THE INDEPENDENCE AND IMPARTIALITY OF ADJUDICATORS IN INTERNATIONAL SPORTS LAW – CAS ARBITRATION

Antonio Rigozzi and Erika Hasler

1. Introduction 194
2. The Structure of the Court of Arbitration for Sport 195
   2.1. The International Council of Arbitration for Sport 195
   2.2. The Court of Arbitration for Sport 198
      2.2.1. The CAS Ordinary Division 198
      2.2.2. The CAS Appeals Division 199
      2.2.3. The CAS Anti-Doping Division 199
      2.2.4. The CAS Ad Hoc Division 202
      2.2.5. The CAS Director General 202
      2.2.6. The CAS Court Office 203
3. The CAS List(s) of Arbitrators 203
   3.1. The General List and Other Lists of CAS Arbitrators 204
   3.2. The Criteria for the Inclusion of Arbitrators on the CAS Lists 206
   3.3. The Authority Appointing the Arbitrators on the List(s) and the Appointment Procedure 208
   3.4. Removal from the CAS Arbitrator Lists 209
4. The Appointment of CAS Panels 209
   4.1. CAS Ordinary Division 210
   4.2. CAS Appeals Division 210
   4.3. CAS Anti-Doping Division 211
   4.4. CAS Ad Hoc Division 212
   4.5. Confirmation of Party-Appointed Arbitrators and Appointment of an Ad Hoc Clerk 212
5. The Requirement of Independence and Impartiality 214
   5.1. Structural Independence 214
   5.2. Personal Independence and Impartiality 221
6. Challenge Proceedings 227
7. Remedies 229
8. Conclusion 231

1. INTRODUCTION

The idea that the state would recognise the outcome of an arbitration as the equivalent of a state court judgment only to the extent that the arbitration process provides sufficient guarantees of independence and impartiality is self-evident. While in commercial arbitration the focal point of inquiry is the personal independence of the arbitrators, in international sports arbitration the issue also goes to the structural independence of the arbitral institution.

The only truly international system capable of resolving the full range of disputes arising in the world of sports is that of the Court of Arbitration for Sport (CAS), under the Code of Sports-related Arbitration (CAS Code). The CAS was established in the early 1980s, at the behest of the International Olympic Committee (IOC), primarily to insulate sports litigation from the intervention of state courts, by offering a specialised tribunal to resolve sports-specific disputes according to uniform rules, regardless of the parties' domicile or of the competition's location, in a final, binding and judicially recognised manner.

Since its 1994 edition, the CAS Code foresees two principal kinds of arbitral proceedings, the 'Ordinary Arbitration Procedure' and the 'Appeal Arbitration Procedure', which provide for different methods for the appointment of the arbitrators. A third kind of CAS arbitration proceedings is available under the Arbitration Rules applicable to the CAS Ad Hoc Division, which (since 1996) is set up to operate on site at the Olympic Games and other major international sports events. Finally, a permanent Anti-Doping Division was established within the CAS in 2019. These different kinds of arbitration proceedings at the CAS have one common feature that is of particular interest for the present report: only individuals who appear on a CAS list of arbitrators can be appointed to sit in the arbitral tribunals (called panels in the CAS system) that are constituted under the CAS rules.

Another provision that is found in all sets of CAS procedural rules mandatorily fixes the seat of the arbitration in Lausanne, Switzerland, which entails that CAS proceedings are always governed by the Swiss lex arbitri, and subject to the supervisory jurisdiction of the Swiss Supreme Court (Tribunal fédéral, SFT).

Accordingly, this report will examine the CAS's rules relating to the independence and impartiality of arbitrators under Swiss law and by reference to the European Convention on Human Rights (ECHR), to which Switzerland is a party.

2. THE STRUCTURE OF THE COURT OF ARBITRATION FOR SPORT

The CAS Code states in its opening provision, Article S1,[1] that: '[i]n order to resolve sports-related disputes through arbitration …, two bodies are hereby created: [(i)] the International Council of Arbitration for Sport (ICAS) [and (ii)] the Court of Arbitration for Sport (CAS).'

2.1. THE INTERNATIONAL COUNCIL OF ARBITRATION FOR SPORT

Article S2 of the CAS Code provides that '[t]he purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration … and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS'. The CAS Code is silent with respect to the legal nature of the ICAS, but it is common knowledge that it is incorporated as a foundation within the meaning of Articles 80 et seq. of the Swiss Civil Code.[2]

According to Articles S4 and S5 of the CAS Code, the 'ICAS is composed of twenty-two members,[3] experienced jurists', 'appointed for one or several renewable period(s) of four years' as follows:

a. six members are appointed by the International Sports Federations (IFs), viz. five by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
b. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;

1 The current (2022) edition of the CAS Code and many of the previous ones can be found on the CAS website, at https://www.tas-cas.org/en/arbitration/code-procedural-rules.html. The CAS Code is divided into two parts, namely the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (Articles S1–S26) and the Procedural Rules (Articles R27–R70).

2 See e.g. ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003, para. 3.3.1. The ICAS's Annual Reports, which it started publishing at the end of 2021, indicate that the ICAS is 'a Swiss foundation of private law and of public interest' and that it is 'governed by the rules of the Swiss Civil Code' (see e.g. ICAS Annual Report 2020, published in December 2021, pp. 5 and 15, available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_2020_Annual_Report_and_Financial_Statements_.pdf).

3 Until 1 November 2022 (and since its first edition, issued in 1994), the CAS Code provided that the ICAS was composed of 20 members. An ICAS Media Release published on 11 October 2022 indicated that '[i]n view of the significant increase of the number of arbitrations related to football conducted by CAS, ICAS has decided to increase the number of ICAS members from 20 to 22 in order to guarantee a better representation of football stakeholders'.

c. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
d. four members are appointed by the fourteen members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
e. four members are appointed by the eighteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

The way in which both the appointment of the 14 members who are directly chosen by the sports governing bodies (SGBs) listed in Article S4(a)–(c) and the co-optation of the remaining eight members pursuant to Article S4(d)–(e) are decided is unknown. The list of current ICAS members (in place for the 2023–2026 term) is published on the CAS website, with a short CV for each member.[4] Until not long ago, no information was provided by the CAS as to which entity had appointed which ICAS member, or, as the case may be, which members were co-opted, and for the latter, on which basis (Article S4(d) or (e)). Since 2021, this information can be found, in very concise form, in the ICAS's Annual Report and Financial Statement.[5]

Among the prerogatives of the ICAS, as listed in Article S6 of the CAS Code, the following are particularly relevant for the present report:

- It elects from among its members for one or several renewable period(s) of four years … the President of the Ordinary Arbitration Division, the President of the Anti-doping Division and the President of the Appeals Arbitration Division of the CAS … [as well as] the deputies of the three Division Presidents who can replace them in the event they are prevented from carrying out their functions;
- It appoints the arbitrators who constitute the list of CAS arbitrators … on the proposal of the CAS Membership Commission. It can also remove them from those lists;
- It resolves challenges to and the removal of arbitrators through its Challenge Commission, and performs any other functions identified in the Procedural Rules.

With respect to the election of the ICAS President, Article S8(3) provides that '[a]ny ICAS member is eligible to be a candidate for the ICAS Presidency' and that the term of appointment is four years. The CAS Code does not specify the ICAS President's prerogatives, other than stating in Article S9 that '[t]he President of ICAS is also President of CAS [and that] [s]he/he is responsible for the ordinary administrative tasks pertaining to the ICAS'.[6]

According to Article S7 of the CAS Code, the ICAS 'exercises its functions itself or through its Board … or [its] permanent commissions'.[7] The ICAS Board is composed of 'the President, the two Vice-Presidents of the ICAS, the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division'.[8]

As mentioned, Article S7 of the CAS Code further provides that the ICAS may exercise its functions through its permanent commissions, including the Challenge Commission, which was introduced in the 2019 edition of the CAS Code to exercise the functions foreseen in Articles R34 and R35 of the Code, namely determining challenges against arbitrators and deciding on their removal

4 https://www.tas-cas.org/en/icas/members-2023-2026/.

5 In the latest Annual Report (covering the year 2021), which was published in November 2022 and can be found at https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report___Financial_Statements_2021.pdf, the ICAS included, in the captions under its members' portraits (at p. 8), a shorthand indication, in brackets, of each member's appointing entity, or, for co-opted members, of whether they had been appointed 'with a view to safeguarding the interests of the athletes' (portraits captioned with '(Athlete)'), or 'chosen from among personalities independent of the bodies appointing the other members' (portraits captioned with '(Independent)'). Prior to the 2020 Annual Report, published in 2021, a CAS Media Release dated 28 December 2018 (the 2018 Media Release) also provided this information with regard to the ICAS's composition for the 2019–2022 term. In fact, the 2018 Media Release provided more information than the ICAS's Annual Reports, as it also indicated, for each member, whether he or she had been 'chosen from within [or from outside] the [ASOIF's or AIOWF's/ANOC's/IOC's] membership' (in accordance with Article S4(a)–(c)), as well as who was a new member (and, indirectly, who had been re-elected); see https://www.tas-cas.org/fileadmin/user_upload/ICAS_media_release_-_ICAS_2019-2022.pdf. The latest CAS Media Release breaking down the ICAS's composition for the current term (2023–2026), was published on 16 December 2022 (the 2022 Media Release) and can be found at https://www.tas-cas.org/fileadmin/user_upload/ICAS_Media_Release_-_Composition_of_ICAS_2023-2026.pdf. Unlike the 2018 Media Release, the 2022 Media Release does not highlight newly elected members, nor expressly indicate, for those among them who are ANOC/ASOIF/AIOWF and IOC appointees, whether they have been selected from within or outside the memberships of those organisations.

6 The current President of ICAS is Mr John Coates, who is also Vice-President of the IOC.

7 The ICAS Board may carry out all functions listed under Article S6 of the CAS Code, except those listed at paras 1, 2, 6.2 and 6.3, namely: adopting and amending the CAS Code (Article S6(1) of the CAS Code); electing the President, the two Vice-Presidents, the President of the Ordinary Arbitration Division, the President of the Anti-doping Division, the President of the Appeals Arbitration Division and the deputies of the three Division Presidents (Article S6(2) of the CAS Code); approving the ICAS budget (Article S6(6.2) of the CAS Code); and approving the annual report and financial statements of the ICAS (Article S6(6.3) of the CAS Code).

8 The current Vice-Presidents of the ICAS are Ms Elisabeth Steiner (elected to replace Ms Tjasa Andree-Prosenc, who retired before the end of her term) and Mr Michael Lenard, and the Presidents of the Ordinary and Appeals Arbitration Division are Ms Carole Malinvaud and Ms Corinne Schmidhauser. According to a Media Release published on 16 December 2022, at a meeting held on 2 December 2022, the ICAS 'voted to amend Article S6.2 [of the CAS Code] so that for the 2023–2026 cycle onwards, ICAS will be composed of three, rather than two, Vice-Presidents, meaning that the ICAS Board will count 6 members' (see https://www.tas-cas.org/fileadmin/user_upload/ICAS_Media_Release_-_Composition_of_ICAS_2023-2026.pdf). As indicated in that same Media Release, elections for the positions of ICAS President and Vice-Presidents, as well as President and Deputy President of the Ordinary, Appeals and Anti-Doping Divisions, will be held on 31 May 2023.

from CAS panels. The Challenge Commission is 'composed of an ICAS Member to be appointed from outside the IOC, IFs and ANOC selection and membership and who shall act as commission chair, any by the 3 Division Presidents and their Deputies'.[9] Article S7(2)(c) clarifies that the Division President and the Deputy President of the Division concerned by a challenge procedure before the Commission shall be 'automatically disqualified' from the proceedings.

Another of the ICAS's permanent commissions (also introduced with the 2019 Code) is the CAS Membership Commission, which is 'responsible to propose the nomination of new CAS arbitrators and mediators to the ICAS [or to] suggest the removal of arbitrators and mediators from the CAS lists'.[10] The CAS Membership Commission is composed of two ICAS members (from among those who have been appointed in accordance with Article S4(d) or (e) CAS Code, i.e. with a view to safeguarding the interests of athletes or in view of their independent status vis-à-vis SGBs) and the Presidents of the Ordinary, Appeals and Anti-Doping Divisions.[11]

2.2. THE COURT OF ARBITRATION FOR SPORT

According to Article S3 of the CAS Code, the 'CAS maintains one or more list(s) of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels composed of one or three arbitrators'.

CAS panels operate within specialised CAS Divisions, dedicated to the management of the different types of CAS procedures, according to specific sets of rules. Article S3 provides that there are three permanent CAS Divisions, namely the CAS Ordinary Division, the CAS Appeals Division, and the CAS Anti-Doping Division. In addition, as mentioned at the outset, the CAS operates an Ad Hoc Division, which is only set up for finite periods of time, to resolve disputes on the occasion of major sports events. CAS arbitration proceedings are administered by the CAS Court Office, which is managed by the CAS Director General.

2.2.1. The CAS Ordinary Division

The CAS Ordinary Division constitutes panels of one or three arbitrators to resolve sports-related commercial disputes, such as media or image rights

9 The current members of the Challenge Commission are listed in the ICAS's 2021 Annual Report, pp. 9–10, available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report___Financial_Statements_2021.pdf.

10 Article S7(2)(a) CAS Code.

11 The current members of the Membership Commission are listed in the ICAS's 2021 Annual Report, p. 10, available at https://www.tas-cas.org/fileadmin/user upload/ICAS_Annual_Report___Financial_Statements_2021.pdf.

disputes, or matters relating to licensing, sponsorship, agency and other commercial agreements. The jurisdiction of the CAS Ordinary Division to hear the disputes brought before it is based on specific submission or arbitration agreements, concluded ad hoc or included in the parties' contracts. The Ordinary Division's role is to 'ensure the efficient running' of the arbitral proceedings within its remit, which are conducted in accordance with the procedural rules contained in Articles R27–R46 and R64–R70 of the CAS Code.[12]

2.2.2. The CAS Appeals Division

The CAS Appeals Division constitutes panels of one or three arbitrators to resolve challenges against the decisions rendered by SGBs in a variety of contexts, be they disciplinary (including anti-doping) or related to governance, eligibility, contractual or other matters. Its jurisdiction is generally based on an arbitration clause contained in the relevant SGB's regulations or other instruments, providing that the SGB's decisions may be impugned before the CAS upon exhaustion of the applicable internal remedies.[13] The Appeals Division's role is to manage and 'ensure the efficient running' of the arbitral proceedings within its remit, which are governed by Articles R27–R37 and R47–R70 of the CAS Code.[14]

2.2.3. The CAS Anti-Doping Division

As mentioned, the permanent CAS Anti-Doping Division (CAS ADD) is a recent creation. It was established in 2019 in order 'to hear and decide anti-doping cases as a first-instance authority pursuant to a delegation of powers from the [IOC], International Federations of sports on the Olympic programme (Olympic IFs), and any other signatories to the World Anti-Doping Code (WADC).'[15] In accordance with Articles A1, A2, A14, A16 and A21 of the ADD Rules, the cases submitted to the CAS ADD operating in this capacity are decided by panels composed of a sole arbitrator and can be appealed before the CAS Appeals Division.

A recent case[16] has raised the question whether CAS ADD panels qualify as genuine arbitration tribunals, and their decisions as arbitral awards, within the meaning of the Swiss lex arbitri. Indeed, as just noted, the CAS ADD decides anti-doping cases as a first-instance authority, by delegation (i.e. on behalf)

12 Article S20(a) of the CAS Code.

13 See Article R47 of the CAS Code.

14 Article S20(b) of the CAS Code.

15 Article A1 of the CAS ADD Rules.

16 SFT 4A_612/2020 (*Evgeny Ustyugov v. International Biathlon Union (IBU)*), Decision of 18.06.2021, reproduced in part in the SFT's reports on leading cases, under the reference ATF 147 III 500; and SFT 4A_232/2022 (*Evgeny Ustyugov v. International Biathlon Union (IBU)*), Decision of 22.12.2022, also slated for publication in the SFT's collection of leading cases.

of the SGBs that opt to entrust it with this role.[17] This means that when the CAS ADD rules on a case in this capacity, it is acting as a substitute for the SGB's internal adjudicatory organs that would otherwise be called to determine (in the first instance and subject to appeal before the CAS) whether there has been an anti-doping violation and impose the appropriate sanction for any such violation.[18]

Under Swiss law, decisions rendered by the internal organs of a sports federation do not qualify as arbitration awards; they are considered as manifestations of the federation's will rather than judicial acts.[19]

This position was confirmed – and its ramifications with regard to the CAS ADD's status clarified – in a very recent decision rendered by the SFT in the *Evgeny Ustyugov v. International Biathlon Union (IBU)* case, where the athlete challenged the jurisdiction and regularity of the constitution of both the CAS ADD and the CAS Appeals Division panel hearing the case on appeal.[20]

After a first application for annulment brought by Ustyugov against the CAS ADD's first-instance 'award' was declared inadmissible by the SFT on the ground that the applicant had failed to exhaust the available remedies,[21] a CAS Appeals Division panel constituted in accordance with Article A21 ADD Rules issued a preliminary award upholding both the CAS ADD's and its own jurisdiction to hear the case, and dismissing the athlete's challenge to the regularity of the constitution and structural independence of both panels.[22]

17 At present, more than a dozen SGBs have delegated the adjudication of alleged anti-doping violations in accordance with their regulations to the CAS ADD.

18 See Articles 8 (Results Management: Right To a Fair Hearing and Notice of Hearing Decision) and 13 (Results Management: Appeals) of the World Anti-Doping Code (WADC).

19 See e.g. SFT 344/2021, Decision of 13.01.2022, para. 5.2, with further references; SFT 4A_612/2020, Decision of 18.06.2021, para. 4 (see also the discussion of the SFT's *Gundel* and *Lazutina* decisions in section 5.1 below). As such, the federations' decisions are not open to annulment or revision before the SFT in the same way as arbitral awards. In accordance with Swiss association law, an athlete who intends to challenge his or her federation's disciplinary decisions, can, once any available internal remedies have been exhausted, bring the case for a final and binding judicial determination before the competent court or, if a valid arbitration agreement so provides (as is often the case), before an arbitral tribunal (almost invariably, in such cases, the CAS).

20 SFT 4A_332/2022, Decision of 22.12.2022.

21 SFT 4A_612/2020 (ATF 147 III 500), Decision of 18.06.2021, paras 4–5.

22 CAS 2020/A/7509, Award of 08.04.2022. In disputing the CAS ADD's and (relatedly) the CAS Appeals Division's jurisdiction under the applicable (2019) IBU regulations, Ustyugov argued that, having retired as a professional biathlete in 2014, at a time when the IBU regulations provided for first-instance proceedings before the IBU Anti-Doping Hearing Panel (ADHP) and appeal proceedings before the CAS Appeals Division, he was not bound by the IBU's later decision to replace the ADHP with the CAS ADD (see the summary of the parties' arguments and of the CAS Appeals Division panel's reasoning in SFT 4A_332/2022, Decision of 22.12.2022, paras 5.3–5.5). In essence, Ustyugov argued that either the CAS ADD lacked jurisdiction for this reason (the ADHP should have heard his case in the first instance), and thus the CAS Appeals Division also had no jurisdiction to hear an appeal against the CAS ADD decision, or, if the CAS ADD was to be considered as a genuine arbitral tribunal, its jurisdiction (and that of the CAS Appeals Division on appeal) could not be validly imposed on him, given that he had never consented to it (since the relevant regulations were adopted after his retirement).

Ustyugov again sought the annulment of this award before the SFT.[23] Here, the SFT recalled that, to qualify as an arbitral award, a decision must be rendered by a tribunal meeting the fundamental requirements of impartiality and independence and drawing its power to adjudicate the case (in lieu of the otherwise competent courts) from a valid arbitration agreement.[24] In this regard, the SFT noted that, even though the CAS ADD is not itself an organ of the sports federation, its power to rule as a first-instance tribunal, applying the federation's anti-doping rules and deciding cases on its behalf, arises from a unilateral decision of the relevant SGB (in this case, the IBU) to delegate that power to the ADD instead of exercising it directly through its internal organs. Under this configuration, there is no basis for a finding that either of the parties to the dispute, i.e. the SGB and the athlete accused of an anti-doping rule violation, have intended to confer jurisdiction to the CAS ADD panel to determine their dispute in a final and binding manner, in lieu of the competent courts of law. Regardless of the terminology used in the CAS ADD Rules, which refer to the proceedings before the ADD as 'arbitration' and to the resulting decisions as 'awards', the CAS ADD's authority vis-à-vis Ustyugov did not rest on actual arbitration agreement, and as a consequence, its decision could not qualify as a genuine arbitral award.[25] On the other hand, in line with its longstanding case law, the SFT held that the CAS Appeals Division panel hearing the case on appeal was a validly constituted arbitral tribunal, with the jurisdictional mission to finally adjudicate the dispute instead of the otherwise competent state courts, based on the parties' mutual submission to the relevant provisions in the IBU regulations.[26]

In *Ustyugov*, the CAS ADD operated in accordance with the 'default' two-tier procedure under the ADD Rules, which, as noted, mandatorily provides for the CAS ADD award to be rendered by a sole arbitrator, subject to a subsequent appeal before a CAS Appeals Division panel (consisting of one or three arbitrators). However, the CAS ADD Rules also allow the parties to agree to have their case decided by a three-member panel as the *sole* adjudicating instance. The procedure for the conclusion of such an agreement is set out in subsections of Articles A13–A15 ADD Rules. As Article A15 makes clear, '[w]hen the parties agree to have a three-member Panel instead of a Sole Arbitrator, they also agree to forgo their right of appeal before the CAS Appeals Division.' Although the CAS ADD Rules still permit certain (non-participating) third parties to bring an appeal against the CAS ADD award,[27] as far as the original parties are concerned, the award is final.

23 SFT 4A_332/2022, Decision of 22.12.2022.

24 Ibid., para. 5.2.

25 Ibid., paras 5.9.1–5.9.3.

26 Ibid., para. 5.9.5. As noted in n. 22 above, the IBU regulations to which Ustyugov had adhered (prior to his retirement) already provided for the CAS Appeal Division's jurisdiction to hear appeals against the IBU's first-instance decisions in anti-doping matters.

27 Article A15(4)(a) and (b) CAS ADD Rules, with reference to Article 13.2.3 WADC.

While the SFT did not rule on this point in the *Ustyugov* decision, it is submitted (in line also with the SFT's reasoning in that case) that in this particular configuration and by virtue of the separate and specific arbitration agreement concluded by the parties in accordance with Articles A13–A15 ADD Rules, the CAS ADD's ruling is to be deemed a genuine arbitral award, subject to review by the Swiss courts in accordance with the Swiss lex arbitri, including its provisions governing the independence and impartiality of arbitrators. Accordingly, the provisions governing CAS ADD 'sole instance' proceedings will be examined, where relevant, in the following sections.

2.2.4. *The CAS Ad Hoc Division*

As mentioned, the CAS also comprises a non-permanent Ad Hoc Division, which is set up specifically on the occasion of major international sporting events (including, beyond the Summer and Winter Olympic Games, the Commonwealth Games, the Asian Games, the UEFA European Championship, and the FIFA World Cup).

Each CAS Ad Hoc Division only exists and operates for a predetermined period of time, to deal with any disputes as may arise in the run-up to the event's official opening and throughout its duration.[28] Given the dynamic competition context in which the Ad Hoc Division operates, the proceedings are highly expedited and the resulting awards must normally be rendered within 24 hours from the lodging of the application.[29]

Since the Summer Olympic Games of 2016, a CAS Ad Hoc Anti-Doping Division has also been operating, alongside the 'classic' Ad Hoc Division, on a temporary basis and on site, at major international sports events.

2.2.5. *The CAS Director General*

The CAS Director General, who formerly carried the title of Secretary General,[30] is appointed by the ICAS. The Code does not set out a limit to the duration of the Director General's mandate.[31]

28 For instance, Article 1 of the Arbitration Rules applicable to the CAS Ad Hoc Division for the Olympic Games (CAS Arbitration Rules for the Olympic Games) provides, in conjunction with Article 61 of the Olympic Charter, that the CAS Ad Hoc Division is competent to adjudicate any disputes 'arising on the occasion of, or in connection with, the Olympic Games', 'insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.'

29 See, in particular, Articles 14–18 of the CAS Arbitration Rules for the Olympic Games.

30 The change in title, which was implemented in the CAS Code's 2020 edition, has been reportedly decided by the ICAS to 'better reflect the managerial role of the chief executive of CAS through the years and acknowledg[e] the person's supervision of the activities of the CAS Court Office' (CAS Bulletin 2020/1, p. 3).

31 The current Director General, Mr Matthieu Reeb, has been in office for 23 years (see 'Important Dates', at https://www.tas-cas.org/en/general-information/statistics.html, indicating that

According to Articles S8(4) and S10 of the CAS Code, the CAS Director General takes part in the decision-making of the ICAS and ICAS Board with a consultative voice, acts as Secretary to the ICAS and ICAS Board, and supervises the activities of the CAS Court Office.

One prerogative of the CAS Director General, which, as will be seen below, has made the object of challenges before the CAS itself and in various courts, is the so-called scrutiny of awards. In this regard, Articles R46 and R59 of the CAS Code provide, for awards rendered by panels sitting in the Ordinary and Appeals Divisions, that 'before the award is signed, it shall be transmitted to the CAS Director General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle.' A similar provision is found in Article A21 of the CAS ADD Rules, which entrusts the Managing Counsel of the CAS ADD with the scrutiny of ADD awards. The CAS Ad Hoc Division Rules provide that the scrutiny of the award is performed by the President of the Ad Hoc Division.[32]

2.2.6. *The CAS Court Office*

According to Article S22 of the CAS Code, the CAS 'includes a Court Office composed of the Director General and one or more Counsel, who may represent the Director General when required',[33] and '[t]he Court Office performs the functions assigned to it by this Code'.

The functions carried out by the CAS Court Office are mentioned in several provisions throughout the Code. Among others, the CAS Court Office receives and issues communications to and from the parties and the CAS, including with regard to the process of constitution of CAS panels and any procedural incidents arising from or related to such process (e.g. disclosures and challenges). Similar functions are performed by the CAS ADD Office under the CAS ADD Rules.

3. THE CAS LIST(S) OF ARBITRATORS

Both the CAS Code[34] and the court decisions that have reviewed the CAS system generally refer to the 'CAS list' of arbitrators in the singular form. In reality there is nowadays, within the CAS, a complex system of lists, special lists and sub-lists.

Mr Reeb was appointed in 1999. The previous CAS Secretary Generals were Messrs Jean-Philippe Rochat (1994–1999), and Gilbert Schwaar (1984–1994)).

32 Article 19 CAS Arbitration Rules for the Olympic Games.

33 According to the CAS website, the CAS Court Office currently employs 13 CAS Counsel and two Clerks (https://www.tas-cas.org/en/general-information/addresses-and-contacts.html).

34 See in particular, in the CAS Statutes, Articles S5, S6, S13, S14 and S19, and, in the CAS Procedural Rules, Articles R33, R38, R39, R40.2 and R48. Article S3 was amended in 2019 to reflect the possibility for CAS of maintaining 'one or more list(s) of arbitrators', and, since

3.1. THE GENERAL LIST AND OTHER LISTS OF CAS ARBITRATORS

Ever since the start of its operations in 1984,[35] the CAS works with a mandatory list of arbitrators, meaning that the parties can only appoint individuals from the list to serve as arbitrators on CAS panels.[36]

Initially, the CAS list of arbitrators consisted of 60 names. Starting in 1994 (as a result of the structural and institutional reforms prompted by the SFT's *Gundel* decision, which will be discussed below)[37] and until 2021, the CAS Code provided that the list should include at least 150 names. The current (2022) wording of Article S13 provides that '[t]here shall be not less than three hundred arbitrators' on the CAS list of arbitrators. The latest version of the list is publicly available on the CAS website, under the tab 'general list'.[38] At the time of drafting the present report there were 376 arbitrators on this 'general list'. Arbitrators appearing on the general list can be appointed to sit in proceedings administered by the Ordinary, Appeals and Ad Hoc Divisions.

The CAS website also refers to a 'football list', which currently contains 111 names.[39] The existence of the 'football list' is not expressly contemplated by the CAS Code but is understood to be the result of an agreement between the CAS and the Fédération Internationale de Football Association (FIFA) when the latter decided to join the CAS system in 2002. It is further understood that the composition of this list is based on recommendations of arbitrators with specific expertise in football matters, made to ICAS by football stakeholders. Several arbitrators on the football list also appear on the general list. That said, arbitrators who only appear on the CAS football list can also be appointed in cases that do not concern football. In connection with the recent renewal of this agreement between FIFA and the CAS it has reportedly been decided to expand the 'football list' and to allow arbitrators who are not on the 'football list' to act as sole or presiding arbitrators in football disputes only if the parties so agree or the President of the Appeals Division so decides in exceptional circumstances.[40]

Since 2018, there is an additional sub-list, selected from the general list, to form a 'special list' of arbitrators who are designated to handle cases concerning

1 November 2022, Article R54 of the Code expressly refers to the existence of special list(s) of arbitrators 'in relation to a particular sport or event' in connection with the appointment of sole or presiding arbitrators in appeals proceedings (see section 4.2 below).

35 For a brief history of the CAS, see https://www.tas-cas.org/en/general-information/history-of-the-cas.html, and G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, paras 1.122–28.

36 Article R33(2) CAS Code.

37 Section 5.1.

38 https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html.

39 https://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html.

40 See Article R54(4) of the 1 November 2022 edition of the CAS Code and section 4.2 below.

non-compliance with the WADC by signatory sports organisations.[41] This list has now become a sub-list of the list of arbitrators composing the recently established CAS ADD.

Indeed, since 2019, there is a 'new list of arbitrators specialized in anti-doping regulations (the CAS ADD list)',[42] who constitute the CAS ADD. According to the CAS, the CAS ADD list 'is separated from the CAS general list of arbitrators in order to avoid that the same arbitrators be eligible in first instance and in appeal. However, the CAS ADD arbitrators … remain eligible to decide cases submitted to the CAS Ordinary Division'.[43] In addition, Article A9 of the CAS ADD Rules provides for a special 'sub-list' of ADD 'arbitrators who shall exclusively act as Presidents of three-member CAS ADD Panels or as Sole Arbitrators', and who will not be 'eligible to be nominated by parties involved in CAS ADD procedures, except where the parties agree on such nomination'.

There are currently 22 arbitrators who are eligible for party nomination on the CAS ADD list, 24 on the list of Panel Presidents/Sole Arbitrators and nine arbitrators who are eligible for appointment in WADC non-compliance issues.[44]

Yet another list of CAS arbitrators is set up on a temporary basis, on the occasion of the establishment of a CAS Ad Hoc Division and CAS Ad Hoc ADD Division to operate at the Olympic Games and other major sports events. According to Article 2 of the CAS Arbitration Rules for the Olympic Games, 'the ad hoc Division consists of arbitrators appearing on a special list, a President, a Co-president and a Court Office'. According to Article 3 of the same Rules, the arbitrators selected to appear in the ad hoc list of arbitrators for the Olympics are drawn from ('appear on') the CAS general list. Article 3 further specifies that '[n]one of these arbitrators may act for the CAS [ADD] during the same edition of the [Olympics], nor thereafter in matters connected to the said edition of the [Olympics]'.

In recent years, the CAS Ad Hoc Division and Ad Hoc ADD Division lists of arbitrators have generally included between six and 12 names, depending on the event.[45]

41 While the jurisdiction of CAS to decide on these issues is provided for by Article 24.1.6 WADC, the existence of the 'list of arbitrators specifically designated by CAS for cases arising under [WADC] Article 24.1' is contemplated in Articles 9.3.2 and 9.4.2 of WADA's International Standard for Code Compliance by Signatories.

42 M. Reeb, 'Editorial', CAS Bulletin 2019/2, p. 4.

43 Ibid. See also Article A8 CAS ADD Rules, and Article S18(1) of the CAS Code, as amended in the Code's 2020 edition.

44 https://www.tas-cas.org/en/add/list-of-arbitrators-cas-add.html.

45 At the London 2012 and Rio 2016 Summer Olympics, the ad hoc list of arbitrators consisted of 12 names. At the Tokyo 2021 Olympics, the list consisted of 10 names (see https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Tokyo_Announcement.pdf). At the last three editions of the Winter Olympics (Sochi 2014, Pyeongchang 2018 and Beijing 2022), the ad hoc list of arbitrators consisted of nine names (see, most recently, https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Beijing2022_18.01.22.pdf). The lists of

3.2. THE CRITERIA FOR THE INCLUSION OF ARBITRATORS ON THE CAS LISTS

With respect to the CAS general list of arbitrators, Article S14(1) ab initio of the CAS Code provides that 'ICAS shall appoint personalities to the list of CAS arbitrators with appropriate 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', namely French, English or Spanish. Until 31 December 2011, candidate arbitrators could only be proposed for inclusion in the list by 'the IOC', 'the IFs' or 'the NOCs [National Olympic Committees]'.[46] This limitation was lifted in the 2012 edition of the Code. Under the current version of Article S14(1), the ICAS may select arbitrators 'whose names and qualifications are brought to [its] attention, *including* by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs' (emphasis added). Hence, theoretically, a proposal can now come from virtually anyone and prospective arbitrators are not precluded from submitting personal applications.

Article S14(1) in fine of the CAS Code adds that the 'ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes'. It is understood that this provision is the basis for the existence of the above-mentioned 'football list' and the 'special list' for WADC non-compliance matters. There are no express requirements that are specifically set out for arbitrators to be included in these two lists, though one would assume that the individuals selected for inclusion will have particular expertise in football and anti-doping matters, respectively.

Similarly, there are no special (express) requirements for inclusion in the list of arbitrators for the CAS Ad Hoc Divisions. The CAS Media Releases issued on 9 July 2021 and 18 January 2022, announcing the composition of the CAS Ad Hoc Divisions for the Tokyo and Beijing Olympics, stated that all the selected arbitrators 'are … experienced lawyers, judges or professors specialized in sports law, anti-doping regulations and arbitration'.[47]

arbitrators for the Ad Hoc CAS ADD Divisions that operated at the Olympic Games in Rio, Pyeongchang and Tokyo each consisted of six names (see, most recently, https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Tokyo_Announcement.pdf).

46 Specifically, one-fifth of the arbitrators were ('in principle') to be 'selected from among the persons proposed by the IOC, chosen from within its membership or from outside'; one-fifth were to be 'selected from among the persons proposed by the IFs, chosen from within their membership or outside'; one-fifth were to be 'selected from among the persons proposed by the NOCs, chosen from within their membership or outside'; one-fifth were to be 'chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes'; and one-fifth were to be 'chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.'

47 https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Tokyo_Announcement.pdf; https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Beijing2022_18.01.22.pdf.

The CAS Code also provides, in Article S16, that '[w]hen appointing arbitrators … the ICAS shall consider continental representation and the different juridical cultures'. It is likely for this reason that one version of the CAS general list published on the CAS website displays the arbitrators' names by continents and countries of nationality.[48] Until very recently, Article S16's recommendation was the only express reference to diversity requirements with regard to arbitrators in the CAS Code.[49] As will be seen in section 4.2 below, the 2022 edition of the CAS Code has introduced a new provision, addressing arbitrator diversity more comprehensively, in connection with the selection, by the President of the Appeals Division, of sole and presiding arbitrators at the panel appointment stage.

Finally, Article S18(3) of the CAS Code prohibits so-called double-hatting, providing that 'CAS arbitrators … may not act as counsel or expert for a party before the CAS'. Hence, candidates for appointment to the list of arbitrators will have to renounce acting in other capacities, even in unrelated cases, in CAS proceedings. Article S18(3) was first introduced in 2010.[50] At the time, the CAS was one of the first major arbitral institutions to introduce an express

48 https://www.tas-cas.org/fileadmin/user_upload/Liste_des_arbitres_par_nationalite_2022__sans_ADD__.pdf (status: January 2023). In this regard, it may be worth noting that, contrary to other institutional arbitration rules, the CAS Code does not contain express nationality-based restrictions to panel appointments (i.e. one or more of the arbitrators on a panel may have the same nationality as one of the parties).

49 In this connection it may be worth noting that recent studies have found that there remain significant disparities in terms of, inter alia, gender and nationality, not only in the make-up of the CAS list(s) of arbitrators (with male arbitrators from a limited number of countries counting for a large proportion of the names on the lists), but, more importantly, when it comes to the arbitrators who are actually appointed to sit in panels, as opposed to simply appearing on the CAS lists (see in particular J. Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva*, Asser Press, The Hague 2019, and R. Sethna, 'A Data Analysis Of The Arbitrators, Cases And Sports At The Court Of Arbitration For Sport', LawInSport, 4 July 2019, https://www.lawinsport.com/topics/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport#_Qualifications). Nevertheless, it is worth noting that, in recent years, the ICAS has seemed to pay more attention to these aspects, as it indicated in Media Releases it published on the occasion of its revisions of the list of arbitrators in 2017 and 2018, where it stated that, in selecting new names to add to the list, its focus was 'on geographic spread as well as on gender and knowledge of the sports world in order to achieve a balanced list of independent legal specialists (attorneys-at-law, judges, professors) equipped to meet the unique challenges of global sports arbitration' (see https://www.tas-cas.org/fileadmin/user_upload/2018.01.26_New_CAS_members.pdf; https://www.tas-cas.org/fileadmin/user_upload/ICAS_release_Jan_17_new_arbitrators_and_mediators_corrected_Bennett_Canada_instead_of_Australia_.pdf (sic) (status: January 2023)).

50 As worded in the 2010 edition of the CAS Code and several subsequent iterations, the provision (originally found in Article S18(2)) only precluded arbitrators from acting as counsel. Since the 2021 edition, and in what is now Article S18(3), appointments as expert are also incompatible with inclusion in the CAS list of arbitrators.

rule prohibiting double-hatting. That said, as noted elsewhere,[51] the CAS's rule's effectiveness in actually preventing conflicts of interest is limited by the fact that it does not prohibit other members of CAS arbitrators' law firms from acting as counsel or experts in CAS cases.

Upon their appointment, CAS arbitrators are required to sign an 'official declaration' whereby they undertake to 'exercise their functions personally with total objectivity, independence and impartiality and in conformity with the provisions of [the CAS Code]'.[52]

3.3. THE AUTHORITY APPOINTING THE ARBITRATORS ON THE LIST(S) AND THE APPOINTMENT PROCEDURE

As mentioned, the various lists of CAS arbitrators are compiled by the ICAS,[53] and, since the entry into force of the CAS Code's 2019 edition, the new members are appointed to the lists upon the proposal of the ICAS's Membership Commission.[54]

As was also seen above, proposals to the CAS Membership Commission can be put forward not only by 'the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs', but also by any other stakeholder, and nothing in the rules prevents the CAS Membership Commission from considering spontaneous applications.

Neither the CAS Code nor the CAS website provide any information on the application process. It is understood that individuals who wish to be considered for inclusion in the list can request an application form from the CAS Court Office.[55] The form requires applicants to state their personal details, including their nationality, domicile 'education (legal)', 'current function', language skills, and whether they have any experience in arbitration and/or sports law and/or experience in sports 'as an athlete, as an official or as a manager'. In addition, applicants are asked to provide '2 or 3 letters of reference of persons who could be consulted and who are specialized in international arbitration …, sports law or sports management.'[56]

51 A. Rigozzi, 'The Recent Revision of the Code of Sports-Related Arbitration (CAS Code)', *Jusletter*, 13 September 2010, p. 3.
52 Article S18(1) CAS Code.
53 Article S3 CAS Code.
54 Article S7(2)(a) CAS Code.
55 An older specimen of the form was reproduced in D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, pp. 155–56.
56 The form (in its 2020 edition on file with the rapporteurs) indicates that it should be sent to the CAS's general postal address (and/or by e-mail to info@tas-cas.org), and that, although applications can be submitted at any time, '[t]he review process of applications by the ICAS takes place twice a year'.

Candidates are not interviewed and it is understood that the decision not to appoint them does not state the reasons for non-appointment.

3.4. REMOVAL FROM THE CAS ARBITRATOR LISTS

Article S7(2)(a) of the CAS Code provides that the CAS Membership Commission, 'may … suggest the removal of arbitrators … from the CAS lists'. Article S19(2) also provides that 'ICAS may remove an arbitrator … from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS/CAS'. As ICAS is not a permanent body, it is understood that the initial call for removal is a matter for the CAS Director General.

According to Article S13, arbitrators can appear on the list 'for one or several renewable period(s) of four years'. Beyond acting to remove an arbitrator in the course of an ongoing four-year 'tenure' period, in accordance with Articles S7 and S19 of the CAS Code, the CAS Membership Commission can obviously also choose not to renew an arbitrator's appointment to the list after one or more four-year period(s). The reasons for removal or non-reappointment are not set out in the CAS Code, and it is understood that they were not, in the past, communicated to the non-renewed arbitrators. It remains to be seen whether the language most recently added in Article S13, providing that 'CAS arbitrators … who have not been reappointed shall be informed accordingly'[57] means that, in addition to being notified of their non-reappointment, arbitrators will also be informed of the reasons for the decision not to reappoint them and be allowed to comment on such reasons.

As far as the Ad Hoc Divisions are concerned, removal from the list would not normally occur, given the Divisions' short-term tenure (a new Ad Hoc Division (and the corresponding list of arbitrators) is appointed for each of the concerned sports events). That said, the Arbitration Rules for the Olympic Games do reserve the faculty for the ICAS Board to 'modify' the Ad Hoc List after it has been published.[58]

4. THE APPOINTMENT OF CAS PANELS

The modalities according to which panels are constituted differ depending on the applicable CAS arbitration proceedings.

57 Article S13(1) in fine, as amended with effect on 1 November 2022.
58 Article 3.

4.1. CAS ORDINARY DIVISION

Article R40.1 of the CAS Code provides that Panels in the CAS Ordinary Division are composed of one or three arbitrators, depending on the parties' agreement. If there is no such agreement,[59] the President of the Ordinary Division 'shall determine the number [of arbitrators], taking into account the circumstances of the case'.[60]

Article R40.2 gives priority to the parties' autonomy and thus to their agreement also with respect to the modalities of appointment of the arbitrators (subject always to the requirement that appointees must be selected from the (relevant) CAS list). In the absence of an agreement, it provides that, if a sole arbitrator is to be appointed, the appointment will be made directly by the Division President. Where the Division President determines that the panel is to be constituted of three arbitrators, the claimant will be expected to nominate an arbitrator within the time limit set by the CAS to that effect, failing which the arbitration will be deemed withdrawn. If, on the other hand, the respondent fails to appoint its arbitrator within the set time limit, the Division President will make the appointment. The two co-arbitrators will then select the President of the Panel by mutual agreement, failing which the Division President will make the appointment.

4.2. CAS APPEALS DIVISION

Article R50 of CAS Code, entitled 'Number of arbitrators', sets out a default rule, providing for the appointment of a three-member panel, unless the parties have agreed to have their dispute heard by a sole arbitrator, or, absent an agreement between the parties, if the President of the Appeals 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'.

The room left to party autonomy is significantly reduced with regard to the appointment of the panels in CAS Appeals Division cases, given that, under Article R54, if a sole arbitrator is to be appointed, the appointment will be made by the President of the Appeals Division, with no direct input from the parties. If the case is to be heard by a three-member panel, while each party may appoint a co-arbitrator,[61] the President of the Panel (who, importantly, will have a casting vote in case the panel cannot reach a majority decision)[62] will be appointed by the President of the Appeals Division, again with no direct input from the parties.[63]

As already mentioned, for cases where a special list of arbitrators is established in relation to a particular sport (e.g. the football list), the 2022 edition of the Code has introduced a further limitation to the effect that the sole arbitrator or the president of the panel must be a person appearing on the special list, unless the parties agree otherwise, or the President of the Appeals Division so decides in exceptional circumstances (when appointing either the sole arbitrator or the president of the panel).[64]

The 2022 edition of the Code has also added a requirement (which, for unclear reasons, is spelled out only with regard to appeals proceedings) that, when selecting sole and presiding arbitrators, the President of the Appeals Division shall consider the criteria of 'expertise, availability, diversity, equality and turnover of arbitrators'.[65]

4.3. CAS ANTI-DOPING DIVISION

Article A15 of the CAS ADD Rules sets out the appointment procedure that applies when a three-member CAS ADD Panel is to be appointed to operate as a single-instance arbitral tribunal, by virtue of an agreement between the parties, as provided in Article A14. In these cases, the claimant, then the respondent, are each to nominate an arbitrator from the CAS ADD list (and, as noted in section 3.1 above, the parties may agree to the appointment of co-arbitrators drawn from the special list of CAS ADD Presidents, in accordance with

59 Article R40.1 was amended in the 1 November 2022 edition of the Code to expressly provide that '[i]f the arbitration agreement does not specify the number of arbitrators', the parties may agree to a panel composed of a sole arbitrator 'at the outset of the procedure.'

60 In particular, the Division President may choose to appoint a sole arbitrator when the claimant so requests and the respondent fails to pay its share of the advance on costs.

61 The 1 November 2022 edition of the CAS Code has been amended to clarify that, as also provided with regard to ordinary proceedings (Article R40.2), where a three-member panel is to be appointed by virtue of a decision made by the President of the Appeals Division, 'the Appellant shall appoint an arbitrator within the time limit set by the President of the Division, failing which the appeal shall be deemed withdrawn.'

62 Articles R46 and R59 CAS Code.

63 According to Article R54(2), the President of the Appeals Division will proceed with the appointment of the presiding arbitrator 'after having consulted the [co-]arbitrators'.

64 Article R54(4) CAS Code (2022 edition): '[i]n case a special list of arbitrators exists in relation to a particular sport or event, the Sole Arbitrator or the President of the Panel shall be appointed from such list, unless the parties agree otherwise or the President of the Division decides otherwise due to exceptional circumstances'. This provision is rather obscure, particularly to the extent it refers to a special list for 'a particular sport event', as in that case the appointment is done directly by the President of the Ad Hoc Division and arbitrators who are not on the list will not be at the venue of the event.

65 Article R54(3) CAS Code (2022 edition). It is submitted that the same criteria should be taken into consideration when CAS (Ordinary or Appeals) Division Presidents appoint arbitrators in lieu of defaulting respondents (in accordance with Articles R40.2(3) and R53 in fine of the CAS Code).

Article A9). If either party fails to nominate its arbitrator, the appointment is made on that party's behalf by the President of the CAS ADD.

With regard to the presiding arbitrator, Article A15 provides that he or she 'shall be appointed from the special list of Presidents for CAS ADD, either by mutual agreement of the parties … or, failing such agreement, by the President of CAS ADD'.

4.4. CAS AD HOC DIVISION

Given the expedited nature of the proceedings in the Ad Hoc Division, it is the President of the Ad Hoc Division that directly appoints a three-member panel (and, within that panel, the presiding arbitrator) or – where he or she deems it appropriate – a sole arbitrator to hear each incoming case, with no input from the parties. This rule applies to both the 'general' CAS Ad Hoc Division and the CAS Ad Hoc Anti-Doping Division.[66]

4.5. CONFIRMATION OF PARTY-APPOINTED ARBITRATORS AND APPOINTMENT OF AN AD HOC CLERK

In the CAS Ordinary, Appeals and ADD Divisions, party-appointed arbitrators must be confirmed by the President of the relevant Division, who is required by the CAS Code to proceed with the confirmation only after having 'ensure[d] that the arbitrators comply with the requirements of Article R33 [of the CAS Code]'.[67] In CAS Ad Hoc Divisions, this step is not required given that panels are exclusively and directly appointed by the Ad Hoc Division President.

Article R33 of the CAS Code sets out the fundamental requirements of independence and impartiality for all CAS arbitrators,[68] and provides that each arbitrator shall 'immediately disclose any circumstances which may affect her/his independence with respect to any of the parties.'[69]

In practice, upon their proposed appointment, CAS arbitrators in the Ordinary, Appeals and ADD Divisions must fill in and sign a form entitled

66 Article 11 Arbitration Rules for the Olympic Games; Article 11 of the CAS Ad Hoc ADD Rules.

67 Articles R40.3 and R54 CAS Code; Article A17 CAS ADD Rules.

68 Article R33(1); see section 5.2 below. In addition, Article R33(2) requires, as seen in section 3.1 above, that '[e]very arbitrator shall appear on the list [of arbitrators] drawn up by the ICAS' and that he or she 'shall have a good command of the language of the arbitration and shall be available as required to complete the arbitration expeditiously.'

69 Similarly, Article 12 of the Arbitration Rules for the Olympic Games requires arbitrators to 'disclose immediately any circumstance likely to compromise their independence.'

'Arbitrator's Acceptance and Statement of Independence'.[70] In this form, appointee arbitrators confirm their ability and availability to serve in the case at hand, and are asked to declare that there are no facts or circumstances that 'might be of such a nature as to compromise [the appointee arbitrator's] independence in the eyes of any of the parties', or to disclose any such facts or circumstances.[71] In the rapporteurs' experience, the CAS Court Office's practice with regard to the timing of communication to the parties of prospective arbitrators' Acceptance and Statement of Independence forms is not entirely consistent, in that the forms may or may not be circulated for comments prior to the Division President's confirmation of the arbitrators' appointment.[72]

Be that as it may, once (all) the arbitrator(s) is/are confirmed, the panel's appointment is recorded in a document entitled Notice of Formation of Panel, which includes copies of the Arbitrator(s)' Statement(s) of Independence (with any disclosures) and is circulated by the CAS Court Office to the parties. As from service of the Notice of Formation (and throughout the arbitration proceedings), any challenges to the panel's composition must be raised by the parties within seven days of their becoming aware of the relevant facts or circumstances, in accordance with the procedure described in section 6 below.[73]

The CAS Code further mentions that '[a]n ad hoc clerk, independent of the parties, may be appointed to assist the Panel'.[74] Upon their appointment (which generally occurs after the panel's formation), CAS ad hoc clerks are also required to fill in a Statement of Independence form, similar to the one filled in by the arbitrators. In practice, the ad hoc clerk's statement is only circulated to the parties if it contains any disclosures (and if the panel has confirmed to the CAS Court Office that it wishes to retain the ad hoc clerk, notwithstanding

70 A sample of this form was reproduced in D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, pp. 151–52.

71 Obviously, an arbitrator who makes a disclosure in the Acceptance and Statement of Independence form considers that the circumstances so disclosed do not affect his or her independence, or else he or she should decline the appointment.

72 When an arbitrator's Acceptance and Statement of Independence form containing a disclosure is circulated by the CAS Court Office to the parties prior to the arbitrator's confirmation, the CAS's cover letter mentions that 'pursuant to Article R34 of the CAS Code, the time limit to bring a challenge against an arbitrator is seven days after the ground for the challenge has become known'. As noted and discussed more thoroughly elsewhere, Article R34's time limit for bringing a challenge runs from the *confirmation* of the appointment (see G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration Law and Practice in Switzerland*, OUP, Oxford 2015, para. 4.137). That said, if a party considers that the disclosure reveals facts or circumstances that may justify a challenge, it must immediately raise any objections it may have or seek any clarifications it may need in that regard, reserving its right to bring a challenge should the arbitrator be confirmed.

73 Article R34 CAS Code; Article A10 CAS ADD Rules.

74 Articles R40.3 and R54 CAS Code; Article A17 CAS ADD Rules. There is no provision for the appointment of an ad hoc clerk in CAS Ad Hoc Division proceedings.

such disclosure(s)).[75] Although, unlike CAS arbitrators, ad hoc clerks are not required to appear on a CAS list, the CAS keeps an internal list of specialised lawyers from different countries who can be called upon to act as ad hoc clerks in CAS proceedings.[76]

5. THE REQUIREMENT OF INDEPENDENCE AND IMPARTIALITY

5.1. STRUCTURAL INDEPENDENCE

The issue of the CAS's structural independence has long been a subject of debate within the sports law and arbitration community.[77] Time and again over the years, it has also come before the highest national and international judicial authorities.

As noted above, the CAS was established in 1983, at the initiative of the IOC, and it started operating in 1984, with a list of 60 arbitrators. In accordance with the CAS Statutes of the time, half of the arbitrators on the list were appointed by the IOC, which also financed all of the CAS's operations.[78] In its landmark *Gundel* decision of 15 March 1993,[79] the SFT ruled that, in light of the close financial and organisational ties between the CAS and the IOC, this system would not qualify as genuine arbitration in disputes involving the IOC,[80] meaning that a resulting CAS award would then be considered an IOC decision, subject to the Swiss courts' full scrutiny (and not the limited review to which arbitral awards are subject).

In the wake of the *Gundel* decision, the IOC undertook a reform of the CAS system. The resulting 1994 Paris Agreement[81] and newly adopted CAS Code provided for the establishment of the ICAS, as a separate and independent body

75 D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, ad Article R40.3, paras 40–41.

76 Ibid., para. 36.

77 See e.g. A. Rigozzi, *L'arbitrage international en matière de sport*, Helbing & Lichtenhahn, Basel 2005, pp. 273–307; D.Y. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, Student Scholarship Papers, Yale Law School May 2006, available at https://openyls.law.yale.edu/handle/20.500.13051/5650; A. Vaitiekunas, *The Court of Arbitration for Sport: Law-Making and the Question of Independence*, Stämpfli, Berne 2014, pp. 121–200 (all with numerous further references to the relevant scholarship and case law).

78 https://www.tas-cas.org/en/general-information/history-of-the-cas.html.

79 ATF 119 II 271 (*Elmar Gundel v. FEI*), Decision of 15.03.1993.

80 Ibid., para. 3(b).

81 Agreement Related to the Constitution of the International Council of Arbitration for Sport (ICAS) (Paris Agreement), signed in Paris on 22 June 1994 (reproduced in M. Reeb, *Digest of CAS Awards II 1998–2000*, Kluwer Law, Alphen aan den Rijn 2002, pp. 883–85).

overseeing and managing the CAS, and responsible for compiling the list of CAS arbitrators according to the modalities described in the preceding sections. The Paris Agreement also overhauled the CAS's funding system, providing that IFs and NOCs would participate in the financing of the CAS, alongside the IOC.[82] Almost 10 years later, in the well-known *Lazutina* decision of 27 May 2003,[83] the SFT reviewed the reformed CAS system and found it to be consistent with the minimal requirements of structural independence, and thus capable of qualifying as genuine arbitration under Swiss law.[84]

In *Lazutina*, the SFT acknowledged that the CAS's mandatory list limits the parties' autonomy in the selection of arbitrators, but held that, since the 1994 reform, with the establishment of ICAS as an autonomous body responsible for compiling and overseeing the list, the IOC was no longer in a position to influence its composition. Further, the SFT found that the list was long enough to provide the parties with 'a wide range of names to choose from', including from a pool of arbitrators which had been selected, in accordance with Article S14 of the CAS Code, with a view to protecting the interests of the athletes.[85] It also noted that the obligation to appoint the arbitrators from a closed list was based on legitimate interests, in particular the benefit of specialisation in cases where awards need to be rendered without delay (as is generally the case in the world of competitive sports), and the necessity of ensuring a 'degree of consistency' in the decisions rendered.[86] The unbalanced composition of ICAS, and in particular the fact that all of its appointed members are nominated by the SGBs, and that only a minority of its co-opted members are appointed 'with a view to safeguarding the interests of the athletes', was not discussed as such in the decision.[87] The fact that, back then,[88] the arbitrators on the list could only be proposed by the IOC, IFs or NOCs also did not appear to be of concern to the SFT. However, the SFT did suggest that it would be desirable for the list to carry an indication, for each arbitrator, of the category (among those listed in Article S14 of Code) to which he or she belonged (i.e. whether the arbitrator's appointment had been proposed by the IOC, by an IF (and if so, which one), or

82 Article 3 of the Paris Agreement. See also G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, para. 1.127.

83 ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003.

84 Ibid., para. 3.3.4.

85 Ibid., para. 3.3.3.2, at pp. 457–58.

86 Ibid., at p. 456.

87 The athletes' challenge was focused on the IOC's alleged control over the ICAS: in this regard, the SFT did dismiss (finding it to be irrelevant *in casu*) their argument based on the 'rather theoretical possibility' that the 12 appointed members of ICAS could potentially, in accordance with Article S4 of the CAS Code, all be selected from within the IOC membership (ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003, para. 3.3.3.2, at p. 456).

88 As provided in Article S14 of the CAS Code until the end of 2011.

by a NOC (and if so, which one)), or if the arbitrator was part of the quota that was to be appointed 'with a view to safeguarding the interests of the athletes' or 'from among persons independent of [the IOC, IFs and NOCs]'.[89] Despite initial indications by the CAS, in the aftermath of the *Lazutina* decision, that this recommendation would be implemented, the CAS list of arbitrators still does not provide this information.

In a more recent case, where the independence of the CAS specifically vis-à-vis FIFA was challenged by the Belgian club FC Seraing,[90] the SFT noted that the changes made in 2012 with regard to the way arbitrators are proposed for inclusion in the CAS list (eliminating the preponderant influence of the SGBs) represented a positive development.[91] In this decision, the SFT also re-examined the role played by the SGBs, and by FIFA more particularly, in the financing of the CAS, concluding that the existing system did not establish a dependence relationship of the latter vis-à-vis the former.[92] Addressing another recurrent criticism of the CAS system raised by the applicant,[93] the SFT reaffirmed its position that the rule requiring the scrutiny of the award by the CAS Director General is not per se problematic, as it does not call into question the arbitrators' ultimate and exclusive power to decide the case before them.[94] In its *Seraing* decision, the SFT referenced the judgment rendered in 2016 by the German Supreme Court in the *Pechstein v. ISU* case, which had also examined and upheld the CAS system, having considered many of the same criticisms.[95]

Even more recently, Russian high jumper Aleksandr Shustov sought the annulment of the CAS award confirming his four-year ban for violations of World Athletics' anti-doping rules, arguing, inter alia, that the CAS lacked structural independence and impartiality vis-à-vis SGBs. Mr Shustov criticised in particular Article R54's rule, providing that the panel's president in appeals cases is to be appointed by the President or Deputy President of the Appeals Division, and more generally the 'totally opaque [manner] in which the CAS list of arbitrators is constituted'.[96] In the *Shustov* case, the athlete's arguments

89 ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003, para. 3.3.3.2, at pp. 458–59.

90 ATF 144 III 120 (*FC Seraing v. FIFA*), Decision of 20.02.2018.

91 Ibid., para. 3.4.3, at pp. 126–27.

92 Ibid., pp. 127–28.

93 See in particular SFT 4A_612/2009, Decision of 10.02.2010, para. 3.3, as well as CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31.01.2012, paras 257–61. The provision for the scrutiny of the award by the (then) CAS Secretary General was also challenged by Ms Claudia Pechstein, a German speed-skater, both before the ECtHR (in the *Pechstein v. Switzerland* case), and the German Supreme Court (in the case of *Pechstein v. International Skating Union (ISU)*), which are discussed below.

94 ATF 144 III 120 (*FC Seraing v. FIFA*), Decision of 20.02.2018, para. 3.4.3, at p. 128.

95 Ibid., paras 3.4.1 and 3.4.3 (referring to the decision rendered by the Bundesgerichtshof in case Az. KZR 6/15, *Pechstein v. International Skating Union (ISU)*, 07.06.2016).

96 SFT 4A_10/2022, Decision of 17.05.2022, para. 5.3.1.

against the CAS were not sufficiently substantiated, and his complaints were clearly inadmissible as he only raised them at the annulment stage. Nevertheless, Mr Shustov's challenge, which relied primarily on a reference to the Dissenting Opinion accompanying the European Court of Human Rights' decision in the *Pechstein* case, to which this report will turn in the following paragraphs, shows that the mechanism for the panels' appointment in CAS appeals cases, as well as the way in which individuals are designated to the CAS's mandatory and closed list of arbitrators, are persistent 'pain points' when it comes to users' (and the public's) perception of the CAS's ability to operate as an independent and impartial tribunal in disputes between sportspersons and SGBs.

Finally and most recently, in the *Ustyugov* case, the applicant challenged, in various respects, the structural independence of the CAS ADD system operating in accordance with its two-tier procedure, i.e. with a CAS ADD sole arbitrator ruling in the first instance, subject to appeal before the CAS Appeals Division.[97] The athlete contended, in particular, that the 'organic links' existing between the CAS ADD and the Appeals Division, which are both part of the CAS and placed under the oversight of the ICAS, would impair the Divisions' ability to rule in an independent and impartial manner on the same case. The SFT dismissed this argument, noting that the coexistence of first-instance and appeal divisions within the same court is not unusual, including in international courts and tribunals like the ECtHR, and thus not, per se, sufficient to call into question the independence of the CAS ADD and Appeals Division vis-à-vis each other in relation to the same case. The SFT also underscored that the CAS ADD and Appeals Divisions have separate lists of arbitrators,[98] and that Article A8 of the CAS ADD Rules, which provides that CAS ADD arbitrators cannot sit in Appeals Division cases, further guarantees the mutual independence of the CAS ADD and Appeals Division.[99]

As just noted, the issue of the CAS's structural independence has also landed on the docket of the European Court of Human Rights (ECtHR), in the well-known *Pechstein v. Switzerland* matter.[100] Ms Pechstein claimed in substance that the SFT's case law acknowledging the CAS as an independent arbitral tribunal constituted a breach of Article 6(1) ECHR.[101]

97 SFT 4A_232/2022, Decision of 22.12.2022, para. 6.7.

98 Ibid.; see section 3.1 above.

99 Ibid., para. 6.7.

100 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, application nos 40575/10 and 67474/10. Only the 'Pechstein limb' of the judgment is discussed in this section of the report, as Mr Mutu did not challenge the CAS's structural independence, but rather the lack of independence and impartiality, on an individual basis, of two of the arbitrators who had sat on the CAS panels that had handled his case. The ECtHR's assessment of Mr Mutu's challenge will be discussed in the following section, which deals with the issue of personal independence and impartiality.

101 For a critical examination of this decision, see in particular A. Rigozzi, 'Sports Arbitration and the ECHR Pechstein and Beyond' in C. Muller et al. (eds), *New Developments in International Commercial Arbitration 2020*, Schulthess, Zurich 2020, available at https://lk-k.com/wp-content/

The ECtHR considered that given the non-consensual nature of CAS arbitration in disputes between athletes and SGBs, Article 6(1) ECHR was fully applicable, and assessed the CAS system in light of its case law regarding the guarantees enshrined in that provision.[102] The ECtHR considered the following principles to be of particular relevance in the case at hand:

- A 'tribunal' within the meaning of Article 6(1) ECHR must be understood in a 'substantive sense', i.e. focusing on its judicial function, 'that is to say' the fact that it 'determin[es] matters within its competence on the basis of legal rules, with full jurisdiction and after proceedings conducted in a prescribed manner', and that it must 'satisf[y] a number of requirements, such as independence from the executive and also from the parties'.[103]
- The independence of a tribunal must be determined taking into account, inter alia, 'the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence'.[104]
- Impartiality under Article 6(1) ECHR, being 'the absence of prejudice or bias', must be determined both subjectively, i.e. 'on the basis of the personal conviction and conduct of a particular judge', and objectively, i.e. based on 'whether the court offered, in particular through its composition, guarantees sufficient to exclude any legitimate doubt about [its] impartiality.'[105]
- The objective test is particularly important as it might 'be difficult to procure evidence with which to rebut the presumption of a judge's subjective impartiality'. In this context, the ECtHR emphasised that 'justice must not only be done, it must also be seen to be done', as ultimately what is at stake 'is the confidence which the courts in a democratic society must inspire in the public'.[106]

Applying these principles to the facts of the case, the ECtHR found (in a majority decision of five votes to two)[107] that there were insufficient grounds for

uploads/2020/12/RIGOZZI-in-M%C3%9CLLER-et-al.-Eds-New-Developments-in-Intl-Comm.-Arb.-2020-2020-Sports-Arb.-ECHR Pechstein beyond-pp.-77-130-1.pdf; and A. Duval, 'The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS', *Asser International Sports Law Blog*, 10 October 2018, https://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas.

102 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, application nos 40575/10 and 67474/10, paras 109–15.

103 Ibid., para. 139.

104 Ibid., para. 140.

105 Ibid., para. 141.

106 Ibid., para. 143.

107 Judges Georgios Serghides of Cyprus and Helen Keller of Switzerland dissented, co-authoring a 'Joint Partly Dissenting, Partly Concurring Opinion' (the Dissenting Opinion), annexed to the ECtHR's judgment.

it to reject the SFT's settled case law to the effect that the CAS system meets the constitutional requirements of independence and impartiality, and, therefore, that the proceedings in the CAS Appeals Division can be assimilated to those before a judicial authority, independent of the parties.[108]

In a nutshell, the ECtHR held, making an analogy with state courts in disputes between litigants and the state, that the fact that the CAS is largely financed by SGBs does not mean that the requirements of structural independence are not met in CAS proceedings between athletes and sports federations.[109]

The ECtHR further examined the list of arbitrators as it was composed at the relevant time, i.e. in application of the 2004 edition of the CAS Code, and in particular the fact that the ICAS was required to choose only one-fifth of the listed arbitrators from individuals who had no relationships with the SGBs involved in disciplinary cases such as Ms Pechstein's.[110] Noting that ICAS itself was composed of individuals directly or indirectly appointed by SGBs,[111] the ECtHR acknowledged that 'the organizations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators', but, crucially, went on to state that it could not 'conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, vis-à-vis those organizations'.[112]

108 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, application nos 40575/10 and 67474/10, para. 157. In their Dissenting Opinion, Judges Serghides and Keller disagreed with this finding, holding (at para. 28) that 'the structural problems of [the CAS] should have led the Court to find a violation of Article 6 §1'. For an in-depth analysis of the relevant points in the Dissenting Opinion, see in particular A. Rigozzi, 'Sports Arbitration and the ECHR – Pechstein and Beyond' in C. Muller et al. (eds), *New Developments in International Commercial Arbitration 2020*, Schulthess, Zurich 2020, pp. 92–94, and A. Rigozzi, 'Chronique de jurisprudence arbitrale en matière sportive' (2019) *Revue de l'arbitrage* 914, available at https://lk-k.com/wp-content/uploads/2019/11/BESSON-RIGOZZI-Rev.-Arb.-2019-903-974-Chronique-jurisprudence-arb.-sportive.pdf.

109 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, application nos 40575/10 and 67474/10, para. 151.

110 Ibid., para. 153.

111 Ibid., para. 154.

112 Ibid., para. 157. This point in particular was criticised by the dissenting judges (at paras 5–16 of the Dissenting Opinion), who held that the Court's majority had gone 'beyond what the [ECtHR's case law] requires' by demanding proof, on an individual basis, of the CAS members' lack of independence and/or impartiality. Given in particular the existing links between the SGBs and ICAS, which the dissenting judges deemed 'worrying', as well as the SGBs' 'disproportionate and unjustified' influence, under the applicable rules, over the procedure for selecting arbitrators to be included in the CAS (closed) list, and the role played by the Division Presidents (who are also ICAS members) in the appointment of CAS panels, Judges Serghides and Keller considered that the concerns raised by Ms Pechstein with regard to the CAS as an institution were 'objectively justified' within the meaning of the ECtHR's case law, which should have led the majority to find a breach of Article 6(1) ECHR, without

Finally, the ECtHR also dismissed Ms Pechstein's challenge of the CAS Secretary General (now Director General)'s power to scrutinise the award prior to its signature, in accordance with Article R59 CAS Code, which the athlete considered to be a further illustration of the lack of independence and impartiality of the CAS vis-à-vis the SGBs, by noting that 'the applicant has not provided evidence to show that the award … was amended by the intervention of the Secretary General, still less in a manner which was unfavourable to her.'[113]

The CAS welcomed the ECtHR's decision as 'another confirmation, this time at a continental level, that CAS is a genuine arbitration tribunal', all the while stating that, while the ECtHR proceedings were pending, the ICAS had undertaken to review 'its own structures and rules in order to strengthen the independence and the efficiency of the CAS year after year'.[114]

On the occasion of its 2018 Dispatch on the proposed revision of the Swiss law governing international arbitration, which was issued shortly after the ECtHR decision, the Swiss government indicated that while it had refrained from including special provisions regarding sports arbitration in the revision bill, it intended to continue monitoring the evolution in that area closely. Interestingly, the government observed that it had taken due notice of the CAS's statements in reaction to the ECtHR's *Pechstein* ruling, which it understood to be an indication of the CAS's 'will to take the [ECtHR's] remarks seriously' and to 'proceed with improvements'. The government's Dispatch also made it a point to underscore that, going forward, the SFT would continue to ensure, in its supervisory capacity, that the CAS would maintain the level of independence required for it to be deemed the equivalent of the state courts.[115]

Meanwhile, in parallel to her ECtHR application, Ms Pechstein has pursued her challenge of the CAS system as part of a damages claim she brought against the International Skating Union before the German courts. In 2015, she succeeded in obtaining a decision from the Oberlandesgericht in Munich that invalidated her consent to CAS arbitration, on the ground that she had been obliged to

requiring that the applicant demonstrate bias or a lack of independence on the part of the individual arbitrators appointed to hear her case.

113 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, applications nos 40575/10 and 67474/10, para. 158.

114 Statement of the Court of Arbitration for Sport (CAS) on the Decision Made by the European Court of Human Rights (ECHR) in the Case Between Claudia Pechstein/Adrian Mutu and Switzerland – The ECHR Recognizes that CAS Fulfils the Requirements of Independence and Impartiality, 2 October 2018, https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf. In particular, the CAS's Statement noted that: 'ICAS is now composed of a large majority of legal experts coming from outside the membership of sports organizations and has achieved an equal representation of men and women. The list of arbitrators has been increased and the privilege reserved to sports organizations to propose the nomination of arbitrators on the CAS list has been abolished'.

115 Swiss Federal Council (Conseil fédéral), *Message concernant la modification de la loi fédérale sur le droit international privé (Chapitre 12: Arbitrage international)*, 24 October 2018, FF 2018 7153, pp. 7171–73, available at https://www.fedlex.admin.ch/eli/fga/2018/2548/fr.

accept CAS jurisdiction even though it did not provide for an impartial and independent system of adjudication, due to its structural imbalance favouring SGBs.[116] However, this decision was overturned by the highest civil court in Germany, the Bundesgerichtshof, in 2016,[117] which re-examined and upheld the validity of the athlete's consent to CAS arbitration and rejected her arguments on the (impact of the) structural imbalance of the CAS. Ms Pechstein continued her legal fight and challenged the Bundesgerichtshof's ruling before the German Constitutional Court (Bundesverfassungsgericht), arguing that the mandatory submission of her dispute to the CAS violated her constitutional right of access to justice. In a landmark decision rendered on 3 June 2022,[118] the Constitutional Court, relying on the ECtHR's judgment in Ms Pechstein's case, ruled that the Bundesgerichtshof had failed to uphold the athlete's right of access to justice by dismissing her case notwithstanding the fact that she had been denied a public hearing before the CAS, in breach of her fundamental right to effective legal protection in accordance with the rule of law. On this basis, the Constitutional Court did not have to address the issue of the CAS's structural independence, and explicitly left that question open.[119]

5.2. PERSONAL INDEPENDENCE AND IMPARTIALITY

Given that CAS arbitrations are seated in Switzerland[120] and thus subject to the Swiss lex arbitri,[121] CAS arbitrators must meet the Swiss statutory requirements of independence and impartiality. These are set out in Chapter 12 of the Private International Law Act (PILA),[122] which governs international arbitrations,

116 OLG München, Az. U 1110/14 Kart., *Claudia Pechstein v. International Skating Union*, 15.01.2015.

117 Bundesgerichtshof, Az. KZR 6/15, *Pechstein v. International Skating Union (ISU)*, 07.06.2016.

118 BVerfG, *Beschluss der 2. Kammer des Ersten Senats*, 1 BvR 2103/16, 03.06.2022, published on 12.07.2022 (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/06/rk20220603_1bvr210316.html); an English translation of the decision is now available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html.

119 Ms Pechstein's case has now been remanded to the Oberlandesgericht in Munich for further consideration. For a full review of the *Pechstein* legal saga to date, covering also the Bundesverfassungsgericht's decision, and discussing the case's direct and indirect implications for the CAS system, see A. Rigozzi, 'Claudia Pechstein v. Court of Arbitration for Sport: Advantage CAS?', *Football Legal*, June 2022, pp. 108–19, https://lk-k.com/wp-content/uploads/2022/07/RIGOZZI-Claudia-Pechstein-v.-Court-of-Arbitration-for-Sport-Football-Legal-17-2022-pp.-108-119.pdf.

120 See Article R28 of the CAS Code; Article A3 ADD Rules; Article 7 of the Arbitration Rules for the Olympic Games.

121 See n. 123 below.

122 Loi fédérale sur le droit international privé du 18 décembre 1987, RS 291, Articles 176–94 (https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/fr). An English translation of

and, for the rare sports cases that fall under the regime governing domestic arbitrations,[123] Part 3 of the Swiss Code of Civil Procedure (CCP).[124] The rules on independence and impartiality are in any event identical under these two regimes, and in turn reflect the guarantees applicable to court judges in Switzerland, as set out in Article 30(1) of the Swiss Constitution and Article 6(1) ECHR.[125]

Chapter 12 PILA, which was enacted in 1987, recently made the object of a revision,[126] which resulted in the inclusion of new black-letter provisions codifying certain developments in the SFT's case law on the requirements of independence and impartiality for arbitrators and the related obligations (discussed in this section), as well as on the challenge proceedings and available remedies in cases giving rise to complaints of lack of independence and impartiality (as discussed in the following two sections).

Article 180(1)(c) PILA provides[127] that '[a]n arbitrator may be challenged … if circumstances exist that give rise to justifiable doubts as to [his or her] independence or impartiality.' This provision is mandatory, in the sense that the parties cannot waive it in advance, by agreeing to submit their arbitration to a set of rules providing for a lower standard of independence and impartiality.[128]

Articles R33 and R34 of the CAS Code mirror the statutory requirements by providing that '[e]very arbitrator shall be and remain impartial and independent of the parties',[129] and that '[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality',[130] and Articles A8 and A10 of the CAS ADD Rules are drafted in almost identical language.[131] Article 12 of the CAS Arbitration Rules for the

Chapter 12 PILA can be found at https://www.swissarbitration.org/wp-content/uploads/2021/05/20210129-Chapter-12-PILA_Translation_English.pdf.

123 The scope of application of Chapter 12 PILA is governed by its Article 176(1), which provides that: 'the provisions of this Chapter shall apply to arbitrations with their seat in Switzerland if at least one of the parties to the arbitration agreement, at the time of its conclusion, did not have its domicile, habitual residence or seat in Switzerland'. While many of the major SGBs have their seat in Switzerland, the clubs, athletes or other sports entities or persons appearing opposite them in CAS disputes are, in the vast majority of cases, domiciled outside Switzerland.

124 Code de procédure civile du 19 décembre 2008, RS 272, Articles 353–99. An English translation of Part 3 CCP can be found at https://www.swissarbitration.org/wp-content/uploads/2021/05/CCP_Translation.pdf.

125 ATF 118 II 361, para. 3c; G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, para. 4.108.

126 RO 2020 4179, https://www.fedlex.admin.ch/eli/oc/2020/767/fr. The revised law entered into force on 1 January 2021.

127 As does Article 367(1)(c) CCP, in substantively similar language.

128 G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, para. 4.107.

129 Article R33 ab initio.

130 Article R34 ab initio.

131 Article 8 of the CAS ADD Rules is identical, in its relevant part, to Article R33, and Article 10 provides that '[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts regarding independence or impartiality.'

Olympic Games sets out that arbitrators 'must be independent of the parties', and Article 13 provides that an arbitrator 'may be challenged by a party if circumstances give rise to legitimate doubts as to his or her independence.'

The SFT emphasises in its case law that it is not possible to 'formulate immutable principles' for the purpose of assessing an arbitrator's independence and impartiality, which always requires an examination of the circumstances of the case.[132] However, the SFT's case law does establish that the relevant circumstances must be examined objectively, i.e. from the point of view of a reasonable third person, and that what is required is not actual proof of bias, but a demonstration that, 'viewed objectively, the circumstances create an appearance of bias'.[133]

In its assessment of the relevant circumstances, the SFT also regularly refers to the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which it has described as 'a useful working instrument, susceptible of contributing to the harmonization and unification of the standards applied to the resolution of conflicts of interests in the field of international arbitration'.[134]

A notable ruling with regard to allegations of bias vis-à-vis one of the parties was issued in the well-known *Sun Yang* case, where the SFT found that a series of tweets published by the President of a CAS Panel before and during the arbitration raised legitimate doubts as to his impartiality vis-à-vis the athlete, a Chinese swimmer, in view of the language used in the tweets to condemn the acts of certain Chinese nationals, and even if the tweets concerned facts that were completely unrelated to the issues at stake in the arbitration.[135]

Beyond the parties to the dispute, an arbitral tribunal must also be independent and impartial vis-à-vis the parties' counsel and other participants in the proceedings, such as experts and other witnesses, as well as vis-à-vis third parties that are related to the litigants and/or may have an interest in the outcome of the dispute.[136]

When examining the relevant relationships, the SFT highlights that although arbitral tribunals are subject to the same constitutional standards of impartiality and independence as court judges, the specificities of arbitration, and in particular the fact that the profession involves frequent encounters between

132 ATF 136 III 605 (*Alejandro Valverde v. CONI, WADA & UCI*), Decision of 29.10.2010, para. 3.3.3, at p. 615. For in-depth analysis and examples of the SFT's determinations in specific situations, see for instance G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, paras 4.111–24.

133 SFT 4P.188/2001, Decision of 15.10.2001.

134 See e.g. ATF 142 III 521, Decision of 07.09.2016, para. 3.1.2, at p. 537; SFT 4A_520/2021, Decision of 04.03.2022, para. 5.1.3; SFT 4A_506/2007, Decision of 20.03.2008, para. 3.3.2.2.

135 ATF 147 III 65 (*Sun Yang v. WADA & FINA*), Decision of 22.12.2020, para. 6.5.

136 G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, paras 4.112–21.

practitioners in a variety of settings, must be taken into account.[137] With regard to CAS arbitrators more specifically, the SFT has underscored time and again that the circumstances that only arbitrators on the CAS list can be appointed, and that in order to be included in the list arbitrators must have both legal training and a demonstrated competence in sports law, make it inevitable that they may end up building relationships with other individuals working in the same field, which relationships cannot automatically be assumed to compromise their impartiality and independence.[138]

As opined elsewhere, while the SFT's approach correctly takes into account the specificities of CAS arbitration in assessing the independence and impartiality of arbitrators on a case-by-case basis, more attention should be given, in the Court's decisions, to the fundamental differences between the situation of commercial parties, freely choosing to resolve their disputes by arbitration, and that of athletes who have no choice but to agree to CAS arbitration (including its closed-list system), as mandated by the regulations governing participation in their sport.[139] The existence of this constraint has significant consequences, which become apparent in particular in disputes brought by athletes against SGBs, which, contrary to their opponents, are 'repeat players' before the CAS, familiar with the system and its workings.[140]

In this context, one specific concern that has already given rise to challenges before the SFT is that of repeat appointments of the same arbitrator(s) by the same SGB.[141] When dealing with challenges to repeat appointments, both the ICAS[142] and the SFT[143] have placed significant emphasis on footnote 5 to paragraph 3.1.3 of the IBA Guidelines, which carves out an exception to the 'orange list' obligation for arbitrators to disclose the fact that they have been

137 ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003, para. 4.2.2.2, at p. 466.

138 Ibid.; ATF 136 III 605 (*Alejandro Valverde v. CONI, WADA & UCI*), Decision of 29.10.2010, para. 3.3.3, at p. 614, noting that it would be counterproductive to disregard these specificities as doing so would prompt an increase in challenges, 'which would be contrary to the objective of securing the speedy resolution of sports disputes by specialized tribunals presenting sufficient guarantees of independence and impartiality'.

139 For more extensive developments on this point, see, in particular, G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, paras 4.126–28.

140 Ibid. This gap can only partially be filled, on the athlete's side, by instructing specialised counsel (an option that, in any event, may not always be available, for financial or other reasons).

141 See SFT 4A_110/2012, Decision of 09.10.2012, and, most recently, SFT 4A_520/2021, Decision of 04.03.2022.

142 CAS 2011/A/2348 and 2386, *UCI & WADA v. Contador & RFEC*, ICAS Board Decision of 04.05.2011 (unpublished), relating to a challenge against an arbitrator who had been appointed by WADA four times in less than three years, and a dozen times since WADA had recognised CAS jurisdiction to deal with doping disputes in 2003.

143 SFT 4A_110/2012, Decision of 09.10.2012; SFT 4A_520/2021, Decision of 04.03.2022.

appointed by one of the parties on two or more occasions in the preceding three years. Footnote 5 acknowledges that:

> [i]t 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.

As noted elsewhere,[144] the addition (in the 2014 edition of the IBA Guidelines) of sports arbitration to the types of specialised arbitrations that can be exempted from the general rule proscribing repeat appointments is unwarranted, not only because the non-consensual nature of sports arbitration rules out any analogy with commodities or maritime arbitration, but also because repeat appointments exclusively benefit repeat players, i.e. in CAS arbitration the SGBs, and the list of CAS arbitrators is anything but a 'small pool' that would make repeat appointments inevitable.[145]

The duty of arbitrators to disclose 'without delay the existence of circumstances that could give rise to legitimate doubts as to [their] independence or impartiality' is now expressly set out in Article 179(6) PILA,[146] where it is also made clear that the duty applies 'throughout the entire proceedings.' That said, contrary to what may be the case in other jurisdictions, the SFT considers that a breach of the duty to disclose is not per se a ground for annulment of the award.[147]

The recent revision of Chapter 12 PILA has also brought about the express codification (in Article 180(2) PILA and Article 367(1)(c) CCP) of a principle that was originally enunciated in the SFT's case law on sports arbitration,[148]

144 G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, OUP, Oxford 2015, para. 4.128.

145 On this point, in the decision referenced in n. 142 above, the ICAS Board agreed with WADA's argument that '[g]iven the limited number of arbitrators who have specific qualifications in doping and the fact that WADA regularly proceeds before CAS, the frequency [of the challenged arbitrator's] appointments is not a sufficient ground to challenge him.' WADA's and the ICAS's reliance on footnote 5 is difficult to reconcile with the SFT's case law justifying the parties' obligation to draw arbitrators from the CAS list. Indeed, if the *raison d'être* of the list is that it allows parties to choose from a pool of specialised arbitrators, then arguments to the effect that only some of the arbitrators on that list have the requisite competence to resolve certain types of CAS disputes raises the question whether the list actually serves its purpose.

146 This rule is also expressly stated in Article 363 CCP.

147 SFT 4P.188/2001, Decision of 15.10.2001, para. 2f. For a more in-depth analysis of this point, with further references, see G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, Oxford, OUP 2015, paras 4.157–65. See also, most recently, SFT 4A_520/2021, Decision of 04.03.2022, para. 5.5.

148 ATF 136 III 605 (*Alejandro Valverde v. CONI, WADA & UCI*), Decision of 29.10.2010, para. 3.2.2; ATF 129 III 445 (*Larisa Lazutina & Olga Danilova v. IOC, FIS & CAS*), Decision of 27.05.2003, para. 4.2.2.1; SFT 4A_110/2012, Decision of 09.10.2012, para. 2; SFT 4P.105/2006, Decision

namely that, while arbitrators must disclose conflicts, the parties themselves are subject to a so-called 'duty of curiosity' (or duty of inquiry), meaning that they cannot simply rely on the arbitrator's duty of disclosure, but are, in turn, under an obligation to diligently undertake any reasonable and necessary investigations about an arbitrator's independence and impartiality.[149] A failure to conduct appropriate and timely investigations may result in the loss of the right to challenge the arbitrator.[150] In the *Sun Yang* decision, the SFT clarified that while the exact scope of the parties' duty of curiosity will always depend on the circumstances of the case, it is not without limits, particularly when it comes to the investigations that can and should be conducted on the internet, and more specifically on social media.[151]

Notwithstanding the outcome in an exceptional case like *Sun Yang*, all in all, commentators tend to agree that the SFT's case law has set a relatively high bar for challenges against arbitrators to succeed.[152]

In the aforementioned *Mutu and Pechstein* decision, the ECtHR was also asked to re-examine the challenges, which had been rejected by the SFT, against the personal independence and impartiality of three CAS arbitrators. In the case of *Pechstein v. Switzerland*, the ECtHR dismissed the athlete's challenge against the Panel's President, which it found to be based on an argument that had not been raised before the SFT, and, in any event, resting on allegations that were too vague and hypothetical.[153] In the case of *Adrian Mutu v. Switzerland*, the applicant complained of a lack of impartiality and independence on the part of two of the arbitrators who had sat on the last of the three separate panels which had dealt with different aspects of his contractual dispute with Chelsea FC.[154]

of 04.08.2006, para. 4; SFT 4P.217/1992, Decision of 15.03.1993 (unpublished version of the *Gundel v. FEI* decision (ATF 119 II 271)).

149 The requirement that the parties apply, throughout the proceedings, the requisite level of 'due diligence' in investigating the existence of possible conflicts of interest or other grounds for challenge is now stated as follows in the revised wording of Article 180(2) PILA (and Article 367(1)(c) CCP): '[a] party may challenge an arbitrator whom it has appointed or in whose appointment it has participated solely for reasons of which, *despite having exercised due diligence*, it became aware only after the appointment.'

150 B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 4th ed., Stämpfli, Berne 2021, para. 882; G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, Oxford, OUP 2015, para. 8.137; SFT 4A_110/2012, Decision of 09.10.2012, para. 2; SFT 4P.105/2006, Decision of 04.08.2006, para. 4.

151 ATF 147 III 65 (*Sun Yang v. AMA and FINA*), Decision of 22.12.2020, para. 6.5.

152 See e.g. L. Beffa, 'Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?' (2011) *ASA Bulletin* 598; J. Marguerat, 'Indépendance et impartialité de l'arbitre – Le devoir de l'arbitre de révéler éclipsé', *Jusletter*, 15 April 2013.

153 *Mutu & Pechstein v. Switzerland*, ECtHR decision of 2 October 2018, application nos 40575/10 and 67474/10, para. 150.

154 Ibid., paras 160–68. The relevant awards were rendered in the following matters: CAS 2005/A/876, *Adrian Mutu v. Chelsea Football Club*, Award of 15.12.2005; CAS 2006/A/1192,

Mr Mutu challenged the award in case CAS 2008/A/1644, arguing that the Panel's President (arbitrator 'L.F.') had failed to disclose that Chelsea FC's owner was among his law firm's clients, a circumstance the player claimed to have discovered after the award had been rendered. In addition, Mr Mutu challenged the fact that arbitrator 'D.-R.M.', who had been appointed as the President of the Panel that rendered the first award (on the question whether the player had unilaterally breached his employment contract), was confirmed as Chelsea's co-arbitrator in the third Panel, which was seized with the player's appeal against the damages FIFA had ordered him to pay as a consequence of that breach. Here too, the ECtHR dismissed the challenges on the merits, upholding the SFT's findings that the player had failed to: (i) adduce any evidence in support of his challenge against L.F., and (ii) establish (as required for a finding of lack of impartiality in such a case) that not only the facts, but also the legal questions submitted to the two panels in which D.-R.M. had sat as an arbitrator were the same.[155]

In closing, it should be noted that challenges for lack of independence and impartiality can also be brought against tribunal secretaries or assistants assuming similar functions,[156] such as ad hoc clerks in CAS arbitration, as has happened recently in a CAS case.[157]

6. CHALLENGE PROCEEDINGS

Article 180(a) PILA and Article 369 CCP set out the (default) procedural rules that apply to challenges against arbitrators in Swiss-seated arbitrations, 'unless the parties have agreed otherwise'. By submitting to CAS arbitration, the parties agree to follow the challenge procedure provided in the CAS Code, as well as, where applicable, the CAS ADD Rules and CAS Ad Hoc Division Rules.

Article R34(1) of the CAS Code, which applies to both ordinary and appeals proceedings, provides that a challenge must be brought within seven days from the time the challenging party has become aware of the ground(s) for challenge.

Chelsea Football Club Limited v. Adrian Mutu, Award of 21.05.2007; CAS 2008/A/1644, *Adrian Mutu v. Chelsea Football Club*, Award of 31.07.2009.

155 Ibid., paras 166–68.

156 See e.g. B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 4th ed., Stämpfli, Berne 2021, para. 1009.

157 SFT 4A_520/2021, Decision of 04.03.2022. D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015 (ad Article R40.3, para. 41), considered that the challenge procedure of Article R34 (examined in the following section) should not apply to CAS ad hoc clerks. However, that position seems now to have been disavowed by the ICAS, since the CAS Challenge Commission recently heard and dealt with an application for challenge filed against an ad hoc clerk (at the same time as a challenge against the Panel's President), as can be read in SFT 4A_520/2021, Decision of 04.03.2022, para. B, p. 5.

The challenge must be lodged 'in the form of a petition setting forth the facts giving rise to the challenge', with the CAS Court Office, and 'shall be determined by the Challenge Commission, which has the discretion to refer a case to ICAS'.

Article R34(2) further provides that '[t]he Challenge Commission 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 [if the case is heard by a three-member panel] to the other arbitrators'.

It may occur that the challenged arbitrator opts to step down upon being notified of a challenge, in which case the procedure for his or her replacement (in accordance with Article R36) will be initiated, without the need for a ruling on the challenge.[158] Where the arbitrator contests the challenge, Swiss law provides that unless the parties agree otherwise, the arbitration may proceed while the challenge is being heard.[159] The CAS Code does not contain a specific provision in this regard. In practice, CAS panels will determine whether to stay the proceedings based on the specific circumstances of the case, including the apparent merit of the challenge and the procedural stage in which it is raised.[160]

Article R34(2) requires that the Challenge Commission's or ICAS's decision 'give brief reasons' for the outcome of the challenge, and provides that the CAS 'may decide to publish [the decision]'.[161] If the challenge is successful, the arbitrator is removed and replaced in accordance with Article R36 of the CAS Code.

The procedure set out in Article A10 of the CAS ADD Rules is identical to that provided in Article R34 CAS Code, with the sole difference that the challenge must be lodged with the CAS ADD Office. Article A10 also adds an express provision that, in the event of a challenge, '[t]he challenged arbitrator remains on duty until her/his replacement, if any.' If the challenge is successful, the disqualified arbitrator is replaced in accordance with Article A12.

Given the highly expedited nature of proceedings in the CAS Ad Hoc Division, the applicable rules necessarily put the strongest possible emphasis on speed with regard to the resolution of arbitrator challenges. Accordingly, Article 13 of the CAS Arbitration Rules for the Olympic Games provides that a challenge 'must be brought as soon as the reason for the challenge becomes known' and that '[t]he President of the ad hoc Division is competent to take cognizance of any challenge requested by a party. She/he shall decide upon the challenge immediately after giving the parties and the arbitrator concerned the opportunity to be heard, insofar as circumstances permit'. This provision does not require that reasons be given for the decision on the challenge. If the challenge is successful, 'the President of the ad hoc Division shall immediately appoint an arbitrator to fill the vacancy'.

The decisions rendered by the ICAS, its Challenge Commission and the President of the Ad Hoc Division are final, in the sense that they are not subject to further recourse within the CAS system.[162] Because they do not qualify as arbitral awards, they are also not amenable to immediate review by the SFT under Article 190 PILA (or Article 393 CCP).[163] A party seeking to overturn a CAS challenge decision must bring its complaint against the (first) award rendered by the panel including the impugned arbitrator(s), as set out in the following section.

7. REMEDIES

A party who wishes to contest a CAS decision rejecting a challenge must raise its complaint in annulment proceedings brought against the award rendered by the panel comprising the impugned arbitrator(s).[164] If the panel issues more than one award, the first award rendered by the panel in the impugned composition must be challenged, failing which the right to call into question the arbitrator's

158 See e.g. CAS 2019/A/6148, *WADA v. Sun Yang & FINA*, Award of 28.02.2020, para. 55.

159 Article 180(a)(3) PILA and Article 369(4) CCP.

160 M. Noth and U. Haas, 'Commentary to Article R34 of the CAS Code' in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed., Kluwer Law International, Alphen aan den Rijn 2018, para. 9; see e.g. CAS 2019/A/6148, *WADA v. Sun Yang & FINA*, Award of 28.02.2020, paras 46–50.

161 To the rapporteurs' knowledge, no decision on challenge has been published by CAS to date. However, two decisions were reproduced in D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, pp. 166–80 (in the matters CAS 2009/A/1893, *Panionios v. Al-Ahli SC*, Decision of 19.11.2009, where the challenge was rejected, and CAS 2012/A/2697, *Brescia Calcio SpA v. West Ham United FC*, Decision of 26.06.2012, where the challenge was upheld). The latest ICAS Annual Report, published in November 2022, provides some recent statistics on challenges against CAS arbitrators, indicating that, in 2021, parties to CAS proceedings filed 11 petitions for challenge, of which 10 were dismissed and one upheld by the CAS Challenge Commission (*ICAS 2021 Annual Report and Financial Statements*, https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report___Financial_Statements_2021.pdf, p. 19).

162 D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, ad Article R34, para. 80.

163 SFT 4A_644/2009, Decision of 13.04.2010, para. 1. For a discussion of the problematic nature of this restriction with regard to the time-sensitivity of many sports disputes, in particular in disciplinary cases, see G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, Oxford, OUP 2015, para. 4.146.

164 This is expressly provided in Article 369(5) CCP for domestic cases, and results from the SFT's case law for cases governed by Chapter 12 PILA (ATF 118 II 359, para. 3b; see also B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 4th ed., Stämpfli, Berne 2021, para. 909).

independence or impartiality (on the grounds invoked in the original challenge) is deemed to have been forfeited.[165]

The applicable ground for annulment is set out, in identical terms, in Article 190(2)(a) PILA and Article 393(a) CCP, which provide that the award may be challenged if 'the sole arbitrator was not properly appointed or the arbitral tribunal was not properly constituted'.

The SFT's case law makes it clear that, in deciding the challenge, the SFT relies on the facts as established in the lower-instance challenge decision.[166] If the SFT upholds the challenge, the award is annulled, and the SFT, if so requested, will order the removal of the arbitrator.[167]

An application to annul an award can only be brought within a strict time limit of 30 days from the date of notification of the award.[168] As a consequence, grounds for challenge discovered after that time limit cannot be invoked to seek the annulment of the award.

In a landmark decision of 1992,[169] the SFT decided that the exceptional remedy of revision, which permits the revocation (on very narrow grounds) of a decision after the expiry of the time limit to request its annulment, was also available against international arbitral awards, even though this was not expressly provided in Chapter 12 PILA.[170] In this regard, the question had also long remained open, in the SFT's case law, whether the discovery, after the 30-day time limit for annulment, of a ground for challenging an arbitrator could be relied upon to request the revision of the award.[171]

That question has been given an affirmative answer in the revised version of Chapter 12 PILA: Article 190a now provides that the remedy of revision is available against international arbitral awards, including in cases where 'despite

165 SFT 4P.168/1999, Decision of 17.02.2000, para. 1b–c. G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, Oxford, OUP 2015, para. 8.21.

166 ATF 136 III 605 (*Alejandro Valverde v. CONI, WADA & UCI*), Decision of 29.10.2010, para. 3.4.1, at p. 616.

167 Ibid., para. 3.3.4. If the challenge was brought against a preliminary or partial award, the parties or the panel will have to decide whether the proceedings can be continued with a newly appointed arbitrator from the point where the disqualified arbitrator ceased to perform his or her duties, or whether any prior procedural steps need to be repeated, the default rule under the Code being in favour of direct continuation (see Article R36 in fine: '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'). For a discussion of the CAS's practice in this regard, see D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Kluwer Law, Alphen aan den Rijn 2015, ad Article R36 CAS Code, paras 19–23.

168 Article 100(1) Swiss Supreme Court Act (SCA).

169 ATF 118 II 199, Decision of 11.03.1992.

170 The CCP (which was enacted in 2008) makes express provision for the revision of domestic arbitral awards (in Articles 396–99), as did the statute governing domestic arbitrations prior to the entry into force of the CCP.

171 SFT 4A_528/2007, Decision of 04.04.2008, para. 2.5; SFT 4A_234/2008, Decision of 14.08.2008, para. 2.1; ATF 142 III 521 (*X. SpA v. Y. B.V*), Decision of 07.09.2016, para. 2.

[the applicant's] diligence, a ground for challenge under Article 180(1)(c) was not discovered until after the conclusion of the arbitration and no other remedy is available.'[172] In the landmark *Sun Yang* decision, rendered just a few days before the entry into force of this statutory provision, the SFT took note of the imminent legislative change, and, as seen above,[173] upheld an application for revision of a CAS award on the ground that there existed legitimate doubts as to the impartiality of the Panel's President.[174]

Under the new legislative regime (which is in line with what the CCP already provided for domestic awards), an application for revision must be brought within 90 days from the discovery of the ground for challenge, and not more than 10 years from the notification of the award.[175] The court of competent jurisdiction to determine applications for revision in international arbitrations is the SFT,[176] whereas applications in domestic arbitrations should be filed with the competent cantonal court at the seat of the arbitration.[177]

If the application is granted, the challenge is upheld and (if the corresponding request is made by the applicant) the arbitrator is disqualified; the award is annulled and the matter is remanded to a new tribunal, to be constituted (without the disqualified arbitrator, or, depending on the circumstances, in an entirely new composition) in accordance with the originally agreed procedure.[178] This procedure was followed in the *Sun Yang* case, resulting in a second award rendered by an entirely new Panel.[179]

8. CONCLUSION

From the very beginning of the CAS's operations, the requirement that arbitrators be selected from the institution's closed list of arbitrators, as well as

172 Article 190a(c) PILA. Article 396 CCP has also been amended, with effect as of 1 January 2021, to include this ground for revision. The other grounds for revision available against both international and domestic awards are: (i) the subsequent discovery of (pre-existing) relevant facts or conclusive evidence; and (ii) the fact that criminal proceedings have established that the award was influenced, to the detriment of the applicant, by a crime or misdemeanour (Article 190a(a)–(b) PILA and Article 396(a)–(b) CCP).

173 Section 5.2.

174 ATF 147 III 65 (*Sun Yang v. AMA and FINA*), Decision of 22.12.2020, para. 6.

175 Article 190a(2) PILA; Article 397 CCP.

176 Article 191 PILA.

177 Article 396(1) CCP.

178 ATF 142 III 521, Decision of 07.09.2016, para. 2.1.

179 CAS 2019/A/6148, *WADA v. Sun Yang & FINA*, Award of 22.06.2021. Upon receipt of the SFT's Decision of 22.12.2020, the CAS noted that the proceedings in case CAS 2019/A/6148 were 'reopened' (CAS 2019/A/6148, *WADA v. Sun Yang & FINA*, Award of 22.06.2021, para. 76). The Panel was entirely reappointed after the athlete challenged both of the co-arbitrators who had sat in the first Panel, and the latter both decided to step down shortly thereafter, 'in the interest of expedition of the procedure' (ibid., paras 74–90).

the rules prescribing the modalities of constitution of the list, have been a focal point of scrutiny before the different judicial instances that have been called to review the independence and impartiality of CAS panels and arbitrators. Still today, almost four decades later and after several revisions of the CAS Code, the closed list(s) of arbitrators remain(s) a defining feature of CAS arbitration, and, as this report has shown, its most problematic aspect.

THE INDEPENDENCE AND IMPARTIALITY OF ADJUDICATORS IN INVESTMENT ARBITRATION UNDER NON-TREATY-BASED RULES

Diego P. Fernández Arroyo and Alexandre Senegacnik

1. The Narrow Scope of Enquiry: Investment Arbitration under NTBRs ... 234
2. A Comparative Study of NTBRs Used in Investment Arbitration. 235
3. Criteria for the Selection of Investment Arbitrators under NTBRs 236
4. Appointing Authorities in Investment Arbitration under NTBRs 240
5. The Method of Appointment in Investment Arbitration under NTBRs 242
6. Parameters to Ensure Independence and Impartiality: Preventive Measures 251
7. Consequences of a Breach of the Duty to Act Independently and Impartially: Curative Measures 255
8. General Conclusions 261

The present special report aims to respond to general rapporteur Giuditta Cordero Moss' questionnaire with a view to providing an overview of the unescapable topic of independence and impartiality of international adjudicators. This report will focus on investment arbitrators operating under 'non-treaty based-rules' (NTBRs). The specific scope of enquiry entrusted to the special rapporteurs will be discussed before turning to each of the general issues raised in the questionnaire.[1]

[1] The issue of the enforceability of a final investment decision/award that was rendered by an arbitrator who breached the requirement to act independently and impartially is left to the national courts or the ICSID ad hoc committee and will thus not be explored in this special report.

INDEPENDENCE AND IMPARTIALITY OF INTERNATIONAL ADJUDICATORS

Edited by

Giuditta CORDERO-MOSS

INTERSENTIA

Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: contact@larcier-intersentia.com
www.larcier-intersentia.com

Distribution for the UK and
Rest of the World (incl. Eastern Europe)
NBN International
1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe
Lefebvre Sarrut Belgium NV
Hoogstraat 139/6
1000 Brussels
Belgium
Tel: +32 (0)2 548 07 13
Email: contact@larcier-intersentia.com

Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

Independence and Impartiality of International Adjudicators

Artwork on cover: Steve Johnson / Pexels

ISBN 978-1-83970-361-4
ISSN 2214-6881
D/2023/7849/90
NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD

It is difficult to overstate the importance of impartiality and independence of arbitrators in the practice of international investment, commercial and investment alike. Users of arbitration expect tribunals to operate with impartiality and independence; arbitrators need to ensure the enforceability of their awards; arbitral institutions have an interest in ensuring the integrity of the awards they issue; national courts may set aside or decline to recognize or enforce awards rendered by tribunals that fall short in that respect; and international arbitration as a whole stakes its very legitimacy on the impartiality and independence of individuals who render awards.

International arbitration community's commitment to the impartiality and independence of arbitrators is nothing new. It is not just waking up now to those concerns. The integrity of the international arbitration process – and arbitrator impartiality and independence is central to that – is the stuff of countless articles and conferences. Arbitral institutions are promulgating their own standards and soft law instruments abound.

From this work there emerges a general consensus that impartiality and independence are of the essence. Giuditta Cordero-Moss rightly describes concern over these values as 'overarching'. The problem is itself international.

But Giuditta is not content to examine the problem internationally. She knows that, while international arbitration is of course international, it is subject in a great many respects to the particularities of national law. Notwithstanding still widely held notions to the effect that international arbitration is a fully autonomous regime, detached from national legal orders, that is simply not the case. That is as true of impartiality and independence as of any other feature of international arbitration.

With the exception of arbitration under the International Convention on the Settlement of Investment Disputes (ICSID), international arbitrations have a territorial home known as the seat, and that seat will have a law of arbitration (*lex arbitri*) determining the conditions to which arbitrations conducted locally are subject. Impartiality and independence are manifestly among the many conditions on which arbitration laws at the state level insist. Even in the presence of provisions on impartiality and independence in the arbitration law of the seat, the application of any such norms rests in the hands of national courts. Naturally, if an arbitration law happens to be silent on the matter, courts will play an even larger role. There also exist across jurisdictions distinctive legal cultures which may be reflected both in the practice of participants who are