

37 It is generally accepted under Swiss law that arbitral tribunals have the power to order interim measures on an *ex parte* basis.[99] Art. R37 of the CAS Code expressly provides for such a possibility, by envisaging that in "*case of utmost urgency*" the CAS "may issue an order *upon mere presentation of the application*, provided that the opponent is subsequently heard".[100]

38 Unless the urgency appears while the case is pending before the panel, it would be for the Division President to decide whether to grant the remedy sought on an *ex parte* basis. It is submitted that urgency should not be the only element to be taken into account and that the more serious the risk of irreparable harm, the less reluctant the Division President should be to decide on the application without hearing the other side. That said, *the plausibility of the facts alleged by the applicant should be examined at least to a certain extent*. In practice, *ex parte* rulings can only be contemplated if the jurisdiction of the CAS (as well as, in appeals cases, the exhaustion of the internal remedies and the timeliness of the appeal) is easily verifiable.

39 It is often said that *ex parte* orders tend to be rare in arbitration but are more frequent in sports disputes due to the need for swift decisions. While it is true that state courts have shown that they will not hesitate to act *ex parte* in sports matters,[101] the same does not apply to the CAS. Indeed, it appears that *the Division President prefers to fix very short time limits to answer by fax rather than rule ex parte*.[102] This is possible because the Division President and/or his or her deputy are available around the clock and, unlike state courts, communicate with the parties by fax and/or e-mail.

C Answer and Failure to Answer

40 When, as in the vast majority of cases, the Division President or the panel invites the opponent party to express its position, the time limit provided for by Art. R37 is normally *ten days, but can be "shorter […] if circumstances so require"*. This flexibility is particularly important as it allows the Division President to avoid the need to decide *ex parte* even if the decision is required on a very urgent basis.

41 *If the respondent does not answer within the set time limit*, the CAS will tend to consider that the applicant has met his or her burden of establishing *prima facie* that the action on the merits has reasonable chances of success.[103] However, when the time limit to respond is particularly short, the CAS should not simply consider that the respondent has acquiesced to the measure sought. Even when there are no third party interests involved, such a drastic consequence should be applied only

99 Von Segesser/Boog, p. 117. Kaufmann-Kohler/Rigozzi, para. 6.124.

100 For a recent example where an *ex parte* order was issued, granting a provisional stay "on the basis that such order would be reconsidered once the Respondent filed its observations", cf. CAS 2015/A/3925, *Traves Smikle v. Jamaica Anti-Doping Commission (JADCO)*, Order of 13 March 2015, para. 3.2.

101 Cf., e.g., the Order issued by the Juge I des Districts de Martigny and St-Maurice in the case *Glarner and others v. SFL ASF, FIFA & FIFA TMS*, C2 11 228, on 3 August 2011.

102 Cf. Mavromati/Reeb, Art. R37, para. 26.

103 Cf. e.g., CAS 2011/A/2351, *Club C. v. FIFA*, Order of 16 March 2011. As seen in para. 23 above, this can also be the case with the 'risk of irreparable harm" test.

if the communication from the CAS fixing the time limit to respond provides so in express terms.[104]

D Security

Article R37 in fine explicitly authorizes the CAS to make the granting of interim relief conditional upon the provision of security. The requirement for the posting of security aims to protect the adverse party by ensuring that it will be able to recover any damages caused by the measure(s) ordered by the tribunal, should these measures eventually be deemed unnecessary or unjustified in the final decision. Before making an order for security, the CAS must therefore be satisfied (i) that the interim measure(s) requested can cause damage to the applicant's adverse party or parties,[105] (ii) that it would be very difficult to recover the amount at stake at a later stage (i.e., based on a cost award),[106] and (iii) that the amount of security requested does not exceed the maximum potential damages claim.[107] In our experience, the *CAS has made little use of this type of order*.[108] 42

E Need to "Confirm" the Request for Provisional Measures

In 2013, a sixth paragraph was added in Art. R37, according to which provisional measures will be ordered (or maintained) only if the requesting party files its *claim on the merits within a certain time limit*. In CAS ordinary proceedings, the request for arbitration must be filed within 10 days from the filing of the request for provisional measures; in appeals proceedings, the statement of appeal must be filed within the time limit provided by Art. R49 of the Code. If such *non-extendable* time limits are not met, the proceedings for interim relief will be terminated and any measure granted in the meantime will be revoked. 43

104 Cf. also Mavromati/Reeb, Art. R37, para. 26, apparently considering that an exception to the acquiescence principle should also be made "where the time limit to file an answer is too short".

105 Cf. Mavromati/Reeb, para. 57, with reference to CAS 2010/A/2240, *Zhongyu Professional Basketball Club v. L. Benson & J. Paris*, Order of 21 March 2011.

106 Cf. Mavromati/Reeb, Art. R37, para. 57, with reference to CAS 2011/A/2360 & 2392, *ECF & GCF v. FIDE & ECF & GCF v. FIDE*, Order of 27 June 2011, and CAS 2013/A/3249, *X. v. FACR*, Award on Jurisdiction of 31 March 2014, para. 57f. As noted by the same authors, "[t]his means that the applicant bears a high onus to prove (by adducing concrete evidence) that the appellants would not be in a financial position to satisfy an eventual costs award against them".

107 Von Segesser/Boog, p. 118; see also Boog, above commentary on Art. 183(3) PILS (Chapter 2, Part II), paras. 17–22.

108 Cf. also Mavromati/Reeb, Art. R37, para. 55. As noted by these authors at para. 60, the CAS has also dealt with cases where a federation's rules imposed the posting of security for costs on parties bringing an appeal against the federation's decisions. In two known instances, FIDE's rules to this effect were held to be disproportionate and contrary to the principle of equality (cf. CAS 2011/A/2360&2392, *ECF & GCF v. FIDE; ECF &GCF v. FIDE*, Order on security for costs of 27 June 2011; CAS 2012/A/2943, *BCF v. FIDE*, Award of 8 April 2013).

VI FURTHER ISSUES RELATING TO ORDERS ON PROVISIONAL MEASURES

A Costs

44 Pursuant to Art. R37 (second paragraph) the party applying for provisional measures before initiating the arbitration shall pay the *Court Office fee* as per Art. R65.2 *upon filing the application*, failing which the "CAS shall not proceed". Should the request for arbitration (Art. R38) or the statement of appeal (Art. R48) be filed at a later stage, the filing fee "shall not be paid again".

45 In cases concerning "decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body" within the meaning of Art. R65 of the CAS Code, orders on provisional measures will be *issued without costs*. However, in light of his/her power to decide to impose the payment of the arbitration costs also in such cases,[109] the President of the Appeals Division can reserve his/her decision for a later stage of the proceedings.

46 In cases where the proceedings are not free of charge, the CAS normally rules that "the costs of the present order will be *settled in the final award* or in any other final decision in this arbitration". In exceptional cases, the allocation of such costs is decided directly in the order.[110]

47 The outcome of the request should be taken into account when deciding on the apportionment of the arbitration costs, if any, and the awarding of a contribution towards legal costs. When the request for provisional measures is filed and dismissed before the applicant has even filed the statement of appeal or request for arbitration, and the latter is ultimately not filed within the time limit set in Art. R37(6),[111] it is submitted that the prevailing party should be allowed to ask the President of the relevant Division to issue an order on costs.

B No Appeal Against Orders on Provisional Measures

48 Generally, under Swiss law, regardless of whether a *decision on interim measures* is labeled as an "order" or an "award", it is not subject to appeal because it can be modified or set aside during the arbitration; in other words, *it is not a final, partial, or interlocutory award that can be challenged, as such, before the Swiss Federal Supreme Court*.[112] Indeed, CAS orders on provisional measures now systematically contain a closing sentence according to which "[t]his decision is a procedural order, not an award. As a result, it may not be challenged in court pursuant to Art. 190 Swiss Private International Law Act".[113] However, an order on interim measures can be appealed (i) if the CAS thereby declines jurisdiction,[114] or (ii) in the exceptional

109 Cf. Art. R65, paras. 7–8 below.

110 Cf., e.g., CAS 2003/O/520, *Association turque de football & B. v. UEFA*, Order of 3 December 2003, p. 11, para. 57.

111 Cf. para. 46 above.

112 BGE 136 III 200 para. 2.3.1.

113 Cf. for example, CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, para. 78, or, more recently, CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 6, para. 8.1; CAS 2013/A/3139, *Fenerbahçe SK v. UEFA*, Order of 3 May 2013.

114 *Contra*, it would seem, Mavromati/Reeb, Art. R37, para. 11, with no particular discussion.

circumstance that the order *de facto* rules on the merits of the dispute, thereby definitively terminating the arbitration proceedings.

C Enforcement

Sports-governing bodies, which impose the CAS Code on their members, but also clubs and athletes in appeals cases, will generally comply voluntarily with orders on provisional measures issued by the CAS.[115] Enforcement is thus not an issue in *CAS appeals arbitration* cases. 49

In *CAS ordinary arbitrations*, similar to commercial arbitration cases, voluntary compliance is less self- evident but still common. Although arbitrators cannot enforce orders directly against the parties, they can use the tools of adverse inferences, cost allocation, and even possibly an adverse ruling (if justified) to reprimand non-compliance with their orders on provisional measures. If necessary, arbitral tribunals can also seek the assistance of the courts for the enforcement of such orders.[116] 50

115 Cf. also Mavromati/Reeb, Art. R37, para. 53, noting that CAS-ordered provisional measures are "quasi automatically enforced". By contrast, experience shows that the same does not apply to orders issued by state courts in disputes for which the relevant sports-governing body provides for CAS arbitration (cf. above, para. 11, footnote 24, and the well-known *OM-Valenciennes* case reported in *SPuRt 1994*, p. 27, as discussed by Rigozzi, para. 153).

116 Von Segesser/Boog, pp. 121–122; see also Boog, above commentary on Art. 183(2) PILS (Chapter 2), paras. 29–44; Kaufmann-Kohler/Rigozzi, paras. 6.130–6.141.

B. Special Provisions Applicable to the Ordinary Arbitration Procedure (Arts. R38 – R46)

Article R38: Request for Arbitration

The party intending to submit a matter to arbitration under these Procedural Rules (Claimant) shall file a request with the CAS Court Office containing:

- the name and full address of the Respondent(s);
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- its request for relief;
- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these Procedural Rules;
- any relevant information about the number and choice of the arbitrator(s); if the relevant arbitration agreement provides for three arbitrators, the name of the arbitrator from the CAS list of arbitrators chosen by the Claimant.

Upon filing its request, the Claimant shall pay the Court Office fee provided in Article R64.1.

If the above-mentioned requirements are not fulfilled when the request for arbitration is filed, the CAS Court Office may grant a single short deadline to the Claimant to complete the request, failing which the CAS Court Office shall not proceed.

I PURPOSE OF THE PROVISION

1 Article R38(1) sets out the prescribed modalities for initiating ordinary arbitration proceedings at CAS, i.e., the filing of a request for arbitration with the CAS and payment of the Court Office fee.

II CONTENT OF THE PROVISION

A Content of the Request for Arbitration

2 Article R38(1) lists the content of the request for arbitration to be filed with the CAS Court Office. It is crucial that from this content it is very clear that the claimant intends to submit a dispute to the CAS to obtain a binding decision.

1 Identity of Claimant and Respondent

3 The parties and the CAS need to understand who the claimant and the respondent are, particularly, the CAS needs to know their contact details to enable communication

between the parties and the Court Office (or the Panel via the Court Office) and to assess whether there exists an arbitration agreement referring to the CAS.[1] Art. R38(1) first bullet point states, therefore, that the request for arbitration must contain the name and full address of the respondent. It goes without saying that the name and full address of the claimant must also be provided with the request.

Furthermore, the email address and fax number (if any) must be mentioned since communication with the CAS may occur via these means of communication.[2] If the claimant is represented by another person, the name, full address and further contact details (email address and fax number) of the representative shall be mentioned in the request as well. In case of multiparty arbitration,[3] the names, addresses and further contact details of all parties must be stated. 4

Updates of a party's name (e.g. due to a merger) or address (e.g. due to change of domicile) are possible at any time during the proceedings. However, a party's last known residence or place of business shall be a valid address in the absence of any notification of a change by that party. 5

2 Brief Statement of Facts and Legal Arguments

According to Art. R38(1) second bullet point, the request shall contain a brief statement of the facts and legal arguments. The facts and legal arguments must be set out to the extent necessary for the CAS and the respondent to roughly understand the key issues of the dispute at stake so that the CAS is in a position to discern any apparent flaws disallowing the continuation of the arbitration at the CAS.[4] and that the appointment of suitable, competent and independent arbitrators are possible. 6

The claimant may also address the question of which law applies to the merits.[5] In case of a separate choice-of-law clause, the Claimant should file this too. An indication of the amount at stake is helpful as well because the monetary value of the claims has an impact on the amount of the fees to be paid and on the number of arbitrators to be appointed if there is a lack of an agreement on this question.[6] 7

It is not required to adduce any evidence at this stage. However, it can be advisable to produce key documents such as a copy of the underlying contract and/or some critical correspondence; in case IP rights are at stake (e.g. in a sponsoring or merchandising agreement) it is helpful to submit also excerpts from the underlying registered intellectual property rights. 8

The full statements must be made only within the written submissions according to Art. R44.1. Hence, the fact that relevant facts and/or legal arguments are not mentioned at this stage does not prevent the claimant from completing or supplementing its submissions at a later stage.[7] 9

1 Cf. Art. R31.
2 For details cf. Art. R31.
3 Cf. Art. R41.
4 Cf. Art. R39(1), first sentence.
5 Cf. Art. R39(1), second sentence.
6 Cf. CAS Schedule of Arbitration Costs and Art. R40.1 second sentence.
7 Cf. Art. R44.1, fourth sentence.

10 The CAS Code does not state how to proceed where the request for arbitration is combined with the statement of claim. As a principle, the court should proceed as if the claimant had filed only a request for arbitration and invite the respondent to file its answer to the request in accordance with Art. R39.

11 In practice, the statement of facts and legal arguments often occupy just a few lines.

3 Request for Relief and Procedural Requests

12 Pursuant to Art. R38(1) third bullet point, the claimant shall define its prayers for relief (request for relief) so that the respondent has a clear picture about what is expected and demanded from him by the claimant.

13 The prayers for relief can result in an action for performance (e.g. damages for breach of contract), an action to modify a legal relationship (e.g. assignment of rights), an action for declaratory judgment[8] (e.g. nullity of registered IP rights) or actions of other nature. The prayers for relief have to be sufficiently precise allowing a proper identification of the subject-matter of the dispute.[9] However, the CAS Rules do not provide for details as to how precise and specific the prayers for relief have to be supplied. It is critical that the degree of precision must allow the respondent to reply to all parts of the claim as the demand for precise prayers for relief are an aspect of respondents' right to be heard.[10] However, the request for relief may still be amended with the written submissions in accordance with Art. R44.1.[11]

14 Even if this is not stated in the CAS Code, procedural requests may be formulated at this stage, too; e.g., a request for an expedited procedure or to order the consolidation of proceedings. Furthermore, provisional measures may be requested in accordance with Art. R37.

4 Proof of Arbitration Agreement

15 Article R38(1) fourth bullet point requires that the claimant files a copy of the document(s) containing the arbitration agreement and/or providing for arbitration in accordance with the CAS rules. This requirement is particularly important because failing to meet it may lead to the CAS refusing to accept the request for arbitration for manifest lack of an arbitration agreement.[12] In case the arbitration agreement is not in English or French, translations should be attached.[13]

5 Information regarding Arbitrators and Language

16 According to Art. R38(1) fifth bullet point, the claimant must provide any relevant information about the number and choice of the arbitrator(s).[14] If the arbitration

8 As to the applicable law with respect to the legal interest required for declaratory relief, cf. Art. 27 para. 7 above.
9 Kellerhals/Berger, N 1207.
10 Wirth, *Rechtsbegehren*, 148, 155; Kellerhals/Berger, N 1207.
11 Cf. Art. R44 para. 4 above.
12 Cf. Art. R39(1), first sentence.
13 Cf. Art. R29, para. 16 above.
14 Cf. Art. R40.

agreement provides for three arbitrators, the name of the arbitrator from the CAS list chosen by the claimant has to be mentioned as well.[15]

If the parties have not already agreed on the language of the arbitration, the request for arbitration should, ideally, contain a proposal in this regard. The relevant language should be determined at a very early stage, preferably before the appointment of the arbitrators because the required language skills have obviously an impact on the choice of arbitrators.[16] 17

6 Information regarding Payment of Court Office Fee

If the payment of the Court Office fee is effected before or at the same time as the filing of the request,[17] it is useful to provide information and proof that the fee has already been paid by the claimant. 18

B Form of the Request for Arbitration

The request for arbitration must be in writing and duly signed by the claimant or its representative. In the event of the representative signing the request, a power of attorney should be attached (if available).[18] Oral requests, for instance by telephone or in person by passing by at the offices at the CAS, are not accepted. 19

There are no specific rules regarding structure, style and length of the request for arbitration. Usually, this depends on both the complexity of the case and the Claimant's strategy and cost-sensitivity. 20

In principle, the request for arbitration should be in English or French.[19] However, the CAS also accepts submissions in some other languages, i.e., German, Spanish or Italian.[20] With regard to the number of copies to be filed, reference can be made to Art. R31(3). 21

The CAS Code requires that communications be sent to the CAS Court Office. A request for arbitration sent only to the respondent will not initiate arbitration proceedings under the CAS Code and will not trigger the pendency of the arbitral proceedings. 22

C Incomplete Request for Arbitration

If the requirements contemplated in Art. R38 are not met when the request for arbitration is filed, the CAS Court Office may grant an appropriate, single short deadline to the claimant to complete said request.[21] 23

15 Only arbitrators who are mentioned in the closed list may be selected, cf. Art. R33(2).
16 Cf. also Art. R29(1), second sentence.
17 Cf. Art. R38(2).
18 Art. R30, third sentence, implies that a power of attorney or written confirmation of representation can be submitted at a later stage.
19 Cf. also Art. R29(1), first sentence.
20 Art. R29(2).
21 Art. R38(3). Cf. also Art. 48(3).

24 If the claimant fails to complete its request within the set deadline, the CAS Court Office does not proceed.[22] Prior to the 2013 revision of the CAS Code, this provision stated that failing to complete the request within the set deadline resulted in a withdrawal of the request. The meaning of this revision and its consequences are not clear at the moment. In any event, it cannot mean lis pendens for an indefinite period of time. Therefore, it is expected that the CAS will issue an order of termination.

D Payment of Court Office Fee

25 The claimant must pay the non-refundable Court Office fee (which is a kind of registration fee) at the time of filing a request for arbitration.[23] Usually, such payment is executed by a bank transfer; however, the CAS also seems to accept a cheque or cash.[24] Under the current version of the CAS Code this fee amounts to CHF 1'000.[25] Although the CAS Code does not require this, it is recommended that evidence proving the said payment be submitted together with the request for arbitration. In the event that the Court Office Fee has not been paid upon, or shortly after, the filing of the request, an additional time limit will be granted for this purpose.[26] The CAS will not proceed until the Court Office fee has been paid.[27]

E Effect of Filing the Request for Arbitration

26 By filing the request for arbitration the arbitration proceedings are initiated and upon CAS Court Office's receipt of such filing the arbitration proceedings commence. However, unlike other well-established arbitration rules (such as the UNCITRAL Rules, ICC Rules, Swiss Rules or WIPO Rules[28]), the CAS Rules do not define and refer to the commencement of arbitration proceedings, but rather take reference to the initiation[29] or pendency[30] of the arbitration proceedings.

27 One of the critical consequences of the filing of the request for arbitration is the procedural effect of pendency (*lis pendens*).[31] Pendency of proceedings is a concept from procedural law, enshrined in the legislation of many countries, including Switzerland.[32] It designates the period of time between the date on which a judicial authority is seized with a dispute and the date on which such dispute is settled by a final and binding judicial decision and it has different procedural consequences.[33] The consequences of *lis pendens* in court litigation and arbitration proceedings are,

22 Art. R38(3), at the end.
23 Art. R38(2).
24 Mavromati/Reeb, Art. R38, para. 22.
25 Art. 64.1(1), first sentence and Art. R65.2(2), first sentence.
26 Art. R38(3).
27 Art. R64.1(1), first sentence. See also Mavromati/Reeb, Art. R38, para. 22 stating the Court Office fee is *conditio sine qua non* for the initiation of the arbitration proceedings.
28 Cf. Art. 3(2) UNICITRAL Rules, Art. 4(2) ICC Rules and Art. 3(2) Swiss Rules. Same view: Mavromati/Reeb, Art. R38, para. 12.
29 Cf. Arts. 39, 49, 52, 67 CAS Rules.
30 Cf. Arts. 39, 52, 67 CAS Rules.
31 Oschütz, p. 276.
32 For civil proceedings at Swiss state courts see Arts. 59(2)(d) and 62–64 CCP, Arts. 27–30 LugC and Art. 9 PILS.
33 Cf. Berger/Kellerhals, paras. 1017–1018.

however, not the same.[34] Under Swiss arbitration law, pendency is to be determined in accordance with Art. 181 PILS for international arbitration and in accordance with Art. 372 ZPO for domestic arbitration. Neither of these two provisions define the exact date and time on which the proceedings shall be deemed to have become pending. It is suggested that the parties are free to agree on the exact date of pendency and that in the absence of such an agreement, the date on which the arbitration institution (CAS Court Office) receives the Request for Arbitration shall apply.[35] Once an arbitration is pending, it is a matter of the applicable procedure rules to determine the procedural consequences of the pendency.[36] Under the ZPO and PILS, the main procedural effect of *lis pendens* is the barring effect within the meaning of Art. 372(2) ZPO and Art. 9(1) PILS excluding that a state court and arbitral tribunal decide on the same dispute between the same parties.[37] Whether the matter in dispute is identical or not is to be assessed in arbitration according to the same criteria as before state courts.

28 The filing of the request for arbitration may also have legal consequences regarding the merits of the dispute. Perhaps the most important one is the effect that such filing has on the expiry of time limits, namely prescription periods (statute of limitations), i.e., such periods usually stop running upon such filing.[38]

34 Cf. Berger/Kellerhals, paras. 1019–1020; Habegger, para. 3 Art. 372.

35 Cf. Kaufmann-Kohler/Rigozzi, para. 6.09; contra Berger/Kellerhals, para. 1031 and Girsberger/Voser, *2016*, para. 881 referring to the date at which the claimant sends its request for arbitration to the institution or respondent.

36 Cf. Berger/Kellerhals, paras. 1065.

37 Cf. BGE 127 III 279 para. 2, holding that an arbitral tribunal with seat in Switzerland must apply Art. 9(1) PILS if the same matter is pending at a state court in Switzerland or abroad.

38 Kaufmann-Kohler/Rigozzi, para. 6.06; Girsberger/Voser, *2016*, para. 861.

Article R39: Initiation of the Arbitration by CAS and Answer – CAS Jurisdiction

Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. It shall communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s) from the CAS list, as well as to file an answer to the request for arbitration.

The answer shall contain:

- a brief statement of defence;
- any defence of lack of jurisdiction;
- any counterclaim.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant of its share of the advance of costs provided by Article R64.2 of this Code.

The Panel shall rule on its own jurisdiction, irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on jurisdiction.

The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Where a party files a request for arbitration related to an arbitration agreement and facts similar to those which are the subject of a pending ordinary procedure before CAS, the President of the Panel, or if she/he has not yet been appointed, the President of the Division, may, after consulting the parties, decide to consolidate the two procedures.

I PURPOSE OF THE PROVISION

1 Paragraphs 1 to 3 of Art. R39 set out the initial actions to be completed by the CAS upon receipt of a request for arbitration and deal with the content of the respondent's answer to the request for arbitration and the respondent's option to request that the time limit for the filing of such answer be fixed after claimant's payment of its share of advance.

2 Paragraphs 4 to 6 of Art. R39 have been added in the course of the 2012 CAS Code revision, in force as of 1 January 2012. These provisions, which from a systemic point of view would have deserved entry as a distinct article within the CAS Code,

clarify that the Panel may decide on its own jurisdiction and that consolidation of two proceedings is not excluded under the CAS Code.

II CONTENT OF THE PROVISION

A Initial Actions by CAS

1 Preliminary Examination of Apparent Lack of Arbitration Agreement

As soon as the request for arbitration is filed, the CAS Court Office will examine whether it appears from the outset that there is manifestly no arbitration agreement referring to the CAS.[1] The relevant test under this provision is not whether the CAS has jurisdiction but only whether there is an appearance of an arbitration agreement referring to CAS.[2] The purpose of this *prima facie* examination is to avoid committing to cases that manifestly are not subject to an arbitration agreement referring to the CAS.[3] If the CAS Court Office comes to the conclusion that there is no arbitration agreement referring to the CAS, it will not set the arbitration in motion and will inform the parties accordingly. This decision of the CAS Court Office can be challenged before the Swiss Federal Supreme Court according to Art. 190(2)(b) PILS. 3

2 Appropriate Actions and Communication to Respondent

If the CAS Court Office is satisfied that there is an arbitration agreement, it takes all appropriate actions to set the arbitration in motion.[4] In particular it examines whether the requirements of Art. R38 are met; if not, the CAS shall grant a single short deadline to complete the request for arbitration.[5] As soon as appropriate, it shall communicate the request to the respondent and invite the respondent to file its answer.[6] According to Mavromati/Reeb, such communication is usually done via courier, although further means of communication are permitted under Art. R31.[7] 4

The CAS may set two different deadlines for submitting the information about the arbitrators and the answer to the request. The CAS Code does, however, not provide any specific time period for these deadlines. Depending on the concrete circumstances of the case this time period can vary; usually about 20 to 30 days is 5

1 Art. R39(1), first part of first sentence. In the course of the 2013 revision of the CAS Code, the word "manifestly" has been deleted in the English version and the word "clear" has been introduced; however, the French version has remained unchanged and still states "manifestement". Against this background, it seems that the change of the wording is of no material nature.

2 Cf. CAS 2000/A/297, *R v. IOC, IWF et al.*, Award of 30 August 2000, p. 2 and CAS 2000/A/288, *T v. CNOSF*, Award of 15 August 2000, p. 2 regarding Art. R52(1), first sentence.

3 Cf. Mavromati/Reeb, Art. R39, para. 2 stating that the control at this stage is a formal and not substantial one.

4 Art. R39(1), second part of first sentence.

5 Art. R38(3); cf. also Art. R39(1), second sentence: If the claimant has not yet set out his point of view on the issue of applicable law to the merits, the claimant shall be invited to express himself on this issue within a set time limit.

6 Art. R39(1), second sentence.

7 Cf. Mavromati/Reeb, Art. R39, para. 4.

appropriate.[8] Such deadline starts running in accordance with Art. R32. In addition, it should be highlighted that the respondent may request that the time limit for filing the answer be fixed after the payment by the claimant of its share of the advance of costs contemplated by Art. R64.2.[9] This provision helps to spare the respondent any unnecessary expenditure. However, this provision cannot be invoked, *vice versa*, by the Claimant with regards to its answer to the counterclaim.[10]

B Answer to Request for Arbitration

1 Content of the Answer

6 The answer to the request for arbitration shall contain (i) a statement of defense, (ii) any defense of lack of jurisdiction, and (iii) any counterclaim.[11] In addition, the answer to the request shall contain any other objections[12] and any further information that may be of major importance for the arbitration, in particular the intention to cause a third party to participate in the arbitration (joinder).[13] In case three arbitrators are to be appointed, the name of the arbitrator chosen by the respondent can be mentioned as well. Moreover, it is very useful to provide information about the law applicable to the merits and the language of the proceedings already at this stage.[14]

7 The statement of defense shall contain a response to the claimant's request for relief and a brief statement of the facts and legal arguments; such a statement is often only a few lines long. Failing to set out relevant facts and/or legal arguments does not preclude the respondent from doing so in his submissions according to Art. R44.1. Even the defense of lack of jurisdiction and the counterclaim may still be filed at a later stage, with the response.[15] Counterclaims may result in the calculation of additional advances.[16]

2 Form of the Answer

8 The answer to the request for arbitration must be in writing and duly signed by the respondent or the latter's representative. In the event of the representative signing, a power of attorney shall be attached (if available).[17] Oral answers, for instance by telephone or in person at the offices at the CAS, are not accepted. There are no specific rules regarding structure, style and length of the answer to the request of arbitration. Usually, this depends on both the complexity of the case and the respondent's

8 Cf. Mavromati/Reeb, R39 para. 7 stating that in practice it is usually about 20 days. Several well established arbitration rules provide for 30 days from receipt of the request for arbitration from the institution or claimant: e.g. Art. 3 para. 7 Swiss Rules, Art. 5 para. 1 ICC Rules, Art. 11 WIPO Rules.
9 Art. R39(3).
10 Cf. Mavromati/Reeb, Art. R39, para. 14.
11 Art. R39(2). Regarding the defense of lack of jurisdiction and counterclaim see also Art. R44.1.
12 E.g., set-off defenses or the request that the claimant be required to state his claims more precisely.
13 Cf. Art. R41.2.
14 Cf. Art. R39(1), second sentence.
15 Cf. Art. R44.1(4).
16 Art. R64.2(1), second sentence.
17 Cf. Art. R30 allowing the submission of a written confirmation of representation at a later stage, cf. Art. R30 para. 6 above.

strategy and cost-sensitivity. With regard to the language of the answer and the number of copies to be submitted, reference can be made to Arts. R29 and R31(3).

3 Incomplete Answer

The deadline to file the answer to the request is extendable.[18] In the event of the answer to the request for arbitration not meeting the requirements of Art. R39, or of the respondent not answering at all, the CAS Court Office shall grant an additional deadline to the respondent to complete and file said answer.[19] If this additional deadline is missed by the respondent, the arbitration may proceed nonetheless. 9

C Jurisdiction of the CAS

Article R39(4), in force as of 1 January 2012, states that the Panel has the power to decide upon its own jurisdiction (so called competence-competence).[20] This principle is in line with Art. 186(1) PILS and Art. 359 ZPO, may be considered the internationally recognized standard,[21] and belongs to the mandatory rules of the Swiss *lex arbitri*.[22] The principle was already recognized by the CAS before the 2012 revision of the CAS Code.[23] 10

The CAS may affirm its jurisdiction only if there is a valid arbitration agreement referring a sports-related dispute to the CAS.[24] The arbitration agreement is valid where[25] (i) the parties agree on the essential elements (*essentialia negotii*), (ii) the formal requirements regarding the agreement are met, (iii) the subject-matter of the dispute can effectively be submitted to arbitration (objective arbitrability),[26] and (iv) the parties had the capacity to enter into a binding arbitration agreement (subjective arbitrability).[27] [28] The main effect of a valid arbitration agreement is to exclude the jurisdiction of State courts in favor of the resolution of the dispute before an arbitral tribunal.[29] 11

18 Cf. Art. R32(2), first sentence.
19 Art. R38(3) by analogy.
20 Equally Art. R55(4).
21 Berger/Kellerhals, paras. 664 and 666.
22 Kaufmann-Kohler/Rigozzi, paras. 5.08–5.09; Poudret/Besson, para. 462; Berger/Kellerhals, para. 670.
23 See, e.g., CAS 2009/A/1910, *Telecom Egypt Club v. EFA*, Award of 9 September 2010, para. 2; CAS 2005/A/952, *Cole v. FALP*, Award of 24 January 2006, paras. 1–4; CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 6.
24 Cf. Art. R27.
25 The validity of the arbitration agreement needs to be examined separately from the validity of the main contract (principle of separability), cf. Art. 178(3) PILS and Art. 357(2) ZPO, which state that the validity of an arbitration agreement may not be challenged on the grounds that the main contract between the parties is not valid.
26 Cf. Art. 177(1) PILS and Art. 354 ZPO; it is common ground among legal scholars that the rules on arbitrability belong to the mandatory rules of the applicable *lex arbitri*, cf. Berger/Kellerhals, para. 190; as all CAS arbitrations have their seat in Switzerland, arbitrability is exclusively governed by the Swiss *lex arbitri*.
27 This requirement is of particular importance with regard to athletes being under age.
28 Regarding these requirements cf. Kaufmann-Kohler/Rigozzi, para. 5.01; Berger/Kellerhals, para. 687; Girsberger/Voser, *2016*, para. 275.
29 Berger/Kellerhals, para. 494; Girsberger/Voser, *2016*, para. 267; Kaufmann-Kohler/Rigozzi, para. 3.32.

12 In the event of a defense of lack of jurisdiction being raised in the answer to the request for arbitration, the court shall invite the parties to file written submissions on the question of the jurisdiction of the CAS.[30] The CAS shall examine all arguments presented with unfettered powers of review.[31] It shall rule on its jurisdiction either in a preliminary decision (partial award) or in the final award.[32] In cases where the arbitral tribunal has ruled on its own jurisdiction through a partial award, the award may only be appealed on the grounds of lack of jurisdiction through an immediate appeal against the partial award, in accordance with Arts. 186(2) and 190(3) PILS.[33] Objections regarding jurisdiction have to be raised prior to any defence on the merits,[34] i.e. with the answer to the request for arbitration, but in any event at the latest with the response to the statement of claim.[35] Once it has submitted its response and expressed itself on the merits of the case, the respondent is deemed to have accepted the jurisdiction and is therefore no longer admitted to raise the defense of lack of jurisdiction.[36] A vague reservation is not deemed to be a valid plea of lack of defense.[37]

13 Article R39(4) corresponds to Art. 186(1bis) PILS and vests the CAS panel with the power to rule on its jurisdiction irrespective of any legal action already pending before the State court or another arbitral tribunal relating to the same object between the same parties.[38]

D Consolidation

14 Article R39(6) was adopted on 1 January 2012.[39] According to this provision, a consolidation of two ordinary procedures before the CAS is acceptable where a party files a request for arbitration related to an arbitration agreement and facts similar to those which are the subject of pending proceedings. The main advantages of consolidation are procedural efficiency and the avoidance of issuing conflicting awards.[40]

15 This provision does not define the requirements necessary for such a consolidation. In principle, a consolidation shall be admitted only provided that in view of all the circumstances of the pending proceedings – in particular the parties involved and links existing between the cases, the progress already made in the proceedings

30 Art. R39(5), first sentence, adopted as per 1 January 2012. See also Art. R44.1(4).
31 Berger/Kellerhals, para. 696.
32 Art. R39(5), second sentence, adopted as per 1 January 2012. In CAS arbitrations, there is no presumption in favor of bifurcation. With regards to the terminology of preliminary and partial award see AFT 4A_428/2011 of 13 February 2012, at 1.1.
33 BGE 121 III 495 para. 6d; Mavromati, *CAS Bull. 2011/1*, p. 32.
34 Art. 186(2) PILS; BGer. 4P.105/2006 para. 6.3; CAS 2013/A/3272, *Ik-Jong Kim v. FILA*, Award of 28 February 2014, paras. 58–60.
35 See however, BGer. 4A_634/2014 para. 3.1 and CAS 2013/A/3272, *Ik-Jong Kim v. FILA*, Award of 28 February 2014, paras. 58–60 referring to the answer to the request for arbitration. Nevertheless, as the statement of claim often contains much more factual and legal information than the request for arbitration, respondents possibly feel urged to raise an objection regarding jurisdiction only after receipt of the statement of claim.
36 Mavromati, *CAS Bull. 2011/1*, p. 34; Poudret/Besson, para. 796.
37 BGE 128 III 50 para. 2c/aa.
38 See also Art. R55(4) and the relating commentary by Rigozzi and Hasler below.
39 Cf. also Art. R50(2).
40 See Art. R50 and the relating commentary by Rigozzi and Hasler below.

(including the question whether the panel is already formed),[41] and the type of the proceedings (including the applicable law and language, and whether they are expedited or not) and the likely impact on the costs – fairness and efficiency will be preserved.[42] In any event, the parties must be consulted in advance. As a principle, the decision to consolidate the proceedings may be taken even if not all parties agree to such consolidation.[43] The decision to consolidate cannot be challenged.

In case of consolidation, the references of all consolidated procedures in all communications keep being used and no new case number will be created.[44] **16**

41 One of the difficulties with consolidation of proceedings concerns the right of the parties to choose their arbitrator, cf. Arts. R40 and R41.

42 Cf. BGer. 4A_312/2012 para. 4.3 concluding that the non-consolidation of proceedings at CAS did not violate the right to be heard.

43 Cf. Mavromati/Reeb, Art. R39, paras. 23, 25 et seq.

44 Cf. Mavromati/Reeb, Art. R39, para. 24.

Article R40: Formation of the Panel

Article R40.1: Number of Arbitrators

The Panel is composed of one or three arbitrators. If the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine the number, taking into account the circumstances of the case. The Division President may then choose to appoint a Sole arbitrator when the Claimant so requests and the Respondent does not pay its share of the advance of costs within the time limit fixed by the CAS Court Office.

Article R40.2: Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

If, by virtue of the arbitration agreement or a decision of the President of the Division, a sole arbitrator is to be appointed, the parties may select her/him by mutual agreement within a time limit of fifteen days set by the CAS Court Office upon receipt of the request. In the absence of agreement within that time limit, the President of the Division shall proceed with the appointment.

If, by virtue of the arbitration agreement, or a decision of the President of the Division, three arbitrators are to be appointed, the Claimant shall nominate its arbitrator in the request or within the time limit set in the decision on the number of arbitrators, failing which the request for arbitration is deemed to have been withdrawn. The Respondent shall nominate its arbitrator within the time limit set by the CAS Court Office upon receipt of the request. In the absence of such appointment, the President of the Division shall proceed with the appointment in lieu of the Respondent. The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel.

Article R40.3: Confirmation of the Arbitrators and Transfer of the File

An arbitrator nominated by the parties or by other arbitrators shall only be deemed appointed after confirmation by the President of the Division, who shall ascertain that each arbitrator complies with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs provided by Article R64.2 of the Code.

An ad hoc clerk independent of the parties may be appointed to assist the Panel. Her/his fees shall be included in the arbitration costs.

I PURPOSE OF THE PROVISION

Article R40 governs the formation of the Panel: Art. R40.1 deals with the number of arbitrators, Art. R40.2 with the method of appointment of arbitrators and Art. R40.3(1) with the confirmation of the Panel by the President of the Division.[1] In addition, Art. R40.3(3) governs the possible appointment of an ad hoc clerk. These provisions ensure that the Panel is formed according to a clear and fair procedure. With regards to multiparty arbitration, Art. R41 complements these rules on the formation of the Panel. 1

II CONTENT OF THE PROVISION

A Number of Arbitrators (Article R40.1)

In principle, the parties are free to determine whether they wish to have a Panel of one or three arbitrators. The parties' agreement on the number of arbitrators for the Panel must be respected by CAS.[2] However, no number of arbitrators other than one or three is accepted in arbitration proceedings in the CAS, as clearly stated by the wording of Art. R40.1, first sentence.[3] In the event the arbitration agreement contemplates a different number of arbitrators (e.g. five), the parties have an opportunity to amend the agreement and to determine the relevant number. If the parties are unable to amend the agreement and jointly decide on a number of one or three arbitrators, the Division President shall consider the originally chosen number when determining the relevant number according to Art. R40.1, second sentence; a provision for more than three arbitrators usually indicates that the parties wish to have a multi-arbitrator panel, i.e., a Panel of three arbitrators. 2

In the event that the arbitration agreement does not contemplate any rule on the number of arbitrators, and if the parties are unable to agree on such a number after the filing of the request for arbitration,[4] the President of the Division shall determine the number of arbitrators.[5] The President shall consider all relevant circumstances of the case;[6] this includes in particular the amount in dispute, the complexity of the matter, the general impact of the case on the parties and the sports world, the urgency of the case, and the cultural background of the parties. If the parties have a very different cultural background, the appointment of three arbitrators is usually appropriate as it might be difficult to find a sole arbitrator who does not have a background which is closer to one of the parties. According to the provision of Art. R40.1, third sentence, adopted in the course of the 2013 revision of the CAS Code, the Division President may choose to appoint a sole arbitrator when the claimant so requests and the respondent does not pay its share of the advance of costs within 3

1 For the appointment of arbitrators in case of multiparty arbitration see also Art R41.
2 BGer. 4A_282/2013 para. 5.2.
3 Also Art. S3(1); in addition, cf. Art. R41.1(3) providing for one or three arbitrators even in case of multiparty arbitration with divergent interests. Contra cf. Rigozzi, para. 409; cautiously addressing this aspect Mavromati/Reeb, Art. R40, para. 16.
4 Rigozzi, para. 938; Kaufmann-Kohler/Bärtsch, p. 75.
5 Cf. also BGer. 4A_476/2012 para. 3: If a party disagrees with the nomination of a sole arbitrator by the Division President, it has to object at once and cannot successfully appeal at the Federal supreme court arguing that a panel of three would have been competent for the proceedings of the challenged award.
6 Art. R40.1, second sentence.

the set time limit.[7] This provision enables the conduct of arbitration proceedings for disputes with cost-sensitive or refractory respondents that are not able or willing to pay their share as contemplated in Art. R64.2. However, this new provision does not limit the discretion of the Division President to choose between the two options, i.e. one sole arbitrator or three arbitrators.

B Method of Appointment of Arbitrators (Article R40.2)

4 As an expression of the principle of party autonomy, the parties are free to jointly define the method of appointment of the arbitrators.[8] This means that the parties are allowed to agree on a different mechanism from that contemplated in Art. R40.2(2) and (3), which applies if the parties are unable to reach such agreement.[9] However, with regard to the appointment of arbitrators the parties are bound to the mandatory closed CAS-list.[10] The football list consists of nearly 100 and the general list of more than 350 arbitrators.[11]

5 If a sole arbitrator is to be appointed, the parties may select him by mutual agreement within a 15 day-time limit set by the CAS Court Office.[12] This provision emphasizes both party autonomy and the precedence given to the parties' agreement. Should no such agreement be reached, the President of the Division shall appoint the arbitrator.[13] Criteria to be considered when appointing the sole arbitrator shall be, in particular, his availability, experience, knowledge of the applicable substantive law, understanding of the sports concerned, language skills, personal and cultural background and reputation. However, there is no rule in the CAS Code, or under Swiss law, requiring that the sole arbitrator must not be of the same nationality as one of the parties.[14]

6 If three arbitrators are to be appointed, each party shall nominate one arbitrator with the first filing or within the time limit set by the CAS Court Office.[15] When contacting an arbitrator to check its availability and suitability for its nomination, the contacting party should provide only some basic information about the dispute and avoid discussing details of the case and even less seeking the arbitrator's view or advice on the case.[16] If claimant fails to nominate its arbitrator, the request for arbitration is deemed to have been withdrawn;[17] if respondent fails to nominate its arbitrator, the President of the Division shall appoint one in its stead.[18] The criteria applied are essentially the same as those applicable to the selection of a sole

7 Cf. also R50(1).
8 Art. R40.2(1), first sentence. Cf. also Art. 179 para. PILS.
9 Art. R40.2(1), second sentence.
10 Cf. Art. R33(2). Special lists exist with regard to (i) football-related disputes and (ii) each edition of the Olympic Games and some other international sporting events.
11 For further information on the list see Arts. S13-S18. The lists are available at http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html.
12 Art. R40.2(2), first sentence.
13 Art. R40.2(2), second sentence.
14 Cf. BGE 84 I 39 para. 6b, confirming that it does not amount to a lack of impartiality for the sole arbitrator to have the same nationality as one of the parties.
15 Art. R40.2(3), first and second sentences.
16 Coccia, *International Sports Justice*, p. 47.
17 Art. R40.2(3), first sentence; amended in the course of the 2013 revision of the CAS Code, effective as of 1 March 2013.
18 Art. R40.2(3), third sentence.

arbitrator.[19] Subsequently, the two appointed arbitrators shall select the President of the Panel by mutual agreement within the deadline set by the CAS Court Office.[20] Absent an agreement between the co-arbitrators, the President of the Division shall appoint the President of the Panel.[21]

C Confirmation of the Arbitrators and Transfer of the File (Article R40.3)

According to the wording of Art. R40.3(1), the President of the Division shall ascertain that the arbitrators are independent and qualified as required in Art. R33. In effect, the confirmation requirement strives to reduce the risk of future interference with the arbitration. Refusal to confirm an arbitrator must remain exceptional, however, since allowing the parties to appoint their arbitrator is considered an essential aspect of arbitration. When deciding whether to confirm a party-appointed arbitrator who has made a disclosure in his statement of independence, the Division President must strike a balance between the party's right to choose an arbitrator and the commitment to ensure that all arbitrators are independent. In practice, a refusal here should be limited to cases in which a challenge of the arbitrator is very likely to be successful. The confirmation or refusal itself are not subject to recourse; however, a positive confirmation decision may be overturned by a successful challenge or request for removal as contemplated in Arts. R34 and R35. 7

After conducting the required examination, the President of the Division shall confirm the appointment of the arbitrators.[22] Only after this confirmation is the Panel formed.[23] In practice, the CAS Court Office communicates to the parties a formal notice of formation of the Panel. With the formation of the Panel, all contracts concluded between the parties, arbitrators and the CAS become unconditionally effective, i.e., the contract between the parties and the arbitrators (*receptum arbitri*),[24] the contract between the parties and the CAS,[25] and the contract between the arbitrators and the CAS.[26] Several rights and obligations arise from these three relationships.[27] 8

19 Cf. above, para. 5.
20 Art. R40.2(3), fourth sentence.
21 Art. R40.2(3), fifth sentence.
22 Art. R40.3(1).
23 BGer. 4A_620/2012 para. 3.4; cf. also Girsberger/Voser, *2016*, para. 1933.
24 This contract creates the obligation for the arbitrators to decide the dispute between the parties in return for a remuneration. Most scholars and the Swiss Federal Supreme Court assume that this relationship is of a contractual nature, cf., e.g., Girsberger/Voser, *2016*, para. 828; Kaufmann-Kohler/Rigozzi, para. 4.183; BGE 111 Ia 72 para. 2c., taking the view that the *receptum arbitri* is a contract of procedural nature; *contra* Berger/Kellerhals, para. 967, who consider that the relationship between the parties and the arbitrators is of a *"statutory legal"* nature (*"gesetzliches Schuldverhältnis"* in German).
25 This contract empowers and obliges the CAS to organize and oversee the arbitration, in particular in the event that a dispute arises between them, cf. Girsberger/Voser, *2016*, para. 832. This relationship is contractual in nature like the *receptum arbitri*.
26 The relationship between the arbitrators and the CAS is twofold: First, they enter into an agreement when the arbitrator is selected for inclusion in the CAS list and commits to be available as an arbitrator in CAS proceedings; second, they enter into an additional agreement when the arbitrator agrees to an appointment for a specific case and undertakes to participate in this specific case.
27 For the various obligations and rights of an arbitrator out of his relationship with the parties, see cf. Berger/Kellerhals, paras. 970–999; Girsberger/Voser, *2016*, paras. 833–849; Kaufmann-Kohler/Rigozzi, para. 4.188.

9 Once the Panel is formed, the CAS Court Office transfers the file to the arbitrators.[28] If the parties have not paid the advance of costs provided by Art. R64.2, the CAS Court Office may hold off on the transfer of the file until the payment is executed.[29]

D Appointment of Ad Hoc Clerk (Article R40.3)

10 The Panel may be assisted by an ad hoc clerk.[30] The appointment of an ad hoc clerk seems to become a standard practice. It is, however, at the discretion of the President of the Panel to decide whether a clerk is to be appointed. Ad hoc clerks are usually young qualified lawyers.[31] Although the ad-hoc clerks have from a legal point of view no power, their actual influence on the outcome of the case may be very strong in fact.[32]

11 Like the arbitrators, an ad hoc clerk must be independent and impartial.[33] In the event of a party contesting the independence of the clerk, it may challenge the latter's appointment in accordance with Art. R34.[34]

12 The tasks of an ad-hoc clerk depend on the circumstances of the arbitration proceedings and namely instructions of the panel (mainly Chairman). Usually, this includes assistance in the hearing and drafting parts of the award in accordance with the Panel's (mainly Chairman's) instructions.[35] Distinction has to be made between an ad-hoc clerk and CAS Counsel who monitors the case by controlling over the procedural steps and progress in order to warrant the smooth functioning of the arbitration.[36]

13 The clerk's fees are included in the arbitration costs.[37] Pursuant to Annex II to the CAS Code, the ad hoc clerk's remuneration is fixed by the Secretary General of the CAS on the basis of the work reports provided and of the time reasonably devoted to the case at stake.

28 Art. R40.3(2).
29 Art. R40.3(2).
30 Art. R40.3(3), first sentence.
31 The CAS has established an unofficial list of ad hoc clerks. Cf. also Mavromati/Reeb, Art. R40, para. 36 stating that sometimes arbitrators wish to engage their own assistants to act as ad-hoc clerks, and that this practice is not favored by the CAS Court Office, but sometimes accepted.
32 Cf. Mavromati/Reeb, Art. R40, para.38 stating that ad-clerks must not influence in any manner the panel's decision.
33 Art. R40.3(3), first sentence.
34 *Contra*: Mavromati/Reeb, Art. R40, para.41, though also indicating that up to now in no CAS case doubts on an ad-hoc clerk's independence have led to real issues.
35 Cf. Mavromati/Reeb, Art. R40, para.37.
36 Cf. Mavromati/Reeb, Art. R40, para.39.
37 Art. R40.3(3), second sentence; cf. also R64.4.

Article R41: Multiparty Arbitration

Article R41.1: Plurality of Claimants / Respondents

If the request for arbitration names several Claimants and/or Respondents, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1.

If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed and there are several Claimants, the Claimants shall jointly nominate an arbitrator. If three arbitrators are to be appointed and there are several Respondents, the Respondents shall jointly nominate an arbitrator. In the absence of such a joint nomination, the President of the Division shall proceed with the particular appointment.

If there are three or more parties with divergent interests, both arbitrators shall be appointed in accordance with the agreement between the parties. In the absence of agreement, the arbitrators shall be appointed by the President of the Division in accordance with Article R40.2.

In all cases, the arbitrators shall select the President of the Panel in accordance with Article R40.2.

Article R41.2: Joinder

If a Respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefor, and file an additional copy of its answer. The CAS Court Office shall communicate this copy to the person whose participation is requested and fix a time limit for such person to state its position on its participation and to submit a response pursuant to Article R39. It shall also fix a time limit for the Claimant to express its position on the participation of the third party.

Article R41.3: Intervention

If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.

Article R41.4: Joint Provisions on Joinder and Intervention

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the

participation of the third party, taking into account, in particular, the prima facie existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed,

Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix.

I PURPOSE OF THE PROVISION

1 Article R41 contemplates a set of rules in relation to multiparty arbitration, which are aimed at ensuring procedural efficiency, saving time and money and preventing conflicting results.[1] Art. R41.1 deals with plurality of claimants and respondents, namely the formation of the panel in such constellations, and Art. R41.2 to R41.4 with the participation of third parties, in particular the joinder and intervention.

2 Article R41 applies also to appeal arbitration proceedings.[2]

II CONTENT OF THE PROVISION

A Plurality of Claimants and/or Respondents

1 General

3 Admitting cases involving a plurality of claimants and/or respondents may be considered an international standard in arbitration and litigation. Art. R41.1 expresses that this standard also applies to CAS arbitration proceedings.[3] Such standard is

1 Mavromati/Reeb, Art. R41, para. 59.
2 Art. R54(4), except that the President of the Panel is appointed by the President of the Appeals Division.
3 The title of Art. R41.1 also clearly indicates this.

indispensable because there is an unlimited number of scenarios where claimants and/or respondents must act jointly due to the legal relationship among them. However, Art. R41.1 does not deal with such legal relationship, which is a matter of substantive laws,[4] but with the appointment of the Panel in multi-party cases, i.e. plurality of claimants and/or respondents.

All formal parties have the same procedural rights in the proceedings. However, the CAS Code does not further state how the joint claimants and/or respondents have to exert their procedural rights. It is understood that the submissions to be filed with the CAS must mention all claimants and/or respondents and must be signed by all formal parties.[5] 4

2 Appointment of Arbitrators

Article R41.1 contains a set of rules governing the appointment of arbitrators in cases involving a plurality of claimants and/or respondents. If several claimants and/or respondents are involved from the outset, the parties are free to jointly decide on both the number of arbitrators and the method of appointment.[6] This provision expresses party autonomy. The number of arbitrators may be either one or three, but no other number is accepted under the CAS Code.[7] 5

If the parties are unable to reach an agreement on the number of arbitrators, the President of the Division shall determine the number in accordance with Art. R40.1, i.e., taking into account all relevant circumstances of the case, including the complexity of the case, the amount in dispute, the impact of the dispute and decision on the parties and the sports world at large, the urgency of the case, as well as the cultural background of the parties.[8] In many cases, party plurality increases the complexity of the case, so that multiparty arbitration tends to justify a panel of three arbitrators. Similarly, cultural diversity usually justifies a three-member panel as it is often difficult to find a sole arbitrator who is not closer to the culture of one of the parties. A sole arbitrator might be suitable in simple, urgent cases. 6

In the event of the parties being unable to reach agreement on the method of appointment, Art. R41.1(2) applies. If a sole arbitrator is to be appointed, Art. R40.2(2) shall apply, i.e., the President of the Division appoints the arbitrator at his own discretion if the parties are unable to select the sole arbitrator by mutual agreement within 15 days.[9] If three arbitrators are to be appointed and there are several claimants and/or respondents with the same interests, the said claimants and/or respondents shall 7

4 The PILS Chapter 12 does not deal with the joinder of parties (*"Streitgenossenschaft"* in German). However, Art. 376(1) ZPO contains the following provision concerning the joinder of parties: Arbitration may be initiated by or against joint parties if a) all the parties are connected among themselves by one or more corresponding arbitration agreements; and b) the asserted claims are identical or factually connected. Further, see also Arts. 70–72 governing the joinder of parties for civil proceedings in Switzerland and differentiating between mandatory and voluntary joinder. It is worth mentioning that the Confederation's unofficial English translation of the ZPO uses the term "joinder" for both the *"Streitgenossenschaft"* and the *"Streitverkündung"*, which are two different legal concepts dealing with multi-party matters.

5 Cf. also Art. R38.

6 Art. R41.1(1), first sentence.

7 Cf. Art. R40.1, first sentence.

8 Art. R41.1(1), second sentence.

9 Art. R41.1(2), first sentence.

jointly nominate one arbitrator.[10] Failing such joint nominations, the President of the Division shall appoint the arbitrator(s).[11] Where there are three or more parties with divergent interests, the two party-appointed arbitrators shall be nominated by agreement between these parties. In the absence of such agreement the appointments will be made by the President of the Division in accordance with Art. R40.2.[12]

8 In all cases mentioned above, the President will then be selected by the two arbitrators by mutual agreement and in the absence of such agreement by the President of the Division.[13]

B Participation of Third Parties

9 The term "participation" used in Arts. R41.2-R41.4 is very broad and refers to different instances of participation by a third party: Firstly, such a third party may participate as a formal party to the proceedings, be it as creditor/claimant or debtor/respondent (participation as a *formal party*). Secondly, such a third party may be a participant directly or indirectly seeking to preserve its own interests or a party's interests, although not a creditor/claimant or debtor/respondent (participation as a *non-party*).

10 The participation in pending arbitration proceedings *as a party* can happen in two forms only, i.e. joinder or intervention, both requiring an arbitration agreement.[14] It is questionable whether the CAS Code contains an exclusive list of the possible forms of participation *as a non-party* or whether it is open to various possibilities.[15] It is noteworthy that the term "joinder" in Art. R41.2 refers to any kind of "participation in the arbitration". Thus, the possible forms of participation under Art. R41.2 (joinder) are broadly worded. Within the scope of application of this provision the Panel has significant discretion in determining "the status of the third party and its rights" in relation to these alternative forms of participation.[16] The provision, thus, enables the definition of a specific status that allows the best possible "integration" of the third party in the proceedings.

11 In contrast to Art. R41.2, the term "intervention" used in Art. R41.3 is confined – subject to the exception contained in Art. 41.4 (6) – to the form of participation as a formal party. This follows from the wording of the article ("If a third party wishes to participate as a party to the arbitration …"). Consequently, within the scope of

10 Art. R41.1(2), second and third sentences.
11 Art. R41.1(2), fourth sentence.
12 Art. R41.1(3); BGer. 4P.105/2006 para. 5.2.
13 Art. R41.1(4).
14 CAS 2009/A/1870, *WADA v. J. Hardy & USADA*, Award of 21 May 2010, para. 23 stating that a third party can participate as a formal party to pending CAS proceedings in two situations, i.e., joinder and intervention; CAS 2006/A/1155, *Giovanella v. FIFA*, para. 54, mentioned in Coccia, International Sports Justice, p. 50.
15 Cf., however, CAS 2008/A/1639, *RCD Mallorca v. FA & Newcastle United*, Award of 24 April 2009, para. 13, which was rendered before the 2010 revision of the CAS Code, and stated that the CAS Code enumerates in an exhaustive manner all possible forms of participation in a proceeding before the CAS, i.e., as an appellant/claimant, a respondent, joinder or intervenor.
16 Art. R41.4(5) (adopted as of 1 January 2010). Cf. also Art. R41.4(2) and Art. R41.4(3), first part of the first sentence, according to which the President of the Division or Panel, if already appointed, will do a first examination and decide on the participation itself (but not on the status and rights of this third party).

application of Art. R41.3 a person can only intervene in the proceedings as a party (or – in line with Art. R41.4 (6) – as amicus curiae). However, the provision does not provide for any other forms of participation.[17] Insofar, Art. R41.3 is different e.g. from Art. 4 (2) of the Swiss Rules that explicitly covers all forms of participation in a procedure (party, interested party or amicus curiae). Despite this rather clear wording, some CAS Panels have – also in the context of Art. R41.3 admitted intervenors as "third parties" with limited party rights whereas the claimant and respondent were considered the "main parties".[18]

Such participation may occur from the beginning of the arbitration proceedings or commence at a later time, but in any event before the hearing or closing of the evidentiary proceedings. 12

1 Joinder (Articles R41.2 and R41.4)

The joinder is possible only upon the request of the respondent and not the claimant / appellant.[19] The latter has the possibility to name the person concerned in its statement of claim / statement of appeal and thereby initiate a proceeding against a plurality of respondents. If a respondent intends to cause a third party to participate in the arbitration as a formal party or in another role, it must mention this in its answer[20] and set out the reasons for the involvement of the third party and the latter's status and rights.[21] Unlike intervention, the notion of joinder refers not only to a role as a formal party in the arbitration, but covers other forms of participation as well. This becomes clear already by comparing the wording of Art. R41.2, first sentence reading "participate in the arbitration" with the one of Art. R41.3, first sentence reading "participate as a party to the arbitration". The CAS Rules do not further define the term of joinder, neither the PILS Chapter 12 (governing international arbitration in Switzerland).[22] It is suggested that joinder in the meaning of Art. R41 is a broad term allowing different forms of participation upon a party's request to join the proceedings, be it as a formal party or as a non-party.[23] 13

17 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, paras. 37 et seq.

18 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, paras. 1–6.

19 CAS 2006/A/1155 *Giovanella v. FIFA*, Award of 22 February 2007, para. 56.

20 If the reasons for causing a third party to participate in the proceedings become known only after having filed the answer to the request for arbitration, the respondent must notify it without delay (i.e. within 10 days) after the reasons for it have become known, but in any event before the hearing or the closing of the evidentiary proceedings, cf. Art. R41.3, first sentence (by analogy).

21 Art. R41.2, first sentence.

22 The PILS Chapter 12 (governing international arbitration in Switzerland) entirely fails to establish rules on multi-party constellations; by contrast, the ZPO Part 3 (governing national arbitration in Switzerland) contains in Art. 376(3) a provision dealing with the joinder of a person notified as a party to an action (*"Streitverkündung"* in German).

23 Cf. also Art. 376(3) and Arts. 78–80 ZPO dealing with the joinder in the meaning of *"Streitverkündung"* and allowing different forms of participation. Cf. also Arts. 70–72 ZPO governing the joinder in the meaning of *"Streitgenossenschaft"*.

14 Even if this is not expressly contemplated in the CAS Code, the claimant may also try to cause a third party to participate in the arbitration.[24] The request for such participation must be put forward without delay (i.e. within 10 days) after the reasons for causing a third party to join have become known, but in any event before the hearing or the closing of the evidentiary proceedings.[25]

15 The CAS Court Office will forward one copy of the request to the person whose participation is sought and fix an appropriate time limit for the said person to set out its position on participation and its view on the dispute.[26] The CAS Court Office shall also inform the other party in the arbitration, fixing an appropriate time limit for him to set out his position on the participation of the third party.[27]

16 If the Panel is not yet appointed, the President of the Division shall decide on the participation of the third party.[28] This decision is without prejudice on the subsequent decision of the Panel[29] and no appeal is possible against it.[30] The Panel will later decide on the status of the third party and its rights in the procedure.[31] The CAS Code does not provide specific guidance as to the criteria on which the decision on the status and rights of the participant is to be based, as this depends on the specificities of the case and in part also on the law applicable to the merits. In any event, the Panel must take into account all circumstances, in particular the interests of the participant and the parties.

2 Intervention (Articles R41.3 and R41.4)

17 If a third party wishes to participate as a (formal) party in a pending arbitration, it has the option to intervene pursuant to Art. R41.3, sentence 1.[32]

a Formal Requirements

18 The intervenor must file a reasoned application with the CAS Court Office to this effect.[33] The formal requirements follow the type of procedure (appeals arbitration procedure or ordinary arbitration procedure). Thus, in case a party intends to intervene in an appeals arbitration procedure the application must follow the formal

24 Contra Mavromati/Reeb, Art. R41, paras. 59 and 81; Coccia, *International Sports Justice*, p.51; CAS 2012/A/2981, *Clube Desportivo Nacional v. FK Sutjeska*, award of 27 March 2013, para. 50 regarding appeal proceedings stating "the joinder of a third party by the Appellant is not contemplated by the Code, which grants such possibility only to the respondent"; CAS 2006/A/1155, *Giovanella v. FIFA*, para. 56 mentioned in Coccia, *International Sports Justice*, p. 51.

25 Cf. Art. R41.3, first sentence (by analogy).

26 Art. R41.2, second sentence.

27 Art. R41.2, third sentence.

28 Art. R41.4(2), first sentence.

29 Art. R41.4(2), second sentence.

30 Mavromati/Reeb, Art. R41, para. 85.

31 Art. R41.4(5).

32 The intervention is also foreseen in Art. 376(3) ZPO (governing national arbitration in Switzerland), but not in the PILS Chapter 12 (governing international arbitration in Switzerland). Cf. also Arts. 73–77 ZPO dealing with intervention in civil proceedings.

33 Art. R41.3, first part of first sentence. Cf. also Mavromati/Reeb, Art. R41, para. 89 stating that it is important to show the legal interest of the intervenor in the outcome of the case.

requirements contained in Art. R48.[34] Furthermore, the application must be filed within ten days once the arbitration has become known to the intervenor, and in any event before the hearing, or, where no hearing is held, before the closing of the evidentiary proceedings.[35] Becoming known of the arbitration proceeding does not require that the intervenor is notified of the request for arbitration or statement of defense.[36] If these deadlines are not met, the right to intervene as a party expires.[37] Compliance with these deadlines is controlled by the Panel ex officio.[38] Especially in complex cases, ten days may not be sufficient to carefully set out the reasons for the intervention. It must therefore suffice for the intervenor to file a (simple) notification of intervention within this time limit.

The CAS Court Office will communicate a copy of the application to the parties and set an appropriate time limit for them to express their position on the participation of the intervenor.[39] **19**

Under Art. R41.4(5), the rights of the intervenor may be limited, for instance, regarding the total number of pages allowed for its written submissions or the time allotted for its oral pleadings at the hearing.[40] **20**

b Substantive Requirements

Article R41.3 requires that an arbitration proceeding is pending and that the party requesting the intervention must be either bound by the arbitration agreement or the other parties must agree in writing to the request of intervention (see in detail para. 27 below). The question is, whether these prerequisites are exhaustive. In the legal literature it is undisputed that Art. 376(3) ZPO that deals with the question of intervention in domestic arbitration proceedings and which is comparable to Art. R41.4, does not list the prerequisites for intervention exhaustively.[41] Instead, the prerequisites must be derived from the very purpose of the procedural institute of intervention. The latter serves procedural efficiency (coordination between several – potential – proceedings through a single and uniform decision) as well as the protection of the parties to the proceeding from undue interference from third persons.[42] Accordingly, there must be a legitimate interest involved for the third party in order to be admitted as a party.[43] The view held here is also supported by a number of CAS decisions.[44] **21**

34 CAS 2008/A/1513, *Emil Hoch v. FIS & IOC*, Decision on Intervention of 27 June 2008, para. 17.
35 Art. R41.3, second part of first sentence.
36 Beloff/Netzle/Haas, E3.107, also stating that the term "known" should be interpreted in a broad sense to protect the parties to the procedure.
37 Cf. CAS 2012/A/2705, *Le Mans FC v. FIFA (Olympique Bamako)*, order of 28 June 2012, para. 17 et seq.
38 Mavromati/Reeb, Art. R41, para. 88.
39 Art. R41.3, second sentence.
40 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA v. FC Sion*, Award of 31 January 2012, para. 105.
41 Netzle, para. 10 at Art. 376 ZPO; Pfisterer, para. 26 at Art. 376 ZPO; cf. also Dasser, para. 12 at Art. 376 ZPO.
42 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para.42.
43 See also Mavromati/Reeb, Art. R41, para. 80.
44 CAS 2008/A/1513, *Emil Hoch v. FIS & IOC*, Decision on Intervention of 27 June 2008, para. 18; CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5

22 The required legal interest can neither be equated to a purely financial nor to a mere sportive interest.[45] Instead, a legal interest requires that a person is adversely affected in its legal sphere or position by the outcome of the arbitration procedure. The impact of the person's legal sphere may derive from the procedural status of the intervenor in the previous instance at the federation level.[46] A legal interest may also follow from substantive rules and regulations, e.g. if the rules and regulations of the federation attribute a claim to one member to issue a decision against a fellow member. However, absent any specific provision to that effect, the latter is not the case in disciplinary matters. A legal interest may also follow, in appeals arbitration proceedings, from the third party's right to appeal the decision. Panels have held that "… at least … all those who could have challenged the decision appealed from or those who would be affected by any reversal of such decision are clearly entitled to become parties to the arbitration proceedings."[47] Of course, the parties are free to define the threshold of legal interest in the applicable rules and regulations of the respective federation.[48]

3 Amicus Curiae and Other Special Forms of Participation

23 Since the revision of 2010, the CAS Code expressly mentions the *amicus curiae*,[49] which literally translated means "friend of the court".[50] According to the understanding of CAS, this "describes an instrument allowing someone who is not party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, usually in the form of a written amicus curiae brief or submission, in order to assist the court in the matter before it".[51] The reasons put forward in favor of amicus participation are – inter alia – that proceedings affecting the public interest are not concluded collusively, unrepresented persons and public interests are protected by amicus participation and that the transparency that goes along with amicus participation strengthens the confidence in the outcome of the arbitral process.[52] Thus, in particular where public sportive interests are at stake, amicus participation can be admitted. In the CAS's practice, *amicus curiae* briefs are not

November 2015, paras. 42 et seq.; CAS 2010/A/2296, *Simon Vroemen v. Nederlandse Atletiek Unie*, Decision on Intervention of 11 January 2011, para. 18.

45 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 44.

46 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 44.

47 CAS 2008/A/1513, *Emil Hoch v. FIS & IOC*, Decision on Intervention of 27 June 2008, para. 18: CAS 2010/A/2296, *Simon Vroemen v. Nederlandse Atletiek Unie*, Decision on Intervention of 11 January 2011, para. 18; CAS 2005/A/881, *Annus v. HAA*, Decision on Intervention of 4 August 2005, para. 17; CAS 2006/A/1166, *FC Aarau AG v. Swiss Football League*, Vorentscheidung of 6 December 2016; CAS 2004/A/748, *Russian Olympic Committee & Viatcheslav Ekimov v. IOC*, 27 June 2006.

48 CAS 2015/A/4259, *Valetino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 43.

49 Cf. Art. R41.4(6).

50 Regarding its origin, see Mavromati/Reeb, Art. R41, para. 95.

51 CAS 2008/A/1639, *RCD Mallorca v. FA & Newcastle United*, Award of 24 April 2009, para. 9; CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 46.

52 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 47.

uncommon for sporting federations.[53] However, also athletes may file an amicus brief in the public (sportive) interests.[54] The Panel may allow the filing of *amicus curiae* briefs only after consideration of all parties' submissions.[55] In the absence of express consent by the parties, the Panel must consider all the circumstances of the case and balance all interests at stake when deciding on the admission of an *amicus curiae* brief; in particular, the interests of the *amicus* himself and of other third parties (including the public) in the subject matter may be crucial.[56] The Panel may also admit the *amicus* for a limited scope or specific issues only; it is up to the Panel's discretion to determine the scope and conditions of the brief. As a principle, the Panel should accept those *amicus'* briefs whose positive effects prevail the possible disadvantages.[57] If accepted, the submitted briefs have to be considered in the decision finding and the Panel should indicate in the award the impact of the brief on its decision.[58]

In some CAS proceedings, third parties such as WADA or the President of a league of a federation who is respondent[59] were admitted to attend hearings as "observers". **24**

Occasionally, the CAS admits the specific participation of parties who are actually excluded from the proceedings because they have failed to comply with certain procedural rules: for instance, with the consent of the parties involved, the CAS has admitted participation as "interested parties" by parties that had failed to bring an appeal within the applicable time limit and allowed the filing of submissions setting out these parties' points of view.[60] **25**

The CAS Code does not contain any rules as to whether or not an *amicus curiae*, ancillary party or other special participant may attend the hearing, may request the discovery of documents, may request a copy of the parties' filing or may have to contribute to the costs of the proceedings (etc.).[61] The Panel's discretion is large and it must balance all interests at stake when deciding on these matters. In any event, participants not subject to the arbitration agreement should be requested to confirm that they are and will continue to be bound by the confidentiality provisions of Art. R43 of the CAS Code. **26**

53 Cf., e.g., CAS 2008/A/1639, *RCD Mallorca v. FA & Newcastle United*, Award of 24 April 2009, para. 17 – *amicus curiae* brief rejected; CAS 2008/A/1517, *Ionikos FC v. C*, Award of 23 February 2009, para. 19 – *amicus curiae* brief admitted; these two cases were rendered before the 2010 revision of the CAS Code which introduced the instrument of *amicus curiae* briefs in Art. R41.4.

54 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 48.

55 Art. R41.4(6).

56 Cf. CAS 2008/A/1639, *RDC Mallorca v. FA & Newcastle United*, Award of 24 April 2009, paras. 11 and 16 where it is stated that the admission of such briefs requires that the *amici* must have a vital interest in the subject matter and that the dispute has a public dimension.

57 Mavromati/Reeb, Art. R41, para. 101.

58 Mavromati/Reeb, Art. R41, para. 104; cf. also CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, paras. 49 et seq.

59 CAS 2013/A/3228, *E. V. Levchenko v. RFA*, award of 15 January 2014, paras. 3.21 et seq.

60 CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, cf. p. 5.

61 Beloff/Netzle/Haas, E3.108 regarding *amicus curiae*.

4 Arbitration Agreement: A Requirement?

27 Article R41.4(1) states that a third party may only participate in an arbitration if it is bound by the arbitration agreement[62] or if it and the other parties agree on this in writing.[63] [64] Whether or not the intervening party was already a party in the proceedings before the internal bodies of the federation that issued the decision being the subject matter before CAS is immaterial.[65] Art. R41(1) applies to participation of a third party as further *formal party*, either via joinder or intervention.[66] In the legal literature it is disputed whether or not an intervention requires – from the viewpoint of the PILS – that the intervenor be bound by the arbitration agreement or not.[67] The purpose of Art. R41.4 is to settle this (disputed) question within the scope of application of the CAS Code.[68] This solution is similar to Art. 376(3) ZPO stating that the intervention of a third party and the joinder of a person notified as a party to an action require an arbitration agreement between the third party and the parties to the dispute and are subject to the consent of the arbitral tribunal.[69] Where a party joins as *non-party*, for instance as an ancillary party or as an *amicus*, Art. R41.4(1) does not apply.

5 Appointment of Arbitrators

28 The parties are free to jointly decide on both the number of arbitrators and the method of appointment.[70] This provision is an expression of party autonomy. In the absence of such agreement, the President of the Division will decide on the number.[71] If a sole arbitrator is to be appointed, he may be selected by the parties by mutual agreement or if such agreement cannot be reached, by the President of the Division.[72] If three arbitrators are to be appointed, the President of the Division shall select two arbitrators; and these two arbitrators shall select the President.[73] When so proceeding, the President must consider the interests, views, and further comments of the parties.

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62 For the validity of arbitration agreements see Art. R28 paras. 10 et seq.

63 Expressly confirmed in CAS 2010/A/2296, *Simon Vroemen v. Nederlandse Atletiek Unie*, Decision on Intervention of 11 Jamuary 2011, paras. 14 et seq.; CAS 2008/A/1513, *Emil Hoch v. FIS & IOC*, Decision on Intervention of 27 June 2008, para. 14; CAS 2009/A/1870, *WADA v. J. Hardy & USADA*, Award of 21 May 2010, para. 23; CAS 2011/A/2377, *Salernitana Calcio 1919 S.p.A. v. FIFA*, order of 23 June 2011, para. 14.

64 The existence of such agreement will be examined by the President of the Division or the Panel, if already appointed, cf. Art. R41.4(2).

65 Contra CAS 2011/A/2377, *Salernitana Calcio 1919 S.p.a. v. FIFA*, Order on Request for Provisional Measures and River Plate Intervention of 23 June 2011, para. 7.5 seq; CAS 2006/A/1155 *Giovanella v. FIFA*, Award of 22 February 2007, para. 55.

66 CAS 2008/A/1641, *NAOC v. IAAF & USOC*, Award of 6 March 2009, cf. pp. 4–5; CAS 1997/O/168, *FFSA, FIC, FNSA v. FISA*, Award of 29 August 1997, p. 5; cf. also CAS 2008/O/1483, *AHF, KzHF, KHA v. IHF*, Award of 20 May 2008, paras. 10–14; Poudret/Besson, para. 241.

67 Berger/Kellerhals, paras. 579 et seq.

68 CAS 2015/A/4259, *Valentino Rossi v. FIM*, Order on Request for a Stay and Intervention of 5 November 2015, para. 41.

69 The PILS (Chapter 12) is silent on this.

70 Art. R41.4(3), first sentence.

71 Art. R41.4(3), second sentence.

72 Art. R41.4(3), third sentence.

73 Art. R41.4(3), fourth sentence.

As soon as the Panel is constituted, it has to determine the status and rights of the third parties in accordance with Art. R41.4(5). Art. R41.4(4), first sentence makes clear that, regardless of the status and rights granted to the third parties, the formation of the Panel cannot be challenged. **29**

Article R41.4(4) also applies (by analogy) to situations where a third party joins the proceedings only after the Panel has already been constituted so that it cannot exert any influence on the composition of the Panel. In other words, as a principle, the new party has to accept the prior appointments of the arbitrators and cannot challenge the formation of the Panel.[74] **30**

74 Mavromati/Reeb, Art. R41, para. 93; cf. Berger/Kellerhals, para. 839 et seq., who state that the intervenor should be admitted only if he is willing to accept the arbitrators already appointed. However, in case of a third-party-notice, they are of the view that the third party should have the opportunity to take part in the constitution of the Panel; they, therefore, require that the party which intends to cause the third party to participate either waives the arbitrator it has already appointed, so that a common arbitrator, for it and the third party, may be designated, or that all existing parties to the proceedings agree to waive the chairman already appointed, so that in his place a third arbitrator may be appointed upon nomination of the third party.

Article R42: Conciliation

The President of the Division, before the transfer of the file to the Panel, and thereafter the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

I PURPOSE OF THE PROVISION

1 The mission of the CAS is to settle sports-related disputes and "also to encourage the resolution of such disputes by way of conciliation" or other forms of alternative dispute resolution.[1] Art. R42 deals with both the conciliation and the settlement agreement. The parties will have the option to settle their dispute by agreement at any time during the proceedings, with or without the help of the court.

II CONTENT OF THE PROVISION

A Conciliation

2 In general, conciliation may be defined as a process whereby a third party assists parties in their attempt to reach an amicable solution of their dispute.[2] Under the provision of Art. R42, the term conciliation is to be understood very broadly and encompasses any efforts by the CAS to achieve an amicable solution for the dispute being subject to the pending CAS arbitration proceedings.[3]

3 Conciliation may be initiated at any time by the CAS *ex officio* or upon a party's request. As long as the Panel is not formed and the file not transferred to the Panel, the President of the Division is competent for conciliation purposes; as soon as the Panel is formed and the file transferred to it, the Panel is competent for conciliation purposes.[4]

4 The CAS Code does not contain any specific rules for conciliation proceedings; this grants maximum flexibility. By contrast, the CAS Code contains specific rules for formal mediation proceedings at CAS, i.e., the CAS Mediation Rules.[5] The main difference between conciliation and mediation under the CAS Code is that the former starts within the framework of arbitration proceedings and can result in an award by consent subject to the New York Convention, while the latter is governed by a separate set of mediation rules and does not result in an award under the New York Convention.[6]

1 CAS 2000/A/264, *G. v. FEI*, order of 23 October 2000, p. 2.
2 Girsberger/Voser, *2016*, para. 35.
3 For an overview on conciliation in sports matters in general, see Foucher, pp. 19–32.
4 Art. R42, first sentence.
5 Arts. 1–14 CAS Mediation Rules.
6 Mavromati/Reeb, Art. R42, para. 5.

B Settlement and Award by Consent

In the event of the parties reaching a full and final settlement during the proceedings, either as a result of conciliation by the Panel[7] or negotiation between the parties without the CAS' assistance, they may request that their settlement agreement be reflected in a consent award, which will make it enforceable as such.[8] It is the task of the Panel to verify the *bona fide* nature of the settlement agreement to ensure that the will of the parties has not been manipulated by them to commit an illegal act and to confirm that the terms of the settlement agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.[9] The parties may include in the settlement agreement points that were not part of the matter in dispute before the Panel. However, they may not dispose of rights of persons that are not party to the proceeding. The CAS Code does not require that the parties provide the full and signed text of a settlement to the Panel; oral settlements may also be embodied in the award. The consent award must take a form similar to an arbitral award; specifically, the consent award must be dated and signed, at least by the President of the Panel or by its two co-arbitrators.[10] Up to 2014, about fifty awards by consent have been rendered by CAS.[11] **5**

If the parties have only reached a partial settlement, a partial award on agreed terms is possible. In multiparty arbitration, the CAS Code does not exclude rendering an award on agreed terms with regard to the parties who have settled and continuing the arbitration between the parties who have not. **6**

Like any award rendered by the Panel, a consent award puts an end to the arbitration proceedings (in relevant part). The Panel may refuse to render an award on terms agreed by the parties in exceptional circumstances only, e.g., if the settlement agreement appears to be contrary to international public policy or if justifiable doubts arise concerning the legality of the transaction.[12] In accordance with Art. R43 CAS Code, awards by consent are confidential unless both parties agree on its publication. **7**

Like an award within the meaning of Art. R46, an award by consent is final and binding.[13] However, where the settlement agreement is subject to revocation or to any condition precedent, the enforce-ability of the award on agreed terms is uncertain. The question as to what extent a consent award has *res judicata* effect is answered by the *lex arbitri*. **8**

In the event of an award by consent, the arbitration costs will usually be reduced as the proceedings are shortened and the panel need not draft a reasoning (as for a decision) for the agreement embodied in the award. It is common practice that the parties agree to share the arbitration costs; often they will be borne in equal **9**

7 Cf. for settlements facilitated by arbitrators in general, Raeschke-Kessler, The Arbitrator as Settlement Facilitator, *Arbitration International*, vol. 25/2005, pp. 323 et seq.

8 Cf. Art. R42, second sentence and Art. R46(3), sentence 1. For an example, see e.g. CAS 2014/A/3498, *IAAF v. TAF & A. Cakir-Alptekin*, award of 17 August 2015, para. 32.

9 CAS 2014/A/3498, *IAAF v. TAF & A. Cakir-Alptekin*, award of 17 August 2015, para. 35; cf. also Netzle, *ASA Special Series no. 41*, p. 27 pointing out to the limited possibilities to settle a dispute in doping matters.

10 Cf. Art. R46(1), third sentence.

11 Mavromati/Reeb, Art. R42, para. 4.

12 Cf. Berger/Kellerhals, para. 1542.

13 Cf. Art. R46, para. 12 below.

shares by both parties.[14] Usually, also the question of a compensation for lawyers' fees is addressed in the settlement and award by consent; often both parties waive any compensation claims.

C Alternative Options for Termination

10 Although not expressly stated in the CAS Code, there are also other options for terminating CAS arbitrations.[15] As an alternative to a consent award, the parties may request the Panel to issue an order for the termination of the proceedings without embodying the terms of their settlement in an award. This option is sometimes chosen where the parties wish to keep the contents of their settlement secret from the Panel and CAS.

11 A further alternative to achieve termination of the arbitration proceedings is that the claimant withdraws the claim.[16] Likewise, an acceptance of the claim by the respondent usually results in the termination of the arbitration. A withdrawal and acceptance of a claim may result from a settlement agreement between the parties or from a unilateral declaration of discontinuance.

12 The determination of the costs of the arbitration in the event of such alternative forms of termination is not governed by the CAS Code either. The Panel must consider all interests involved and decide on a case-by-case basis.[17] In any event, the Court Office fee will not be refunded.[18]

13 The effects of a termination order issued by the CAS follow from the *lex arbitri*. According to Swiss law the answer hereto depends on whether or not the party that withdrew the request intended to put an end to the arbitration proceeding only or whether the party wanted to renounce to the matter in dispute altogether.[19] Only in the latter case there is room for *res judicata* effects.[20] Whether there is a waiver or a simple withdrawal does not depend upon how the decision in question is named (award, termination order, etc.). Instead, the effects depend on the applicable arbitration rules. If the latter provide that no unilateral withdrawal is possible without renouncing to the matter in dispute altogether, the decision that puts an end to the proceeding also finally disposes of the claim and, thus, has *res judicata* effect. The CAS Code, however, does not provide for any specific rules in that respect. Nevertheless, it is constant practice with CAS (and most other arbitral institutions)[21] that a claimant/appellant can unilaterally withdraw his appeal/request for arbitration before an appeal brief/statement of claim has been filed without renouncing his claim altogether. In such event a CAS termination order only acknowledges that

14 Mavromati/Reeb, Art. R42, para. 17, with reference to CAS jurisprudence.
15 Cf. < http://www.tas-cas.org/statistics > differentiating between "award", "procedures terminated by a CAS decision other than an award" and "cases withdrawn".
16 This happens quite often: In the year 2012, 86 and in the year 2013 70 CAS cases were withdrawn, cf. < http://www.tas-cas.org/statistics > .
17 Cf. Art. R64.
18 Cf. Art. R64.1; cf. also CAS 2000/A/259, *SBSV v. FIBT*, Oschütz, pp. 284–285.
19 Cf. Wirth, para. 54 at Art. 189; CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club,* Award of 27 November 2015, para. 110.
20 BGer. 4A_374/2014 para. 4.3.2.2; CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club,* Award of 27 November 2015, para. 110.
21 Wirth, para. 55 at Art. 189.

an appeal with CAS had been lodged, that this appeal has then been withdrawn without a panel having been constituted, thus, leading to the (purely procedural) termination of the proceedings (without *res judicata* effects).[22]

22 CAS 2015/A/3959, *CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club,* Award of 27 November 2015, para. 110.

Article R43: Confidentiality

Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.

I PURPOSE OF THE PROVISION

1 The notion of confidentiality is inherent in arbitration. The confidentiality *of* arbitration proceedings (i.e. non-disclosure towards third parties) is one of the main motivations[1] in resorting to arbitration.[2] However, despite this motivation (of at least some of the parties), in most jurisdictions it is contested to what extent there are (statutory) duties of confidentiality.[3] Art. R43 clarifies this confidentiality and ensures that ordinary proceedings at the CAS, incl. the award, are, as a principle, confidential. However, Art. R43 does not deal with confidentiality *within* arbitration (i.e. non-disclosure towards the opposing party and other participants to the proceedings, namely the introduction of confidential information into, and its treatment within, the arbitral process).[4]

II CONTENT OF THE PROVISION

A Confidentiality Duty

2 As a principle, the parties, arbitrators and the CAS are obliged not to disclose any facts or other information regarding the dispute or arbitration proceedings to third parties.[5] According to the express wording of this provision, this rule applies also to the CAS. This means that the Secretary General, the ad hoc clerks, any auxiliaries and staff of the CAS are also subject to this confidentiality duty. Whether the same duty applies to tribunal-appointed experts is questionable, since they are neither "the arbitrators" nor "CAS" within the meaning of the provision.[6] To be on the same safe side, it is recommended that tribunal-appointed experts sign a confidentiality commitment. The legal situation in respect of party-appointed experts and witnesses is similar. They are not subject to the duty of confidentiality. Hence, if confidentiality is critical, the execution of a separate confidentiality agreement with such experts and witnesses is required.[7]

1 The empirical data available is quite ambiguous (and one might have to distinguish between the privacy of hearings and duties of confidentiality), see Kahlert, pp. 63 et seq.
2 Trakman, *ArbInt. 2002*, p. 1.
3 For an overview on the international debate, cf. Kahlert, pp. 3 et seq.
4 This is partially governed by Art. R44.3.
5 Art. R43, second sentence; cf. also Art. S19(1) confirming the duty of confidentiality for CAS arbitrators.
6 Kahlert, p. 368.
7 Cf. Trakman, *ArbInt. 2002*, pp. 11–13; Berger/Kellerhals, para. 1232; Mavromati/Reeb, Art. R43, para. 21.

The duty of confidentiality covers all awards and orders issued by the Panel, as well as its deliberations. This does not solely follow from Art. R43, but also from Swiss law.[8] It also extends to all oral and written communications by the Panel, Court Office, witnesses, experts and parties, and to all materials submitted by the parties in the course of the proceedings. Art. R43 includes the entirety of the arbitral proceedings.[9] Given that duties of confidentiality and the privacy of hearings are two different things, it does not automatically follow from Art. R43 that in CAS proceedings the public[10] is generally excluded from the hearings.[11] Instead, the question of the privacy of the hearing is addressed in Art. R44.2 (2) of the CAS Code. The question of who is permitted to attend the non-public hearing is governed by the *lex arbitri*, i.e. Swiss law.[12] Occasionally the CAS publishes hearing dates for information purposes.[13] The legal basis for this in the CAS Code is not obvious.[14] Even in the Appeal Procedure, press statements can be made only after the end of the proceedings, see Art. R59 (6) CAS Code. **3**

The duty of confidentiality does not apply if, and to the extent that, a disclosure is required by legal obligation, which includes orders from a judge or administrative authority to provide information. Neither does the duty apply to materials that are in the public domain. Furthermore, it does not apply where a party must divulge information to protect legitimate interests in proceedings against third parties.[15][16] Disclosure is also permitted when this is necessary for the orderly conduct of the arbitration.[17] In addition, filing an appeal against the CAS award at the Federal Supreme Court or filing the award for enforcement purposes at the state court does not violate the confidentiality duty.[18] The CAS Code does not address the question as to whether arbitrators have the right to involve public prosecution authorities where there are indications of criminal activities in connection with the arbitration (e.g., money laundering, forgery or bribery). In international arbitration this question is controversial. At least in cases where arbitration is misused for criminal purposes, arbitrators are not subject to the duty of confidentiality as agreements based on criminal intents are null and void under Swiss law and do not deserve any legal protection.[19] Furthermore, R43 provides that disclosure to any third party may be made with the permission of the CAS. It is not clear what organ of the CAS would be competent to grant leave of disclosure (General Secretary, ICAS, Division President). However, it is rather clear from the construction of the provision that the CAS Panel is not the proper organ to grant such leave. Any such requests must, thus, be directed to the CAS Court Office and not to the Panel. In addition, the provision does not specify the conditions under which an exemption from the duty of confidentiality **4**

8 Ritz, pp. 163, 168 et seq.; for an international overview, see Kahlert, p. 201.
9 Mavromati/Reeb, Art. R43, para. 16.
10 It follows from Art. R44.2 (2) sentence 4 that at least interpreters are allowed to participate (Kahlert, pp. 367 et seq.).
11 Art. R43, first sentence and Art. R44.2(2), second sentence.
12 Kahlert, pp. 367 and 400.
13 Mavromati/Reeb, Art. R43, para. 20.
14 Kahlert, p. 367.
15 Examples can be found in Kahlert, pp. 193 et seq.
16 Kaufmann-Kohler/Bärtsch, p. 96.
17 Kahlert, pp. 192 et seq. (an example would be information divulged to an expert witness or interpreter).
18 Redfern/Hunter/Blackaby/Partasides, para. 2.178; Mavromati/Reeb, Art. R43, para. 23.
19 Cf. Art. 20 CO; see also Redfern/Hunter/Blackaby/Partasides, paras. 5.82 et seq.

may be granted by the CAS. At the end of the day the decision must be taken on the basis of a balance of interests of the parties involved.

5 The duty of confidentiality is valid for an unlimited period. A violation of the confidentiality undertaking may lead to civil liability based on breach of contract.[20] Art. R68 excludes all liability of arbitrators, the CAS and its staff in connection with any CAS proceedings; however, due to mandatory Swiss law foreseen in Art. 100 CO this exclusion is null and void with regards to deliberate wrongdoing and gross fault.[21] Moreover, an arbitrator may be removed from the CAS list if he violates the duty of confidentiality.[22] It is debated whether a breach of confidentiality by an arbitrator can be a ground for challenging this arbitrator.[23] Where a party is in breach of the duty of confidentiality a Panel may order it to refrain from such conduct pursuant to Art. R37, Art. 183 PILS and Art. 374 ZPO respectively.[24] There is a discussion whether a party can terminate the arbitration agreement if the other party breaches a duty of confidentiality.[25] Because there is regularly no direct connection between a violation of the confidentiality duty and the final outcome of the arbitration proceeding (award), such violation may hardly result in the invalidity of the award.[26]

6 The parties are free to agree on alternative terms to govern their confidentiality undertakings as Art. R43 is not a mandatory provision.[27] It is recommended that such agreements be concluded in writing.

B Publication of Awards

7 Awards from ordinary proceedings[28] are generally not made public unless all the parties concerned agree or the Division President so decides.[29]

8 The parties' consent to the publication can be express or implicit. The fact that an order of procedure was rendered and "none of the Parties ha[d] objected to the publication of the final award" can qualify as a consent to the publication.[30]

9 The CAS Code does not specify under what circumstances the Division President may admit the publication of the award. According to CAS jurisprudence, the publication of awards has been decided on the basis of "the significance of this matter for

20 Kaufmann-Kohler/Bärtsch, p. 97; Berger/Kellerhals, para. 1235; Mavromati/Reeb, Art. R43, para. 27.
21 Cf. Art. R68, at paras. 2 et seq. below. However, see Mavromati/Reeb, Art. R43, para. 28 generally excluding any kind of liability.
22 Art. S19(2).
23 This is seen rather critically by Kahlert, p. 386.
24 Kaufmann-Kohler/Bärtsch, p. 96.
25 This, however, is usually not a ground to terminate the arbitration agreement, see Kahlert, p. 385.
26 Kahlert, pp. 389 et seq., however noting that this can be different for a breach of the confidentiality of deliberations (in particular if there is a further round of submissions after an arbitrator has disclosed information from the deliberation); see also Mavromati/Reeb, Art. R43, para. 29 stating that "it would be theoretically possible to have an action to set aside the arbitral award based on the violation of the procedural public policy".
27 Cf. Art. R43, third sentence.
28 Unlike awards from appeal proceedings, cf. Art. R59(6).
29 Art. R43, third sentence. This provision has been adopted only per 1 January 2010.
30 CAS 2011/O/2574, *UEFA v. FC Sion/Olympique des Alpes SA*, award of 31 January 2012 (operative part of 15 December 2011), para. 162.

football",[31] based on a finding "that there are reasons of legal certainty and fairness that require this award be made public"[32] or to outweigh a suspicion of doping that arose through a press release. Furthermore, it has been stated that publication is allowed where making an award public may have a dissuasive effect, for instance, in connection with doping[33] or if there is a general interest for the public.[34] However, a general interest for the public must not be assumed hastily; the parties must be able to rely on the confidentiality of the proceedings otherwise uncertainty exits with regards to this key feature of arbitration. In particular, in purely commercial matters the general interests for the public never prevails the parties' interest in confidentiality. In any event, the Division President should always first consult with the parties and take into account their interests in not making the award public. In particular, if sensitive data such as business or trade secrets or private know-how are involved, a publication of such information within the award is hardly acceptable. Moreover, the Division President should examine whether the public interest can be satisfied by a less interfering action than the publication of the entire award such as publishing only parts of the award. In a nutshell, the Division President may order publication, without the parties' consent, only on exceptional grounds.

Finally, it should be clarified that the publication of anonymized and redacted awards is not generally, but only permitted if all identifying features (and not only the names) are removed and the further context of the award does not allow conclusions to the parties.[35] 10

31 CAS 2008/O/1808, *KFA v. FIFA*, Award of 27 April 2010, para. 85.
32 CAS 2008/O/1455, *Boxing Australia v. AIBA*, Award of 16 April 2008, para. 49.
33 Reeb, *Role and Functions*, p. 39.
34 Mavromati/Reeb, Art. R43, para. 5.
35 In similar terms: Mavromati/Reeb, Art. R43, para. 23, stating that *"all elements prone to lead to the identification of the parties"* need to be removed; the same authors seem to be less strict when stating that the publication of the reasons of the award is acceptable if the *"the names of the parties involved"* are removed (Mavromati/Reeb, Art. R43, para. 32).

Article R44: Procedure before the Panel

Article R44.1: Written Submissions

The proceedings before the Panel comprise written submissions and, in principle, an oral hearing. Upon receipt of the file and if necessary, the President of the Panel shall issue directions in connection with the written submissions. As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response. The parties may, in the statement of claim and in the response, raise claims not contained in the request for arbitration and in the answer to the request. Thereafter, no party may raise any new claim without the consent of the other party.

Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.

In their written submissions, the parties shall list the name(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.

If a counterclaim and/or jurisdictional objection is filed, the CAS Court Office shall fix a time limit for the Claimant to file an answer to the counterclaim and/or jurisdictional objection.

Article R44.2: Hearing

If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the Respondent is heard last.

The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant. Unless the parties agree otherwise, the hearings are not public. Minutes of the hearing may be taken. Any person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person.

The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.

The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference.

With the agreement of the parties, she/he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.

The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance.

Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanctions of perjury.

Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.

Article R44.3: Evidentiary Proceedings Ordered by the Panel

A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.

If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts.

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The expert shall be independent of the parties. Before appointing her/him, the Panel shall invite her/him to immediately disclose any circumstances likely to affect her/his independence with respect to any of the parties.

Article R44.4: Expedited Procedure

With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.

Article R44.5: Default

If the Claimant fails to submit its statement of claim in accordance with Article R44.1 of the Code, the request for arbitration shall be deemed to have been withdrawn.

If the Respondent fails to submit its response in accordance with Article R44.1 of the Code, the Panel may nevertheless proceed with the arbitration and deliver an award.

If any of the parties, or its witnesses, has been duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing and deliver an award.

I PURPOSE OF THE PROVISION

1 The purpose of Art. R44 is to govern several critical aspects of the proceedings before the Panel. In view of their importance, it is hard to understand why all these (discrete) aspects are lumped together and addressed in a single article. Art. R44.1 governs the statement of claim, the response and further written submissions, as well as the evidence to be included together with the written submissions, and the counterclaim and defense of lack of jurisdiction. Art. R44.2 concerns various matters relating to the hearing. Art. R44.3 addresses a number of questions regarding the taking of the evidence, including the production of documents and the handling of witnesses and experts. Art. R44.4 deals with the expedited procedure. Finally, Art. R44.5 governs the conduct of the proceedings in case of default by a party.

II CONTENT OF THE PROVISION

A Written Submissions (Article R44.1)

2 Once the Panel has been constituted, the parties exchange written submissions, i.e., the claimant issues its statement of claim and the respondent issues a response.[1] These two submissions are the main filings in ordinary proceedings before the CAS: any further written submissions will only be admitted if the circumstances so require.[2] The circumstances may require the exchange of a reply and second response, e.g., where the respondent puts forward facts and evidence in his response, that were not addressed in the statement of claim.[3] Failing this, the right to be heard and/or the Panel's duty to ensure the parties' equal treatment might be violated, which in turn may jeopardize the validity of the award to be rendered. Procedural fairness also applies to the setting of time limits for filing written submissions. Where the parties are not granted the same time periods to comment on the other party's submission(s), their rights risk being violated.[4] The duration of the time granted depends on the nature of submission and circumstances of the case; often the Panel grants 20 to 30 days, with the possibility of an extension upon reasoned request.[5] Usually, written submissions are filed consecutively; however the CAS Code does not exclude the possibility for the Panel to order simultaneous filings.[6] If necessary, the President of the Panel may issue directions in connection with written submissions in a procedural order.[7]

3 The statement of claim and the response must contain detailed statements of the relevant facts. Such factual statements should be exhaustive as there is no guarantee that a further exchange of submissions will take place.[8] The facts supporting the claim and the response must be sufficiently substantiated, which, under Swiss law,

1 Art. R44.1(1), first and third sentences.
2 Art. R44.1(1), third sentence.
3 In case of a counterclaim or set-off claim, the claimant always needs to be permitted to file an additional pleading, cf. Art. R44.1(4).
4 BGE 116 II 639 para. 4.c; cf. BGE 130 III 35 para. 5.
5 Mavromati/Reeb, Art. R44, para. 5; Girsberger/Voser, *2016* para. 1946.
6 This might be useful, e.g., for post-hearing briefs.
7 Art. R44.1(1), second sentence; Kaufmann-Kohler/Bärtsch, p. 81.
8 Cf. Art. R44.1(1), third sentence.

is an issue of procedural law.[9] In addition, the parties are entitled to include legal arguments.[10] Furthermore, the names of the parties and their representatives, as well as their prayers for relief and/or remedies sought must be reflected in the written submissions.[11] Requests for relief must be clear and precise.[12] If this requirement is not met, the Panel must not hesitate to order the claimant to amend his prayers for relief within a certain time-limit.[13] Moreover, written submissions must refer to the evidence in support of the allegations made therein.[14] Following the exchange of written submissions, no further written evidence must be produced unless the other party agrees to such new written evidence or the Panel accepts such new evidence on the basis of exceptional circumstances.[15] Exceptional circumstances may include new facts or the fact that such evidence was unavailable at an earlier stage.[16] The Panel has, however, no obligation to admit late evidence.[17]

The parties may not raise new claims in the reply or second response, or thereafter, unless the other party agrees to such new claims.[18] New claims must be distinguished from amendments and supplements to the prayer for relief and/or the cause of action (i.e., factual basis). Where the amendment or supplement to the prayer for relief relies on the same cause of action, the Panel must admit it without reservation.[19] Amendments or supplements to the previously presented cause of action must also be admitted without restrictions. However, an additional, new cause of action which gives rise to a new set of claims with no connection to the original claim and the corresponding cause of action, will be considered a new claim and may be admitted only with the agreement of the other party or under exceptional circumstances. The above means, for instance, that a claimant basing his claim on a sponsorship agreement may increase his claim for payment in his reply based on this same sponsorship agreement; however, the claimant may not bring a claim for additional payment(s) in his reply based on a merchandise agreement which was not the cause of the action adduced in his statement of claim. **4**

9 Cf. CAS 2017/A/5111, *Debreceni Vasutas Sport Club v. Nenad Novakovic*, Award of 16 January 2018, para. 69 et seq.; PILS (Basel)- Schneider/Scherrer, Art. 184 N 7.

10 Cf. Art. R38(1), second bullet point.

11 Cf. Art. R38(1), first and third bullet points.

12 The demand for precise prayer for relief appears as an aspect of the respondent's right to be heard, cf. Wirth, *Rechtsbegehren*, p. 155.

13 Where appropriate, the Panel may even announce that if the claimant does not meet this requirement as requested in the Panel's order, the Panel will refuse to hear such claim, Wirth, *Rechtsbegehren*, pp. 157–158; Berger/Kellerhals, paras. 1207–1208, also stating that, for the same reasons, a Swiss arbitral tribunal should disregard "catch-all clauses".

14 Art. R44.1(2) and (3).

15 Art. R44.1(2), second sentence.

16 The Panel considered the circumstances where a party was not aware until after the hearing that there was an expert in the area of doping analysis who disagreed with a view of an important Professor as exceptional and re-opened the proceedings, cf. CAS 2004/A/726, *M. L. Calle Williams v. IOC*, Award of 19 October 2010, p. 3; cf. also CAS 2012/A/2705, *Le Mans FC v. FIFA (Olympique Bamako)*, Award of 11 March 2013, para. 106; Rochat/Cuendet, p. 67; cf. Coccia, *International Sports Justice*, p. 57, mentioning that exceptional circumstances can also be met *"if it is necessary to protect the equality of the parties and their right to be heard"*.

17 Cf. BGer. 4A_ 178/2014 para. 5.3.3 (no violation of the right to be heard for not admitting late evidence).

18 Art. R44.1(1), fourth and fifth sentences.

19 Cf. Berger/Kellerhals, para. 1215 with reference to BGer. 4P.115/1994 para. 1b. *Contra*: Mavromati/Reeb, Art. R44, para. 7.

5 As a principle, the parties are not permitted to submit unsolicited written statements. In particular, shortly before or during the hearing, unsolicited written submissions are generally not admissible; without this procedural fairness, the parties' right to be heard and to be treated equally might be violated. Where the Panel comes to the conclusion that to strictly ignore an unsolicited filing is inappropriate, it may allow the party to refer to the content of such filing in post-hearing briefs[20] or during the final oral arguments.[21]

B Counterclaim and Objections (Article R44.1)

6 Since the revision of the CAS Code valid as of 1 January 2010, counterclaims and jurisdictional objections (i.e., defenses of lack of jurisdiction) have been expressly provided for in this provision. Where a counterclaim or a jurisdictional objection is filed, the CAS Court Office shall fix an appropriate time limit for the filing of an answer to the counterclaim and/or jurisdictional objection.[22] Further written submissions may be ordered in accordance with Art. R44.1(1).

7 The CAS Code does not expressly govern the question of the time limit for raising any counterclaims and/or defenses of lack of jurisdiction. As a principle, the respondent is not allowed to raise a defense of lack of jurisdiction or a counterclaim after the filing of the first response.[23] This principle does not apply in the event of new information being brought to the respondent's attention with the claimant's reply and such new information being the basis for the jurisdictional objection or the counterclaim.

8 The CAS Code does not expressly deal with set-off claims.[24] Under Swiss law, the following applies: in domestic arbitration, under the ZPO, the CAS has jurisdiction to hear a set-off defense even where the relationship from which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement.[25] For international arbitration, the PILS does not contemplate any rule addressing this issue. According to the prevailing opinion in doctrinal writings, the right to set off must be admitted without restrictions in international arbitration proceedings seated in Switzerlan d ("juge de l'action, juge de l'exception").[26]

C Hearing (Article R44.2)

1 General

9 In principle, the proceedings before the Panel involve a hearing.[27] In the course of the 2016 revision, the previous wording in Art. R44.1(1) "if the Panel deems it

20 Cf. Art. R44.2(7).
21 Cf. Art. R44.2(1), second sentence.
22 Art. R44.1(4); cf. also Art. R39(4).
23 Cf. Art. R44.1(1), fifth sentence; Kaufmann-Kohler/Rigozzi, para. 5.12; Berger/Kellerhals, para. 1108.
24 Regarding the material requirements of set-off claims under Swiss law see CAS 2005/A/957, *Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA)*, Award of 23 March 2006, in particular paras. 22–23.
25 Art. 377(1) ZPO.
26 E.g., Poudret/Besson, para. 324; Berger/Kellerhals, paras. 522–524.
27 Art. R44.1(1), first sentence and Art. R44.2(1), second sentence.

appropriate" has been substituted by "in principle" in order to be in line with Art. R44.2(1) stating that "[A]s a general rule" there shall be a hearing. Nevertheless, non-holding a hearing does not constitute per se a violation of the right to be heard;[28] if the Panel deems itself sufficiently well-informed and if the parties' right to be heard is otherwise granted, it may deviate from the principle and decide not to hold a hearing.[29] This also applies where only one of the parties requests a hearing.[30] However, where both parties insist on a hearing, the Panel must conduct a hearing; and where the parties explicitly request that the Panel renders the award solely on the basis of written submissions, as a principle, no hearing should take place.

Except for pre-hearing meetings or conferences,[31] hearings must take place after the exchange of written submissions. The President of the Panel may issue directions with respect to the hearing, in particular with regard to the date(s), time and place of the hearing.[32] When fixing the hearing, the Panel must also consider organizational and logistical issues, including travel and accommodation and the availability of interpreters, experts and any other persons whose presence may be required. 10

As a general rule, there is *one* hearing during which the Panel hears the parties as well as the witnesses and experts. A hearing can last half day or several days. Hearings by video-conference are admitted as well.[33] The parties will also have the opportunity to make final oral pleadings at the hearing.[34] Providing the Panel with pleading notes is, as a principle, acceptable.[35] The last word always belongs to the respondent.[36] Post-hearing briefs may be admitted by the Panel; but this seems to be rare at CAS[37] For post-hearing briefs the Panel may set the same deadline for both parties. 11

2 Conduct of the Hearing

The hearing is conducted by the President.[38] The President must ensure that statements made by the parties, witnesses and/or experts are both concise and limited to the subject of the relevant submissions.[39] This implies that the President has a duty to ask questions, in particular to clarify any relevant open issues, and to guide the parties' exchanges during the hearing. He may also limit or exclude any question to a witness or expert, where it appears that the question is irrelevant, duplicative, 12

28 Mavromati/Reeb, Art. R44, para. 12.
29 Art. R44.2(8); CAS 2012/A/2731, *Brazilian Olympic Committee et al. v. World Taekwondo Federation et al.*, Award of 13 July 2012, para. 24. Cf. also Mavromati/Reeb, Art. R44, para. 10, also considering the financial constraints and urgency of the case.
30 CAS 2010/O/2039, *FASANOC v. CGF*, Award of 30 March 2010, p. 3.
31 The Panel might find it useful to convene a pre-hearing telephone or video-conference for the purpose of discussing the procedure, cf. Kaufmann-Kohler/Bärtsch, p. 83. However, according to Netzle, p. 212, pre-hearing conferences are, in practice, rare at the CAS.
32 Cf. Art. R44.2(1), first sentence; cf. also Beloff/Netzle/Haas, E.3.80, stating in most cases the hearing will take place in the premises of the CAS in Lausanne.
33 Art. R44.2(4), first sentence.
34 Art. R44.2(1), second sentence.
35 Rochat/Cuendet, p. 71; cf. Rigozzi, para. 981.
36 Art. R44.2(1), second sentence *in fine*.
37 Cf. Art. R44.2(7); Oschütz, p. 309; cf. Kaufmann-Kohler/Bärtsch, p. 85, who seem to admit post-hearing briefs only exceptionally.
38 Art. R44.2(2), first part of first sentence.
39 Art. R44.2(2), second part of first sentence.

excessively burdensome or pertains to matters that are protected by legal privilege.[40] He or she further must intervene if any of the present persons behave improperly or interfere with the smooth and efficient conduct of the hearing.[41]

13 Hearings are generally not public.[42] This follows from Art. R44.2 (2). The privacy of the hearing and the duty of confidentiality must be distinguished.[43] Art. R44.2 (2) is also applicable to appeals arbitration proceedings (cf. Art. R57 (3)). According to Mavromati/Reeb, so far only one CAS hearing was open to public.[44] The publication of hearing dates by the CAS Secretariat is occasionally done for information purposes.[45]

14 A common hearing comprises the following steps: (i) opening of the hearing, (ii) preliminary remarks by the parties, (iii) witness examinations, (iv) expert examination, (v) parties examination, (vi) other evidentiary matters and closing of evidentiary proceedings, (vii) oral pleadings, and (viii) closing and subsequent deliberations.[46] However, it is at the Panel's discretion to define the appropriate steps for the hearing.[47]

15 Interpreters may attend and assist any person to ensure that they are heard. This is important, given that there is no obligation for a witness to testify or for an expert to provide an opinion in the language of the arbitration. The CAS Court Office is willing to help finding a suitable interpreter, but the party that called the person requiring such assistance must bear the costs of the interpreter.[48]

16 Minutes of the hearing may be taken.[49] However, usually this does not happen; in particular unlike in most international commercial arbitrations, no verbatim transcripts of the hearing are generally taken, although audio recordings are made.[50] The parties may request a copy of the audio recording.[51]

3 Witnesses and Experts[52]

17 Each party is responsible for the availability and full costs of the witnesses and experts it has called.[53] This responsibility will be shared if both parties call the same witness or expert for the same question.

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40 Art. 8(2) 2010 IBA Rules; Kaufmann-Kohler/Bärtsch, p. 85.
41 Mavromati/Reeb, Art. R44, para. 14.
42 Art. R44.2(2), second sentence; this can be considered as a standard in international arbitration, cf. Redfern/Hunter/Blackaby/Partasides, paras. 2.163 et seq.; cf., however, the Swiss Federal Supreme Court in BGer. 4A_612/2009 para. 4.1, questioning the corresponding provision in connection with the Appeal proceedings by stating that in the light of the overwhelming significance of the CAS in the field of sports it would be desirable with respect to the confidence in the independence of the arbitrators and fair trial, if, upon request by the athlete, a public hearing would be held.
43 Cf. Art. R43 para.3 above.
44 Mavromati/Reeb, Art. R43, para. 20.
45 Mavromati/Reeb, Art. R43, para. 20.
46 See CAS checklist for hearing, printed in Mavromati/Reeb, Art. R43, Annex D.
47 Beloff/Netzle/Haas, para. E3.81.
48 Art. R44.2(2), fourth sentence.
49 Art. R44.2(2), third sentence.
50 Mavromati/Reeb, Art. R43, para. 16; cf. also Rigozzi, para. 994; Kaufmann-Kohler/Bärtsch, p. 85.
51 Mavromati/Reeb, Art. R43, para. 16.
52 Cf. also below, paras. 39–47.
53 Art. R44.2(3), second sentence.

Where convenient and appropriate, the President of the Panel may admit the hearing of witnesses and experts via tele- or videoconference or by telephone, apparently a very time and cost efficient method.[54] Since the 2012 revision of the CAS Code, this rule also applies to the parties themselves.[55] The President may also exempt a witness or expert from appearing at the hearing where both parties agree and statements by the said witness/expert have previously been filed with the Panel.[56] The appearance of any witness or expert may be disallowed by the Panel on the grounds of irrelevance;[57] however, this provision should be applied only with great restraint, to limit the risk of violating procedural fairness. The before mentioned rules allow for the (cost-) effective handling of witnesses and experts. 18

"Anonymous" witnesses have been admitted in a few CAS proceedings.[58] According to this CAS jurisprudence, which takes into account the case law of the ECHR and Swiss Supreme Court, the admission of such witnesses requires that "(i) the witness must be concretely facing a risk of retaliations by the party he/she is testifying against if his/her identity was known; (ii) the witness must be questioned by the court itself which must check his/her identity and the reliability of his/her statements; and (iii) the witness must be cross-examined through an 'audiovisual protection system'".[59] 19

D Evidence (Articles R44.1 and R44.3)

1 General

In comparison to other arbitration rules, the rules governing evidence (*lex evidentia*) provided in the CAS Code are quite short.[60] Due to the brief and open wording of the *lex evidentia* in the CAS Code, the different treatment and qualification of evidential issues in different legal and cultural systems and the different specifications of the various sports can be adequately taken into account. 20

Pursuant to Art. 184(1) PILS and Art. 375(1) ZPO the arbitral tribunal shall itself conduct the taking of evidence. In accordance with the prevailing Swiss doctrine it is suggested that administrating evidence is a matter for the entire Panel of the tribunal and that delegating the taking of evidence to one of its members is not permitted unless expressly agreed by the parties with regards to a specific subject matter and ensured that the results of the taking of evidence can be made available to the other arbitrators.[61] 21

54 Art. R44.2(4), first sentence.
55 Art. R44.2(4), first sentence; cf. also Rochat/Cuendet, p. 70.
56 Art. R44.2(4), second sentence.
57 Art. R44.2(5), first sentence.
58 CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* & CAS 2011/A/2386, *WADA v. Alberto Contador*, Award of 6 February 2012, para. 32; CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA*, Award of 15 April 2010, paras. 72 et seq.
59 CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* & CAS 2011/A/2386, *WADA v. Alberto Contador*, Award of 6 February 2012, para. 31.
60 For an example of comprehensive rules, see WIPO Rules (Arts. 50 et seq.).
61 Berger/Kellerhals, para. 1310; cf. also Schneider/Scherrer, para. 49 at Art. 184, only requiring the parties' consent.

2 Presentation of Facts, Burden of Proof and Standard of Proof

22 It seems standard in international arbitration that the facts relevant for the arbitral tribunal are the facts presented by the parties.[62] It is clear that also the CAS Code is drafted on the basis of the parties having to present the facts and the tribunal taking a decision based on these facts presented by the parties. This principle corresponds to the legal system of Switzerland and other civil law countries (so called "*Verhandlungsmaxime*").[63] This means that each party has to *present and substantiate* the facts it relies on (so called "*Behauptungs- und Substantiierungspflicht*").[64] Furthermore, it also means that the other party can contest such presentation and that such contesting has to be substantiated.[65] In addition, it also encompasses the evidence to be adduced.

23 The principle commonly applied in international arbitration holds that each party has to substantiate and prove the facts on which it relies to support its claim or defense (*actori incumbit probatio*).[66] Unlike other well-established arbitration rules such as the UNCITRAL or Swiss Rules, the CAS Code does not expressly deal with the question of the *burden of proof*.[67] Under the civil law approach, the burden of proof is governed by the applicable substantive law; in Switzerland, this is generally governed by Art. 8 of the Swiss Civil Code which states that the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact, unless the law provides otherwise.[68] By contrast, under the common law approach the burden of proof is a matter of procedural law. However, in this respect the distinction between substantive and procedural law appears academic and seems not to raise controversial issues in practice.[69] The Swiss Federal Supreme Court has held that the burden of proof is not a matter of public policy.[70]

24 One must also take into account that substantive law governing the merits or individual sports regulations may provide for specific rules on the burden of proof, namely swifts of the burden of proof or statutory presumptions. In particular, the WADA Code contains critical rules regarding the burden of proof which deviate from the principle pursuant to Art. 8 CC.[71] In any event, on the whole, it seems fair

62 Schneider/Scherrer, para. 5 at Art. 184.
63 Schneider/Scherrer, para. 5 at Art. 184.
64 CAS 2003/O/506, para. 54 mentioned in Coccia, *International Sports Justice*, p. 59: *"If a party wishes to establish some facts and persuade the arbitrators, it must actively substantiate its allegations with convincing evidence"*.
65 According to the Swiss Federal Supreme Court, it is not sufficient to contest the other party's presentation in its entirety without any specification (cf. BGer. of 17 August 1994, *ASA Bull. 1995*, pp. 198, 204); cf. also CAS 2011/A/2616, *UCI v. Oscar Sevilla Rivera & RFEC*, Award of 15 May 2012, para. 21.
66 Redfern/Hunter/Blackaby/Partasides, para. 6.84.
67 Cf. Art. 27(1) UNCITRAL Rules or Art. 24(1) Swiss Rules.
68 However, in recent times, the principle of Art. 8 ZGB has been criticized and it has been suggested that for each legal provision the burden of proof should be determined by interpretation, in particular in consideration of the purpose of the provision, the availability of and proximity to evidence, and the principle of proportionality, cf. Staehelin/Staehlin/Grolimund, § 18, para. 50.
69 Schneider/Scherrer, paras. 11–12 at Art. 184.
70 BGer. 4A_488/2011 para. 6.2, also stating that the principles applicable in criminal proceedings such as the presumption of innocence and *in dubio pro reo* do not apply in international arbitration.
71 Rigozzi/Quinn, pp. 16 et seq.

to allocate the burden of proof according to the laws governing the merits of the dispute (*lex causae*) unless the parties have agreed otherwise.[72]

No proof is required regarding uncontested factual assertions (which seems to be another principle accepted in international arbitration).[73] The distinction of whether an assertion is of factual or legal nature is determined according to the *lex fori*.[74] With regards to legal assertions, the principle *iura novit arbiter (iura novit curia)* applies to arbitrations seated in Switzerland; as a corollary, the arbitral tribunal itself shall determine the content of the applicable law.[75] 25

The CAS Code also does not contain any rule on the *standard of proof* determining the threshold to be reached to consider a matter of fact as proven. Sporting federations are entitled to impose their own standard of proof; such standard of proof does even not need to be in accordance with the previous CAS jurisprudence.[76] The CAS has developed an impressive jurisprudence on the standard of proof.[77] One of the traditional standards of proof in CAS proceedings is the test of the balance of probability (i.e. it is more probable than not).[78] This test is the common one in international arbitration and suits well to commercial sport matters.[79] Another frequently applied test, in particular in disciplinary matters, is whether the facts have been established to the "comfortable satisfaction of the court".[80] 26

3 Assessment of Evidence

Article 9(1) IBA Rules gives the tribunal discretionary powers to determine the admissibility, relevance, materiality and weight of the evidence adduced and clarifies that the tribunal is not bound by any rules of evidence unless the parties have expressly provided otherwise. This rule can be considered as a principle in international arbitration rules[81] and applies also to proceedings under the CAS Code. 27

Article 9(2) of the IBA Rules illustrates grounds that usually lead to the exclusion (i.e. non-admissibility) of evidence. Hence, the tribunal may exclude evidence, *inter alia*, for legal impediment or privilege under the legal or ethical rules, unreasonable burden or impossibility to produce the requested evidence, grounds of commercial or technical confidentiality, or special political or institutional sensitivity. The Panel has the power to decide whether to admit the evidence submitted.[82] When deciding 28

72 Berger/Kellerhals, para. 1316; differentiating: Schneider/Scherrer, paras. 11–12 at Art. 184.
73 Schneider/Scherrer, para. 10 at Art. 184; Tercier/Bersheda, *ASA Special Series no. 35*, p. 80.
74 Nater-Bass/Rouvinez, para. 10 at Art. 24.
75 Berger/Kellerhals, N 1434; similar: Coccia, *International Sports Justice*, p. 60. However, the Panel may impose on the parties duties of cooperation, cf. CAS 2017/A/5111, *Debreceni Vasutas Sport Club v. Nenad Novakovic*, Award of 16 January 2018, para. 114.
76 CAS 2011/A/2490, *Köllerer v. ATP et al*, paras. 82–85, mentioned in Rigozzi/Quinn, p. 25.
77 For an overview see Rigozzi/Quinn, pp. 24–38.
78 CAS 2009/A/1926 & 1930, *ITF v. Gasquet & WADA v. ITF & Gasquet*, Award of 17 December 2009, para.29–31; CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* & CAS 2011/A/2386, *WADA v. Alberto Contador*, Award of 6 February 2012, paras. 53 et seq.
79 Cf. Redfern/Hunter/Blackaby/Partasides, para. 6.85.
80 CAS 2010/A/2172, *Oriekhov v. UEFA*, para. 53; CAS 2009/A/1920, *Probeda et al. v. UEFA*, para. 85.
81 Cf. also Art. 27(4) UNCITRAL Rules (2010/2013); Art. 24(2) Swiss Rules; Art. 50(1) WIPO Rules; Art. 26(1) SCC.
82 CAS 2009/A/1879, *Alejandro Valverde v. CONI & AMA & UCI*, Award of 16 March 2010, para. 36; CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* & CAS 2011/A/2386, *WADA v.*

on the admissibility of the evidence the Panel is not bound to the rules of evidence before the national courts of the seat of the arbitral tribunal.[83] However, the latter may be a source of inspiration for the Panel, e.g. whether or not to admit evidence that has been obtained illegally.[84]

29 As previously set out, the parties have to present the facts and evidence, but the tribunal decides what facts and evidence are relevant and material to the case and parties' requests. Also this principle is in line with the IBA Rules and applies, in principle, to arbitration proceedings under the CAS Rules: according to Art. 9(2)(a) IBA Rules all means of evidence shall be excluded for "lack of sufficient relevance to the case or materiality to its outcome". The Federal Supreme Court has confirmed that an arbitral tribunal may reject evidence if it does not consider such evidence fit or relevant for the facts and that such rejection does not violate the principle of equal treatment and the right to be heard.[85]

30 The Panel also determines the weight and probative value of the evidence submitted.[86] Under the CAS Rules, arbitral tribunals have wide discretion in relation to the probative value of evidence. This is in line with the *principle of free assessment of evidence* ("*Grundsatz der freien Beweiswürdigung*") enshrined in various jurisdictions, including Swiss procedure law in Art. 157 ZPO,[87] and also applies to arbitrations before the CAS.[88] Credibility, consistency, contradictions, conclusiveness, clearness and preciseness of statements, etc. are indications to be considered when weighing evidence in arbitration proceedings under the WIPO Rules. In general, arbitral tribunals tend to give more weight to contemporaneous documents than uncorroborated witness statements ("*Verba volant, scripta manent*").[89]

31 If it is deemed to be appropriate[90] that the presentations of the parties be supplemented by the parties, the Panel may at any time order the production of additional documents,[91] the examination of the parties or witnesses, the hearing of experts[92] or

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Alberto Contador, Award of 6 February 2012, para. 18; Kaufmann-Kohler/Rigozzi, para. 6.14; Berger/Kellerhals, para. 1205. Cf. also Art. R57(3).

83 CAS 2009/A/1879, *Alejandro Valverde Belmonte v. CONI & AMA & UCI*, Award of 16 March 2010, para. 99.

84 CAS 2009/A/1879, *Alejandro Valverde Belmonte v. CONI & AMA & UCI*, Award of 16 March 2010, paras. 133 et seq.

85 BGE 116 II 639 para. 4c; cf. also BGer. 4A_ 634/2011 para. 2 and BGer. 5A_ 634/2011 para. 2.2 regarding a justified refusal to hear a witness; BGer. 4A_ 682/2011 para. 4.1 regarding a justified disregarding of a witness statement of a witness who did not appear at the hearing; BGer. 4A_76/2012 para. 3.3 regarding the justified refusal to conduct a new witness hearing; BGer. 4A_150/2012 para. 4 regarding justified failure to order a requested on-site visit; BGer. 4A_274/2012 para. 3 regarding the justified failure to appoint an expert.

86 Art. 9(1) of the 2010 IBA Rules.

87 Cf. Staehelin/Staehlin/Grolimund, § 18, para. 29.

88 Cf. BGer 4A_522/2012 para. 3.4., balancing different expert statements differently does not entail to a violation of the right to be heard.

89 Redfern/Hunter/Blackaby/Partasides, para. 6.90.

90 This is clearly a discretionary power and not an obligation of the Panel, BGer. 4A_70/2015 para. 3.2.2; CAS 2009/A/2014, *AMA v. RLVB & Iljo Keisse*, Award of 6 July 2010, para. 34.

91 The Panel may also do so if the counterparty has omitted to ask for a document within the relevant deadline, cf. CAS 2007/A/1429, *Bayal Sall v. FIFA and IK Start* & CAS 2007/A/1442, *ASSE Loire v. FIFA and IK Start*, Award of 25 June 2008, para. 8. Such requests can refer not only to matters of facts, but also to legal issues, cf., e.g., CAS 2008/A/1545, *Andrea Anderson et. Al. v. IOC*, Award of 16 July 2010, p. 4.

92 Cf., e.g., CAS 1998/A/212, *UCI v. M & FCI*, Award of 24 February 1999, p. 3.

other evidentiary measures and procedural acts.[93] Art. R44.3(2) shows that the Panel has unfettered powers in reviewing the case, including in dealing with the related evidentiary issues.[94] The "other procedural act[s]" contemplated in this provision do not encompass provisional or conservatory measures within the meaning of Art. R37.[95]

The question of whether unlawfully or illegally obtained means of evidence may be used in arbitration proceedings or not, is not governed by the CAS Rules. In general, the principle of good faith prevents the arbitral tribunal from admitting evidence that a party collected by unlawful means.[96] However, this does not bar illegally obtained evidence from the outset. The decision whether or not to admit the evidence should be taken through a careful balancing of the interests involved.[97] Equally the Federal Supreme Court has stated that illegally obtained evidence should be admitted if the interest in protecting the right that was infringed by collecting the evidence weighs less than the interest in establishing the truth.[98] **32**

4 Means of Evidence

There is no *numerus clausus* of means of evidence in CAS proceedings.[99] The evidence adduced may, in particular, include the production of documents, as well as the examination of parties, witnesses and experts and site or subject-matter inspections; however, other means of evidence may also be admitted. **33**

Hair analyses, for instance, have been admitted in CAS proceedings.[100] Polygraphs (lie detectors) are not admitted in court proceedings according to the Swiss Federal Supreme Court;[101] however, on a recent CAS decision, this mean of evidence was **34**

93 Art. R44.3(2), first sentence.

94 Cf. CAS 2008/A/1631, *RCK v. FAF*, Award of 29 September 2008, para. 23; CAS 2007/A/1368, *UCI v. M. & FCI*, Award of 25 March 2008, para. 20.

95 CAS 2007/A/1396, *WADA & UCI v. Alejandro Valverde & RFEC*, Award of 10 July 2008, paras. 66–68.

96 Berger/Kellerhals, para. 1320.

97 CAS 2009/A/1879, *Alejandro Valverde Belmonte v. CONI & AMA & UCI*, Award of 16 March 2010, paras. 133 et seq.

98 BGE 131 I 272 para. 4; BGE 4A_362/2013 of 27 March 2014 para. 3.2.2, where an action for annulment of a CAS award based on Art. 190(2)(e) PILS against the admission of illegally obtained evidence was dismissed. Cf. also CAS 2011/A/2425, *Ahongalu Fusimalohi v. FIFA*, para. 80, mentioned in Rigozzi/Quinn, pp. 42 et seq.: *"In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law"*.

99 Cf. Art. R44.1(3), first sentence. According to Art. 182 PILS, the parties may determine which means of evidence to be admitted.

100 CAS 2009/A/1926 & 1930, *ITF v. Gasquet & WADA v. ITF & Gasquet*, Award of 17 December 2009, para. 34; CAS 1998/A/214, *B v. FIJ*, Award of 17 March 1999, para. 19; cf. also CAS OG 00/006, *B v. IOC & German NOC & IAAF*, Award of 22 September 2000, para. 40c.

101 BGer. 6B_663/2011 para. 1.3; BGer. 6B_708/2009 para. 1.6; BGE 109 Ia 273 para. 7; CAS 1999/A/246, *W v. FEI*, Award of 11 May 2000, para. 9; CAS 1996/A/157, *FIN v. FINA*, Award of 23 April 1997, para. 14; CAS OG 00/006, *B v. IOC & German NOC & IAAF*, Award of 22 September 2000, para. 40d.

accepted by CAS.[102] Surveys can be very important in some IP related sport matters.[103] Also demonstrative evidence,[104] hearsay evidence,[105] notoriety,[106] primers,[107] and commonly accepted rules of experience ("Erfahrungsgrundsätze") can be admitted. However, taking of oaths are not admitted.[108] In general, the IBA Rules may provide useful guidance to CAS Panels and parties.[109]

5 Written Evidence and Production of Documents

35 The parties must mention all written evidence in their written submissions and produce it together with the same where available.[110] The terms "written evidence" and "documents" used in Arts. R44.1 and R44.3 essentially correspond to the definition of documents under the 2010 IBA Rules, i.e., writings, communications, pictures, drawings, programs or data of any kind, whether recorded or stored on paper or by electronic, audio, visual or any other means.[111] It should be stressed that any form of electronic documents are covered by the term document in the CAS Rules.

36 Photocopies of written evidence shall suffice unless the authenticity of the photocopy is disputed or the Panel requests that the original be submitted for inspection on other grounds.[112] If the authenticity of the copies is doubted,[113] the tribunal may disregard the documents in question as unreliable[114] unless there is a credible explanation why the original is missing or cannot for other reasons be produced. Whether the filing only of certain parts of a specific document is sufficient and whether blacking of certain parts of a specific document is acceptable, has to be determined in the light of all circumstances of the specific individual case; but it is well possible that non-disclosure of some parts can lead to an adverse inference.[115] If necessary, it is

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102 CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* & CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC*, Award of 9 February 2012, paras. 233–243; cf. also Rigozzi/Quinn, p. 41, supporting this means of evidence, but at the same time warning that it should not become pre-requisite. Cautious CAS 2014/A/3487, *Campbell-Brown v. JAAA & IAAF*, Award of 10 April 2014, para. 109. For detail, see Haas/Trunz, Zulässigkeit polygraphischer Untersuchungen in *Straf-, Zivil- und sportrechtlichen Schiedsverfahren*, in Schulze (ed.), Aktuelle Rechtsfragen im Profifussball, 2015, pp. 89 et seq.

103 Cf. Rüetschi, in: Noth/Bühler/Thouvenin (eds.), *Beweisrecht MSchG*, paras. 17 – 53, with further references.

104 Demonstrative evidence such as diagrams, graphs, charts, tables, maps, simulations or animations helps illustrating the underlying evidence and/or persuading the panel, cf. Ehle, *Effective Use*, para. 3.31.

105 Cf. Cook/Garcia, p. 200, stating that indirect evidence is often accepted in international arbitration.

106 BGE 135 III 88 para. 4.1. confirmed regarding exchange rate Swiss Francs – Euro; BGE 130 III 113 para. 3.4 denied regarding generic term in trademark law; BGE 117 II 321 para. 2 confirmed regarding the influence of the soil conditions on the quality of mineral water.

107 Cf. Art. 53 WIPO Rules.

108 Oschütz, p. 315.

109 Kaufmann-Kohler/Bärtsch, p. 82; cf. also Berger/Kellerhals, para. 1313, describing the IBA Rules as *"a code of generally accepted principles for the taking of evidence in international arbitration"*.

110 Art. R44.1(2), first sentence; cf. also Art. 3(1) 2010 IBA Rules.

111 Rigozzi/Quinn, p. 6.

112 Cf. Art. 3(12)(a) 2010 IBA Rules; cf. also Rigozzi/Quinn, p. 6.

113 Regarding relevant circumstances raising reasonable doubts on a document's authenticity, see Gabriel, *ASA Bull. 2011*, pp. 832 et seq.

114 Redfern/Hunter/Blackaby/Partasides, para. 6.118.

115 Swiss Federal Supreme Court decision of 9 January 2008, 4A_450/2007, *ASA Bull. 2008*, p. 543.

also possible for the Panel to appoint a graphologist or other qualified expert for the authentication of documents and signatures.[116]

A party may request the Panel to order the other party to submit documents in its custody or under its control.[117] The party seeking such an order must demonstrate that the documents in question are likely to exist and are relevant to the case.[118] According to Mavromati/Reeb, the CAS Code adopts an approach between the restrictive civil law concept and the extensive US law concept.[119] The request should specify the documents in detail as much as possible. Art. 3(3)(a) of the IBA Rules provide helpful guidelines as to the degree of detail, i.e.: (i) either a description that allows a clear identification of the requested document or (ii) a description in sufficient detail of a narrow and specific requested category of documents that are reasonably believed to exist (e.g. "a copy of all purchase orders of the merchandising product X by the company Y from the company Z under the merchandising agreement ABC during the time period 1 January 2014 to 31 December 2015"). It is also worth stating here that under Swiss arbitration law, actions by stages ("Stufenklage") can be admitted subject to the conditions foreseen in the Swiss civil procedural law. In line with Art. 3(3) IBA Rules, fishing expeditions like in the American-style discovery proceedings are not permitted under Swiss arbitration law.[120] The legitimate interests of the party opposing the submission of the said documents must also be considered by the Panel when deciding on the request.[121] Where a party refuses to comply with such a request, the Panel does not have any recourse to enforce the request without the assistance of the state courts. However, where a party fails to submit the requested documents without providing a satisfactory explanation, the Panel may infer that such documents would be adverse to the interests of said party.[122] An order for document production under the IBA Rules cannot be challenged before the Swiss Federal Supreme Court.[123] The Panel should not overuse the powers of investigation, in particular because of the need to avoid partiality and maintain equal treatment of both parties.[124] **37**

The Panel may not order the production of documents in the custody of third parties such as a doping laboratory.[125] No conclusion may be drawn from the third party's refusal to submit such documents.[126] **38**

116 Cf. CAS 2012/A/2957, *FC Khimki v. E. Raça*, Award of 5 February 2014, para. 4.4.

117 Art. R44.3(1), first sentence. See, e.g., CAS 2007/A/1359, *FC Pyunik Yerevan v. E, AFC Rapid Bucaresti & FIFA*, Award of 26 May 2008, p. 8. See also Art. 3(2)–(4) 2010 IBA Rules.

118 Art. R44.3(1), second sentence. Cf. BGer. 4A_50/2013 para. 4, where the tribunal's refusal to order the production of confidential information did not qualify as a violation of the right to be heard.

119 Mavromati/Reeb, Art. R43 para. 24.

120 Tercier/Bersheda, *ASA Special Series no. 35*, p. 80; cf. Coccia, *International Sports Justice*, p. 60, stating that in practice, CAS arbitrators *"tend not to allow"* fishing expedition; cf. also Berger/Kellerhals, para. 1329, who state that in international arbitration the prevailing view is that there is no room for such American-style discovery.

121 Kaufmann-Kohler/Bärtsch, p. 82.

122 Art. 9(5) of the 2010 IBA Rules; Swiss Federal Supreme Court decision of 28 March 2007, 4A_2/2007, *ASA Bull. 2007*, p. 610; Swiss Federal Supreme Court decision of 9 January 2008, 4A_450/2007, *ASA Bull. 2008*, p. 543; Schneider/Scherrer, para. 21 at Art. 184.

123 BGer. 4A_596/2012 para. 3 (under ICC Rules).

124 Beloff/Netzle/Haas, para. E3.104.

125 Rochat/Cuendet, p. 66; Oschütz, p. 314; Kaufmann-Kohler/Bärtsch, pp. 82–83; Mavromati/Reeb, Art. R43, para. 31 and 35; Rigozzi/Quinn, p. 13, unless the third party is under the control of an arbitration party.

126 Berger/Kellerhals, para. 1326.

6 Witnesses

39 The parties must list any witnesses they intend to call and provide a brief summary of their expected testimony.[127] Any witness statements are to be filed together with the submissions, as a principle.[128] [129] However, where the parties have not expressly agreed otherwise, there is no strict duty to provide a witness statement in order to present a witness whose attendance has been duly specified before the hearing.[130] Art. 4(5)(d) of the 2010 IBA Rules contemplates that witness statements must contain an affirmation of the truth of the witness statement.[131] After the exchange of written submissions no further witness may be called unless the other party agrees to the calling of such witness or the Panel accepts it due to exceptional circumstances.[132] As the CAS Code does not contain any requirements regarding the question of who may appear as a witness in CAS proceedings, any person may be a witness, as a principle.[133] Hence, witnesses may, for instance, be a coach in a matter pertaining to his own athlete or club, a director in a dispute concerning his own club or company, a member or official in proceedings regarding his federation (etc.).

40 The CAS Code does not contain any rule regarding the question of whether a party's counsel may interview witnesses and experts. In accordance with Art. 4(3) of the 2010 IBA Rules, one must assume that such interviews are not prohibited. Against this background, the common practice that a party's counsel will assist the witness in preparing the witness statements is not unlawful. However, to coach or even influence the witness is apparently not allowed.

41 Where a witness refuses or fails to appear for oral testimony, the Panel does not have the coercive power to subpoena him. However, the Panel may request judicial assistance from the competent state court[134] or simply take into account the witness's refusal to appear when evaluating his evidence.

42 Before hearing any witness, expert or interpreter, the Panel solemnly invites the individual concerned to tell the truth, subject to the sanctions for perjury.[135] If such a person does not tell the truth, he may face serious criminal sanctions.[136]

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127 Art. R44.1(3), first sentence.

128 Art. R44.1(3), second sentence. Such statements are usually signed, but not sworn. According to Netzle, p. 213, a sworn witness statement may be submitted where the witness is absent or to underline the credibility of the witness.

129 According to Netzle, p. 213, the parties are often invited to designate their witnesses and experts and to present the witness statements only after the written submissions have been filed, which can be regarded as an additional written submission ordered by the President in application of Art. R44.1(1).

130 Netzle, p. 213; Coccia, *International Sports Justice*, p. 61, but recommends doing so; undecided Kaufmann-Kohler/Bärtsch, p. 84, who recommend that the President should clarify this matter in a procedural order at the outset of the proceedings; cf. also Rigozzi/Quinn, pp. 8–9, supporting the use of witness statements for efficiency reasons.

131 This provision also defines the further content of witness statements.

132 Art. R44.1(2), second sentence (by analogy) and Art. R44.2(3), first sentence.

133 Cf. also Art. 4(2) of the 2010 IBA Rules.

134 Cf. Art. 184(2) PILS.

135 Art. R44.2(6).

136 Cf. Arts. 306, 307 and Art. 309 Swiss Criminal Code; Berger/Kellerhals, para. 1339; Kaufmann-Kohler/Bärtsch, p. 84.

In accordance with the practice of international arbitration, each party usually conducts examinations in-chief of its witnesses and cross-examinations of the witnesses called by the other parties.[137] The parties are usually given the opportunity to re-examine the witnesses. In addition, the witnesses may be questioned by the arbitrators. The Panel usually excludes a witness of fact from attending the examination of other witnesses of fact prior to his own testimony in order to avoid influencing his testimony.[138] However, witness confrontation for clarifying some specific issues is not excluded under the CAS Code. 43

7 Experts

The parties shall also list any experts they wish to be heard and set out the latters' area of expertise.[139] In doping cases it is almost systematic for the parties to appoint experts.[140] Where it is deemed appropriate, the Panel may also appoint its own experts.[141] It shall consult with the parties with respect to the appointment and terms of reference of such expert.[142] The tribunal-appointed experts must be independent from the parties.[143] In accordance with Art. R33(1) amended in the course of the 2013 revision, the experts shall disclose any circumstances that may affect (and not only likely affect) their independence. The provisions regarding independence and challenge of arbitrators according to Arts. R33-R34 of the CAS Code will also apply by analogy to the experts appointed by the Panel.[144] Objections with regard to independence must be raised immediately once the party becomes aware of the grounds calling the independence of the expert into question.[145] Where the Panel rejects the challenge of an expert, such a decision is not subject to appeal, but it can be indirectly challenged in setting aside proceedings against the award or at the enforcement stage.[146] 44

Not only individuals but also legal entities may be appointed as experts provided that a representative to attend the expert hearing is identified.[147] The expert to be appointed must have the required expertise and experience in the relevant field. The expert appointed by the Panel acts as an auxiliary to the Panel.[148] Although the Panel is not bound by the expert's finding,[149] it may not simply ignore them, and will have to indicate the grounds for departing from or disregarding such findings.[150] The right 45

137 Rigozzi, para. 991; Kaufmann-Kohler/Bärtsch, pp. 84–85; Netzle, p. 213.
138 Cf. Born, pp. 1846–1847.
139 Art. R44.1(3), first sentence.
140 Kaufmann-Kohler/Rigozzi, para. 517.
141 Cf. Art. R44.3(2), first sentence.
142 Cf. Art. R44.3(3), first sentence.
143 Art. R44.3(3), second and third sentence. Cf. also Art. 6(2) 2010 IBA Rules.
144 Cf. BGE 126 III 249 para. 3c; Berger/Kellerhals, para. 1350; Poudret/Besson, para. 667; critical Schneider, *ASA Bull. 1993*, para. 24.
145 BGE 126 III 249 para. 3c.
146 BGE 126 III 249 para. 3c; Poudret/Besson, para. 667.
147 Schneider, *ASA Bull. 1993*, para. 21.
148 Cf. Berger/Kellerhals, para. 1341.
149 Schneider, *ASA Bull. 1993*, para. 39. However, if the parties agree that the expert's conclusion shall have binding effect (in German *"Schiedsgutachten"*), it shall be binding for the Panel as well.
150 Poudret/Besson, para. 666.

to be heard is not violated if the tribunal adopts the conclusions of party-appointed experts which were not disapproved by evidence.[151]

46 It is at the Panel's discretion to decide whether it is appropriate to appoint an expert. However, where the parties request the Panel to appoint an expert concerning a specific issue, it is rare for the Panel to find grounds that justify acting against the parties' will.[152] Obtaining the requested expert opinion is part of the right to be heard.[153] Where none of the parties has requested the appointment of an expert to assist the Panel, the latter is entitled to make such an appointment only if it deems it appropriate, i.e., if it understands that it is not in a position to render a proper award without the assistance of an expert.[154] However, where both parties object to the appointment of an expert, the Panel must respect their will in the matter (in particular also because the costs caused by the involvement of an expert can be very high).

47 As a principle, experts must submit an expert report before the hearing. The CAS Code does not contain any rules regarding the requirements for such report; in case the Panel has not defined these requirements in an order, one can refer to the corresponding IBA Rules.[155]

E Expedited Procedure (Article R44.4)

48 The purpose of this rule is to provide parties with more efficient proceedings in terms of time and cost. The expedited procedure results in an award that is treated in the same manner as an award rendered under the normal procedure.

49 Each party may request an expedited procedure, and the Panel may propose one. However, the Panel may proceed in an expedited manner only where both parties agree.[156] If one party disagrees, this procedure may not be applied (unless the disagreement is against the rules of good faith). The parties' consent can also be given in advance, for instance, by a stipulation in the contract between the parties containing the arbitration clause.[157] Such consent can also be achieved by requesting the expedited procedure in the claimant's request for arbitration and by giving the respondent's consent in the answer to the request for arbitration.

50 The Panel may issue appropriate directions.[158] This provision leaves the Panel a lot of flexibility to tailor appropriate proceedings. For instance, it may set shorter time limits, limit the number of submissions exchanged or the length of any hearings, or set a maximum of time for pleadings or maximum of pages for briefs.

151 BGer. 4A_572/2015 para. 4.
152 Born, p. 1861.
153 BGer. 4P.115/2003 para. 4.2; Poudret/Besson, para. 664.
154 Art. R44.3(2), first sentence; cf. Poudret/Besson, para. 664.
155 Cf. Art. 5(2) and Art. 6(4) of the 2010 IBA Rules.
156 See the clear wording of Art. R44.4; of the same view: Mavromati/Reeb, Art. R43, para. 35.
157 Mavromati/Reeb, Art. R43, para. 26.
158 Art. R44.4.

F Default (Article R44.5)

Article R44.5 of the CAS Code governs certain critical legal consequences and effects of a party's default. In particular, it ensures that the right to be heard is observed and that the award is valid and effective. **51**

Where the claimant fails to submit its statement of claim in accordance with Art. R44.1, the request for arbitration is deemed withdrawn.[159] However, this only applies where the request for arbitration is not comprehensive and cannot be considered as the statement of claim as well. In the event of any doubts, the court must require the necessary clarifications from the claimant.[160] Furthermore, it is not clear from the wording of the CAS Code what the effects of such a withdrawal are, namely whether it has *res judicata* effect. As the respondent has at that point of time not yet filed the statement of defense, i.e., the response, in the authors' view such a withdrawal has no *res judicata* effect. **52**

Where the respondent fails to submit its response in accordance with Art. R44.1, the Panel may nevertheless proceed with the arbitration.[161] However, this does not imply that the respondent acknowledges the claimant's facts and claims. The burden of proof still remains with the claimant. **53**

Where the claimant fails to submit its reply or the respondent fails to submit its second response, or where one of the parties fails to file any other later submission (such as a post-hearing briefs) the Panel must also proceed with the arbitration.[162] **54**

Where the claimant and/or the respondent fail to appear at the hearing, the Panel will nevertheless proceed with the hearing.[163] The purpose of this provision is the avoidance of (tactical) delays of the proceedings by non-presence of a party.[164] A postponement of the hearing should only be admitted on important grounds such as proven sickness of a party. **55**

In the course of the last revision of the CAS Code, it has been clarified that if a called witness does not appear at the hearing, the Panel may nonetheless proceed.[165] The purpose of this rule is the avoidance of (tactical) delays of the proceedings by non-presence of a witness.[166] This rule also applies to party-appointed, but not to Panel-appointed experts. **56**

An award rendered in the absence of some party or witness in accordance with Art. R44.5 is valid and enforceable like an award rendered in adversarial proceedings.[167] **57**

159 Art. R44.5(1).
160 Oschütz, pp. 289–290.
161 Art. R44.5(2); cf. also Mavromati/Reeb, Art. R44, para. 50 stating that the parties are simply informed about the non-receipt and the continuation of the proceedings.
162 Art. R44.5(2) by analogy.
163 Art. R44.5(3); cf. also BGer. 4A_70/2015 para. 3.2, where the Swiss Federal Supreme Court concluded that the refusal to hold a second hearing after claimant had failed to attend the first hearing did not qualify as a violation of the right to be heard.
164 Mavromati/Reeb, Art. R43, para. 50.
165 Art. R44.5(3).
166 Mavromati/Reeb, Art. R43, para. 50.
167 Mavromati/Reeb, Art. R43, para. 51.

Article R45: Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.

I PURPOSE OF THE PROVISION

1 Article R45 governs the law applicable to the substance of the dispute, i.e., the merits. It states that the dispute must be decided pursuant to the law chosen by the parties and, in the absence of such a choice, pursuant to Swiss law. This provision confirms both the priority of party autonomy and the great importance of Swiss law in CAS ordinary proceedings, as the latter will always apply where the parties have failed to choose the applicable law.

2 This provision does not govern the law applicable to the arbitration procedure; however, it is sometimes not easy to distinguish between matters of procedure and matters of substance, for instance, in the field of evidence[1] or regarding a party's standing to sue or to be sued.[2]

II CONTENT OF THE PROVISION

A Chosen Law

3 The parties are entitled to jointly decide what law shall apply to their dispute.[3] They may choose the applicable law before or after the dispute has arisen. Unless expressly foreseen, the choice of law qualifies as a "Sachnormverweisung", i.e. a reference to the substantial laws of the law chosen under exclusion of the conflict of law rules.[4] The parties' choice of law is not limited to national laws: it may also refer to transnational law, general legal principles or other rules such as *lex mercatoria* or *lex sportiva*.[5] [6] Alternatively, the parties may also choose that their dispute be decided *ex aequo et bono*.[7] Moreover, the parties are free to choose different laws to govern different aspects of their dispute.[8] Regardless of the chosen law, the Panel must always take into account any relevant public policy norms, i.e., the public policy

1 Berger/Kellerhals, para. 1372.
2 Some CAS cases have treated the issue of standing to sue/standing to be sued as a procedural matter (e.g., CAS 2007/A/1329, 1330, Award of 15 December 2007, para. 3), while others treated it as a matter of substantive law (e.g. CAS 2008/A/1517, Award of 23 February 2009, paras. 19–27). However, under Swiss law the standing to sue and to be sued is a matter of substantive law, cf. Berger/Kellerhals, para. 352.
3 Art. R45, first sentence.
4 Mavromati/Reeb, Art. R45, para. 61.
5 However, scholars have different understandings of the concept and notion of *lex sportiva*, cf. McLaren, pp. 40–64; Coccia, *International Sports Justice*, pp. 67–69; for an overview on *lex sportive*, see also Loquin, pp. 85–108.
6 Kaufmann-Kohler/Bärtsch, p. 88.
7 Art. R45, second sentence.
8 Berger/Kellerhals, para. 1397; Girsberger/Voser, *2016*, paras. 1355 et seq.

rules of the *lex causae* as well as those of other legal systems which are applicable to the case on the basis of Art. 19 PILS.[9]

The validity of choice of law agreements is governed by the *lex arbitri*.[10] The form requirements governing the validity of arbitration agreements are not applicable to choice-of-law clauses. The parties' choice of law is not required to be express and in writing, it may even be tacit; in particular, it suffices for such a choice to be clear from the circumstances or from the parties' conduct during the proceedings.[11] In a case where the parties based their arguments throughout the proceedings on the provisions of the Olympic Charter and on anti-doping rules as well as on the relevant CAS jurisprudence, the Panel considered that this meant that the parties made a corresponding choice of rules.[12] **4**

Like an arbitration agreement, the choice of law agreement is independent and separate from the main contract. Hence, the invalidity of the main contract does not necessarily entail the invalidity of the choice of law agreement.[13] **5**

A choice of law clause may be drafted in narrow or broad terms. In case of doubt, it should be assumed in principle that the parties had a broad understanding, meaning that they intended their chosen law to apply not only to contractual, but also to non-contractual claims related to the contract in question.[14] **6**

An allegedly wrong determination of the applicable law to a CAS case is not tantamount to a public policy violation.[15] **7**

B Swiss Law

Where the parties are unable to agree on the applicable law, Swiss law shall apply to the dispute.[16] "Swiss law" here means the substantive laws of Switzerland, including the international treaties concluded by Switzerland, but excluding Swiss private international law.[17] **8**

This importance of Swiss law in CAS proceedings appears to have historical reasons: on the one hand, the CAS has its seat in Switzerland; on the other hand, many important federations such as the IOC, FIFA and UEFA also have their seat in Switzerland, and some of them even contemplate in their statutes that Swiss law applies complementarily to the parties' chosen law.[18] **9**

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9 Rigozzi, paras. 1181–1192; Rochat/Cuendet, p. 74; Kaufmann-Kohler/Rigozzi, para. 7.89; Mavromati/Reeb, Art. R45, para. 63; cf. CAS 98/O/200, *AEK Athens and SK Slavia Prague v. UEFA*, para. 10 with regards to EC competition law being considered as foreign mandatory law.

10 Kaufmann-Kohler/Bärtsch, p. 87; Girsberger/Voser, *2016*, para. 1385.

11 CAS 2002/O/373, *COC & Beckie Scott v. IOC*, Award of 18 December 2003, paras. 11 and 14; Kaufmann-Kohler/Bärtsch, p. 88; Rochat/Cuendet, p. 74; Berger/Kellerhals, para. 1269; Mavromati/Reeb, Art. R45, paras. 59 and 64 et seq.; Coccia, *International Sports Justice*, p. 65.

12 CAS 2002/O/373, *COC & Beckie Scott v. IOC*, Award of 18 December 2003, para. 14.

13 Berger/Kellerhals, para. 1390; Mavromati/Reeb, Art. R45, para. 58.

14 Berger/Kellerhals, para. 1401.

15 BGer. 4A_654/2011 para. 4.

16 Art. R45, first sentence.

17 Poudret/Besson, para. 684; CAS 2003/O/486 *Fulham FC v. Olympique Lyonnais*, Award of 15 September 2003, para. 8; this understanding is also indicated by the title of this provision "Law Applicable to the Merits" and "*Droit applicable au fond*".

18 E.g., Art. 66(2) FIFA Statutes.

10 Due to this rule, Swiss law applies even to cases with no relation to Switzerland, where the parties are unable to agree on the applicable law.[19] Therefore, e.g., the CAS was bound to apply Swiss law to a contract regarding the rights to host a sporting event in the USA, concluded between an international sports union with its seat in Canada and a US company that bore no relation to Swiss law.[20] This prevalence of Swiss law has been criticized by some scholars, in particular because it differs from the law of international commercial arbitration and limits the freedom arbitrators normally enjoy in determining the applicable law and in applying general principles of law.[21] In their view it makes more sense to apply the law that bears the closest relation to the case concerned.[22] In line with this, the CAS has reserved the test of whether the application of Swiss law is appropriate.[23] Although this criticism appears well-founded, the wording of Art. R45 very clearly states that Swiss law applies in the absence of a choice of law by the parties, leaving no room for other interpretations such as the application of the law that has the closest connection to the case. Deviating from this unambiguous rule would require an amendment to the CAS Code. Furthermore, one should not underestimate the advantage of the current provision in terms of legal certainty and clarity.[24] In addition, it assures a certain degree of coherence and consistency.[25]

11 The wording of this provision does not however contemplate that Swiss law applies complementarily or subsidiarily.[26] The questions of how to fill a gap in a statute or how to complete an agreement not governing a legal issue must be answered in accordance with the corresponding rules of the applicable law.

C *Ex Aequo et Bono*

12 Under Art. R45, second sentence, the parties also have the option of authorizing the Panel to decide *ex aequo et bono*,[27] i.e., to render its award based on considerations of fairness and not on positive law.[28] An authorization to decide *ex aequo et bono* does not however relieve the Panel from the duties of establishing the relevant facts of the case and setting out the grounds upon which the award is based.[29] The power

19 Oschütz, pp. 50, 327–328; Kaufmann-Kohler/Bärtsch, p. 90.
20 CAS 96/O/161, *ITU v. Pacific Sports Corp. Inc.*, Award of 4 October 1999, in particular para. 9, stating that it is to be assumed that when the parties agreed to refer to the CAS they were aware of this provision and missed the opportunity to choose another law.
21 Rigozzi, para. 1174; Loquin, p. 91; Kaufmann-Kohler/Rigozzi, para. 7.37; Kaufmann-Kohler/Bärtsch, pp. 90–91.
22 Cf. Art. 187(1) PILS.
23 CAS 2002/O/373 *COC & Beckie Scott v. IOC*, Award of 18 December 2003, para. 15: *"the application of Swiss law is also appropriate"*. This is in line with other arbitration rules, e.g., Art. 17(1) ICC Rules or Art. 35(1) UNCITRAL Rules.
24 Sternheimer/Le Lay, *CAS Bull. 2012/1*, p. 54; Coccia, *International Sports Justice*, p. 65.
25 Mavromati/Reeb, Art. R45, para. 69.
26 *Contra*: CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Award of 5 November 2003, para. 8; cf. also Art. R58, expressly stating "subsidiarily".
27 Art. 187(2) PILS also provides that the parties can authorize the panel to decide *ex aequo et bono*.
28 Kaufmann-Kohler/Bärtsch, p. 91; Girsberger/Voser, *2016*, para. 1426; Mavromati/Reeb, Art. R45, para. 76 stating that the ordre public still needs to be respected. Cf. also Netzle, *ASA Special Series no. 41*, p. 27 stating that the arbitrators still have to *"pay close attention to precedents"*.
29 Berger/Kellerhals, para. 1445.

to decide *ex aequo et bono* refers to the merits of the dispute only, but not to the conduct of the arbitral procedure governed by the CAS Code.

An agreement on an *ex aequo et bono* decision does not require a particular form, i.e., it may also be oral. However, the authorization to decide *ex aequo et bono* must be unequivocal, which requires express statements by the parties.[30] It is not requested that the parties use the wording "ex aequo et bono" as used in Art. R45; crucial is simply that the reference to *ex aequo et bono* is expressed unambiguously.[31] 13

It is also possible that the Parties authorize the Panel to answer only some of the questions at stake under the principle of *ex aequo et bono (*for instance to determine the amount of damages according to the principle *ex aequo et bono* and to determine all other questions such as the requirements for damages under Swiss law). Likewise, and although not explicitly mentioned by the CAS Code, the parties also have the option of authorizing the Panel to decide as *amiable compositeur*, i.e., to mitigate the effects of the applicable law if they appear unfair in a given case.[32] 14

D *Jura Novit Arbiter*

The Swiss Federal Supreme Court has ruled that the principle of *jura novit curia*, i.e., that the court is deemed to know the law and must apply it *ex officio*, not only applies in state court litigation, but also in arbitrations in Switzerland.[33] Hence, the principle "*jura novit CAS*" applies in all CAS arbitrations.[34] 15

This means, inter alia, that the parties do not have to prove the contents of the applicable law as a fact and that the arbitrators are not limited by the legal submissions made by the parties.[35] However, in the event the arbitrators intend to rely on legal rules which were not addressed by the parties and the applicability of which was not reasonably foreseeable for them, the arbitrators must give the parties the opportunity to set out their views on these legal issues, as failing to do so would constitute a violation of the parties' right to be heard.[36] In a very recent decision, the Swiss Federal Supreme Court rejected though the challenge of an award based on the right to be heard due to the surprising application of the law, holding that the parties may limit the mandate of the arbitral tribunal to only those legal ground invoked by the parties.[37] 16

30 Rochat/Cuendet, p. 76; *contra*: Kaufmann-Kohler/Bärtsch, p. 91; Berger/Kellerhals, para. 1494; Girsberger/Voser, *2016*, paras. 1431 et seq.

31 Cf. Mavromati/Reeb, Art. R45, para. 72, referring to a case in which *„equality arbitration"* was considered to be sufficient to authorize the Panel to rule *ex aequo et bono*.

32 Cf. Berger/Kellerhals, para. 1448.

33 BGer. 4A_554/2014 para. 2.1; BGer. 4P.114/2001 para. 3; BGer. 4P.260/2000 para. 5b, referring to BGE 120 II 172 para. 3a and BGE 116 II 594 para. 3b. Cf. also Meier/McGough, *ASA Bull. 2014*, pp. 503 et seq., stating that it is rather a power than a duty of the arbitral tribunal to apply the law *ex officio*; for a detailed analysis, cf. Arroyo, *Jura Novit Arbiter*, pp. 27–54; see also the above commentary by Arroyo on Art. 190 PILS (Chapter 2, Part II), paras. 144–159.

34 Cf. CAS 2005/A/983, 984, *Club Atlético Peñarol v. Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain*, Award of 12 July 2006, para. 13 (item 3); for detail on the Supreme Court case law regarding *jura novit curia/arbiter*, see the above commentary by Arroyo on Art. 190 PILS (Chapter 2, Part II), paras. 144–159; cf. also Arroyo, *Jura Novit Arbiter*, pp. 27–54.

35 Girsberger/Voser, *2016*, paras. 1421 et seq.

36 BGE 130 III 35 para. 6; BGer. 4P.260/2000 para. 6a; Berger/Kellerhals para. 1435; Coccia, *International Sports Justice*, p. 60.

37 BGer. 4A_554/2014 para. 2.2.

Article R46: Award

The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to delivery of the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the original award. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.

I PURPOSE OF THE PROVISION

1 The purpose of Art. R46 is to provide rules that govern the award to be rendered, in particular concerning the decision-making process, the form and content of the decision and its effect.

2 This provision applies to full, partial or interlocutory awards. The provisions does not (directly) apply to procedural orders. One must determine whether and to what extent it may be applied (by analogy) to procedural orders on a case-by-case-basis. In general the provision will apply *mutatis mutandis* also to orders on provisional measures.

II CONTENT OF THE PROVISION

A Decision-Making Process

3 Article R46(1), first sentence, governs the process of making a decision for an arbitral tribunal composed of more than one arbitrator: as a principle, the award shall be made by a majority decision,[1] meaning an absolute majority of the members of the Panel.[2] This provision also holds that in the absence of a majority, the President decides alone. The vote on the award must not be confused with the arbitrators' prior deliberations.[3]

1 This is in line with Art. 189(2) PILS and Art. 382(3) ZPO.
2 Poudret/Besson, para. 740.
3 Kaufmann-Kohler/Bärtsch, p. 92; Kaufmann-Kohler/Rigozzi, paras. 7.114–7.120; Poudret/Besson, para. 740.

As the CAS Code does not provide any rules with regard to deliberations, the Panel has a wide discretion with regard to this matter. In particular, the arbitrators are free to choose the means of communication, i.e., deliberations may take the form of telephone or video-conferences, meetings at any place or exchanges in writing.[4] Deliberations at the CAS are confidential; not even the parties have the right to participate in, or to obtain information on, deliberations.[5] According to the express wording of Art. R46, dissenting opinions are not recognized by the CAS and may not therefore be attached to the award.[6] However, general remarks such as "the majority of the Panel considers" or "the Panel has decided unanimously" are accepted.[7] It is further submitted that this does not preclude an arbitrator from drafting a dissenting opinion and communicating it to the parties directly.[8] Moreover, an arbitrator has de facto the option to refuse to sign the award.[9] 4

Unlike Art. R59, Art. R46 does not provide any time limit for rendering the award. Where there is a specific contractual time-limit agreed by the parties, the Panel shall have jurisdiction to extend it. In any event, the Panel must ensure that the award is rendered within a timeframe that is reasonable in view of all the relevant circumstances, in particular the parties' needs and the urgency of the case. 5

The CAS Code is silent on the question of what the consequences are where an arbitrator blocks or delays deliberations by failing to participate. As a principle, the other members of the Panel must be allowed to continue the proceedings and decide without the defaulting arbitrator.[10] Yet it is crucial that the defaulting arbitrator has been put in a position to deliberate on an equal footing with the other arbitrators, meaning that he must always be invited to attend the meetings of the Panel and be given an opportunity to submit his comments on the successive drafts of the award.[11] As an alternative to this, one may examine whether the requirements for a removal of the defaulting arbitrator pursuant to Art. R35 are met; although this is a solution that usually proves costly and time-consuming and does not exclude with certainty that the same problems may arise. 6

B Content, Form and Types of Award

Unless agreed otherwise by the parties, the award must briefly state grounds,[12] which requires that the relevant facts and legal issues of the case and the essential 7

4 Kaufmann-Kohler/Bärtsch, p. 92; Kaufmann-Kohler/Rigozzi, para. 7.119; Berger/Kellerhals, para. 1465; Mavromati/Reeb, Art. R46, para. 18.
5 Cf. Berger/Kellerhals, para. 1470; Poudret/Besson, para. 753.
6 Art. R46(1), sixth sentence.
7 Mavromati/Reeb, Art. R46, para. 23.
8 Cf. the below commentary on Art. R59.
9 However, see Mavromati/Reeb, Art. R46, para. 4, stating that the signing of the award *"equates to the deliberations made by the arbitrators rather than the arbitrators' unreserved consent to the content of the award"*.
10 Berger/Kellerhals, para. 1478; Girsberger/Voser, *2016*, paras. 1475 and 1490 et seq.
11 BGE 128 III 234 para. 3b; BGer. 4P.115/2003 paras. 3.2–3.3.
12 Art. R46(1), third sentence; cf. also Kaufmann-Kohler/Rigozzi, para. 7.127, stating that in reality the extensiveness and style of the reasoning mainly depends on the President of the Panel; Mavromati/Reeb, Art. R46, para. 13, stating that the reasons are a condition for the validity of arbitral award.

allegations and arguments of the parties be reflected in the Panel's considerations.[13] However, failing to do so does not necessarily constitute a violation of the right to be heard or the principle of public policy.[14] In addition, the award must contain the names and domiciles of the parties and their representatives, the names of the arbitrators, the seat of the arbitration, the parties' prayers for relief, the Panel's decision on each prayer for relief, incl. the decision on costs, and a brief description of the proceedings showing that the principle of equal treatment and the right to be heard have been respected.[15]

8 The award must be in written form.[16] It must be signed, at least by the President or the two co-arbitrators.[17] This means that where one arbitrator refuses to sign the award, this has no effect on the validity of the award.[18] According to Mavromati/Reeb, in case of notification of the operative part of the award, it is practice at CAS to have it signed by the President of the Panel only, and that in case of extreme urgency, it seems acceptable to have it signed exceptionally by the CAS Secretary General on behalf of the Panel.[19] Furthermore, it is also required that the award contains the place and date of the rendering of the decision.[20] The determination of the relevant date is not expressly governed by the CAS Code; at CAS it seems common praxis to use the date of the signing of the award (usually, the date is filled in by the CAS Court Office that prepares the Panel's decision for signing).

9 Before the signing of the award, the CAS Secretary General must review the decision and examine whether it is formally in line with the CAS rules.[21] In addition, the CAS Secretary General may draw the attention of the Panel to fundamental issues of principle,[22] including CAS case law (since precedents have a somewhat distinct role in CAS jurisprudence).[23] The advice of the CAS Secretary General is not binding on the arbitrators, however.[24] The Swiss Federal Supreme Court has confirmed that the independence of the Panel is not jeopardized by this provision.[25]

10 In accordance with Art. R59(3), first sentence, Art. R46(2), first sentence, adopted in 2013, states that the Panel has the option to communicate the operative part of

13 BGE 121 III 331 para. 3b; BGer. 4P.26/2005 para. 3.1; BGE 133 III 235 para. 5.2; BGer. 4A_352/2009 para. 4.2.1; BGer. 4A_524/2009 para. 4.1; BGer. 4A_624/2009 para. 4.1.

14 E.g., BGE 116 II 373 para. 7b; BGE 133 III 235 para. 5.2; BGE 134 III 186 para. 6.1.

15 Kaufmann-Kohler/Bärtsch, p. 92; Mavromati/Reeb, Art. R46, para. 9. With regard to the costs, see also Art. R64.4.

16 Art. R46(1), second sentence; Art. 189(2), second sentence PILS; Mavromati/Reeb, Art. R46, para. 3, stating that the parties *"do not seem to be able to waive the written form of the award"*.

17 Art. R46(1), fourth sentence; cf. also Art. 189(2), third sentence PILS, stating that the signature of the Chairman is sufficient; Wirth, para. 35 at Art. 189, stating that the signature of both co-arbitrators suffices if the Chairman refuses to sign; Mavromati/Reeb, Art. R46, para. 4 footnote 8.

18 Kaufmann-Kohler/Bärtsch, p. 92; Girsberger/Voser, *2016*, para. 1518.

19 Mavromati/Reeb, Art. R46, para. 5.

20 Art. R46(1), second sentence.

21 Art. R 46(1), fifth sentence; see also Mavromati/Reeb, Art. R46, para. 24, stating that in practice the proofreading operation consists in suggesting the correction of formal mistakes.

22 Art. R46(1), fifth sentence.

23 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, paras. 120 and 260; for precedents in general, see Kaufmann-Kohler, *ArbInt. 2007*, pp. 357 et seq.; see also Béguin, The rule of precedent in international arbitration, *Jusletter of 5 January 2009*.

24 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, paras. 120 and 260; cf. also Sternheimer/Le Lay, *CAS Bull. 2012/1*, p. 55.

25 BGer. 4A_612/2009 para. 3.3.

the award to the parties, prior to the delivery of the reasons. As a principle, the requirements contained in Art. R46(1) also apply to the communication of the operative part of the award. Such award is enforceable.[26] It is submitted that this option should be used only exceptionally, i.e. only when the parties need to have clarified their legal positions without delay.

The CAS Code is silent on the types of award that may be rendered. However, it is clear that in addition to final awards the Panel may render partial awards or preliminary or interim awards.[27] It is at the Panel's discretion to determine whether the issuance of partial or preliminary/interim awards is appropriate.[28] Partial awards may be challenged immediately on any ground listed in Art. 190(2) PILS;[29] by contrast, preliminary/interim awards may be challenged immediately only on the grounds set out in Art. 190(2) (a and b) PILS.[30] However, in some cases it is not easy to distinguish between partial and interim awards.[31] Further, it is the content of the decision, and not its notation (formal description), which is decisive for the admissibility before the Swiss Federal Supreme Court.[32] 11

C Effects of the Award and its Challenge

Upon notification to the parties, the award is "final and binding upon the parties".[33] Final means that it is enforceable and terminates the proceedings; binding means that it is subject to *res judicata*.[34] However, this does not mean that it becomes a binding precedent precluding a later Panel from reaching a different conclusion on a similar question of law.[35] 12

While the authority of *res judicata* is in principle attached only to the operative part of the award (*dispositif* in French), the principle also applies to the reasoning leading to the findings when reference thereto is required or useful to understand the meaning, the nature or the effect of the award's operative part.[36] 13

The final and binding effect of the award is subject the recourse available.[37] However, challenging the award in the Supreme Court is only admissible within the limited scope of Art. 190(2) and (3) PILS.[38] Challenges are not admitted where the parties have no domicile, habitual residence or business establishment in Switzerland and 14

26 Art. R46(2), second sentence.
27 Kaufmann-Kohler/Bärtsch, p. 94; Kaufmann-Kohler/Rigozzi, para. 7.105; BGE 130 III 76 para. 3.1; cf. also Art. 188 PILS and Art. 383 ZPO. Awards by consent and other alternative options for termination are also possible, cf. Art. R42.
28 Wirth, paras. 12, 14–17 at Art. 188.
29 BGE 130 III 755 para. 1.2.2 at the end; Rigozzi, *JIDS 2010*, p. 221; Kaufmann-Kohler/Bärtsch, p. 94; Berger/Kellerhals para. 1689.
30 Art. 190(3) PILS; Rigozzi, *JIDS 2010*, pp. 221–222; Kaufmann-Kohler/Bärtsch, p. 94; critical: Berger/Kellerhals, para. 1696.
31 Mavromati/Reeb, Art. R46, para. 38.
32 Mavromati/Reeb, Art. R46, paras. 39–40, with references to case law.
33 Art. R46(3), first sentence; cf. also Art. 190(1) PILS and Art. 387 ZPO.
34 The *res judicata*-effect applies only to final and partial awards, but not to interim awards (see, e.g., Berger/Kellerhals, para. 1645; Girsberger/Voser, *2016*, paras. 1447 and 1457).
35 Beloff/Netzle/Haas, para. E.3.148; Mavromati/Reeb, Art. R46, paras. 47–48.
36 Cf. BGE 125 III 8 para. 3b.
37 Art. R46(3), first sentence.
38 Regarding the competence of the Swiss Federal Supreme Court, see Art. 191 PILS. Cf. also Art. R63 concerning the interpretation of CAS awards.

have expressly excluded all setting aside proceedings in the arbitration agreement.[39] For this reason, international sporting federations having their seat in Switzerland (e.g. ICC, FIFA and UEFA) may not request from their athletes to waive the right to challenge CAS awards at the Swiss Federal Supreme Court.

15 The requirements and formalities of such challenge at the Swiss Federal Supreme Court are governed by the Swiss civil procedure law, namely the BGG.[40] For the start of the (non-extendable) 30-day time limit within which an award may be challenged in the Swiss Federal Supreme Court, the date of notification of the *original* of the award is relevant.[41] This wording was complemented for clarification reasons in the course of the last CAS Code revision valid as of 1 January 2016.[42] The Swiss Federal Supreme Court has further clarified that this rule refers to the notification of the *reasoned* award.[43]

16 Statistically, the chances of success of challenge are very low (i.e. clearly below 10%), namely because the Swiss Federal Supreme Court does not have the power to review the merits of the award.[44]

17 As a principle, the filing of an action to set aside an award does not stay the enforcement of the award.[45] Nevertheless, it is always possible to request a stay by seeking to obtain an order granting a suspensive effect to the challenge.[46] However, according to the very restrictive practice of the Supreme Court, such a stay is only granted in exceptional circumstances.[47]

39 Art. R46(3), second sentence and Art. 192(1) PILS. Cf. BGE 133 III 235 para. 4.3.2.2 concerning appeal proceedings, but not ordinary proceedings, stating that such renouncement is not enforceable against an athlete.

40 See, e.g., Art. 42(1) BGG which establishes that the brief filed with the Supreme Court has to be in one of the official languages of Switzerland (i.e., German, French, Italian).

41 Cf. Art. 100(1) BGG.

42 Cf. Art. 100(1) BGG which establishes the relevant deadline of 30 days for challenging the award; for detail on the challenge proceedings before the Supreme Court, cf. the above commentary of Arroyo (Chapter 2, Part II), paras. 6–54 at Art. 191 PILS.

43 BGer. 4A_304/2013 para. 2.1.

44 Mavromati/Reeb, Art. R46, para. 32.

45 Cf. Art. 103(1) BGG.

46 Rigozzi, *JIDS 2010*, p. 230.

47 Rigozzi, *JIDS 2010*, p. 231.

C. Special Provisions Applicable to the Appeal Arbitration Procedure (Arts. R47 – R59)

Article R47: Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

I PURPOSE OF THE PROVISION

Article R47 is the first provision of Section C of the CAS arbitration rules, entitled "Special Provisions Applicable to the Appeal Arbitration Procedure". Its main purpose is to *set out the scope of application of the CAS Appeal Arbitration Procedure* (hereinafter also referred to as "the [CAS] appeals procedure"). In commenting this provision, it is useful to start by considering the genesis of Art. R47 *et seqq.* of the Code (II.) and outlining the main features of the CAS appeals procedure (III.). The scope of application of Art. R47 (IV.), as well as the threshold issues of the requirement of prior exhaustion of legal remedies (V.) and disputes on CAS jurisdiction (VI.) should then be addressed in some detail. The specific case of appeals against awards rendered by the CAS acting as a first instance tribunal in accordance with Art. R47(2) of the Code also deserves to be discussed briefly (VII.). 1

II HISTORICAL BACKGROUND

Originally, the CAS arbitration rules did not contain a specific set of provisions regarding appeals proceedings. In 1991, the CAS published its first *Guide to Arbitration*, which contained several *model arbitration clauses*, including the following clause *to be inserted in sports federations' statutes or regulations*: "Any dispute arising from the present Statutes and Regulations of the […] Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts […]".[1] The Fédération équestre internationale (FEI) was the first sports-governing body to include a clause of this type in its statutes, with the almost immediate result that a significant number of FEI decisions were appealed before the CAS. 2

Thus, it was probably no coincidence that the first CAS award to be brought before the Swiss Federal Supreme Court in setting aside proceedings concerned an FEI 3

1 Reeb, *CAS Digest III*, p. xxix.

dispute.[2] In this decision, which has since become known as the *Gundel* case, the Supreme Court acknowledged (i) that the *decisions of an international federation incorporated in Switzerland could be validly made subject to arbitration* (in lieu of being submitted to the courts at the seat of the relevant federation, as provided in Art. 75 CC) by the inclusion of a clause to that effect in the federation's statutes, and (albeit with some reservations) (ii) that CAS arbitration, under the then applicable rules, was, as a matter of principle, sufficiently independent from the sports federations to qualify as "true arbitration" under Swiss law.[3]

4 The combined effect of *Gundel* and of the increasing number of CAS proceedings (due to the fact that many other important sports-governing bodies had in the meantime followed the FEI's example by including a CAS arbitration clause in their regulations), induced the IOC to launch a *revision of the CAS arbitration rules*. The so-called "1994 reform", which resulted in the enactment of what is now known as the CAS Code, was thus the perfect opportunity not only to address the reservations expressed by the Swiss Supreme Court in *Gundel*, but also to enact a specific set of rules to govern arbitrations arising from appeals against the decisions issued by sports-governing bodies, i.e., Arts. R47-R70 of the CAS Code. This set of rules, which are also commonly referred to as the "appeal arbitration rules", or "*CAS appeals proceedings", turned out to be the CAS's greatest success*. According to the most recent statistics, more than 80% of CAS cases are conducted as appeals proceedings pursuant to Art. R47 *et seqq.* of the Code.[4]

5 The wording of Art. R47 remained unchanged until 2004, when the scope of application of the appeals procedure was clarified by replacing the words "decision of a disciplinary tribunal or similar body of a federation, association or sports body" with the current phrase "decision of a federation, association or sports-related body", thus stating unambiguously that CAS appeals proceedings *are available to challenge all kinds of decisions issued by sports-governing bodies*, and *not only disciplinary decisions*. In practice, however, disciplinary disputes still count for the vast majority of cases heard by the CAS under the appeals procedure.

6 By the same token, a second paragraph was added to Art. R47 in the 2004 revision to take into account the practice that had developed in Australia, where anti-doping and selection disputes were heard by a local branch of the CAS in the first instance, with a possibility to appeal to the "international" CAS in Lausanne. Today, the provision according to which "an appeal may be filed with the CAS *against an award rendered by the CAS acting as a first instance tribunal*" plays an important role, in particular as it allows the parties to anti-doping disputes in the United States to challenge before the CAS the awards rendered by the so-called "North American Court of Arbitration for Sport", under the auspices of the American Arbitration Association.[5]

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2 BGer. 4P.217/1992 (*Gundel v. FEI*), BGE 119 II 271, *ASA Bull. 1993*, p. 398; translated in: *Mealey's I.A.R.*, Issue 10, October 1993, p. 12, with a comment by Jan Paulsson.

3 Cf. the Supreme Court's decision in *Gundel*, BGE 119 II 280 para. 3.b, where the Court noted, however, that there was room for improvement with respect the then existing structural and financial links between the CAS and the International Olympic Committee (IOC).

4 According to the latest available statistics, there were, up to 31 December 2016, 790 ordinary arbitrations and 4'053 appeals arbitrations registered in the CAS roll.

5 Weston, *GA J. Int'l & Comp. L.* 2009, pp. 106–109 (an electronic version of the paper is available at: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1524323 >). For a recent case, see, e.g. CAS 2016/A/4371, *Robert Lea v. USADA*, Award of 4 May 2016. Cf. also below, para. 46.

III SALIENT FEATURES OF THE CAS APPEALS PROCEDURE

The central characteristic of the CAS appeals procedure is its *expedited nature*. In appeals proceedings, *each procedural step is to be accomplished within a specified time limit*, which should allow the CAS to issue the "operative part of the award […] within three months after the transfer of the file to the Panel".[6] According to the rules, the *constitution of the panel* should not take longer than a month: the appellant appoints an arbitrator in the statement of appeal;[7] the respondent is then required to appoint an arbitrator within a time limit of ten days following the notification of the statement of appeal,[8] failing which the Division President "shall make the appointment";[9] and finally, the chair will be appointed directly by the Division President, without the parties being consulted, precisely in order to avoid delays.[10] The rules further provide that the *exchange of written submissions* should be completed approximately within a month from the filing of the statement of appeal: the appeal brief shall be filed within ten days from the expiry of the time limit for appeal and the Respondent's answer shall be filed within twenty days from receipt of the appeal brief.[11] All these time limits can however be (and often are) extended upon the request of either or both parties.[12] In practice, the main delays occur after the exchange of written submissions, as in the vast majority of cases the *Panel will hold a hearing*,[13] and finding a suitable date for the CAS, the members of the panel and the parties is not an easy task. Even though the CAS increasingly tends to ignore the parties' (and/or their attorney's) constraints in terms of availability, the fact remains that the most experienced arbitrators tend to be very busy people and it is thus highly unlikely that a hearing can be scheduled right away. The arbitrators' busy schedules also have an impact on the timing of *deliberations and the drafting of the award*.[14] Despite the increasingly frequent appointment of ad hoc clerks to assist CAS panels,[15] in the vast majority of cases, the Division President will have to grant one or more extensions of the time limit for rendering the award.[16] Inevitably, 7

6 Art. R59(5).
7 Cf. Art. R48(1).
8 In CAS arbitrations, the file is transferred to the arbitrators once (i) the panel is constituted and confirmed by the Division President, (ii) the CAS Court Office has issued the so-called "Notice of Formation" of the panel and, (iii) if applicable, the requested advance of costs has been paid (cf. Art. R40.3). The constitution of the panel can take longer when several respondents have to agree on a joint appointment and thus need more time to conduct the necessary consultations.
9 Cf. Art. R53.
10 Paradoxically, however, the appointment of the chair and the confirmation of the panel by the Division President often take significantly longer than the other steps in the constitution of the panel.
11 Cf. Arts. R51(1) and R55(1).
12 Cf. Art. R32(2).
13 As there will be no further exchange of submissions (cf. Art. R56(1) CAS Code), the panel will generally be quite reluctant to decide that *"it deems itself to be sufficiently well informed […] not to hold a hearing"* (cf. Art. R57(2)).
14 One may wonder whether there have been abuses of the possibility to ask for extensions of the time limit to render the award, as the ICAS has recently decided to amend Art. R35 in order to allow for the removal of an arbitrator not only when he or she refuses to, or is prevented from, carrying out his or her duties or if he or she fails to fulfill such duties pursuant to the CAS Code, but also – this being the new provision – when he or she does not do so "within a reasonable time".
15 Cf. Art. R54(4).
16 Cf. Art. R59(5).

the fact that the awards must also be scrutinized by the Secretary General[17] further contributes to the delays.

8 Originally, CAS appeals proceedings were meant to be totally *free of charge*. In 2004, the scope of the "free of charge" principle was limited to appeals against decisions that were both disciplinary and international in nature. In 2012, this scope was further restricted by the qualification that proceedings were to be free of charge *only if the disciplinary decision under challenge had been rendered by an "international federation"*.[18] The 2013 revisions to the Code have added yet another caveat to this principle, by providing that although as a rule appeals against disciplinary decisions rendered by international sports federations will remain free of charge, "[i]f the circumstances so warrant" the President of the Appeals Division may impose the payment of the arbitration costs on the parties. As last amended in this respect in 2013, the Code provides two examples of circumstances where the President might exercise this discretion, i.e. the "predominant economic nature of a disciplinary case" and where the "federation which has rendered the challenged decision is not a signatory to the Agreement constituting the ICAS".[19]

9 Accordingly, in *cases where the President deems that this is "warranted" and in all other cases which do not involve an appeal against a disciplinary decision of an international sports federation, the parties will have to pay an advance on costs* before the arbitration is actually initiated. As the amount of the advance can be substantial,[20] it is submitted that, as discussed under Art. R64, the availability of a legal aid system is of paramount importance. Absent such a system, indigent athletes, who did not voluntarily agree to CAS arbitration, could validly claim that they are deprived of their fundamental right of access to justice.[21]

10 Another issue is whether *CAS appeals proceedings are confidential*. Art. R59(6) specifically allows for the *publication of the award* and/or the issuance of a press release only if the parties do not agree otherwise, and its 2013 version clarifies that "[i]n any event, the other elements of the case record shall remain confidential". This is also consistent with the principle that the hearings are held "in camera unless the parties agree otherwise"[22] and the general confidentiality obligation to which all CAS arbitrators are subjected.[23] Accordingly, it is submitted that the first sentence of Art. R43 – which provides that "[t]he parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute

17 Cf. Art. R59(2).
18 Cf. Art. R65.
19 Cf. Art. R65.4. This Agreement provides for the financing of the ICAS by the various constituents of the Olympic Movement, but it is not known which federations did sign it.
20 Cf. Art. R64.2.
21 As noted in the previous edition of this commentary (Rigozzi/Hasler, at Art. R47, para. 9), the increasing professionalization of athletes' representation could mean that, instead of simply dropping their cases, as they would in the past, indigent athletes were likely to start bringing their actions before the state courts by arguing, in response to any jurisdictional challenge, that the arbitration clause contained in the sports regulations was inoperative for costs reasons. It remains to be seen whether the legal aid system based on the recently adopted CAS Legal Aid Guidelines (September 2013), which are examined in the commentary to Art. R64 below, will be capable of avoiding such situations.
22 Art. R57(2) at the end.
23 Art. S19(1) of the CAS Code.

or the proceedings without the permission of CAS"[24] – is also applicable to CAS appeals proceedings. In our opinion, the same obligation should apply to the CAS as the arbitration institution, even if there is no express provision to this effect in the CAS Code.[25] Thus, we believe the CAS should refrain, for instance, from issuing pre-award press releases without the consent of the parties, even if the 2017 addition of Art. R52(3) now technically allows that.[26]

IV THE SCOPE OF APPLICATION OF THE CAS APPEALS PROCEDURE

An arbitration shall be conducted according to the CAS appeals procedure only if there exists a CAS arbitration agreement covering challenges against the relevant sports-governing body's decisions (A.) and if the dispute at issue actually originates from such a decision (B.). 11

A Arbitration Agreement to Challenge Sports-Governing Bodies' Decisions

Most of the awards rendered under the CAS appeals procedure contain, in their section dedicated to the legal analysis of the case, an introductory and relatively "standardized" paragraph setting out the principle that, in accordance with the wording of Art. R47 and well-established CAS case law, "for the CAS to have jurisdiction in a matter it is necessary that either [(i)] the parties have expressly agreed to it or [(ii)] the statutes or regulations of the body issuing the decision provide for an appeal before the CAS".[27] The second scenario is, obviously, the more frequent one in practice, and we will therefore discuss it first. 12

1 Arbitration Clause in the Relevant Sports Regulations

According to Art. R47(1), an "appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide". While this wording refers to the arbitration clause contained in the statutes or regulations of the governing body that actually issued the decision appealed against (a.), the agreement to arbitrate can also arise from an arbitration clause contained in the regulations of another sports governing body (b.). 13

24 The breach of this obligation can result in a claim for damages and, for the arbitrators only, in the sanctions provided for by Art. S19(2) of the CAS Code.

25 By way of comparison, the Swiss Rules do provide that the same general undertaking as to the confidentiality of the proceedings also applies to the arbitral institution and its governing bodies and staff (cf. Art. 44 Swiss Rules).

26 This strict approach should apply irrespective of whether the case is a high profile matter or not and regardless of any pressure by the medias and related interests. An exception should be made only if the parties themselves have already breached their obligation of confidentiality by "leaking" information to the media and any such leaks require a clarification by the CAS. In any event the parties must be consulted first, in particular to take into account the interests of the party that did not breach its confidentiality obligation and/or is affected by the leaks.

27 This wording is quoted from CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 65, confirmed by the Swiss Supreme Court (see BGer. 4A_404/2010).

a Regulations of the Sports-Governing Body that Issued the Decision under Appeal

14 The arbitration agreement does not necessarily have to make an express reference to appealable "decision(s)" or to the "CAS appeals procedure". An arbitration clause referring "any dispute" to the CAS is sufficiently broad to cover disputes concerning decisions rendered by an adjudicative or any other decision-making instance of the sports-governing body that has enacted the regulations containing such clause. That said, a provision merely "recognizing" the CAS is not sufficient to assert CAS jurisdiction under Art. R47 CAS Code,[28] unless, as the FIFA Statutes do, it also prohibits all parties subject to the regulations from bringing disputes before the state courts.[29] In practice, in the vast majority of cases CAS jurisdiction is based on either (i) a *special arbitration clause contained in the regulations governing the merits of the dispute* (for instance, in the anti-doping regulations that the sports-governing bodies must enact to implement the WADA Code)[30] or (ii) a more general arbitration clause (often contained in the statutes or in the regulations concerning a federation's internal proceedings).

15 For instance, the Doping Control Rules of the International Swimming Federation (FINA) provide that "[i]n cases arising from participation in an International Competition or in cases involving International- Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court".[31] This clause only applies to decisions made under the Doping Control Rules and it *prevails, as a lex specialis and in as far as such decisions are concerned, over the general arbitration clause* contained in the FINA Constitution, which stipulates that "[d]isputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne […]".[32] In case of discrepancy, for instance, with respect to the time limit for appeal or the parties authorized to bring such an appeal, the specific clause will prevail over the general one. Thus, in our example, WADA will be allowed to appeal against a decision issued

28 CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 73. All national football federations are required to include such a "recognition clause" in their statutes pursuant to Art. 59(1) and (3) of the FIFA Statutes. Cf., e.g., Art. 10 (as it was then) of the Statutes of the Saudi Arabian Football Federation (SAFF) according to which the clubs, in their capacity as members of the SAFF, "undertake to recognize the dispute resolution chamber recognized by the [SAFF] and to recognize the Court of Arbitration for Sport (CAS) in Lausanne" (*CAS* 2011/A/2472, *Al- Wehda v. SAFF*, Award of 12 August 2011, para. 46).

29 Art. 59(2) FIFA Statutes.

30 Like all other provisions of the World Anti-Doping Code, Art. 13.2.3 of the WADA Code does not have direct effect (Adolphsen, *CAS Bull. 2010/1*, p. 3 and *passim*). Unless properly incorporated in the relevant sports regulations, Art. 13.2.3 WADC cannot constitute in and of itself a valid arbitration agreement (cf. CAS 2006/A/1190, *WADA v. Pakistan Cricket Board & Akhtar & Asif*, Award on Jurisdiction of 28 June 2006, where the CAS dismissed an appeal by WADA in a case where an international federation had failed to meet its obligation to incorporate a rule corresponding to Art. 13.2.3 WADC in its own regulations).

31 FINA Doping Control Rules, available at < https://www.fina.org/content/doping-control-rules > , DC 13.2.1.

32 FINA Constitution, available at < https://www.fina.org/content/constitution > , C26 – Arbitration.

by the FINA Doping Panel even if it is not a "Member of FINA" within the meaning of the arbitration clause contained in the FINA Constitution.

b Regulations of Another Sports-Governing Body

16 According to the well-established case law of the Swiss Federal Supreme Court concerning so-called "specific" arbitration agreements by reference,[33] it is generally accepted that a provision in the regulations of the sports-governing body that has issued the decision under appeal *specifically referring to a CAS arbitration clause contained in the regulations of another governing body* is sufficient to establish CAS jurisdiction: in such a case, the arbitration clause is deemed to have been validly incorporated in the regulations of the governing body that issued the decision.

17 CAS jurisdiction to hear an appeal is more controversial when the regulations of the sports-governing body that issued the decision under appeal do not contain (an arbitration agreement or) a specific reference to an arbitration agreement contained in the regulations of another governing body, but *merely refer to the regulations of another sports-governing body (which contain a CAS arbitration agreement in global terms)*. According to the Swiss Supreme Court's case law, the CAS should assert jurisdiction only if, in light of the circumstances of the case, the global reference to the regulations should be understood as an acceptance of the arbitration clause they contain. That said, when the applicable regulations specify that the athletes are also "bound" by the regulations of the other governing body, the Supreme Court has held (in the *Dodô* case, where the reference was to FIFA's regulations) that, consistent with the "liberal approach" followed in its case law dealing with arbitration agreements concluded by reference, a "general reference to the FIFA Rules […] is sufficient in order for the jurisdiction of the CAS to be established in the light of R47 of the Code".[34]

18 The fact that in the *Dodô* case the Swiss Supreme Court stated that its case law is "to the effect that a global reference to an arbitration clause contained in [a Federation's statutes] is valid and binding"[35] should not mean that any dispute involving parties somehow bound by the statutes of an international federation containing a CAS arbitration clause can be brought before the CAS. In the *Dodô* case this was so because the FIFA Statutes explicitly provide for CAS arbitration with respect to the kind of doping dispute that had to be decided. Indeed, Art. 58(5) (then Art. 63(6)) of the FIFA Statutes provides that "WADA is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by the confederations, member associations [i.e. the national federations] or leagues". The validity of the global reference was particularly clear in that case, as it was *a*

33 Cf. Müller/Riske, above commentary on Art. 178 PILS (Chapter 2, Part II), paras. 61–66.

34 Cf. BGer. 4A_460/2008 para. 6.2, *ASA Bull. 2009*, pp. 544–545; translated in *Swiss Int'l Arb.L.Rep 2009*, pp. 52–53 (referring, inter alia, to BGE 133 III 235 para. 4.3.2.3, where the Supreme Court stated that its case law with respect to arbitration agreements by reference is "based on a liberal approach and a bias [in favor of] formal validity"). In this case, Art. 1(2) of the [Brazilian FA]'s Statutes provide[d], inter alia, that the athletes affiliated to [it] must comply with the FIFA Regulations (cf. CAS 2007/A/1370 & 1376, *FIFA& WADA v. CBF, STJD & Dodô*, Award of 11 September 2008, para. 72). See also CAS 2014/A/3474, *Clube de Regatas do Flamengo v. CBF & STJD*, Award of 5 October 2015, paras. 83–110.

35 BGer. 4A_460/2008 para. 6.2, *ASA Bull. 2009*, pp. 544–545; translated in *Swiss Int'l Arb.L.Rep 2009*, pp. 52–53.

doping dispute, and no athlete can reasonably contend that he or she could ignore the existence of the arbitration clause in the regulations referred to.[36]

19 By way of contrast, the Supreme Court has upheld the CAS's view that Art. 63(1) of the FIFA Statutes (now Art. 58(1)), according to which "appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS […]" did not constitute an "arbitration clause per se for national disputes".[37] The fact that *Art. 59 (then Art. 64) of the FIFA Statutes expressly requires that all national federations insert an arbitration clause in their regulations*[38] obviously rules out that the arbitration agreement can be concluded just through a general reference to the FIFA Statutes (as the latter specifically require an arbitration clause at the level of national regulations). A national federation's failure to comply with the obligation set out in the FIFA Statutes is likely to constitute a violation of those Statutes, but cannot automatically create an arbitration agreement by reference.[39] The so-called pro-arbitration bias of the Swiss Supreme Court's case law does not allow to fill the [jurisdictional gap[s]] of the applicable regulations, even when such gaps would create a denial of justice.[40]

c Scope of the Arbitration Agreement Contained in Sports Regulations

20 According to Art. R47 CAS Code, an appeal may be filed with CAS (in other words, the CAS has jurisdiction to hear an appeal) against a decision of a sports-governing body "if the statutes or regulations of the said body so provide". This means that the *sports-governing bodies are free to determine which kinds of decisions can be appealed to the CAS*. The most notable example is Art. 58(3) of the FIFA Statutes, which makes it clear that "CAS […] does not deal with appeals arising from: (a) violations of the Laws of the Game [and] (b) suspensions of up to four matches or up to three months (with the exception of doping decisions) […]". Decisions explicitly excluded from CAS jurisdiction *ratione materiae* cannot be reviewed by the CAS.

21 The *arbitration agreement can also determine who is entitled to file an appeal*. Again, the answer should be sought in the applicable regulations. For instance, all the

36 Indeed, the jurisdiction of the CAS in doping matters concerning international competitions and/or international level athletes is mandatory for all signatories of the WADA Code (Art. 13.2.1 WADC) and is also undoubtedly one of the "principles of the [WADA] Code" that the States parties to UNESCO's International Convention against Doping in Sport (the UNESCO Convention, SR 0.812.122.2) have undertaken to "commit to" in accordance with Art. 4 of the Convention (cf. also BGE 129 III 445 para. 3.3.3.3).

37 CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 76.

38 According to this provision, the clause to be inserted must "stipulate[e] that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law" and that "instead" such disputes "shall be taken to a duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS".

39 Of course, the prohibition from resorting to state courts would be equally inoperative, and the decisions made by the national federation should be challenged according to the relevant provisions of the applicable national law. The fact that the local legislation provides that a specific sport decision cannot be appealed in the state courts, is not sufficient, *per se*, to establish CAS jurisdiction.

40 CAS 2008/O/1694, *P. v. BFU*, Award of 5 June 2009, para. 4.23.

anti-doping regulations based on the WADA Code contain a provision (implementing Art. 13.2.3 WADC) setting out an exhaustive list of who may be considered as a party and identifying who has the right to appeal to the CAS – namely

> *"(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered [i.e. the relevant federation or anti-doping agency]; (c) the relevant International Federation [if the proceedings were dealt with at national level]; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder [if the proceedings were dealt with by an international or national federation]; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA".*

The athlete's competitors are not listed and can thus not bring an appeal to CAS, even if they have a manifest interest in the dispute.[41] Thus, if the silver medallist files an appeal against the decision of the IOC not to disqualify the gold medallist despite the presence of a prohibited substance in his body, the CAS will not be in a position to hear the appeal.

Even if the terminology is often confusing,[42] the issue of the *scope of the arbitration agreement ratione personae* must be *distinguished* from that of *standing to appeal (locus standi;* also referred to as standing to sue (*légitimation active; Aktivlegitimation*), or where relevant, standing to be sued (*légitimation passive; Passivlegitimation*)*)*.[43] For instance, Art. 62(2) of the UEFA Statutes provides that "only parties directly affected by a decision may appeal to the CAS".[44] All the clubs participating in the UEFA Champions League are bound by the CAS arbitration agreement contained in the UEFA Statutes.[45] Accordingly, the CAS will have jurisdiction to hear appeals brought against UEFA decisions by any of the participant clubs, but it will dismiss 22

41 Cf., e.g., CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 119.

42 Cf., e.g., CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 119, stating that the "list of persons or organizations having standing to appeal 'does not include Athletes, or their federations, who might benefit from having another competitor disqualified'."

43 Cf., e.g., CAS 2013/A/3140, *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, Award of 10 October 2013, para. 8.3: "[i]n principle, standing to sue or standing to appeal is recognized if a person appealing against a certain decision has an interest worthy of protection, i.e. a sufficient interest in the matter being appealed" (cf. CAS 2008/A/1674; CAS 2010/A/2354). In other words, an appellant has to demonstrate that he or she is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature at stake" (with reference to cf. De La Rochefoucauld, CAS Bull. 2011/1, p. 13).

44 The arbitration agreement with respect to appeals against FIFA decisions does not contain any limitation as to the parties who can bring an appeal. CAS jurisprudence considers that there is a presumption that the standing to appeal to CAS is the same as the standing to appeal in the lower instances: cf., e.g., CAS 2008/A/1658, *SC Fotbal Club Timisoara v. FIFA & RFF*, Award of 13 July 2009, para. 111, reported in *CAS Bull. 2010/1*, pp. 99–100 applying *per analogiam* Art. 126 (now Art. 119) of the FIFA Disciplinary Code, which allows internal appeals to be filed with the FIFA Appeal Committee by "anyone who is affected and has an interest justifying amendment or cancellation of [a] decision [issued by a lower FIFA internal instance]".

45 Art. 83, Regulations of the UEFA Champions League, 2015/16 Season.

the appeal for lack of standing to appeal if the appellant club is not directly affected by the decision at issue.[46]

2 Specific Arbitration Agreement

23 In the absence of an arbitration clause in the relevant sports regulations, the CAS has jurisdiction to hear an appeal against a decision pursuant to Art. R47 *et seqq.* of the Code only if "the parties have concluded a specific arbitration agreement". The instances in which a sports-governing body has explicitly accepted CAS jurisdiction on such an *ad hoc* basis are rare in disciplinary matters, as a *governing body will be reluctant* to allow an individual party (athlete or club) to arbitrate despite the absence of an arbitration clause in its regulations, knowing that other parties will then ask for a similar treatment.

24 On the other hand, it is increasingly the case that, to reduce the risk of unnecessary disputes about jurisdiction, sports-governing bodies *request all athletes to sign a specific arbitration agreement as a precondition for participating in the sport* (for instance, in a so-called "licence")[47] or in a given event or competition (in particular

46 *"The 'directly affected' standard contained in the UEFA Statutes is met when the association disposes in its measure/decision not only of the rights of the addressee [of the measure/decision] but also of those of [a] third party"* (CAS 2008/A/1583, *Benfica v. UEFA & FC Porto* & CAS 2008/A/1584, *Vitória Guimarães v. UEFA & FC Porto*, Award of 15 July 2008, para. 31, and the awards referred therein, CAS 2002/O/373; TAS 2006/A/1082–1104; CAS 2007/A/1278 & 1279). In this respect, CAS has made it clear that: (i) where a third party is affected because it is a competitor of the addressee of the measure/decision – unless otherwise provided by the association's rules and regulations – the third party does not have a right of appeal; and (ii) effects that ensue only from competition are only indirect consequences of the measure/decision (cf. again CAS 2008/A/1583, *Benfica v. UEFA & FC Porto* & CAS 2008/A/1584, *Vitória Guimarães v. UEFA & FC Porto*, Award of 15 July 2008, para. 31). According to the latest CAS case law, the "directly affected" standard is not met when the club merely has a "unique position" compared to other competitors (for example because it finished runner up behind a club that has been disqualified). The Club must show that it would automatically replace the disqualified club in the relevant competition (CAS 2015/A/4151, *Panathinaikos FC v. UEFA & Olympiakos FC*, Award of 26 November 2015, paras. 134–149). Furthermore, the CAS has held that the fact that a club or a national federation is the victim of the wrongful conduct by another party does not in and of itself confer standing to appeal, even if this means that UEFA's alleged laxity in prosecuting misconduct would remain unchecked by CAS (CAS 2015/A/3874). As noted in the previous edition of this commentary (Rigozzi/Hasler (2013), at Art. R47, para. 22, footnote 42), whether standing to appeal is a condition for admissibility or an issue pertaining to the merits of the dispute was long a controversial question in the CAS case law (cf. also De La Rochefoucauld, *CAS Bull. 2011/1*, p. 13). According to the more recent jurisprudence and in line with the Swiss Federal Supreme Court's case law, standing to appeal is an issue pertaining to the merits (cf., e.g., CAS 2012/A/2906, *Alain Geiger v. EFA & Al Masry Club*, Award of 12 February 2013, para. 78, with reference to BGer. 4A_79/2010; CAS 2013/A/3140, *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, Award of 10 October 2013, paras. 8.09–8.15; CAS 2013/A/3417, *FC Metz v. NK Nafta Lendava*, Award of 13 August 2014, para. 57, both with reference to BGE 128 III 50).

47 For instance, in order to participate in competitions organized or supervised by the UCI, each professional rider must sign a "UCI Licence" prepared by his national federation, which contains inter alia the following wording: *"I hereby undertake to respect the constitution and regulations of the International Cycling Union, its continental confederations and its national federations. […] I accept the Court of Arbitration for Sport (CAS) as the sole competent body for appeals in [disciplinary cases] and under the conditions set out in the regulations"* (UCI Cycling Regulations, available at < http://www.uci.ch > , Part I: General Organisation of Cycling as a Sport, Art. 1.1.023).

in what is often referred to as an "entry form").[48] The signing of such an undertaking clearly constitutes a valid arbitration agreement.[49]

3 The Validity of Arbitration Agreements in Sports

As the arbitration agreement is included in the sports regulations or in a written undertaking, the requirement of *written form* within the meaning of Art. 178(1) PILS is not problematic in CAS appeals arbitration.[50] 25

The Swiss Federal Supreme Court has held that in case of a *global reference to another sports regulations containing an arbitration clause*, the problem moves from the issue of form to that of consent, and must be resolved according to the "principle of confidence" ("*principe de la confiance*"), taking into account all relevant circumstances.[51] As already discussed, the Supreme Court has taken a "liberal approach", meaning that it will uphold CAS jurisdiction when the arbitration clause is not unusual and provided that it is clearly meant to govern the dispute at hand. In a recent decision, the Court has held that CAS arbitration agreements must be considered as "usual within the branch of sport" ("*Branchentypisch*"), thus practically establishing a presumption in favor of the validity of CAS arbitration agreements by reference in sports matters.[52] 26

The main issue in terms of validity arises from the undisputable fact that arbitration agreements contained in sports regulations or subscribed as a precondition for participating in specific competitions are not consensual in nature. An athlete has no choice but to accept the sports regulations (containing the arbitration agreement) or to subscribe to a specific arbitration agreement (whether by requesting a licence or signing an entry form) if he or she wants to participate in the sport or in a tournament or other event. However, to the extent that the contemplated procedure and the arbitration institution overseeing it are sufficiently independent to qualify as a "true arbitration",[53] such *lack of consent does not per se invalidate the arbitration agreement*. Thus, the Swiss Supreme Court has felt compelled to note that given the independence of the CAS, a CAS arbitration agreement contained in a document that a tennis player must sign in order to participate in ATP events is not invalid despite the lack of consent. According to the Supreme Court, this solution "obeys a certain logic […] favouring the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality".[54] 27

48 Thus, when entering the Olympic Games, athletes must sign a form including the following wording: *"I also agree that any dispute arising on the occasion of or in connection with my participation in the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration"* (cf. by-law 6 to Rule 45 of the Olympic Charter).

49 CAS 2010/A/2070, *Antidoping Schweiz v. Ullrich*, Award of 30 November 2011, paras. 38–39 (a case decided by reference to the (now repealed) *Concordat*, which set forth stricter requirements than the PILS with respect to the formal validity of arbitration agreements).

50 For a commentary on Art. 178 PILS, see Müller/Riske, Chapter 2 (Part II) above, especially paras. 61–66.

51 BGer. 4C.44/1996 para. 3c, reproduced in: *CAS Digest I*, pp. 589–590.

52 BGer. 4A_428/2011 para. 3.2.3.

53 Cf. above, para. 3.

54 BGE 133 III 235 (*Cañas v. ATP*) para. 4.3.2.3, English translation in *Swiss Int'l Arb.L.Rep 2007*, pp. 65–99, referring, as to the independence of the CAS, to BGE 129 III 445 (*Lazutina*) para.

28 *Arbitrability* is generally unproblematic in CAS appeals arbitrations, since both employment and disciplinary disputes are deemed to involve matters "of financial interest" within the meaning of Art. 177(1) PILS.[55]

B The Concept of "Decision"

29 In defining the concept of decision within the meaning of Art. R47, the CAS has relied upon the *relevant principles of Swiss administrative law*.[56] The form and/or denomination of the challenged act are not determinative,[57] what matters is whether the latter contains a ruling affecting the parties' legal positions.[58] For instance, a simple letter sent by an employee of a sports governing body qualifies as a decision within the meaning of Art. R47 CAS Code if it is aimed at "resolv[ing a legal situation] in an obligatory and constraining manner".[59]

30 The fact that the challenged ruling is not reasoned is (subject to a contrary provision in the applicable rules)[60] of no consequence with respect to its characterization as a "decision" within the meaning of Art. R47.[61] Since CAS appeals entail a *de novo* review of the case, the reasons for the challenged ruling are not decisive for the

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3.3.3.3. This view, however, is not uncontroversial, as shown, for instance, by the critical views of Prof. Andreas Bucher (cf. in particular his commentary of Chapter 12 PILS, available at http://www.andreasbucher-law.ch/NewFlash/bis.html, at Art. 178 PILS, pp. 15 (update dated 4 October 2016)).

55 BGer. 4P.230/2000 (*Roberts c. FIBA*), *ASA Bull. 2001*, p. 523. Cf. also, e.g., TAS 2013/A/3250, *Belgian Cycling Company v. Philippe Gilbert*, Award of 25 February 2014, paras. 10.9–10.15, recalling that under the Swiss Supreme Court's case law, the sole exception to the arbitrability of employment disputes (and other disputes involving matters of "financial interest") in international arbitration is where the applicable foreign law provides for the exclusive jurisdiction of the state courts over the dispute and the relevant provision(s) pertain(s) to public policy within the meaning of Art. 190(2)(e) PILS (cf. BGer. 4A_654/2011 para. 3.4).

56 Cf., e.g., CAS 2007/A/1396&1402, *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 6.14, quoting CAS 2009/A/1869, *FC La Chaux-de-Fonds v. SFL*, para. 59.

57 Cf., e.g., CAS 2007/A/1251, *FC Aris Thessaloniki v. FIFA*, Award of 27 July 2007, paras. 3–6. Cf. also Mavromati/Reeb, Art. R47, para. 13.

58 Cf., e.g., CAS 2012/A/2854, *Rolla v. US Città di Palermo & FIFA*, Award of 26 March 2013, CAS Bull. 2013/2, pp 50–53, with further references; CAS 2012/A/2750, *Shakhtar Donetsk v. FIFA & Real Zaragoza SAD*, Award of 12 October 2012, CAS Bull. 2013/1, pp. 41–42; CAS 2008/A/1633, *FC Schalke 04 v. CBF*, Award of 16 December 2008, para. 10, and the references cited therein; cf. also CAS 2007/A/1355, *FC Politehnica Timisoara SA v. FIFA & RFF & Politehnica Stintia 1921 Timisoara Invest SA*, Award of 25 April 2008, paras. 5–16. Cf. also Mavromati/Reeb, Art. R47, para. 14.

59 CAS 2005/A/899, *FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.*, Award of 15 July 2005, para. 59. Cf. also Mavromati/Reeb, Art. R47, and the examples given in paras. 15–22. More recently, cf., e.g., CAS 2015/A/3920, *FRMF v. CAF*, Award of 17 November 2015, paras. 8.8–8.14, referring to CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 9.1, with numerous further references, and CAS 2015/A/4063, *WADA v. CADC & Remigius Machura Jr.*, Award of 5 November 2015, paras. 54–61. For examples of cases where the panel found that there was no appealable decision, cf., e.g. CAS 2013/A/3409, *FAHB et consorts v. IHF*, Award of 28 August 2014, paras. 120–130; CAS 2015/A/4213, *Khazar Lankaran Football Club v. FIFA*, Award of 5 January 2016, paras. 48–60.

60 See, e.g., Art. 15 of the FIFA Rules Governing the Procedures of the PSC and the DRC, Art. 116 of the FIFA Disciplinary Code (quoted in footnote 63 below).

61 See, e.g., CAS 2009/A/1781, *FK Siad Most v. Clube Esportivo Bento Gonçalves*, Award of 12 October 2009, reported in *CAS Bull. 2010/1*, p. 113, and the references therein, and CAS 2011/A/2436, *Associaçao Académica de Coimbra – OAF v. Suwon Samsung Bluewings FS*, Award of 25 May 2012, para. 4.

purposes of the appeal.[62] That said, if the applicable rules provide that the decision under appeal can be issued first in non-reasoned form, with the reasons to be provided subsequently, *the appealable decision should be the reasoned decision*. Nevertheless, it is submitted that in urgent cases the party affected by an unreasoned decision shall not be prevented from filing a statement of appeal against such decision, without waiting for the issuance of the reasons,[63] for the purposes of seeking its (immediate) stay pursuant to Arts. R48(1), fifth bullet point, and R37 of the Code.[64]

V THE "EXHAUSTION OF INTERNAL REMEDIES" REQUIREMENT

Article R47(1) provides that a sports decision can be appealed before the CAS according to the appeals procedure only "*if the Appellant has exhausted the legal remedies available to him prior to the appeal*". In other words, the decision under appeal must be final. **31**

A When is a Decision Final?

The answer to this question should be sought in the applicable sports regulations. Unless the applicable regulations expressly state that the decision at hand is final, one must ascertain whether they provide for any further internal recourse against that decision. The requirement of the *exhaustion of internal remedies only applies to remedies which are mandatory under the applicable regulations*: discretionary, optional or extraordinary remedies, such as, for instance, applications for early **32**

62 Cf. Art. R57; and, e.g., CAS 2011/A/2436, *Associaçao Académica de Coimbra – OAF v. Suwon Samsung Bluewings FS*, Award of 25 May 2012, paras. 16–23.

63 It should be noted however that the CAS's position is different in relation to the FIFA rules stipulating that decisions can be rendered without reasons in certain cases, specifically Arts. 15 of the FIFA Procedural Rules and 116 of the FIFA Disciplinary Code (FDC). Art. 116 FDC provides that "1. The [FIFA] judicial bodies may decide not to communicate the grounds of a decision and instead communicate only the terms of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the terms of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding. 2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal, where applicable, begins upon receipt of this motivated decision". According to some recent CAS decisions, this provision means that i) an appeal filed prior to the communication (upon request) of the reasons for the decision is premature and must therefore be dismissed, and ii) absent a request for reasons within the applicable time limit, the decision cannot be appealed (cf., e.g., CAS 2012/A/2961, *Khaled Adenon v. FIFA*, Award of 20 March 2013, paras. 110–132; and CAS 2011/A/2439, *FA Thailand v. FIFA*, Award of 17 June 2011). With regard to the similar rule set out in Art. 15 FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, cf., e.g., CAS 2011/A/2563, *CD Nacional v. FK Sutjeska*, Award of 30 March 2012, analyzing the earlier jurisprudence at paras. 17–30. Contra: CAS 2011/A/2436, *Associaçao Académica de Coimbra – OAF v. Suwon Samsung Bluewings FS*, Award of 25 May 2012. In line with the predominant case law, see also Mavromati/Reeb, Art. R47, para. 21, and at Art. R49, para. 99.

64 While declaring the appeal against a FIFA unreasoned decision premature and inadmissible in light of Art. 116 FDC (see footnote 63 above), the Panel in CAS 2012/A/2961, *Khaled Adenon v. FIFA*, Award of 20 March 2013, did not rule that the filing of a request for provisional measures with the CAS prior to the issuance of the reasons (as was done in that case) was also inadmissible (see in particular paras. 23–31 and 125–131 of the award). Indeed, the Deputy President of the Appeals Division ruled on the request.

reinstatement in case of exceptional circumstances,[65] need not be exhausted for the purposes of Art. R47(1).[66]

33 If the arbitration agreement contemplates that any decision rendered by the relevant sports-body can be appealed, then CAS jurisdiction will extend to *decisions on provisional measures*, provided of course that the applicable internal remedies have been exhausted.[67] A decision by the Single Judge of the FIFA Players' Status Committee concerning the issuance of a temporary International Transfer Certificate (allowing the player to be provisionally registered with a club pending the resolution of a contractual dispute with his prior club) is a "final decision" for the purposes of Art. R47(1) even if its object is intrinsically provisional.[68]

B Are There Any Exceptions to the "Exhaustion Of Internal Remedies" Rule?

34 According to fundamental principles of law, internal remedies must be exhausted only if, under the circumstances, this can reasonably be required of the appellant. By reference to the *case law developed under Art. 75 CC*, it is generally accepted that the requirement that internal remedies must be exhausted does not apply in cases where, for instance, the internal hearing body deliberately delays the proceedings or refuses to deal with the case, or has made comments about the matter which make it clear that it will not be able to act with the necessary impartiality.[69]

35 Furthermore, it is submitted that, in accordance with *fundamental principles of international law*, the exhaustion of internal remedies can reasonably be required only if such remedies are adequate and effective, that is, if they are capable of redressing the alleged infringement of the legal right at stake.[70] This is confirmed by Art. 13.1 of the WADA Code, according to which internal remedies "must be

65 See, e.g., IAAF Rule 60.9, which was in force prior to the enactment of the WADA Code, providing that, in exceptional circumstances, athletes who had been sanctioned with a suspension for doping could apply to the IAAF Council for reinstatement prior to the expiry of their period of ineligibility.

66 CAS 2002/A/409, *Longo v. IAAF*, Award of 28 March 2003, para. 17 (where the Sole Arbitrator concluded that an application for early reinstatement, which was available on the basis of the IAAF's Council's right of mercy in exceptional circumstances, was not a "legal remedy" within the meaning of Art. R47). Cf. also, e.g., CAS 2011/A/2670, *Masar Omeragik v. MFF*, Award of 25 January 2013, paras. 4.6–4.8.

67 For a case discussing whether a procedural order (setting out the panel's tentative views on jurisdiction and the confidentiality obligations of the sports-governing body, and expressly reserving the panel's definitive ruling on those issues for the final award) constituted an appealable decision within the meaning of the USADA Protocol for Olympic and Paralympic Movement Testing and Art. R47 CAS Code (coming to the conclusion that such was not the case), cf. CAS 2013/A/3285, *Johan Bruyneel v. USADA*, Award of 13 May 2014, paras. 3.1–3.13.

68 CAS 2008/A/1691, *Kraków v. FIFA & Empoli*, Award of 3 July 2009, *CAS Bull. 2010/1*, p. 104.

69 Kiener, p. 8 and the references therein. The fact that a sports body takes five months to issue a simple decision that it lacks jurisdiction allows the appellant to bring the case to CAS even though the time limit to seize the competent internal body has, in the meantime, elapsed (cf. CAS 2006/A/1163, *Touzé v. FIDE*, Award of 22 May 2007, para. 51). Cf. also CAS 2010/A/2243-2358-2385-2411, *J. & ABAT v. AIBA*, Award of 3 August 2011, para. 69 (referring to the Panel's findings in an earlier order on provisional measures), and Mavromati/Reeb, Art. R47, para. 35.

70 Cf., e.g., CAS 2008/A/A1583 & 1584, *Sport Lisboa e Benfica Futebol SAD v. UEFA; FC Porto Futebol SA & Vitoria Sport Clube de Guimaraes v. UEFA & FC Porto Futebol SAD*, Award of 15 July 2008, paras. 6–9. Cf. Mavromati/Reeb, Art. R47, para. 35; see also para. 39 below.

exhausted, provided that such re[medies] respect the principles set forth in Art. 13.2.2 [of the WADA Code]" by offering "a timely hearing; a fair, impartial and independent hearing panel; the right to be represented by counsel at the [appellant]'s own expense; and a timely, written, reasoned decision".

Finally, it bears to mention that the requirement of the exhaustion of internal remedies does not apply to third parties that are entitled to appeal by operation of the arbitration agreement, in particular when they have no such entitlement in the context of the internal first instance proceedings.[71] Thus, Art. 13.1.1 of the WADA Code provides that "[w]here WADA has a right to appeal […] and no other party has appealed a final decision within the Anti-Doping Organization's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the Anti-Doping Organization process". **36**

C Procedural Questions

The exhaustion of internal remedies is an *admissibility* requirement.[72] If it is not met, the CAS will reject the appeal but will not dismiss the claim. The appellant will be free to bring the same claim again once the internal remedies have been exhausted.[73] **37**

Contrary to the question of compliance with the time limit for appeal,[74] or of the existence of a CAS arbitration agreement, the exhaustion of internal remedies *should not be examined by the CAS ex officio*.[75] If the sports-governing body that has rendered the decision under appeal wishes to rely on the fact that an internal remedy was still available to the appellant, it should do so in its answer brief at the latest.[76] The relevant sports-governing body can also elect to abandon such objection in the course of the arbitration.[77] **38**

If there is a dispute regarding the existence of an internal remedy, the sports-governing body bears the burden of proving that such remedy existed.[78] If the governing body does so, the *burden of proof* shifts to the appellant, who must then establish that (i) the remedy in question was in fact exhausted, or (ii) was inadequate and/or ineffective in the particular circumstances of the case, or (iii) **39**

71 CAS 98/212, *UCI v. M. & FCI*, Award of 24 February 1999, para. 8.
72 Cf., e.g., BGer. 4A_682/2012 para. 4.4 in fine.
73 Cf. also Mavromati/Reeb, Art. R47, para. 42, with reference to CAS 2007/A/1259, *K. Bum Suk v. Korea Skating Union*, Award of 14 August 2007, para. 7.4.
74 Art. R49.
75 *Contra*, apparently, Mavromati/Reeb, Art. R47, para. 32.
76 Art. R55.
77 CAS Ad Hoc Division, OG 00/012, *Dimitrova Neykova v. FISA and IOC*, Award of 29 September 2000, para. 9. In CAS 2014/A/3694, *Roman Kreuziger v. UCI*, Award of 24 September 2014, para. 5.2, the parties agreed to waive the exhaustion of internal remedies requirement for the purpose of expediting the proceedings. Cf. also Mavromati/Reeb, Art. R47, para. 39 with further references.
78 CAS 2005/A/971, *RBF v. IBF*, Award of 31 January 2006, para. 6.1.2; cf. also CAS Ad Hoc Division OG 00/014, *FFG v. SOCOG*, Award of 30 September 2000, para. 6, where the Panel noted that *"no legal remedies other than resort to the Court of Arbitration were drawn to our attention"*. More recently, cf., e.g., CAS OG 14/03, *Maria Belen Simari Birkner v. COA and FASA*, Award of 13 February 2014, para. 5.9.

that there existed special circumstances exempting him or her from the obligation to exhaust the available remedies.[79]

40 Finally, it must be emphasized that although the "exhaustion of internal remedies rule" constitutes a mere admissibility requirement, it is treated as a precondition for CAS jurisdiction in the context of *actions to set aside CAS awards based on Art. 190(2)(b) PILS*, meaning that the issue can be reviewed with unfettered powers by the Swiss Supreme Court.[80]

VI DISPUTES ABOUT JURISDICTION

41 Pursuant to Art. 186(2) PILS, a plea of lack of jurisdiction must be raised prior to any defence on the merits. Accordingly, if the respondent challenges the jurisdiction of the CAS, it must do so at the latest in its answer brief.[81] If it does not, it will be deemed to have implicitly accepted the jurisdiction of the CAS in accordance with the so-called *Einlassung doctrine* developed by the Swiss Federal Supreme Court.[82]

42 In those cases where CAS jurisdiction is disputed, CAS panels have the power to decide on their own jurisdiction according to the *Kompetenz-Kompetenz principle* embodied in Art. 186(1) PILS.[83] This is now expressly restated in Art. R55(4) of the CAS Code as well.

43 In accordance with *Art. 186(1)bis PILS* (and Art. R55(4) of the Code), a CAS panel "shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless serious reasons require a suspension of the proceedings". Applying this provision in a case in which a Swiss club had filed an appeal based on Art. 75 CC against a FIFA decision before the Zurich courts, the CAS held that "the Appellant should prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience" and went on to conclude that the mere "possibility that the Zurich Court may come up with a different decision than that of the CAS" was "manifestly not" a serious reason within the meaning of Art. 186(1) *bis* PILS.[84]

44 Contrary to the principle set out in Art. 186(2) PILS, CAS panels do not, as a rule, decide on their jurisdiction by means of a preliminary award. The *bifurcation of the proceedings* is generally ordered only upon a request by the party opposing

79 Cf., e.g., the discussion in CAS 2013/A/3272, *Ik–Jong Kim v. FILA*, Award of 28 February 2014, paras. 65–66, where the panel held that there was no internal remedy available to deal with the contested decision, which – contrary to the respondent's assertion – was non-disciplinary in nature and could therefore not be appealed to the FILA Sports Judge, whose jurisdiction is limited to disciplinary matters.

80 Rigozzi, *JIDS 2010*, p. 244; cf., e.g., BGer. 4A_682/2012 para. 4.

81 Cf. Art. R55(1). The fact that the respondent did not challenge the jurisdiction of the CAS in previous procedural exchanges or in its response to a request for provisional measures does not constitute an acceptance of such jurisdiction. Cf., e.g., Kaufmann-Kohler/Rigozzi, para. 5.13.

82 Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), paras. 47–49.

83 Cf., e.g., CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, paras. 62–63; CAS 2015/A/4213, *Khazar Lankaran Football Club v. FIFA*, Award of 5 January 2016, para. 43.

84 CAS 2009/A/1881, *El-Hadary v. FIFA & Al-Ahly SC*, Partial Award of 7 October 2009, paras. 66–68; cf. also BGer. 4A_428/2011 para. 5.2.2.

jurisdiction. While it is difficult to point to established general rules in this regard, experience suggests that panels will grant a request for bifurcation and issue a separate award only if (i) the jurisdictional challenge is based on legal issues that are clearly distinct from the issues pertaining to the merits of the dispute and can thus be easily dealt with separately in a time- and cost-efficient manner, or (ii) it would otherwise be procedurally unfair to require the party challenging the jurisdiction of the CAS to prepare a full-fledged submission covering also the merits of the dispute. Of course, in practice, panels will be more inclined to order the bifurcation of the proceedings if it appears that there are good chances that the case will not even reach the merits phase.[85]

If the panel does issue an award on jurisdiction, the losing party can (and must)[86] challenge that award in the Swiss Supreme Court within thirty days from the notification of the signed original.[87] The filing of an action to set aside an award asserting jurisdiction *will not prevent the panel from continuing the arbitration proceedings*, unless the Supreme Court grants a request by the petitioner for the stay of the arbitration pending the Supreme Court's decision on the challenge against the award.[88] However, in practice, if the challenge is at least colorable, CAS panels will prefer to *suspend the proceedings sua sponte, out of deference towards the Supreme Court*. It is submitted that this approach is justified in those cases where (i) the jurisdictional questions turn on the determination of legal issues the Swiss Supreme Court is free to review under Art. 190(2)(b) PILS (such as, for instance, the determination of the hypothetical will of the parties), and (ii) the delay in the proceedings does not unduly harm the party relying on CAS jurisdiction. **45**

VII APPEALS AGAINST CAS (FIRST INSTANCE) AWARDS

Article R47(2) provides that "[a]n appeal may be filed with the CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".[89] A two-tier arbitration system of this kind was first set up by the Australian Olympic Committee's "Anti-doping Policy", which provides for an arbitration hearing before a CAS panel instituted by the CAS's Oceania decentralized office,[90] followed by an appeal to the "international CAS" in Lausanne.[91] The same approach was then adopted by the US Antidoping Agency (USADA). Thus, US athletes are afforded *a first hearing in the so-called North American Court of Arbitration for Sport, instituted* **46**

85 See, e.g., CAS 2011/A/2534 & 2535, *Hasan et al. v. FIFA & IFA*, Award of 14 February 2012.

86 If it does not do so, it will be deemed to have accepted CAS jurisdiction and shall be estopped from bringing a jurisdictional challenge against the final award; cf. Rigozzi, *JIDS 2010*, p. 245.

87 Art. 190(3) PILS; cf. BGer. 4A_392/2010 para. 2.3.2 (confirmed in BGer. 4A_604/2010 para. 1.3 and the ensuing case law; cf. Kaufmann-Kohler/Rigozzi, para. 8.38).

88 Cf. also Arroyo, above commentary on Art. 191 PILS (Chapter 2), paras. 55–59. On the (strict) requirements to be met to obtain an order staying the enforceability of the award before the Supreme Court, see also Kaufmann-Kohler/Rigozzi, paras. 8.92–8.99.

89 See also Mavromati/Reeb, Art. R47, para. 6.

90 The CAS's Oceania decentralized office is in Sydney, Australia. There is a second permanent decentralized CAS office in New York City, USA.

91 For a description of this mechanism, cf. CAS 2004/A/651, *French v. Australian Sports Commission & Cycling Australia*, (Appeal) Award of 11 July 2005.

under the aegis of the American Arbitration Association (AAA),[92] as well as the possibility to appeal against the AAA award to the CAS in Lausanne. US athletes can also elect to bring appeals directly to the CAS, and in such cases they will have the guarantee that the hearing will take place in the US.[93] Given that the CAS Panel is to hear the dispute *de novo*,[94] one may wonder whether it is sensible to have two full-fledged arbitration hearings to decide a doping case.[95] However, this is a question for the relevant national anti-doping organizations, rather than the CAS.

92 Proceedings before the North American CAS are governed by the *AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, available at < http://www.adr.org > (under 'Rules and Forms'), which are incorporated in USADA's Protocol for Olympic and Paralympic Movement Testing (USADA Protocol, available at < http://www.usada.org >) as Annex D.

93 This is so, because making use of the option provided for in Art. R28 *at the end* of the Code, the USADA Protocol (Annex D, R-45) states that *"[a]ppeals to CAS filed under these rules shall be heard in the United States"*. This has no influence on the legal seat of the arbitration which remains in Lausanne. The second stage of the USADA arbitrations will thus be governed by Swiss arbitration law, which is confirmed by the USADA Protocol's provision to the effect that *"[t]he decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss [Federal Supreme Court] Act or the Swiss Statute on Private International Law"* (USADA Protocol, R-45). For a well-known case, cf. *USADA v. Hamilton*, AAA Case No. 30 190 0013005, Award of 18 April 2005 and CAS 2005/A/884, *Hamilton v. USADA & UCI*, Award of 10 February 2006; or, more recently, *USADA v. Hardy*, AAA Case No. 77 190 00288 08, AAA Award on Liability of 1st August 2008, AAA Interim Award of 4 May 2009 and AAA Final Award of 30 May 2009, and CAS 2009/A/1870, *WADA v. Hardy & USADA*, Award of 21 May 2010. Among the more recent cases, see, e.g., CAS 2016/A/4371, *Robert Lea v. USADA*, Award of 4 May 2016. CAS awards on appeal against AAA awards can be found on the USADA website, at < http://www.usada.org/testing/results/arbitration-decisions/ > .

94 Cf. Art. R57. Note however that, as discussed in connection with that provision, the concept of *de novo* hearings in CAS has recently been qualified, with the 2013 edition of the CAS Code expressly providing that the Panel will have discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered, i.e. in the first instance proceedings (cf. Art. R57(3) below).

95 Weston, *GA J.Int'l & Comp.L. 2009*, pp. 104–106.

Article R48: Statement of Appeal

The Appellant shall submit to CAS a statement of appeal containing:

- the name and full address of the Respondent(s);
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against, together with reasons;
- a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS.

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed.

I PURPOSE OF THE PROVISION

The filing of the statement of appeal is the first step in CAS appeals arbitration proceedings. The purpose of Art. R48 is to *set out the minimum required contents and information to be provided with the statement of appeal*, so that the proceedings can be properly set in motion by the CAS (II.). That being said, appellants are free to include additional items and procedural requests in the statement of appeal (IV.). Together with Arts. R64.1 and R65.2, Art. R48 also clarifies that, in order for the arbitration to proceed, prospective appellants are required to pay the CAS Court Office fee when filing the statement of appeal (III). Finally, Art. R48 provides guidance on how the CAS will deal with the filing of a statement of appeal that is not fully compliant with the Code's requirements (V.). 1

II FILING AND MINIMUM REQUIRED CONTENTS OF THE STATEMENT OF APPEAL

As a preliminary matter, it bears to note that according to Art. R48(1) the statement of appeal is to be "submitted to the CAS". This means in particular that the statement of appeal should be *filed directly with the CAS*: any rules requiring the appellant to file the statement via a federation's organ or other sports-body are, in the words of a CAS Panel, "seriously questionable" as they prevent the CAS from applying "its 2

usual standards to consider whether an appeal is admissible or not", in particular with respect to compliance with the time limit for appeal.[1]

3 The statement of appeal is the "initiating document" in CAS appeals proceedings. As such, it must be filed *within the time limit for appeal*, which can be set out in the applicable sports-governing rules or may have to be determined pursuant to Art. R49 of the Code.[2] In view of the fundamental need for certainty as to the finality of the decisions issued by sports-governing bodies, the time limit to bring an appeal against such decisions is in general relatively short. Taking this time pressure element into consideration, the statement of appeal can be filed in the form of *a concise and simple document*, as long as it includes the basic elements required by Art. R48. In particular, the statement of appeal need not contain detailed factual and legal developments. These may be reserved for the appeal brief, which is considered as the appellant's (in principle, only) full-fledged "written submission" in CAS appeals proceedings.[3]

4 Pursuant to Art. R31(3), the statement of appeal *must be filed by courier delivery to the CAS Court Office*, in as many copies ("printed or saved on digital medium") as there are other parties and arbitrators, together with an additional copy for the CAS.[4] As just mentioned, the statement of appeal must be filed within the applicable time limit. In this connection, it is important to note that the 2016 revision of the Code has further amended (and partly reversed a change introduced in the 2013 version of) the second part of Art. R31(3), which governs the validity of filings made by means other than courier. In the Code's 2013 edition, Art. R31(3) provided that if written submissions were transmitted to CAS by facsimile, in order for the filing to be valid they should also be sent by courier before the expiry of the relevant time limit (effectively ruling out the hitherto prevailing practice of faxing submissions on the day of the time limit (before midnight) and dispatching them by registered post or courier as soon as possible thereafter). Art. R31(3)'s 2016 version now allows for the filing of submissions by e-mail (in addition to facsimile), and expressly readmits the pre-2013 practice of filing only by facsimile (or e-mail) within the time limit, albeit specifying that if submissions are "transmitted in advance by facsimile or by electronic mail […], the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office *provided that the written submission and its copies is also filed by courier within the first subsequent business day of the relevant time limit*".

5 While the relevant date to determine whether the statement of appeal was filed within the applicable time limit is the date of dispatch (the date when it was sent),[5] it is the date of its receipt by the CAS Court Office that will be determinative for the purposes of *lis pendens* within the meaning of Art. 181 PILS.[6]

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1 CAS 2006/A/1065, *W. v. FEI*, Termination Order of 20 June 2006, pp. 3–4.
2 Cf. Art. R49.
3 Cf. Art. R51.
4 Since the 2013 revision, the Code also permits the filing of written submissions via an electronic platform "*under the conditions set out in the CAS guidelines on electronic filing*". However, this service is not available for the statement of appeal (and request for arbitration).
5 Cf. Art. R49.
6 Cf., e.g., Kaufmann-Kohler/Rigozzi, para. 6.09, and Mavromati/Reeb, Art. R48, para. 47. For a different view (considering that absent a specific provision in the rules chosen by the parties, the relevant date for *lis pendens* purposes is that when the request for arbitration, viz. the statement of appeal, is sent to the arbitral institution), cf. Berger/Kellerhals, para. 1031 and Girsberger/Voser, para. 881. For a commentary on Art. 181 PILS, cf. Stacher/Feit at Chapter 2

According to Art. R48, the *elements that must be included*[7] in the statement of appeal are the following: 6

A Name and Full Address of the Parties

From a practical point of view, the objective of this requirement is *to enable the CAS Court Office to notify the appeal* to the designated respondent(s) and more generally to be provided with the contact details to use for communications with the parties or their counsel and/or other representatives throughout the proceedings.[8] 7

The parties' details as provided by the appellant also give a first indication of the scope, *ratione personae*, of the arbitral proceedings to be set in motion. At this preliminary stage, the information required under Art. R48 is meant to assist the CAS Court Office in conducting a *prima facie review of the existence of an arbitration agreement*[9] so as to determine whether, assuming there is an existing and valid agreement, the appellant(s) and the designated respondent(s) appear to be parties to it.[10] 8

In this respect, even though this is not expressly mentioned in Art. R48, the appellant obviously also needs to provide the CAS with his, her or its own name and contact details (as well as those of his, her or its counsel, if and when one is appointed).[11] If the appellant(s) and/or respondent(s) have been insufficiently identified or if there are other issues with the information provided in the statement of appeal with regard to the potential parties to the proceedings, the *CAS Court Office will invite the appellant to provide additional details* as may be necessary and/or to clarify any such issues within a short time limit.[12] 9

B Complete Copy of the Decision Appealed against

To the extent the decision in question forms the very object of the appeal, this is an obvious requirement. If the decision has been rendered in a language other than the CAS's working languages (English or French),[13] it is submitted that at least for the 10

(Part II) above. The corresponding provision for domestic arbitrations is Art. 372 ZPO, which, in pertinent part, is worded similarly.

7 On the consequences of filing an incomplete statement, which are set out in Art. R48(3), see below, paras. 26–29.

8 Since the CAS Court Office's day-to-day communications in arbitration proceedings are made by fax or (increasingly) by email, it is important to provide fax numbers and/or e-mail addresses in the contact details.

9 Cf. Art. R52(1).

10 The issue of standing to appeal is briefly discussed above under Art. R47 (para. 21). On this question as well as that of standing to be sued, cf. Mavromati/Reeb, Art. R48, paras. 65–70, and De La Rochefoucauld, *CAS Bull. 2011/1*, pp. 13–20 and the references therein, as well as, by the same author, *CAS Bull. 2010/1*, pp. 51–56, and the references therein. See also CAS 2012/A/2981, *Clube Desportivo Nacional v. FK Sutjeska*, Award of 27 March 2013, for a case where the appeal was declared inadmissible and dismissed due to the appellant's failure to designate the correct respondent in the statement of appeal.

11 Cf. also below, para. 21, and Art. R30 regarding the production of powers-of-attorney for party representatives. The appellant should indicate at any appropriate stage whether the correspondence from the CAS Court Office should be addressed to him or her, and/or any representative(s) or counsel.

12 Cf. below, paras. 28–32.

13 Cf. Art. R29.

immediate purpose of filing the statement of appeal within the applicable time limit, no *translation* is mandatorily required, provided it is produced as soon as possible thereafter.[14] That said, it would obviously be strongly advisable to file at least (e.g. if the decision is particularly long) a translation of the sections of the decision which set out the parties' names and the date when the decision was issued, as well as the dispositive part and any other elements which may be of relevance for the purposes of the CAS's *prima facie* examination of jurisdiction.[15]

11 For the sake of efficiency, even though this is not required under Art. R48, it may be sensible to include as an exhibit to the statement of appeal a *proof of the date of receipt* of the challenged decision in order to demonstrate that the time limit for appeal has been complied with.[16]

C Appellant's Request for Relief

12 The request for relief defines the object and scope of the dispute and thus the subject-matter of the arbitration. In appeals cases, the relief requested will generally be *the annulment or amendment of the challenged decision(s) in whole or in part*, together with any additional requests, including, for instance, requests seeking declaratory relief and/or orders for specific performance (such as the reinstatement of results or the delivery of an ITC), and/or pecuniary relief (for instance the payment of transfer fees), and/or orders in relation to costs, including arbitration and legal costs.

13 The statement of appeal must provide an *indication* of the relief sought, so as to enable the CAS Court Office, the respondent(s), and (once it will be appointed) the panel to grasp the issues raised by the appeal and the claim(s) at stake.[17] That said, the CAS case law has explicitly recognized that the *appellant will still be at liberty to amend or complete the relief sought* in his or her appeal brief,[18] to which the respondent(s) will in any event have a full opportunity to reply.[19]

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14 See also Mavromati/Reeb, Art. R48, para. 74.

15 Conversely, experience shows that the CAS Court Office will generally also require a copy of the original version of the decision if only a translation is filed.

16 Cf. Art. R49. The appellant may also wish to point to the provision (if any) in the governing rules or regulations that sets out the applicable time limit for appeal. Mavromati/Reeb, Art. R48, para. 71, state that if the appellant's filing provides *"no indication as to the date of notification [of the appealed decision] and the appeal seems to have been filed late, the CAS Court Office sends a letter to the appellant requesting […] this information before initiating the procedure"*.

17 In the words of the Panel in CAS 2005/A/835 & 942, *PSV N.V. v. FIFA et al.*, Award of 3 February 2006: *"for a statement of appeal against a given respondent to be admissible, it is necessary not only that it names that respondent, but also that it contains an actual claim against the subject indicated as respondent; the simple indication of a respondent does not mean per se that arbitration can proceed against that respondent, unless a specific claim is brought against it"* (para. 86). Cf. also CAS 2005/A/957, *Clube Atlético Mineiro v. FIFA*, Award of 23 March 2006, paras. 7–8.

18 Cf. CAS 2007/A/1434 & 1435, *IOC & WADA v. Pinter & FIS*, para. 79; CAS 2007/A/1396 & 1402, *WADA & UCI v. Alejandro Valverde & RFEC*, Award of 31 May 2010, paras. 10–11. See also Mavromati/Reeb, Art. R48, para. 76.

19 Cf., e.g., CAS 2009/A/1881, *El Hadary v. FIFA & Al-Ahly Sporting Club*, Partial Award on *lis pendens* and jurisdiction of 7 October 2009, para. 58.

D Nomination of the Arbitrator Chosen by the Appellant

Article R48(1) requires the appellant to *nominate an arbitrator* "*from the CAS list*", which is compiled by the ICAS in accordance with Arts. S13 and S14 and published on the CAS website.[20] This is a mandatory requirement and any appointment from outside the list will not be confirmed by the CAS. In other words, the CAS list of arbitrators is a so-called closed list. The Swiss Federal Supreme Court considers that the CAS list is sufficiently long to afford the parties "a wide choice of names to choose from, even taking into account the nationality, language and sport practiced by athletes who appeal to the CAS".[21] In view of this and of the specific context of competitive sports, the Supreme Court has held that the CAS list of arbitrators helps to achieve the objective of resolving disputes "quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues".[22] 14

The requirement of Art. R48(1) for the statement of appeal to contain "the nomination of the arbitrator chosen by the Appellant […], unless the Appellant requests the appointment of a sole arbitrator" suggests that the *default solution in CAS appeals proceedings is for a three member panel to hear the case* (as further confirmed by Art. R50, first sentence). Against this background, and knowing that pre-existing agreements on the number of arbitrators are rather rare in sports disputes, the clarification introduced in the 2013 edition of the Code, according to which *the appellant may request the appointment of a sole arbitrator* upon filing the statement of appeal, is to be welcomed. The appellant may wish to do so, for instance, for the sake of time and/or cost efficiency (where the proceedings are not free of charge under the Code). In such a case, the appellant will thus not be required to nominate an arbitrator in the statement of appeal and the CAS Court Office will invite the respondent to state its position with regard to the appellant's request.[23] If the respondent agrees to have a sole arbitrator hear the case, the arbitrator will be appointed by the President of the Appeals Division in accordance with Art. R51. If the respondent does not agree or the President of the Appeals Division decides that the case should be heard by a three-member panel,[24] the CAS Court Office should fix a short time limit for the parties to nominate their respective arbitrators. 15

20 Cf. Introduction, paras. 5–10 above (Part I). The list (< http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html >) can be searched by nationality, last name and languages spoken. There is a distinct list, also available on the CAS website, from which parties are required to select arbitrators in football disputes for cases involving FIFA, cf. < http://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html > .

21 BGE 129 III 445 para. 3.3.3.2; English translation available in: *ICCA Yearbook 2004*, Vol. XXIX, pp. 206–231. As mentioned, the list of arbitrators has more than doubled in length (from approx. 150 names to about 350 as of the end of 2016) from the time when the Supreme Court's Lazutina decision was rendered.

22 BGE 129 III 445 para. 3.3.3.2; English translation available in: *ICCA Yearbook 2004*, Vol. XXIX, pp. 206–231.

23 See Mavromati/Reeb, Art. R48, para. 79, noting that the CAS's practice is to indicate *"in the letter sent following the statement of appeal that, if the respondent remains silent on [the appellant's proposal for a sole arbitrator], the matter will subsequently be brought before the President of the Appeals Division"*.

24 The President of the Appeals Division retains the right to decide that the dispute is to be heard by a sole arbitrator, irrespective of any agreement or disagreement by the parties; cf. Art. R50(1).

E Request for a Stay of the Execution of the Decision Appealed against (if Applicable)

16 Article R48(1) expressly provides that the appellant may request, in the statement of appeal, a stay of the decision under appeal pending the outcome of the proceedings.[25] An application for the stay of the execution of a decision is a request for provisional relief.[26] As such, *in order to be granted, the request must meet the conditions governing requests for provisional measures in CAS* proceedings. Thus, as discussed in more detail in the commentary to Art. R37, an applicant is required to show that: (i) he or she is at risk of suffering irreparable harm if the stay is not granted; (ii) he or she is likely to succeed on the merits of his or her case when this will be heard by the panel, and (iii) his or her interest in obtaining the grant of the stay outweighs that of his or her counterparties (or those of other interested parties) in seeing the decision applied without delay or interruption (the so-called "balance of interests" test).[27]

17 The wording of Art. R48(1) suggests that an application for a stay must be *filed (at the latest) with the statement of appeal* and *would be inadmissible at a later stage*.[28] While the CAS's practice does not appear to be cast in stone in this respect,[29] it is submitted that a request for a stay filed *at a later stage should be entertained only in exceptional circumstances*, upon a reasoned application by the appellant, in particular when the need for the measure and/or the urgency of the matter has become apparent at a later stage.[30]

F Provisions of the Relevant Regulations or Specific Agreement Providing for Appeal before the CAS

18 A copy of the provisions in the relevant statutes, by-laws, regulations, other rules or any separate arbitration agreement[31] on which the appellant relies to ground the jurisdiction of the CAS with regard to the dispute at hand must be provided with the statement of appeal. In case such regulations or agreement are not available in English or French, *translations* of the relevant provisions should also be provided with the statement of appeal or as soon as practicable after its filing. Together with

25 Cf. Art. R48 (1), fifth bullet point.

26 Accordingly, pursuant to Art. R37(6), it could also be filed prior to the statement of appeal, which would then have to be submitted within the applicable time limit under Art. R49, failing which the procedure relating to the request for a stay (including an order granting such effect if it has already been issued) would be "automatically annulled". Cf. Art. R37; see also Mavromati/Reeb, Art. R48, paras. 80–81.

27 Cf. Art. R37, paras. 15–32 above.

28 Rigozzi, para. 1154.

29 In CAS 2010/A/2371, *FBF v. FIFA*, where the respondent had raised an argument in this sense, the decision issued by the President of the Division did not deal with it, as it rejected the appellant's request on the ground that the CAS lacked *prima facie* jurisdiction to hear the appeal.

30 For instance, when the process turns out to be much slower than what the appellant could reasonably have expected when filing the statement of appeal. By contrast, considering the impact the grant of such a request may have on the interests of third parties, the appellant should not be allowed to wait until just before an important competition to ask for a stay of his or her suspension. See also Mavromati/Reeb, Art. R48, para. 82, who concur.

31 Cf. Art. R47, paras. 11–24 above.

the decision appealed against,[32] this is an essential element to allow the CAS Court Office to ascertain *prima facie* that the CAS has jurisdiction to hear the case.[33]

III COURT OFFICE FEE

Upon filing the statement of appeal, the appellant must pay the non-refundable CAS Court Office fee, which is set at *CHF 1'000* in the current edition of the Code.[34] The CAS Court Office fee is the equivalent of the "registration fee" or "filing fee" charged by other arbitral institutions:[35] it is meant to cover the CAS's case-handling costs and *will thus not be refunded* (unless legal aid is granted, as discussed below), even if the case is withdrawn immediately after the filing of the statement of appeal.[36] 19

If the appellant makes a request for *legal aid*,[37] the CAS requires payment of the Court Office fee pending the ICAS Board's decision on the request. If legal aid is granted, the Court Office fee will be refunded.[38] Although normally the CAS will not accept to provisionally waive the payment of the Court Office fee pending the ICAS's decision on the request for legal aid,[39] it has accepted to do so on at least one occasion.[40] 20

Where legal aid is not in issue, the CAS Court Office systematically informs appellants that it will *not proceed with the case until the fee has been paid*, so applicants who want their case to be handled without delay should settle the fee before or immediately upon filing the statement of appeal, and provide proof of payment to the CAS as soon as it is available. If the payment has been made prior to the filing of the statement of appeal, then a proof of payment (e.g., copy of a wire- or bank transfer order or a stamped post-office payment-receipt) should be attached to the statement as an exhibit. 21

IV OTHER PROCEDURAL ISSUES

If the appellant instructs counsel or another person, such as an agent, to represent him or her in the arbitration,[41] a *power of attorney* should be provided,[42] but there is no obligation to file it with the statement of appeal. 22

In appeals cases, it is relatively rare for the parties to have made an express agreement with regard to the *language of the proceedings*. In most instances, appellants will file their statement of appeal in the language of their preference between the 23

32 See above, paras. 10–11.
33 Art. R52(1). Cf., e.g., CAS 95/143, *S. & L. v. FIS*, Order of 30 October 1995, *CAS Digest I*, pp. 535–536; see also Mavromati/Reeb, Art. R48, paras. 83–84.
34 Cf. Art. R65.2(2).
35 Cf., e.g., Swiss Rules Art. 3(3)(i) and Schedule B; ICC Rules Art. 4(4)(b) and Appendix III.
36 That said, as indicated in Art. R64.1 CAS Code, the Court Office fee will be taken into account by the Panel (or the Division President) when assessing the final amount of costs.
37 See below, para. 24.
38 CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, Letter of 8 February 2012.
39 Mavromati/Reeb, Art. R30, para. 25.
40 CAS 2011/A/2503, *D. v. CONI*, Order of 5 September 2011.
41 The appellant can choose to be assisted or represented, throughout the proceedings, by any person of his or her choice, not necessarily a lawyer (cf. Art. R30).
42 Cf. Art. R30.

two CAS working languages, i.e. French or English,[43] and this will normally be assumed to be their choice of language for the conduct of the arbitration. Absent any objections from the respondent(s),[44] the language so chosen will be deemed to be the language of the proceedings by the CAS. If the respondent(s) disagree(s), the panel will decide the issue. Should the panel decide to change the language of the arbitration after the statement of appeal has been filed, for instance to revert to the language in which the proceedings leading to the decision under appeal were conducted, the CAS can order that the statement of appeal should be translated into the newly designated language of the arbitration.[45] If necessary, in light of the change in the linguistic skills required, the panel may also order the replacement of the arbitrator appointed by the appellant. If the parties cannot find an agreement on the language of the arbitration, the CAS can also, where appropriate, fix the language of the proceedings (in which the CAS's correspondence and the award will be drafted) and allow each party to make written and oral submissions in the language of its choice between French and English.[46]

24 As mentioned, the statement of appeal may include a *request for legal aid*. The form to be used for the request can now be downloaded from the CAS website,[47] together with the CAS's Legal Aid Guidelines, which set out the eligibility conditions and the procedure followed in dealing with the application.[48]

25 In addition to a request for the stay of the execution of the decision under appeal, discussed above, *other procedural requests* can be included in the statement of appeal, for instance[49] applications for certain evidentiary measures to be taken,[50] for the

43 If the appellant wishes to file the statement of appeal in a language other than English or French, then it should first inquire with the CAS Court Office as to the languages accepted, which will normally include German, Italian and Spanish, but are subject to the Court Office's and, subsequently, the panel's agreement. In this connection it should be kept in mind that the choice of a particular language for the conduct of the proceedings will also have an impact on the choice of arbitrators: selecting a language that is not widely spoken among the arbitrators included in the CAS list will obviously restrict the pool of suitable candidates for appointment (not to mention the fact that it may cause additional translation and interpretation costs).

44 The standard letter sent by the CAS Court Office to set the arbitration proceedings in motion will normally contain a paragraph noting that the appellant has chosen to proceed in the language of the statement of appeal, in some cases indicating that absent any objections from the respondent within a short time limit (usually five days), all the submissions and documents in the arbitration will have to be filed (and thus where necessary, translated) in that language, in accordance with Art. R29.

45 Cf., e.g., CAS 2013/A/3365, *Juventus FC v. Chelsea FC* & CAS 2013/A/3366, *AS Livorno Calcio SpA v. Chelsea FC*, Award of 21 January 2015, para. 51, where the decision was taken by the President of the Appeals Division, as the panel had not yet been appointed.

46 Cf., e.g., CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 44.

47 Available in English at < http://www.tas-cas.org/fileadmin/user_upload/Legal20Aid20Form20_English_.pdf > , and in French at < http://www.tas-cas.org/fr/arbitrage/assistance-judiciaire.html > .

48 On the creation of the CAS legal aid fund pursuant to Art. S6 point 9 of the CAS Code, and the adoption of the CAS Legal Aid Guidelines in 2013, see Mavromati/Reeb, Art. R30, paras. 22–29. On the Legal Aid Guidelines and how to apply for legal aid, see Art. R64 and the commentary below.

49 In addition to the examples given here, Mavromati/Reeb, Art. R48, para. 54, also mention the possibility to include submissions on the law applicable to the merits, if that law is not *"indicated in the arbitration agreement"*.

50 Cf. Art. R44.3.

proceedings to be conducted in an expedited manner,[51] or for the extension of the time limit for the filing of the appeal brief.[52] If any such requests are made in the statement of appeal, it may be wise to mention them expressly in the accompanying letter (if any) or on the cover page of the statement of appeal, so as to draw the CAS Court Office's attention to them, especially if they are urgent.

Article R48 contains no specific requirement with respect to the *form of the statement of appeal*. As mentioned above, the statement can be a very short document, and can even be submitted as a simple letter, provided it contains all the required elements and information.[53] Art. R31(3) indicates the *number of copies* of the statement that should be filed with the CAS *by courier and/or registered mail*, whether printed or saved "on digital medium".[54] If the number of copies filed is insufficient, the CAS Court Office can ask the appellant to file additional ones. **26**

Finally, it bears to note that the CAS's *e-filing service*, introduced with the 2013 edition of the Code, is only available after the opening of the case, which implies that the statement of appeal cannot be filed via that channel.[55] **27**

V INCOMPLETE STATEMENT

Article R48(3) provides that if the statement of appeal does not meet the requirements set out in Art. R48(1) and (2), the *CAS Court Office shall grant the appellant a short deadline to complete his or her statement*. The additional deadline granted by the CAS Court Office will usually not exceed 3–4 days.[56] **28**

If the statement of appeal is completed within the short additional deadline set by the Court Office, the appellant will be deemed to have complied with the time limit for appeal even if the original statement was found to be incomplete (provided of course that the filing of the original statement was made within the time limit for appeal). **29**

If the statement is not completed within this additional deadline, the "CAS Court Office shall not proceed" with the case. The draconian consequences of this should be kept in mind, as the very existence of a time limit for appeal may *de facto* preclude the appellant from filing a new appeal and thus deprive him or her of his or her right to challenge the decision under appeal.[57] **30**

Accordingly, despite the fact that Art. R48(3) indicates that an additional deadline can be granted "one time only", it is submitted that the CAS Court Office can adopt **31**

51 Cf. Art. 52(3).
52 Cf. Art. R51.
53 Cf., e.g., CAS 2011/A/2568, *Raja Club Athletic v. FC Chiasso & Iajour Mouhssine*, Award of 28 June 2012, paras. 5–8.
54 In accordance with Art. R31(5), the exhibits attached to the statement of appeal can be sent to the CAS Court Office by email, "provided they are listed and that each exhibit can be clearly identified".
55 See the explanations provided on the CAS website, under the E-filing tab: < http://www.tas-cas.org/en/e-filing/e-filing.html > , where it is also specified that the service can only be used if all parties agree to it. On the e-filing service, see also Stocker, pp. 112–113.
56 Cf. Mavromati/Reeb, Art. R48, para. 86.
57 Cf. Art. R49, paras. 21–23 below.

a non-formalistic approach[58] in order to afford the appellant an adequate opportunity to remedy any deficiencies in the statement of appeal, by *extending, where necessary, the additional deadline in accordance with Art. R32*.[59] Such an extension may be necessary, for instance, with respect to the payment of the Court Office fee, due to the difficulties that may be caused by the existing payments regulations in certain countries. The appellant should in any event ask for the extension of the additional deadline before its expiry.[60] That being said, the possibility to complete the statement of appeal should not allow the appellant to substantively change the nature or scope of its appeal, for instance by indicating an additional respondent.[61]

32 Finally, it is important to note, as the CAS Court Office normally points out in its letter setting the additional deadline, that the granting of this deadline *does not extend the time limit for the filing of the appeal brief* (which is due within ten days following the expiry of the time limit for appeal).[62] If the appellant needs such an extension then he or she must file a specific request, again taking care to do so before the expiry of the time limit in question (to be calculated in accordance with Art. R51).

58 As the Panel put it in CAS 2009/A/1940, *BAP v. FIBA & SBP*, Award of 7 April 2010, para. 10.11: *"the arbitration should not be summarily dismissed in zealous adherence to rigid formalism. It is the function and goal of any arbitral body, including this Panel, to resolve differences and disputes and to restore harmony to factional discord within sports organisations"*.

59 *Contra* – albeit confusingly referring to the "CAS practice *to grant an additional deadline"* even though this is expressly codified in Art. R48(3) (and the 'practice' should then be, in the specific cases where this may be necessary, to grant a further extension in accordance with Art. R32) – Mavromati/Reeb, Art. R48, paras. 88–89.

60 Cf. Art. R32(2).

61 For a case where this point was argued by one of the Respondents but found by the Panel not to apply, cf. CAS 2015/A/4071, *F. v. B. & C. & A.*, Award of 25 May 2016, paras. 98–106.

62 See also Mavromati/Reeb, Art. R48, para. 55.

Article R49: Time Limit for Appeal

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

I PURPOSE OF THE PROVISION

Article R49 sets out the time limit within which, unless otherwise provided in the applicable regulations or agreed by the parties, an appeal may be brought before the CAS against final decisions taken by federations or other sports-governing bodies.[1] Art. R49's *time limit for appeal* is to be *distinguished from* the time limit to file the appeal brief under Art. R51 of the Code. Art. R49 prescribes that the appeal must be lodged, by filing a (simple) statement of appeal,[2] prior to the expiry of the applicable limitation period, whereas Art. R51 specifies *the (additional) time limit for filing the grounds for the appeal*, which can be submitted by means of a subsequent brief.[3] 1

In the words of the CAS Panel in the *NNZ v. IFNA* case,[4] "[t]ime limits are commonplace in all kinds of fora. They *contribute to legal certainty*. They enable decision-makers to know precisely when they can be confident that their decisions will not be challenged. They ensure that any Tribunal seized of a dispute over a decision can resolve it when the issues and evidence are still fresh and do not have to adjudicate upon stale claims. Such is the perceptible and valuable purpose of Art. R49 of the CAS Code". 2

Article R49 and more generally the very existence, nature and effects of a time limit for appeal are among the *distinctive features of CAS appeals proceedings* (II.). Accordingly, the manner in which this time limit is to be calculated (III.), but also the question whether it can be extended or reinstated (IV.) and the consequences of a decision by the CAS on compliance with it (V.), are all topics that deserve careful consideration. Further, it bears to note that the relevance of the time limit for appeal in cases where the appellant claims that the decision under challenge is null and void is a matter of debate (VI.). 3

II NATURE OF THE TIME LIMIT FOR APPEAL

According to its express wording ("[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned […]"), 4

1 Cf. Art. R47.
2 Cf. Art. R48(1).
3 Cf. Art. R51(1).
4 CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.11 (emphasis added).

Art. R49 is meant to apply only as a *default rule*, when the regulations of the sports-organization that issued the decision under appeal contain no specific provision on the applicable time limit.[5] As a matter of fact, sports regulations often do contain provisions dealing with the time limit for appeal before CAS, and there are significant differences in the length of such time limits. While a number of federations, such as FIFA, have integrated the 21-day limit of the CAS Code into their own regulations,[6] many others have provided for different time limits, in most cases ranging from ten days to one month.[7] Thus, prospective appellants must *check the relevant regulations carefully*, in particular in view of the drastic consequences of missing the time limit for appeal. Indeed, as discussed in more detail below, the time limit under Art. R49 *is to be considered as "preclusive" in nature*,[8] which means that a failure to comply with it will result in the loss of the appellant's claim.-

5 A (logical) consequence of this is that *compliance with the time limit for appeal should be reviewed by the CAS ex officio*, in spite of the view to the contrary (impliedly) taken by certain panels.[9] Since the 2013 Code revision, Art. R49 does provide that "the Division President shall not initiate a procedure if the statement of appeal is, on its face, late", which is consistent with the idea of *ex officio* review.

6 In view of the foregoing, it is of the utmost importance for prospective appellants to identify and be sure to apply correctly the rules governing the calculation of the time limit for appeal before the CAS.

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5 Art. R49 also contemplates the possibility of a previous (ad hoc) agreement between the parties as to the time limit for appeal, which rarely occurs in practice. On the subsidiary character of the 21-day time limit set out in Art. R49, cf., *ex multis*, CAS 2001/A/318, *V. v. Fédération Cycliste Suisse (Swiss Cycling)*, Award of 23 April 2001, para. 5, or CAS 2002/A/403, *Pantani v. UCI* & CAS 2002/A/408, *FCI v. UCI,* Award of 12 March 2003, para. 84; see also Mavromati/Reeb, Art. R49, paras. 90–91. For a recent case where the regulations did not provide for a time limit to appeal, see CAS 2013/A/3148, *PAASF v. FIAS & Vasily Shestakov*, Award of 5 September 2014, at para. 122.

6 Art. 58(1) FIFA Statutes.

7 Cf., e.g., Art. 62(3) UEFA Statutes 2016 (10 days); Art. 13.2.5.1 UCI Cycling Regulations, Part. 14 (2015) (1 month); Art. 42.15 IAAF Competition Rules 2016–2017 (45 days). See also the other examples cited in Mavromati/Reeb, Art. R49, para. 91. As discussed in connection with Art. R47, when a federation's rules provide for different time limits for appeal, depending on the activities they govern (e.g., a federation's anti-doping rules as opposed to its statutes or general regulations), the relevant time limit for appeal will be that set out in the specific regulations applying to the merits of the dispute brought before the CAS (cf. Art. R47(1)). On the scope and limits of party autonomy with respect to the time limit for appeal against sports-governing bodies' decisions, in particular in relation to the nature of such time limit (a question which we only address briefly here), cf. Haas, *CAS Bull. 2011/2,* pp. 6–9.

8 Cf. paras. 24–26 below.

9 Cf., e.g., CAS 2002/A/432, *Demetis v. FINA*, Award of 27 May 2003, para. 7.4, *CAS Digest III*, p. 422; CAS 2005/A/971, *RBF v. IBF*, Award of 31 January 2006, para. 6.2.1. Thus, if one of the parties brings forward facts in the case which show that the time limit for appeal has elapsed, the CAS should review the question of its own motion, rather than doing so only if the respondent(s) raise(s) an objection to that effect (in this sense, cf. CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 74; CAS 2013/A/3135, *PAS Giannina 1966 v. Stéphane Demol*, Award of 3 April 2014, para. 27, referring to CAS 2006/A/1168, *Nathan Baggaley v. International Canoe Federation*, Award of 29 December 2006, para. 80). This does not mean that CAS panels must ascertain the relevant facts *ex officio*. The facts are to be adduced by the parties, and the burden of proving compliance with the applicable time limit normally lies with the party bringing an appeal (cf. Haas, *CAS Bull. 2011/2,* p. 6). See also Mavromati/Reeb, Art. R49, para. 100.

III CALCULATION OF THE TIME LIMIT FOR APPEAL UNDER ARTICLE R49

A Applicable Law

CAS jurisprudence shows that *questions relating to the calculation of the time limit under Art. R49 are generally decided according to Swiss law*.[10] However, the reasons given by CAS panels to apply Swiss law to these issues are not entirely consistent. In some decisions, Swiss law was applied on the ground that it was the law applicable to the merits of the dispute, which is often the case, in particular when the sports-governing body having rendered the decision under appeal is domiciled in Switzerland.[11] However, this approach will result in the applicability of a different national law every time the decision under appeal is rendered by a sports-governing body domiciled outside Switzerland. Other CAS panels have referred to Swiss law as the *lex arbitri* (which will always be the case in CAS proceedings, by operation of Art. R28).[12] We submit that the latter approach is preferable and should be followed systematically as it leads to a uniform result, especially because it allows for the application of the *European Convention on the Calculation of Time Limits* (ECCTL), to which Switzerland is a party.[13] The ECCTL sets out clear rules,[14] which are particularly well-suited for proceedings in an international context. 7

The questions that arise most often in connection with the calculation of the time limit for appeal relate to the determination of the correct starting point for the calculation (*dies a quo*) (B.), as well as the moment when the time limit expires (*dies ad quem*) and what exactly needs to be done by then (C.), but also the exact manner in which the time limit should be calculated, including whether and how official holidays and other non-working days are to be taken into account (B. and C.). 8

10 See also the discussion in Mavromati/Reeb, Art. R49, paras. 96–97.

11 See, e.g., CAS 2006/A/1065, *W. v. FEI*, Termination Order of 20 June 2006.

12 Cf., e.g., CAS 2002/A/403, *Pantani v. UCI* & CAS 2002/A/408, *FCI v. UCI*, Award of 12 March 2003, paras. 86–87; CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.6; CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.12–7.13 (referring to Swiss law as the "lex fori").

13 European Convention on the Calculation of Time Limits of 16 May 1972, in force in Switzerland since 28 April 1983 (SR 0.221.122.3), available at: < http://www.admin.ch/ch/f/rs/0_221_122_3/index.html > . For a case where the Panel expressly referred to the ECCTL (in connection with the calculation of the time limit to submit a respondent's answer), see CAS 2014/A/3489 and 2014/3490, *S. E. Palmeiras v. D. Filho,* and *Panathinaikos FC*; *Panathinaikos FC v. S. E. Palmeiras, D. Filho and FIFA*, Award of 10 November 2014, para. 119.

14 The basic rules for the calculation of time limits pursuant to the ECCTL (Arts. 3, 4 and 5) are the following: (i) time-limits expressed in days, weeks, months or years shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight; (ii) where a time limit is expressed in weeks the *dies ad quem* shall be the day of the last week whose name corresponds to that of the *dies a quo*; (iii) where a time limit is expressed in months or in years the *dies ad quem* shall be the day of the last month or of the last year whose date corresponds to that of the *dies a quo* or, when there is no corresponding date, the last day of the last month; (iv) where a time limit is expressed in months and days or fractions of months, whole months shall be counted first, and afterwards the days or fractions of months; for the purpose of calculating fractions of months, a month shall be deemed to consist of 30 days; (v) Saturdays, Sundays and official holidays shall count when calculating a time limit. However, where the *dies ad quem* of a time limit before the expiry of which an act shall be performed is a Saturday, a Sunday, an official holiday or a day which shall be considered as an official holiday, the time limit shall be extended to include the first working day thereafter.

B The *Dies a Quo* and Related Issues

9 To calculate the applicable time limit for appeal, the appellant first needs to know how to determine the point in time, that is, the triggering event, from which the time limit starts to run. Art. R49 provides that the time limit for appeal runs "*from the receipt of the decision appealed against*". Under Swiss law, a decision is deemed to have been received (or as the case may be, notified) from the moment it enters the so-called "sphere of control" of its addressee or of a representative, agent or other person authorized to receive it on the addressee's behalf.[15] According to CAS case law, "as a basic rule, a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge. Hence, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content".[16] This may mean that depending on the circumstances, even if the decision is received by the appellant late in the evening or during the week-end (e.g., by fax, assuming the applicable rules allow for notification by this means), provided he or she did have a (reasonable) opportunity to gain knowledge of its contents, the decision will be deemed to have been notified at that time.[17]

10 On the other hand, in cases where a decision is formally notified after the appellant has already had an opportunity to find out its contents – for instance, because the decision or at least its substance has become available on the internet – *formal notification will remain the relevant starting point* for the purposes of the time limit for appeal. Thus, any specific requirements as to the manner of notification in the applicable regulations (e.g., a provision requiring the use of registered mail with acknowledgment of receipt) should be complied with.[18] That being said, while such requirements should be interpreted strictly in order to preserve legal certainty and the parties' procedural rights,[19] appellants should not be allowed to invoke them abusively so as to artificially extend the time limit for appeal.[20] Accordingly, there

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15 BGE 118 II 42 para. 3b. Cf. also Haas, *CAS Bull. 2011/2*, p. 11; see further Mavromati/Reeb, Art. R49, para. 98, with regard to the case law concerning appeals against FIFA decisions rendered in proceedings where a national association acted as the representative of a player.

16 CAS 2006/A/1153, *WADA v. Assis & FPF*, Award of 24 January 2007, para. 40, referring to CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 60, where this principle was said to be *"recognised unanimously by the Swiss legal doctrine and the Swiss Tribunal Federal"*.

17 Cf. CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, paras. 57–66 (where the applicable rules provided for notification by fax); cf. also, by contrast, CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.14–7.15.

18 Cf., e.g., Art. 277 UCI ADR (no longer in force). In CAS 2008/A/1555 & 2009/A/1779, *UCI v. Kashechkin & CFRK / Kashechkin v. CFRK & UCI*, Award of 10 August 2009, paras. 77–80, the Panel observed in passing that while an irregularity in the notification of the decision (which, *in casu*, had been sent by the national federation to counsel for the appellant by fax, rather than by registered letter as then required by the UCI Rules) may have affected the running of time with respect to the time limit for appeal, it did not operate to invalidate the decision *per se*, as pleaded by the rider. Cf. also CAS 2004/A/635, *RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield*, Award of 27 January 2005, para. 50. More recently, see CAS 2012/A/2997, *NADA v. Y*, Award of 19 July 2013, para. 10.

19 Or, as the Panel put it in CAS 2007/A/1396 & 1402, *WADA & UCI v. Valverde & RFEC*, Preliminary Award of 10 July 2008, para. 53: *"in the interest of justice and proper proceedings"*.

20 Cf., e.g., CAS 2008/A/1528, *UCI v. Caruso & FCI* and CAS 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, paras. 7.5.-7.7. The correct approach in those instances where receipt

is CAS case law to the effect that potential appellants may have to make good faith efforts to *inquire about a decision if, in the circumstances, they are (or should be) aware of its existence, even though the decision has not been notified to them in accordance with the applicable rules*.[21] We submit that this should apply only in truly exceptional cases, namely when, under the specific circumstances, it would be abusive to rely on formal notification. In any event, prior awareness should not be presumed and the burden of proof in that respect lies with the party asserting it.[22]

The reference to a "decision" in Art. R49 should be understood to mean *the complete decision, including the reasons for it*.[23] However, subject to overriding rules to the contrary,[24] a party may choose to start appeal proceedings upon receipt of (only) the operative part, if the latter is notified prior to the issuance of the reasons,[25] in particular for the purpose of seeking an immediate staying order.[26] This will have no influence on the time limit to file the appeal brief, which is to be computed from the moment in which the time limit to file the statement of appeal (against the "full" decision) expires, and not from the date on which the statement of appeal is actually filed with the CAS.[27] 11

of notification of the decision on a certain date is disputed will depend on the circumstances of the case. Since, as pointed out by Haas, the possibility that the running of time for the appeal may be delayed by an irregularity in the (or lack of) notification can impose a heavy burden on the other parties affected by the decision, the extent to which such delay should be admitted will likely have to be determined by reference to the point in time when, under the circumstances, *"the other parties involved were legitimately able to rely on the (federation's) measure in question no longer being appealed"*(Haas, *CAS Bull. 2011/2*, p. 13).

21 Cf., e.g., CAS 2007/A/1413, *WADA v. FIG & Vysotskaya*, Award of 20 June 2008, paras. 54–62; or (finding that such a requirement did not apply in the circumstances), CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 3 July 2009, paras. II.4.10-II.4.19 (noting that the appellant in question, WADA, had not been a party to the proceedings from which the decision under challenge originated). See also CAS 2014/A/3485, *WADA v. Daria Goltsova & IWF*, Award of 12 August 2014, para. 22. See also Pellaux, *CAS Bull. 2016/2*, paras. 19–20.

22 Cf. CAS 2007/A/1413, *WADA v. FIG & Ms. N. Vysotskaya*, Award of 20 June 2008, para. 60; cf. also CAS 2007/A/1444 & CAS 2008/A/1465, *UCI v. Iban Mayo & RFEC*, Award of 11 August 2008, para. 86.

23 See, e.g., CAS 2002/A/403, *Pantani v. UCI* & CAS 2002/A/408, *FCI v. UCI*, Award of 12 March 2003, paras. 97–98; CAS 2007/A/1322, *Giannini, Giannini & Cardinale v. S.C. Fotbal Club 2005 S.A.*, Award of 19 September 2007, para. 7.2. See also CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.6; CAS 2013/A/3361, *Dominique Blake v. JADCO*, Award of 2 May 2014, para. 6.7. More generally on the concept of appealable decision, cf., e.g., Bernasconi, pp. 261–274, and CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.8–7.10 (summarizing the CAS case law in point). Cf. also Art. R47, paras. 29–30.

24 See the discussion of the FIFA Rules Governing the Proceedings before the Players' Status Committee and the Dispute Resolution Chamber (Art. 15) and the FIFA Disciplinary Code (Art. 116) in the commentary on Art. R47 above.

25 Cf., e.g., CAS 2007/A/1322, *Giannini, Giannini & Cardinale v. S.C. Fotbal Club 2005 S.A.*, Award of 19 September 2007, para. 7.3. Haas, *CAS Bull. 2011/2*, p. 11, makes this statement under the proviso that any express rules to the contrary (i.e., requiring for appeals to be brought only upon receipt of the reasoned decision) may have to be deviated from in those cases where the "decision already has an adverse effect on the person concerned before the reasons for the decision are issued".

26 Cf. Arts. R37 and R48(1).

27 Cf. Art. R51, first sentence (*"[w]ithin ten days following the expiry of the time limit for the appeal…"*).

12 All this being said, there is no uniform solution in the CAS case law on the question of the *exact starting point* for the purpose of calculating the time limit for appeal under Art. R49. Although some (isolated) CAS awards have held that the time limit begins to run on the day of service of the decision under appeal,[28] it is submitted that, unless the applicable regulations provide otherwise, *the starting point should be the day after that on which notification was received,*[29] as contemplated by Art. 3(1) of the ECCTL. This is explicitly provided in Art. R32(1) for the cases where Art. R49 applies directly (because the applicable regulations do not stipulate a specific time limit for appeal),[30] but should apply also in cases where the relevant regulations provide for a time limit to appeal without specifying when it starts.[31] In line with this position, some CAS panels have referred to Art. R32(1)'s rationale, namely that the appellant should have the full time limit at his or her disposal regardless of the time when the decision was notified to him or her, where the regulations were silent on this point.[32]

13 When, as is the case in anti-doping matters, the sports regulations also provide for *a right to appeal by sports-governing bodies that did not participate in the first instance proceedings*, they usually stipulate that the time limit for this purpose shall begin to run only upon receipt by the relevant sports-governing body of the complete case file.[33]

14 Another situation that may occasionally arise is that where the addressee of a final decision requests the relevant sports-governing body to reconsider the decision. Although as a general rule, *a mere request for reconsideration does not have the*

28 CAS 2002/A/399, *Poll v. FINA*, Award of 31 January 2003.

29 CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, paras. 33–34; CAS 2008/A/1583, *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD* / CAS 2008/A/1584, *Vitoria Sport Clube de Guimaraes v. UEFA & FC Porto Futebol SAD*, Award of 15 September 2008, para. 7; CAS 2007/A/1364, *WADA v. FAW and James*, Award of 21 December 2007, paras. 6.1–6.4.

30 Art. R32(1) ab initio, providing that "[t]he time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received". Cf., e.g., CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 13 July 2009, paras. 3.2–3.6; CAS 1006/A/1176, *Belarus Football Federation v. UEFA & FAI Belarus*, Award of 14 March 2007, para. 7.2.

31 For a case where the Sole Arbitrator found that the applicable rules determined both the time limit for appeal and its exact starting point in time, cf. CAS 2014/A/3611, *Real Madrid FC v. FIFA*, Award of 27 February 2015, paras. 41–65, with regard to (then) Art. 67(1) FIFA Statutes (now Art. 58(1)) and Annex 2, art. 9, para. 2 of the FIFA RSTP.

32 Cf., e.g., CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, para. 34; cf. also Haas, *CAS Bull. 2011/2,* p. 12.

33 The relevant regulations will normally also set out a time limit within which the file can be requested. An example of such rules can be found, in Art. 12.3 of the FEI Equine Anti-doping and Controlled Medication Rules (2016), fixing a time limit of 10 days, and in Art. 13.2.5.2 of the UCI Anti-Doping Rules (UCI ADR, 2015 version), fixing a time limit of 15 days. In a case applying the UCI ADR (the relevant provision being Art. 334 at the time), the Panel found that the time limit for appeal, as far as the UCI was concerned, had begun to run only once a document that was missing from the case file had been received by the UCI, after the latter had requested it from the national federation that had issued the decision (TAS 2010/A/2288, *UCI v. Giunti, FCI & CONI*, Award of 30 May 2011, paras. 5–10). Thus, CAS Panels tend to apply this requirement strictly, meaning that the complete file – not just a file that is substantially complete – must have been delivered, if requested, to the relevant anti-doping organization (cf., e.g., CAS 2007/A/1444 & CAS 2008/A/1465, *UCI v. Mayo Diez & RFEC*, Award of 11 August 2008, para. 85). See also CAS 2013/A/3112, *WADA v. Lada Chernova & RUSADA*, Award of 16 June 2014, para. 56.

effect of suspending the time limit for appeal,[34] in some specific cases the CAS has acknowledged (by reference to the principle of good faith) that the *dies a quo* had been delayed by discussions between the parties, as long as such discussions could reasonably be understood to allow for the possibility of a reconsideration of the decision in question.[35] Of course, a new time limit will start running if the application for reconsideration is entertained and a new decision (confirming or amending the previous one) is issued as a result.

C The *Dies ad Quem* and the Act(s) to be Accomplished within the Time Limit for Appeal

Article R49 does not state how to determine when exactly the time limit for appeal expires (the *dies ad quem*).[36] Art. 3(1) ECCTL provides that time limits expressed in days, weeks, months or years shall run from the *dies a quo* at midnight to *the dies ad quem at midnight*. Art. R32(1) encapsulates the same solution, stipulating that a time limit will be met if the relevant communication is sent "before midnight, […] on the last day on which [the time limit expires]". Accordingly, if a decision is notified on 31 March, the *dies ad quem* under Art. R49 would be 21 April at midnight.[37] But what if 21 April falls on a non-working day? 15

Article R49 also does not specify how *official holidays and non-working days* are to be taken into account when calculating the time limit for appeal. Art. R32(1) (in line with Art. 5 ECCTL) directs that holidays and non-working days should be included in the calculation of the time limit (i.e., counted as normal days), and that where the *dies ad quem* falls on a holiday or non-working day, the time limit is to be extended so as to include the first working day thereafter. Art. R32(1) is directly applicable when the relevant time limit is the one of Art. R49, but can also be (and has indeed been) applied by analogy in cases where the relevant regulations contain a special time limit but are silent on this point.[38] 16

The next (logical) question is *which country's official holidays and other non-working days should be referred to* in order to determine the date (and time) of the *dies ad quem*. Until the Code's latest (2017) revision, Art. R32(1) (as amended in 2013) 17

34 CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.8; see also Haas, *CAS Bull. 2011/2*, p. 13.

35 CAS 2003/A/443, *Slovak Karate Union v. World Karate Federation*, Award of 31 July 2003, para. 7; CAS 2002/A/362, *IAAF v. CAF & Zubek*, Award of 27 August 2002. A party shall not be allowed to artificially extend the time limit for appeal by sending repeated requests for clarification and/or interpretation of the decision (for instance so as to make the dispute fall under the jurisdiction *ratione temporis* of the CAS ad Hoc Division; see most recently CAS-OG 16/022, *COC & CCF v. UCI*, Award of 9 August 2016).

36 Cf. Art. 2 ECCTL.

37 If the applicable regulations provided for a "one month" time limit (replacing Art. R49's 21 days), the time limit for appeal would expire, in this example, on 30 April. Indeed, according to Art. 4(2) ECCTL, *"[w]here a time-limit is expressed in months […] the dies ad quem shall be the day of the last month […] whose date corresponds to that of the dies a quo or, when there is no corresponding date, the last day of the last month"*. See also the example provided in Mavromati/Reeb, Art. R49, p. 437 (showing how to calculate a 21-day time limit spanning over the Christmas and New Year period pursuant to Art. R49).

38 Cf., e.g., CAS 2004/A/574, *Associaçao Portuguesa de Desportos v. Valencia C.F. S.A.D.*, Award of 15 September 2004, paras. 68–69. Cf. also CAS 2002/A/399, *Poll v. FINA*, Award of 31 January 2003, para. 7.3.

stated that the relevant country was that "where the notification is to be made". In the previous edition of this commentary, it was submitted that, given the ambiguity of Art. R32(1)'s language as just quoted, "when the applicable rules contain no specific provision, official holidays and non-working days in Switzerland[, i.e. the country in which the statement of appeal is to be notified (and the place of arbitration)], *as well as* those in the country where the appellant (or, as the case may be, his or her counsel/representative) is domiciled should be taken into account".[39] The subsequent CAS case law demonstrated that the meaning of Art. R32(1)'s reference to the country "where the notification is to be made" was indeed far from clear.[40]

18 As revised in 2017, Art. R32(1) now provides that the "[t]ime limits fixed under th[e] Code are respected if the communications by the parties are sent before midnight, *time of the location of their own domicile or, if represented, of the domicile of their main legal representative*, on the last day on which such time limits expire" (emphasis added). While one can debate on the wisdom of opting for a solution which entails that the country of reference may well be different for each party to the dispute, Art. R32(1)'s current wording has the undeniable advantage that it finally provides, in clear terms, the necessary elements to determine the *exact date (and time) of expiry* of the time limit to appeal under Art. R49. Art. R32(1)'s provision supplements Art. R49 whenever the latter applies because the relevant rules do not provide for a specific time limit for appeal, but also when the rules do specify the time limit, but do not provide how and which holidays or non-working days should be taken into account in calculating the *dies ad quem*.

19 As to the question of what exactly the appellant must do, on the *dies ad quem*, to comply with the time limit for appeal, reference must be made to Art. R31(3) of the Code. According to the latest (2016) version of this provision, while the statement of appeal must be filed "by courier delivery"[41] with the CAS Court Office, if it is transmitted before midnight on the *dies ad quem* "by facsimile [or email], the filing is valid upon receipt of the facsimile [or email] by the CAS Court Office provided that the [statement of appeal is] also filed by courier within the first subsequent business day".[42] It should also be noted that since the 2010 Code revision, the *exhibits* accompanying the statement of appeal *need not be filed by "courier delivery"*. As

39 Rigozzi/Hasler, at Art. R49, para. 16.

40 See in particular CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, para. 52, and CAS 2016/A/4615, *A. v. WADA*, Award of 4 November 2016, paras. 6.1–6.11.

41 As submitted in the previous edition of this commentary (at Art. R49, para. 15), the reference to "courier delivery" also allows for the use of registered mail, the important point being that the means of delivery used by the appellant allows him or her to prove that and when the statement was sent to the CAS, whether in printed form or "saved on digital medium" (as permitted by Art. R31(3)). On the appellant's burden of proof as to the timely filing of the statement of appeal, see the above commentary of Noth/Haas, para. 7 at Art. R32. On what constitutes a "digital medium" within the meaning of Art. R31(3), see the commentary of Noth/Haas, para. 8 at Art. R31.

42 Note that, taken verbatim, the English version of this provision is somewhat ambiguous, to the extent it stipulates that: *"if […] transmitted in advance by facsimile or by electronic mail […], the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit […]"*.Indeed, one may wonder whether *"the first subsequent business day of the relevant time limit"* (emphasis added) must fall before the expiry of the time limit. However, the French version of Art. R31(3), which is the prevailing one in case of doubt (see Art. R69), clarifies that what is meant is "le premier jour ouvrable *suivant l'expiration* du délai applicable" (emphasis added).

stated in Art. R31(5), exhibits "*may be sent to the CAS Court Office by electronic mail*, provided that they are listed and that each exhibit can be clearly identified".[43]

IV EXTENSION AND REINSTATEMENT OF THE TIME LIMIT TO APPEAL

Article R32(2), which allows for the extension, in certain circumstances, of the time limits set forth in the CAS Code's procedural rules, unambiguously stipulates that it does not apply to "the time limit for the filing of the statement of appeal". Thus, the *time limit for the filing of the statement of appeal pursuant to Art. R49 cannot be extended*. 20

The question is whether it can be reinstated (*restitué*, *wiederherstellt*) and if so in what circumstances. Even though the CAS Code is silent in this respect, the principle of good faith, which also applies to arbitration proceedings,[44] requires that an *application for the reinstatement of the time limit for appeal* should be allowed where (i) the appellant establishes to the hearing body's satisfaction that he or she was unable to act timely through no fault of his or her own and (ii) the request for reinstatement is submitted, together with the statement of appeal, promptly after the hindrance causing the appellant's failure to comply with the applicable time limit has ceased to exist or to deploy its effects.[45] 21

A specific question that may arise in this respect is how to deal with those instances where the appellant's *failure to meet the time limit has been caused by the sports-body that issued the decision*.[46] This may occur, for example, when the relevant sports-body's regulations are unclear as to whether the decision is subject to appeal before the CAS,[47] or, where there is a notice on the right to appeal accompanying the decision, if that notice is erroneous or misleading.[48] Although the relevant jurisprudence is case- and rule-specific, it is submitted that the length of the time limit in question should be taken into account in determining whether a reinstatement should be allowed: the shorter the time limit for appeal, the more emphasis should be placed on the sports-governing body's duty to ensure that the time limit, as well as any action(s) required on the part of the appellant within such time limit, are stated and/or communicated clearly.[49] 22

43 On the meaning of this provision, see the above commentary on Art. R31; see also Mavromati/Reeb, Art. R31, paras. 25–26.

44 Cf., e.g., BGer. 4A_600/2010 para. 4.2. See also Mavromati/Reeb, Art. R49, para. 101 in fine (with reference to BGer. 4A_600/2010, according to which a breach of procedural good faith can lead to the setting aside of the award).

45 Cf. Rigozzi, *Délai d'appel*, p. 264. These criteria are now reflected in Art. 148 ZPO; cf. also Haas, *CAS Bull. 2011/2*, p. 12; Pellaux, para. 30.

46 Cf. Haas, *CAS Bull. 2011/2,* p. 10, for a more thorough analysis of this point.

47 Cf., finding that this was not the case, CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 3 July 2009, paras. 1.1–1.15; CAS 2008/A/1658, *S.C. Fotbal Club Timisoara S.A. v. FIFA & RFF*, Award of 13 July 2009, para. 100.

48 CAS 2009/A/1795, *Obreja v. AIBA*, Award of 25 September 2009, paras. 80–82; CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, para. 30. For a case where the appellant (unsuccessfully) contended that the absence of a notice on appeal and/or an indication of the applicable time limits in the decision itself operated to extend the time limit for appeal, and the ramifications of the principle of good faith in this context, cf. CAS 2011/A/2366, *Sable Football Club de Batie c. Fédération Camérounaise de Football*, Award of 12 December 2011, paras. 48–70.

49 Cf. also Haas, *CAS Bull. 2011/2,* p. 14.

23 In this context, one could also wonder what would happen if the decision was challenged before the state courts and the latter were to decline jurisdiction on the ground that there is a valid arbitration agreement between the parties.[50] In accordance with Art. 182(2) PILS, since the CAS Code does not regulate this issue, it should be decided by the panel. It is submitted that, as a matter of principle, *CAS panels should apply (by analogy) the rule contained in Art. 63(1) ZPO*, which provides that "[i]f an application that was withdrawn due to lack of jurisdiction or dismissed on procedural grounds is brought again before the competent conciliation authority or court within a month of its withdrawal or dismissal, it shall be deemed pending as from the time when it was first brought".[51] The principle embodied in Art. 63(1) ZPO should apply[52] even if (i) the time limit applicable in the state court that declined jurisdiction (for instance, the "one month" time limit applicable before the Swiss courts for actions pursuant to Art. 75 CC) was longer than the relevant time limit for appeal before the CAS (for instance, the 21-day time limit of Art. R49), and (ii) the action in the state court was filed after the time limit for appeal applicable before CAS had elapsed (for instance, 28 days from receipt of the decision under appeal, in a case where Art. R49 applies before CAS). Even if it is true that this would, in effect, allow the appellant party to obtain an extension of the time limit for appeal, the fact remains that any other interpretation would deprive that party of the possibility of bringing its claim and challenging CAS jurisdiction before the state courts, a possibility which is expressly contemplated by both Art. 7 PILS and Art. II NYC.[53] Hence, unless it is established that the appellant brought the challenge in the state courts solely in an attempt to cure his or her failure to meet the applicable time limit for appeal before the CAS, or for any other abusive reason,[54] *a new time limit*[55] *must be given irrespective of whether the state court declining jurisdiction was seized within the time limit that would have been applicable before the CAS*. That said, to be on the safe side, prospective appellants are advised to ensure that any challenge they bring before the courts is filed within the time limit that would be

50 Cf. Art. 7 PILS and Art. II NYC.

51 Prior to the enactment of the ZPO, the principle now embodied in its Art. 63 was found in Art. 139 CO, which the Swiss courts had progressively interpreted so as to cover various different situations extending beyond its strict contractual scope, including with respect to appeals against decisions issued by sports federations (cf. *Bezirksgericht of Zurich*, 1st Section, *Galatasaray Sport Kulübü v. FIFA*, decision of 7 February 2005; CaS 2005, p. 258). For its part, the CAS has affirmed the applicability of Art. 139 CO by analogy in appeals proceedings, and held that, *in casu,* this provision did operate to "suspend" the relevant time limit for appeal (CAS 2008/A/1528, *UCI v. Caruso & FCI* & CAS 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, para. 7.12). For a case where the Supreme Court alluded to the possible application of Art. 63 ZPO in arbitration matters, see BGer. 4A_628/2015 para. 2.4.4.1.

52 With the adjustment, it is submitted, that the new time limit should not be one month, as provided in Art. 63(1) ZPO, but rather the same time limit as would have originally applied in case of appeal before the CAS.

53 Hence, it is submitted that the majority of the panel in CAS 2005/A/953 (*Dorthe v.* IIHF) was incorrect in holding that the expiry of the time limit for appeal under the relevant regulations excluded the application of Art. 139 CO (the predecessor of Art. 63 ZPO) by analogy (Award of 6 March 2006, paras. 65–73). *Contra*: Mavromati/Reeb, Art. R49, para. 108 (without reference to Art. 7 PILS and Art. II NYC).

54 Requesting an additional time limit could be abusive, e.g., when the challenging party, knowing full well that there was an undisputable CAS arbitration agreement, has made a claim that the CAS would not be able to afford an effective remedy, or would otherwise be incapable of deciding in an unbiased manner.

55 Corresponding, it is submitted, to the one that would have originally applied in case of appeal before the CAS.

applicable if the challenge were filed before the CAS, even if it is their claim that any relevant CAS arbitration agreement is inoperative/invalid or does not apply in the case at hand.[56]

V NATURE AND EFFECT OF A DECISION ON COMPLIANCE WITH THE TIME LIMIT IN ARTICLE R49

24 Since the 2013 Code revision, Art. R49 provides that the Division President shall not initiate a procedure if he or she finds that a *statement of appeal is "on its face, late"* and that "[w]hen a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has already been constituted, to terminate it if the statement of appeal is late", in which case, "the Division President or the President of the Panel renders his decision after considering any submission made by the other parties". In view of the importance of the decision at stake and since the text of this provision may lend itself to different interpretations, we consider that (i) prior to making his or her decision "on the face" of the statement of appeal, the Division President should, where reasonable, draw the appellant's attention to the issue and allow him or her to provide any further information as may be useful for the purposes of that decision within a short time limit (arguably 5 days by analogy with Art. R48(3)), and (ii) where a procedure has been initiated, the Division President or the President of the Panel should not just consider "any submission [as may have been] made by the other parties" on the issue of the timeliness of the appeal, but should *invite* them to submit *observations* further to the request for termination.

25 An important issue that, so far, has been dealt with in an inconsistent manner in the case law is the nature of the decision rendered by the CAS when it finds that an appeal has been filed out of time. In some such cases, the panel ruled that it had "no jurisdiction to decide" the dispute at hand,[57] while in others the (statement of) appeal was deemed "inadmissible".[58] It is submitted that the correct consequence of a *failure to meet the time limit for appeal is that the appeal is dismissed on the merits*.[59] As mentioned above, we consider that the time limit set out in Art. R49 is to be treated as a "preclusive" time limit.[60] This position is grounded in the answer to the question whether the situation resulting from an untimely appeal should be that the appellant's claim can no longer be brought before the CAS (as opposed to another judicial forum) or that it can no longer be raised *at all*. From this perspective, it seems clear that the intent in adopting a time limit for appeal against decisions

56 Another possibility would be to file a statement of appeal with the CAS simply to toll the time limit, requesting that the arbitration be stayed pending the state court's decision on jurisdiction. There is however no guarantee that the CAS will grant such a request.

57 Cf., e.g., CAS 2004/A/574, *Associaçao Portuguesa de Desportos v. Club Valencia*, Award of 15 September 2004.

58 Cf., e.g., CAS 2006/A/1065, *Williams v. FEI*, Termination order of 20 June 2006; CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006; CAS 2011/A/2366, *Sable Football Club de Batie v. Fédération Camérounaise de Football*, Award of 12 December 2011. More recently, CAS 2013/A/3135, *PAS Giannina 1966 v. Stéphane Demol*, Award of 3 April 2014; CAS 2014/A/3611, *Real Madrid FC v. FIFA*, Award of 27 February 2015.

59 CAS 2008/A/1528, *UCI v. Caruso & FCI* & CAS 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, para. 7.9; Haas, *CAS Bull. 2011/2,* p. 4–5.

60 Under Swiss law, this is referred to, in French, as a *délai de péremption* (in German, *Verwirkungsfrist*). Haas, *CAS Bull. 2011/2,* pp. 4–5; Oswald, *Temps et droit*, pp. 244–245; Rigozzi, *Délai d'appel*, pp. 269–271. Cf. also Mavromati/Reeb, Art. R49, para. 100, approving this approach.

rendered by sports bodies, whether in the CAS Code or in the relevant sports regulations, is not that of reserving any further available remedy, including before the state courts, upon the expiry of that time limit. The purpose of a provision such as Art. R49 is to ensure that any challenges to the validity of a decision issued by a sports organization will be heard and determined swiftly, in a final and binding manner and within the same time limit for all those that are subjected to it. In other words, the time limit for "appeal" stipulated in Art. R49 (or any corresponding provisions in the sports-bodies' statutes or regulations) ought to be seen as the *equivalent of the preclusive time limit* set out (as far as Swiss association law is concerned) *in Art. 75 CC*, upon the lapsing of which no actions can be brought against an association's decision.[61] In a 2012 ruling, the Supreme Court discussed the approach outlined here and held that it was "prima facie convincing", adding that any other interpretation would allow appellants to circumvent CAS arbitration agreements by simply waiting for the time limit for appeal to expire.[62]

26 A *ruling finding that the appeal was filed out of time* puts an end to the arbitration by (in effect) rejecting the appellant's claim and is therefore a final, dispositive decision (with prejudice) as to the underlying dispute. Irrespective of the terminology used by the CAS, and whether such a decision is issued before or after the initiation of a procedure, it will *qualify as a final award*, even when it is rendered in the form of a simple (termination) order, or just as a letter.[63] Thus, any such decision issued by either a panel or the President of the Appeals Division may be challenged before the Swiss Federal Supreme Court pursuant to Art. 190 PILS. In this connection, it bears noting that despite the fact that such a ruling does in effect dismiss the claim and therefore is not a decision on the arbitrators' jurisdiction,[64] the Supreme Court is likely to consider, in light of its case law, that compliance with the time limit for appeal constitutes a jurisdictional question for the purposes of the action to set aside.[65]

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61 CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006, para. 55; CAS 2008/A/1528, *UCI v. Caruso & FCI* & CAS 2008/A/1546, *CONI v. Caruso & FCI*, para. 7.9; Haas, *CAS Bull. 2011/2,* p. 4; Rigozzi, p. 271. The Swiss Federal Supreme Court has confirmed that, with respect to the decisions adopted by Swiss sports associations, appeals before the CAS pursuant to Art. R47 of the Code are the equivalent of annulment proceedings in the Swiss courts under Art. 75 CC (BGE 136 III 345 para. 2.2.1).

62 BGer. 4A_488/2011 para. 4.3.1. The same interpretation appears to be adopted by Mavromati/Reeb, Art. R49, para. 100, and Fumagalli, *CAS Bulletin 2016/1*, pp. 24–25. See, however, Pellaux, *CAS Bull. 2016/2*, paras. 65–70.

63 Here again, CAS practice has not been entirely consistent. In some instances the decision has been made as an award (cf. CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006), while in other cases it has been issued in the form of a simple "Termination Order" whereby the proceedings were declared closed and struck from the CAS roll (cf. CAS 2006/A/1065, *Williams v. FEI*, Termination order of 20 June 2006). See also Mavromati/Reeb, Art. R49, para. 105 in fine, concurring.

64 Contrary to what was held by the Panel in CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 56, namely that a finding that the appeal was out of time would entail the extinction of the arbitration agreement, as it were, *ratione temporis* (which would mean that, subject to any applicable preclusive time limits in the relevant national law, the parties would then be free to bring their dispute before the state courts).

65 BGer. 4P.284/1994; cf. also Kaufmann-Kohler/Rigozzi, para. 8.150. While dogmatically questionable, this approach is pragmatically sound, as, given the limited grounds for appeal provided for by Art. 190(2) PILS, it constitutes the only way to ensure that a party is not deprived of access to justice. Significantly, this question was left open in the relevant passage of the Supreme Court's decision BGer. 4A_488/2011. See also Mavromati/Reeb, Art. R49, paras. 100–102 and 104–105, with further references.

VI RELEVANCE OF ARTICLE R49 WHEN THE APPELLANT CLAIMS THAT THE DECISION UNDER APPEAL IS NULL AND VOID

27 It is well established under Swiss association law that decisions which are null and void are challengeable at any point in time irrespective of the one-month time limit of Art. 75 CC.[66] One might ask whether the same principle applies also in CAS appeals proceedings. Contrary to what a CAS panel held in a 2011 award,[67] we submit that *when Swiss law applies to the merits, Art. R49 (or the corresponding provisions in the applicable sports regulations) should not be interpreted in such a way as to curtail the exercise of a substantive right that would still be available to the challenging party were it not for the existence of the arbitration agreement*.[68] In any event, Art. R49 should not prevent a party from requesting a declaration that a given decision is null and void if the ground for nullity is so egregious that the decision itself should be considered as constituting a violation of public policy.[69]

66 Riemer, para. 62 at Art. 75 CC; cf. also the discussion in CAS 1997/O/168, *Fédération Française des Sociétés d'Aviron et al. v. FISA*, Award of 29 August 1997, para. 11, and, more recently, CAS 2013/A/3148, *PAASF v. FIAS & Vasily Shestakov*, Award of 5 September 2014, para. 137.

67 CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 96.

68 See also the Panel's statement in CAS 2013/A/3148, *PAASF v. FIAS & Vasily Shestakov*, Award of 5 September 2014, at para. 137, that *"decisions which are null and void are challengeable at any point in time irrespective of the 21-day time limit of Article R49"* (although in that case the Panel went on to find that the Appellant had failed to establish that the decision at issue was null and void). The inherent problems and limitations in the *ECF & GCF v. FIDE* Panel's reasoning are apparent in the following passage of the Award: *"[f]or sake of clarity, the Panel underlines that in its view Article R49 of the CAS Code is not intended to alter the law applicable on the merits. If the latter differentiates between decisions that are null and void and those that are only 'annullable' this situation remains unchanged. Article R49 of the Code comes into play at a different level. It only deals with the admissibility of the claim in front of the CAS and not with the merits of a specific claim. Thus, in a case where an association's decision were null and void, it would not become materially valid merely because the time limit in R49 of the CAS Code has expired. Instead, the member would only be procedurally barred from filing a principal action against said decision. However, nothing would prevent the same member to avail himself in a different context of the fact that the decision is null and void"* (CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 97). See also the critical views expressed by Del Fabro, *SpuRt 2014*, pp. 49–53, and Handschin, pp. 127–128. *Contra* (i.e., in favor of the view held by the *ECF & GCE v. FIDE* Panel): Fumagalli, *CAS Bulletin 2016/1*, p. 25.

69 Mavromati/Reeb, Art. R49, para. 115; Haas, *CAS Bull. 2011/2*, p. 9; Oswald, *Temps et droit*, pp. 245–246. On this point, the Panel in *ECF & GCF v. FIDE* noted that *"[whether] an exception to this rule must be accepted and an appeal allowed after the expiry of the deadline if a decision of an association violates international public policy can be left unanswered, since in the view of the Panel no such violation has occurred in the case here"* (CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 9).

Article R50: Number of Arbitrators

The appeal shall be submitted to a Panel of three arbitrators, unless the parties have agreed to a Panel composed of a sole arbitrator or, in the absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent pays its share of the advance of costs within the time limit fixed by the CAS Court Office.

When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide.

I SCOPE AND PURPOSE OF THE PROVISION

1 Article R50 of the CAS Code deals with two distinct issues, namely the possible alternatives in terms of the number of arbitrators composing CAS panels (II.) and the circumstances in which two or more appeals can be heard by the same panel (III.).

II THREE MEMBER PANEL OR SOLE ARBITRATOR

2 Article R50(1) clarifies that in appeals proceedings, in the absence of an agreement between the parties on the number of arbitrators, the CAS will proceed on the basis of a *presumption in favor of a panel composed of three arbitrators.* Thus, unless the arbitration agreement provides for a sole arbitrator (which to our knowledge occurs very rarely in appeals cases)[1] or the appellant requests the appointment of a sole arbitrator in the statement of appeal, the arbitration will be set in motion under the assumption that the case will be heard by a three-member panel. Indeed, in accordance with Art. R48, the appellant is expected to nominate an arbitrator in the statement of appeal.[2]

3 Nonetheless, Art. R50(1) enables the President of the Appeals Division to decide, in light of "*the circumstances of the case*" *that the dispute should be heard by a sole arbitrator*. Since the 2013 revision, the CAS Code specifies that whether or not the Respondent has paid its share of the advance of costs will be one such circumstance.[3] It is submitted that further relevant circumstances may be: (i) whether one of

1 Where such an agreement has been concluded, it will be for the Division President to appoint the sole arbitrator (Art. R54(1)). Mavromati/Reeb, Art. R50, para. 13, indicate that, as a rule, the Division President will do so within 10 days from receipt of the statement of appeal, unless the parties agree on the appointee's name, in which case the Division President will decide whether to confirm the appointment in accordance with Art. R54(2).

2 Cf. Art. R48, para. 14 above. The time limit for the respondent to appoint its arbitrator is then ten days after receipt of the statement of appeal (cf. Art. R53). In multiparty cases, Art. R54(5) provides for the application of Art. R41 by analogy and *mutatis mutandis* (cf. Art. R54(5) and Art. R41, paras. 5–8 above).

3 Cf. Mavromati/Reeb, Art. R50, para. 11, with reference to a CAS case where this criterion was applied prior to the 2013 Code revision (CAS 2009/A/1801, *Aris FC v. D. Bajevic*, Award of 17 March 2010). For a recent case applying that rule, see CAS 2014/A/3472, *WADA v. Marzena Karpinska & Polish Weightlifting Federation*, Award of 5 September 2014, paras. 20–27.

the parties has requested the appointment of a sole arbitrator, (ii) the degree of complexity and (iii) the importance of the case, as well as, where applicable, (iv) the amount in dispute.[4] In practice, it is quite rare for the President of the Appeals Division to decide that a case should be heard by a sole arbitrator where the parties do not agree on that solution.[5] By contrast, it is not so unusual for the parties to agree after the filing of the statement of appeal that, in the circumstances, the panel should be composed of a sole arbitrator.[6] Whether it is made prior to or after the commencement of the arbitration, the parties' agreement on the number of arbitrators is binding on the CAS. According to a recent ruling by the Swiss Supreme Court,[7] if the institution disregards that agreement, the parties must immediately (i.e., without awaiting the final award) seek the annulment of the relevant decision based on Art. 190(2)(a) PILS, failing which they will be deemed to have waived the corresponding objection.[8]

The *advantage of having the case heard by a sole arbitrator* rather than a three- **4**
member panel is that it *saves time and reduces the costs of the proceedings*.[9] The prospect of a faster resolution of the dispute will weigh heavily in the parties' decision where there is some urgency, for instance when an athlete's or team's eligibility to

4 Cf. also Mavromati/Reeb, Art. R48, para. 10, adding, by reference to the language used in the 1994 CAS Code, that the urgency of the matter is also a relevant circumstance, *"to the extent that the case can be resolved more rapidly through a sole arbitrator"*.

5 Cf., e.g., CAS 2009/A/1846, *Azovmash Mariupol Basketball v. van de Hare et al.*, Award of 30 November 2009, paras. 13 and 16, and, more recently, CAS 2015/A/3961, *Samuel Inkoom v. Andrew Evans & FIFA*, Award of 10 December 2015, paras. 25–35. In CAS 2015/A/4095, *B. & M. v. FIVB*, Award of 6 October 2015, paras. 14–23, the Division President decided to appoint a sole arbitrator notwithstanding the Respondent's objection, but confirmed the appointee subsequently suggested by the Respondent. The grounds for the Division President's decision under Art. R50 are generally not communicated to the parties. According to Mavromati/Reeb, Art. R50, para. 10, the Division President will be more likely to decide in favor of a sole arbitrator in matters involving *"lower amounts in dispute"* and *"as long as the case is simple – both at a factual and at a legal level – and there is rich precedent on the issues to be approached"*. In line with this reasoning, cf, e.g., CAS 2012/A/2906, *Alain Geiger v. EFA and Al Masry FC*, Award of 12 February 2013, paras. 17–20, where one of the parties disagreed with the (CAS Court Office's) proposal to appoint a sole arbitrator "in view of the [low] amount in dispute", and the Division President nonetheless decided to appoint a sole arbitrator. However, see CAS 2012/A/2972, *Matti Helminen v. RLVB*, Award of 23 July 2013, paras. 11–14, where the appellant accepted the CAS Court Office's proposal to appoint a sole arbitrator in order to contain costs, but the respondent did not consent and the Division President decided the case should be heard by a three member panel. See also CAS 2013/A/3358, *Mersin Idman Yurdu Club v. FIFA*, Award of 25 April 2014, paras. 14–21, where the Respondent objected, "in view of the issue of principle […] at stake" in that case, to the appointment of a sole arbitrator as suggested by the Appellant, and the Division President nonetheless decided to appoint a sole arbitrator; and CAS 2014/A/3765, *Club X. v. D. & FIFA*, Award of 5 June 2015, paras. 13–22, where FIFA unsuccessfully objected to a sole arbitrator on the ground of the potential *"substantial and far-reaching consequences [of the case] in respect of future FIFA procedures"*.

6 Cf., e.g., CAS 2015/A/4190, *Mohammed Shafi Al Rumaithi v. FEI*, Award of 1st March 2016, paras. 17–19; CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, para. 26; CAS 2013/A/3075, *WADA v. Laszlo Szabolcs & RADA*, Award of 12 August 2013, paras. 3.1–3.26.

7 BGer. 4A_282/2013 para. 5.2, confirming the binding character of the parties' agreement on the number of arbitrators, meaning that the Code's fallback rules in Art. R50 apply only absent such an agreement.

8 BGer. 4A_282/2013 para. 5.3.1.

9 Cf., e.g., CAS 2007/A/1377, *Rinaldi v. FINA*, Award of 26 November 2007.

take part in a specific competition or tournament is at stake.[10] The choice of a sole arbitrator favors faster decisions by eliminating the need for tripartite exchanges and deliberations. It should also be borne in mind that finding (a) date(s) where three arbitrators are simultaneously available for a hearing (in addition to the parties and their counsel) can be a source of significant delays. The appointment of a sole arbitrator will naturally obviate such difficulties.[11]

5 On the other hand, the *default presumption in favor of a three-member panel* that is embedded in Art. R50(1) reflects the importance (for the parties but also for the sake of a well-articulated jurisprudence) of having legal questions considered from different perspectives, it reduces the risk of mistakes, it allows each party or side to the dispute to participate in the composition of the panel and, for all the foregoing reasons, it *generally contributes to the parties' acceptance of the outcome*.[12]

III CASES HEARD BY THE SAME PANEL – CONSOLIDATION

6 Although Art. R50(2) also appears under the heading "number of arbitrators", it deals with a different topic, namely the instances in which *two or more cases may be heard by the same panel*.

7 Art. R50(2) only provides that two or more cases may be submitted to the same panel, i.e. not consolidated within the meaning of Art. R52(4), entailing that, under Art. R50(2), the cases will still "be treated separately".[13] The stated condition for Art. R50(2) to apply is that the cases in question "*clearly involve the same issues*". In practice, this condition will of course be easily met when two or more parties bring an appeal against the same decision, which will then generally also lead to the consolidation of the cases (in line with Art. R52(4)).[14] This happens relatively frequently in doping disputes, as the WADA Code allows an appeal not only by the athlete(s) concerned but also by the relevant international federation and by WADA itself.[15] The same can occur

10 In this connection, it should also be recalled that the parties can request for the CAS to conduct the proceedings in an expedited manner (cf. Art. R52(3)).

11 Moreover, a careful choice of the appointee arbitrator by the Division President will prevent any time-consuming challenge procedures.

12 All these advantages of three-member panels over sole arbitrators were underscored by the Supreme Court in its aforementioned decision, 4A_282/2013 para. 4 (discussed in para. 3 above).

13 Cf. Mavromati/Reeb, Art. R52, para. 15. In other words, the cases remain formally distinct and the panel may issue separate awards (cf., e.g., CAS 2008/A/1564, *WADA v. IIHF & Busch*, Award of 23 June 2009, paras. 30–33, and CAS 2008/A/1738, *WADA v. DEB & Busch*, Award of 23 June 2009, paras. 37–41).

14 Art. R52(4) governs cases where a party files a statement of appeal "in connection with a decision" which is already the object of (an)other appeal(s) before the CAS.

15 The appellants' prayers for relief do not need to be identical (in CAS 2011/A/2384, *UCI v. Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Contador Velasco & RFEC*, Award of 6 February 2012, both WADA and the UCI had initiated proceedings against Alberto Contador and Real Federación Española de Ciclismo. The fact that UCI was seeking financial sanctions, unlike WADA, was not viewed as an impediment to the matters being consolidated), and do not need to be directed against the same parties (cf. CAS 2009/A/1817, *WADA & FIFA v. CFA et.al.* & CAS 2009/A/1844, *FIFA v. CFA & Eranosian*, Award of 26 October 2010, where, although the Cyprus Football Association was a common party, the second case included seven respondents not included in the first proceedings).

when two football clubs[16] (or a player and a club[17] or two clubs and a player[18]) had a case against each other before the relevant FIFA dispute resolution body, they are all unhappy with the final decision, and they each appeal it before the CAS.[19] Art. R50(2) may also be considered an option when there are two (or more) different decisions under appeal, but the parties are the same and the subject matter of the decisions is similar or related[20] – for instance, two different positive tests involving the same athlete.[21] That said, the parties do not necessarily have to be the same. Hence, one fails to see why Art. R50(2) was not applied in the well-known cases where Joseph Blatter and Michel Platini appealed the FIFA Appeal Committee decisions declaring each of them ineligible to take part in football-related activities at national and international level for six years.[22] While there were two separate decisions and the parties were not the same (which rules out consolidation within the meaning of Art. R52), the main issue was clearly similar (i.e. both cases revolved around the question whether Mr. Blatter and Mr. Platini had concluded an oral agreement back in 1998/1999). Art. R50(2) may also come into play when both appeals and ordinary proceedings are initiated in connection with the same dispute, given that the CAS considers that appeals proceedings cannot be consolidated with ordinary proceedings.[23]

8 According to Art. R50(2), it is the *President of the Appeals Division* who invites the parties to agree on having their cases heard by the same panel.[24] The Parties can of course also agree between themselves and present a joint request to that effect. If a party disagrees, either when the suggestion is made by another party or upon the invitation of the President of the Division, the latter shall decide the issue. In making that decision, the President of the Division will verify that the disputes clearly involve the same issues and assess whether, under the circumstances, the advantages of having them heard by the same panel outweigh the reasons invoked by the resisting party.

9 The *main advantage of having the case heard by the same panel* is procedural efficiency and, crucially, the avoidance of the problems that could arise if distinct panels were to issue conflicting awards in relation to the same object or issues.

16 CAS 2007/A/1388 & 1389, *Racing Club de Strasbourg Football v. Ismaily Sporting Club*, Award of 21 May 2008.

17 CAS 2009/A/1856 & 1857, *Fenerbahçe Spor Kulubu v. Appiah*, Award of 7 June 2010.

18 Cf., e.g., CAS 2010/A/2145/2146/2147, *Sevilla FC SAD et al. v. Udinese Calcio S.p.A. et al.*, Award of 28 February 2011, para. 52.

19 While in most of these cases FIFA waives the right to be a party in the arbitration, in important ones it may elect to participate. Cf., e.g., CAS 2009/A/1880, *FC Sion v. FIFA & Al-Ahly Sporting Club* and CAS 2009/A/1881, *El-Hadary v. FIFA & Al-Ahly Sporting Club*, Award of 1 June 2010; CAS 2008/A/1519, *FC Shakhtar Donetsk (Ukraine) v. Matuzalem (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520, *Matuzalem (Brazil) & Real Zaragoza SAD (Spain) v. FC Shakhtar Donetsk (Ukraine) & FIFA*, Award of 19 May 2009.

20 CAS 2010/A/2243-2358-2385-2411, *General Jantararoj & ABAT v. AIBA*, Award of 3 August 2011.

21 CAS 2009/A/1805 & 1847, *IAAF v. RFEA & Onyia*, Award of 22 September 2009.

22 CAS 2016/A/4474, appeal filed against the FIFA Appeal Committee decision dated 16 February 2016; CAS 2016/A/4501, appeal filed against the FIFA Appeal Committee decision dated 24 February 2016.

23 CAS 2016/O/4430, *T. et al. v. TFF, UEFA et al.*, and CAS 2015/A/4343, *T. et al. v. TFF, UEFA et al.*, CAS Court Office letters of 15 and 19 February 2016.

24 Cf., e.g., CAS 2007/A/1298, *Wigan Athletic FC v. Heart of Midlothian*, CAS 2007/A/1299, *Heart of Midlothian v. Webster & Wigan Athletic FC* & CAS2007/A/1300, *Webster v. Heart of Midlothian,* Award of 30 January 2008, paras. 42–47. More recently, CAS 2013/A/3091, 3092 & 3093, *FC Nantes v. FIFA & Al Nasr SC,* Award of 2 July 2013, para. 46.

10 A *potential difficulty* with Art. R50(2) relates to the ability of the parties to nominate their own arbitrator. Whereas, in the normal course of events, both the appellant(s) and the respondent(s) are given the opportunity to nominate their respective arbitrators,[25] problems could arise in the event two or more cases were to be heard by the same panel, as arbitrators may have already been appointed by the parties to the case which was filed first in time and the parties to the later case(s) would not then have the opportunity to participate in this important decision. This element should of course be carefully considered by the President of the Appeals Division in making his or her decision.[26]

25 In cases where there is a plurality of claimants and/or respondents, it is not uncommon for the parties on the same side to find an agreement on the nomination of an arbitrator (cf. Art. R41.1(2)).

26 In such cases, it is submitted that the party or parties concerned may request the application, by analogy, of Art. R40.2.

Article R51: Appeal Brief

Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit.

In his written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

I PURPOSE OF THE PROVISION

In CAS appeals proceedings, the appeal brief is the *only full-fledged written submission* the appellant can file. Art. R51 sets out the time limit for filing the appeal brief (II.), as well as its required contents (III.). Art. R31's (recently amended) prescriptions as to the modalities for filing written submissions should also be taken into account in this context (IV.). 1

II TIME LIMIT FOR FILING THE APPEAL BRIEF

According to Art. R51, the appeal brief must be filed "within *ten days following the expiry of the time limit for the appeal*",[1] i.e. the time limit to file the statement of appeal pursuant to Art. R49 of the CAS Code, failing which the appeal will be deemed withdrawn. The appellant is normally reminded of this time limit by the CAS Court Office in its letter acknowledging receipt of the statement of appeal and setting the arbitration in motion.[2] That said, given the *drastic consequences of a failure to meet the time limit to file the appeal brief*, it is worth examining the way in which that time limit must be calculated. 2

The *calculation of the time limit for the filing of the appeal brief* should not be done by taking the date of notification of the decision under appeal and adding to that date the number of days corresponding to the time limit for appeal increased by ten. The correct way to calculate the time limit for filing of the appeal brief is to determine, first, the exact day on which the time limit for appeal expires, and then to calculate an additional ten-day time limit from that date. This can make a difference because, 3

1 Note that while Art. R51 does not make an express reservation for regulations deviating from its ten-day time limit, the CAS practice seems to admit such deviations, as shown in particular by the cases governed by the IAAF Anti-doping Rules (ADR), which provide, in Rule 42.15, that the appellant has fifteen days from the deadline for filing the statement of appeal to file his or her appeal brief with CAS. See, e.g., CAS 2013/A/3341, *WADA v. Contreras & COC*, Award of 28 May 2014, paras. 46–48; CAS 2012/A/2779, *IAAF v. CBAt & Simone Alves da Silva*, Award of 13 January 2013, para. 29 (both referring to what was then Rule 42.13 IAAF ADR).

2 Cf. paras. 8–10 at Art. R52 below.

as already mentioned,[3] if the time limit for the filing of the statement of appeal expires on a Saturday, Sunday, official holiday or other non-business day, the ten days within which the appeal brief should be filed are to be calculated from the first working day thereafter. It is also worth noting that if the appellant files the statement of appeal before the expiry of the deadline for appeal, he or she still has the full time limit of ten days from the date of the actual time limit for appeal to file his appeal brief.[4]

4 The appellant can also opt to *file the appeal brief together with the statement of appeal*. If he or she chooses to do so, in particular to speed up the process (as the time limit for the Respondent to file its answer is calculated from the actual date of filing of the appeal brief),[5] he or she should state this clearly already in the statement of appeal, for instance by entitling it "Statement of Appeal and Appeal Brief". If the appellant does not proceed in this manner, but nonetheless wants his statement of appeal to be treated as his appeal brief, Art. R51 affords him a last opportunity to inform the CAS Court Office in writing that the statement of appeal shall be considered as the appeal brief within the time limit for filing the appeal brief, i.e., ten days following the expiry of the time limit for appeal. It is important to emphasize that once the time limit for filing the appeal brief has expired, the appellant cannot "cure" his failure to timely file the brief by informing the CAS that his original statement of appeal should actually also be considered as his appeal brief. Failing to provide this indication to the CAS within the applicable time limit will result in the appeal "be[ing] deemed withdrawn".[6]

5 If the time limit to file the appeal brief *expires on an official holiday or non-business day* "in the location from where [the brief] is to be sent", it shall be deemed to expire at the end of the first subsequent business day in accordance with Art. R32(1).[7] It is submitted that the relevant location is that of the domicile of the addressee of all correspondence for the appellant's attention, as identified by the CAS Court Office in its communication acknowledging the appointment of counsel and/or stating the official addresses for notification that will be used for the parties in the arbitration.[8] Be that as it may, it is for the party asserting that the last day of the time limit was an official holiday in the relevant location to prove this and the fact that the submission was filed on the first subsequent business day.

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3 Cf. Art. R49 and R32.

4 Cf. also Mavromati/Reeb, Art. R51, para. 5.

5 Cf. Art. R55(1).

6 Cf., e.g., CAS 2011/A/2632 & 2633, *Memis & Sevgi v. TFF*, Termination order of 9 December 2011. It is submitted, however, that this consequence might be excessive if the appellant filed a statement of appeal containing all the elements required by Art. R51 and merely omitted to inform the CAS that the statement should also be considered as the appeal brief. For a case admitting a belated indication by the appellant that the statement of appeal should be considered as its appeal brief (inter alia because the only participating respondent had not objected), see CAS 2008/A/1699, *Nile Sports Club (Hasaheisa) Sudan v. SFA & Al-Hilal Sports Club*, Award of 4 September 2009, paras. 28–29. On the other hand, Mavromati/Reeb, Art. R51, para. 6 in fine refer to an unpublished case, CAS 2014/A/3482, *FC Union Berlin v. Changchun Yatai FC*, Award of 17 September 2014, to state that *"the appeal shall be deemed to have been withdrawn if the appellant fails to meet [Art. R51(1)'s time limit to indicate that the statement of appeal should be considered as the appeal brief]"*.

7 CAS 2006/A/1175, *Daniute v. International Dance Sport Federation*, Award of 26 June 2007, para. 53.

8 On this, see Art. 32(1) above, and the discussion in the commentary on Art. R49, para. 18, above.

Unlike the time limit to file the statement of appeal,[9] the *time limit to file the appeal brief can be extended* upon a reasoned request, in accordance with Art. R32(2).[10] This notwithstanding, the calculation of the actual time limit according to the principles set out above[11] must be carried out diligently, as an extension can be granted only if it has been requested *before its expiry*.[12] The possibility of requesting such an extension is particularly important in practice because, once the appeal brief is filed, the appellant will not be allowed to supplement or amend its contents, save in exceptional circumstances (as provided in Art. R56(1)). If the appellant or his counsel have legitimate reasons not to be in a position to gather all the required evidence and to properly prepare the appellant's case within the time limit provided for in Art. R51, they should ask for an extension, indicating already at that stage that if the extension should be denied, the appellant reserves the right to seek the panel's authorization to supplement his/its case according to Art. R56(1). 6

III CONTENTS OF THE APPEAL BRIEF

Pursuant to Art. R51, the appeal brief should contain a "stat[ement of] the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which [the appellant] intends to rely". The appeal brief should be a comprehensive submission, as in principle *there will be no other possibility for the appellant to file further written submissions*. The notion of a "stat[ement of] the facts and legal arguments" is well-known in the vast majority of jurisdictions. In practice, similar to the briefs filed under other arbitration rules, a CAS appeal brief will generally be divided in two main parts, namely (A.) a statement of the relevant "Facts" or "Factual background", and (B.) a section setting out the "Law" or a "Legal Discussion". A final section should be devoted to the appellant's prayers for relief (C.). The appeal brief must be accompanied by all the evidence that the appellant wishes to rely upon (D.) and, if necessary, contain any request(s) for evidentiary measures to be taken by the panel (E.).[13] 7

A Statement of Facts

The factual part of the appeal brief must be *as comprehensive as possible*, as new allegations are not admissible after the filing of that submission (in accordance with Art. R56(1)). That being said, it is advisable for appellants to take the precaution of 8

9 Cf. Arts. R32(2) and R49 and the relating commentary above.

10 The parties can also agree between themselves on an extension (cf., e.g., CAS 2013/A/3052, *Miguel Sanchíz et al. v. Camilo Amado et al. & COP*, Award of 14 February 2014, para. 31). In such cases, CAS should confirm the parties' agreement.

11 Cf. paras. 2–3.

12 On the other hand, the extension need not be granted before the expiry of the original time limit (which the CAS Court Office is also at liberty of staying pending a decision on the request for extension by the Division President or the panel, if already constituted); cf. CAS 2010/A/2235, *UCI v. Tadej Valjavec & Olympic Committee of Slovenia*, Award of 21 April 2011, paras. 69–70. Note also that absent an objection by the respondent, a belated request for extension and/or filing of the appeal brief may (exceptionally) be deemed admissible if the circumstances so warrant (cf. CAS 2013/A/3140, *A v. Club Atlético de Madrid SAD & FREF & FIFA*, Award of 10 October 2013, paras. 5.6–5.9).

13 On the contents of the appeal brief, see also Mavromati/Reeb, Art. R51, paras. 9–14.

reserving the right to expand on their statements of facts in case the respondent's answer contains factual allegations that need to be rebutted.[14]

9 On a more practical level, even if this is not required by Art. R51, nor by the CAS Court Office's standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion,[15] it is highly advisable to *number the paragraphs* of the statement of facts (or, for that matter, of the entire brief) and, *for each allegation, to indicate the evidence relied upon*.[16]

B Legal Discussion

10 The appeal brief's section devoted to the legal discussion should contain a preliminary subsection *establishing the grounds for CAS's jurisdiction to hear the appeal as well as the appeal's admissibility*, including its timeliness.[17] In this preliminary section it is also useful to set out the applicable regulations and (national) law(s) on which the appellant's legal analysis will be based.[18]

11 The main section devoted to the *discussion of the merits of the case* should also be as comprehensive as possible. However, while Art. R56(1) does indicate that new arguments will not be admissible after the submission of the appeal brief, CAS practice shows that the appellant will be allowed to fine-tune his legal argumentation at the hearing or even to bring new arguments. After all, under Swiss arbitration law the panel is not bound by the legal reasoning of the parties (*jura novit curia*).[19] By contrast, the appellant should not be allowed to resort, at the hearing, to totally new arguments in such a way as to "ambush" the respondent.

C Prayers for Relief

12 A final section in the appeal brief should be devoted to the appellant's prayers for relief. Even if this is not specifically stated in Art. R51, the prayers for relief set out in the appeal brief must not necessarily be the same as those contained in the statement of appeal.[20] On the other hand, *the appellant must consider very carefully the wording* of his or her prayers for relief at the stage of the appeal brief, since, as noted above, he or she shall not subsequently "be authorized to supplement or amend [his] requests".[21] At the hearing, the panel may (and often will) ask for

14 Cf. Art. R56 and the commentary below.
15 Cf. Art. R52, paras. 8–10 below.
16 It is submitted that the CAS Court Office's standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion could be adjusted accordingly.
17 Cf. Art. R47 and R49.
18 Cf. Art. R58.
19 BGE 130 III 35 para. 5 and the references cited therein. See also the discussion in the commentary on Art. R56(1) below.
20 CAS 2007/A/1434 & 1435 *IOC & WADA v. Pinter & FIS*, para. 79. Cf. also Mavromati/Reeb, Art. R51, para. 9, referring to the unpublished award in CAS 2013/A/3206, *Genoa Cricket and Football Club v. Gelsenkirchen Schalke 04* (7 March 2014), para. 41. To be on the safe side, it is however advisable to reserve, in the statement of appeal, the appellant's right to amend his prayers for relief (CAS 2007/A/1396 & 1402 *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 5.11). Cf. also CAS 2009/A/1881, *El Hadary v. FIFA & Al-Ahly Sporting Club,* Partial Award on *lis pendens* and jurisdiction of 7 October 2009, para. 58.
21 Art. R56(1). On this point see the commentary on Art. R56 below.

clarifications on the parties' prayers for relief, but should not allow them to put forward new claims.

D Exhibits and Other Evidence

In accordance with Art. R51(1), the appeal brief must be accompanied by "*all exhibits and specification of other evidence*". 13

Exhibits within the meaning of Art. R51 are not only paper documents, but more generally any "writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means".[22] The main issues that may possibly arise in connection with exhibits relate to (i) their authenticity and (ii) any required translations. 14

In the absence of any indication, whether in the CAS Code or in the Court Office's letter setting the arbitration in motion,[23] it is generally accepted that there is no need to file the originals of documents: copies will be deemed to conform to the originals. If there is a dispute as to the *authenticity* of a document (which regrettably tends to occur with increasing frequency, in particular in football transfer disputes), the panel can order the production of the original document(s) for inspection[24] and if needed decide that an independent investigation will be conducted on this aspect.[25] 15

In its standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion, the CAS Court Office generally emphasizes that "all exhibits […] shall be clearly listed and numbered" and that any documents that are not in the language of the arbitration (as determined in that same letter, based on the statement of appeal)[26] should be accompanied by a *translation* into that language.[27] For lengthy documents, it is recommended to request leave from the CAS to translate only the most relevant parts. 16

The *other evidence* that must be specified according to Art. R51(1) may be witness evidence, but also – in particular in doping cases – expert evidence. 17

Article R51(2) sets out the applicable rules with respect to *witness evidence*. The witnesses must be listed in the appeal brief. The CAS Code simply requires that the appeal brief "includ[e] a brief summary of their expected testimony". Experience suggests that a literal interpretation of this provision allows the parties to describe the 18

22 In accordance with the definition of the term "Document" in the IBA Rules.

23 Cf. Art. R52, paras. 8–10 below.

24 Cf., e.g., CAS 2012/A/2698, *Konyaspor Kulübü Dernegi v. Ituano Futebol Clube*, Award of 23 July 2013, para. 46.

25 Cf., e.g., CAS 2010/A/2196, *Al Qadsia v. FIFA & Kazma SC* & CAS 2010/A/2205, *Jovancic v. FIFA & Kazma SC*, Award of 29 February 2012, paras. 45–49; CAS 2012/A/2957, *Football Club Khimki v. Eljver Raça*, Award of 5 February 2014, paras. 3.24–3.30.

26 Cf. Art. R52. If the respondent wants the arbitration to be conducted in (another) CAS (working or accepted) language, it should inform the CAS Court Office immediately so that the President of the Division can decide on the language before the documents are actually translated.

27 While Art. R29(3) provides that *"the Panel may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure"*, in practice the CAS Court Office requests the said translations already in the directions it issues when acknowledging receipt of the statement of appeal. That said, the CAS Court Office does not request "certified" translations and leaves it to the panel to take the appropriate steps in case of disputes as to the accuracy of any of the translations provided.

contents of prospective witness testimonies in very broad terms, which can lead the other party to feel ambushed during the hearing. When such a risk is foreseeable, the respondent should request, or the panel could order *sua sponte*, that the appellant provide further particulars on the contents of the witness testimony or testimonies on which he or she relies, or that he or she file (a) proper witness statement(s).[28]

19 Since the Code contains no specific provision with respect to the *concept of "witness"*, the practice of the CAS tends to follow the principles crystallized in Art. 4(2) of the IBA Rules, namely that "any person may present evidence as a witness, including a party or a party's officer, employee or other representative".[29] A party does not have an obligation to testify. According to CAS practice, if a party or a party representative decides to give evidence as a witness, then the other party or parties will have the right to cross-examine him. The accused *athlete is thus allowed to file a "witness statement" and to give evidence at the hearing*. In doping cases, the athlete has a clear incentive to at least appear at the hearing and make himself available for questioning, since the doping regulations allow the panel to draw adverse inferences from his "refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation".[30]

20 *Witness statements* are seldom used in CAS proceedings. It is submitted that the possibility to file such statements should be used more systematically, in particular in complex cases. Experience shows that the use of witness statements significantly reduces the length of the evidentiary part of the hearing, leaving more time for the discussion of legal and procedural issues between the parties and the panel. In the

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28 The same is true (*a fortiori*) for experts, as discussed further below. The authors are aware of one case where the respondent objected to (1) the appellant's failure to submit summaries of the expected testimonies of some witnesses, and (2) the appellant's submission of summaries of the expected testimonies of other witnesses and experts that in the respondent's view were "insufficient to allow for a meaningful and expedient witness examination", "provid[ing] for very broad topics" and only "rudimentary information", allegedly making it impossible for the respondent to anticipate what exactly the relevant individuals would testify at the hearing, and thus preventing it from effectively defending itself. The panel decided not to hear the witnesses for which no summary had been provided (considering also that it deemed itself sufficiently informed on the relevant topics), and ordered that the experts provide (additional) summaries of their expected evidence (*in lieu* of the detailed expert reports requested by the respondent), adding that it reserved its right to reject the experts if on the basis of the summaries so provided, it would come to the conclusion that their contribution was irrelevant (CAS 2015/A/4343 & CAS 2016/A/4430, Order of 28 September 2016).

29 Note that isolated decisions such as CAS 2012/A/2874, *Grzegorz Rasiak v. AEL Limassol*, Award of 31 May 2013, paras. 64–72, according to which *"the CAS Code specifically refers only to witnesses and experts and not to parties and thus makes a clear distinction between them. Consequently, the Panel finds that a party or representative of a party is, strictly speaking, not required to provide a statement of its/his expected testimony"* should not be followed as a matter of principle. Where a party intends to have one of its representatives heard at the hearing, but has not listed him or her as a witness, nor provided a summary of his or her testimony, it will be for the panel to clarify the situation sufficiently ahead of the hearing in order to avoid abuses.

30 Cf. Art. 3.2.5 WADA Code. In non-doping matters, athletes might think twice before submitting witness statements and testifying, as this would expose them to cross-examination by the sports-governing body. The athlete's counsel should thus consider this option carefully, bearing in mind that the athlete will in any event be allowed to make a personal statement at the end of the hearing.

absence of any indication in Art. R51, Art. 4(5) of the IBA Rules should be adopted as the governing or at least guiding standard with respect to the contents of witness statements.[31]

The same principles apply to *experts* and expert reports. The concept of expert is also not defined in the Code. Beyond distinguishing between tribunal appointed and party-appointed experts, only the latter of which are expressly mentioned in Art. R51(2),[32] the IBA Rules provide that a party may rely on an expert appointed by it as "a means of evidence on specific issues" (Art. 5(1)). 21

In practice, the hearing of experts without the prior filing of written *expert reports* is simply not realistic. Expert reports can also be presented to cover legal issues,[33] in particular if they concern a law of which none of the members of the panel has specific knowledge.[34] The contents of the expert reports should be in line with the requirements of Art. 5(2) of the IBA Rules.[35] In particular, any report submitted by an 22

31 Art. 4(5) of the IBA Rules reads as follows: *"[e]ach Witness Statement shall contain: (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided; (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing; (d) an affirmation of the truth of the Witness Statement; and (e) the signature of the witness and its date and place."* Note that witness statements filed in the lower instance or even transcripts of testimonies given before the previous instance (provided they contain, or are supplemented with, the information suggested under Art. 4(5) IBA Rules) can be used as witness statements in CAS proceedings.

32 The appointment of an expert by the panel may be requested as one of the evidentiary measures mentioned in Art. R51(2), which CAS arbitrators have the power to order in accordance with Art. R44.3(2) and (3).

33 For examples of cases in which legal opinions on specific matters of foreign law were filed in CAS proceedings, see, e.g., CAS 2008/A/1583 & 1584, *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*; CAS 2008/A/1584, *Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD*, Award of 15 September 2008, where expert evidence was provided on Portuguese law; and CAS 2010/A/2252, *Zavarov v. FC Arsenal Kiev,* Award of 6 July 2011, where both parties produced legal opinions on questions of Ukrainian law. More recently, see, e.g., CAS 2013/A/3365 & 336, *Juventus FC v. Chelsea FC & AS Livorno v. Chelsea FC*, Award of 21 January 2015, where both sides produced several legal opinions on matters of Swiss and EU law before a panel composed of a majority of non-Swiss lawyers, in a dispute raising numerous issues of legal interpretation.

34 To avoid the arbitrators' inclination to consider such legal opinions as mere submissions, which is technically incorrect since they qualify as evidence, a legal expert should ensure that his or her opinion is stated in a way that is as neutral as possible and make clear that the conclusions set forth therein are based on the factual assumptions provided in his or her instructions.

35 Art. 5(2) of the IBA Rules reads as follows: *"[t]he Expert Report shall contain: (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience; (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions; (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal; (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions; (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided; (f) if the Expert Report has been translated, a statement as to the language in which it was originally*

expert should include a statement of "his or her background, qualifications, training and experience". The qualifications of the experts adduced by the parties can and will be taken into account by the arbitrators when assessing the expert evidence. Absent any specific evidentiary rules in the applicable regulations,[36] the arbitrators cannot apply evidentiary rules of national law since Swiss arbitration law provides that arbitrators can freely assess the evidence ("*libre appréciation des preuves*").[37]

23 The appellant should in any event reserve the possibility, in his appeal brief, to (i) name *rebuttal witnesses and/or experts* and (ii) file rebuttal witness statements and/or rebuttal expert reports in case the evidence tendered with the respondent's answer should make this necessary.[38]

E Requests for Evidentiary Measures

24 Article R51(2) also requires that any "evidentiary measure which [the appellant] requests" should be contained in (or at least filed together with) the appeal brief. Such evidentiary requests can range from a request to produce the case *file from the first instance proceedings* to an application for the panel to request the assistance of the state courts in accordance with Art. 184(2) PILS, for instance to *summon a witness* who is not under the control of the appellant. Under this provision the parties may also request the appointment of an expert by the panel.[39] In the vast majority of cases, the requests made will concern the *production of documents according to Art. R44.3* of the Code. After the filing of the appeal brief, evidentiary requests should be granted solely in exceptional circumstances, in particular if the existence and/or the relevance of the evidence sought have become apparent further to the filing of the respondent's answer in accordance with Art. R55.

IV FILING AND NUMBER OF COPIES

25 The previous edition of this commentary noted that the Code's 2013 revisions had removed the possibility for the appellant to file the appeal brief only by facsimile within the time limit and to send the original by post later on. The 2016 edition of

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prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing; (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report; (h) the signature of the Party-Appointed Expert and its date and place; and (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author".

36 See, e.g., Arts. 5.2.4.4 and 6.2.4.3, both entitled 'Alternative Biological Matrices', in WADA's International Standard for Laboratories providing that *"[a]ny testing results obtained from hair, nails, oral fluid or other biological material shall not be used to counter Adverse Analytical Findings"* from urine, respectively blood.

37 See, e.g., BGer 4A_214/2013 para. 4.1, underscoring that the arbitrators' freedom in assessing the evidence is *"a pillar of arbitration"*.

38 On the (limited) possibility to file additional (rebuttal) submissions, see the commentary on Art. R56 below.

39 Mavromati/Reeb, Art. R51, para. 12. A CAS decision denying such a request, even though it had been presented in due time and in the appropriate form, was considered by the Swiss Supreme Court in BGer. 4A_274/2012 para. 3. The Court held that the parties have the right to request the appointment of a tribunal expert and that an unjustified denial of such a request violates their right to be heard. That said, in accordance with the principle of good faith, a party's failure to raise the corresponding objection during the proceedings precludes it from challenging the award on that ground.

the Code has brought further changes in this respect:[40] it is again possible to file submissions, including the appeal brief, by facsimile (and now also by e-mail) on the date of expiry of the time limit, and such submissions will be deemed timely provided that they have also been sent by courier, in the requisite number of copies (on paper or saved on a "digital medium"), "within the first subsequent business day of the relevant time limit".[41]

As submitted in the previous edition, the *filing of an incorrect number of copies* is **26** of no effect with regard to the observance of the time limit. In such a case, a short additional deadline should be given to the appellant for completing his filing.[42]

40 For more details, see the commentary on Art. R31 above.
41 Art. R31(3).
42 See also the commentary on Art. R31 above, para. 13.

Article R52: Initiation of the Arbitration by the CAS

Unless it appears from the outset that there is clearly no arbitration agreement referring to CAS or that the agreement is clearly not related to the dispute at stake, CAS shall take all appropriate actions to set the arbitration in motion. The CAS Court Office shall communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Articles R53 and R54. If applicable, he shall also decide promptly on any application for a stay or for interim measures.

The CAS Court Office shall send a copy of the statement of appeal and appeal brief to the authority which issued the challenged decision, for information.

The CAS Court Office may publicly announce the initiation of any appeals arbitration procedure and, at a later stage and where applicable, the composition of the arbitral panel and the hearing date, unless the parties agree otherwise.

With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure.

Where a party files a statement of appeal in connection with a decision which is the subject of a pending appeal before CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may decide, after inviting submissions from the parties, to consolidate the two procedures.

I PURPOSE OF THE PROVISION

1 Article R52 governs the first stages of the appeals arbitration procedure, once the statement of appeal has been received by the CAS Court Office. It provides the legal basis for the different actions that will or may be undertaken by the CAS to set the arbitration in motion (III.-IV.), depending on the contents of the statement of appeal and, as the case may be, the existence of any other pending appeals against the same decision (V.). All this, however, is subject to the CAS being *prima facie* satisfied, on the basis of the statement of appeal, that it has jurisdiction to hear the case (II.).

II *PRIMA FACIE* EXAMINATION OF CAS JURISDICTION

2 Before initiating the arbitration, the CAS Court Office should conduct a *prima facie* analysis of CAS jurisdiction *based on the statement of appeal and the documents mandatorily enclosed therewith*.[1] The purpose of this preliminary review is to make sure that no action is taken, in particular the notification of the statement of appeal to the respondent(s) or the issuance of an order on provisional measures, if (i) "there is clearly no arbitration agreement referring to the CAS" or (ii) "the agreement is clearly not related to the dispute at stake".

3 The *relevant test* for the purposes of Art. R52 "is not whether CAS has jurisdiction but only whether there is an appearance of an arbitration agreement referring to

1 Cf. Art. R48.

CAS. If there is such an appearance, then the Panel of arbitrators, to which this case may be referred, will have to rule on its own jurisdiction" if the latter is challenged.[2] Thus, the CAS emphasizes that it "may refuse to set the arbitration in motion and not assign the case to a panel only when the absence of an arbitration agreement is *manifest*" and that "[t]he examination of the CAS jurisdiction at that stage is merely a *prima facie* assessment, which is necessary to prevent the CAS from ordering specific measures in the absence of jurisdiction".[3] The *prima facie examination* conducted by the CAS Court Office upon receipt of the statement of appeal is similar to that performed by other arbitral institutions, such as, for instance, the ICC International Court of Arbitration under Art. 6(4) ICC Rules.[4]

The wording of Art. R52(1) ("[u]nless […] the CAS shall take all appropriate actions […]") seems to suggest that *if the CAS Court Office does come to the clear conclusion that there is no arbitration agreement* referring to the CAS or relating to the dispute at hand, it will simply inform the appellant accordingly, without involving the designated respondent. However, it appears that sometimes both "parties are informed as such in writing by the CAS Court Office and in the absence of an alternative agreement between the parties, the arbitration procedure is discontinued".[5] Either way, the CAS's decision not to initiate the proceedings shall be considered as an award on jurisdiction within the meaning of Art. 186(3) PILS, and can (or rather must, on pain of forfeiture of the right to do so at a later stage) thus be challenged before the Swiss Federal Supreme Court pursuant to Art. 190(2)(b) PILS. **4**

In case of a so-called "*pathological*" *arbitration agreement*[6] or if there is any doubt as to the agreement's validity and/or scope, it is recommended to include a section in the statement of appeal explaining the reason(s) why the appellant considers that the CAS does have jurisdiction, together with an invitation for the CAS Court Office and/or the Division President to defer to the panel on this issue. **5**

In some cases, the CAS Court Office forwards the statement of appeal to the respondent(s) with an invitation to comment on the existence of a valid arbitration agreement, and then *leaves it to the President of the Appeals Division to decide* on a *prima facie* basis whether the arbitration is to continue.[7] It is submitted that such a possibility is interesting given the jurisdictional nature of the decision to be made, **6**

2 CAS 2000/A/297, *R. v. IOC, IWF, National Olympic Committee of Bosnia and Herzegovina and Weightlifting Federation of Bosnia and Herzegovina*, Order of 30 August 2000; see also Mavromati/Reeb, Art. R52, para. 4.

3 CAS 2008/A/1600, *PFC Botev 1912 – Plovdiv AD v. BFU & Hristov*, Award on Jurisdiction of 1 July 2009, para. 5.1. While the wording of this provision has been changed from "manifestly" to "clearly" in the 2013 edition of the Code, this is not likely to have a significant effect on the analysis (and conclusion) as to whether or not there is an arbitration agreement referring to the CAS.

4 See Favre Schnyder, below commentary on Art. 6(4) ICC Rules (Chapter 17, Part II), paras. 15–28. For another example drawn from sports arbitration, see Art.11 in the Basketball Arbitral Tribunal Arbitration Rules (1 May 2014 version).

5 CAS 2005/A/952, *Cole v.* FAPL, Award of 24 January 2006, para. 6.5. See also CAS 2013/A/3409, *FAHB et consorts v. IHF*, Award of 28 August 2014, paras. 28–30, where the CAS Court Office asked for information from both the Appellants and the designated Respondent before initiating the appeals proceedings.

6 On pathological arbitration clauses under Swiss law, see in particular Müller/Riske, above commentary on Art. 178 PILS (Chapter 2, Part II), para. 60.

7 CAS 2000/A/288, *T. v. Comité National Olympique et Sportif Français*, Procedural Order of 15 August 2000.

but it should be provided for in the CAS Code so that the Court Office can resort to it by reference to a proper legal basis.

7 *If the CAS Court Office is satisfied that prima facie there is an arbitration agreement* referring to the CAS in relation to the dispute in question, and provided the other requirements of Art. R48 are met,[8] it will "communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Arts. R53 and R54. If applicable, the [Division President] shall also decide promptly on any application for a stay or other request for interim measures".[9] This decision does *not* constitute a challengeable award.[10]

III FIRST PROCEDURAL STEPS

8 If the statement of appeal withstands the CAS's *prima facie* jurisdictional review, Art. R52(1) provides that the CAS Court Office "shall take all appropriate actions to set the arbitration in motion." As just seen, the first such action is the "*communicat[ion of] the statement of appeal to the Respondent[s]"*. The standard letter issued by CAS to that effect also confirms that "[p]ursuant to Article S20 of the Code […], the present arbitration has been assigned to the Appeals Arbitration Division of the CAS and shall therefore be dealt with according to Articles R47 et seq. of the Code."

9 More importantly, the CAS letter also (i) takes note of the arbitrator appointed by the appellant in the statement of appeal, (ii) *invites the respondent(s) "to nominate an arbitrator* from the list of CAS arbitrators published on the CAS website […] within ten days of receipt of this letter by courier, in accordance with Art. R53 of the Code" and (iii) informs the respondent(s) that "[i]f the Respondent[s] fail[s] to nominate an arbitrator the President of the CAS Appeals Arbitration Division, or his Deputy shall proceed with the appointment in lieu of the Respondent[s]".[11]

10 If the statement of appeal was accompanied by an *application for provisional measures*, in particular a request to stay the decision under appeal,[12] the CAS's standard letter also contains a paragraph noting that such an application has been

8 Cf. the commentary to Art. R48 above, especially sections II and III.

9 Art. R52(1) at the end. As mentioned in the commentary on Art. R37 above, in so doing, the President of the Division shall first satisfy him- or herself that CAS jurisdiction is established *prima facie*, it being understood that he or she *"may terminate the arbitration procedure if he/she rules that the CAS clearly has no jurisdiction"*. Similarly, a preliminary review of the existence of an arbitration agreement establishing CAS jurisdiction, at least *prima facie* and *"without prejudice to the decision of the panel on the same matter"*, will be carried out by the President of the Division in ruling on a request for the joinder or intervention of third parties (cf. Art. R41.4, which also applies in appeals proceedings).

10 Save in the (very exceptional) cases where the President of the Division finds that the CAS clearly has no jurisdiction" (see footnote 9 above and Art. R37).

11 Cf. Art. R53. The same letter will generally also contain an acknowledgment of the payment of the filing fee or of the fact that the appellant has taken the necessary steps to that end; directions as to the payment of the advance of costs, and a determination on the language of the proceedings based on the Appellant's submission, indicating that *"[u]nless the Respondent objects within three (3) days from the receipt of this letter by courier, pursuant to Art. R29 of the Code, all written submissions shall be filed in [the language used by the Appellant] and all exhibits submitted in any other language should be accompanied by a translation into [that same language]. In case of objection, it will be for the President of the CAS Appeals Arbitration Division or [his or her] Deputy, to decide on the language of the proceedings"*.

12 Cf. Art. R48(1).

filed and fixing a time limit for the respondent(s) to express its (their) position with regard to it.[13] Art. R52(1) further provides that "the President of the Division shall […] decide promptly on an application for a stay or for interim measures".

With the 2017 revision, a new paragraph has been added in Art. R52, providing that "*[t]he CAS Court Office may publicly announce the initiation of any appeals arbitration procedure* and, at a later stage and where applicable, *the composition of the arbitral panel and the hearing date*, unless the parties agree otherwise". The introduction of an express provision calling for increased transparency regarding the initiation and conduct of CAS appeals proceedings is unobjectionable and in fact desirable. In reality, Art. R52(3) partly codifies the CAS's current practice, given that the initiation of appeals proceedings is sometimes announced via a press release, and a list (with no indication as to its exhaustiveness) of the hearing dates by case is regularly posted on the CAS website. Yet, it is submitted that, as it stands, the wording of Art. R52(3) falls short of introducing an actual transparency rule, and thus does not represent a real progress on the current situation. On the one hand, the new provision leaves the decision whether to publicly announce the initiation of the proceedings, composition of the panel and hearing date to the CAS's discretion (subject to the parties' agreement to the contrary, which will not occur frequently given that the parties may easily have opposing wishes in this regard), and on the other, it provides no guidance on how such discretion should be exercised. It remains to be seen whether the CAS's future practice will shed light on the relevant criteria for the institution's decision to publish the information mentioned in Art. R52(3). 11

Finally, since the 2010 revision, Art. R52 contains a provision codifying the CAS's previous practice[14] of *sending a copy of the statement of appeal and appeal brief, for information, to the authority that issued the challenged decision* (Art. R52(2)).[15] This provision applies only if the authority in question was not named as a respondent in the statement of appeal, which is mainly the case in appeals against FIFA's decisions on disputes between clubs or between clubs and players. FIFA can then decide whether to intervene, for instance, because the case raises important issues, or waive its right to do so. As noted in the CAS case law, the fact that the governing body that issued the decision receives a copy of the statement of appeal and appeal brief does not mean that it automatically becomes a party to the proceeding: "[t]he use of the term 'for information' shows that the issuing authority is not per se party to the proceedings, yet. It must either be called as a party or itself request to intervene in order to, potentially, become a party".[16] 12

13 The same applies for any other procedural requests filed by the appellant, including a request for the arbitration to be conducted as an expedited procedure according to Art. R52(4), as discussed in paras. 12–14 below.

14 Cf. Reeb, *Modifications essentielles*, p. 7.

15 The 2017 revision has introduced a further change in this regard, under Art. R59, which now provides that a copy of the award will also be communicated *"to the authority or sports body which has rendered the challenged decision, if that body is not a party to the proceedings"* (Art. R59(6)).

16 CAS 2010/A/2289, *S.C. Sporting Club S.A. Vaslui v. Ljubinkovic*, Award of 3 August 2011, para. 63. See also Mavromati/Reeb, Art. R52, para. 11, noting, in addition, that the CAS also sends a copy of the final award to the authority that issued the appealed decision, a practice now also reflected in the Code (cf. footnote 15 above).

IV EXPEDITED PROCEDURE

13 According to Art. R52(4) it is at this early stage that, "with the agreement of the parties", the President of the Appeals Division (or the panel)[17] may decide that the arbitration shall be conducted "in an expedited manner". Hence, if it so wishes, the appellant should make a *request in this sense in the statement of appeal*, so that the CAS Court Office can refer to it in the letter forwarding the statement of appeal to the respondent(s) and invite it (or them) to indicate whether it (or they) agree(s) to such request.

14 In practice, it is *not so infrequent for the parties to agree to having the arbitration conducted in an expedited manner*:[18] On the side of the athlete this will be so, for instance, because he or she needs a decision in time for any competitions or events he or she is aspiring to participate in, to the extent his or her ability to participate may be affected by the appealed decision,[19] and in such cases, on the side of the sports-governing body, an expedited procedure will be favored in order to have certainty as to who will be authorized to compete. This possibility has been used often and quite successfully for cases that needed to be decided just before the beginning of an important competition, such as the world championships,[20] the UEFA Champions League[21] or even the Olympic Games.[22]

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17 This, however, is less likely to occur as the swift appointment of the panel already requires an agreement by the parties and the active cooperation of the Division President.

18 The request for expedited proceedings is often accompanied by the suggestion that the case should be heard by a sole arbitrator instead of a three member panel, cf., e.g., CAS 2011/A/2678, *IAAF v. RFEA & F. Pelàez*, para. 61, also referred to by Mavromati/Reeb, Art. R52, para. 13. Similarly, i.e. again for the sake of speed, the parties may forego a hearing in expedited appeals proceedings; cf., e.g., CAS 2012/A/2690, *Dinamo 1948 FC v. RPFL, RFF & SC S.A. Vaslui*, Award of 16 October 2012, para. 4.4, cited by Mavromati/Reeb, Art. R52, para. 13 in fine. The agreement to have disputes heard in an expedited manner can also be concluded in advance. For an example, cf. the provision in the Regulations of the UEFA Champions League provision quoted in footnote 21 below.

19 Depending on the importance of the competition, the athlete may be prepared to agree to an expedited proceeding even if it will inevitably restrict his or her right to produce evidence (in particular technical expert reports in anti-doping cases). See, e.g., CAS 2016/A/4707, *Alex Schwazer v. IAAF, NADO Italia, FIDAL & WADA*, Award of 10 August 2016: as indicated in the press release issued by the CAS on 11 August 2016, the athlete had filed a statement of appeal together with a request for provisional measures seeking a stay of the IAAF's decision to provisionally suspend him in the wake of an alleged anti-doping rule violation. The President of the Appeals Division dismissed the athlete's request for provisional measures, however the CAS suggested, and the athlete eventually agreed to, *"an expedited procedure with a hearing, in presence of the athlete, in Rio de Janeiro on 8 August 2016 in order that a final decision on the merits of the case be issued prior to the Rio Olympic Games"*.

20 Cf., e.g., CAS 2011/A/2495/2496/2497/2498, *FINA v. Cielo et. Al. & CBDA*, Award of 29 July 2011, paras. 4.1–4.8.

21 Cf. CAS 2008/A/1583/1584, *Benfica et al. v. UEFA & FC Porto*, Award of 15 September 2008, paras. 3.1–3.8. In fact, the Regulations of the UEFA Champions League 2015–2018 Cycle (2015/2016 Season) expressly provide in Art. 4.01(f) that to be eligible to participate in the competition, clubs must *"agree that any proceedings before the CAS concerning admission to, participation in or exclusion from the competition will be held in an expedited manner in accordance with the CAS Code […]"*. Applying this provision, see, e.g., CAS 2015/A/4151, *Panathinaikos FC v. UEFA & Olympiakos FC*, Award of 26 November 2015, para. 31.

22 Cf., e.g., CAS 2000/A/260, *Beashel & Czislowski v. AYF*, Award of 2 February 2000, p. 4, and, more recently, CAS 2012/A/2843, *IAAF v. Hungarian Athletics Association & Zoltan Kövago*, Award of 12 October 2012, para. 8. See also Alex Schwazer's case, as discussed in footnote 19 above. This solution is, in most cases, preferable to waiting until ten days before the beginning

The wording of Art. R52(4) seems to rule out recourse to the expedited procedure in the absence of an agreement between the parties to that effect.[23] It is submitted that *the President of the Appeals Division cannot grant a request for expedited procedure upon one party's application without the agreement of the other(s)*, unless any refusal so to proceed by the other party (or parties) is against the rules of good faith. Such would be the case, for instance, if the sports-governing body were to refuse the expedited procedure simply in order to prevent the athlete from participating in the sport for as long as possible, or if the athlete/club had obtained a provisional measure allowing him/her/it to participate in a competition or tournament and his/her/its resistance against an expedited procedure were but an attempt to extend the scope of validity or the effect of that measure by delaying the action on the merits. 15

If the parties do agree for the proceedings to be expedited, they may also agree on a specific timetable (which will be subject to the panel's agreement) for the conduct of the proceedings.[24] Alternatively, the Division President or the panel, once constituted, may suggest such a timetable.[25] 16

V CONSOLIDATION

Article R52(5) was enacted in 2010 to *codify the practice* allowing the CAS to consolidate two or more appeals against, or "in connection with" the same decision.[26] 17

The decision to consolidate will be made either by the panel constituted in the appeal that was brought first in time, or, where no panel has been constituted yet, by the President of the Appeals Division. In both cases, the deciding authority enjoys a *great deal of discretion* but should, in taking its decision, duly consider all the surrounding circumstances, in particular the stage already reached in the first arbitration, the likely impact of such decision on the cost-efficiency of the relevant proceedings and, most importantly, the need to avoid inconsistent awards.[27] In accordance with Art. R52(5), the parties should always be consulted before a decision 18

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of the Games in order to bring the case before the CAS Ad Hoc Division (cf. Art. 1 of the CAS Arbitration Rules for the Olympic Games). Indeed, all the athletes directly or indirectly concerned need certainty well before that time and so do the sports-governing bodies involved. The only advantage, for the athlete bringing the claim, of opting for Ad Hoc Division proceedings rather than regular CAS appeals proceedings is that the former are always free of charge.

23 Cf., e.g., CAS 2008/A/1595, *Deriugina v. FIG*, Award of 27 October 2008, paras. 6–8. See also Mavromati/Reeb, Art. R52, para. 13.

24 Cf., e.g., CAS 2014/A/3665, 3666 & 3667, *Luis Suàrez, FC Barcelona & AUF v. FIFA*, Award of 2 December 2014, para. 21; CAS 2013/A/3256, *Fenerbahçe Spor Kulübü v. UEFA*, Award of 11 April 2014, paras. 77–78.

25 Cf., e.g., CAS 2013/A/3233, *PAE Giannina 1966 v. UEFA*, Award of 9 December 2013, para. 17; CAS 2015/A/3975, *Nassir Ali N. Alshamrani v. AFC*, Award of 31 August 2015, paras. 23–24. See also the sample letter to the parties reproduced in Mavromati/Reeb, Art. R52, p. 468.

26 For a brief discussion of the elements considered by the CAS in deciding whether to consolidate, cf. Mavromati/Reeb, Art. R52, para. 18, referring to the order rendered in CAS 2011/A/2685, *FC Basel 1893 SA v. SFL & OLA*, CAS 2011/A/2686, *FC Luzern – Innerschweiz SA v. SFL & OLA*, and CAS 2011/A/2687, *FC Thun SA v. SFL & OLA*.

27 For a few recent examples of consolidated appeals proceedings, see, e.g., CAS 2010/A/2145, *Sevilla FC SAD v. Udinese Calcio SpA*, CAS 2010/A/2146, *Morgan De Sanctis v. Udinese Calcio SpA* and CAS 2010/A/2147, *Udinese Calcio SpA v. Morgan De Sanctis & Sevilla FC SAD*, Award of 28 February 2011; CAS 2011/A/2615&2618, *Thibaut Fauconnet v. ISU, ISU v. Thibaut Fauconnet*, Award of 19 April 2012, p. 6; CAS 2014/A/3647, *Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur* and CAS 2014/A/3648, *SASP OGC Nice Côte d'Azur v. Sporting Clube de*

on consolidation is rendered. That said, the language of Art. R52(5) suggests that where, on balance, the circumstances lead the CAS to the conclusion that the proceedings should be consolidated, an order to that effect may be issued even if not all the parties agree to it.[28]

19 As also noted in connection with Art. R50(2), which provides that cases clearly involving the same issues may be submitted to the same panel (either by agreement of the parties or upon a decision by the Division President), one of the main difficulties with consolidation is dealing with the appointment of arbitrators where more than two parties are involved and one or more of them have already appointed their arbitrator(s). In such cases, if necessary, Art. R41 should apply *mutatis mutandis* to the constitution of the panel.[29]

20 In practice, where two or more proceedings are consolidated, the cases are merged and decided in a single award.[30] Where applicable, the parties must each pay their respective shares of the advances on costs, as ordered by the CAS, before the proceedings can be set in motion.[31] If an appellant fails to pay the advance within the time limit set for that purpose, his or her appeal will be deemed withdrawn,[32] and the award eventually rendered by the CAS will be without effect vis-à-vis the parties to the appeal that has been withdrawn.[33]

Portugal SAD, Award of 11 May 2015; CAS 2013/A/3365, *Juventus FC v. Chelsea FC* and CAS 2013/A/3366, *A.S. Livorno Calcio SpA v. Chelsea FC*, Award of 21 January 2015.

28 Cf. also Mavromati/Reeb, Art. R52, para. 16.

29 Cf. also the commentary on Art. R54, para. 14 below.

30 Cf. the examples cited in footnote 27 above; see also Mavromati/Reeb, Art. R52, para. 19.

31 Cf. Art. R53(3) and R64.2.

32 Cf. Art. R64.2.

33 BGE 140 III 520 para. 3.2.2 (partially annulling the award rendered on 20 November 2013 in CAS 2012/A/2915, *Boca Juniors FC v. Birmingham FC*, on the ground that the panel had disregarded the fact that it no longer had jurisdiction to deal with the player's appeal, which, after it had been consolidated with Boca Juniors FC's appeal, had been deemed withdrawn due to the player's inability to pay his share of the advance of costs).

Article R53: Nomination of Arbitrator by the Respondent

Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall make the appointment.

I PURPOSE OF THE PROVISION

In cases calling for a three-member panel,[1] Art. R53 requires the respondent to nominate an arbitrator, reflecting the appellant's equivalent obligation under Art. R48(1). It sets out a relatively short time limit for the respondent to do so (II.), as well as a fallback mechanism (III.) in case it fails to, ensuring that the arbitration can proceed with due dispatch.[2] 1

II NOMINATION OF RESPONDENT'S ARBITRATOR – TIME LIMIT

Article R53 provides that the respondent has *10 days after the receipt of the statement of appeal* to nominate an arbitrator.[3] The respondent is expressly reminded of this time limit in the CAS Court Office letter notifying the statement of appeal.[4] 2

Contrary to Art. R48(1), which governs the nomination of an arbitrator by the appellant, Art. R53 does not specify that the respondent's nominee must be selected *from the CAS list of arbitrators*. Nevertheless, this is an obvious consequence of the mandatory nature of the CAS list pursuant to Arts. S3, S13, S14, S18 and R33 of the Code.[5] Again, the Court Office letter notifying the statement of appeal expressly draws the respondent's attention to this requirement, with directions to access the CAS website, where the list of arbitrators is published. 3

The appeal may be directed against *more than one respondent*. For instance, in doping cases, when appealing against a decision taken by a sports-governing body or anti-doping agency, WADA and/or the relevant international federation may name as respondents both the athlete concerned by that decision and the body that issued it.[6] In football transfer cases, the old club will often file claims against both the 4

1 On the rules governing the determination of the number of arbitrators composing CAS panels, see Art. R50 above.

2 The next and final steps in the panel's constitution are covered in Art. R54.

3 Thus, the respondent is required to nominate an arbitrator prior to submitting an answer to the appeal brief (Arts. R55(1) and R51(1) respectively), the objective being to allow the CAS to form the panel without delay, so that the latter can "take over" the conduct of the arbitration as soon as possible after the filing of the statement of appeal.

4 Cf. Art. R52, para. 9 above.

5 See also Mavromati/Reeb, Art. R53, para. 9.

6 Cf., e.g., CAS 2009/A/1870, *WADA v. Hardy & USADA*, Award of 21 May 2010; CAS 2011/A/2384, *UCI v. Contador Velasco & RFEC*; CAS 2011/A/2386, *WADA v. Contador & RFEC*, Award of 6 February 2012. More recently, e.g., CAS 2013/A/3241, *WADA v. CONI & Alice Fiorio*, Award of 22 January 2014; CAS 2015/A/4063, *WADA v. Czech Anti-Doping Committee & Remigius Machura* Jr., Award of 5 November 2015.

player and the new club.[7] In such instances, the CAS Court Office's letter forwarding the statement of appeal will indicate that "the respondents are requested to jointly nominate an arbitrator".[8] In most cases the need *to agree on a joint nomination* will not be problematic for the respondents, either because they have common interests, or because the body that took the decision under appeal elects to endorse the athlete's choice of an arbitrator considering that the athlete is the central party, potentially facing the heaviest consequences on foot of the prospective CAS decision. If the respondents cannot agree on the joint choice of an arbitrator within the *ten-day deadline set by Art. R53*, they are *entitled to request an extension pursuant to Art. R32(2)*,[9] so as to avoid the appointment being made by the CAS in their stead.[10] Nevertheless, it can happen that the respondents cannot find an agreement at all. If this is due to the fact that one (or more) of them is not co-operative, the other respondent(s) should notify the CAS Court Office of any such difficulties within Art. R53's ten-day time limit, and possibly inform the Court Office of its/their own proposed nominee. The CAS Court Office is then likely to inform the parties that it has not received the position of one (or more) of the respondents and to grant that/those respondent(s) a short additional time limit to state whether it/they agree(s) to the joint nomination of the arbitrator put forward by the other respondent(s).[11] If the respondent(s) so invited to react remains silent, they will be deemed to have agreed to the appointment of the arbitrator designated by the other respondent(s).[12]

5 Where a *respondent is joined* after the initial parties have nominated their arbitrators, Art. R41.4(4) applies pursuant to Art. R54(6).[13]

III RESPONDENT'S FAILURE TO NOMINATE AN ARBITRATOR

6 In case the respondent(s) fail(s) to nominate its/their arbitrator within Art. R53's time limit (as possibly extended pursuant to Art. R32(2)), *the President of the Division shall make the appointment*.[14] This provision is in line with the fallback mechanisms provided in other international arbitration rules:[15] its purpose is to avoid that respondents take advantage of their right to appoint an arbitrator to unduly

7 Cf., e.g., CAS/2004/A/708–713, *Mexès v. FIFA; AS Roma v. FIFA*; *AJ Auxerre v. AS Roma & Mexès*, Award of 11 March 2005.
8 Cf., e.g., CAS 2011/A/2551, *F. v. U. & T.*, decision of 2 September 2011.
9 Any such request should be made before expiry of the time limit (cf. Art. R32(2)).
10 Cf. para. 6 below.
11 Cf., e.g., CAS 2012/O/2736, *A. et al. v. P. et al.*, decision of 23 March 2012; CAS 2012/A/3029, *WADA v. Anthony West & FIM*, Award of 22 November 2014, para. 12. See also Mavromati/Reeb, Art. R53, para. 11, indicating that the additional time limit granted in these cases will not exceed five days.
12 Mavromati/Reeb, Art. R53, para. 11.
13 Cf. para. 14 at Art. R54 below.
14 Cf., e.g., CAS 2014/A/3485, *WADA v. Daria Goltsova & IWF*, Award of 12 August 2014, paras. 11–12. According to Mavromati/Reeb, Art. R53, paras. 12–14, in selecting an arbitrator the President of the Division will consider several criteria and circumstances (in addition to the fundamental requirement of independence and impartiality in accordance with Art. R33), including availability, legal and educational background, prior experience with similar cases (where relevant), languages spoken and nationality.
15 Cf., e.g., ICC Rules, Art. 12(4); SRIA Rules, Art. 8(2).

delay the proceedings, and the CAS has demonstrated a willingness to exercise this prerogative if necessary.[16]

Where there is more than one respondent and an agreement on a joint nomination cannot be found due to the fact that *(at least some of) the respondents have divergent interests* in the dispute, it is highly recommended to ask the CAS to apply Art. R41.1(2)–(3), by appointing the panel in its entirety.[17] This, it is submitted, is the only way to prevent the problematic situation where one side has had the opportunity to appoint the arbitrator of its choice while the other side has had to settle for an arbitrator selected by the CAS.[18] 7

16 Cf., e.g., CAS 2010/A/2072, *WADA v. Federacao Bahiana de Futebol (FBF) & Carneiro Filho*, Award of 21 October 2010, para. 25; CAS 2007/A/1395, *WADA v. NSAM & Cheah & Ng & Masitah*, Award of 31 March 2008, para. 30.

17 Cf. Art. R41.

18 On this issue, see also Kaufmann-Kohler/Rigozzi, paras. 4.80–4.88.

Article R54: Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by CAS

If, by virtue of the parties' agreement or of a decision of the President of the Division, a sole arbitrator is to be appointed, the President of the Division shall appoint the sole arbitrator upon receipt of the motion for appeal or as soon as a decision on the number of arbitrators has been rendered.

If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators. The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation of the Panel and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs in accordance with Article R64.2 of the Code.

An *ad hoc* clerk, independent of the parties, may be appointed to assist the Panel. Her/his fees shall be included in the arbitration costs.

Article R41 applies mutatis mutandis to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division.

I PURPOSE OF THE PROVISION

1 Article R54 governs the *final stages in the constitution of the tribunal*, i.e., as the case may be, the *appointment by the CAS of a sole arbitrator* (II.), *or* where there is to be a three-member panel and once the two party-appointed arbitrators have been nominated, the appointment by the CAS *of the President of the Panel and the confirmation of the party-appointed arbitrators* (III.), as well as the consequent issuance by the CAS Court Office of a "*Notice of formation" of the panel* and the *transfer of the file to the panel* (IV.-V.). This provision also governs the possible *appointment of an "ad hoc clerk"* (VI.) and, where relevant, the applicability of the Code's provisions on *multi-party arbitration* (VII.).

II APPOINTMENT OF A SOLE ARBITRATOR

2 The first issue regulated by Art. R54(1) is the appointment of a sole arbitrator. This provision repeats that a single-arbitrator panel will be appointed only "*by virtue of the parties' agreement or of a decision of the President of the Division*" pursuant to Art. R50(1), which in turn specifies that the President of the Division will, in reaching such a decision, "tak[e] into account the circumstances of the case".[1] In practice, the parties will often agree on a sole arbitrator when they also agree that

1 Cf. para. 3 at Art. R50. As discussed in connection with that provision, the default solution under the CAS Code is that appeals cases will be heard by three-member panels.

the proceedings should be conducted in an expedited manner[2] or when they are both not in a position to pay the advance of costs related to the appointment of three member panel.

When only the appellant is not in a position to pay the advance of costs for a three member panel it will most likely be the President of the Appeals Division who will decide to appoint a sole arbitrator, in particular when the respondent refuses to pay its own share of the advance of costs.[3] Another instance where the Division President may decide to appoint a sole arbitrator is where the case does not appear to be particularly complex and the parties' will to have a three-member panel hear the dispute appears to be unreasonable, in particular in disciplinary cases where the arbitrators' fees and costs are borne by the CAS.[4] **3**

Article R54(1) indicates that the President of the Division is to appoint the arbitrator "upon receipt of the motion for appeal or as soon as a decision on the number or arbitrators has been rendered". In those instances where it is the President of the Appeals Division who decides to appoint a sole arbitrator, (as in the examples just mentioned) it is submitted that the circumstances of the case can be fully assessed only once the respondent has had the opportunity to file its answer. In any event, it appears reasonable for the President of the Appeals Division to *consult the parties before imposing a sole arbitrator* where the parties cannot agree on the number of arbitrators, it being understood that while the parties' views will not be binding on the Division President, they should at least form part of the "circumstances of the case" he or she is required to take into account under Art. R50(1).[5] **4**

Article R54(1) does not state whether the decision of the President of the Appeals Division to appoint a sole arbitrator – where the parties have not agreed on the number of arbitrators – may be challenged. If a party disagrees with that decision, it can and must challenge it immediately, in accordance with Art. 190(3) PILS.[6] However, it should be noted that the action to set aside will only be successful if it can be shown that the President of the Appeals Division has disregarded a specific agreement between the parties as to the tribunal's composition, it being understood that the discretion afforded to the Division President under Art. R54(1) (absent an agreement between the parties) is itself the result of an "the agreement of the parties" (on the manner in which the tribunal should be constituted) within the meaning of Arts. 179(1) and 190(2)(a) PILS. **5**

2 Cf., e.g., CAS 2007/A/1363, *TTF Liebherr Ochsenhausen v. ETTU*, Award of 5 October 2007, paras. 24–27. More recently, cf., e.g., CAS 2013/A/3453, *FC Petrolul Ploiesti v. UEFA*, Award of 20 February 2014, paras. 18–23.

3 Cf. Art. R50(1). See also Mavromati/Reeb, Art. R50, para. 15, with reference to CAS 2012/A/2952, *K. Musampa v. Trabzonspor Kulübü*, Award of 21 May 2013.

4 Cf. Article R65.

5 In CAS 2008/A/1516/, *WADA v. CONI, FITET & Piacentini*, the CAS suggested the appointment of a sole arbitrator to the parties, took note of the fact that they did not object to the proposal and proceeded accordingly (cf. Award of 11 September 2009, para. 2.7).

6 BGer. 4A_282/2013 para. 5.3.3; see also Art. R50(1) and the relating commentary above.

III APPOINTMENT OF THE PRESIDENT OF THE PANEL

6 In practice, most appeals cases are heard by a panel of three arbitrators.[7] Whereas in CAS ordinary proceedings (in line with the standard practice reflected in many sets of arbitration rules),[8] the president of a three-member panel is selected by the two party-appointed arbitrators, without the involvement of the institution[9] in appeals proceedings *it is the President of the Appeals Division who appoints the presiding arbitrator*.[10] Although Art. R54(2) provides that the President of the Division shall consult the party-appointed arbitrators in relation to the appointment of the President of the Panel,[11] the Division President enjoys the widest discretion in making the appointment. In other words, *the parties have no influence – direct or indirect – on the appointment of the President of the Panel*.[12]

7 Originally, this solution was devised to speed up the proceedings. However, given the time that is actually required, on average, by the Division President to appoint the president, *it is submitted that it would be preferable for the CAS to grant the party-appointed arbitrators a short time limit, for instance ten days, to try and agree upon the selection of a president for the panel*. This change in practice could help alter the perception that the sports-governing bodies have, at least indirectly,[13] a preponderant influence on the appointment of the panel.[14]

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7 Cf. paras. 2–3 at Art. R50 above.

8 Cf., e.g., Swiss Rules Art. 8(2).

9 Cf. Art R40.2(3).

10 This rule is mandatory under the CAS Code, whereas the similar provision contained in the ICC Rules (Art. 12(5)), contemplating the appointment of the presiding arbitrator by the ICC Court, only operates when the parties have not *"agreed upon another procedure"* for the said appointment.

11 In practice, the CAS prepares a short list of names which is circulated to the party-appointed arbitrators with the indication that any objections on their part with respect to the suggested appointees should be raised within a given (short) time limit. Mavromati/Reeb, Art. R54, para. 2, note that *"[s]imple preferences expressed by the party-appointed arbitrators are generally not taken into consideration"* in this process.

12 It is submitted that it should be appropriate for the party-appointed arbitrators to communicate the short list of possible presidents prepared by the CAS to their appointing parties, to ensure that the parties (and/or their counsel) do not have major issues with the appointment of any one of the shortlisted potential presidents (irrespective of whether they consider that their discomfort amounts to a ground for challenge). The party-appointed arbitrators will then be free to decide whether to pass on any such concerns to the Division President. If one of the party-appointed arbitrators decides to proceed in this manner, he or she should in any event inform the arbitrator appointed by the other party of such contact, so that the latter can make the same enquiry with his or her appointing party, to make sure that the principle of equal treatment is fully respected.

13 The President of the Appeals Division is appointed by the ICAS, a body which is predominantly composed of personalities appointed by the sports-governing bodies. Technically, the President of the Division would have the possibility to ensure that no arbitrator who is perceived as "athletes-friendly" is ever appointed as president of a panel.

14 On the other hand, it is true that Art. R54(2) allows the CAS to "launch" arbitrators who have been recently added on the list of arbitrators and may not be sufficiently well-known to be appointed by the parties, which helps extend the number of arbitrators on the list that are actually appointed (and may perhaps also help address the concerns that are often raised with respect to the fact that in practice the panel presidents appear to be drawn from a rather small "pool" of arbitrators). Concurring on this point, see Mavromati/Reeb, Art. R54, para. 2, footnote 1 (adding that [i]n any event, the parties will have the opportunity to challenge the appointment of the chairman in the event that such person would not comply with the prerogatives of impartiality and independence of Article R33 CAS Code", which however defeats the

IV CONFIRMATION OF THE ARBITRATORS AND NOTICE OF FORMATION OF THE PANEL

Article R54(2) at the end provides that the arbitrators nominated by the parties shall be *deemed appointed after confirmation by the President of the Division*.[15] A party-appointed arbitrator should be confirmed only once the President of the Division is assured that the arbitrator fulfills the requirements of Art. R33, namely that he or she is impartial and independent of the parties, and "shall be available as required to complete the arbitration expeditiously". Despite widespread concerns about the increasing delays in the rendering of awards, it appears that, unlike the ICC, the CAS is not using the confirmation process as an incentive for the arbitrators to decline appointment when their *availability* is insufficient to handle the case with due dispatch. In practice, we are not aware of any case in which an arbitrator was not confirmed by the CAS *sua sponte* (i.e., absent an objection by one of the parties or by another member of the proposed panel).[16] The CAS appears to apply a similar policy of self-restraint with respect to the *preemptive control of the arbitrators' independence and impartiality* prior to confirmation. In reality, the President of the Division will simply leave it to the parties to challenge an arbitrator if they consider there are valid grounds for doing so. It is submitted that a stricter approach by the CAS might be preferable as – given the liberal approach of both the ICAS[17] and the Supreme Court[18] towards arbitrator challenges – a party will think twice before challenging an arbitrator. Needless to say that, even where a party takes the risk of challenging an arbitrator and the challenge is successful, it would still be preferable to avoid such (unnecessary) ancillary proceedings by adopting a more rigorous approach at the confirmation stage. 8

Article R54(3) provides that the CAS Court Office "takes notice" of the panel's formation (i.e., when the President of the Division has appointed the sole arbitrator, or confirmed the party-appointed arbitrators and appointed the president of the panel). In practice, the CAS Court Office writes to the parties enclosing *a formal "Notice of formation of a Panel"* (in French, *Avis de désignation d'une formation*) in which the Secretary General records that the arbitral panel called upon to resolve the dispute is composed of the arbitrator(s) as named in the Notice. The Notice of formation is generally accompanied by copies of the *Acceptance and statement of independence* 9

purpose of limiting the co-arbitrators' and possibly the parties' involvement at the appointment stage for the sake of speed). Be that as it may, the obvious drawback of such a policy is that an arbitrator who is relatively "new" on the list may not be as experienced in CAS arbitration as his or her co-arbitrators. On balance, we see no reason why the co-arbitrators should not be given a chance to agree on the chair.

15 As noted by Mavromati/Reeb, Art. R54, para. 6, only the Division President, as opposed to other CAS officers (e.g., the Secretary General) can confirm appointee arbitrators. Moreover, the confirmation requirement under Art. R54(2) cannot be waived by the parties (*ibid.*, para. 4 in fine).

16 Cf. also Mavromati/Reeb, Art. R54, para. 4, confirming this. For an example of a case where a party objected to the appointment of an arbitrator prior to his confirmation, cf. CAS 2010/A/2098, *Sevilla FC v. RC Lens*, Award of 29 November 2010, paras. 23–29. Before confirming the arbitrators, the CAS should also verify that they possess any qualifications as may be stipulated in the relevant arbitration agreement (cf., e.g., Art. 63(2) of the UEFA Statutes, providing that *"[o]nly arbitrators who have their domicile in Europe shall be competent to deal with disputes submitted to the CAS according to the present Statutes"*).

17 Cf. Art. R33.

18 Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), para. 31; see also Art. R33.

forms signed by the arbitrator(s) upon accepting his/her (or their) nomination.[19] Unless the relevant arbitrators' declarations had already been circulated to the parties,[20] receipt of the Notice of formation triggers the running of the seven-day time limit for challenge under Art. R34(1).[21] In the cover letter accompanying the Notice of formation, the CAS will generally also indicate that the case file has been or is about to be transferred to the panel.

V TRANSFER OF THE FILE TO THE ARBITRATORS

10 Article R54(3) specifies that the arbitration file is transferred to the arbitrators only once the CAS has taken notice of the formation of the panel, and, if the parties have been requested to pay an advance on costs in accordance with Art. R64.2,[22] *once the advance of costs has been received* by the CAS. The language of Art. R54(3) is slightly misleading in that it suggests that it may be sufficient for one of the parties to pay "an" advance on the costs. However, as becomes clearer in reading Art. R64.2, what is required before the file can be transmitted to the panel is payment of the entire advance of costs, as fixed by the CAS.[23] In practice this means that, more often than not, the arbitrators will receive the file only once the exchange of the written submissions has already been completed. It also means that, *de facto*, the respondent can delay the arbitration by not paying its share of the advance on costs. In such instances, the CAS will fix a time limit for the appellant to substitute for the respondent.[24]

19 Cf. Art. R33. Since the 2013 revision of the Code, these forms refer to both independence and impartiality. The Acceptance form also confirms that the arbitrator signing it is familiar with the CAS Code, and able and available to deal with the case in conformity with the Code and in the language of the proceedings.

20 The CAS's practice is to circulate the party-nominated arbitrators' Statements of acceptance prior to circulating the Notice of formation of the panel if those Statements contain disclosures. In such cases, the CAS Court Office cover letter circulating the relevant Statement will draw the parties' attention to the disclosure(s) made by the arbitrator signing it, and to the time limit for bringing a challenge pursuant to Art. R34(1). Cf. also Mavromati/Reeb, Art. R54, para. 5; BGer. 4A_620/2012 paras. 3.5–3.6. The Statement of acceptance and independence signed by the president of the panel (appointed by the Division President) will be circulated together with the Notice of formation of the panel, and thus its contents will become known to the parties only upon receipt of the Notice.

21 Cf. Art. R34 and Orelli, above commentary on Art. 180 PILS (Chapter 2, Part II), paras. 21–26; cf. BGE 129 III 445 para. 4.2.2.1.

22 Cf. Art. R64.2.

23 See also Mavromati/Reeb, Art. R64, para. 16, confirming that the "entire amount of the advance of costs must be paid" for the procedure to be initiated. That being said, the actual practice appears to be relatively inconsistent, with the Court Office sometimes forwarding the file to the panel at a moment when only one party's share of the advance has already been paid (cf. also Mavromati/Reeb, Art. R54, para. 3).

24 Failing which the appeal will be deemed withdrawn (cf. Art. R64.2(2)). This will obviously put an impecunious athlete appealing against a sports-governing body's decision in a difficult situation (cf. also Rigozzi, *Jusletter of 13 September 2010*, pp. 9–10). However, in such a case, the athlete should be entitled to benefit from the CAS legal aid fund in accordance with the Guidelines on Legal Aid issued on 1st September 2013 (see in particular Art. 6 of the Guidelines). On the subject of legal aid before the CAS, see the commentary on Art. R64 below.

VI APPOINTMENT OF AN AD HOC CLERK

The appointment of an *ad hoc* clerk is *becoming standard practice* in CAS arbitrations.[25] This is understandable in light of the increasing workload of the CAS and the consequential reality that the institution's permanent staff of counsel do not always have sufficient availability to assist the arbitrators, in particular in connection with the drafting of the award.[26] 11

The process for selecting *ad hoc* clerks is not clearly regulated by the Code, which only states that a clerk may be appointed to assist the panel and that he/she must be independent of the parties.[27] Over the years, the CAS has established an *unofficial list of CAS ad hoc clerks*.[28] They are often young qualified lawyers or barristers from different jurisdictions or legal backgrounds, who also possess the relevant linguistic skills. The CAS ensures that ad hoc clerks have access to the required know-how with respect to the CAS's practice and procedure in order to provide efficient assistance to panels, in particular by inviting them to attend the CAS seminars. 12

Article R54(4) at the end specifies that the *ad hoc clerk's fees* "shall be included in the arbitration costs". According to Annex II to the Code, entitled Schedule of Arbitration Costs, the ad hoc clerk's remuneration "is fixed by the Secretary General of the CAS on the basis of the work reports provided and on the basis of the time reasonably devoted to the case at stake".[29] 13

25 Cf. Mavromati/Reeb's commentary under Art. R40 (which is, in relevant part, identical to Art. R54), noting that the insertion of that provision's last paragraph (and of Art. R54's 4th paragraph) in the 2010 CAS Code edition codified *"a long-time practice concerning the appointment of ad hoc clerk[s] in order to assist the Panel"* (Mavromati/Reeb, Art. R40, para. 36), but also that *"the appointment of an ad hoc clerk should not be trivialized, but […] should only be reserved in specific cases of high complexity"* (*ibid.*, para. 42 in fine), without further elaboration.

26 For a discussion of the role and functions of ad hoc clerks, as opposed to CAS counsels, cf. Mavromati/Reeb, Art. R40, paras. 37 and 39.

27 This is in line with the provisions in other institutional arbitration rules dealing with the appointment of secretaries to the tribunal, cf., e.g., Art. 15(5) Swiss Rules. In practice, the appointment of an *ad hoc* clerk is often suggested by the president of the panel. In general, the parties will be informed of the clerk's appointment with the Order of procedure that is circulated by the CAS Court Office for their approval and signature prior to the hearing (cf. para. 29 at Art. R57 below). As noted by Mavromati/Reeb, Art. R54, para. 9, ad hoc clerks are required to fill in a declaration of independence, which is almost identical to the Statement of acceptance and independence filled in by CAS arbitrators. Mavromati/Reeb also indicate (at Art. R40, para. 40) that once notified of the appointment of an ad hoc clerk, the parties will have the possibility to raise objections, be it to question the need for such appointment in general or to express any reservations they may have on the independence of the individual selected as clerk. According to those same (authoritative) commentators, the challenge procedure under Art. R34 does not apply to CAS ad hoc clerks, who are not arbitrators. *Contra*: Noth/Haas, para. 11 at Art. R40 above. Be that as it may, Mavromati/Reeb state that so far, no challenges have been brought against ad hoc clerks, which is probably due to the fact that, as they explain, possible conflicts are screened at the selection stage, either by the CAS Court Office or by the panel (Mavromati/Reeb, Art. R40, para. 41).

28 Cf. also Mavromati/Reeb, Art. R40, para. 36.

29 The latest version of the Schedule of Arbitration Costs (currently dated 1st January 2017) is available on the CAS website at: <http://www.tas-cas.org/en/arbitration/arbitration-costs.html>. With regard to ad hoc clerks, the Schedule indicates that *"in principle, an hourly fee of CHF 150 to CHF 200 is taken into account depending on the qualifications of the clerk"*.

VII MULTI-PARTY ARBITRATION

14 Article R54(5) indicates that Art. R41 on multiparty arbitration is applicable *mutatis mutandis* to appeals arbitration procedures, with the specifically stated (and logical) qualification that the President of the Panel is appointed by the President of the Appeals Division.[30]

30 Cf. Art. R41. For a practical example, cf. CAS 2004/A/748, *Russian Olympic Committee & Ekimov v. IOC*, Decision on Request for intervention of 5 July 2005.

Article R55: Answer of the Respondent – CAS Jurisdiction

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing:

- a statement of defence;
- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts it intends to call, stating their area of expertise, and state any other evidentiary measure which he requests.

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of its share of the advance of costs in accordance with Art. R64.2.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing:

- a statement of defence;
- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts it intends to call, stating their area of expertise, and state any other evidentiary measure which it requests.

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of its share of the advance of costs in accordance with Art. R64.2.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

I PURPOSE OF THE PROVISION

1 Article R55 sets out the *requirements to be satisfied by the respondent in filing its answer* to the appeal brief.[1] It provides guidance as to the answer's required contents (II.), as well as the time limit within which it must be filed. In this connection, Art. R55 opens the possibility for the respondent to make the fixing of the time limit for the filing of the answer contingent upon payment by the appellant of his or her share of the advance of costs (III.). As for the actual filing modalities and timing, due note should be taken of the changes made to Art. R31 in the Code's latest edition (IV.). Should the respondent fail to submit an answer, Art. R55 restates the important principle that the award may be rendered by default if necessary (V.). Further, since the Code's 2012 revision, Art. R55 also deals expressly with issues of jurisdiction, essentially reflecting the relevant provisions of the PILS (VI.). Finally, respondents need to be aware that, since its 2010 revision, the Code no longer permits the filing of counterclaims (including cross- or joint appeals) in appeals proceedings (VI.).

II CONTENTS OF THE ANSWER[2]

2 As previously noted,[3] the parties' written submissions in CAS appeals proceedings are, as a rule, limited to a single exchange.[4] Accordingly, the respondent's *statement of defence* (to be set out in its answer to the statement of appeal) must include *all the factual allegations and legal arguments*[5] on which the respondent relies to request the (total or partial) dismissal of the appeal. Legal arguments can be both substantive

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1 Cf. Art. R51.

2 In addition to the comments made here, readers are referred to the commentary to Art. R51 (Appeal Brief), which applies, in pertinent part, also with respect to the contents of the Answer. More precise cross references to the relevant passages in that commentary will be provided in the following paragraphs.

3 Cf. para. 7 at Art. R51 above with respect to the claimant.

4 Cf. paras. 2–3 at Art. R56 below.

5 On the general structure and format that tend to be adopted for written submissions in appeals proceedings, cf. the comments provided under Art. R51 (paras. 7–24). While the structure of the answer may be influenced by that of the appeal brief, one important practical recommendation that applies regardless of the structure adopted is that paragraphs should be numbered and the evidence relied upon in support of each allegation should be clearly indicated.

and procedural, including jurisdictional challenges. In this respect, Art. R55(1) expressly requires that any defence of lack of jurisdiction be raised with the answer.[6]

Article R55(1) further specifies that the answer must also contain all the *exhibits*[7] *and other evidence* the respondent intends to rely upon, e.g., supporting documents, witness statements and expert reports. **3**

Even if the respondent chooses not to file witness statements, its answer (just like the appeal brief on the appellant's side)[8] must indicate the *names of any witnesses*[9] *and/or experts* on whose testimonies or opinions it intends to rely. In order to limit the risk of surprise/ambushing where a party does not file witness statements and experts reports, the Code has been revised in 2013 to provide that the answer (like the appeal brief) shall also contain a "brief summary of th[e named witnesses'] expected testimony" and of the named experts' "area of expertise". There may be situations where such summaries are insufficient. It is submitted that, where necessary for the sake of good order and the fair and efficient conduct of the proceedings, the panel should, either upon a request by the appellant or *sua sponte*, invite the respondent to further specify the summary information it has provided.[10] **4**

Article R55(1) suggests that witness statements can be provided *at a later stage* only if the President of the panel permits it. It is submitted that this provision applies solely if the relevant witnesses were named with the answer. If not, the President of the panel can allow witness statements *only if the requirements of Art. R56(1) are met*.[11] **5**

The answer and any documents accompanying it must be *submitted in the language of the proceedings*.[12] If documents are submitted in languages other than the language of the proceedings, the CAS will normally order the filing of translations within a short time frame. **6**

The *answer's required format and filing modalities* are specified in the letter from the CAS Court Office notifying the appeal brief to the respondent. By reference to Art. R31's provisions on notifications and communications in CAS proceedings, and unless the parties have agreed to use the CAS's E-filing service, the Court Office will require that the answer be filed by courier (or registered mail), indicate the number of hard copies (whether on paper or digital medium) that need to be submitted in the specific case and remind the respondent that exhibits may be filed by courier (or registered mail), saved on a digital medium, or by e-mail. **7**

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6 Cf. below, paras. 15–20.

7 For the definition of "exhibit", cf. the comments provided under Art. R51 (paras. 14–16).

8 Cf. the commentary on Art. R51 above (paras. 18–22).

9 On the concept of "witness", cf. the comments provided under Art. R51 (paras. 18–20).

10 The same applies, of course, to the summaries provided by the appellant in his or her appeal brief, as noted in connection with Art. R51; cf. paras. 18 and 21–22 at Art. R51 above.

11 Cf. R56(1). See also Mavromati/Reeb, Art. R55, para. 12. As noted *ibid.*, in CAS 2012/A/2874, *G. Rasiak v. AEL Limassol*, Award of 31 May 2013, para. 71, the panel underscored that Art. R55(1) only refers to witnesses and experts, but not party representatives, meaning that the latter are not subject to the requirement that a summary of their expected testimony should be included in the answer, although such testimony remains subject to Art. R56 and can thus not exceed the scope of the parties' written submissions (in other words, it must "be restricted to what has been stated before").

12 Cf. the commentary on Arts. R29 and R48 above.

III TIME LIMIT TO SUBMIT THE ANSWER

8 The above-mentioned letter from the CAS Court Office also reminds the respondent that, as provided in Art. R55(1) *ab initio*, its answer must be filed *within twenty days* from receipt of the original of the appeal brief forwarded by the CAS.[13]

9 The time limit to file the answer can be *extended upon a reasoned request*. The requirements are the same as those applying to requests for the extension of the time limit to submit the appeal brief.[14] Just like the time limit for filing the appeal brief, the time limit under Art. R55(1) may turn out to be unrealistic in cases presenting complex scientific issues that can only be addressed with the support of expert evidence, which is time-consuming to gather.[15] Moreover, it is submitted that extensions aimed at obtaining a time limit to file the answer that is the same as the time limit the appellant was granted to file his or her appeal brief should be granted without difficulties, as a matter of equal treatment.

10 In accordance with Arts. R55(3) and R64(2), as amended in the 2010 and 2013 revisions of the Code, the respondent may make a request to the CAS Court Office for the time limit to file the answer to be *fixed after payment by the appellant of his or her share of the advance of costs*.[16] It is submitted that such a request should be made without delay: it would run counter to procedural good faith to artificially extend the time limit for submitting the answer by filing a request pursuant to Art. R55(3) just before its expiry. A way of avoiding any abuse might be to simply suspend the time limit from the date of the request until the date of the payment of the advance of costs.[17] In any event, the respondent should not be allowed to rely on the possibility offered by Art. R55(3) with respect to the share of the advance that the appellant may have been required to pay, pursuant to Art. R64.2(2), to substitute for the respondent's own failure to do so.[18]

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13 The fact that the appellant's counsel may have sent a courtesy copy of the appeal brief directly to respondent's counsel is irrelevant for the purposes of the calculation of this time limit. In other words, the determinative event for the running of time is receipt of the CAS's notification of the appeal brief. The observations made in connection with the calculation of time limits under Arts. R49 and R51(1) apply, *mutatis mutandis*, also with respect to Art. R55 (cf. paras. 7–16 at Art. R49; and para. 3 at Art. R51 above). Mavromati/Reeb, Art. R55, para. 2, cite CAS 2010/A/2159, *Al-Kohr Sports Club v. Jean-Paul Rabier,* Award of 17 January 2011 (unpublished), para. 3.10, as an example of a case where the answer was not admitted because it had been filed after the expiry of the time limit under Art. R55(1). As those same authors note (at Art. R55, para. 3), an exception can be made to the inadmissibility of a belated answer if Art. R56's conditions apply.

14 In particular, it is important to note that the request must be made *before* the expiry of the set time limit (cf. para. 6 at Art. R51 above).

15 Cf. CAS 2009/A/1752, *Devyatovskiy v. IOC* and *CAS 2009/A/1753, Tsikhan v. IOC*, Award of 6 June 2010, paras. 3.16 – 3.21, where the deadline to file the respondent's answer was extended twice.

16 In CAS 2011/A/2492, *Leali v. CONI*, Award of 15 March 2012, para. 9.2, the Panel held that the twenty-day time limit runs from receipt by the respondent of the CAS's notification of the appellant's payment.

17 To these authors' knowledge, on one occasion where the respondent made a request pursuant to Art. R55(3), the CAS Court Office, having granted the request, decided to withhold forwarding the appeal brief until such payment had been made (CAS 2015/A/4188, *AS Monaco v. FC Sevilla*, Court Office letter dated 2 September 2015).

18 As submitted in the previous edition of this commentary, the addition of the words "his share" in the 2013 version of this provision (replaced by "its share" in the 2016 version) clarified that the intention was to refer to the appellant's share. Not entirely straightforward on this point,

IV TIMELINESS AND NUMBER OF COPIES

As a result of the changes made to the CAS Code in 2016, it is important to note that it is now again[19] possible to *file the answer by facsimile* [*or email*] *before midnight on the last day of the time limit, provided hard copies are sent by courier or registered mail the next following business day*. Exhibits "may be sent to the CAS Court Office by electronic mail", provided "they are listed and that each exhibit can be clearly identified".[20] 11

It is submitted that the filing of an incorrect number of copies of the answer is of no effect with regard to the observance of the time limit. In such a case, *a short additional deadline* should be given to the respondent for completing the filing. 12

V FAILURE TO SUBMIT ANSWER

According to Art. R55(2), in the event that the respondent fails to submit its answer within the stated time limit, the *Panel may nevertheless proceed with the arbitration* and deliver an award without the benefit of a written answer or without taking into account an answer that was filed out of time.[21] 13

The award will be considered as having been *rendered by default* only if the respondent communicates to the CAS that it does not intend to participate in the proceedings[22] or if the respondent simply ignores the CAS's communications and does not appear at the hearing.[23] The arbitrators' authority to proceed with the arbitration in case of default is in accordance with Swiss arbitration law. However, the CAS must make every effort to allow the defaulting party to assert its rights,[24] which means that the Court Office must continue to send any communication/notification to the defaulting party throughout the proceedings, and in particular the invitation to attend the hearing.[25] 14

Mavromati/Reeb, Art. R55, para. 7, who speak of "the share", with reference to an unpublished award (CAS 2012/A/2775).

19 After removing (in the Code's 2013 edition) the possibility of meeting the deadline by filing written submissions via facsimile, the CAS has reintroduced it in the current version of the Code (adding also the possibility of filing by email). Cf. Art. R31(3)'s text in the marked-up version of the 2013 Code that was appended to Rigozzi/Hasler/Quinn, *Jusletter of 3 June 2013*, and Art. R31(3) as set out in the document "Amendments to the Code of Sports-related Arbitration (2016 edition), published by the CAS together with the latest version of the Code (available at <http://www.tas-cas.org/fileadmin/user_upload/Amendments_to_the_Code__2016_.pdf>).

20 Cf. Art. R31(3) with regard to the filing of the answer and Art. R31(5) with respect to exhibits. On all these points, cf. Noth/Haas, paras. 9–11 at Art. R31 above, and Mavromati/Reeb, Art. R31, paras. 23, 25–26.

21 Cf. CAS 2009/A/1828 & 1829, *Olympique Lyonnais v. US Soccer Federation (Bompastor)* & *Olympique Lyonnais v. US Soccer Federation (Abily)*, Award of 18 March 2010, paras. 32–35.

22 Cf. CAS 2003/A/505, *UCI v. Pitts, USA Cycling & USADA*, Award of 19 December 2003, paras. 36–37.

23 Cf. CAS 2006/A/1156, *FC Molenbeek Brussels v. FC Levadia*, Award of 27 November 2009, para. 19.

24 Cf., e.g., Kaufmann-Kohler/Rigozzi, para. 6.20, with further references.

25 Cf., e.g., CAS 2013/A/3050, *WADA v. Andrey Krylov & FIG*, Award of 10 June 2013, para. 65; CAS 2013/A/3077, *WADA v. Ivan Mauricio Casas Buitrago & GCD*, Award of 4 December 2013, paras. 15–19; CAS 2013/A/3347, *WADA v. Polish Olympic Committee v. Przemyslaw Koterba*, Award of 22 December 2014, paras. 34–38.

VI CAS JURISDICTION

15 As mentioned above, Art. R55(1) directs that any objections to CAS jurisdiction must be set out in the answer. This provision reflects Art. 186(2) PILS, according to which "[a] plea of lack of jurisdiction must be submitted prior to any defence on the merits".[26] This means that the *respondent will be estopped from submitting a jurisdictional challenge once it has filed its answer*, whether in the course of the CAS arbitration[27] or in the context of an action to set aside the award before the Supreme Court.[28]

16 Articles R55(4) and R55(5) were introduced with the 2012 Code revision to expressly set out the *applicable principles of Swiss arbitration law regarding jurisdictional issues*.

17 The first sentence of Art. R55(4) provides that "[t]he Panel shall rule on its own jurisdiction", mirroring the principle of "*Kompetenz-Kompetenz*" pursuant to Art. 186(1) PILS.

18 The second sentence of Art. R55(4) restates Art. 186(1*bis*) PILS, allowing CAS panels to rule on their jurisdiction "*irrespective of any legal action already pending* before a State court or another arbitral tribunal relating to the same object between the same parties". Unfortunately, the English version of this provision in the Code is slightly misleading in the manner it sets out the exception to the above-stated principle: a proper translation of the relevant wording of Art. 186(1*bis*) PILS (and of the French version of Art. R55(4))[29] should read "[…] unless there are serious reasons [rather than 'substantive grounds'] to stay the proceedings".[30] As already mentioned, CAS

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26 See Berger, above commentary on Art. 186 PILS (Chapter 2, Part II), paras. 40–41. As recalled in CAS 2013/A/3409, *FAHB & consorts v. IHF*, Award of 28 August 2014, paras. 108–112, Art. 186(2) PILS does not dictate how an objection to jurisdiction must be raised, leaving room for arbitration rules to regulate this aspect. This is what Art. R55(1) does by specifying that the objection must be raised in the respondent's answer. As to the form of such an objection, Swiss law does not require the use of specific words or expressions to convey it. To determine whether it is faced with a jurisdictional objection, the tribunal should construe the respondent's statements in accordance with the general rules on contract interpretation (Art. 18 CO).

27 Cf. CAS 2002/A/395, *UCI v. de Paoli & FCI*, Award of 19 November 2002, p. 5 para. 14.

28 See Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), paras. 47–49. It should also be noted here that in the uncommon circumstances where a party is allowed to intervene in the proceedings pursuant to Art. R41.3 and then afforded the opportunity to file an application "having the same content as an answer as described under Art. R55" challenges to CAS jurisdiction are unlikely to be successful if the main parties have already "explicitly agreed and [given] their consent [to CAS jurisdiction] in the Appeal Brief and Statement of Defence respectively" (CAS 2008/A/1609, *Ozkan v. MKE Ankaragucu Spor Kulubu*, Award of 6 October 2009, paras. 3.2 and 6.5–6.7).

29 The wording of the French version of Art. R55(4), second sentence (which is to prevail in case of discrepancy with the English version, as provided in Art. R69), is identical to that of Art.186(1 *bis*) PILS. The English version reads as follows: "[t]he Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings". The French version provides that "*[l]a Formation statue sur sa propre compétence. Elle statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure*".

30 Contra, Mavromati/Reeb, Art. R55, para. 24, footnote 29, who maintain that *"substantive grounds seems to be the right expression ('substantial', 'considerable' grounds in order to stay the proceedings)"*.

panels have interpreted the second sentence of Art. R55(4) as meaning that the mere possibility that another court seized with the case might render a different decision than that of the CAS was "manifestly not" a serious reason within the meaning of Art. 186(1*bis*) PILS.[31]

19 The first sentence of Art. R55(5) states that the CAS "shall invite the parties to file written submissions on the matter of CAS jurisdiction" thus codifying the previous practice according to which *the appellant should be given an opportunity to file a written response to the jurisdictional challenge*.

20 The second sentence of Art. R55(5) deals with the so-called bifurcation of the proceedings. Pursuant to Art. 186(3) PILS "the arbitral tribunal shall, as a rule, decide on its jurisdiction by [a separate] preliminary award". In practice, the CAS can order a bifurcation upon a reasoned request or *sua sponte* when the jurisdictional challenge is straightforward and can be easily dealt with separately in a time- and cost efficient way and/or it would otherwise be procedurally unfair to require the respondent to prepare a full-fledged submission answering also the appellant's arguments on the merits where it appears likely that the case may not even reach the merits phase. Art. R55(5) reads: "[t]he Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits", indicating that, contrary to the position under Art. 186(3) PILS,[32] *in CAS arbitrations there is no presumption in favor of bifurcation*. This approach is, in our opinion, the better one in CAS appeals cases, as a bifurcation will inevitably slow down the proceedings and bring with it an inherent risk of abuse on the part of the respondent.

VII COUNTERCLAIMS AND CROSS-APPEALS

21 Further to the 2010 revision of the Code, Art. R55 no longer provides that the respondent's answer should set out "any counterclaims",[33] meaning that it is *no longer possible to file counterclaims in CAS appeals procedures*. As noted in the commentary that was released by the CAS at the time, "[t]he persons and entities which want to challenge a decision [have] to do so before the expiry of the applicable time limit for appeal".

22 It has been argued that the rationale for this amendment was to prevent respondents from, in effect, benefiting from a longer time limit to "appeal" (in the form of a counterclaim) against the challenged decision than the appellant himself.[34] As submitted in the previous edition of this commentary, while this may be correct, *the solution adopted with the 2010 amendment to Art. R55 could be too drastic* and potentially unfair in some circumstances, as well as costly and inefficient.[35] The CAS has been strict in its application of the exclusion of counterclaims under the

31 Cf. para. 43 at Art. R47 above; CAS 2009/A/l881, *El-Hadary v. FIFA & Al-Ahly SC*, Preliminary Award of 7 October 2009, paras. 66–68; cf. also BGer. 4A_428/2011 para. 5.2.2.

32 Under this provision, "[t]he arbitral tribunal shall, *as a rule*, decide on its jurisdiction by preliminary award" (emphasis added).

33 Art. R39, which applies to ordinary proceedings, has remained unchanged and thus still allows the filing of counterclaims with the respondent's answer.

34 Cf. Stincardini, p. 87.

35 Rigozzi/Hasler, para. 22 at Art. R55 (2013); cf. also Rigozzi, *Jusletter of 13 September 2010*, paras. 40–42.

amended Art. R55.[36] Meanwhile, in a move consistent with the concerns expressed by these and other commentators, the drafters of the *2015 WADA Code* have *added a specific provision in the section governing appeals before the CAS, Art. 13.2.4*, entitled "Cross Appeals and other Subsequent Appeals Allowed", which reads as follows: *"[c]ross appeals and other subsequent appeals by any respondent named in cases brought to CAS under the [WADC] are specifically permitted*. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal at the latest with the party's answer" (emphasis added). The WADC's official comment to Art. 13.2.4 notes that "[t]his provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision *permits a full hearing for all parties*" (emphasis added).[37] Since the WADC 2015's entry into force, Art. 13.2.4 has been incorporated in the rules of anti-doping organizations around the world.[38] At the time of writing, it remained to be seen how this provision – effectively overriding Art. R55 for doping cases – would be given effect in the CAS's practice.

36 Including, in the initial period, in cases where the applicable regulations still provided for counterclaims and cross-claims at the time when the dispute was brought before the CAS. Cf., e.g., CAS 2010/A/2101, *UCI v. Duval & FFC*, Award of 18 February 2011, paras. 75–82; CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, paras. 123–131; CAS 2011/A/2349, *UCI v. Sentjens & RLVB*, Award of 29 December 2011, paras. 94–102. Cf. also CAS 2010/A/2193, *Club Cagliari Calcio v. Club Olimpia Deportivo*, Award of 15 September 2011, paras. 6.3–6.6. More recently, e.g., CAS 2013/A/3432, *Manchester United FC v. Empoli FC S.p.A.*, Award of 21 July 2014, paras. 56–57, with further references.

37 As noted by Netzle (p. 10), the addition of Art. 13.2.4 is *"especially important in cases where the WADA exercises its appeal right [before the CAS] according to Article 13.2.3 of the WADA Code although it was not a party in the [first instance proceedings]"*.

38 Pursuant to Art. 23.2.2 WADC 2015, Art. 13.2.4 is among the provisions that WADC signatories must implement without substantive changes.

Article R56: Appeal and Answer complete – Conciliation

Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

The Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

I PURPOSE OF THE PROVISION

The main purpose of Art. R56(1) is to limit the parties' written submissions in appeals arbitrations to a single exchange (II.) – namely the appellant's appeal brief[1] and the respondent's answer[2] – in order to *ensure that the resolution of the dispute is not unduly delayed*.[3] Conciliation according to Art. R56(2) (III.) plays a limited role in practice as it is not suited for appeals disputes, in particular in disciplinary matters, where the sports-governing bodies have a fundamental obligation to treat all of their members equally. 1

II THE PRINCIPLE OF A SINGLE EXCHANGE OF SUBMISSIONS

As a matter of principle, and as already discussed in connection with Arts. R51 and R55, in CAS appeals proceedings the parties are not authorized to supplement or amend their requests or their argument, nor to produce or rely on new exhibits or other evidence after the submission of the appeal brief and answer. This principle is enshrined in Art. R56(1) and it is aimed at *ensuring the expeditiousness of appeals proceedings*. The CAS Court Office reminds the appellant of Art. R56(1)'s rule in the letter acknowledging receipt of the statement of appeal, and does the same for the respondent's attention in its letter acknowledging receipt of the appeal brief and fixing a time limit for the filing of the answer.[4] 2

However, given the short time limits within which the submissions must be filed in CAS appeals proceedings,[5] Art. R56(1)'s restriction puts a *heavy burden on counsel*, which is not to be underestimated and may, depending on the circumstances, call for some adjustment.[6] Indeed, despite all the efforts made by diligent counsel, it is not always possible to comprehensively brief a case in a single submission, in particular in complex matters which require the gathering of witness statements and expert evidence. Hence, Art. R56(1) allows for exceptions to the general rule, 3

1 Cf. Art. R51(1).
2 Cf. Art. R55(1).
3 CAS 2006/A/1088, *RBF v. IBF*, Award of 29 December 2006, para. 9.20.
4 The parties are again reminded of Art. R56(1)'s rule in the Court Office's letter acknowledging receipt of the answer.
5 Cf. Arts. R51(1) and R55(1).
6 Rigozzi/McAuliffe, *GAR European and Middle Eastern Arbitration Review 2016,* pp. 5–6.

on two distinct bases: an agreement between the parties (A.) or a decision by the President of the Panel (B.).[7]

A The Parties' Agreement to Deviate from Article R56

4 One of the main characteristics of the CAS appeals procedure is that it contains a number of restrictions on the parties' freedom to fashion the arbitration proceedings according to their preferences.[8] From this point of view, Art. R56(1) constitutes an exception to the overall approach, as it expressly reserves the possibility that the parties may agree to depart from the general rule provided in the Code. If the parties find an agreement, the panel is bound by that agreement.[9]

5 However, it is *rather uncommon* for the parties to reach a procedural agreement once the arbitration has started, as counsel will inevitably tend to think that the adverse party may gain an advantage from being allowed to expand on its case. This might explain why more often than not parties are tempted to file unsolicited additional evidence or submissions after the applicable time limit, without asking the other party first. The panel will then in any event (retroactively) ask for the other party's agreement, indicating that the panel('s president) will decide on the admissibility of the filing if there is no agreement.

B The President's Authority to Grant an Exception

6 Failing an agreement by the parties, the President of the Panel can decide to depart from the principle that the parties' written submissions pursuant to Arts. R51 and R55 must be exhaustive only "on the basis of exceptional circumstances". Although the President enjoys *wide discretion*[10] in determining what may amount to "exceptional circumstances" (1.), it is submitted that the need to safeguard the parties' fundamental procedural rights must always constitute an "exceptional circumstance" (2.) within the meaning of Art. R56(1).

1 The CAS Practice

7 It seems fair to say that *the practice* resulting from the CAS panels' presidents' decisions on whether to allow the parties to supplement their case after the time limit for

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7 As the scope of these exceptions is very limited, it is suggested that counsel who have legitimate reasons to believe that it will not be possible to gather all the required evidence and to properly prepare their case within the time limits set by the Code must ask for an extension (cf. Arts. R51 and R55). If the CAS rejects the request for an extension, it is submitted that it will be easier to establish the existence "exceptional circumstances" within the meaning of Art. R56(1).

8 This is so, in particular, with respect to the number of arbitrators constituting the panel (cf. Art. R50(1)), the selection of the arbitrators (cf. Arts. R48(1) and R55(1)), and the appointment of the President of the Panel (Art. R54(2)); cf., e.g., Kaufmann-Kohler/Rigozzi, paras. 4.09, 4.17 and 4.23.

9 Cf. Knoll, above commentary on Art. 182 PILS (Chapter 2, Part II), paras. 4–8; see also, e.g., CAS 2013/A/3365 + 3366, *Juventus FC v. Chelsea FC & AS Livorno Calcio SpA v. Chelsea FC*, Award of 21 January 2015, para. 81; and Mavromati/Reeb, Art. R56, para. 6.

10 CAS 2007/A/1290, *Diethart v. IOC*, Award of 4 January 2008, paras. 17–18; see also Mavromati/Reeb, Art. R56, para. 7, noting that Art. R56 does not define the 'exceptional circumstances' it refers to.

the filing of their written submissions is *not very consistent*.[11] Since such decisions are *often unreasoned*,[12] in particular when they are made on the spot during the hearing, it is difficult to provide a meaningful and comprehensive analysis of this practice. The following are some examples taken from cases in which explanations as to the President's decision were provided in the award.[13]

8 As a threshold matter, it should be noted that the existence of "*exceptional circumstances*" is to be *demonstrated*[14] *with sufficient certainty*[15] by the party seeking to supplement its case.

9 In principle, *new evidence* should be admitted based on the "exceptional circumstances" test only if it has become available after the time limit for filing the appeal brief or the answer.[16] If the evidence in question existed already before that time limit but was discovered thereafter, this would *constitute an exceptional circumstance only if the said evidence could not reasonably be discovered and produced in time for the filing*.[17] Accordingly, a panel denied the appellant's request for leave to file new evidence only a few days before the time limit for the respondent to submit its answer and just ahead of the hearing, taking into account the fact that the evidence had been in the appellant's possession for more than a month, that he had already been granted an extension of the time limit for filing his appeal brief, and that he had failed to give any advance explanation or notice of the filing of that evidence.[18] That said, 'late' evidence filed by the respondent athlete was allowed by another panel on the basis that the evidence had been *part of prior proceedings* and the appellant federation ought to have reviewed it in preparing its appeal.[19] In yet another case, the panel decided to admit documents that had been filed after the time limit for the appeal brief, considering that they merely confirmed statements already made in that brief and "therefore did not harm the respondent".[20] Finally, it bears to note

11 See, e.g., CAS 2009/A/1835, *CONI v. Priamo*, Award of 11 November 2009, para. 41, allowing the late production of a document on the ground that the other party was aware of the existence of such document, without indicating why this should be considered an exceptional circumstance.

12 CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 3.12; CAS 2007/A/1370 & 1376, *FIFA, WADA v. CBF, STJD & Dodo*, Award of 11 September 2008; CAS 2009/A/1940, *BAP v. FIBA & SBP*, Award of 7 April 2010, para. 15.7.

13 In practice, the President will consult with his or her co-arbitrators, and the decision is often presented as a decision of the panel. Cf., e.g., CAS 2007/A/1290, *Diethart v. IOC*, Award of 4 January 2008, paras. 17–18; CAS 2013/A/3264, *Abderrahim Achchakir v. FIFA*, Award of 19 November 2013, para. 84.

14 Cf., e.g., CAS 2009/A/1920, *FK Pobeda, Zabrcanec & Zdraveski v. UEFA*, Award of 15 April 2010, para. 50.

15 Cf., e.g., CAS 2013/A/3264, *Abderrahim Achchakir v. FIFA*, Award of 19 November 2013, paras. 82–83.

16 CAS 2010/A/2172, *Oriekhov v. UEFA*, Award 18 January 2011, para. 47, regarding testimonies given in a context external to the proceedings before the CAS. See also CAS 2014/A/3488, *WADA v. Juha Lallukka*, award of 20 November 2014, paras. 66–72, noting further that the other party had not objected to the belated filing.

17 CAS 2001/A/318, *Virenque v. Swiss Cycling*, Award of 23 April 2001, para. 32. See also, e.g., CAS 2013/A/3148, *PAASF v. FIAS & Vasily Shestakov*, Award of 5 September 2014, paras. 79–83.

18 CAS 2013/A/3264, *Abderrahim Achchakir v. FIFA*, Award of 19 November 2013, para. 82.

19 CAS 2012/A/2779, *IAAF v. CBAT & Simone Alves Da Silva*, Award of 31 January 2013, para. 55.

20 CAS 2011/A/2681 KSV, *Cercle Brugge v. FC Radnicki*, Award of 19 September 2012, para. 80; see also Mavromati/Reeb, Art. R56, para. 10, noting further that statements in the parties' briefs purporting to reserve their right to produce further documents at a later stage in the proceedings are inoperative under Art. R56's rule (as confirmed in CAS 2011/A/2681, para. 80). Conversely, in CAS 2014/A/3604, *Ralfs Freibergs v. IOC*, Award of 17 December 2014, paras. 71–72, the

that unless the panel has issued specific procedural directions in this respect, *legal authorities* do not constitute new evidence within the meaning of Art. R56 and can thus, in principle, be produced until the day of the hearing.[21]

10 *Additional submissions* are generally allowed only when the respondent's answer contains defenses that need to be rebutted in writing.[22] For instance, if the answer contains a jurisdictional[23] or procedural[24] challenge,[25] a request by the appellant to respond to the challenge by a separate written submission should normally be granted. The panel should clearly define the scope of the additional submission, which will then allow it to disregard any portions of that submission that exceed the prescribed perimeter.[26] Moreover, the panel has discretion to allow the filing of a *second round of submissions* when the circumstances so require.[27]

11 *Amendments to the prayers for relief* should be accepted only when they are limited to clarifications of the original requests. For instance, if the appellant initially sought the setting aside of the decision under appeal, he or she should be allowed to later request that the decision be only partially set aside or replaced with a new, different decision, or to add a declaratory claim that was already implicit in the reasoning supporting the request to have the decision set aside.

12 The practice is generally less restrictive with regard to *new legal arguments*.[28] After all, arbitration under Swiss law is governed by the *jura novit curia* principle.[29] New arguments should be excluded only when it is obvious that they could have been

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panel decided not to allow evidence that the appellant had obtained from a laboratory almost a month before the hearing, but omitted to share with the panel and its adverse party until then, considering that it would be "clearly unfair to admit such evidence at this late stage" (but also that in any event – envisaging it *de bene esse* – the evidence in question was irrelevant).

21 CAS 2006/A/1192, *Chelsea Football Club Limited v. Mutu*, Award of 21 May 2007, paras. 50–51; more formalistic, CAS 2009/A/1926 & 1930, *WADA v. ITF & Gasquet*, Award of 17 December 2009, para. 3.26. With regard to the submission of publicly available documents after the exchange of written submissions, see also CAS 2013/A/3222, *FC Interstar Sibiu v. RFF & AFC Astra*, Award of 24 January 2014, paras. 59–60.

22 CAS 2016/A/4371 *Robert Lea v. USADA*, Award of 4 May 2016, para. 45.

23 TAS 98/199, *Real Madrid v. UEFA*, Award of 9 October 1998, para. 19. See also Mavromati/Reeb, Art. R56, para. 3.

24 CAS 2004/A/748, *ROC, Ekimov v. IOC, USOC, Hamilton*, Award of 27 June 2006, para. 48.

25 Cf. Art. R55(1). Art. R55(4) expressly provides that if the answer raises a jurisdictional challenge, the CAS Court Office or the panel (if already constituted) must invite reply submissions by the other party.

26 CAS 2009/A/1912&1913, *Pechstein v. ISU; Deutsche Eisschnellauf Gemeinschaft e.V. v. ISU*, Award of 25 November 2009, para. 30. More recently, cf., e.g., CAS 2015/A/3899, *F. v. Athletics Kenya (AK)*, Award of 3 July 2015, paras. 26, 29–31.

27 Cf. e.g., *Omer Riza v. Trabzonspor Kulübü Dernegi & TFF*, Award on jurisdiction of 10 June 2010, para. 26; CAS 2013/A/3365, *Juventus FC v. Chelsea FC*, CAS 2013/A/336, *AS Livorno Calcio SpA v. Chelsea FC*, Award of 21 January 2015, paras. 66–78 (*passim*). See also Mavromati/Reeb, Art. R56, para. 4, noting that this could be the case, for instance, where the need to understand the legal context in another country dictates that further submissions be made by the parties, with reference to CAS 2011/A/2586, *William Lanes de Lima v. FIFA & Real Betis Balompié*, Award of 3 October 2012, para. 19. For a case where the panel found that there were no circumstances requiring a second round of submissions, cf. CAS 2014/A/3587, *KRC Genk v. Monaco FC*, Award of 18 December 2014, *CAS Bulletin 2015/1*, p.71.

28 CAS 2015/A/4059, *WADA v. Bellchambers et al., AFL and ASADA*, Award of 11 January 2016, para. 111.

29 CAS 2005/A/983 & 984, *Club Atlético Peñarol v. PSG*, Award of 12 July 2006, para. 58. On the role played by the principle *jura novit curia* in Swiss international arbitration, cf. Arroyo, *Jura*

made at a previous stage and that, under the circumstances, the delay puts the other party at a procedural disadvantage.[30] Procedural good faith commands that ambushing by new arguments or constantly "evolving" ones should be proscribed, especially when coming from the governing body charging an athlete in disciplinary cases.

More surprisingly, the CAS has admitted a *late answer* (filed after Art. R55's time limit). In this case, the CAS Court Office allowed the respondent's answer on the basis that "(i) Article R55 of the CAS Code grants the Sole Arbitrator discretion to continue the proceedings even if an Answer has been filed out of time; (ii) Since the Second Respondent had requested a hearing, she was likely to raise the same arguments as those contained in her Answer, and the Appellant's position would not be prejudiced; and (iii) The issue at stake related to a doping matter, which had the potential of placing the Athlete's life and career at stake".[31] In other instances, panel presidents have been more formalistic and refused an answer despite the fact that similar considerations would have applied.[32] 13

2 The Need to Safeguard the Parties' Fundamental Procedural Rights

Experience shows that each panel President has his or her own view of how rigorously Art. R56's requirement of "exceptional circumstances" should be applied. It is submitted that the guiding principle should always be the strict observance of the parties' fundamental procedural rights. Accordingly, upon a proper application, *rebuttal evidence should not be easily disallowed*,[33] in particular when the application shows that the need to file rebuttal evidence became apparent only after receipt of the other party's submissions (i.e. that it is genuine rebuttal evidence and not new additional evidence disguised as rebuttal evidence). 14

Similarly, the existence of exceptional circumstances should be accepted when it appears that *the CAS did not grant a request for an extension that would have afforded the requesting party with the time necessary* to properly prepare and present its case with its written submission. 15

Novit Arbiter, pp. 44–54 (with a comprehensive overview and critical analysis of the Supreme Court's case law).

30 CAS 2001/A/354, *Irish Hockey Association (IHA) v. Lithuanian Hockey Federation (LHF) and International Hockey Federation (FIH)* & CAS 2001/A/355, *Lithuanian Hockey Federation (LHF) v. International Hockey Federation (FIH)*, Award of 15 April 2002, para. 10, speaking of "estoppel".

31 CAS 2012/A/2779, *IAAF v. CBAT & Simone Alves Da Silva*, Award of 31 January 2013, para. 55 letter e.

32 E.g., CAS 2015/A/4352&4353, *V. v. L. & Z v. L.*, Award of 7 October 2016, paras. 48–62 and 111–122. Note that the Respondent agreed to the extension of the time limit for the Appellant to file the appeal brief reserving the right to seek a similar extension, and that the Appellant then refused to agree to the Respondent's request for an extension on the ground that it was made after the original time limit had elapsed. While it is true that the Respondent could still make its submissions at the hearing, the Panel's approach unnecessarily rewarded the Appellant's procedural conduct despite the fact that such conduct is difficult to square with the obligation to arbitrate in good faith, in particular knowing that the Respondent was not represented by counsel at the relevant time.

33 CAS 2004/A/717, *International Paralympic Committee v. WADA & Brockman*, Award of 8 June 2005, paras. 37–38 (however without further elaboration on the grounds on which the Panel had based its decision to admit the relevant evidence).

16 For its part, the Swiss Supreme Court has confirmed that a decision dismissing a request to file additional evidence does not infringe the parties' right to adduce evidence, which forms part of the right to be heard, if the evidence is tendered out of time (and its consequent inadmissibility is provided for in the applicable rules),[34] and that the parties' right to equal treatment is not violated by a decision accepting one party's submission of evidence after the relevant time limit on the basis of duly argued exceptional circumstances, and refusing a similar request by the other party where no such circumstances were invoked, let alone established.[35]

III CONCILIATION AND SETTLEMENT

17 Article R56(2) provides that "the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties". This provision plays a limited role in practice, as *sports-governing bodies are not inclined to "settle" disciplinary cases*.[36] In those rare disciplinary cases that are settled, the sports-governing body involved will not generally be keen to have the settlement made public, as this could trigger similar requests from other athletes.[37] That being said, many consent awards in doping cases embody an acceptance by the athletes of the sanction imposed on them, rather than a fully negotiated solution of the dispute.[38] In those cases, the settlement is mainly aimed at reducing the duration and costs of proceedings.[39]

18 The requirement to treat the members equally does not apply in cases where the previous instance acted as a neutral body in a dispute between two members. For instance it has become frequent that in the appeals brought against the decision of the FIFA DRC or PSC in transfer-related matters the panel starts the hearing by telling the parties that the arbitrators have identified a significant litigation risk on both sides and inviting them to take advantage of a short break to see whether they can reach a settlement.

19 Before acting as conciliators under Art. R56(2) the arbitrators should make sure that the parties understand the reasons for and the scope of their intervention, and that in case the conciliation attempt should fail, the parties agree to waive any right to challenge the arbitrators (or the award) on the ground that the arbitrators acted as settlement facilitators during the arbitration.[40]

20 Where the parties ask the panel to "ratify and incorporate" their settlement agreement in a consent award, according to the CAS case law, the panel must "verify the *bona fide* nature of [the agreement] to ensure that [it does not conceal an attempt to

34 BGer. 4A_274/2013 para. 3.2; BGer. 4A_576/2012 para. 4.2.
35 BGer. 4A_274/2013 para. 3.2.
36 Cf. Mavromati/Reeb, Art. R56, para. 17. That said, overall, the CAS has registered more consent awards in appeals proceedings than in ordinary proceedings (see Mavromati/Reeb, Art. R56, para.14 (with footnote 24 quoting the figures of 8 ordinary cases and 29 appeals cases where consent awards were issued). One could surmise that this is simply a reflection of the fact that the total number of appeals cases is much greater than that of ordinary cases.
37 For one recent example where a consent award related to an anti-doping rule violation was published, see CAS 2014/A/3498, *IAAF v. TAF & Ms Asli Cakir-Alptekin*, Consent award of 17 August 2015.
38 Mavromati/Reeb, Art. R56, footnotes 31 and 35.
39 Mavromati/Reeb, Art. R56, para. 20.
40 Cf. Kaufmann-Kohler/Rigozzi, para. 1.29.

commit a fraud] and […] confirm that the terms of [the agreement] are not contrary to public policy principles or mandatory rules of the law applicable to the dispute".[41]

41 Cf., e.g., CAS 2014/A/3498, *IAAF v. TAF & Ms Asli Cakir-Alptekin*, Consent award of 17 August 2015, para. 35; Mavromati/Reeb, Art. R56, para. 19. For a discussion of the requirements of the Swiss *lex arbitri* in this respect, cf., e.g., Kaufmann-Kohler/Rigozzi, para. 7.109; see also Girsberger/Voser, para. 1451.

Article R57: Scope of Panel's Review – Hearing

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.

If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.

I PURPOSE OF THE PROVISION

1 Article R57 establishes a central principle of the CAS appeals system, namely the *power of CAS panels to hear the cases submitted to them de novo* (II.). It also regulates the main questions relating to the *oral hearing* (III.). The broad powers made available to the CAS under this provision are motivated by a desire to achieve procedural economy, while ensuring that the parties can receive a timely, fair, and final decision – in other words, that the CAS appeals procedure constitutes a proper and effective legal remedy.[1]

II THE SCOPE OF THE PANEL'S REVIEW

2 Appeals before the CAS are *de novo* proceedings, meaning that the panels hearing them may make *new decisions* in the matters under appeal, if necessary disregarding and/or replacing all or part of the findings and conclusions of the previous instances. Art. R57(1) determines not only "the scope of [the] Panel's review", as stated in its heading (A.), but also the decision-making power of the Panel when seized with an appeal under the CAS Code (B.).

A The Panel's Power of Review (*Pouvoir de cognition*)

3 CAS appeals proceedings provide for the *de novo* hearing of disputes (1). To understand the exact scope of this *de novo* principle in practice (3.), as well as its limitations (4.), it is important to consider its intended procedural implications (2.).

1 BGer. 4A_386/2010 para. 5.3.2, *Rev.Arb. 2011*, p. 826, with comments by Besson; see also CAS 2012/A/2895, *E. v. FIA*, Award of 15 April 2013, para. 45, and the reference to the principle of procedural economy.

1 De Novo Hearing of the Case (Art. R57(1))

According to Art. R57(1), first sentence, the "*[p]anel has full power to review the facts and the law*". The CAS has repeatedly held that the panels' scope of review under this provision is "basically unrestricted",[2] meaning that the CAS will in substance "*re-hear*" *the matter afresh, as if the case had not been previously heard or decided*.[3] Accordingly, the CAS is not bound by the factual or legal findings of, or the evidence presented before, the previous instance.[4] As a corollary, this also means that the parties can adduce new facts and produce new evidence before the CAS.[5] 4

2 Procedural Implications

An important implication of the *de novo* power of review, which is well-entrenched in CAS jurisprudence, is that any violations of the parties' procedural rights at first instance can be "cured" by a full appeal to the CAS.[6] The CAS has described this "*curing effect*" in the following terms:[7] 5

> *"The virtue of an appeal system which allows for a rehearing before an appealed body is that issues relating to the fairness of the hearing before the Tribunal of First Instance 'fade to the periphery' (CAS 98/211, published in Digest of CAS Awards II, pp. 255 at 264, citing Swiss doctrine and case law). Furthermore, the case law of the Swiss Supreme Court clearly establishes that any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly*

2 CAS 2003/A/507, *Strahija v. FINA*, Award of 9 February 2004, para. 7.3.1; CAS 2004/A/607, *B. v. IWF*, Award of 6 December 2004, para. 43; CAS 2004/A/633, *IAAF v. FFA & Chouki*, Award of 2 March 2005, para. 6.9; CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann; Ahlmann v. FEI*, Award of 30 April 2009, para. 66. More recently, cf., e.g., CAS 2015/A/4057, *Maritimo da Madeira Futebol SAD v. Al-Ahli Sports Club*, Award of 30 November 2015, para. 63.

3 CAS 2008/A/1718 to CAS 2008/A/1724, *IAAF v. All Russia Athletic Federation & Yegorova et al.*, Award of 18 November 2009, para. 166.

4 Cf., e.g., CAS 96/156, *Foschi v. FINA*, Award of 6 October 1997, unreported, para. 10.3; CAS 2002/A/383, *IAAF v. Dos Santos*, Award of 27 January 2003, para. 71.

5 CAS 2004/A/651, *French v. Australian Sports Commission and Cycling Australia*, Interlocutory Award of 30 March 2005, paras. 17–20. See also CAS 2004/A/714, *Fazekas v. IOC*, Award of 31 March 2005, para. 57; CAS 2004/A/607, *B. v. IWF*, Award of 6 December 2004, para. 3.

6 The "curing effect" of a full appeal is a long-standing principle that has consistently been affirmed in the CAS case law. See, among many others, CAS 94/129, *USA Shooting & Quigley v. International Shooting Union (UIT)*, Award of 23 May 1995, para. 59; CAS 98/208, *N., J., Y., W., v. FINA*, Award of 22 December 1998, para. 10; CAS 98/211, *B. v. FINA*, Award of 7 June 1999, para. 8. For a more recent case, see, e.g., CAS 2009/A/1920, *FK Pobeda, Zabrcanec & Zdraveski v. UEFA*, Award of 15 April 2010, para. 87.

7 CAS 2006/A/1177, *Villa FC v. B.93 Copenhagen*, Award of 28 May 2007, para. 19. This principle is also in line with the decisions of the European Court of Human Rights, which has held that an adjudicatory body's violation of Art. 6(1) ECHR will effectively be cured if its decisions are subject to "subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Art. 6(1)" (*Wickramsinghe v. The United Kingdom*, Application No. 31503/96, The European Commission of Human Rights (First Chamber), 9 December 1997, para. 41, cited in CAS 2009/A/1920, *FK Pobeda, Zabrcanec, Zdraveski v. UEFA*, Award of 15 April 2010, para. 87).

exercised (see [BGE] 124 II 132, especially p. 138; [BGE] 118 Ib 111, especially p. 120 and [BGE] 116 I a 94, especially p. 95)."

6 Since the availability of a full-fledged appeal to the CAS has the effect of remedying prior procedural flaws, CAS panels will not need to entertain arguments alleging violations of due process by the first instance hearing bodies.[8] For example, CAS practice shows that the following procedural deficiencies were (or could be) cured through the conduct of appeals proceedings: a violation of the right to be heard in all of its forms, in particular the fact for a party of not having been afforded an opportunity to be heard at first instance;[9] the lack of, or insufficient reasoning in, the impugned decision; defects in the administration of evidence;[10] other deficiencies/omissions in the evidentiary proceedings as conducted by the first instance hearing body,[11] and more generally any breach of "natural justice".[12]

7 Certain CAS panels have accepted the "curing" principle with some reluctance.[13] In this respect, there is, indeed, a concern that a disciplinary body's violation of fundamental procedural rights may go unpunished if the CAS simply issues a new decision.[14] The CAS has addressed this problem, to a certain extent, by drafting its decisions in such a way as to 'educate'[15] or warn[16] sports-governing bodies about respecting the principles of due process. That said, it is submitted that concerns related to the enforcement of the obligations of sports federations and/or their disciplinary bodies must cede to the *overarching goal of Art. R57, which aims to ensure procedural economy and efficiency*.[17] If the CAS did not have full powers of review, it would be forced to refer decisions back to the previous instance each time an athlete could show that his or her procedural rights have not been duly observed – unfortunately not such a rare occurrence in sports matters. The resolution of sports disputes would be significantly delayed,[18] creating uncertainty for the parties, especially athletes, and increasing the costs of the proceedings.[19] Such an outcome would seriously compromise the CAS's efforts to create a dispute

8 CAS 94/129, *USA Shooting & Quigley v. International Shooting Union (UIT)*, Award of 23 May 1995, para. 59; CAS 98/208, *N., J., Y. & W., v. FINA*, Award of 22 December 1998, para. 11.

9 CAS 2004/A/549, *Deffer & RFEG v. FIG*, Award of 27 May 2004, paras. 30–31.

10 CAS 2002/A/340, *S. v. FIG*, Award of 19 March 2002, para. 17.

11 CAS 2003/A/524, *Duda v. RLVB*, Award of 1 April 2004, para. 24.

12 CAS 2003/O/486, *Fulham FC v. Olympique Lyonnais*, Award of 19 December 2003, paras. 28 and 50–51.

13 CAS 2000/A/290, *Xavier & Everton FC v. UEFA*, Award of 2 February 2001, para. 8.

14 Rigozzi, para. 1086. Along the same lines, the Panel in *Quigley* noted that "[i]t would obviously be wise to ensure that accused competitors are given a satisfactory opportunity to be heard from the start, so that they do not feel impelled to appeal out of frustration, but that is another matter" (cf. above, footnote 8).

15 CAS OG 96/005, *Andrade [II], W. & L. v. NOC Cap Verde*, Award of 1 August 1996, para. 8.

16 See, e.g., CAS 2000/A/290, *Xavier & Everton FC v. UEFA*, Award of 2 February 2001, para. 8.

17 Rigozzi, para. 1086.

18 The serious delays that may arise from repeated challenges were exemplified by the *FC Sion v. Swiss Football League* debacle (see Rigozzi, paras. 1076–1078). In that case, the decision by the football association to exclude the club from a competition was set aside three times by three different tribunals, but the dispute could still not be definitively settled. Absent an express provision to this effect in the governing rules, the last tribunal was left to try and find a basis to enable it to revise the association's decision (as opposed to simply setting it aside as provided in the rules). Art. R57 of the Code is intended to prevent this type of situations from occurring.

19 CAS 98/214, *B. v. FIJ*, Award of 17 March 1999, para. 10.

resolution system that is responsive to the time pressures and specific requirements of competitive sports.

3 The De Novo *Principle in Practice*

a New Facts

As seen above, a corollary of the CAS's full power of review under Art. R57, which implies a full re-hearing of the case, is that the panel is free to consider new facts. 8

In cases where the decision under appeal is already a genuine arbitral award, like for instance in contractual disputes adjudicated by the Basketball Arbitral Tribunal (BAT),[20] one could wonder whether an unlimited possibility to adduce new facts in CAS appeals proceedings is reasonable as a matter of procedural economy. It is submitted that if the applicable regulations provide for an arbitral tribunal at first instance, they could validly limit the parties' right to adduce new facts on appeal before the CAS.[21] 9

This however would not apply in doping matters, in particular in cases where the appeal before CAS has been brought by WADA or the relevant international federation, which were not a party in the first instance arbitration. Indeed, one of the reasons for such appeals is to allow the correction of mistakes in the prosecution, for instance when factual excuses by the athlete appear to have been accepted too readily by the first instance tribunal. 10

b New Evidence (Art. R57(3))

The *de novo* principle also means that the parties can produce new evidence with respect to both (i.) factual allegations made in the previous instance (which the decision under appeal might have found to have been established or not) and (ii.) new factual allegations. The *2013 edition of the Code* included a *significant amendment* in this respect, namely the *addition of a new paragraph 3 to Art. R57*, providing that "[t]he panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered". 11

To these authors' knowledge, there is no publicly available document explaining the rationale for this change in the Code. It is our understanding that the provision was meant to deter parties to proceedings in the FIFA DRC or Player Status Committee 12

20 The BAT is a real arbitral tribunal, as implicitly confirmed by the fact that the Swiss Supreme Court has accepted to be seized of setting aside actions pursuant to Art. 190 PILS against BAT awards. Until the relevant provision was eliminated in the BAT Rules in 2010, BAT awards were by default subject to appeal before the CAS. The parties can still provide for appeals to the CAS in their contracts, however they do not often do so. For an example of a case where the CAS heard an appeal against a BAT award, see CAS 2011/A/2350, *Giorgi Shermadini v. Life Sports Management Inc.*, Award of 23 August 2011.

21 One could even argue that it would not be totally unreasonable to provide that the CAS will have to decide based on the factual findings of the first arbitral tribunal and that its panels could review the factual findings of the first tribunal only to the extent that such findings were made in violation of the right to be heard (on this standard, which is the one applicable in the Swiss Supreme Court, see Kaufmann-Kohler/Rigozzi).

from simply assuming that, given the stakes, the case would in any event end up in CAS and waiting until then before putting forward their case in a comprehensive (and professional) fashion, thus making a mockery out of the FIFA proceedings.[22] In the vast majority of the cases where the appeal against a decision of the FIFA DRC or PSC was upheld, it was because the factual background of the dispute put forward in the CAS proceedings was radically different from the one that was before the prior FIFA instance.[23] However, the CAS official commentary suggests[24] and has been understood to submit[25] that the limitation of the right of to produce new evidence applies only when the first instance hearing body is a true (independent) tribunal.[26]

13 The Swiss Supreme Court has held that Art. R57(3) is not problematic as a matter of principle also in cases where the decision under appeal emanated from the FIFA DRC,[27] irrespective of the fact that the DRC is not an arbitral tribunal. It is indeed submitted that Art. R57(3) should apply not only in cases where the lower instance is an arbitral tribunal, but also where it is not.[28] The difference between the two situations should rather be reflected in the way in which the CAS panel exercises its discretion to exclude new evidence on the basis of Art. R57(3).

14 When the decision under appeal is an arbitral award, rendered after full-fledged proceedings by a proper arbitral tribunal hearing the case in the first instance, the CAS panel hearing the case on appeal should not hesitate to exclude new evidence that was available or could reasonably have been discovered and produced before the first instance tribunal. When the decision under appeal is not an arbitral award, Art. R57(3) is still applicable, but the CAS panel should use its discretion to apply this provision with restraint, so as not to impinge upon the fundamental principle of *de novo* review (and in line with the reasons why it was provided for in the first place). Indeed, as further illustrated by the discussion below, it should be underscored that the CAS's power to conduct a fully *de novo* review of the case and the associated "curing" effect of such review provide important grounds for validly excluding the jurisdiction of the state courts over sports disputes.[29] The sole arbitrator in *Zamalek* followed this line of reasoning and refused to exercise his discretion to exclude

22 See also Levy (2016), at p. 181 who finds it "understandable that prospective appellants may not want to make huge efforts for a proceedings before an internal judicial body of a sport organisation which they do not expect to take an independent decision in the matter, or where they anticipate that making such efforts will not make a difference to the outcome", and indicates that such appellants will thus often act according to the principle "let's save our resources for the CAS proceedings".

23 Irrespective of the fact that FIFA might end up paying the costs while the decision under appeal was not necessarily wrong it is submitted that this situation is far from an ideal allocation of resources.

24 Mavromati/Reeb, Art. R57, para. 53, according to whom "the full power of review, a well-established principle in appeals before the CAS, should be preserved to the extent that the previous instance is not an independent arbitral tribunal but the internal body of a sports federation".

25 Levy (2016), p. 180.

26 In our view, in these cases one could even consider refusing not only new evidence but also new factual allegations.

27 BGer. 4A_246/2014 para. 6.4.3.2 in fine.

28 See also Levy (2016), p. 180.

29 As already mentioned, CAS appeals are not appeals *stricto sensu*. This is the main reason why Art. 317(1) CCP, according to which new facts and evidence are admissible on appeal only if they are "a) invoked without delay; and b) [if] it was not possible, despite reasonable diligence, to invoke them in the proceedings before the court of first instance", should not apply in this

evidence that was not tendered before the FIFA DRC, on the ground that the latter is not an independent body and that, irrespective of whether the non-production could have been justified by the social and political unrest in the relevant country at the time, it was not "substantiate[d] let alone prove[n] that [in failing to produce the said evidence] Zamalek acted abusively".[30] As noted in another recent award, "the discretion to exclude evidence should be exercised with caution".[31] These awards confirm that (i) the party requesting the exclusion of evidence that was not presented in the first instance (non-arbitral) proceedings will have to establish (not only that the new evidence was already available or could reasonably have been discovered at the first instance level, but also (ii) why admitting the evidence would constitute an abuse of process.

15 It is also submitted that the panel's discretion under Art. R57(3) should be exercised only to decide on a request for exclusion of evidence, and not to exclude evidence on an *ex officio* basis (even after having consulted the parties).[32] Where a request is made for the panel to exclude evidence on the basis of Art. R57(3), the panel should give an opportunity to comment to the other party/ies, and require explanations for the belated submission of the disputed evidence. If no plausible explanation is put forward, the Swiss Supreme Court has held that the exclusion of evidence based on Art. R57(3) does not constitute a violation of the right to be heard, nor of procedural policy.[33]

16 The above distinction does not apply in anti-doping cases, given that the WADA Code explicitly rules out any limitation whatsoever of the *de novo* principle. In other words it is submitted that *in doping cases* CAS arbitrators will have *no discretion as far as new evidence is concerned*. Indeed, the official comment to Art. 13.1.2 WADC expressly states that "[p]rior proceedings do not limit the evidence or carry weight in the hearing before CAS".[34] Art. 13.1.2 WADC constitutes a *lex specialis* with respect to general procedural rule set out in Art. R57(3) of the CAS Code.[35] While it is likely that this express provision was added in order to make clear that, as already mentioned, WADA and/or the relevant international federation must be allowed to bring new evidence if they did not participate in the first instance proceedings, the same must hold true for the other parties, in particular the athlete who will have the burden to rebut not only the evidence brought by the anti-doping organization in first instance but also the possibly new evidence brought by WADA and/or the international federation. In other words, it is submitted that the broad wording of Art. 13.1.2 WADC should also benefit the athlete and exclude the application of Art. R57(3) of the CAS Code when the appellant party is the athlete.

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context. See also BGer. 4A_246/2014 para. 6.4.3.2 *ab initio*. For other reasons not to refer to Article 317(1) CCP, see also Mavromati *(CAS Bull. 2014/1)*, pp. 54–55; Lévy (2016), p. 181.

30 CAS 2014/A/3518, *Zamalek Sporting Club v. Accra Hearts of Oak Sporting Club*, Award of 31 October 2014, para. 49.

31 CAS 2014/A/3486, *MFK Dubnica v. FC Parma*, Award of 2 February 2015, CAS Bull. 2015/1, pp. 67–68 (commented in Levy (2016)). See also CAS 2015/A/3923, *Fábio Rochemback v. Dalian Aerbin FC*, Award of 30 October 2015, paras. 60–68.

32 Question left open by Mavromati *(CAS Bull. 2014/1)*, p. 51, and not addressed in Mavromati/Reeb, Art. R57.

33 BGer. 4A_246/2014 para. 6.4.3.1, where the applicant invoked, among other grounds, a violation of Art. 6 ECHR.

34 Art. 13.1.2 2015 WADC, under the heading "CAS Shall Not Defer to the Findings Being Appealed".

35 See also Mavromati *(CAS Bull. 2014/1)*, p. 53.

c New Legal Arguments

17 Again as noted above, the *de novo* principle under Art. R57 means that CAS panels have an unrestricted power to review the law, given that they are to re-hear and decide the case afresh.

18 Furthermore, the CAS is *free to decide irrespective of the legal arguments put forward by the parties*. From this point of view, Art. R57 confirms that the principle *jura novit curia* is fully applicable under Swiss arbitration law.[36] It also means that "a decision, [even if] wrong in its reasoning, needs not be annulled, if its outcome is correct"[37] based on what the CAS considers to be the proper reasoning.

d New Prayers for Relief

19 The panel's full power of review of the case under Art. R57 implies that the parties can amend their prayers for relief on appeal before the CAS. That said, as a general rule, the CAS considers that its *power of review is limited by the object of the dispute that was before the previous instance*.[38] For example, if the first instance proceedings were limited to a specific disciplinary offence, the CAS will not accept to hear claims based on a separate offence that was not "dealt with in the Appealed Decision".[39] However, this principle does not apply when the arbitration agreement allows "third parties" to appeal a decision. If the applicable anti-doping regulations provide that WADA can appeal to the CAS, even if it was not a party to the first instance proceedings, CAS panels consider that they can adjudicate WADA's prayers for relief whether or not they go beyond the object of the dispute in the first instance,[40] in particular when the first instance hearing body had avoided or refused to rule on (all or part of) the merits of the dispute.

20 The notion of "object of the dispute before the previous instance" also includes preliminary issues, like for instance the validity/legality of the provision on which the decision under appeal was based. The arbitrators in *Riis Cycling v. UCI Licencing Commission* even explicitly held that Art. R57 allowed the Panel to issue a declaratory award on the legality of a provision in the relevant sports regulations as the Code and the regulations themselves (by referring to the Code) "implicitly accept" the

36 The only limitation imposed by the Swiss Federal Supreme Court relates to exceptional circumstances requiring the arbitrators to seek the parties' views as to points of law; this is so when they contemplate relying, for their decision, on "an authority or legal consideration which was not referred to in the proceedings and the relevance of which could not therefore possibly have been anticipated by either party […]" (BGer. 4A_400/2008 paras. 3.1 and 3.2; *Swiss Int'l Arb.L.Rep 2009*, pp. 85–86).

37 CAS 2012/A/2817, *Fenerbahçe Spor Kulübü v. Fédération Internationale de Football Association (FIFA) & Roberto Carlos Da Silva Rocha*, Award of 21 June 2013, para. 118.

38 CAS 2007/A/1433, *Di Luca v. CONI*, Award of 30 April 2008, para. 36; CAS 2006/A/1206, *Zivadinovic v. Iraqi Football Association*, Award of 2 April 2007, para. 25. See also the cases quoted in Mavromati, footnote 10, p. 50, in support of the statement that "the full power of review cannot be wider than that of the appellate body".

39 CAS 2007/A/1426, *Gibilisco v. CONI*, para. 61, and the references provided therein.

40 CAS 2007/A/1396 & 1402, *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 7, confirmed by the Swiss Supreme Court upon a jurisdictional challenge (BGer. 4A_386/2010 para. 5.3.2, *Rev.Arb. 2011*, p. 826, with comments by Besson). See also Mavromati/Pellaux, *ISLR 2013*, p. 40, who consider that Art. R57 allows the CAS to issue a sanction even when the decision under appeal was a *"decision not to enter into the merits of the case"*.

possibility that the decision rendered in a specific case "may, and almost certainly will, have consequences *erga omnes* that go beyond the dispute *inter partes*".[41]

As a final matter, it bears to point out that Art. R57 does not alter each CAS *panel's* **21** *obligation to render a decision that does not go "beyond the claims submitted to it"* within the meaning of Art. 190(2)(c) PILS.[42]

4 Limitations of the Panel's Power of Examination

a Arbitral Nature of the Proceedings

CAS panels often emphasize that their unrestricted power of review is reinforced **22** by the power to order at all times, if they deem it useful to complete the parties' submissions, the production of additional documents and/or the taking of further evidence, be it in the form of witness testimonies, through the appointment of experts or by any other appropriate means.[43] That said, the *CAS's powers are not inquisitorial*. The panel, as an arbitral tribunal, will "investigate the facts of its own accord [only] if this appears appropriate on the basis of the parties' submissions"[44] and will refrain from, or at least be very reluctant to review the decision under appeal "any further than the objections raised by the Appellant"[45] (in accordance with the so-called "*Rügeprinzip*").[46] For instance, a Panel held that since the Appellant had deliberately decided to only challenge the independence of the first instance body and the way in which it had conducted the proceedings (without offering the witnesses he claimed were wrongfully excluded in the first instance), the Panel was not in a position to re-hear the entire matter *de novo*, even if it had the power to do so under Art. R57.[47]

b Limitations Contained in the Applicable Regulations?

Given that Art. R57(1) is a central provision in the CAS appeals system,[48] *sports* **23** *rules providing for a "limited appeal" to the CAS are unenforceable*, unless such

41 CAS 2012/A/3055, *Riis Cycling A/S v. the Licence Commission of the UCI*, Award of 11 October 2013, paras. 8.15–8.16.

42 Cf. Arroyo, above commentary on Art. 190(2)(c) PILS (Chapter 2, Part II), paras. 55–61; cf., for instance, CAS 2008/A/1612, *Rasmussen v. FMC*, Award of 22 January 2009, para. 38; CAS 2008/A/1718, *IAAF v. ARAF & Yegorova & others*, para. 166, where the Panel noted that it was of course "limited by the requests of the parties (the so called 'petita')", and CAS 2007/A/1233 & 1234, *FC Universitatea Craiova*, Award of 19 December 2007, para. 66, as summarized in Mavromati, footnote 11, p. 50. More recently, see also, e.g., CAS 2013/A/3432, *Manchester United FC v. Empoli FC SpA*, Award of 21 July 2014, paras. 59–60.

43 CAS 2008/A/1555 & CAS 2008/A/1779, *UCI v. Kashechkin & CFRK*; *Kashechkin v. CFRK & UCI*, Award of 10 August 2009, para. 70.

44 CAS 2003/A/455, *W. v. UK Athletics*, Award of 21 August 2003, para. 13.

45 *Ibid*.

46 Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2, Part II), paras. 9, 67–69. Should the Panel decide to conduct a wider review, it will have to invite the parties to put forward their positions (including evidence) in order to comply with their right to be heard (Art. 190(2)(d) PILS).

47 CAS 2012/A/2829, *R. v. CONI*, Award of 28 February 2013, paras. 9.20–9.21.

48 Rigozzi, para. 1088.

limitations have been specifically approved by the ICAS.[49] Hence, the CAS has refused to uphold Rule 60.27 of the International Association of Athletics Federations' (IAAF) Competitions Rules 2004–2005, which stipulated that, on the question of "exceptional circumstances" in doping cases, the CAS could only review the materials presented before the IAAF Doping Review Board and its review of the Board's determinations was limited to very narrow grounds.[50] The CAS held that this rule was not compatible with the power of review granted to its panels under Art. R57 of the Code.[51] That said, the CAS has allowed certain derogations from Art. R57. For instance, a CAS panel accepted Art. 24.2 of the Rules of the New Zealand Sports Disputes Tribunal which provides that, in the absence of any specific provision for a full appeal to the CAS in the relevant sports regulations, the only grounds for appeal against a decision by the Tribunal are a breach of natural justice or the incorrect application of the law.[52] In our view, such an (isolated) award is incorrect and was most likely due to the purely national nature of the case. Even if one were to consider Art. R57 as a non-mandatory provision within the CAS arbitration system, CAS panels should in any event review the sports decisions submitted to them with at least the same powers of review as those that would be exercised by the competent adjudicating authority in the absence of an arbitration agreement (i.e., before the state courts). Given the mandatory nature of sports arbitration, a more "self-restraining" approach could be tantamount to a denial of justice. Recent case law has endorsed this view. For instance, the Panel in the well-known *Katusha* case explicitly noted the mandatory nature of sports arbitration in discarding certain provisions in the applicable regulations that restricted the scope of its review (in essence, limiting it to the question whether the challenged decision was arbitrary). The Panel convincingly held that "CAS jurisdiction cannot be imposed to the detriment of an athlete's fundamental rights. In other words, an athlete basically cannot be precluded from obtaining in CAS arbitration at least the same level of protection of his or her substantive rights that he or she could obtain before a State court."[53]

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49 CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann*; *Ahlmann v. FEI*, Award of 30 April 2009, paras. 62–69.

50 Rule 60.27 of the then IAAF Competitions Rules, Chapter 3, Doping, read as follows: "[t]he grounds for interfering with a Doping Review Board decision include: a) that no factual basis existed for the Doping Review Board's determination; b) the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts of the case; c) that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach."

51 CAS-OG 04/003, *Edwards v. IAAF & USATF*, p. 5, para. 2.3.8, *Digest of CAS Awards – Salt Lake City & Athens*, pp. 89, *93*, para. 8. Although the CAS could have justified its decision by simply upholding the supremacy of the arbitration rules over the arbitration agreement itself, the panel added another argument, holding that Rule 60.27 violated a mandatory provision of the WADC, namely Art. 13, which guarantees a full appeal to the CAS.

52 Rigozzi, para. 1088, citing CAS [NZ] *Yachting New Zealand v. Murdoch, Cooke & Gair*, Award of 27 April 2004, para. 4.1.

53 CAS 2012/A/3031, *Katusha Management SA v. Union Cycliste Internationale (UCI)*, Award of 2 May 2013, paras. 62–70. In this case the UCI regulations then in force expressly provided, as to the panel's scope of review, that "[t]he CAS shall examine only whether the contested decision was arbitrary, i.e. whether it was manifestly unsustainable, in clear contradiction with the facts, or made without objective reasons or subsequent upon a serious breach of a clear and unquestioned rule or legal principle. It may only be overturned if its outcome is found to be arbitrary". See also CAS 2009/A/1782, *Filippo Volandri v. ITF*, Award of 12 May 2009, paras. 68–73, where the Panel held that it was not bound by Article O.5.1 of the 2008 ITF Programme, providing that the CAS should limit its scope of review to a "consideration of whether the

As already mentioned, a narrower power of review is however possible, and arguably desirable, when the decision under appeal is already an arbitral award, rendered by an independent arbitration tribunal, itself vested with a full power of review. An explicit limitation contained in the regulations providing for such a first instance arbitration should thus be upheld by CAS. 24

c Field-of-Play Decisions

There is another inherent, sport-specific limitation to the CAS panels' power of review. The purpose of Art. R57(1) is clearly not to allow the CAS to review the decisions made by referees, umpires and other officials during competitions. While it is generally admitted that the traditional distinction between "rules of law" and "rules of the game" is not sufficiently nuanced to take into account the professional and financial interests at stake in modern sports,[54] the fact that *referee calls and other so-called field-of-play decisions are not subject to review is an intrinsic feature of sports competition.*[55] There are indeed strong sporting rationales underlying this doctrine, including (i) the fact that referees and match officials are better placed than the arbitrators to make such decisions, being on site and given their specific training and knowledge of the particular sport, (ii) the principle that their authority should not be undermined, (iii) the inevitable element of subjectivity of such decisions and the fact that in most cases there is "no way to know what would have happened if the decision had gone another way", as well as, crucially, (iv) the need to ensure finality and to avoid constant interruptions in competitions, which would "[open] the floodgates, [with the ensuing] difficulties of rewriting records and results after the fact".[56] 25

This is a matter of mere common sense; if all such decisions were fully reviewable, then the final results of competitions would remain unknown long after the end of the relevant race or game: they would be definitively fixed only months later, with the arbitrators' decision. This is all the more true nowadays, given that the available technologies (instant video footage, allowing for zooming-in and out, replay in slow motion, etc.) make it possible to scrutinize and challenge virtually all field-of-play decisions. The CAS has consistently upheld the principle that "field-of-play" decisions are not subject to review, or only to a very limited extent. Thus, for instance, a CAS panel ruled that a ring judge's determination that a boxer was to be disqualified due to an alleged low blow was not reviewable on appeal.[57] A similar "immunity" was recognized by another CAS panel to the judges' finding, during a race, that a walker had "lifted", in breach of the rules of walking.[58] 26

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decision being appealed was erroneous" on the ground that such and "Agreements between athletes and international federations are – in general terms – not concluded voluntarily on the part of the athletes but rather imposed upon them unilaterally by the federation (ATF 133 III 235, 242 et seq. [i.e. the *Cañas* decision])".

54 *Kindle v. Fédération Motocycliste Suisse*, BGE 118 II 12 para. 2.

55 CAS 2004/A/704 *Young v. FIG*, Award of 21 October 2004, para. 4.7. See also CAS 2015/A/4208, *H & O. v. FEI*, Award of 15 July 2016, para. 48, referring to a "defining characteristics of the *lex sportiva*, as a sport specific rule that guides much of sports competition at a fundamental level".

56 CAS 2015/A/4208, *H. & O. v. FEI*, para. 47 and the references, in particular to CAS 2010/A/2090, *Saarinen & Finnish Ski Association v. FIS*, Award of 7 February 2011.

57 CAS–OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4.

58 CAS–OG 00/013, *Segura v. IAAF*, Award of 30 September 2000, *Digest of CAS Awards – Sydney 2000*, p. 134. For a more recent example, see, e.g., CAS-OG 16/027, *FFN & Aurélie Muller &*

27 Although the terminology used to describe all such non-reviewable decisions may vary ("technical rules", "rules of the game", "judgment calls", etc.), the fundamental need to define and circumscribe the scope of the autonomy of "field-of-play" rules and the resulting decisions is essentially intuitive. The definition of *what falls within the ambit of the "field-of-play" must primarily be sought in the applicable sports regulations*. For instance, Art. 58(3)(a) of the FIFA Statutes explicitly provides that "the CAS […] does not deal with appeals arising out of violations from the Laws of the Game". If the applicable sports regulations do not contain a clear definition of the "field-of-play" rules and decisions that are not subject to review, "it is for the arbitral tribunal […] to interpret the regulations and to decide, e.g., whether their rationale implicitly excludes certain rules and decisions from being reviewed and within what limits".[59] Drawing a line between what can be reviewed and what is inherently final and thus immune from review is not a straightforward issue. The task is particularly difficult when the rules provide for the possibility of reviewing the decision immediately after the competition. The CAS Panel in *Saarinen* held that the field of play doctrine should also apply in those situations, at least on a *prima facie* basis.[60] We would submit that in such cases the result is by definition capable of being altered after the race and thus there is a presumption that the doctrine does not apply; such presumption could however be rebutted if it is shown that the decision at stake was itself quintessentially a field of play decision: only in that case is it right, to use the language of the Panel in *H. & O. v. FEI*, that "the post-match review provided for by the rules would lead to a complete end run around the 'field of play' doctrine, frustrating all of the public interest and other objectives that underlie it".[61] It goes without saying that when it has become impossible to rewrite the records and results without affecting the integrity of the competition (for instance because the dispute concerned a qualifying event and the final has already taken place, or the subsequent phase of the competition is already underway) any review should be ruled out. When the rewriting is possible, the arbitrators should be reluctant to step in when it is impossible or even difficult to determine what the result of the competition would have been if the referee, umpire or match official had decided the other way.

28 When a decision qualifies as a "field of play decision", CAS jurisprudence recognizes a very limited *exception to its "immunity"* under the *field-of-play doctrine*, namely when it was taken in bad faith[62] or arbitrarily,[63] or if it was adopted in "violation of the law, social rules or general principles of law".[64] How exactly a panel should

CNOSF v. FINA, Award of 20 August 2016.

59 CAS 2009/A/1783, *Woestenborghs v. ITU*, Award of 14 October 2009, para. 124.

60 CAS 2010/A/2090, *Saarinen & Finnish Ski Association v. FIS*, Award of 7 February 2011, paras. 35(6) and 38.

61 CAS 2015/A/4208, *H. & O. v. FEI*, Award of 15 July 2016, para. 52, noting that allowing review by CAS "would have the most undesirable result that sports bodies would be forced to write out of their rule books any mechanism for post-match review of the original match official's decision, to ensure that the 'qualified immunity' his or her decision enjoys was maintained".

62 CAS–OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4; CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, p. 71; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

63 CAS 2004/A/704, *Young v. FIG*, Award of 21 October 2004, paras. 4.5–4.6; CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, p. 71; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

64 CAS–OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4; CAS–OG 00/013, *Segura v. IAAF*, Award of 30 September 2000, *Digest of CAS Awards – Sydney 2000*, 2001, p. 134.

determine whether this threshold has been crossed is not entirely well-established. What is clear, however, is that there must be particular circumstances, in addition to the simple fact that the decision at stake is "wrong".[65] Such circumstances could be, for instance, factors related to the conduct of the umpire/referee himself, such as obvious bias, bribery or corruption.[66] In some cases, objective circumstances can also call for a review of the decision, namely when it is fundamentally at odds with general principles of law. Putting this principle into effect, CAS panels have ruled that, in light of its consequences for the sanctioned athlete as well as the other competitors, the decision at issue ought not to be manifestly disproportionate or arbitrary, nor result in an unjustified discrimination against the athlete.[67] This kind of formulation impliedly calls for a balancing of the interests of all those concerned or affected by the decision (the relevant federation(s), the athlete who is subject to the sanction and his or her competitors). All in all, however, the threshold for a field-of-play decision to be deemed reviewable is rather high.[68]

d Discretionary and Experience-Based Decisions

Traditionally, state courts are extremely cautious in reviewing internal decisions by sports- governing bodies. As an Australian arbitrator (nicely) put it, the same is not necessarily true of CAS arbitrators: **29**

> *"I am conscious of the caution held out to me, by Counsel for the Australian Cycling federation, that I should be careful not to readily trespass into the selection processes of a professional cycling organization which processes clearly embrace a wealth of experience and expertise that I cannot hope to share. Counsel referred me to two decisions of the Courts during the course of which the learned judges had expressed such caveats (Sheehy v. Judo federation of Australia Inc., unreported, Equity Division, Supreme Court of N.S.W., 1 December, 1995, and McInnes v. Onslow-Fane (1978) 1 WLR 1520). Those judgments convey the caution which the Courts of law traditionally exercise in interfering with the decisions of domestic bodies. […] I agree with the sentiments so expressed, but there must be necessarily a rider placed upon them in the context of this arbitration. The CAS is not a court of law. It is an arbitral tribunal set up to entertain disputes referred to it (inter alia) by agreement of the domestic body if the agreement between the parties requires it to do so. In this case the parties have executed an 'appeal agreement' in which they agree to refer to the exclusive jurisdiction of the CAS any dispute regarding (inter alia) 'the nomination of an athlete by*

65 CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70.

66 CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 30.

67 CAS–OG 00/004, *COC & Kibunde v. AIBA*, Award of 18 September 2000, *Digest of CAS Awards – Sydney 2000*, 2001, para. 12. Cf. also CAS 2001/A/354, *IHA v. FIH* and 2001/A/355 *LHF v. FIH*, Award of 15 April 2002, CAS Digest III, p. 489, 497; CAS 93/103, *SC Langnau v. LSHG*, Award of 15 November 1993, *CAS Digest I*, p. 307, 313.

68 CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

> *the ACF to be a member of the 1996 Olympic Team'. By their agreement the parties thus want the selection decision scrutinised by this Tribunal […].*"[69]

30 In general, sports-governing bodies are prepared to accept a greater measure of intervention by the CAS. As a specialized tribunal, the CAS is assumed to be familiar with the specificities of sport, and thus capable of *substituting its own judgment for that of the governing bodies, even when the decisions at stake require some sports-specific knowledge*. However, some *restraint is advisable* when, under the applicable rules, the first instance adjudicative body enjoyed a great deal of discretion, in particular when the manner in which this discretion is to be exercised involves a sport-specific judgment.

31 The main area where discretion plays an important role is in *selection disputes*. The extent of the arbitrators' scrutiny in such cases depends on the degree of discretion that the applicable rules afford to the selection body. Where a selection body is to apply purely *objective criteria*, CAS panels will be free to review its decisions. When the applicable rules provide that the selection authority retains some degree of discretion or if they call for the application of *subjective criteria*, the CAS will not intervene in the selection process, unless it is established that the selection authority abused its discretion or acted in an arbitrary manner,[70] for instance by deliberately changing the applicable criteria in order to favor an athlete or team over others.[71]

32 A similar standard has been applied with respect to *integrity checks conducted prior to elections for important positions within a sports-governing body*. In upholding the standard of integrity applied by the relevant authority in a case concerning the elections to the FIFA presidency, a CAS Panel held that

> *"it shall give a certain deference to the FIFA Ad-hoc Electoral Committee in deciding whether a person is a suitable candidate for the office of FIFA President and that such decision shall only be overturned if the Panel is of the view that the FIFA Ad-hoc Electoral Committee could not reasonably have come to the conclusion reached."*[72]

33 In *doping cases*, the CAS has ruled that "[i]n respect to disputes relating to the grant or denial of a [Therapeutic Use Exemption (TUE)[73]] the Panel confirms that the exercise of the jurisdiction conferred upon it by the pertinent arbitration clause and by the Code must be restrained [as follows]: [the] role of the CAS Panel is not that of substituting itself for the TUE Committee of the relevant anti-doping organization […]".[74]

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69 CAS 96/153, *Watt v. ACF & Tyler-Sharman*, Award of 22 July 1996, CAS Digest I, p. 340.

70 CAS-OG 06/002, *Schuler v. Swiss Olympic Association*, Award of 12 February 2006, paras. 18–19.

71 CAS-OG 06/008, *Dal Balcon v. CONI & FISI*, Award of 18 February 2006, para. 5.10.

72 CAS 2015/A/4311, *B. v. FIFA*, Award of 19 February 2016, para. 64.

73 As explained on the WADA website, *"[a]thletes may have illnesses or conditions that require them to take particular medications. If the medication an athlete is required to take to treat an illness or condition happens to fall under the Prohibited List, a Therapeutic Use Exemption (TUE) may give that athlete the authorization to take the needed medicine"* (see < https://www.wada-ama.org/en/what-we-do/science-medical/therapeutic-use-exemptions >).

74 CAS 2004/A/717, *International Paralympic Committee v. Brockman & WADA*, Award of 8 June 2005, para. 51.

e Deference?

Apart from the specific instances mentioned above, CAS panels have consistently held the view that "no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses".[75] Some panels have added that "[t]his is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the [panel]. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision".[76] In the landmark *Glasner* case involving the restitution of a gold medal, the Sole Arbitrator underscored that he failed to see why (i) an internal tribunal or indeed a sports-governing body would have greater expertise in applying the anti-doping rules implementing the WADA Code than a CAS panel, given the truly transnational character of such rules, or (ii) why the risk that the matter be decided "according to [the adjudicators'] subjective sensitivity" would be any greater before the CAS than at the level of the federation organs.[77] **34**

One of the reasons why the need for a certain degree of deference is often put forward is the fact that the panels' full power of review constitutes an incentive to file an appeal in the CAS, even to get a small reduction of the sanction.[78] This argument has some bearing in disciplinary cases where the CAS proceedings are free of charge. However, as noted by the Sole Arbitrator in the above-mentioned *Glasner* case, "these [alleged negative] consequences would have to be balanced with those resulting from granting (partial) immunity [as this] might induce organs of federations (to a certain extent) to misuse their adjudicative powers to the detriment of the athletes".[79] **35**

It is telling that where a sports-governing body has a right to appeal, like for instance WADA in doping cases, it is less inclined to have the scope of the CAS power of review reduced. On one occasion at least the CAS limited the scope of its review in favor of an athlete: noting that the first instance body had exonerated the athlete because of deficiencies displayed by the laboratory or another body in connection **36**

75 CAS 2012/A/2924, *UCI v. Monica Bascio & USADA*, Award of 14 June 2013, para. 48, endorsing CAS 2011/A/2518. See also CAS 2013/A/3124, *Rashid Mohd Ali Alabbar v. FEI*, Award of September 2013, para. 11.2, where the Panel observed that "that this bears on the exercise of the powers, not their extent; and is only germane in circumstances where the sanction is a matter of discretion."

76 CAS 2012/A/2959, *WADA v. Ali Nilforushan & FEI*, Award of 30 April 2013, para. 8.2, endorsing the comment of the Panel in CAS 2010/A/2283, which noted that it "would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the [p]anel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so".

77 CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, para. 64.

78 It is notorious that several sports-governing bodies consider that CAS panels are often inclined to slightly reduce the sanction while fully supporting the rationale and reasoning of the decision under appeal in what they perceive as being a way of showing that "CAS matters".

79 CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, para. 64–69, referring to the risk of "systematic filing of appeals" raised in FINA's written submission.

with internal procedures during the pre-hearing stage of the disciplinary proceedings, the Panel held that "its function in applying the *de novo* standard as an appellate body is only to determine, on the basis of the evidence submitted to [it], whether the [first instance] evaluation is soundly based and whether the conclusion consequently derived from those facts by the [first instance] is equally sound" and not to "rectify the deficiencies" identified by the first instance."[80]

37 Indeed, the WADC 2015 expressly states in a subsection to Art. 13.1 (Decisions Subject to Appeal), that "[i]n making its decision [on appeal], CAS need not give deference to the discretion exercised by the body whose decision is being appealed". Irrespective of the (arguably self-serving) reasons why this new provision was added, the fact is that it also meets the legitimate expectation of the sanctioned athletes to have access to (at least) one instance of justice: "doping sanctions strongly affect the rights of an athlete and […] federation instances do not provide for access to justice within the meaning of Art. 6(1) ECHR, since they do not guarantee adjudication of the facts and the law by a truly independent judicial instance."[81] Hence, athletes too are not required to go so far as to show that the decision under appeal was "one which no reasonable tribunal could have reached or that the decision was defective either in taking into account matters which it should not have done or failing to take into account matters which it should have done".[82]

38 It is submitted that the issue is not one of deference, but rather one of comity. Indeed nothing prevents a CAS panel from considering that the decision under appeal is persuasive, where the proceedings were conducted professionally and in compliance with fundamental procedural guarantees, and the ruling is particularly well-reasoned, as may be the case of the decisions of specialized tribunals, like, for instance, the UCI Anti-Doping Tribunal.[83]

39 Deference *stricto sensu* only comes into play in cases where the decision under appeal is already a genuine arbitral award rendered by a true arbitral tribunal (Art. R47(2)).[84] Pursuant to Art. R57, the CAS will conduct a *de novo* review of the first arbitral award, which means in particular that "it is the duty of the [CAS] Panel to make its independent determination of whether the Appellant's contentions are correct, not to limit itself to assessing the correctness of the [previous] award".[85] That said, it is submitted that in cases under Art. R47(2), the *findings of the first-instance*

80 CAS 2012/A/2922, *WADA v. Federaçao Pernambucana de Futebol & Alex Bruno Costa Fernandes*, Award of 10 December 2013, paras. 101–106. The Panel emphasized the exceptional nature of this case, explicitly pointing out that the lower instance disciplinary bodies had acknowledged the mismanagement of the athlete's results at various levels and decided to exonerate him of all wrongdoings precisely because of those deficiencies.

81 CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, para. 65, referring to CAS 2011/A/2384 & 2386, *UCI & WADA v. Contador Velasco & SCF*, paras. 17 et seq. for the relevance of Article Art. 6(1) ECHR.

82 CAS 2013/A/3080, *Alemitu Bekele Degfa v. TAF and IAAF*, Award of 14 March 2014, para. 64.

83 The case law of the UCI Anti-Doping Tribunal is available at <http://www.uci.ch/news/article/anti-doping-tribunal/>. The issue of whether other first instance decisions may set precedents does not pertain to Art. R57 but is very similar under the suggested approach (see CAS 2013/A/3075, *WADA v. Laszlo Szabolcs & RADA*, Award of 12 August 2013, para. 9.11, where the Panel rules out any *"deference"* on the ground that *"the underlying facts of these other NADO decisions [being] unknown to the Sole Arbitrator, the latter is prevented to take these into account in the present case"*).

84 Cf. Art. R47, para. 46 above.

85 CAS 2007/A/1394, *Landis v. USADA*, Award of 30 June 2008, p. 6 at the end.

arbitral panels are entitled to some deference,[86] unless it appears that significant new evidence has been introduced before the CAS by WADA and/or by the relevant international federation (which were not parties to the first arbitration proceedings).

However, in non-doping disputes, numerous CAS panels have mechanically repeated the principle that "only if the sanction is evidently and grossly disproportionate in comparison with the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law".[87] 40

B The Panel's Decision-Making Power

Importantly, Art. R57 provides the CAS with a choice: "the Panel […] may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance" (1.). Here again, Art. R57 vests CAS panels with wider powers than those normally enjoyed by the courts, notably when the sports-governing body having issued the decision under challenge is incorporated in Switzerland (2.). 41

1 New Decision versus Annulment

Given its ability to make an independent determination, the CAS is not limited to assessing the correctness of the challenged decision, but can also issue a *new decision* based on the applicable regulations.[88] In normal circumstances, the CAS will render a new decision to replace the challenged decision. As already mentioned, this is the solution that is more frequently adopted in practice, as it helps achieve a timely resolution of the dispute. 42

In exceptional cases, however, despite its power to make a *de novo* determination, the CAS may deem it preferable to *annul the decision and refer the case back to the previous instance*.[89] This solution may be sensible in cases where the disciplinary body that issued the first instance decision enjoys broad discretion in its determinations and/or when the decision in question rests on considerations that are subjective in nature, e.g. in selection disputes.[90] 43

86 Cf. CAS 2008/A/1473, *Warren v. USADA*, Award of 24 July 2008, para. 134 (on appeal from an award rendered by a North American Court of Arbitration for Sports Panel in arbitration proceedings administered by the AAA).

87 Cf. e.g., CAS 2005/A/1001. More recently, CAS 2014/A/3467, *Guillermo Olaso de la Rica v. TIU*, Award of 30 September 2014, para. 121, with further references.

88 Rigozzi, para. 1080.

89 Rigozzi, p. 556 (footnote 3018); CAS 2001/A/340, *S. v. FIG*, Award of 19 March 2002, para. 17, referring to CAS 2000/A/281, *Haga v. Fédération Internationale de Motocyclisme (FIM)*, Award of 22 December 2000, and CAS 2000/A/290, *Xavier & Everton v. UEFA*, Award of 2 February 2001.

90 CAS-OG 06/008, *Dal Balcon v. CONI & FISI*, Award of 18 February 2006, para. 5.11. In this case, the Panel noted that, as such, the original selection rule was discretionary in nature, and that if it were not "under a time pressure not normally found in selection proceedings [it] might have referred the matter back to the [selection body] for reconsideration".

2 Relationship with Article 75 CC

44 Given that many international sports federations and other sports-governing bodies are incorporated as associations under Swiss law within the meaning of Arts. 60–79 CC, the powers granted to the CAS under the Code inevitably give rise to the question of the relationship between Art. R57 and Art. 75 CC, *the provision governing challenges against Swiss associations' decisions before the ordinary courts*. According to the Swiss Federal Supreme Court, judicial powers of review under Art. 75 CC are limited, to the extent that courts of law can only affirm or set aside the decisions issued by associations (so-called "*effet cassatoire*").[91] As a result, any new and revised decision must be taken by the association itself. The underlying rationale for this restriction is to protect the autonomy of associations from undue interference by the State.

45 While some scholars maintain that the "*effet cassatoire*" of Art. 75 CC is mandatory as a matter of Swiss law,[92] it is submitted that the parties' agreement to arbitrate under (Art. R47 of) the *CAS Code prevails over the default rules that would apply in the absence of an arbitration agreement*. Indeed, the rationale for restricting the courts' powers, i.e., to protect the autonomy of associations, becomes moot when it is the association itself that has decided to include an arbitration clause in its own statutes or regulations. By agreeing to accept the arbitral jurisdiction of the CAS, sports associations necessarily accept the fundamental principles of the CAS Code, including that of *de novo* review in appeals proceedings.[93]

III THE HEARING

A The Panel's Directions

46 In line with Art. R57(2), after the appeal brief and the answer have been filed, CAS panels generally issue the following standard procedural directions: *"[t]he parties are invited to inform the CAS Court Office, by [date], whether their preference is for a hearing to be held in this matter or for the Panel to issue an award based on all the parties' written submissions. In accordance with Article R57 of the Code, it will in any event be for the Panel to decide whether to hold a hearing"*. Experience shows that *appellants almost systematically request a hearing*, as this will be their only opportunity to rebut the factual and legal arguments contained in the respondents' answer.

47 Unless the parties agree that a hearing is not necessary, *CAS panels will practically always decide to hold one*.[94] If they do, they will issue a so-called "Order of Procedure" including a standard paragraph to the effect that "in accordance with Article R57 of the Code, the parties, experts and witnesses, if any, will be heard at the hearing,

91 *Kindle v. Fédération Motocycliste Suisse*, BGE 118 II 12 para. 1.c.
92 Scherrer, *SpuRt 2003*, p. 127.
93 CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann*; *Ahlmann v. FEI*, Award of 30 April 2009, para. 66; CAS 2005/A/847, *Knauss v. FIS*, Award of 20 July 2005, para. 7.1.: "since the powers of the present court of arbitration are of a private nature, not of a state nature, there is, in the Panel's opinion, from the very outset, an absence of any legitimate grounds for application of Art. 75 CC in the context of the present proceedings".
94 Cf. paras. 48–51 below.

which will be held: on [date] at [time] at [location[95]]. It is the responsibility of the parties to convene the witnesses and/or experts as well as the interpreters, if any, at the hearing and to ensure their presence at the expenses of the party which has requested their attendance". This order constitutes the "minimum requirement" with respect to the directions the panel shall issue according to Art. R44.2(1). Traditionally, additional directions are issued only if the parties disagree in advance on the conduct of the hearing. In particularly litigious cases, CAS panels have on occasion held a pre-hearing conference to solve as many procedural and organizational issues as possible ahead of the hearing.[96]

B The Actual Conduct of the Hearing

Article R44.2(1) states that at the hearing "the Panel hears the parties, the witnesses and the expert[s] as well as the parties' final oral arguments, for which the Respondent has the floor last." As indicated above, in the vast majority of cases, the panel will not issue specific directions as to the actual conduct of the hearing. While each panel may have its own approach, experience shows that the hearing *will normally be conducted according to the following sequence*: (1) discussion of any outstanding procedural issues, (2) appellant's opening statement, (3) respondent's opening statement, (4) examination of the witnesses and/or experts, if any, presented by the appellant, (5) examination of the witnesses and/or experts, if any, presented by the respondent, (6) oral arguments/closing submission by the appellant, (7) oral arguments/closing submission by the respondent, (8) brief closing statement and/or (preliminary) indication of any further procedural directions that the panel may intend to issue (e.g., with regard to post-hearing briefs or costs submissions) by the (President of the) panel.[97] **48**

The *examination of witnesses* will generally be conducted in the following order: (i) direct examination (or confirmation of the witness statement), (ii) cross-examination, (iii) re-direct and re-cross examination, if allowed by the panel. The style of cross-examination should be adjusted to take into account the legal backgrounds of the parties and their representatives, the scope and length of the witness statements and the importance of the witness testimony at issue, in particular where the witness under examination has brought serious accusations against a party.[98] **49**

According to Art. R44.2(2), the President of the panel conducts the hearing. In practice, *the members of the panel can put questions* to the parties and their **50**

95 Generally, hearings are held at the CAS headquarters in Lausanne (*Chateau de Béthusy*), unless travel and/or other housekeeping/organizational reasons make it more efficient to hold the hearing in a different location.

96 Martens Dirk-Reiner, *The Role of the Arbitrator in CAS Proceedings – Reflections on How to Prepare for and Conduct a Hearing of a CAS Case* (paper on file with the authors), para. 4.4.2. For a recent example, cf. CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31st January 2012, para. 117.

97 In disciplinary cases, we submit that, despite the order provided for in Art. R44.2(1) the sports-governing body should go first even if, technically, it is the respondent in the arbitration. In any event, the athlete should be given the right to make a final statement at the end of the hearing.

98 In such instances, it is submitted that panels should allow for extensive cross-examination, in order to ensure that the credibility of (accusing) witnesses is properly tested (see, e.g., CAS 2010/A/2226, *Queiroz v. ADoP*, Award of 23 March 2011, paras. 6.9–6.20 and 9.16–9.17).

representatives, as well as to the witnesses and experts, at any time throughout the hearing. Art. R44.2(2) also provides, in a rather more directive tone than that used in other arbitration rules, that the President of the panel shall "ensure that the statements made are concise and limited to the subject-matter of the written presentations, to the extent that these presentations are relevant". Art. R44.2(5) adds that the panel may limit or disallow the appearance of any witness or expert, or any part of a proposed testimony, on the ground of irrelevance.

51 Pursuant to Art. R44.2(4), the President of the panel may authorize the hearing of witnesses and experts *via tele-conference or video-conference*. Despite the fact that the adverb "exceptionally" was removed from this provision (in 2012), it is submitted that this possibility should be used only sparingly, namely when there are overriding time and/or costs constraints. Important witnesses and experts should appear in person if the party wishing to cross-examine them so requests. Appearance in person is particularly important for experts providing evidence on behalf of anti-doping organizations charging an athlete, unless it is clear from the outset that the athlete's challenge of the analysis or other relevant issues is based on spurious grounds. Recourse to tele- or video-conferencing should also be avoided for the hearing of witnesses or experts located in parts of the world where communications are not reliable. In any event, if the President of the panel does allow a hearing by tele- or video-conference, he or she should, out of precaution, adopt clear rules as to the consequences that will apply in case a person cannot be heard/examined due to a failure in communications. Even if this is not expressly provided for in the Code, CAS panels can also allow the parties and/or their legal representatives to appear by tele- or video-conference. By requesting to appear by tele- or video-conference, a party must be deemed to have waived any right to equal treatment in respect of the manner in which it is heard.

C Publicity and Recording

52 Article R57 provides for an "in camera hearing, unless the parties agree otherwise." In practice, almost all *CAS hearings are held in camera*.

53 The Swiss Federal Supreme Court has considered, in the *Pechstein* case, an athlete's arguments in support of her right to a public hearing within the meaning of the ECHR. The Supreme Court held that the CAS's refusal to allow the athlete's manager to attend a hearing did not violate her *fundamental right to a public hearing* because Art. R57 only provides for a public hearing if the parties agree to it.[99] As a rule, international arbitration proceedings are not public.[100] Furthermore, a party

99 BGer. 4A_612/2009 para. 4.1 (*Pechstein v. International Skating Union*). The Supreme Court itself refused to hold a public hearing as requested by the athlete (BGer. 4A_612/2009 para. 4.2), by stating that *"[u]nlike the proceedings before the CAS, which freely assesses any issues of fact and law, the scope of judicial review in the context of setting aside proceedings before the Supreme Court is significantly limited. In these challenge proceedings, a decision can be taken on the basis of the record; ordering a public hearing (Art. 57 BGG), as requested by the Appellant, is not advisable. A mandatory public hearing before the Supreme Court, as exceptionally required by the ECHR – in case of claims according to Art. 120(1)(c) BGG or where the Court intends to adjudicate the matter itself […] based on its own factual findings […], is not an option in challenge proceedings against arbitral awards pursuant to Art. 77 BGG"* (free translation from the German original).

100 BGer. 4A_612/2009 para. 4.1.

cannot rely on Art. 6(1) ECHR, Art. 30(3) of the Swiss Federal Constitution and Art. 14(1) ICCPR[101] to assert the right to a public hearing, as these provisions are not applicable to voluntary arbitration proceedings.[102] However, the Court added the following proviso:[103]

> *"That said, in view of the standing of the CAS in the field of sports, it would be desirable for a public hearing to be held when this is requested by the athlete concerned, with a view to [enhancing] trust in the independence and fairness of the decision-making process."*

54 Since the dates of the main hearings are listed on the CAS website, it is not unusual for *journalists to show up at the CAS premises* on the date of important hearings. The CAS seems to be inclined to allow the press to take photographs or to film the hearing room and the participants before the commencement of the hearing, but the hearing as such remains closed to the public.

55 In CAS appeals arbitrations, no verbatim transcript is produced of what is said at the hearing. Art. R44.2(2) provides that "minutes of the hearing may be taken". In practice, the contents of the hearing are *recorded in an audio file*. The parties may request a copy of the recording (on a CD). Given the fact that the hearing is not public, the CAS might ask the parties to state the reason why they make such a request. A copy of the audio recording must be provided to a party before the award if the panel ordered post-hearing briefs or if there was a procedural incident during the hearing to which a party wishes to direct the panel's attention in writing. After the award, a copy of the recording must be provided to a party wishing to file an action to have the award set aside based on what was said during the hearing. It is submitted that in such circumstances the CAS should inform the other party or parties of the request and ask them to indicate whether they also wish to receive a copy of the recording.

D The Decision not to Hold a Hearing

56 Article R57(2) provides that "[a]fter consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. As seen above, in the standard letter acknowledging receipt of the respondent's answer, the CAS invites the parties "to inform the CAS […] whether their preference is for a hearing to be held in this matter or for the Panel to issue an award based on the parties' written submissions only", and reminds them that "[i]n accordance with Art. R57 of the Code, *it will in any event be for the Panel to decide whether to hold a hearing*".

57 As the arbitration rules provide for one single exchange of submissions, the decision not to hold a hearing can be *problematic with respect to the parties' right to be heard in adversarial proceedings*, guaranteed by Arts. 182(3) and 190(2)(d) PILS. As a rule, the panel will decide a dispute without a hearing only upon a joint request

101 International Treaty on Civil and Political Rights of 16 December 1966, in force in Switzerland since 18 September 1992, SR 0.103.2 (in German: *Internationaler Pakt vom 16. Dezember 1966 über bürgerliche und politische Rechte*; in French: *Pacte international du 16 décembre 1966 relatif aux droits civils et politiques*).

102 BGer. 4A_612/2009 para. 4.1.

103 BGer. 4A_612/2009 para. 4.1 (free translation from the German original).

from the parties.[104] In that case, the parties are deemed to have waived any claim based on their right to be heard. The same should apply when the request not to hold a hearing comes from the appellant: in that case, the respondent will have had a full opportunity to respond, in its answer, to the appeal brief and the appellant will be deemed, by his or her request, to have voluntarily waived his or her right to reply to the answer. By way of contrast, the panel should be very reluctant to decide not to hold a hearing against the will of the appellant. As already mentioned, the Supreme Court's decision that the parties can validly waive their right to reply by agreeing to a single exchange of submission only applies when the waiver was fully informed.[105] This is clearly not the case when the principle of a single exchange is set out in the arbitration rules, in particular when their application is mandatorily provided for by the applicable sports regulations and has thus not been genuinely agreed by the parties. In practice, it is very rare that the appellant will be happy to allow the panel to rule on the case without a hearing, which is why in the vast majority of appeals cases a hearing does take place.[106]

58 If the parties have submitted *witness or expert evidence*, the holding of a hearing is necessary, unless the parties accept the contents of the witness/expert statements produced and do not wish to cross-examine the persons having rendered such statements, or if the panel considers that the witness and/or expert evidence in question is irrelevant.

59 It is submitted that a hearing should be held in any event *in disciplinary cases* if the athlete so requests in order to appear in person before the panel.

E The Consequences of a Failure to Appear at the Hearing

60 According to Art. R57(4), "[i]f any of the parties or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award". If the hearing does go ahead even in the absence of a party, experience shows that *panels will tend to "substitute" for the non-appearing party by putting questions to the appearing party*. These questions are basically aimed at ensuring that all relevant factual allegations and legal arguments are properly "tested" before a decision is made.

61 In doping cases, athletes must be aware of the fact that according to Art. 3.2.5 of the WADA Code, the panel "may *draw an inference adverse to the Athlete* or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel)".[107]

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104 Cf., e.g., CAS 2005/A/908, *WADA v. Wium*, Award of 25 November 2005, para. 3.4. In this case the parties agreed because the Panel had allowed a second round of written submissions.

105 BGE 142 III 360.

106 The only real exception is when the panel has already allowed at least a complete second round of written submissions (cf., e.g., CAS 2009/A/1545, *Anderson et al. v. IOC*, Award of 18 December 2009, paras. 14–30, where several submissions were allowed).

107 Oddly, the same does not seem to apply to an anti-doping organization that decides not to appear at the hearing (cf. CAS 2010/A/2161, *Wen Tong v. IJF*, Award of 23 February 2011, where the Panel tested all the contentions made by the Appellant in the absence of the Respondent).

Article R58: Law Applicable to the Merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

I PURPOSE OF THE PROVISION

In order to resolve disputes, arbitrators, as all adjudicators, are required to apply the relevant rules to the facts they have established. Art. R58 indicates how CAS panels are to determine the *substantive rules and/or law(s) to be applied to the merits* of the disputes submitted to them pursuant to the appeals procedure.[1] Art. R58 is to be read in light of both the governing Swiss arbitration law (II.), which it reflects to the extent that it gives precedence – always within the limits of mandatory rules and public policy (V.) – to party autonomy as the principal connecting factor (III.), but also the fact that it regulates issues of applicable law in the particular context of appeals proceedings. Indeed, Art. R58 places specific limits on party autonomy and on the authority of arbitrators to determine the applicable substantive law (IV.). As will become apparent in the following discussion, the objective of these particular features of Art. R58 is to promote the uniform application and interpretation of the relevant regulations and standards in international sports disputes, ensuring the equal treatment of all parties that are subject to them.[2] 1

II LEGAL FRAMEWORK

The law applicable to the merits, or *lex causae*, must be distinguished from the law governing the arbitral proceedings, or *lex arbitri*.[3] CAS arbitrations are all seated in Switzerland,[4] which means that the Swiss *lex arbitri* (Chapter 12 of the PILS when the arbitration is international, or Part 3 of the ZPO when the arbitration is domestic) will govern the proceedings. However, this does not, *per se*, entail the application of Swiss substantive law to the merits of CAS disputes, nor the application of the conflict of laws rules that would be applied by the Swiss courts to determine the *lex* 2

1 The corresponding provision for CAS arbitrations governed by the ordinary procedure is Art. R45.

2 As the sole arbitrator in put it in CAS 2014/A/3505, *Al Khor SC v. C.*, Award of 3 December 2014, para. 85 (free translation): "sports is by essence a phenomenon that transcends national frontiers. It is not only desirable, but in fact indispensable that the rules that govern sport at an international level are of a uniform character and largely coherent worldwide. In order to ensure their uniform application at an international level, such rules and regulations must not be applied differently from one country to the other, in particular as a result of the interference of national laws in sports regulations. The principle of the universal application of [international sports regulations] arises from the requirements of rationality, legal security and predictability. [… The objective of having uniform(ly applied) regulations is] to ensure the equal treatment of all those who are subject to them, in whichever country they are".

3 Cf. also Mavromati/Reeb, Art. R58, para. 76.

4 Cf. Art. R28.

causae. Arbitral tribunals, including CAS panels, *determine the applicable substantive law pursuant to methods which are specific to (international) arbitration*.[5] Hence, Art. R58 of the CAS Code is to be read against the background of Art. 187 PILS (or Art. 381 ZPO), the provision governing the selection of the applicable substantive law in international (or domestic) arbitral proceedings seated in Switzerland. As the vast majority of CAS appeals arbitrations are international, the brief discussion in this commentary is limited to the situation under Art. 187 PILS.[6]

3 According to Art. 187(1) PILS, arbitral tribunals decide the disputes before them by applying "the rules of law chosen by the parties or, in the absence [of such a choice], according to the rules of law with which the case has the closest connection".[7] The choice of law rule contained in Art. 187(1) PILS *ab initio* upholds the *fundamental principle of party autonomy in arbitration*. Art. R58 and the specific conflict rules it sets out can be seen as an expression of this principle: by submitting their disputes to CAS (appeals) arbitration, the parties have agreed that the *lex causae* should be determined as provided in the Code.[8] However, as will be seen when examining Art. R58's contents more closely, the particularity of this provision vis-à-vis the overall framework laid down in Art. 187 PILS is that it places specific constraints on both the parties' and the arbitrators' autonomy in determining the applicable rules of law.

4 Before turning to the analysis of Art. R58's conflict rules, it bears to note that, in line with the standard approach for contractual and commercial matters in private international law, CAS panels construe the parties' choice (or the arbitrators' determination) of the applicable law as referring solely to *the corpus of substantive*

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5 Kaufmann-Kohler/Rigozzi, para. 7.04. On this point, cf. also, for instance, CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 7.2; more recently, CAS 2013/A/3274, *Mads Glaesner v. FINA*, Award of 31 January 2014, para. 56; cf. also Mavromati/Reeb, Art. R58, para. 91.

6 For present purposes, we will merely provide an overview of the salient features of the regime under Art. 187 PILS, to the extent these are useful for understanding the practice under Art. R58 of the Code. The references made to arbitral case law in the following paragraphs will also be limited to CAS awards. For a discussion covering the applicable law regime under the ZPO, cf., e.g., Berger/Kellerhals, paras. 1371–1453.

7 Art. 187(2) states that "[t]he parties may authorize the arbitral tribunal to decide *ex aequo et bono*". The same possibility is expressly provided for in Art. R45 of the Code, governing the law applicable to the merits in CAS ordinary proceedings, but is not replicated in Art. R58, for appeals proceedings. It can hardly be contended that this should be otherwise, in light of the fundamental principle that athletes across all sports are to be treated equally vis-à-vis sports-governing bodies, particularly in disciplinary matters, which leaves little room for the more ad hoc solutions that may be adopted in *ex aequo et bono* decisions. See however, Mavromati/Reeb, Art. R58, para. 133 and the references given in para. 136, footnote 106 (CAS appeals case law relating to FAT/BAT awards rendered *ex aequo et bono*, in accordance with the FAT/BAT Rules). For a case where the sole arbitrator declined to rule *ex aequo et bono*, even though the parties expressly authorized him to do so, on the ground that the option to do so is not available under Art. R58, see CAS 2014/A/3836, *Admir Aganovic v. Cvijan Milosevic*, Award of 28 September 2015, paras. 40–41 (where, instead, relying on the closest connection test, the Arbitrator applied the FIFA Rules and Swiss law as the rules of law he deemed appropriate).

8 Cf., e.g., CAS 2014/A/3850, *Branislav Krunic v. BIHFF*, Award of 17 July 2015, para. 49; CAS 2013/A/3274, *Mads Glaesner v. FINA*, Award of 31 January 2014, para. 58; CAS 2008/A/1644, *Adrian Mutu v. Chelsea FC*, Award of 31 July 2009, para. 10. See also Haas, *ISLR 2016*, pp. 10–11, noting that in effect this means that the option foreseen in the second part of Art. 187(1) PILS (the closest connection test) is never applied as such by CAS arbitrators, given that the parties are always deemed to have made a choice of law, even if indirect.

norms, to the exclusion of the conflict rules (*renvoi*) of the designated law.[9] In addition, as is also generally admitted in private international law, including in international arbitration, the parties can agree, or the arbitrators can determine, that different laws shall apply to different aspects of a dispute (so-called *depeçage*),[10] or, *a fortiori*, that the parties' choice of law only governs a limited part of the dispute.

III (LIMITED) PARTY AUTONOMY IN THE CHOICE OF THE APPLICABLE LAW

As just seen, Art. 187 PILS primarily gives effect to the universally recognized private international law principle of party autonomy with regard to the determination of the applicable substantive law. 5

Under Swiss arbitration law, the *parties are free to select*, in the exercise of their autonomy, not only a specific national law, but also a-national, international or transnational substantive rules[11] as the "law" governing the merits.[12] This is evidenced by the fact that the PILS speaks of "*rules of law*" in Art. 187(1).[13] On the basis of this same principle, it is accepted that the applicable substantive rules in sports disputes may be contained in the bye-laws, statutes and regulations of the (international) sports federations or other sports-governing bodies.[14] 6

The parties' choice of law can be made *at any time* before or after a dispute has arisen and is *not subject to any specific requirements as to its form*.[15] What matters is that the parties have made an actual choice, i.e., that they did agree, at some point, on the selection of a given law or set of rules to govern their relationship.[16] 7

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9 Cf. e.g., CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 40. See also Mavromati/Reeb, Art. R58, para. 79. More generally, Kaufmann-Kohler/Rigozzi, para. 7.14.

10 Cf., for instance, CAS 2006/A/1082–1104, *Valladolid v. Barreto Càceres & Cerro Porteño*, Award of 19 January 2007, para. 51. More recently, e.g., CAS 2015/A/3871 & 3882, *Sergio Sebastiàn Ariosa Moreira c. Club Olimpia & Club Olimpia c. Sergio Sebastiàn Ariosa Moreira*, Award of 29 July 2015, para. 50. See also Mavromati/Reeb, Art. R58, paras. 118–119. Kaufmann-Kohler/Rigozzi, para. 7.18.

11 Cf., for instance, CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 84.

12 Such rules are reflected, for instance, in the UNIDROIT Principles of International Commercial Contracts. Cf. Carbone, *Lex mercatoria and lex sportiva*, in: Greppi Edoardo/Vellano Michele (eds.), Diritto internazionale dello sport, Torino: Giappichelli, 2010, p. 254, on the possible use of the UNIDROIT Principles as an aid to interpretation in sports disputes.

13 The ZPO (Art. 381(1)) now also refers to "rules of law".

14 Rigozzi, para. 1178. *Ex multis*, see CAS 92/98, *Beeuwsaert v. FIBA*, *CAS Digest I*, p. 287, 292; CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 64; CAS 2007/A/1395, *WADA v. NSAM, Cheah, Ng & Masitah*, Award of 31 March 2008, para. 125. See also Mavromati/Reeb, Art. R58, para. 92, with further references.

15 Kaufmann-Kohler/Rigozzi, paras. 7.24–7.29; Mavromati/Reeb, Art. R58, para. 94.

16 The validity of choice of law clauses is to be examined independently from that of the underlying contract or other agreement between the parties, and is itself submitted to the legal regime governing the formation of contracts. Cf., for instance, CAS 2006/A/1024, *FC Metallurg Donetsk v. Lerinc*, Award of 31 January 2007, paras. 6.5–6.6. For a recent case where the Panel found that a clause in an employment contract whereby only one of the parties undertook to "abide by the rules and regulations of the Club and the Azerbaijan Federation together with the laws and principles observed in the Azerbaijan" was not, in view of its unilateral nature, a choice of law clause within the meaning of Art. R58, given that "a governing law clause is, by nature,

This choice *can thus be tacit or implied*,[17] as, for instance, when the parties argue their respective cases by reference to the same substantive law in the course of the proceedings, without concluding an express choice of law agreement referring to that law.[18]

8 The *parties' choice of the applicable law can also be made in an indirect manner*, that is, by reference not to a substantive law directly,[19] but to a conflict rule or to a set of arbitration rules which in turn contain provisions dealing with the law to be applied by the tribunal in resolving the dispute.[20] All the major sets of arbitration rules contain provisions of this kind.[21] Art. R58 itself is one such provision, although it is rather more elaborate than most of its counterparts in commercial arbitration rules, which merely restate the preeminence of the parties' choice of law. In fact, as the following paragraphs will show, Art. R58 is a relatively complex aggregate of various choice of law mechanisms.[22]

A The Applicable Regulations

9 As just seen,[23] the parties may choose non-national or transnational rules of law – such as sports regulations – to govern their relationship. By providing that "[t]he Panel shall decide the dispute according to the applicable regulations", Art. R58 *ab initio* encapsulates *an indirect choice of law by the parties* in favor of such rules. CAS panels are bound by this choice of law, which applies mandatorily in appeals arbitrations.[24] This means that to resolve the disputes before them, they must always apply, in the first place, the relevant sports regulations.

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bilateral and reciprocal, as it shall express the parties' choice as to what law shall govern the Contract and apply to both parties", see CAS 2015/A/3894, *Khazar Lankaran Football Club v. Eder Jose Oliveira Bonfim*, Award of 26 August 2015, paras. 60–66.

17 Cf., e.g., CAS 2006/A/1082–1104, *Valladolid v. Barreto Càceres & Cerro Porteño*, Award of 19 January 2007, para. 49; CAS 2006/A/1024, *FC Metallurg Donetsk v. Lerinc*, Award of 31 January 2007, para. 6.5; CAS 2013/A/3444, *SC FC Brasov SA v. Renato Ferreira Da Silva Alberto*, Award of 29 October 2015, para. 58.

18 Cf., e.g., CAS 2007/A/1395, *WADA v. NSAM, Cheah, Ng & Masitah*, Award of 31 March 2008, para. 62; CAS 2014/A/3508, *FC Lokomotiv v. Football Union of Russia*, Award of 23 March 2015, para. 144. A further illustration of the principle of party autonomy with respect to the selection of the *lex causae* is that the parties are also free to agree to modify, at any time, a previously concluded choice of law agreement. Cf., for instance, CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, paras. 7.7 and 7.10. See also Mavromati/Reeb, Art. R58, para. 97.

19 Cf., e.g., CAS 2004/A/678, *Apollon Kalamarias FC v. Morais*, Award of 20 May 2005, para. 5.3 (noting that the disputed contract was specifically made subject to "Law 2725/99", i.e., "*Greek* sports law").

20 Cf., e.g., CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia CF SAD*, Award of 15 September 2004, para. 42; CAS 2005/A/983–984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 78; CAS 2010/A/2187, *Calenda v. Sport Lisboa e Benfica Futebol, SAD*, Award of 12 April 2011, para. 8.2 and the references provided therein. See also Mavromati/Reeb, Art. R58, para. 93.

21 Cf., e.g., Art. 21 ICC Rules; Art. 33 Swiss Rules.

22 Rigozzi, para. 1195.

23 Cf. above, para. 6.

24 Cf., e.g., CAS 2014/A/3850, *Branislav Krunic v. BIHFF*, Award of 17 July 2015, para. 51. See also Haas, *ISLR 2016*, pp. 11–13. Only a limited room for maneuver is left to the arbitrators, to the extent they will have to determine what version of the relevant regulations applies in a given case, which they will do by reference to the transitory provisions contained in the regulations and/or the relevant principles in this regard (in particular, the *tempus regit actum* maxim); cf.,

Article R58 then makes it clear that CAS panels shall also apply "*subsidiarily*, […] the rules of law chosen by the parties, or in the absence of such a choice, […] the law of the country in which [the sports-body that issued the challenged decision] is domiciled, *or* […] the rules of law the Panel deems appropriate".[25] Hence, under Art. R58, *the governing sports regulations shall apply together with at least another law (or set of rules of law)*, which will come to bear on a subsidiary basis (irrespective of whether it is chosen by the parties or selected by the panel in accordance with the relevant rules of conflict). In other words, the indirect choice of the "applicable regulations" contained in Art. R58 *ab initio* is only a partial choice of law and CAS panels will have to determine what other (rules of) law, if any, apply to the merits of a given dispute, as outlined below.[26] 10

B The Rules of Law Chosen by the Parties

As mentioned, the parties' choice of law can be made in a direct or indirect manner.[27] The choice is *direct* when the parties expressly submit their relationship to a given law or other set of rules. Choices of this kind are frequently encountered in sports arbitration, for instance in disputes arising out of employment contracts.[28] 11

On the other hand, the parties may be deemed to have made an *indirect* choice of law when their contract refers (or is otherwise subject) to the applicable regulations and these in turn contain a choice of law clause.[29] The regulations of many international sports federations contain provisions of this kind. For instance, Art. 57(2) of the FIFA Statutes provides that in resolving disputes between FIFA, members associations, confederations, leagues, clubs, players, officials, intermediaries and 12

ex multis, CAS 2014/A/3652, *KRC Genk v. LOSC Lille Métropole*, Award of 5 June 2015, paras. 34–35; CAS 2014/A/3488, *WADA v. Juha Lallukka*, Award of 20 November 2014, para. 111; CAS 2013/A/3398, *FC Petrolul Ploiesti v. Aleksandar Stojmirovic*, Award of 23 June 2014, para. 48; CAS 2011/A/2645, *UCI v. Kolobnev and Russian Cycling Federation*, Award of 29 February 2012, para. 12; CAS 2010/A/2041, *Chepalova v. FIS*, Award of 10 January 2010, paras. 65–69; CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, paras. 86–91. As illustrated by some of the cases just cited, where appropriate, and as discussed further below, CAS panels will also refer to the *lex mitior* principle in determining the applicable rules of law (see the references in footnote 65 below).

25 Emphasis added. As also noted by Mavromati/Reeb Art. R58, para. 92, the adverb "subsidiarily" was inserted in the 2013 version of the Code. The addition (which reflected the language used in prior CAS case law, cf., e.g. CAS 2012/A/2699, *Al-Birair v. CAF*, Award of 20 December 2012, para. 82) has clarified that in appeals proceedings the applicable regulations enjoy primacy over the rules of law chosen by the parties or selected by the arbitrators.

26 Rigozzi, para. 1199. This does not exclude that the parties may choose, under Art. R58, that their dispute shall be determined exclusively by reference to the relevant sports regulations (cf., for instance, CAS 2007/A/1322, *Giannini et al v. S.C. Fotebal Club 2005 S.A.*, Award of 15 April 2008, para. 8.2).

27 Cf. above para. 8.

28 Cf., among many others, CAS 2004/A/678, *Apollon Kalamarias FC v. Morais*, Award of 20 May 2005, paras. 5.1–5.4; CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 7.8; CAS 2008/A/1644, *Mutu v. Chelsea FC*, Award of 31 July 2009, para. 95; CAS 2013/A/3364, *SC FC Steaua Bucuresti SA v. Cristiano Bergodi & FIFA*, Award of 13 January 2015, paras. 74–76; CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, para. 188.

29 Cf., *ex multis*, CAS 2004/A/791, *Le Havre v. FIFA & Newcastle & N'Zgobia*, Award of 27 October 2005, paras. 40–44.

licensed match agents, "CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".[30]

13 This being so, difficulties may arise, when the parties have made both a direct and an indirect choice of law in their agreement, if these choices differ. CAS case law deviates on this point from the standard approach under Swiss international arbitration law, which, in light of the overriding role of party autonomy under Art. 187(1) PILS, gives precedence to the express and direct choice made by the parties over any indirect choice as may arise from their relationship.[31] CAS appeals panels, on the other hand, will follow Art. R58's conflict rule, which, as just seen, invariably places the relevant sports regulations ("the applicable regulations" including any choice of law provisions they may contain) first, and the parties' choice, even if express and direct ("the rules of law chosen by the parties"), second and in a subsidiary position vis-à-vis the applicable regulations. As some panels have put it, Art. R58 establishes a hierarchy of norms in matters of substantive law.[32]

14 The question then is how to identify the respective scopes of application of the sports regulations (which apply primarily, and may also – in turn – contain a choice of law) and the rules of law (directly) chosen by the parties (which are to apply subsidiarily to the former). Unsurprisingly, CAS case law is inconsistent in this respect.[33] A recent study by Prof. Haas offers a perceptive analysis of this question in relation to football disputes, where it arises quite frequently. As just seen, Art. 57(2) FIFA Statutes requires CAS panels to apply Swiss law "additionally" (in French, "*à titre supplétif*") to the relevant FIFA regulations. Where the parties have also directly chosen an applicable law other than Swiss law (e.g. in a player's employment contract), the FIFA Statutes' reference to Swiss law, which mandatorily applies in a dispute before the CAS by the operation of Art. R58 *ab initio*, will effectively put the panel before a case of *dépeçage*.[34] Prof. Haas's study discusses the criteria to determine which law should apply to which question(s) in such a situation. In a nutshell, the study

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30 See also, for instance, Art. 12.6.4 Tennis Antidoping Programme 2016, which provides that "[i]n all appeals to CAS pursuant to this Article 12, the governing law shall be English law and the appeal shall be conducted in English unless the parties agree otherwise", and the IAAF Rules, providing that in all CAS appeals involving the IAAF, the governing law shall be Monegasque law (IAAF Competition Rules, Rule 42.24).

31 Cf. Haas, *ISLR 2016*, pp. 11–13. Cf. also, e.g., CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, para. 189.

32 Cf., e.g., CAS 2014/A/3850, *Branislav Krunic v. BIHFF*, Award of 17 July 2015, para. 51; CAS 2013/A/3309, *FC Dynamo Kyiv v. Gerson Alencar de Lima Junior & SC Braga*, Award of 22 January 2015, para. 70. In other words, Art. R58 restricts the scope of party autonomy as far as the choice of the applicable substantive law is concerned, given that the parties may not oust the relevant sports regulations, but only complement them by choosing a law that will apply subsidiarily to those regulations.

33 See the discussion in Haas, *ISLR 2016*, p. 13, with numerous references.

34 Note that, in addition, the relevant regulations may refer to yet another law, as is the case, for instance, of Art. 17(1) RSTP, which requires the panel to calculate "compensation for the breach […] *with due consideration for the law of the country concerned*" (cf., e.g., CAS 2008/A/1644, *Adrian Mutu v. Chelsea FC*, Award of 31 July 2009, paras. 17, 19 and 29–34), and Art. 25(6) RSTP, which provides that "[…] when taking their decisions [the FIFA judicial bodies] shall apply these regulations whilst *taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level* […]"(emphasis added). For a recent case considering the impact of the latter reference (in addition to the reference to Swiss law in Art. 57(2) (then Art. 66(2)) FIFA Statutes), see CAS 2014/A/3652, *KRC Genk v. LOSC Lille Métropole*, Award of 5 June 2015, paras. 36–40. On Art. 17(1) RSTP, see also para. 15 below.

suggests that Swiss law, being the law to which the governing FIFA Statutes refer, should apply to all matters covered by the FIFA regulations – to the extent the latter require interpretation or supplementation, or present a *lacuna*[35] – whereas the (rules of) law chosen by the parties should apply to all matters that do not come within the purview of FIFA regulations.[36] The rationale for this approach is that both the CAS Code's reference to the FIFA regulations (as the "applicable regulations" within the meaning of Art. R58 *ab initio*) and those regulations' reference to Swiss law are meant to "ensure the uniform interpretation of the standards of the [football] industry" – an objective that evidently does not apply to any matters not subject to those same standards.[37] For instance, the FIFA Regulations on the Status and Transfer of Players (RSTP), the purpose of which is "to lay down global and binding rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different associations",[38] should be applied and interpreted uniformly and consistently across the world of professional football.[39] On the other hand, issues that are specific only to the relevant parties' relationship should be interpreted in accordance with the law chosen by them (i.e., in line with the principle of party autonomy).[40] Hence, whether a contract has been terminated with just cause, as well as the consequences of a termination without just cause, both issues covered by the RSTP (in Arts. 14 and 17 respectively) should be determined in accordance with those regulations and ("additionally", to the extent necessary) Swiss law.[41] On the other hand, whether a contract has been validly concluded,[42] or invalidated (for instance on grounds of error, fraud, duress, etc.), whether a given contractual requirement can be deemed satisfied,[43] or the interest rate that should apply to any damages awarded pursuant to Art. 17 RSTP,[44] all issues

35 Cf., Mavromati/Reeb, Art. R58, paras. 100, 121–122. Cf. also, e.g., CAS 2014/A/3850, *Branislav Krunic v. BIHFF*, Award of 17 July 2015, para. 51; CAS 2014/A/3864, *AFC Astra v. Laionel da Silva Ramalho & FIFA*, Award of 31 July 2015, paras. 53 and 56; CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, para. 192.

36 Haas, *ISLR 2016*, p. 14. In similar terms, cf. Mavromati/Reeb, Art. R58, para. 119. See also Del Fabro (2016), p. 233.

37 Haas, *ISLR 2016*, p. 14.

38 Cf. Art. 1(1) RSTP (2016 Edition), available at < http://www.fifa.com/about-fifa/official-documents/law-regulations/index.html#doctransfersreg > .

39 Cf., e.g., CAS 2014/A/3505, *Al Khor SC v. C*, Award of 3 December 2014.

40 Cf., e.g., CAS 2005/A/902 & CAS 2005/A/903, *Mexès AS Roma v. AJ Auxerre; AJ Auxerre v. Mexes & AS Roma*, Award of 5 December 2005, paras. 12–16, and, more recently, CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, paras. 190–193; CAS 2013/A/3647, *Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur* & CAS 2013/A/3648, *SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal & FIFA*, Award of 11 May 2015, paras. 93–98.

41 Cf., e.g., CAS 2013/A/3398, *FC Petrolul Ploiesti v. Aleksandar Stojmirovic*, Award of 23 June 2014, paras. 55–61; CAS 2014/A/3527, *FFK v. P.*, Award of 31 July 2015, paras. 64–74. CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, paras. 239–244.

42 Cf., e.g., CAS 2013/A/3309, *FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC Braga*, Award of 22 January 2015, paras. 84–92; CAS 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, Award of 27 May 2016, para. 238.

43 Haas, *ISLR 2016*, p. 15, referring to CAS 2013/A/3647, *Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur* & CAS 2013/A/3648, *SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal & FIFA*, Award of 11 May 2015, paras. 113 et seq., at footnote 44.

44 Haas, *ISLR 2016*, p. 15, with several references at footnote 45, including CAS 2014/A/3864, *AFC Astra v. Laionel da Silva Ramalho & FIFA*, Award of 31 July 2015, para. 105; 2014/A/3848, Award of 31 July 2015, paras. 117 et seq; 2008/A/1519 & 1520, *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA; Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA*, Award of 19 May 2009, paras. 182 et seq.

that are not regulated in the RSTP, should be determined in accordance with the law (if any) chosen by the parties to govern the underlying contract.[45]

15 The bearing of the parties' choice of law can also be limited by specific provisions in the applicable regulations, as for instance Art. 17(1) RSTP, which provides that the compensation due in case of termination without just cause "shall be calculated with consideration for the law of the country concerned". CAS panels are reluctant to apply national laws in these cases. It is submitted that national laws other than Swiss law should apply to matters covered by the RSTP only if their application is required by an analogical application of Art. 19 PILS, i.e. if they set out mandatory overriding rules.[46] Other than in such cases, the application of different national laws may be detrimental to the uniform application of the FIFA regulations.

16 Where the parties have *not* made a choice of law, Art. R58 (to which the parties have referred in agreeing to submit their disputes to CAS) sets out further conflict rules for the determination – by the arbitrators – of the law that is to apply subsidiarily, in addition to the applicable sports regulations.

IV (RESIDUAL) POWER OF ARBITRATORS TO DETERMINE THE APPLICABLE LAW

17 Article 187(1) PILS (like most arbitration laws) and the majority of arbitration rules contain liberal conflict rules to determine the *lex causae* absent a choice by the parties. Art. 187(1) PILS requires arbitrators to apply the rules of law that are most closely connected to the dispute,[47] whereas arbitration rules generally provide that the tribunal shall apply the (rules of) law that it determines to be appropriate.[48]

18 Article R58 of the CAS Code is *more restrictive than its counterparts in commercial arbitration rules* also when it comes to the authority of arbitrators to determine the applicable law, given that *it provides for a specific connecting factor to be used by CAS panels where the parties have not made a choice*, namely the country of domicile of the sports-governing body that rendered the challenged decision (A.). Moreover, while Art. R58 does also enable CAS panels to apply the rules of law

45 See the further examples mentioned by Haas, *ISLR 2016*, p. 15. For similar reasoning with regard to disputes arising under the UEFA Club Licensing and Financial Fair Play Regulations, cf., e.g., CAS 2013/A/3067, *Málaga CF SAD v. UEFA*, Award of 8 October 2013, paras. 9.1–9.7. The same is true for issues that the RSTP do regulate, but subsidiarily, i.e. by providing that any specific agreement between the parties will apply primarily (cf., e.g., CAS 2006/A/1082 & 1104, *Real Valladolid c. Barreto Càceres & Cerro Porteño*, Award of 19 January 2007, paras. 19–21, about the validity of a contractual indemnity clause in case of unilateral termination, decided under the 2001 edition of the RSTP). Note also that when the parties have made a choice of law in their contract, but fail to argue their case on the basis of the chosen (rules of) law, the panel will not necessarily apply the latter. In light of the principles discussed above (see para. 7 above), such conduct could be considered as an implied (subsequent) choice of law by the parties: cf., e.g., CAS 2013/A/3089, *FK Senika A.S. v. Vladimir Vukajlovic & FIFA*, Award of 30 August 2013, para. 52; CAS 2014/A/3858, Award of 5 August 2015, paras. 66–67; CAS 2013/A/3398, *FC Petrolul Ploiesti v. Aleksandar Stojmirovic,* Award of 23 June 2014, para. 47.

46 See para. 31 below.

47 On the meaning of the *closest connection test*, see, e.g., Kaufmann-Kohler/Rigozzi, paras. 7.28–7.49.

48 Cf., e.g., Art. 35(1) UNCITRAL Rules; Art. 21(1) ICC Rules; Art. 22.3 LCIA Rules; Art. 22(1) SCC Rules. By contrast, Art. 33(1) SRIA incorporates the *closest connection test* of Art. 187 PILS's.

which they deem appropriate (in lieu of the law of the country of domicile of the sports-governing body that issued the challenged decision), if they decide to do so, they are required to provide reasons for their choice (B.).

These conflict rules apply to the determination by CAS arbitrators in appeals proceedings of the (rules of) law that shall apply in addition (and subsidiarily) to the applicable sports regulations where the parties have not chosen such (rules of) law. As seen above, under Art. R58, the arbitrators are required to apply the relevant regulations. The only "room for manoeuver" they have in that regard, is with respect to the determination of the applicable version(s) of such regulations.[49] 19

A The Law of the Country in which the Sports-Governing Body which Issued the Challenged Decision is Domiciled

When the parties have not chosen the rules of law to be applied (subsidiarily) to the merits of their dispute, Art. R58 provides, as a first option, that CAS panels shall apply the law of the seat of the federation or other sports-body that issued the decision under challenge.[50] This conflict rule again reflects both the fact that Art. R58 regulates the determination of the applicable law in the context of appeals proceedings – where there will necessarily be a "challenged decision" – and the fundamental objective of promoting consistency in the solutions found to the disputes that arise in that context, by applying the same law to the assessment of all decisions originating from the same sports-governing body. 20

That said, as noted in the previous edition of this commentary, applying this connecting factor can be problematic in all those cases in which the *national federation* or other national sports-body from which the decision under challenge emanates *has rendered that decision according to the rules of the relevant international federation*. For instance, CAS appeals proceedings regularly involve, as the respondent party, a national federation which, in taking the challenged decision, acted by delegation of the relevant international federation (e.g., the IAAF).[51] This is so in particular since the WADA Code has entered into force, as the latter provides for the shared responsibility of international federations, national federations and other anti-doping organizations with respect to doping controls, hearings and sanctions, whilst reserving the right for international federations to appeal against the decisions adopted by national federations or anti-doping organizations.[52] In these cases, *strict adherence to the conflict rule set out in Art. R58 may be prejudicial to the uniform application of the international sports regulations at issue*. This result is undesirable and, worse, contrary to the athletes' fundamental right to equal treatment in disciplinary cases arising under the same (international) rules. CAS panels have on occasion considered these cases to be "atypical" appeals proceedings, and on this basis have, albeit 21

49 See footnote 24 above.

50 Cf., e.g., CAS 2009/A/1545, *Anderson, Colander Clark, Miles-Clark, Edwards, Gaines, Hennagan & Richardson v. IOC*, Award of 18 December 2009, para. 55; more recently, e.g., CAS 2014/A/3860, *O. et consorts v. FIFA* & CAS 2015/A/4023, *E. et consorts v. FIFA*, Award of 25 May 2016, paras. 78–79; CAS 2015/A/4021, *LNFP v. FIFA*, Award of 13 July 2016, para. 127.

51 As mentioned in the previous edition of this commentary (Rigozzi/Hasler (2013), at Art. R58, para. 12), this used to be the case of the UCI as well. The situation has now changed, at least for cases involving international level riders, given that, in January 2015, the UCI established its own Anti-doping Tribunal (see < http://www.uci.ch/news/article/anti-doping-tribunal/ >).

52 Cf. Arts. 7, 8, 13 and 15 WADC.

without saying it in so many words, simply circumvented the rule set out in Art. R58, by applying only the relevant sports regulations, or (subsidiarily) the law of the seat of the federation which had issued the applicable sports regulations (rather than the law of the seat of the federation or other sports-governing body which had issued the decision under challenge).[53]

22 In reality, the same result can also be achieved by considering that the law of the seat of the international federation (the rules of which are applicable in case of dispute) is more appropriate than the law of the seat of the national federation (having issued the decision under appeal), as discussed in the following section.[54]

B The Rules of Law, the Application of which the Panel Deems Appropriate

23 As a second option when the parties have not chosen the applicable rules of law, Art. R58 allows CAS panels to apply, in addition to the applicable sports regulations (and in lieu of the law of the domicile of the sports body that rendered the disputed decision), the rules of law they deem appropriate.[55] In other words, Art. R58 *enables CAS panels not to refer to the otherwise applicable (rules of) law* when this would produce inappropriate results. Here too, the rationale for the conflict rule is to "immunize" sports disputes from the variances that may result from the application of different domestic laws to cases that are subject to the same international rules.

24 To the extent Art. R58 at the end circumvents the precedence given by Art. 187(1) PILS to the parties' (direct or indirect) choice of law over the tribunal's own determination, it is understandable that the drafters of the Code have *required arbitrators to give reasons for their decision* on the appropriate applicable (rules of) law.[56]

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53 Cf., e.g., CAS 2002/A/403 & 408, *Pantani v. UCI & FCI v. UCI*, Award of 12 March 2003, para. 45; CAS 2002/A/383, *IAAF v. CBA & Dos Santos*, Award of 27 January 2003, paras. 78–79; cf. also Rigozzi, para. 1214. Note however that, in the recent *Sharapova* award, the athlete argued that harmonization should lead to the application of Swiss law irrespective of the country in which the international federation that took the decision (here the ITF, which is based in the UK) has its seat. The Panel rejected the argument, noting simply that it had not been "directed to any difference that could derive from the application of Swiss law instead of English law" to the matters in dispute, and thus concluding that the question did not need to be "further explored" (CAS 2016/A/4643, *Maria Sharapova v. ITF*, Award of 30 September 2016, paras. 70–73). That said, in at least another case involving a decision by the ITF, the Panel applied Swiss law precisely by reference to the need to harmonize the interpretation of the ITF's Anti-doping Programme, incorporating the WADC, so that WADA's rules would be applied uniformly and consistently everywhere, rather than being "subject to the vagaries of myriad systems of law throughout the world" (CAS 2006/A/1025, *Mariano Puerta v. ITF*, Award of 12 July 2006, paras. 11–16).

54 Indeed, as explained in Mavromati/Reeb, Art. R58, para. 81, this was the rationale of the addition of the last part of the first sentence of Art. R58 ("or according to the rules of law, the application of which the Panel deems appropriate") in 2003. This is what the sole arbitrator did, e.g., in CAS 2014/A/3496, *Anti-doping Autoriteit Nederland v. X*, Award of 6 March 2015, paras. 26–34, determining that Swiss law should apply subsidiarily to the relevant national regulations (which stated they were to be in interpreted in light of the WADC and/or its International Standards) "in order to preserve a certain level of conformity in CAS jurisprudence regarding doping matters".

55 Cf. Mavromati/Reeb, Art. R58, para. 134.

56 For examples of the reasons provided by panels for their decision to apply the law they deemed appropriate to a particular case, cf., e.g., CAS 2014/A/3836, *Admir Aganovic v. Cvijan Milosevic*, Award of 28 September 2015, para. 41, where the Sole Arbitrator decided that the application

The case law shows that panels have often used the margin of appreciation granted to them by Art. R58 at the end to apply general principles of law or other transnational norms of different origins, a practice that has *contributed to the emergence of a consistent jurisprudence* with regard to questions that arise frequently in (international) sports disputes. The general principles that are regularly applied in the CAS case law can be subdivided in three main categories,[57] namely: (i) general principles of law that are customarily applied in sports matters (e.g., the principles of equal treatment;[58] good faith/estoppel;[59] legality[60] and proportionality,[61] as well as maxims such as *lex specialis derogat generali*[62]); (ii) fundamental guarantees and principles governing criminal procedure which may be applied by analogy in **25**

of *ex aequo et bono* principles (as agreed by the parties during the hearing) would be inappropriate, given that there was no provision to that effect in Art. R58 (contrary to Art. R45 for ordinary proceedings). Accordingly, the Sole Arbitrator applied the relevant FIFA regulations and Swiss law (by virtue of the reference in (then) Art. 66(2) of the FIFA Statutes). As noted by Mavromati/Reeb, Art. R58, para. 134, in CAS 2013/A/3250, Award of 25 February 2014, the Panel decided to apply Belgian law (rather than Swiss law as the law of the seat of the relevant federation), given that Belgian law had been applied before the federation's judicial bodies in the first instance. Conversely (and deploring the inherent contradiction of the FIFA Rules governing the applicable law at different stages of the proceedings) the Panel in CAS 2014/A/3652, *KRC Genk v. LOSC Lille Métropole* held that it would be inappropriate for it not to take into account the "*relevant arrangements, laws and/or collective bargaining agreements that exist at national level*" pursuant to Art. 25(6) RSTP – which the DRC had failed to do in the first instance – even if Art. 25(6) only applies to FIFA's judicial bodies (including the DRC) and not to the CAS. As the reason for its decision in this regard, the panel held that this should be so in all cases where the application of the relevant national law is material for the resolution of the case ("*là où [l']application [du droit national] est pertinente pour la résolution du litige*", free translation, Award of 5 June 2015, paras. 37–40). *In casu*, the national law at issue (Belgian law) affected the outcome of the case because it entailed that the player could not be offered a work contract by his then club as he was still a minor at the relevant time. In CAS 2015/A/4021, *LNFP v. FIFA*, Award of 13 July 2016, paras. 127–130, the Panel explained that (beyond the applicable FIFA regulations and Swiss law as the law of the country where FIFA is domiciled), considering the markets potentially affected by the challenged decision, it would apply EU (but not Swiss) competition law to the dispute at hand. Similarly, cf. CAS 2009/A/1788, *UMMC Ekaterinburg v. FIBA Europe e.V.*, Award of 29 October 2009, paras. 4–8.

57 Needless to say, the following is an over-simplified summary. For thorough analyses of the issue, including extensive catalogues of the relevant legal principles, cf., for instance, Beloff, *Is there a lex sportiva?*, in: *ISLR 2005*, pp. 49–60; Loquin, pp. 85–108, and Maisonneuve, paras. 905–941.

58 Including the principle that there is no equality in illegality, cf. CAS 2001/A/357, *Nabokov v. IIHF*, Award of 31 January 2002, para. 26, *CAS Digest III*, p. 510.

59 Cf., among many others, CAS OG 02/006, *NZOC v. SLOC*, Award of 20 February 2002, para. 18, *CAS Digest III*, p. 609. Similarly, on the related principles of the protection of legitimate expectations/*ne venire contra factum proprium*, cf., for instance, CAS 2008/O/1455, *Boxing Australia v. AIBA*, Award of 16 April 2008, paras. 35–36.

60 Cf., among many others, CAS OG 98/002, *Rebagliati v. IOC*, *CAS Digest I*, p. 433; CAS 94/129, *USA Shooting & Quigley v. UIT*, Award of 23 May 1995, passim; CAS OG 00/010, *Tsagaev v. IWF*, Award of 25 September 2000, paras. 22–25.

61 Cf., among many others, CAS/2006/A/1025, *Puerta v. ITF*, Award of 12 July 2006, section 11.7. More recently, cf., e.g., CAS 2013/A/3264, *Abderrahim Achchakir v. FIFA*, Award of 19 November 2013, paras. 133-; CAS 2015/A/3920, *FRMF v. CAF*, Award of 17 November 2015, para. 11.65–11.66.

62 Cf., among many others, CAS 2004/A/748, *ROC, Ekimov v. IOC, USOC, Hamilton*, Award of 27 June 2006, para. 106. More recently, cf., e.g., CAS 2013/A/3274, *Mads Glasner v. FINA*, Award of 31 January 2014, paras. 77–79.

disciplinary proceedings (e.g., the principles *nulla poena sine lege*;[63] *nulla poena sine culpa*[64] and *lex mitior*[65]), and (iii) general principles of sports law, including anti-doping regulations (e.g., the principles of strict liability;[66] judicial restraint vis-à-vis field of play decisions;[67] integrity and loyalty of competitions, and fair-play[68]).

26 Some scholars and CAS panels have referred to the body of general principles and rules that has emerged from the case law referenced above as the so-called *lex sportiva*.[69] A

63 Cf., among many others, CAS 94/129, *USA Shooting & Quigley v. UIT*, Award of 23 May 1995, para. 34. More recently, cf., e.g., CAS 2015/A/3920, *FRMF v. CAF*, Award of 17 November 2015, para. 11.64.

64 Cf., among many others, CAS 2001/A/317, *Aanes v. FILA*, Award of 9 July 2001, *CAS Digest III*, p. 216, para. 26; CAS 2007/O/1381, *RFEC & Valverde v. UCI*, Award of 23 November 2007, paras. 67–72. The principle has made the object of some reservations: in some non-doping cases, reference was made to the fact that the variety of sanctioning measures which may be at issue in sports disciplinary cases should not all be rigidly subjected to this principle, which is meant to apply in the very specific context of criminal law. Cf., for instance, CAS 2008/A/1583 & 1584, *Sport Lisboa e Benfica futebol SAD & al. v. UEFA & FC Porto*, Award of 15 September 2008, paras. 10.3.2.2 and 10.3.3, with numerous references.

65 Cf., among many others, CAS 2014/A/3485, *WADA v. Daria Goltsova & IWF*, Award of 12 August 2014, paras. 18, 43 and 49; CAS 2012/A/2817, *Fenerbahçe Spor Kulübü v. FIFA & Roberto Carlos Da Silva Rocha*, Award of 21 June 2013, *passim*; 2010/A/2308 & 2335, *Pellizotti v. CONI & UCI* and *UCI v. Pellizotti & FCI & CONI*, Award of 14 June 2011, para. 30; CAS 2010/A/1817 & 1844, *WADA & FIFA v. CFA & Marques, Medeiros, Eranosian et al.* and *FIFA v. CFA*, Award of 26 October 2010, para. 134; CAS 2004/O/679, *USADA v. Bergman*, Award of 13 April 2005, para. 5.2.3; CAS 2000/A/289, *UCI v. Chiotti et al.*, Award of 12 January 2001, *CAS Digest II*, p. 427, para. 7; CAS 96/149, *A. Cullwick v. FINA*, Award of 13 March 1997, *CAS Digest I*, p. 260, para. 28.

66 Cf., among many others, CAS 95/141, *Chagnaud v. FINA*, Award of 22 April 1996, para. 13; CAS 2002/O/373, *COC & Scott v. IOC*, Award of 18 December 2003, para. 14.

67 Cf., among many others, CAS 2004/A/704, *Young & KOC v. FIG*, Award of 21 October 2004, para. 3.7; CAS OG 02/007, *KOC v. ISU*, Award of 23 February 2002, paras. 16–17.

68 In French, "équité sportive" (cf., for instance in CAS OG 00/004, *COC & Kibunde v. AIBA*, Award of 18 September 2000, paras. 11–12), or, in the words of a commentator "*sincérité des compétitions*" (Loquin et al., *Tribunal arbitral du sport, Chronique des sentences arbitrales, JDI 2002*, p. 344). Cf. also CAS 2004/A/708, *Mexès & AS Roma v. SAOS AJ Auxerre Football (AJ Auxerre) & FIFA*, Award of 11 March 2005, *passim*, where reference was made to the objective of safeguarding "*la régularité des competitions et l'intégrité des championnats*", in determining whether, in the silence of the relevant FIFA regulations, the so-called stability rule could be applied in a specific situation. CAS jurisprudence has in fact extended the scope of application of this same general principle beyond sports competition itself, by expressing the view that the fair-play principle "is as pertinent to the disciplinary process as it is to competitive sport", with the consequence that sports-governing bodies are bound by the "elementary rules of natural justice and due process" in their dealings with athletes in a disciplinary context (cf. for instance, CAS OG 96/005, *A., W. and L. V. NOC CV*, Award of 1 August 1996, para. 7; CAS 2002/A/378, *S. v. UCI & FCI*, Award of 8 August 2002, paras. 19–20).

69 In reality, there appear to be different understandings among commentators as to what exactly should be defined as the *lex sportiva*. For instance (and again, without any claim whatsoever to exhaustiveness), according to some, the *lex sportiva* is nothing more than a collection of all the rules and regulations that are issued by the different existing sports organizations, or, in a slight variation to this definition, the compilation of all the rules, regardless of their source, that govern sports activities (cf., e.g., Loquin et al., *Tribunal arbitral du sport, chronique des sentences arbitrales, Chronique JDI 2001*, p. 266). Others consider that the *lex sportiva* simply corresponds to the entire body of CAS jurisprudence (cf., e.g., Nafziger, p. 409). A third approach in the literature can be considered (simplifying somewhat) as a combination of the previous two, in that it sees the *lex sportiva* as the "transnational law of sports", formed of the CAS case law and the rules and regulations of transnational sports organizations (cf., e.g., Latty, *La Lex Sportiva – Recherche sur le droit du transnational, Leiden: Martinus Nijhoff, 2007*, p. 46). Yet another group of commentators, and much of the CAS case law that has addressed this topic,

short commentary such as this is not the right place to address the doctrinal debate surrounding the *lex sportiva* as a legal, sociological or even philosophical phenomenon, including the obvious analogies with its historical predecessor, the *lex mercatoria*.[70] For present purposes, we would simply observe that, in their practice under Art. R58, CAS panels will refer to the legal principles, maxims and jurisprudential rules forming this so-called *lex sportiva* whenever they will deem their application to be "appropriate", in addition to, or instead of, the applicable sports regulations and/or the chosen or designated (rules of) law, to decide a given case.

V OBJECT, SCOPE AND STATUS OF THE CHOSEN OR SELECTED (RULES OF) LAW

The following aspects should also be borne in mind, whether the applicable (rules of) law have been chosen by the parties or selected by the panel. 27

Naturally, *the matters subject to the law applicable to the merits* or substance of the dispute within the meaning of Art. R58 (the *lex causae*) *are substantive, as opposed to procedural* (procedural issues being governed by the *lex arbitri*). The question is how to distinguish substantive matters from procedural ones. Generally speaking, commentators consider that matters of substance are those which can influence the outcome of the case (such as issues of standing, statutes of limitations, the consequences of a breach of contract and the burden of proof),[71] while procedural issues pertain to the conduct of the case (e.g., time limits; the standard of proof; issues of costs).[72] Another generally held view is that, if in doubt, arbitrators should characterize an issue as substantive rather than procedural.[73] 28

The scope of the applicable (rules of) law, be they selected by the parties or by the arbitrators, is not unlimited as certain *subject matters* are reserved for the exclusive regulatory competence of the state. To cite but one example that is relevant to sports law, it is undisputed that the acquisition of the nationality of a particular State can only be subject to the laws of that State. In other words, the parties have no right to submit that issue to a different law of their choice.[74] 29

views the *lex sportiva* as the normative body constituted by the legal principles that emerge from the interaction between the regulations enacted by the sports-governing bodies and the relevant general principles drawn from the different national laws involved, as progressively embodied in CAS jurisprudence. Cf., for instance, Loquin, and, among others, CAS 98/200, *AEK Athens & SK Slavia Prague v. UEFA*, Award of 20 August 1999, para. 156). Finally, some go as far as considering the *lex sportiva* as an autonomous transnational legal system (cf., e.g., Maisonneuve, paras. 1162–1170).

70 For comprehensive and detailed discussions, cf., among others, Beloff, *Is there a lex sportiva?*, in*: ISLR 2005*, pp. 49–60; Nafziger, pp. 409–419; Haas, *Die Vereinbarung von "Rechtsregeln" in (Berufungs-) Schiedsverfahren vor dem Court of Arbitration für Sport, in:* CaS 2007, pp. 271–280; Latty, *La Lex Sportiva – Recherche sur le droit du transnational, Leiden: Martinus Nijhoff, 2007*; Loquin, pp. 85–108; and, more recently, Mitten/Opie, "*Sports law*"*: implications for the development of international, comparative, and national aw and global dispute resolution, CAS Bull. 2012/1*, pp. 2–13.

71 Cf. Mavromati/Reeb, Art. R58, para. 78; Haas, *ISLR 2016*, p. 14 *in fine* – 15 *ab initio*.

72 Cf. Mavromati/Reeb, Art. R58, para. 78.

73 Mavromati/Reeb, Art. R58, para. 78. This is in line with the prevailing approach in Switzerland, cf., e.g., Berger/Kellerhals, para. 1372; Karrer, at Art. 187 PILS, para. 10 (note that this author sets out a list of issues with his suggested characterization as substantive or procedural, *ibid.*, paras. 10–11).

74 Rigozzi, para. 1171.

30 There may also be *inherent limits to the scope of application* (*ratione personae, ratione materiae* or *ratione temporis*) of the designated law or set of rules that cannot be disregarded. For instance, CAS panels have on various occasions refused to apply the RSTP to disputes arising from contracts with coaches, even though the parties had expressly referred to those regulations, as their scope of application does not extend to coaches.[75]

31 Moreover, the application of any designated (rules of) law is limited by the overriding effect of so-called *mandatory laws* ("*Eingriffsnormen*"; "*lois de police*" or "*lois d'application immédiate*").[76] As discussed in more detail elsewhere, arbitral jurisprudence, including that of the CAS, has tended to rely on the following criteria – expressed with some variations in the terminology and in the emphasis put on one or the other of the criteria – in determining whether mandatory rules (of a law other than the *lex causae*) should be taken into consideration in any given case:[77] (i) such rule[s] must be meant to govern international situations such as that before the panel, i.e., must "belong to that special category of norms which need to be applied irrespective of the law applicable to the merit of the case"; (ii) there must be a close connection between the subject matter of the dispute and the State from which the mandatory rule[s] at issue emanate; (iii) the application of such rule[s] must not produce a result that is contrary to transnational standards; in other words, the mandatory rule[s] at issue should pursue a goal which is internationally, if not universally recognized as legitimate.[78] This reasoning has been applied by CAS panels, *inter alia*, to assess arguments relying on EU competition law or free movement rights.[79]

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75 CAS case law (cf. e.g., CAS 2008/A/1464 & 1467, *Futebol Clube do Porto v. J.*; *J. v. Futebol Club do Porto*, Award of 3 December 2008, para. 24) has concluded that this is so given that Art. 1 defining the scope of the RSTP does not mention coaches, and the provision equating coaches to players in the FIFA Statutes (then Art. 33(4)) has been removed from the Statutes as from their 2008 version. See Mavromati/Reeb, Art. R58, para. 107 and the references. Cf. also CAS 2012/A/2906, *Alain Geiger v. Egyptian Football Association (EFA) & Al Masry Club*, Award of 12 February 2013, paras. 65–73. Similarly, some statutes purport to regulate only activities having an effect within a specific territory and cannot be applied otherwise (cf., e.g., with regard to the Swiss Federal Act on Cartels (LCart), CAS 2015/4021, *LNFP v. FIFA*, Award of 13 July 2016, para. 128, and the example quoted in Mavromati/Reeb, Art. R58, para. 107, footnote 65). For a different example, cf., e.g., CAS 2015/A/4304, *Tatyana Andrianova v. ARAF*, Award of 14 April 2016, para. 42, noting that the reference to Monegasque law contained in Art. 42.24 of the ARAF's ADR was not triggered in that case, given that the IAAF was not involved in the proceedings (as required by that provision).

76 On this point, advocating the pre-eminence of the mandatory provisions of the *lex causae* over the applicable sports regulations, see Del Fabro (2016), pp. 236–238.

77 Rigozzi, para. 1189. These criteria consist in an application by analogy of the test called for under Art. 19 PILS. Cf. for instance, CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 73. See also Mavromati/Reeb, Art. R58, para. 113, with further references.

78 Rigozzi, para. 1190, in part referring to CAS 98/201, *Celtic v. UEFA*, Award of 7 January 2000, para. 4; *CAS Digest II*, p. 111. Cf. also CAS 2007/A/1424, *Federación Española de Bolos c. Fédération Internationale des Quilleurs (FIQ) & Federació Catalana de Bitlles i Bowling (FCBB)*, Award of 23 April 2008, paras. 52–56. Most recently, cf. CAS 2016/A/4492, *G. v. UEFA*, Award of 3 October 2016, paras. 41–45. See also Kaufmann-Kohler/Rigozzi, para. 7.95–7.99. As noted by the panel in CAS 2013/A/3314, *Villaréal CF SAD v. SS Lazio*, Award of 7 March 2014, para. 42, in Switzerland as elsewhere, "a provision of law which is not applicable as *lex causae* would be considered mandatory and directly applied only in exceptional circumstances".

79 Cf., e.g., CAS 98/200, *AEK & PAE & SK Slavia Praha v. UEFA*, Award of 20 August 1999, paras. 10–11; CAS 2007/A/1287, *Danubio FC v. FIFA & Inter Milano*, Award of 28 November 2007, para. 17. See also Coccia, pp. 87–90, and Duval (2015), pp. 235–245.

Furthermore, it is widely recognized that arbitral tribunals sitting in Switzerland must disregard any provisions in the parties' chosen (rules of) law which, if applied, would lead to a decision whose substance would be incompatible with *international public policy* within the meaning of Art. 190(2)(e) PILS.[80] **32**

In closing, it bears to recall that according to the Swiss Federal Supreme Court's case law, the principle *jura novit curia*, according to which the courts are deemed to know the law or required to ascertain it of their own motion and to apply it *ex officio*, also applies to arbitral tribunals.[81] This means in particular that the parties before arbitral tribunals sitting in Switzerland (as are CAS panels) are not expected to prove the applicable law as a fact, but also that the arbitrators are not restricted by the parties' pleadings as to the content of the applicable (rules of) law.[82] **33**

More generally, an error by the arbitrators in determining or applying the *lex causae* is not *per se* a ground for the annulment of the award.[83] The only (exceptional) cases where the arbitrators' determination as to the *lex causae* may open the award to annulment is where it entails a violation of the parties' right to be heard (Art. 190(2)(d) PILS)[84] or leads to a result that is incompatible with public policy (Art. 190(2)(e) PILS).[85] **34**

80 Cf. CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 70; CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, paras. 7.3–7.4; CAS 2009/A/1926&1930, *ITF v. Gasquet; WADA v. ITF & Gasquet*, Award of 17 December 2009, para. 3.5. See also Kaufmann-Kohler/Rigozzi, para. 7.95–7.99; Mavromati/Reeb, Art. R58, para. 108.

81 For a comprehensive overview of the Supreme Court case law on *jura novit curia* (including the exceptions that apply to this rule), cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), paras. 144–159. See also, e.g., BGer. 4P.260/2000 para. 5b. Further, cf. CAS 2006/A/1043, *Hetzel v. FEI*, Award of 28 July 2006, para. 5.2. Note however that the *jura novit curia* principle is not violated if the tribunal requires the parties to participate in establishing the contents of the applicable law or requests expert opinions in that regard (cf., e.g., BGer. 4P.242/2004 para. 7.3).

82 Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), paras. 144–145. As previously mentioned, this principle should induce CAS arbitrators to avoid an over-formalistic interpretation of Art. R56 in as far as legal arguments are concerned (cf. Art. R56, para. 2 above).

83 See also Mavromati/Reeb, Art. R58, paras. 137–141. See also, e.g., Kaufmann-Kohler/Rigozzi, para. 7.86.

84 For this ground to be upheld, the challenging party must establish that the tribunal based its decision on (a) rule(s) of law the parties did not refer to and the relevance of which they could not reasonably foresee (cf., e.g., BGer. 4A_400/2008, relating to a CAS appeals award). Cf. Kaufmann-Kohler/Rigozzi, paras. 8.183–8.184.

85 For instance, the Supreme Court has held that the fact that the tribunal engaged in a mistaken or even arbitrary application of the law is not a breach of public policy within the meaning of Art. 190(2)(e) PILS (cf., e.g., BGer. 4A_14/2012 para. 5.2.1; BGer 4A_654/2011 para. 4.2, with further references). See also Berger/Kellerhals, para. 1400; Kaufmann-Kohler/Rigozzi, paras. 7.86 and 8.202.

Article R59: Award

The award shall be rendered by a majority decision, or in the absence of a majority, by the President alone. It shall be written, dated and signed. The award shall state brief reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice.

Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

A copy of the operative part of the award, if any, and of the full award shall be communicated to the authority or sports body which has rendered the challenged decision, if that body is not a party to the proceedings.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.

I PURPOSE OF THE PROVISION

1 Article R59 of the CAS Code regulates the main issues related to the award in appeals proceedings,[1] namely (II.) the arbitrators' decision-making process, (III.) the form and contents of the award, (IV.) its 'scrutiny' by the CAS, (V.) its notification to the parties and (VI.) its effect, as well as (VII.) the CAS's policy with regard to the publicity of awards and/or the outcome of the proceedings.

1 Art. R59 applies to all types of awards rendered by the CAS in appeals proceedings, be they partial awards, interim or interlocutory awards (e.g., awards on jurisdiction), and additional awards (cf. Art. R63 below).

II THE ARBITRATORS' DECISION-MAKING PROCESS

Article R59(1) governs the arbitrators' vote on the decision(s) embodied in the award. It does not deal with the arbitrators' *deliberations*, which are a distinct component of the arbitral decision-making process.[2] The arbitrators' deliberations are "the exchange[s] of views on the claims or questions submitted to them by the parties which lead to the decisions of the arbitral tribunal".[3] The principle of collegiality, which always governs the activities of an arbitral tribunal, commands that all arbitrators must participate not only in the final vote on a decision but also in the deliberations preceding such vote. In accordance with this principle, each arbitrator is to be given an (adequate) opportunity to express his or her own opinion on the issues to be decided and to state his or her position with respect to his or her co-arbitrators' opinions on those same issues.[4] The requirement that deliberations must take place is an integral part of the parties' right to be heard and both a right and a duty of the arbitrators, resulting from their status as members of a collegiate tribunal. If the tribunal's deliberations fail to afford one of the arbitrators the opportunity to state his or her views on all the issues to be decided, the resulting award is open to annulment.[5] The rationale but also the limit of this rule is that *each of the panel's members must be given the same opportunity as his or her fellow arbitrators to participate in the decision-making process*. This also means that an arbitrator who deliberately refuses to participate in the deliberations cannot, by doing so, obstruct the panel's progress towards a (majority) decision,[6] let alone expose the award to annulment. **2**

Article R59(1) provides that (in cases heard by three-member panels) CAS awards can be rendered by *majority decision*, *or*, where a majority cannot be found, by the *President of the panel alone*. In line with the analogous provisions contained in practically all arbitration rules, this latter possibility is meant to avoid deadlocks in the decision-making process, without obliging the President to adhere to the position of one or the other of his or her co-arbitrators, even if he or she does not agree with it, just so as to achieve a majority in the vote. Thus, the President of the panel plays a pivotal role in the making of the award. The significance of this role is accentuated in CAS appeals proceedings as the President is appointed by the arbitral institution, with no influence whatsoever by the parties.[7] **3**

More than the principle of the majority vote itself, the manner in which an absence of unanimity within the panel may transpire in the award calls for some observations. Art. R59(2) at the end expressly provides that *dissenting opinions* "are not recognized by CAS and are not notified".[8] This does not preclude an arbitrator from **4**

2 Cf. BGE 111 Ia 336 para. 3.a.
3 Poudret/Besson, para. 732, p. 649.
4 Poudret/Besson, para. 734, p. 650; Kaufmann–Kohler/Rigozzi, para. 7.118.
5 Cf. Rigozzi, para. 999, and the references provided therein; Kaufmann–Kohler/Rigozzi, para. 7.117.
6 Cf. BGE 128 III 234 para. 3.b)aa). Cf. also Mavromati/Reeb, Art. R46, para. 19; Kaufmann-Kohler/Rigozzi, para. 7.118.
7 Cf. Art. R54, paras. 5–6 above.
8 This provision was inserted with the 2010 revision of the CAS Code to codify the CAS's consistent practice in this respect, cf. Reeb, *Modifications essentielles*, p. 7. According to Mavromati/Reeb, Art. R46, para. 23, *"if a dissenting opinion […] is filed with the CAS Court Office, it is sent back to its author and is neither notified to the parties nor included in the file"*.

drafting a dissenting opinion and communicating it to the parties directly. If the dissenting opinion is motivated by the fundamental need to express the dissenter's inability to adhere to a reasoning or a decision he or she cannot approve of, or a genuine disagreement on matters of principle that could not be expressed in the award itself, it is submitted that the CAS should tolerate the communication of the opinion and refrain from taking any measures pursuant to Art. S19.[9] In most cases, CAS awards do not mention whether the decisions they contain were taken unanimously or only by a majority of the panel.[10] That said, when an arbitrator is really uncomfortable with one (or more) section(s) of the award, he or she will be allowed to request that the relevant passage(s) specifically mention(s) the fact that the decision(s) set out therein was (were) taken by "the majority of the panel".[11] Conversely, in some cases, the panel might also want to indicate expressly in the award that some important decision(s) was (were) made unanimously, in order to underscore the strength of its members' conviction and adhesion to the solution(s) adopted.[12]

III FORM AND CONTENTS OF THE AWARD

5 Article R59(1) states that the award "shall be written, dated and signed". Neither the CAS Code nor the PILS[13] contain any other mandatory requirements with respect to the contents of the award. This notwithstanding, the CAS makes sure that its awards always contain, in addition to the date of the award and (at least) the required signature(s), also the other *elements that are essential to the award's correct understanding and enforcement*, in particular the parties' and the tribunal members' names, the seat of the arbitration, the object of the dispute and the arbitrators' decision(s) with respect to such object.[14]

9 Art. S19 provides that *"CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS. ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if he violates any rule of this Code or if his action affects the reputation of ICAS/CAS"*.

10 Given the principle of the secrecy of deliberations (Supreme Court Decision of 12 November 1991, para. 1b/bb), it is thus impossible to know whether all members of the panel agreed or not. This notwithstanding, Mavromati/Reeb indicate, at Art. R46, para. 22, that *"[i]n the vast majority of CAS awards rendered by a three-member Panel, the decision is taken unanimously"*.

11 Cf., for instance, CAS 2005/A/726, *Calle Williams v. IOC*, Award of 19 October 2005, para. 2.5.2, stating that "[w]hile the Panel's findings up to this point are unanimous, only a majority of the arbitrators is not "comfortably satisfied" that [the substance at issue] is a prohibited substance under the applicable rules". More recently, see, e.g., CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 195, and CAS 2014/A/3630, *Dirk de Ridder v. ISAF*, Award of 8 December 2014, paras. 123 and 133. On this point, see also Mavromati/Reeb, Art. R46, para. 23. The dissenting arbitrator cannot require that the award also indicate that the dissent was his or hers. If being identified as the dissenting arbitrator is an important issue for the arbitrator in question, then he or she will have no other choice but to issue and notify to the parties a (separate) dissenting opinion.

12 Cf., e.g., CAS 2011/A/2433, *Diakite v. FIFA*, Award of 8 March 2012, para. 159.

13 For a commentary on Art. 189 PILS ("The Arbitral Award"), see Molina, Chapter 2 (Part II) above.

14 Cf. Rigozzi, para. 1009, Poudret/Besson para. 745, p. 665.

The *signature* is an essential element of the award.[15] Since the 2013 Code revision, Art. R59(1) specifies that while (consistent with Art. 189(2) PILS) the signature of the President will suffice, where the President does not sign, the award can be issued bearing only the signatures of the two co-arbitrators. Thus, Art. R59(1) implicitly acknowledges the right of a dissenting arbitrator (whatever his role within the panel) not to sign an award with which he or she disagrees. That said, one should not automatically conclude that an award bearing only the President's or the co-arbitrators' signature(s) is the result of a majority decision.[16] In fact, when CAS awards are signed only by the panel's President this will be, more often than not, for merely practical reasons, in particular to avoid delays in dispatching the decision to the parties.[17] 6

The *date of the award* is the date of the last signature or of signature by the President,[18] and it normally corresponds to the date on which the award is communicated by courier and/or fax and/or e-mail to the parties.[19] When the dispositive part of the award was communicated to the parties prior to the reasons,[20] the reasoned version of the award should mention the first date as the date of the award, but panels generally indicate both dates.[21] 7

As far as the contents of the award are concerned, Art. R59(1) provides that it "shall state brief reasons", thus ruling out the possibility given under Swiss law for tribunals to render unreasoned awards (if so agreed by the parties).[22] In practice, *the reasoning of CAS awards is often quite detailed*. That said, reflecting the fact that CAS arbitrators originate from more than fifty countries and thus belong to different legal cultures and traditions, the drafting style of the awards – beyond the basic "standard" structure comprising (i) a factual part, (ii) a section devoted to the legal analysis, and (iii) a part setting out the operative decision – still appears to 8

15 Poudret/Besson, para. 745. That said, as noted by those same authors, the PILS does not provide for the annulment of the award based on a failure to observe requirements as to its form, including the signature requirement (*Id.*, para. 644, p. 664). Nevertheless, where the absence of (at least the president's) signature indicates that the deliberations were conducted in an irregular manner, that may lead to the award's annulment pursuant to Art. 190(2)(a) PILS.

16 However, the situation where only the two co-arbitrators sign an award which has been made unanimously is bound to be rare. One may thus surmise that this possibility has been expressly envisaged in the 2013 version of Art. R59(1) as a clarification of the fact that such an alternative is available, perhaps in reaction to cases where the President had refused to sign an award because he or she disagreed with its contents.

17 According to Mavromati/Reeb, Art. R46, para. 5 "in case of extreme urgency and in order to notify the award on time, it seems acceptable to have the operative part of the award signed exceptionally by the CAS Secretary General on behalf of the Panel, provided that the award signed by the President of the Panel be sent shortly thereafter." This practice, which is questionable as a matter of principle, should be followed only when the President of the Panel is unable to sign in time after scrutiny, for instance because this would require him or her to take a long distance flight.

18 Cf. Mavromati/Reeb, Art. R46, para. 7.

19 Cf. para. 16 below.

20 Cf. para. 13 below.

21 Cf., for instance, CAS 2011/A/2495/2496/2497/2498, *FINA v. Cielo Filho et al. & CBDA*, Award of 29 July 2011 at the end (operative part issued on 21 July 2011). More recently, e.g., CAS 2015/A/4129, *Demir Demirev et al. v. IWF*, Award of 6 October 2015 (operative part issued on 25 August 2015). See also Mavromati/Reeb, Art. R46, paras. 6–7. As to the date that triggers the time limit to file an action to set aside, cf. para. 14 below.

22 Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2, Part II), paras. 77 and 99.

be rather heterogeneous.[23] In practice, CAS awards systematically contain a section summarizing the procedural history and a comprehensive discussion of the arguments raised by the parties. Although neither of these requirements is mandatory at law, both contribute to reinforcing the parties' confidence in the system. They also facilitate the understanding (and acceptance) of awards, and participate in generating a consistent corpus of jurisprudence, in particular in disciplinary cases.[24]

9 The *actual drafting* of the award may be done entirely by the President of the panel or shared between its members. Quite often, the CAS Counsel in charge of the case or the ad hoc clerk, when one is appointed,[25] will provide substantial assistance to the panel in this respect.

IV SCRUTINY

10 According to Art. R59(2), "[b]efore the award is signed, it shall be transmitted to the CAS *Secretary General* who *may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle*". In a case where he was called as a witness, the Secretary General has explained that "his intervention […] only relates to matters of pure form (clerical mistakes, standardization of style with other CAS awards, etc.) and that he might draw the Panel's attention to CAS case law when the award to be rendered is manifestly not in line with such case law" but that "*his advice is not binding on the arbitrators*".[26]

11 This practice is certainly sensible to the extent that it *promotes consistency in the case law*.[27] However, it is submitted that it would be preferable for the CAS Court Office (or the CAS Counsel in charge of the case) to draw the arbitrators' attention to any relevant (unpublished) decisions already in the course of the proceedings,[28] so that the parties can be invited to comment on such decisions. It is undeniably *disconcerting to find, in an award, references to "precedents" whose very existence was hitherto unknown* to the parties (or at least one of them).

12 In any event, the CAS *Secretary General shall not intervene in the arbitrators' deliberations*. The Secretary General should thus systematically make it clear for the arbitrators, in particular those who are less experienced, that his advice is not binding on the panel. It is understood that the Secretary General's scrutiny is particularly thorough with respect to the costs of the arbitration, including the award of legal costs, to ensure that the CAS policy in this respect[29] is followed.

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23 In particular, the difference between the "continental" (civil law) style, which tends to remain relatively impersonal, and the common law style, with its direct, more personal discourse, is still quite perceptible in the awards issued by the CAS.

24 Cf. Rigozzi, paras. 1013–1014, with the references.

25 Cf. Art. R54(4).

26 CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para. 120. On this issue, cf. also BGer. 4A_612/2009 para. 3.3. See, further, Mavromati/Reeb, Art. R46, paras. 25–26, describing the "standard process for the review of CAS awards" by the CAS Secretary General.

27 Rigozzi, paras. 1260–1268.

28 Rigozzi, para. 1269.

29 Cf. Arts. R64 and R65 below.

V NOTIFICATION AND COMMUNICATION

Article R59(3) provides that "[t]he Panel may decide to *communicate the operative part of the award to the parties, prior to the reasons*". It is submitted that this possibility should be used only in exceptional circumstances, when the parties need certainty as to their legal position without delay, and the panel is not in a position to issue at least "brief reasons". Indeed, experience shows that it is during the drafting process that the arbitrators might realize that their initial decision is not necessarily legally justifiable or that the operative part should at least be nuanced.[30] 13

While the second sentence of Art. R59(3) provides that the award is *immediately enforceable* (i.e., upon communication of its operative part), the *time limit to file an action to set aside* before the Swiss Federal Supreme Court can only start to run with the notification of the *complete award*.[31] This however does not prevent a party from initiating setting aside proceedings as soon as it receives the operative part, for the purpose of requesting a stay of the award.[32] 14

Article R59(5) provides that "[t]he operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel".[33] In practice, the Code-prescribed *time limit to communicate the award* is very rarely met, and Art. R59(5) enables the CAS to deal with this by adding that "such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel". As a matter of fact, the time limit is generally extended *sua sponte* by the CAS along the lines of, for instance, the practice of the ICC Court.[34] Experience shows that the time limit may even be formally extended after it has already elapsed. In itself, this is unproblematic since, as a matter of Swiss law, the time limits set in arbitration rules are indicative and procedural in nature (so-called "*délais d'ordre*"), meaning that their expiry does not affect the validity of the arbitral proceedings or give rise to a ground for challenging the award.[35] 15

According to Art. R59(4) the award is "notified by the CAS Court Office". In practice the *CAS first communicates the award by fax* (*or, increasingly, by email)*[36] with a cover 16

30 See also Mavromati/Reeb, Art. R46, para. 15.

31 Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2), paras. 39–40.

32 Rigozzi, *JIDS 2010*, p. 225. See also Kaufmann-Kohler/Rigozzi, para. 8.98. By contrast, the enforcement courts will likely require the filing of at least the signed original version of the dispositive part of the award (see Art. IV(1)(a) NYC)). See also para. 16 below.

33 Cf. Art. R54(3). Prior to the 2010 revision of the Code, Art. R59 provided that the award was to be rendered within four months from the filing of the statement of appeal. As explained by Reeb, *Modifications essentielles*, p. 7: the amendment introducing a time limit running from the transfer of the file to the panel was made to avoid the difficulties resulting from the delays incurred in connection with the first stages in the proceedings (which are beyond the control of the arbitrators), in particular the panels' formation, the determination of the language of the proceedings, if disputed, and the payment of the advances of costs by the parties. See also Mavromati/Reeb, Art. R59, paras. 74–75.

34 Cf. below commentary on Art. 30 ICC Rules (Chapter 17, Part II), paras. 9–14.

35 Kaufmann-Kohler/Rigozzi, para. 7.170. Cf. also BGer. 4P.196/2003 para. 5. That said, it may be advisable for the CAS to ensure that its awards contain an indication of the fact that the original time limit has been duly extended, in particular for enforcement purposes, in cases where the award is issued much later than the expiry of the said time limit.

36 Cf. Art. R31(2) above, providing that "arbitration awards, orders and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail

letter indicating to the parties that they "will receive an original copy of the award in due course". While the award becomes binding for each party upon receipt of its faxed/emailed version, it is the date of *receipt of the signed original that constitutes the starting point of the 30-day time limit for bringing setting aside proceedings* before the Swiss Federal Supreme Court and for the award's enforceability.[37] This has now been clarified in the Code itself, with an amendment introduced in Art. R59(4) (and Art. R46(3)) in 2016, specifying that "recourse [against the award] is available […] pursuant to Swiss Law within 30 days from the notification of the *original* award" (emphasis added).

17 The latest revision of the Code, in 2017, has seen the addition of a new paragraph to Art. R59, which provides that "a copy of the operative part of the award, if any, and of the full award shall be communicated to the authority or sports body which has rendered the challenged decision, if that body is not a party to the proceedings" (Art. R59(6)).

VI EFFECT OF THE AWARD

18 Article R59(4) provides that the award shall be final and binding upon the parties. According to Art. 190(1) PILS, "the award shall be final when communicated". Hence, *a CAS award will have res judicata effect and shall be binding* upon the parties as soon as its operative part is communicated to them (by courier and/or fax and/or e-mail, in accordance with Art. R31). Once the original, signed version is notified, the award can be immediately enforced in Switzerland and abroad, unless the Swiss Supreme Court grants an order to stay the award pending setting aside proceedings.[38]

19 Article R59(4) also states that the award "may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration". This provision merely restates Art. 192(1) PILS. Hence, to be valid, a waiver agreement of this kind must *meet the requirements set out in the Swiss Federal Supreme Court's case law relating to Art. 192(1) PILS*,[39] according to which the waiver must be in express terms and "indisputably manifest" the parties' "common intention to waive all future setting aside proceedings".[40] Similar waivers contained in the regulations

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but at least in a form permitting proof of receipt".

37 Indeed, according to the Swiss Federal Supreme Court (cf. BGer. 4A_392/2010 para. 2.3; BGer. 4A_604/2010 para. 1.3), the faxed (or e-mailed) award cannot be considered as "signed" and validly notified within the meaning of Art. R59. As mentioned (footnote 32 above), the faxed (or e-mailed) version of the award will also not meet the requirements of Art. IV NYC.

38 Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2, Part II), para. 59; cf. also footnote 32 above. On the grounds and proceedings for annulment of awards before the Swiss Supreme Court, see in particular Arroyo, above commentaries on Art. 190 and 191 PILS and Kaufmann-Kohler/Rigozzi, paras. 8.01–8.205. See also Mavromati/Reeb, Art. R46, paras. 12–69.

39 Cf. BGer. 4P.62/2004 para. 1.2 at the end; BGE 131 III 173 para. 4.2. For a recent analysis of the requirements for a valid waiver under Art. 192(1) PILS, see Kaufmann-Kohler/Rigozzi, paras. 8.49–8.75.

40 English translation of the topical passage in BGE 131 III 173 para. 4.2.3.1 as set out in BGE 133 III 235 para. 4.3.1; *Swiss Int'l Arb.L.Rep. 2007*, p. 80. More recently, see, e.g., BGer. 4A_93/2013 para. 3. For a discussion on the requirement for an express agreement and the ineffectiveness of indirect waivers, cf. Kaufmann-Kohler/Rigozzi, paras. 8.56–8.59.

of a sports-governing body or in the entry forms that have to be signed in order to participate in a competition are, according to the Supreme Court, unenforceable with respect to challenges against CAS awards rendered in appeals proceedings opposing the sports-governing body to an athlete or club.[41]

VII PUBLICITY OF THE AWARD

20 According to Art. R59(7), the "award, a summary and/or a press release setting forth the results of the proceedings shall be *made public by CAS, unless both parties agree that they should remain confidential*".[42] Unless the parties have agreed to keep the award confidential, the award is public irrespective of any 'official' publication by the CAS.

21 In practice, the CAS will ask the parties, in the cover letter accompanying the faxed (or emailed)[43] version of the award, to confirm that the award can be published. It is very unlikely that the winning party will agree to confidentiality as it will, naturally, wish to capitalize on the publication of the decision.[44] *When the award contains sensitive and/or personal information*, the CAS will specifically ask the parties whether they "consider that any of the information contained in the award should remain confidential", informing them that, if such should be the case, "they should send a request, with grounds, to the CAS" within a given time limit, "in order that such information could potentially be removed, to the extent such removal does not affect the comprehension of the decision".[45] If a party can show *good reasons to have certain information or portions of the award redacted*, it is submitted that the CAS need not have the agreement of all the parties in order to do so.

22 While Art. R59(7) provides that the non-confidential awards "shall be made public by the CAS", *only a limited number of awards are actually published*, as of their issuance, on the CAS website,[46] nor are all awards made available in the *CAS*

41 Cf. BGE 133 III 235 para. 4.3.2.2. Cf. also Rigozzi, *JIDS 2010*, pp. 226–227. For an example where the waiver was deemed valid in the context of setting aside proceedings against a sports arbitral award, cf. BGer. 4A_232/2012 (award issued by the Basketball Arbitral Tribunal in a contractual dispute).

42 Cf. also CAS 99/A/246, *W. v. FEI*, Award of 11 May 2000, para. 34. Since its 2013 edition, the Code specifies that "in any event, the other elements of the case record shall remain confidential". According to Mavromati/Reeb, Art. R59, para. 78, this "clarification was necessary as third parties (including tribunals) often requested the CAS to disclose elements of the file." For a recent case involving an allegation that the outcome of a CAS case had been leaked to the press prior to the issuance of the award to the parties, see BGer. 4A_510/2015 (where the Supreme Court found that the petitioner had failed to establish both the occurrence and the source of the alleged leak, and noted that in any event a breach of the arbitrators' duty of confidentiality would not *per se* entail the annulment of the award).

43 As noted above, according to Art. R31(2), arbitration awards "shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt". The first transmission of the award to the parties (prior to the dispatch of the signed original by courier) usually occurs by fax, or – in the more recent practice – by email.

44 Cf. also Mavromati/Reeb, Art. R59, para. 77.

45 E.g. CAS 2011/A/2425, *Fusimalohi v. FIFA*, letter accompanying the Award of 8 March 2012.

46 See <http://www.tas-cas.org/en/jurisprudence/recent-decisions.html>.

database.[47] This selective publication practice is unfortunate[48] for various reasons: (i) it is fundamentally at odds with the very concept of a "CAS jurisprudence", the existence and consistency of which has been referred to by the Swiss Federal Supreme Court as one of the reasons that can justify the existence of a closed list of arbitrators in CAS proceedings;[49] (ii) it gives an advantage to lawyers who regularly act before the CAS (not to mention lawyers from the same firm as a CAS arbitrator), as they will inevitably be informed of, and have access to, a wider pool of decisions and precedents; (iii) it might create an impression of lack of transparency.

23 While the CAS has seemingly stopped publishing periodical volumes of *digests* of its awards,[50] its *Bulletin*, a publication which in the past was circulated only to CAS arbitrators, is now available on the internet for downloading.[51] In addition, an increasing number *of digests and reports on CAS awards* are published in various academic arbitration and sports law journals, in particular the *Journal du droit international* (JDI),[52] the *Revue de l'Arbitrage* (Rev.Arb.),[53] the *Paris Journal of International Arbitration/Cahiers de l'arbitrage*,[54] the *International Sports Law Review* (ISLR),[55] the *International Sports Law Journal* (ISLJ),[56] and, starting in 2016, the *Yearbook of International Sports Arbitration* (YISA).[57]

24 Article R59(7) also allows the CAS to issue a press release together with or in lieu of the publication of the award. Given the increased attention devoted by the media to CAS disputes, it is submitted that the contents of the *press statement issued by the CAS* should be agreed (or at least discussed) with the parties prior to its issuance. If the parties cannot agree, the press release should at least be drafted with the

47 See < http://jurisprudence.tas-cas.org/Help/Home.aspx > . In addition, as noted in the previous edition of this commentary, the uploading of awards in the CAS's "searchable" database seems to occur only quite some time after their issuance. That said, the frequency and number of uploads seems to have increased recently, with the result that more awards, both old and more recent, are now available in the database's archives.

48 Cf., in particular, Rigozzi, paras. 1259–1269.

49 BGE 129 III 445 para. 3.3.3.2. On the CAS list of arbitrators, cf. Introduction to the CAS Code (Part I), paras. 5–11 above.

50 Cf. *CAS Digests I, II and III*.

51 Available at < http://www.tas-cas.org/en/bulletin/cas-bulletin.html > from the 2010 issue onwards. Each issue of the CAS Bulletin contains several articles and commentaries, a series of reports and summaries of recent CAS awards, under the title "Leading Cases", and a section devoted to the Swiss Federal Supreme Court's case law relating to CAS awards, as well as miscellaneous information on the CAS activities and CAS-related publications and news.

52 Featuring a digest with commentaries, published almost every year since 2001 by Eric Loquin, together with Dominique Hascher and/or Gérald Simon, and, more recently, Johanna Guillaumé, under the title "Tribunal Arbitral du Sport, Chronique des sentences arbitrales".

53 Digest under the editorship of Mathieu Maisonneuve with commentaries by various contributors, including Sébastien Besson, Cécile Chaussard, Francis Kessler, Marc Peltier and Gérald Simon, published yearly under the title "Chronique de jurisprudence arbitrale en matière sportive".

54 Published regularly in the then Cahiers de l'arbitrage, under the title "Chronique de jurisprudence en matière d'arbitrage sportif", by Andrea Pinna and Antonio Rigozzi, then continued in the Paris Journal of International Arbitration by Antonio Rigozzi and Ulrich Haas.

55 See in particular the insert "Switzerland – Anti-doping Reports", by Antonio Rigozzi, Marjolaine Viret and Emily Wisnosky.

56 Both the ISLR and the ISLJ regularly feature reports on individual CAS cases or on the decisions rendered during particular events, such as the Olympic Games. Cf., for instance, Beloff, *ISLR 2009*, pp. 3–11.

57 Co-edited by Antoine Duval and Antonio Rigozzi, the Yearbook aims to be the first comprehensive annual review devoted exclusively to sports arbitration. The first volume, published in 2016, covers the decisions rendered in 2015.

involvement of the panel that rendered the award, bearing in mind that journalists will, in most cases, not bother to read the full award, but simply (and sometimes selectively) copy-paste the contents of the press release(s).[58] Inaccurate media coverage can cause a great deal of harm to athletes, whose entire career may be at stake in a CAS decision. Moreover, in high profile cases, the CAS Secretary General has recently started the practice of giving a *press conference*. This is an unprecedented step by an arbitral institution and a new development in the area of arbitration law. While it is true that media attention needs to be addressed and dealt with, including by adopting an efficient communication policy, it is submitted that such a policy ought to be carefully considered and that clear rules governing its various aspects should be set out, ideally in the Code itself. Any such rules should, in all cases, aim at ensuring that the interests of the parties themselves always prevail over those of the media and/or the arbitral institution.

58 According to Mavromati/Reeb, art. R59, para. 79, the CAS's practice of issuing media releases "was mostly developed in order to avoid misinterpretation of [the] decisions, e.g. when a party makes unilateral statements to the press, and in order to give the parties an objective statement that they can use for their own communication."

D. Special Provisions Applicable to the Consultation Proceedings (Arts. R60 – R62, R66)

1 Articles R60 to R62 and R66 of the Code, governing the so-called CAS "consultation" or "advisory proceedings"[1] (the "C" proceedings) were *abrogated by a decision of the ICAS, with effect from 1st January 2012*. As noted in the comments released by the CAS Secretary General upon the entry into force of the revised Code,[2] the reasons for abrogating these provisions were, on the one hand, that recourse to the advisory procedure had been declining since the second half of the 1990s,[3] and on the other, that the requests for advisory opinions lodged in recent years tended to deviate from the original purpose of the procedure, which was to provide sports organizations with the opportunity to seek a "neutral" legal opinion from the CAS to help them resolve questions of interpretation or difficulties arising from conflicting sports rules.[4]

2 According to the CAS Secretary General's comments, in the more recent cases, advisory *opinions were requested with respect to questions which also made the object of pending or impending contentious proceedings*, with the sole purpose of obtaining an authoritative opinion which, even if it had no binding force, would undoubtedly have "a certain influence" on the outcome of the contentious proceedings involving the same question.[5] This gave the sports-governing bodies an undue advantage since, under Art. R60, athletes were not habilitated to request such advisory opinions,[6] but could only insist on the fact that the opinions issued upon request by a governing body were (i) non-binding and (ii) not necessarily persuasive, as they were rendered only on the basis of the materials and arguments provided by the party requesting the opinion.[7]

3 As reported in the CAS Secretary General's comments, in taking its decision to abrogate the provisions on the advisory procedure, the ICAS found that *CAS ordinary proceedings were just as suitable* to allow parties in disagreement over the interpretation of a given sports regulation to request an opinion from the CAS, with the difference that in such cases the resulting pronouncement would be embodied in a binding award,[8] and be rendered with the benefit of having heard arguments

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1 For a discussion of the practice and procedure of CAS advisory proceedings, cf., e.g., McLaren, *Advisory Opinions*, pp. 180–193.

2 Reeb, *Modifications essentielles*, pp. 9–10.

3 Cf. the table of statistics related to cases submitted to CAS since its creation, available at < http://www.tas-cas.org/d2wfiles/document/437/5048/0/statistics202011.pdf > .

4 The advisory procedure, which had been in existence since the very inception of the CAS, enabled CAS panels or sole arbitrators to give opinions on any questions of law or general interpretation related to sports activities. These opinions were rendered in the same format as CAS awards, but as provided in Art. R62, did not have binding force. For an example of an important advisory opinion rendered by the CAS under this procedure, cf. CAS 2005/C/976 & 986, *FIFA & WADA*, Advisory Opinion of 21 April 2006.

5 Reeb, *Modifications essentielles*, pp. 9–10. Cf. also McLaren, *Advisory Opinions*, p. 181. For an example of a situation of this kind, cf. CAS 2009/A/1870, *WADA v. Jessica Hardy and USADA*, Award of 21 May 2010, paras. 40–49.

6 Indeed, as is apparent from the text of Art. R60, first sentence, only certain sports-governing bodies and organizations were authorized to file such requests.

7 In addition, this had an inevitable impact on the quality of the opinions and, indirectly, on the (perceived) independence of the system.

8 Reeb, *Modifications essentielles*, pp. 9–10.

from both sides. A recent example of this latter solution can be found in the matter CAS 2011/O/2422, *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)*,[9] based on a joint request for arbitration filed by the USOC and the IOC, concerning the validity of the "Regulations Regarding Participation in the Olympic Games – Rule 45 of the Olympic Charter" (the so-called "Osaka Rule").

9 Cf. Award of 4 October 2011, finding that the Osaka Rule is invalid and unenforceable. Interestingly, however, a very similar question was subsequently submitted to the exact same panel in the matter CAS 2011/A/2658, *British Olympic Association (BOA) v. World Antidoping Agency (WADA)*, this time filed as appeals proceedings, arising from BOA's appeal against WADA's decision declaring BOA's By-Law on the selection of British athletes for the Olympic Games to be non-compliant with the WADA Code (cf. Award of 30 April 2012, upholding WADA's decision).

E. Interpretation (Art. R63)

Article R63: Interpretation

A party may, not later than 45 days following the notification of the award, apply to CAS for the interpretation of an award issued in an ordinary or appeals arbitration, if the operative part of the award is unclear, incomplete, ambiguous, if its components are self-contradictory or contrary to the reasons, or if the award contains clerical mistakes or mathematical miscalculations.

When an application for interpretation is filed, the President of the relevant Division shall review whether there are grounds for interpretation. If so, he shall submit the request for interpretation to the Panel which rendered the award. Any Panel members who are unable to act at such time shall be replaced in accordance with Article R36. The Panel shall rule on the request within one month following the submission of the request for interpretation to the Panel.

I PURPOSE OF THE PROVISION

1 In line with other sets of arbitration rules,[1] the Code affords parties to CAS arbitrations the possibility of requesting the interpretation of the awards rendered by panels operating under *both the ordinary and appeals arbitration procedures*. The purpose of this type of provision is that of facilitating the performance and enforcement of the award, by making room for "remedial action" by the tribunal itself in those cases where the award may be deemed deficient due, for instance, to unclear wording or clerical mistakes. As illustrated by the discussion below, the rules governing this type of remedy endeavor to reconcile this objective with two fundamental principles of international arbitration, namely the *res judicata* effect of awards, and the principle according to which arbitral tribunals are *functus officio* once they have rendered their award.

2 Article R63 *provides the legal basis for the CAS panels' power to interpret (and/or correct) their awards*: it defines the circumstances in which an application for interpretation (and/or correction) may be made with the CAS (II.) and the procedure that will be followed in dealing with it (III.). The following sections will also address Art. R63's distinctive features, compared to similar provisions in other sets of arbitration rules, and its relationship with other post-award remedies (IV.-V.).

II TRIBUNALS' POWER TO INTERPRET AND/OR CORRECT THEIR AWARDS

3 It is a well-established principle that, absent an agreement to the contrary, the power of arbitrators to correct and/or interpret their award is *governed by the law of the seat of the arbitration*.[2] Pursuant to Art. R28, in CAS arbitral proceedings,

1 Cf., e.g., Art. 35 ICC Rules; Art. 35 Swiss Rules; Art. 37 UNCITRAL Rules.
2 Cf. Born, §24.03[B] and § 24.04[B].

this will be Chapter 12 of the PILS (or Part 3 of the ZPO when the arbitration is domestic).[3] Contrary to other arbitration statutes,[4] including the ZPO,[5] the PILS contains no provision on the interpretation of awards or similar forms of "post-award remedies", such as correction and supplementation. Nevertheless, it is well-settled that international arbitral tribunals siting in Switzerland do have the inherent power to correct or interpret their awards.[6] The conditions for the exercise of such power are primarily governed by *the parties' agreement*.[7] In practice, the parties' agreement will be expressed in an indirect manner, by reference to any relevant provisions in the applicable arbitration rules.

4 In CAS arbitrations, the arbitrators' residual powers with respect to their awards are set out in Art. R63. The heading of Art. R63 only speaks of interpretation, but as its text makes clear, this *provision also deals with the correction* of awards, to the extent it allows the parties to request the panel's intervention where "the award contains clerical mistakes or mathematical miscalculations". The distinction between interpretation and correction is not always clear-cut. In practical terms, a request for *interpretation will aim at obtaining a clarification* of the meaning of a given term, expression or passage in the award,[8] whereas *the purpose of a request for correction is to seek the rectification* of its text.[9] Be that as it may, what matters is that the remedies of interpretation and correction are both meant to help elucidate the intent of the tribunal in rendering its original award, i.e., "to restore the true meaning of the award"; they are not means to obtain a new, different decision from the arbitrators.[10]

5 Article R63 specifies that a request for interpretation can be made with respect to "the *operative part of the award*" ("*le dispositif de la sentence*"). The operative part of an award contains the substantive ruling rendered by the panel on the parties' claims, as opposed to the discussion of the underlying facts and arguments and the panel's reasoning in reaching its decision. However, under Swiss law, the operative part of the award may need to be interpreted in light of the reasons.[11] Hence, Art. R63

3 Cf. Art. R28.

4 Cf., e.g., Art. 1058 of the German ZPO.

5 Under the heading "Rectification, interpretations and completion of the award", Art. 388 ZPO reads as follows: *"1. Each party can apply to the arbitral tribunal for it to: a) rectify clerical mistakes and errors of calculation in the award; b) interpret specific passages in the award; c) render an additional award regarding claims which were raised in the arbitral proceedings but not addressed in the award. 2. The application must be made within 30 days of discovering the error or parts of the award that require an additional ruling, but at the latest one year after notification of the award. 3. The time limits for filing an appeal continue to run notwithstanding the application. If a party suffers detriment from the rectification or interpretation, the time limit for appeal starts again"*.

6 BGE 126 III 524. On this decision, cf. Kaufmann-Kohler/Rigozzi, *Jusletter of 19 March 2001*. The same is true of the power to render additional awards, briefly discussed below at para. 16.

7 Art. 182(1) PILS; Art. 373(1) ZPO.

8 The purpose of interpretation is to explain more clearly what a (possibly ambiguous or obscure) statement in the award is intended to mean, without however altering it.

9 As suggested by the text of Art. 388(1) ZPO, this will concern *"clerical mistakes and errors of calculation"*, i.e., errors of typographical, computational or similar nature, but not errors in the reasoning or errors of law. Contrary to interpretation, a correction of the award does entail an alteration of the text.

10 Kaufmann-Kohler/Rigozzi, *Jusletter 19 March 2001*, p. 4.

11 BGE 128 III 191 para. 4a.

correctly provides that interpretation (and/or correction) can also be required when components of the award's operative part "are […] contrary to the reasons".

6 *Any type of award*[12] can make the object of a request for interpretation or correction. Thus, awards on jurisdiction, other interim awards, partial and final awards as well as consent awards may be the object of a request under Art. R63.[13]

7 The surprisingly liberal language of Art. R63, which used to provide (until it was amended in the 2013 edition) that a request for interpretation could be made "whenever" the operative part or the award itself was deficient in the sense outlined above, now reads, more plainly, that such requests may be made "*if* the operative part of the award is unclear, incomplete, ambiguous, *if* its components are self-contradictory or contrary to the reasons, or *if* the award contains clerical mistakes or mathematical miscalculations". Regardless of the adverb used, the correct reading of this provision is that it constitutes an exception to the general rule that awards are final and binding for the parties and the tribunal. Arguably, this is also the rationale of Art. R63(2), which invests the President of the relevant Division with the authority to review any such request and decide "whether there are grounds for interpretation" before forwarding the request to the panel.[14]

III PROCEDURE

A Time Limit

8 Until the 2013 edition of the Code, the most striking aspect of Art. R63 was that it did not set out a time limit for the filing of requests for interpretation or correction. Virtually all institutional rules (and the statutes that contain provisions on interpretation/correction) provide for a short time limit, generally of one month or thirty days, either from the issuance of the award or from its receipt, upon the expiry of which the parties may no longer request an interpretation or correction (and the tribunal, being definitively *functus officio*, no longer has the power to rule on such a request).[15] *Art. R63 now provides for a 45-day time limit to file such requests*. While one could argue that an (even) longer time limit may be warranted due to the fact that errors or ambiguities in the award could become apparent only at the time of its execution or enforcement,[16] this is a welcome change, consistent with the fundamental principle of the finality of arbitral awards and the need for legal certainty, which is of paramount importance in competitive sports.

12 Or, whatever its denomination, any final and binding decision disposing of some or all claims with *res judicata* effect.

13 Cf. for instance, BGE 130 III 755 para. 1.3; Knutson, *J.Int.Arb. 1994*, p. 107.

14 Cf. below, para. 9.

15 Cf., e.g., Arts. 35(1) and 36(1) Swiss Rules.

16 In CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, e.g., where a request filed more than one year after the rendering of the award was admitted (at a time when the rules did not specify a time limit), the need for interpretation only became apparent when the athlete was granted his requests for the stay of the execution of the award in the context of challenge proceedings. The grant of the stays had the effect of rendering otiose (in French, "*caduque*") the portion of the operative part of the award that, in addition to the total duration, set out the exact date range of his suspension for an anti-doping rule violation (cf. Decision of 9 March 2007 (reported in *Dictionnaire du droit permanent* (Update 47), pp. 3488–3489).

B Decision by the Division President

According to Art. R63, when an application for interpretation or correction is filed with the CAS,[17] the President of the relevant Division shall "review whether there are grounds for interpretation [or correction]" (in French, "*examine s'il y a lieu à interpretation [ou correction]*"). Only if the Division President comes to a conclusion in the affirmative upon such review will the request be submitted to the panel or the sole arbitrator who rendered the award. In this respect too, *Art. R63 differs from its counterparts in the majority of the other institutional rules*. The Swiss Rules, for instance, simply require for the Secretariat (as well as the other party or parties) to receive "notice" of a request for correction or interpretation,[18] which is formally addressed to the tribunal itself: there is no provision for the Secretariat to "review" the form or merits of the request before forwarding it to the tribunal.[19] 9

In practice, the *Division President will issue a formal decision only if he or she comes to the conclusion that there is no ground for interpretation or correction*. The Division President does not need to consult the other party or parties prior to making his or her decision,[20] but can surely decide to do so if he or she deems it appropriate under the circumstances. In our experience, the practice with respect to such decisions is rather inconsistent: some are reasoned[21] while others are not at all.[22] The CAS Code does not indicate whether decisions by the Division President refusing to entertain a request for interpretation or correction can be appealed, even if they do not qualify as awards. It is submitted that the contrary view supported in the previous edition of this commentary would deprive the parties of their right to judicial review.[23] 10

C Procedure before the Panel

If the Division President decides that the request should be submitted to the panel, *in case one or more of the members of the original panel are no longer available*, Art. R63 provides for their *replacement in accordance with Art. R36*. This provision is in line with the practice followed under other arbitration rules.[24] 11

Although Art. R63, contrary to analogous provisions in other arbitration rules,[25] does not expressly mention that the *other party or parties should be afforded an opportunity* 12

17 It may be worth noting here that, contrary to other arbitration rules (cf., e.g., Art. 35(1) ICC Rules; Art. 36(2) Swiss Rules)), Art. R63 does not state that the CAS may correct errors in the award *sua sponte*. According to Mavromati/Reeb, Art. R63, paras. 5–6, *"it should be possible for the CAS Court Office to (unofficially) proceed to [correct] purely clerical mistakes [e.g., date, docket number, etc. …] if they are discovered after the notification of the award"*.

18 For a commentary on Art. 35 Swiss Rules, see Courvoisier, Chapter 3 (Part II) above.

19 Similarly, under the ICC Rules (Art. 35(2)), the Secretariat will merely proceed to transmit the application for correction or interpretation to the Tribunal.

20 Indeed, if the request is granted, the other party or parties will be consulted by the panel. Cf. below, para. 12.

21 CAS 2007/A/1396&1402, *WADA v. RFEC & V.* and *UCI v. Federation R. & V.*, Decision of 9 July 2010. See also CAS 2006/A/1117, *C. FC v. E. FCE FC*, Decision of 5 April 2007, reproduced as Annex [A] in Mavromati/Reeb, Art. R63.

22 CAS 2009/A/1816, *FC M. v. V.*, Decision of 12 May 2010.

23 This question has not yet been decided by the Supreme Court, which left it open in BGer 4A_420/2010 para. 3 (Valverde's case).

24 Cf. Veit, para. 3 at Arts. 35–36 Swiss Rules, p. 309.

25 Cf., e.g., Art. 35(2) ICC Rules.

to comment on an application for interpretation, it is submitted that this should always be the case, as failing to do so would amount to a breach of due process. As far as we are aware, the practice of the CAS is indeed to forward the request to the other party or parties, fixing a short time limit for them to file their comments.[26]

13 Article R63(2) at the end sets a *time limit for the panel to rule* on the application for interpretation, namely one month following the submission of the request to it. The CAS Court Office should thus make sure that both the Division President and, as the case may be, the panel, react swiftly when seized with such a request.

D Decision Rendered

14 If the panel concludes that the award should be interpreted or corrected, its decision will form an *integral part of the original award*, a principle that is expressly stated in some arbitration rules,[27] but not in the CAS Code.[28] This means, in particular, that the requirements of Art. R59 will apply to such a decision.[29]

E Costs Issues

15 Some institutional rules allow for the charging of additional fees in relation to the work performed by the arbitrators in rendering a decision on interpretation/correction (provided, however, that the need for such a decision is not attributable to the tribunal's own negligence).[30] The CAS Code is silent on this point. While it may be sensible not to rule out this possibility, we would submit that, in appeals cases, additional costs should be applied only *when the request gives rise to particularly complex questions* or turns out to be abusive.

IV ADDITIONAL AWARDS AND REVISION

16 Although the PILS contains no express provision on the arbitrators' power to render *additional awards*, commentators agree that even where the arbitration rules adopted by the parties are silent in this respect (as is the CAS Code), *a request for*

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26 Cf., e.g., CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, Decision of 9 March 2007, a case involving several parties, where all submitted observations and the athlete filed additional comments thereafter.

27 Cf., e.g., Art. 35(2) Swiss Rules; Art. 35(3) ICC Rules. Cf. also BGE 131 III 164 para. 1.1.

28 The Panel in CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, Decision of 9 March 2007, expressly noted at the end of its decision that the latter's purpose was to allow for the correct execution of the original CAS award, and that it did not constitute a new arbitral award. More recently, one of the authors made a request for correction which was granted by the panel. The panel did not issue a separate decision on correction, and instead issued a new version of the award incorporating the relevant corrections (of a clerical mistake on the currency of the award), and which did not mention that there had been a request for correction. The CAS Court Office letter accompanying the newly issued award, which carried a new date, stated that the previous award was "null and void and […] replaced by the enclosed award" (CAS 2015/A/4292, *S. v. A., B. v. A. & S.*, letter and award dated 21 October 2016).

29 Cf. Art. R59, in particular paras. 5–8 above.

30 Cf. Derains/Schwarz, p. 326; Fry/Greenberg/Mazza, Art. 35, paras. 3.1279–3.1287. Art. 40(5) of the Swiss Rules, which provides that "[n]o additional costs may be charged by an arbitral tribunal for interpretation or correction or completion of its award", has been qualified in the 2012 version of the Rules by the addition of the wording "unless the circumstances justify otherwise".

such an award will be admissible.[31] An additional award is a supplemental decision rendered by the tribunal with respect to claims which were presented in the arbitral proceedings but have not been dealt with in the original award. In other words, an additional award is a means to remedy the tribunal's omission to decide on one (or more) of the claims submitted to it. Contrary to a decision on interpretation/correction, an additional award is a self-standing decision, which does not form an integral part of the original award, but complements it with one or more additional rulings with respect to the parties' claims.

While this was the case in the original CAS arbitration rules of 1984, the current CAS Code does not contemplate the possibility to file a request for the *revision* of an award. Under Swiss law, the court of competent jurisdiction to hear such requests is the Swiss Federal Supreme Court.[32] However, the Supreme Court's jurisdiction to hear applications for revision is not mandatory and the CAS itself can accept to hear such a request, provided all the parties agree to it.[33] 17

V RELATIONSHIP WITH SETTING ASIDE PROCEEDINGS

Importantly, *the filing of a request for interpretation/correction does not stay the running of the statutory time limit for challenging awards before the Swiss Federal Supreme Court*.[34] Thus, an aggrieved party wanting to initiate setting aside proceedings must be careful to file its challenge within the applicable time limit, regardless of its intention of requesting a correction or interpretation of the award from the tribunal. That said, upon filing the challenge the petitioner can also request a stay of the proceedings before the Supreme Court pending the CAS's decision on interpretation or correction if the outcome of such decision could render the challenge (or part of the challenge) against the award moot.[35] 18

The decision on interpretation/correction could itself be the object of a new request for interpretation or correction to the tribunal, or be challenged in separate setting aside proceedings.[36] Any *challenge against the decision on interpretation or correction* must, however, be strictly limited to issues arising in connection with the interpretation/correction proceedings or, as to the merits, with the subject matter of 19

31 Cf., e.g., Kaufmann-Kohler/Rigozzi, para. 7.196; Berger/Kellerhals, para. 1521, referring to BGE 126 III 254. This power is now expressly provided for in Art. 388(1)(c) ZPO.

32 For more details on the procedure for revision before the Swiss Federal Supreme Court, cf. also Rigozzi, *JIDS 2010*, pp. 255–264, and the references provided therein.

33 Cf. CAS 2000/A/270, *Meca-Medina & Majcen v. FINA*, Award of 23 May 2001; CAS 2008/A/1557, *FIGC, Mannini, Possanzini & CONI v. WADA*, Award of 27 July 2009.

34 BGE 131 III 164 para. 1.2.4.

35 Conversely, since the decision on interpretation or correction forms part of the award (cf. above, para. 14), it will also share its fate in case the latter is challenged. Thus, if the award is set aside, any decision on its interpretation or correction as may have been rendered in the meantime will also be annulled (BGE 130 III 755 para. 1.3; BGE 131 III 164 para. 1.1).

36 As the decision forms an integral part of the award, it can only be challenged to the extent the award itself is capable of being challenged (cf., e.g., Berger/Kellerhals, para. 1530). Thus, a challenge against the decision can be brought on all the grounds on which the award to which the decision is related could be challenged. This does not mean that the decision on interpretation/correction cannot be challenged independently (*contra*: Mavromati/Reeb, Art. R63, para. 12, based on an overly extensive reading of BGer. 4A_420/2010).

the decision itself.[37] In other words, a challenge against a decision on interpretation/correction "may not serve as a pretext for obtaining a review of the original award, be it because the latter had not been challenged within the applicable time limit or the motion to set aside brought against it has been declared inadmissible or rejected".[38]

20 A related question is whether in arbitrations submitted to rules which provide for the tribunal's power to interpret/correct its award, such as the CAS Code, there is an obligation for the aggrieved party to submit a request for such a remedy prior to bringing a challenge against the award itself before the Supreme Court. In a recent decision, the Supreme Court has held that this should not be the case under Swiss law.[39]

21 The principles outlined above apply *mutatis mutandis* to decisions on requests for supplemental awards, or to awards rendered by the CAS pursuant to a request for revision.

37 If the challenge is dismissed, the decision on interpretation or correction will definitively form part of the award, whereas if the decision is set aside, the award will stand in its original form.

38 BGE 131 III 164 para. 1.2.3, free translation from the French original. By analogy, see also BGer. 4A_420/2010 para. 3 (Alejandro Valverde's case), where the Supreme Court held that the rider no longer had a legal interest in challenging the decision by the President of the Appeals Division *not to admit* his request for interpretation of the CAS award sanctioning him with a two-year suspension in view of the fact that his concomitant challenge against that same award on the ground that it was affected by a contradiction between the reasons and the operative part (i.e. based on the same point that was the object of the request for interpretation) had just been dismissed (in BGer. 4A_386/2010).

39 BGE 137 III 85 para. 1.2, referring to BGE 131 III 164 para. 1.2.4.

F. Costs of the Arbitration Proceedings (Arts. R64 – R65)

Article R64: In General

R64.1

Upon filing of the request/statement of appeal, the Claimant/Appellant shall pay a non-refundable Court Office fee of Swiss francs 1'000.–, without which the CAS shall not proceed. The Panel shall take such fee into account when assessing the final amount of costs.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R64.2

Upon formation of the Panel, the CAS Court Office shall fix, subject to later changes, the amount, the method and the time limits for the payment of the advance of costs. The filing of a counterclaim or a new claim may result in the calculation of additional advances.

To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision applies *mutatis mutandis* to any counterclaim.

R64.3

Each party shall pay for the costs of its own witnesses, experts and interpreters.

If the Panel appoints an expert or an interpreter, or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.

R64.4

At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the *ad hoc* clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters.

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.

R64.5

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

I PURPOSE AND SCOPE OF APPLICATION OF THE PROVISION

1 Article R64, together with Art. R65, sets out the provisions governing costs in CAS arbitration proceedings. The purpose of this type of provision in institutional rules is to *provide advance guidance to the parties on the manner in which the costs of the arbitration will be calculated and allocated*. The indications given in Arts. R64–65, together with the applicable Schedule of Arbitration Costs,[1] help make costs-related issues more transparent and predictable for parties contemplating or involved in an arbitration before the CAS.

2 Article R64 *applies (i) to all CAS arbitrations conducted as ordinary proceedings, as well as (ii) to appeals proceedings against decisions that were not issued by international federations or that were issued by international federations but are not disciplinary in nature*[2] *and, (iii) in particular when the federation which has rendered the challenged decision "is not a signatory to the [Paris] Agreement constituting the ICAS"*,[3] to appeals proceedings against decisions issued by international federations in disciplinary matters, *when the President of the Appeals Division so decides*.[4]

3 In CAS proceedings, the costs of the arbitration include the CAS Court Office fee (II.), the administrative costs of the CAS and the costs and fees of the arbitrators, as well as, where relevant, the costs and fees of, e.g., any expert(s) or interpreters appointed by the panel (III.). In addition, the parties will incur costs for their legal representation and other expenses in connection with the proceedings (IV.). The

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1 The CAS Schedule of Arbitration Costs, last updated on 1 January 2017, can be found on the CAS website, at < http://www.tas-cas.org/en/arbitration/arbitration-costs.html > .

2 The costs of appeals proceedings against decisions which are of a disciplinary nature and rendered by an international federation are governed by Art. R65.

3 This provision, introduced in 2013, is understandably meant to avoid that sports governing bodies which do not contribute to the financing of the ICAS take advantage of free of charge proceedings before the CAS. A list of such governing bodies is nowhere to be found but it is common knowledge that the Fédération Internationale de l'Automobile (FIA) and the International Golf Federation (IGF) are among them. See also Mavromati/Reeb, Art. R65, para. 6, footnote 9.

4 Cf. Art. R65(4), paras. 7–8 below.

evolution of the rules governing costs in CAS arbitration means that the availability of legal aid for impecunious parties has become crucially important (III. A.).

II CAS COURT OFFICE FEE

Article R64.1(1) provides that, upon the filing of the request for arbitration/statement of appeal, the claimant/appellant is required to pay a *non-refundable fee of CHF 1'000.–* before the proceedings can be set in motion. 4

Having remained unvaried since 1994,[5] the CAS Court Office fee was doubled from CHF 500.– to CHF 1'000.– in 2011. While this may appear to be a significant increase, the CAS fee remains moderate when compared with the filing fees charged by other arbitral institutions.[6] Hence, it is submitted that, even in appeals cases (save for truly exceptional circumstances), *the CAS Court Office fee does not constitute a bar to the ability to access justice* as it is still affordable for the vast majority of parties. Parties who apply for CAS legal aid[7] should be aware that this would not usually dispense them from paying the Court Office fee pending the ICAS Board's decision on their application.[8] 5

III ARBITRATION COSTS

A Advance of Costs and Legal Aid

Under Art. R64.2 the *CAS Court Office* shall request the parties to pay an advance of costs upon the constitution of the panel. The panel is not directly involved in fixing the initial advance as it will only receive the file once the advance has been paid, at least by one of the parties.[9] 6

In fixing the *amount of the advance*, the CAS Court Office will "estimate […] the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4". These costs comprise the CAS's administrative costs and the costs and fees of the panel.[10] In practice, the advance is calculated on the basis of the CAS Schedule of Arbitration Costs, which can be found on the CAS website.[11] The CAS Court Office enjoys significant discretion in fixing the advance and does not provide any explanation as to how the relevant amount has been calculated. Moreover, being an administrative decision, the Court Office's determination on the advance cannot 7

5 Reeb, *Modifications essentielles*, p. 10.

6 Cf. for instance, Art. 1 of Appendix III to the ICC Rules (providing for a filing fee of USD 3'000) or Appendix B to the Swiss Rules (providing for a registration fee ranging between CHF 4'500 and CHF 8'000, depending on the amount in dispute and fixing the fee at CHF 6'000 where the amount is not quantified).

7 Cf. below, paras. 11–13.

8 Mavromati/Reeb, Art. R64, para. 4, footnote 5 and at Art. R30, para. 25. Further, it is submitted that, unless the appellant can establish that he or she cannot even afford paying the filing fee, such payment should be required simply as a means to determine whether he or she is serious about the appeal.

9 Cf. Art. R52.

10 Cf. below paras. 26–28.

11 See <http://www.tas-cas.org/en/arbitration/arbitration-costs.html>. The schedule was recently amended, with effect on 1 January 2017.

be challenged.[12] Parties are thus faced with a considerable level of unpredictability. That said, experience shows that when the case does not have a specific value, the advance requested will tend to be between CHF 30'000.– and CHF 40'000.– for a three-member panel. In disciplinary cases, the current CAS practice appears to be that the total advance will be fixed at CHF 36'000–. In case a sole arbitrator is appointed, the amount of the advance is usually CHF 18'000–.[13]

8 *Supplementary advances* of costs may be requested by the Court Office (including upon request by the panel). This may occur where the complexity of the dispute and/or the time required to deal with the case are greater than initially anticipated.[14] The CAS Court Office can review the financial status of the file at different stages of the proceedings, including after the arbitrators have drafted the award (or when the drafting is under way), in which case it will request the payment of an additional advance before notifying the award to the parties.[15] Such late requests for additional advances should be avoided in disciplinary cases when it is clear that the athlete already had difficulties in paying the initial advance.

9 As a matter of principle, the advance is to be paid in *equal shares by the claimant(s)/appellant(s) and the respondent(s)*.[16] Only in ordinary proceedings, when the respondent files a counterclaim,[17] will the CAS Court Office proceed to calculate an "additional" advance, as stated in Art. R64.2(1). In that case, it is submitted that, according to the original language of Art. R64.2(1)[18] any party can ask the CAS to calculate "separate advances", pro-rated to the amount of the parties' respective claims.[19]

10 The Code is silent as to how the shares of the advance are allocated in *multi-party arbitration*, in particular in cases where there are multiple respondents and/or multiple claimants/appellants following the consolidation of connected proceedings, or involving the intervention of third parties.[20] When two parties file an appeal against

12 Mavromati/Reeb, Art. R64, para. 15.

13 Figures based on the authors' experience. Absent a publicly available corpus of practice in point, they should be taken as a very rough indication.

14 As noted by Mavromati/Reeb, Art. R64, para. 18, this may be the case in proceedings where it is necessary to hold a second hearing, as well as in matters requiring the issuance of more than one award, or in cases involving multiple procedural incidents.

15 CAS 2011/A/2360 & 2392, *E. Federation & G. Federation v. FIDE*, Letter of 20 January 2012. In one instance known to the authors, the CAS has requested the payment of a supplementary advance of costs almost 5 months *after* the notification of the award without grounds, referring to "the significant activity performed by the Panel to date, and the costs incurred by the CAS" (CAS 2015/A/4241, *KSC et al. v. FIFA & KFA*, letter dated 3 November 2016).

16 Art. R64.2(2). For cases involving multiple parties, see para. 10 below.

17 The filing of counterclaims is no longer possible in appeals proceedings under the Code (cf. Art. R55, paras. 21–22 above).

18 As from the 2013 edition of the Code, the adjective "separate" that was previously used in Art. R64.2(1) was replaced by "additional".

19 According to Mavromati/Reeb, Art. R64, para. 19, if *"a counterclaim is filed and in the event the respondent has not paid the first advance of costs, the respondent will be invited to pay its share in order to validate the filing of the counterclaim. If the [claimant] has paid the entirety of the advance of costs, the Respondent will still be invited to pay its share in case of a counterclaim. Any amount paid in excess by the [claimant] would then be reimbursed by CAS"*.

20 Since the Code's 2013 edition, the wording of Art. R64.2 does contemplate cases where there are more than two parties (by adding an "s" to claimant(s), appellant(s) and respondent(s)), but, as noted in the previous edition of this commentary, it still does not specify how the "equal shares" of the advance of costs are allocated across all the parties (i.e. whether it is 50% for

the same decision (for instance WADA and the IAAF against a decision rendered by a national anti-doping organization) they should be considered as two separate parties for the purpose of allocating the advance of costs. Similarly, it is submitted that when a party decides to join the proceedings it must also pay its share of the advance as an independent party.

11 It can occur that the respondent(s) do(es) not pay its/their share of the advance. In such cases, the CAS Court Office will fix a time limit for the claimant(s)/appellant(s) to substitute for the respondent(s) by paying also the latter's share (except for counterclaims in ordinary proceedings).[21] As Art. R64.2 makes clear, if the claimant(s)/appellant(s) fail(s) to pay the outstanding share of the advance, the request for arbitration or appeal is deemed withdrawn. In other words, *the respondent(s) can force the claimant(s)/appellant(s) to pay the entire advance of costs* for the arbitration. While this is standard practice in commercial arbitration, it is submitted that, at least in disciplinary matters in appeals arbitrations, sports-governing bodies should refrain from engaging in such tactic, unless it is abundantly clear that the appeal is spurious and the prospects that the appellant(s) will be in a position to honor an award on costs are manifestly nil.

12 In appeals cases, depending on the financial resources of the parties, the obligation to pay an advance of costs in disputes of national character or in non-disciplinary international disputes *can in fact preclude access to arbitration*. Arguably, in such situations, there is the possibility for an appellant without sufficient financial resources to rescind the arbitration agreement contained in a sports regulation on the ground that it does not afford him fair access to justice.[22]

13 Indeed, the obligation to submit sports disputes to arbitration deprives athletes of the legal aid facilities that may be available before the otherwise competent state courts. Accordingly, the *availability of legal aid before the CAS* is of crucial importance. Art. S6 para. 9 of the CAS Code provides (in varying terms, since 1994) that "if it deems such action appropriate, the ICAS may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund". Even though guidelines on legal aid have been adopted by the ICAS only recently (in September 2013), as noted in the previous edition of this commentary, the possibility to apply to the CAS for legal aid already existed before that date, via the "Legal Aid Application Form" that could be obtained upon request from the CAS Court Office.[23]

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each 'side' to the dispute, or whether there should be as many equal shares as there are parties to the proceedings). According to Mavromati/Reeb, Art. R64, para. 16, footnote 20, the former applies: the advance is to be paid in equal shares by each side, and, where applicable, it is normally divided in equal parts within the relevant side(s) (e.g., if there are two respondents, each will be expected to pay 50% of the respondents' share, or 25% of the total advance).

21 In cases involving multiple respondents, if one of the respondents fails to pay its share of the advance of costs, the claimant(s)/appellant(s), and not the other respondent(s), will be invited to substitute for that party (see Mavromati/Reeb, Art. R64, para. 17).

22 Cf. Kaufmann-Kohler/Rigozzi, para. 3.187. The question whether and under what conditions an impecunious party could terminate the arbitration agreement on this ground was left open in BGer. 4A_178/2014 para. 4. For a recent discussion of this question under the Swiss *lex arbitri*, see Göksu, *Prozessarmut*.

23 Rigozzi/Hasler, at Art. R64, para. 12. Cf. also, e.g., CAS 2012/A/2696, *Steve Mullings v. JADCO*, Order of 4 May 2012, CAS 2011/A/2503, *D. v. CONI*, Order of 5 September 2011; CAS 2005/A/953, *D. v. IIHF*, Order of 24 October 2005.

14 The *CAS Legal Aid Guidelines* (and the Legal Aid Application Form) can now be downloaded from the CAS website.[24] Enacted on 1st September 2013 (with slight amendments adopted on 1st January 2016), the Guidelines' stated aim "is to guarantee the rights of natural persons without sufficient financial means, to defend their rights before the [CAS]".[25]

15 CAS legal aid is *available in both ordinary and appeals proceedings*.[26] It can be requested by the claimant/appellant once the request for arbitration/statement of appeal has been filed,[27] and the respondent can apply for it as soon as it receives the request for arbitration/statement of appeal.[28] A request can be lodged at any later stage in the arbitration, however applicants should bear in mind that, if the request is successful, the legal aid they will receive "will only cover future costs and cannot be granted retroactively".[29]

16 The *Guidelines set out the requirements and procedure to obtain legal aid from the ICAS*. As stated in their Art. 5, the request must be "reasoned and accompanied by supporting documents". Applicants must fill in the CAS's Legal Aid Application Form and enclose the relevant documents with it.[30]

17 In essence, the information and documents provided with the application form should demonstrate (i) that *the applicant's financial situation does not allow him or her to pay the* advance of *costs* (respectively, honor an award on costs)[31] and (ii) that *his or her case on the merits is not manifestly unfounded*.[32] The best way

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24 Available at < http://www.tas-cas.org/en/arbitration/legal-aid.html > .

25 More specifically, according to Art. 5 of the Guidelines, legal aid is available to applicants whose "income and assets are not sufficient to allow [them] to cover the costs of the proceedings without drawing on that part of [their] assets necessary to support [themselves] and [their] family".

26 Mavromati/Reeb, Art. R30, para. 28, indicate, based on the data available until August 2014, that "[s]ince 2013, CAS has registered 30 requests for legal aid (and rendered 30 decisions). More than two-third[s] of the cases where disciplinary nature, whereas one-third was related to commercial cases. The request was granted in 65% of cases (and in the vast majority of cases related to doping). […] While most of the requests were submitted within the framework of a case related to football and athletics, there were also some other sports involved, like cycling, judo, rugby, swimming and motorcycling".

27 Art. 7 Legal Aid Guidelines. The rationale and legal basis for this limitation is unclear.

28 Art. 7 Legal Aid Guidelines.

29 Art. 7 Legal Aid Guidelines.

30 The Form requires applicants to provide basic information such as their name, marital status and address, as well as details of his or her financial situation, including monthly income, any payments received from sponsors, sports organisations, social security or other benefits, assets, any charges (e.g., rent) and outstanding debts. Supporting documentation must be provided for some of these data. As stated in the Form's header, the information supplied and any attached documents "are treated in confidence" by the ICAS. See also Art. 22 of the Legal Aid Guidelines.

31 According to Art. 5 of the Guidelines, legal aid is available to applicants who can demonstrate that their "income and assets not sufficient to allow [them] to cover the costs of proceedings, without drawing on that part of [their] assets necessary to support [themselves] and [their] family". This wording reflects that used in the Swiss Supreme Court's jurisprudence under Art. 29(3) of the Federal Constitution (e.g. BGE 135 I 221 para. 5.1).

32 Article 5 of the Guidelines provides that "legal aid will be refused if it is obvious that the applicant's claim or grounds of defence have no legal basis" or if they are "frivolous or vexatious". As explained on the application form, the request will be rejected *"[…] if it is obvious that the proceedings would not be undertaken or pursued by a reasonable litigant conducting the case at his own expense"*.

of establishing the financial situation of the applicant is for him or her to provide taxation documents (e.g., the latest tax return).[33] To allow the ICAS Board to consider the prospects of success on the merits, the applicant should take care to summarize his or her case in a clear, concise and compelling manner.[34] This may of course be difficult if the applicant cannot afford legal representation, which is something the ICAS Board should take into account in taking its decision.

The Guidelines only mention *natural persons* ("*personnes physiques*") as the possible beneficiaries of CAS legal aid.[35] That said, the ICAS appears to be aware that the granting of legal aid should be considered for clubs (or similar entities) where evidence can be provided that "the economically interested individuals within the club are indigent".[36] It is submitted that Art. 5's limitation should not be applied to purely *amateur clubs (or similar entities) incorporated as non-profit organizations*.[37] Indeed, the risk of rescission of the arbitration agreement also exists when the applicant is a legal entity.[38] **18**

The application form, duly filled in and signed, should be sent together with the accompanying documents to the CAS Court Office.[39] The *ICAS Board decides on the request*, providing brief reasons for its determination.[40] The Guidelines do not set out a time limit for the Board to render its decision, nor do they provide that the filing of an application for legal aid stays the running of time limits in the arbitration. In appeals proceedings, where the time limits set by the Code are particularly short, this can be problematic for the applicant as, without knowing when the decision will be rendered, he or she or it may find it difficult to organize the preparation and briefing of his or her or its case. Accordingly, it is submitted that the CAS should order the stay of the proceedings where this is requested together with the application for legal aid, and that the ICAS Board should in any event render its decision as quickly as possible to avoid the attendant uncertainties and complications. The ICAS Board's decision on the application cannot be appealed,[41] but is subject to reconsideration.[42] **19**

33 Note that under Art. 9 of the Guidelines, "the applicant is requested to authorize state institutions and third parties to provide confidential information on his financial situation".

34 The legal aid application form contains a field requiring a brief summary of the "facts of the case and what is the stake in the procedure" (see also Art. 9 of the Guidelines). Reference can be made, in the summary, to any topical documents already in the record, e.g. if they have been produced with the statement of appeal/request for arbitration or the answer (cf. Arts. R38, R39 respectively R48, R55).

35 Article 5 of the Guidelines. Mavromati/Reeb, Art. R30, para. 24 state that legal aid is available to *"only natural persons and therefore not clubs or juridical persons"*.

36 CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, ICAS Order of 16 July 2012, para. 11.

37 Swiss courts have granted legal aid to amateur clubs constituted as associations under Swiss law (cf. decision by the Tribunal d'Arrondissement Côte VD, *FCI. v. LA ASF & ASF & FCC.*, AJ12.038542, Decision of 8 November 2012), presumably on the ground that Art. 117 ZPO provides that "any *person*" can request legal aid.

38 Cf. CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, Award of 11 April 2014, paras. 3.4–3.43, In this case, the SFL realized that risk and opted to "supplant" the ICAS decision not to grant legal aid to the appellants by covering all the costs of the arbitration.

39 Article 8 of the Guidelines.

40 Article 10 of the Guidelines.

41 Article 10 of the Guidelines.

42 According to Art. 12 of the Guidelines, the applicant may lodge a request for reconsideration "in circumstances where his financial situation deteriorates significantly after his initial request for legal aid was considered and refused". Note also that, under Art. 14 of the Guidelines, *"[t]he ICAS Board may withdraw legal aid if it finds that the beneficiary is no longer entitled to it, or if legal aid was improperly granted"*.

20 Pursuant to Art. 6 of the Guidelines, if the ICAS Board grants the application, it may[43] (i) exonerate the applicant from having to pay the costs of the procedure or to pay an advance of costs, and/or (ii) invite the applicant to choose, from a list of *pro bono* lawyers established by the CAS, a counsel who will advise and represent him in the CAS proceedings and/or (iii) provide the applicant with a limited lump sum (in these authors' experience, usually not exceeding CHF 4'000.–) as reimbursement for travel, accommodation and other expenses justifiably incurred in connection with the arbitration.

21 According to Art. 18 of the Guidelines, the CAS list of *pro bono* counsel allows applicants to choose from a pool of "volunteer lawyers […] competent in international arbitration and/or sports law and able to work in the official languages of the CAS". The CAS's commentary specifies that the CAS list of *pro bono* lawyers "is managed by the CAS Court Office and is not published. It is however remitted to the beneficiary of legal aid, who has the freedom to select the *pro bono* lawyer of his choice".[44] In this regard, the question arises whether applicants are entitled to appoint *pro bono* counsel from outside the CAS list. This question is particularly relevant in appeals proceedings, where the appellant may wish to be assisted by the same counsel who advised him or her before the lower instance(s). This will obviously have the advantage that the chosen counsel will already be familiar with the file and the relevant legal issues, which will help save time and costs. The importance of an established trust relationship between counsel and the client should also not be underestimated. Accordingly, it is submitted that applicants should be entitled to avail themselves of the services of *pro bono* counsel who fulfil the requirements or Art. 18 of the Guidelines, even though they are not on the CAS list. Where applicants wish to suggest the appointment of *pro bono* counsel from outside the CAS list, it would seem advisable to state that in the application form and to attach the candidate counsel's *curriculum vitae,* together with a statement of his or her availability to act on a *pro bono* basis, so as to enable the ICAS Board to duly consider the request.

22 Finally, it should be noted that, pursuant to Art. 11 of the Guidelines, "all beneficiaries of legal aid agree to immediately advise the CAS Court Office of any change in circumstances on which the granting of legal aid was based, as well as the occurrence of any other fact relevant to the granting of legal aid". Art. 14 of the Guidelines goes on to add that "[t]he ICAS Board may withdraw legal aid if it finds that the beneficiary is no longer entitled to it, or if legal aid was improperly granted. The withdrawal […] has retroactive effect". Here, we would submit that the only correct interpretation of the last sentence can be that, where the circumstances of the beneficiary have changed so that he or she or it is no longer entitled to legal aid, an ICAS-ordered withdrawal should deploy its effects as from the moment the change in circumstances occurred (not *ab initio*). Where there is no change in circumstances, "legal aid takes effect from the day it is requested and ends […] at the end of the proceedings before the CAS".[45]

23 The decision on legal aid is particularly important since *failure to pay the advance of costs* (be it the initial share of the advance, the substitution for the respondent's

43 Provided the applicant has ticked the corresponding box(es) on the legal aid application form.
44 Mavromati/Reeb, Art. R30, para. 27.
45 Article 13 of the Guidelines.

share or any additional advance ordered by the CAS) within the time limit fixed by the CAS *will result in the claim/appeal being deemed withdrawn*.[46] This is systematically restated in all the CAS decisions fixing advances of costs and the parties are reminded of such consequence in a further letter that the CAS sends approximately one week before the time limit for payment. If the initial advances are not fully paid within the time limit set by the CAS Court Office, the President of the relevant Division will terminate the arbitration. If the failure to pay concerns an additional advance, the termination shall be decided by the panel. The parties can request an extension of the time limit to pay the advance but, unlike under the provision made in the Code for the CAS Court Office fee,[47] they cannot simply rely on a so-called "*délai de grace*". Only where the delay in payment was caused by a third party will the CAS find it to be an unjustifiable basis to terminate the arbitration.[48] That said, the decision to terminate the proceedings is within the exclusive purview of the CAS. This means that one party's failure to pay the advance within the prescribed time limit cannot be relied up by the other party to ask that the request for arbitration/appeal or counterclaim be deemed withdrawn.[49]

24 In addition, parties should be aware that according to the Swiss Federal Supreme Court, the fact that a party is confronted with financial difficulties in the course of the proceedings does not constitute a sufficient ground to stay the arbitration.[50] The termination of the arbitration in ordinary proceedings will not prevent the claimant from reintroducing the claim subsequently, subject to any applicable statute of limitations. By contrast, the consequences of a failure to pay the advance in appeals proceedings will be much more dramatic, as *the appellant may lose his or her substantive rights due to the expiry of the time limit for appeal*.[51] Despite this drastic consequence, the Swiss Supreme Court has held that issuing a termination order is both justified[52] and not overly formalistic[53] in this context.

25 Pursuant to Arts. R39(3) and R55(3), *the respondent may request that the time limit for the filing of the answer be fixed after the payment by the claimant/appellant of his or her share of the advance of costs*. It is submitted that the respondent should not be allowed to rely on the said provisions with respect to its own share of the

46 Article R64.2(2). It has been contended that a literal interpretation of this provision would suggest that it sanctions only a default with respect to the advance on costs, not a failure to comply with the time limit set in order for payment to be made. The Swiss Federal Supreme Court has held that such an interpretation is not sustainable as it would "paralyze the operation" of the CAS as an arbitral institution (BGer. 4A_600/2008 para. 4.2.1.3).

47 Cf. Art. R38(3) and Art. R48(3).

48 Cf. CAS 2010/A/2170 & 2171, *Iraklis Thessaloniki FC v. Hellenic Football Federation, OFI FC v. Hellenic Football Federation*, Award of 23 February 2011, para. 34. Having noted that payment instructions had been given to the bank, and that payment had in fact been effected by the latter, all within the prescribed time limit, the panel added: "[t]he delay […] was caused by the bank and not by OFI FC itself. The fact that the amount had not been credited on the CAS bank account was due to technical problems within the bank […]. In the present case, it would have been therefore not only disproportionate and overly formalistic, but simply wrong for the CAS Court Office to terminate the present procedure on the basis of Art. R64.2 of the Code".

49 Mavromati/Reeb, Art. R64, para. 20 and the references; CAS 2012/A/2972, *Matti Helminen v. RL VB*, Award of 23 July 2013, para. 24.

50 BGer. 4P.64/2004 paras. 3.2–3.3.

51 Cf. Art. R49 above. See also Mavromati/Reeb, Art. R64, para. 22.

52 BGer. 4A_600/2008 para. 4.2.1.3.

53 BGer. 4A_600/2008 para. 5.2.2.

advance in cases where the claimant/appellant has to substitute for the respondent's failure to pay.

B Determination of the Arbitration Costs

26 Article R64.4 provides that the CAS Court Office shall determine the final amount of the costs of the arbitration *at the end of the proceedings*.[54] According to Article R64.4, the *arbitration costs include* (i) the "CAS Court Office fee" (paid by the claimant/appellant), (ii) the "CAS administrative costs", (iii)[55] the arbitrators' fees and expenses, including the fees of the ad hoc clerk where one is appointed,[56] (iv) an unspecified "contribution towards the expenses of the CAS", which should cover any costs arising in connection with the holding of a hearing, including the rental of premises and costs associated with the use of technologies such as video- or teleconferencing, audio recording etc., and (v) "the costs of witnesses, experts and interpreters", which should cover the fees and expenses of the witnesses summoned by the tribunal (if any), and of the expert(s) and/or interpreter(s) appointed by the tribunal (if any).

27 The CAS arbitration rules provide scales for the *arbitrators' fees* which are meant to guarantee the parties that they will not face excessive fees claims.[57] The amount of fees to be paid to each arbitrator is fixed by the CAS Secretary General on the basis of the work provided and of the time reasonably devoted to the case by the panel's members. The hourly fees for CAS arbitrators had not been revised since 2010, when, as noted in the previous edition of this commentary, the *ad valorem* fee scale, based on the amount in dispute, had been introduced for the first time.[58] The arbitrators' fee scale has now been amended (with effect as of 1 January 2017) in that the first threshold for the amount in dispute (corresponding to the lowest tier of the hourly rate) has been moved to CHF 2,500,000 (up from CHF 1,000,000 in the 2010 scale), the hourly rates for the following tiers along the scale have all been increased by CHF 50, and a new rate of CHF 500 per hour has been introduced for cases where the amount in dispute is above CHF 15,000,000. Notwithstanding the latest changes, it is submitted (as already in the previous edition)[59] that the CAS

54 Art. R64.1, 2nd sentence, governs the determination of the costs of the proceedings when these are terminated before a panel has been constituted. In such cases, it will be for the President of the relevant Division to make a ruling on costs (covering both their amount and allocation) in the termination order. As noted by Mavromati/Reeb, Art. R64, para. 23, this provision was revised in 2013 to provide that the Division President may also rule, when issuing the termination order, on party requests for legal costs (if any), upon giving the parties an opportunity to make submissions in that regard.

55 The scale setting out the amount of administrative costs that may be levied by the CAS depending on the amount in dispute is included in the Schedule of Arbitration Costs, which is available at http://www.tas-cas.org/en/arbitration/arbitration-costs.html. It is noteworthy that, contrary to other institutions in the recent past, the CAS has not increased the rates it charges for its administrative costs, while, as discussed in the following paragraph, it has increased the hourly rate payable to arbitrators.

56 Art. R64.4 does not mention the ad hoc clerk's expenses. It is submitted that this is an oversight and that the clerk's expenses should also be taken into account in the arbitration costs or should be considered as expenses of the arbitrators.

57 Cf. the Schedule of Arbitration Costs (in effect as of 1 January 2017) is available at < http://www.tas-cas.org/en/arbitration/arbitration-costs.html > .

58 Rigozzi/Hasler, at Art. R64, para. 16.

59 Rigozzi/Hasler, at Art. R64, para. 16.

scale remains reasonable, and still compares favorably with the standard arbitrators' fees applied in commercial arbitration. Moreover, the CAS Secretary General has the possibility to adapt the arbitrators' fees, depending on the circumstances, which includes the power to reduce them if excessive.[60]

28 Article R64.4 provides that "[t]he final account of the arbitration costs may either be included in the award or *communicated separately to the parties" after the award*. As amended in 2017, Art. R64.4 expressly states the general rule that advances of costs "already paid by the parties are not reimbursed by the CAS, with the exception of the portion which exceeds the total amount of the arbitration costs". In most cases, the CAS will opt for a separate communication of the arbitration costs. The relevant part of the award will then only state that the costs of the arbitration, to be later determined and communicated to the parties by the CAS Court Office/Secretary General, shall be borne as apportioned in the award.[61] The CAS will subsequently issue a decision (in the form of a letter) containing (i) the amount of the costs of arbitration and, where relevant, (ii) directions as to the reimbursement(s) by, or further payment(s) to be made to, the CAS. In practice, this information may be notified by the CAS quite some time after the award.[62]

C Allocation of Arbitration Costs

29 Article R64.5 of the CAS Code provides that "in the arbitral award, *the panel shall determine* which party shall bear the arbitration costs or in which proportion the parties shall share them".[63]

30 The CAS Code does not set out how the panel should exercise its *discretion* in allocating the arbitration costs. It is very difficult to identify a clear pattern in CAS jurisprudence since, for obscure reasons, the CAS deletes the costs section from the awards it publishes. However, experience shows that in practice panels use the same criteria as are provided under Art. R64.5 at the end for determining the allocation of legal costs.

31 The main criterion is of course the *outcome of the proceedings*: as a matter of principle the costs of the arbitration will be borne by the losing party. Where no party prevails entirely, the panel can allocate the arbitration costs in proportion to the parties' relative success. According to the CAS's commentary, in appeals cases,

60 As noted by Mavromati/Reeb, Art. R64, para. 5, in case of disagreement, the ICAS Board has the final say on arbitrators' fees. The Schedule of Arbitration Costs is Appendix II to the Code. Its current version is available on the CAS website, at < http://www.tas-cas.org/en/arbitration/arbitration-costs.html > .

61 On the rules and practice relating to the apportionment of costs, cf. below, III.C.

62 In CAS 2011/A/2380, *Arie Haan v. FECAFOOT*, for example, almost one year after the award had been rendered, the decision on the costs of arbitration had not yet been communicated to the parties. Consequently arbitrators must also be prepared to be compensated with significant delay. Mavromati/Reeb, Art. R64, para. 24, indicate that the Panel may "ask the CAS Court Office to determine the final amount of the arbitration costs and then include the exact amounts to be paid by each party in the final award", however, to the present authors' knowledge, this practice is rarely followed.

63 Art. R64.1(2), which was inserted in with the 2012 revision of the Code, deals with the decision on costs in instances where the arbitration is terminated before the constitution of a panel.

if the appeal is withdrawn the case is considered as having been dismissed, meaning that the respondent is deemed to have prevailed.[64]

32 The allocation according to the outcome of the proceedings should be adjusted by taking into account the *procedural conduct of the parties*. For instance, CAS panels have decided that the arbitration costs should be borne in equal proportions by the parties in cases where the losing appellant was found to have raised a legitimate concern, even if it was ultimately unsuccessful.[65] The panel may also consider other procedural circumstances, such as multiple and unfounded procedural requests by the parties which may end up being time consuming to deal with and thus expensive.[66]

33 Finally, the Panel can (and should) further adjust its decision on costs by taking into account the *parties' respective financial situations*, in particular when there is an obvious disparity between them. While some awards do take this criterion into account,[67] CAS case law is very inconsistent in this respect, and the fact that the relevant part of the award is often redacted does nothing to help promote harmonization.

34 The parties should be allowed to make *submissions on costs* if they so request, either at the end of the hearing or within a short time limit thereafter.[68]

IV LEGAL FEES AND OTHER EXPENSES OF THE PARTIES

35 As amended in 2017, Art. R64.5 provides that "as a general rule *and without any specific request from the parties*, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters" (emphasis added). This provision *applies to all CAS arbitrations*, including appeals arbitrations concerning a disciplinary decision rendered by an international federation, for which no arbitration costs are charged according to Art. R65. It should be noted however that according to the CAS's commentary, "[i]f the prevailing party is not represented by counsel, the Panel may not grant any legal fees or limit the costs to effective travel/accommodation expenses (mostly for awards involving federations represented by in-house lawyers)".[69]

64 Mavromati/Reeb, Art. R64, para. 26 and the references.

65 Cf. e.g., CAS 2010/O/2039, *FASANOC v. CGF*, Award of 19 April 2010, para. 8.4, where the Panel dismissed a claim brought by a national federation against a sports federation, but ordered the parties to bear the arbitration costs in equal shares and declined to award a contribution towards the respondent's legal costs. The panel noted that the claim was "one of principle and important constitutional interpretation" which had been brought "before CAS in order to protect and advance the best interests of the athletes".

66 CAS 2003/O/462 (unpublished), paras. 2.1–2.2.

67 Cf., e.g., CAS 2013/A/3115&3116, *WADA v. Rebecca Mekonnen & NOPC* and *WADA v. Lasse Sundel and NOPC*, Award of 9 December 2013, para. 167, where the appellant prevailed (specifically, the appeals were partially upheld), but was ordered to bear a greater share of the arbitration costs than the athletes. The panel, noting that "*the costs associated with this appeal are likely such that they could have a significant impact*", considered that the athletes, two "*recreational amateurs with minimal financial means*" should not be subjected to "*such a burden […that their] financial situation [would be] at stake*".

68 See also Mavromati/Reeb, Art. R64, para. 31 at the end.

69 Mavromati/Reeb, Art. R64, para. 25 at the end.

Be that as it may, the wording of Art. R64.5 makes it clear that the panel has *no obligation to award legal costs* and that, if it decides to do so, it will not order a full reimbursement to the prevailing party but *only grant a contribution* toward such costs.[70] The Swiss Federal Supreme Court has held that "it would be desirable for the CAS to specify the concept of "contribution" within the meaning of Art. R64.5 of the Code, in order to give a framework to the discretionary power of the arbitrators in these matters".[71] **36**

In the previous edition of this commentary, it was submitted that (in line with the usual practice in arbitration) a party can be granted a contribution to its costs only if it made a request to that end in its prayers for relief.[72] Art. R64.5, as amended in 2017, now expressly provides that the panel can grant a contribution even "without any specific request from the parties". It is submitted that the insertion of this new wording is unfortunate. First, it does not provide any further clarity on how CAS arbitrators should exercise their discretionary power to grant a contribution, even more so in the absence of a specific request from the parties. Second, and more importantly, it overlooks the fact that awarding legal costs in the absence of a specific prayer for relief may result in an *ultra petita* award, which can be set aside pursuant to Art. 190(2)(c) PILS. To avoid this risk, we submit that CAS arbitrators should now systematically invite the parties to make *submissions on costs*, or at least submit *statements of costs specifying whether they wish to be awarded a contribution* towards such costs.[73] As to the amount of the contribution, the parties may opt to leave it to the arbitrators to determine what a fair contribution is, or request a specific amount. **37**

A submission on costs should contain the parties' arguments regarding the four criteria mentioned in Art. R64.5 as a basis for the panel's determination on the contribution to be awarded, namely "*the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties*". The outcome of the proceedings is the main criterion, since Art. R64.5 provides that a contribution towards legal costs is granted only to the prevailing party. Although experience shows that CAS practice is far from consistent in this regard,[74] it is submitted that a contribution can also be granted to a party that did not entirely prevail in **38**

70 See also Mavromati/Reeb, Art. R64, paras. 27–28, noting (at para. 27) that the ICAS's rationale in providing for a contribution rather than full indemnification in the Code was to "encourage parties (and their counsel) to invest reasonable and proportionate costs for their defence, bearing in mind that the contribution that may be granted in the end will also be reasonable", the idea being that this would in turn induce parties *"to focus on the core of the legal dispute and […] shorten the CAS procedures, allowing them to remain quick and efficient"*.

71 BGer. 4A_600/2010 para. 4.2.

72 Rigozzi/Hasler, at Art. R64, para. 26.

73 Note that if a panel does order the filing of submissions on costs, then it cannot render an award ruling on the costs before having received the said submissions, as this would amount to a breach of the parties' right to be heard, cf. BGer. 4A_600/2010 paras. 4.2–4.3. See also Mavromati/Reeb, Art. R64, para. 31.

74 The lack of consistency and the ensuing unpredictability for the parties are compounded by the fact that the awards as published by CAS do not include the figures relating to costs in the dispositive section.

the proceedings, be it the claimant/appellant[75] or the respondent.[76] The parties' procedural conduct might lead the panel to decide that no contribution shall be granted to the winning (or substantially winning) party or to reduce the amount of such contribution. The fact that the losing party's "procedural conduct has been irreprehensible" can be considered as a good reason "to grant only a relatively small amount of costs' contribution" in favor of the prevailing party, in particular when the latter "certainly has larger financial resources than [the former]".[77]

39 In an apparent attempt to address the above mentioned criticism by the Swiss Supreme Court as to the predictability of the CAS's practice in relation to the concept of "contribution" within the meaning of Art. R64.5 at the end,[78] the Code now stipulates (since the 2013 edition) that the "complexity" of the proceedings should also be taken into account by the panel in reaching its decision as to the costs' contribution to be awarded. It is submitted that the *complexity of the dispute should be taken into account to determine the reasonableness of the statements of costs submitted by the parties*, but should not impact the arbitrators' discretion to determine the amount of the said contribution. In particular, the fact that the prevailing party has made complicated factual or legal allegations that were eventually dismissed by the panel should be taken into account to *reduce* the amount of any contribution towards its costs. For its part, the CAS's commentary states that, while "it is difficult to give a clear-cut definition of what a standard 'contribution' should be", it being understood that "discretion and common sense should serve as the best tools" for the purposes of such determination, "it can be assumed that for each case, CAS Panels would first evaluate the activity which would be reasonably involved in the preparation of the written submissions and of the hearing, in the internal consultations and in the participation in the CAS hearing(s). Such activity would be converted in fees, to which would be added reasonable costs for transportation and accommodation of (useful) parties, counsel, witnesses and experts. From that amount, which constitute[s] the higher limit, the Panel would determine the 'contribution' which should eventually be granted".[79]

40 Be that as it may, here again, it is impossible to provide a meaningful analysis of CAS panels' practice, given that (1) as mentioned, the costs section is systematically redacted by the CAS in the awards it publishes, and (2), in those awards to which these authors have had access in un-redacted form, the panels' decisions were far from being consistent on this point. In terms of institutional policy, it is generally understood that, as part of his scrutiny duties in relation to CAS awards, the Secretary General invites the arbitrators to limit the amounts awarded under Art. R64.5 in order to preserve the accessibility of the CAS.

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75 Cf. CAS 2000/A/278, *Chiba v. Japan Amateur Swimming Federation (JASF)*, Award of 24 October 2000, para. 16. Cf., however, CAS 2009/A/2023, *Gianni Da Ros v. CONI*, Award of 17 August 2010, where the Panel did not grant any contribution to the athlete, who had to seize the CAS to reduce a clearly abusive penalty, but was unable to get the totality of the reduction he requested.

76 Cf. CAS 2008/A/l458, *UCI v. Vinokourov & KCF*, Award of 30 August 2010, para. 5.10; CAS 2011/A/2325, *UCI v. Roel Paulissen & RLVB*, Award of 23 December 2011, para. 213.

77 Cf. CAS 2011/A/2426, *Adamu v. FIFA*, Award of 24 February 2012, para. 168.

78 Cf. para. 36 above.

79 Mavromati/Reeb, Art. R64, para. 30.

Article R65: Appeals Against Decisions Issued by International Federations in Disciplinary Matters

R65.1

This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue.

R65.2

Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1'000.– without which CAS shall not proceed and the appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R65.3

Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4

If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either *ex officio* or upon request of the President of the Panel.

I PURPOSE AND SCOPE OF APPLICATION OF THE PROVISION

Together with Art. R64 and the Schedule of Arbitration Costs,[1] Art. R65 provides guidance to prospective appellants on how costs are calculated and allocated in CAS proceedings. 1

1 The CAS Schedule of Arbitration Costs (last amended on 1 January 2017) can be found on the CAS website, at < http://www.tas-cas.org/en/arbitration/arbitration-costs.html > .

2 Contrary to Art. R64, Art. R65 only applies in appeals (not in ordinary) CAS proceedings. More specifically, Art. R65's scope of application is limited to *appeals against decisions (i) which are exclusively of a disciplinary nature and (ii) which are rendered by an international federation or sports-body*. In such cases, pursuant to Art. R65.2, the proceedings are free, as their costs are borne by the CAS. This *does not extend to the parties' costs including attorney's fees* as well as any expenses sustained in connection with the intervention of their witnesses, experts and interpreters. It is useful to trace the evolution of Art. R65's "free of charge" rule in the CAS Code (II.) before considering how the costs of the proceedings (III.) and the parties' costs (IV.) are now dealt with under it.

II EVOLUTION OF THE RULE SET OUT IN ARTICLE R65

3 To start with, it is instructive to compare the text of Art. R65 in the 2013 and 2016 editions of the CAS Code (where it remained unvaried) with its wording in the earlier editions.[2] The 1994 edition of the Code stipulated that *all* appeals proceedings were free of charge. In the 2004 edition, the scope of application of this rule was restricted to "disciplinary cases of an international nature". The 2010 edition was then amended to provide that Art. R65 was "applicable to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body or by a national federation or sports-body acting by delegation of powers of an international federation or sports-body".[3] Finally, in the 2012 edition of the Code, the scope of the "free of charge" rule has been further reduced, with the stipulation that Art. R65 is only applicable to appeals against "*decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body*".[4] It has been argued that the rationale behind this rule change may be to prevent spurious appeals against decisions of national federations, which would be brought without regard to the cost consequences.[5] Be that as it may, as the rule now stands, *in all non-disciplinary and/or non international appeals cases* appellants are required to cover their share of the arbitration costs.[6] It is submitted that this differentiated treatment is hard to justify

2 See also Mavromati/Reeb, Art. R65, paras. 1–2.

3 Cf. Rigozzi, *Jusletter of 13 September 2010*, paras. 43–46 for a critical analysis of the 2010 amendment.

4 This includes continental federations or confederations: cf., e.g., CAS 2012/A/2759, *Rybka v. UEFA*, Award of 11 July 2012, para. 12.

5 Cf., for instance, Stephen Sampson/Stacey Shevill, *Amendments to the Code of Sports-related Arbitration*, Squire Sanders [as it then was] International Arbitration News 5 April 2012, available at: < http://www.lexology.com/library/detail.aspx?g = bc437e05-900e-4b76-b80b-7a039d48f457 > . It is submitted that the real purpose of the 2004 limitation was to prevent the national sports-governing bodies from "externalizing" their dispute resolution costs to the CAS (as the system is financed by the international federations, National Olympic Committees and the IOC). The 2010 change was simply meant to reduce the ancillary disputes that could arise in connection with the definition of "*disciplinary cases of an international nature*" for the purposes of Art. R65. As noted in the previous edition of this commentary, the rationale of the 2012 revision may have been to act as an incentive for international federations to refrain from delegating dispute resolution to their national member federations. In the meantime, one major international federation that functioned according to that model, the UCI, has abolished the delegation system and set up its own anti-doping tribunal. The only other important federation still delegating disciplinary proceedings to its member national sports bodies is the IAAF.

6 Cf. Arts. R64.1 and R64.2. As indicated in the previous edition of this commentary, in accordance with Art. R67, the rule applies to proceedings initiated on or after 1st March 2013.

as both the disciplinary and the international nature of the dispute are clearly not sound criteria to determine whether the arbitration proceedings should be free of charge. It is difficult to understand why an athlete or sports-person sanctioned for match-fixing should benefit from the free of charge rule, while another, who was subject to a non-disciplinary decision, should advance the costs of the arbitration in order to have an opportunity to contest that decision. Non-disciplinary decisions, for instance eligibility decisions, can be just as invasive and damaging as doping-related or other disciplinary decisions.[7] Similarly, one fails to understand why an allegedly doped athlete can benefit from the free of charge rule if the decision under appeal has been rendered by an international federation, while he or she would have to pay for the arbitration if the decision was taken by a national federation or anti-doping agency. As noted in the previous edition of this commentary,[8] this leads to *unsatisfactory situations, as was the case in cycling*, where the regulations of the international governing body (UCI) required national federations to investigate and decide disciplinary cases in the first instance, meaning that CAS appeals would inevitably fall outside the scope or the free of charge rule of Art. R65. The UCI has now set up its own anti-doping tribunal, *inter alia* to avoid this situation.[9] Nevertheless, the same problem still exists *in track and field cases* under the IAAF Rules.[10] The CAS has routinely rejected applications to the effect that the national decision was in reality a decision by the relevant international federation and that it is thus unfair to request the athlete to pay the (advance of the) arbitration costs.[11]

Fortunately, the 2013 edition of the Code introduced an amendment in Art. R65.1, which now provides that any *dispute regarding the application of Art. R65* (i.e. as to the "free of charge rule") *shall be determined by the panel*.[12] According to this provision, the CAS Court Office can direct the party claiming that the arbitration should be free of charge to pay the advance of costs "pursuant to Article R64.2 pending a decision by the Panel on the issue".[13] Given the limited scope of that specific dispute, it is submitted that the CAS Court Office should request the payment of only a fraction of the advance, and invite the panel to render its decision at the earliest opportunity. **4**

7 Cf. CAS 2007/A/1377, *Rinaldi v. FINA*, Award of 26 November 2007, para. 110: "[…] the non-approval of a change of national affiliation is not related to a disciplinary procedure or sanction and is not akin to a disciplinary sanction. Accordingly, it is article R64.4 and R64.5 of the Code that apply to the determination of costs".

8 Rigozzi/Hasler, at Art. R65, para. 3.

9 See < http://www.uci.ch/news/article/anti-doping-tribunal/ >

10 See IAAF Competition Rules (2015) – Chapter 3, Rule 38.

11 In such cases, the CAS tends to propose the appointment of a sole arbitrator and to reduce the amount of the advance accordingly. However, such a proposal does not really address the problem: it can only possibly alleviate its consequences.

12 For a case where the Panel was called to make a decision under Art. R65.1, see CAS 2012/A/2817, *Fenerbahçe v. FIFA & Roberto Carlos*, Award of 21 June 2013, paras. 127–134: the arbitrators had to determine whether the dispute at stake was disciplinary in nature, and concluded that it was not given that it related solely to a question of competence (namely whether the FIFA Disciplinary Committee had been correct in ruling that it was not competent to deal with a request to sanction a party under Art. 64 of the FIFA Disciplnary Code for failing to comply with an award rendered in CAS ordinary proceedings).

13 See also Mavromati/Reeb, Art. R65, para. 5, indicating that "the Panel will have the power to decide the issue at the beginning of the procedure and not at the end (in the award), as it was the case before".

5 The issue remains, however, that the application of Art. R65.1's criteria can potentially impair the athletes' rights of access to justice. Against this background, the *availability of legal aid* becomes a crucial matter, as discussed in connection with Art. R64.[14]

III COSTS OF THE PROCEEDINGS

A Principle: "Free of Charge Rule"

6 Under Art. R65.2, appeals proceedings in disciplinary cases of an international nature are *free of charge, save for the CHF 1'000.– CAS Court Office fee*, which has to be paid for the arbitration to be set in motion.[15] The parties are only liable for their own legal representation and assistance costs and the costs incurred in connection with the involvement in the proceedings of any witnesses, experts and interpreters, as well as any contribution that the final decision may require them to make towards the opposing party's legal costs.[16]

B Exception: Application of Article R64

7 Pursuant to Art. R65.4, a departure from the free of charge rule *can be decided only by the Division President*, either *ex officio* or upon request by the President of the panel or sole arbitrator.[17]

8 Article R65.4 provides that the application of Art. R64 may be decided "*if the circumstances so warrant*" including in particular "the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS". The "*predominant economic nature*" criterion is relevant with regard to UEFA's disputes relating to the Financial Fair Play Regulations[18] and in appeals against FIFA or FIBA's disciplinary decisions sanctioning parties who did not comply with CAS[19] or BAT[20] awards in financial disputes. Disciplinary disputes concerning match-fixing, corruption and agents' activities can also be considered as preeminently economic in nature within the meaning of Art. R65.4. As to the cases involving decisions by international sports-governing bodies that are not signatories to the Paris Agreement constituting the ICAS (and thus do not contribute to its financing), one could mention in particular doping disputes decided by the Fédération Internationale de l'Automobile

14 Cf. Art. S6(9) of the Code; cf. Art. R64, paras. 12–13 above.
15 Cf. Art. R48(2), paras. 19–21 above.
16 Cf. Art. R65(3).
17 Cf. CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 211. See also Mavromati/Reeb, Art. R65, para. 8, indicating that where a decision under Art. R65.4 is taken, the CAS "sends a letter to the parties informing them of the decision of the Division President and this is confirmed and accepted by the Parties through the signature of the procedural order".
18 Cf., e.g., CAS 2013/A/3453, *FC Petrolul Ploiesti v. UEFA*, Award of 20 February 2014, para. 23.
19 See Art. 64 FIFA Disciplinary Code.
20 See Arts. of FIBA's Internal Regulations. BAT stands for the Basketball Arbitral Tribunal. Previously named FAT (FIBA Arbitral Tribunal), the BAT has its seat in Geneva, and resolves non-disciplinary disputes between players, agents and clubs through *ex aequo et bono* arbitration. Cf. < http://www.fiba.com/en/bat/sanctions > .

(FIA) or the International Golf Federation (IGF).[21] It is submitted that Art. R65.4's rule should be applied only if the parties are financially in a position to pay the arbitration costs. Ideally, such a decision should be made at the beginning of the arbitration in order to avoid any "bad surprises" further down the line. A decision at a later stage should only be made in exceptional cases, where it becomes evident during the arbitration that a party has abused the system.

Where the parties reach a settlement during the arbitration, the CAS has ruled that if the settlement leads to the withdrawal of the appeal this may trigger the application of Art. R64 notwithstanding the free of charge nature of the proceedings.[22] This approach is counter-intuitive as it somehow 'punishes' the parties for having reached a settlement. That said, this situation should in any event remain exceptional as settlements are not common in disciplinary proceedings.[23] 9

IV PARTIES' COSTS

Article R65.3 provides that "[e]ach party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and in particular, the costs of witnesses and interpreters". As submitted above in commenting Art. R64.5 (to which the same wording has been added),[24] the 2017 amendment providing that the panel may decide to grant a contribution towards the prevailing party's legal costs even in the absence of a prayer for relief to that effect ("without any specific request from the parties") is unfortunate and may result in the rendering of an *ultra petita* award (which would then be open to annulment under Art. 190(2)(c) PILS). Again as suggested above, the solution to avoid this risk may be for panels to always invite the parties to make (even very brief) submissions on costs, indicating whether they wish to be granted a contribution. Under Art. R65.3, the contribution *applies only to the legal and other costs sustained by the parties in putting their respective case(s) to the CAS and possibly the filing fee*, as pursuant to Art. R65.2 (and subject to Art. R65.4) the CAS bears the arbitration costs proper, including the fees and costs of arbitrators. 10

In the majority of cases, the CAS holds that the prevailing party is to be granted a *contribution towards the legal fees and other expenses* it has incurred in connection with the arbitration.[25] It is submitted that panels should set out a *reasoned* decision 11

21 See also Mavromati/Reeb, Art. R65, para. 6 in fine, citing the same examples. As noted under Art. R64, at footnote 3, the list of signatories does not seem to be publicly available.

22 The parties may have, for instance, to contribute to the costs of the organization of the hearing if such costs could have been avoided at their own initiative, cf., e.g., CAS 2000/A/264, *G. v. FEI*, Order of 23 October 2000.

23 For detail, cf. above commentary on Art. R56, part III.

24 Cf. above commentary on Art. R64, para. 37.

25 In this respect, past panels have often paraphrased the wording of Art. R64.5, according to which, as a general rule, *"the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings […]"*. In the 2013 edition of the Code, the same wording has been incorporated in Art. R65.3 (cf. Art. R64.5, paras. 18–22 above). While this "general rule" is consistently recalled and upheld in CAS awards subject to Art. R65 (cf., e.g., CAS 2010/A/2162, *Doping Control Centre University Sains Malaysia v. WADA*, Award of 15 June 2011, para. 21.2), there are significant differences in the way it is applied *in concreto* by CAS panels, in particular with respect to the considerations

on the allocation of costs, taking into account not only the outcome of the case but also its complexity, the procedural conduct of the parties and their financial resources (as now expressly provided in Art. R65.3), more frequently than they currently do. When it is obvious that an appeal has been brought on spurious grounds, the amount of the contribution should be significant – irrespective of whether the appellant is an athlete or a sports-governing body. Ultimately, just like the decision to retrospectively require payment of the arbitration costs pursuant to Art. 65.4 (cf. above III.B), this should lead to a reduction in the overall number of appeals brought before the CAS, which in turn would allow the CAS to revise the scope of application of the free of charge rule, extending it again to appeals cases other than just appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. Conversely, when an athlete had to resist an appeal brought by a sports-governing body, it would appear to be right that no legal costs should be awarded against the athlete. After all, it is not the athlete who rendered the decision under appeal.

12 In an exceptional, but illustrative award related to the allocation of parties' costs based on the other side's *procedural conduct and financial resources*, the Panel ruled that the appellant had to bear a significant portion of the respondent's costs based on his "litigation misconduct".[26] Such misconduct included, inter alia, requiring an unnecessarily large number of witnesses for cross-examination and subsequently electing not to call them, pursuing serious allegations of misconduct against the respondent without any evidence, and bringing an unprecedented number of technical challenges against the opponent, thereby engaging it in lengthy and costly proceedings. Ultimately, the respondent was awarded an amount of USD 100'000.00 to cover a portion of its attorney fees and other expenses.

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underlying the decision as to the quantum of the contribution awarded to the prevailing party. In this regard, and to cite but one example, a parallel reading of the relevant sections of the awards in (i) CAS 2007/A/1377, *Melanie Rinaldi v. FINA*, Award of 26 November 2007, paras. 111–113 and (ii) CAS 2011/A/2426, *Amos Adamu v. FIFA*, Award of 24 February 2012, para. 168 (noting that "the Respondent certainly has larger financial resources than the Appellant. Moreover, the Appellant's procedural conduct has been irreprehensible. Accordingly, the Panel does not believe that it would be appropriate for the Appellant to have to pay a large amount to the Respondent and decides to grant only a relatively small amount of costs' contribution in favour of the Respondent"), is perplexing. It is submitted that, without questioning the discretion panels rightly enjoy in this regard, an approach considering all the relevant elements and circumstances carefully is not only warranted, but even necessary as a matter of fairness and proper administration of justice (cf., for instance, CAS 2011/A/2325, *UCI v. Paulissen and Royale Ligue Vélocipédique Belge (RLVB)*, Award of 23 December 2011, paras. 212–213, where the Panel took into account the complexity of the case, the outcome of the dispute, the fact that the arguments raised by the rider had been debated at length in the proceedings, as well as his financial situation in awarding a contribution towards his legal costs even though the UCI had prevailed in the arbitration).

26 CAS 2007/A/1394, *Landis v. USADA*, Award of 30 June 2008, para. 289.

G. Miscellaneous Provisions (Arts. R67 – R70)

Article R67: Miscellaneous, I

These Rules are applicable to all procedures initiated by the CAS as from 1 January 2017. The procedures which are pending on 1 January 2017 remain subject to the Rules in force before 1 January 2017, unless both parties request the application of these Rules.

Article R67 sets out the inter-temporal or *transitional rule* governing the applicability of the current edition of CAS Code.[1] 1

As noted elsewhere,[2] this provision, which was first inserted in the 2010 edition of the Code, was a welcome improvement, in terms of legal certainty, on the 2004 edition. However, the reference it makes to the "initiation of proceedings by the CAS" remains somewhat ambiguous as, in the absence of a definition, this can be understood to refer either to the filing of the request for arbitration/statement of appeal (as would be logical), or to the initiation of the proceedings by the CAS in the "technical" sense (i.e., pursuant to Arts. R39 (ordinary proceedings) and R52 (appeals proceedings)). We are only aware of a few CAS (appeals) decisions addressing this issue, and in those cases the panels seemed to consider that the relevant criterion was initiation of the proceedings by the CAS within the meaning of Art. R52, although they also referred to the date of filing of the statement of appeal.[3] Given the clear reference to "pending procedures" in the second sentence of Art. R67, and since, under the Swiss *lex arbitri*, this is to be understood as a reference to the *date of filing of the request for arbitration or statement of appeal*,[4] it is submitted that this, rather than the date of initiation of proceedings pursuant to Arts. R39 and R52, should be taken as the relevant date for inter-temporal purposes under Art. R67.[5] 2

Be that as it may, the question may also arise whether the parties whose dispute is already pending at the time when the new version of the Code comes into force may agree to the application of the new rules (as provided in Art. R67 *in fine*), subject to specific exceptions (i.e., maintaining one or more of the provisions from the previous version). This question appears to be rather theoretical with respect to the transition between the 2016 and 2017 versions of the Code, as the changes introduced in the latter version do not significantly impact the conduct of the proceedings (for instance, by introducing new criteria for the admissibility of certain 3

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1 As observed by Mavromati/Reeb, Art. R67, para. 2, this rule, which aims at identifying the version of the rules that shall govern the *proceedings*, differs from the *tempus regit actum* principle (providing for the application of the (rules of) law in force at the time the dispute arose), which is used to determine the *lex causae* (see Art. R58).

2 Cf. Rigozzi, *Jusletter of 13 September 2011*, para. 3.

3 Cf. CAS 2010/A/2075, *Maritimo de Madeira-Futebol S.A.D v. Coritiba Foot-Ball Club*, Award of 22 October 2010, para. 4.1; CAS 2010/A/2193, *Cagliari Calcio v. Olimpia Deportivo*, Award of 15 September 2011, para. 4.1; see also Mavromati/Reeb, Art. R67, para. 3, confirming this interpretation.

4 Cf. Art. 181 PILS.

5 *Contra*: Mavromati/Reeb, Art. R67, para. 3.

requests).[6] Nevertheless, according to the official CAS commentary, Art. R67 would permit this type of agreement to the extent that the provisions the parties wish to 'carry over' from the previous version of the Code do not "affect the CAS as an institution (e.g., the application of an old rule related to the costs of the procedure would not be possible if less favorable to the institution)".[7]

6 For examples from previous versions of the Code where the changes could make a significant difference for the parties, see Mavromati/Reeb, Art. R67, para. 6. Among those examples, Mavromati/Reeb refer to the (lack of) admissibility of counterclaims after the entry into force of the 2010 version of the Code (cf. Art. R55 above), with reference to CAS 2011/A/2336&2339, *WADA v. Federación Colombiana de Levantamiento de Pesas & M.*, and *WADA v. Federación Colombiana de Levantamiento de Pesas & K.*, Award of 2 March 2012, para. 81; CAS 2010/A/2296, *S. Vroemen v. Koninlijke Nederlandse Atletiek Unie & Antidoping Autoriteit Nederland*, Award of 12 September 2011, para. 191; and CAS 2010/A/2108, *JFF v. FIFA & X.*, Award of 2 February 2011, para. 182. As noted in commenting Art. R55 (para. 22, footnote 36 above), counterclaims were deemed inadmissible even in cases where the applicable sports regulations still allowed respondents to file counterclaims before the CAS.

7 Mavromati/Reeb, Art. R67, para. 4.

Article R68: Miscellaneous, II

CAS arbitrators, CAS mediators, ICAS and its members, CAS and its employees are not liable to any person for any act or omission in connection with any CAS proceeding.

I PURPOSE OF THE PROVISION

Article R68 is an *exclusion of liability clause*. Although the relationship between the parties and the arbitrators (as well as the arbitral institution) is contractual in nature, arbitrators fulfill a judicial function. When acting in such capacity, their status is comparable to that of state court judges. The purpose of provisions excluding or limiting the liability of arbitrators and other persons involved in the arbitral process is, similar to the rules on the immunity of judges, to avoid that the adjudicators be subjected to undue pressure in the discharge of their mandate, so as to preserve their independence and the integrity of the decision-making process. 1

II VALIDITY AND SCOPE OF APPLICATION OF ARTICLE R68

Article R68 was inserted in the Code on the occasion of the 2010 revision.[1] It is *similar to the exclusion of liability clauses contained in other sets of arbitration rules, although the extent to which it purports to exclude liability appears to be broader* than that provided for under most other rules.[2] For instance, the Swiss Rules specify that arbitrators shall not be liable for acts or omissions in connection with an arbitration, save where such acts or omissions constitute "deliberate wrongdoing or extremely serious negligence",[3] whereas no such qualification is included in Art. R68 of the Code. 2

The limitation in the Swiss Rules is in line with *mandatory provisions of Swiss law*, according to which agreements excluding liability for deliberate wrongdoing and gross fault are null and void.[4] It is submitted that the same limitation should apply to Art. R68, since, (i) by the operation of Art. R28, all CAS arbitrations have their seat in Switzerland, meaning that the *lex arbitri* will be the Swiss law of arbitration,[5] and, (ii) in line with the prevailing view, the arbitrator's contract is governed by the law of the seat of the arbitration (with which it is deemed to have the closest connection).[6] Thus the exclusion of liability provided for in Art. R68 is valid and 3

1 Cf. Mavromati/Reeb, Art. R67-70, para. 7.

2 As noted in the previous edition of this commentary, the absolute terms of the exclusion of liability provision in the older versions of the ICC Rules have been tempered in the Rules' latest (2017) edition, with the result that their Art. 41 (previously Art. 40) now provides that the purported exclusion applies *"to the extent [it is not] prohibited by applicable law"*. For a commentary on Art. 41 ICC Rules, see Spoorenberg, Chapter 17 (Part II) below.

3 Art. 45(1) Swiss Rules. For a commentary on Art. 45 Swiss Rules, see Jenny, Chapter 3 (Part II) above.

4 Cf. Art. 100 Swiss Code of Obligations.

5 Cf. Art. R28.

6 Cf., for instance, Kaufmann-Kohler/Rigozzi, para. 4.184, with further references. Impliedly taking the same position, BGE 140 III 75.

enforceable (only) to the extent it is compatible with Swiss law; i.e., for unintentional wrongdoing and non-significant fault.[7]

4 *Deliberate wrongdoing* refers to intentional breaches of an arbitrator's core duties, and therefore includes cases of fraud, corruption, deliberate failure to disclose information which may be relevant to the assessment of the arbitrator's impartiality or independence, or refusing to perform arbitral functions without valid reasons.[8]

5 The test of *gross fault* should be interpreted in light of the specific function of arbitrators as adjudicators, namely keeping in mind that they cannot be treated as mere agents of the parties.[9] Only in cases where the arbitrators or any of the other persons contemplated in Art. R68 utterly disregard the most basic rules of conduct, including the general duty of care that would apply to any individual acting in the same circumstances, will liability arise despite Art. R68's exclusion.

6 More generally, and as the above examples illustrate, limitations of liability for arbitrators are intended to *operate only within the ambit of their judicial function* and activities.

7 The exclusion of liability under Art. R68 of the Code is expressly stated to *apply to CAS arbitrators, CAS mediators, the ICAS and its members, as well as the CAS and its employees*. Contrary to Art. 45 Swiss Rules, which expressly lists the secretary of the arbitral tribunal among the persons whose liability is excluded, Art. R68 contains no mention of CAS ad hoc clerks, who, in accordance with Art. R54(4), may be (and in fact often are) appointed to assist panels in discharging their duties under the Code.[10] Considering the function performed by ad hoc clerks in CAS arbitrations, including the fact that they normally assist the panel in connection with the drafting of the award,[11] which they will often sign together with the arbitrators, it is submitted that the language of Art. R68 could be revised to include them as well.

7 See also Mavromati/Reeb, Art. R67-70, para. 9. Contrary to the law in some other jurisdictions, where any exclusion of liability clause exceeding the statutorily permitted scope is deemed void altogether, Swiss law allows for the application of such clauses, provided their effect is reduced to the standard admitted by Swiss mandatory rules of law.

8 Cf. BGE 117 Ia 166.

9 Peter, *ASA Special Series no. 22*, p. 12.

10 Cf. Art. R54(4), paras. 11–13 above.

11 Cf. the commentary on Art. R59 above.

Article R69: Miscellaneous, III

The French text and the English text are authentic. In the event of any discrepancy, the French text shall prevail.

Article R69 provides a helpful indication by stating that French is the *prevailing language in case of discrepancy* between the English and French texts of the CAS Code, or where there are doubts as to the correct interpretation of a term or expression used therein.[1] 1

This provision was included in the CAS Code as the latter was originally drafted in French[2] and then translated into English. It is a sensible one, since *various provisions in Code "borrow" language from the PILS* (which exists in an official French version, but is only "unofficially" translated into English). The same rule is stated in Art. S24 with regard to the Statutes of the Bodies Working for the Settlement of Sports-related Disputes and in Art. 23 of the CAS Ad Hoc Rules.[3] 2

1 For an example of a case where reference was made to Art. R69 (Art. R68, as it then was) in holding that the French language version should be referred to in order to establish the proper meaning of a provision in the Code, cf. CAS 2008/A/1700&1710, *DRV eV v. FEI & Ahlmann* and *Ahlmann v. FEI*, Award of 30 April 2009, para. 48 (concerning the use of the word "courier" in Art. R31(1)).

2 Cf. Mavromati, *CAS Bull. 2012/1*, p. 40; Mavromati/Reeb, Art. R69, para. 13.

3 By contrast, the reverse solution has been adopted under Art. 23 of the Arbitration Rules Applicable to the CAS Anti-doping Division of 18 April 2016 (available at < http://www.tas-cas.org/en/arbitration/anti-doping-division.html >), which provides that *"[t]he English and French texts are authentic. In the event of any discrepancy, the English text shall prevail"*.

Article R70: Miscellaneous, IV

The Procedural Rules may be amended pursuant to Article S8.

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1 Article R70, by reference to Art. S8, stipulates that the procedural rules in the CAS Code (Arts. R27-R70) can only be amended with the approval of a *majority of two thirds of the ICAS* members (Art. S8(2)).[1]

2 There have been a number of revisions of the Code since it was first adopted in 1984, namely in 1994, 2004, 2010, 2011, 2012, 2013 and 2016.[2] As noted in the previous edition of this commentary, the *increasing frequency of amendments* to the Code's procedural rules in recent years is somewhat troubling, both because it seems to be done in a rather piecemeal fashion, by incremental and punctual adjustments in response to recent developments in the case law,[3] and because there is still a lack of information as to the exact scope, timing and modalities of the purported involvement of "stakeholders and users of the CAS"[4] in the revision process.

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1 The same provision is contained in Art. 23 of the CAS Ad Hoc Rules, and in Art. 23 of the Arbitration Rules applicable to the CAS Anti-doping Division, established in 2016. For detail on the procedure followed to amend the rules under Art. S8 of the Code, see Mavromati/Reeb, Arts. R67-R70, para. 16.

2 For a summary and commentary of the 2010 and 2012 revisions, cf., for instance, Reeb, *Modifications essentielles*, (on the 2010 and 2012 revisions), and Rigozzi, *Jusletter of 13 September 2010* (on the 2010 revision). On the 2013 revisions, see the detailed discussions in Mavromati/Reeb and the previous edition of this commentary. The CAS published a "marked-up version" of the 2016 and 2017 editions of the Code (showing the changes made to the 2013 and 2016 Rules respectively), available at: < http://www.tas-cas.org/en/arbitration/code-procedural-rules.html > . Other than that, at the time of writing, the authors were not aware of any official CAS commentary on the changes introduced in the latest editions of the Code.

3 On this point, cf. also Favre-Bulle, *Recent Amendments to the CAS Code (2010–2012), Global Sports Law and Taxation Reports 2012*, p. 50, stating that *"the absence of amendments for a long period, followed by successive revisions at very short intervals may affect the credibility of the arbitration institution and its rules."*

4 As mentioned by Coates, *CAS Bull. 2012/1*, *Message of the ICAS President*, p. 1, by reference to the 2012 revision.