

Arbitration in Switzerland

The Practitioner's Guide

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Chapter 5

Sports Arbitration under the CAS Rules

Article R37: Provisional and Conservatory Measures

I. Purpose of the Provision

- 1 In sports arbitration, even the most expedited procedures may not always keep pace with the *tight schedule of competitions*, exposing parties to uncertainty in the interim before a final award. Art. R37 enables the CAS to order the provisional measures that may be necessary to temporarily protect the parties’ rights or regulate the situation between them pending the outcome of the proceedings.
- 2 This provision *was amended significantly both in 2010 and 2013*, which is in and of itself an indication that its application raises significant issues. Art. R37 *principally deals with jurisdictional issues* (II.). It is silent with respect to the types of provisional measures the CAS may order (III.) but now specifies the substantive and procedural requirements that must be met for such preliminary relief to be granted (IV. and V.). The other issues that should be addressed briefly in connection with interim relief orders made by the CAS are the handling of the costs related to these orders, whether they are subject to appeal and the modalities of their enforcement (VI.).

II. Jurisdiction – Authority to Order Provisional Measures

A. The Legal Basis for CAS Jurisdiction

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

B. Provisional Measures Prior to the Constitution of the Panel

- 4 Article 183(1) PILS provides (as does Art. 374(1) ZPO) that the “*arbitral tribunal may [...] order provisional [or conservatory] measures*”, which in turn can be taken to imply that until the moment the arbitral tribunal is constituted, jurisdiction to issue such orders lies exclusively with the state courts.¹ For its part, Art. R37 (third paragraph) of the CAS Code provides for “*CAS jurisdiction*” to order provisional measures *even before the constitution of the panel as it grants the authority to order such measures to “the President of the relevant [CAS] Division” until the file is transferred to the panel*. While under the previous versions of the Code provisional measures could only be requested from the filing of the Request for arbitration (Art. R38) or the Statement of Appeal (Art. R48), the new wording of Art. R37 (first paragraph) adopted in 2013 allows for the filing of a request for provisional measures *immediately after the notification of a final decision* by a sports federation, even before the filing of a formal appeal with the CAS, the only requirement being the exhaustion of “all internal legal remedies provided for in the rules of the federation or sports-body concerned”.
- 5 Although the President of the relevant CAS division is clearly not an “arbitral tribunal” within the meaning of Art. 183(1) PILS and Art. 374(1) ZPO, it is generally accepted that the parties are free to confer such power on the arbitral institution. The same principle underlies the adoption of provisions such as Art. 29 (2012) ICC Arbitration Rules, establishing the so-called “Emergency Arbitrator” procedure.² It is submitted that the *President of the relevant CAS Division* can be considered *sufficiently independent from the parties to order provisional measures*. However, should the case involve the IOC or an issue in which

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

² For a commentary on this provision, cf. Boog, Chapter 4 above, Art. 29 ICC Rules.

the IOC has an interest, the President of the Appeals Division (who currently happens to be an IOC Vice-President) should step down and ask his deputy to decide the case.³

An important question raised by Art. R37 is *whether a party can request interim relief from the panel after a request to that effect was dismissed by the Division President*. The chance to get a “second bite at the apple” is relevant, especially in sports disputes, since a decision to dismiss a request for provisional measures may in fact result in the disposal of the entire dispute.⁴ CAS panels have been very reluctant to hear applications that had already been dismissed by the Division President, unless the applicant could show that there had been new developments since the decision of the Division President dismissing the request⁵ or if important facts which existed at the time of the decision were unknown to the applicant.⁶ Absent such new circumstances, CAS panels tend to consider that hearing the same application again would effectively turn the panel into an appeal body reviewing the decisions of the Division President. It is submitted that since decisions on provisional measures are mere procedural orders, this approach is too rigid. If, for instance, the application was originally dismissed on the ground that the applicant’s interests were found not to outweigh those of the other parties involved, and the panel were to disagree with such an assessment of the balance of interests, there would be no reason to prevent the panel from ordering the provisional measures sought by the applicant. The panel should in any event remain free to lift any provisional measures ordered by the Division President if it subsequently finds that the relevant prerequisites were not met or are no longer satisfied. After all, the panel will be in a much better position to assess the chances of success of the claim on the merits. More generally, a party could also argue that the reference to the “arbitral tribunal” in Art. 183 PILS and Art. 374 ZPO grants a statutory right to have an application for provisional measures heard by the panel itself.

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

It is unanimously accepted that under Art. 183 PILS (and Art. 374 ZPO) arbitral tribunals and state courts have concurrent jurisdiction to grant interim measures. According to Art. R37 (third paragraph), in agreeing to submit to arbitration *under the CAS Code the parties expressly waive their rights to request any such measures from state authorities or tribunals*. Originally, this waiver was limited to appeals proceedings, but it has now been explicitly extended to ordinary arbitration proceedings as well. The scope of the waiver has also been extended with respect to appeals proceedings themselves, since the CAS now has jurisdiction to hear requests for provisional measures as from the notification of the decision under appeal. This change was meant to prevent parties from circumventing the waiver by seizing the state courts before the expiry of the time limit for appeal and then relying on the *perpetuatio fori* principle.⁷

Is such a waiver of the parties’ right of access to the state courts valid and enforceable? In other words, can a party challenge the jurisdiction of the state courts relying on Art. R37? The short answer to this question is yes, as it is generally accepted that, at least in international arbitration, the parties can validly agree to exclude the jurisdiction of state courts even for provisional measures. Commentators consider that, to be valid, such a waiver must be “explicit and specific”.⁸ Art. R37 (third paragraph) is clearly both explicit and specific. As far as CAS ordinary proceedings are concerned, the waiver does not appear to be problematic. The issue is more complicated with respect to CAS appeals proceedings as the waiver

³ It goes without saying that it would be preferable if the President of the Appeals Division was a person having no particular links with the sports-governing bodies.

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

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

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

⁷ This is in effect what FC Sion attempted to do in the judicial saga opposing it to FIFA, the ASF and UEFA before the Vaud and Valais courts between 2011 and 2012. For an account of these various proceedings and the issues raised by them see Anderson, *The FC Sion Case and its Effects, Part One*, World Sports Law Report May 2012, pp. 8-10, and Id., *The FC Sion Case and its Effects, Part Two*, World Sports Law Report, June 2012, pp. 8-11.

⁸ Von Segesser/Kurth, p. 85.

was imposed by the sports-governing body. It is submitted that the enforceability of such waiver is not impaired by the fact that it is non-consensual in nature. In other words, the case law developed by the Swiss Federal Supreme Court with respect to waivers under Art. 192 PILS does not apply to the waiver of state courts' jurisdiction to hear requests for provisional measures.⁹ Indeed, while the waiver of the parties' right to file an action to set aside before the Supreme Court *deprives* them of the only remedy available against the arbitral award, a waiver of the right to request provisional measures in state courts constitutes in fact the *selection* of one particular remedy (recourse to the CAS) in a setting where the parties are given a choice between two alternative remedies. Accordingly, it is submitted that *while the waiver of state court jurisdiction to issue provisional measures is valid as such, it is enforceable only to the extent that it does not deprive a party of the protection that is offered by the state courts* or, to put it otherwise, only to the extent that arbitration is capable of providing effective relief.

- 9 Of course, state courts will consider declining their jurisdiction only if the respondent objects to it on the ground that it has been validly waived under Art. R37. In such cases, the state courts should, as a matter of principle, decline jurisdiction and invite the applicant to file his request with the CAS. This is what the District Court of Zurich did in a decision of 16 August 2005 in the matter *Dorthe v. IIHF*, giving full deference to the waiver in Art. R37 despite the fact that the applicant was challenging the jurisdiction of the CAS.¹⁰ The validity of such waiver was explicitly upheld by the High Court of the Canton of Berne in the *FC Sion v. ASF* case – a domestic case decided under Art. 374 ZPO – on the ground that party autonomy plays a paramount role in arbitration and that the CAS *meets the constitutional requirement of effective relief* (“*Anspruch auf effektiven Rechtsschutz*”) also with respect to provisional measures, *as it is a permanent arbitration institution, which can issue provisional measures even pending the constitution of the arbitral tribunal*.¹¹ We agree with these decisions inasmuch as they consider that the waiver is valid as such, but would submit that the waiver should be declared unenforceable if one party can establish that the CAS system is, under the circumstances, not in a position to provide effective relief.¹²
- 10 The first scenario in which a state court could consider that the waiver is unenforceable is when the applicant asserts that, under the circumstances, the CAS *will not be in a position to grant the requested relief in time*.¹³ It is submitted that this argument should not be successful as the CAS has shown that it

⁹ See Baizeau, above commentary on Art. 192 PILS (Chapter 2), paras. 30–33. If one were to apply such case law to Art. R37, then the waiver would be unenforceable because it would qualify as an indirect waiver, i.e., a waiver contained in the arbitration rules and not in the arbitration agreement or a separate agreement between the parties, (cf. BGER. 4P.62/2004 para. 1.2 (*Federación costarricense de triatlón (FECOTRI) v. ITU & CNOC*), *ASA Bull.* 2005, p. 485), but also because, despite the wording of Art. R37, the athlete cannot be considered as having consented to (CAS) arbitration and thus to Art. R37 of the Code (cf. BGER. 4P.172/2006 (X. (*Cañas*) v. *ATP Tour*), partially reproduced in BGE 133 III 235; *ASA Bull.* 2007, p. 592; *Swiss Int'l Arb.L.Rep* 2007, p. 65). However, for the reasons outlined in this short commentary, the waiver of state court jurisdiction to set aside an award is different in nature from the waiver of state court jurisdiction to hear applications on provisional measures.

¹⁰ In its decision of 16 August 2005, the District Court of Zurich declined jurisdiction to order provisional measures in a matter that, according to the respondent, should have been decided by the CAS in the framework of appeals proceedings. The Court held that since the CAS Code granted CAS the jurisdiction to order provisional measures within the meaning of Art. 183(1) PILS, the request was inadmissible.

¹¹ Decision by the Obergericht of the Canton of Bern of 19 April 2012, reported in CaS 2012, p. 171, setting aside the lower decision by the Regionalgericht Bern-Mittelland, which dogmatically ruled that such waiver is unenforceable in and of itself because it would infringe the principle of the right to effective relief (“*Anspruch auf effektiven Rechtsschutz*”) (Decision CIV 12 75 WUN of 14 February 2012, paras. 26 and 29, reported in CaS 2012, p. 79).

¹² For a detailed analysis of these decisions and the waiver issue in general, see Rigozzi/Robert-Tissot, *La pertinence du «consentement» dans l'arbitrage du Tribunal Arbitral du Sport*, *Jusletter* of 16 July 2012.

¹³ This is why, for instance, the Munich *Oberlandesgericht* held, in the well known Stanley Roberts case, that the waiver did not operate to preclude the jurisdiction of the courts, particularly when the CAS could not offer swift relief. However, it must be emphasized that this ruling was made on the basis of the (inaccurate) submission by the respondent party (FIBA) that the CAS was “capable of issuing a decision within 15 days”, which the Munich court found to be much too slow, OLG München, Judgment of 26 October 2000, U (K) 3208/00, *SpuRt* 2/2001, p. 65.

is capable of notifying all the relevant parties by fax and, by granting very short time limits, it can decide within days if not hours.¹⁴ Moreover, the CAS also has the power to issue *ex parte* orders, if needed.¹⁵

Hence, the only instances in which state courts should assert jurisdiction despite the waiver contained in Art. R37 are those where it is clear that only they have the authority to issue and/or the power to enforce the order that is being sought. Contrary to what was held by the lower court in the above-mentioned *FC Sion v. ASF* domestic case, the fact that formally the CAS does not have the power to enforce its orders is not decisive. While it is true that in domestic cases the enforcement of CAS orders through the state courts (Art. 374(2) ZPO) may appear as an “unnecessary roundabout way”,¹⁶ in international cases such a “detour” through the courts will be almost inevitable in practice each time that an order must be enforced abroad. In international matters, the fact that the sports-governing bodies voluntarily comply with CAS orders is thus of pivotal importance. In view of the foregoing, it is submitted that a *state court should assert jurisdiction only if the applicant can establish that, under the circumstances, it is very unlikely that the respondent will spontaneously comply with the CAS order.*¹⁷ 11

III. Types of Provisional Measures Available

Under Swiss law, the types of interim measures that an arbitral tribunal can order are determined by the procedural rules agreed upon by the parties and by the relevant provisions of the *lex arbitri*. Art. R37 of the CAS Code as well as Arts. 183 PILS and 374 ZPO do not specify or restrict in any way the types of provisional measures that can be ordered. Therefore, it is generally accepted that the CAS, just as arbitral tribunals in general, has *wide discretion* in this respect and may order any measures it deems appropriate in a particular case, subject to any limitations set forth in the parties’ agreement and mandatory provisions of law.¹⁸ 12

Swiss law customarily distinguishes between three non-exhaustive categories of provisional measures: 13
 (i) *conservatory measures* (“*Sicherungsmassnahmen*”, “*mesures conservatoires*”), aimed at maintaining the status quo during the arbitration proceedings so as to secure the enforcement of the final award, including measures to safeguard evidence, (ii) *regulatory measures* (“*Regelungsmassnahmen*”, “*mesures de réglementation*”), aimed at regulating the relationship between the parties pending the final award, and (iii) so-called *performance measures* (“*Leistungsmassnahmen*”, “*mesures d’exécution anticipée provisoires*”), aimed at obtaining the enforcement on an interim basis of all or a portion of the claim on the merits.¹⁹
 In sports disputes, the stay of a decision under appeal is the most commonly requested provisional measure. When it is aimed at indirectly authorizing an athlete or a club to partake in a competition, this measure is not only conservatory and regulatory in nature, but also, to some extent, akin to interim performance.

¹⁴ Cf. below, para. 38.

¹⁵ Cf. below, paras. 36-38. This in turn raises the delicate question whether state courts should address the issue *sua sponte* when they are seized with an *ex parte* request.

¹⁶ Regionalgericht Bern-Mittelland, Decision CIV 12 75 WUN of 14 February 2012, para. A. 26 (speaking of an “*unnötigen Umweg*”).

¹⁷ Tribunal Cantonal, canton de Vaud, Order CM11.033798 of 27 September 2011, pp. 15-16. In this second decision related to the above-mentioned *FC Sion v. UEFA* dispute, the Vaud court held that the exclusion of the jurisdiction of state courts “could result in practical difficulties that may be hard to overcome”, and that there was an actual risk that UEFA, “which did not comply with the *ex parte* order on provisional measures, may maintain the same stance, meaning that enforcement measures may be required; in this respect, while the CAS is vested with the necessary jurisdiction, it does not possess the imperium required to order such measures [reference omitted] and would thus have to request the assistance of the courts, which in turn may delay the proceedings to an extent that is hardly compatible with the requirement of expeditiousness which is inherent to applications for interim relief” (loose translation from the French original). As an aside, the unfolding of this case has shown that the courts’ power to decide that non-compliance with their orders shall constitute a criminal offence provides no guarantee that the relevant sports-governing bodies will indeed abide by the said orders, let alone do so without delay.

¹⁸ Boog, *Interim Measures*, p. 432.

¹⁹ BGE 136 III 200 para. 2.3.2.

- 14 Interim performance concerning the payment of a sum of money is not available in the CAS as it would be tantamount to a *freezing order* (*Arrest, séquestre*), a measure that is only within the competence of the state courts.²⁰ In appeals proceedings, when the decision under appeal condemns a club or an athlete to pay a certain amount of money, there is *no need to file a request to stay monetary or compensation decisions* issued by the relevant sports-governing body, as the CAS has consistently held that under Swiss law pecuniary claims cannot be enforced by the competent Swiss authorities as long as an appeal on the merits is pending.²¹

IV. (Substantive) Prerequisites for Granting Provisional Measures

- 15 The 2013 revision of the Code has finally codified the prerequisites to be satisfied for the CAS to grant interim relief, which have been distilled by CAS case law,²² in accordance with the criteria stipulated in Art. 14(2) of the CAS Ad Hoc Division Rules²³ and the practice generally followed in international commercial arbitration.²⁴ Art. R37(4) now explicitly provides that:

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

- 16 Previous CAS case law has made clear that these three prerequisites are cumulative.²⁵ However, the same case law also makes room for some flexibility, in that the CAS will generally take all the circumstances of the case into account. As a result, although each of the prerequisites is relevant, any one of them may be decisive on the facts of a given case.²⁶ In other words, the CAS “retains the measure of discretion necessary to evaluate the situation in a comprehensive manner, using the above-mentioned requirements as guidance, it being understood that the strict application of fixed criteria is neither desirable nor useful, as it may give rise to more difficulties than it will actually resolve in terms of predictability.”²⁷

A. Irreparable Harm

- 17 Irreparable harm is defined as any *damage that cannot be fully compensated if the applicant succeeds on the merits*.²⁸ Despite the inevitably fact-specific nature of irreparable harm, it is possible to identify some commonly followed lines of reasoning with regard to this notion in the jurisprudence of the CAS.
- 18 *Suspensions or bans* partially served before the hearing on the merits frequently satisfy the irreparable harm prerequisite. For instance, denying a football player the opportunity to play during four months due to a suspension would cause irreparable harm if the appointed Panel were to subsequently set aside

²⁰ CAS 2011/O/2545, *P. Calcio v. S.*, Order of 26 October 2011, paras. 33-41.

²¹ CAS 2004/A/780, *Maicon Henning v. Prudentopolis & FIFA*, Order of 6 January 2005, p. 10, paras. 6.1-6.3; CAS 2011/A/2433, *D. v. FIFA*, Order of 1 June 2011, p. 4, paras. 13-14.

²² See, among many others, CAS 97/169, *Menegotto v. FIC*, Order of 15 May 1997, *CAS Digest I*, p. 540, para. 1.

²³ The CAS Ad Hoc Division Rules comprise the set of special procedural rules which are adopted (with slight amendments from one edition to the next) to apply to disputes arising during important international competitions, such as the Olympic Games and the Commonwealth Games. Art. 14(2) CAS Ad Hoc Rules provides that: “when deciding whether to award any preliminary relief, the President of the ad hoc Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community”.

²⁴ Cf. Patocchi, *Switzerland*, p. 903, referring to “general principles of civil procedure”.

²⁵ See, e.g., CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, pp. 10-11, para. 41; and, more recently, CAS 2011/A/2473, *A. Club v. Saudi Arabian Football Federation (SAFF)*, Order of 17 June 2011, p. 5, para. 6.3, with the references.

²⁶ CAS OG 02/004, *COA v. ISU*, Order of 14 February 2002, *CAS Digest III*, p. 593.

²⁷ CAS 2011/A/2489, *P. et al. v. FIFA*, Order of 8 July 2011, pp. 7-8, para. 25, loose translation from the French original.

²⁸ CAS 2006/A/1141, *M.P. v. FIFA & PFC Krilja Sovetov*, Order of 31 August 2006, p. 6, para. 19, citing BGE 126 I 207 para. 2.

the suspension.²⁹ The CAS acknowledges that the months lost to a suspension can never be recovered and that the impact of disciplinary suspensions is compounded by the relative brevity of most athletic careers.³⁰ An athlete's *inability to compete in a major competition* often entails damage that is difficult to remedy. World championships and the Olympic Games evidently qualify as major competitions. For other competitions, it should be up to the applicant to demonstrate the importance of the event for his or her career.³¹ For instance, the *Giro d'Italia*, at least as far as Italian riders are concerned, is a major competition.³² However, the CAS has, on occasion, gone against this principle by holding that the economic, emotional and psychological hardship that results from the inability to compete in important events is an unavoidable consequence of every suspension of a professional athlete from competition.³³

Damage to reputation and loss of opportunity may also constitute irreparable (or hardly reparable) 19 harm, to the extent that they are difficult to quantify. The CAS has considered such risk to be self-evident in a situation where a football club was prohibited from participating in the UEFA Cup.³⁴ However, *damage to reputation* may not amount to irreparable harm if, in the circumstances, it is inevitable. For example, if an official is accused of corruption, the suspicions relayed in the media are not likely to dissipate until the rendering of the final decision, meaning that provisional measures cannot in any event provide protection against them.³⁵

Financial losses are not considered "irreparable" if they can be fully compensated by an award of dam- 20 ages at the end of the proceedings.³⁶ *Pecuniary damage* is relevant *per se* only if the applicant can establish that the resulting loss is impossible or very difficult to recover.³⁷ In all other instances, it *must be coupled with some form of moral damage or damage to a sporting interest*. For instance, the CAS will take notice, without deeming it conclusive in itself, of the fact that an athlete has a financial interest in competing in a major event³⁸ or that a club's inability to partake in an important event could result in lost revenue or financial jeopardy.³⁹ However, the CAS has held that financial losses suffered by football clubs due to a prohibition from signing new players during a transfer window,⁴⁰ or resulting from the potential loss of investment in a player due to a decision refusing his international transfer certificate,⁴¹ were quantifiable and could thus be indemnified if the club succeeded on the merits.

An applicant may also refer to the *interests of third parties* in cases where others will suffer negative con- 21 sequences if the CAS does not grant the interim measures sought. For instance, a football player agent appealing a decision which suspended his license during two transfer periods emphasized the interests of his clients.⁴² Along the same lines, a football club argued that if it were prevented from signing players during the transfer period, the resulting loss of financial sponsorship could jeopardize its future, which in turn would affect the interests of the football association it belonged to, and more generally football at the national level.⁴³

Other considerations may also be factored into the CAS's analysis, such as the *length of time between the 22 issuing of an order on provisional measures and the scheduled hearing*. The point is self-evident when the

²⁹ CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.5.

³⁰ CAS 2008/A/1453, *Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA*, Preliminary decision of 8 February 2008, p. 7, para. 15.

³¹ CAS 2001/A/328, *F. v. International Sports Organization for the Disabled (ISOD) et al.*, Order of 3 August 2001, p. 2.

³² CAS 97/169, *Menegotto v. FIC*, Order of 15 May 1997, *CAS Digest I*, p. 542, para. 10.

³³ CAS 2005/A/990, *Pobyedonostsev v. IIHF*, Order of 19 January 2006, p. 4, para. 8.2.

³⁴ CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 10, para. 43.

³⁵ CAS 2011/A/2433, *D. v. FIFA*, Order of 1st June 2011, p. 5, paras. 19-21.

³⁶ CAS 2006/A/1187, *British Skeleton v. FIBT*, Award on Interim Measures of 30 January 2007, p. 7, para. 31.

³⁷ CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 5, paras. 6.4-6.6.

³⁸ CAS 2001/A/328, *F. v. International Sports Organization for the Disabled (ISOD) et al.*, Order of 3 August 2001, p. 3.

³⁹ CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 6, para. 7.10.

⁴⁰ CAS 2005/A/916, *AS Roma v. FIFA*, Order of 25 July 2005, p. 4, paras. 18-19.

⁴¹ CAS 2011/A/2376, *S. Football Club LLC v. FIFA*, Order of 13 April 2011, p. 10, para. 44.

⁴² CAS 2007/A/1198, *Piveteau v. FIFA*, Order of 23 January 2001, p. 7, para. 30.

⁴³ CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 6, para. 7.10.

hearing is delayed as it is obvious that this would compound harm to the applicant. In the case of an early hearing, the situation may be more complex. For instance, in a case where a stay of an athlete's suspension from competition is requested, the applicant can claim that this will result only in a short-term infringement of the adverse party's interests,⁴⁴ but the Panel could also consider that, in the circumstances, the applicant would only miss a limited number of competitions, and thus reject the application itself.⁴⁵

- 23 Finally, applicants should take care to submit specific arguments about the harm that will arise given the particular factual scenario, and to demonstrate that such harm extends beyond mere recoverable financial ramifications. Although this is not specified in the relevant CAS jurisprudence, *the applicant need only make a showing that the risk of suffering irreparable harm is plausible* by alleging and bringing *prima facie* evidence of such risk.⁴⁶ The application should not be dismissed on the mere ground that the applicant was unable to quantify precisely the potential amount of damage.

B. The Likelihood of Success on the Merits

- 24 The definition of the standard required for the "likelihood of success" criterion has been subject to fluctuating terminology. Debate exists as to whether a positive or negative standard should be applied such that the claim must be "likely to be well-founded" or, rather, "not obviously ill-founded". The positive standard was reflected in older CAS decisions, which required "reasonable chances of success".⁴⁷ However, several recent CAS decisions have favored the negative standard which considers that an application is likely to succeed if "it cannot be definitely discounted"⁴⁸ or if its chances of success are higher than the chances that it will be dismissed.⁴⁹ This reasoning, as will be seen below, reflects concerns that it is necessary, at the stage of provisional measures, to *avoid trespassing into the merits of the case*. Be that as it may, the fact that, again, there is *no definitive, monolithic standard* in this respect enables arbitrators to exercise their discretion on a case by case basis.
- 25 Considering that the final decision on the merits is for the panel to make, the Division President will be *most reluctant to rule that the action on the merits does not appear to have the required chances of success*, unless the case is totally farfetched or, in appeals cases, if it is easy to determine that the time limit for appeal has clearly elapsed.⁵⁰ Understandably, the arbitrators are even more cautious. Thus, when they come to the conclusion that the required likelihood of success is not established, they will generally strive to emphasize that "the Panel expressly does not state at this stage a final opinion on the ultimate outcome of the case [...] which will be decided after a full hearing on the merits of the case".⁵¹
- 26 Given the flexibility available to arbitrators, establishing an inverse correlation between irreparable harm and the likelihood of success would ensure the greatest fairness to applicants. In other words, the more severe the irreparable harm is, the lower the "likelihood of success" threshold should be. Since varying standards exist, one can only advise applicants to expand as much as possible on their case on the merits and to *support their arguments with sufficient proof in order to "make summarily plausible"* that the claim is likely to succeed.⁵² Failing to adequately address the "likelihood of success" prerequisite may jeopardize a party's chances of obtaining interim relief.⁵³
- 27 It is submitted that in those cases where the interim relief sought amounts to an order imposing, on a provisional basis, the performance of the ruling requested on the merits, in particular where a request to be *provisionally admitted into a specific competition* is at issue, the CAS should require a *higher standard*

⁴⁴ CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.7.

⁴⁵ CAS 2005/A/951, *Cañas v. ATP*, Order of 18 November 2005, p. 3, para. 13.

⁴⁶ CAS 2008/A/1525, *A. FC v. HFF & O. FC*, Order of 21 April 2008, p. 18, para. 71.

⁴⁷ Cf., e.g., CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 9, para. 40.

⁴⁸ See, among many others, CAS 2006/A/1100, *Eltaib v. Club Gaziantepspor*, Order of 14 July 2006, p. 7, para. 30.

⁴⁹ *A contrario*, cf. CAS 2006/A/1162, *Iglesias v. FILA*, Order of 16 October 2006, para. 24.

⁵⁰ CAS 2011/A/2489, *P. et al. v. FIFA*, Order of 8 July 2011, pp. 7-8, paras. 26-29.

⁵¹ CAS 2006/A/1187, *British Skeleton v. FIBT*, Award on Interim Measures of 30 January 2007, p. 7, para. 32.

⁵² CAS 2001/A/324, *Addo & van Nistelrooij v. UEFA*, Order of 15 March 2001, p. 5, CAS Digest III, p. 631.

⁵³ CAS 2003/O/486, *Fulham FC v. Olympique Lyonnais*, Award of 19 December 2003, p. 4, para. 18.

of likelihood of success, both as to the existence of the relevant facts and as to the merits of the applicant's case.⁵⁴

C. The Balance of Interests (or Convenience)

The third pre-requisite that is examined by the CAS when hearing applications for interim relief is generally referred to as the “balance of interests” test. This criterion aims at *comparing the hardship* that will be caused to the applicant if the interim relief is not granted with the disadvantages the adverse party and any relevant third parties will suffer if the relief is granted, i.e., whether it would do “greater harm to grant the preliminary relief than to deny it.”⁵⁵ This requirement is also applied by state courts.⁵⁶

On several occasions, the CAS has confirmed that granting the stay of a sanction under appeal does not undermine the sports-governing body's interest in maintaining the sanction's deterrent effect, by underscoring that if it is subsequently upheld, the sanction will merely be postponed in time, not cancelled.⁵⁷ The CAS has also held that the irreparable harm resulting for an athlete or club from the immediate execution of a sanction may override a sports-governing body's general interest in maintaining contractual stability,⁵⁸ preserving the integrity of a competition,⁵⁹ or ensuring “fair-play” and the proper behavior of sport professionals.⁶⁰ However, such generalizations merely serve as examples since the balance of interests test will always turn on the specific facts of a given case. Consequently, the main principle which can be extrapolated from the jurisprudence is that *once the applicant's irreparable harm is established, sports-governing bodies must provide specific reasons why the immediate execution of the sanction is necessary*. Although the CAS supports sporting regulators in the exercise of their disciplinary powers, their position is clearly seen as “distinct from [that of] a private party at risk of suffering irreparable damage if a stay is not granted.”⁶¹

On the other hand, and as noted above with respect to the likelihood of success criterion, it is submitted that when the requested provisional measures seek the *ex ante* enforcement, on an interim basis, of all or a portion of the claim on the merits, in particular when a request to be provisionally admitted into a specific competition is at issue, the CAS should be particularly prudent in its analysis before concluding that the interests of the appealing club⁶² or athlete(s) outweigh those of the other parties involved.⁶³ The scope of the balance of interests is potentially wider in sports- than in commercial arbitration, enabling arbitrators to consider the *interests of parties that are not involved in the proceedings*. Inspiration again emanates from Art. 14(2) of the CAS Ad Hoc Division Rules which compares the interests of the applicant to those of the opponent as well as “other members of the Olympic Community”. This broad scope illustrates that, in the large majority of sports disputes, the granting of provisional measures can have far-reaching consequences. For example, the CAS found that granting the provisional reinstatement of an athlete following a positive doping test based on unproven and contradictory facts could be seriously detrimental to the sports-governing body and to other competitors if the applicant's suspension was later to be upheld.⁶⁴ Concern for the interests of other athletes has also led the CAS to consider, as a general rule, that stays of doping sanctions must be granted “parsimoniously.”⁶⁵

⁵⁴ The same line of reasoning is reflected in the Swiss Supreme Court's case law, cf., e.g., BGE 131 III 473 paras. 2.3 and 3.2.

⁵⁵ CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, p. 15, para. 70.

⁵⁶ Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, p. 23, at VIII.c.aa.

⁵⁷ CAS 2003/O/482, *Ortega v. Fenerbahçe & FIFA*, Order of 19 August 2003, p. 6, para. 8.6.

⁵⁸ CAS 2004/A/780, *Maicon Henning v. Prudentopolis & FIFA*, Order of 6 January 2005, p. 9, para. 5.12.

⁵⁹ CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, pp. 15-16, paras. 71-74.

⁶⁰ CAS 2007/A/1198, *Piveteau v. FIFA*, Order of 23 January 2001, pp. 7-8, paras. 33-35.

⁶¹ CAS 2003/A/523, *Pohang v. FIFA*, Order of 30 December 2003, p. 7, para. 7.13.

⁶² Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, p. 23, at VIII.c.aa.

⁶³ Tribunal Cantonal, canton du Valais, Order of 16 November 2011, p. 13, at 4.a at the end.

⁶⁴ CAS 2005/A/951, *Cañas v. ATP*, Order of 18 November 2005, p. 3, paras. 12-13.

⁶⁵ CAS 2005/A/958, *R. v. UEFA*, Order of 9 November 2005, p. 3, para. 8, free translation from the French original.

- 31 The same type of “sport specific” reluctance to order measures that will affect third parties can be observed in cases where *the granting of the relief sought could disrupt the smooth organization of an event or championship*. For instance, in a case concerning the relegation of a club, the CAS explicitly noted the concern that greater damage would be suffered by the football federation and the other football clubs which were trying to qualify for the following year’s tournament.⁶⁶ Finally, it is submitted that given the importance of the wider sports community, it is for the respondent sports-governing body and, if necessary, the CAS *sua sponte* to draw attention to, and duly take into consideration, such third party interests.⁶⁷

V. Procedural Questions

- 32 Arbitral tribunals (and institutions) can entertain applications for provisional measures only if the arbitrators have jurisdiction to hear the merits of the dispute (A.).⁶⁸ Obviously, they can only do so once they are seized with the claim. From a procedural point of view, it is important to consider whether and to what extent arbitral tribunals (and institutions) can decide *ex parte* (B.), and what the consequences should be when the respondent is invited to submit its position on a request but fails to do so (C.). Parties should also be aware that the CAS has the possibility of making interim relief conditional upon the provision of security (D.) and of the need to “validate” any request filed prior to the submissions on the merits (E.).

A. Prima Facie Examination of CAS Jurisdiction

- 33 It is self-evident that arbitrators can order provisional measures only if they have jurisdiction to hear the merits of the dispute. Art. R37 was amended in 2010 to make it clear that this requirement also applies before the arbitrators are actually appointed and the panel constituted: “[t]he President of the relevant Division or the Panel shall issue an order within a short time and shall rule first on the CAS jurisdiction”. Art. R37 was further amended in 2013 and now expressly stipulates that the CAS should undertake only a “*prima facie*” analysis of jurisdiction. This provision specifies that “[t]he Division President may terminate the arbitration procedure if he rules that the CAS clearly⁶⁹ has no jurisdiction”.⁷⁰ In general, *the Division President will be very cautious before dismissing an application on jurisdictional grounds*.⁷¹ When satisfied that there is *prima facie* jurisdiction, the Division President usually explicitly notes in his decision that “the final decision on jurisdiction will be made by the Panel”.⁷²

⁶⁶ CAS 2008/A/1525, *A. FC v. HFF & O. FC*, Order of 21 April 2008, pp. 19-20, para. 78. State courts appear to be less concerned by such “sport specific interests” (thus, there was no discussion of any arguments relating to the disruption of the competition and the damage caused to other clubs in the decisions rendered in the *FC Sion* saga, whether in the case brought by the Club against UEFA in the courts of the canton of Vaud (cf. in particular Tribunal Cantonal, canton de Vaud, Order of 27 September 2011, at p. 23, simply dismissing “*les difficultés d’ordre organisationnel auxquelles (l’intimée) serait confrontée*” (freely translated: “the organizational difficulties the respondent would have to deal with”), without taking into account the interests of the other clubs), or in the case brought by the six players of the Club before the courts in the canton of Valais (Order issued by the Juge I des Districts de Martigny and St-Maurice, *Glarner and others v. SFL ASF, FIFA & FIFA TMS*, C2 11 228, on 3 August 2011). What the state courts appear to do in such cases is to emphasize the fact that the order sought is akin to a measure ordering *ex ante* specific performance and thus require higher chances of success on the merits (cf. above, para. 24 and footnote 49, and also Tribunal Cantonal, canton du Valais, Order of 16 November 2011).

⁶⁷ Rigozzi, *Provisional Measures*, p. 229.

⁶⁸ Rigozzi, para. 1147.

⁶⁹ The fact that the 2013 edition of the Code substituted the original adverb “manifestly” with “clearly” constitutes a mere cosmetic change and should not be taken as a lowering of the applicable standard. Indeed, the French version of the 2013 rules still uses the word “*manifestement*”.

⁷⁰ CAS 2011/A/2376, *S. Football Club LLC v. FIFA*, Order of 13 April 2011, pp. 8-9, para. 36.

⁷¹ CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 3, para. 4.2. In this case the Division President preferred to dismiss the request for preliminary measures for lack of irreparable harm despite the fact that CAS jurisdiction was more than doubtful (as it then became apparent with the Award issued in CAS 2011/A/2472, *A. v. SAFF* on 12 August 2011).

⁷² CAS 2011/A/2541, *B. v. AFC*, Order of 30 September 2011, para. 4.2.

Article R37 does not apply the “clearly no jurisdiction” standard to the panel’s analysis. While it would 34
 certainly be preferable for the panel to conduct a more complete, and even final, examination of jurisdiction,
 more often than not the specific circumstances of a case, the effect of time constraints, and limitations
 in the information available during interim proceedings may confine the panel to a *prima facie*
 examination. In practice, the panel will defer its final decision on jurisdiction to a later stage if it does not
 have sufficient information and evidence to render such a decision when seized with an application for
 interim relief.⁷³ In sum, given the fundamental importance of jurisdictional issues, *the panel should verify*
its jurisdiction as accurately as possible under the circumstances and applicants would be well-advised to
 make thorough submissions on jurisdiction already at the stage of a request for provisional measures.⁷⁴

Neither the panel nor, *a fortiori*, the Division President should terminate the arbitration on jurisdictional 35
 grounds in an *ex parte* order.⁷⁵

B. Ex parte Orders

It is generally accepted under Swiss law that arbitral tribunals have the power to order interim measures 36
 on an *ex parte* basis.⁷⁶ Art. R37 of the CAS Code expressly provides for such a possibility, by envisaging
 that in “*case of utmost urgency*” the CAS “*may issue an order upon mere presentation of the application,*
provided that the opponent is subsequently heard”.

Unless the urgency appears while the case is pending before the panel, it would be for the Division 37
 President to decide whether to grant the remedy sought on an *ex parte* basis. It is submitted that urgency
 should not be the only element to be taken into account and that the more serious the risk of irreparable
 harm, the less reluctant the Division President should be to decide on the application without hearing
 the other side. *The plausibility of the facts alleged by the applicant should be examined at least to a certain*
extent. In practice, *ex parte* rulings can only be contemplated if the jurisdiction of the CAS (as well as, in
 appeals cases, the exhaustion of the internal remedies and the timeliness of the appeal) is easily verifiable.

It is often said that *ex parte* orders tend to be rare in arbitration but are more frequent in sports arbitration 38
 due to the need for swift decisions. While it is true that state courts have recently shown that they will
 not hesitate to act *ex parte* in sports matters,⁷⁷ the same does not apply to the CAS. Indeed, it appears
 that *the Division President prefers to fix very short time limits to answer by fax rather than ruling ex parte*. This
 is possible because the Division President and/or his deputy are available around the clock and, unlike
 state courts, communicate with the parties by fax and/or e-mail.

C. Answer and Failure to Answer

When, as in the vast majority of cases, the Division President or the panel invites the opponent party to 39
 express its position, the time limit provided for by Art. R37 is normally *ten days, but can be “shorter [...]*
if circumstances so require”. This flexibility is particularly important as it allows the Division President to
 avoid the need to decide *ex parte* even if the decision is required on a very urgent basis.

If the respondent does not answer within the set time limit, the CAS will tend to consider that the applicant 40
 has met his burden of establishing *prima facie* that the action on the merits has reasonable chances of
 success.⁷⁸ However, when the time limit to respond is particularly short, the CAS should not simply
 consider that the respondent has acquiesced to the measure sought. Even when there are no third party

⁷³ CAS 2011/A/2376, *S. v. FIFA*, Order of 13 April 2011, pp. 8-9, para. 36.

⁷⁴ In appeals proceedings, when the appellant seeks the stay of the decision under appeal, the request should be made
 together with the statement of appeal (cf. Art. R48, paras. 15-16 below).

⁷⁵ After all, the respondent could accept CAS jurisdiction even though it is not provided for in the applicable sporting
 regulations or in the arbitration clause contained in the underlying contract.

⁷⁶ Von Segesser/Kurth, p. 79.

⁷⁷ Cf., e.g., the Order issued by the Juge I des Districts de Martigny and St-Maurice in the case *Glarner and others v. SFL*
ASF, FIFA & FIFA TMS, C2 11 228, on 3 August 2011.

⁷⁸ Cf. above, paras. 23-26. TAS 2011/A/2351, *Club C. v. FIFA*, Order of 16 March 2011.

interests involved,⁷⁹ such a drastic consequence should be applied only if the communication from the CAS fixing the time limit to respond provides so in express terms.

D. Security

- 41 Article R37 explicitly authorizes the CAS to make the granting of interim relief conditional upon the provision of security. The requirement for security to be posted aims to protect the adverse party by ensuring that the applicant will be able to compensate any damages caused by the interim measure(s) sought if these are eventually deemed unnecessary or unjustified in the final decision. Before making an order for security to be posted, the CAS must therefore be satisfied that (i) the interim measure(s) requested can cause damage to the applicant’s adverse party or parties, and (ii) the amount of security does not exceed the maximum potential loss.⁸⁰ In our experience, the CAS has made little use of this possibility.

E. Need to “Validate” the Order on Provisional Measures

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

VI. Further Issues relating to Orders on Provisional Measures

A. Costs

- 43 Pursuant to Art. R37 (second paragraph) the party filing for provisional measures before initiating the arbitration shall pay the *Court Office fee* as per Art. R65.2 *upon filing the request*, failing which the “CAS shall not proceed”. Should the request for arbitration (Art. R38) or the statement of appeal (Art. R48) be filed at a later stage, the filing fee “shall not be paid again”.
- 44 In cases concerning “decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body” within the meaning of Art. R65 of the CAS Code, orders on provisional measures will be *issued without costs*. In light of his power to decide to impose the payment of the arbitration costs also in such cases,⁸¹ the President of the Appeals Division can reserve his decision for a later stage of the proceedings.
- 45 In cases where the proceedings are not free of charge, the CAS normally rules that “the costs of the present order will be *settled in the final award* or in any other final decision in this arbitration”. In exceptional cases, the allocation of such costs is decided directly in the order.⁸²

B. No Appeal against Orders on Provisional Measures

- 46 Generally, under Swiss law, regardless of whether a *decision on interim measures* is labeled as an “order” or an “award”, it is not subject to appeal because it can be modified or set aside during the arbitration; in other words, *it is not a final, partial, or interlocutory award that can be challenged, as such, before the Swiss Federal Supreme Court*.⁸³ Indeed, CAS orders on provisional measures now systematically contain a closing sentence according to which “[t]his decision is a procedural order, not an award. As a result,

⁷⁹ Cf. above, paras. 20, 27 and 30.

⁸⁰ Von Segesser/Kurth, p. 79; see also Boog, above commentary on Art. 183(3) PILS (Chapter 2), paras. 17–22.

⁸¹ Cf. Art. R65, paras. 7–8 below.

⁸² Cf., e.g., CAS 2003/O/520, *Association turque de football & B. v. UEFA*, Order of 3 December 2003, p. 11, para. 57.

⁸³ BGE 136 III 200 para. 2.3.1.

it may not be challenged in court pursuant to Art. 190 Swiss Private International Law Act”.⁸⁴ However, an order on interim measures can be appealed (i) if the CAS thereby declines jurisdiction, or (ii) in the exceptional circumstance that the order *de facto* rules on the merits of the dispute, thereby definitively terminating the arbitration proceedings.

C. Enforcement

Sports-governing bodies, which impose the CAS Code on their members, but also clubs and athletes 47 in appeals cases, will generally comply voluntarily and without difficulties with orders on provisional measures issued by the CAS.⁸⁵ Enforcement is thus not an issue in *CAS appeals arbitration* cases.

In *CAS ordinary arbitrations*, similar to commercial arbitration cases, voluntary compliance is less self- 48 evident but still common. Although arbitrators cannot enforce orders directly against the parties, they can use the tools of adverse inferences, cost-allocation, and even possibly an adverse ruling (if justified) to reprimand non-compliance with their orders on provisional measures. If necessary, arbitral tribunals can also seek the assistance of the courts for the enforcement of such orders.⁸⁶

⁸⁴ Cf. for example, CAS 98/200, *AEK PAE & SK Slavia v. UEFA*, Order of 17 July 1998, para. 78, or, more recently, CAS 2011/A/2473, *A. Club v. SAFF*, Order of 17 June 2011, p. 6, para. 8.1.

⁸⁵ By way of contrast, experience shows that the same does not apply to orders issued by state courts in disputes for which the relevant sports-governing body provides for CAS arbitration (cf. above, para. 10, footnote 12, and the well-known *OM-Valenciennes* case reported in *SPuRt* 1994, p. 27, as discussed by Rigozzi, para. 153).

⁸⁶ Von Segesser/Kurth, pp. 81-82; see also Boog, above commentary on Art. 183(2) PILS (Chapter 2), paras. 29-44.

C. Special Provisions Applicable to the Appeal Arbitration Procedure (Arts. R47 – R59)

Article R47: Appeal

I. Purpose of the Provision

- 1 Article R47 is the first provision of Section C of the CAS arbitration rules, entitled “Special Provisions Applicable to the Appeal Arbitration Procedure”. Its main purpose is to *set out the scope of application of the CAS Appeal Arbitration Procedure* (hereinafter also referred to as “the [CAS] appeals procedure”). In commenting this provision, it is useful to start by setting out the genesis of Art. R47 *et seqq.* of the Code (II.) and outlining the main features of the CAS appeals procedure (III.). The scope of application of Art. R47 (IV.), as well as the threshold issues of the requirement of prior exhaustion of legal remedies (V.) and disputes on CAS jurisdiction (VI.) should be addressed in some detail. The specific case of appeals against awards rendered by the CAS acting as a first instance tribunal in accordance with Art. R47(2) of the Code also deserves to be discussed briefly (VII.).

II. Historical Background

- 2 Originally, the CAS arbitration rules did not contain a specific set of provisions regarding appeals proceedings. In 1991, the CAS published its first *Guide to Arbitration*, which contained several *model arbitration clauses*, including the following clause *to be inserted in sports federations’ statutes or regulations*: “Any dispute arising from the present Statutes and Regulations of the [...] Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts [...]”.¹ The Fédération équestre internationale (FEI) was the first sports-governing body to include a clause of this type in its statutes, with the almost immediate result that a significant number of FEI decisions were appealed before the CAS.
- 3 Thus, it was probably no coincidence that the first CAS award to be brought before the Swiss Federal Supreme Court in setting aside proceedings concerned an FEI dispute.² In this decision, which has since become known as the *Gundel* case, the Supreme Court acknowledged (i) that the *decisions of an international federation incorporated in Switzerland could be validly made subject to arbitration* (in lieu of being submitted to the courts at the seat of the relevant federation, as provided in Art. 75 CC) by the inclusion of a clause to that effect in the federation’s statutes, and (albeit with some reservations) (ii) that CAS arbitration under the then applicable CAS arbitration rules was, as a matter of principle, sufficiently independent from the sports federations to qualify as “true arbitration” under Swiss law.³
- 4 The combined effect of *Gundel* and of the increasing number of CAS proceedings (due to the fact that many other important sports-governing bodies had in the meantime followed the FEI’s example by including a CAS arbitration clause in their regulations), induced the IOC to launch a *revision of the CAS arbitration rules*. The so-called “1994 reform”, which resulted in the enactment of what is now known as the CAS Code, was thus the perfect opportunity not only to address the concerns raised by the Swiss Supreme Court in *Gundel*, but also to enact a specific set of rules to govern arbitrations arising from appeals against the decisions issued by sports-governing bodies, i.e., Arts. R47-R70 of the CAS Code. This set of rules, which is also commonly referred to as the “appeal arbitration rules”, or “CAS appeals

¹ Reeb, *CAS Digest III*, p. xxix.

² BGer. 4P.217/1992 (*Gundel v. FEI*), BGE 119 II 271, *ASA Bull.* 1993, p. 398; translated in: *Mealey’s I.A.R.*, Issue 10, October 1993, p. 12, with a comment by Jan Paulsson.

³ Cf. the Supreme Court’s decision in *Gundel*, BGE 119 II 280 para. 3.b, where the Court noted, however, that there was room for improvement with respect the then existing structural and financial links between the CAS and the International Olympic Committee (IOC).

proceedings”, turned out to be the CAS’s greatest success. According to the most recent statistics, more than 80% of CAS cases are conducted as appeals proceedings pursuant to Art. R47 *et seqq.* of the Code.⁴

The original wording of Art. R47 remained unchanged until 2004, when the scope of application of the appeals procedure was clarified by replacing the words “decision of a disciplinary tribunal or similar body of a federation, association or sports body” with the current phrase “decision of a federation, association or sports-related body”, thus stating unambiguously that CAS appeals proceedings *are available to challenge all kinds of decisions issued by sports-governing bodies, and not only disciplinary decisions*. In practice, however, disciplinary disputes still count for the vast majority of cases heard by the CAS under the appeals procedure. 5

By the same token, a second paragraph was added to Art. R47 to take into account the practice that had developed in Australia, where anti-doping and selection disputes were heard by a local branch of the CAS in the first instance, with a possibility to appeal to the “international” CAS in Lausanne upon completion of the first instance proceedings. Today, the provision according to which “an appeal may be filed with the CAS *against an award rendered by the CAS acting as a first instance tribunal*” plays an important role, in particular as it allows the parties to anti-doping disputes in the US to challenge before the CAS the awards rendered by the so-called “North American Court of Arbitration for Sport”, under the auspices of the American Arbitration Association.⁵ 6

III. Salient Features of the CAS Appeals Procedure

The central characteristic of the CAS appeals procedure is its *expedited nature*. In appeals proceedings, *each procedural step is to be accomplished within a specified time limit*, which should allow the CAS to issue the “operative part of the award [...] within three months after the transfer of the file to the Panel”.⁶ According to the rules, the *constitution of the panel* should not take longer than a month: the appellant appoints an arbitrator in the statement of appeal;⁷ the respondent is then required to appoint an arbitrator within a time limit of ten days following the notification of the statement of appeal,⁸ failing which the Division President “shall make the appointment”;⁹ and finally, the chair will be appointed directly by the Division President, without the parties being consulted.¹⁰ The rules further provide that the *exchange of written submissions* should be completed approximately within a month from the filing of the statement of appeal: the appeal brief shall be filed within ten days from the expiry of the time limit for appeal and the Respondent’s answer shall be filed within twenty days from receipt of the appeal brief.¹¹ All these time limits can however be (and often are) extended upon the request of either or both parties.¹² In practice, the main delays occur after the exchange of written submissions, as in the vast majority of cases the *Panel will hold a hearing*,¹³ and finding a suitable date for the CAS, the members of the panel and the

⁴ According to the latest available statistics, there were, up to 31st December 2011, 338 ordinary arbitrations and 2’186 appeals arbitrations registered in the CAS roll.

⁵ Weston, GA J. *Int’l & Comp. L.* 2009, pp. 106-109 (an electronic version of the paper is available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524323>). For a recent case, see CAS 2009/A/1870, *WADA v. Hardy & USADA*, Award of 21 May 2010. Cf. also below, para. 46.

⁶ Art. R59(5).

⁷ Cf. Art. R48(1).

⁸ In CAS arbitrations, the file is transferred to the arbitrators once (i) the panel is constituted and confirmed by the Division President, (ii) the CAS Court Office has issued the so-called “Notice of Formation” of the panel and, (iii) if applicable, the requested advance of costs has been paid (cf. Art. R40.3). The constitution of the panel can take longer when several respondents have to agree on a joint appointment and thus need more time to conduct the necessary consultations.

⁹ Cf. Art. R53.

¹⁰ In practice, the appointment of the chair and the confirmation of the panel by the Division President often take significantly longer.

¹¹ Cf. Arts. R51(1) and R55(1).

¹² Art. R32.

¹³ As there will be no further exchange of submissions (cf. Art. R56 CAS Code), the panel will generally be quite reluctant to decide that “it deems itself to be sufficiently well informed [...] not to hold a hearing” (cf. Art. R57(2)).

parties is not an easy task. Even though the CAS increasingly tends to ignore the parties' (and/or their attorney's) constraints in terms of availability, the fact remains that the most experienced arbitrators happen to be very busy people and it is thus very unlikely that a hearing can be scheduled right away. The arbitrators' busy schedules also have an impact on the timing of *deliberations and the drafting of the award*.¹⁴ Despite the increasingly frequent appointment of ad hoc clerks to assist CAS panels,¹⁵ in the vast majority of cases, the Division President will be required to grant one or more extensions of the time limit for rendering the award.¹⁶

- 8 Originally, CAS appeals proceedings were meant to be totally *free of charge*. In 2004, the scope of this "free of charge" principle was limited to appeals against decisions that were both disciplinary and international in nature. In 2012, this scope was further narrowed down by the qualification that proceedings were to be free of charge *only if the disciplinary decision under challenge had been rendered by an "international federation"*.¹⁷ The 2013 revisions to the Code have restricted this principle even further, providing that whilst appeals against disciplinary decisions rendered by international sports federations will remain free of charge, "[i]f the circumstances so warrant" the President of the Appeals Division may impose the payment of the arbitration costs on the parties. The latest amendment also provides two examples of circumstances where the President might exercise this discretion, including the "predominant economic nature of a disciplinary case" and cases in which the "federation which has rendered the challenged decision is not a signatory to the Agreement constituting the ICAS".¹⁸
- 9 Accordingly, in *cases where the President deems that this is "warranted" and in all other cases which do not involve an appeal against a disciplinary decision of an international sports federation, the parties will have to pay an advance on costs* before the arbitration is actually initiated. As the amount of the advance can be substantial,¹⁹ it is submitted that in the absence of an efficient legal aid system, this could raise significant issues in those cases where the athlete is unable to pay the requested advance. Indeed, as the athlete did not voluntarily agree to arbitration, he could validly claim, in such a situation, that he was deprived of his fundamental right of access to justice. For the time being, athletes simply end up dropping their cases in many of these instances. However, with the increasing professionalization of athletes' representation, it is to be anticipated that some could try to bring their actions in the state courts by arguing, in response to any jurisdictional challenge, that the arbitration clause contained in the sports regulations is inoperative for costs reasons.
- 10 Another issue is whether the arbitrations governed by the *CAS appeals proceedings are confidential*. Art. R59(6) specifically allows for the *publication of the award* and/or the issuance of a press release only if the parties do not agree otherwise, and its 2013 version now clarifies that "[i]n any event, the other elements of the case record shall remain confidential". This is also consistent with the principle that the hearings are held "in camera unless the parties agree otherwise"²⁰ and the general confidentiality obligation to which all CAS arbitrators are subjected.²¹ Accordingly, it is submitted that the first sentence of Art. R43 – which provides that "[t]he parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS"²² – is also applicable to CAS appeals proceedings. In our opinion, the same obligation

¹⁴ One may wonder whether there have been abuses of the possibility to ask for extensions of the time limit to render the award, as the ICAS has recently decided to amend Art. R35 in order to allow for the removal of an arbitrator not only when he refuses to, or is prevented from, carrying out his duties or if he fails to fulfill such duties pursuant to the CAS Code, but also – this being the new provision – when he does not do so "within a reasonable time".

¹⁵ Cf. Art. R54(4).

¹⁶ Cf. Art. R59(5).

¹⁷ Cf. Art. R65.

¹⁸ Cf. Art. R65.4.

¹⁹ Cf. Art. R64.2.

²⁰ Art. R57(2) *at the end*.

²¹ Art. S19(1) of the CAS Code.

²² The breach of this obligation can result in a claim for damages and, for the arbitrators only, in the sanctions provided for by Art. S19(2) of the CAS Code.

should apply to the CAS as the arbitration institution, even if there is no express provision to this effect in the CAS Code.²³ Thus, we believe the CAS should refrain, for instance, from issuing any pre-award press release without the consent of the parties.²⁴

IV. The Scope of Application of the CAS Appeals Procedure

An arbitration shall be conducted according to the CAS appeal procedure only if there exists a CAS arbitration agreement covering challenges against the relevant sports-governing body's decisions (A.) and if the dispute at issue actually originates from such a decision (B.). 11

A. Arbitration Agreement to Challenge Sports-Governing Bodies' Decisions

Most of the awards rendered under the CAS appeals procedure contain, in their section dedicated to the legal analysis of the case, an introductory and relatively "standardized" paragraph setting out the principle that, in accordance with the wording of Art. R47 and well-established CAS case law, "for the CAS to have jurisdiction in a matter it is necessary that either [(i)] the parties have expressly agreed to it or [(ii)] the statutes or regulations of the body issuing the decision provide for an appeal before the CAS".²⁵ The second scenario is, obviously, the more frequent one in practice. 12

1. Arbitration Clause in the Relevant Sports Regulations

According to Art. R47, an "appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide". While this wording refers to the arbitration clause contained in the statutes or regulations of the governing body that actually issued the decision appealed against (a.), the agreement to arbitrate can also arise from an arbitration clause contained in the regulations of another sports governing body (b.). 13

a. Regulations of the Sports-Governing Body that Issued the Decision under Appeal

The arbitration agreement does not necessarily have to make an express reference to appealable "decision(s)" or to the "CAS appeals procedure". An arbitration clause referring "any dispute" to the CAS is sufficiently broad to cover disputes concerning decisions rendered by an adjudicative instance of the sports-governing body that has enacted the regulations containing such clause. That said, a provision merely "recognizing" the CAS is not sufficient to assert CAS jurisdiction under Art. R47 CAS Code,²⁶ unless, as the FIFA Statutes do, it also prohibits all parties subject to the regulations from bringing disputes before the state courts.²⁷ In practice, in the vast majority of cases CAS jurisdiction is based on either (i) a *special arbitration clause contained in the regulations governing the merits of the dispute* (for instance, in the anti-doping regulations that the sports-governing bodies must enact to implement the 14

²³ By way of comparison, the Swiss Rules do provide that the same general undertaking as to the confidentiality of the proceedings also applies to the arbitral institution and its governing bodies and staff (cf. Art. 44 2012 Swiss Rules).

²⁴ This strict approach should apply irrespective of whether the case is a high profile matter or not and of any pressure by the medias and related interests. An exception should be made only if the parties themselves have already breached their obligation of confidentiality by "leaking" information to the media and any such leaks require a clarification by the CAS. In any event the parties must be consulted first, in particular to take into account the interests of the party that did not breach its confidentiality obligation and/or is affected by the leaks.

²⁵ This wording is quoted from CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 65, confirmed by the Swiss Supreme Court, BGer. 4A_404/2010.

²⁶ CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 73. All national football federations are required to include such a "recognition clause" in their statutes pursuant to Art. 68(1) of the FIFA Statutes. Cf., e.g., Art. 10 of the Statutes of the Saudi Arabian Football Federation (SAFF) according to which the clubs, in their capacity as members of the SAFF, "undertake to recognize the dispute resolution chamber recognized by the [SAFF] and to recognize the Court of Arbitration for Sport (CAS) in Lausanne" (CAS 2011/A/2472, *Al-Wehda v. SAFF*, Award of 12 August 2011, para. 46).

²⁷ Art. 68(2) FIFA Statutes.

WADA Code)²⁸ or (ii) a more general arbitration clause (often contained in the statutes or in the regulations concerning a federation's internal proceedings).

- 15 For instance, the Doping Control Rules of the International Swimming Federation (FINA) provide that “[i]n cases arising from participation in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court.”²⁹ Such clauses only apply to decisions made under the Anti-Doping Rules and *prevail, as a lex specialis and in as far as such decisions are concerned, over the general arbitration clause* contained in the FINA Constitution, which stipulates that “[d]isputes between FINA and any of its Members or Members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne [...]”³⁰ In case of discrepancy, for instance, with respect to the time limit for appeal or the parties authorized to bring such an appeal, the specific clause will prevail over the general one. Thus, in our example, WADA will be allowed to appeal against a decision issued by the FINA Doping Panel even if it is not a “Member of FINA” within the meaning of the arbitration clause contained in the FINA Constitution.

b. Regulations of Another Sports-Governing Body

- 16 According to the well-established case law of the Swiss Federal Supreme Court concerning so-called “specific” arbitration agreements by reference,³¹ it is generally accepted that a provision in the regulations of the sports-governing body that has issued the decision under appeal *specifically referring to a CAS arbitration clause contained in the regulations of another governing body* is sufficient to establish CAS jurisdiction: in such a case, the arbitration clause is deemed to have been incorporated in the regulations of the governing body that issued the decision.
- 17 CAS jurisdiction to hear an appeal is more controversial when the regulations of the sports-governing body that issued the decision under appeal do not contain (an arbitration agreement or) a specific reference to an arbitration agreement contained in the regulations of another governing body, but *merely refer, in global terms, to the regulations of another sports-governing body which contain a CAS arbitration agreement*. According to the Swiss Supreme Court's case law, the CAS should assert jurisdiction only if, in light of the circumstances of the case, the global reference to the regulations should be understood as an acceptance of the arbitration clause contained therein. That said, when the applicable regulations specify that the athletes are also bound by the regulations of that other governing body, the Supreme Court has held (in a case where the reference was to FIFA's regulations) that, consistent with the “liberal approach” followed in its case law dealing with arbitration agreements concluded by reference, a “general reference to the FIFA Rules [...] is sufficient in order for the jurisdiction of the CAS to be established in the light of R47 of the Code.”³²

²⁸ Like all other provisions of the World Anti-Doping Code, Art. 13.2.3 of the WADA Code does not have direct effect (Adolphsen, *CAS Bull.* 2010/1, p. 3 and *passim*). Unless properly incorporated in the relevant sports regulations, Art. 13.2.3 WADC cannot constitute in and of itself a valid arbitration agreement (cf. CAS 2006/A/1190, *WADA v. Pakistan Cricket Board & Akhtar & Asif*, Award on Jurisdiction of 28 June 2006, where the CAS dismissed an appeal by WADA in a case where an international federation had failed to meet its obligation to incorporate a rule corresponding to Art. 13.2.3 WADC in its own regulations).

²⁹ FINA Doping Control Rules, available at <<http://www.fina.org>>, DC 13.2.1.

³⁰ FINA Constitution, available at <<http://www.fina.org>>, C25 – Arbitration.

³¹ Cf. Müller, above commentary on Art. 178 PILS (Chapter 2), paras. 61–66.

³² Cf. BGER. 4A_460/2008 para. 6.2, *ASA Bull.* 2009, pp. 544–545; translated in *Swiss Int'l Arb.L.Rep.* 2009, pp. 52–53 (referring, *inter alia*, to BGE 133 III 235 para. 4.3.2.3, where the Supreme Court stated that its case law with respect to arbitration agreements by reference is “based on a liberal approach and a bias to formal validity”). In this case, Art. 1(2) of the [Brazilian FA]'s Statutes provide[d], *inter alia*, that the athletes affiliated to [it] must comply with the FIFA Regulations (cf. CAS 2007/A/1370 & 1376, *FIFA & WADA v. CBF, STJD & Dodô*, Award of 11 September 2008, para. 72).

The fact that in the well-known *Dodô* case the Swiss Supreme Court stated that its case law is “to the effect that a global reference to an arbitration clause contained in [a Federation’s statutes] is valid and binding”³³ should not mean that any dispute involving parties somehow bound by the statutes of an international federation containing a CAS arbitration clause can be brought before the CAS. In the *Dodô* case this was so because the FIFA Statutes explicitly provide for arbitration with respect to the kind of doping dispute that had to be decided. Indeed, Art. 67(6) (then Art. 63(5)) of the FIFA Statutes provides that “WADA is entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members [i.e. the national federations] or Leagues”. The validity of the global reference was particularly clear in the case at hand, as it was *a doping matter, and no athlete can reasonably contend that he could ignore the existence of the arbitration clause* in the provisions of the regulations referred to.³⁴

By way of contrast, the Supreme Court has upheld the CAS’s view that Art. 63(1) of the FIFA Statutes (now Art. 67), according to which “appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS” did not constitute an “arbitration clause per se for national disputes”.³⁵ The fact that Art. 68 (then Art. 64) of the FIFA Statutes expressly requires that all national federations insert an arbitration clause in their regulations³⁶ obviously rules out that the arbitration agreement can be concluded just through a general reference to the FIFA Statutes (as the latter specifically require an arbitration clause at the level of national regulations). A national federation’s failure to comply with the obligation set out in the FIFA Statutes is likely to constitute a violation of those Statutes, but cannot automatically create an arbitration agreement by reference.³⁷

c. Scope of the Arbitration Agreement Contained in Sports Regulations

According to Art. R47 CAS Code, an appeal may be filed with CAS (in other words, the CAS has jurisdiction to hear an appeal) against a decision of a sports-governing body “if the statutes or regulations of the said body so provide”. This means that the *sports-governing bodies are free to determine which kind of decisions can be appealed to the CAS*. The most notable example is Art. 67(3) of the FIFA Statutes, which makes it clear that “CAS [...] does not deal with appeals arising from: (a) violations of the Laws of the Game [and] (b) suspensions of up to four matches or up to three months (with the exception of doping decisions) [...]”. Decisions explicitly excluded from CAS jurisdiction *ratione materiae* cannot be reviewed by the CAS.

The *arbitration agreement can also determine who is entitled to file an appeal*. Again, the answer should be sought in the applicable regulations. For instance, all the anti-doping regulations based on the WADA Code contain a provision (implementing Art. 13.2.3 WADC and) setting out an exhaustive list of who may be considered as a party and identifying who has the right to appeal to the CAS – namely

³³ BGer. 4A_460/2008 para. 6.2, *ASA Bull.* 2009, pp. 544-545; translated in *Swiss Int’l Arb.L.Rep* 2009, pp. 52-53.

³⁴ Indeed, the jurisdiction of the CAS in doping matters concerning international competitions and/or international-level athletes is mandatory for all signatories of the WADA Code (Art. 13.2.1 WADC) and is also undoubtedly one of the “principles of the [WADA] Code” that the States parties to UNESCO’s International Convention against Doping in Sport (the UNESCO Convention, SR 0.812.122.2) have undertaken to “commit to” in accordance with Art. 4 of the Convention (cf. also BGE 129 III 445 para. 3.3.3.3).

³⁵ CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 76.

³⁶ According to this provision, the clause to be inserted must “stipulate[e] that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law” and that “instead” such disputes “shall be taken to a duly constituted arbitration tribunal recognised under the rules of the Association or Confederation or to CAS”.

³⁷ Of course, the prohibition from resorting to state courts would be equally inoperative, and the decisions made by the national federation should be challenged according to the relevant provisions of the applicable municipal law. The fact that the local legislation provides that a specific sport decision cannot be appealed in the state courts, is not sufficient, *per se*, to establish CAS jurisdiction.

“(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered [i.e. the relevant federation or anti-doping agency]; (c) the relevant International Federation [if the proceedings were dealt with at national level]; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder [if the proceedings were dealt with by an international or national federation]; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA”.

The athlete's competitors are not listed and can thus not bring an appeal to CAS, even if they have a manifest interest in the dispute.³⁸ Thus, if the silver medallist files an appeal against the decision of the IOC not to disqualify the gold medallist despite the presence of a prohibited substance in his body, the CAS will have no other choice but to decline jurisdiction.

- 22 Even if the terminology is often confusing,³⁹ the issue of the *scope of the arbitration agreement ratione personae* must be *distinguished* from that of *standing to appeal (locus standi)*. For instance, Art. 62(2) of the UEFA Statutes provides that “only parties directly affected by a decision may appeal to the CAS”.⁴⁰ All the clubs participating in the UEFA Champions League are bound by the CAS arbitration agreement contained in the UEFA Statutes.⁴¹ Accordingly, the CAS will have jurisdiction to hear appeals brought against UEFA decisions by any of the participant clubs, but it will declare such an appeal to be inadmissible for lack of standing to appeal if the appellant club is not directly affected by the decision at issue.⁴²

2. Specific Arbitration Agreement

- 23 In the absence of an arbitration clause in the relevant sports regulations, the CAS has jurisdiction to hear an appeal against a decision pursuant to Art. R47 *et seqq.* of the Code only if “the parties have concluded a specific arbitration agreement”. The instances in which a sports-governing body has explicitly accepted CAS jurisdiction on such an *ad hoc* basis are rare, as a *governing body will be reluctant* to allow an individual party (athlete or club) to arbitrate despite the absence of an arbitration clause in its regulations, knowing that other parties will then ask for a similar treatment.
- 24 On the other hand, it is increasingly the case that, to reduce the risk of unnecessary disputes about jurisdiction, sports-governing bodies *request all athletes to sign a specific arbitration agreement as a precondition for participating in the sport* (for instance, in a so-called “licence”)⁴³ or in a specific event or competition

³⁸ Cf., e.g., CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 119.

³⁹ Cf., e.g., CAS 2004/A/748, *ROC & Ekimov v. IOC, USOC & Hamilton*, Award of 27 June 2006, para. 119, stating that the “list of persons or organizations having standing to appeal ‘does not include Athletes, or their federations, who might benefit from having another competitor disqualified’”.

⁴⁰ The arbitration agreement with respect to appeals against FIFA decisions does not contain any limitation as to the parties who can bring an appeal. CAS jurisprudence considers that there is a presumption that the standing to appeal to CAS is the same as the standing to appeal in the lower instances: cf., e.g., CAS 2008/A/1658, *SC Fotbal Club Timisoara v. FIFA & RFF*, Award of 13 July 2009, para. 111, reported in *CAS Bull. 2010/1*, pp. 99-100 applying *per analogiam* Art. 126 (now Art. 119) of the FIFA Disciplinary Code, which allows internal appeals to be filed with the FIFA Appeal Committee by “anyone who is affected and has an interest justifying amendment or cancellation of [a] decision [issued by a lower FIFA internal instance]”.

⁴¹ Art. 30, Regulations of the UEFA Champions League, 2012/13.

⁴² Whether standing to appeal is a condition for admissibility or an issue pertaining to the merits of the dispute is a controversial question on which the CAS case law is far from having distilled a consistent analysis and position (cf. De La Rochefoucauld, *CAS Bull. 2011/1*, p. 13, who does not appear, however, to take the distinction between jurisdiction *ratione personae* and standing to appeal into consideration).

⁴³ For instance, in order to participate in competitions organized or supervised by the UCI, each professional rider must sign a “UCI Licence” prepared by his national federation, which contains inter alia the following wording: “I hereby undertake to respect the constitution and regulations of the International Cycling Union, its continental confederations and its national federations. [...] I accept the Court of Arbitration for Sport (CAS) as the sole competent body

(in particular in what is often referred to as an “entry form”).⁴⁴ The signing of such an undertaking clearly constitutes a valid arbitration agreement.⁴⁵

3. *The Validity of Arbitration Agreements in Sports*

As the arbitration agreement is included in the sports regulations or in a written undertaking, the requirement of *written form* within the meaning of Art. 178(1) PILS is not problematic in sports arbitration.⁴⁶ 25

The Swiss Federal Supreme Court has held that in case of a *global reference to another sports regulation containing an arbitration clause*, the problem moves from the issue of form to that of consent, and must be resolved according to the “principle of confidence” (“*principe de la confiance*”), taking into account all the circumstances.⁴⁷ As already discussed, the Supreme Court has taken a “liberal approach”, meaning that it will uphold CAS jurisdiction when the arbitration clause is not unusual and provided that it is clearly meant to govern the dispute at hand. In a recent decision, the Court has held that CAS arbitration agreements must be considered as “usual within the branch of sport” (“*Branchentypisch*”), thus practically establishing a presumption in favor of the validity of CAS arbitration agreements by reference in sports matters.⁴⁸ 26

The main issue arises from the undisputable fact that arbitration agreements contained in sports regulations or subscribed as a precondition for participating in specific competitions are not consensual in nature. An athlete has no choice but to accept the sports regulations (containing the arbitration agreement) or to subscribe to a specific arbitration agreement (whether by requesting a licence or signing an entry form) if he wants to partake in the sport or participate in a specific tournament or other event. However, to the extent that the contemplated procedure and the arbitration institution overseeing it are sufficiently independent to qualify as a “true arbitration”,⁴⁹ such *lack of consent does not per se invalidate the arbitration agreement*. Thus, the Swiss Supreme Court has felt compelled to note that given the independence of the CAS, a CAS arbitration agreement contained in a document that a tennis player must sign in order to participate in ATP events is not invalid despite the lack of consent. According to the Supreme Court, this solution “obeys a certain logic [...] favouring the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality”.⁵⁰ 27

Arbitrability is generally unproblematic in CAS appeals arbitrations, since both employment and disciplinary disputes are deemed to involve matters “of financial interest” within the meaning of Art. 177(1) PILS.⁵¹ 28

for appeals in [disciplinary cases] and under the conditions set out in the regulations” (UCI Cycling Regulations, available at <<http://www.uci.ch>>, Part I: General Organisation of Cycling as a Sport, Art. 1.1.023).

⁴⁴ Thus, when entering the Olympic Games, athletes must sign a form including the following wording: “I also agree that any dispute arising on the occasion of or in connection with my participation in the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration” (cf. Bye-law 6 to Rule 45 of the Olympic Charter).

⁴⁵ CAS 2010/A/2070, *Antidoping Schweiz v. Ullrich*, Award of 30 November 2011, paras. 38–39 (a case decided by reference to the (now repealed) *Concordat*, which set forth stricter requirements than the PILS with respect to the formal validity of arbitration agreements).

⁴⁶ For a commentary on Art. 178 PILS, see Müller, Chapter 2 above (especially paras. 61–66).

⁴⁷ BGer. 4C.44/1996 para. 3c, reproduced in: *CAS Digest I*, pp. 589–590.

⁴⁸ BGer. 4A_428/2011 para. 3.2.3.

⁴⁹ Cf. above, para. 3.

⁵⁰ BGE 133 III 235 (*Cañas v. ATP*) para. 4.3.2.3, English translation in *Swiss Int'l Arb.L.Rep* 2007, pp. 65–99, referring, as to the independence of the CAS, to BGE 129 III 445 (*Lazutina*) para. 3.3.3.3.

⁵¹ BGer. 4P.230/2000 (*Roberts c. FIBA*), *ASA Bull.* 2001, p. 523.

B. The Concept of “Decision”

- 29 In defining the concept of decision within the meaning of Art. R47, the CAS case law has relied upon the *relevant principles of Swiss administrative law*.⁵² The form and/or denomination of the challenged act are not determinative,⁵³ what matters is whether the latter contains a ruling affecting the parties’ legal positions.⁵⁴ For instance, a simple letter sent by an employee of a sports governing body qualifies as a decision within the meaning of Art. R47 CAS Code if it is aimed at “resolv[ing a legal situation] in an obligatory and constraining manner”.⁵⁵
- 30 The fact that the challenged ruling is not reasoned is of no consequence with respect to its categorization as a “decision” within the meaning of Art. R47.⁵⁶ Since CAS appeals are *de novo* hearings,⁵⁷ the reasons for the challenged decision are not relevant for the purposes of the appeal. However, if the applicable rules provide that the decision under appeal can be issued first in a non-reasoned form, with the reasons to be provided subsequently, *the appealable decision should be the reasoned decision*. That said, it is submitted that in urgent cases the party affected by an unreasoned decision shall not be prevented from filing a statement of appeal against such decision, without waiting for the issuance of the reasons, for the purposes of seeking its (immediate) stay pursuant to Arts. R48(1), fifth bullet point, and R37 of the Code.⁵⁸

V. The “Exhaustion of Internal Remedies” Requirement

- 31 Article R47 provides that a sports decision can be appealed before the CAS according to the appeals procedure only “*if the Appellant has exhausted the legal remedies available to him prior to the appeal*”. In other words, the decision under appeal must be final.

A. When is a Decision Final?

- 32 The answer to this question should be sought in the applicable sports regulations. Unless the applicable regulations expressly state that the decision at hand is final, one must ascertain whether they provide for any further internal recourse against that decision. The requirement of the *exhaustion of internal remedies only applies to remedies which are mandatory under the applicable regulations*: discretionary or extraordinary remedies, such as, for instance, applications for early reinstatement in case of exceptional circumstances,⁵⁹ need not be exhausted.⁶⁰
- 33 If the arbitration agreement contemplates that any decision by the relevant sports-body can be appealed, then CAS jurisdiction will extend to *decisions on provisional measures*. For instance, a decision by the Single Judge of the FIFA Players’ Status Committee concerning the issuance of a temporary International Transfer Certificate (allowing the player to be provisionally registered with a club pending the resolution

⁵² Cf., e.g., CAS 2007/A/1396&1402, *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 6.14, quoting CAS 2009/A/1869, *FC La Chaux-de-Fonds v. SFL*, para. 59.

⁵³ Cf., e.g., CAS 2007/A/1251, *FC Aris Thessaloniki v. FIFA*, Award of 27 July 2007, paras. 3-6.

⁵⁴ Cf. CAS 2008/A/1633, *FC Schalke 04 v. CBF*, Award of 16 December 2008, para. 10, and the references cited therein; cf. also CAS 2007/A/1355, *FC Politehnica Timisoara SA v. FIFA & RFF & Politehnica Stintia 1921 Timisoara Invest SA*, Award of 25 April 2008, paras. 5-16.

⁵⁵ CAS 2005/A/899, *FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.*, Award of 15 July 2005, para. 59.

⁵⁶ See, e.g., CAS 2009/A/1781, *FK Siad Most v. Clube Esportivo Bento Gonçalves*, Award of 12 October 2009, reported in *CAS Bull. 2010/1*, p. 113, and the references therein.

⁵⁷ Cf. Art. R57.

⁵⁸ Cf. Art. R37, para. 13 above, and R48, paras. 15-16 below.

⁵⁹ See, e.g., IAAF Rule 60.9, which was in force prior to the enactment of the WADA Code, providing that, in exceptional circumstances, athletes who had been sanctioned with a suspension for doping could apply to the IAAF Council for reinstatement prior to the expiry of their period of ineligibility.

⁶⁰ CAS 2002/A/409, *Longo v. IAAF*, Award of 28 March 2003, para. 17 (where the Sole Arbitrator concluded that an application for early reinstatement, which was available on the basis of the IAAF’s Council’s right of mercy in exceptional circumstances, was not a “legal remedy” within the meaning of Art. R47).

of a contractual dispute with his prior club) is a “final decision” for the purposes of Art. R47 even if its object is intrinsically provisional.⁶¹

B. Are There Any Exceptions to the “Exhaustion Of Internal Remedies” Rule?

According to fundamental principles of law, internal remedies must be exhausted only if, under the circumstances, this can reasonably be required from the appellant. By reference to the *case law developed under Art. 75 CC*, it is generally accepted that the requirement that internal remedies must be exhausted does not apply in those cases where, for instance, the internal hearing body deliberately delays the proceedings or refuses to deal with the case, or has made comments about the matter which make it clear that it will not be able to act with the necessary impartiality.⁶²

Furthermore, it is submitted that, in accordance with *fundamental principles of international law*, the exhaustion of internal remedies can reasonably be required only if such remedies are adequate and effective, that is, if they are suitable to address the infringement of a legal right and capable of producing the result for which they were put in place. This is confirmed by Art. 13.1 of the WADA Code, according to which internal remedies “must be exhausted, provided that such re[medies] respect the principles set forth in Art. 13.2.2 [of the WADA Code]” by offering “a timely hearing; a fair, impartial and independent hearing panel; the right to be represented by counsel at the [appellant]’s own expense; and a timely, written, reasoned decision”.

Finally, it bears mentioning that the requirement of the exhaustion of internal remedies does not apply to third parties that are entitled to appeal by the arbitration agreement, in particular when they have no such entitlement in the context of the internal first instance proceedings.⁶³ Thus, Art. 13.1.1 of the WADA Code provides that “[w]here WADA has a right to appeal [...] and no other party has appealed a final decision within the Anti-Doping Organization’s process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the Anti-Doping Organization process”.

C. Procedural Questions

The exhaustion of internal remedies is an *admissibility* requirement. If it is not met, the CAS will reject the appeal but will not dismiss the claim. The appellant will be free to bring the same claim again once the internal remedies have been exhausted.

Contrary to the question of compliance with the time limit for appeal,⁶⁴ the exhaustion of internal remedies *will not be examined by the CAS ex officio*. If the sports governing body that has rendered the decision under appeal wishes to rely on the fact that an internal remedy was still available to the appellant, it should do so in its answer brief at the latest.⁶⁵ The relevant sports-governing body can also elect to abandon such objection in the course of the arbitration.⁶⁶

If there is a dispute regarding the existence of an internal remedy, the sports-governing body bears the burden of proving that such remedy existed.⁶⁷ Once the governing body has discharged its burden, the *burden of proof* shifts to the appellant, who must then establish that (i) the remedy in question was in fact exhausted, or (ii) was inadequate and ineffective in the particular circumstances of the case, or (iii)

⁶¹ CAS 2008/A/1691, *Kraków v. FIFA & Empoli*, Award of 3 July 2009, CAS Bull. 2010/1, p. 104.

⁶² Kiener, p. 8 and the references therein. The fact that a sports body takes five months to issue a simple decision that it lacks jurisdiction allows the appellant to bring the case to CAS even though the time limit to seize the competent internal body has, in the meantime, elapsed (cf. CAS 2006/A/1163, *Touzé v. FIDE*, Award of 22 May 2007, para. 51).

⁶³ CAS 98/212, *UCI v. M. & FCI*, Award of 24 February 1999, para. 8.

⁶⁴ Art. R49.

⁶⁵ Art. R55.

⁶⁶ CAS Ad Hoc Division, OG 00/012, *Dimitrova Neykova v. FISA and IOC*, Award of 29 September 2000, para. 9.

⁶⁷ CAS 2005/A/971, *RBF v. IBF*, Award of 31 January 2006, para. 6.1.2; cf. also CAS Ad Hoc Division OG 00/014, *FFG v. SOCOG*, Award of 30 September 2000, para. 6, where the Panel noted that “no legal remedies other than resort to the Court of Arbitration were drawn to our attention”.

that there existed special circumstances absolving him/it from the requirement to exhaust the available remedies.

- 40 Finally, it must be emphasized that although the “exhaustion of internal remedies rule” constitutes a mere admissibility requirement, it is treated as a precondition for CAS jurisdiction in the context of *actions to set aside CAS awards based on Art. 190(2)(b) PILS*, meaning that the issue can be reviewed with unfettered powers by the Swiss Supreme Court.⁶⁸

VI. Disputes about Jurisdiction

- 41 Pursuant to Art. 186(2) PILS, a plea of lack of jurisdiction must be raised prior to any defence on the merits. Accordingly, if the respondent challenges the jurisdiction of the CAS, it must do so at the latest in its answer brief.⁶⁹ If it does not, it will be deemed to have implicitly accepted the jurisdiction of the CAS in accordance with the so-called *Einlassung doctrine* developed by the Swiss Federal Supreme Court.⁷⁰
- 42 In those cases where CAS jurisdiction is disputed, CAS panels have the power to decide on their own jurisdiction according to the *Kompetenz-Kompetenz principle* embodied in Art. 186(1) PILS.⁷¹
- 43 In accordance with Art. 186(1) *bis* PILS, a CAS panel “shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless serious reasons require a suspension of the proceedings”. Applying this provision in a case in which a Swiss club had filed an appeal based on Art. 75 CC against a FIFA decision before the Zurich courts, the CAS held that “the Appellant should prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience” and went on to conclude that the mere “possibility that the Zurich Court may come up with a different decision than that of the CAS” was “manifestly not” a serious reason within the meaning of Art. 186(1) *bis* PILS.⁷²
- 44 Contrary to the principle set out in Art. 186(2) PILS, CAS panels do not, as a rule, decide on their jurisdiction by means of a preliminary award. The *bifurcation of the proceedings* is generally ordered only upon a request by the party opposing jurisdiction. While it is difficult to point to established general rules in this regard, experience suggests that panels will grant a request for bifurcation and issue a separate award only if (i) the jurisdictional challenge is based on legal issues that are clearly distinct from the issues pertaining to the merits of the dispute and can thus be easily dealt with separately in a time- and cost-efficient manner, or (ii) it would otherwise be procedurally unfair to require the party challenging the jurisdiction of the CAS to prepare a full-fledged submission covering also the merits of the dispute. Of course, in practice, panels will be more inclined to order the bifurcation of the proceedings if it appears that there are good chances that the case will not even reach the merits phase.⁷³
- 45 If the panel does issue an award on jurisdiction, the losing party can (and must)⁷⁴ challenge that award in the Swiss Supreme Court within thirty days from the notification of the signed original.⁷⁵ The filing of an action to set aside an award asserting jurisdiction *will not prevent the panel from continuing the arbitration proceedings*, unless the Supreme Court grants a request by the petitioner for the stay of the arbitration

⁶⁸ Rigozzi, *JIDS* 2010, p. 244.

⁶⁹ Cf. Art. R55(1). The fact that the respondent did not challenge the jurisdiction of the CAS in previous procedural exchanges or in its response to a request for provisional measures does not constitute an acceptance of such jurisdiction.

⁷⁰ Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 47–49.

⁷¹ Cf., e.g., CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, paras. 62–63.

⁷² CAS 2009/A/1880 & 2009/A/1881, *FC Sion v. FIFA & Al-Ahly SC*; *El-Hadary v. FIFA & Al-Ahly SC*, Award of 1 June 2010, paras. 66–68. Cf. also BGer. 4A_428/2011 para 5.2.2.

⁷³ See, e.g., CAS 2011/A/2534 & 2535, *Hasan et al. v. FIFA & IFA*, Award of 14 February 2012.

⁷⁴ If it does not do so, it will be deemed to have accepted CAS jurisdiction and shall be estopped from bringing a jurisdictional challenge against the final award; cf. Rigozzi, *JIDS* 2010, p. 245.

⁷⁵ Art. 190(3) PILS. Cf. BGer. 4A_392/2010 para. 2.3.2.

pending the Supreme Court's decision on the challenge against the award.⁷⁶ However, in practice, if the challenge is at least colorable, CAS panels will prefer to *suspend the proceedings sua sponte, out of deference to the Supreme Court*. It is submitted that this approach is justified in those cases where (i) the jurisdictional questions turn on the determination of legal issues the Swiss Supreme Court is free to review under Art. 190(2)(b) PILS, such as, for instance, the determination of the hypothetical will of the parties, and (ii) the delay in the proceedings does not unduly harm the party relying on CAS jurisdiction.

VII. Appeals against CAS (First Instance) Awards

Article R47(2) provides that “[a]n appeal may be filed with the CAS against an award rendered by CAS 46 acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”. A two-tier arbitration system of this kind was first set up by the Australian Olympic Committee’s “Anti-doping Policy”, which provides for a first arbitration hearing before a CAS panel instituted by the CAS’s Oceania decentralized office,⁷⁷ followed by an appeal to the “international CAS” in Lausanne.⁷⁸ The same approach was then adopted by the US Antidoping Agency (USADA). Thus, US athletes are afforded a *first hearing in the so-called North American Court of Arbitration for Sport, instituted under the aegis of the American Arbitration Association (AAA)*,⁷⁹ as well as the possibility to appeal against the AAA award to the CAS in Lausanne. US athletes can also elect to bring appeals directly to the CAS, and in such cases they will have the guarantee that the hearing will take place in the US.⁸⁰ Given that the CAS Panel is to hear the dispute *de novo*,⁸¹ one may wonder whether it is sensible to have two full-fledged arbitration hearings to decide a doping case.⁸² However, this is a question for the relevant national anti-doping organizations, rather than the CAS.

⁷⁶ Cf. also Arroyo, above commentary on Art. 191 PILS (Chapter 2), paras. 55–59.

⁷⁷ The CAS’s Oceania decentralized office is in Sydney, Australia. There is a second permanent decentralized CAS office in New York City, USA.

⁷⁸ For a description of this mechanism, cf. CAS 2004/A/651, *French v. Australian Sports Commission & Cycling Australia*, (Appeal) Award of 11 July 2005.

⁷⁹ Proceedings before the North American CAS are governed by the AAA *Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, available at <<http://www.adr.org>>, which are incorporated in USADA’s Protocol for Olympic and Paralympic Movement Testing (USADA Protocol, available at <<http://www.usada.org>>) as Annex D.

⁸⁰ This is so because, making use of the option provided for in Art. R28 at the end of the Code, the USADA Protocol (Annex D, R-45) states that “[a]ppeals to CAS filed under these rules shall be heard in the United States”. This has no influence on the legal seat of the arbitration which remains in Lausanne. The second stage of the USADA arbitrations will thus be governed by Swiss arbitration law, which is confirmed by the USADA Protocol’s provision to the effect that “[t]he decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss [Federal Supreme Court] Act or the Swiss Statute on Private International Law” (USADA Protocol, R-45). For a well-known case, cf. *USADA v. Hamilton*, AAA Case No. 30 190 0013005, Award of 18 April 2005 and CAS 2005/A/884, *Hamilton v. USADA & UCI*, Award of 10 February 2006; or, more recently, *USADA v. Hardy*, AAA Case No. 77 190 00288 08, AAA Award on Liability of 1st August 2008, AAA Interim Award of 4 May 2009 and AAA Final Award of 30 May 2009, and CAS 2009/A/1870, *WADA v. Hardy & USADA*, Award of 21 May 2010.

⁸¹ Cf. Art. R57. However, as discussed in connection with that provision, the concept of *de novo* hearings in CAS has recently been qualified, with the 2013 edition of the CAS Code expressly providing that the Panel will have discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered (cf. Art. R57, para. 4 below).

⁸² Weston, *GA J.Int’l & Comp.L.* 2009, p. 104–106.

Article R48: Statement of Appeal

I. Purpose of the Provision

- 1 The filing of the statement of appeal is the first step in CAS appeals arbitration proceedings. The purpose of Art. R48 is to *set out the minimum required contents and information to be provided with the statement of appeal*, so that the proceedings can be properly set in motion by the CAS (II.). That being said, appellants are free to include additional items and procedural requests in the statement of appeal (IV.). Together with Arts. R64.1 and R65.2, Art. R48 also clarifies that, in order for the arbitration to proceed, prospective appellants are required to pay the non-refundable CAS Court Office fee when filing the statement of appeal (III). Finally, Art. R48 provides guidance on the manner in which the CAS will deal with the filing of a statement of appeal that is not fully compliant with the Code’s requirements (V.).

II. Filing and Minimum Required Contents of the Statement of Appeal

- 2 As a preliminary matter, it bears noting that according to Art. R48(1) the statement of appeal is to be “submitted to the CAS”. This means in particular that the statement of appeal should be *filed by the appellant directly with the CAS*: any rules requiring the appellant to file the statement via a federation’s organ or other sports-body are, in the words of a CAS Panel, “seriously questionable” as they prevent the CAS from applying “its usual standards to consider whether an appeal is admissible or not”, in particular with respect to compliance with the time limit for appeal.¹
- 3 The statement of appeal is the “initiating document” in CAS appeals proceedings. As such, it must be filed *within the time limit for appeal*, whether the latter is contained in the applicable sports-governing rules or otherwise to be determined pursuant to Art. R49 of the Code.² In view of the fundamental need for certainty as to the finality of the decisions issued by sports-governing bodies, the time limit to bring an appeal against such decisions is in general relatively short. Taking this time pressure element into consideration, the statement of appeal can be filed in the form of *a very short and simple document*, as long as it includes the basic elements required by Art. R48.³ In particular, the statement of appeal need not contain detailed factual and legal developments. These may be reserved for the appeal brief, which is considered as the (in principle, only) proper “written submission” in CAS appeals proceedings.⁴
- 4 Pursuant to Art. R31(3), the statement of appeal *must be filed by courier delivery to the CAS Court Office*, in as many copies as there are other parties and arbitrators, together with an additional copy for the CAS.⁵ The 2013 revisions to the Code now also provide for filing the statement of appeal (and other written submissions) by electronic mail “under the conditions set out in the CAS guidelines on

¹ CAS 2006/A/1065, *W. v. FEI*, Termination Order of 20 June 2006, pp. 3-4.

² Cf. Art. R49.

³ As the CAS Guide to Arbitration puts it: “[a]ppeal proceedings are initiated by the submission of a statement of appeal including the elements mentioned in Article R48 of the Code [...]. Since its principal function is to respect the time limit for appeal, the declaration may be very brief. It is sufficient for it to contain the claims of the appellant and the designation of his arbitrator, unless the parties have agreed to call upon a sole arbitrator. The appellant will also ensure that a copy of the contested decision and the provisions of the statutes and regulations confirming recourse to the CAS are attached to his statement.”

⁴ Cf. Art. R51.

⁵ Prior to the 2013 revisions, Art. R31 provided that the statement of appeal could be “sent by courier or facsimile to the CAS Court Office”, however, the Code now provides that if written submissions are “transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office *provided that the written submission is also filed by courier within the relevant time limit*”. Consequently, the previous practice, which allowed for the filing of the statement of appeal by facsimile until the final day of the time limit (before midnight) and its subsequent dispatch by registered post or courier as soon as possible thereafter, can no longer be considered admissible. Prospective appellants will have to ensure that they’ll be ready to file their statement of appeal by the time of the last courier pick-up on the date of expiry of the time limit (cf. Art. R49, paras. 15-16 below).

electronic filing”⁶ While the relevant date to determine whether the statement of appeal was filed within the applicable time limit is the date of dispatch (the date when it was sent),⁷ it is the date of its receipt by the CAS Court Office that will be the determining one for the purposes of *lis pendens* within the meaning of Art. 181 PILS.⁸

According to Art. R48, the *elements that must be included* in the statement of appeal, on pain of the appeal being eventually “deemed withdrawn” by the CAS⁹ are the following:

A. Name and Full Address of Respondent(s)

From a practical point of view, the objective of this requirement is *to enable the CAS Court Office to notify the appeal* to the designated respondent(s) and more generally to be provided with the contact details to use for communications with the parties or their counsel and/or other representatives throughout the proceedings.¹⁰

The parties’ details as provided by the appellant also give a first indication of the scope, *ratione personae*, of the arbitral proceedings to be set in motion. At this preliminary stage, the information required under Art. R48 is meant to assist the CAS Court Office in conducting a *prima facie* review of the existence of an arbitration agreement¹¹ so as to determine whether, assuming there is an existing and valid agreement, the appellant(s) and the designated respondent(s) appear to be parties to it.¹²

In this respect, even though this is not expressly mentioned in Art. R48, the appellant obviously also needs to provide the CAS with his/its own name and contact details (as well as those of his/its counsel, if and when one is appointed).¹³ If the appellant(s) and/or respondent(s) have been insufficiently identified or if there are other issues with the information provided in the statement of appeal with regard to the potential parties to the proceedings, the *CAS Court Office will invite the appellant to provide additional details* as may be necessary and/or to clarify any such issues within a short time limit.¹⁴

B. Complete Copy of the Decision Appealed against

To the extent the decision in question forms the very object of the appeal, this is an obvious requirement. If the decision has been rendered in a language other than the CAS’s working languages (English or French),¹⁵ it is submitted that at least for the immediate purpose of filing the statement of appeal

⁶ The “CAS guidelines on electronic filing” were not yet available at the time of printing, even though the 2013 edition of the Code had already entered into force. As long as the uncertainty generated by this situation is not lifted with the publication of the guidelines, prospective appellants will need to make sure they file their statement of appeal by courier prior to the expiry of the relevant time limit.

⁷ Cf. Art. R49.

⁸ For a commentary on Art. 181 PILS, cf. Stacher/Feit, Chapter 2 above. The corresponding provision for domestic arbitrations is Art. 372 ZPO, which, in pertinent part, is similarly worded. Cf., e.g., Kaufmann-Kohler/Rigozzi, para. 470. For a different view (considering that absent a specific provision in the rules chosen by the parties, the relevant date for *lis pendens* purposes is that when the request for arbitration, viz. the statement of appeal, is sent to the arbitral institution), cf. Berger/Kellerhals, para. 944 and Girsberger/Voser, 2012, para. 654.

⁹ Art. R48(3) states that “[i]f the [requirements discussed below] are not fulfilled when the statement of appeal is filed, the CAS Court Office shall grant only once a short deadline to the Appellant to complete his statement, failing which it shall be deemed withdrawn”, see below, paras. 26-29.

¹⁰ Since the CAS Court Office’s day-to-day communications in arbitration proceedings are made by fax, it is important to provide fax numbers, if available, in the contact details.

¹¹ Cf. Art. R52(1).

¹² The issue of standing to appeal is briefly discussed above under Art. R47 (para. 21). On this question as well as that of standing to be sued, cf. also De La Rochefoucauld, *CAS Bull.* 2011/1, pp. 13-20 and the references therein, as well as, by the same author, *CAS Bull.* 2010/1, pp. 51-56, and the references therein.

¹³ Cf. also below, para. 21, and Art. R30 regarding the production of powers-of-attorney for party representatives. The appellant should indicate at any appropriate stage whether the correspondence from the CAS Court Office should be addressed to him, and/or any representative(s) or counsel.

¹⁴ Cf. below, paras. 26-30.

¹⁵ Cf. Art. R29.

within the applicable time limit, no *translation* is mandatorily required, provided it is produced as soon as possible thereafter. That said, it would obviously be strongly advisable to file at least (e.g. if the decision is particularly long) a translation of the sections of the decision which set out the parties' names and the date when the decision was issued, as well as the dispositive part and any other elements which may be of relevance for the purposes of the CAS's *prima facie* examination of jurisdiction.¹⁶

- 10 For the sake of efficiency, even though this is not required under Art. R48, it may be sensible to include as an exhibit to the statement of appeal a *proof of the date of receipt* of the challenged decision in order to demonstrate that the applicable time limit for appeal has been complied with.¹⁷

C. Appellant's Request for Relief

- 11 The request for relief defines the object and scope of the dispute and thus the subject-matter of the arbitration. In appeals cases, the relief requested will generally be *the annulment or amendment of the challenged decision(s) in whole or in part*, together with any additional requests, including, for instance, requests seeking declaratory relief and/or orders for specific performance (such as reinstatement of results or delivery of an ITC), and/or pecuniary relief, and/or orders in relation to costs, including arbitration and legal costs.
- 12 The statement of appeal must provide an *indication* of the relief sought, so as to enable the CAS Court Office, the respondent(s), and, once it will be appointed, the panel to grasp the issues raised by the appeal and the claim(s) at stake.¹⁸ That said, the CAS case law has explicitly recognized that the *appellant will still be at liberty to amend or complete the relief sought* in his appeal brief,¹⁹ to which the respondent(s) will in any event have a full opportunity to reply.²⁰

D. Nomination of the Arbitrator Chosen by the Appellant

- 13 Article R48(1) requires the appellant to nominate an arbitrator "*from the CAS list*", which is compiled by the ICAS in accordance with Arts. S13 and S14 and published on the CAS website.²¹ This is a mandatory requirement and any appointment from outside the list will not be confirmed by the CAS. In other words, the CAS list of arbitrators is a so-called closed list. The Swiss Federal Supreme Court considers that the CAS list is sufficiently long to afford the parties "a wide choice of names to choose from, even taking into account the nationality, language and sport practiced by athletes who appeal to the CAS".²² In view of this and of the specific context of competitive sports, the Supreme Court has held that the CAS list of arbitrators helps to achieve the objective of resolving disputes "quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues".²³

¹⁶ Conversely, experience shows that the CAS Court Office will generally also require a copy of the original version of the decision if only a translation is filed.

¹⁷ Cf. Art. R49. The appellant may also wish to point to the provision (if any) in the governing rules or regulations that provides for the applicable time limit for appeal.

¹⁸ In the words of the Panel in CAS 2005/A/835 & 942, *PSV NV v. FIFA et al.*, Award of 3 February 2006: "for a statement of appeal against a given respondent to be admissible, it is necessary not only that it names that respondent, but also that it contains an actual claim against the subject indicated as respondent; the simple indication of a respondent does not mean per se that arbitration can proceed against that respondent, unless a specific claim is brought against it" (para. 86). Cf. also CAS 2005/A/957, *Clube Atlético Mineiro v. FIFA*, Award of 23 March 2006, paras. 7-8.

¹⁹ Cf. CAS 2007/A/1434 & 1435, *IOC & WADA v. Pinter & FIS*, para. 79.

²⁰ CAS 2009/A/1881, *El Hadary v. FIFA & Al-Ahly Sporting Club*, Partial Award on *lis pendens* and jurisdiction of 7 October 2009, para. 58.

²¹ Cf. Introduction, paras. 5-10 above. The list is available on the CAS website (<www.tas-cas.org/arbitrators-genlist>) and can be searched by nationality, last name and languages spoken. There is a distinct list, also available on the CAS website, from which parties are required to select arbitrators in football disputes for cases involving FIFA, cf. <<http://www.tas-cas.org/arbitrators-footlist>>.

²² BGE 129 III 445 para. 3.3.3.2; English translation available in: *ICCA Yearbook 2004*, Vol. XXIX, pp. 206-231.

²³ BGE 129 III 445 para. 3.3.3.2; English translation available in: *ICCA Yearbook 2004*, Vol. XXIX, pp. 206-231.

The requirement of Art. R48(1) for the statement of appeal to contain “the nomination of the arbitrator chosen by the Appellant [...], unless the Appellant requests the appointment of a sole arbitrator” suggests that the *default solution in CAS appeals proceedings is for a three member panel to hear the case* (as further confirmed by Art. R50, first sentence). Against this background, and knowing that pre-existing agreements on the number of arbitrators are rather rare in sports disputes, the clarification introduced in the 2013 edition of the Code, according to which *the appellant may request the appointment of a sole arbitrator* upon filing the statement of appeal, is to be welcomed. The appellant may wish to do so, for instance, for the sake of time and/or cost efficiency (where the proceedings are not free of charge under the Code). In such a case, the appellant will thus not be required to nominate an arbitrator in the statement of appeal and the CAS Court Office will invite the respondent to state its position with regard to the appellant’s request. If the respondent agrees to have a sole arbitrator hear the case, the arbitrator will be appointed by the President of the Appeals Division in accordance with Art. R51.²⁴ If the respondent does not agree or the President of the Appeals Division decides that the case should be heard by a three-member panel, the CAS Court Office should fix a short time limit for the parties to nominate their arbitrators. 14

E. Request for a Stay of the Execution of the Decision Appealed against (if Applicable)

Article R48(1) expressly provides that the appellant may immediately request, in the statement of appeal, a stay of the decision under appeal pending the outcome of the proceedings.²⁵ An application for the stay of the execution of a decision is a request for provisional relief. As such, *in order to be granted, the request must meet the conditions governing requests for provisional measures in CAS proceedings*. Thus, as discussed in more detail in the commentary to Art. R37, an applicant is required to show that: (i) he is at risk of suffering irreparable harm if the stay is not granted; (ii) he is likely to succeed on the merits of his case when this will be heard by the panel, and (iii) his interest in obtaining the grant of the stay outweighs that of his counterparties (or those of other interested parties) in seeing the decision applied without delay or interruption (the so-called “balance of interests” criterion).²⁶ 15

The wording of Art. R48(1) suggests that an application for a stay must be *filed with the statement of appeal* and *would be inadmissible at a later stage*.²⁷ While the CAS’s practice does not appear to be cast in stone in this respect,²⁸ it is submitted that a request for a stay filed *at a later stage should be entertained only in exceptional circumstances*, upon a reasoned application by the appellant or when the urgency has become evident at a later stage.²⁹ 16

F. Provisions of the Relevant Regulations or Specific Agreement Providing for Appeal before the CAS

A copy of the provisions in the relevant statutes, by-laws, regulations, other rules or any separate arbitration agreement³⁰ on which the appellant relies to ground the jurisdiction of the CAS with regard to the dispute at hand must be provided with the statement of appeal. In case such regulations or agreement are not (available) in English or French, *translations* of the relevant provisions should also be provided with the statement of appeal or as soon as practicable after its filing. Together with the decision appealed 17

²⁴ The President of the Appeals Division retains the right to decide that the dispute is to be heard by a sole arbitrator, irrespective of any agreement or disagreement by the parties Cf. Art. R50.

²⁵ Cf. Art. R48 (1), fifth bullet point.

²⁶ Cf. Art. R37, paras. 15-31 above.

²⁷ Rigozzi, para. 1154.

²⁸ In CAS 2010/A/2371, *FBF v. FIFA*, where the respondent had raised an argument in this sense, the decision issued by the President of the Division did not deal with it, as it rejected the appellant’s request on the ground that the CAS lacked *prima facie* jurisdiction to hear the appeal.

²⁹ For instance, when the process turns out to be much slower than what the appellant could reasonably have expected when filing the statement of appeal. By contrast, considering the impact the grant of such a request may have on the interests of third parties, the appellant should not be allowed to wait until just before an important competition to ask for a stay of his/its suspension.

³⁰ Cf. Art. R47, paras. 11-24 above.

against,³¹ this is an essential element to allow the CAS Court Office to ascertain *prima facie* that the CAS has jurisdiction to hear the case.³²

III. Court Office Fee

- 18 Upon filing the statement of appeal, the appellant must pay the non-refundable CAS Court Office fee, which is set at CHF 1'000 in the current edition of the Code.³³ If the payment has been effected prior to the filing of the statement of appeal, then a proof of payment (e.g., copy of a wire- or bank transfer order or a stamped post-office payment-receipt) should be attached to the statement as an exhibit. The CAS Court Office fee is the equivalent of the “registration fee” or “filing fee” charged by other arbitral institutions:³⁴ it is meant to cover the CAS’s case-handling fees and *will thus not be refunded*, even if the case is withdrawn immediately after the filing of the statement of appeal.
- 19 If the appellant makes a request for *legal aid*,³⁵ the CAS has discretion to provisionally waive the payment of the Court Office fee pending the ICAS’s decision on the request,³⁶ or to require payment of the fee, subject to refund in case the ICAS grants legal aid.³⁷
- 20 Where legal aid is not in issue, the CAS Court Office systematically informs appellants that it will *not proceed with a case until payment of the fee has been effected*, so applicants wishing for their case to be handled without delay should settle the fee before or immediately upon the filing the statement of appeal and provide proof of payment to the CAS as soon as it is available.

IV. Other Procedural Issues

- 21 If the appellant instructs counsel or another person, such as an agent, to represent him in the arbitration,³⁸ a *power of attorney* should be provided,³⁹ but there is no obligation to furnish it with the statement of appeal itself.
- 22 In appeals cases, it is relatively rare for the parties to have made an express agreement with regard to the *language of the proceedings*. In most cases, appellants will file their statement of appeal in the language of their preference between the two CAS working languages, i.e. French or English,⁴⁰ and this will normally be assumed to be their choice of language for the conduct of the arbitration. Absent any objections from the respondent(s), the language so chosen will be deemed to be the language of the proceedings by the CAS.⁴¹ If the respondent(s) disagree(s), the panel will decide the issue. Should the panel decide to

³¹ See above, paras. 9-10.

³² Art. R52(1). Cf., e.g., CAS 95/143, *S. & L. v. FIS*, Order of 30 October 1995, *CAS Digest I*, pp. 535-536.

³³ Cf. Art. R65.2(2).

³⁴ Cf., e.g., Swiss Rules Art. 3(3)(i) and Schedule B; ICC Rules Art. 4(4)(b) and Appendix III.

³⁵ See below, para. 23.

³⁶ CAS 2011/A/2503, *D. v. CONI*, Order of 5 September 2011.

³⁷ CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, Letter of 8 February 2012.

³⁸ The appellant can choose to be assisted or represented, throughout the proceedings, by any person of his choice, not necessarily a lawyer (cf. Art. R30).

³⁹ Cf. Art. R30.

⁴⁰ Should the appellant wish to file the statement of appeal in a language other than English or French, then it should first inquire with the CAS Court Office as to the languages accepted, which will normally include German, Italian and Spanish, but are subject to the Court Office’s and, subsequently, the panel’s agreement. In this connection it should be kept in mind that the choice of a particular language for the conduct of the proceedings will also have an impact on the choice of arbitrators: selecting a language that is not widely spoken among the arbitrators included in the CAS list can severely restrict the pool of suitable candidates for appointment (not to mention the fact that it may cause additional translation and interpretation costs).

⁴¹ The standard letter sent by the CAS Court Office to set the arbitration proceedings in motion will normally contain a paragraph noting that the appellant has chosen to proceed in the language of the statement of appeal, in some cases indicating that absent any objections from the respondent within a short time limit (usually five days), all the submissions and documents in the arbitration will have to be filed (and thus where necessary, translated) in that language, in accordance with Art. R29.

change the language of the arbitration after the statement of appeal has been filed, for instance, to revert to the language in which the proceedings leading to the decision under appeal were conducted, the CAS can order that the statement of appeal should be translated into the newly designated language of the arbitration. If necessary, in light of the change in the linguistic skills required, the panel may also order the replacement of the arbitrator appointed by the appellant. If the parties disagree on the language to be adopted for the arbitration, the CAS can also fix the language of the proceedings (in which the CAS's correspondence and the award will be drafted) and allow each party to make written and oral submissions in the language of its choice between French and English.⁴²

Where applicable, another item that may be included when filing the statement of appeal is a *request for legal aid*. A specific form can be obtained from the CAS Court Office for that purpose.⁴³ 23

In addition to an application for the stay of the execution of the decision under appeal, discussed above, 24 *other procedural requests* can be included in the statement of appeal, for instance requests for certain evidentiary measures to be taken,⁴⁴ for the proceedings to be conducted in an expedited manner,⁴⁵ or for the extension of the time limit for the filing of the appeal brief.⁴⁶ If any such requests are made in the statement of appeal, it may be wise to mention them expressly in the accompanying letter (if any) or on the cover page of the statement of appeal, so as to draw the CAS Court Office's attention to them, especially if they are urgent.

Article R48 contains no specific requirement with respect to the *form of the statement of appeal*. As mentioned above, this can be a very short document, and can even be submitted as a simple letter, provided it contains all the required elements and information. Art. R31(3) provides guidance as to the *number of copies* of the statement that should be filed with the CAS *by courier and/or registered mail*, whether printed or saved "on digital medium". If an insufficient number of copies is filed, the CAS Court Office can ask the appellant to file additional copies. As seen above, according to the 2013 version of Art. R31(3), the filing of the statement of appeal by electronic mail is "permitted under the conditions set out in the CAS guidelines on electronic filing", which, to the authors' knowledge had not (yet) been issued by the CAS at the time the new edition of the Code entered into force (March 2013). The situation is clearer with regard to *exhibits*: Art. R31(3) states that they *can be filed by electronic mail*, provided "that they are listed and that each exhibit can be clearly identified". That said, it is important to emphasize that until a specific provision is enacted to that effect in the relevant guidelines, the electronic filing of the statement of appeal does not replace its filing by courier or registered mail for the purposes of determining if the statement was filed within the applicable time limit.⁴⁷ 25

V. Incomplete Statement

Article R48(3) provides that if the statement of appeal does not fulfill the requirements set out in Art. 26 R48(1) and R48(2), the *CAS Court Office shall grant the appellant a short deadline to complete his statement*. The additional deadline granted by the CAS Court Office will normally not exceed 5 days.

If the statement of appeal is completed within the short additional deadline set by the Court Office, the appellant will be deemed to have complied with the time limit for appeal even if the original statement was found to be incomplete (provided of course that the filing of the original statement was made within the time limit for appeal). 27

If the statement is not completed within this additional deadline, the "CAS Court Office shall not proceed" 28 with the case. The draconian consequences of this should be kept in mind, as the very existence of a time

⁴² Cf., e.g., CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 44.

⁴³ Cf. Art. S6 point 9 of the CAS Code; cf. also Art. R64, para. 12 below.

⁴⁴ Cf. Art. R44.3.

⁴⁵ Cf. Art. R44.4.

⁴⁶ Cf. Art. R51.

⁴⁷ Cf. Art. R49.

limit for appeal may *de facto* preclude the appellant from filing a new appeal and thus deprive him of his right to challenge the decision under appeal.⁴⁸

- 29 Accordingly, despite the fact that Art. R48(3) indicates that an additional deadline can be granted “one time only”, it is submitted that the CAS Court Office can adopt a non-formalistic approach⁴⁹ in order to afford the appellant an adequate opportunity to remedy any deficiencies in the statement of appeal, by *extending, where necessary, the additional deadline in accordance with Art. R32*. Such an extension may be necessary, for instance, with respect to the payment of the Court Office fee, due to the difficulties that may be caused by the existing payments regulations in certain countries. The appellant should in any event ask for the extension of the additional deadline before its expiry.⁵⁰
- 30 Finally, it is important to note that, as the CAS Court Office normally points out in its letter setting the additional deadline, the granting of this deadline *does not extend the time limit for the filing of the appeal brief* (which is due within ten days following the expiry of the time limit for appeal). If the appellant needs such an extension then he must file a specific request, taking care to do so before the expiry of the time limit in question (to be calculated in accordance with Art. R51).

⁴⁸ Cf. Art. R49, paras. 21-23 below.

⁴⁹ As the Panel put it in CAS 2009/A/1940, *BAP v. FIBA & SBP*, Award of 7 April 2010, para. 10.11: “the arbitration should not be summarily dismissed in zealous adherence to rigid formalism. It is the function and goal of any arbitral body, including this Panel, to resolve differences and disputes and to restore harmony to factional discord within sports organisations”.

⁵⁰ Cf. Art. R32(2).

Article R49: Time Limit for Appeal

I. Purpose of the Provision

Article R49 sets out the time limit within which, unless the parties have agreed otherwise, an appeal may be brought before the CAS against final decisions taken by federations or other sports-governing bodies.¹ This so-called *time limit for appeal* is to be distinguished from the time limit set out in Art. R51 of the Code. Art. R49 prescribes that the appeal itself² shall be brought, in the form of a (simple) statement of appeal, prior to the expiry of the applicable limitation period, whereas Art. R51 specifies *the (additional) time limit for filing the grounds for the appeal*, which can be submitted by means of a subsequent brief.³

In the words of the CAS Panel in the *NNZ v. IFNA* case,⁴ “[t]ime limits are commonplace in all kinds of fora. They contribute to legal certainty. They enable decision-makers to know precisely when they can be confident that their decisions will not be challenged. They ensure that any Tribunal seized of a dispute over a decision can resolve it when the issues and evidence are still fresh and do not have to adjudicate upon stale claims. Such is the perceptible and valuable purpose of Article R49 of the CAS Code”.

Article R49 and more generally the very existence, nature and effect of a time limit for appeal are among the *distinctive features of CAS appeals proceedings* (II.). Accordingly, the manner in which this time limit is to be calculated (III.), but also the question whether it can be extended or reinstated (IV.) and the consequences of a decision by the CAS on compliance with it (V.), are all issues that deserve careful consideration. A recent CAS decision has also dealt with the debated question of the applicability of the time limit for appeal in those cases where the appellant claims that the decision under challenge is null and void (VI.).

II. Nature of the Time Limit for Appeal

According to its express wording (“[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned [...]”), Art. R49 is meant to apply only as a *default rule*, when the regulations of the sports-organization that issued the decision under appeal contain no specific provision on the applicable time limit.⁵ As a matter of fact, sports regulations often do contain provisions dealing with the time limit for appeal before CAS, and there are considerable differences in the length of such time limits. While a number of federations, such as FIFA, have integrated the 21-day limit of the CAS Code into their own regulations,⁶ those of many other federations provide for different time limits, in most cases ranging from ten days to one month.⁷ Thus, prospective appellants are advised to *check the relevant regulations carefully*, in particular in view of the drastic consequences of missing the time limit for appeal. Indeed, as discussed in more detail below, the time limit set out in Art. R49 is to be

¹ Cf. Art. R47.

² Cf. Art. R48(1).

³ Cf. Art. R51(1).

⁴ CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.11 (emphasis added).

⁵ Art. R49 also contemplates the possibility of a previous (ad hoc) agreement between the parties as to the time limit for appeal, which rarely occurs in practice. On the subsidiary character of the 21-day time limit set out in Art. R49, cf., *ex multis*, CAS 2001/A/318, *V. v. Fédération Cycliste Suisse (Swiss Cycling)*, Award of 23 April 2001, para. 5, or CAS 2002/A/403, *Pantani v. UCI & CAS 2002/A/408, FCI v. UCI*, Award of 12 March 2003, para. 84.

⁶ Art. 67(1) FIFA Statutes.

⁷ Cf., e.g., Art. 62(3) UEFA Statutes 2012 (10 days); Art. 12.3 FEI Equine Anti-Doping and Controlled Medication Regulations 2012 (30 days); Art. 333 UCI Cycling Regulations, Part. 14 (2012) (1 month); Art. 42.13 IAAF Competition Rules 2012-2013 (45 days). As discussed in connection with Art. R47, when a federation's rules provide for different time limits for appeal, depending on the activities they govern (e.g., a federation's anti-doping rules as opposed to its statutes or general regulations), the relevant time limit for appeal will be that set out in the specific regulations applying to the merits of the dispute brought before the CAS (cf. Art. R47). On the scope and limits of party autonomy with respect to the time limit for appeal against sports-governing bodies' decisions, in particular in relation to the nature of such time limit (a question which is addressed only briefly in the present contribution), cf. Haas, *CAS Bull.* 2011/2, pp. 6-9.

considered as “preclusive” in nature,⁸ which means that a failure to comply with it when bringing an appeal against a decision will result in the loss of the appellant’s claim, or, to put it otherwise, the extinction of the underlying right(s).⁹

- 5 A logical consequence of this is that *compliance with the time limit for appeal should be reviewed by the CAS ex officio*, in spite of the view to the contrary (impliedly) taken by certain panels.¹⁰ In its 2013 version, Art. R49 does provide that “the Division President shall not initiate a procedure if the statement of appeal is, on its face, late”, but does not go as far as to establish the principle of *ex officio* review by the panel in those cases where a procedure is initiated by the CAS based on the Division President’s *prima facie* review.
- 6 In light of the foregoing, it is of the utmost importance for prospective appellants to identify and understand the rules governing the calculation of the time limit for appeal before the CAS.

III. Calculation of the Time Limit for Appeal under Article R49

A. Applicable Law

- 7 CAS jurisprudence shows that *questions relating to the calculation of the time limit under Art. R49 are generally decided according to Swiss law*. However, the reasons given by CAS panels to apply Swiss law to these issues are not entirely consistent. In some decisions, Swiss law was applied on the ground that it was the law applicable to the merits of the dispute (which is often the case, in particular when the sports-governing body having rendered the decision under appeal is domiciled in Switzerland).¹¹ However, this approach will result in the applicability of a different national law every time the decision under appeal is rendered by a sports-governing body domiciled outside Switzerland. Other CAS panels have referred to Swiss law as the *lex loci arbitri* (which will always be the case in CAS proceedings, by the operation of Art. R28).¹² We submit that the latter approach is preferable and should be followed systematically as it leads to a uniform result, especially because it allows for the application of the *European Convention on the Calculation of Time Limits* (ECCTL), to which Switzerland is a party.¹³ The ECCTL sets out clear rules,¹⁴ which are particularly well-suited for proceedings in an international context.

⁸ Cf. paras. 21-22 below.

⁹ And not, as concluded by the Panel in CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 56, the extinction of the arbitration agreement, as it were, *ratione temporis* (which would mean that, subject to any applicable preclusive time limits in the relevant national law, the parties would then be free to bring their dispute before the state courts).

¹⁰ Cf., e.g., CAS 2002/A/432, *Demetis v. FINA*, Award of 27 May 2003, para. 7.4, *CAS Digest III*, p. 422; CAS 2005/A/971, *RBF v. IBF*, Award of 31 January 2006, para. 6.2.1. Thus, if one of the parties brings forward facts in the case which show that the time limit for appeal has elapsed, the CAS should review the question of its own motion, rather than doing so only if the respondent(s) raise(s) an objection to that effect (in this sense, cf. CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 74). This does not mean that CAS panels must ascertain the relevant facts *ex officio*. The facts are to be adduced by the parties, and the burden of proving compliance with the applicable time limit normally lies with the party bringing an appeal (cf. Haas, *CAS Bull.* 2011/2, p. 6).

¹¹ See, e.g., CAS 2006/A/1065, *W. v. FEI*, Termination Order of 20 June 2006.

¹² Cf., e.g., CAS 2002/A/403, *Pantani v. UCI* & CAS 2002/A/408, *FCI v. UCI*, Award of 12 March 2003, paras. 86-87; CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.6; CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.12-7.13 (referring to Swiss law as the “*lex fori*”).

¹³ European Convention on the Calculation of Time Limits of 16 May 1972, in force in Switzerland since 28 April 1983 (SR.0.221.122.3), available at: <http://www.admin.ch/ch/f/rs/0_221_122_3/index.html>.

¹⁴ The basic rules for the calculation of time limits pursuant to the ECCTL (Arts. 3, 4 and 5) are the following: (i) time-limits expressed in days, weeks, months or years shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight; (ii) where a time limit is expressed in weeks the *dies ad quem* shall be the day of the last week whose name corresponds to that of the *dies a quo*; (iii) where a time limit is expressed in months or in years the *dies ad quem* shall be the day of the last month or of the last year whose date corresponds to that of the *dies a quo* or, when there is no corresponding date, the last day of the last month; (iv) where a time limit is expressed in months and days or fractions of months, whole months shall be counted first, and afterwards the days or fractions of months; for the purpose of

The questions that arise most often in connection with the calculation of the time limit for appeal relate 8 to the determination of the correct starting point for the calculation (*dies a quo*) (B.), as well as the moment when the time limit is deemed to expire (*dies ad quem*) and what exactly needs to be done by then (C.), but also, overall, the manner in which the time limit should be calculated, including whether and how official holidays and other non-working days are to be taken into account in the calculation.

B. *The Dies a Quo and Related Issues*

The day from which the time-limit starts to run is often referred to as the *dies a quo*.¹⁵ In order to calculate 9 the applicable time limit for appeal, the appellant needs, first, to know how to determine the *dies a quo*. Art. R49 provides that the time limit for appeal is to be calculated “from the receipt of the decision appealed against”. Under Swiss law, a decision is deemed to have been received (or as the case may be, notified) at the time when it came into the so-called “sphere of control” of its addressee or of a representative, agent or other person authorized to take receipt on the addressee’s behalf.¹⁶ According to CAS case law “as a basic rule, a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content”.¹⁷ This may mean that depending on the circumstances, even if the decision is received by the appellant late in the evening or during the week-end (e.g., by fax, assuming the applicable rules allow for notification by this means), provided he did have a (reasonable) opportunity to gain knowledge of its contents, the decision will be deemed to have been notified at that time.¹⁸

On the other hand, in cases where a decision is formally notified after the appellant has already had 10 an opportunity to find out its contents – for instance, because the decision (or (the substance of) its operative part) has become available on the internet – *formal notification will remain the relevant starting point* for the purposes of the time limit for appeal. Thus, as a rule, any specific requirements as to the manner of notification as may be contained in the applicable regulations (e.g., by registered letter with acknowledgment of receipt) should be complied with.¹⁹ That said, while such requirements should be interpreted strictly in order to preserve legal certainty and the parties’ procedural rights,²⁰ appellants should not be allowed to invoke them abusively so as to artificially extend the time limit for appeal.²¹

calculating fractions of months, a month shall be deemed to consist of 30 days; (v) Saturdays, Sundays and official holidays shall count when calculating a time limit. However, where the *dies ad quem* of a time limit before the expiry of which an act shall be performed is a Saturday, a Sunday, an official holiday or a day which shall be considered as an official holiday, the time limit shall be extended to include the first working day thereafter.

¹⁵ Cf. Art. 2 ECCTL.

¹⁶ BGE 118 II 42 para. 3b. Cf. also Haas, *CAS Bull.* 2011/2, p. 11.

¹⁷ CAS 2006/A/1153, *WADA v. Assis & FPF*, Award of 24 January 2007, para. 40, referring to CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, para. 60, where this principle was said to be “recognised unanimously by the Swiss legal doctrine and the Swiss Tribunal Federal”.

¹⁸ Cf. CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, paras. 57-66 (where the applicable rules provided for notification by fax); cf. also, by contrast, CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.14-7.15.

¹⁹ Cf., e.g., Art. 277 UCI ADR. In CAS 2008/A/1555 & 2009/A/1779, *UCI v. Kashechkin & CFRK / Kashechkin v. CFRK & UCI*, Award of 10 August 2009, paras. 77-80, the Panel observed in passing that while an irregularity in the notification of the decision (which, *in casu*, had been sent by the national federation to counsel for the appellant by fax, rather than by registered letter as required by the UCI Rules) may have affected the running of time with respect to the time limit for appeal, it did not operate to invalidate the decision *per se*, as pleaded by the rider. Cf. also CAS 2004/A/635, *RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield*, Award of 27 January 2005, para. 50.

²⁰ Or, as the Panel put it in CAS 2007/A/1396 & 1402, *WADA & UCI v. Valverde & RFEC*, Preliminary Award of 10 July 2008, para. 53: “in the interest of justice and proper proceedings”.

²¹ Cf., e.g., CAS 2008/A/1528, *UCI v. Caruso & FCI* and CAS 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, paras. 7.5.-7.7. The correct approach in those instances where receipt of notification of the decision on a certain date is disputed will depend on the circumstances of the case. Since, as pointed out by Haas, the possibility that the running of time for the appeal may be delayed by an irregularity in the (or lack of) notification can impose a heavy burden on the other parties affected by the decision, the extent to which such delay should be admitted will likely have to be determined by reference to the point in time when, under the circumstances, “the other parties

Accordingly, there is CAS case law to the effect that potential appellants may have to make good faith efforts to inquire about a decision if, in the circumstances, they are (or should be) aware of its existence, even though the decision has not been notified to them in accordance with the applicable rules.²² We submit that this should apply only in truly exceptional cases, in particular when, under the specific circumstances, it would be abusive to rely on formal notification. In any event, prior awareness should not be presumed and the burden of proof in that respect lies with the party asserting it.²³

- 11 The reference to a “decision” in Art. R49 should be understood to mean *the complete decision, including the reasons for it*.²⁴ That said, a party may choose to start appeal proceedings upon receipt of the sole operative part of a decision, if the latter is notified separately prior to the issuance of the reasons,²⁵ in particular for the purpose of immediately requesting the issuance of an order to stay the decision.²⁶ This will have no influence on the time limit to file the appeal brief, which is to be computed from the moment in which the time limit to file the statement of appeal (against the “full” decision) expires, and not from the date on which the statement of appeal is actually filed with the CAS.²⁷
- 12 As for the exact starting point for the calculation of the time limit under Art. R49, there is, again, no uniform solution to be found in the CAS case law. Nor have the recent revisions of the Code brought any further clarity to this the matter. Although some (isolated) CAS awards have held that the time limit begins to run on the day of service of the decision under appeal,²⁸ it is submitted that *the starting point should be the day after that on which notification was received*,²⁹ as contemplated by Art. 3(1) of the ECCTL. In line with this position, other CAS panels have sometimes noted, by reference to the first sentence of Art. R32,³⁰ that the same rationale also underlies Art. R49: the appellant should have the “full” time limit at his disposal regardless of the time when the decision was notified to him.³¹

involved were legitimately able to rely on the (federation's) measure in question no longer being appealed” (Haas, CAS Bull. 2011/2, p. 13).

²² Cf., e.g., CAS 2007/A/1413, *WADA v. FIG & Vysotskaya*, Award of 20 June 2008, paras. 54-62; or (finding that such a requirement did not apply in the circumstances), CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 3 July 2009, paras. II.4.10-II.4.19 (noting that the appellant in question, WADA, had not been a party to the proceedings from which the decision under challenge originated).

²³ Cf. CAS 2007/A/1413, *WADA v. FIG & Ms. N. Vysotskaya*, Award of 20 June 2008, para. 60. Cf. also CAS 2007/A/1444 & CAS 2008/A/1465, *UCI v. Iban Mayo & RFEC*, Award of 11 August 2008, para. 86.

²⁴ See, e.g., CAS 2002/A/403, *Pantani v. UCI & CAS 2002/A/408, FCI v. UCI*, Award of 12 March 2003, paras. 97-98; CAS 2007/A/1322, *Giannini, Giannini & Cardinale v. S.C. Fotbal Club 2005 S.A.*, Award of 19 September 2007, para. 7.2. See also CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.6. More generally on the concept of appealable decision, cf., e.g., Bernasconi, pp. 261-274. Cf. also, e.g., CAS 2010/A/2401, *Bulgarian Boxing Federation v. European Boxing Confederation*, Award of 7 June 2011, paras. 7.8-7.10 (summarizing the CAS case law in point).

²⁵ Cf., e.g., CAS 2007/A/1322, *Giannini, Giannini & Cardinale v. S.C. Fotbal Club 2005 S.A.*, Award of 19 September 2007, para. 7.3. Haas, CAS Bull. 2011/2, p. 11, makes this statement under the proviso that any express rules to the contrary (i.e., requiring for appeals to be brought only upon receipt of the reasoned decision) may have to be deviated from in those cases where the “decision already has an adverse effect on the person concerned before the reasons for the decision are issued”.

²⁶ Cf. Arts. R37 and R48.

²⁷ Cf. Art. R51, first sentence.

²⁸ CAS 2002/A/399, *Poll v. FINA*, Award of 31 January 2003.

²⁹ CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, paras. 33-34; CAS 2008/A/1583, *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD / CAS 2008/A/1584, Vitoria Sport Clube de Guimaraes v. UEFA & FC Porto Futebol SAD*, Award of 15 September 2008, para. 7; CAS 2007/A/1364, *WADA v. FAW and James*, Award of 21 December 2007, paras. 6.1-6.4.

³⁰ Art. R32(1), providing that “the time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received”. Cf., e.g., CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 13 July 2009, paras. 3.2-3.6; CAS 1006/A/1176, *Belarus Football Federation v. UEFA & FAI Belarus*, Award of 14 March 2007, para. 7.2.

³¹ Cf., e.g., CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia C.F. S.A.D.*, Award of 15 September 2004, paras. 68-70; CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, para. 34. Cf. also Haas, CAS Bull. 2011/2, p. 12.

When, like in anti-doping matters, the sports regulations also set forth *a right to appeal by sports-governing bodies that did not participate in the first instance proceedings*, they usually provide that the time limit for this purpose shall begin to run only upon receipt by the relevant sports-governing body of the complete case file.³² 13

Finally, another specific situation that may occasionally arise is that where the addressee of a sports-governing body's decision requests for the decision to be reconsidered by the issuing body. Although as a general rule, *a mere request for reconsideration cannot have the effect of suspending the time limit for appeal*,³³ in some specific cases the CAS has acknowledged (by reference to the principle of good faith) that the *dies a quo* had been delayed by discussions between the parties, as long as these could reasonably be understood to allow for the possibility of a reconsideration of the decision in question.³⁴ Of course, a new time limit will start running if the application for reconsideration is entertained and a new decision (confirming or amending the previous one) is issued as a result. 14

C. *The Dies ad Quem and the Act(s) to be Accomplished within the Time Limit for Appeal*

The *dies ad quem* is the day on which a time-limit expires.³⁵ Art. R49 does not contain a rule to determine the *dies ad quem*. According to Art. 3(1) ECCTL, time-limits expressed in days, weeks, months or years shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight. Thus, for instance, if a decision is notified on 31 March, the *dies ad quem* under Art. R49 would be 21 April.³⁶ As things stand just after the entry into force of the 2013 edition of the Code, while the situation is unclear with respect to the possibility of filing written submissions by electronic mail,³⁷ prospective appellants should note that under the new rules the statement of appeal can no longer be filed only by fax on the *dies ad quem*. According to the new version of Art. R31(3), if the statement of appeal "is transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office provided that the written submission is also filed by courier within the relevant time limit". It is submitted that this provision also allows for the use of registered mail for the filing of written submissions (in other words, what matters is that the parties use a means of delivery that allows them to prove when the submissions were sent and to track their dispatch and actual delivery to the CAS). Thus, the statement of appeal will have to be *handed over to the courier company* at the latest on the *dies ad quem* before that company's closing time. The same rule shall apply if the appellant chooses to file the statement of appeal by registered mail: the submission must be handed in to the post office before it closes on the *dies ad quem*.³⁸ In any event, as rightly underscored in the CAS Guide to Arbitration, it is of paramount importance for appellants to "preserve 15

³² The relevant regulations will set out a time limit within which the file can be requested. An example of such rule can be found in Art. 334 of the UCI Antidoping Rules (UCI ADR). In a recent case applying the UCI ADR, the Panel found that the time limit for appeal, as far as the UCI was concerned, had begun to run only once a document that was missing from the case file had been received by the UCI, after the latter had requested it from the national federation that had issued the decision (TAS 2010/A/2288, *UCI v. Giunti, FCI & CONI*, Award of 30 May 2011, paras. 5-10). Thus, CAS Panels tend to apply this requirement strictly, meaning that the complete file – not just a file that is substantially complete – must have been delivered, if requested, to the relevant anti-doping organization (cf., e.g., CAS 2007/A/1444 & CAS 2008/A/1465, *UCI v. Mayo Diez & RFEC*, Award of 11 August 2008, para. 85).

³³ CAS 2010/A/2315, *Netball New Zealand v. IFNA*, Award of 27 May 2011, para. 7.8; Haas, *CAS Bull.* 2011/2, p. 13.

³⁴ CAS 2003/A/443, *Slovak Karate Union v. World Karate Federation*, Award of 31 July 2003, para. 7; CAS 2002/A/362, *IAAF v. CAF & Zubek*, Award of 27 August 2002.

³⁵ Cf. Art. 2 ECCTL.

³⁶ If the applicable regulations provided for a "one month" time limit, the time limit for appeal would expire, in this example, on 30 April. Indeed, according to Art. 4(2) ECCTL, "[w]here a time-limit is expressed in months [...] the *dies ad quem* shall be the day of the last month [...] whose date corresponds to that of the *dies a quo* or, when there is no corresponding date, the last day of the last month".

³⁷ Pending the publication of the "CAS guidelines on electronic filing" as per the new Art. R31(4).

³⁸ According to Art. 3(2) ECCTL, "the provisions of [Art. 3(2) ECCTL, according to which time limits run until midnight on the *dies ad quem*] do not preclude that an act which is to be performed before the expiry of a time-limit may be performed on the *dies ad quem* only before the expiry of the normal office or business hours."

carefully all proof of the date on which the statement of appeal was sent"; i.e. proof of receipt from the courier company or the post office.³⁹

- 16 Article R49 does not specify how official holidays and non-working days are to be taken into account when calculating the time limit for appeal. The ECCLT provides that Saturdays, Sundays and official holidays shall be counted as normal days in calculating a time limit. However, *where the dies ad quem falls on a Saturday, a Sunday, an official holiday or a day which shall be considered as an official holiday*, the time limit is to be extended so as to include the first working day thereafter.⁴⁰ The same approach is found in Art. R32(1) of the CAS Code, and has been adopted, sometimes by relying on the application of that provision by analogy, in a number of CAS decisions in appeals proceedings.⁴¹ Art. R32(1) refers to official holidays and non-business days "in the country where the notification has to be made". It is submitted that in appeals proceedings, in order to avoid unnecessary disputes when the applicable rules contain no specific provision, official holidays and non-working days in Switzerland (as the place of arbitration)⁴² *as well as* those in the country where the appellant (or, as the case may be, his counsel/representative) is domiciled should be taken into account.⁴³

IV. Extension and Reinstatement of the Time Limit to Appeal

- 17 Article R32(2), which allows for the extension, in certain circumstances, of the time limits set forth in the CAS Code's procedural rules, unambiguously provides that it does not apply to "the time limit for the filing of the statement of appeal". Thus, the *time limit for the filing of the statement of appeal pursuant to Art. R49 cannot be extended*.
- 18 The question is, however, whether it can be reinstated (*restitué, wiederherstellt*) and if so in what circumstances. Even though the CAS Code is silent in this respect, the principle of good faith, which also applies to arbitration proceedings,⁴⁴ requires that an *application for the reinstatement of the time limit for appeal* should be allowed in those cases where (i) the appellant establishes to the hearing body's satisfaction that he was unable to act timely through no fault of his own and (ii) the request for reinstatement is submitted, together with the statement of appeal, promptly after the hindrance causing the appellant's failure to comply with the applicable time limit has disappeared or ceased to operate.⁴⁵
- 19 A specific question that may arise in this respect is how to deal with those situations where the appellant's *failure to meet the time limit has been directly or indirectly caused by the sports-body that issued the decision*.⁴⁶ This may occur, for instance, when the applicable regulations are unclear as to whether a given decision is subject to appeal before the CAS,⁴⁷ or, where there is a notice on the right to appeal accompanying

³⁹ The procedural rules of some sports organizations are to similar effect (see, e.g., Art. 16(5) of the FIFA Procedural Regulations, which specify that "proof of compliance with the time limit is to be provided by the sender").

⁴⁰ Art. 5 ECCTL.

⁴¹ Cf., e.g., CAS 2004/A/574, *Associação Portuguesa de Desportos v. Valencia C.F. S.A.D.*, Award of 15 September 2004, paras. 68-69. Cf. also CAS 2002/A/399, *Poll v. FINA*, Award of 31 January 2003, para. 7.3.

⁴² In accordance with Art. 11 of the ECCTL, Switzerland has notified the list of official holidays or days which shall be considered as such in Switzerland to the Secretary General of the Council of Europe. The current consolidated list for the Confederation and the 26 cantons is available online at: <http://www.bj.admin.ch/content/dam/data/staat_buerger/zivilprozessrecht/kant-feiertage.pdf>.

⁴³ That said, to be on the safe side as long as the matter is not definitely settled in the case law, parties should assume that only Swiss official holidays are the relevant ones, and seek clarification from the CAS Court Office in case the time limit for filing the statement of appeal falls on an official holiday or non-working day in the appellant's (or in his counsel's) country.

⁴⁴ Cf. BGer. 4A_600/2010 para. 4.2.

⁴⁵ Cf. Rigozzi, *Délai d'appel*, p. 264. These criteria are now reflected in Art. 148 ZPO. Cf. also Haas, *CAS Bull.* 2011/2, p. 12.

⁴⁶ Cf. Haas, *CAS Bull.* 2011/2, p. 10, for a more thorough analysis of this point.

⁴⁷ Cf., finding that this was not the case, CAS 2009/A/1759, *FINA v. Jaben & ISA* and CAS 2009/A/1778, *WADA v. Jaben & ISA*, Award of 3 July 2009, paras. 1.1-1.15; CAS 2008/A/1658, *S.C. Fotbal Club Timisoara S.A. v. FIFA & RFF*, Award of 13 July 2009, para. 100.

the decision, the said notice is erroneous or misleading.⁴⁸ Although the jurisprudence concerning such instances is case- and rule-specific, it is submitted that the length of the time limit in question should be taken into account in determining whether a reinstatement should be allowed: the shorter the time limit for appeal, the more emphasis should be placed on the sports-body's duty to ensure that the time limit, as well as any action(s) required on the part of the appellant within such time limit, are stated and communicated in a clear and unambiguous manner.⁴⁹

In this context, one could also wonder what would happen if the decision was challenged before the state 20 courts and the latter were to decline jurisdiction on the ground that there is a valid arbitration agreement between the parties.⁵⁰ Since the CAS Code does not regulate this issue, it should be decided by the panel, in accordance with Art. 182(2) PILS. It is submitted that, as a matter of principle, *CAS panels should apply by analogy the rule contained in Art. 63(1) ZPO*, which provides that “[i]f an application which was withdrawn due to lack of jurisdiction or which was rejected on procedural grounds is brought again before a competent conciliation authority or court within a month of its withdrawal or rejection, it is deemed pending at the time when it was first brought.”⁵¹ The principle embodied in Art. 63(1) ZPO should apply even if (i) the time limit applicable in the state court that declined jurisdiction (for instance, the “one month” time limit applicable before the Swiss courts for actions pursuant to Art. 75 CC) was longer than the relevant time limit for appeal before the CAS (for instance, the 21-day time limit of Art. R49), and (ii) the action in the state court was filed after the latter time limit had elapsed (for instance, 28 days from receipt of the decision under appeal). Even if it is true that this would, in effect, allow the appellant party to obtain an extension of the time limit for appeal, the fact remains that any other interpretation would deprive that party of the possibility of bringing its claim and challenging CAS jurisdiction before the state courts, a possibility which is expressly contemplated by both Art. 7 PILS and Art. II NYC.⁵² Hence, unless it is established that the appellant brought the challenge in the state courts solely in an attempt to cure his failure to meet the applicable time limit for appeal before the CAS, or for any other abusive reason,⁵³ *a new time limit must be given irrespective of whether the state court declining jurisdiction was seized within the time limit that would have been applicable before the CAS*. That said, to be on the safe side, prospective appellants are advised to ensure that any challenge they bring before the courts is filed within the time-limit that would be applicable if the challenge were filed before the CAS, even if it is their claim that any relevant CAS arbitration agreement is inoperative/invalid or does not apply in the case at hand.⁵⁴ The application of Art. 63(1) ZPO *by analogy* requires an adjustment, in that

⁴⁸ CAS 2009/A/1795, *Obreja v. AIBA*, Award of 25 September 2009, paras. 80-82; CAS 2008/A/1705, *Grasshopper v. Alianza Lima*, Award of 18 June 2009, para. 30. For a case where the appellant (unsuccessfully) contended that the absence of a notice on appeal and/or an indication of the applicable time limits in the decision itself operated to extend the time limit for appeal, and the ramifications of the principle of good faith in this context, cf. CAS 2011/A/2366, *Sable Football Club de Batie c. Fédération Camérounaise de Football*, Award of 12 December 2011, paras. 48-70.

⁴⁹ Cf. also Haas, *CAS Bull.* 2011/2, p. 14.

⁵⁰ Cf. Art. 7 PILS and Art. II NYC.

⁵¹ Prior to the enactment of the ZPO, the principle now embodied in its Art. 63 was found in Art. 139 CO, which the Swiss courts had progressively interpreted so as to cover various different situations extending beyond its strict contractual scope, including with respect to appeals against decisions issued by sports federations (cf. *Bezirksgericht Zürich*, 1. Division, *Galatasaray Sport Kulübü v. FIFA*, decision of 7 February 2005; *CaS* 2005, p. 258). For its part, the CAS has affirmed the applicability of Art. 139 CO by analogy in appeals proceedings, and held that, *in casu*, this provision did operate to “suspend” the relevant time limit for appeal (CAS 2008/A/1528, *UCI v. Caruso & FCI & CAS* 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, para. 7.12).

⁵² Hence, it is submitted that the majority of the panel in CAS 2005/A/953, *Dorthe v. IJHF*, was wrong in holding that the expiry of the time limit for appeal under the relevant regulations excluded the application of Art. 139 CO by analogy (Award of 6 March 2006, paras. 65-73).

⁵³ Requesting an additional time limit could be abusive, e.g., when the challenging party, knowing full well that there was an undisputable CAS arbitration agreement, has made a claim that the CAS would not be able to afford an effective remedy, or would otherwise be incapable of deciding in an unbiased manner.

⁵⁴ Another possibility would be to file a statement of appeal with the CAS simply to toll the time limit, requesting that the arbitration be stayed pending the state court's decision on jurisdiction. There is however no guarantee that the CAS will grant such a request.

the new time limit is not one month, as set out in that provision, but rather the same time limit as would have originally applied in case of appeal before the CAS.

V. Nature and Effect of a Decision on Compliance with the Time Limit in Article R49

- 21 Article R49 now provides that the Division President shall not initiate a procedure if he finds that a *statement of appeal* is “on its face, late” and that “[w]hen a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has already been constituted, to terminate it if the statement of appeal is late”, in which case, “the Division President or the President of the Panel renders his decision after considering any submission made by the other parties”. In view of the importance of the decision at stake and since the text of this provision may lend itself to different interpretations, we consider that (i) prior to making his decision “on the face” of the statement of appeal, the Division President should, where reasonable, draw the appellant’s attention to the issue and allow him to provide any further information as may be useful for the purposes of the decision within a short time limit (arguably 5 days by analogy with Art. R48(3)), and (ii) where a procedure has been initiated, the Division President or the President of the Panel should not just consider “any submission [as may have been] made by the other parties” on the issue of the timeliness of the appeal, but should *invite* them to submit observations further to the request for termination.
- 22 An important issue that, so far, has been dealt with in an inconsistent manner in the case law is the nature of the decision rendered by the CAS when it does find that an appeal has been filed out of time. In some such cases, the panel ruled that it had “no jurisdiction to decide” the dispute at hand,⁵⁵ while in others it was held that the (statement of) appeal was “inadmissible”.⁵⁶ It is submitted that the correct consequence of a *failure to meet the time limit for appeal* is that the appeal is dismissed.⁵⁷ As mentioned above, we consider that the time limit set out in Art. R49 is to be treated as a “preclusive” time limit.⁵⁸ The starting point for this position resides in the answer to the question whether the situation resulting from an untimely appeal should be that the appellant’s claim can no longer be brought before the CAS (as opposed to another judicial forum) or that it can no longer be raised *at all*. From this perspective, it seems clear that the intent in adopting a time limit for appeal against decisions rendered by sports bodies, whether in the CAS Code or in the relevant sports regulations, is not that of reserving any further available remedy, including before the state courts, upon the expiry of that time limit. The purpose of a provision such as Art. R49 is to ensure that any challenges to the validity of a decision issued by a sports-organization will be heard and determined swiftly, in a final and binding manner, and within the same time limit for all those that are subjected to it. In other words, the time limit for “appeal” provided for in Art. R49 (or any corresponding provisions in the sports-bodies’ statutes or regulations) is to be seen as the *equivalent* of the preclusive time limit set out (as far as Swiss law is concerned) in Art. 75 CC, upon the lapsing of which no actions can be brought against an association’s decisions.⁵⁹ In a recent decision, the Supreme Court discussed the approach outlined here and held that it was “prima facie convincing”, adding that any other interpretation would allow appellants to evade CAS arbitration agreements by simply waiting for the time limit for appeal to expire.⁶⁰

⁵⁵ Cf., e.g., CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia*, Award of 15 September 2004.

⁵⁶ Cf., e.g., CAS 2006/A/1065, *Williams v. FEI*, Termination order of 20 June 2006; CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006; CAS 2011/A/2366, *Sable Football Club de Batie v. Fédération Camérounaise de Football*, Award of 12 December 2011.

⁵⁷ CAS 2008/A/1528, *UCI v. Caruso & FCI* & CAS 2008/A/1546, *CONI v. Caruso & FCI*, Award of 21 January 2009, para. 7.9; Haas, *CAS Bull.* 2011/2, p. 4-5.

⁵⁸ Under Swiss law, this is referred to, in French, as a *délai de péremption* (in German, *Verwirkungsfrist*). Haas, *CAS Bull.* 2011/2, pp. 4-5; Oswald, *Temps et droit*, pp. 244-245; Rigozzi, *Délai d’appel*, pp. 269-271.

⁵⁹ CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006, para. 55; CAS 2008/A/1528, *UCI v. Caruso & FCI* & CAS 2008/A/1546, *CONI v. Caruso & FCI*, para. 7.9; Haas, *CAS Bull.* 2011/2, p. 4; Rigozzi, p. 271. The Swiss Federal Supreme Court has confirmed that, with respect to the decisions adopted by Swiss sports associations, appeals before the CAS pursuant to Art. R47 of the Code are the equivalent of annulment proceedings in the Swiss courts under Art. 75 CC (BGE 136 III 345 para. 2.2.1).

⁶⁰ BGer. 4A_488/2011 para. 4.3.1.

A ruling finding that the appeal was filed out of time puts an end to the arbitration by (in effect) rejecting 23 the appellant's claim and is therefore a final, dispositive decision (with prejudice) as to the underlying dispute. Irrespective of the terminology used by the CAS, and whether such a decision is issued prior to or after the initiation of a procedure by the CAS, it will *qualify as a final award*, even when it is rendered in the form of a simple (termination) order, or just as a letter.⁶¹ Thus, any such decision issued by either a panel or the President of the Appeals Division may be challenged before the Swiss Federal Supreme Court pursuant to Art. 190 PILS. In this connection, it bears noting that despite the fact that such a ruling does in effect dismiss the claim and therefore has nothing to do with a decision on the arbitrators' jurisdiction, the Supreme Court is likely to consider, in light of its case law, that compliance with the time limit for appeal constitutes a jurisdictional question for the purposes of the action to set aside.⁶²

VI. Relevance of Article R49 when the Appellant Claims that the Decision under Appeal is Null and Void

It is well established under Swiss association law that decisions which are null and void are challengeable 24 at any point in time irrespective of the one-month time limit of Art. 75 CC.⁶³ One might ask whether the same principle applies also in CAS appeals proceedings. We submit that, contrary to what a CAS panel has recently held,⁶⁴ *when Swiss law is the law applicable to the merits, Art. R49 (or the corresponding provisions in the applicable sports regulations) should not be interpreted in such a way as to curtail the exercise of a substantive right that would still be available to the challenging party were it not for the existence of the arbitration agreement.*⁶⁵ In any event, Art. R49 should not prevent a party from bringing a claim requesting a declaration that a given decision is null and void if the ground for nullity is so egregious that the decision itself should be considered as constituting a violation of public policy.⁶⁶

⁶¹ Here again, CAS practice is not entirely consistent. In some instances the decision has been made as an award (cf. CAS 2005/A/953, *Dorthe v. IIHF*, Award of 6 March 2006), while in other cases it has been issued in the form of a simple "Termination Order" whereby the proceedings were declared closed and struck from the CAS roll (cf. CAS 2006/A/1065, *Williams v. FEI*, Termination order of 20 June 2006).

⁶² BGer. 4P.284/1994. Cf. also Kaufmann-Kohler/Rigozzi, para. 813a. While dogmatically questionable, this approach is pragmatically sound, as, given the limited grounds for appeal provided for by Art. 190(2) PILS, it constitutes the only way to ensure that a party is not deprived of access to justice. Significantly, this question was left open in the relevant passage of the Supreme Court's decision BGer. 4A_488/2011 mentioned in footnote 60 above.

⁶³ Riemer, para. 62 at Art. 75 CC; cf. also the discussion in CAS 1997/O/168, *Fédération Française des Sociétés d'Aviron et al. v. FISA*, Award of 29 August 1997, para. 11.

⁶⁴ CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 96.

⁶⁵ The inherent problems and limitations in the *ECF & GCF v. FIDE* Panel's reasoning are apparent in the following passage of the Award: "[f]or sake of clarity, the Panel underlines that in its view Article R49 of the CAS Code is not intended to alter the law applicable on the merits. If the latter differentiates between decisions that are null and void and those that are only 'annullable' this situation remains unchanged. Article R49 of the Code comes into play at a different level. It only deals with the admissibility of the claim in front of the CAS and not with the merits of a specific claim. Thus, in a case where an association's decision were null and void, it would not become materially valid merely because the time limit in R49 of the CAS Code has expired. Instead, the member would only be procedurally barred from filing a principal action against said decision. However, nothing would prevent the same member to avail himself in a different context of the fact that the decision is null and void" (CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 97).

⁶⁶ Haas, CAS Bull. 2011/2, p. 9; Oswald, *Temps et droit*, pp. 245-246. On this point, the Panel in *ECF & GCF v. FIDE* noted that "[whether] an exception to this rule must be accepted and an appeal allowed after the expiry of the deadline if a decision of an association violates international public policy can be left unanswered, since in the view of the Panel no such violation has occurred in the case here" (CAS 2011/A/2360&2392, *English Chess Federation & Georgian Chess Federation v. FIDE*, Award of 3 July 2012, para. 9).

Article R50: Number of Arbitrators

I. Scope and Purpose of the Provision

- 1 Article R50 of the CAS Code provides guidance on two discrete issues, namely the possible alternatives in terms of the number of arbitrators composing CAS panels (II.) and the circumstances in which two or more appeals can be heard by the same panel (III.).

II. Three Member Panel or Sole Arbitrator

- 2 Article R50(1) makes it clear that in appeals proceedings, in the absence of an agreement between the parties on the number of arbitrators, the CAS will proceed on the basis of a *presumption in favor of a panel composed of three arbitrators*. Thus, unless the arbitration agreement provides for a sole arbitrator – which to our knowledge is practically never the case – or the appellant requests the appointment of a sole arbitrator upon the filing of the statement of appeal, the arbitration will be initiated under the assumption that the case will be heard by a three-member panel, and the appellant will have to appoint an arbitrator with the statement of appeal.¹
- 3 That said, Art. R50(1) allows the President of the Appeals Division to decide, in light of “*the circumstances of the case*” that *the dispute should be decided by a sole arbitrator*. The 2013 CAS Code now expressly provides that whether or not the Respondent has paid its share of the advance of costs will be one such circumstance. It is submitted that further relevant circumstances may be: (i) the request by a party to have the matter determined by a sole arbitrator, (ii) the degree of complexity of the issues raised, (iii) the importance of the case and, where applicable, (iv) the amount in dispute. In practice, we are aware of a very limited number of instances in which the President of the Appeals Division decided that a case should be heard by a sole arbitrator without the parties’ agreement.² By contrast, it is not so unusual for the parties to agree after the filing of the statement of appeal that, in the circumstances, the panel should be composed of a sole arbitrator.³
- 4 The *potential advantages of having the case heard by a sole arbitrator* rather than a three-member panel are mainly savings on costs⁴ and improved time efficiency. The prospect of a faster resolution of the dispute will weigh heavily in the parties’ decision where there is some urgency to have the dispute resolved, for instance when the latter concerns an athlete’s or team’s eligibility to take part in a specific competition or tournament.⁵ It should also be borne in mind that a significant source of delay in the scheduling of a CAS hearing can be identifying (a) date(s) where not only the parties and their counsel, but also all members of the panel are available. The appointment of a sole arbitrator will of course help alleviate such difficulties.⁶

III. Cases Heard by the Same Panel – Consolidation

- 5 Although Art. R50(2) appears under the heading “number of arbitrators”, it does not deal specifically with the number of arbitrators on the panel hearing a given dispute. Instead, this provision addresses the instances in which *two or more cases may be heard by the same panel*.
- 6 In practice, the CAS has interpreted this provision in a wide manner, so as to allow the President of the Appeals Division, not only to rule that the cases shall be heard by the same panel, but also that they

¹ Cf. Art. R48, para. 14 above.

² Cf., e.g., CAS 2009/A/1846, *Azovmash Mariupol Basketball v. van de Hare et al.*, Award of 30 November 2009, paras. 13 and 16.

³ Cf., e.g., CAS 2008/A/1698, *Riccò v. CONI*, Award of 17 March 2009, para. 36.

⁴ Cf., e.g., CAS 2007/A/1377, *Rinaldi v. FINA*, Award of 26 November 2007.

⁵ In this connection, it should also be recalled that the parties can request for the CAS to conduct the proceedings in an expedited manner (cf. Art. R52(3)).

⁶ Moreover, a careful choice of the arbitrator to be appointed by the Division President will prevent any time-consuming challenge procedures.

should be consolidated, i.e., that they will be *joined in one single arbitration* and decided in one single award. This has now been formally set out in Art. R52(4) for those cases in which two or more appeals are filed against the same decision.

The preliminary condition to be met for Art. R50(2) to apply is that the cases in question have the “*same object*”. Whilst the language of this article has now changed to cases which “*clearly involve the same issues*”, it is evident that the vital criterion for consolidation is whether or not the two distinct cases could be more efficiently and/or comprehensively addressed in one consolidated proceeding. This condition is easily met when two or more parties bring an appeal against the same decision.⁷ The more frequent examples relate to doping disputes, as the WADA Code allows an appeal not only by the athlete(s) concerned but also by the relevant international federation and by WADA itself.⁸ The dispute will also involve the same issues when two clubs⁹ (or a player and a club¹⁰ or two clubs and a player¹¹) had a case against each other before the relevant FIFA dispute resolution body and all the parties are unhappy with the final decision,¹² against which they each bring an appeal before the CAS. Finally, consolidation may be efficient when the parties are the same and there are two (or more) different decisions under appeal, provided that the subject matter of such decisions is similar or related¹³ – for instance, two different positive tests involving the same athlete.¹⁴

According to Art. R50(2), it is the *President of the Appeals Division* who invites the parties to agree on consolidation.¹⁵ The Parties can of course also agree between themselves and present a joint request for consolidation to the President of the Division. If a party disagrees, either upon a request by another party or an invitation by the President of the Division, the latter shall decide the issue. In making that decision, the President of the Division will verify that the disputes do clearly involve the same issues and assess whether, under the circumstances, the advantages of consolidating the cases at hand outweigh the reasons invoked by the party opposing consolidation.

The *advantages of consolidation* are readily identifiable, in that it adds to procedural efficiency and crucially avoids the problems that could arise if distinct panels were to issue conflicting awards in relation to the same object or issues.

A *potential difficulty* with consolidation relates to the ability of the parties to nominate their own arbitrator. Whereas, in the normal course of events, both the appellant(s) and the respondent(s) are given the

⁷ Cf. also Art. R52(4).

⁸ The appellants' prayers for relief do not need to be identical (in CAS 2011/A/2384, *UCI v. Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Contador Velasco & RFEC*, Award of 6 February 2012, both WADA and the UCI had initiated proceedings against Alberto Contador and Real Federación Española de Ciclismo. The fact that UCI was seeking financial sanctions, unlike WADA, was not viewed as an impediment to the matters being consolidated), and do not need to be directed against the same parties (cf. CAS 2009/A/1817, *WADA & FIFA v. CFA et al.* & CAS 2009/A/1844, *FIFA v. CFA & Eranosian*, Award of 26 October 2010, where, although the Cyprus Football Association was a common party, the second case included seven respondents not included in the first proceedings).

⁹ CAS 2007/A/1388 & 1389, *Racing Club de Strasbourg Football v. Ismaily Sporting Club*, Award of 21 May 2008.

¹⁰ CAS 2009/A/1856 & 1857, *Fenerbahçe Spor Kulubu v. Appiah*, Award of 7 June 2010.

¹¹ Cf., e.g., CAS 2010/A/2145/2146/2147, *Sevilla FC SAD et al. v. Udinese Calcio S.p.A. et al.*, Award of 28 February 2011, para. 52.

¹² While in most cases FIFA waives the right to be a party in the arbitration, in important cases it may elect to participate. Cf., e.g., CAS 2009/A/1880, *FC Sion v. FIFA & Al-Ahly Sporting Club* and CAS 2009/A/1881, *El-Hadary v. FIFA & Al-Ahly Sporting Club*, Award of 1 June 2010; CAS 2008/A/1519, *FC Shakhtar Donetsk (Ukraine) v. Matuzalem (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520, *Matuzalem (Brazil) & Real Zaragoza SAD (Spain) v. FC Shakhtar Donetsk (Ukraine) & FIFA*, Award of 19 May 2009.

¹³ CAS 2010/A/2243-2358-2385-2411, *General Jantararoj & ABAT v. AIBA*, Award of 3 August 2011.

¹⁴ CAS 2009/A/1805 & 1847, *IAAF v. RFEA & Onyia*, Award of 22 September 2009.

¹⁵ Cf., e.g., CAS 2007/A/1298, *Wigan Athletic FC v. Heart of Midlothian*, CAS 2007/A/1299, *Heart of Midlothian v. Webster & Wigan Athletic FC* & CAS 2007/A/1300, *Webster v. Heart of Midlothian*, Award of 30 January 2008, paras. 42-47.

opportunity to nominate their respective arbitrators,¹⁶ problems could arise in the event two or more cases are consolidated, as arbitrators may have already been appointed by the parties to the case which was filed first in time and the parties to the later case(s) would not then have the opportunity to participate in this important decision. This element should of course be carefully considered by the President of the Appeals Division in making his decision.¹⁷

¹⁶ And in cases where there is a plurality of claimants and/or respondents it is not uncommon for the parties to find an agreement on the nomination of an arbitrator (cf. Art. R41.1(2)).

¹⁷ In such cases, it is submitted that the party or parties concerned may request the application, by analogy, of Art. R40.2 (cf. Art. R40.2).

Article R51: Appeal Brief

I. Purpose of the Provision

In CAS appeals proceedings, the appeal brief is the *only written submission* the appellant will be allowed to file. Art. R51 deals with the time limit within which the appeal brief must be filed (II.) and sets out its required contents (III.). The changes in the required filing modalities for written submissions which have been introduced with the 2013 edition of the Code should also be noted in connection with this provision (IV.).

II. Time Limit for Filing the Appeal Brief

According to Art. R51, the appeal brief must be filed “within *ten days following the expiry of the time limit for the appeal*”, i.e., the time limit to file the statement of appeal pursuant to Art. R49 of the CAS Code, failing which the appeal will be deemed withdrawn. The appellant is normally reminded of this time limit by the CAS Court Office in its letter acknowledging receipt of the statement of appeal and setting the arbitration in motion.¹ That said, given the *severe consequences of a failure to meet the time limit*, it is worth addressing in some detail the way in which it is to be calculated.

The *calculation of the time limit for the filing of the appeal brief* should not be done by taking the date of notification of the decision under appeal and adding the number of days corresponding to the prescribed time limit for appeal increased by ten. The correct manner of calculating the time limit for the filing of the appeal brief is to determine, first, the exact day on which the time limit for appeal expires, and then to calculate an additional ten day time limit from that date. This can of course make a difference, since, as already mentioned,² if the time limit for the filing of the statement of appeal expires on a Saturday, Sunday, official holiday or other non-business day, the ten days within which the appeal brief should be filed are to be calculated from the first working day thereafter. This also means that if the appellant files the statement of appeal before the expiry of the deadline for appeal, he still has the full time limit of ten days from the date of the actual time limit for appeal to file his appeal brief.

The appellant can also opt to *file the appeal brief together with the statement of appeal*. If he chooses to do so, in particular to speed up the process (as the time limit for the Respondent to file its answer will be calculated from the date of the filing of the appeal brief),³ he should state this clearly already in the statement of appeal, for instance by entitling it “Statement of Appeal and Appeal Brief”. If the appellant does not proceed in this manner, but nonetheless wants his statement of appeal to be treated as his appeal brief, Art. R51 affords him a last opportunity to inform the CAS Court Office in writing that the statement of appeal shall be considered as the appeal brief within the time limit for filing the appeal brief, i.e., ten days following the expiry of the time limit for appeal. It is important to emphasize that once the time limit to file the appeal brief has expired, the appellant cannot “cure” his failure to timely file the brief by informing the CAS that his original statement of appeal should actually also be considered as his appeal brief. Failing to provide this indication to the CAS within the prescribed time limit will result in the appeal “be[ing] deemed withdrawn”.⁴

If the time limit to file the appeal brief *expires on an official holiday or a non-business day*, it shall be deemed to expire at the end of the first subsequent business day.⁵ Holidays will be determined firstly in accordance with the *lex arbitri*, i.e., Swiss law. All parties, wherever they are based, can refer to Swiss official

¹ Cf. Art. R52, paras. 8-10. below.

² Cf. Art. R49 and R32.

³ Cf. Art. R55(1).

⁴ Cf., e.g., CAS 2011/A/2632 & 2633, *Memis & Sevgi v. TFF*, Termination order of 9 December 2011. It is submitted, however, that this consequence might be excessive if the appellant filed a statement of appeal containing all the elements required by Art. R51 and merely omitted to inform the CAS that the statement should also be considered as the appeal brief.

⁵ Cf., e.g., CAS 2006/A/1175, *Daniute v. International Dance Sport Federation*, Award of 26 June 2007, para. 53.

holidays for the purposes of the calculation of the time limit.⁶ It is submitted that the parties can also rely on the official holidays of their own country or, if they have instructed counsel, of the country in which such counsel are based.⁷ It is for the party asserting that the last day of the time limit was an official holiday according to the relevant applicable law to prove this and the fact that the submission was filed on the first subsequent business day.

- 6 Unlike the time limit to file the statement of appeal,⁸ the *time limit to file the appeal brief can be extended* upon a reasoned request, in accordance with Art. R32(2). This notwithstanding, the calculation of the actual time limit according to the principles set out above⁹ must be carried out diligently, as an extension can be granted only if it has been requested *before its expiry*. The possibility of requesting such an extension is particularly important in practice because, once the appeal brief is filed, the appellant will not be allowed to supplement or amend its contents, save in exceptional circumstances.¹⁰ If the appellant or his counsel have legitimate reasons not to be in a position to gather all the required evidence and to properly prepare the appellant’s case within the time limit provided for in Art. R51, they should ask for an extension, indicating already at that stage that if the extension should be denied, the appellant reserves the right to seek the panel’s authorization to supplement his/its case according to Art. R56(1).

III. Contents of the Appeal Brief

- 7 Pursuant to Art. R51, the appeal brief should contain a “stat[ement of] the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which [the appellant] intends to rely”. The appeal brief should be a comprehensive submission, as in principle *there will be no other possibility for the appellant to file further written submissions*. The notion of a “stat[ement of] the facts and legal arguments” is well-known in the vast majority of jurisdictions and need not be expanded upon. In practice, the appeal brief will generally be divided in two main parts, namely (A.) a statement of the relevant “Facts” or “Factual background”, and (B.) a section setting out the “Law” or a “Legal Discussion”. A final section will be devoted to the appellant’s prayers for relief (C.). The appeal brief shall be accompanied by all the evidence that the appellant wishes to rely upon (D.) and, if necessary, contain any request(s) for evidentiary measures to be taken by the panel (E.).

A. Statement of Facts

- 8 The factual part must be *as comprehensive as possible* since new allegations are not admissible after the filing of the appeal brief.¹¹ That said, it is advisable for appellants to take the precaution of reserving the right to expand on their statements of facts in case the respondent’s answer contains factual allegations that need to be rebutted.
- 9 On a more practical level, even if this is not required by Art. R51, nor by the CAS Court Office’s standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion,¹² it is highly advisable to *number the paragraphs* of the statement of facts (or, for that matter, of the entire brief) and, *for each allegation, to indicate the evidence relied upon*.¹³

⁶ Cf. also Art. R49 and R32.

⁷ That said, to be on the safe side as long as the matter is not definitively settled in the case law, parties should assume that only Swiss official holidays and non-working days are the relevant ones, and promptly seek clarification from the CAS Court Office in case the time limit for filing the Appeal Brief falls on an official holiday or non-working day in the appellant’s (or his counsel’s) country.

⁸ Cf. Art. R49.

⁹ Cf. paras. 2-3.

¹⁰ Art. R56. Cf. below, paras. 6-13.

¹¹ Cf. Art. R56(1).

¹² Cf. Art. R52.

¹³ It is submitted that the CAS Court Office’s standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion could be adjusted accordingly.

B. Legal Discussion

The appeal brief's section devoted to the legal discussion should contain a preliminary subsection 10 establishing the grounds for CAS's jurisdiction to hear the appeal as well as the appeal's admissibility, including its timeliness.¹⁴ In this preliminary section it is also useful to set out the applicable regulations and (national) law(s) on which the appellant's legal analysis will be based.¹⁵

The main section devoted to the *discussion of the merits of the case* should also be as comprehensive as 11 possible. However, while Art. R56 does indicate that new arguments will not be admissible after the submission of the appeal brief, CAS practice shows that the appellant will be allowed to fine-tune his legal argumentation at the hearing or even to bring new arguments. After all, under Swiss arbitration law the panel is not bound by the legal reasoning of the parties (*jura novit curia*).¹⁶ By contrast, the appellant should not be allowed to resort, at the hearing, to totally new arguments in such a way as to "ambush" the respondent.

C. Prayers for Relief

A final section in the appeal brief should be devoted to the appellant's prayers for relief. Even if this is 12 not specifically stated in Art. R51, the prayers for relief set out in the appeal brief must not necessarily be the same as those contained in the statement of appeal.¹⁷ However, *the appellant must consider very carefully the wording* of his prayers for relief at the stage of the appeal brief, since, as noted above, he shall not subsequently "be authorized to supplement or amend [his] requests".¹⁸ At the hearing, the panel may (and often will) ask for clarifications on the parties' prayers for relief, but should not allow them to put forward new claims.

D. Exhibits and Other Evidence

In accordance with Art. R51(1), the appeal brief must be accompanied by "*all exhibits and specification 13 of other evidence*".

Exhibits within the meaning of Art. R51 are not only paper documents, but more generally any "writing, 14 communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means".¹⁹ The main issues that may possibly arise in connection with exhibits relate to (i) their authenticity and (ii) any required translations.

In the absence of any indication, whether in the CAS Code or in the Court Office's letter setting the arbi- 15 tration in motion,²⁰ it is generally accepted that there is no need to file the originals of documents: copies will be deemed to conform to the originals. If there is a dispute as to the *authenticity* of a document (which regrettably tends to occur with increasing frequency, in particular in football transfer disputes), the panel can order the production of the original document(s) for inspection and if needed decide that an independent investigation will be conducted on this aspect.²¹

In its standard letter acknowledging receipt of the statement of appeal and setting the arbitration in 16 motion, the CAS Court Office generally emphasizes that "all exhibits [...] shall be clearly listed and numbered" and that any documents that are not in the language of the arbitration (as determined in

¹⁴ Cf. Art. R47 and R49.

¹⁵ Cf. Art. R58.

¹⁶ BGE 130 III 35 para. 5 and the references cited therein.

¹⁷ CAS 2007/A/1434 & 1435 *IOC & WADA v. Pinter & FIS*, para. 79. To be on the safe side, it is however advisable to reserve, in the statement of appeal, the appellant's right to amend his prayers for relief (CAS 2007/A/1396 & 1402 *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 5.11). Cf. also CAS 2009/A/1881, *El Hadary v. FIFA & Al-Ahly Sporting Club*, Partial Award on *lis pendens* and jurisdiction of 7 October 2009, para. 58.

¹⁸ Cf. Art. R56.

¹⁹ In accordance with the definition of the term "Document" in the IBA Rules.

²⁰ Cf. Art. R52, paras. 8-10 below.

²¹ CAS 2010/A/2196, *Al Qadsia v. FIFA & Kazma SC* & CAS 2010/A/2205, *Jovancic v. FIFA & Kazma SC*, Award of 29 February 2012, paras. 45-49.

that same letter, based on the statement of appeal)²² should be accompanied by a *translation* into that language.²³ For lengthy documents, it is recommended to request leave from the CAS to translate only the most relevant parts.

- 17 The *other evidence* that must be specified according to Art. R51(1) may be witness evidence, but also – in particular in doping cases – expert evidence.
- 18 Article R51(2) sets out the applicable rules with respect to *witness evidence*. The witnesses must be listed in the appeal brief. The CAS Code simply requires that the appeal brief “includ[e] a brief summary of their expected testimony”. Experience suggests that a literal interpretation of this provision allows the parties to describe the contents of prospective witness testimonies in very broad terms, which can lead the other party to feel ambushed during the hearing. When such a risk is foreseeable, the respondent should request for the appellant to be ordered to further specify the contents of the witness testimony or testimonies on which he relies, or to file (a) proper witness statement(s).
- 19 Since the Code contains no specific provision with respect to the *concept of “witness”*, the practice of the CAS tends to follow the principles crystallized in Art. 4(2) of the IBA Rules, namely that “any person may present evidence as a witness, including a Party or a party’s officer, employee or other representative”. A party does not have an obligation to testify. According to CAS practice, if a party or a party representative decides to give evidence as a witness, then the other party or parties will have the right to cross-examine him. The accused *athlete is thus allowed to file a “witness statement” and to give evidence at the hearing*. In doping cases, the athlete has a clear incentive to at least appear at the hearing and make himself available for questioning, since the doping regulations allow the panel to draw adverse inferences from his “refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.”²⁴
- 20 *Witness statements* remain seldom used in CAS proceedings. It is submitted that the possibility to file such statements should be used more systematically, in particular in complex cases. Experience shows that the use of witness statements dramatically reduces the length of the evidentiary part of the hearing, leaving more time for the discussion of legal and procedural issues between the parties and the panel. In the absence of any indication in Art. R51, Art. 4(5) of the IBA Rules should be adopted as the governing or at least guiding standard with respect to the contents of witness statements.²⁵

²² Cf. Art. R52. If the respondent wishes for the arbitration to be conducted in (another) CAS (working or accepted) language, it should inform the CAS Court Office immediately so that the President of the Division can decide on the language before the documents are actually translated.

²³ While Art. R29(3) provides that “the Panel may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure”, in practice the CAS Court Office requests the said translations already in the directions it issues when acknowledging receipt of the statement of appeal. That said, the CAS Court Office does not request “certified” translations and leaves it to the panel to take the appropriate steps in case of disputes as to the accuracy of any of the translations provided.

²⁴ Cf. Art. 3.2.4 WADA Code. In non-doping matters, athletes might think twice before submitting witness statements and testifying, as this would expose them to cross-examination by the sports-governing body. The athlete’s counsel should thus consider this option carefully, bearing in mind that the athlete will in any event be allowed to make a personal statement at the end of the hearing.

²⁵ Art. 4(5) of the IBA Rules reads as follows: “[e]ach Witness Statement shall contain: (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided; (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing; (d) an affirmation of the truth of the Witness Statement; and (e) the signature of the witness and its date and place.”

The same principles apply to *experts* and expert reports. In practice, the hearing of experts without the prior filing of written expert reports is simply not realistic. The contents of the expert reports should be in line with the requirements of Art. 5(2) of the IBA Rules.²⁶ Expert reports can also be presented to cover legal issues, in particular if they concern a law of which none of the members of the panel has a specific knowledge.²⁷

The appellant should in any event reserve the possibility, in his appeal brief, to (i) name *rebuttal witnesses and/or experts* and (ii) file rebuttal witness statements and/or rebuttal expert reports in case the evidence tendered with the respondent's answer should make this necessary.

E. Requests for Evidentiary Measures

Article R51(2) also requires that any “evidentiary measure which [the appellant] requests” should be contained in (or at least filed together with) the appeal brief. Such evidentiary requests can range from a request to produce the case *file from the first instance proceedings* to an application for the panel to request the assistance of the state courts in accordance with Art. 184(2) PILS, for instance to *summon a witness* who is not under the control of the appellant. In the vast majority of cases, the requests made will concern the *production of documents according to Art. R44.3* of the Code. After the filing of the appeal brief, evidentiary requests should be granted solely if the existence and/or the relevance of the evidence sought have become apparent further to the filing of the respondent's answer in accordance with Art. R55.

IV. Filing and Number of Copies

As a result of the 2013 revisions to the CAS Code, it is important to note that the appeal brief shall be filed by courier or registered mail in the *requisite number of copies within the relevant time limit*. The latest edition of the Code has therefore removed the possibility for the appellant to file the appeal brief only by facsimile within the time limit and to send the original by post later on. In other words, filing by fax only is no longer sufficient for the purposes of meeting the time limit, and will result in the CAS declaring that the appeal is deemed withdrawn. Considering its drastic effects, we submit that such a decision should be taken by the panel itself.

Conversely, it is submitted that the *filing of an incorrect number of copies* is of no effect with regard to the observance of the time limit. In such a case, a short additional deadline should be given to the appellant for completing his filing.

²⁶ Art. 5(2) of the IBA Rules reads as follows: “[t]he Expert Report shall contain: (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience; (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions; (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal; (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions; (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided; (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing; (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report; (h) the signature of the Party-Appointed Expert and its date and place; and (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author”.

²⁷ For examples of cases in which legal opinions on specific matters of foreign law were filed in CAS proceedings, see, e.g., CAS 2008/A/1583 & 1584, *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*; CAS 2008/A/1584, *Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD*, Award of 15 September 2008, where expert evidence was provided on Portuguese law; and CAS 2010/A/2252, *Zavarov v. FC Arsenal Kiev*, Award of 6 July 2011, where both parties produced legal opinions on questions of Ukrainian law.

Article R52: Initiation of the Arbitration by the CAS

I. Purpose of the Provision

- 1 Article R52 governs the very *first stages of the appeals arbitration procedure*, once the statement of appeal has been received by the CAS Court Office. It provides the legal basis for the various actions that will or may be undertaken by the CAS to set the arbitration in motion (III.-IV.), depending on the contents of the statement of appeal and, as the case may be, the existence of any other pending appeals against the same decision (V.). All this, however, is subject to the CAS being *prima facie* satisfied, on the basis of the statement of appeal, that it has jurisdiction to hear the case (II.).

II. *Prima Facie* Examination of the Arbitration Agreement

- 2 Before initiating the arbitration, the CAS Court Office should conduct a *prima facie* analysis of the arbitration agreement *based on the statement of appeal and the documents mandatorily enclosed therewith*.¹ The purpose of this preliminary analysis is to make sure that no action is taken, in particular the notification of the statement of appeal to the respondent(s) or the issuance of an order on provisional measures, if (i) “there is clearly no arbitration agreement referring to the CAS” or (ii) “the agreement is clearly not related to the dispute at stake”.
- 3 The *relevant test* for the purposes of Art. R52 “is not whether CAS has jurisdiction but only whether there is an appearance of an arbitration agreement referring to CAS. If there is such an appearance, then the Panel of arbitrators, to which this case may be referred, will have to rule on its own jurisdiction”.² Thus, the CAS emphasizes that it “may refuse to set the arbitration in motion and not assign the case to a panel only when the absence of an arbitration agreement is *manifest*” and that “[t]he examination of the CAS jurisdiction at that stage is merely a *prima facie* assessment, which is necessary to prevent the CAS from ordering specific measures in the absence of jurisdiction”.³ The *prima facie examination* conducted by the CAS Court Office upon receipt of the statement of appeal is similar to that performed by other arbitral institutions, such as, for instance, the ICC International Court of Arbitration under Art. 6(4) ICC Rules.⁴
- 4 The opening language of Art. R52⁵ seems to suggest that *if the CAS Court Office comes to the clear conclusion that there is no arbitration agreement* referring to the CAS or relating to the dispute at hand, it will simply inform the appellant accordingly, without involving the designated respondent. However, it appears that sometimes both “parties are informed as such in writing by the CAS Court Office and in the absence of an alternative agreement between the parties, the arbitration procedure is discontinued”.⁶ Either way, the CAS’s decision not to initiate the proceedings shall be considered as an award on jurisdiction within the meaning of Art. 186(3) PILS, and can thus be challenged before the Swiss Federal Supreme Court pursuant to Art. 190(2)(b) PILS.

¹ Cf. Art. R48.

² CAS 2000/A/297, *R. v. IOC, IWF, National Olympic Committee of Bosnia and Herzegovina and Weightlifting Federation of Bosnia and Herzegovina*, Order of 30 August 2000.

³ CAS 2008/A/1600, *PFC Botev 1912 – Plovdiv AD v. BFU & Hristov*, Award on Jurisdiction of 1 July 2009, para. 5.1. While the wording of this provision has been changed from “manifestly” to “clearly” in the 2013 edition of the Code, this is not likely to have a significant effect on the analysis (and conclusion) as to whether or not there is an arbitration agreement referring to the CAS.

⁴ See Favre Schnyder, above commentary on Art. 6(4) ICC Rules (Chapter 4), paras. 15–28.

⁵ Art. R52(1) begins with the following wording: “[u]nless it is apparent from the outset that there is clearly no arbitration agreement referring to the CAS or that the agreement is clearly not related to the dispute at stake, the CAS shall take all appropriate actions to set the arbitration in motion. The CAS Court Office shall communicate the statement of appeal to the Respondent, [...]”.

⁶ CAS 2005/A/952, *Cole v. FAPL*, Award of 24 January 2006, para. 6.5.

In case of a so-called “*pathological*” *arbitration agreement*⁷ or if there is any doubt as to the agreement’s validity and/or scope, it is recommended to include a section in the statement of appeal explaining the reason(s) why the appellant considers that the CAS does have jurisdiction, together with an invitation for the CAS Court Office to defer to the panel on this issue. 5

In some cases, the CAS Court Office forwards the statement of appeal to the respondent(s) with an invitation to comment on the existence of a valid arbitration agreement, and then *leaves it to the President of the Appeals Division to decide* on a *prima facie* basis whether the arbitration is to continue.⁸ It is submitted that such a possibility is interesting given the jurisdictional nature of the decision to be made, but it should be provided for in the CAS Code so that the Court Office can resort to it by reference to a proper legal basis. 6

If the CAS Court Office is satisfied that prima facie there is an arbitration agreement referring to the CAS in relation to the dispute in question, it will “communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Arts. R53 and R54. If applicable, he shall also decide promptly on any application for a stay or for interim measures.”⁹ This decision does *not* constitute a challengeable award. In practice, the CAS Court office forwards the statement of appeal and the enclosed documents to the party (or parties) named as respondent(s) in the statement of appeal and to the sports-governing body that rendered the decision under appeal.¹⁰ The standard cover letter by the CAS Court Office includes the following information and directions: (i) the date of receipt of the statement of appeal, (ii) a confirmation that the appeal has been assigned to the Appeals Division,¹¹ (iii) an acknowledgment of the payment of the filing fee or of the fact that the appellant has taken the necessary steps to that end, (iv) directions as to the payment of the advance of costs, if any,¹² and (v) the setting of a 10-day time limit for the respondent(s) to (jointly) appoint an arbitrator or to agree with the appellant on the appointment of a sole arbitrator, (vi) a determination as to the language of the arbitration, together with a reminder that all submissions shall be in the language of the arbitration and that all exhibits submitted in any other language should be accompanied by a translation, and (vii) a short time limit for the respondent(s) to state its (or their) position on any procedural request(s) contained in the statement of appeal, in particular any request for the arbitration to be conducted as an expedited procedure according to Art. R52(3), any request for a stay of the decision under appeal,¹³ or any other request for provisional measures.¹⁴ 7

III. First Procedural Steps

If the statement of appeal withstands the CAS’s *prima facie* analysis of the arbitration agreement, Art. R52(1) provides that the CAS Court Office “shall take all appropriate actions to set the arbitration in motion.” The first such action is the “*communicat[ion of] the statement of appeal to the Respondent[s]*”. The standard letter issued by CAS to that effect also confirms that “[p]ursuant to Article S20 of the Code [...], the present arbitration has been assigned to the Appeals Arbitration Division of the CAS and shall therefore be dealt with according to Articles R47 et seq. of the Code.” 8

More importantly, the CAS letter also (i) takes note of the arbitrator appointed by the appellant in the statement of appeal, (ii) *invites the respondent(s) “to nominate an arbitrator* from the list of CAS arbitrators published on the CAS website <<http://www.tas-cas.org>>, within ten days of receipt of this letter by courier, in accordance with Art. R53 of the Code” and (iii) informs the respondent(s) that “[i]f the 9

⁷ On pathological arbitration clauses, see Müller, above commentary on Art. 178 PILS (Chapter 2), para. 60.

⁸ CAS 2000/A/288, *T. v. Comité National Olympique et Sportif Français*, Procedural Order of 15 August 2000.

⁹ Art. R52(1) at the end.

¹⁰ Cf. below, para. 11.

¹¹ In accordance with Art. S20 of the Code.

¹² Cf. Art. R64.2.

¹³ Cf. Art. R48(1).

¹⁴ Cf. Art. R37. On all these points cf. also below, paras. 8-14.

Respondent[s] fail[s] to nominate an arbitrator the President of the CAS Appeals Arbitration Division, or his Deputy shall proceed with the appointment in lieu of the Respondent[s].¹⁵

- 10 If the statement of appeal was accompanied by an *application for provisional measures*, in particular a request to stay the decision under appeal,¹⁶ the CAS's standard letter also contains a paragraph noting that such an application has been filed and fixing a time limit for the respondent(s) to express its (their) position with regard to it. Art. R52(1) further provides that "the President of the Division shall [...] decide promptly on an application for a stay or for interim measures".
- 11 Since the 2010 revision, the Code contains a provision codifying the CAS's previous practice¹⁷ of *sending a copy of the statement of appeal and appeal brief, for information, to the authority that issued the challenged decision*. This provision applies only if the authority in question was not named as a respondent in the statement of appeal, which is mainly the case in appeals against FIFA's decisions on disputes between clubs or between clubs and players. FIFA can then decide whether to intervene, for instance, because the case raises important issues, or waive its right to do so. As noted in a recent case, the fact that the governing body that issued the decision receives a copy of the statement of appeal and appeal brief does not mean that it automatically becomes a party to the proceeding: "[t]he use of the term 'for information' shows that the issuing authority is not per se party to the proceedings, yet. It must either be called as a party or itself request to intervene in order to, potentially, become a party".¹⁸

IV. Expedited Procedure

- 12 According to Art. R52(3) it is at this early stage that, "with the agreement of the parties", the President of the Appeals Division (or the panel)¹⁹ may decide that the arbitration shall be conducted "in an expedited manner". Hence, if it so wishes, the appellant should make a *request in this sense in the statement of appeal*, so that the CAS Court Office will refer to it in the letter forwarding the statement of appeal to the respondent(s) and invite the latter to indicate whether it (or they) agree(s) to such request.
- 13 In the majority of cases, the parties will agree to having the arbitration conducted in an expedited manner (on the side of the athlete this will be so, for instance, because he needs a decision in time for any competitions or events he is aspiring to participate in, to the extent his ability to participate may be affected by the appealed decision, and in such cases, on the side of the sports-governing body, an expedited procedure will be favored in order to have certainty as to who will be authorized to compete). This possibility has been used often and quite successfully for cases that needed to be decided swiftly, before the beginning of an important competition, such as the world championships,²⁰ the UEFA Champions League²¹ or even the Olympic Games.²²
- 14 The wording of Art. R52(3) seems to rule out recourse to the expedited procedure in the absence of an agreement between the parties to that effect.²³ Hence, *the President of the Appeals Division cannot grant a request for expedited procedure upon one party's application without the agreement of the other(s)*, unless any refusal so to proceed by the other party (or parties) is against the rules of good faith. Such would

¹⁵ Cf. Art. R53.

¹⁶ Cf. Art. R48(1).

¹⁷ Cf. Reeb, *Modifications essentielles*, p. 7.

¹⁸ CAS 2010/A/2289, *S.C. Sporting Club S.A. Vaslui v. Ljubinkovic*, Award of 3 August 2011, para. 63.

¹⁹ This, however, is less likely to occur as the swift appointment of the panel already requires an agreement by the parties and the active cooperation by the Division President.

²⁰ Cf., e.g., CAS 2011/A/2495/2496/2497/2498, *FINA v. Cielo et. Al. & CBDA*, Award of 29 July 2011, paras. 4.1-4.8.

²¹ Cf. CAS 2008/A/1583/1584, *Benfica et al. v. UEFA & FC Porto*, Award of 15 September 2008, paras. 3.1-3.8.

²² Cf., e.g., CAS 2000/A/260, *Beashel & Czulowski v. AYF*, Award of 2 February 2000, p. 4. This solution is, in most cases, preferable to waiting until ten days before the beginning of the Games in order to bring the case before the CAS Ad Hoc Division (cf. Art. 1 of the CAS Arbitration Rules for the Olympic Games). Indeed, all the athletes directly or indirectly concerned need certainty well before that time and so do the sports-governing bodies involved. The only advantage for the athlete bringing the claim is that proceedings before the Ad Hoc Division are always free of charge.

²³ Cf., e.g., CAS 2008/A/1595, *Deriugina v. FIG*, Award of 27 October 2008, paras. 6-8.

be the case, for instance, if the sports-governing body were to refuse the expedited procedure simply in order to prevent the athlete from participating in the sport for as long as possible, or if the athlete/club had obtained a provisional measure allowing him/it to participate in a competition or tournament and its resistance against an expedited procedure were but an attempt to extend the scope of validity or the effect of that measure by delaying the action on the merits.

V. Consolidation

Article R52(4) was enacted in 2010 to *codify the practice* allowing the CAS to consolidate two or more 15
appeals concerning the same decision or filed “in connection with” the same decision.

The decision to consolidate will be made either by the panel constituted in the appeal that was brought 16
first in time, or, where no panel has been constituted yet, by the President of the Appeals Division. Be
that as it may, the deciding authority enjoys a *great deal of discretion* and should, in taking its decision,
duly consider all the relevant circumstances, in particular the stage already reached in the first arbitra-
tion, the likely impact on the cost-efficiency of the proceedings at stake and, most importantly, the need
to avoid inconsistent awards.

Article R53: Nomination of Arbitrator by the Respondent

I. Purpose of the Provision

- 1 Article R53 requires the respondent to nominate the arbitrator of its choice, reflecting the appellant's equivalent obligation under Art. R48(1). It sets out a relatively short time limit for the respondent to do so (II.), as well as a fallback mechanism (III.) in case it fails to act, so as to ensure that the arbitration can proceed with due dispatch.

II. Nomination of Respondent's Arbitrator – Time Limit

- 2 Article R53 provides that the respondent has *10 days after the receipt of the statement of appeal* to nominate his/its choice of arbitrator.¹ The respondent is expressly reminded of this obligation in the CAS Court Office letter accompanying the notification of the statement of appeal.²
- 3 Contrary to Art. R48(1) regarding the appointment of an arbitrator by the appellant, Art. R53 does not specify that the respondent's nominee must be selected *from the CAS list of arbitrators*. This notwithstanding, it is an obvious consequence of the mandatory nature of the list as stipulated in Arts. S13 and S14 that the respondent-appointed arbitrator must also be drawn from it. Again, the respondent is expressly reminded of this in the Court Office letter accompanying the notification of the statement of appeal, together with a link to the CAS website, where the list of CAS arbitrators is published.
- 4 Quite often, the appeal is directed against *more than one respondent*. For instance, in doping cases, WADA and/or the relevant international federation may file an appeal against the decision taken by an athlete's national federation or the national anti-doping agency and will thus name both the athlete and the body that issued the decision under appeal as respondents.³ In football transfer cases, the old club will often act against both the player and the new club.⁴ In such instances, the CAS Court Office's letter forwarding the statement of appeal will indicate that "the respondents are requested to jointly nominate an arbitrator".⁵ In most cases the need *to agree on a joint nomination* will not be problematic, either because the respondents will have shared interests or a common line of defense, which will also facilitate agreement on the nomination of an arbitrator, or because the body that took the decision under appeal will elect to endorse the athlete's choice considering that he is the central party, potentially facing the heaviest consequences on foot of the prospective CAS decision. If, nonetheless, the respondents cannot jointly agree on the nomination of the arbitrator within the ten-day deadline set by Art. R53, they are entitled to request an *extension of the time limit for nomination pursuant to Art. R32(2)*,⁶ so as to avoid the appointment being made by the CAS in their stead.⁷ It may of course happen that the respondents cannot find an agreement at all. If this is simply because one of the respondents is not co-operative, the other respondent(s) should notify the CAS Court Office within the ten days' time limit of any such difficulties and possibly inform the Court Office of his/its/their own proposed nominee. The CAS Court Office is then likely to intervene by notifying the parties that it has not received the position of one of the respondents and granting a short additional time limit to state whether the latter agrees to the joint nomination of the arbitrator put forward by the other respondent(s).⁸

¹ Thus, the respondent is required to nominate his/its arbitrator prior to submitting his/its answer, the objective being to allow the CAS to proceed without delay in forming the panel, so that the latter can efficiently "take over" the conduct of the arbitration, within a very short time from the filing of the statement of appeal.

² Cf. Art. R52, para. 9 above.

³ Cf., e.g., CAS 2009/A/1870, *WADA v. Hardy & USADA*, Award of 21 May 2010; CAS 2011/A/2384, *UCI v. Contador Velasco & RFEC*; CAS 2011/A/2386, *WADA v. Contador & RFEC*, Award of 6 February 2012.

⁴ Cf., e.g., CAS/2004/A/708-713, *Mexès v. FIFA*; *AS Roma v. FIFA*; *AJ Auxerre v. AS Roma & Mexès*, Award of 11 March 2005.

⁵ Cf., e.g., CAS 2011/A/2551, *F. v. U. & T.*, decision of 2 September 2011.

⁶ Any such request should be made before expiry of the time limit (cf. Art. R32(2)).

⁷ Cf. para. 6 below.

⁸ Cf., e.g., CAS 2012/O/2736, *A. et al. v. P. et al.*, decision of 23 March 2012.

Where a *respondent* is *joined* after the initial parties have nominated their arbitrators, Art. R41.4(4) is 5 applicable pursuant to Art. R54(6).⁹

III. Respondent's Failure to Nominate an Arbitrator

Where the respondent(s) fail(s) to nominate his/its/their arbitrator within the time limit provided 6 for by Art. R53 as possibly extended according to Art. R32(2), *the President of the Division shall make the appointment*. This provision is in line with the fallback mechanisms provided in other international arbitration rules: it offers a means to avoid the risk that the respondent(s) deliberately abuse his/its (or their) appointing right to unduly delay the proceedings, and the CAS has demonstrated a willingness to take this step if necessary.¹⁰

Where there is more than one respondent and an agreement on a joint nomination cannot be found due 7 to the fact that (*at least some of*) *the respondents have divergent interests* in the dispute, it is highly recommended to ask the CAS to apply Art. R41.1(2)-(3), by appointing the panel in its entirety.¹¹ This, it is submitted, is the only way to prevent the problematic situation where one side has had the opportunity to appoint the arbitrator it wished while the other side has had to settle for an arbitrator selected by the CAS.

⁹ Cf. Art. R54, para. 13 below.

¹⁰ Cf., e.g., CAS 2010/A/2072, *WADA v. Federacao Bahiana de Futebol (FBF) & Carneiro Filho*, Award of 21 October 2010, para. 25; CAS 2007/A/1395, *WADA v. NSAM & Cheah & Ng & Masitah*, Award of 31 March 2008, para. 30.

¹¹ Cf. Art. R41.

Article R54: Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by the CAS

I. Purpose of the Provision

- 1 Article R54 governs the *final stages in the constitution of the tribunal*, i.e., as the case may be, the *appointment by the CAS of a sole arbitrator* (II.), or where there is to be a three-member panel and once the two party-appointed arbitrators have been nominated, the appointment by the CAS of the President of the Panel and the confirmation of the party-appointed arbitrators (III.), as well as the consequent issuance by the CAS Court Office of a “*Notice of formation*” of the panel and the transfer of the file to the panel (IV.-V.), the possible *appointment of an “ad hoc clerk”* (VI.) and, where relevant, the applicability of the Code’s provisions on *multi-party arbitration* (VII.).

II. Appointment of a Sole Arbitrator

- 2 The first issue regulated by Art. R54(1) is the appointment of a sole arbitrator. This provision repeats that a single-arbitrator panel will be appointed only “*by virtue of the parties’ agreement or of a decision of the President of the Division*” as per Art. R50(1), which in turn specifies that the President of the Division will, in reaching such a decision, “tak[e] into account the circumstances of the case”.¹ In practice, the parties will often agree on a sole arbitrator when they also agree that the proceedings should be conducted in an expedited manner.²
- 3 Article R54(1) indicates that the President of the Division is to appoint the arbitrator “upon receipt of the motion for appeal or as soon as a decision on the number or arbitrators has been rendered”. In those instances where it is the President of the Appeals Division who decides to appoint a sole arbitrator, it is submitted that the circumstances of the case can be fully assessed only once the respondent has had the opportunity to file its answer. In any event, it appears reasonable for the President of the Appeals Division to *consult the parties before imposing a sole arbitrator* where the parties cannot agree on the number of arbitrators, it being understood that while the parties’ views will not be binding on the Division President, they should at least form part of the “circumstances of the case” he is required to take into account under Art. R50(1).³
- 4 Article R54(1) does not state whether the decision of the President of the Appeals Division to appoint a sole arbitrator absent an agreement of the parties may be challenged. It is submitted that the only available “remedy” with respect to such a decision would be a formal *request for reconsideration* submitted by the aggrieved party to the CAS. A challenge in the Swiss Federal Supreme Court does not come into question, as the discretion afforded to the President of the Division under Arts. R50(1) and R54(1) is precisely the consequence of “the agreement of the parties” (according to which the arbitral tribunal is to be constituted) within the meaning of Arts. 179(1) and 190(2)(a) PILS.

III. Appointment of the President of the Panel

- 5 In practice, most appeals cases are heard by a panel of three arbitrators.⁴ Whereas in CAS ordinary proceedings (in line with the standard practice followed in international commercial arbitration, as reflected in many sets of arbitration rules),⁵ the president of a three-member panel is selected by the two

¹ Cf. Art. R50, para. 3. As discussed in connection with that provision, the default solution under the CAS Code is that appeals cases will be heard by three-member panels.

² Cf., e.g., CAS 2007/A/1363, *TIF Liebherr Ochsenhausen v. ETU*, Award of 5 October 2007, paras. 24-27.

³ In CAS 2008/A/1516/, *WADA v. CONI, FITET & Piacentini*, the CAS suggested the appointment of a sole arbitrator to the parties, took note of the fact that they did not object to the proposal and proceeded accordingly (cf. Award of 11 September 2009, para. 2.7).

⁴ Cf. Art. R50, paras. 2-3 above.

⁵ Cf., e.g., Swiss Rules Art. 8(2).

party-appointed arbitrators,⁶ in appeals proceedings *it is the President of the Appeals Division who appoints the panels' presidents.*⁷ Although Art. R54(2) provides that the President of the Division shall consult the party-appointed arbitrators in relation to the appointment of the President of the Panel,⁸ he enjoys the widest discretion and is free to select appointees as he sees fit. In other words, *the parties have no influence whatsoever on the appointment of the President of the Panel.*⁹

Originally, this solution was devised to speed up the proceedings. However, given the time that is actually required, on average, by the Division President to appoint the president, *it is submitted that it would be preferable for the CAS to grant the party-appointed arbitrators a short time limit, for instance ten days, to try and agree upon the selection of a president for the panel.* Such a change would reduce the impression that the sports-governing bodies have, at least indirectly,¹⁰ a preponderant influence on the appointment of the panel.¹¹

IV. Confirmation of the Arbitrators and Notice of Formation of the Panel

Article R54(2) at the end provides that the arbitrators nominated by the parties shall be *deemed appointed after confirmation by the President of the Division.* A party-appointed arbitrator should be confirmed only once the President of the Division is assured that the arbitrator fulfills the requirements of Art. R33, namely that he is and will remain impartial and independent of the parties, “shall immediately disclose any circumstances which may affect his independence with respect to any of the parties [...] and shall be available as required to complete the arbitration expeditiously”. Despite widespread concerns about the increasing delays in the rendering of awards, it appears that, unlike the ICC, the CAS is not using the confirmation process as an incentive for the arbitrators to decline appointment when their *availability* is insufficient to handle the case with due dispatch. In practice, we are not aware of any case in which an arbitrator was not confirmed by the CAS *sua sponte* (i.e., absent an objection by one of the parties or by another member of the proposed panel).¹² The CAS appears to apply a similar policy of self-restraint with respect to the *preemptive control of the arbitrators' independence and impartiality* prior to confirmation. In reality, the President of the Division will simply leave it to the parties to challenge an arbitrator if

⁶ Cf. Art R40.2(3).

⁷ This rule is mandatory under the CAS Code, whereas the similar provision contained in the ICC Rules (Art. 12(5)), contemplating the appointment of the presiding arbitrator by the ICC Court, only operates when the parties have not “agreed upon another procedure” for the said appointment.

⁸ In practice, the CAS prepares a short list of names which is circulated to the party-appointed arbitrators with the indication that any objections on their part with respect to the suggested appointees should be raised within a given (short) time limit.

⁹ It is submitted that it should be appropriate for the party-appointed arbitrators to communicate the short list of possible presidents prepared by the CAS to their appointing parties, to ensure that the latter (and/or their counsel) do not have major issues with the appointment of any one of the shortlisted potential presidents (irrespective of whether they consider that their discomfort amounts to a ground for challenge). The party-appointed arbitrators will then be free to decide whether to pass on any such concerns to the Division President.

¹⁰ The President of the Appeals Division is appointed by the ICAS, a body which is predominantly composed of personalities appointed by the sports-governing bodies. Technically, the President of the Division would have the possibility to ensure that no arbitrator who is perceived as “athletes-friendly” is ever appointed as president of a panel.

¹¹ On the other hand, it is true that Art. R54(2) allows the CAS to “launch” arbitrators who have been recently added on the list of arbitrators and may not be well-known enough to be appointed by the parties, which helps extend the number of arbitrators on the list that are actually appointed (and may perhaps also help address the concerns that are often raised with respect to the fact that in practice the panel presidents appear to be drawn from a rather small “pool” of arbitrators). That said, the obvious drawback of such a policy is that an arbitrator who is relatively “new” on the list may not necessarily be as experienced in CAS arbitration as his co-arbitrators. On balance, we see no reason why the co-arbitrators should not be given a chance to agree on the chair.

¹² For an example of a case where a party objected to the appointment of an arbitrator prior to his confirmation, cf. CAS 2010/A/2098, *Sevilla FC v. RC Lens*, Award of 29 November 2010, paras. 23-29. Before confirming the arbitrators, the CAS should also verify that they possess any qualifications as may be stipulated in the relevant arbitration agreement (cf., e.g., Art. 63(2) of the UEFA Statutes, providing that “[o]nly arbitrators who have their domicile in Europe shall be competent to deal with disputes submitted to the CAS according to the present Statutes”).

they consider there are valid grounds to do so. It is submitted that a stricter approach by the CAS might be preferable as it is well known that – given the ostensibly liberal approach taken by the ICAS¹³ and the Supreme Court¹⁴ on arbitrator challenges – a party will think twice before challenging an arbitrator. Even when a party takes the risk of challenging the arbitrator and the challenge is successful, a more rigorous approach at the confirmation stage would have avoided such (unnecessary) ancillary proceedings.

- 8 Article R54(3) provides that once the panel is formed (i.e., when the President of the Division has confirmed the party-appointed arbitrators and/or appointed the President of the Panel or the sole arbitrator), the CAS Court Office will “take notice” of its formation. In practice, the CAS Court Office writes to the parties enclosing a formal “Notice of formation of a Panel” (in French, *Avis de désignation d'une formation*) in which the Secretary General records that the arbitral panel called upon to resolve the dispute is composed of the named arbitrator(s). This will trigger the seven-day time limit to issue any challenge to the constitution of the panel.¹⁵ The Notice of formation is generally accompanied by copies of the *Acceptance and statement of independence forms* signed by the arbitrator(s) upon accepting his (or their) nomination.¹⁶ In the same letter, the CAS will generally also indicate that the case file has been or is about to be transferred to the panel.

V. Transfer of the File to the Arbitrators

- 9 Article R54(3) specifies that the arbitration file is transferred to the arbitrators only once the CAS has taken notice of the formation of the panel and, if the parties have been requested to pay an advance on costs,¹⁷ *once the entirety of the advance of costs has been received* by the CAS. In practice this means that, more often than not, the arbitrators will receive the file only once the exchange of the written submissions has already been completed. It also means that, *de facto*, the respondent can delay the arbitration by not paying its share of the advance on costs. In such instances, the CAS will fix a time limit for the appellant to substitute for the respondent.¹⁸

VI. Appointment of an Ad Hoc Clerk

- 10 The appointment of an *ad hoc* clerk is *becoming standard practice* in CAS arbitrations. This is understandable in light of the increasing workload of the CAS and the consequential reality that the institution's permanent staff of counsel do not always have sufficient availability to assist the arbitrators, in particular in connection with the drafting of the award.¹⁹
- 11 The process of selection of the *ad hoc* clerk is not clearly regulated by the Code, which only indicates that one such clerk may be appointed to assist the panel and that he must be independent of the parties.²⁰ Over the years, the CAS has established an *unofficial list of CAS ad hoc clerks*. They are often young qualified lawyers or barristers from different jurisdictions or legal backgrounds, who also possess the relevant

¹³ Cf. Art. R33.

¹⁴ Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), para. 31, and Art. R33.

¹⁵ Cf. Art. R34 and Orelli, above commentary on Art. 180 PILS (Chapter 2), paras. 21–26; cf. BGE 129 III 445 para. 4.2.2.1.

¹⁶ Cf. Art. R33. Given the 2013 amendments to the Code, as of 1 March 2013 these forms are likely to relate to both independence and impartiality.

¹⁷ Cf. Art. R64.2.

¹⁸ Failing which the appeal will be deemed withdrawn (cf. Art. R64.2(2)). This will obviously put an impecunious athlete appealing against a sports-governing body's decision in a difficult situation. It is submitted that the legal aid fund contemplated in Art. S6(9) of the Code should be of assistance in such cases (cf. also Rigozzi, *Jusletter* 13 September 2010, pp. 9–10).

¹⁹ In practice, the parties will generally be informed of the appointment of an *ad hoc* clerk with the Order of procedure that is circulated by the CAS Court Office for their approval and signature prior to the hearing (cf. Art. RS7, para. 29 below).

²⁰ This is in line with the provisions in other institutional arbitration rules dealing with the appointment of secretaries to the tribunal, cf., e.g., Art. 15(5) Swiss Rules. In practice, the *ad hoc* clerk is often suggested or chosen by the President of the Panel.

linguistic skills. The CAS ensures that ad hoc clerks have access to the required know-how with respect to the CAS's practice and procedure in order to provide efficient assistance to panels, most notably by inviting them to attend the CAS seminars.

Article R54(4) at the end specifies that the *ad hoc clerk's fees* "shall be included in the arbitration costs".¹² According to Annex II to the Code, entitled Schedule of Arbitration Costs, the ad hoc clerk's remuneration "is fixed by the Secretary General of the CAS on the basis of the work reports provided and on the basis of the time reasonably devoted to the case at stake".²¹

VII. Multi-party Arbitration

Article R54(5) indicates that Art. R41 on multiparty arbitration is applicable *mutatis mutandis* to appeals arbitration procedures, with the specifically stated (and logical) qualification that the President of the Panel is appointed by the President of the Appeals Division.²²

²¹ The latest version of the Schedule of Arbitration Costs is available on the CAS website at <<http://www.tas-cas.org/arbitration-costs>>. With regard to ad hoc clerks, it currently indicates that "in principle, an hourly fee of CHF 150 to CHF 200 is taken into account depending on the qualifications of the clerk".

²² Cf. Art. R41. For a practical example, cf. CAS 2004/A/748, *Russian Olympic Committee & Ekimov v. IOC*, Decision on Request for intervention of 5 July 2005.

Article R55: Answer of the Respondent/CAS Jurisdiction

I. Purpose of the Provision

- 1 Article R55 sets out the *requirements to be satisfied by the respondent in filing his/its answer* to the appeal brief.¹ It provides guidance as to the answer's required contents (II.), as well as the time limit within which it is to be filed. In this connection, Art. R55 opens the possibility for the respondent to make the fixing of the time limit for the filing of the answer contingent upon payment by the appellant of his share of the advance of costs (III.). As for the actual filing of the answer, due note should be taken of the changes made to Art. R31 in the 2013 edition of the Code, in particular for the purposes of its timeliness (IV.). Should the respondent fail to file an answer, Art. R55 restates the important principle that the award may be rendered by default if necessary (V.). Further, since the Code's revision of 2012, Art. R55 also deals expressly with issues of jurisdiction, essentially reflecting the relevant provisions of the PILS in this regard (VI.). Finally, respondents need to be aware that, since the 2010 revision, counterclaims (including cross- or joint appeals) are no longer permitted in appeals proceedings under the Code (VI.).

II. Contents of the Answer²

- 2 As previously noted,³ the parties' written submissions in CAS appeals proceedings are as a rule limited to a single exchange.⁴ Accordingly, the respondent's *statement of defence* in the answer must include *all the factual allegations and legal arguments*⁵ on which the respondent relies to request the (total or partial) dismissal of the appeal. Legal arguments can be both substantive and procedural, including jurisdictional challenges. In this respect, Art. R55(1) expressly requires that any defence of lack of jurisdiction be included in the answer.⁶
- 3 Article R55(1) further specifies that the answer must also contain all the *exhibits*⁷ and *other evidence* the respondent wishes to rely upon, e.g., supporting documents, witness statements and expert reports.
- 4 If the respondent does not wish to provide witness statements, the answer shall indicate the *names of any witnesses*⁸ and/or *experts* that the respondent intends to rely upon. In order to limit the inherent risk of surprise/ambushing related to the non filing of witness statements and experts reports, the CAS Code has been revised in 2013 to provide that the answer shall also contain a "brief summary of th[e named witnesses'] expected testimony" and of the named experts' "area of expertise". It is submitted that such summaries may be insufficient and that, where necessary for the sake of good order and the fair and efficient conduct of the proceedings, the panel should, either upon a request by the appellant or *sua sponte*, invite the respondent to further specify the summary information it has provided.⁹
- 5 Article R55(1) indicates that witness statements can be provided *at a later stage* only if the President of the panel permits it. It is submitted that this provision only applies if the relevant witnesses were named

¹ Cf. Art. R51.

² In addition to the comments made here, readers are referred to the commentary to Art. R51 (Appeal Brief), which applies, in pertinent part, also with respect to the contents of the answer. More precise cross references to the relevant passages will be provided in the following paragraphs.

³ Cf. Art. R51, para. 7 above; see also Art. R56(1).

⁴ Cf. Art. R56, paras. 2-3 below.

⁵ On the general structure and format that tend to be adopted for written submissions in appeals proceedings, cf. the comments provided under Art. R51 (cf. Art. R51, paras. 7-24 above). While the structure of the answer may be influenced by that of the appeal brief, one important practical recommendation is to number the paragraphs in the answer and to indicate the evidence relied upon in support of each allegation.

⁶ Cf. below, paras. 15-20.

⁷ For the definition of "exhibit", cf. the comments provided under Art. R51 (cf. Art. R51, paras. 14-16 above).

⁸ On the concept of "witness", cf. the comments provided under Art. R51 (cf. Art. R51, paras. 18-20 above).

⁹ The same holds true, of course, for the summaries provided by the appellant in his appeal brief, as noted in connection with Art. R51; cf. Art. R51, para. 18 above.

with the answer. If not, the President of the panel can allow witness statements *only if the requirements of Art. R56(1) are met*.¹⁰

The answer and any documents attached to it must be *submitted in the language of the proceedings*.¹¹ If documents are submitted in languages other than the language of the proceedings, the CAS will normally require that a translation be submitted within a short time frame.

The *format in which the answer is to be filed* is specified in the letter from the CAS Court Office notifying the appeal brief to the respondent. By reference to Art. R31's provisions on notifications and communications in CAS proceedings, the Court Office will require that the answer be filed by courier (or registered mail), indicate the number of hard copies that need to be submitted in the specific case and remind the respondent that exhibits may be filed by courier (or registered mail), on a CD-Rom or by e-mail.

III. Time Limit to Submit the Answer

The above-mentioned letter from the CAS Court Office also clearly reminds the respondent that, as provided in Art. R55(1) *ab initio*, its answer must be filed *within twenty days* from receipt by courier or registered mail of the original of the appeal brief forwarded by the CAS.¹²

The time limit to file the answer can be *extended upon a reasoned request*. The requirements are the same as those applying to requests for the extension of the time limit to submit the appeal brief.¹³ It bears noting that, just like the time limit for the filing of the appeal brief, the time limit under Art. R55(1) may turn out to be unrealistic in cases presenting complex scientific issues that can only be addressed with the support of expert evidence, which is time-consuming to gather.¹⁴ Moreover, it is submitted that extensions aimed at obtaining a time limit to answer that is the same as the time limit the appellant had or was granted to file his appeal brief (from the notification of the decision under appeal) should be granted to the respondent without difficulties, as a matter of equal treatment.

In accordance with Arts. R55(3) and R64(2), as modified in the 2010 and 2013 revisions of the Code, the respondent may request to the CAS Court Office that the time limit for filing the answer be *fixed after payment by the appellant of his share of the advance of costs*.¹⁵ It is submitted that such a request should be made without delay: it would run counter to procedural good faith to artificially extend the time limit for submitting the answer by filing a request pursuant to Art. R55(3) just before its expiry. A way of avoiding any abuse might be to simply suspend the time limit from the date of the request until the date of the payment of the advance of costs. In any event, the respondent should not be allowed to rely on the possibility offered by Art. R55(3) with respect to the share of the advance that the appellant may have been required to pay, pursuant to Art. R64.2(2), to substitute for the respondent's own failure to do so.¹⁶

¹⁰ Cf. R56(1).

¹¹ Cf. Art. R29.

¹² The fact that the appellant's counsel may have sent a courtesy copy of the appeal brief directly to respondent's counsel is irrelevant for the purposes of the calculation of this time limit. In other words, the relevant event for the running of time is receipt of the CAS's notification of the appeal brief. The observations made in connection with the calculation of time limits under Arts. R49 and R51(1) apply, *mutatis mutandis*, also with respect to Art. R55 (cf. Art. R49, paras. 7-16, and Art. R51, para. 3 above).

¹³ In particular, it is important to note that the request must be made *before* the expiry of the set time limit (cf. Art. R51, para. 6 above).

¹⁴ Cf. CAS 2009/A/1752, *Devyatovskiy v. IOC* and CAS 2009/A/1753, *Tsikhon v. IOC*, Award of 6 June 2010, paras. 3.16 – 3.21, where the deadline to file the respondent's answer was extended twice.

¹⁵ In CAS 2011/A/2492, *Leali v. CONI*, Award of 15 March 2012, para. 9.2, the Panel held that the twenty-day time limit runs from receipt by the respondent of the CAS's notification of the appellant's payment.

¹⁶ In spite of the fact that it is grammatically unclear, the addition of the phrase "his share" in the new wording of this provision in the 2013 version of the Code clarifies that the intention is to refer to the appellant's share.

IV. Timeliness and Number of Copies

- 11 As a result of the 2013 revisions to the CAS Code, it is important to note that the answer shall be filed *by courier or registered mail in the requisite number of copies within the relevant time limit*.¹⁷ The new Code has removed the possibility for the parties to file their written submissions only by facsimile within the time limit and to send the original by post or courier later on. In other words, the filing of written submissions by fax only is no longer sufficient for the purposes of meeting the time limit.
- 12 Conversely, it is submitted that the filing of an incorrect number of copies of the Answer is of no effect with regard to the observance of the time limit. In such a case, *a short additional deadline* should be given to the respondent for completing the filing.

V. Failure to Submit Answer

- 13 According to Art. R55(2), in the event that the respondent fails to submit his answer within the stated time limit, the *Panel may nevertheless proceed with the arbitration* and deliver an award without the benefit of a written answer or without taking into account an answer that was filed out of time.¹⁸
- 14 The award will be considered as having been *rendered by the default* only if the respondent communicates to the CAS that it does not intend to participate in the proceedings¹⁹ or if the respondent simply ignores the CAS's communications and does not appear at the hearing.²⁰ The arbitrators' authority to proceed with the arbitration in case of default of one of the parties is in accordance with Swiss arbitration law. However, the CAS must make every effort to allow the defaulting party to assert its rights,²¹ which means that it shall continue to send any communication/notification to the defaulting party throughout the proceedings, including the invitation to attend the hearing.

VI. CAS Jurisdiction

- 15 As mentioned above, Art. R55(1) directs that any objections to CAS jurisdiction must be set out in the answer. This provision reflects the principle laid down in Art. 186(2) PILS, according to which "[a] plea of lack of jurisdiction must be submitted prior to any defence on the merits."²² This means that the *respondent will be estopped from submitting any further jurisdictional challenge*, whether in the course of the CAS arbitration²³ or in the context of an action to set aside the award before the Supreme Court.²⁴
- 16 Articles R55(4) and R55(5) were introduced with the 2012 Code revision to expressly set out the *applicable principles of Swiss arbitration law regarding jurisdictional issues*.
- 17 The first sentence of Art. R55(4) provides that "[t]he Panel shall rule on its own jurisdiction" thus restating the principle of "*Kompetenz-Kompetenz*" of Art. 186(1) PILS.

¹⁷ Cf. Art. R31(3). Art. R31(4) of the 2013 edition of the Code provides for possibility of filing written submissions by electronic mail "under the conditions set out in the CAS guidelines on electronic filing". Such guidelines are not yet available (as of the time this commentary was going to press). As for the exhibits, Art. R31(5) provides that they "may be sent to the CAS Court Office by electronic mail". On all these points, cf. Art. R31.

¹⁸ Cf. CAS 2009/A/1828 & 1829, *Olympique Lyonnais v. US Soccer Federation (Bompastor)* & *Olympique Lyonnais v. US Soccer Federation (Abily)*, Award of 18 March 2010, paras. 32-35.

¹⁹ Cf. CAS 2003/A/505, *UCI v. Pitts, USA Cycling & USADA*, Award of 19 December 2003, paras. 36-37.

²⁰ Cf. CAS 2006/A/1156, *FC Molenbeek Brussels v. FC Levadia*, Award of 27 November 2009, para. 19.

²¹ Kaufmann-Kohler/Rigozzi, para. 484.

²² See Berger, above commentary on Art. 186 PILS (Chapter 2), paras. 40-41.

²³ Cf. CAS 2002/A/395, *UCI v. de Paoli & FCI*, Award of 19 November 2002, p. 5 para. 14.

²⁴ See Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 47-49. It should also be noted here that in the uncommon circumstances where a party is allowed to intervene in the proceedings pursuant to Art. R41.3 and then afforded the opportunity to file an application "having the same content as an answer as described under Art. R55" challenges to CAS jurisdiction are unlikely to be successful if the main parties have already "explicitly agreed and [given] their consent [to CAS jurisdiction] in the Appeal Brief and Statement of Defence respectively" (CAS 2008/A/1609, *Ozkan v. MKE Ankaragucu Spor Kulubu*, Award of 6 October 2009, paras. 3.2 and 6.5-6.7).

The second sentence of Art. R55(4) restates Art. 186(1bis) PILS, allowing CAS panels to rule on their jurisdiction “irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties”. Unfortunately, the English version of this provision in the Code is slightly misleading in the manner it sets out the exception to the above-stated principle: a proper translation of the relevant wording of Art. 186(1bis) PILS (and of the French version of Art. R55(4))²⁵ should read “[...] unless there are serious reasons [rather than ‘substantive grounds’] to stay the proceedings”. As already mentioned, CAS panels have interpreted the second sentence of Art. R55(4) as meaning that the mere possibility that another court seized with the case might render a different decision than that of the CAS was “manifestly not” a serious reason within the meaning of Art. 186(1bis) PILS.²⁶

The first sentence of Art. R55(5) states that the CAS “shall invite the parties to file written submissions on the matter of CAS jurisdiction” thus codifying the previous practice according to which *the appellant should be given an opportunity to file a written response to the jurisdictional challenge*.

The second sentence of Art. R55(5) deals with the so-called bifurcation of the proceedings. Pursuant to Art. 186(3) PILS “the arbitral tribunal shall, as a rule, decide on its jurisdiction by [a separate] preliminary award”. In practice, the CAS can order a bifurcation upon a reasoned request or *sua sponte* when the jurisdictional challenge is straightforward and can be easily dealt with separately in a time- and cost efficient way and/or it would otherwise be procedurally unfair to require the respondent to prepare a full-fledged submission answering also the appellant’s submissions on the merits where it appears likely that the case may not even reach the merits phase. The new wording according to which “[t]he Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits” indicates that, contrary to the stance taken by the Swiss legislator in Art. 186(3) PILS,²⁷ *in CAS arbitrations there is no presumption in favor of bifurcation*. This approach is, in our opinion, the better one in CAS appeals cases, as a bifurcation will inevitably slow down the proceedings and bring with it an inherent risk of abuse on the part of the respondent.

VII. Counterclaims and Cross-Appeals

Further to the 2010 revision of the Code, Art. R55 no longer provides that the respondent’s answer should set out “any counterclaims”,²⁸ meaning that it is *no longer possible to file counterclaims in CAS appeals procedures*. As noted in the commentary that was released by the CAS together with the revised Code, “[t]he persons and entities which want to challenge a decision [have] to do so before the expiry of the applicable time limit for appeal”.

It has been argued that the rationale for the amendment was to prevent respondents from, in effect, benefiting from a longer time limit to “appeal” (in the form of a counterclaim) against the challenged decision than the appellant himself.²⁹ While this may be correct, it is submitted that *the solution adopted with the amended version of Art. R55 may be too drastic* and should be applied only to counterclaims that

²⁵ The wording of the French version of Art. R55(4), second sentence (which is to prevail in case of discrepancy with the English version, as provided in Art. R69), is identical to that of Art. 186(1bis) PILS. The English version reads as follows: “[t]he Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings”. The French version provides that “[l]a Formation statue sur sa propre compétence. Elle statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure”.

²⁶ Cf. Art. R47, para. 43 above; CAS 2009/A/1880 & 2009/A/1881, *FC Sion v. FIFA & Al-Ahly Sporting Club*; *El-Hadary v. FIFA & Al-Ahly SC*, Award of 1 June 2010, paras. 66-68; cf. also BGer. 4A_428/2011 para 5.2.2.

²⁷ Under this provision, “[t]he arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award” (emphasis added).

²⁸ Art. R39, which applies to ordinary proceedings, has remained unchanged and thus still allows the filing of counterclaims with the respondent’s answer.

²⁹ Cf. Stincardini, p. 87.

are not related to the decision under appeal. In particular, it amounts to obliging a party who may otherwise be prepared to “live with” an unfavorable decision imposing a penalty against him (e.g., an athlete suspended for six months by his national federation for marijuana consumption) to bring a pre-emptive appeal against the decision just to safeguard his rights in case another party (e.g., WADA) were to bring an appeal requiring an increase in the penalty. The pre-emptive appeal will be withdrawn if this does not happen, but in the meantime, it will have generated costs for the sanctioned party and additional work for the CAS Court Office.³⁰ Respondents were confronted with this new provision in a number of recent cases, and the CAS has been inflexible in applying it, even where the applicable sports regulations (still) provided for counterclaims and cross-claims.³¹ Interestingly, the *current draft of the 2015 WADA Code* contains an express provision dealing with the *potentially unfair outcome* of Art. R55's prohibition of cross-claims. Under the heading “Cross Appeals Allowed”, Art. 13.2.4 of the Draft 2015 WADC, which forms part of Art. 13, entitled “Appeals”, reads as follows: “[c]ross appeals are specifically permitted in cases brought to CAS under the Code. Any party with a right to appeal under this Article 13 may file a cross appeal with the party's answer”. The Comment to Art. 13.2.4 in the Draft 2015 WADC notes that “[t]his provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired” before concluding that the proposed text of Art. 13.2.4 is meant to “[*permit*] a full hearing for all parties”.³²

³⁰ Cf. Rigozzi, *Jusletter* of 13 September 2010, paras. 40-42.

³¹ Cf., e.g., CAS 2010/A/2101, *UCI v. Duval & FFC*, Award of 18 February 2011, paras. 75-82; CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, paras. 123-131; CAS 2011/A/2349, *UCI v. Sentjens & RLVB*, Award of 29 December 2011, paras. 94-102. Cf. also CAS 2010/A/2193, *Club Cagliari Calcio v. Club Olimpia Deportivo*, Award of 15 September 2011, paras. 6.3-6.6.

³² Art. 13.2.4 Draft 2015 WADC, version 2.0.

Article R56: Appeal and Answer Complete/Conciliation

I. Purpose of the Provision

The main purpose of Art. R56(1) is to limit the parties' written submissions in appeals arbitrations to a single exchange (II.) – namely the appellant's appeal brief¹ and the respondent's answer² – in order to ensure that the resolution of the dispute is not unduly delayed.³ Conciliation according to Art. R56(2) (III.) plays a very limited role in practice as it is not suited for appeals disputes, in particular in view of the sports-governing bodies' fundamental obligation to treat all of their members equally.

II. The Principle of a Single Exchange of Submissions

As a matter of principle, in accordance with Art. R56, "the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer". This principle is aimed at ensuring the expeditiousness of appeals proceedings. The CAS Court Office reminds the appellant of this obligation in the letter acknowledging receipt of the statement of appeal and does the same for the respondent's attention in its letter acknowledging receipt of the appeal brief and fixing a time limit for the filing of the answer.⁴

However, given the short time limits within which the submissions must be filed in CAS appeals proceedings,⁵ this provision puts a *heavy burden on counsel*, which is not to be underestimated and may, depending on the circumstances, call for some adjustment.⁶ Indeed, despite all the efforts made by diligent counsel, it is not always possible to comprehensively brief a case in a single submission, in particular in complex matters requiring the gathering of witness statements and expert evidence. Hence, Art. R56(1) allows for exceptions to be made to the general rule it sets out, on two distinct bases: an agreement between the parties (A.) or a decision by the President of the Panel (B.).⁷

A. The Parties' Agreement to Deviate from Article R56

One of the main characteristics of the CAS appeals procedure is that it significantly restricts the parties' freedom to fashion the arbitration proceedings in accordance with their (agreed) preferences.⁸ From this point of view, Art. R56(1) constitutes an exception to the overall approach in appeals proceedings, as it expressly reserves the possibility that the parties may agree to depart from the general rule provided in the Code. If the parties do find an agreement, the panel is bound by that agreement.⁹ However, in practice it is *rather uncommon* for the parties to find a procedural agreement once the arbitration has started, as counsel will inevitably tend to think the other party may gain an advantage from being allowed to expand on its case.

¹ Cf. Art. R51.

² Cf. Art. R55.

³ CAS 2006/A/1088, *RBF v. IBF*, Award of 29 December 2006, para. 9.20.

⁴ The CAS Court Office reminds the parties of the rule set out in Art. R56 once again in its letter acknowledging receipt of the answer.

⁵ Cf. Arts. R51(1) and R55(1).

⁶ Rigozzi/McAuliffe, *GAR European and Middle Eastern Arbitration Review 2012*, pp. 29-30.

⁷ As the scope of these exceptions is very limited, it is suggested that counsel who have legitimate reasons to believe that it will not be possible to gather all the required evidence and to properly prepare their case within the time limits set by the Code must ask for an extension (cf. Arts. R51 and R55). If the CAS rejects the request for an extension, it is submitted that it will be easier to establish the existence "exceptional circumstances" within the meaning of Art. R56(1).

⁸ This is so, in particular, with respect to the number of arbitrators constituting the panel (cf. Art. R50), the selection of the arbitrators (cf. Arts. R48 and R55), and the appointment of the President of the Panel (Art. R54); cf., e.g., Kaufmann-Kohler/Rigozzi, paras. 286, 290 and 298.

⁹ Cf. Knoll, above commentary on Art. 182 PILS (Chapter 2), paras. 4–8.

B. The President's Authority to Grant an Exception

- 5 Given that an agreement between the parties is unlikely, the authors of the Code have also allowed for the President of the Panel to depart from the principle that the parties' written submissions must be comprehensive, but only "on the basis of exceptional circumstances". While the President naturally has *wide discretion*¹⁰ in determining what may amount to "exceptional circumstances" (1.), it is submitted that the need to safeguard the parties' fundamental procedural rights ought to always constitute an "exceptional circumstance" (2.) within the meaning of Art. R56(1).

1. The CAS Practice

- 6 It is fair to say that CAS practice is *not really consistent* as far as the President's decision to allow the parties to supplement their case after the filing of written submissions is concerned.¹¹ Since such decisions are *often unreasoned*,¹² in particular when they are made on the spot during the hearing, it is difficult to provide a comprehensive analysis of this practice. The following are some examples taken from cases in which the panel felt compelled to explain the President's decision in the award. As a threshold matter, the existence of "exceptional circumstances" *must be adduced*¹³ and established¹⁴ by the party seeking to supplement its case.
- 7 In practice, the *President of the Panel always consults with his co-arbitrators*, and the decision is often presented as a decision of the panel.¹⁵
- 8 As a matter of principle, *new evidence* should be admitted if it has become available after the time limit for filing the appeal brief or the answer.¹⁶ If the evidence in question existed already before that time but was discovered thereafter, this would constitute an *exceptional circumstance only if* the evidence in question could not reasonably be discovered and produced in time.¹⁷ Unless the panel has issued specific procedural directions in this respect, *legal authorities* do not constitute new evidence within the meaning of Art. R56 and can thus, in principle, be produced until the day of the hearing.¹⁸
- 9 *Additional submissions* are generally allowed only when the respondent's answer contains defenses that need to be rebutted in writing. For instance, if the answer contains a jurisdictional¹⁹ or procedural²⁰ challenge,²¹ a request by the appellant to respond to the challenge by a separate written submission should be easily granted. The panel will define the scope of the additional submission and will disregard any portions of that submission that exceed the prescribed perimeter.²²

¹⁰ CAS 2007/A/1290, *Diethart v. IOC*, Award of 4 January 2008, para. 39.

¹¹ See, e.g., CAS 2009/A/1835, *CONI v. Priamo*, Award of 11 November 2009, para. 41, allowing the late production of a document on the ground that the other party was aware of the existence of such document, without indicating why this should be considered an exceptional circumstance.

¹² CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 3.12; CAS 2007/A/1370 & 1376, *FIFA, WADA v. CBF, STJD & Dodo*, Award of 11 September 2008; CAS 2009/A/1940, *BAP v. FIBA & SBP*, Award of 7 April 2010, para. 15.7.

¹³ CAS 2008/A/1621, *Iraqi Football Association v. FIFA & Qatar Football Association*, Award of 29 September 2008, para. 29.

¹⁴ CAS 2009/A/1920, *FK Pobeda, Zabranec & Zdravski v. UEFA*, Award of 15 April 2010, para. 50.

¹⁵ CAS 2007/A/1290, *Diethart v. IOC*, Award of 4 January 2008, para. 40.

¹⁶ CAS 2010/A/2172, *Oriekhov v. UEFA*, Award 18 January 2011, para. 47, regarding testimonies given in a context external to the proceedings before the CAS.

¹⁷ TAS 2001/A/318, *Virenque v. Swiss Cycling*, Award of 23 April 2001, para. 32.

¹⁸ CAS 2006/A/1192, *Chelsea Football Club Limited v. Mutu*, Award of 21 May 2007, paras. 50-51; more formalistic, CAS 2009/A/1926 & 1930, *WADA v. ITF & Gasquet*, Award of 17 December 2009, para. 3.26.

¹⁹ TAS 98/199, *Real Madrid v. UEFA*, Award of 9 October 1998, para. 19.

²⁰ CAS 2004/A/748, *ROC, Ekimov v. IOC, USOC, Hamilton*, Award of 27 June 2006, para. 48.

²¹ Cf. Art. R55(1).

²² CAS 2009/A/1912&1913, *Pechstein v. ISU; Deutsche Eischnellauf Gemeinschaft e.V. v. ISU*, Award of 25 November 2009, para. 30.

Amendments to the prayers for relief should be accepted only in exceptional cases and should be limited to clarifications of the original requests. For instance, if the appellant initially sought the setting aside of the decision under appeal, he should be allowed to later request that the decision be only partially set aside or replaced with a new, different decision, or to add a declaratory claim that was already implicit in the reasoning supporting the request to have the decision set aside. 10

The practice is generally less restrictive where *new legal arguments* are concerned. After all, arbitration under Swiss law is governed by the *jura novit curia* principle.²³ New arguments should be excluded only when it is obvious that they could have been made at a previous stage and that, under the circumstances, the delay puts the other party at a procedural disadvantage.²⁴ Procedural good faith commands that ambushing by new arguments or constantly “evolving” ones should be proscribed, especially when coming from the governing body charging an athlete in disciplinary cases. 11

2. *The Need to Safeguard the Parties’ Fundamental Procedural Rights*

Experience shows that each panel President has his own view of how rigorously Art. R56’s requirement of “exceptional circumstances” should be applied. It is submitted that the guiding principle should always be the strict observance of the parties’ fundamental procedural rights. Accordingly, *rebuttal evidence should be allowed* in any event,²⁵ but only upon a proper application. 12

Similarly, the existence of exceptional circumstances should be accepted when it appears that *the CAS did not grant a request for an extension that would have afforded the requesting party with the time necessary to properly prepare and present its case with its written submission.* 13

III. Conciliation and Settlement

Article R56(2) provides that “the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties”. This provision plays a limited role in practice, as *sports-governing bodies are not inclined to “settle” disciplinary cases*. In those rare disciplinary cases that are settled, the sports-governing body involved will not generally be keen to have the settlement made public, as this could trigger similar requests from other athletes. Conciliation is much more useful and quite often used in appeals proceedings concerning FIFA’s decisions in transfers matters, in particular when the main issue at stake is the amount of the compensation to be paid. In these instances too, the parties tend to ask that any settlement remain confidential. 14

Before acting as conciliators under Art. R56(2) the arbitrators should make sure that the parties understand the reasons and the scope of their intervention, and that in case the conciliation attempt should fail, the parties agree to waive any right to challenge the arbitrators (or the award) on the ground that the arbitrators acted as settlement facilitators during the arbitration.²⁶ 15

²³ CAS 2005/A/983 & 984, *Club Atlético Peñarol v. PSG*, Award of 12 July 2006, para. 58. On the role played by the principle *jura novit curia* in Swiss international arbitration, cf. Arroyo, *Jura Novit Arbitrator*, pp. 44-54 (with a comprehensive overview and critical analysis of the Supreme Court’s case law).

²⁴ CAS 2001/A/354, *Irish Hockey Association (IHA) v. Lithuanian Hockey Federation (LHF) and International Hockey Federation (FIH)* & CAS 2001/A/355, *Lithuanian Hockey Federation (LHF) v. International Hockey Federation (FIH)*, Award of 15 April 2002, para. 10, speaking of “estoppel”.

²⁵ CAS 2004/A/717, *International Paralympic Committee v. WADA & Brockman*, Award of 8 June 2005, paras. 37-38.

²⁶ Cf. Kaufmann-Kohler/Rigozzi, paras. 31a-31c.

Article R57: Scope of Panel's Review/Hearing

I. Purpose of the Provision

- 1 Article R57 establishes a central principle of the CAS appeals system, namely the power of CAS panels to hear the cases submitted to them *de novo* (II.). It also regulates the main questions relating to the oral hearing (III.). The broad powers made available to the CAS under this provision are motivated by a desire to achieve procedural economy, while ensuring that the parties can receive a timely, fair, and final decision – in other words, that the CAS appeals procedure constitutes a proper and effective legal remedy.¹

II. The Scope of the Panel's Review

- 2 In substance, appeals before the CAS are *de novo* hearings, meaning that the panels may make *new decisions* in matters under appeal, if necessary disregarding and/or replacing all or part of the findings and conclusions of the previous instances. Art. R57(1) determines not only “the scope of [the] Panel's review”, as stated in its heading (A.), but also the nature of the decisions that panels can take when seized with appeals under the CAS Code (B.).

A. The Panel's Power of Examination (Pouvoir de Cognition)

1. De Novo Hearing of the Case

- 3 According to Art. R57(1), first sentence, the “[p]anel has full power to review the facts and the law”. The CAS has stated in several cases that the panels' scope of review is “basically unrestricted”,² meaning that the CAS will in substance “re-hear” the matter afresh, as if it had not been previously heard or decided.³ Accordingly, the CAS is not bound by the factual or legal findings of, or the evidence adduced before, the previous instance.⁴
- 4 The panel can therefore (if necessary) consider *new facts and new evidence* produced by both the appellant and the respondent.⁵ That said, it must be noted that the 2013 edition of the Code contains a significant amendment in this respect, as Art. R57(3) now provides that “[t]he panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered”. It is submitted that this new provision raises delicate questions and should be applied with restraint, so as not to impinge upon the fundamental principle of *de novo* review by the CAS. Indeed, as further illustrated by the discussion below,⁶ it should be underscored that the CAS's power to conduct a fully *de novo* review of the case and the associated “curing” effect of such review provide important grounds for validly excluding the jurisdiction of the state courts over sports disputes. While the new provision of Art. R57(3) arguably makes sense in those cases where the CAS acts as a second instance tribunal, reviewing a decision rendered after full-fledged proceedings by a proper arbitral tribunal in the first instance, in appeals proceedings against decisions

¹ BGer. 4A_386/2010 para. 5.3.2, *Rev.Arb.* 2011, p. 826, with comments by Besson.

² CAS 2003/A/507, *Strahija v. FINA*, Award of 9 February 2004, para. 7.3.1; CAS 2004/A/607, *B. v. IWF*, Award of 6 December 2004, para. 43; CAS 2004/A/633, *IAAF v. FFA & Chouki*, Award of 2 March 2005, para. 6.9; CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann; Ahlmann v. FEI*, Award of 30 April 2009, para. 66.

³ CAS 2008/A/1718 to CAS 2008/A/1724, *IAAF v. All Russia Athletic Federation & Yegorova et al.*, Award of 18 November 2009, para. 166.

⁴ Cf., e.g., CAS 96/156, *Foschi v. FINA*, Award of 6 October 1997, unreported, para. 10.3; CAS 2002/A/383, *IAAF v. Dos Santos*, Award of 27 January 2003, para. 71.

⁵ CAS 2004/A/651, *French v. Australian Sports Commission and Cycling Australia*, Interlocutory Award of 30 March 2005, paras. 17-20. See also CAS 2004/A/714, *Fazekas v. IOC*, Award of 31 March 2005, para. 57; CAS 2004/A/607, *B. v. IWF*, Award of 6 December 2004, para. 3.

⁶ Cf. in particular, paras. 9-11 and 22 below.

rendered by the sports-governing bodies, CAS Panels should use the discretion granted to them by Art. R57(3) only in those instances where the adducing of pre-existing evidence constitutes a clearly abusive or otherwise unacceptable procedural conduct by a party.

Furthermore, to the extent that the current draft of the 2015 WADC is not altered (in relevant part) 5 during the final consultation process, CAS arbitrators will have *no discretion as far as new evidence is concerned in doping cases*. Indeed, the draft new WADC expressly states in a new subsection to Art. 13.1 (Decisions Subject to Appeal), that “[i]n making its decision [on appeal], CAS shall not give deference to the findings made, or discretion exercised, by the body whose decision is being appealed”. The Comment to this sub-section (Art. 13.1.2) reads as follows: “CAS proceedings are *de novo*. The [proceedings by first instance Anti-Doping Organizations] do not limit the evidence or carry weight in the hearing before CAS”.⁷

With regard to the law, the CAS is *free to decide irrespective of the arguments put forward by the parties*. 6 From this point of view, Art. R57 merely confirms that the principle *jura novit curia* is fully applicable under Swiss arbitration law.⁸

That said, as a general rule, the CAS considers that its *power of review is limited by the object of the dispute that was before the previous instance*.⁹ For example, if the first instance proceedings were limited to a specific disciplinary offence, the CAS will not accept to hear claims based on a separate offence that was not “dealt with in the Appealed Decision”.¹⁰ However, this principle does not apply when the arbitration agreement allows “third parties” to appeal a decision. If the anti-doping regulations of a sports-governing organization provide that WADA can appeal to the CAS against the decisions of that organization’s internal anti-doping commission or other similar adjudicating body, CAS panels can proceed and make a new decision, even if the internal body had in fact avoided or refused to rule on (all or part of) the merits of the case.¹¹

As a final matter, it bears pointing out that Art. R57 does not alter each CAS panel’s *obligation to render a decision that does not go “beyond the claims submitted to it”* within the meaning of Art. 190(2)(c) PILS.¹²

2. Procedural Implications

An important implication of the *de novo* power of review, which is well-entrenched in CAS jurispru- 9 dence, is that any violations of procedural rights at first instance can be “cured” by a full appeal to the CAS.¹³ The CAS has elaborated on this “*curing effect*” in the following terms:¹⁴

⁷ Art. 13.1.2, Draft 2015 WADC (version 2.0), under the heading “CAS Shall Not Defer to the Findings Being Appealed”.

⁸ The only limitation imposed by the Swiss Federal Supreme Court relates to exceptional circumstances requiring the arbitrators to seek the parties’ views as to points of law; this is so when they contemplate relying, for their decision, on “an authority or legal consideration which was not referred to in the proceedings and the relevance of which could not therefore possibly have been anticipated by either party [...]” (BGer. 4A_400/2008 paras. 3.1 and 3.2; *Swiss Int’l Arb.L.Rep* 2009, pp. 85-86).

⁹ CAS 2007/A/1433, *Di Luca v. CONI*, Award of 30 April 2008, para. 36; CAS 2006/A/1206, *Zivadinovic v. Iraqi Football Association*, Award of 2 April 2007, para. 25.

¹⁰ CAS 2007/A/1426, *Gibilisco v. CONI*, para. 61, and the references provided therein.

¹¹ CAS 2007/A/1396 & 1402, *WADA & UCI v. Valverde & RFEC*, Award of 31 May 2010, para. 7, confirmed by the Swiss Supreme Court upon a jurisdictional challenge (BGer. 4A_386/2010 para. 5.3.2, *Rev.Arb.* 2011, p. 826, with comments by Besson).

¹² Cf. Arroyo, above commentary on Art. 190(2)(c) PILS (Chapter 2), paras. 55–61; cf. CAS 2008/A/1612, *Rasmussen v. FMC*, Award of 22 January 2009, para. 38.

¹³ The “curing effect” of a full appeal is a long-standing principle that has consistently been affirmed in the CAS case law. See, among many others, CAS 94/129, *USA Shooting & Quigley v. International Shooting Union (UIT)*, Award of 23 May 1995, para. 59; CAS 98/208, *N., J., Y., W., v. FINA*, Award of 22 December 1998, para. 10; CAS 98/211, *B. v. FINA*, Award of 7 June 1999, para. 8. For a more recent case, see CAS 2009/A/1920, *FK Pobeda, Zabrcanec & Zdraveski v. UEFA*, Award of 15 April 2010, para. 87.

¹⁴ CAS 2006/A/1177, *Villa FC v. B.93 Copenhagen*, Award of 28 May 2007, para. 19. This principle is also in line with the decisions of the European Court of Human Rights, which has held that an adjudicatory body’s violation of Art.

“The virtue of an appeal system which allows for a rehearing before an appealed body is that issues relating to the fairness of the hearing before the Tribunal of First Instance ‘fade to the periphery’ (CAS 98/211, published in Digest of CAS Awards II, pp. 255 at 264, citing Swiss doctrine and case law). Furthermore, the case law of the Swiss Supreme Court clearly establishes that any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised (see [BGE] 124 II 132, especially p. 138; [BGE] 118 Ib 111, especially p. 120 and [BGE] 116 I a 94, especially p. 95).”

- 10 Since the availability of a full-fledged appeal to the CAS has the effect of remedying prior procedural flaws, CAS panels will not entertain arguments alleging violations of due process by the first instance hearing bodies.¹⁵ For example, the CAS practice shows that the following procedural deficiencies were (or could be) cured: a violation of the right to be heard, in all of its forms, in particular the fact for a party of not having been afforded an opportunity to be heard at first instance;¹⁶ the lack of, or insufficient reasoning in the impugned decision and defects in the administration of evidence;¹⁷ or other deficiencies/omissions in the evidentiary proceedings as conducted by the first instance hearing body,¹⁸ and more generally any breach of “natural justice”.¹⁹
- 11 Some CAS panels have accepted the “curing” principle with some reluctance.²⁰ In this respect, there is, indeed, a concern that a disciplinary body’s violation of fundamental procedural rights may go unpunished if the CAS simply issues a new decision.²¹ The CAS has addressed this problem, to a certain extent, by drafting its decisions in such a way as to educate²² or warn²³ sports-governing bodies about respecting the principles of due process. Furthermore, it is submitted that concerns related to the enforcement of the obligations of sports federations and/or their disciplinary bodies must cede to the *overarching goal of Art. R57, which aims to ensure procedural economy and efficiency*.²⁴ If the CAS did not have full powers of review, it would be forced to refer decisions back to the previous instance each time an athlete could show that his fundamental procedural rights have not been duly observed, which, unfortunately, is not such a rare occurrence in sports matters. The resolution of sports disputes would be significantly delayed,²⁵ creating uncertainty for the parties, especially athletes, and increasing the costs of the proceedings.²⁶

6(1) ECHR will effectively be cured if its decisions are subject to “subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Art. 6(1)” (*Wickramsinghe v. The United Kingdom*, Application No. 31503/96, The European Commission of Human Rights (First Chamber), 9 December 1997, para. 41, cited in CAS 2009/A/1920, *FK Pobeda, Zabrcanec, Zdraveski v. UEFA*, Award of 15 April 2010, para. 87).

¹⁵ CAS 94/129, *USA Shooting & Quigley v. International Shooting Union (UIT)*, Award of 23 May 1995, para. 59; CAS 98/208, *N., J., Y. & W. v. FINA*, Award of 22 December 1998, para. 11.

¹⁶ CAS 2004/A/549, *Deffer & RFEG v. FIG*, Award of 27 May 2004, paras. 30-31.

¹⁷ CAS 2002/A/340, *S. v. FIG*, Award of 19 March 2002, para. 17.

¹⁸ CAS 2003/A/524, *Duda v. RLVB*, Award of 1 April 2004, para. 24.

¹⁹ CAS 2003/O/486, *Fullham FC v. Olympique Lyonnais*, Award of 19 December 2003, paras. 28 and 50-51.

²⁰ CAS 2000/A/290, *Xavier & Everton FC v. UEFA*, Award of 2 February 2001, para. 8.

²¹ Rigozzi, para. 1086. Along the same lines, the Panel in *Quigley* noted that “[i]t would obviously be wise to ensure that accused competitors are given a satisfactory opportunity to be heard from the start, so that they do not feel impelled to appeal out of frustration, but that is another matter” (cf. above, footnote 15).

²² CAS OG 96/005, *Andrade [II], W. & L. v. NOC Cap Verde*, Award of 1 August 1996, para. 8.

²³ See, e.g., CAS 2000/A/290, *Xavier & Everton FC v. UEFA*, Award of 2 February 2001, para. 8.

²⁴ Rigozzi, para. 1086.

²⁵ The serious delays that may arise from repeated challenges were exemplified by the *FC Sion v. Swiss Football League* debacle (see Rigozzi, paras. 1076-1078). In that case, the decision by the football association to exclude the club from a competition was set aside three times by three different tribunals, but the dispute could still not be definitively settled. Absent an express provision to this effect in the governing rules, the last tribunal was left to try and find a basis to enable it to revise the association’s decision (as opposed to simply setting it aside as provided in the rules). Art. R57 of the Code is intended to prevent this type of situations from occurring.

²⁶ CAS 98/214, *B. v. FIJ*, Award of 17 March 1999, para. 10.

Such an outcome would seriously compromise the CAS's efforts to create a dispute resolution system that is responsive to the time pressures and specific requirements of competitive sport.

3. *Limitations of the Panel's Power of Examination*

a. *Arbitral Nature of the Proceedings*

CAS panels often emphasize that their unrestricted power of review is reinforced by the power to order 12 at all times, if they deem it useful to complete the parties' submissions, the production of additional documents and/or the taking of further evidence, be it in the form of witness testimonies, through the appointment of experts or by any other appropriate means.²⁷ That said, the CAS's powers are not inquisitorial. The panel, as an arbitral tribunal, will not review the decision under appeal "any further than the objections raised by the Appellant" (in accordance with the so-called "*Rügeprinzip*")²⁸ and will "investigate the facts of its own accord [only] if this appears appropriate on the basis of the parties' submissions".²⁹

b. *Limitations Contained in the Applicable Regulations?*

Given that Art. R57(1) is a central provision in the CAS appeals system,³⁰ *arbitration clauses providing for* 13 a "limited appeal" to the CAS are unenforceable, unless such limitations have been specifically approved by the ICAS.³¹ Hence, the CAS has refused to uphold Rule 60.27 of the International Association of Athletics Federations' (IAAF) Competitions Rules 2004-2005, which stipulated that, on the question of "exceptional circumstances" in doping cases, the CAS could only review the materials presented before the IAAF Doping Review Board and its review of the Board's determinations was limited to very narrow grounds.³² The CAS held that this rule was not compatible with the power of review granted to its panels under Art. R57 of the Code.³³

That said, the CAS has allowed certain derogations from Art. R57. For instance, a CAS panel accepted 14 Art. 24.2 of the Rules of the New Zealand Sports Disputes Tribunal which provides that, in the absence of any specific provision for a full appeal to the CAS in the relevant sports regulations, the only grounds for appeal against a decision by the Tribunal are a breach of natural justice or the incorrect application of the law.³⁴ In our view, such (isolated) awards are incorrect. Even if one were to consider Art. R57 as a non-mandatory provision within the CAS arbitration system, CAS panels should in any event review the sports decisions submitted to them with at least the same powers of review as those that would be exercised by the competent adjudicating authority in the absence of an arbitration agreement (i.e., before the state courts). Given the mandatory nature of sports arbitration, a more "self-restraining" approach would be tantamount to a denial of justice. A narrower power of review is however possible, and

²⁷ CAS 2008/A/1555 & CAS 2008/A/1779, *UCI v. Kashechkin & CFRK; Kashechkin v. CFRK & UCI*, Award of 10 August 2009, para. 70.

²⁸ Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2), paras. 9, 67–69.

²⁹ CAS 2003/A/455 *W. v. UK Athletics*, Award of 21 August 2003, para. 13.

³⁰ Rigozzi, para. 1088.

³¹ CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann; Ahlmann v. FEI*, Award of 30 April 2009, paras. 62–69.

³² Rule 60.27 of the then IAAF Competitions Rules, Chapter 3, Doping, read as follows: "[t]he grounds for interfering with a Doping Review Board decision include: a) that no factual basis existed for the Doping Review Board's determination; b) the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts of the case; c) that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach."

³³ CAS-OG 04/003, *Edwards v. IAAF & USATF*, p. 5, para. 2.3.8, *Digest of CAS Awards – Salt Lake City & Athens*, pp. 89, 93, para. 8. Although the CAS could have justified its decision by simply upholding the supremacy of the arbitration rules over the arbitration agreement itself, the panel added another argument, holding that Rule 60.27 violated a mandatory provision of the WADC, namely Art. 13, which guarantees a full appeal to the CAS.

³⁴ Rigozzi, para. 1088, citing CAS [NZ] *Yachting New Zealand v. Murdoch, Cooke & Gair*, Award of 27 April 2004, para. 4.1.

arguably desirable,³⁵ when the decision under appeal is already an arbitral award, rendered by an independent arbitration tribunal, itself vested with a full power of review.

c. *Field-of-Play Disputes*

- 15 There is an inherent, sport-specific limitation to the CAS panels' power of review. The purpose of Art. R57(1) is clearly not to allow the CAS to review the decisions made by referees, umpires and other officials during competitions. While it is generally admitted that the traditional distinction between "rules of law" and "rules of the game" is not sufficiently nuanced to take into account the professional and financial interests at stake in modern sports,³⁶ the fact that *referee calls and other so-called field-of-play decisions are not subject to review is an inherent feature of sports competition*.³⁷ This is a matter of mere common sense; if all such decisions were fully reviewable, then the final results of competitions would remain unknown long after the end of the relevant race or game: they would be definitively fixed only months later, with the arbitrators' decision. This is all the more true nowadays, as the technological means available (instant video footage, allowing for zooming-in and out, replay in slow motion, etc.) make it possible to scrutinize and challenge virtually all field-of-play decisions. The CAS has consistently upheld the principle that "field-of-play" decisions are not subject to review, or only to a very limited extent. Thus, for instance, a CAS panel ruled that a ring judge's determination that a boxer was to be disqualified due to an alleged low blow was not reviewable on appeal.³⁸ A similar "immunity" was recognized by another CAS panel to the judges' finding, during a race, that a walker had "lifted", in breach of the rules of walking.³⁹
- 16 Although the terminology used to describe all such non-reviewable decisions may vary ("technical rules", "rules of the game", "judgment calls", etc.), the fundamental need to define and circumscribe the scope of the autonomy of these "field-of-play" rules and decisions is intuitive. The definition of *what falls within the ambit of the "field-of-play" must primarily be sought in the applicable sports regulations*. For instance, Art. 67(3)(a) of the FIFA Statutes explicitly provides that "the CAS [...] does not deal with appeals arising out of violations from the Laws of the Game". If the applicable sports regulations do not contain a clear definition of the "field-of-play" rules and decisions that are not subject to review, "it is for the arbitral tribunal [...] to interpret the regulations and to decide e.g. whether their rationale implicitly excludes certain rules and decisions from being reviewed and within what limits".⁴⁰
- 17 That said, CAS jurisprudence recognizes that there may be *exceptions to the "immunity" of field-of-play decisions*. For instance, CAS panels have held that a decision to disqualify a competitor should be subject to review if it was taken in bad faith⁴¹ or arbitrarily,⁴² or if it was adopted in "violation of the law, social rules or general principles of law".⁴³ How exactly a panel should determine whether this threshold has been crossed is not entirely well-established. What is clear, however, is that there must be particular circumstances, in addition to the simple fact that the decision at stake is "wrong".⁴⁴ Such circumstances could be, for instance, factors related to the conduct of the umpire/referee himself, such as obvious bias,

³⁵ Cf. para. 21 below.

³⁶ *Kindle v. Fédération Motocycliste Suisse*, BGE 118 II 12 para. 2.

³⁷ CAS 2004/A/704 *Young v. FIG*, Award of 21 October 2004, para. 4.7.

³⁸ CAS-OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4.

³⁹ CAS-OG 00/013, *Segura v. IAAF*, Award of 30 September 2000, *Digest of CAS Awards – Sydney 2000*, p. 134.

⁴⁰ CAS 2009/A/1783, *Woestenborghs v. ITU*, Award of 14 October 2009, para. 124.

⁴¹ CAS-OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4; CAS-OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, p. 71; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

⁴² CAS 2004/A/704, *Young v. FIG*, Award of 21 October 2004, paras. 4.5-4.6; CAS-OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, p. 71; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

⁴³ CAS-OG 1996/06, *Mendy v. AIBA*, Award of 1st August 1996, para. 4; CAS-OG 00/013, *Segura v. IAAF*, Award of 30 September 2000, *Digest of CAS Awards – Sydney 2000*, 2001, p. 134.

⁴⁴ CAS-OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70.

bribery or corruption.⁴⁵ In some cases, objective circumstances can also call for a review of the decision, namely when the latter is fundamentally at odds with general principles of law. Putting this principle into effect, CAS panels have ruled that, in light of its consequences for the sanctioned athlete as well as the other competitors, the decision at issue ought not to be manifestly disproportionate or arbitrary, nor result in an unjustified discrimination against the athlete.⁴⁶ This kind of formulation impliedly calls for a balancing of the interests of all those concerned or affected by the decision (the relevant federation(s), the athlete who is subject to the sanction and his competitors). All in all, however, the threshold for a field-of-play decision to be deemed reviewable is rather high.⁴⁷

d. Discretionary and Experience-Based Decisions

Traditionally, state courts are extremely cautious in reviewing internal decisions by sports- governing 18
bodies. As an Australian arbitrator (nicely) put it, the same is not necessarily true of CAS arbitrators:

“I am conscious of the caution held out to me, by Counsel for the Australian Cycling federation, that I should be careful not to readily trespass into the selection processes of a professional cycling organization which processes clearly embrace a wealth of experience and expertise that I cannot hope to share. Counsel referred me to two decisions of the Courts during the course of which the learned judges had expressed such caveats (*Sheehy v. Judo federation of Australia Inc.*, unreported, Equity Division, Supreme Court of N.S.W., 1 December, 1995, and *McInnes v. Onslow-Fane* (1978) 1 WLR 1520). Those judgments convey the caution which the Courts of law traditionally exercise in interfering with the decisions of domestic bodies. [...] I agree with the sentiments so expressed, but there must be necessarily a rider placed upon them in the context of this arbitration. The CAS is not a court of law. It is an arbitral tribunal set up to entertain disputes referred to it (inter alia) by agreement of the domestic body if the agreement between the parties requires it to do so. In this case the parties have executed an ‘appeal agreement’ in which they agree to refer to the exclusive jurisdiction of the CAS any dispute regarding (inter alia) ‘the nomination of an athlete by the ACF to be a member of the 1996 Olympic Team’. By their agreement the parties thus want the selection decision scrutinised by this Tribunal [...]”⁴⁸

It is submitted that sports-governing bodies are prepared to accept a greater measure of intervention by 19
the CAS. As a specialized tribunal, the CAS is assumed to be familiar with the specificities of sports, and thus capable of *substituting its own judgment for that of the governing bodies, even when the decisions at stake require some sports-specific knowledge*. However, some *restraint is advisable* when, under the applicable rules, the first instance adjudicative body enjoyed a great deal of discretion, in particular when the manner in which this discretion is to be exercised involves a sport-specific judgment.

The main area where discretion plays an important role is in *selection disputes*. The extent of the arbitra- 20
tors’ scrutiny regarding decisions in this area depends on the degree of discretion that the applicable rules afford to the selection body. Where a selection body is to apply purely *objective criteria*, CAS panels will be free to review its decisions. When the applicable rules provide that the selection authority retains some degree of discretion or if they call for the application of *subjective criteria*, the CAS will not intervene in the selection process, unless it is established that the selection authority abused its discretion or acted in an arbitrary manner,⁴⁹ for instance by deliberately changing the applicable criteria during the selection process in order to favor an athlete or team over others.⁵⁰

⁴⁵ CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 30.

⁴⁶ CAS–OG 00/004, *COC & Kibunde v. AIBA*, Award of 18 September 2000, *Digest of CAS Awards – Sydney 2000*, 2001, para. 12. Cf. also CAS 2001/A/354, *IHA v. FIH* and 2001/A/355 *LHF v. FIH*, Award of 15 April 2002, CAS Digest III, p. 489, 497; CAS 93/103, *SC Langnau v. LSHG*, Award of 15 November 1993, CAS Digest I, p. 307, 313.

⁴⁷ CAS–OG 02/007, *KOC v. ISU*, Award of 23 February 2002, *Digest of CAS Awards – Salt Lake City 2002 & Athens 2004*, 2004, p. 70; CAS 2004/A/727, *De Lima BOC v. IAAF*, Award of 8 September 2005, para. 29.

⁴⁸ CAS 96/153, *Watt v. ACF & Tyler-Sharman*, Award of 22 July 1996, CAS Digest I, p. 340.

⁴⁹ CAS–OG 06/002, *Schuler v. Swiss Olympic Association*, Award of 12 February 2006, paras. 18–19.

⁵⁰ CAS–OG 06/008, *Dal Balcon v. CONI & FISL*, Award of 18 February 2006, para. 5.10.

- 21 In *doping cases*, the CAS has ruled that “[i]n respect to disputes relating to the grant or denial of a [Therapeutic Use Exemption (TUE)]⁵¹ the Panel confirms that the exercise of the jurisdiction conferred upon it by the pertinent arbitration clause and by the Code must be restrained [as follows]: [the] role of the CAS Panel is not that of substituting itself for the TUE Committee of the relevant anti-doping organization [...]”⁵²

e. Deference

- 22 As already mentioned, Art. R47(2) allows the parties to bring appeals before the CAS against decisions rendered by first instance arbitral tribunals.⁵³ Pursuant to Art. R57, the CAS will conduct a *de novo* review of the first arbitral award, which means in particular that “it is the duty of the [CAS] Panel to make its independent determination of whether the Appellant’s contentions are correct, not to limit itself to assessing the correctness of the [previous] award”⁵⁴ That said, it is submitted that in cases pertaining to Art. R47(2), the *findings of the first-instance arbitral panels are entitled to some deference*,⁵⁵ unless it appears that significant new evidence has been introduced before the CAS by WADA and/or by the relevant international federation (which were not parties to the first, national-level, arbitration proceedings).

B. The Panel’s Decision-Making Power

- 23 Importantly, Art. R57 provides the CAS with a choice: “the Panel [...] may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance” (1.). Here again, Art. R57 vests CAS panels with wider powers than those normally enjoyed by the courts, notably when the sports-governing body having issued the decision under challenge is incorporated in Switzerland (2.).

1. New Decision versus Annulment

- 24 Given its ability to make an independent determination, the CAS is not limited to assessing the correctness of the challenged decision, but can also issue a *new decision* based on the applicable regulations.⁵⁶ In normal circumstances, the CAS will render a new decision to replace the challenged decision. As already mentioned, this is the solution that is more frequently adopted in practice, as it helps achieve a timely resolution of the dispute.
- 25 In exceptional cases, however, despite its power to make a *de novo* determination, the CAS may deem it preferable to *annul the decision and refer the case back to the previous instance*.⁵⁷ This solution may be sensible in cases where the disciplinary body that issued the first instance decision enjoys broad discretion in its determinations and/or when the decision in question rests on considerations that are subjective in nature, e.g. in selection disputes.⁵⁸

⁵¹ As explained on the WADA website, “[a]thletes, like all others, may have illnesses or conditions that require them to take particular medications. If the medication an athlete is required to take to treat an illness or condition happens to fall under the Prohibited List, a Therapeutic Use Exemption (TUE) may give that athlete the authorization to take the needed medicine” (see <<http://www.wada-ama.org/en/Science-Medicine/TUE/QA-on-Therapeutic-Use-Exemptions/>>).

⁵² CAS 2004/A/717, *International Paralympic Committee v. Brockman & WADA*, Award of 8 June 2005, para. 51.

⁵³ Cf. Art. R47, para. 46 above.

⁵⁴ CAS 2007/A/1394, *Landis v. USADA*, Award of 30 June 2008, p. 6 at the end.

⁵⁵ Cf. CAS 2008/A/1473, *Warren v. USADA*, Award of 24 July 2008, para. 134 (on appeal from an award rendered by a North American Court of Arbitration for Sports Panel in arbitration proceedings administered by the AAA).

⁵⁶ Rigozzi, para. 1080.

⁵⁷ Rigozzi, p. 556 (footnote 3018); CAS 2001/A/340, *S. v. FIG*, Award of 19 March 2002, para. 17, referring to CAS 2000/A/281, *Haga v. Fédération Internationale de Motocyclisme (FIM)*, Award of 22 December 2000, and CAS 2000/A/290, *Xavier & Everton v. UEFA*, Award of 2 February 2001.

⁵⁸ CAS-OG 06/008, *Dal Balcon v. CONI & FISI*, Award of 18 February 2006, para. 5.11. In this case, the Panel noted that, as such, the original selection rule was discretionary in nature, and that if it were not “under a time pressure not normally found in selection proceedings [it] might have referred the matter back to the [selection body] for reconsideration”.

2. Relationship with Article 75 CC

As many international sports federations and other sports-governing bodies are incorporated as associations under Swiss law within the meaning of Arts. 60-79 CC, the powers granted to the CAS under the Code inevitably give rise to the question of the relationship between Art. R57 and Art. 75 CC, the provision governing challenges against Swiss associations' decisions before the ordinary courts. According to the Swiss Federal Supreme Court, judicial powers of review under Art. 75 CC are limited, to the extent that courts of law can only affirm or set aside the decisions issued by associations (so-called "*effet cassatoire*").⁵⁹ As a result, any new and revised decision must be taken by the association itself. The underlying rationale for this restriction is to protect the autonomy of associations from undue interference by the state.

While some scholars maintain that the "*effet cassatoire*" of Art. 75 CC is mandatory as a matter of Swiss law,⁶⁰ it is submitted that the parties' agreement to arbitrate under (Art. R47 of) the CAS Code prevails over the default rules that would apply in the absence of an arbitration agreement. Indeed, the rationale for restricting the courts' powers, i.e., to protect the autonomy of associations, becomes moot when it is the association itself that has decided to include an arbitration clause in its own statutes or regulations. By agreeing to accept the arbitral jurisdiction of the CAS, sports associations necessarily accept the fundamental principles of the CAS Code, including that of *de novo* review in appeals proceedings.⁶¹

III. The Hearing

A. The Panel's Directions

In line with Art. R57(2), after the filing of the appeal brief and the answer, CAS panels generally issue the following standard procedural directions: "[t]he parties are invited to inform the CAS Court Office, by [date], whether their preference is for a hearing to be held in this matter or for the Panel to issue an award based on all the parties' written submissions. In accordance with Article R57 of the Code, it will in any event be for the Panel to decide whether to hold a hearing". Experience shows that *appellants almost systematically request a hearing*, as this will be their only opportunity to rebut the factual and legal arguments contained in the respondents' answer.

Unless the parties agree that a hearing is not necessary, CAS panels will practically always decide to hold one.⁶² If they do, they will issue a so-called "Order of Procedure" including a standard paragraph to the effect that "in accordance with Article R57 of the Code, the parties, experts and witnesses, if any, will be heard at the hearing, which will be held: on [date] at [time] at [location⁶³]. It is the responsibility of the parties to convene the witnesses and/or experts as well as the interpreters, if any, at the hearing and to ensure their presence at the expenses of the party which has requested their attendance". This order constitutes the "minimum requirement" with respect to the directions the panel shall issue according to Art. R44.2(1). Traditionally, additional directions are issued only if the parties disagree in advance on the conduct of the hearing. In litigious cases, CAS panels have seen the benefits of holding a pre-hearing conference to solve as many procedural and organizational issues as possible ahead of the hearing.⁶⁴

⁵⁹ *Kindle v. Fédération Motocycliste Suisse*, BGE 118 II 12 para. 1.c.

⁶⁰ Scherrer, *SpuRt* 2003, p. 127.

⁶¹ CAS 2008/A/1700 & CAS 2008/A/1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Ahlmann; Ahlmann v. FEI*, Award of 30 April 2009, para. 66; CAS 2005/A/847, *Knauss v. FIS*, Award of 20 July 2005, para. 7.1.: "since the powers of the present court of arbitration are of a private nature, not of a state nature, there is, in the Panel's opinion, from the very outset, an absence of any legitimate grounds for application of Art. 75 CC in the context of the present proceedings".

⁶² Cf. paras. 37-40 below.

⁶³ Generally, hearings are held at the CAS headquarters in Lausanne (*Chateau de Béthusy*), unless travel and/or other housekeeping/organizational reasons make it more efficient to hold the hearing in a different location.

⁶⁴ Martens Dirk-Reiner, *The Role of the Arbitrator in CAS Proceedings – Reflections on How to Prepare for and Conduct a Hearing of a CAS Case* (paper on file with the authors), para. 4.4.2. For a recent example, cf. CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31st January 2012, para. 117.

B. The Actual Conduct of the Hearing

- 30 Article R44.2(1) states that at the hearing “the Panel hears the parties, the witnesses and the expert[s] as well as the parties’ final oral arguments, for which the Respondent has the floor last.” As indicated above, in the vast majority of cases, the panel will not issue any specific directions as to the actual conduct of the hearing. While each panel may have its own approach, experience shows that the hearing *will normally be conducted according to the following sequence*: (1) discussion of any outstanding procedural issues, (2) appellant’s opening statement, (3) respondent’s opening statement, (4) examination of the witnesses and/or experts, if any, presented by the appellant, (5) examination of the witnesses and/or experts, if any, presented by the respondent, (6) oral arguments/closing submission by the appellant, (7) oral arguments/closing submission by the respondent, (8) brief closing statement and/or (preliminary) indication of any further procedural directions as the panel may intend to issue (e.g., with regard to post-hearing or costs submissions) by the (President of the) panel.⁶⁵
- 31 The *examination of witnesses* will generally be conducted according to the following outline: (i) direct examination (or confirmation of the witness statement), (ii) cross-examination, (iii) re-direct and re-cross examination, if allowed by the panel. The style of cross-examination should be adjusted to take into account the legal backgrounds of the parties and their representatives, the scope and length of the witness statements and the importance of the witness testimony at issue, in particular where the witness under examination has brought serious accusations against a party.⁶⁶
- 32 According to Art. R44.2(2), the President of the panel conducts the hearing. In practice, *the members of the panel can put questions* to the parties and their representatives, as well as to the witnesses and experts, at any time throughout the hearing. Art. R44.2(2) also provides, in a rather more directive tone than that adopted in other arbitration rules, that the President of the panel shall “ensure that the statements made are concise and limited to the subject-matter of the written presentations, to the extent that these presentations are relevant”. Art. R44.2(5) adds that the panel may limit or disallow the appearance of any witness or expert, or any part of a proposed testimony, on the ground of irrelevance.
- 33 Pursuant to Art. R44.2(4), the President of the panel may authorize the hearing of witnesses and experts *via tele-conference or video-conference*. Despite the fact that in the 2012 version of the CAS Code the word “exceptionally” was deleted from this provision, it is submitted that this possibility should be used only sparingly, namely when time and/or costs constraints so require. Important witnesses and experts should appear in person if the party wishing to cross-examine them so requests. Appearance in person is particularly important for experts providing evidence on behalf of anti-doping organizations charging an athlete, unless it is clear from the outset that the athlete’s challenge of the analysis or other relevant issues is based on spurious grounds. Recourse to tele- or video-conferencing should also be avoided for the hearing of witnesses or experts located in parts of the world where communications are not reliable. In any event, if the President of the panel does allow a hearing by tele- or video-conference, he should, out of precaution, adopt clear rules as to the consequences that will apply in case a person cannot be heard/examined due to a failure in communications. Even if this is not expressly provided for in the Code, CAS panels can also allow the parties and/or their legal representatives to appear by tele- or video-conference. By requesting to appear by tele- or video-conference, a party must be deemed to have waived any right to equal treatment in respect of the manner in which it is heard.

C. Publicity and Recording

- 34 Article R57 provides for an “in camera hearing, unless the parties agree otherwise.” In practice, almost all CAS hearings are held *in camera*.

⁶⁵ In disciplinary cases, we submit that, despite the order provided for in Art. R44.2(1) the sports-governing body should go first even if, technically, it is the respondent in the arbitration. In any event, the athlete should be given the right to make a final statement at the end of the hearing.

⁶⁶ In such instances, it is submitted that panels should allow for extensive cross-examination, in order to ensure that the credibility of (accusing) witnesses is properly tested (see, e.g., CAS 2010/A/2226, *Queiroz v. ADoP*, Award of 23 March 2011, paras. 6.9-6.20 and 9.16-9.17).

The Swiss Federal Supreme Court has recently considered, in the *Pechstein* case, an athlete's arguments 35 in support of her right to a public hearing within the meaning of the ECHR. The Supreme Court held that the CAS's refusal to allow the athlete's manager to attend a hearing did not violate her *fundamental right to a public hearing* because Art. R57 only provides for a public hearing if the parties agree to it.⁶⁷ As a rule, international arbitration proceedings are not public.⁶⁸ Furthermore, a party cannot rely on Art. 6(1) ECHR, Art. 30(3) of the Swiss Federal Constitution and Art. 14(1) ICCPR⁶⁹ to assert the right to a public hearing, as these provisions are not applicable to voluntary arbitration proceedings.⁷⁰ However, the Court added the following proviso:⁷¹

“That said, in view of the standing of the CAS in the field of sports, it would be desirable for a public hearing to be held when this is requested by the athlete concerned, with a view to [enhancing] trust in the independence and fairness of the decision-making process.”

Since the dates of the main hearings are now listed on the CAS website, it is not unusual for *journalists* 36 to show up at the CAS premises on the date of such hearings. The CAS seems to be inclined to allow the press to take photographs or to film the hearing room and the participants before the commencement of the hearing, but the hearing as such remains closed to the public.

In CAS appeals arbitrations, no verbatim transcript is produced of what is said at the hearing. Art. 37 R44.2(2) provides that “minutes of the hearing may be taken”. In practice, the contents of the hearing are recorded on audio tape. The parties may request a copy of the recording (on a CD). Given the fact that the hearing is not public, the CAS might ask the parties to state the reason why they make such a request. A copy of the audio recording must be provided to a party before the award if the panel ordered post-hearing briefs or if there was a procedural incident during the hearing to which a party wishes to direct the panel's attention in writing. After the award, a copy of the recording must be provided to a party wishing to file an action to have the award set aside based on what was said during the hearing. It is submitted that in such circumstances the CAS should inform the other party or parties of the request and ask them to indicate whether they also wish to receive a copy of the recording.

D. The Decision not to Hold a Hearing

Article R57(2) provides that “[a]fter consulting the parties, the Panel may, if it deems itself to be suf- 38 ficiently well informed, decide not to hold a hearing. As seen above, in the standard letter acknowledging receipt of the respondent's answer, the CAS invites the parties “to inform the CAS [...] whether their preference is for a hearing to be held in this matter or for the Panel to issue an award based on the parties' written submissions only”, and reminds them that “[i]n accordance with Art. R57 of the Code, it will in any event be for the Panel to decide whether to hold a hearing”.

As the arbitration rules provide for one single exchange of submissions, the decision not to hold a hear- 39 ing can be problematic with respect to the parties' right to be heard in adversarial proceedings, guaranteed by Arts. 182(3) and 190(2)(d) PILS. As a rule, the panel will decide a dispute without a hearing only upon

⁶⁷ BGer. 4A_612/2009 para. 4.1 (*Pechstein v. International Skating Union*). The Supreme Court itself refused to hold a public hearing as requested by the athlete (BGer. 4A_612/2009 para. 4.2), by stating that “[u]nlike the proceedings before the CAS, which freely assesses any issues of fact and law, the scope of judicial review in the context of setting aside proceedings before the Supreme Court is significantly limited. In these challenge proceedings, a decision can be taken on the basis of the record; ordering a public hearing (Art. 57 BGG), as requested by the Appellant, is not advisable. A mandatory public hearing before the Supreme Court, as exceptionally required by the ECHR – in case of claims according to Art. 120(1)(c) BGG or where the Court intends to adjudicate the matter itself [...] based on its own factual findings [...] is not an option in challenge proceedings against arbitral awards pursuant to Art. 77 BGG” (free translation from the German original).

⁶⁸ BGer. 4A_612/2009 para. 4.1.

⁶⁹ International Treaty on Civil and Political Rights of 16 December 1966, in force in Switzerland since 18 September 1992, SR 0.103.2 (in German: *Internationaler Pakt vom 16. Dezember 1966 über bürgerliche und politische Rechte*; in French: *Pacte international du 16 décembre 1966 relatif aux droits civils et politiques*).

⁷⁰ BGer. 4A_612/2009 para. 4.1.

⁷¹ BGer. 4A_612/2009 para. 4.1 (free translation from the German original).

a joint request from the parties.⁷² In that case, the parties are deemed to have waived any claim based on their right to be heard. The same should apply when the request not to hold a hearing comes from the appellant: in that case, the respondent will have had a full opportunity to respond, in its answer, to the appeal brief and the appellant will be deemed, by his request, to have voluntarily waived his right to reply to the answer. By way of contrast, the panel should be very reluctant to decide not to hold a hearing against the will of the appellant. In practice, it is very rare that the appellant will be happy to allow the panel to rule on the case without a hearing, which is why in the vast majority of appeals cases a hearing does take place.⁷³

- 40 If the parties have submitted *witness or expert evidence*, the holding of a hearing is necessary, unless the parties accept the contents of the witness/expert statements produced and do not wish to cross-examine the persons having rendered such statements, or if the panel considers that the witness and/or expert evidence in question is irrelevant.
- 41 It is submitted that a hearing should be held in any event *in disciplinary cases* if the athlete so requests in order to appear in person before the panel.

E. The Consequences of a Failure to Appear at the Hearing

- 42 According to Art. R57(3), “[i]f any of the parties or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award”. If the hearing does go ahead even in the absence of a party, experience shows that *panels will tend to “substitute” for the non-appearing party by putting questions to the appearing party*. These questions are basically aimed at ensuring that all relevant factual allegations and legal arguments are properly “tested” before a decision is made.
- 43 In doping cases, athletes must be aware of the fact that according to Art. 3.2.4 of the WADA Code, the panel “*may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete’s or other Person’s refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel)*”.⁷⁴

⁷² Cf., e.g., CAS 2005/A/908, *WADA v. Wium*, Award of 25 November 2005, para 3.4. In this case the parties agreed because the Panel had allowed a second round of written submissions.

⁷³ The only real exception is when the panel has already allowed at least a complete second round of written submissions (cf., e.g., CAS 2009/A/1545, *Anderson et al. v. IOC*, Award of 18 December 2009, paras. 14-30, where several submissions were allowed).

⁷⁴ Oddly, the same does not seem to apply to an anti-doping organization that decides not to appear at the hearing (cf. CAS 2010/A/2161, *Wen Tong v. IJF*, Award of 23 February 2011, where the Panel tested all the contentions made by the Appellant in the absence of the Respondent).

Article R58: Law Applicable to the Merits

I. Purpose of the Provision

In order to resolve disputes, arbitrators, as all adjudicators, are required to apply the law to the facts they have established. Art. R58 indicates how CAS panels are to determine the so-called *lex causae*, i.e., the substantive rules and/or law(s) to be applied to the merits of the disputes submitted to them pursuant to the appeals procedure.¹ Art. R58 needs to be read in light of the governing Swiss arbitration law (II.), which it reflects to the extent that it gives precedence – always within the limits of mandatory rules and public policy (V.) – to party autonomy as the principal connecting factor (III.). Absent a choice of law agreement by the parties, Art. R58 provides for a specific conflict of laws mechanism, whilst reserving some residual powers for the arbitrators in determining the applicable substantive law (IV.).

II. Legal Framework

The *lex causae* must be distinguished from the law governing the arbitral proceedings, or *lex arbitri*. CAS arbitrations are all seated in Switzerland,² which means that the Swiss law of arbitration (Chapter 12 of the PILS when the arbitration is international, or Part 3 of the ZPO when the arbitration is domestic) will govern the proceedings. However, this does not, *per se*, entail the application of Swiss substantive law to the merits of CAS disputes, nor the application of the conflict of laws rules that would be applied by the Swiss courts to determine the *lex causae*. Arbitral tribunals, including CAS panels, determine the applicable substantive law pursuant to methods which are specific to (international) arbitration.³ Thus, Art. R58 of the CAS Code is to be read against the background of Art. 187 PILS (or Art. 381 ZPO), the provisions governing the selection of the applicable substantive law in international (or domestic) arbitral proceedings seated in Switzerland. As the vast majority of CAS appeals arbitrations are international, the brief discussion in this commentary is limited to the situation under Art. 187 PILS.⁴

According to Art. 187(1) PILS, arbitral tribunals are to decide disputes by applying “the rules of law chosen by the parties or, in the absence [of such a choice], according to the rules of law with which the case has the closest connection.”⁵ The choice of law rules contained in Art. 187 PILS uphold the fundamental principle of party autonomy in arbitration. Art. R58 and the specific conflict rules it sets out constitute an expression of this principle: by submitting their disputes to CAS (appeals) arbitration, the parties have agreed that the *lex causae* should be determined as provided in the Code.⁶

¹ The corresponding provision for CAS arbitrations governed by the ordinary procedure is Art. R45.

² Cf. Art. R28.

³ Kaufmann-Kohler/Rigozzi, para. 597. On this point, cf. also, for instance, CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 7.2.

⁴ For present purposes, we will merely provide an overview of the salient features of the regime under Art. 187 PILS, to the extent these are useful for understanding the practice under Art. R58 of the Code. The references made to arbitral case law in the following paragraphs will also be limited to CAS awards. For a discussion covering the applicable law regime under the ZPO, cf., e.g., Berger/Kellerhals, paras. 1254-1330.

⁵ Art. 187(2) states that “[t]he parties may authorize the arbitral tribunal to decide *ex aequo et bono*”. The same possibility is expressly provided for in Art. R45 of the Code, governing the law applicable to the merits in CAS ordinary proceedings, but is not replicated in Art. R58, for appeals proceedings. It can hardly be contended that this should be otherwise, in light of the fundamental principle that athletes across all sports are to be treated equally vis-à-vis sports-governing bodies, particularly in disciplinary matters, which leaves little room for the more ad hoc solutions that may be adopted in *ex aequo et bono* decisions.

⁶ Cf. Art. R27.

III. Party Autonomy in the Choice of the Applicable Law

- 4 Under the Swiss law of arbitration, *parties are free to select*, in the exercise of their autonomy, not only a specific national law, but also a national, international or transnational substantive rules⁷ such as, for instance, the UNIDROIT Principles of International Commercial Contracts, as the “law” governing the merits.⁸ This is evidenced by the fact that the PILS speaks of “*rules of law*” in its Art. 187(1). On the basis of this same principle, it is generally acknowledged that the applicable substantive rules in sports disputes may be contained in the bye-laws, statutes and regulations of the (international) sports federations or other sports-governing bodies.⁹
- 5 The parties’ choice of law can be made at any time before or after a dispute has arisen and is *not subject to any specific requirements as to its form*. What matters is that the parties have made an actual choice, i.e., that they did agree, at some point, on the selection of a given law or set of rules to govern their relationship.¹⁰ This choice can be tacit or implied,¹¹ as, for instance, when the parties argue their respective cases by reference to the same substantive law in the course of the proceedings, without concluding an express choice of law agreement referring to that law.¹²
- 6 The *parties’ choice of the applicable law can also be made in an indirect manner*, that is, by reference not to a substantive law directly,¹³ but to a conflict rule or to a set of arbitration rules which in turn contain provisions dealing with the law to be applied by the tribunal in resolving the dispute.¹⁴ All the major sets of arbitration rules contain provisions of this kind.¹⁵ Art. R58 itself is one such provision, although it is rather more elaborate than most of its counterparts in commercial arbitration rules. In fact, as the following paragraphs will show, Art. R58 is a relatively complex aggregate of various different choice of law mechanisms.¹⁶

A. The Applicable Regulations

- 7 As seen above,¹⁷ under Art. 187 PILS, the parties may choose as the *lex causae* not only a national law, but also non-national or transnational rules of law (such as sports regulations). Inasmuch as it provides that “[t]he Panel shall decide the dispute according to the applicable [sports] regulations”, Art. R58 constitutes an *indirect choice of law* provision in favor of such rules. CAS panels are bound by this choice

⁷ Cf., for instance, CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 84. The ZPO (Art. 381(1)) now also refers to “rules of law”.

⁸ Cf. Carbone, *Lex mercatoria and lex sportiva*, in: Greppi Edoardo/Vellano Michele (eds.), *Diritto internazionale dello sport*, Torino: Giappichelli, 2010, p. 254, on the possible use of the UNIDROIT Principles as an aid to interpretation in sports disputes.

⁹ Rigozzi, para. 1178. Cf. also CAS 92/98, *Beeuwsaert v. FIBA*, CAS Digest I, p. 287, 292; CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 64; CAS 2007/A/1395, *WADA v. NSAM, Cheah, Ng & Masitah*, Award of 31 March 2008, para. 125.

¹⁰ The validity of choice of law clauses is to be examined independently from that of the underlying contract or other agreement between the parties, and is itself submitted to the legal regime governing the formation of contracts. Cf., for instance, CAS 2006/A/1024, *FC Metallurg Donetsk v. Lerinc*, Award of 31 January 2007, paras. 6.5-6.6.

¹¹ Cf., e.g., CAS 2006/A/1082-1104, *Valladolid v. Barreto Cáceres & Cerro Porteño*, Award of 19 January 2007, para. 49; CAS 2006/A/1024, *FC Metallurg Donetsk v. Lerinc*, Award of 31 January 2007, para. 6.5.

¹² Cf. CAS 2007/A/1395, *WADA v. NSAM, Cheah, Ng & Masitah*, Award of 31 March 2008, para. 62. A further illustration of the principle of party autonomy with respect to the selection of the *lex causae* is that the parties are also free to agree to modify, at any time, a previously concluded choice of law agreement. Cf., for instance, CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, paras. 7.7 and 7.10.

¹³ Cf., e.g., CAS 2004/A/678, *Apollon Kalamarias FC v. Morais*, Award of 20 May 2005, para. 5.3 (noting that the disputed contract was specifically made subject to “Law 2725/99”, i.e., “Greek sports law”).

¹⁴ Cf., e.g., CAS 2004/A/574, *Associação Portuguesa de Desportos v. Club Valencia CF SAD*, Award of 15 September 2004, para. 42; CAS 2005/A/983-984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 78; CAS 2010/A/2187, *Calenda v. Sport Lisboa e Benfica Futebol, SAD*, Award of 12 April 2011, para. 8.2 and the references provided therein.

¹⁵ Cf., e.g., Art. 21 ICC Rules; Art. 33 Swiss Rules.

¹⁶ Rigozzi, para. 1195.

¹⁷ Cf. above, para. 4.

of law. They will generally ascertain which version of the relevant regulations is to be applied in a given case by reference to the transitory provisions contained in the relevant rules and/or the principle *tempus regit actum*.¹⁸

Some CAS panels have held that an athlete's membership in his sports federation, which entails the acceptance of the federation's rules and regulations, also amounts to a choice by the parties of those same regulations as the sole applicable substantive rules in case of a dispute.¹⁹ On its face, this approach would seem to be desirable in international sports matters, as it would "insulate" disputes arising under the same sports regulations from the impact of different national laws or other rules (as may be applicable by virtue of the parties' choice in any given case or due to the fact that the sports-governing bodies involved will have their seats in different countries, the laws of which would apply by the operation of Art. R58, first sentence). However, it is submitted that this reading is contrary to the plain language of Art. R58. By stipulating that panels shall decide "according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties, or in the absence of such a choice, according to the law of the country in which [the sports-body that issued the challenged decision] is domiciled, or according to the rules of law the Panel deems appropriate",²⁰ Art. R58 clearly posits that *the applicable sports regulations will apply together with another law (or set of rules of law)*, even if only on a subsidiary basis (and irrespective of whether the latter is chosen by the parties or selected by the panel in accordance with the prescribed conflict rules). In other words, the indirect choice of the "applicable regulations" contained in Art. R58 ab initio is only a partial choice of law and CAS panels will have to determine what other (rules of) law, if any, apply to the merits of a given dispute, as outlined below.²¹

B. The Rules of Law Chosen by the Parties

As seen above, the parties' choice of law can be made in a direct or indirect manner.²² The choice is *direct* 9 when the parties expressly submit their relationship to a given law or other set of rules. Choices of this kind are frequently encountered in sports arbitration, for instance in disputes arising out of employment contracts.²³ In some cases a choice of law agreement is reached between the parties only once a dispute has arisen, just prior to the commencement, or in the course of the proceedings before the CAS.²⁴

On the other hand, the parties will be deemed to have made an *indirect* choice of law when their agree- 10 ment to arbitrate simply refers to the applicable regulations and these in turn contain a choice of law clause.²⁵ The regulations of many international sports federations contain provisions of this kind. For instance, the FIFA Statutes and the UCI ADR provide for the application of Swiss law,²⁶ whereas the

¹⁸ CAS panels will also generally mitigate the effects of this rule in accordance with the *lex mitior* principle, where appropriate. Cf., *ex multis*, CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 86; CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 7.6; CAS 2010/A/2041, *Chepalova v. FIS*, Award of 10 January 2010, paras. 65-69; CAS 2008/A/1920, *FK Pobeda et al. v. UEFA*, Award of 15 April 2010, paras. 64-69; CAS 2011/A/2645, *UCI v. Kolobnev and Russian Cycling Federation*, Award of 29 February 2012, paras. 58-63.

¹⁹ CAS 92/80, *Beeuwsaert v. FIBA*, Award of 25 March 1993, *CAS Digest II*, p. 292.

²⁰ Emphasis added.

²¹ Rigozzi, para. 1199. This does not exclude that the parties may choose, under Art. R58, that their dispute shall be determined exclusively by reference to the relevant sports regulations (cf., for instance, CAS 2007/A/1322, *Giannini et al v. S.C. Fotebal Club 2005 S.A.*, Award of 15 April 2008, para. 8.2).

²² Cf. above para. 6.

²³ Cf., among many others, CAS 2004/A/678, *Apollon Kalamarias FC v. Morais*, Award of 20 May 2005, paras. 5.1-5.4; CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, para. 7.8; CAS 2008/A/1644, *Mutu v. Chelsea FC*, Award of 31 July 2009, para. 95.

²⁴ Cf., e.g., CAS 99/A/223, *ITF v. Korda*, Award of 31 August 1999, *CAS Digest II*, p. 346, para. 5; CAS 98/214, *Bouras v. IJF*, Award of 17 March 1999, para. 6, *CAS Digest II*, p. 315; CAS 2004/A/607, *Boevski v. IWF*, Award of 6 December 2004, para. 5.3; CAS 2007/A/1322, *Giannini et al v. S.C. Fotebal Club 2005 S.A.*, Award of 15 April 2008, para. 8.2.

²⁵ Cf., e.g., CAS 2004/A/791, *Le Havre v. FIFA & Newcastle & N'Zgobia*, Award of 27 October 2005, paras. 40-44.

²⁶ Cf. Art. 66(2) FIFA Statutes; Art. 345 UCIADR.

IAAF Rules state that in all CAS appeals involving the IAAF, the governing law shall be Monegasque law.²⁷

C. The Law of the Country in which the Sports-Governing Body which Issued the Challenged Decision is Domiciled

- 11 When the parties have not, directly or indirectly, chosen the law to be applied to the merits of their dispute (other than the relevant sports regulations), Art. R58 provides that CAS panels shall apply the law of the seat of the federation or other sports-body that issued the appealed decision.²⁸
- 12 This provision is problematic in all those cases in which the *national federation* or other national sports-body from which the decision under challenge emanates *has decided according to the rules of the relevant international federation*. For instance, CAS appeals proceedings regularly involve, as the respondent party, a national federation which, in taking the challenged decision, acted by delegation of the relevant international federation (e.g., the IAAF or the UCI). This is so in particular since the WADA Code has entered into force, as the latter provides for the shared responsibility of international federations, national federations and other anti-doping organizations with respect to doping controls, hearings and sanctions, whilst reserving the right for international federations to appeal against the decisions adopted by national federations or anti-doping organizations.²⁹ In these cases, *strict adherence to the conflict rule set out in Art. R58 may be prejudicial to the uniform application of the international sports regulations at issue*. This result is undesirable and, worse, contrary to the athletes' fundamental right to equal treatment in disciplinary cases arising under the same (international) rules. CAS panels have on occasion considered these cases to be "atypical" appeals proceedings, and on this basis have, albeit without saying it in so many words, simply circumvented the rule set out in Art. R58, by applying only the relevant sports regulations, or (subsidiarily) the law of the seat of the federation which had issued the applicable sports regulations (rather than the law of the seat of the federation or other sports-governing body which had issued the decision under challenge).³⁰

IV. (Residual) Power of Arbitrators to Determine the Applicable Law

- 13 Article 187(1) PILS requires that, where the parties have not chosen the applicable substantive law, arbitrators decide in accordance with the law or rules of law that are "most closely connected" to the dispute. The PILS does not define the criteria of this "closest connection" test, meaning that arbitrators are free to resort to any one of a variety of different methods in order to establish the relevant law(s) or rules.³¹ In general, arbitration rules, which apply by virtue of the parties' choice to submit their dispute to them, tend to be rather liberal, often merely providing that the tribunal shall apply the (rules of) law that it determines to be appropriate.³² However, Art. R58 of the Code is *more restrictive than its counterpart provisions in commercial arbitration rules, since it expressly identifies the law that CAS panels should apply* absent a choice of law by the parties (B.). While CAS panels do have the residual power to apply, in addition to the governing sports regulations (A.), any (rules of) law which they deem appropriate (in lieu of the law designated by Art. R58), if they decide to do so, they are required to provide reasons for such a choice (C.).

²⁷ Cf. IAAF Competition Rules, Rule 42.23.

²⁸ Cf., e.g., CAS 2009/A/1545, *Anderson, Colander Clark, Miles-Clark, Edwards, Gaines, Hennagan & Richardson v. IOC*, Award of 18 December 2009, para. 55.

²⁹ Cf. Arts. 7, 8, 13 and 15 WADC.

³⁰ Cf., e.g., CAS 2002/A/403 & 408, *Pantani v. UCI & FCI v. UCI*, Award of 12 March 2003, para. 45; CAS 2002/A/383, *IAAF v. CBA & Dos Santos*, Award of 27 January 2003, paras. 78-79; cf. also Rigozzi, para. 1214.

³¹ Kaufmann-Kohler/Rigozzi, paras. 626-635.

³² Cf., e.g., Art. 35(1) UNCITRAL Rules; Art. 21(1) ICC Rules.

A. The Applicable Sport Regulations

As mentioned above, Art. R58 mandatorily provides for the application of the governing sports regulations, *leaving the arbitrators little choice* in this respect, other than the margin allowed by the application of the *lex mitior* principle.³³ 14

B. The Applicable (Rules of) Law

Again, as outlined above, even if the parties did not make a direct or indirect choice of law as to the (rules of) law that shall apply together with the applicable sports regulations, Art. R58 provides for a *fall-back indirect choice of law* in favor of the national law of the seat of the respondent federation or other sports-body.³⁴ As just mentioned, CAS panels have sometimes considered that this provision should be disregarded in “atypical” appeals cases, where the seat of the federation or sports-body having issued the decision (under the applicable international sports regulations) would lead to the application of a different national law in each case, undermining the uniform application of the international rules. The same result could also be achieved by considering that the law of the seat of the international federation (the rules of which are applicable in case of dispute) is more appropriate than the law of the seat of the national federation (having issued the decision under appeal), as discussed in the following paragraph. 15

C. The Rules of Law, the Application of which the Panel Deems Appropriate

Article R58 allows CAS panels to disregard the (rules of) law applicable by virtue of the indirect choice of law provisions contained therein (other than the applicable sports regulations) in favor of the rules of law they deem it appropriate to apply. This provision *enables CAS panels not to refer to the otherwise applicable national law* when this would produce inappropriate results. In some cases it can also be used as a tool to “immunize” international sports disputes from the specificities of domestic laws or, indeed, from any national law *tout court*. 16

To the extent Art. R58 at the end circumvents the precedence given by Art. 187(1) PILS to the parties’ (direct or indirect) choice of law over the tribunal’s own determination, it is understandable that the drafters of the Code have *required arbitrators to give reasons for their decision* on the appropriate applicable substantive (rules of) law. 17

The margin left to the arbitrators’ appreciation by Art. R58 at the end has been used, in particular, by CAS panels to apply general principles of law or other transnational norms of different origins, thereby *contributing to the emergence of a consistent jurisprudence* with regard to various questions which regularly arise in (international) sports disputes. The general principles that are regularly applied in the CAS case law can be subdivided in three main categories,³⁵ namely: (i) general principles of law that are customarily applied in sports matters (e.g., the principles of equal treatment;³⁶ good faith/estoppel;³⁷ legality³⁸ and proportionality³⁹); (ii) fundamental guarantees and principles governing criminal procedure which may be applied by analogy in disciplinary proceedings (e.g., the principles *nulla poena sine lege*;⁴⁰ *nulla poena* 18

³³ Cf. above, para. 7.

³⁴ Cf. above, para. 12.

³⁵ Needless to say, the following is an over-simplified summary. For thorough analyses of the issue, including extensive catalogues of the relevant legal principles, cf., for instance, Beloff, *Is there a lex sportiva?*, in: *I.S.L.R.* 2005, pp. 49-60; Loquin, pp. 85-108, and Maisonneuve, paras. 905-941.

³⁶ Including the principle that there is no equality in illegality, cf. CAS 2001/A/357, *Nabokov v. IIHF*, Award of 31 January 2002, para. 26, *CAS Digest III*, p. 510.

³⁷ Cf., among many others, CAS OG 02/006, *NZOC v. SLOC*, Award of 20 February 2002, para. 18, *CAS Digest III*, p. 609. Similarly, on the related principles of the protection of legitimate expectations/*ne venire contra factum proprium*, cf., for instance, CAS 2008/O/1455, *Boxing Australia v. AIBA*, Award of 16 April 2008, paras. 35-36.

³⁸ Cf., among many others, CAS OG 98/002, *Rebagliati v. IOC*, *CAS Digest I*, p. 433; CAS 94/129, *USA Shooting & Quigley v. UIT*, Award of 23 May 1995, *passim*; CAS OG 00/010, *Tsagaev v. IWF*, Award of 25 September 2000, paras. 22-25.

³⁹ Cf., among many others, CAS/2006/A/1025, *Puerta v. ITF*, Award of 12 July 2006, section 11.7.

⁴⁰ Cf., among many others, CAS 94/129, *USA Shooting & Quigley v. UIT*, Award of 23 May 1995, para. 34.

*sine culpa*⁴¹ and *lex mitior*⁴²), and (iii) general principles of sports law, including anti-doping regulations (e.g., the principles of strict liability;⁴³ judicial restraint vis-à-vis field of play decisions;⁴⁴ integrity and loyalty of competitions, and fair-play⁴⁵).

- 19 Some scholars and CAS panels have referred to the body of general principles and rules that has emerged from the case law referenced above as the so-called *lex sportiva*.⁴⁶ A short commentary such as this is not the right place to address the doctrinal debate surrounding the *lex sportiva* as a legal, sociological or even philosophical phenomenon, including the obvious analogies with its historical predecessor, the *lex mercatoria*.⁴⁷ For present purposes, we would simply observe that, in their practice under Art. R58,

⁴¹ Cf., among many others, CAS 2001/A/317, *Aanes v. FILA*, Award of 9 July 2001, *CAS Digest III*, p. 216, para. 26; CAS 2007/O/1381, *RFEC & Valverde v. UCI*, Award of 23 November 2007, paras. 67-72. The principle has made the object of some reservations: in some non-doping cases, reference was made to the fact that the variety of sanctioning measures which may be at issue in sports disciplinary cases should not all be rigidly subjected to this principle, which is meant to apply in the very specific context of criminal law. Cf., for instance, CAS 2008/A/1583 & 1584, *Sport Lisboa e Benfica futebol SAD & al. v. UEFA & FC Porto*, Award of 15 September 2008, paras. 10.3.2.2 and 10.3.3, with numerous references.

⁴² Cf., among many others, CAS 2010/A/1817 & 1844, *WADA & FIFA v. CFA & Marques, Medeiros, Eranosian et al. and FIFA v. CFA*, Award of 26 October 2010, para. 134; CAS 96/149, *A. Cullwick v. FINA*, Award of 13 March 1997, *CAS Digest I*, p. 260, para. 28; CAS 2000/A/289, *UCI v. Chiotti et al.*, Award of 12 January 2001, *CAS Digest II*, p. 427, para. 7; CAS 2004/O/679, *USADA v. Bergman*, Award of 13 April 2005, para. 5.2.3; CAS 2010/A/2308 & 2335, *Pellizotti v. CONI & UCI and UCI v. Pellizotti & FCI & CONI*, Award of 14 June 2011, para. 30.

⁴³ Cf., among many others, CAS 95/141, *Chagnaud v. FINA*, Award of 22 April 1996, para. 13; CAS 2002/O/373, *COC & Scott v. IOC*, Award of 18 December 2003, para. 14.

⁴⁴ Cf., among many others, CAS 2004/A/704, *Young & KOC v. FIG*, Award of 21 October 2004, para. 3.7; CAS OG 02/007, *KOC v. ISU*, Award of 23 February 2002, paras. 16-17.

⁴⁵ In French, “équité sportive” (cf., for instance in CAS OG 00/004, *COC & Kibunde v. AIBA*, Award of 18 September 2000, paras. 11-12), or, in the words of a commentator “sincérité des compétitions” (Loquin et al., *Tribunal arbitral du sport, Chronique des sentences arbitrales*, JDI 2002, p. 344). Cf. also CAS 2004/A/708, *Mexès & AS Roma v. SAOS AJ Auxerre Football (AJ Auxerre) & FIFA*, Award of 11 March 2005, *passim*, where reference was made to the objective of safeguarding “la régularité des compétitions et l’intégrité des championnats”, in determining whether, in the silence of the relevant FIFA regulations, the so-called stability rule could be applied in a specific situation. CAS case law has in fact extended the scope of application of this same general principle beyond sports competition itself, by expressing the view that the fair-play principle “is as pertinent to the disciplinary process as it is to competitive sport”, with the consequence that sports-governing bodies are bound by the “elementary rules of natural justice and due process” in their dealings with athletes in a disciplinary context (cf. for instance, CAS OG 96/005, *A., W. and L. V. NOC CV*, Award of 1 August 1996, para. 7; CAS 2002/A/378, *S. v. UCI & FCI*, Award of 8 August 2002, paras. 19-20).

⁴⁶ In reality, there appear to be different understandings among commentators as to what exactly should be defined as the *lex sportiva*. For instance (and again, without any claim whatsoever to exhaustiveness), according to some, the *lex sportiva* is nothing more than a collection of all the rules and regulations that are issued by the different existing sports organizations, or, in a slight variation to this definition, the compilation of all the rules, regardless of their source, that govern sports activities (cf., e.g., Loquin et al., *Tribunal arbitral du sport, chronique des sentences arbitrales, Chronique JDI 2001*, p. 266). Others consider that the *lex sportiva* simply corresponds to the entire body of CAS jurisprudence (cf., e.g., Nafziger, p. 409). A third approach in the literature can be considered (simplifying somewhat) as a combination of the previous two, in that it sees the *lex sportiva* as the “transnational law of sports”, formed of the CAS case law and the rules and regulations of transnational sports organizations (cf., e.g., Latty, *La Lex Sportiva – Recherche sur le droit du transnational*, Leiden: Martinus Nijhoff, 2007, p. 46). Yet another group of commentators, and much of the CAS case law that has addressed this topic, views the *lex sportiva* as the normative body constituted by the legal principles that emerge from the interaction between the regulations enacted by the sports-governing bodies and the relevant general principles drawn from the different national laws involved, as progressively embodied in CAS jurisprudence. Cf., for instance, Loquin, and, among others, CAS 98/200, *AEK Athens & SK Slavia Prague v. UEFA*, Award of 20 August 1999, para. 156). Finally, some go as far as considering the *lex sportiva* as an autonomous transnational legal system (cf., e.g., Maisonneuve, paras. 1162-1170).

⁴⁷ For comprehensive and detailed discussions, cf., among others, Beloff, *Is there a lex sportiva?*, in: *I.S.L.R. 2005*, pp. 49-60; Nafziger, pp. 409-419; Haas, *Die Vereinbarung von “Rechtsregeln” in (Berufungs-) Schiedsverfahren vordem Court of Arbitration für Sport*, in: *CaS 2007*, pp. 271-280; Latty, *La Lex Sportiva – Recherche sur le droit du transnational*, Leiden: Martinus Nijhoff, 2007; Loquin, pp. 85-108; and, more recently, Mitten/Opie, “Sports law”: implications for the development of international, comparative, and national law and global dispute resolution, *CAS Bull.* 2012/1, pp. 2-13.

CAS panels will refer to the legal principles, maxims and jurisprudential rules forming this so-called *lex sportiva* whenever they will deem their application to be “appropriate”, in addition to, or instead of, the applicable sports regulations and/or the chosen or designated (rules of) law, to decide a given case.

V. Object, Scope and Status of the Chosen or Selected (Rules of) Law

The following aspects should also be borne in mind, whether the parties have made a choice of law or not. 20

Unless the parties expressly provide otherwise, their choice (or the arbitrators’ determination) of the applicable law is generally construed as referring to *the corpus of substantive norms*, as opposed to the conflict rules (*renvoi*) of the chosen law.⁴⁸ 21

The scope of the applicable (rules of) law is not unlimited as certain *subject matters* are reserved for the exclusive regulatory competence of a given state’s legislation. To cite but one example that is relevant to sports law, it is undisputed that the acquisition of the nationality of a particular State can only be subject to the laws of that State. In other words, the parties have no right to submit that issue to a different law of their choice.⁴⁹ 22

Moreover, the application of any designated (rules of) law is limited by the overriding effect of so-called *mandatory laws* (“*Eingriffsnormen*”; “*lois de police*” or “*lois d’application immédiate*”). As discussed in more detail elsewhere, arbitral jurisprudence, including that of the CAS, has tended to rely on the following criteria – expressed with some variations in the terminology and in the emphasis put on one or the other of the criteria – in determining whether mandatory rules should be taken into consideration in any given case:⁵⁰ (i) such rule[s] must be meant to govern international situations such as that before the panel, i.e., must “belong to that special category of norms which need to be applied irrespective of the law applicable to the merit of the case”; (ii) there must be a close connection between the subject matter of the dispute and the State from which the mandatory rule[s] at issue emanate; (iii) the application of such rule[s] must not produce a result that is contrary to transnational standards; in other words, the mandatory rule[s] at issue should pursue a goal which is internationally, if not universally recognized as legitimate.⁵¹ 23

Furthermore, it is widely recognized that arbitral tribunals sitting in Switzerland must disregard any provisions in the parties’ chosen (rules of) law which, if applied, would lead to a decision whose substance would be incompatible with *international public policy* within the meaning of Art. 190(2)(e) PILS.⁵² 24

As a final matter, it bears recalling that according to the Swiss Federal Supreme Court’s case law, the principle *jura novit curia*, according to which the courts are deemed to know the law or required to ascertain it of their own motion and to apply it *ex officio*, also applies to arbitral tribunals.⁵³ This means, in particular, 25

⁴⁸ Cf. e.g., CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 84. Swiss arbitration law also admits the practice called *depeçage*, meaning that the parties can decide that only certain parts of a given law will apply to their relationship, or choose to submit different aspects of that relationship to different laws. Cf., for instance, CAS 2006/A/1082-1104, *Valladolid v. Barreto Càceres & Cerro Porteno*, Award of 19 January 2007, para. 51.

⁴⁹ Rigozzi, para. 1171.

⁵⁰ Rigozzi, para. 1189. These criteria consist in an application by analogy of the test called for under Art. 19 PILS. Cf. for instance, CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 73.

⁵¹ Rigozzi, para. 1190, in part referring to CAS 98/201, *Celtic v. UEFA*, Award of 7 January 2000, para. 4; CAS Digest II, p. 111. Cf. also CAS 2007/A/1424, *Federación Española de Bolos c. Fédération Internationale des Quilleurs (FIQ) & Federació Catalana de Bitlles i Bowling (FCBB)*, Award of 23 April 2008, paras. 52-56.

⁵² Cf. CAS 2005/A/983 & 984, *Club Atlético Peñarol v. Bueno Suarez, Rodriguez Barrotti & Paris Saint Germain*, Award of 12 July 2006, para. 70; CAS 2006/A/1180, *Galatasaray SK v. Ribéry & Olympique Marseille*, Award of 24 April 2007, paras. 7.3-7.4; CAS 2009/A/1926&1930, *ITF v. Gasquet*; *WADA v. ITF & Gasquet*, Award of 17 December 2009, para. 3.5.

⁵³ For a comprehensive overview of the Supreme Court case law on *jura novit curia* (including the exceptions that apply to this rule), cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 144–159; BGer. 4P.260/2000 para.

that arbitrators sitting in Switzerland are not restricted by the parties' pleadings as to the content of the applicable law(s) or rules.⁵⁴ As previously mentioned, this principle should induce CAS arbitrators to avoid an over-formalistic interpretation of Art. R56 in as far as legal arguments are concerned.⁵⁵

5b. Cf. also CAS 2006/A/1043, *Hetzel v. FEI*, Award of 28 July 2006, para. 5.2.

⁵⁴ Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 144–145.

⁵⁵ Cf. Art. R56, para. 11 above.

Article R59: Award

I. Purpose of the Provision

Article R59 of the CAS Code regulates the main issues related to the award,¹ namely (II.) the arbitrators' 1
decision-making process, (III.) the form and contents of the award, (IV.) its scrutiny by the CAS, (V.)
its notification to the parties and (VI.) its effect, as well as (VII.) the CAS's policy with regard to the
publicity of awards and/or the outcome of the proceedings.

II. The Arbitrators' Decision-Making Process

Article R59 governs the arbitrators' vote on the decision(s) embodied in the award. It does not deal 2
with the arbitrators' *deliberations*, which are a distinct² component of the arbitral decision-making pro-
cess. The arbitrators' deliberations are "the exchange[s] of views on the claims or questions submitted
to them by the parties which lead to the decisions of the arbitral tribunal"³ The principle of collegiality,
which always governs the activities of an arbitral tribunal, commands that all arbitrators must participate
not only in the final vote on a decision but also in the deliberations preceding such vote. In accordance
with this principle, each arbitrator is to be given an (adequate) opportunity to express his own opinion
on the issues to be decided and to state his position with respect to his co-arbitrators' opinions on those
same issues.⁴ The requirement that deliberations must take place is an integral part of the parties' right
to be heard and both a right and a duty of the arbitrators, resulting from their status as members of a
collegiate tribunal. If the tribunal's deliberations fail to afford one of the arbitrators the opportunity to
state his views on all the issues to be decided, the resulting award is open to annulment.⁵ The rationale
but also the limit of this rule is that *each of the panel's members must be given the same opportunity as
his fellow arbitrators to participate in the decision-making process*. This also means that an arbitrator who
deliberately refuses to participate in the deliberations cannot, by doing so, obstruct the panel's progress
towards a (majority) decision.⁶

Article R59(1) provides that (in cases heard by three-member panels) CAS awards can be rendered by 3
majority decision, or, where a majority cannot be found, by the President of the panel alone. In line with the
analogous provisions contained in practically all arbitration rules, this latter possibility is meant to avoid
deadlocks in the decision-making process, without obliging the President to adhere to the position of
one or the other of his co-arbitrators, even if he does not agree with it, just so as to achieve a majority in
the vote. Thus, the President of the panel plays a pivotal role in the making of the award. The significance
of this role is accentuated in CAS appeals proceedings as the President is appointed by the arbitral insti-
tution, with no influence whatsoever by the parties.⁷

More than the principle of the majority vote itself, the manner in which an absence of unanimity within 4
the panel may transpire in the award calls for some observations. Art. R59(2) at the end expressly pro-
vides that *dissenting opinions* "are not recognized by CAS and are not notified"⁸ This does not preclude
an arbitrator from drafting a dissenting opinion and communicating it to the parties directly. If the dis-
senting opinion is motivated by the fundamental need to express the dissenter's inability to subscribe to
a reasoning or a decision he cannot approve of, or a genuine disagreement on matters of principle that
could not be expressed in the award itself, it is submitted that the CAS should tolerate the communica-

¹ Art. R59 applies to all types of awards rendered by the CAS, be they partial awards, interim or interlocutory awards (e.g., awards on jurisdiction), and additional awards (cf. Art. R63).

² Cf. BGE 111 Ia 336 para. 3.a).

³ Poudret/Besson, para. 732, p. 649.

⁴ Poudret/Besson, para. 734, p. 650.

⁵ Cf. Rigozzi, para. 999, and the references provided therein.

⁶ Cf. BGE 128 III 234 para. 3.b)aa).

⁷ Cf. Art. R54, paras. 5-6 above.

⁸ This provision was inserted with the 2010 revision of the CAS Code to codify the CAS's consistent practice in this respect, cf. Reeb, *Modifications essentielles*, p. 7.

tion of the opinion and refrain from taking any measures pursuant to Art. S19.⁹ In the vast majority of cases, CAS awards do not mention whether the decisions they contain were taken unanimously or only by a majority of the panel. That said, when an arbitrator is really uncomfortable with one (or more) section(s) of the award, he will be allowed to request that the relevant passage(s) specifically mention(s) the fact that the decision(s) set out therein was (were) taken by “the majority of the panel”.¹⁰ Conversely, in some cases, the panel might also want to indicate expressly in the award that some important decision(s) was (were) made unanimously, in order to stress the strength of its collegiate conviction and adhesion to the solution(s) adopted.¹¹ This will of course add to the persuasive authority of the award, including as a precedent to which other panels may later refer.

III. Form and Contents of the Award

- 5 Article R59(1) states that the award “shall be written, dated and signed”. Neither the CAS Code nor the PILS¹² contain any other mandatory requirements with respect to the contents of the award. This notwithstanding, the CAS makes sure that its awards always contain, in addition to the date of the award and (at least) the required signature(s), also the other *elements that are essential to the award's correct understanding* and enforcement, in particular the parties' and the tribunal members' names, the seat of the arbitration, the object of the dispute and the arbitrators' decision(s) with respect to such object.¹³
- 6 The *signature* is an essential element of the award. In the 2013 edition of the Code, Art. R59(1) specifies that while (consistent with Art. 189(2) PILS) the signature of the President will suffice, where the President does not sign, the award can be issued bearing only the signatures of the two co-arbitrators. Thus, Art. R59(1) implicitly acknowledges the right of a dissenting arbitrator (whatever his role within the panel) not to sign an award with which he disagrees. That said, one should not automatically conclude that an award bearing only the President's or the co-arbitrators' signature(s) is necessarily the result of a majority decision.¹⁴ In fact, when CAS awards are signed only by the panel's President this will be, more often than not, for merely practical reasons, in particular to avoid any delay in dispatching the decision to the parties.
- 7 The *date of the award* is the date of the last signature or of signature by the President, and it normally corresponds to the date on which the award is communicated by courier and/or fax and/or e-mail to the parties.¹⁵ When the dispositive part of the award was communicated to the parties prior to the reasons,¹⁶ the reasoned version of the award should mention the first date as the date of the award, but panels generally¹⁷ indicate both dates.¹⁸

⁹ Art. S19 provides that “CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS. ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if he violates any rule of this Code or if his action affects the reputation of ICAS/CAS”.

¹⁰ Cf., for instance, CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 195. The dissenting arbitrator cannot require that the award also indicate that the dissent was his. If being identified as the dissenting arbitrator is an important issue for the arbitrator in question, then he will have no other choice but to issue and notify to the parties a (separate) dissenting opinion.

¹¹ Cf., for a recent case, CAS 2011/A/2433, *Diakite v. FIFA*, Award of 8 March 2012, para. 159.

¹² For a commentary on Art. 189 PILS (“The Arbitral Award”), see Molina, Chapter 2 above.

¹³ Cf. Rigozzi, para. 1009, Poudret/Besson para. 745, p. 665.

¹⁴ However, the situation where only the two co-arbitrators sign an award which has been made unanimously is bound to be rare. One may thus surmise that this possibility has been expressly envisaged in the latest version of Art. R59(1) as a clarification of the fact that such an alternative is available, perhaps in reaction to cases where the President had refused to sign an award because he disagreed with its contents.

¹⁵ Cf. para. 15 below.

¹⁶ Cf. para. 13 below.

¹⁷ Cf., for instance, CAS 2011/A/2495/2496/2497/2498, *FINA v. Cielo Filho et al. & CBDA*, Award of 29 July 2011 at the end (operative part issued on 21 July 2011).

¹⁸ As to the date that triggers the time limit to file an action to set aside, cf. para. 16 below.

As far as the contents of the award are concerned, Art. R59(1) provides that it “shall state brief reasons”,¹⁹ thus ruling out the possibility given under Swiss law for tribunals to render unreasoned awards (if so agreed by the parties).¹⁹ In practice, *the reasoning of CAS awards is often quite detailed*. That said, reflecting the fact that CAS arbitrators originate from more than fifty countries and thus belong to different legal cultures and traditions, the drafting style of the awards – beyond the basic “standard” structure comprising (i) a factual part, (ii) a section devoted to the legal analysis, and (iii) a part setting out the operative decision – still appears to be rather heterogeneous.²⁰ Be that as it may, what seems important in CAS appeals proceedings is that the awards rendered systematically contain a section summarizing the procedural history and a comprehensive discussion of the arguments raised by the parties. Although neither of these requirements is mandatory at law, both contribute to reinforcing the parties’ confidence in the system. They also facilitate the understanding (and the acceptance) of awards, and participate in generating a consistent corpus of jurisprudence, in particular in disciplinary cases.²¹

The *actual drafting* of the award may be done entirely by the President of the panel or shared between its members. Quite often, the CAS Counsel in charge of the case or the ad hoc clerk, when one is appointed,²² will provide substantial assistance to the panel with respect to the drafting of the award.

IV. Scrutiny

According to Art. R59(2), “[b]efore the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle”. In a recent case, the Secretary General has explained that “his intervention [...] only relates to matters of pure form (clerical mistakes, standardization of style with other CAS awards, etc.) and that he might draw the Panel’s attention to CAS case law when the award to be rendered is manifestly not in line with such case law” but that “his advice is not binding on the arbitrators”.²³

This practice is certainly sensible to the extent that it *promotes consistency in the case law*.²⁴ However, it is submitted that it would be preferable for the CAS Court Office (or the CAS Counsel in charge of the case) to draw the arbitrators’ attention to any relevant (unpublished) decisions already in the course of the proceedings,²⁵ so that the parties can be invited to comment on such decisions. It is undeniably *disconcerting to find, in an award, references to “precedents” whose very existence was hitherto unknown* to the parties (or at least one of them).

In any event, the CAS Secretary General shall not intervene in the arbitrators’ deliberations. The Secretary General should thus systematically make it clear for the arbitrators, in particular those who are less experienced, that his advice is not binding on the panel.

V. Notification and Communication

Article R59(3) provides that “[t]he Panel may decide to *communicate the operative part of the award to the parties, prior to the reasons*”. It is submitted that this possibility should be used only in exceptional circumstances, when the parties need certainty as to their legal position without delay. Indeed, experience shows that it is during the drafting process that the arbitrators might realize that their initial decision is not necessarily legally justifiable or that its operative part should at least be nuanced. The second sentence of Art. R59(3) adds that the award is *immediately enforceable* (i.e., upon communication of its

¹⁹ Cf. Arroyo, above commentary on Art. 190 PILS (Chapter 2), paras. 77 and 99.

²⁰ In particular, the difference between the “continental” (civil law) style, which tends to remain relatively impersonal, and the common law style, with its direct, more personal discourse, is still quite perceptible in the awards issued by the CAS.

²¹ Cf. Rigozzi, paras. 1013-1014, with the references.

²² Cf. Art. R54(4).

²³ CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, Award of 31 January 2012, para 120. On this issue, cf. also BGer. 4A_612/2009 para. 3.3.

²⁴ Rigozzi, paras. 1260-1268.

²⁵ Rigozzi, para. 1269.

operative part). The *time limit to file an action to set aside* before the Swiss Federal Supreme Court can only start to run with the notification of the *complete award*.²⁶ However, this does not prevent a party from bringing setting aside proceedings before the Supreme Court as soon as it receives the operative part, for the purpose of requesting a stay of the award.²⁷

- 14 Article R59(5) provides that “[t]he operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel.”²⁸ In practice, the Code-prescribed *time limit to communicate the award* is very rarely met, and Art. R59(5) enables the CAS to deal with this by adding that “such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel”. As a matter of fact, the time limit is generally extended *sua sponte* by the CAS along the lines of, for instance, the practice of the ICC Court.²⁹ Experience shows that the time limit may even be formally extended after it has already elapsed. In itself, this is unproblematic since, as a matter of Swiss law, the time limits set in arbitration rules are indicative and procedural in nature (so-called “*délais d’ordre*”), meaning that their expiry does not affect the validity of the arbitral proceedings or give rise to a ground for challenging the award.³⁰
- 15 According to Art. R59(4) the award is “notified by the CAS Court Office”. In practice the CAS *first communicates the award by fax*³¹ with a cover letter indicating to the parties that they “will receive an original copy of the award in due course”. While the award becomes binding for each party upon receipt of its faxed version, it is the date of receipt of the signed original that constitutes the starting point of the 30-day time limit for bringing setting aside proceedings before the Swiss Federal Supreme Court and for the award’s enforceability.³²

VI. Effect of the Award

- 16 Article R59(4) provides that the award shall be final and binding upon the parties. According to Art. 190(1) PILS, “the award shall be final when communicated”. Hence, *a CAS award will have res judicata effect and shall be binding* upon the parties as soon as its operative part is communicated to them (by courier, fax and/or e-mail, in accordance with Art. R31). Once the original, signed version is notified, the award can be immediately enforced in Switzerland and abroad, unless the Swiss Supreme Court grants an order to stay the award pending setting aside proceedings.³³
- 17 Article R59(4) also states that the award “may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in

²⁶ Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2), paras. 39–40.

²⁷ Rigozzi, *JIDS* 2010, p. 225. By contrast, enforcement in the courts would require the filing of at least the signed original version of the dispositive part of the award (cf. footnote 28 below).

²⁸ Cf. Art. R54(3). Prior to the 2010 revision of the Code, Art. R59 provided that the award was to be rendered within four months from the filing of the statement of appeal. As explained by Reeb, *Modifications essentielles*, p. 7: the amendment introducing a time limit running from the transfer of the file to the panel was made to avoid the difficulties resulting from the delays incurred in connection with the first stages in the proceedings (which are beyond the control of the arbitrators), in particular the panels’ formation, the determination of the language of the proceedings, if disputed, and the payment of the advances of costs by the parties.

²⁹ Cf. above commentary on Art. 30 ICC Rules (Chapter 4), paras. 9–14.

³⁰ Kaufmann-Kohler/Rigozzi, para. 682. Cf. also BGer. 4P.196/2003 para. 5. That said, it may be advisable for the CAS to ensure that its awards contain an indication of the fact that the original time limit has been duly extended, in particular for enforcement purposes, in cases where the award is issued much later than the expiry of the said time limit.

³¹ Note that Art. R31(2) as amended in the 2013 edition of the Code now provides that “arbitration awards, orders and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt”.

³² Indeed, according to the Swiss Federal Supreme Court (cf. BGer. 4A_392/2010 para. 2.3.), the faxed (or e-mailed) award cannot be considered as “signed” and validly notified within the meaning of Art. R59. The faxed (or e-mailed) version of the award will also not meet the requirements of Art. IV NYC.

³³ Cf. Arroyo, above commentary on Art. 191 PILS (Chapter 2), para. 59; cf. also footnote 28 above.

an agreement entered into subsequently, in particular at the outset of the arbitration”. This provision constitutes, at best, an *indirect waiver* of the parties’ right to challenge the award. As such, it *does not meet the requirements set out in the Swiss Federal Supreme Court’s case law relating to Art. 192(1) PILS*,³⁴ according to which, in order to be deemed valid and enforceable, any such waiver must be in express terms and “indisputably manifest” the parties’ “common intention to waive all future setting aside proceedings”.³⁵ Similar waivers contained in the regulations of a sports-governing body are, according to the Supreme Court, unenforceable with respect to challenges against CAS awards rendered in appeals proceedings opposing the sports-governing body to an athlete or club.³⁶

VII. Publicity of the Award

According to Art. R59(6), the “award, a summary and/or a press release setting forth the results of the proceedings shall be *made public by CAS, unless both parties agree that they should remain confidential*”.³⁷ Unless the parties have agreed to keep the award confidential, the award is public irrespective of any ‘official’ publication by the CAS. 18

In practice, the CAS will ask the parties, in the cover letter accompanying the faxed³⁸ version of the award, to confirm that the award can be published. It is very unlikely that the winning party will agree to confidentiality as it will, naturally, wish to capitalize on the publication of the award. *When the award contains sensitive and/or personal information*, the CAS will specifically ask the parties whether they “consider that any of the information contained in the award should remain confidential”, informing them that, if such should be the case, “they should send a request, with grounds, to the CAS” within a given time limit, “in order that such information could potentially be removed, to the extent such removal does not affect the comprehension of the decision”.³⁹ If a party can show *good reasons to have certain information or portions of the award redacted*, it is submitted that the CAS need not have the agreement of all the parties in order to do so. 19

While Art. R59(6) provides that the non-confidential awards “shall be made public by the CAS”, *only a limited number of awards are actually published*, as of their issuance, on the CAS website,⁴⁰ nor are all awards made available in the CAS database.⁴¹ This selective publication practice is unfortunate⁴² for various reasons: (i) it is fundamentally at odds with the very concept of a “CAS jurisprudence”, the existence and consistency of which has been referred to by the Swiss Federal Supreme Court as one of the reasons that can justify the existence of a closed list of CAS arbitrators;⁴³ (ii) it gives an advantage to lawyers who regularly act before the CAS (not to mention lawyers from the same firm as a CAS arbitrator), as they will inevitably be informed of, and have access to, a wider pool of decisions and precedents; (iii) it might create an impression of lack of transparency. 20

³⁴ Cf. BGer. 4P.62/2004 para. 1.2 at the end; BGE 131 III 173 para. 4.2.

³⁵ English translation of the topical passage in BGE 131 III 173 para. 4.2.3.1 as set out in BGE 133 III 235 para. 4.3.1; *Swiss Int’l Arb.L.Rep.* 2007, p. 80.

³⁶ Cf. BGE 133 III 235 para. 4.3.2.2. Cf. also Rigozzi, *JIDS* 2010, pp. 226-227.

³⁷ Cf. also CAS 99/A/246, *W. v. FEI*, Award of 11 May 2000, para. 34. The 2013 edition of the Code now specifies that “in any event, the other elements of the case record shall remain confidential”.

³⁸ As noted above, according to the 2013 version of Art. R31(2), arbitration awards “shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt”.

³⁹ CAS 2011/A/2425, *Fusimalohi v. FIFA*, Award of 8 March 2012.

⁴⁰ See <<http://www.tas-cas.org/recent-decision>>.

⁴¹ See <<http://jurisprudence.tas-cas.org/sites/caselaw/help/home.aspx>>. In addition, at least for the time being, the uploading of awards in the CAS’s “searchable” database seems to occur only quite some time after their issuance. For instance, at the time this commentary was being finalised, the most recent award posted on that database was already more than one year old.

⁴² Cf., in particular, Rigozzi, paras. 1259-1269.

⁴³ BGE 129 III 445 para. 3.3.3.2. On the CAS list of arbitrators, cf. Introduction, paras. 5-11 above.

- 21 While the CAS has stopped publishing periodical volumes of *digests* of its awards,⁴⁴ in a welcome initiative, it has recently started to make its *CAS Bulletin*, a publication which in the past was circulated only to CAS arbitrators, available on the internet for downloading.⁴⁵ In addition, an increasing number of *digests and reports on CAS awards* are published in various arbitration and sports law journals, in particular the *Journal du droit international* (JDI),⁴⁶ the *Revue de l'Arbitrage* (Rev.Arb.),⁴⁷ the *Paris Journal of International Arbitration/Cahiers de l'arbitrage*,⁴⁸ the *International Sports Law Review* (ISLR) and the *International Sports Law Journal* (ISLJ).⁴⁹
- 22 Article R59(6) also allows the CAS to issue a press release together with or in lieu of the publication of the award. Given the increased attention devoted by the media to CAS disputes, it is submitted that the contents of the *press statement issued by the CAS* should be agreed (or at least discussed) with the parties prior to its issuance. If the parties cannot agree, the press release should at least be drafted with the involvement of the panel that rendered the award, bearing in mind that journalists will, in most cases, not bother to read the full award, but simply (and sometimes selectively) copy-paste the contents of the press release(s). Inaccurate media coverage can cause a great deal of harm to athletes, whose entire career may be at stake in a CAS decision. Moreover, in high profile cases, the CAS Secretary General has recently started the practice of giving a *press conference*. This is an unprecedented step by an arbitral institution and a new development in the area of arbitration law. While it is true that media attention needs to be addressed and dealt with, including by adopting an efficient communication policy, it is submitted that such a policy ought to be carefully considered and that clear rules governing its various aspects should be set out in the Code itself. Any such rules should, in all cases, aim at ensuring that the interests of the parties themselves always prevail over those of the media and/or the arbitral institution.

⁴⁴ Cf. *CAS Digests I, II and III*.

⁴⁵ Available at <<http://www.tas-cas.org/bulletins>>, and, for the previous editions (since 2010), <<http://www.tas-cas.org/bulletins-archives>>. Each issue of the Bulletin contains several articles and commentaries, a series of reports and summaries of recent CAS awards, under the title "Leading Cases", and a section devoted to the Swiss Federal Supreme Court's case law relating to CAS awards, as well as miscellaneous information on the CAS activities and CAS-related publications and news.

⁴⁶ Featuring a digest with commentaries, published almost every year since 2001 by Eric Loquin, together with Dominique Hascher and/or Gérald Simon, under the title "Tribunal Arbitral du Sport, Chronique des sentences arbitrales".

⁴⁷ Digest under the editorship of Mathieu Maisonneuve with commentaries by various contributors, including Sébastien Besson, Cécile Chaussard, Francis Kessler, Marc Peltier and Gérald Simon, published yearly under the title "Chronique de jurisprudence arbitrale en matière sportive".

⁴⁸ Published regularly in the then *Cahiers de l'arbitrage*, under the title "Chronique de jurisprudence en matière d'arbitrage sportif", by Andrea Pinna and Antonio Rigozzi, to be continued in the *Paris Journal of International Arbitration* by Antonio Rigozzi and Ulrich Haas.

⁴⁹ These journals, among others, regularly feature reports on individual CAS cases or on the decisions rendered during particular events, such as the Olympic Games. Cf., for instance, Beloff, *ISLR 2009*, pp. 3-11.

D. Special Provisions Applicable to the Consultation Proceedings (abrogated)

Articles R60, R61, R62, R66 (abrogated)

Articles R60 to R62 and R66 of the Code, governing the so-called CAS “consultation” or “advisory proceedings”¹ (the “C” proceedings) were recently *abrogated by a decision of the ICAS, with effect from 1st January 2012*. As noted in the comments released by the CAS Secretary General upon the entry into force of the revised Code,² the reasons for abrogating these provisions were, on the one hand, that recourse to the advisory procedure had been declining since the second half of the 1990s,³ and on the other, that the requests for advisory opinions lodged in recent years tended to deviate from the original purpose of the procedure, which was to provide sports organizations with the opportunity to seek a “neutral” legal opinion from the CAS to help them resolve questions of interpretation or difficulties arising from conflicting sports rules.⁴

According to the CAS Secretary General’s comments, in the more recent cases, advisory opinions were requested with respect to questions which also made the object of pending or impending contentious proceedings, with the sole purpose of obtaining an authoritative opinion which, even if it had no binding force, would undoubtedly have “a certain influence” on the outcome of the contentious proceedings involving the same question.⁵ This gave the sports-governing bodies an undue advantage since, under Art. R60, athletes were not habilitated to request such advisory opinions,⁶ but could only insist on the fact that the opinions issued upon request by a governing body were (i) non-binding and (ii) not necessarily persuasive, as they were rendered only on the basis of the materials and arguments provided by the party requesting the opinion.⁷

As reported in the CAS Secretary General’s comments, in taking its decision to abrogate the provisions on the advisory procedure, the ICAS found that CAS ordinary proceedings were just as suitable to allow parties in disagreement over the interpretation of a given sports regulation to request an opinion from the CAS, with the difference that in such cases the resulting pronouncement would be embodied in a binding award,⁸ and be rendered with the benefit of having heard arguments from both sides. A recent example of this latter solution can be found in the matter CAS 2011/O/2422, *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)*,⁹ based on a joint request for arbitration

¹ For a discussion of the practice and procedure of CAS advisory proceedings, cf., e.g., McLaren, *Advisory Opinions*, pp. 180-193.

² Reeb, *Modifications essentielles*.

³ Cf. the table of statistics related to cases submitted to CAS since its creation, available at <<http://www.tas-cas.org/d2wfiles/document/437/5048/0/statistics202011.pdf>>.

⁴ The advisory procedure, which had been in existence since the very inception of the CAS, enabled CAS panels or sole arbitrators to give opinions on any questions of law or general interpretation related to sports activities. These opinions were rendered in the same format as CAS awards, but as provided in Art. R62, did not have binding force. For an example of an important advisory opinion rendered by the CAS under this procedure, cf. CAS 2005/C/976 & 986, *FIFA & WADA*, Advisory Opinion of 21 April 2006.

⁵ Reeb, *Modifications essentielles*, pp. 9-10. Cf. also McLaren, *Advisory Opinions*, p. 181. For an example of a situation of this kind, cf. CAS 2009/A/1870, *WADA v. Jessica Hardy and USADA*, Award of 21 May 2010, paras. 40-49.

⁶ Indeed, as is apparent from the text of Art. R60, first sentence, only certain sports-governing bodies and organizations were authorized to file such requests.

⁷ In addition, this had an inevitable impact on the quality of the opinions and, indirectly, on the (perceived) independence of the system.

⁸ Reeb, *Modifications essentielles*, pp. 9-10.

⁹ Cf. Award of 4 October 2011, finding that the Osaka Rule is invalid and unenforceable. Interestingly, however, a very similar question was subsequently submitted to the exact same panel in the matter CAS 2011/A/2658, *British Olympic Association (BOA) v. World Antidoping Agency (WADA)*, this time filed as appeals proceedings, arising from

filed by the USOC and the IOC, concerning the validity of the “Regulations Regarding Participation in the Olympic Games – Rule 45 of the Olympic Charter” (the so-called “Osaka Rule”).

BOA's appeal against WADA's decision declaring BOA's Bye-Law on the selection of British athletes for the Olympic Games to be non-compliant with the WADA Code (cf. Award of 30 April 2012, upholding WADA's decision).

E. Interpretation

Article R63

I. Purpose of the Provision

In line with other sets of arbitration rules, the Code affords parties to CAS arbitrations the possibility 1
of requesting the interpretation of the awards rendered by panels operating under *both the ordinary and*
appeals arbitration procedures. The purpose of this type of provision is that of facilitating the performance
and enforcement of the award, by making room for “remedial action” by the tribunal itself in those cases
where the award may be deemed deficient due, for instance, to unclear wording or clerical mistakes. As
illustrated by the discussion below, the rules governing this type of remedy endeavor to reconcile this
objective with two fundamental principles of international arbitration, namely the *res judicata* effect of
awards, and the principle according to which arbitral tribunals are *functus officio* once they have rendered
their award.

Article R63 *provides the legal basis for the CAS panels’ power to interpret (and/or correct) their awards*: it 2
outlines the circumstances in which an application for interpretation (and/or correction) may be made
with the CAS (II.) and the procedure that will be followed in dealing with it (III.). Art. R63’s distinctive
features, compared to similar provisions in other sets of arbitration rules, as well as its relationship with
other post-award remedies should also be addressed briefly (IV.-V.)

II. Tribunals’ Power to Interpret and/or Correct their Awards

It is a well-established principle that, absent an agreement to the contrary, the power of arbitrators to 3
correct and/or interpret their award is *governed by the law of the seat of the arbitration*.¹ Pursuant to Art.
R28, in CAS arbitral proceedings, this will be Chapter 12 of the PILS (or Part 3 of the ZPO when the
arbitration is domestic).² Contrary to other arbitration statutes,³ including the ZPO,⁴ the PILS contains
no provision on the interpretation of awards or similar forms of “post-award remedies”, such as correc-
tion and supplementation. Nevertheless, it is well-settled that international arbitral tribunals sitting in
Switzerland do have the power to correct or interpret their awards.⁵ The conditions for the exercise of
such power are primarily governed by *the parties’ agreement*.⁶ In practice, the parties’ agreement will be
expressed in an indirect manner, by reference to the relevant provisions in the applicable arbitration
rules.

In CAS arbitrations, the arbitrators’ residual powers with respect to their awards are set out in Art. R63. 4
The heading of Art. R63 only speaks of interpretation, but as its text makes clear, this *provision also deals*
with the correction of awards, inasmuch as it allows the parties to request the panel’s intervention where
“the award contains clerical mistakes or mathematical miscalculations”. The distinction between inter-
pretation and correction is not always clear-cut. In practical terms, a request for *interpretation* will aim at

¹ Cf. Born, p. 2522 and p. 2537.

² Cf. Art. R28.

³ Cf., e.g., Art. 1058 of the German ZPO.

⁴ Under the heading “Rectification, interpretations and completion of the award”, Art. 388 ZPO reads as follows: “1. Each party can apply to the arbitral tribunal for it to: a) rectify clerical mistakes and errors of calculation in the award; b) interpret specific passages in the award; c) render an additional award regarding claims which were raised in the arbitral proceedings but not addressed in the award. 2. The application must be made within 30 days of discovering the error or parts of the award that require an additional ruling, but at the latest one year after notification of the award. 3. The time limits for filing an appeal continue to run notwithstanding the application. If a party suffers detriment from the rectification or interpretation, the time limit for appeal starts again”.

⁵ BGE 126 III 524. On this decision, cf. Kaufmann-Kohler/Rigozzi, *Jusletter* 19 March 2001. The same is true of the power to render additional awards, briefly discussed below at para. 16.

⁶ Art. 182(1) PILS; Art. 373(1) ZPO.

obtaining a clarification of the meaning of a given term, statement or passage in the award,⁷ whereas the purpose of a request for *correction* is to seek the rectification of a portion of the text.⁸ Be that as it may, the remedies of interpretation and correction are both meant to help elucidate the intent of the tribunal in rendering its original award, i.e., “to restore the true meaning of the award”; they are not means to obtain a new, different decision from the arbitrators.⁹

- 5 Article R63 specifies that a request for interpretation can be made with respect to “the *operative part of the award*” (“*le dispositif de la sentence*”). The operative part of an award contains the substantive ruling rendered by the panel on the parties’ claims, as opposed to the discussion of the underlying facts and arguments and the panel’s reasoning in reaching its decision. However, under Swiss law, the operative part of the award may need to be interpreted in light of the reasons.¹⁰ Hence, Art. R63 correctly provides that interpretation (and/or correction) can also be required when components of operative part “are [...] contrary to the reasons”.
- 6 Any type of award¹¹ can make the object of a request for interpretation or correction. Thus, awards on jurisdiction, other interim awards, partial and final awards, as well as consent awards may come within the ambit of Art. R63.¹²
- 7 The surprisingly liberal language of Art. R63, which used to provide that a request for interpretation could be made “whenever” the operative part or the award itself was deficient in the sense outlined above, now reads, more plainly, that such requests may be made “if the operative part of the award is unclear, incomplete, ambiguous, if its components are self-contradictory or contrary to the reasons, or if the award contains clerical mistakes or mathematical miscalculations”. Whatever the adverb used, the correct reading of this provision is that it constitutes an exception to the general rule that awards are final and binding for the parties and the tribunal. Arguably, this is also the rationale of Art. R63(2), which invests the President of the relevant Division with the authority to review any such request and decide “whether there are grounds for interpretation” before forwarding the request to the panel.¹³

III. Procedure

A. Time Limit

- 8 Until the 2013 edition of the Code, the most striking aspect of Art. R63 was that it did not set out a time limit for the filing of requests for interpretation or correction. Virtually all institutional rules (and the statutes that contain provisions on interpretation/correction) provide for a short time limit, generally of one month or thirty days, either from the issuance of the award or from its receipt, upon the expiry of which the parties may no longer request an interpretation or correction (and the tribunal, being definitively *functus officio*, no longer has the power to rule on such a request).¹⁴ Art. R63 now provides for a 45-day time limit to file such requests. While one could argue that an (even) longer time limit may be warranted due to the fact that errors or ambiguities in the award could become apparent only at the time of its execution or enforcement,¹⁵ this is a welcome change, consistent with the fundamental principle

⁷ The purpose of interpretation is to explain more clearly what a (possibly ambiguous or obscure) statement in the award is intended to mean, without however altering it.

⁸ As suggested by the text of Art. 388(1) ZPO, this will concern “clerical mistakes and errors of calculation”, i.e., errors of typographical, computational or similar nature, but not errors in the reasoning or errors of law. Contrary to interpretation, a correction of the award does entail an alteration of the text.

⁹ Kaufmann-Kohler/Rigozzi, *Jusletter* 19 March 2001, p. 4.

¹⁰ BGE 128 III 191 para. 4a.

¹¹ Or, whatever its denomination, any final and binding decision disposing of some or all claims with *res judicata* effect.

¹² Cf. for instance, BGE 130 III 755 para. 1.3; Knutson, *J.Int.Arb.* 1994, p. 107.

¹³ Cf. below, para. 9.

¹⁴ Cf., e.g., Arts. 35(1) and 36(1) Swiss Rules.

¹⁵ In CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, e.g., where a request filed more than one year after the rendering of the award was admitted, the need for interpretation only became apparent when the athlete was granted his requests for the stay of the execution of the award in the context of challenge proceedings. The grant

of the finality of arbitral awards and the need for legal certainty, which is of paramount importance in competitive sports.

B. Decision by the Division President

According to Art. R63, when an application for interpretation is filed with the CAS, the President of the relevant Division shall “review whether there are grounds for interpretation” (in French, “*examine s’il y a lieu à interprétation*”). Only if the Division President comes to a conclusion in the affirmative upon such review will the request be submitted to the panel or the sole arbitrator who rendered the award. In this respect too, Art. R63 differs from its counterparts in the majority of the other institutional rules. The Swiss Rules, for instance, simply require for the Secretariat (as well as the other party or parties) to receive “notice” of a request for correction or interpretation,¹⁶ which is formally addressed to the tribunal itself: there is no provision for the Secretariat to “review” the form or merits of the request before forwarding it to the tribunal.¹⁷

In practice, the *Division President will issue a formal decision only if he comes to the conclusion that there is no ground for interpretation*. The Division President does not need to consult the other party or parties prior to making his decision,¹⁸ but can surely decide to do so if he deems it appropriate under the circumstances. In our experience, the practice with respect to such decisions is rather inconsistent: some are reasoned¹⁹ while others are not at all.²⁰ Since they are not in the nature of awards, decisions by the Division President refusing to entertain a request for interpretation or correction cannot be appealed.

C. Procedure before the Panel

If the Division President does decide that the request should be submitted to the panel, in case one or more of the members of the original panel are no longer available, Art. R63 provides for their replacement in accordance with Art. R36. This provision is in line with the practice followed under other arbitration rules.²¹

Although Art. R63, contrary to analogous provisions in other arbitration rules,²² does not expressly mention that the other party or parties should be afforded an opportunity to comment on an application for interpretation, it is submitted that this should always be the case, as failing to do so would amount to a breach of due process. As far as we are aware, the practice of the CAS is indeed to forward the request to the other party or parties, fixing a short time limit for them to file their comments.²³

Article R63(2) at the end sets a *time limit for the panel to rule* on the application for interpretation, namely one month following the submission of the request to it. The CAS Court Office should thus make sure that both the Division President and, as the case may be, the panel, react swiftly when seized with such a request.

of the stays had the effect of rendering otiose (in French, “*caduque*”) the portion of the operative part of the award that, in addition to the total duration, set out the exact date range of his suspension for an anti-doping rule violation (cf. Decision of 9 March 2007 (reported in *Dictionnaire du droit permanent* (Update 47), pp. 3488-3489).

¹⁶ For a commentary on Art. 35 Swiss Rules, see Courvoisier, Chapter 3 above.

¹⁷ Similarly, under the ICC Rules (Art. 35(2)), the Secretariat will merely proceed to transmit the application for correction or interpretation to the Tribunal.

¹⁸ Indeed, if the request is granted, the other party or parties will be consulted by the panel. Cf. below, para. 12.

¹⁹ CAS 2007/A/1396&1402, *WADA v. RFEC & V. and UCI v. Federation R. & V.*, Decision of 9 July 2010.

²⁰ CAS 2009/A/1816, *FC M. v. V.*, Decision of 12 May 2010.

²¹ Cf. Veit, para. 3 at Arts. 35-36, p. 309.

²² Cf., e.g., Art. 35(2) ICC Rules.

²³ Cf., e.g., CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, Decision of 9 March 2007, a case involving several parties, where all submitted observations and the athlete filed additional comments thereafter.

D. Decision Rendered

- 14 If the panel does decide that the award should be interpreted or corrected, its decision will form an *integral part of the original award*, a principle that is expressly stated in some arbitration rules,²⁴ but not in the CAS Code.²⁵ This means, in particular, that the requirements of Art. R59 will apply to such a decision.²⁶

E. Costs Issues

- 15 Some institutional rules allow for the charging of additional fees in relation to the work performed by the arbitrators in rendering a decision on interpretation/correction (provided, however, that the need for such a decision is not attributable to the tribunal's own negligence).²⁷ The CAS Code is silent on this point. While it may be sensible not to rule out this possibility, we would submit that recourse to it in appeals cases should be had only *when the request gives rise to particularly complex questions* or turns out to be abusive.

IV. Additional Awards and Revision

- 16 Although the PILS contains no express provision on the arbitrators' power to render *additional awards*, commentators unanimously agree that even where the arbitration rules adopted by the parties are silent in this respect (as is the CAS Code), *a request for such an award will be admissible*.²⁸ An additional award is a supplemental decision rendered by the tribunal with respect to claims which were presented in the arbitral proceedings but have not been dealt with in the original award. In other words, an additional award is a means to remedy the tribunal's omission to decide on one (or more) of the claims submitted to it. Contrary to a decision on interpretation/correction, an additional award is a self-standing decision, which does not form an integral part of the original award, but complements it with one or more additional rulings with respect to the parties' claims.
- 17 While this was the case in the original CAS arbitration rules of 1984, the current CAS Code does not contemplate the possibility to file a request for the *revision* of an award. Under Swiss law, the court of competent jurisdiction to hear such requests is the Swiss Federal Supreme Court.²⁹ However, the Supreme Court's jurisdiction to hear applications for revision is not mandatory and the CAS itself can accept to hear such a request, provided all the parties agree to it.³⁰

V. Relationship with Setting Aside Proceedings

- 18 Importantly, *the filing of a request for interpretation/correction does not stay the running of the statutory time limit for challenging awards before the Swiss Federal Supreme Court*.³¹ Thus, an aggrieved party wanting to initiate setting aside proceedings must be mindful to file its challenge within the applicable time limit, regardless of its intention of requesting a correction or interpretation of the award from the tribunal. That said, a party filing a challenge against the award can also request a stay of the proceedings before

²⁴ Cf., e.g., Art. 35(2) Swiss Rules; Art. 35(3) ICC Rules. Cf. also BGE 131 III 164 para. 1.1.

²⁵ The Panel in CAS 2005/A/922 & 923 & 926, *WADA & UCI v. Hondo & Swiss Olympic*, Decision of 9 March 2007, expressly noted at the end of its decision that the latter's purpose was to allow for the correct execution of the original CAS award, and that it did not constitute a new arbitral award.

²⁶ Cf. Art. R59, in particular paras. 5-8 above.

²⁷ Cf. Derains/Schwarz, p. 326. Art. 40(5) of the Swiss Rules, which provides that "[n]o additional costs may be charged by an arbitral tribunal for interpretation or correction or completion of its award", has been qualified in the 2012 version of the Rules by the addition of the wording "unless the circumstances justify otherwise".

²⁸ Cf., e.g., Berger/Kellerhals, para. 1402, referring to BGE 126 III 254. This power is now expressly provided for in Art. 388(1)(c) ZPO.

²⁹ For more details on the procedure for revision before the Swiss Federal Supreme Court, cf. also Rigozzi, *JIDS* 2010, pp. 255-264, and the references provided therein.

³⁰ Cf. CAS 2000/A/270, *Meca-Medina & Majcen v. FINA*, Award of 23 May 2001; CAS 2008/A/1557, *FIGC, Mannini, Possanzini & CONI v. WADA*, Award of 27 July 2009.

³¹ BGE 131 III 164 para. 1.2.4.

the Supreme Court pending the CAS's decision on interpretation or correction if the outcome of such decision could render the challenge (or part of the challenge) against the award moot.³²

The decision on interpretation/correction could itself be the object of a new request for interpretation or correction to the tribunal, or be challenged in autonomous setting aside proceedings.³³ Any *challenge against the decision on interpretation or correction* must, however, be strictly limited to issues arising in connection with the interpretation/correction proceedings or, as to the merits, with the subject matter of the decision itself.³⁴ In other words, a challenge against a decision on interpretation/correction “may not serve as a pretext for obtaining a review of the original award, be it because the latter had not been challenged within the applicable time limit or the motion to set aside brought against it has been declared inadmissible or rejected.”³⁵ 19

A related question is whether in arbitrations submitted to rules which provide for the tribunal's power to interpret/correct its award, such as the CAS Code, there is an obligation for a party aggrieved by an award to submit a request for such a remedy prior to bringing a challenge against the award itself before the Supreme Court. In a recent decision, the Supreme Court has held that this should not be the case under Swiss law.³⁶ 20

The principles outlined above apply *mutatis mutandis* to decisions on requests for supplemental awards. 21

³² Conversely, since the decision on interpretation or correction forms part of the award (cf. above, para. 14), it will also share its fate in case the latter is challenged. Thus, if the award is set aside, any decision on its interpretation or correction as may have been rendered in the interim will also be annulled (BGE 130 III 755 para. 1.3; BGE 131 III 164 para. 1.1).

³³ As the decision forms an integral part of the award, it can only be challenged to the extent the award itself is capable of being challenged (cf. Berger/Kellerhals, para. 1411). Thus, a challenge against the decision can be brought on all the grounds on which the award to which the decision is related could be challenged.

³⁴ If the challenge is dismissed, the decision on interpretation or correction will definitively form part of the award, whereas if the decision is set aside, the award will stand in its original form.

³⁵ BGE 131 III 164 para. 1.2.3, free translation from the French original.

³⁶ BGE 137 III 85 para. 1.2, referring to BGE 131 III 164 para. 1.2.4.

F. Costs of the Arbitration Proceedings (Arts. R64 – 65)

Article R64: In General

I. Purpose and Scope of Application of the Provision

- 1 Article R64, together with Art. R65, sets out the provisions governing costs in CAS arbitration proceedings. The purpose of this type of provision in institutional rules is to *provide advance guidance to the parties on the manner in which the costs of the arbitration will be calculated and allocated*. The indications given in Arts. R64–65, together with the applicable Schedule of Arbitration Costs,¹ help make costs-related issues more transparent and predictable for parties contemplating or involved in an arbitration before the CAS.
- 2 Article R64 applies (i) to all CAS arbitrations conducted as ordinary proceedings, as well as (ii) to appeals proceedings against decisions that were not issued by international federations or that were issued by international federations but are not disciplinary in nature² and, (iii) in particular when the federation which has rendered the challenged decision “is not a signatory to the [Paris] Agreement constituting the ICAS”,³ to appeals proceedings against decisions issued by international federations in disciplinary matters, when the President of the Appeals Division so decides.⁴ The costs of the arbitration in CAS proceedings include the CAS Court Office fee (II.), the administrative costs of the CAS and the costs and fees of the arbitrators, as well as, where relevant, the costs and fees of, e.g., any expert(s) or interpreters appointed by the panel (III.). Furthermore, the parties will have to sustain costs for their legal representation and other expenses in connection with the proceedings (IV.). In parallel to these issues, the availability of legal aid for impecunious parties needs to be addressed (III. A.).

II. CAS Court Office Fee

- 3 Article R64.1(1) provides that, upon the filing of the request for arbitration/statement of appeal, the claimant/appellant is required to pay a *non-refundable fee of CHF 1'000.–* before the proceedings can be set in motion.
- 4 A notable development in 2011 was the doubling in the CAS Court Office fee from CHF 500.– to CHF 1'000.– for all requests for ordinary and appeals arbitration. While this may appear to be a significant increase, it should be remembered that the fee had remained unvaried since 1994.⁵ In fact, the CAS Court Office fee remains moderate when compared with the filing fees charged by other arbitral institutions,⁶ and it is submitted that, even in appeals cases, save for truly exceptional circumstances, *it does not constitute a bar to the ability to access justice* as it is still affordable for the vast majority of parties. It is unclear whether the granting of legal aid⁷ by the ICAS would also cover a waiver of the CAS Court Office fee.⁸

¹ The CAS Schedule of Arbitration Costs can be found on the CAS website, at <<http://www.tas-cas.org/arbitration-costs>>.

² The costs of appeals proceedings against decisions which are of a disciplinary nature and which are rendered by an international federation are governed by Art. R65.

³ This new provision is understandably meant to avoid that sports governing bodies which do not contribute to the financing of the ICAS take advantage of free of charge proceedings before the CAS. A list of such governing bodies is nowhere to be found but it is common knowledge that the Fédération Internationale de l'Automobile (FIA) and the International Golf Federation (IGF) are among them.

⁴ Cf. Art. R65(4), paras. 7–8 below.

⁵ Reeb, *Modifications essentielles*, p. 10.

⁶ Cf. for instance, Art. 1 of Appendix III to the ICC Rules (providing for a filing fee of USD 3'000) or Appendix B to the Swiss Rules (providing for a registration fee ranging between CHF 4'500 and CHF 8'000, depending on the amount in dispute and fixing the fee at CHF 6'000 where the amount is not quantified).

⁷ Cf. below, paras. 11–13.

⁸ The most prudent course of action for appellants seeking legal aid would be to request that the CAS refrains from requiring the payment of the CAS Court Office fee pending the ICAS decision on legal aid, where the applica-

III. Arbitration Costs

A. Advance of Costs and Legal Aid

Under Art. R64.2 the *CAS Court Office* shall request the parties to pay an advance of costs upon the constitution of the panel. The panel is not directly involved in fixing the initial advance as it will only receive the file once the advance has been paid, at least by one of the parties. 5

In fixing the *amount of the advance*, the CAS Court Office will “estimate [...] the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4”, and comprise the CAS’s administrative costs and the costs and fees of the panel.⁹ In practice, the advance is calculated on the basis of the CAS Schedule of Arbitration Costs which can be found on the CAS website.¹⁰ The CAS Court Office enjoys a great deal of discretion in fixing the advance and does provide any explanation as to how the relevant amount has been calculated. Parties must thus live with a considerable level of unpredictability. That said, experience shows that when the case does not have a specific value, the amount of advance costs required will tend to be between CHF 30’000.– and CHF 40’000.– for a three-member panel. In disciplinary cases, the current CAS practice appears to be that the total advance will be fixed at CHF 36’000.–. In case a sole arbitrator is appointed, the amount of the advance is usually CHF 18’000.–. 6

Supplementary advances of costs may be requested by the CAS Court Office (including upon request by the panel) if it appears that the costs will be higher than originally estimated. This may occur where the complexity of the dispute and the time required by the arbitrators to deal with the case are more important than initially anticipated by the Court Office. It can also occur that the CAS Court Office reviews the financial status of the file after the arbitrators have drafted the award (or when the drafting is under way) and requests the payment of an additional advance before notifying the award to the parties.¹¹ Such late requests for additional advances should be avoided in disciplinary cases when it is clear that the athlete already had significant difficulties in paying the initial advance. 7

As a matter of principle, the advance shall be paid in *equal shares by the claimant(s)/appellant(s) and the respondent(s)*.¹² Only in ordinary proceedings, when the respondent files a counterclaim,¹³ will the CAS Court Office proceed to the calculation of an “additional” advance in accordance with Art. R64.2(1). In that case, it is submitted that, according to the original language of Art. R64.2(1)¹⁴ any party can ask the CAS to calculate “separate advances”, pro-rated to the amount of the parties’ respective claims. 8

The Code is silent as to how the shares of the advance are allocated in *multi-party arbitration*, in particular in cases where there are multiple respondents and/or multiple appellants following the consolidation of connected proceedings, or involving the intervention of third parties.¹⁵ When two parties file an appeal against the same decision (for instance WADA and the UCI against a decision rendered by a national 9

tion is filed at the same time as the statement of appeal. In some cases, the CAS has granted such a request (CAS 2011/A/2503, *D. v. CONI*, Order of 5 September 2011), but in others it has denied it (CAS 2012/A/2720, *FC I. v. LA de l’ASF & ASF & FC C.*, Decision of 8 February 2012). It is submitted that, unless the appellant can establish that he cannot even afford paying the filing fee, such payment should be required simply as a means to determine whether he is serious about his appeal.

⁹ Cf. below paras. 15-17.

¹⁰ See <<http://www.tas-cas.org/arbitration-costs>>.

¹¹ CAS 2011/A/2360 & 2392, *E. Federation & G. Federation v. FIDE*, Letter of 20 January 2012.

¹² Art. R64.2(2).

¹³ The filing of counterclaims is no longer possible in appeal proceedings under the Code (cf. Art. R55, paras. 21-22 above).

¹⁴ The adjective “separate” was replaced by “additional” in art. R64.2(1) as per the 2013 edition of the Code.

¹⁵ In its latest version, the wording of Art. R64.2 does now contemplate cases where there are more than two parties (by adding an “s” to claimant(s), appellant(s) and respondent(s)), but it is still unclear whether the “equal shares” of the advance of costs are to be paid by the “claimant(s)/appellant(s)” on the one hand, and by the “respondent(s)” on the other (meaning that each ‘side’ will be required to pay 50%), or by each of the multiple “claimant(s)/appellant(s)” and “respondent(s)” (in which case the amount of the advance will be divided in as many “equal shares” as there are parties).

anti-doping organization) they should be considered as two separate parties for the purpose of allocating the advance of costs. Similarly, it is submitted that when a party decides to join the proceedings it must also pay its share of the advance as an independent party.

- 10 It can occur that the respondent does not pay its share of the advance. In such cases, the CAS Court Office will fix a time limit for the claimant/appellant to substitute for the respondent by paying also the latter's share. In other words, *the respondent can force the claimant/appellant to pay the entire advance of costs* for the arbitration. While this is standard practice in commercial arbitration, it is submitted that, at least in appeals arbitrations, sports-governing bodies should refrain from engaging in such tactic, unless it is abundantly clear that the appeal is mischievous and the prospects that the appellant will be in a position to honor an award on costs are manifestly nil.
- 11 Depending on the amount requested and on the financial resources of the parties, the obligation to pay an advance of costs in disputes of national character or in non-disciplinary international disputes *can in fact preclude access to arbitration*. Arguably, in such situations, there is the possibility for an appellant without sufficient financial resources to rescind the arbitration agreement contained in a sports regulation on the ground that it does not afford him fair access to justice.¹⁶
- 12 Indeed, the obligation to submit sports disciplinary disputes to arbitration deprives athletes of any legal aid as may be available before the otherwise competent state courts. Accordingly, the *provisions for the availability of legal aid before the CAS* are of crucial importance. Art. S6 para. 9 of the CAS Code, provides that "if it deems such action appropriate, the ICAS may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund".¹⁷ Although legal aid guidelines have not, so far, been enacted by the ICAS,¹⁸ the possibility to apply to the CAS for legal aid does exist. The request should be made to the ICAS through a "Legal Aid Application Form" that can be obtained upon request from the CAS Court Office.¹⁹ In substance, the applicant will have to show (i) that his financial situation does not allow him to pay the advance of costs (respectively, honor an award on costs)²⁰ and (ii) that his case on the merits is not manifestly unfounded.²¹ The best way of establishing the financial situation of the applicant is for him to provide taxation documents (e.g., his latest tax return). To allow the ICAS to consider the prospects of success, the applicant should be careful to set out his case in the best possible way.²² This may of course be difficult if the applicant cannot afford legal representation, which is something the ICAS should

¹⁶ Cf. Kaufmann-Kohler/Rigozzi, para. 280a and the references provided therein.

¹⁷ In spite of the CAS Secretary General's assurances, at the time the 2010 edition of the Code was adopted, that the ICAS had decided "to maintain and even reinforce the CAS legal aid system and intended to establish official guidelines so that the application procedure and the criteria for granting legal aid could be made public" (cf. Reeb, *Modifications essentielles*, p. 4, free translation), one can only note that, three years on, no guidelines have been issued and, in the latest version of the CAS Statutes, the language of Art. S6(9) has gone from the affirmative ("it creates a legal aid fund [...]") to the hypothetical mode ("it may create a legal aid fund and [...] CAS legal aid guidelines for the operation of the fund").

¹⁸ Reeb, *Modifications essentielles*, p. 4.

¹⁹ The four-page long form requires basic information such as the applicant's name, marital status and address, as well as details of his financial situation, including his monthly income, any payments received from sponsors, sports organisations, social security or other benefits, assets, any charges (e.g., rent) and outstanding debts. Supporting documentation must be provided for some of these data (as stated on the form, the information and any documents provided with it "are treated in confidence" by the ICAS).

²⁰ As specified on the CAS form legal aid is granted when the applicant's income and capital "are not sufficient to allow him/her to cover the costs of proceedings before the CAS without drawing on that part of his/her assets necessary to support him/herself and his/her family".

²¹ As explained on the application form, legal aid will be refused "[...] if it is obvious that the applicant's claims or grounds of defence have no legal basis [and] if it is obvious that the proceedings will not be begun or pursued by a reasonable litigant conducting his/her case at his/her own expense". Cf. also Reeb, *Modifications essentielles*, p. 4.

²² The Legal Aid Application Form contains a field requiring a brief summary of the "facts of the case and what is the stake in the procedure". It can only help the applicant's case to provide a clear and comprehensive statement of his reasons for appealing in the form, but also to take care to provide the necessary supporting documents with the statement of appeal (cf. Art. R48).

take into account in making its decision. According to the CAS's application form, legal aid is available only for individuals ("*personnes physiques*"). Clubs (or other legal entities) seeking legal aid should be aware that ICAS appears to be prepared to consider legal aid where evidence can be provided that "the economically interested individuals within the club are indigent".²³ It is submitted that this possibility should be limited to amateur clubs incorporated as non-profit organizations.²⁴ Given the lack of predictability arising from the absence of a proper guide, it is advisable for prospective applicants to include in their request a specific note asking the ICAS to inform them "if there is any further information or any additional document(s) that it may require to be submitted", so that they can remedy the situation if the application should be deemed deficient. If the ICAS does grant the application,²⁵ it will (i) exonerate the applicant from the payment of the advance of costs (and possibly the filing fee),²⁶ (ii) order that the CAS will bear the applicant's share of the costs of arbitration and, in some cases, (iii) provide the applicant with a limited amount of money (in our experience, usually not exceeding CHF 4'000.–) as reimbursement for travel, accommodation and other expenses justifiably incurred in connection with the arbitration, and/or (iv) an amount for legal representation, in which case the total amount granted usually does not exceed CHF 5'000.–.²⁷ Instead of granting monies for legal representation costs, the CAS will propose the "assistance of an official defence counsel" (*avocat d'office*) acting *pro bono* where the applicant ticks the corresponding box on the form.²⁸

The decision on legal aid is particularly important since *failure to pay the advance of costs* (be it the initial share of the advance, the substitution for the respondent's share or any additional advance ordered by the CAS) within the time limit fixed by the CAS *will result in the claim/appeal being deemed withdrawn*.²⁹ This is systematically restated in all the CAS decisions fixing advances of costs and the parties are reminded of such consequence in a further letter that the CAS sends approximately one week before the time limit for payment. If the initial advances are not fully paid within the time limit set by the CAS Court Office, the President of the relevant Division will terminate the arbitration. If the failure to pay concerns an additional advance, the termination shall be decided by the panel. The parties can request an extension of the time limit to pay the advance but, unlike under the provision made in the Code for the CAS Court Office filing fee,³⁰ they cannot simply rely on a so-called "*délai de grace*". Only where the delay in payment was caused by a third party will the CAS find it to be an unjustifiable basis to terminate the arbitration.³¹

²³ CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, ICAS Order of 16 July 2012, para. 11.

²⁴ Indeed, Swiss courts have granted legal aid to amateur clubs constituted as associations under Swiss law (cf. decision by the Tribunal d'Arrondissement Côte VD, *FC I. v. LA ASF & ASF & FC C.*, AJ12.038542, Decision of 8 November 2012), presumably on the ground that Art. 117 ZPO provides that "any person" can request legal aid.

²⁵ As indicated on the Legal Aid Application Form, the ICAS's decision is final and not subject to appeal.

²⁶ Cf. above, footnote 6. In CAS 2012/A/2720, *FC I. v. LA de l'ASF & ASF & FC C.*, Decision of 8 February 2012, the CAS indicated that the Court Office fee had to be paid pending the ICAS's decision but that depending on the outcome of that decision, the fee could later be reimbursed.

²⁷ Cf., for instance, CAS 2005/A/953, *D. v. IIHF*, Order of 24 October 2005.

²⁸ In this regard, the Legal Aid form specifies that if the assistance of a counsel is granted, "the ICAS designates such counsel of its own motion after consulting the applicant". It bears noting that if the applicant has already instructed counsel, in particular to assist with the request for legal aid and the preliminary steps in the arbitration, the appointment of a different attorney as "official defence counsel" would seem to be inefficient.

²⁹ Art. R64.2(2). It has been contended that a literal interpretation of this provision would suggest that it sanctions only a default with respect to the advance on costs, not a failure to comply with the time limit set in order for payment to be made. The Swiss Federal Supreme Court has held that such an interpretation is not sustainable as it would "paralyze the operation" of the CAS as an arbitral institution (BGer. 4A_600/2008 para. 4.2.1.3).

³⁰ Cf. Art. R38(3) and Art. R48(3).

³¹ Cf. CAS 2010/A/2170 & 2171, *Iraklis Thessaloniki FC v. Hellenic Football Federation, OFI FC v. Hellenic Football Federation*, Award of 23 February 2011, para. 34. Having noted that payment instructions had been given to the bank, and that payment had in fact been effected by the latter, all within the prescribed time limit, the panel added: "[t]he delay [...] was caused by the bank and not by OFI FC itself. The fact that the amount had not been credited on the CAS bank account was due to technical problems within the bank [...]. In the present case, it would have been therefore not only disproportionate and overly formalistic, but simply wrong for the CAS Court Office to terminate the present procedure on the basis of Art. R64.2 of the Code".

In addition, parties should be aware that according to the Swiss Federal Supreme Court, the fact that a party is confronted with financial difficulties in the course of the proceedings does not constitute a sufficient ground to stay the arbitration.³² The termination of the arbitration in ordinary proceedings will not prevent the claimant from reintroducing the claim subsequently, subject to any applicable statute of limitations. By contrast, the consequences of a failure to pay the advance in appeals proceedings will be much more dramatic, as *the appellant may lose his substantive rights due to the expiry of the time limit for appeal*.³³ Despite this drastic consequence, the Swiss Supreme Court has held that issuing a termination order is both justified³⁴ and not overly formalistic in this context.³⁵

- 14 Pursuant to Art. R55 of the CAS Code, *the respondent may request that the time limit for the filing of the answer be fixed after the payment by the appellant of his share of the advance of costs*. It is submitted that the respondent should not be allowed to rely on Art. R55 with respect to its share of the advance in cases where the appellant has to substitute for the respondent’s own failure to pay.

B. Determination of the Arbitration Costs

- 15 Article R64.4 provides that the CAS Court Office shall determine the final amount of the costs of the arbitration *at the end of the proceedings*. According to Article R64.4, the *arbitration costs include* (i) the “CAS Court Office fee” (paid by the claimant/appellant), (ii) the “CAS administrative costs”, (iii) the arbitrators’ fees and expenses, including the fees of the ad hoc clerk where one is appointed,³⁶ (iv) an unspecified “contribution towards the expenses of the CAS”, which should cover any costs arising in connection with the holding of a hearing, including the rental of premises and costs associated with the use of technologies such as video- or teleconferencing, audio recording etc., and (v) “the costs of witnesses, experts and interpreters”, which should cover the fees and expenses of the witnesses summoned by the tribunal (if any), and of the expert(s) and/or interpreter(s) appointed by the tribunal (if any).
- 16 The CAS arbitration rules provide scales for the *arbitrators’ fees* which guarantee the parties that they will not face excessive fees claims.³⁷ The amount of fees to be paid to each arbitrator is fixed by the Secretary General of the CAS on the basis of the work provided and of the time reasonably devoted to the case by the panel’s members. The CAS Code was recently revised to amend the hourly rate payable to CAS arbitrators.³⁸ Previously, arbitrators were remunerated at a fixed hourly rate of CHF 250. The new scale allows for this rate to increase in accordance with the amount in dispute. It is submitted that this scale remains reasonable and compares well with the standard arbitrators’ fees applied in commercial arbitrations. The CAS Secretary General has the possibility to reduce the costs, if excessive, and should make sure that each arbitrator files a summary of his work and time spent on the case, as required by the Schedule of Arbitration Costs.³⁹
- 17 Article R64.4 provides that “[t]he final account of the arbitration costs may either be included in the award or *communicated separately to the parties*” *after the award*. The latter option is the most frequent in practice. The relevant part of the award will state that the costs of the arbitration, to be later determined and communicated to the parties by the CAS Court Office/Secretary General, shall be borne as apportioned in the award.⁴⁰ The CAS will subsequently issue a letter-decision containing (i) the amount of the costs of arbitration and, where relevant, (ii) directions as to the reimbursement(s) by, or further

³² BGer. 4P.64/2004 paras. 3.2-3.3.

³³ Cf. Art. R49.

³⁴ BGer. 4A_600/2008 para 4.2.1.3.

³⁵ BGer. 4A_600/2008 para 5.2.2.

³⁶ Art. R64.4 does not mention the ad hoc clerk’s expenses. It is submitted that this is an oversight and that the clerk’s expenses should also be taken into account in the arbitration costs or should be considered as expenses of the arbitrators.

³⁷ Cf. the Schedule of Arbitration Costs available at <<http://www.tas-cas.org/arbitration-costs>>.

³⁸ With effect as from 1st January 2010.

³⁹ The Schedule of Arbitration Costs is Appendix II to the Code. Its current version is available on the CAS website, at <<http://www.tas-cas.org/arbitration-costs>>.

⁴⁰ Cf. below, III.C.

payment(s) to be made to, the CAS. In practice, this information may be notified by the CAS quite some time after the award.⁴¹

C. Allocation of Arbitration Costs

Article R64.5 of the CAS Code provides that “in the arbitral award, *the panel shall determine* which party shall bear the arbitration costs or in which proportion the parties shall share them.”⁴²

The CAS Code does not set out how the panel should exercise its *discretion* in allocating the arbitration costs. It is very difficult to identify a clear pattern in CAS jurisprudence since, for obscure reasons, the CAS deletes the costs section from the awards it publishes. However, experience shows that in practice panels use the same criteria as are provided under Art. R64.5 at the end for determining the allocation of legal costs.

The main criterion is of course the *outcome of the proceedings*: as a matter of principle the costs of the arbitration will be borne by the losing party. Where no party prevails entirely, the panel can allocate the arbitration costs in proportion to the parties’ relative success.

The allocation according to the outcome of the proceedings should be adjusted by taking into account the *procedural conduct of the parties*. Indeed, CAS panels have decided that the arbitration costs should be borne in equal proportions by the parties in cases where it was found that the losing appellant had raised a legitimate concern, even if it was ultimately unsuccessful.⁴³ The panel may also consider other procedural circumstances, such as multiple and unfounded procedural requests by the parties which may end up being time consuming to deal with and thus expensive.⁴⁴

Finally, the Panel can (and should) further adjust its decision on costs by taking into account the parties’ *respective financial situations*, in particular when there is an obvious disparity between them.

The parties should be allowed to make *submissions on costs* if they so request, either at the end of the hearing or within a short time limit thereafter.

IV. Legal Fees and Other Expenses of the Parties

Article R64.5 provides that “as a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters”. This provision *applies to all CAS arbitrations*, including appeals arbitrations concerning a disciplinary decision rendered by an international federation, for which no arbitration costs are charged according to Art. R65.

The wording of Art. R64.5 makes it clear that the panel has *no obligation to award legal costs* and that, if it decides to do so, it will not order a full reimbursement to the prevailing party but *only grant a contribution* toward such costs. In a recent decision, the Swiss Federal Supreme Court has held that “it would be desirable for the CAS to specify the concept of “contribution” within the meaning of Art. R64.5 of the Code, in order to give a framework to the discretionary power of the arbitrators in these matters.”⁴⁵

⁴¹ In CAS 2011/A/2380, *Arie Haan v. FECAFOOT*, for example, almost one year after the award had been rendered, the decision on the costs of arbitration had not yet been communicated to the parties. Consequently arbitrators must also be prepared to be compensated with significant delay.

⁴² Art. R64.1(2), which was inserted in with the 2012 revision of the Code, deals with the decision on costs in instances where the arbitration is terminated before the constitution of a panel.

⁴³ CAS 2010/O/2039, *FASANOC v. CGF*, Award of 19 April 2010, para. 8.4, where the Panel dismissed a claim brought by a national federation against a sports federation, but ordered the parties to bear the arbitration costs in equal shares and declined to award a contribution towards the respondent’s legal costs. The panel noted that the claim was “one of principle and important constitutional interpretation” which had been brought “before CAS in order to protect and advance the best interests of the athletes”.

⁴⁴ CAS 2003/O/462 (unpublished), paras. 2.1-2.2.

⁴⁵ BGer. 4A_600/2010 para 4.2.

- 26 A party can be granted a contribution only if it made a request to that end in its prayers for relief. The parties may either decide to leave it to the arbitrators to determine what a fair contribution is, or request a specific amount. In the latter case the parties must ask the panel to be allowed to make a short *submission on costs*⁴⁶ after the hearing or at least to *submit a statement of costs*.
- 27 A submission on costs should contain the parties’ arguments regarding the four elements mentioned in Art. R64.5, namely “*the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties*”. The outcome of the proceedings is the main criterion, since Art. R64.5 provides that a contribution towards legal costs is granted only to the winning party. Although experience shows that CAS practice is far from consistent in this regard,⁴⁷ it is submitted that a contribution can also be granted to a party that did not entirely prevail in the proceedings, be it the claimant/appellant⁴⁸ or the respondent.⁴⁹ The parties’ procedural conduct might lead the panel to decide that no contribution shall be granted to the winning (or substantially winning) party or to reduce the amount of such contribution. The fact that the losing party’s “procedural conduct has been irreprehensible” can be considered as a good reason “to grant only a relatively small amount of costs’ contribution” in favor of the prevailing party, in particular when the latter “certainly has larger financial resources than [the former]”.⁵⁰
- 28 In an apparent attempt to address the above mentioned criticism by the Swiss Supreme Court as to the predictability of the CAS’s practice in relation to the concept of “contribution” within the meaning of Art. R64.5 at the end,⁵¹ the 2013 version of the Code now indicates that the “complexity” of the proceedings should also be taken into account by the panel in reaching its decision as to the costs’ contribution to be awarded. It is submitted that the *complexity of the dispute should be taken into account to determine the reasonableness of the statements of costs submitted by the parties*, but should not impact the arbitrators’ discretion to determine the amount of the said contribution. In particular, the fact that the prevailing party has made complicated factual or legal allegations that were eventually dismissed by the panel should be taken into account to reduce the amount of any contribution towards its costs.

⁴⁶ If the panel does order the filing of submissions on costs, then it cannot render an award ruling on the costs before having received the said submissions, as this would amount to a breach of the parties’ right to be heard, cf. BGER. 4A_600/2010 paras. 4.2-4.3.

⁴⁷ The lack of consistency and the ensuing unpredictability for the parties are compounded by the fact that the awards as published by CAS do not include the figures relating to costs in the dispositive section.

⁴⁸ Cf. CAS 2000/A/278, *Chiba v. Japan Amateur Swimming Federation (JASF)*, Award of 24 October 2000, para. 16. Cf., however, CAS 2009/A/2023, *Gianni Da Ros v. CONI*, Award of 17 August 2010, where the Panel did not grant any contribution to the athlete, who had to seize the CAS to reduce a clearly abusive penalty, but was unable to get the totality of the reduction he requested.

⁴⁹ Cf. CAS 2008/A/1458, *UCI v. Vinokourov & KCF*, Award of 30 August 2010, para. 5.10; CAS 2011/A/2325, *UCI v. Roel Paulissen & RLVB*, Award of 23 December 2011, para. 213.

⁵⁰ Cf. CAS 2011/A/2426, *Adamu v. FIFA*, Award of 24 February 2012, para. 168.

⁵¹ Cf. para. 24 above.

Article R65: Appeals against Decisions Issued by International Federations in Disciplinary Matters

I. Purpose and Scope of Application of the Provision

Together with Art. R64 and the Schedule of Arbitration Costs,¹ Art. R65 provides guidance to prospective appellants on how costs are calculated and allocated in CAS proceedings. 1

The express terms of Art. R65 indicate that it applies only to *appeals against decisions (i) which are exclusively of a disciplinary nature and (ii) which are rendered by an international federation or sports-body*. It provides that in such cases the proceedings are free, as their costs are borne by the CAS. This *does not extend to the parties' costs including attorney's fees* as well as any expenses sustained in connection with the intervention of their witnesses, experts and interpreters. Any discussion of Art. R65 should trace the evolution of this rule in the CAS Code (II.), before addressing how the costs of the proceedings (III.) and the parties' costs (IV.) are dealt with under it. 2

II. Evolution of the Rule Set out in Article R65

It is instructive to compare the text of Art. R65 in the current edition of the CAS Code with its wording in the previous editions. The 1994 edition of the CAS Code stipulated that *all* appeals proceedings were free of charge. In the 2004 edition, the scope of application of this rule was restricted to "disciplinary cases of an international nature". Subsequently, the 2010 edition was again amended to provide that Art. R65 was "applicable to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body or by a national federation or sports-body acting by delegation of powers of an international federation or sports-body".² Finally, as of the 2012 edition of the Code the scope of the "free of charge" rule has been further reduced by the provision that Art. R65 is only applicable to appeals against "*decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body*", which include continental federations or confederations.³ It has been argued that the rationale behind this rule change may be to prevent spurious appeals against decisions of national federations, which would be brought without regard to the cost consequences.⁴ Be that as it may, as the rule now stands, *in all other (i.e., non-disciplinary and/or non-international) appeals cases* appellants are required to cover their share of the arbitration costs.⁵ It is submitted that this differentiated treatment is not sustainable as both the disciplinary and the international nature of the dispute are clearly not sound criteria to determine whether the arbitration proceedings should be free of charge. It is difficult to understand why an athlete or other sports-person sanctioned for match-fixing should benefit from the free of charge rule, while another athlete who was subject to a non-disciplinary decision should advance the costs of the arbitration in order to have an opportunity to contest such decision. Non-disciplinary decisions, for instance eligibility decisions, can be just as inva- 3

¹ The CAS Schedule of Arbitration Costs can be found on the CAS website, at <<http://www.tas-cas.org/arbitration-costs>>.

² Cf. Rigozzi, *Jusletter* of 13 September 2010, paras. 43-46 for a critical analysis of the 2010 amendment.

³ Cf. for instance CAS 2012/A/2759, *Rybka v. UEFA*, Award of 11 July 2012, para 12.

⁴ Cf., for instance, Stephen Sampson/Stacey Shevill, *Amendments to the Code of Sports-related Arbitration*, Squire Sanders International Arbitration News 5 April 2012, available at: <<http://www.squiresanders.com/international-arbitration-newsletter-04-05-2012/>>. It is submitted that the real purpose of the 2004 limitation was to prevent the national sports-governing bodies from "externalizing" their dispute resolution costs to the CAS (as the system is financed by the international federations, National Olympic Committees and the IOC). The 2010 change was simply meant to reduce the ancillary disputes that could arise in connection with the definition of "*disciplinary cases of an international nature*" for the purposes of Art. R65. The rationale of the latest revision is more difficult to understand: one could perhaps see it as an incentive for international federations to refrain from delegating dispute resolution to their national federations, the classical example here being the UCI's rule according to which doping cases shall be dealt with by the relevant national federation in application of the UCI Rules.

⁵ Cf. Arts. R64.1 and R64.2. In accordance with Art. R67, this new rule applies to procedures initiated by the CAS on or after 1st March 2013.

sive and damaging as doping-related or other disciplinary decisions.⁶ Similarly, one fails to understand, frankly, why an allegedly doped athlete can benefit from the free of charge rule if the decision under appeal has been rendered by an international federation, while he would have to pay for the arbitration if the decision was taken by a national federation or anti-doping agency. This leads to *unsatisfactory situations, in particular in cycling*, where the regulations of the international governing body (UCI) require the national federation of the rider to investigate and decide the case in first instance, meaning that the CAS appeal will be inevitably fall outside the scope of the free of charge rule of Art. R65.⁷ The same situation often occurs *in track and field cases* under the IAAF Rules. The CAS has routinely rejected applications to the effect that the national decision was in reality a decision by the relevant international federation and that it is thus unfair to request the athlete to pay the (advance of the) arbitration costs.⁸

- 4 Fortunately, the 2013 edition of the Code contains a new provision in Art. R65.1, according to which any *dispute regarding the application of Art. R65* (i.e. as to the “free of charge rule”) *shall be determined by the panel*. According to this provision, the CAS Court Office can direct the party claiming that the arbitration shall be free of charge to pay the advance of costs “pursuant to Article R64.2 pending a decision by the Panel on the issue”. Given the limited scope of the dispute, it is submitted that the CAS Court Office should request the payment of a minor fraction of the advance, in particular when the reason of the dispute is precisely that the appellant is not in a position to pay the arbitration costs.
- 5 The issue remains, however, that the application of Art. R65.1's criteria can potentially impair the athletes' rights of access to justice. Against this background, the *availability of legal aid* becomes of the utmost importance, as discussed in connection with Art. R64.⁹

III. Costs of the Proceedings

A. Principle: “Free of Charge Rule”

- 6 Under Art. R65.2, appeals proceedings in disciplinary cases of an international nature are free of charge, with the *save for the CHF 1'000.– CAS Court Office fee*, which has to be paid for the arbitration to be set in motion and will in any event be retained by the CAS.¹⁰ Thus, in international disciplinary cases, parties are liable only for their own legal representation and assistance costs and the costs incurred in connection with the involvement in the proceedings of any witnesses, experts and interpreters, as well as any contribution that the final decision may require them to make towards the opposing party's legal costs.¹¹

B. Exception: Application of Article R64

- 7 Pursuant to Art. R65.4, a departure from the free of charge rule *can be decided only by the Division President*, either *ex officio* or upon request by the President of the panel or sole arbitrator.¹²
- 8 Article R65.4 provides that the application of Art. R64 may be decided “*if the circumstances so warrant*” including in particular, according to the 2013 edition of the Code, “the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS”. It is anticipated that the “*predominant economic nature*”

⁶ Cf. CAS 2007/A/1377, *Rinaldi v. FINA*, Award of 26 November 2007, para. 110: “[...] the non-approval of a change of national affiliation is not related to a disciplinary procedure or sanction and is not akin to a disciplinary sanction. Accordingly, it is article R64.4 and R64.5 of the Code that apply to the determination of costs”.

⁷ This rule is particularly worrisome in light of the contemplated revision of the WADA Code according to which “Athletes and other Persons shall be Ineligible until any CAS cost awards against them have been paid, unless fairness requires otherwise”.

⁸ In such cases, the CAS tends to propose the appointment of a sole arbitrator and to reduce the amount of the advance accordingly. However, such a proposal does not really address the problem: it can only possibly alleviate its consequences.

⁹ Cf. Art. S6(9) of the Code; cf. Art. R64, paras. 12-13 above.

¹⁰ Cf. Art. R48(2), paras. 18-20 above.

¹¹ Cf. Art. R65(3).

¹² Cf. CAS 2011/A/2325, *UCI v. Paulissen & RLVB*, Award of 23 December 2011, para. 211.

of the case will come into play in UEFA's disputes relating to the regulations of "financial fair-play" and in appeals against FIFA or FIBA's disciplinary decisions sanctioning parties who did not comply with CAS or BAT¹³ awards in financial disputes. Disciplinary disputes concerning match-fixing, corruption and agents' activities can also be considered as preeminently economic in nature within the meaning of Art. R65.4. As to the cases involving decisions by international sports-governing bodies that are not signatories to the Paris Agreement constituting the ICAS (and thus do not contribute to its financing), one could mention in particular doping disputes decided by the Fédération Internationale de l'Automobile (FIA) or the International Golf Federation (IGF). It is submitted that this rule should be applied only if the parties are financially in a position to pay the arbitration costs. Ideally, such a decision should be made at the beginning of the arbitration in order to avoid any "bad surprises" further down the line. A decision at a later stage should only be made in exceptional cases, where it becomes evident during the arbitration that a party has abused the system.

Where the parties reach a settlement during the arbitration, the CAS has ruled, pursuant to Art. R65.4, 9 that if the settlement leads to the withdrawal of the appeal this may trigger the application of Art. R64 notwithstanding the free of charge nature of the proceedings.¹⁴ The parties may have, for instance, to contribute to the costs of the organization of the hearing if such costs could have been avoided at their own initiative.¹⁵ This situation should remain exceptional as settlements in disciplinary proceedings are not common in practice.

IV. Parties' Costs

Article R65.3 provides that "[e]ach party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and in particular, the costs of witnesses and interpreters". This contribution *applies only to the legal and other costs sustained by the parties in putting their respective case(s) to the CAS and possibly the filing fee*, as pursuant to Art. R65.2 (and subject to Art. R65.4) the CAS bears the arbitration costs proper, including the fees and costs of arbitrators. 10

In the majority of cases, the CAS holds that the prevailing party is to be granted a *contribution towards the legal fees and other expenses* it has incurred in connection with the arbitration.¹⁶ It is submitted that a 11

¹³ BAT stands for the Basketball Arbitral Tribunal. Previously named FAT (FIBA Arbitral Tribunal), the BAT has its seat in Geneva, and resolves non-disciplinary disputes between players, agents and clubs through *ex aequo et bono* arbitration. Cf. <http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16808/selNodeID/16808/pres.html>.

¹⁴ CAS 2000/A/264, *G. v. FEI*, Order of 23 October 2000.

¹⁵ CAS 2000/A/264, *G. v. FEI*, Order of 23 October 2000.

¹⁶ In this respect, panels often paraphrased the wording of Art. R64.5, according to which, as a general rule, "the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings [...]". In the 2013 edition of the Code, the same wording has been incorporated in Art. R65.3 (cf. Art. R64.5, paras. 18-22 above). While this "general rule" is consistently recalled and upheld in CAS awards subject to Art. R65 (cf., e.g., CAS 2010/A/2162, *Doping Control Centre University Sains Malaysia v. WADA*, Award of 15 June 2011, para. 21.2), there are significant differences in the way it is applied *in concreto* by CAS panels, in particular with respect to the considerations underlying the decision as to the quantum of the contribution awarded to the prevailing party. In this regard, and to cite but one example, a parallel reading of the relevant sections of the awards in (i) CAS 2007/A/1377, *Melanie Rinaldi v. FINA*, Award of 26 November 2007, paras. 111-113 and (ii) CAS 2011/A/2426, *Amos Adamu v. FIFA*, Award of 24 February 2012, para. 168 (noting that "the Respondent certainly has larger financial resources than the Appellant. Moreover, the Appellant's procedural conduct has been irreprehensible. Accordingly, the Panel does not believe that it would be appropriate for the Appellant to have to pay a large amount to the Respondent and decides to grant only a relatively small amount of costs' contribution in favour of the Respondent"), is perplexing. It is submitted that, without questioning the discretion panels rightly enjoy in this regard, an approach considering all the relevant elements and circumstances carefully is not only warranted, but even necessary as a matter of fairness and proper administration of justice (cf., for instance, CAS 2011/A/2325, *UCI v. Paulissen and Royale Ligue Vélocipédique Belge (RLVB)*, Award of 23 December 2011, paras. 212-213, where the Panel

reasoned allocation taking into account not only the outcome of the case but also its complexity (as now expressly provided in Art. R65.3), the procedural conduct of the parties and their financial resources should be applied more frequently. When it is obvious that an appeal has been brought on spurious grounds, the amount of the contribution should be significant – irrespective of whether the appellant is an athlete or a sports-governing body. Ultimately, just like the decision to retrospectively require payment of the arbitration costs pursuant to Art. 65.4 (cf. above III.B), this should lead to a reduction in the overall number of appeals brought before the CAS, which in turn would allow the CAS to revise the scope of application of the free of charge rule, extending it again to appeals cases other than just appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. Conversely, when an athlete had to resist an appeal brought by a sports-governing body, it would appear to be right that no legal costs should be awarded against the athlete. After all, it is not the athlete who rendered the decision under appeal.

- 12 In an exceptional, but illustrative award related to the allocation of parties' costs based on the other side's *procedural conduct and financial resources*, the Panel ruled that the appellant had to bear a significant portion of the respondent's costs based on his "litigation misconduct".¹⁷ Such misconduct included, inter alia, requiring an unnecessarily large number of witnesses for cross-examination and subsequently electing not to call them, pursuing serious allegations of misconduct against the respondent without any evidence, and bringing an unprecedented number of technical challenges against the respondent, thereby engaging it in lengthy and costly proceedings. Ultimately, the respondent was awarded an amount of USD 100'000.00 to cover a portion of its attorney fees and other expenses.

took into account the complexity of the case, the outcome of the dispute, the fact that the arguments raised by the rider had been debated at length in the proceedings, and his financial situation in awarding a contribution towards his legal costs even though the UCI had prevailed in the arbitration).

¹⁷ CAS 2007/A/1394, *Landis v. USADA*, Award of 30 June 2008, para. 289.

G. Miscellaneous Provisions (Arts. R67 – R70)

Article R67

Article R67 sets out the inter-temporal or *transitional rule* governing the applicability of the current 1
edition of CAS Code. It now provides that the Code's Rules "are applicable to all procedures initiated
by the CAS as from 1 March 2013", further specifying that "the procedures which are pending on 1
March 2013 remain subject to the Rules in force before 1 March 2013, unless both parties request the
application of these Rules".

As noted elsewhere,¹ this provision, which was inserted in the 2010 edition of the Code, was a welcome 2
improvement, in terms of legal certainty, on the 2004 edition.² However, the reference it makes to the
"initiation of proceedings by the CAS" remains somewhat ambiguous as, in the absence of a definition,
this can be understood to refer either to the filing of the request for arbitration/statement of appeal
(as would be logical), or to the initiation of the proceedings by the CAS in the "technical" sense (i.e.,
pursuant to Arts. R39 (ordinary proceedings) and R52 (appeals proceedings)). We are only aware of
a few CAS (appeals) decisions addressing this issue, and in those cases the panels seemed to consider
that the relevant criterion was initiation of the proceedings by the CAS within the meaning of Art. R52,
although they also referred to the date of filing of the statement of appeal.³ Given the clear reference to
"pending procedures" in the second sentence of Art. R67, and since, under the Swiss *lex arbitri*, this is
to be understood as a reference to the *date of filing of the request for arbitration or statement of appeal*,⁴ it
is submitted that this, rather than the date of initiation of proceedings pursuant to Arts. R39 and R52,
should be taken as the relevant date for inter-temporal purposes under Art. R67.

¹ Cf. Rigozzi, *Jusletter* of 13 September 2011, para. 3.

² It also does away with the somewhat ambiguous situation arising from the fact that, in the 2012 version of the Code, Art. R67 was left unvaried, still referring to the 2010 edition of the Code, while the 2012 Rules were simply stated to be "in force as of 01.01.2012" on the CAS website.

³ Cf. CAS 2010/A/2075, *Marítimo de Madeira-Futebol S.A.D v. Coritiba Foot-Ball Club*, Award of 22 October 2010, para. 4.1; CAS 2010/A/2193, *Cagliari Calcio v. Olimpia Deportivo*, Award of 15 September 2011, para. 4.1.

⁴ Cf. Art. 181 PILS.

Article R68

I. Purpose of the Provision

- 1 Article R68 is an *exclusion of liability clause*. Although the relationship between the parties and the arbitrators (as well as the arbitral institution) is contractual in nature, arbitrators fulfill a judicial function. When acting in such capacity, their status is comparable to that of state court judges. The purpose of provisions excluding or limiting the liability of arbitrators and other persons involved in the arbitral process is, similar to the rules on the immunity of judges, to avoid that the adjudicators be subjected to undue pressure in the discharge of their mandate, so as to preserve their independence and the integrity of the decision-making process.

II. Validity and Scope of Application of Article R68

- 2 Article R68 was inserted in the Code on the occasion of the 2010 revision.¹ It is *similar to the exclusion of liability clauses contained in other sets of arbitration rules, although the extent to which it purports to exclude liability appears to be broader* than that provided for under most other rules.² For instance, the Swiss Rules specify that arbitrators shall not be liable for acts or omissions in connection with an arbitration, save where such acts or omissions constitute “deliberate wrongdoing or extremely serious negligence”,³ whereas no such qualification is included in Art. R68 of the Code.
- 3 The limitation in the Swiss Rules is in line with *mandatory provisions of Swiss law*, according to which agreements excluding liability for deliberate wrongdoing and gross fault are null and void.⁴ It is submitted that the same limitation should apply to Art. R68, since, (i) by the operation of Art. R28, all CAS arbitrations have their seat in Switzerland, meaning that the *lex arbitri* will be the Swiss law of arbitration,⁵ and, (ii) in line with the prevailing view, the arbitrator's contract is governed by the law of the seat of the arbitration (with which it is deemed to have the closest connection).⁶ Thus the exclusion of liability provided for in Art. R68 is valid and enforceable (only) to the extent it is compatible with Swiss law; i.e., for unintentional wrongdoing and non-significant fault.⁷
- 4 According to commentators, *deliberate wrongdoing* refers to intentional breaches of an arbitrator's core duties, and therefore includes cases of fraud, corruption, deliberate failure to disclose information which may be relevant to the assessment of his impartiality or independence, or refusing to perform arbitral functions without valid reasons.⁸
- 5 The test of *gross fault* should be interpreted in light of the specific function of arbitrators as adjudicators, namely keeping in mind that they cannot be treated as mere agents of the parties.⁹ Only in cases where the arbitrators or any of the other persons contemplated in Art. R68 utterly disregard the most basic rules of conduct, including the general duty of care that would apply to any individual acting in the same circumstances, will liability arise despite the exclusion contemplated in Art. R68.

¹ Cf. Reeb, *Modifications essentielles*, p. 8.

² The absolute terms of the exclusion of liability provision contained in the ICC Rules have been tempered in the Rules' latest (2012) revision, with the result that their Art. 40 (previously Art. 34) now provides that the purported exclusion applies “to the extent [it is not] prohibited by applicable law”. For a commentary on Art. 40 ICC Rules, see Spoorenberg, Chapter 4 above.

³ Art. 45(1) Swiss Rules. For a commentary on Art. 45 Swiss Rules, see Jenny, Chapter 3 above.

⁴ Cf. Art. 100 CO.

⁵ Cf. Art. R28.

⁶ Cf., for instance, Kaufmann-Kohler/Rigozzi, para. 413e.

⁷ Contrary to the law in certain other jurisdictions, where any exclusion of liability clause exceeding the statutorily permitted scope is deemed void altogether, Swiss law allows for the application of such clauses, provided their effect is reduced to the standard admitted by Swiss mandatory rules of law.

⁸ Cf. BGE 117 Ia 166.

⁹ Peter, *ASA Special Series no. 22*, p. 12.

More generally, and as the above examples illustrate, limitations of liability for arbitrators are intended to 6
operate only within the ambit of their judicial function and activities.

The exclusion of liability under Art. R68 of the Code is expressly stated to *apply to CAS arbitrators, CAS 7*
mediators, the ICAS and its members, as well as the CAS and its employees. Contrary to Art. 45 Swiss Rules,
which expressly lists the secretary of the arbitral tribunal among the persons whose liability is excluded,
Art. R68 contains no mention of CAS ad hoc clerks, who, in accordance with Art. R54(4), may be (and
in fact often are) appointed to assist panels in discharging their duties under the Code.¹⁰ Considering the
function performed by ad hoc clerks in CAS arbitrations, including the fact that they normally assist the
panel in connection with the drafting of the award, which they will often sign together with the arbitra-
tors, it is submitted that the language of Art. R68 could be revised to include them as well.

¹⁰ Cf. Art. R54(4), paras. 10-12 above.

Article R69

- 1 Article R69 provides a helpful indication by stating that French is the *prevailing language in case of discrepancy* between the English and French texts of the CAS Code, or where there are doubts as to the correct interpretation of a term or expression used therein.¹
- 2 This provision was included in the CAS Code as the latter was originally drafted in French² and then translated into English. It is a sensible one, since *various provisions in Code “borrow” language from the PILS* (which exists in an official French version, but is only “unofficially” translated into English). The same rule is stated in Art. S24 with regard to the Statutes of the Bodies Working for the Settlement of Sports-related Disputes and in Art. 23 of the CAS Ad Hoc Rules.

¹ For an example of a case where reference was made to Art. R69 (Art. R68, as it then was) in holding that the French language version should be referred to in order to establish the proper meaning of a provision in the Code, cf. CAS 2008/A/1700&1710, *DRV eV v. FEI & Ahlmann and Ahlmann v. FEI*, Award of 30 April 2009, para. 48 (concerning the use of the word “courier” in Art. R31(1)).

² Cf. Mavromati, *CAS Bull.* 2012/1, p. 40.

Article R70

Article R70 provides that the procedural rules in the CAS Code (Arts. R27-R70) can only be amended 1
if a *majority of two thirds of the ICAS* members vote in favor of the amendment (Art. S8(2)).¹

There have been a number of revisions of the Code since it was first adopted in 1984, namely in 1994, 2
2004, 2010, 2011, 2012 and 2013,² and the possibility of further rounds of amendments has been re-
cently evoked by the ICAS President.³ The *increasing frequency of amendments* to the Code's procedural
rules is somewhat troubling, especially in light of the fact that this seems to be done in a rather piecemeal
fashion, by ad hoc adjustments, e.g., in response to recent developments in the case law.⁴ The more re-
cent revisions appear to have involved the consultation of "stakeholders and users of the CAS",⁵ although
it is unclear which stakeholders were actually consulted and to what extent.

¹ The same provision is contained in Art. 23 of the CAS Ad Hoc Rules.

² For a summary and commentary of the 2010 and 2012 revisions, cf., for instance, Reeb, *Modifications essentielles*, (on the 2010 and 2012 revisions), and Rigozzi, *Jusletter of 13 September 2010* (on the 2010 revision).

³ Cf. Coates, *CAS Bull. 2011/2, Message of the ICAS President*, p. 2.

⁴ On this point, cf. also Favre-Bulle, *Recent Amendments to the CAS Code (2010-2012)*, *Global Sports Law and Taxation Reports 2012*, p. 50, stating that "the absence of amendments for a long period, followed by successive revisions at very short intervals may affect the credibility of the arbitration institution and its rules."

⁵ Cf. Coates, *CAS Bull. 2012/1, Message of the ICAS President*, p. 1, by reference to the 2012 revision.