

EVIDENTIARY ISSUES BEFORE CAS

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*If it is a miracle, any sort of
evidence will answer, but if it
is a fact, proof is necessary.*

Mark Twain

Introductory Remarks

Evidentiary issues, whilst sometimes overlooked in the wider scheme of an arbitration, are often the very element upon which a party's case will turn.³ Whilst one may arguably have the best entitlement to a particular right, or objectively the most just cause, it is the reality of arbitration (and in fact any legal proceedings) that such right or cause must be pursued with the aid of admissible and relevant evidence. The necessity of producing sufficient evidence and convincing the relevant arbitration tribunal that the alleged facts "*are true, accurate and produce the consequence envisaged by the party*"⁴ cannot be overstated. It is an unfortunate fact that, despite the merits of the

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³ In fact it has been suggested that approximately 60 to 70% of cases in international arbitrations turn on facts rather than the application of the relevant principles of law. See Blackaby et al., *Redfern and Hunter on International Arbitration, Fifth Edition*, p. 384. It is submitted that such percentage might be even higher in sports disputes.

⁴ See CAS 2007/A/1380, *MKE Ankaragücü Spor Kulübü v. S.*

claim in question, if a party is unable to provide evidence to the requisite standard of proof, or such evidence is deemed inadmissible, such party will be incapable of convincing the arbitrators that the disputed issue or issues in the case ought to be resolved in its favour.

Over recent years the Court of Arbitration for Sport (CAS) has had cause to consider a number of evidentiary issues particular to sports arbitration and to provide guidance as to how such issues should be approached and resolved in the future. Accordingly, this article first sets out the legal framework for evidentiary issues in CAS arbitrations (I); and then considers: relevant types of evidence (II); the allocation of the burden of proof (III); the different standards of proof that may be imposed (IV); and, finally, the admissibility of certain types of evidence and the evaluation of evidence so admitted (V).

I. THE LEGAL FRAMEWORK

With the exception of the rare cases in which all the parties to the arbitration are domiciled in Switzerland,⁵ CAS arbitrations are governed by Chapter 12 of the Swiss Private International Law Act (PILA). This legislation sets out the main rules applicable to international arbitrations in Switzerland including: the requirements for the validity of the arbitration agreement, including arbitrability; the fundamental rules of procedure; the authority to order provisional and conservatory measures; the law applicable to the merits of the dispute; and the annulment of awards.

The only provision of Chapter 12 PILA specifically devoted to evidentiary issues is Article 184. Under the heading “[t]aking of evidence” this provision states that “[t]he Arbitral tribunal shall itself conduct the taking of evidence” (first paragraph) and that, “[i]f the assistance of state judiciary authorities is necessary for the taking of evidence, the Arbitral tribunal or a party with the consent of the Arbitral tribunal, may request

⁵ See for instance CAS 2010/A/2083, *UCI v. Jan Ullrich & Swiss Olympic*, at para. 27.

the assistance of the state judge at the seat of the Arbitral tribunal; the judge shall apply his own law” (second paragraph).

For all other evidentiary issues, the governing provision is the general provision on arbitral procedure, namely Article 182 PILA. Under the heading “Principle” this provision states that “the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure” (first paragraph) and that, “[i]f the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration” (second paragraph), keeping in mind that “[r]egardless of the procedure chosen, the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings” (third paragraph).

What does this mean? In substance it means that all evidentiary issues shall be decided according to the CAS Code of Sports-related Arbitration (**Code**) and, if the Code is silent on the relevant evidentiary issue, shall be decided according to the procedural rules decided by the CAS Panel appointed for the case. Indeed, the parties are deemed to have indirectly determined the arbitral procedure by reference to the CAS Code (which then, in effect, becomes the “rules of arbitration” within the meaning of Article 182(1) PILA).

The only remaining question is whether the parties could still enter into a separate agreement on the procedure to be followed. It is submitted that a specific procedural agreement entered into by the parties should prevail over the general procedural agreement they are deemed to have concluded when agreeing to arbitrate in CAS under the CAS Code. Any such specific agreement should always prevail, unless it is not consistent with what one could call the ‘mandatory procedural rules’ contained in the Code. For instance, the CAS will not agree to depart from the ‘CAS mandatory rule’ that the arbitration cannot be conducted with an arbitrator who is not on the CAS arbitrator list,⁶ but alternatively should not object if the parties agree to file an

⁶ See for instance CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA / FC Sion*, at para. 73, where the Respondent criticised the closed list of CAS arbitrators and informed the CAS that it wished to appoint Mr Niels Sørensen (judge at the State Court of the Canton of Neuchâtel).

additional set of written submissions not provided for by the Code.⁷ With respect to the rules of evidence *stricto sensu*, the CAS Code does not contain any such ‘mandatory rules’ which means that the parties are free to agree on specific evidentiary rules. That said, sports governing bodies should be hesitant to enter into such procedural agreements as they are intrinsically at odds with the paramount obligation to treat all of their members in an equal manner. In any event, in practice, once a proceeding has started it is quite difficult for the parties to reach any alternative agreement which would allow the application of any different or additional evidentiary rule

Accordingly, in practice evidentiary issues will be determined according to the procedural rules adopted by each CAS Panel, unless the applicable sport regulations contain specific evidentiary rules. In making determinations on evidentiary issues, the CAS arbitrators are in no way bound to apply the procedural rules that would be applicable in a Swiss Court. Their freedom is only limited by the obligation to make sure that the contemplated procedural rule complies with the necessity for equal treatment of the parties and the right of both parties to be heard (Art. 182(3) PILA), and is consistent with “procedural public policy”, which:

*guarantees the parties the right to an independent ruling on the conclusions and facts submitted to the tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognized principles are infringed, resulting in an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law.*⁸

In fact, given the international nature of (sports) arbitration, it is submitted that the arbitrators should find (more) useful guidance in transnational sets of rules specifically drafted for arbitration than in national legislation enacted to govern court proceed-

This request was denied by the CAS who instead appointed the CAS arbitrator who had been earlier provisionally appointed by the Respondent.

⁷ See for instance CAS 2009/A/1752, *Vadim Devyatovskiy v. IOC* and CAS 2009/A/1753, *Ivan Tsikhan v. IOC*.

⁸ See Swiss Federal Tribunal decision 4P.267-270/2002 at para. 4.2.1.

ings. In particular, procedural rules contained in other sets of arbitral rules and, with specific respect to evidentiary issues, the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules) can and should be used as helpful guidance.⁹

Under Swiss international arbitration law, the IBA Rules are even perceived to codify the state of the law regarding evidence and are considered to operate as a sort of handbook for arbitrators when they have to decide procedural questions for which the applicable arbitration rules do not contain any provision.¹⁰

Given the considerable discretion that the above legal framework affords to arbitrators in evidentiary matters, this framework can in fact create more questions than it answers. The following sections will therefore consider the practicalities of evidence in CAS proceedings, including the types of evidence, burdens and standards of proof, and admissibility and evaluation of evidence.

II. TYPES OF EVIDENCE

The CAS Code does in fact contain some basic provisions in relation to the types of evidence that may be tendered in a CAS arbitration. Whilst these articles provide some guidance to the parties, it is suggested that they ought to be supplemented by the IBA Rules in order to ensure that they conform with best practice in other legal forums. The following section considers the typical types of evidence in a CAS arbitration such as exhibits, witness statements and expert reports, and also briefly discusses requests for evidentiary measures.

A. Exhibits

Pursuant to Articles R51(1) and R55(1), the parties' submissions must be accompanied by all "exhibits and specification of other evidence upon which [the relevant party]

⁹ Available at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

¹⁰ BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd edition, Bern 2010, para. 1200.

intends to rely". In accordance with the definition of the term "document" in the IBA Rules, exhibits within the meaning of these articles include not only paper documents, but more generally any "writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means". Accordingly, a party is required to produce all documentary evidence supporting his or her case together with the relevant submission.

In practice, the main issues that commonly arise in connection with exhibits relate to: (i) their authenticity; and (ii) any required translations.

With respect to the authenticity of a document, there is no need to file the originals of a document as a copy will be deemed to conform to the original.¹¹ If a dispute does arise in relation 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 for inspection and, if needed, require that an independent investigation be conducted.¹²

In its standard letter acknowledging receipt of the statement of appeal and setting the arbitration in motion, the CAS Court Office generally emphasizes that "all exhibits [...] shall be clearly listed and numbered" and that any documents that are not in the language of the arbitration (as confirmed in the same letter based on the statement of appeal)¹³ should be accompanied by a translation in the language of the arbitration.¹⁴

¹¹ See Article 3.12(a) of the IBA Rules.

¹² See for example: CAS 2010/A/2196, *Al Qadsia v. FIFA & Kazma SC* and CAS 2010/A/2205, *Jovancic v. FIFA & Kazma SC*, paras. 45–49.

¹³ See 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.

¹⁴ 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 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.

For lengthy documents, it is recommended to request leave from the CAS to translate only the most relevant parts.

The “other evidence” that must be specified according to Articles R51(1) and R55(1) of the CAS Code may be witness evidence (B); and also - in particular in doping cases - expert evidence (C).¹⁵

B. Witnesses and Witness Statements

Articles R51(2) and R55(1) of the CAS Code set out the applicable rules with respect to witness evidence, including that the witnesses must be listed in the parties’ written submissions. These articles then simply require the parties to “includ[e] a brief summary of their expected testimony” and state that the “witness statements, if any, shall be filed together with the [appeal brief/answer] unless the President of the Panel decides otherwise”.

Past experience has shown that either or both of the parties to a CAS arbitration may, on a literal interpretation of this provision, be inclined to describe the contents of prospective witness testimonies in very broad terms without bringing specific (relevant) matters to the attention of the opposing party. This can obviously lead the other party to feel ambushed during the hearing. Accordingly, when a party (or the Panel) believes that such a risk is foreseeable, it should request clarification of the contents of the witness testimony or the filing of an adequate witness statement.

Since the Code contains no specific provision with respect to the concept of a “witness”, the practice of the CAS tends to follow the principles crystallized in Article 4(2) of the IBA Rules, namely that “[a]ny person may present evidence as a witness, including a Party or a Party’s officer, employee or other representative”.

In disciplinary proceedings, a party does not have an obligation to testify and cannot be compelled to do so. However, according to CAS practice, if a party or a party representative decides to give evidence, then the other party or parties will have the right

¹⁵ Note that “other evidence” can also include documentary evidence that has been requested from the other party pursuant to the Code.

to cross-examine him. The relevant party is thus allowed to file a “witness statement” and give evidence at the hearing. Athletes charged with disciplinary offences often take advantage of this possibility.

In doping cases the athlete has a clear incentive to appear at the hearing and be available for questioning, since the doping regulations expressly allow the Panel to draw adverse inferences from any “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”.¹⁶ This evidentiary rule is questionable as it is at odds with the general prohibition of self incrimination. That said, athletes who did not voluntarily dope will in any event be eager to explain to the Panel the reasons for the positive test.

Witness statements are still rarely used in CAS proceedings. Indeed, the possibility to file witness statements was only introduced in the CAS Code in 2004. It is submitted

¹⁶ See Article 3.2.4 of the World Anti-Doping Code. In matters where the applicable regulation does not explicitly provide for adverse inferences, it is submitted that the Panel should first inform the parties of this possibility and of the extent to which the Panel will be permitted to draw such adverse inferences. See *Montgomery* at 53 “*On 17 September 2005, the Panel advised the parties that, having considered their written and oral arguments and the legal authorities filed by them for and against the drawing of an adverse inference, and after deliberation, it found that ‘it does have the right and power to draw an adverse inference from Mr. Montgomery’s refusal to testify. More particularly, it may draw adverse inferences in respect of allegations regarding which USADA has presented evidence that would normally call for a Response from the Respondent himself, and not merely from his experts or counsel.’ The Panel further informed the parties that it had not yet determined whether it would draw any such inferences and that its deliberations had been suspended so as to allow Respondent the opportunity to reconsider, in the circumstances, his decision not to testify.*” Failing such a warning, athletes might be hesitant to submit witness statements and testify, as this would expose them to cross-examination by the sports-governing body. That said, experience shows that not appearing at the hearing at all is often perceived as a lack of respect and may lead to conclusions being drawn that the evidence sought from the relevant person would be adverse to the interests of that party (this is consistent with Article 9(6) of the IBA Rules on Evidence). For a notable exception, see CAS 2011/A/2625, *Mohamed Bin Hammam v. FIFA*, where the Panel noted that the accused person did not appear and that he “*will appreciate that the Panel is entitled to draw inferences from his non-attendance, as well as the evident limits of the statement he has made*” yet did not draw any such adverse inference).

that the use of such statements should be increased, with a systematic implementation of the practice in complex cases. Experience shows that the use of witness statements dramatically reduces the length of the evidentiary part of the hearing, thus leaving more time for the discussion of issues between the parties and the Panel.

Furthermore, in the absence of any detailed rule in Articles R51 and R55, it is submitted that Article 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.¹⁷

Irrespective of whether they have submitted a witness statement, witnesses that are heard at the hearing will be sworn in before giving evidence. While in practice the exact wording used varies according to the President's legal culture, it would be preferable to simply use the wording of Article R44.2 of the CAS Code which provides that before hearing any witness the Panel shall "solemnly invite [the witness] to tell the truth subject to the sanctions of perjury". When athletes give evidence in disciplinary proceedings, the reference to perjury should be omitted as, technically, they are not witnesses within the meaning of Article 307 of the Swiss Criminal Code (CP)¹⁸ nor "party to a civil proceeding" within the meaning of Article 306 (CP).¹⁹

¹⁷ 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".

¹⁸ According to Article 307 of the Swiss Criminal Code, "(1) Any person who appears in judicial proceedings as a witness, expert witness, translator or interpreter and gives false evidence or provides a false report, a false expert opinion or a false translation in relation to the case is liable to a custodial sentence not exceeding five years or to a monetary penalty. (2) If the statement, report, expert opinion or translation is made on oath or affirmation, the penalty is a custodial sentence not exceeding five years or a monetary penalty of not less than 180 daily penalty units. (3)

Witnesses can be heard by video or telephone conference in circumstances where they are unable to attend in person or the importance of their evidence to the issues in dispute does not justify the significant expenses that can be incurred in attending the hearing personally. Unless costs are of the essence it is recommended to make sure that crucial witnesses attend in person as the personal interaction between the Panel, counsel for the parties and the witness/es will allow for greater ease in assessing credibility, more effective cross-examination and the possibility for witness conferencing or confrontation, where necessary.

C. Expert Evidence

The same principles also apply to the treatment of experts and expert reports in CAS arbitrations. In particular, the utility of filing written expert reports prior to any hearing cannot be overemphasised as, in practice, the hearing of experts without the prior filing of written expert reports is simply ineffective and unrealistic.

Without the benefit of a written report, the opposing party cannot know the precise assertions that will be presented at the hearing and will accordingly be unable to frame an adequate response. To the contrary, if all of the parties (and the Panel) are aware of the specific matters to be dealt with by the expert/s, the ability of one party to take another by surprise will be limited, and the scope of the specific issues in the case can be narrowed. Each of these benefits greatly assists a Panel in conducting more equitable and efficient proceedings.

It is submitted that, as with witness statements, if expert reports are to be used effectively, the contents of such reports should be in line with the requirements of the IBA

If the false statement relates to matters that are irrelevant to the judicial decision, the penalty is a monetary penalty not exceeding 180 daily penalty units."

¹⁹ According to Article 306 of the Swiss Criminal Code, "(1) Any person who is a party to civil proceedings and, following an express caution by the judge that he must tell the truth and notification of the penalties for failure to do so, gives false evidence in relation to the case is liable to a custodial sentence not exceeding three years or to a monetary penalty. (2) If the offender testifies on oath or affirmation, the penalty is a custodial sentence not exceeding three years or a monetary penalty of not less than 90 daily penalty units."

Rules, specifically Article 5(2).²⁰ In particular, there must be consideration of what is considered to be an “expert report” as well as the basis for the classification of the author as an expert in the particular field.

Expert evidence is very common in doping cases involving complex technical issues. Such issues can be as wide-ranging as the scientific measures employed in conducting doping controls (including compliance with the International Standard for Laboratories (ISL)), an assertion that the biological markers in an Athlete’s Biological Passport (ABP) indicate an anti-doping rule violation, or opinions on the use of medications or supplements,²¹ the effects of ingestion of a particular food²² or the recreational drug use of an athlete.²³

²⁰ 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.”

²¹ For example see CAS 2011/A/2645, *UCI v. Kolobnev RCF*.

²² For example see CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC*.

²³ For example see CAS 2008/A/1515, *WADA v. Swiss Olympic & Daubney* and CAS 2009/A/1926, *International Tennis Federation v. Richard Gasquet* and CAS 2009/A/1930, *WADA v. ITF & Richard Gasquet*.

In particularly complex cases, the Panel might also want to appoint an independent expert to assist the arbitrators in understanding the expertise brought forward by the parties' experts.²⁴

Furthermore, legal opinions are often filed in CAS arbitrations, in particular when the case concerns a law of which none of the members of the Panel has specific knowledge²⁵ or raises legal issues that have not yet been decided in any precedent.

Contrary to experts appointed by the arbitral tribunal, party-appointed experts are not required to be independent and impartial. That said, the more independent and impartial the expert is the more intrinsic weight the expertise will be afforded. From this point of view doping proceedings are problematic as experts working for WADA accredited laboratories are contractually prevented from giving evidence in favour of athletes. This raises delicate issues that are considered in more detail below in Section V(B) below (relating to the evaluation of evidence once admitted).

D. Requests for evidentiary measures

With respect to requests from a party relating to evidentiary matters, Articles R51(2) and R55(1) require that any requested "evidentiary measure" should be contained in (or at least filed together with) the appeal brief or the answer.²⁶ Such evidentiary requests can range from a request to produce the case file from the first instance pro-

²⁴ Whilst the ability to appoint an independent expert is referenced in the Code only in relation to the ordinary arbitration procedure (in Article R44.3), this possibility should also be possible in appeal proceedings. For example see: CAS 2009/A/1752, *Vadim Devyatovskiy v. IOC* and CAS 2009/A/1753, *Ivan Tsikhan v. IOC* at para 3.37 et seq.

²⁵ 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*, where expert evidence was provided on Portuguese law; and CAS 2010/A/2252, *Oleksandr Zavarov v. FC Arsenal Kiev*, where both parties produced legal opinions on questions of Ukrainian law.

²⁶ After the filing of the appeal brief (or the answer), 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 other party's submission or to circumstances that have arisen after the filing of the relevant submission.

ceedings (Article R57) to an application for the Panel to request the assistance of the state courts in accordance with Art. 184(2) PILA, for instance to summon a witness who is not under the control of the parties.²⁷

In the vast majority of cases, the requests made will concern the production of documents according to Article R44.3 of the Code, which is also applicable in appeals arbitration proceedings.²⁸ According to this article, a party may request the Panel to order the other party to submit documents in its custody or under its control.²⁹ The party seeking such an order must demonstrate that the documents in question are likely to exist and are relevant to the case.³⁰ Along the lines of Article 3 of the IBA Rules, the legitimate interests of the party opposing the submission of the said documents must also be considered by the Panel when deciding on the request.³¹

The Panel may also order the production of documents in the custody of third parties provided that such third party is under the control of an arbitration party. An example of this is the WADA accredited laboratories as they clearly act as the agent of the relevant anti-doping organisation and are required to have “documented procedures to ensure that [they maintain] a coordinated record related to each Sample analysed”.³² Under the IBA Rules, if a party refuses to comply with a production order, the Panel may infer that such documents would be adverse to the interests of said party.³³

²⁷ For example see CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA / FC Sion* at para. 124 where the Respondent applied for the Panel to request the assistance of the State Court to summon various witnesses. This motion was ultimately denied as the relevant Panel considered that the documents requested by the Respondent were irrelevant.

²⁸ See Article R57(3) of the Code.

²⁹ Article R44.3(1) first sentence. See for example: CAS 2007/A/1359, *FC Pyunik Yerevan v. E, AFC Rapid Bucuresti & FIFA*, p. 8. See also Articles 3(2)–(4) of the IBA Rules.

³⁰ See Article R44.3(1) second sentence.

³¹ KAUFMANN-KOHLER/BÄRTSCH, *Ordinary Procedure*, p. 82.

³² See Article 5.2.6 of the International Standard for Laboratories.

³³ See Article 9(5) of the IBA Rules.

This principle being considered a general principle of (Swiss) arbitration law,³⁴ the same should apply in CAS arbitration. For instance, in a case concerning a failure of production by a WADA accredited laboratory, the Panel ruled that “*in consequence of the Laboratory’s refusal the Panel holds that it cannot place the Appellants at a procedural disadvantage in bearing their burden of proof, where the evidence requested is critical to their defence and the laboratory remains in exclusive control of its disclosure*”.³⁵

III. BURDEN OF PROOF

In addition to determining the types of evidence that may be produced in CAS proceedings, it will be necessary at the outset of any proceedings to determine which party bears the “burden of proof” in establishing any given matter.

A. The Concept of the Burden of Proof and Presumption

The burden of proof has been described by the CAS as follows:

*According to the general rules and principles of law, facts pleaded have to be proved by those who plead them [...] This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based.*³⁶

³⁴ See D. P. RONEY/A. K. MÜLLER, *The Arbitral Procedure*, in *Arbitration in Switzerland – a Handbook for Practitioners*, The Hague: Kluwer Law International 68 (G. Kaufmann-Kohler, B. Stucki eds., 2004) p. 86.

³⁵ See CAS 2009/A/1752, *Vadim Devyatovskiy v. IOC* and CAS 2009/A/1753, *Ivan Tsikhan v. IOC* at para. 5.162.

³⁶ CAS 2007/A/1380, *MKE Ankaragücü Spor Kulubu v. S.* at para. 25.

Accordingly, the concept of burden of proof essentially requires a determination of which party bears the risk if a certain fact cannot be proven.³⁷ As noted in the recent *Contador* decision,³⁸ the burden of proof also designates the party that is required to submit the relevant facts before a court or tribunal.³⁹

Under Swiss law, the burden of proof is an issue pertaining to the merits of the dispute.⁴⁰ It follows that each time the decision under appeal has been rendered by a governing body in Switzerland – or according to sports regulations containing a choice of law clause in favour of Swiss law – the CAS Panel can rely on the principle set out in Article 8 of the Swiss Civil Code (SCC), according to which:

Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

Individual sports regulations can also contain specific provisions on the burden of proof, that said, in the vast majority of cases where an express provision is contained in the regulations, it simply clarifies the application of the principle of Art. 8 of the SCC to a specific kind of dispute.

For instance, the FIFA Disciplinary Code, in Article 99 “Burdens of Proof” states that:

1. *The burden of proof regarding disciplinary infringements rests on FIFA.*
2. *In the case of an anti-doping rule violation, it is incumbent upon the suspect to produce the proof necessary to reduce or cancel a sanction. For sanctions to be reduced, the suspect must also prove how the prohibited substance entered his body.*

³⁷ CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC*, at para. 248.

³⁸ CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC*.

³⁹ *Ibid* at para. 249.

⁴⁰ POUDRET/BESSON, *Comparative Law of International Arbitration*, 2nd ed, 2007, no 643; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International*, 2nd ed., 2010, no 653a; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed, 2010, no 1203.

With respect to doping proceedings under the 2009 World Anti-Doping Code (WADC), Article 3.1 provides that

[t]he Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred

and goes on to note that certain other provisions of the WADC impose a burden on the athlete to “rebut a presumption” or “establish specified facts or circumstances”. Where the Anti-Doping Organisation (ADO) wishes to impose a higher sanction than that ordinarily imposed in a particular case, it must also establish the existence of aggravating circumstances.⁴¹

Examples of some instances in which a burden is imposed on the athlete to rebut a presumption or establish specified facts or circumstances include:

- A. Art. 3.2.1⁴² of the WADC (in relation to contesting the validity of sample analysis and custodial procedures);
- B. Article 10.4 (in relation to specified substances), which imposes the burden on the athlete to establish:
 - a. how the substance entered his or her system; and
 - b. that the substance was not intended to enhance the athlete’s performance or mask the use of a performance enhancing substance; and
- C. Articles 10.5.1 and 10.5.2 (in relation to other substances), which impose the burden on the athlete to establish:
 - a. how the substance entered his or system; and
 - b. that the athlete bears no fault or negligence, or no significant fault or negligence.⁴³

⁴¹ See Article 10.6 of the WADC.

⁴² Which corresponds to Article 3.2.1 and 3.2.2 of the 2015 World Anti-Doping Code, set to come into effect in January 2015.

Presumptions are procedural instruments aimed at facilitating a party required to discharge of the burden of proof. They typically apply when the party bearing the burden of proof would otherwise be in a difficult evidentiary position given the nature of the factual allegation that needs to be proven. One should distinguish between presumptions of fact and presumptions of law.

In essence, presumptions of fact provide that a fact can be “proven” through the mere existence of certain (easier to establish) factual circumstances. Presumptions operate as part of the evaluation of the evidence and, technically, do not reverse the burden of proof. In common law parlance, presumptions reverse the evidential burden but do not affect the legal burden. In other words, the evidentiary risk remains with the party bearing the burden of proof.

By way of contrast, presumptions of law have an influence on the burden of proof. They operate by assuming the existence of a fact (the presumed fact) from the existence of another fact (the so-called “premise-fact”). Legal presumptions are rebuttable or irrebuttable.

B. Rebuttable Presumptions

A rebuttable presumption operates as follows: the party bearing the burden of proof needs to establish the “premise fact”. The presumed fact will then be considered as established, except if the opponent can disprove the existence of the “premise fact” (the so-called “counter-proof”) or by establishing that the presumed fact does not exist (the so-called “proof of the contrary”).

⁴³ It is worth noting that the 2015 version of the World Anti-Doping Code contains considerable changes to the current regime set out in Articles 10.4 and 10.5. However, the general rule remains that the athlete will have the burden of establishing certain facts, such as the source of the substance involved and the intention (or lack thereof) of the athlete in ingesting the substance. See Articles 10.2 to 10.5 of the 2015 World Anti-Doping Code for further information (available at

http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADA-2015-WADC-Final-EN.pdf)

There are a number of examples of “rebuttable” presumptions contained in the FIFA Regulations and the WADC.⁴⁴ For example, Article 17.4 of the FIFA Regulations on the Status and Transfer of Players (**RSTP**) provides for sporting sanctions where a club is found to be in breach (or to have induced a breach) of contract during a “protected period”. The article then specifically provides that:

It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach.

According to Article 17.4 the burden of proof of establishing inducement can therefore be discharged purely on the basis of evidence that the club has signed a professional who has terminated his contract without just cause during the protected period. The fact that the club is then expressly enabled to provide evidence to the contrary qualifies this as a rebuttable presumption. The provision thenceforth imposes the onus on the club to prove that no such inducement was in fact made.

The WADC features a rebuttable presumption in the key provisions relating to the presence of a prohibited substance in an athlete’s body.⁴⁵ Relevantly, Article 2.1 establishes an anti-doping violation on the basis of the “Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample”. Article 2.1.2 provides that sufficient proof of the anti-doping rule violation is established by the presence of the substance in the athlete’s A-Sample (where the athlete waives the analysis of the B-Sample), or the presence of the substance in both the A- and B-Sample if the B-Sample is analysed.

Article 3.2.1⁴⁶ then provides for the presumption in question, stating that:

WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for La-

⁴⁴ Technically, since they are contained in sports regulations “agreed” by the parties, such presumptions are private agreements between the parties.

⁴⁵ See Articles 2.1 and 3.2.1 of the WADC.

⁴⁶ Article 3.2.2 of the 2015 World Anti-Doping Code.

*laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*⁴⁷

As with the club in the previous example, the athlete is able to rebut the presumption, in this case by proving both that a departure from the ISL occurred, and that it could reasonably have caused the adverse analytical finding. The article then goes one step further than Article 17.4 FIFA RSTP, however, by providing that:

If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the Anti-Doping Organisation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

Accordingly, whilst the presumption is rebuttable, the ADO will have another opportunity to establish that the anti-doping violation has been proven to the requisite standard, as the existence of the violation will be accepted so long as the procedural departure did not actually cause the adverse analytical finding.

Rebuttable presumptions have also been created by CAS case law. For instance, the fact that an “adverse” ABP finding constitutes – in and of itself – use of a prohibited substance or method under Article 2.2 of the WADC, unless said athlete is able to provide an explanation to show that that it is not “highly likely the Athlete used a

⁴⁷ Article 3.2.1 of the 2015 World Anti-Doping Code contains an additional – rebuttable – presumption, providing that “*Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. CAS, on its own initiative, may also inform WADA of any such challenge. At WADA’s request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of WADA’s receipt of such notice, and WADA’s receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding*”.

Prohibited Substance or Prohibited Method [and unlikely that the Passport was abnormal due to any other cause]”,⁴⁸ is also a rebuttable presumption of use.

C. Irrebuttable Presumptions

In addition to rebuttable presumptions, sports regulations may also provide for irrebuttable presumptions. These are essentially presumed facts that cannot be disproved by presenting contradictory evidence: by establishing fact X, the hearing body will have to consider that fact Y is also established, irrespective of whether this is true or can be positively proven untrue. This is why irrebuttable presumptions are often referred to as legal fictions.

Article 3.2.3 of the WADC expressly refers to an “irrebuttable presumption”, that is:

The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the Athlete or other Person to whom the decision pertained of those facts unless the Athlete or Person establishes that the decision violated principles of natural justice.

Given that the provision does in fact allow rebuttal of the relevant facts on certain – limited – grounds this indicates that the presumption is more properly defined as quasi-irrebuttable.

D. Hidden Legal Fictions

The presumptions contained in Article 3.2.1 of the WADC had, until 2013, created the impression that an athlete could only challenge a laboratory’s compliance with the IST

⁴⁸ See Appendix 3 Article 6 of the WADA Biological Passport Operating Guidelines (available at http://www.wada-ama.org/Documents/Science_Medicine/Athlete_Biological_Passport/WADA-ABP-Operating-Guidelines_v4.0-EN.pdf). Note the Initial Expert Review requires the expert to determine whether “it is highly unlikely that the longitudinal profile is the result of a normal physiological or pathological condition, and likely may be the result of the Use of a Prohibited Substance or Prohibited Method” (Appendix E Article 3).

and could not challenge the validity of the tests and methods underlying same (and other relevant WADA International Standards).

This, therefore seemed to operate as an irrebuttable presumption that if a WADA accredited laboratory had followed the ISL and the result of the analysis was accurate (and, as a result, the test was positive), the offence was established. The absence of such a legal fiction was exposed by the CAS in the *Veerpalu* decision, where the Panel considered that WADA and the FIS had not established to its comfortable satisfaction that the decision limit used in the relevant test was sufficiently scientifically reliable.⁴⁹ As a result of this finding, WADA has added a new rebuttable presumption to the 2015 World Anti-Doping Code providing that “[a]nalytical methods or decision limits approved by WADA after consultation with the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid”.⁵⁰

E. The Burden of Proof in Appeals from Disciplinary Bodies

It is notable that the burden of proof in appeals from disciplinary bodies can often seem to be misplaced, as often it is the athlete or other person convicted of an offence who has appealed the decision in question, yet the relevant statutes or regulations require the federation to bear the initial burden of proof.

This, in effect, means that the athlete must “go first” even though doing so may require he or she to address a case that has not yet been proven before the CAS. Given the “de novo” nature of CAS appeals, the federation must again prove its case in each proceeding, however due to this peculiar sequence of events, it need not do so until the athlete has filed his or her submissions.

In such situations, the athlete will either have to: (i) accept that the offence has been proven (and concentrate on, for example, the validity of the sanctions imposed); or (ii) simply state that the federation has not proven the offence to the requisite standard.

⁴⁹ See CAS 2011/A/2566, *Andrus Veerpalu v. International Ski Federation*, at paras. 202–206.

⁵⁰ See Article 3.2.1 of the 2015 World Anti-Doping Code.

In the latter case, the athlete can then choose to rebut the possible evidence of the federation in advance, or request a further round of submissions to allow him to respond to the federation's case only once it has adduced evidence to "prove" the offence. Each approach has its disadvantages – the athlete may be viewed as acting in bad faith if he or she refuses to address evidence from the first instance decision which will clearly be relied upon in the CAS proceedings, yet if the athlete does attempt to address such evidence in advance, he or she must effectively "show his cards" and lose the benefit of responding to the federation's eventual case. In practice, the preferable approach will therefore be highly fact dependent and may even involve a combination of the two options.

F. Illustration of the Burden of Proof in Doping Proceedings

In order to demonstrate the operation of the burden of proof, the following table summarises the imposition of the burden for discrete issues in anti-doping matters.

Fig. 1 Burden of Proof in Adverse Analytical Finding Scenarios

BURDEN OF PROOF		
ANTI-DOPING ORGANISATION		ATHLETE
PRESENCE OF A PROHIBITED SUBSTANCE		
The existence of an anti-doping violation [proof of intent, fault, negligence or knowing use not necessary].		
Report produced by a Laboratory accredited or approved by WADA indicating an Adverse Analytical Finding (AAF):		
i) Presence of a Prohibited Substance in the A-Sample; <u>and</u> ii) Such presence is confirmed by the B-sample (if tested).		
		The report is not from a WADA accredited laboratory; <u>or</u> <u>The analytical methods or decision limits used by the Laboratory are not scientifically valid; or</u> i) A departure from the International Standard for Laboratories (ISL) occurred; <u>and</u> ii) Such departure could reasonably have caused the AAF:
Departure from the ISL (established by the Athlete) did not cause the AAF.		
ANTI-DOPING RULE VIOLATION => SANCTION		
	How the prohibited substance entered the athlete's body.	
	Specified substance	Other substance
	No fault or negligence. Not intended to enhance sport performance or mask the use of a performance-enhancing substance	No fault or negligence. No significant fault or negligence.
Establish aggravating circumstances.		
		Did not knowingly commit the anti-doping rule violation.

IV. STANDARD OF PROOF

Once the burden of proof (i.e. the allocation of risk) has been determined, it is next necessary to consider the standard according to which the relevant party must prove the particular facts at issue. This concept is known as the “standard of proof”.

There is no rule in the PILA, nor in the CAS Code, which defines the applicable standard of proof for CAS arbitrations. Accordingly, two different scenarios can arise in CAS proceedings – cases which involve an express standard imposed by the relevant sports federation, and cases in which no such express standard of proof is specified.

With respect to the former, consistent jurisprudence has upheld the validity of a sports-governing body choosing to impose its own concept of the applicable standard of proof. Two recent decisions have reinforced this notion, the *Bin Hammam*⁵¹ decision and the *Köllerer*⁵² decision.

In the *Bin Hammam* decision, the Panel confirmed the findings of the CAS panel in the 2011 *Adamu*⁵³ case, relevantly, that sporting federations and related parties can make use of their “private autonomy” to validly designate the rules of evidence to be applied in the proceedings. The panel in *Bin Hammam* specifically referred to following extract from the *Adamu* decision:

80. [...] This is particularly so if the parties make use of their private autonomy to lay down some rules of evidence.

81. The Panel notes that the parties to this arbitration did make use of their private autonomy – FIFA by adopting its rules and the Appellant by accepting them when he voluntarily became an indirect member and an official of FIFA – and did agree on some rules of evidence to be applied in FIFA disciplinary proceedings. Therefore, the Panel holds that the evidentiary issues of this case must be ad-

⁵¹ CAS 2011/A/2625, *Mohamed Bin Hammam v. FIFA*.

⁵² CAS 2011/A/2490, *Daniel Köllerer v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee*.

⁵³ CAS 2011/A/2426, *Amos Adamu v. FIFA*.

dressed applying those rules privately agreed between the parties and not the rules of evidence applicable before Swiss civil or criminal courts.

The *Köllerer* decision since confirmed this principle, holding not only that a federation is entitled to impose its own minimum standard of proof, but that such standard does not need to be in line with previous CAS jurisprudence or the standard of proof employed by other international federations in similar matters:

*By signing a consent form, the Player agreed to both the standard of proof and the contractual sanctions in case of breach [...] The Panel does not agree with the Appellant that it is required to apply a different standard of proof on the basis of CAS jurisprudence. There is no universal (minimum) standard of proof for match-fixing offences.[...] Whilst the Panel acknowledges that consistency across different associations may be desirable, in the absence of any overarching regulation (such as the WADA Code for doping cases), each association can decide for itself which standard of proof to apply, subject to national and/or international rules of public policy.*⁵⁴

As noted, cases also arise in which no applicable standard of proof has been specified in the relevant regulations. In these cases, it will fall to the Panel to determine the appropriate standard to apply to the case. Such a situation arose in two UEFA cases in 2010 and 2011 on match-fixing, for which there was no specific standard of proof specified in the UEFA regulations. In reaching its determination on the applicable standard to be imposed, the CAS Panel in both matters endorsed the approach that:

*[...] cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the facts "to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made".*⁵⁵

⁵⁴ See *Köllerer* at paras. 82–85.

⁵⁵ See CAS 2010/A/2172, *Mr Oleg Oriekhov v. UEFA* at para. 53; see also CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanex, Nikolce Zdraveski v. UEFA* at para. 85.

Notably, this statement indicates that in situations where the determination of the applicable standard of proof is to be made by the Panel, consistent jurisprudence in similar fields ought to at least be considered in deciding the appropriate standard to apply.

A. Standards of Proof in CAS Arbitrations

Obviously, allowing parties to devise their own standards of proof and/or requiring arbitration panels to determine the appropriate standard can result in the existence of a number of different standards of proof. CAS arbitrations are no exception to this, with the relevant standard of proof in particular proceedings (or even for a particular issue) depending on matters as diverse as the international federation involved, the type of matter and the stage of the proceedings.

The traditional standards of proof in legal proceedings are:

- a) the “balance of probabilities” (that is, the standard typically applied in civil law matters); and
- b) “beyond reasonable doubt” (that is, the standard applied in criminal law matters).

Additional standards (and alternative expressions of the traditional standards above) also feature in sports arbitration, including:

- a) “Comfortable satisfaction” – a standard of proof that is stated to be lower than the criminal standard of beyond reasonable doubt, but higher than the civil standard of balance of probabilities;
- b) “Personal conviction” – most akin to comfortable satisfaction and found in Art 97 of the FIFA Disciplinary Code; and
- c) “Preponderance of the evidence” – akin to the balance of probabilities and featured in Section 3(G)(a) of the Uniform Tennis Anti-Corruption Program.

Although it has been consistently debated, the application of the criminal standard of “beyond reasonable doubt” has been held to be inappropriate in the context of sport-

ing arbitration (with particular reference to doping offences).⁵⁶ The following sections will therefore focus on those standards most commonly employed in sports arbitration proceedings, being “comfortable satisfaction” and the “balance of probabilities”.

B. Comfortable Satisfaction

The standard of comfortable satisfaction is most commonly applied in disciplinary proceedings, due to the often serious repercussions of being found guilty of a relevant offence. The use of this standard offers somewhat of a safeguard to the accused, requiring the satisfaction of the offence to a higher standard than that typically used in civil proceedings.

The standard has been applied both as a result of express provisions in the applicable regulations, and as the appropriate standard where no such provisions exist.

1. Express Provisions Contained in the Applicable Regulations

The comfortable satisfaction standard is well-established in doping cases, and features in various articles in the WADC. For example, the standard is expressly employed in the following instances:

Art 3.1: The Anti-Doping Organisation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the offence. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

⁵⁶ See for example CAS 2009/A/1912 & 1913, *P. & DESG v. ISU* where the Panel noted that several awards have withstood the scrutiny of the Swiss Federal Tribunal in terms of the criminality of a doping offence and that the assessment of evidence is a problem “which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law” at para. 124. That said, this does not prohibit parties from adopting this standard, and such standard was in fact applied in the decision of CAS 2011/A/2362, *Mohammad Asif v. ICC* at para. 69.

Comment to Art 3.2.1: [...] the burden shifts to the Anti-Doping Organisation to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.

Comment to Art 10.4: This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete [...] did not intend to enhance his or her sport performance.

Art. 10.6: If the Anti-Doping Organisation establishes in an individual case [...] that aggravating circumstances are present [an increased period of ineligibility shall be imposed] unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly commit the anti-doping rule violation.⁵⁷

As indicated by the wording of Article 3.1 above, the “comfortable satisfaction” standard must be applied with respect to both the seriousness of the offence and the type of the offence. The WADC and CAS jurisprudence have clarified the operation of the standard in this respect, noting that:

*“the more serious the allegation being considered the greater is the degree of evidence which is required to achieve the requisite degree of comfortable satisfaction necessary to establish the commission of the offence”;*⁵⁸ and

*“the greater the potential performance-enhancing effect of the substance, the higher the burden to prove lack of an intent to enhance sport performance”.*⁵⁹

It has also been suggested that the fact that the offence is typified as one of strict liability is a further factor which may require a higher degree of satisfaction than might otherwise be appropriate.⁶⁰

⁵⁷ See Fig 2. for a full illustration of the relevant standard of proof at discrete points in doping proceedings.

⁵⁸ See CAS OG 003-4, *Andrei Korneev v. International Olympic Committee and Zakhar Gouliev v. International Olympic Committee*.

⁵⁹ See comment to Art. 10.4 of the WADC.

With respect to FIFA disciplinary proceedings, the CAS has also found the standard of comfortable satisfaction to be applicable on the basis of the wording in Article 97 of the FIFA Disciplinary Code (FIFA DC), which states that the FIFA bodies will have absolute discretion regarding proof and decide “on the basis of their personal convictions”. This standard has been accepted by the CAS to be commensurate with that of “comfortable satisfaction” in other disciplinary proceedings.⁶¹

2. No Expression of a Standard in the Regulations

As indicated (in the context of the UEFA match-fixing proceedings), the standard of “comfortable satisfaction” has also been applied as the appropriate standard in disciplinary proceedings even when the relevant regulations are silent as to the standard of proof⁶² or when the regulations are “unclear”.⁶³

In this regard, the CAS panel in *Pobeda*⁶⁴ commented (and such comment was confirmed in *Oriekhov*⁶⁵) that:

Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the

⁶⁰ See CAS OG 003-4, *Andrei Korneev v. International Olympic Committee and Zakhar Gouliev v. International Olympic Committee* at page 18.

⁶¹ See CAS 2011/A/2426, *Amos Adamu v. FIFA* at para. 87.

“The Panel notes that, under article 97 FDC, the Panel has a wide margin of appreciation and may freely form its opinion after examining all of the available evidence. The applicable standard of proof is the “personal conviction” of the Panel (in the French version ‘intime conviction’, but according to article 143 para. 2 FDC the English version prevails).

The Panel is of the view that, in practical terms this standard of proof of personal conviction coincides with the ‘comfortable satisfaction’ standard widely applied by CAS panels in disciplinary proceedings.”

⁶² CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA* at para. 85.

⁶³ See CAS 2011/A/2426, *Amos Adamu v. FIFA*, at para. 87.

⁶⁴ CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA* at para. 85.

⁶⁵ CAS 2010/A/2172, *Mr Oleg Oriekhov v. UEFA* at para. 53.

Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases.

3. Particular Difficulties in Satisfying the Standard

The use of the comfortable satisfaction standard in match-fixing cases has also prompted the CAS to acknowledge the difficulties disciplinary bodies may have in discharging their burden of proof for such offences. Relevantly, in the *Oriekhov* decision, the CAS panel stated that:

“when assessing the evidence, the Panel has [to keep] well in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing”.⁶⁶

This comment is indeed particularly relevant in match-fixing cases in light of the fact that the investigative powers of sports governing bodies are extremely limited compared to both national authorities and even anti-doping authorities. Notably, the coercive investigatory powers possessed by anti-doping authorities are both wide-reaching and often invasive, essentially enabling such agencies to pre-emptively collect evidence of an anti-doping violation such as:

- bodily samples in and out of competition;
- detailed whereabouts information; and
- complete physiological profiles.

In such cases evidence clearly cannot be hidden such as it is with corruption, and, in fact, athletes face severe punishment for attempting to withhold information or for not complying with their duties under the WADC to provide such information.⁶⁷

⁶⁶ *Ibid*, at para. 54.

⁶⁷ See Art. 2.3 of the WADC which classes “*refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection*” as a violation; and Art. 2.4 which imposes a penalty on athletes who fail to make themselves available for out of competition testing three times with-

Quite distinct from such agencies, the sports-governing bodies in corruption cases do not have any ability to engage in pre-emptive evidence collection, let alone impose it as a condition of participation in a given competition.

The author notes that this distinguishing feature of corruption was not considered in the 2012 *Bin Hamman* decision, where the Panel appeared to be satisfied on the balance of probabilities that the offence had been established, yet then proceeded to state that it could not *completely exclude* other possibilities. The Panel's reasoning indicates that it was in fact applying a standard more akin to that of beyond reasonable doubt:

The Panel considers it to be more likely than not that Mr. Bin Hammam was the source of the money...

The evidence before the Panel allows, according to the majority of the Panel, other scenarios to be imagined or constructed. ... The possibility also cannot be entirely excluded that there was another source of money, other than Mr. Bin Hammam. Whilst the Panel considers this to be unlikely..."

The Panel is doing no more than concluding that the evidence is insufficient in that it does not permit the majority of the Panel to reach the standard of comfortable satisfaction ... It is a situation of "case not proven", coupled with concern on the part of the Panel that the FIFA investigation was not complete or comprehensive enough to fill the gaps in the record.⁶⁸

As a matter of policy, and whilst it is certainly important to safeguard the rights of any party against whom corruption proceedings have been brought, it is submitted that in order to effectively guard against corruption, future CAS decisions would benefit from

in an eighteen-month period – including by failing to file whereabouts information and missing tests.

⁶⁸ CAS 2011/A/2625, *Mohamed Bin Hammam v. FIFA* at para. 204.

a consideration of the difficult position of federations in producing sufficient evidence of the offence.⁶⁹

C. The Balance of Probabilities

The other standard of proof routinely employed in sports arbitration is that of the “balance of probabilities”. This standard has developed over the years from a requirement that the accused prove that its version of the facts are more likely than not to have occurred, to a complex standard which may require the cooperation of both parties in discharging the burden of proof.

1. The traditional concept

The “balance of probabilities” has historically been considered to require that the Panel be satisfied that there is a 51% chance of a relevant scenario having had occurred. As stated in the *Gasquet*⁷⁰ decision:

*...it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof [...] In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability, simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.*⁷¹

⁶⁹ Indeed, in CAS 2011/A/2621, *Savic v. PITO*, the Panel prefaced its evaluation of the evidence in question by stating: “[w]hen evaluating the evidence, the Panel is well aware that corruption is, by its very nature, likely to be concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing” (at para. 8.7).

⁷⁰ CAS 2009/A/1930, *WADA & ITF v. Gasquet*.

⁷¹ At para. 5.9. See also CAS 2008/A/1515 *WADA, v Swiss Olympic Association and Simon Daubney* (at page 23), where the Panel stated that the “[...] athlete has the burden of persuading the Pan-

2. “Beweisnotstand” or “evidence calamity”

The balance of probabilities standard was also considered in far greater detail in the *Contador* decision, where the Panel specifically acknowledged that it may require special application in so-called instances of *beweisnotstand* or “evidence calamity”.⁷² Such situations arise when a party faces serious difficulty in discharging his or her burden of proof, in light of the fact that the information required to prove the fact is (for example) not in the athlete’s control, or that:

*[...] by its very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove “negative facts”.*⁷³

Whilst the WADC provides for the standard of the balance of probabilities in establishing how a substance entered an athlete’s body, the panel in *Contador* clarified that principles of procedural fairness demand that in cases where a party is facing extreme evidentiary difficulties, the opposing party who contests an explanation that has been offered must “*substantiate and explain in detail why it considers that the facts submitted by the other party are wrong*”.⁷⁴

Essentially, the Panel held that while there is no re-allocation of the burden of proof, such cases will result in a “duty of cooperation” of the contesting party.⁷⁵

The application of this principle to each case will depend on the particular facts at hand, however in relation to establishing how a prohibited substance entered an athlete’s body it can generally be said to operate as follows:

el that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the relevant testing”.

⁷² CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC* at para. 254.

⁷³ *Ibid* at para. 254.

⁷⁴ *Ibid* at para. 255.

⁷⁵ *Ibid* at para. 256.

- i. The athlete must provide a credible explanation as to how the prohibited substance entered his or her system, direct proof of which may not be available to substantiate his or her claim.
- ii. In such cases, the athlete may only succeed in discharging his or her burden by proving that:
 - a. The explanation offered is possible; and
 - b. Other sources from which the substance may have entered the athlete's body either do not exist or are less likely.
- iii. Given that ii.(b) above involves a form of negative fact that is difficult to prove for the athlete, the party who contests the athlete's explanation must "contribute through substantiated submissions to the clarification of the corresponding facts of the case".
- iv. The Panel must then evaluate the submissions of each party and determine what was most likely to have occurred.

It is submitted that the *Contador* Panel's clarification of the operation of the standard of proof in instances of *beweisnotstand* is both necessary and positive. A careful application of the principles in each case ought properly result in a safeguard of sorts for athletes who are attempting to satisfy an often very difficult burden of proof.

3. The Balance of Probabilities in Corruption Cases

Finally, and in an interesting development in dealing with corruption in sport, the imposition of the "balance of probabilities" standard has recently been held to be appropriate in match-fixing cases, provided that it is expressly included as the relevant standard in the applicable regulations.

The March 2012 decision of *Köllerer*⁷⁶ concerned a Player's appeal against the imposition of a life ban for match-fixing pursuant to the rules of the Uniform Tennis Anti-Corruption Program (UTACP).

During the course of the proceedings, various arguments were presented by both parties as to the applicable standard of proof in the matter, which had been accepted by the Anti-Corruption Hearing Officer (AHO) to be that provided for in the UTACP, namely, satisfaction on "a preponderance of the evidence".⁷⁷ This standard was considered to require that the proposition that the Player engaged in match-fixing "was more likely to be true than not", and was commensurate with the standard of the balance of probabilities.⁷⁸

The Player argued that applying such a standard was inappropriate, and submitted, inter alia, that the relevant standard of proof ought to be commensurate with CAS jurisprudence (i.e. "comfortable satisfaction") and that to impose a life ban on the basis of a mere balance of probabilities would be against the principles of *ordre public*.⁷⁹

In rejecting the player's arguments, the CAS Panel confirmed that a federation is acting within its rights where it imposes its own standard of proof in its regulations. The panel stated that:

*The CAS has neither the function nor the authority to harmonise regulations by imposing a uniform standard of proof, where, as in the current case, an association decides to apply a different, specific standard in its regulations.*⁸⁰

In coming to its conclusion, the Panel also noted that the Player had consented to the relevant rules and that it did not consider that applying the balance of probabilities as the standard of proof would violate any national or international rules of public poli-

⁷⁶ CAS 2011/A/2490, *Daniel Köllerer v ATP et. al.*

⁷⁷ Ibid at para. 47.

⁷⁸ Ibid at para. 82.

⁷⁹ Ibid at paras. 47–50.

⁸⁰ Ibid at para. 86.

cy. The Panel was, however, careful to point out that while the circumstances did not require the imposition of a higher standard of proof, there was a necessity to “have a high degree of confidence in the quality of the evidence”.⁸¹

The Panel ultimately concluded that given the vulnerability of tennis to match fixing, it was imperative to be able to send a clear signal by imposing the significant deterrent of a lifetime ban.⁸²

D. Illustration of Relevant Standards of Proof in Doping Offences

In order to demonstrate how the different standards of proof can apply in relation to discrete matters at different stages of a case, the following table sets out the standards applicable in doping proceedings. This table expands upon Fig. 1 and indicates both the burden of proof and the relevant standard to which it must be proved at each stage.


⁸¹ CAS 2011/A/2490, *Daniel Köllerer v ATP et. al.* at para. 97.


⁸² Notably, the Panel also held that in such circumstances the lifetime ban was a sufficient deterrent, and it would be inappropriate to impose a financial penalty in addition to the ban (see para. 130). This has also been confirmed in the recent decision of CAS 2011/A/2621, *Savic v. PITO*.

Fig. 2 Relevant Standards of Proof in Doping Offences.

BURDEN AND STANDARD OF PROOF	
Anti-Doping Organisation	Athlete
PRESENCE OF A PROHIBITED SUBSTANCE	
Report produced by a Laboratory accredited or approved by WADA indicating an Adverse Analytical Finding (AAF)	
	<p>The report is not from a WADA accredited laboratory; <u>or</u></p> <p><u>The analytical methods or decision limits used by the Laboratory are not scientifically valid; or</u></p> <p>i) A departure from the International Standard for Laboratories (ISL) occurred; <u>and</u></p> <p>ii) Such departure could reasonably have caused the AAF:</p>
Departure from the ISL (established by the athlete) did not cause the AAF.	

ANTI-DOPING RULE VIOLATION => SANCTION		
	How the prohibited substance entered the athlete's body	
	Specified substance	Other substance
	No fault or negligence	No fault or negligence
	Not intended to enhance sport performance or mask the use of a performance-enhancing substance	No significant fault or negligence
Establish aggravating circumstances		
	Did not knowingly commit the anti-doping rule violation.	

 Comfortable Satisfaction

 Balance of Probabilities

V. THE ADMISSIBILITY AND EVALUATION OF EVIDENCE

Once the burden and standard of proof have been determined in the proceedings, it is obviously vital for a party to produce relevant and admissible evidence to support their case. Accordingly, the following section will consider the admissibility of certain types of evidence in CAS proceedings, and how the Panel is required to evaluate the evidence so admitted.

A. Admissibility of Evidence

There is no rule in the CAS Code to define what may, or may not, be admitted in terms of evidence. Furthermore, both Article 184(1) PILA and 9(1) of the IBA Rules support the ability of the arbitrators to decide whether or not a given piece of evidence is admissible, with Article 9(1) specifically providing that the “Arbitral Tribunal shall determine the admissibility [...] of evidence”.

Arbitral panels are therefore granted considerable discretion in admitting evidence and, notably, are not bound by the rules of evidence that are applicable before (Swiss) civil or criminal courts.⁸³ These rules do not even apply as “guidance” for a panel, as it has been suggested that association disciplinary proceedings are “by their very nature, less formalistic and guarantee-driven than criminal proceedings”.⁸⁴

In terms of how a CAS Panel ought to exercise its discretion then, it is bound to apply the rules contained in applicable sports regulations (if any) and, if no such rules exist, may admit evidence according to its discretion. In either case, the Panel will always be bound by the relevant principles of procedural public policy.⁸⁵

The WADC is one example of a regulation which does contain specific provisions as to the admissibility of evidence. For example, this code provides that the presence of a prohibited substance may only be established by sample analysis performed by a WADA-approved laboratory.⁸⁶ With respect to all other “facts related to [anti-]doping rule violations [these] may be established by any reliable means”:

Anti-doping organisation: *athlete’s admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A*

⁸³ See CAS 2011/A/2425, *Ahongalu Fusimalohi v. FIFA* at para. 79.

⁸⁴ See CAS 2011/A/2426, *Amos Adamu v FIFA* at para. 90.

⁸⁵ Ibid in particular at para. 68.

⁸⁶ See Articles 2.1, 3.2 and 6 of the WADC and the International Standard for Laboratories.

*or B Sample, or conclusions drawn from the profile of a series of the Athlete's blood or urine samples.*⁸⁷

Athlete: *must produce corroborating evidence in addition to his or her word.*⁸⁸

With respect to the latter, the question then arises as to what may be used as “corroborating evidence” by an athlete. For example, is it possible for the athlete to rely on a hair test or a polygraph?

1. Polygraph Evidence

The *Contador* decision was an important step forward from previous CAS jurisprudence with respect to the admissibility of polygraph evidence. As a result of this decision, an athlete now has the opportunity to admit polygraph evidence pursuant to certain minimum standards.

The traditional approach of CAS panels to the admissibility of polygraph evidence has been that:

*A polygraph test is inadmissible as per se evidence under Swiss law. Therefore, the CAS Panel may take into consideration the declarations of [the athlete] as mere personal statements, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test.*⁸⁹

Fortunately (in terms of an athlete's defence to a violation under the WADC) the *Contador* panel re-examined this question, and held that, contrary to historical jurisprudence, polygraph evidence is in fact admissible provided that it is “reliable”.⁹⁰ In admitting the evidence, the Panel highlighted that the previous instances in which polygraph evidence had been excluded in CAS arbitrations had involved proceedings

⁸⁷ See Comment to Article 3.2 WADC.

⁸⁸ See Article 10.4 of the WADC.

⁸⁹ CAS 2008/A/1515, *Wada v. Daubney* at para. 119. See also *TAS 99/A/246, Ward v. FEI* at para. 4.5 and *CAS 96/156, Foschi v. FINA*, at para. 14.1.1.

⁹⁰ In accordance with Article 3.2 of the WADC.

prior to the implementation of the WADC, and in particular prior to the express statement therein that facts may be established by any reliable means.

Pursuant to the findings of the panel in the *Contador* decision, polygraph evidence may now be admissible in CAS proceedings provided that the relevant test is conducted in a professional manner; by an experienced examiner; according to the best professional standard; and supported by empirical evidence.

With respect to the probative value of such evidence the *Contador* Panel considered that the polygraph results corroborated the athlete's attestations of innocence and added some force to the declaration of innocence, but that the credibility of these assertions must still be verified in light of all of the other elements of proof adduced.⁹¹

Of course, while this is a positive development in terms of providing the athlete another evidentiary tool to support his or her case, there exists the danger that the consistent use of this tool may result in polygraphs being viewed as a pre-requisite in every doping case, which could be a prohibitive requirement for certain athletes in terms of expense.

In this respect it ought to be noted that the acceptance of this evidentiary tool in CAS proceedings should not allow any adverse inference to be taken against an athlete who does not produce a polygraph. Rather, it ought properly be regarded as a further opportunity for an athlete to support his or her case through "any reliable means". Given the often onerous burden of proof the athlete must overcome under the WADC, particularly with respect to the previously discussed situation of *beweisnotstand*, it is submitted that affording athletes the use of this evidentiary tool is entirely justifiable.⁹²

⁹¹ CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386, *WADA v. Alberto Contador Velasco & RFEC* at para. 393.

⁹² Of course, it would be unacceptable for an ADO to force an athlete to undergo a polygraph to establish a violation. The use of polygraph evidence ought properly be a matter of choice for each individual athlete who is attempting to prove his or her defence to an anti-doping violation. Compelling an athlete to undergo such a test (as with drawing an adverse inference against an athlete who fails to do so) would be entirely improper.

2. Unlawfully Obtained Evidence

The second type of evidence for which questions of admissibility can arise is that of so-called “unlawfully obtained” evidence.

In the 2012 decision of *Fusimalohi*,⁹³ the relevant CAS Panel was required to consider the admissibility of a number of audiovisual recordings taken by journalists. Specifically, the panel had to determine whether these recordings had been obtained illegally and as such ought to be excluded from consideration.

The CAS panel in its determination endorsed the finding in the previous *Valverde* decision⁹⁴ where it was stated that the:

“internal Swiss legal order does not set forth a general principle according to which illicit evidence would be generally inadmissible in civil proceedings before State courts. On the contrary and according to the long-standing jurisprudence of the Federal Tribunal, whether the evidence is admissible or inadmissible depends on the evaluation of various aspects and legal interests. For example, the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties’ legitimate interests and the possibility to obtain the (same) evidence in a lawful manner are relevant in this context [...] The above described principles are only a feeble source of inspiration for arbitral tribunals. [...] In particular, the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal [...] As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable con-

⁹³ CAS 2011/A/2425, *Ahongalu Fusimalohi v. FIFA*.

⁹⁴ CAS 2009/A/1879, *Alejandro Valverde Belmonte v. CONI*.

*tradition with the sentiment of justice, to the effect that the decision appears incompatible with the values recognised in a State governed by the rule of law”.*⁹⁵

The Panel in *Fusimalohi* then noted that the parties had made use of their private autonomy in determining the admissibility of evidence in such proceedings (through adopting and accepting the FIFA rules) and that, accordingly, the matter fell to be decided on the basis of the rules privately agreed between the parties, without addressing the criteria on the admissibility of evidence that can be found in the Swiss civil or criminal jurisprudence.

Given that the relevant regulations contained a provision on the admissibility of evidence, namely, that “any type of proof may be produced” unless it “violate[d] human dignity”,⁹⁶ the CAS Panel was first required to determine whether admitting the audiovisual recordings would be consistent with this provision.

The Panel considered that the concept of “human dignity” was equivalent to Art. 28 of the SCC which applies to fundamental “personality rights”, and concluded that whilst filming and recording without consent does infringe personality rights,⁹⁷ the admissibility of such evidence can be justified in circumstances where a predominant public or private interest exists.⁹⁸

The Panel then conducted a “balancing exercise”, ultimately deciding that the Appellant’s interest in keeping the audiovisual recordings confidential was outweighed by the interests of FIFA and other private and public stakeholders in disclosing the full content of the recordings and using them for disciplinary purposes.

The relevant interests that the panel considered included:

- the general public interest in the exposure of illegal or unethical conduct;

⁹⁵ See CAS 2011/A/2425, *Ahongalu Fusimalohi v. FIFA* at para. 80.

⁹⁶ See Article 96 of the FIFA Disciplinary Code.

⁹⁷ Pursuant to Art. 28(1) of the SCC.

⁹⁸ Pursuant to Art. 28(2) of the SCC.

- the private interest of FIFA to restore the truth and its image and to identify and sanction wrongdoing amongst its officials;
- the private interest of the national football associations to be fully informed about the bidding process;
- the public interest of the governments pledging support to a World Cup bid; and
- the interest of the general public in being comforted about the bidding process for the 2018 and 2022 FIFA World Cups.⁹⁹

In light of this, the Panel stated that it had no difficulty in finding that the balance of interests favoured the disclosure and utilisation of the evidence. The Panel also went on to consider whether the use of the evidence could amount to a violation of Swiss procedural public policy. Taking into account the nature of the conduct in question; the ethical need to discover the truth and sanction wrongdoing; the necessity for accountability; the general consensus that corrupt practices were a growing concern in sport; and the limited investigative powers of sports governing bodies, the Panel held that there was no such violation and the evidence was admissible.¹⁰⁰

The approach taken in the *Fusimalohi* appears to have been confirmed by subsequent, recent CAS decisions concerning match fixing in football.¹⁰¹ With respect to an earlier Panel's decision to admit allegedly "illegally obtained evidence" in a proceeding,¹⁰² the

⁹⁹ See CAS 2011/A/2425, *Ahongalu Fusimalohi v. FIFA* at para. 105.

¹⁰⁰ Notably, the CAS panel in *Fusimalohi* did state that it considered there to be certain circumstances where evidence may be inadmissible in light of the manner in which it was obtained. The Panel referred to decisions from two international arbitral tribunals which essentially held that, in acquiring evidence through private detectives covertly trespassing into the other party's office building, or using police powers and intelligence services to eavesdrop on another party's telephone conversation, the parties who had acquired the evidence had acted contrary to the principles of good faith and of respect for the arbitral process: see CAS 2011/A/2425, *Ahongalu Fusimalohu v. FIFA* at para. 73

¹⁰¹ This point was considered in extensive detail in the 2013 decision of CAS 2010/A/2267, 2278, 2279, 2280, 2281 – *Football Club "Metalist" et al. v. FFU*.

¹⁰² CAS 2010/A/2267, 2278, 2279, 2280, 2281 – *Football Club "Metalist" et al. v. FFU*.

Panel in CAS 2013/A/3297 *Public Joint-Stock Company “Football Club Metalist” v. UEFA & PAOK* expressly stated that:

It should further be noted, as a matter of form and as already established in consistency with CAS jurisprudence (for instance CAS 2009/A/1879), that even if evidence might not be admissible in a civil or criminal court in Switzerland, this does not automatically prevent a sport federation or an arbitration tribunal from taking such evidence into account in its deliberations.

Moreover, the Panel concurs that that steps must be taken, in regard to the public interest in finding the truth in match-fixing cases and also in regard to the sport federations’ and arbitration tribunals’ limited means to secure evidence, to open up the possibility of including evidence in the case although such evidence could potentially have been secured in an inappropriate manner so long as the inclusion of such evidence in the case does not infringe any fundamental values reflected in Swiss procedural public policy.¹⁰³

It is also worth noting that where the sports regulations do not contain specific rules such as that in the FIFA DC, it has been held that:

The mere circumstance that some evidence has been illegally obtained does not necessarily preclude [the Panel] to admit it into the proceedings.¹⁰⁴

In such a case it is appropriate to apply the “balance of interests” approach referred to above, as a matter of Article 28 of the SCC if the federation is governed by Swiss law, and as a general principle of (Swiss) procedural law.

In such a balancing exercise it must be noted that, whilst the interests of discovering the truth are strong, they do not necessarily prevail in all cases, and that this is particularly so with respect to coerced evidence.

¹⁰³ At para. 8.10 to 8.11.

¹⁰⁴ See CAS 2011/A/2426, *Amos Adamu v. FIFA*.

3. Protected Witnesses

In recent years, CAS Panels have also been required to determine whether certain circumstances might allow for a party to rely on the testimony of an anonymous or protected witness in a case. Such requests featured in both the *Pobeda*¹⁰⁵ and *Contador*¹⁰⁶ proceedings with mixed results.

In the opinion of the author, the conclusions of both panels were entirely appropriate in light of the specific factual circumstances each was dealing with.

The first of these cases, the *Pobeda* case, concerned allegations against various Appellants that each had engaged in match fixing in contravention of the principles of integrity and sportsmanship under the UEFA Disciplinary Regulations.

The first instance proceedings were conducted by UEFA, who had mandated an expert to analyse the betting patterns related to the relevant matches. A number of witnesses were then interrogated and UEFA brought formal charges against the Appellants. Despite being provided a brief opportunity to review the witness statements, the identity of a number of the witnesses was not disclosed to the Appellants. After the first instance decision against the Appellants, an appeal was brought before the UEFA Appeals Body which again saw a number of protected witnesses provide testimony. The identity of these witnesses was revealed to the UEFA Appeals Body but not to the Appellants, and the Appellants were not permitted to question the witnesses directly in order to “*protect the anonymity guaranteed to them by both UEFA disciplinary bodies for the sake of their safety and that of their families*”.¹⁰⁷ The Appellants were, once again, found guilty of the relevant offences.

In July 2009 the Appellants filed an appeal with CAS submitting, inter alia, that they were not given the opportunity to ask direct questions to the witnesses. UEFA responded that the Appellants ought not be granted the original recordings of the pro-

¹⁰⁵ CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA*.

¹⁰⁶ CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* and CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC*.

¹⁰⁷ *Pobeda* at para. 24.

tected witnesses' interrogations and requested the relevant panel to hear the witnesses anonymously. UEFA submitted that previous incidents indicated that the safety of the witnesses and their families would be endangered if their identity was revealed. Specifically, UEFA alleged that the Appellants had engaged in witness intimidation in the past and that if the witnesses were not protected then there would be a high risk that they would refuse to testify at all.

The CAS panel ultimately decided that the witnesses could be heard without disclosing their identity, provided that specific modalities for cross-examination of the witnesses were accepted by the parties.

In coming to its conclusion the Panel noted that admitting facts based on anonymous witness statements affects the right to be heard, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR) and Article 29.2 of the Swiss Constitution. However, according to Swiss jurisprudence on the matter, such breaches may be permissible subject to certain conditions and the requirement that the witness statements support the other evidence provided to the court.¹⁰⁸

The Swiss jurisprudence cited by the panel referred to further ECHR decisions which recognised the right of a party to rely on anonymous witness statements, and to prevent another party from cross-examining such witnesses, in situations where the personal safety of the witness was at stake, "*la sauvegarde d'intérêts dignes de protection*".¹⁰⁹

In accepting this proposition the Swiss Federal Court noted that whilst evidence from anonymous witnesses may be admissible in such circumstances, this was subject to strict conditions. In particular, the Court held that the opposing party's right to be heard and right to a fair trial must be respected and ensured through other means.¹¹⁰

¹⁰⁸ Referring to the decision ATF 133 I 33.

¹⁰⁹ The Swiss Federal Court referred in particular to the ECHR decisions of Doorson, Van Mechelen and Krasniki.

¹¹⁰ For example, by cross-examination through audiovisual protection and a detailed investigation by the relevant Court into the identity and reputation of the anonymous witness.

The *Pobeda* panel ultimately found that in the specific circumstances of the case it could rely on procedural methods to strike an appropriate balance between the rights of the parties and allow the anonymous evidence to be admitted. The Panel noted the statements of the witnesses that they had been subjected to threats, insults, pressure and intimidation and stated that:

Given the circumstances of this case, the Panel had no reasons to ignore those fears and could not disregard the possibility of such threats and the Respondent's assertion that the life and/or the personal safety of the witnesses and their families were at risk.

However, the Panel was satisfied that in providing for specific modalities for cross-examination it had maintained a proper balance between the rights of the parties. Relevantly, the Panel ensured that the Appellants received the minutes of the interrogations of the witnesses and that the Appellants were able to directly cross-examine the protected witnesses over the phone during the hearing. A CAS counsel ensured that the witnesses were properly identified and that they were alone at the time of examination-in-chief and cross-examination.

The issue of anonymous witnesses was once again considered in *Contador*, however this time with a different outcome. The Appellant in these proceedings, WADA, filed a witness statement from an anonymous witness and indicated that the witness did not want to reveal his/her identity in fear of the negative repercussions that his/her evidence might have. The other parties to the dispute took various positions with respect to this witness: the athlete in question objected to the use of an anonymous witness on the basis that it would be contrary to a fair hearing; the national federation indicated that it was not concerned with the identity of the witness, however wished to retain the right to put questions to him/her in an efficient manner; and the international federation (the co-Appellant in the proceedings) had no objection.

In considering whether to admit the evidence of the anonymous witness, the Panel first considered the principle under PILA 184.1 that an arbitral panel shall itself conduct the taking of evidence. The Panel then noted that the issue of anonymous wit-

nesses is linked to the right to a fair trial under the ECHR, in particular, the right of a person to “examine or have examined witnesses testifying against him or her”.¹¹¹

The Panel considered that:

Admitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information to have in hand when testing his/her credibility.

*Furthermore, it is a right of each party to assist in the taking of evidence and to be able to ask the witness questions.*¹¹²

The Panel then went on to consider (with reference to the same Swiss jurisprudence cited in *Pobeda*) the fact that not all encroachments on the right to be heard and/or the right to a fair trial will amount to a violation of the above principles or of procedural public policy. The Panel concluded that the right to use anonymous witnesses was available in certain circumstances in civil proceedings,¹¹³ however that an abstract danger to the personality rights and personal safety of a witness was insufficient to allow for such anonymity.¹¹⁴ The Panel stated that:

[...] there must be a concrete or at least a likely danger in relation to the protected interests of the person concerned. Furthermore, the measure ordered by the tribunal must be adequate and proportionate in relation to all interests concerned. The more detrimental the measure is to the procedural rights of a party the more concrete the threat to the protected interests of the witness must be.

¹¹¹ *Contador* at para. 172 (referring to Article 6.1 ECHR and noting that said article was applicable both in criminal and civil proceedings).

¹¹² *Contador* at paras. 175–176.

¹¹³ The Panel also noted that it was comforted in this conclusion by the fact that Article 156 of the Swiss Code of Civil Procedure provides that a court is entitled to take “all appropriate measures” if the evidentiary proceedings endanger the protected interests of one of the parties or of the witness.

¹¹⁴ *Contador* at para. 180.

As with the panel in *Pobeda*, the *Contador* Panel considered that in order to admit anonymous witness evidence the following strict conditions must be met:

- The witness must provide a convincing motivation of his or her right to remain anonymous;
- The court must have the possibility to see the witness;
- There must be a concrete risk of retaliations against the witness by the party against whom he or she is testifying;
- The witness must be questioned by the court itself and such court must investigate his or her identity and the reliability of his or her evidence; and
- The opposing party must be able to cross-examine the witness through an “audiovisual protection system”.

Whilst noting that the *Pobeda* decision had allowed the admissibility of anonymous evidence, the *Contador* Panel ultimately concluded that in the particular circumstances of the case it was not prepared to admit such evidence. Specifically, the Panel noted that WADA had insufficiently demonstrated that the interests of the witness were threatened to an extent that could justify a complete protection of the witness’s identity, particularly given the extent to which this would curtail the procedural rights of the other party.

As in the *Pobeda* decision, the Panel also noted that it had attempted to achieve a balance between the different interests at play by proposing a specific proposal for hearing and cross examining the witnesses. Both parties declined to accept this proposal. On that basis and the submissions of the parties, the Panel decided to deny WADA’s request to hear any witness without the disclosure of his or her identity to the opposing party.

It is evident that whilst the Panels in *Pobeda* and *Contador* ultimately came to different conclusions, there was a general consensus as to the necessary conditions for allowing anonymous witness evidence to be admitted in CAS proceedings. Embarking on such an exercise is clearly a delicate balancing act, and requires a detailed consideration of the particular circumstances of the case and all of the parties. In particular,

any curtailment of a party's right to a fair hearing is certainly only appropriate in the face of a concrete risk to the relevant witness's safety or that of his or her family.

It is submitted that the Panels in each of these cases got the balance right. It is clear that in proceedings concerning match fixing (which often involve some element of organised crime) there is a high likelihood that the safety of a witness may be compromised.

Conversely, the suggestion by a witness that his or her career might be adversely affected by testifying against another party in anti-doping proceedings does not, in general, bear this same risk. This is particularly so given that anti-doping proceedings invariably have a significant impact on the careers of those athletes involved in them. To prefer the anonymity of a voluntary witness on the basis of his or her career prospects over the interests of an athlete to have a fair hearing in circumstances where he or she has no right but to participate in such hearing would quite simply be an inappropriate balance of the competing interests of these parties.

In any event and in all cases, it is clear that the Panel must not agree to the admissibility of anonymous evidence without first ensuring that the strict conditions set out in the above cases are adhered to.

B. The Evaluation of Evidence

Finally, once the burden of proof, the relevant standard of proof, and any questions as to the admissibility of relevant evidence have been determined, the final task to be undertaken by a Panel will be the evaluation of the evidence so admitted.

Under Swiss law, arbitral tribunals are once again granted significant discretion in terms of their evaluation of evidence and, in fact, failing any specific provision agreed by the parties, the deciding body is essentially free in its evaluation of evidence (*libre appréciation des preuves*).¹¹⁵

¹¹⁵ Moreover, the Panel's assessment of the evidence will not be reviewed by the Supreme Court in an action to set aside the award (Supreme Court decision 4A_584/2009 of 18 March 2010, para 3.3, ASA Bulletin 2011, 426, at 431 and 4A_539/2008 of 19 February 2009 consid. 4.2.2).

This is confirmed by Art. 9(1) of the IBA Rules which provides that the Arbitral Tribunal shall determine not only the admissibility, but also the relevance, materiality and weight of evidence.

Certain provisions in sports-governing bodies' regulations support this notion, the most obvious example being Article 97 of the FIFA DC which expressly provides that the FIFA bodies will have "absolute discretion regarding proof".

In terms of what the above rules mean for CAS proceedings, essentially each CAS panel has the freedom to decide the evidentiary weight of any evidence on the record unless such freedom is limited in the relevant regulations. The CAS Panel also has the freedom to choose between contradictory elements of evidence in the decision-making process.

The Swiss Supreme Court is very respectful of this right of the Panel, and will not review the Panel's assessment of the evidence aside from the very limited point of view of a possible violation of public policy.

Problematic aspects arise when governing bodies enact regulations introducing specific limits or indications for the way which evidence may be used, for example, Art. 5.2.4.4. of the ISL, which provides that:

[a]ny testing results obtained from hair, nails, oral fluid or other biological material shall not be used to counter Adverse Analytical Findings from urine.

Whilst it is therefore clear that such test results may not be used to entirely invalidate an Adverse Analytical Result, given the fact that Article 3.2 of the WADC allows any "reliable means" of proving facts, it is still clearly possible that such tests are admissible as support for certain facets of an athlete's case.

By way of example, the Panel in the *Gasquet* decision¹¹⁶ was required to consider whether there was any evidence that the athlete involved would have deliberately

¹¹⁶ CAS 2009/A/1926, *ITF v. Gasquet*; CAS 2009/A/1930, *WADA v. ITF & Gasquet*.

ingested the amount of cocaine that was detected in the relevant sample. In deciding in favour of the athlete, the Panel gave significant weight to the fact that:

The Player's hair test has shown that the Player has never, as far as the hair test may go back in time including the time of the Miami tournament, consumed any cocaine at an amount above 10 mg. It is thus considered by the Panel as established that the Player is certainly not a regular user of the substance in question.

As already mentioned, the International Standard for Laboratories also prevents experts working for WADA laboratories from engaging in any “analysis that undermines or is detrimental to the anti-doping program of WADA. The Laboratory should not provide analytical services in a Doping Control adjudication, unless specifically requested by the responsible Testing Authority or a Hearing Body”.¹¹⁷

This situation prevents the athlete from asking an expert from another laboratory to evaluate the work done by the laboratory that analysed his/her samples. The athlete's expert will thus inevitably be an outsider and will not have all the insights that would allow him or her to identify possible flaws in the analysis (or simply to identify the analytical documentation the production of which could establish such flaws). It is thus regrettable that at times the anti-doping organisation has tended to question the expertise of the athlete's (external) experts on the ground that he or she is not primarily active in the specific field of anti-doping. While some panels logically take into account the fact that a expert working for the anti-doping organisation is simply “not acting as an independent expert in this case and that [his/]her opinion must be appraised accordingly”¹¹⁸ in the vast majority of the cases the CAS does not appear to draw any particular inferences from this undesirable state of affairs.

¹¹⁷ See Article 4.4 of Annex B to the International Standard for Laboratories.

¹¹⁸ With respect to “Dr. IRENE MAZZONI is a Research Manager from WADA”.

VI. CONCLUDING REMARKS

The combination of the fundamental principles of Swiss arbitration law, the CAS Code, and evidentiary rules contained in the applicable sports regulations has resulted in the creation of a unique set of evidentiary principles that apply in CAS arbitration in general and in doping disputes in particular. Knowledge by counsel and consistent application by arbitrators are key to the success of this system and to the strength of the decisions coming out of CAS.

Michele Bernasconi (Ed.)

International Sports Law and Jurisprudence of the CAS

4th Conference CAS & SAV/FSA Lausanne 2012

Colloquium

Editions Weblaw, Bern 2014

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Editions Weblaw

ISBN 978-3-906230-11-5

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