

Prof. Dr. Antonio Rigozzi

The recent revision of the Code of sports-related arbitration (CAS Code)

Le nouveau Code d'arbitrage (CAS-Code 2010) du Tribunal Arbitral du Sport (TAS-CAS) siégeant à Lausanne est entré en vigueur le 1er janvier 2010. Beaucoup de modifications codifient simplement la pratique antérieure du TAS ou apportent des changements mineurs. Le présent article est le premier à tenter une analyse des changements qui peuvent modifier sensiblement la procédure devant le TAS. (bb)

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Inhaltsübersicht

Introduction

- I. Amendments to the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes
 - A. Procedure for the election of the President (and the Vice-presidents) of the ICAS
 - B. The prohibition for CAS arbitrators to act as counsel to a party before the CAS
- II. Amendments to the Procedural Rules^A
 - C. General Provisions (Articles R27 to R37 CAS Code)
 - a. Communications and notifications
 - b. Extension of time limits
 - c. Provisional measures
 - D. Special provisions applicable to the ordinary arbitration procedure (Articles R37 to R47 CAS Code)
 - a. Advance of costs
 - b. Third party intervention
 - c. Witnesses and experts
 - d. Publication of awards and dissenting opinions
 - E. Special provisions applicable to the appeals arbitration procedure (Articles R47 to R59 CAS Code)
 - a. Codification of established practices
 - b. Amendments to the rules governing the ordinary procedure which are applicable *mutatis mutandis* to the appeals procedure
 - c. The prohibition of counter-claims
 - d. Limitations to the application of the « free of charge rule »

Introduction

[Rz 1] At its meeting of 29 October 2009, the International Council of Arbitration for Sport (ICAS), the governing body of the Court of Arbitration for Sport (CAS), approved a 'mini-revision' (hereinafter referred to as the Revision) of the CAS arbitration rules, more commonly known as the CAS Code. The CAS Code is divided into two parts, namely the «Statutes of the Bodies Working for the Settlement of Sports-Related Disputes» (Articles S1 to S22 of the CAS Code, hereinafter sometimes referred to as the Statutes), and the «Procedural Rules», i.e. the CAS arbitration rules proper (Articles R23 to R70 of the CAS Code).

[Rz 2] The Revision implements changes to both parts of the CAS Code. According to the wording of the press release announcing the Revision, «the most significant amendment is the prohibition for CAS arbitrators and mediators to act as counsel before the CAS. This prohibition of the so-called 'double-hat' arbitrator/counsel role was decided in order to limit the risk of conflicts of interest and to reduce the number of petitions for challenge during arbitrations. The other amendments to the Code are related to procedural issues».¹

[Rz 3] The present article is a first analysis of the main changes brought forward by the Revision. As a preliminary matter it is worth noting that, besides the new Code, a short commentary entitled «Main Amendments to the Code of Sports-related Arbitration (2010 edition)» (hereinafter referred to as

the Commentary) and a version highlighting the amended provisions were made available on the CAS website.² This is a welcome improvement, which will help avoid the uncertainties created when the previous amendments entered into force in 2004.³ From this point of view, the revised text of Article R67 is also to be welcomed, as it now contains a transitory provision stating that the new Code is applicable to «all procedures initiated by the CAS as from 1 January 2010».⁴

I. Amendments to the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes

[Rz 4] The first part of the CAS Code has undergone various minor amendments, of which some are purely stylistic. There were, however, two significant changes, concerning on the one hand the members of the ICAS (A) and on the other the members of the CAS (B).

A. Procedure for the election of the President (and the Vice-presidents) of the ICAS

[Rz 5] The Revision has modified the procedure for the election, by the ICAS members, of their President and two Vice-presidents. While according to the old Article S6 para. 2 *ab initio*, the President-elect was «proposed by the IOC» and the Vice-presidents were «one proposed by the [international federations] and one by the National Olympic Committees», the new Article S6 para. 2 *in fine* now simply provides for these elections to take place after «consulting» the IOC and the associations of the International Federations of the Summer and Winter Olympics as well as the Association of the National Olympic Committees.

[Rz 6] The general view was that this change would improve the autonomy of the ICAS in relation to sports organizations.⁵

¹ See 'The Court of Arbitration for Sport (CAS) amends its rules' (1st October 2009), available at www.tas-cas.org/d2wfiles/document/3546/5048/0/2009.10.01%20PR%20Eng%20FINAL.pdf (visited on 16 July 2010).

² Available at www.tas-cas.org/statutes (visited on 16 July 2010). Even though this is not exactly a 'tracked changes' version, the new provisions and the amendments made to the text are easy to identify. This enables practitioners used to working with the old Code to be mindful of the changes introduced. From this point of view, it is regrettable that the printed version of this 4th edition of the Code does not contain any typographic elements highlighting the amendments.

³ The previous (third) edition of the CAS Code did not make any reference to the new provisions and simply indicated «January 2004», without specifying the exact date of its entry into force.

⁴ The criterion of «initiation» is not as precise as one would have hoped (should one understand, as would be logical, the filing of the request for arbitration or, as would seem to be the case, the «initiation» in the technical sense of Articles R39 and R52 of the CAS Code?). That said, any difficulties in the interpretation of this provision will have been solved in the CAS practice by now.

⁵ RUGGERO STINCARDINI, Tribunale arbitrale dello Sport – Analisi della riforma 2010 del Codice, *Rivista di diritto ed economia dello sport*, 2010, p. 75, 79

Insofar as the method of election of the ICAS members has remained the same,⁶ one may question the actual significance of this change, given that its only concrete consequence is that the President of the ICAS can no longer be necessarily considered as an 'IOC person'. That being said, apart from its symbolic value, this issue is of minor significance from the point of view of CAS arbitration practitioners, since the CAS Code does not provide for the ICAS President to intervene in the arbitration procedures directly.

B. The prohibition for CAS arbitrators to act as counsel to a party before the CAS

[Rz 7] Much more significant is the insertion of a new para. 3 in Article S18. Article S18 para. 1 provides that «[t]he personalities who appear on the list of arbitrators may be called upon to serve on Panels constituted by either of the CAS Divisions». One of the most important specificities of CAS, compared to arbitral institutions specialized in commercial arbitration, is the obligation for arbitrators to «appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code» (Article R33 para. 2 of the CAS Code). The closed nature of the CAS list of arbitrators has been approved without reservation by the Swiss Supreme Court, in particular in view of the need to keep CAS arbitrators regularly informed of any developments in sports law and in the CAS jurisprudence, as well as to ensure a degree of consistency in the decisions issued.⁷

[Rz 8] Soon after this landmark decision, apart from some marginal criticism, Swiss commentators generally recognized that the closed nature of the list of arbitrators did not compromise the structural independence of CAS. Instead, the debate seemed to concentrate on the question of the possibility, or indeed the opportunity, for the arbitrators appearing on the CAS list to represent parties before the very same CAS.⁸ In another decision, handed down in 2006,⁹ the Swiss Supreme Court held that the fact that an arbitrator in one CAS arbitration was, at the same time, sitting in another CAS panel alongside the counsel to one of the parties to the first arbitration did not constitute a ground for challenging the award.¹⁰ It was

therefore all the more remarkable that shortly thereafter the ICAS issued a circular to the attention of CAS arbitrators recommending that they renounce acting as counsel before the CAS. According to the said circular, this was meant to avoid «an appearance of imbalance where, of two parties appearing before a CAS Panel, one party is assisted by a counsel who is a CAS member and the other party is assisted by a counsel who is not a CAS member». Thus, the circular stated that it was the ICAS's position that «a CAS member appointed as arbitrator in a CAS Panel shall not act as counsel in another CAS procedure during the same time period». Effectively, the CAS circular called for a general obligation of disclosure of these types of situations and for a special rule, according to which «[i]n the appeals procedure, the president of a panel shall be appointed only from among the CAS members who do not or whose law firm does not represent a party before the CAS at the time of such appointment».

[Rz 9] The new Article S18 para. 3 is binding, contrary to the recommendations expressed in the circular, which, in fact, were not taken too seriously by all CAS arbitrators at the time. In addition, *ratione materiae*, the scope of application of the rule is more extensive than that called for in the circular, since it creates a concrete incompatibility that applies both in the appeals proceedings and in the ordinary proceedings. On the other hand, the personal scope of application of the rule is more limited than that envisaged in the circular, as it only targets the arbitrator himself, but not the other members of his law firm. This simple observation demonstrates that, contrary to what one may believe, the aim of the rule is not to prevent conflicts of interest,¹¹ but rather, at best, to reduce the risk of *issue conflict* arising from the recurrent character of certain legal questions submitted to the CAS. A closer reading of the new Article S18 para. 3 of the Code gives the impression that the rule is essentially aimed at countering the (often unfounded) criticism that the system of CAS arbitration can be seen as «incestuous» and monopolized by a small number of insiders. It is submitted that the main reason for the adoption of a rule of this kind lies in the strategic advantages available to lawyers that are also CAS members. These advantages include, notably, the access to unpublished CAS jurisprudence and to the CAS internal manual exclusively for the use of arbitrators.¹² Further advantages are a knowledge of the predispositions of certain arbitrators on matters of substance and procedure, and of the practice of the CAS Court Office with regard to important practical questions such as the extension of time limits, the fixing of the advance on costs, and the preparation of the *short list* of arbitrators from which

(http://www.rdes.it/RDES_1_10.pdf).

⁶ Article S4 of the CAS Code, concerning the composition of the ICAS, has remained unchanged.

⁷ Decision of the Swiss Supreme Court 4P.267-270/2002 of 27 May 2003, at 3.3.3.2; reported in ATF 129 III 445, 457; ASA Bull. 2003, p. 601, 614; Yearbook Commercial Arbitration Vol. XXIX – 2004, pp. 206-231, 219.

⁸ See ANTONIO RIGOZZI, Le fonctionnement du Tribunal Arbitral du Sport, in Pinna/Rigozzi, Chronique de jurisprudence en matière d'arbitrage sportif, Cahiers de l'arbitrage, N° 2006/2 – Gazette du Palais 15-17 October 2006, p. 30, 32.

⁹ Decision of the Swiss Supreme Court 4P.105/2006 of 4 August 2006, reported in ASA Bull. 2007, p. 105.

¹⁰ See ANTONIO RIGOZZI, Constitution du tribunal arbitral et indépendance des arbitres, in Pinna/Rigozzi, Chronique de jurisprudence en matière

d'arbitrage sportif, Cahiers de l'arbitrage, N° 2007/2 – Gazette du Palais 13-17 July 2007, pp. 31-35.

¹¹ Under the new regulations, CAS arbitrators may perfectly well carry on assisting their clients in CAS arbitrations, by taking the simple measure of leaving the clients' actual representation to a partner or associate within their firm.

¹² STINCARDINI, *op. cit.*, p. 80, note 7.

the President of the Appeals Division will appoint the panels' presidents in arbitrations conducted according to the appeals procedure. From this point of view, the limited personal scope of application of the new rule curtails its efficiency, since most of these advantages can be considered to be available to lawyers working in the law firm of a CAS member.

[Rz 10] That said, the most interesting question is what happens if a CAS arbitrator nonetheless accepts to represent a party in a CAS arbitration. According to the Commentary «[i]f a CAS arbitrator nevertheless acts as Counsel before the CAS, his/her function as Counsel will not be called into question in the arbitration at stake. However, the ICAS will have the power to take particular measures towards him/her with respect to his/her function as arbitrator/mediator».¹³ The intervention of the ICAS could mean that the arbitrator is removed from the list of CAS arbitrators, and possibly revoked from the arbitrations he is sitting in at the time. The new para. 2 of Article S19 of the Code seems to foresee only the first hypothesis, that is, to «temporarily or permanently remove an arbitrator [...] from the list of CAS members».

[Rz 11] The next interesting question is thus whether a CAS arbitrator who is also acting as counsel in CAS proceedings can be challenged on this ground. In light of the Supreme Court's jurisprudence mentioned above,¹⁴ this may not constitute a ground for disqualification for lack of independence or impartiality (Article 180(1)(c) of the Swiss Private International Law Act (PILA) or Article 180(1)(b) PILA together with Article R33 of the CAS Code). In fact, as submitted above, the prohibition of the 'double hat' seems more aimed at preserving the credibility and the image of the institution, than avoiding conflicts of interest. The possibility of a challenge would also seem to be excluded on the ground that the arbitrator in question «does not meet the qualifications agreed upon by the parties» (Article 180(1)(a) PILA).

[Rz 12] Only future can tell what will be the real influence of the new Article S18 para. 3 of the Code on CAS practice and whether it will increase the quality (or the perceived quality) of the justice rendered under its aegis. For the time being, the only palpable effect seems to be the resignation of several experienced arbitrators. One can only hope that the increase in the hourly rate payable to CAS arbitrators (provided for in the new Annex 2 of the CAS Code) will suffice to at least contain the number of such departures.¹⁵

¹³ Commentary *ad* Article S18, p. 1.

¹⁴ See fn 9 above.

¹⁵ The system has moved from a fixed hourly rate of CHF 250 to a variable rate of between CHF 250 and CHF 400, depending on the amount in dispute, with the possibility for the President of the relevant Division to decide on a lower or higher rate if the circumstances, notably the complexity of the case, so require.

II. Amendments to the Procedural Rules

[Rz 13] Before moving on to review the various changes made to the procedural rules, it is worth mentioning an amendment introduced in the Statutes which also has a direct bearing on these rules. Article S20 para. 2 of the Code provides that «Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to one of these two Divisions according to their nature.¹⁶ Such assignment may not be contested by the parties or raised by them as a cause of irregularity». This decision is not always obvious, especially because it has to be taken at an embryonic stage of the procedure, when the object of the dispute and the conclusions of the parties have not necessarily crystallized yet. The decision of the CAS Court Office in this regard is extremely delicate due to the potentially serious consequences it may have and the fact that there is no possibility of appeal against it.¹⁷ One must therefore welcome the addition of a second part to Article S20 para. 2 of the CAS Code that allows the Court Office, under certain conditions, to overturn its initial decision assigning a case to one Division rather than the other: «In the event of a change of circumstances during the procedure, the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division. Such reassignment shall not affect the constitution of the Panel or the validity of the proceedings that have taken place prior to such re-assignment». This last precision is necessary in view of the specificities of the constitution of panels in the Appeals Division, where the President of the Panel is appointed directly by the President of the Appeals Division, without consulting the parties. It is anticipated that re-assignments will raise complex issues with respect to the (advance of) costs. In particular, can a party who has relied on an early decision according to which the arbitration was governed by the appeals proceedings be required to pay the inevitable (significant) advance of costs that the CAS will have to ask once the arbitration is governed by the appeals proceedings? What if the appellant (now claimant) refuses or is truly incapable of paying such an advance?

¹⁶ Article S20 para. 1 of the CAS Code provides that two Divisions shall deal with the arbitrations brought before the CAS, that is, the Appeals Arbitration Division, which is meant to deal with disputes concerning decisions of sports governing bodies that have accepted the jurisdiction of CAS, and the Ordinary Arbitration Division, which is concerned with all the other disputes of a sporting nature, where the parties have concluded an arbitration agreement providing for CAS arbitration.

¹⁷ ANTONIO RIGOZZI, *L'arbitrage international en matière de sport*, Basel [etc.] 2005, p. 919. Most importantly, the choice between the two procedures may often be decisive as to the question of admissibility of the appeal/request for arbitration. While in the ordinary procedure admissibility is mostly governed by the content of the arbitration clause applicable, in the appeals procedure there are strict time limits regarding the filing of an appeal and the finality of the contested decision. The choice of procedure may therefore easily make the difference between the admissibility or inadmissibility of a claim.

C. General Provisions (Articles R27 to R37 CAS Code)

[Rz 14] The Code's General Provisions, which apply to all CAS arbitrations regardless of the Division they are assigned to, have not undergone major changes. In particular, the fundamental provision that all CAS arbitrations have their seat in Lausanne regardless of the place where they are actually conducted, has remained unchanged. The amendments to be noted concern communications and notifications (a), the extension of time limits (b) and provisional measures (c).

a. Communications and notifications

[Rz 15] In CAS arbitrations, all communications are effected via the Court Office, which is responsible for informing the parties concerned. Apart from submissions, this is done primarily by fax. This system might seem obsolete, but has not been abandoned for more modern solutions, which would, for instance, allow the parties and the Panel to communicate directly and according to agreed procedures they may deem more appropriate for the specific case. There are two main reasons for this: first of all, in CAS arbitrations, the Panel plays a secondary role in the conduct of the proceedings, at least up to the hearing. More importantly, the parties litigating before the CAS are not always represented by counsel accustomed to the practices of international arbitration, including the usage of sending a copy of any communications to the Panel also to the opposing party(ies). Evidently, the CAS has deemed it useful to maintain its control over the correspondence between the parties and the Panel, even though this entails a significant amount of extra work and, under certain circumstances, may cause inconvenient delays. One would have nonetheless hoped for a provision allowing the parties to agree, with the consent of the Panel, to easier and more direct means of communication.

[Rz 16] With regard to the notification of submissions, the Revision brings about a welcome novelty in providing that «[t]he exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail» (Article R31 para. 3 *in fine*). This, however, is not without its dangers, due to the known fact that the maximum allowed size of attachments to electronic mail is limited, at times very much so depending on the country in question. A practice will therefore have to be established for cases in which briefs are submitted timely, but the attachments do not arrive within the time limit due to technical reasons.

b. Extension of time limits

[Rz 17] The issue of time limits is a very sensitive one in CAS arbitrations, especially those assigned to the Appeals Division. Requests for extensions are quite frequent and often objectively justified. It is very difficult for a party to prepare a submission, that is not supposed to be later supplemented and which has to be accompanied by all the exhibits and

indicate all the relevant evidence, within the stringent time limits provided for in the CAS Code. In practice, it is not uncommon that just before the expiry of the time limit a party discovers an element requiring further action, which cannot be taken or completed in time. In such 'last minute' cases, the request for an extension will necessarily only be made shortly before the expiry of the time limit. This in turn requires a swift decision in order not to leave the requesting party in an uncomfortable situation of uncertainty. From this point of view, the introduction of a new sentence in Article R32 para. 2 of the CAS Code, providing that «any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General» is to be welcomed. For the sake of clarity, it would have been preferable for the Code to also indicate the status of the time limit between the filing of the request for an extension and the issuing of a decision on the request. The practice of the CAS in these cases is to acknowledge receipt of the request and to indicate that the time limit shall be suspended until the competent body has taken a decision on the request.

[Rz 18] In addition, the new wording of Article R32 para. 2 now explicitly provides, although this was already self-evident, that a request for an extension may only be entertained if «the initial time limit has not already expired» at the time of the request. Even in situations in which the time limit has already expired, it is submitted that a party could nonetheless request the reinstatement of the time limit (*restitution du délai*). It is submitted that reinstatement should also be permitted with respect to the time limit for appeal (which, according to the express wording of Article 32 para. 2 of the CAS Code cannot be extended). It is thus regrettable that neither the principle of reinstatement nor the conditions under which a reinstatement can be granted have been clearly set out in the Code.¹⁸

c. Provisional measures

[Rz 19] In sports arbitration, the tight calendar of competitions often means that even the most expedited procedures may not be fast enough to safeguard the parties' rights. For this reason, provisional measures play a significant role in CAS arbitration.

[Rz 20] Provisional measures are governed by Article R37 of the CAS Code. This provision identifies: the competent

¹⁸ ANTONIO RIGOZZI, Le délai d'appel devant le Tribunal arbitral du sport, in Zen-Ruffinen (ed.), *Le temps et le droit – Recueil de travaux offerts à la Journée suisse des juristes 2008*, Basel 2008, p. 255, 264, where it was submitted that, by analogy with the principles applicable before Swiss courts, one should consider that the reinstatement of a time limit in CAS proceedings could be granted if (i) the person concerned – be it the appellant or his representative – can provide a plausible explanation as to why he was impeded from acting in time, through no fault of his own, and (ii) the request for reinstatement, accompanied by the statement of appeal, is submitted within a reasonably short time from the day when the cause of the impediment has ceased.

body to issue such measures (i.e., the President of the relevant Division before the transmission of the file to the Panel, and thereafter the Panel itself), the moment from which such measures can be issued (i.e., after the filing of the request for arbitration or the statement of appeal, which implies the exhaustion of internal remedies), as well as the procedure to be followed (*ex parte* decision of the CAS in cases of utmost urgency or a fixed time limit for the other party to comment, after which a decision is to be taken within a short time). Besides providing that they are issued upon request from a party and that their granting can be made conditional on the provision of a security, Article R37 of the CAS Code is silent as to the conditions under which provisional measures can be obtained. CAS practice in this regard is inspired by the criteria set forth in Article 14 para. 2 of the CAS *Ad Hoc* Division Rules (which are adopted to apply to disputes arising during special competitions, such as the Olympic Games)¹⁹ and has systematically made the granting of provisional measures subject to the fulfillment of the following conditions: (i) the claim has *prima facie* reasonable chances of success on the merits; (ii) the party requesting the measure is at risk of suffering serious and irreparable harm; (iii) the interests of the requesting party from the point of view of the damage to which it may be exposed outweigh the interests of the opposing party in maintaining the *status quo*. One would have hoped that the ICAS would seize the opportunity of the Revision to codify this practice in the text of the new Code, thus allowing all parties to have an immediate idea of the applicable regime, without having to consult the precedents available in the CAS data base²⁰ or the commentaries relevant to the matter.²¹

[Rz 21] Instead, the revised text now specifies another condition, which was already occasionally mentioned both in CAS practice and in the legal doctrine, namely that the body deciding upon a request for provisional measures «shall first rule on CAS jurisdiction». It is in fact self-evident that the CAS

should not issue an order on provisional measures if it is not competent to rule on the merits of the dispute. What the new text does not say, is whether the examination of CAS jurisdiction at this stage should be limited to a *prima facie* analysis or whether a complete examination should be conducted. It is submitted that the CAS should verify its jurisdiction as accurately as possible under the circumstances, in particular if the applicable time limits and the urgency of the matter allow for such a detailed examination. Be that as it may, requesting parties would obviously be well-advised to make thorough submissions on jurisdiction at this stage already.

[Rz 22] The new Article R37 para. 3 of the CAS Code adds that «[t]he Division President may terminate the arbitration procedure if he rules that the CAS has manifestly no jurisdiction». This new provision raises several questions. The most obvious one is whether this possibility is open only to the President of the Division or if such a decision can also be taken by the Panel. The answer should be in the affirmative, as it would be difficult to justify a situation in which the Panel would have fewer powers than the President of the Division. That said, neither the Panel nor *a fortiori* the President of the Division should, terminate the arbitration with an *ex parte* order. After all, the respondent could perfectly well 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.

[Rz 23] The question that inevitably arises is that of the exact bearing of the decision on jurisdiction taken at the stage of provisional measures. A distinction should be made based on two criteria, namely : (i) the body that has taken the decision (the President of the relevant Division or the Panel itself), and (ii) the nature of the decision (rejecting or admitting CAS jurisdiction).

- If it is the Panel that rejects CAS jurisdiction and thus terminates the arbitration, this is an award on jurisdiction, which can be challenged before the Supreme Court pursuant to Article 190(2)(b) PILA.
- The same should be true of a ruling by the President of the Division terminating the arbitration. It would be inequitable to deprive a party of its right to appeal on the jurisdiction of the arbitral tribunal due to the decision being taken by the arbitration institution rather than the tribunal itself²².
- When CAS jurisdiction is established, a Panel's

¹⁹ Article 14(2) of the *Ad Hoc* Division Rules provides that « 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 ».

²⁰ See in particular the following decisions : CAS 2002/A/378 *S.c. FCI & UCI*, Order of 2 May 2002 ; TAS 2005/A/916 *AS Roma c. FIFA*, Order of 23 August 2005 ; TAS 2005/A/958 *R.c. UEFA of*, Order 9 November 2005 ; CAS 2006/A/1141 *M.P.v. FIFA & PFC Krilja Sovetov*, Order of 31 August 2006 and CAS 2008/A/1453 *Elkin Soto Jaramillo & FSV Mainz 05 c. CD Once Caldas & FIFA*, Preliminary decision of 8 February 2008 (all available in the CAS database, at <http://jurisprudence.tas-cas.org/sites/caselaw/help/home.aspx>.)

²¹ See in particular ANTONIO RIGOZZI, Provisional Measures in CAS Arbitration, in Blackshaw/Siekman/Soek (Eds.), *The Court of Arbitration for Sport 1984–2004*, The Hague 2006, pp. 216 ss and STEPHAN NETZLE, Die Praxis des Tribunal Arbitral du Sport (TAS) bei vorsorglichen Massnahmen, in Rigozzi/Bernasconi (Eds.), *The Proceedings before the Court of Arbitration for Sport - CAS & FSA/SAV Conference Lausanne 2006*, Bern 2007, p. 133 ss.

²² In the same sense, see already the Swiss Supreme Court's decision 4A_600/2008 of 20 February 2009, at B and 2.3, ASA Bull. 2009, p. 568, 569-571, where the Court rejected the argument of the CAS according to which « the appealed decision is not an arbitral award, in the sense that it was not taken by a Panel but by the substitute President of the Appeals Division, who is a member of the ICAS, elected by this body to replace the President in cases of impediment (art. S6.2 of the Code) and to perform the tasks assigned to the latter, including the constitution of the Panel (art. R52 of the Code) ».

decision regarding provisional measures cannot be subject to an appeal, except maybe in the exceptional circumstances in which it *de facto* rules on the merits of the dispute.

- The same is true, *a fortiori*, when the order on provisional measures is issued by the President of the Division. It is submitted, that each party remains free to ask for a reconsideration of the said order by the Panel, once it is constituted. In this case, the Panel is obviously not bound by the decision of the President of the Division with regard to jurisdiction and could perfectly well arrive to the conclusion that the CAS has no jurisdiction.

D. Special provisions applicable to the ordinary arbitration procedure (Articles R37 to R47 CAS Code)

[Rz 24] The ordinary arbitration procedure governs arbitrations assigned to the Ordinary Arbitration Division. This procedure is regulated by the General Provisions and by Articles R37 to R47 of the CAS Code. Considering that the ordinary procedure is essentially designed to deal with commercial disputes related to sports, it comes as no surprise that in this respect the CAS Code does not fundamentally differ from the rules of commercial arbitration institutions. The 2010 Revision has not brought about fundamental changes to this regime. Noteworthy amendments have been made to the rules governing the advance of costs (a), third party intervention (b), witnesses and experts (c) and dissenting opinions (d).

a. Advance of costs

[Rz 25] Contrary to the appeals procedure, the ordinary procedure is not meant to be free of charge. Disputes arbitrated under this procedure are for the most part purely commercial and as such do not justify for the proceedings to be conducted without cost to the parties. Thus, as in any commercial arbitration, the procedure commences with a Court Office decision fixing the amount of the advance of costs to be paid by each party. Article R64.2 para. 2 of the CAS Code provides that when a party does not pay its share, the opposing party may substitute for it. In case of non-payment of the advance on costs within the time limit set by the CAS, the request is deemed withdrawn and the CAS terminates the arbitration.

[Rz 26] Article R39 of the CAS Code now contains a new paragraph 2 allowing the respondent to request that the time limit for the filing of the answer be fixed after the payment by the claimant of the advance of costs. This rule does not seem to be of fundamental importance. In fact, the answer is a summary brief that does not require a substantial amount of work. It is submitted that a respondent cannot in any case use Article R39 para. 2 of the CAS Code to delay the arbitration

by requesting that the claimant also pay respondent's share of the advance of costs before the arbitration can proceed.

b. Third party intervention

[Rz 27] The new wording of Article R41.3 of the CAS Code extends the time limit for third parties to file a request for intervention. Under the old Code, this time limit coincided with the filing of the answer. According to the new Code, a request for intervention can be filed within ten days from the moment the third party becomes aware of the arbitration, until the time of the hearing, or the closing of the evidentiary proceedings if no hearing is held.

[Rz 28] Article 41.4 *in fine* of the CAS Code now provides that, after consulting the parties, the Panel shall decide on the status of third parties and their rights in the proceedings. According to the same provision, the Panel may also authorize the filing of *amicus curiae* briefs. This possibility was already accepted by certain panels on the basis of the procedural powers granted by Article 182(2) PILA and by reference to international arbitration practice, in particular the famous *Methanex* decision, which was based on Article 15 of the UNCITRAL Rules²³. The new rule will reduce the risk of unnecessary litigation on the question of the admissibility of *amicus* briefs. Given the unsettled nature of the law of international arbitration in this respect²⁴, it is certainly sound not to attempt to determine in the abstract which parties can be granted the status of *amici curiae* and under which conditions. It should be left to the individual panels to apply the relevant criteria to the different situations that may present themselves. One can nonetheless consider that international federations would be the primary candidates for such a status. This could be the case in those instances where a federation decides not to participate directly in an arbitration so as to avoid taking a position that favors either of the parties, but wishes nonetheless to point out the solution that would best conform to the rationale of its regulations under dispute, or to ensure that the Panel's decision is in line with the relevant case law. The same can be said of public authorities faced with a CAS arbitration whose outcome will have an impact on their area(s) of competence. One could also think of athletes' organizations, such as the FIFpro, provided they are sufficiently representative and that the matter before the CAS raises a question of principle concerning the sport in question.

c. Witnesses and experts

[Rz 29] The new Article 44.1 of the CAS Code provides that, in their written submissions, the parties that do not produce

²³ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as «*Amicus Curiae*», 15 January 2001 (www.state.gov/documents/organization/6039.pdf).

²⁴ See, for instance, FLORIAN GRISEL, JORGE E. VINALES, *L'amicus curiae* dans l'arbitrage d'investissement, *ICSID Review: Foreign Investment Law Journal*, 2007, pp. 380-432.

written witness or expert declarations shall list any witnesses and/or experts whom they intend to call at the hearing and also provide a brief summary of their expected testimony. As far as experts are concerned, an indication of their area(s) of expertise is also required.

[Rz 30] This solution has the advantage of avoiding the practice, much too often tolerated by the CAS, of parties reserving the right to call a series of witnesses and experts without providing the scope of their intended testimonies and naming them only a few days before the hearing, when the Court Office asks the parties to confirm the names of the persons who will take part in the hearing.

d. Publication of awards and dissenting opinions

[Rz 31] One of the main differences between the ordinary proceedings and the appeal proceedings lies in the fact that according to Article R43 of the Code awards rendered under the ordinary proceedings «shall not be made public unless all parties agree or [and this is what was added in the Revision] the Division President so decides». One fails to see on what basis the Division President can ignore the parties' agreement to keep the award confidential. It is submitted that only the Panel itself can order the publication of the award if publication is part of the relief requested by the claimant.²⁵

[Rz 32] The new Article R46 of the CAS Code codifies the practice of the CAS not to recognize dissenting opinions and not to communicate them to the parties. An arbitrator wishing to render a dissenting opinion, for which he/she may in certain cases have good reasons, will thus have to send it directly to the parties.

E. Special provisions applicable to the appeals arbitration procedure (Articles R47 to R59 CAS Code)

[Rz 33] The appeals procedure is the procedure applied in arbitrations assigned to the Appeals Division, namely those relating to disputes where the object of the arbitration is a challenge brought against a federation's or other sports organization's decision. This procedure is governed by the General Provisions set out in Articles R27 to R37 and by the special provisions of Articles R47 to R59 of the CAS Code. The 2010 Revision has not brought about fundamental changes in the well-established regime of the appeals procedure. Certain of the newly introduced provisions simply codify the practice developed by the CAS in the some 1,600 arbitrations that have been conducted, to date, under the appeals

procedure²⁶ (a). It should also be pointed out that some of the new provisions applicable to the ordinary procedure also apply in the appeals arbitration procedure (b). Finally, the two most substantial changes are the prohibition against counter-claims (c) and the limitation of the extent to which the appeals procedure is available without cost (d).

a. Codification of established practices

[Rz 34] Appeals arbitration commences with the filing of the statement of appeal, which has to be filed within the time limit provided for in the applicable regulations or, absent a specific provision to that effect, within the default time limit of 21 days provided for by Article R48 of the CAS Code. The appealing party must then file an appeal brief within ten days following the expiry of the time limit for appeal. Pursuant to the new Article R51, a statement of appeal can be considered as an appeal brief should the appellant so request in writing. In the absence of such a request and should no such brief be filed within the time limit, the CAS will deem the appeal withdrawn and terminate the arbitration.

[Rz 35] According to Article R52 para. 1, the CAS shall not set the arbitration in motion if there is manifestly no arbitration agreement referring to CAS, but also, as per the new wording added with the Revision, if the arbitration agreement «is manifestly not related to the dispute at stake».

[Rz 36] Another provision codifying an established CAS practice is Article R52 para. 2 of the Code, which provides that the CAS shall send a copy of the statement of appeal and of the appeal brief, for information, to the authority which has issued the decision under challenge. This provision was rendered necessary from the moment the CAS accepted that the losing party in a procedure before the FIFA Dispute Resolution Chamber or the FIFA Player Status Committee could initiate an appeals procedure without nominating FIFA as a (co)respondent, despite the fact that, technically, those decisions originate from a FIFA body²⁷. In light of the Swiss Supreme Court's latest jurisprudence, holding such an appeal to be the equivalent of an action for annulment pursuant to Article 75 of the Swiss Civil Code²⁸, appealing parties can

²⁵ See TAS 2008/O/1643 *Vladimir Gusev c/ Olympus sarl*, Award of 15 June 2009 at para. 142-145, available at [www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (visited on 27 August 2010)

²⁶ See Table 2 of the statistics until 31 December 2009 published on the CAS website (www.tas-cas.org/d2wfiles/document/437/5048/0/stat2009.pdf).

²⁷ GÉRALD SIMON, La partie intimée dans la procédure d'appel des litiges de football, in Bernasconi/Rigozzi (Eds.), *Sport Governance, Football Disputes, Doping and CAS Arbitration - 2nd CAS & FSA/SAV Conference Lausanne 2008, Bern 2009*, pp. 155-159, *passim*.

²⁸ Decision of the Swiss Supreme Court 4A_490/2009 of 13 April 2010, *Club Atlético de Madrid SAD v Sport Lisboa E Benfica – Futebol SAD & FIFA*. An English translation of this decision, issued in German, is available at www.praetor.ch/docs/13%20avril%202010%204A%20490%202009.pdf (visited on 29 August 2010). Art. 75 CC provides that «[a]ny member of an association is authorized by law to appeal, within a month from the day it has become aware of it, against a decision by the association in which this member has not participated and which is contrary to the law or to the

only be encouraged to nominate FIFA as a (co)respondent before the CAS.

[Rz 37] The new Article R52 para. 4 now provides express support for the discretion enjoyed by the President of the Division and the President of the Panel, respectively, in deciding whether to consolidate two (or more) proceedings when a party files a statement of appeal related to a decision against which one (or more) appeal procedure(s) is(are) already pending before the CAS.

b. Amendments to the rules governing the ordinary procedure which are applicable *mutatis mutandis* to the appeals procedure

[Rz 38] To the extent that Article R54 provides for the application *mutatis mutandis* of Article R41 to the appeals procedure, the comments made above in relation to third party intervention and *amici curiae* (*supra* II.,B.,b.) are also pertinent to the appeals arbitration procedure.

[Rz 39] The same can be said with regard to the provisions relating to the advance of costs, when requested in appeals proceedings (since Article R55 para. 3 has substantially the same wording as Article R39 para. 3), the definition of the minimum content of witness and expert statements (as Article R51 para. 2 is nearly identical to Article R44.1 para. 3) and dissenting opinions (with respect to which Article R59 para. 2 *in fine* reproduces the wording of Article R46 para. 1 *in fine*).

c. The prohibition of counter-claims

[Rz 40] The new wording of Article R55 of the CAS Code no longer provides that the respondent's answer should set out «any counter-claims». The elimination of this possibility, which in practice amounted to allowing a joint appeal, obliges, as stated in the Commentary, «[t]he persons and entities which want to challenge a decision [...] to do so before the expiry of the applicable time limit for appeal».

[Rz 41] The desirability of such a drastic solution is questionable. One could imagine for instance an athlete who has been suspended by his national federation for six months for marijuana consumption. He thinks the length of the suspension is excessive, but nonetheless decides to accept the decision sanctioning him, as long as no appeal against it is filed, for instance, by the World Anti-doping Agency (WADA), which could result in an increase of the period of suspension. Under the new rule, the athlete has to file a pre-emptive appeal, pay the CAS Court Office fee of CHF 500, wait to see if WADA appeals, then withdraw his appeal should that not be the case.

[Rz 42] Thus, the new CAS rule, as it stands, could result in a growing number of appeals submitted to the CAS that are intended to be withdrawn should the opposing party (or

other parties) not submit an appeal of its own, thereby causing unnecessary work for the CAS Court Office. One could even imagine scenarios where both parties submit an appeal, each with the intention of withdrawing should the other party not appeal, but end up having an arbitration that neither party truly wanted due to not being aware of the other party's intention to withdraw. It is submitted that, in principle, counter-claims are undesirable in the appeals procedure only in so far as they are not relevant to the subject matter of the decision under appeal, and an amendment taking this aspect into account would have been more apposite than the very restrictive rule introduced with the Revision.

d. Limitations to the application of the « free of charge rule »

[Rz 43] The only really disturbing outcome of the Revision lies in the further limitation of the types of disputes for which the appeals procedure is free of charge.

[Rz 44] Originally, all appeals governed by the appeals procedure were free of charge. When the CAS Code was revised in 2004, the scope of application of this rule was restricted to «disciplinary cases of an international nature». The new text of Article R65 resolves the difficulties encountered in the interpretation of the expression «of an international nature» in providing that the free of charge rule applies 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». Although such a limitation is perfectly understandable for budgetary reasons, it can result in absurd and arbitrary discriminations. For example, an arbitration in a doping matter involving a Swiss athlete will be free of charge if the athlete is of international level, but not if the athlete is of national level.²⁹ Obviously, nothing justifies such an arbitrary distinction. The same can be said about the limitation to disciplinary disputes: should an athlete opposing a federation in a disciplinary matter be more worthy of protection than an athlete who has been discriminated against by his federation in the context of the selection process for an important competition, or of yet another athlete who is being prevented from changing club?

[Rz 45] It is submitted that the free of charge nature of the appeals procedure constitutes one of the features of CAS which ensures the validity of arbitration clauses in sports regulations

statutes of the association» (free translation).

²⁹ Art. 13.2.2 of the WADA Code allows national sports organizations to choose the CAS as the competent authority for appeals also in cases not involving international-level athletes. This is notably the case in Switzerland, where the regulations of Anti-doping Switzerland provide that the decisions of Swiss Olympic's Disciplinary Chamber can be challenged before the CAS (Art. 13.2.1 of the 2009 Statutes relating to doping). The same is true of the national anti-doping regulations in force in Italy and in the USA.

even though arbitration is in fact imposed upon athletes. One could imagine the situation of an athlete wishing to change his «sporting nationality», who would like to challenge the decision of a national federation refusing this change for reasons he does not understand. What should he do upon receiving the Court Office decision requesting him to pay an advance of costs of, say, CHF 18'000 to initiate the proceedings? If he cannot afford to pay this amount, the athlete will naturally be tempted to take the matter to a national court, where he could be eligible for legal aid from the State and for the assistance of a court-appointed lawyer. An argument for this would be that the arbitration clause in the federation's regulations is not enforceable, because it amounts to depriving the athlete of his fundamental right of access to justice, given that he cannot pay the advance of costs.³⁰

[Rz 46] The CAS seems to recognize the problem with regard to disciplinary decisions taken by national federations or sports bodies against athletes. According to the Commentary, such decisions «may still be submitted to the CAS Appeals procedure but the parties will have to contribute to the costs of such procedure», however «the ICAS will [...] make sure that the financial constraints will not [be] too onerous for athletes and will shortly adopt new guidelines regarding legal aid» (Article S6 point 9 of the CAS Code). Hopefully this legal aid fund, which was already envisaged in the CAS Code of 1994, will finally become a reality and be systematically proposed to athletes, in a transparent way and with clear and publicly accessible rules. This would constitute a truly significant evolution in sports arbitration, much more so than the Revision that has been briefly presented in this article.

Professor Antonio Rigozzi teaches international arbitration and sports law at the University of Neuchâtel law school. He is a partner of Lévy Kaufmann-Kohler, a boutique law firm in Geneva specialising in international arbitration. A similar version, in French, of this article will also appear as part of the 2010 «Chronique de jurisprudence en matière d'arbitrage sportif» in the *Cahiers de l'arbitrage*, now also known as the *Paris journal of international arbitration*. The author wishes to thank Mrs. Erika Hasler, associate at Lévy Kaufmann-Kohler,

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³⁰ Furthermore, when the procedure is not free of charge, a federation, for instance, may be tempted to exploit an appealing athlete's or club's lack of financial means by refusing to pay its share of the advance of costs. As seen above, according to Article R64.2 of the CAS Code «[i]f a party fails to pay its share, the other may substitute for it; in case of non-payment within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration». This leads to a situation where, should the federation refuse to pay its share of the costs, the appealing party must pay the entire amount of the advance of costs under the threat of having the appeal withdrawn. This puts federations in a position to effectively prevent «undesirable» appeals from being submitted to the CAS by simply refusing to pay the advance of costs, which is an obvious problem from the point of view of access to justice.