

**INTERNATIONAL SPORTS JUSTICE:
THE COURT OF ARBITRATION FOR SPORT**

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SUMMARY: 1. The Creation and History of the CAS – 2. The Organization of the CAS – 3. Jurisdictional and Admissibility Issues – 4. Appointment and Challenge of Arbitrators – 5. Joinder, Intervention and Other Forms of Third Parties' Participation – 6. Provisional and Conservatory Measures – 7. Evidentiary Issues – 8. Applicable Law – 9. Appeals Against CAS Awards – 10. Concluding Remarks

Abstract:

This article examines the Court of Arbitration for Sport (CAS), dealing first with its history and its organization and then with the most relevant procedural issues that are encountered in CAS arbitration proceedings. In particular, this article explores some of the features which characterize and distinguish the CAS ordinary arbitration procedure, the CAS appeals arbitration procedure and the CAS Olympic arbitration procedure. Important procedural topics such as jurisdictional and admissibility issues, the appointment and challenge of arbitrators, the participation of third parties in CAS proceedings and the granting of interim measures are analyzed in depth. Evidentiary issues are also examined in detail, with particular reference to burden of proof, witness statements and discovery. Finally, the article examines the appeals to the Federal Tribunal against CAS awards and the various grounds for annulment provided by Swiss law.

1. The Creation and History of the CAS

1.1 The Early Days

The idea of an international jurisdiction specialized in sporting matters was first

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launched by the International Olympic Committee (IOC) at the beginning of the 1980s. During the 1981 IOC Session, held in Rome, the IOC member Judge Keba Mbaye – a high-profile jurist from Senegal, then a judge at the United Nations’ International Court of Justice – chaired a working group that started drafting the statutes of an arbitral institution that soon was going to be named Court of Arbitration for Sport (CAS).¹

An important driver of the IOC’s initiative probably was the wish to reduce the risk of litigation before ordinary courts. Indeed, in those years the number of international sports related disputes was increasing and sports organisations often had to defend themselves before various courts in different jurisdictions.

In 1983 the IOC adopted the first statutes of the CAS, which entered into force on 30 June 1984. Not coincidentally, given the position of Judge Keba Mbaye, the first statutes of the CAS set forth a procedural framework that was comparable to that of the International Court of Justice,² providing for (a) an arbitral jurisdiction in contentious cases, based on the acceptance of an arbitration clause by the parties to the dispute and yielding a binding decision, and (b) an advisory jurisdiction, based on a unilateral request submitted by any interested sports body and producing a non-binding advisory opinion.

For several years very few cases were litigated before the CAS, given that sports organisations were not inserting CAS arbitration clauses in their statutes or in contracts they signed. In 1986, the very first case was registered in the CAS docket; it was an entirely Swiss dispute concerning ice hockey. In 1991, the International Equestrian Federation (FEI) was the first international federation to insert in its statutes an arbitration clause accepting the jurisdiction of the CAS on any dispute arising from a decision of its disciplinary bodies. As a consequence, the first batch of disciplinary cases litigated before the CAS concerned equestrian issues, such as horses’ mistreatment or equine doping.

1.2 *The Gundel Case*

In 1992, the arbitral award issued in one of those equestrian disciplinary cases was challenged by the sanctioned rider – Mr Elmar Gundel – before the Swiss Federal Tribunal, that is, the Swiss Supreme Court (hereinafter, the “Federal Tribunal”). Mr Gundel mainly claimed that the award was invalid because the CAS did not meet the requirements of independence and impartiality needed to be deemed as a proper arbitral institution. On 15 March 1993, the Federal Tribunal issued a landmark judgment that was going to revolutionize the CAS.³

¹ See M. REEB, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, *The International Sports Law Journal*, 2002, n. 2, 21-23.

² Cf. J. CRAWFORD, *Brownlie’s Principles of Public International Law*, 8th Edition, Oxford, Oxford University Press, 2012, 721-733.

³ ATF 119 II 271, reprinted in M. REEB (ed.), *Digest of CAS Awards 1986-1998*, Berne, Staempfli, 1998, 561. Cf. L. FUMAGALLI, *La circolazione Internazionale dei lodi sportive: il caso del Tribunale Arbitrale dello Sport*, in *Rivista diritto sportivo*, 1994, 336.

The Federal Tribunal recognized that, as long as the CAS dealt with disputes to which the IOC was not a party, the CAS was a true and independent arbitral institution whose panels were proper arbitral tribunals issuing regular arbitral awards; so, in the Federal Tribunal's view, there was no question that the CAS was sufficiently independent to adjudicate disputes having as a party the FEI or other international federations. However, the Federal Tribunal indicated that the links with the IOC were too meaningful (particularly in terms of financing, rule-making and appointment of arbitrators to the list) to maintain the same position in the event of CAS proceedings involving the IOC itself. The Federal Tribunal thus recommended that a greater independence of the CAS be ensured vis-à-vis the IOC.⁴

1.3 *The Paris Agreement and the ICAS*

As a consequence, on 22 June 1994, the representatives of the highest sports bodies in the Olympic Movement⁵ – the IOC, the Association of the Summer Olympic International Federations (ASOIF), the Association of International Olympic Winter Sports Federations (AIOWF) and the Association of National Olympic Committees (ANOC) – signed in Paris an agreement (now known as the “Paris Agreement”) that established the International Council of Arbitration for Sport (ICAS) as an independent and autonomous foundation constituted pursuant to Article 80 *et seq.* of the Swiss Civil Code, and placed the CAS under its aegis. Since then, the ICAS has been responsible for the administration and funding of the CAS “with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution”.⁶

The ICAS governing body is composed of twenty respected and experienced jurists (for example, judges of high courts) from different jurisdictions, who are appointed in the following manner: four members are appointed by the IOC, three by the ASOIF, one by the AIOWF and four by the ANOC; then, four members are appointed by the twelve ICAS members listed above with a view to safeguarding the interests of the athletes, and four members are chosen by the other sixteen ICAS members from among personalities independent of the above mentioned sports bodies.

The ICAS, among other things, elects among its members the President of the ICAS and of the CAS (who must coincide) and the Presidents of the CAS Divisions, it adopts and amends the arbitration and mediation rules, it appoints the

⁴ ATF 119 II 271, reprinted in M. REEB (ed.), *Digest of CAS Awards 1986-1998*, Berne, Staempfli, 1998, 561, at 570.

⁵ According to Rule 1 of the Olympic Charter, the Olympic Movement is under “the supreme authority and leadership of the International Olympic Committee” and “encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter”. On the legal and institutional aspects of the Olympic Movement, see A.M. MESTRE, *The Law of the Olympic Games*, The Hague, TMC Asser Press, 2009, 35 ff.

⁶ Preamble of the Paris Agreement, in M. REEB (ed.), *Digest of CAS Awards, II, 1998-2000*, The Hague, Kluwer, 2002, 883.

CAS Secretary General, it appoints the arbitrators to and removes them from the list of CAS arbitrators, it resolves challenges to arbitrators and in general performs any functions needed to oversee the operation of the CAS. In particular, the ICAS is responsible for the financing and the budget of the CAS and, in accordance with the Paris Agreement, is granted an automatic source of funding through a small percentage of the proceeds from the sale of the Olympic Games television rights.⁷

After the 1994 reform, most International Federations recognized the jurisdiction of the CAS as an appeals body for the decisions of last instance of their internal justice bodies. The number of cases brought before the CAS thus gradually increased.

1.4 *The Creation of the CAS Ad Hoc Division for the Olympic Games*

In 1996, on the occasion of the Atlanta Olympic Games, the ICAS successfully established and organized for the first time the CAS Olympic ad hoc Division – entrusted with the resolution on site of all disputes related to the Olympic Games within 24 hours of the request for arbitration – that was to become a staple feature of all the following editions of the Summer and Winter Olympic Games.⁸

1.5 *The Federal Tribunal's Endorsement*

On 27 May 2003, the Federal Tribunal issued a judgment on a challenge brought by two Russian cross-country skiers (Larissa Lazutina and Olga Danilova) against two parallel CAS awards sanctioning them for having used recombinant erythropoietin.⁹ The Federal Tribunal acknowledged that the new institutional framework guaranteed the independence and impartiality of the CAS towards the IOC not only from a formal angle but also from a substantive one, significantly noting that the IOC had lost four of the twelve CAS cases in which it had been a party up to that moment.¹⁰ In its judgment, the Federal Tribunal found that the CAS, “having gradually gained the trust of the sporting world”, had become “one of the main pillars of organized sport”.¹¹ The Federal Tribunal went on to qualify the CAS (quoting the former IOC President Juan Antonio Samaranch) as “a true supreme court of the sports world, and stated that “there appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively” even though it “could undoubtedly be improved”.¹²

⁷ Article 3 of the Paris Agreement, *id.* at 884.

⁸ See G. KAUFMANN-KOHLER, *Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law*, The Hague, Kluwer, 2001.

⁹ Awards CAS 2002/A/370 *Lazutina v. IOC* and CAS 2002/A/371 *Danilova v. IOC*.

¹⁰ Federal Tribunal, case 4P.267-270/2002, *Lazutina, Danilova v. IOC, FIS, CAS*, at para. 3.3.3.3, translated from the original French text.

¹¹ *Id.*

¹² *Id.*

1.6 *The Role of the CAS in Doping and Football Cases*

In the first years of the XXI century, the above mentioned characterization of the CAS as the “supreme court” of international sports became particularly evident in doping and football matters, due to the acceptance of the CAS as the last instance judge by both WADA, which inserted a CAS arbitration clause in the World Anti-Doping Code, and FIFA, which inserted a CAS arbitration clause in its Statutes. Indeed, most CAS cases are nowadays related to anti-doping rule violations or to football.

Sovereign States have also indirectly recognized the role of the CAS as world court of last resort in doping matters, by adopting within the framework of UNESCO the International Convention against Doping in Sport of 19 October 2005, pursuant to which the contracting States “commit themselves to the principles of the [World Anti-Doping] Code”.¹³

2. *The Organization of the CAS*

2.1 *The Code of Sports-Related Arbitration*

In 1994, as part of the reform prompted by the Federal Tribunal, the ICAS enacted the Code of Sports-Related Arbitration (the “CAS Code”), setting forth the rules governing the organization of the CAS and all jurisdictional and procedural matters. From time to time the ICAS amends the CAS Code, also taking into account input and suggestions coming from the CAS Secretary General and from CAS arbitrators.¹⁴ The latest version of the CAS Code came into force on 1 March 2013 and is applicable to all arbitral proceedings initiated on or after that date (Article R67 of the CAS Code).

2.2 *The CAS Divisions*

The CAS comprises of two permanent divisions, an Ordinary Arbitration Division and an Appeals Arbitration Division, overseeing the two different arbitral procedures governed by the CAS Code (see *infra* at para. 3.1). The CAS also has several temporary *ad hoc* divisions, instituted from time to time to promptly resolve disputes arising during sports events, of which the most prominent is the Olympic *ad hoc* Division, set up every two years to resolve disputes arising on the occasion of the Summer and Winter Olympic Games and governed by the CAS Arbitration Rules for the Olympic Games (the “Olympic Arbitration Rules”).

¹³ The UNESCO Anti-Doping Convention entered into force on 1 February 2007 and, as of 31 January 2013, has been ratified by 173 States.

¹⁴ The current version of the CAS code can always be checked at the CAS website: www.tas-cas.org.

The CAS also administers a mediation procedure governed by the CAS Mediation Rules. The CAS also used to administer a now abolished “consultation procedure”, whereby CAS arbitrators rendered advisory opinions upon the request of international federations or Olympic Committees (former Articles R60-R62 of the CAS Code).

Each Division is chaired, upon ICAS appointment (see *supra* at 1.3), by a President and a Deputy President, who preside over the efficient running of the arbitral proceedings and exert important functions, particularly with regard to the appointment of the arbitrators and to interim measures.¹⁵

2.3 *The CAS Court Office*

The CAS has a Court Office located in Lausanne and performing the functions assigned to it by the CAS Code. It is headed by a Secretary General and composed of several Counsels, who assist and may represent the Secretary General when required (Article S22 of the CAS Code), and of administrative and secretarial staff.

The Secretary General and the various Counsels have legal training and administer all arbitration and mediation procedures, supporting from a procedural standpoint the arbitrators and dealing with the parties. Compared to other arbitral institutions, the CAS Court Office is intensively involved in the day to day administration of arbitration proceedings. Under the supervision of the Secretary General, each CAS arbitration is specifically assigned to a given CAS Counsel, who supervises the proceedings with a view to ensuring as far as possible their swift and smooth progress. In particular, CAS Counsels take part in the arbitrators’ meetings, conference calls and exchange of electronic correspondence. They also take care of all correspondence between the arbitrators and the parties, thus avoiding that arbitrators keep direct contacts with the parties. Indeed, all “notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office” (Article R31 of the CAS Code) and vice-versa. The old rules that imposed the use of hard mail or facsimile for all communications or notifications have been changed at last and, as of the latest version of the CAS Code, parties are allowed to send correspondence and file submissions by electronic mail (Article R31 of the CAS Code).

In practice, CAS Counsels also have an important role in keeping the arbitrators – and upon request even the parties – knowledgeable about procedural rules and practices and relevant CAS precedents (as, regrettably, not all CAS awards are published on the CAS web site).

2.4 *The Seat of the CAS*

While under the arbitration rules of many arbitral institutions the seat of the arbitration

¹⁵ See *infra* at Sections 4 and 6.

is variable, depending each time on the choice of the parties or of the institution,¹⁶ pursuant to Article R28 of the CAS Code (which is applicable to both ordinary and appeals arbitration proceedings), the “seat of CAS and of each Arbitration Panel (‘Panel’) is Lausanne, Switzerland”. The same is provided by Article 7 of the Olympic Arbitration Rules: “The seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland”.

Such requirement that all CAS arbitrations be seated in Switzerland is particularly important because it is well known that the choice of the place of arbitration establishes a certain relationship between the arbitration and the legal and jurisdictional system of the chosen territory. In particular, the choice of the place of arbitration may be legally relevant to determine issues such as:

- the national courts which have jurisdiction to set aside the award;
- the national courts which may intervene to support the arbitral tribunal for interim or conservatory measures;
- the applicability of certain conflict of law rules;
- the applicability of mandatory rules of the country where the arbitration takes place or of other countries;
- the national law applicable to certain procedural issues and the relevance of public policy;
- the national law governing the arbitrability of a given subject matter,
- the nationality of the arbitral award for the purposes of article I.1 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It is well established in international arbitration that the “seat of the arbitration” is a legal concept, which must be clearly distinguished from the geographical location or locations where the arbitrators may actually hold hearings, consultations or other meetings. Indeed, CAS hearings are sometimes held in other locations, as provided by the second part of Article R28 of the CAS Code, according to which “should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing”.¹⁷ The CAS has even two decentralized offices, in New York and Sydney, in order to facilitate the access to CAS by parties from North America and Oceania.

In any event, even when a CAS hearing is not held in Switzerland and even when all elements of the arbitration point to another jurisdiction, from a legal standpoint the arbitration must be considered as taking place in Switzerland. This was notably confirmed on 1 September 2000 by an Australian court in *Raguz v. Sullivan*, a selection case involving two Australian judokas battling for a spot on

¹⁶ See e.g. Article 18.1 of the Rules of Arbitration of the International Chamber of Commerce: “*The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties*”.

¹⁷ The CAS has even two decentralized offices, in New York and Sydney, in order to facilitate the access to CAS by parties from North America and Oceania.

the Australian Olympic squad.¹⁸ The two athletes first litigated before the CAS, in a dispute where every single element of the arbitral proceedings – but for Article R28 of the CAS Code – pointed to Australia: the parties, their counsel and the arbitrators were all Australian citizens residing in Australia, the hearings were held in Sidney and the proceedings were managed from the CAS offices in Sydney. Then, the athlete who lost the arbitration and was excluded from the Australian Olympic judo team, challenged the CAS award before the Supreme Court of the New South Wales Court of Appeal asking to set it aside. However, the Australian court declined jurisdiction to entertain the case because “the ‘seat’ or ‘place’ of arbitration [has] its essential function as a ‘juridical’ concept” and the “unqualified choice of Lausanne as the ‘seat’ of all CAS arbitrations within the scope of the arbitration agreement means that that agreement *did* provide for arbitration in a country other than Australia”.¹⁹

Therefore, whenever there is an agreement to arbitrate a dispute before the CAS, the parties automatically choose Switzerland as the place of arbitration and are pre-empted from selecting another place. It is submitted that, even if the parties were to expressly indicate another seat in their arbitration agreement, such a choice would be pre-empted by their acceptance of the CAS Code, because once the parties choose an arbitration institution they must abide by the arbitration rules of that institution.

The fact that the seat of CAS arbitration proceedings is always in Lausanne implies, in particular, that whenever at least one of the parties is neither domiciled nor habitually resident in Switzerland the arbitration qualifies as a Swiss “international arbitration” subject to Chapter 12 (Articles 176-194) of the Swiss Private International Law Act (*Loi fédérale sur le droit international privé* of 18 December 1987) or “PILA”.²⁰ In fact, the vast majority of CAS cases involve parties from various parts of the world and are thus governed by the PILA.

Should the parties be all domiciled or habitually resident in Switzerland – for example, a Swiss football club acting against FIFA or UEFA – the CAS arbitration would be a Swiss “domestic” arbitration governed by Part 3 (Articles 353-399) of the Swiss Federal Civil Procedure Code (*Code de procédure civile* of 19 December 2008, which came into effect on 1 January 2011), unless the parties expressly agree to submit their dispute to Chapter 12 of the PILA. However, for the purposes of this article, all procedural issues will be only dealt with having in mind CAS international arbitration cases and, thus, it will be only made reference to the PILA.

¹⁸ See *Angela Raguz v Rebecca Sullivan & ORS*, [2000] NSWCA 240; the judgment is reprinted in G. Kaufmann-Kohler, *Arbitration at the Olympics*, *supra* note 9, at 51-78.

¹⁹ *Id.* at 95, 108. Emphasis in the original.

²⁰ Pursuant to Article 176.1 PILA, the “provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland”. All Swiss provisions are quoted herein in their English translation; the original texts in the official languages of the Swiss Confederation can be found at www.admin.ch/dokumentation.

Another important consequence deriving from the permanent Swiss seat of all CAS arbitration proceedings is the fact that the ordinary court having jurisdiction to hear actions to set aside international CAS awards is the Federal Tribunal, which (as we have already seen) has thus become a sort of “supervisor” and “controller” of the CAS and the ICAS. Other consequences of the Swiss seat of CAS arbitration proceedings will become apparent during the rest of this article.

2.5 *The Language of CAS Proceedings*

Pursuant to Article R29 of the CAS Code, the official languages of the CAS are English and French; accordingly, a party starting a CAS arbitration must choose either language to file its first submission (the Request for Arbitration in the ordinary procedure or the Statement of Appeal in the appeals procedure). If the respondent answers without raising any objection as to the language, the arbitration will usually proceed in that language. In case of disagreement between the parties, the president of the appointed Panel or, before the appointment, the president of the relevant Division selects either language, taking into account all relevant circumstances. Thereafter, the proceedings are conducted exclusively in the selected language, unless the parties and the Panel agree otherwise.

Sometimes the parties agree to conduct the arbitration in a language other than French or English; pursuant to the second paragraph of Article R29 of the CAS Code, this may be done provided that both the Panel and the CAS Court Office agree. The appointment of arbitrators fluent in the selected language is obviously very relevant to that end. Accordingly, it sometimes occurs in CAS practice that arbitration proceedings are conducted in Spanish, Italian or German, without particular problems.

3. *Jurisdictional and Admissibility Issues*

3.1 *The Ordinary and Appeals Procedures*

The CAS Code governs two types of arbitration proceedings – the “ordinary procedure” and the “appeals procedure”, with partially different sets of procedural rules. Articles R27 to R37 and R63 to R70 of the CAS Code apply to both procedures, while Articles R38 to R46 and Articles R47 to R59 respectively apply to the ordinary procedure and the appeals procedure. In addition, a few provisions inserted among the ordinary procedural rules also apply to appeals proceedings through some express references included in the appeals procedural rules.²¹

²¹ In particular: (a) Article R57 of the CAS Code provides that Articles R44.2, related to the hearing, and R44.3, governing evidentiary issues, also apply in the context of the appeals procedures; (b) Article R54, concerning the appointment of the arbitrators, provides that “Article R41 applies *mutatis mutandis* to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division”.

Pursuant to the CAS Code, a CAS arbitration falls within the ordinary procedure whenever the arbitration clause pointing to the jurisdiction of the CAS is contained in a contract or in a sports regulation or in an ad hoc arbitration agreement, whereas it falls within the appeals procedure whenever the party requesting the arbitration is challenging a decision rendered by a sports organization and a specific agreement or the rules of such sports organization (directly or through a reference to other sports rules) provide for an appeal to CAS.

Therefore, the essential difference between the two procedures is determined by the existence or not of a challenge against a decision adopted by a sports organization. This is the first element that a party should analyse before deciding whether to file a request for arbitration (the statement prompting the start of a CAS ordinary procedure) or whether to lodge a statement of appeal (the statement prompting the start of a CAS appeals procedure). In addition, when the jurisdiction is based on an arbitration clause included in the rules of a sports organization, the way in which such clause is drafted might also be relevant in order to qualify a case as appellate or ordinary.

Once the initial statement has been submitted to the CAS, it's the CAS Court Office which, regardless of the party's characterization, assigns the case to the appropriate CAS Division, qualifying it as an ordinary or appeals procedure.²² Pursuant to Article S20 of the CAS Code, such Court Office's "assignment may not be contested by the parties nor be raised by them as a cause of irregularity". This assignment may sometimes be switched in the "event of a change of circumstances during the proceedings" and, in such a case, "the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division", and this "re-assignment shall not affect the constitution of the Panel or the validity of any proceedings, decisions or orders prior to such re-assignment".

This Court Office's qualification of a case as an ordinary or appellate one may have a great relevance in a given case because the right to file an appeal before the CAS against a decision of a sports organization is limited by stringent time-limits (ranging from a few days until a month, depending on the applicable sports rules) whereas, essentially, the right to request an ordinary arbitration is only limited by the applicable statute of limitation (which is usually a matter of years).

Would it be possible for a panel to revise the assignment done by the CAS Court Office if it feels that the Court Office erroneously interpreted the submission filed by the party? A CAS panel has observed that "the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard the arguments put forward by the parties with respect to the characterization of this arbitration as an 'appeal' or an 'ordinary' arbitration" (CAS 2004/A/748 *ROC, Ekimov v. IOC, USOC, Hamilton*).

²² The CAS Court Office attributes to the new arbitration case a docket number formed by a progressive number, an "O" or an "A" (depending on the ordinary or appellate character of the case) and the year of the filing.

However, if the assignment of the case to a type of CAS procedure or the other involves a decision on jurisdiction, the appointed CAS panel certainly has the power to decide this issue, even revising what was decided by the Court Office, given that under Swiss law an arbitral body “shall rule on its own jurisdiction” (Article 186.1 PILA) on the basis of the “*Kompetenz-Kompetenz*” principle. For instance, in the case CAS 2007/O/1237 *GFA v. UEFA* the panel found that it had “jurisdiction as an ordinary arbitration court pursuant to UEFA Statutes Article 61” (section V.1 of the Award on Jurisdiction dated 3 July 2008) and dismissed UEFA’s argument that the only way in which the CAS could have jurisdiction over the dispute was as an appeals panel. In this case, the issue was one of jurisdiction because UEFA includes in its Statutes two separate arbitration clauses, one conferring upon the CAS an “ordinary jurisdiction” and the other one conferring an “appellate jurisdiction”, and the panel had to decide whether the dispute fell under one or the other arbitration clause (with a very different outcome, because if the panel had found that the CAS had jurisdiction only as an appeals arbitration court, with the consequent application of the rules governing the appeals procedure, the GFA’s initial submission could have been deemed inadmissible for having been filed out of time).

3.2 *The Ad Hoc Olympic Procedure*

The CAS system includes a third arbitration procedure, the ad hoc Olympic procedure (the “Olympic procedure”), governed by the Olympic Arbitration Rules.

The panels (or sole arbitrators) appointed in accordance with the Olympic Arbitration Rules resolve disputes arising during the Olympic Games or during the 10 days preceding the Olympic Games’ opening ceremony. Article 1 of the Olympic Arbitration Rules, combined with Rule 61 of the Olympic Charter, is the basis for the CAS Olympic jurisdiction: “The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule [61] of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games”.

Most jurisdictional problems at the Olympic Games arise from the temporal requirement that the dispute “arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony”. There have been several Olympic cases where the appointed CAS panel had to determine whether the dispute had arisen within the said 10-day period in order to decide whether it could retain jurisdiction. In the case CAS OG 06/02 *Schuler v. Swiss Olympic & Swiss Ski*, the panel decided that, although the decision excluding the athlete had been published three days before the 10-day period, the dispute had arisen when “Ms Schuler had decided to appeal and had filed notice of her appeal”. This notion was refined in a subsequent Olympic case, when another CAS panel specified that “an applicant to the CAS ad hoc Division cannot rely on the Schuler award to mean that s/he,

through an exploration designed to learn the rationale for a decision with which s/he disagrees, can extend the time when a ‘dispute arose’ into the period identified in Rule 1 of the Ad Hoc Rules”, and that it is not up to the athlete to decide when the issue arose but rather that the facts must be “examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose” (CAS OG 12/02 *Ward v. IOC & AIBA*).

3.3 *The Arbitration Agreement*

As with any arbitration, CAS may have jurisdiction over a given dispute only if there is an arbitration agreement. In other words, the disputing parties must consent to have their dispute resolved by an arbitration administered by the CAS. Pursuant to Article R27 of the CAS Code, the procedural rules included therein “apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)”.

The peculiar aspect of CAS arbitration depends on the fact that in most cases, in particular appeals arbitration cases, athletes or clubs are bound by an arbitration clause that is inserted into the statutes or regulations of the sports organization with which they have registered in order to compete. This has sometimes been criticized in the legal literature, as athletes and clubs are automatically bound to the arbitration clause if they wish to compete at high level. However, the situation does not seem to be very different from what normally happens to consumers or small businesses in everyday life with the so-called “adhesion contracts”; they must sign standard contracts with, say, a bank or an insurance company and are forced to accept clauses – including arbitration clauses – that they would not otherwise accept.²³

The situation gets a little trickier when there is a so-called “arbitration clause by reference”.²⁴ In this case, the CAS arbitration clause is not even included in the rules of the sports organization with which the athlete or club is registered – usually a national federation – but is incorporated therein by way of a general reference to the relevant international federation’s statutes or regulations that include a CAS arbitration clause. CAS panels have retained jurisdiction on several occasions on

²³ The recent judgment of the US Supreme Court in the American Express case is a good example of a situation where the weaker parties (merchants who accept American Express cards) are obliged to comply with the arbitration clause inserted in their contract with American Express, and are thus required to resort to individual arbitration and are prevented to litigate their claims on a class action basis (US Supreme Court, judgment of 20 June 2013, *American Express Co. et al. v. Italian Colors Restaurant et al.*, at www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf).

²⁴ Cf. S. NETZLE, *Arbitration Agreements by Reference to Regulations of Sports Organisations*, in *Arbitration of Sports-Related Disputes*, ASA Special Series No. 11, Basel, 1998, 45-58.

the basis of such arbitration clauses by reference, and the Federal Tribunal has upheld such CAS jurisprudence, adopting a “benevolent” and “flexible” approach to this issue.²⁵

For example, in the *Roberts* case the Federal Tribunal stated that “the reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause” and that it “can also be assumed that a sportsman recognizes the regulations of a federation with which he is familiar if he applies to that federation for a general competition or playing license”.²⁶

In the *Dodô* case,²⁷ the CAS panel ascertained that since the statutes of the Brazilian Football Confederation, of which the player Dodô was a member, provided that all athletes had to comply with FIFA rules, the player was bound by the arbitration clause in the FIFA statutes providing that FIFA and WADA could appeal against national federations’ anti-doping decisions. The Federal Tribunal upheld the *Dodô* award,²⁸ stating that its decision was in line with “the case law which holds valid the global reference to an arbitration clause contained in the statutes of an association”.²⁹

However, the reference to the document containing the arbitration clause must be clear-cut, as it cannot be assumed lightly on the basis of imprecise wording. Indeed, the Federal Tribunal annulled the *Busch* award because the CAS panel had erroneously retained jurisdiction on the basis of an imprecise reference.³⁰

3.4 *The Sports-Related Requirement*

The CAS Code provides that CAS arbitration is only available to solve “sports-related disputes” (see Articles S1, S2, S6 and R27). Accordingly, should a dispute not related to sport be brought before the CAS, the appointed panel should decline jurisdiction, even if both parties have agreed to submit the dispute to the CAS. Obviously, even a loose connection to sport would be sufficient to establish jurisdiction, and this renders this issue mostly theoretical.

The Olympic Arbitration Rules have a different language, insofar as Article 1 requires that CAS Olympic arbitration may be resorted to “in the interests of the

²⁵ Federal Tribunal, Judgment 4A_428/2011 of 13 February 2012, *Wickmayer/Malisse*, at 3.2.3: “the Federal Tribunal reviews with ‘benevolence’ the consensual nature of sport arbitration with a view to enhancing speedy disposition of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS. The liberalism of its jurisprudence in this respect clearly appears in the flexibility with which it treats the issue of the arbitration clause by reference” (citations omitted).

²⁶ Federal Tribunal, Judgment 4P.230/2000 of 7 February 2001, *Roberts*, at 2.a.

²⁷ CAS 2007/A/1370-1376 *FIFA & WADA v. STJDF, CBF & Ricardo Lucas Dodô*, award of 11 September 2008.

²⁸ Federal Tribunal, Judgment 4A_460/2008 of 9 January 2009, *Dodô*.

²⁹ *Id.*

³⁰ Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*, annulling CAS 2008/A/1564 *WADA v. Busch & IIHF*, award of 23 June 2009.

athletes and of sport". This wording induced the CAS Olympic Division in Salt Lake City to decline jurisdiction on an application filed by the animalist association PETA against the IOC in order to stop the holding of a rodeo that had been organized as a side event to the Winter Olympic Games.

3.5 *The Arbitrability of Disputes Before the CAS*

The arbitrability of disputes brought before the CAS must be evaluated under the Swiss legal system, whose approach is very favourable to arbitration.³¹ Pursuant to Article 177.1 PILA, all "pecuniary claims may be submitted to arbitration".

Swiss jurisprudence interprets this requirement in the sense that it is enough that at least one of the parties has some economic interest at stake in the dispute. This basically means that under Swiss law all CAS disputes are arbitrable; indeed, even in disciplinary cases, the sanctioned athlete certainly has some economic interest at stake in fighting against a sanction temporarily banning him or her from competitions.³²

3.6 *The Appealability of Decisions to the CAS*

The CAS appeals arbitration procedure has some peculiar issues of its own, in particular with reference to "appealability".

Article R47 of the CAS Code provides as follows: "An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

Accordingly, in order to bring an appeal to the CAS, an appellant needs to demonstrate that the sports organization against which it is acting has issued (i) a true *decision* and (ii) one that is considered *final*, i.e. that any and all available stages of appeal within that sports organization have been exhausted.

In this regard, a CAS panel stated that the CAS "does not have the power to adjudicate an appeal if there is no true decision or if the decision is not final, or if the applicable statutes, regulations or agreements do not allow the appellant to bring an appeal against the decision".³³

The jurisprudence of the CAS illustrates what constitutes a true appealable "decision".

³¹ See A. RIGOZZI, *L'arbitrabilità des litiges sportifs*, in *Bulletin ASA*, 2003, 501.

³² See Federal Tribunal, Judgment 4P.230/2000 of 7 February 2001, *Stanley Roberts c. FIBA*, reprinted in *Bulletin ASA*, 2001, 523, at 526: "the appellant has a pecuniary interest in his application for the ban to be lifted". On the arbitrability of anti-doping disputes, cf. M. COCCIA, *Questioni in tema di arbitrato sportivo internazionale e norme antidoping*, in *Rivista dell'arbitrato*, 2001, 779-787

³³ See award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

First of all, it is evident from the CAS awards that ruled on this issue that the form of communication alone is insufficient to determine whether a true decision exists.³⁴ Thus, the form used by a sports organization to convey a given communication – letter, email, press release, etc. – does not exclude the possibility that that communication be considered a “decision” and, as such, be subject to appeal to the CAS (obviously, provided that such sports organization has accepted the jurisdiction of the CAS). As a CAS panel stated, “the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal”.³⁵

Secondly, CAS jurisprudence makes clear that a communication from a sports organization might be characterized as a “decision”, in principle appealable to the CAS, if (i) it is not of a mere informative nature and (ii) it contains a ruling which intends to affect the legal situation of the addressee(s) or of other concerned parties. Accordingly, a decision is “a unilateral act, sent to one or more determined recipients and [...] intended to produce legal effects”,³⁶ and “for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties”.³⁷

Thirdly, from a reading of CAS cases it is evident that where a sports organization refuses to issue or delays the issuance of a decision beyond a reasonable period of time, there may be a “denial of justice”, opening the door for the CAS to hear the dispute even though no formal decision was ever taken: “if a body refuses without reason to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision”.³⁸

In conclusion, as explained by a learned commentator, “an appealable decision of a sport association is normally a communication of the association directed to a party and based on an ‘*animus decidendi*’, i.e. an intention of a body of the association to decide on a matter, being also only the mere decision on its competence (or non-competence). A simple information, which does not contain any ‘ruling’, cannot be considered as a decision. Under certain circumstances, ‘negative decisions’ or ‘refusals to decide’ can be considered as appealable decisions. However, courts and CAS Panels are well advised not to accept easily the existence of a denial of justice: sport associations must be able to operate, and this principle would be put at risk if basically each letter or fax of an association could be appealed. Simple information or the communication of a mere intention cannot be considered as a

³⁴ *Id.* at paras. 90-91.

³⁵ Award CAS 2004/A/659, *Galatasaray v. FIFA, Club Regatas Vasco da Gama & F. J. Loureiro*, at para. 63.

³⁶ *Id.* at para. 36.

³⁷ Award CAS 2005/A/899, *FC Aris Thessaloniki v. FIFA & Panionios*, at para. 61.

³⁸ *Id.* at para. 62.

decision, and are not appealable”.³⁹

Furthermore, as already mentioned, in order to lodge an appeal with the CAS, the appealed decision need be *final*. As stipulated in Article R47 of the CAS Code, a party may not appeal to the CAS until it has “exhausted the legal remedies available to him prior to the appeal”.

This means that the CAS may adjudicate an appeal only if the statutes or regulations of the concerned sports organization “do not provide any internal stage of appeal and do not set forth any legal remedy other than an appeal to the CAS”.⁴⁰

However, not every conceivable internal remedy can be deemed as a true “legal remedy” that must necessarily be exhausted before appealing to the CAS. The internal remedy must be truly available to the interested party and it must be governed by specific procedural rules that allow a prompt decision. In this respect, a CAS panel ruled that an international federation’s rule granting to a national federation the opportunity to submit a given matter to the international federation’s Congress is not “an actual ‘remedy’ in the strict legal sense, because it does not grant to an individual [...] member the right to call an extraordinary Congress. Nor waiting a couple (or more) years for the next ordinary Congress, with no specific procedure, may amount to a ‘remedy’. To be such, the internal remedy must be readily and effectively available to the aggrieved party and it must grant access to a definite procedure”.⁴¹

3.7 *The De Novo Character of the Appeals Procedure*

Pursuant to Article R57 of the CAS Code, CAS arbitrators have “full power to review the facts and the law”.

As repeatedly stated in CAS jurisprudence, this provision means that an appeal to the CAS against a decision adopted by a sports organization entails a *de novo* review on the merits of the case, which is not confined to deciding whether the body that issued the appealed ruling was correct or not but it requires making an independent determination as to whether the parties’ contentions are inherently correct: “the CAS does not act as an administrative court reviewing an act of an administrative authority where, usually, the scope of review is characterised by minimum standards of scrutiny, mostly procedural, and the administrative court may not substitute its own judgement for that of the administrative authority. Typically, administrative courts may only control the fairness and correctness of the previous procedure, the way in which the decision was arrived at, the reasons given for the decision, the competence of the body adopting the decision and the

³⁹ M. BERNASCONI, *When is a «decision» an appealable decision?*, in A. Rigozzi, M. Bernasconi (eds.), *The Proceedings before the Court of Arbitration for Sport*, Berne, editions Weblaw, 2007, 261-274, at 273.

⁴⁰ Award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 96.

⁴¹ Award CAS 2003/O/466 *NISA vs. ISU*, in *International Sports Law Review*, 2004, vol. 4, no. 4, SLR-48, at para. 6.12.

like. In contrast, it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision".⁴²

The main consequence of such approach is that any procedural deficiency occurred during the previous intra-association proceedings is cured by the appeal to the CAS and does not necessarily yield the annulment of the appealed decision: "the CAS appeal arbitration procedure cures any infringement of the right to be heard or to be fairly treated committed by a sanctioning sports organization during its internal disciplinary proceedings. Indeed, a CAS appeal arbitration procedure allows a full *de novo* hearing of a case with all due process guarantees, granting the parties every opportunity not only to submit written briefs and any kind of evidence, but also to be extensively heard and to examine and cross-examine witnesses or experts during a hearing".⁴³

As a result, CAS panels need not analyse any possible infringements of due process rights committed by the sports body issuing the appealed decision and may proceed to fully review the facts and legal arguments submitted by the parties and, on that basis, definitively rule on the merits of the case.

3.8 *Standing to Sue and to Be Sued*

A party wishing to be heard in CAS arbitration proceedings must have *locus standi*, i.e. it must be legally entitled to appear before the CAS. A party wishing to bring a case before the CAS must have "standing to sue" (and, in particular, "standing to appeal" if it pursues an appeals arbitration), and it must summon to the CAS a respondent that has standing to be sued.

The notion of standing to sue is characterized by both a substantive element and a formal one. The substantive element must always be present and applies to all CAS procedures (ordinary, appellate and Olympic); it requires that the claimant/appellant has a concrete interest at stake in the outcome of the arbitration.

Some CAS panels, in reference to the appeals procedure, have defined this notion as an *aggrievement requirement*, stating that "only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision"⁴⁴ or, in other words, that a party has no standing if it "is not directly affected by the decision appealed from".⁴⁵ Indeed, "the above described 'aggrievement requirement' is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body's decision, because the duty assigned to a panel by the CAS

⁴² Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 146.

⁴³ Final Award CAS 2009/A/1545 *Anderson et al. v. IOC*, at para. 78; see also CAS 2003/O/486, at para. 50; CAS 2008/A/1594 *Sheykhov v. FILA*, at para. 109.

⁴⁴ Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 153.

⁴⁵ Award CAS 2006/A/1206 *Zivadinovic v. IFA*, at para. 31.

Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision”.⁴⁶

Then, in appeals and Olympic procedures, there is often also a formal aspect of the standing requirement to be complied with. Indeed, if the regulations of the sports body adopting the contested decision include rules specifying who may and who may not appeal, those rules determine who has standing to sue.

The typical example of this is the WADA Code rule providing that a competitor to the athlete accused of doping may not appeal to the CAS the decision imposing or not imposing a doping sanction (see Article 13.2.3, listing the “persons entitled to appeal”).

This is illustrated by a CAS case where the panel declined to adjudicate the case upon its merits because both appellants (an athlete and its National Olympic Committee) lacked standing to appeal as they were not mentioned in the applicable anti-doping rules (identical to the WADA Code) listing the parties entitled to appeal a doping decision to the CAS: “It is evident that neither a competitor (of the athlete subject to an anti-doping decision) nor his National Olympic Committee are among the individuals or organisations listed therein. This interpretation is confirmed by the Comment on the WADA Code [...] which unambiguously states that such list of persons or organizations having standing to appeal ‘does not include Athletes, or their federations, who might benefit from having another competitor disqualified’. If the appeal had been brought by parties who were entitled to bring it, the CAS would have adjudicated upon the merits”.⁴⁷

A similar situation occurred in an Olympic case decided by a panel of the CAS ad hoc division of Beijing, where the Azerbaijan National Olympic Committee, the Azerbaijan Field Hockey Federation and the players of the Azerbaijan National Field Hockey Team were unsuccessful in bringing a case against the International Hockey Federation attempting to have the Spanish team excluded from the Olympic Games, since they failed to demonstrate that they had standing to sue under the applicable rules.⁴⁸ In particular, the CAS panel cited that Article 13.2.3 of the FIH Anti-Doping Policy had an exhaustive list of parties that could appeal a decision of the Disciplinary Commission and that this list included the accused athletes, the FIH, the IOC and WADA, but made no room for an appeal from the Appellants: “the Applicants were not a party, nor were they entitled to be an interested party before the Disciplinary Commission. Once the Disciplinary Commission has issued its Decision [...] the Applicants have no rights of appeal under Article 13, and more particularly, under the applicable Article 13.2.3. The Panel must conclude that the Applicants have no standing to make this Application to the CAS ad hoc division”.⁴⁹

⁴⁶ Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 154.

⁴⁷ Award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 119.

⁴⁸ Award CAS OG 08/01 *ANOC, AFHF, et al. v. FIH, RFEH, IOC, WADA & Spanish Olympic Committee*.

⁴⁹ *Id.* at paras. 3.10-3.12.

Obviously, exactly as the claimant/appellant must have standing to sue, the respondent must have standing to be sued. In particular, the respondent must have a stake in the dispute.

For example, in the case CAS 2006/A/1189 *IFK Norrköping vs. Trinité Sports FC & Fédération Française de Football*, the Swedish club *Norrköping* lodged an appeal with the CAS against a FIFA decision, naming as Respondents both the French club *Trinité* and its national federation (the “FFF”). The FFF asked to be excluded from the case and the panel remarked that the FFF was not a party to the case before FIFA and, moreover, that “the Appellant is not claiming anything against the FFF and that the FFF has nothing at stake in this dispute”. As a consequence, the respondent FFF was excluded from the case as it did not have standing to be sued.

3.9 *Lis Pendens*

The concept of *lis alibi pendens* (meaning “suit pending elsewhere”), or simply *lis pendens* as is commonly referred to, is also applicable in the context of CAS proceedings. This principle might sometimes prevent the CAS from hearing a dispute where the same case is already pending before another court or arbitral body.

According to Paragraph 1bis of Article 186 PILA,⁵⁰ a CAS panel is required to stay an arbitral proceedings on the basis of *lis pendens* only if three conditions are cumulatively met: (i) another litigation between the same parties and having the same object must be pending before a State court or another arbitral tribunal; (ii) the other case must be already pending when the arbitration claim is lodged with the CAS; and (3) the party raising the exception of *lis pendens* must prove the existence of serious reasons requiring the stay of the arbitral proceedings.

A notable CAS case in which a panel had to deal with the issue of *lis pendens* is CAS 2009/A/1881 *El-Hadary v. FIFA & Al-Ahly*. On 12 June 2008, the Egyptian club Al-Ahly lodged a claim with FIFA against the Egyptian goalkeeper El-Hadary and FC Sion for breach of contract and inducement of breach of contract, respectively. On 16 April 2009, the FIFA DRC rendered a decision which adjudged FC Sion and the player to have breached the FIFA Regulations on the Status and Transfer of Players and imposed on the Player a sanction of four months ineligibility as well as an obligation to pay a compensation of EUR 900,000 to Al-Ahly. On 18 June 2009, the player filed an appeal with the CAS, requesting an interim stay of the effects of the DRC decision and in any event contesting the jurisdiction of the CAS, and specifying that he was appealing to the CAS only to safeguard his rights by complying with the 21-day deadline. On 29 June 2009, Mr El-Hadary filed a civil law suit with the District Court of Zurich against FIFA and Al-Ahly, contesting

⁵⁰ Paragraph 1bis was inserted in Article 186 PILA by the Swiss legislator as a reaction to the legal uncertainty on the issue of *lis pendens* determined by the Federal Tribunal’s judgment of 14 May 2001, *Fomento*, ATF 127 III 279.

the FIFA decision and requesting annulment on the basis of Article 75 of the Swiss Civil Code. On 10 July 2009, the player submitted its appeal brief in which it requested the panel to suspend the CAS arbitration proceeding on account of *lis pendens*.

On 7 October 2009, the appointed panel issued a “partial award on *lis pendens* and jurisdiction” by which it denied the player’s request for the application of *lis pendens*, pointing out that the civil law suit commenced after the player had filed an appeal with the CAS requesting for interim stay of the DRC decision and contesting jurisdiction. The Panel stressed that even a “conditional” claim to the CAS (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), triggers the procedural “pendency” of the arbitration in view of Article 181 PILA, under which an arbitration is pending “from the moment [...] one of the parties institutes the procedure for the appointment of the arbitral tribunal”. Indeed, the CAS panel stated that “the Player had the right to lodge his appeal to the CAS with the sole purpose of asking the Panel to suspend the arbitration and decline its jurisdiction. However, even merely asking the Panel to adjudicate the preliminary issues in his favour (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), the Player has nonetheless instituted the procedure for the appointment of the arbitrators and has asked the Panel to deal with those preliminary issues, thus determining inexorably the pendency of the arbitration from the date of the filing”.

With regard to the third condition set forth by Article 186 PILA, the panel stated that, in order to demonstrate the existence of “serious reasons”, the Appellant should have proven, but it did not, that the stay was necessary to protect his rights and that the persistence of the arbitration would have caused him some serious inconvenience.

3.10 *Res Judicata*

The principle of *res judicata*, which is Latin for “a matter already adjudged”, is also applicable in CAS proceedings. Indeed, a CAS award was annulled by the Federal Tribunal due to the violation of this principle.⁵¹

It is discussed in the legal literature whether a well-founded exception of *res judicata* implies the lack of jurisdiction or the inadmissibility of the claim. In the *Final report on res judicata and arbitration* of the International Commercial Arbitration Committee of the International Law Association, the following can be read: “In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility. Jurisdictions give different answers to this question and the Committee

⁵¹ Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, which annulled the award CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*, because the CAS panel disregarded a previous judgment rendered by the Zurich Commercial Court on the same matter on an application filed pursuant to Article 75 of the Swiss Civil Code.

prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings”.⁵²

Under Swiss law it is unsure whether *res judicata* implies the lack of jurisdiction or the inadmissibility of a claim, as the Federal Tribunal has not clarified the issue.⁵³ Anyway, in either case the practical result would be the same, as the arbitral tribunal would be prevented from dealing with the merits of the case.

An example of the application by the CAS of the *res judicata* principle can be found in CAS 2010/A/2091 *Dennis Lachter v. Derek Boateng Owusu*. In that case, to determine whether it was truly confronted with a question of *res judicata*, the CAS used the so called “triple identity” test. According to this test, one must analyze whether the proceeding involves the same parties, deals with the same subject matter, and is based on the same legal issues as a case that has already been litigated by the same parties and adjudged by another court or arbitral body. If all three prongs are met, the CAS, based on the principle of *res judicata*, is not at liberty to rehear the case.

In that case, the agent, Mr. Lachter, and the player, Mr. Boateng, signed a representation contract. After a dispute broke out concerning the contract, the agent on 4 March 2007 decided to submit a claim against Mr. Boateng to FIFA, requesting that he “fulfill all his contractual obligations, under the Representation Contract”. On 21 June 2007, Mr. Boateng lodged a claim with the Arbitration Institute of the Israeli Football Association (“IFA”), asking for declaratory relief ascertaining that he did not owe anything to the Mr. Lachter. On 22 October 2007, the IFA Arbitrator issued an arbitral award in favour of Mr. Boateng. Mr. Lachter appealed this decision with no success to the District Court of Tel Aviv-Jaffa and then to the Israeli Supreme Court, the latter which issued its final decision on 4 November 2009. In the meantime, the FIFA case continued and finally ended on 17 March 2010, when the Single Judge ruled that although he had jurisdiction to hear the dispute, he would reject the claim of Mr. Lachter on the merits. Upon appeal to the CAS, the Panel ruled that *res judicata* applied because the triple identity test had unquestionably been met: “The Panel has no doubt, and it is common ground between the parties, that the merits of the dispute before it – does the Player owe money or not to the Agent on the basis of the Contract in relation to the Agent’s alleged work in promoting the Player’s transfer to and employment with Beitar FC? – were already litigated by the same parties in Israel and dealt with and adjudicated by an Israeli arbitral tribunal. In other words, these arbitral proceedings involve the same subject matter, the same legal grounds and the same parties as the Israeli arbitral proceedings terminated with the award issued on 22

⁵² See www.ila-hq.org/en/committees/index.cfm/cid/19, Toronto Conference [2006], para. 68.

⁵³ In the already quoted *Fomento* judgment of 14 May 2001 the Federal Tribunal appears to make reference to *res judicata* as a matter of jurisdiction (ATF 127 III 279, at 283), whereas in a judgment of 3 November 1995 the Federal Tribunal appears to make reference to *res judicata* as an exception rendering the claim inadmissible (ATF 121 III 474 at 477).

October 2007. The Panel thus finds that the so-called ‘triple identity’ test – used basically in all jurisdictions to verify whether one is truly confronted with a *res judicata* question [...] is indisputably met”.

Finally, it is also important to note that, as a further preliminary consideration, the Panel held that *lis pendens*, which has already been discussed, did not apply. According to the Panel, once a parallel case ends with a final award, the issue must center only on *res judicata*, and no longer around *lis pendens*. Specifically, the Panel was of the opinion that the fact that the FIFA proceeding started before the IFA arbitration and that the cases were for some time running parallel is completely irrelevant since the Israeli arbitral award had been rendered before the commencement of the CAS arbitration.

4. Appointment and Challenge of Arbitrators

4.1 The Closed List of Arbitrators

The CAS is characterized by the fact that arbitrators can only be chosen from within a list of individuals nominated by the ICAS. Arbitrators are appointed by the ICAS to be on the CAS list for a mandate of four years, which can be renewed without limits (Article S13 of the CAS Code). To be on the list, arbitrators should have “appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language” (Article S14 of the CAS Code). When nominating the arbitrators, the ICAS must “consider continental representation and the different juridical cultures” (Article S16 of the CAS Code). Indeed, about 300 arbitrators are currently on the list, coming from all continents and representing a wide variety of legal, cultural and professional backgrounds.

Article S14 of the CAS Code also provides that “ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes”. This provision permits the creation of separate lists of arbitrators specialized in certain areas (for instance, in doping or in a given sport). Currently, for historical reasons,⁵⁴ the CAS website shows a “football list” of arbitrators who are supposed to be particularly knowledgeable about football. However, this list is advisory and not mandatory, given that parties to a football case may discretionally appoint a CAS arbitrator who is not on the football list – and they often do it. It is submitted that any future specialized list should also be of a merely advisory nature, as the parties should have as wide a choice of arbitrators as possible.⁵⁵

Upon their appointment to a given case, CAS arbitrators must sign a

⁵⁴ When FIFA accepted the jurisdiction of the CAS, it requested the CAS to accept as arbitrators, to be inserted in a special football list, the individuals who had already been selected to be in the list of the (aborted) FIFA arbitration tribunal.

⁵⁵ Cf. A RIGOZZI, E. HASLER, B. QUINN, *The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration*, in *Jusletter*, 3 juin 2013, <http://jusletter.weblaw.ch>, 4-5.

declaration “undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code” (Article S18 of the CAS Code). It is submitted that, besides the obvious requirements of independence and impartiality, CAS arbitrators should accept a case only if they truly have the necessary time to devote to the case and if they are able to effectively work in the language of the arbitration.

The closed-list system has both detractors⁵⁶ and supporters.⁵⁷ It must be said that the Federal Tribunal has stated that the resort to a closed list does not imply that CAS arbitrators should be held to a different standard of independence and impartiality, be it higher or lower, than that normally used in international arbitration.⁵⁸

In any event, with a view to avoiding some criticism⁵⁹ and to further promoting the independence and impartiality of the arbitrators nominated to the CAS list, since 2010 the ICAS has amended the CAS Code so that CAS arbitrators “may not act as counsel for a party before the CAS” (Article S18), thus avoiding the switching of roles between arbitrator and counsel that sometimes occurs in commercial arbitration. In addition, the “ICAS may remove an arbitrator [...] from the list of CAS members, temporarily or permanently, if he violates any rule of this Code” (Article S19 of the CAS Code).

In the Olympic procedure there is a “special list” of arbitrators selected by the ICAS among the arbitrators already present in the general list (Article 3 of the Olympic Arbitration Rules). For each edition of the Olympic Games a dozen arbitrators are selected and must be present on site during the Games (and, as seen, even ten days before), ready to hear cases and to “give a decision within 24 hours of the lodging of the application” (Article 18 of the Olympic Arbitration Rules).

4.2 *The Appointment of Arbitrators in CAS Proceedings*

Normally, CAS cases are dealt with by panels composed of three arbitrators. However, in both the ordinary and the appeals arbitration procedures, a sole arbitrator may be appointed if the parties so expressly agree, or if the President of the relevant CAS Division so decides “taking into account the circumstances of the case” (Articles R40.1 and R50 of the CAS Code). In practice, sole arbitrators are usually appointed either to reduce the costs of the arbitration (typically in cases of minor importance) or to deal with cases that need an expedite resolution (for example, because the case affects the chance of an athlete or a team to participate

⁵⁶ See e.g. A.A. SANTENS, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, in *Kluwer Arbitration Blog*, 28 June 2011, <http://kluwerarbitrationblog.com>.

⁵⁷ See e.g. J. PAULSSON, *Moral Hazard in International Dispute Resolution*, in *Transnational Dispute Management*, 2011, 2, www.transnational-dispute-management.com, at 11-12.

⁵⁸ Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.1.1.

⁵⁹ See for instance the arguments put forward by the appellant in the *Sheikh Hazza* case decided by the Federal Tribunal with Judgment 4P.105/2006 of 4 August 2006.

in a competition that is going to start soon).

In the Olympic procedure, the parties may not choose to have a sole arbitrator instead of a panel, but the President of the ad hoc Division may appoint a sole arbitrator “in his discretion” (Article 11 OG Arbitration Rules). This, for example, occurred in the last case heard at the London Olympic Games, when a decision was needed in a matter of hours (being relevant to a sail race that was going to be held four hours after the application) and, clearly, a sole arbitrator could manage to do it more efficiently than a panel.⁶⁰

The appointment of the three-arbitrator panel is different in the three CAS arbitration procedures. In any event, as said, all arbitrators must be chosen from within the CAS list. Whenever a party nominates for a case an arbitrator who is not on the list, the CAS Court Office treats this situation as if no arbitrator had been chosen and invites the interested party to choose an arbitrator from the CAS list.

In the ordinary procedure, each party selects one arbitrator and the two appointed arbitrators choose the president of the panel by mutual agreement (Article R40.2 of the CAS Code). If the claimant does not choose an arbitrator, the arbitration does not start, whereas if the respondent fails to appoint an arbitrator or if the two party-appointed arbitrators do not agree on the president the missing arbitrator is chosen by the President of the Division. Pursuant to Article R40.3 of the CAS Code, the appointment of the party-appointed arbitrator and of the president of the panel must be ratified by the President of the Ordinary Division, who checks whether the arbitrators comply with the requirements of impartiality and independence set forth by Article R33 of the CAS Code.

In the appeals procedure, each party appoints an arbitrator and the President of the CAS Appeals Division appoints the president of the panel (Article R54 of the CAS Code). The two party-appointed arbitrators must be confirmed by the President of the Appeals Division, who checks whether they appear to be independent and impartial.

In the Olympic procedure, all three arbitrators are appointed by the President of the Ad hoc Division among those who have been previously selected and are on site. Customarily, the President of the Ad hoc Division does not appoint arbitrators of the same nationality as one of the parties to the dispute. This is different from the ordinary and appeals procedures (or even from commercial arbitration), where it often happens that one or more arbitrators (and even the president of the panel) possess the same nationality of one of the parties. This difference (not provided by any rule) can be explained by the circumstance that at the Olympic Games the nationalistic aspect tends to be very important, both in the eyes of the competitors and in those of the public opinion.

⁶⁰ CAS OG 12/11 *Russian Olympic Committee v. International Sailing Federation & Spanish Olympic Committee*, award of 11 August 2012; in this case, the application was lodged on 11 August 2012 at 8.00 am and the operative part of the decision was notified to the parties on the same day at 11.40 am, with the complete award with reasons notified later on the same day.

4.3 *Relationship between a Party and the Arbitrator it Appoints*

In choosing an arbitrator for a case, a party and its counsel should know that it is appropriate for them to contact beforehand a prospective arbitrator to check whether s/he is available or has any conflict of interest or any other reason to decline the appointment. For example, if a party has an interest in a speedy resolution of the dispute, it should check before the appointment whether that arbitrator has a personal schedule which is compatible with such swift resolution.

However, when contacting an arbitrator before the appointment, the party should limit itself to giving to the arbitrator some basic information in general terms about the dispute, such as the names of the parties and of the lawyers, the language of the procedure and the general subject-matter of the case. The appointing party must avoid to discuss with the prospective arbitrator the details – either procedural or on the merits – of the case or, even less, to seek the arbitrator’s advice. Furthermore, after the appointment, it is improper to have contacts or communicate with the party-appointed arbitrator (or any other arbitrator) in relation to the case. Indeed, Article R31 of the CAS Code provides that all “communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office”; this provision, as constantly interpreted in CAS practice, means also the opposite, in the sense that during the case parties may not directly get in contact with arbitrators.

When parties choose an arbitrator, it is advisable that they look for fairness, expertise and hard work, rather than for partisanship. Parties and their counsel should understand that ultimately they are better off with an arbitrator who is well prepared, has the respect of his colleagues and defends the integrity of the arbitral process than with “their arbitrator” (i.e., someone whom they would expect to constantly inform them and obstinately advocate their cause). Obviously, this is not to deny that a party-appointed arbitrator has an important role for the party who has appointed him/her. Indeed, the appointing party may legitimately expect that the appointed arbitrator studies the file in earnest, fully knows and understands the submissions, listens carefully to the oral presentation, and ensures throughout the proceedings that the panel considers carefully that party’s arguments and evidence, grants a fair hearing and issues a considered decision.⁶¹

Parties should also make sure before the appointment that their perspective arbitrator is truly proficient in the language to be used in the proceedings (beyond the formal requirement of Article R33 of the CAS Code), because an arbitrator that may work easily in the language of the arbitration (and, if different, in the language of the evidentiary materials and of the witnesses) is able to fully grasp all the nuances of the case and make sure that the other arbitrators grasp them too. Before

⁶¹ Cf. A. LOWENFELD, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, in *Texas International Law Journal*, 1995, vol. 30, 59-69; *Id.*, *The Party-Appointed Arbitrator: Further Reflections*, in L.W. Newman and R.D. Hill (eds.), *Leading Arbitrators’ Guide to International Arbitration*, 2nd edn., New York, Juris Publishing, 2008.

the appointment, a party could also check the arbitrator's stance, if any, in other cases with comparable issues; indeed, many CAS awards are available on the internet or in legal publications.

4.4 *The Challenge against an Arbitrator for Lack of Independence and Impartiality*

A CAS arbitrator must at all times remain impartial and independent of the parties. Once an arbitrator is appointed to sit in a CAS arbitration proceeding, s/he is required to sign a declaration whereby s/he pledges to exercise her/his "functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code" (Article S18 of the CAS Code). After this moment, the parties will have the opportunity to challenge the arbitrator's appointment.

Pursuant to Article R34 parties only have seven days, after the ground for the challenge has become known, to bring the challenge. This short time limit is particularly important because the Federal Tribunal (which has the last word on this matter) has repeatedly stated that, in accordance with the principle of good faith and the prohibition of abuse of rights set forth in Article 2 of the Swiss Civil Code, a challenge against an arbitrator for lack of independence or impartiality is admissible only if the grounds of challenge were timely submitted during the arbitration proceedings:⁶² "it is not allowed for formal means to be brought forward after an unfavourable result when they could have been raised earlier in the proceedings".⁶³

Hence, if a party to a CAS arbitration has reasons to challenge the appointment of an arbitrator, it should act quickly and submit within a week the matter to the ICAS Board, which is competent to rule on the challenge or to discretionally refer it to the *plenum* of ICAS; before the ruling, the other party (or parties), the challenged arbitrator and the other arbitrators are invited to submit written comments on the challenge (Article R34 of the CAS Code).

According to Article 180.1 PILA: "An arbitrator may be challenged: a. if he does not possess the qualifications agreed upon by the parties; b. if there exist grounds for challenge in the arbitration rules adopted by the parties; or c. if the circumstances permit legitimate doubts about his independence". Article R34 of the CAS Code permits a party to challenge the appointment of an arbitrator to the ICAS where "the circumstances give rise to legitimate doubts over his independence or over his impartiality".

The difference between the notions of independence and impartiality has frequently been discussed in the literature devoted to international arbitration. The lack of *independence* of an arbitrator has often been described in terms of an arbitrator's particular link or relationship with one of the parties or with anyone

⁶² Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 4.2; Federal Tribunal, Judgment 4A.234/2008 of 14 August 2008.

⁶³ Federal Tribunal, Judgment 4A.528/2007 of 4 April 2008, at 2.5.1.

else involved in the arbitration, whereas the lack of *impartiality* has usually been associated to the arbitrator's bias or preconception in relation to the dispute or to the issues to be adjudged. However, in the jurisprudence of the Federal Tribunal "no strict distinction is drawn between the concepts of independence and impartiality";⁶⁴ nor a clear distinction seems to have been persuasively drawn in the legal literature.⁶⁵ As a consequence, the requirements of independence and impartiality may be jointly treated as a combined concept.

In order to verify the independence and impartiality of arbitrators, the Federal Tribunal has underlined the relevance of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"),⁶⁶ considering them "a precious instrument [that] should not fail to influence the practice of arbitral institutions and tribunals".⁶⁷ Indeed, these guidelines are not binding *per se* but do constitute a widely accepted standard in the international arbitration community. The IBA Guidelines set forth some General Standards and include three illustrative lists of specific situations which may or may not give rise to justifiable doubts, from an objective point of view, as to the arbitrator's impartiality and independence. Accordingly, there is (i) a "red list", setting out an inventory of situations of conflicts of interest where an arbitrator is required to recuse her/himself (although in some situations the requirement is waivable by the parties), (ii) an "orange list", setting forth situations where an arbitrator should disclose the potential conflict but is not supposed to automatically resign, and (iii) a "green list", indicating situations where there appears to be no conflict of interest and, thus, where no disclosure is required.

The ICAS has made it clear that in the assessment of an arbitrator's independence and impartiality the nationality or domicile are in principle irrelevant; rather, the arbitrator's independence and impartiality must be assessed according to the specific circumstances of the case and "not on the basis of general and subjective assumptions which are not objectively verified".⁶⁸ In order to take into account a subjective impression, therefore, there must exist concrete facts that "are by themselves susceptible to justify objectively and reasonably such an impression by a person acting normally".⁶⁹ For instance, lack of independence can be proven where there exists a direct link between the challenged arbitrator and one of the parties involved in the dispute. This link can be for example an economic dependency (employment relationship, etc), or a family or personal link.

⁶⁴ Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 3.3.1.

⁶⁵ See C. PONCET, *The independence of the Court of Arbitration for Sport*, in *European International Arbitration Review*, 2012, vol. 1, 31-56, at 40.

⁶⁶ The IBA Guidelines were approved on 22 May 2004 by the Council of the International Bar Association and can be found at www.ibanet.org. Cf. O.L.O. DE WITT WIJNEN, N. VOSER, N. RAO, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, in *Business Law International*, 2004, vol. 5, 433, at 454. A new version of the IBA Guidelines is currently being drafted.

⁶⁷ Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.3.2.2.

⁶⁸ ICAS Board, 2007/A/1322 *Giannini et al. vs. SC FC 2005*.

⁶⁹ *Id.*

If the ICAS upholds the challenge against an arbitrator, that arbitrator will step down and another one will be appointed following the usual appointment procedure. If the ICAS rejects the challenge against an arbitrator, the interested party may submit the matter to the Federal Tribunal; however, the ICAS decision may not be directly appealed to the Federal Tribunal.⁷⁰ Rather, the CAS proceedings go ahead and eventually, if the award is unfavourable, the interested party may challenge the whole award before the Federal Tribunal invoking the first ground for annulment provided by Article 190.2 PILA (“a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly”).⁷¹

5. Joinder, Intervention and Other Forms of Third Parties’ Participation

5.1 Common Features of Joinder and Intervention

The rules of the CAS Code on joinder and intervention are dictated for the ordinary arbitration procedure, but they are also applicable to the appeals arbitration procedure through the reference found in the last paragraph of Article R54 (“Article R41 applies *mutatis mutandis* to the appeals arbitration procedure [...]”).

A third party which is not among the parties to a CAS arbitration proceeding may be summoned into the arbitration (“joinder”) or may decide to participate in it (“intervention”) only “if it is bound by the arbitration agreement or if it and the other parties agree in writing” (Article R41.4 CAS Code). In other terms, the rules on joinder and intervention cannot be used to circumvent the first and foremost condition of any arbitration – that all parties have agreed to have their dispute decided by a given arbitral tribunal: “a third party can participate as a party to the arbitration proceedings already pending among other subjects in two situations, joinder or intervention, but subject to a common condition: that it is bound by the same arbitration agreement binding the original parties to the dispute or that it agrees in writing to such participation”.⁷²

Joinder and intervention share a second common condition: that any third party entering into the arbitration proceedings must have *locus standi*, i.e. it must have something at stake in the dispute. Indeed, “the scope of such right is subject to the proof, by the applicant, of the existence of a clear and concrete interest to participate in the pending arbitration”.⁷³

Pursuant to the first paragraph of Article R41.4 of the CAS Code, the decision on the participation of a third party, either via a joinder or via an intervention, can be taken by the President of the relevant Division or, after it is appointed, by the

⁷⁰ Federal Tribunal, Judgment 4A_644/2009 of 13 April 2010, *Valverde*. The Federal Tribunal stated that the direct appeal against a decision on a challenge taken by a private body, such as the ICAS, is not admissible.

⁷¹ See *infra* at Section 9.1.

⁷² CAS 2006/A/1155 *Giovanella v. FIFA*, at para. 54.

⁷³ Order on Request for Intervention, CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

arbitral panel; in any event, the ultimate decision lies with the panel, which may even revise a previous decision adopted by the President of the Division.

5.2 Joinder

A party before the CAS may request that a third party be summoned into the proceedings. In essence, under Article R41.2 of the CAS Code, if a respondent wishes to join a third party to the arbitration proceedings, it must include its request to do so in its answer, together with the reasons for requesting a joinder. Faced with a request for a joinder, the CAS Court Office shall communicate such request to the third party whose participation is requested and fix a time limit for such third party to state its position on its participation and submit a response. The CAS Court Office shall also ask the claimant/appellant to express its position on the requested joinder.

It must be noted that a request for a joinder must necessarily come from a respondent and not from a claimant/appellant. The reason for this rule is simply that a claimant/appellant has the possibility to name as many respondents as it wishes to involve in the proceedings when it files the request for arbitration or the statement of appeal. As a CAS panel has stated, “the joinder of a third party in the proceedings is possible only upon the request of the respondent, and not of the appellant. The Appellant, in fact, had the possibility to name, in the statement of appeal, a plurality of respondents, if he wished that the proceedings involve all the parties that he might think to be interested in their outcome”.⁷⁴

5.3 Intervention

Under Article R41.3 of the CAS Code, a third party may intervene in a CAS arbitration by requesting to be admitted into the proceedings within ten days after the arbitration has become known to the intervenor. However, the intervenor may be admitted only on condition that the request for intervention be filed prior to the hearing or prior to the closing of the evidentiary proceedings if no hearing is held. The intervenor also needs to make sure that, when it files its application, it provides the reasons for requesting an intervention.

Obviously, a party which had the right to appeal but did not do it within the appeal deadline may not request to intervene once such deadline has expired, unless the interest to intervene was prompted by the appellant’s appeal. In this regard, an order by the President of the CAS Appeals Division dismissed the request for intervention presented by two third parties observing that such parties “were also entitled to appeal the IOC’s decision, but decided not to do it within the time limit for appeal. Should CAS allow them to acquire now the status of full parties, in fact as co-Appellants, CAS would permit them to recover their right to appeal that they have failed to duly exercise. Or, the purpose of the CAS rules for intervention shall

⁷⁴ CAS 2006/A/1155 *Giovanella v. FIFA*, at para. 56.

definitely not be used to correct the failure of an Appellant to submit a case to CAS in a timely manner, no matter if, in fact, the decision to be issued by CAS might undoubtedly affect them”.⁷⁵

5.4 *Claims of and against Third Parties*

Obviously, a third party who is not participating in a case may not circumvent the rules on joinder and intervention by having an actual party to the case claim some rights on its behalf. Indeed, according to CAS jurisprudence, a party may only assert its own rights and may not raise the claims of a third party which is not before the CAS.⁷⁶

Conversely, a party acting before the CAS as appellant/claimant should be very careful to call into the arbitration all the parties against whom it is seeking some redress. Indeed, a party may not ask the CAS to adjudicate claims against third parties who were not summoned before the CAS. For example, in the case TAS 2005/A/812 the Panel rejected the appellant’s request without even examining its merits, ruling that it could never render a decision which could impose an obligation on a third party, as the latter was not a party to the CAS proceedings (nor was a party to the previous FIFA proceedings).⁷⁷

5.5 *Interested Parties*

A third party might sometimes participate in CAS proceedings as an “interested party”, although without being entitled to the rights of a full party.

One of the interesting questions addressed in the case CAS 2004/A/748 was whether a third party not having the right to intervene in a CAS proceeding should be allowed to participate as a mere “observer”, or “interested party”, provided all parties agreed on such limited form of participation. The President of the CAS Appeals Division answered in the affirmative, noting that all the parties to the arbitration had “agreed in writing to the limited participation, as interested parties, of Mr Michael Rogers and AOC. Under such agreement, the scope of such participation may however not go beyond the right of the latter ‘to follow the proceedings as an observer, to have access to the record of the case and to receive copies of the parties’ submissions, [...] to file written statements in support of Appellants or Respondent and take part in the hearing.’ It follows that Mr Michael Rogers and AOC are to be granted the status of interested parties, with the mentioned restrictions”.⁷⁸

⁷⁵ Order on Request for Intervention, CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

⁷⁶ Award CAS 2005/A/889 *Mathare United FC vs Al-Arabi FC*.

⁷⁷ See award TAS 2005/A/812 *Sporting Clube de Lisboa v. J.-J. Misse Misse*.

⁷⁸ *Id.* at para. 36.

This procedural tool is often used in CAS Olympic arbitration proceedings, where third parties who do not have proper standing to sue or be sued but are interested in the outcome of the case are anyways allowed by the CAS, in the absence of objections from the proper parties, to take part in hearings and present their observations. Given the extreme urgency with which Olympic cases are dealt with, this mechanism allows arbitrators to have at the hearing a clearer picture of all the matters at stake. For instance, in a London Olympic arbitration, which opposed a South African rider (as applicant) to the South African Sports Confederation and Olympic Committee and the South African Equestrian Federation (as respondents), the IOC and the competent international federation FEI were admitted into the case as “interested parties”.⁷⁹ In another London Olympic case, where an Irish boxer acted against the IOC and the international boxing federation AIBA requesting to be admitted into the Games, a boxer from Montenegro and his National Olympic Committee were allowed by the CAS panel to take part in the hearing as interested parties because they could be affected by the award had the claim been upheld.⁸⁰

5.6 *Amicus Curiae*

Amicus curiae is a Latin expression meaning “friend of the court”. An *amicus curiae* brief is a submission filed with a court by someone who is not a party to the dispute but who is interested in presenting to the court its opinion on the case. It is a procedural tool largely used in some common law jurisdictions; for instance *amicus curiae* briefs are often submitted to the United States Supreme Court.⁸¹

The last paragraph of Article R41.4 allows the submission of *amicus curiae* briefs to the CAS: “After consideration of submissions by all parties concerned, the Panel may allow the filing of *amicus curiae* briefs, on such terms and conditions as it may fix”. Considering the influence that some CAS awards may have on the whole sports sector, this provision is to be praised.

6. *Provisional and Conservatory Measures*

6.1 *Requesting an Interim Measure*

Article 183 PILA permits an international arbitral tribunal sitting in Switzerland to grant “provisional or conservatory measures” (also known as “interim measures”) at the request of a party. Article R37 of the CAS Code follows Article 183 PILA, by allowing a party to apply for and be granted provisional or conservatory

⁷⁹ See award CAS OG 12/01 *Peternell v. SASCOC & SAEF*.

⁸⁰ See award CAS OG 12/02 *Ward v. IOC & AIBA*.

⁸¹ For example, in the landmark *American Needle* sports law case, decided by the US Supreme Court on 25 June 2010, seventeen *amicus curiae* briefs were filed; 130 S. Ct. 2201 (2010) *American Needle, Inc. v. National Football League, et al.*

measures.⁸² Upon request by one of the parties, the President of the relevant Division or the arbitral panel, if the file has already been transferred to it (i.e., after the constitution of the panel and the payment of the advance on costs), will promptly make an order accepting or dismissing the request for an interim measure.

The application for an interim measure may be lodged even before the start of the CAS case⁸³ but, in case the measure is granted, the applicant must begin the arbitration within a short time limit. More precisely, in case of an ordinary procedure the request for arbitration must be lodged within ten days after the filing of the request for provisional measures, whereas in case of an appeals procedure the statement of appeal must be filed within its normal deadline. Such time limits may not be extended and, if they are not complied with, the granted interim measure is “automatically annulled” (sixth paragraph of Article R37 of the CAS Code).

In agreeing to submit a dispute to the CAS – either an ordinary arbitration procedure or an appeals arbitration procedure – “the parties expressly waive their rights to request any such measures from state authorities or tribunals” (third paragraph of Article R37 of the CAS Code). The validity of such a waiver of the right to resort to a State court depends on State courts and on the law that they apply. For instance, in the context of the *Stanley Roberts* case,⁸⁴ the *Oberlandesgericht* of Munich disregarded such waiver and, applying § 1033 of the German Code of Civil Procedure (ZPO), conferring concurring authority for interim measures to German courts and arbitration tribunals, ordered a provisional measure against the international basketball federation FIBA.⁸⁵ On the other hand, in Switzerland the prevailing view is that such a waiver is indeed valid.

For a provisional or conservatory measure to be granted, the applicant party must demonstrate that it has exhausted all internal remedies under the rules of the appropriate federation or sports body (first paragraph of Article R37). Before the exhaustion of all internal remedies, parties may not ask the CAS to issue a provisional or conservatory measure, despite the great urgency to do so. Moreover, the President of the Appeals Division declared, in an order dismissing an athlete’s request for a stay of a sanction, that a “CAS procedure cannot be initiated to compensate the fact that a stay cannot be granted under the rules of a sports federation”.⁸⁶

Pursuant to the fourth paragraph of Article R37 of the CAS Code, when one party requests that a provisional measure be issued, the other party is given a deadline of ten days (or less if circumstances so require) to comment on the application for provisional measures. In cases of “utmost urgency”, the President

⁸² Cf. I. BLACKSHAW, *Provisional and Conservatory Measures – an Under-Utilised Resource in the Court of Arbitration for Sport*, in *Entertainment and Sports Law Journal*, 2006, vol. 4, no. 2, <http://go.warwick.ac.uk/eslj/issues/volume4/number2/blackshaw>.

⁸³ This is a novelty introduced in the latest revision of the CAS Code.

⁸⁴ See CAS 2000/A/262 *Roberts v. FIBA*, in *Digest of CAS Awards, II, 1998-2000*, The Hague, Kluwer, 2002, 377.

⁸⁵ See OLG München, order 26 October 2000, 3209/00, *Stanley Roberts v. FIBA*, in *SpuRt - Zeitschrift für Sport und Recht*, 2001, n. 2 (March-April).

⁸⁶ See order CAS 2007/A/1347 *Gibilisco vs. CONI*.

of the relevant Division or, after the transfer of the file, the president of the panel may grant an *ex parte* order (i.e., an order based solely on the applicant's submission), but the other party must be subsequently heard. For example, an *ex parte* order was issued by a CAS Olympic panel in the context of the infamous *Salé-Pelletier* case in Salt Lake City. The case arose when, after the pairs figure-skating judges had awarded (in a controversial 5-4 decision) the gold medal to the Russian pair Berezhnaya-Sikharulidze over the Canadian pair Salé-Pelletier, a French figure-skating judge reported of some "pressure" placed upon her to vote for the Russians. Upon application "for extremely urgent preliminary relief" by the Canadian Olympic Committee, the CAS panel immediately ordered *ex parte* the respondent International Skating Union (ISU) to impose on its competition judges not to leave the Olympic Village, and summoned those judges to attend the hearing before the Panel as witnesses "and to bring with them any book, record, document, or paper which may be deemed material as evidence".⁸⁷ In a matter of hours, before the CAS panel could hold the hearing, the IOC and the ISU decided – amid allegations of corruption and outraged press reports describing the case as "skategate" – to award a second gold medal to the Canadian pair; as a result, the Canadians withdrew the application.

It's important to note that the President of the relevant Division, or the arbitral panel if the case has already been transferred to it, before issuing an order on interim measures, must always rule *prima facie* on the jurisdiction of the CAS. Under Article R37 of the CAS Code, the Division President is granted the right to terminate the arbitration proceedings if he believes that the CAS clearly has no jurisdiction over the case.

Obviously, any order issued by the Division President may be superseded by a subsequent Panel's order, with regard both to jurisdiction and to the merits of the provisional measure. This was the case in CAS 2007/O/1440, where the Panel determined that "in deciding on its own jurisdiction, [it] is absolutely not bound by the preliminary determination made by the President of the CAS Ordinary Arbitration Division when it set the arbitration in motion. [...] Such *prima facie* assessment done by the President of the Division must obviously be reconsidered by the appointed panel, which has full authority to take the definitive decision as to the jurisdiction of the CAS. Indeed, this is in conformity with the generally accepted principle in international arbitration that the arbitrators have the inherent authority to decide on their own jurisdiction. It is the so-called *Kompetenz-Kompetenz* principle, to be applied by any international arbitral tribunal sitting in Switzerland".

It must be noted that when a sports organization based in Switzerland (like FIFA and most international federations) orders a party to pay a sum of money to another party (as often happens in transfer cases decided by FIFA), the party appealing to the CAS need not apply for a stay of such decision because in any event such decision is not directly enforceable, as held in CAS 2003/O/486: "The Decision is one made by a Swiss private association, and as such it cannot be

⁸⁷ Order CAS OG 02/04 *COC v. ISU*.

legally enforced, if it is challenged, either before the ordinary courts, pursuant to Art. 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS”.

6.2 Conditions to Obtain Provisional and Conservatory Measures

The three cumulative conditions to obtain from the CAS a provisional and conservatory measure (such as the stay of a federation’s decision) are (i) irreparable harm, (ii) likelihood of success on the merits and (iii) balance of interests (also known as balance of convenience). This three-pronged test has been applied consistently in countless CAS cases and has eventually been codified in the fifth paragraph of Article R37 of the CAS Code: “When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s)”.

First, to meet the *irreparable harm* prong an applicant must show that the requested measure is useful to protect its position from damages that would be impossible, or very difficult, to remedy a later stage. For instance, it is clear that in sport, the inability of an athlete to participate in a major competition often entails damages that are difficult or impossible to remedy.⁸⁸

Second, to demonstrate a *likelihood of success* an applicant must show that it has a reasonable chance to win the case. Two CAS cases must be cited in the respect. In the first one the CAS panel held that a request for a stay “must give the impression that the facts have a certain probability, and must also make summarily plausible that the rights cited exist and that the material conditions for a legal action are fulfilled”.⁸⁹ In the second case, the CAS panel concluded that where it cannot definitely discount the Athlete’s chances of success without a hearing and without thoroughly examining the pertinent factual and scientific evidence, his chances are *prima facie* reasonable.⁹⁰

Finally, to satisfy the third prong, referred to as the *balance of interests* test, the applicant must establish that its interests outweigh those of the opposite party or of third parties. As a CAS panel stated, it “is necessary to compare the risks incurred by the Appellant in the event of immediate execution of the decision with the disadvantages for the Respondent in being deprived of such execution”.⁹¹

When applying the balance of interests test in disciplinary cases, CAS panels must also consider the interest of the other athletes, who are not parties to the arbitration, given that the “provisional” participation in a competition may irremediably alter that competition because sporting conduct or tactics may vary if

⁸⁸ See order TAS 2009/A/1790 *GM Bikes c RCS & UCI*.

⁸⁹ See order CAS 2001/A/324 *Addo & Van Nistelrooij vs. UEFA*.

⁹⁰ See order CAS 2009/A/1912-1913 *Pechstein, DESG vs. ISU*.

⁹¹ See order CAS 2003/O/486 *Fulham vs. Olympique Lyonnais*.

a given competitor is present or not. In Olympic cases, the rules provide that the interests of “other members of the Olympic Community” must be weighed (Article 14 of the Olympic Arbitration Rules). In doping cases, the interest of clean athletes must be protected: “with specific regard to anti-doping cases, the Panel is of the view that in weighing the balance of convenience a CAS panel must also consider the public interest of the fight against doping”.⁹²

It must be noted that, according to CAS jurisprudence, all of the mentioned factors (irreparable harm, likelihood of success and balance of interests) are relevant, but any of them may be particularly decisive on the facts of a specific case.⁹³

7. *Evidentiary Issues*

7.1 *Limits to the Submission of Evidence*

In CAS appeals arbitration cases, the parties to a proceeding must be prepared to submit all their evidence in one shot at the outset of the case, in the only brief that in principle they are allowed to file. Indeed, Article R56 of the CAS Code provides that, after the submission of the appeal brief and of the answer, “the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely”.

There are however two exceptions under this rule.

First, the parties can agree to allow the introduction of new evidence that was not submitted at the outset of the case.

Second, upon a party’s request, the president of the panel may order that additional evidence be introduced on the basis of “exceptional circumstances” (Article R56 of the CAS Code). In practice, to obtain such order the applicant must demonstrate that the new evidence was not available or could not be obtained at the time of the first filing. CAS arbitrators may also recognize the existence of “exceptional circumstances” if it is necessary to protect the equality of the parties and their right to be heard. Thus, the submission of further evidence is likely to be authorized, e.g., if the claimant needs to submit documents in order to refute evidence presented by the respondent, particularly if such evidence was unexpected.

In CAS practice, it is also fairly frequent that the parties are granted another round of submissions if the panel decides not to hold a hearing in accordance with the last paragraph of Article R44.2 of the CAS Code (“After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing”).

In the version of the CAS Code entered into force on 1 March 2013, Article R57 provides that the “Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by

⁹² Order CAS 2007/A/1370 *FIFA & WADA vs. CBF & Ricardo Lucas Dodó*.

⁹³ Orders CAS OG 02/04 *COC v. ISU*, CAS 2007/A/1370-1376 *FIFA & WADA v. STJDF, CBF & Ricardo Lucas Dodó*.

them before the challenged decision was rendered”. In other terms, if a party withheld some evidence during the previous proceedings within a sports body, it may be prevented to present such evidence before the CAS. This provision appears to excessively limit the right to be heard (which includes the right to submit evidence⁹⁴) and to contradict the *de novo* character of CAS proceedings, by creating an unwarranted link between the evidence presented during the internal proceedings of a sports organization and the evidence presented before the CAS. Given that CAS arbitration is alternative to State jurisdiction, and has thus a legal nature which is very different from that of the intra-association proceedings held within sports organizations, it is submitted that CAS arbitrators should resort to this discretionary power to exclude evidence only in the most extreme case, e.g. when it is utterly evident that a party is acting in bad faith and is ambushing the other party.

7.2 *Burden of Proof*

The CAS recognizes the principle “*ei incumbit probatio qui dicit, non qui negat*”, that is, each party has the burden of proving the facts necessary to establish its claim or defense, not the facts which it denies. This is a general principle of law, accepted in international arbitration as well as in national legal systems (e.g. in Switzerland, it is provided by Article 8 of the Swiss Civil Code). In practice, it means that each party must submit all the written and oral evidence useful to persuade the arbitrators of the truth of its allegations and to refute the opposite party’s contentions.

In appeals arbitration proceedings, since the CAS procedure is wholly distinct from the intra-association procedure below (e.g., the disciplinary procedure before an internal justice body of an international federation), it is advisable that the parties resubmit to the CAS any document or other evidence already submitted below and/or specifically request that the CAS obtain from the relevant federation or sports body a complete copy of the file. Although Article R57 of the CAS Code states that the President of the Panel “may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal”, parties should not take for granted that this will be done without a party’s request.

It is true that a CAS panel has, under Article R44.3 of the CAS Code, the power to ask for evidence *ex officio*: “If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step”.

However, a party should not rely on the panel’s exercise of such *ex officio* power to look for evidence. In this regard, the CAS made it clear that such panel’s power is discretionary and not obligatory.

⁹⁴ See Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*, at 4.1.

In the case CAS 2003/O/506, the Respondent invoked Article R44.3 of the CAS Code and argued that “the Panel has an obligation to instruct the case ex officio and cannot simply take its decision on the basis of the evidence submitted by the parties, if it deems it insufficient”; it added that it was ready to present evidence “should the Arbitral Tribunal ask for more information or documents”. However, the panel did not accept such argument and stated that, although Article R44.3 empowers the arbitral panel to supplement the presentations of the parties, “in the Panel’s opinion, this is clearly a discretionary power which a CAS panel may exert with an ample margin of appreciation – ‘if it deems it appropriate’ – and which cannot be characterized as an obligation. In particular, the CAS Code does not grant such discretionary power to panels in order to substitute for the parties’ burden of introducing evidence sufficient to avoid an adverse ruling; this is clearly confirmed by the circumstance that, in CAS practice, panels resort very rarely to such power. Indeed, it is the Panel’s opinion that the CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. In other terms, in CAS proceedings a party cannot simply declare to be ready to present evidence [...]; if a party wishes to establish some facts and persuade the arbitrators, it must actively substantiate its allegations with convincing evidence”.⁹⁵

The above approach by CAS arbitrators is consistent with the prevailing view in the international arbitration community that there is “much in general to recommend arbitrator passivity as regards the obtaining of factual and legal evidence” and that it “will only be in limited special circumstances where arbitrators will take initiatives in evidence with a view to favouring a more correct award, independently of the parties’ submissions”.⁹⁶

7.3 *Iura Novit Curia*

Another relevant issue concerns the application of the principle *iura novit curia* – more precisely, *iura novit arbiter*⁹⁷ – in CAS arbitration. Whether the substantive law governing the dispute is to be proven by the parties or is to be autonomously investigated by the arbitrators is a very controversial issue in international arbitration.⁹⁸ Arbitrators, depending on their legal culture, tend to work on different assumptions and to approach this issue as they do in their home courts.⁹⁹

⁹⁵ Award CAS 2003/O/506 at para. 54.

⁹⁶ P. LANDOLT, *Arbitrators’ Initiatives to Obtain Factual and Legal Evidence*, in *Arbitration International*, 2012, vo. 28, no. 2, 173-223, at 222-223.

⁹⁷ See G. KAUFMANN-KOHLER, «*Iura novit arbiter*» – *Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l’arbitre international*, in A. Héritier Lachat, L. Hirsch (eds.), *De Lege Ferenda – Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch*, Geneva, 2004, 71-78.

⁹⁸ Cf. International Law Association, International Commercial Arbitration Committee, *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, Rio de Janeiro, 2008, L. Radicati di Brozolo, M. Friedman (rapporteurs).

⁹⁹ See G. KAUFMANN-KOHLER, *The Governing Law: Fact or Law? – A Transnational Rule on*

Under Swiss law “the principle ‘*iura novit curia*’, which is applicable to arbitration proceedings, obliges [...] arbitrators to apply the law *ex officio*”¹⁰⁰ and permits arbitral tribunals to “adjudicate based on different legal grounds from those submitted by the parties”.¹⁰¹

In CAS practice, arbitrators tend to scrutinize by themselves the rules of sports organizations – which, although termed ‘rules’, have a contractual nature – while they tend to rely on, but do not feel limited by, the parties’ submissions for the knowledge and appraisal of any national law and related jurisprudence. Indeed, in some CAS cases, parties have presented written and oral evidence by expert witnesses (such as law professors) on issues of national law.¹⁰²

In any event, even if Swiss law authorizes arbitral tribunals sitting in Switzerland to inquire about the applicable law and conduct their own research, CAS arbitrators must always refrain from taking the parties by surprise and may not base their “decision on a provision or legal consideration which has not been discussed during the proceedings and which the parties could not have suspected to be relevant”.¹⁰³ Accordingly, when in the course of the proceedings it appears that some rules of law which the parties have not discussed might affect the outcome of the case, CAS arbitrators should promptly raise such matter with the parties and issue appropriate directions as to how the contents of the law will be ascertained and discussed.

7.4 Discovery

The notion of “discovery” refers to the compulsory disclosure by one party, at the other party’s request, of documents or other evidence related to the dispute. In international arbitration some limited discovery is generally permitted.

Under Article R44.3 of the CAS Code, a panel – upon the other party’s request or even on its own motion – may order one party to produce documents in its custody or under its control. In order for a CAS panel to compel disclosure of evidence, the party requesting discovery must demonstrate that the documents are likely to exist and that they are likely to be relevant. Thus, in practice, CAS arbitrators tend not to allow “fishing expeditions”, i.e. they do not grant discovery if the request is too broad and does not describe in sufficient detail the specific requested documents (or types of documents) and their relevance.

Helpful guidance for the parties on how to draft a request of discovery and for CAS arbitrators on how to administer issues of discovery may be found in

Establishing its Content, in M. Wirth (ed.), *Best Practices in International Arbitration*, ASA Special Series no. 26, 2006, 79-85.

¹⁰⁰ Federal Tribunal, judgment 4P.114/2001 of 19 December 2001, at 3.a.

¹⁰¹ Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.1.

¹⁰² For example, this occurred in CAS 98/200 *AEK, Slavia v. UEFA* on issues of US antitrust law, in TAS 2002/A/403-408 *UCI vs. Pantani, FCI* on issues of Italian law, and in CAS 2011/A/2426 *Adamu v. FIFA* on issues of Swiss law.

¹⁰³ Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.1.

Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration.¹⁰⁴

Since CAS arbitrators obviously lack the enforcement powers that a State judge can have, when a party is requested to produce documents but does not comply with the CAS order, the panel cannot enforce its order.

In principle, it is possible for the panel to ask for the assistance of the Swiss judiciary under Article 184.2 PILA: “If the assistance of the judicial authorities of the State is needed to take evidence, the arbitral tribunal or, with the consent of the arbitral tribunal, a party may request the assistance of the judge at the seat of the arbitral tribunal who shall apply his own law”. However, with reference to the discovery of documents, this is hardly an effective remedy against a party not willing to comply. A more effective remedy is the arbitrators’ power to draw “adverse inferences” from a party’s unjustified failure to produce evidence. Indeed in practice, CAS arbitrators may issue a new order, threatening the recalcitrant party to draw adverse inferences from its lack of cooperation and most of the time, unsurprisingly, the parties end up complying with the discovery order.

7.5 *Witness Statements*

In international arbitration it is commonly required that testimonial evidence be submitted in writing prior to the hearing. The witness statement can be a summary of the witness’s testimony or a detailed statement serving as a direct testimony. The witness must then give oral evidence at the hearing, submitting to examination, cross-examination by the other party and questioning by the arbitrators. The same applies to both factual witnesses and expert witnesses.

The CAS Code is ambiguous as to whether the filing of witness statements in CAS proceedings is mandatory. It merely states, for the ordinary procedure, that any “witness statements shall be filed together with the parties’ submissions, unless the President of the Panel decides otherwise” (third paragraph of Article R44.1) and, for the appeals procedure, that the “witness statements, if any, shall be filed together with the appeal brief [or the answer], unless the President of the Panel decides otherwise” (Articles R51 and R55).

In CAS practice, it is not considered strictly mandatory to file witness statements, but most CAS arbitrators instruct the parties to file them before the hearing for two reasons: fairness, as it ensures that the parties play with all the cards on the table, and efficiency, as it saves a good deal of time at the hearing.

Article R44.2 of the CAS Code allows the president of the panel to authorize hearing witnesses and experts via tele-conference or video-conference. The president

¹⁰⁴ See International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 2010. The IBA Rules are considered to codify the status of Swiss arbitration law in this respect. See B. BERGER, F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed., Berne, Stämpfli Verlag, 2010, para. 1200, who emphasize that the IBA Rules of Evidence are used by the arbitrators as a sort of handbook to decide procedural questions for which the applicable arbitration rules do not contain any provision.

of the panel, with the agreement of the parties, may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a written statement.

7.6 Expert Evidence

In some CAS cases expert testimony might be crucial, particularly in anti-doping cases where biological, medical or statistical issues are at stake. Differently from ordinary court cases, in CAS proceedings there is usually no preliminary question of admissibility of the expert evidence; it is rather a matter of plausibility and weight of the expert testimony.¹⁰⁵

In the *Valjavec* case, an international federation that had suspended an athlete on the basis of the scientific opinion of a panel of biological passport experts¹⁰⁶ argued that a CAS Panel should limit itself to check whether the panel of experts “considered the correct issues and exercised its appreciation in a manner which does not appear arbitrary or illogical”.¹⁰⁷ The CAS arbitrators rejected this approach and, even acknowledging their own lack of scientific expertise, stated that a CAS panel “cannot abdicate its adjudicative role”, quoting the Roman law principle *iudex peritus peritorum*, i.e., the judge is the expert on the experts.¹⁰⁸

The *Valjavec* award so described the role of a CAS panel when confronted with expert evidence: “the CAS Panel [must] determine whether the Expert Panel’s evaluation (upon which UCI’s case rests) is soundly based in primary facts, and whether the Expert Panel’s consequent appreciation of the conclusion [to] be derived from those facts is equally sound. It will necessarily take into account, inter alia, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence’s consistency with any published research”.¹⁰⁹

In *De Bonis* case the arbitrators reached a similar conclusion in assessing the role of a CAS panel confronted with expert evidence: “This Panel is in a position to evaluate and assess the weight of a (party-appointed) expert opinion submitted to it. It does so by evaluating the facts, on which the expert opinion is based and by assessing the correctness and logic of the conclusions drawn by the experts. In fulfilling this task the Panel takes into account the statements and opinions of (all) the parties. It is on the basis of this evaluation and balancing of the various submissions that the Panel will form its own opinion on the facts and consequences that follow thereof. This opinion may be in line with the evidence provided by a party-appointed expert. However, the contrary may be equally true. The Panel’s

¹⁰⁵ See C. DAVIES, *Expert Evidence and the Court of Arbitration for Sport: A Question of Weight*, in *International Sports Law Review*, 2012, vol. 12, no. 2, 25-31.

¹⁰⁶ See M. COCCIA, *The Athlete Biological Passport: Legal And Scientific Aspects*, in *International Sports Law Review*, 2013, vol. 13, no. 1, 9-26.

¹⁰⁷ See award CAS 2010/A/2235 *UCI v Valjavec and OCS*, at para. 78.

¹⁰⁸ *Id.* at para. 79.

¹⁰⁹ *Id.*

activity is, thus, not a ‘pure referral’ to some other’s opinion”.¹¹⁰

Therefore, on the basis of CAS jurisprudence, in assessing expert evidence a CAS panel should particularly consider the following: (i) the expert witnesses’ respective standing, experience and publications, (ii) whether an expert’s opinion is soundly based on the facts, (iii) whether the conclusions derived from those facts are sound, correct and logic, and (iv) the consistency of the expert’s opinion with published research.¹¹¹

7.7 *Evidence Illegally Obtained*

The CAS has ruled that evidence that may have been gathered in violation of some national law does not necessarily violate procedural public policy or personality rights under Swiss law, and may thus be submitted to the CAS, if there is an overriding public interest at stake.

In the groundbreaking *Valverde* case,¹¹² the Spanish police gathered (during the so-called “Operación Puerto”) evidence including a blood bag, which supposedly contained the blood of Mr Valverde. An Italian prosecutor who was pursuing a criminal investigation in Italy, in cooperation with the Italian anti-doping prosecutor of CONI, asked for such evidence through a so-called rogatory commission. The Spanish judge permitted the Italian prosecutor to collect an aliquot of the blood contained in said blood bag and to take it to Italy. Later on, when the aliquot of blood had already been collected and transported to Italy (where a DNA test confirmed that the blood belonged to Mr Valverde), the Spanish judge revoked such permission and issued an order prohibiting to use such evidence in any legal proceedings other than in the Spanish one. This evidence was anyway used by CONI against Mr. Valverde at the Italian disciplinary proceedings and in appeal at the CAS to ban him for two years from Italian competitions, and was later used again by WADA and UCI to extend the sanction at worldwide level.

A first CAS panel ruled that this evidence could be introduced in the case, stating that “the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal. According to international arbitration law, an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the 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 contradiction with the sentiment of justice, to the effect that the

¹¹⁰ Award CAS 2009/A/2174 *De Bonis v. CONI & UCI*, at para. 9.4.

¹¹¹ For a slightly different list, cf. C. DAVIES, *Expert Evidence and the Court of Arbitration for Sport: A Question of Weight*, in *International Sports Law Review*, 2012, vol. 12, no. 2, 25-31, at 30.

¹¹² CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI*; CAS 2007/A/1396-1402 *WADA & UCI v. Alejandro Valverde Belmonte & RFEC*.

decision appears incompatible with the values recognized in a State governed by of the rule of law”.¹¹³

A second CAS panel dealing with the *Valverde* case stated that even “if the Operacion Puerto evidence should be deemed to have been collected illegitimately (quod non) it is noted that, under Swiss law – as Swiss counsel for the Appellants and the RFEC agreed at the Hearing – such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a possible violation of Mr Valverde’s personal rights”.¹¹⁴

The same principles were later confirmed in a corruption case concerning the use for disciplinary purposes of video and audio recordings secretly obtained by some journalists and partially published in the paper and electronic versions of a newspaper.¹¹⁵

8. *Applicable Law*

With regard to the law applicable to the merits, Article 187.1 PILA provides that an arbitral tribunal must decide “according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of law with which the action is most closely connected”.

It must be noted that the primary connecting factor in Article 187.1 PILA is the choice of law by the parties, with the “closest connection” being the subsidiary connecting factor.¹¹⁶ Therefore, if the parties have agreed on arbitration rules which include a choice of law, such as the CAS Code, there is no room for the subsidiary conflict rule set forth by the second part of Article 187.1.¹¹⁷

The rules concerning the law applicable to the merits are different in the ordinary, appellate and Olympic procedures.

8.1 *Applicable Law in CAS Ordinary Proceedings*

With regard to CAS ordinary arbitration proceedings, Article R45 of the CAS Code provides that the “Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*”.

Therefore, if the parties have expressly chosen a given law in a contract, such law must definitely be applied to decide the merits of the dispute. However,

¹¹³ Award CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI*, at paras. 134 ff.

¹¹⁴ Award CAS 2007/A/1396-1402 *WADA & UCI v. Alejandro Valverde Belmonte & RFEC*, at para. 10.5.c.

¹¹⁵ See award CAS 2011/A/2426 *Amos Adamu v. FIFA*.

¹¹⁶ See P. KARRER, *Art. 187*, in S.V. Berti (ed.), *International Arbitration in Switzerland*, The Hague, 2000, 479-531, at para. 59.

¹¹⁷ *Id.* at para. 118.

the contractual choice of law need not be explicit; it is indeed recognised under Swiss law¹¹⁸ as well as CAS jurisprudence¹¹⁹ that the parties' choice of law may also be implicit, provided that it is demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. For example, some contractual clauses or other written evidence (such as exchange of correspondence) making reference to some articles of the civil code of a certain country might indicate that the parties have implicitly agreed on the application of the national law of such country to the merits of the case.¹²⁰

If not even an implicit choice of law can be inferred in a given case, CAS jurisprudence is very clear in stating that arbitrators will have to resort to the choice of Swiss law residually made by Article R45 of the CAS Code, even if the case has no connection whatsoever to Switzerland.¹²¹ Indeed, as a CAS panel has stated, given that "the parties have chosen the CAS to solve their dispute, they have also chosen the CAS Code and thus – in the absence of a different choice of law in their Contract – they have chosen Swiss substantive law".¹²²

This rule of the CAS Code has been understandably criticized by some commentators,¹²³ but at least it has the merit of laying down a clear solution which helps the parties focusing on the merits of the dispute without having to spend considerable time in discussing conflict-of-law issues.

8.2 *Applicable Law in CAS Appeals Proceedings*

With regard to CAS appeals proceedings, Article R58 of the CAS Code provides as follows: "The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

Typically, in appeals arbitration proceedings, the parties are bound by the rules of the competent international sports organization and CAS Panel apply, primarily, the sports organization's rules material to the dispute. Indeed, Swiss law allows the parties to choose even "rules of law" ("*règles de droit*" in French) which are not State laws, such as the private rules and regulations adopted by sports organizations. For example, this is what normally occurs in the many appeals to the CAS against FIFA decisions in matters related to the transfer and status of players.

¹¹⁸ *Id.* at paras 88-89.

¹¹⁹ See, e.g., awards CAS 2002/O/373; CAS 2006/O/1127.

¹²⁰ See award CAS 2010/O/2237.

¹²¹ See awards CAS 96/161 *International Triathlon Union (ITU) v. Pacific Sports Corp. Inc.*, CAS 2003/O/482, CAS 2003/O/486.

¹²² Award CAS 2010/O/2237, at para. 136.

¹²³ See A. RIGOZZI, *L'arbitrage international en matière de sport*, Basel, Helbing & Lichtenhahn, 2005, 596-597.

As many international federations are domiciled in Switzerland, substantive Swiss law is often applied on a subsidiary basis, as “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled”. However, CAS arbitrators may also apply – giving reasons – other rules of law, the application of which they deem appropriate, such as other national laws, general principles of law or the so-called *lex sportiva*.

For example, a CAS panel ended up applying Paraguayan law, reasoning as follows: “The Panel remarks that the ‘applicable regulations’ are all FIFA rules material to the dispute at stake [...]. As to any applicable State law, pursuant to Article R58 of the Code, the Panel finds that it would be inappropriate to apply substantive Swiss law to the various contracts signed between the Player [...] and the Appellant [...], as they have no connection whatsoever with Switzerland. The Panel remarks that [those] Contracts were drafted and signed in Paraguay between a Paraguayan citizen and a Paraguayan football club, set out the rules for activities mainly taking place in Paraguay and include several explicit references to Paraguayan law [...]. Accordingly, the Panel finds that [those] Contracts are solely connected with Paraguayan law. Taking also into account that in their written submissions, as well as during the hearing, all parties have repeatedly made reference to Paraguayan civil and labour law, the Panel deems appropriate that [those] Contracts be governed by Paraguayan law and not by Swiss law. Further, the Panel finds that, in accordance with Article R58 of the Code, any other aspect of the present dispute which is not covered by the FIFA regulations must be governed by Swiss law [...]. In this respect, the Panel points out that it is certainly appropriate to apply Swiss law to the contract of 21 January 2005 between the Player and St. Gallen, as the Player must perform its activities in Switzerland for a Swiss employer under the rules of the Swiss football federation”.¹²⁴

Then, a CAS panel may decide not to apply some federation’s regulations or foreign laws if it considers them to be incompatible with Swiss “public policy” (“*ordre public*” in French), in accordance with Article 190 PILA, as exemplified in the following CAS award: “The rules of law primarily applicable, such as the FIFA Regulations, cannot validly contradict a mandatory rule of Swiss law if this would result in the impairment of essential and generally recognized Swiss legal values, i.e. Swiss public policy. [...] The reservation of public policy may lead to discard the application of the rules of law chosen pursuant to art. 187 PILA”.¹²⁵

8.3 *Applicable Law in CAS Olympic Proceedings*

With regard to Olympic arbitration proceedings, Article 17 of the Olympic Arbitration Rules provides as follows: “The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”.

¹²⁴ Award CAS 2005/A/878 *Club Guarani v. González Ferreira & FC St. Gallen*.

¹²⁵ Award CAS 2005/A/983-984 *Club Peñarol v. Bueno, Rodriguez & PSG*.

Accordingly, CAS Olympic panels have ample latitude in selecting the law to be applied to a given case. Obviously, most Olympic cases are decided on the basis of the Olympic Charter and of the sports regulation of the concerned international federation.

However, various panels have applied general principles of law such as the principle of estoppel¹²⁶ and the principle of *res judicata*.

For example, in the Salt Lake City case CAS 02/06, the panel applied “the doctrine of ‘estoppel by representation’ a doctrine firmly established in common law and known in other legal systems even though under a different heading (e.g. reliance in good faith, *venire contra factum proprium*). This doctrine which the Panel applies as a general principle of law (art. 17 of the CAS ad hoc Rules) is defined as ‘An estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person’s reasonable and detrimental reliance on the belief’” (citations omitted).

It is interesting to note that the last part of Article 17 of the Olympic Arbitration Rules (“the rules of law, the application of which it deems appropriate”) permits CAS Olympic panels to resort to a wide variety of rules, such as national laws, public international law and *lex sportiva*.

An illustration of the application of public international law can be found in the *Perez* and *Miranda* cases, decided at the Sidney Olympic Games, where the issues of nationality and citizenship as well as the notion of statelessness were discussed.¹²⁷

8.4 The Application of *Lex Sportiva*

As seen *supra*, both Article R58 of the CAS Code in appeals proceedings and Article 17 of the Olympic Arbitration Rules should be considered to allow CAS panels to apply principles of *lex sportiva* to solve a dispute. However, it is not easy to define what *lex sportiva* is. Indeed, there has been much discussion in the legal literature about the notion of *lex sportiva*,¹²⁸ reminding of the recurring debate

¹²⁶ See D. DI PIETRO, *Rules of Interpretation of International Statutes and Application of Venire Contra Factum Proprium and Estoppel in the Case Law of CAS Tribunals*, in *International Sports Law Review*, 2004, vol. 4, no. 4, 79-84.

¹²⁷ See awards CAS OG 00/01, *USOC & USA Canoe/Kayak v. IOC*, CAS OG 00/03 *Arturo Miranda v. IOC*, CAS OG 00/05 *Angel Perez v. IOC*, CAS OG 00/08 *Arturo Miranda v. IOC*, CAS OG 00/09 in the matter *Angel Perez*.

¹²⁸ With varied conceptions of *lex sportiva*, cf. RC.R. SIEKMANN, J. SOEK (eds.), *Lex Sportiva: What is Sports Law?*, Springer, 2012; F. LATTY, *La lex sportiva. Recherche sur le droit transnational*, Leiden-Boston, Martinus Nijhoff Publishers, 2007; M.J. BELOFF QC, *Is there a Lex Sportiva?*, in *International Sports Law Review*, 2005, vol. 5, no. 3, 49-60; L. CASINI, *The Making of a Lex Sportiva. The Court of Arbitration for Sport «The Provider»*, IILJ Working Paper 2010/5 (Global Administrative Law Series), in www.iilj.org/publications/documents/2010-5.Casini.pdf; J.A.R. NAFZIGER, *Lex Sportiva*, in *The International Sports Law Journal*, 2004, vol. 1-2, 3-8; K. FOSTER, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in I.S. Blackshaw, R.C.R. Siekmann, J. Soek (eds.), *The Court of Arbitration for Sport 1984-2004*, The

among commercial arbitration specialists about *lex mercatoria*.¹²⁹

The term *lex sportiva* has become quite successful, despite its being an odd mixture of a Latin word (*lex*) and an Italian one (*sportiva*). Besides the terminology, the concept of *lex sportiva* has been characterized in different manners, on the one hand being stretched to the point of including in it all the written rules issued by international sports organizations¹³⁰ and, on the other hand, confining it to CAS awards.¹³¹

It is submitted here that, as already remarked a few years ago,¹³² *lex sportiva* is constituted by a set of unwritten legal principles of sports law, deriving from the interaction between sports rules and general principles of law, developed and consolidated along the years through the arbitral settlement of sports disputes, both at the CAS and at other dispute settlement institutions specialized in sports.¹³³

An illustration of an important principle of *lex sportiva* can be found in the various CAS cases – especially Olympic cases – where the so-called “field of play” doctrine was developed.¹³⁴ Indeed, “pursuant to the long-established line of CAS jurisprudence, the CAS will only review a field-of-play decision in circumstances of the decision having been taken arbitrarily or in bad faith”.¹³⁵

It is not a matter of lack of jurisdiction but it is rather an exercise of self-restraint by CAS arbitrators, who do not want to alter a decision taken by a referee or a judge on the field, even when that decision – with the benefit of hindsight – is recognized as wrong, unless it is demonstrated that there has been arbitrariness or bad faith (e.g. due to corruption) in arriving at such decision: “An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition”.¹³⁶ Evidently, the need to prove arbitrariness or bad faith “places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the

Hague, TMC Hasser Press, 2006, 420-440; A. ERBSEN, *The Substance and Illusion of Lex Sportiva*, in I.S. Blackshaw, R.C.R. Siekmann, J. Soek (eds.), *The Court of Arbitration for Sport 1984-2004*, The Hague, TMC Hasser Press, 2006, 441-454.

¹²⁹ For example, cf. Y. FORTIER CC QC, *The New, New Lex Mercatoria, or, Back To The Future*, in *Arbitration International*, 2001, vol. 17, no. 2, 121-128; T. SCHULTZ, *Some Critical Comments on the Juridicity Of Lex Mercatoria*, in *Yearbook of Private International Law*, 2008, vol. 10, 667-710.

¹³⁰ See F. LATTY, *La lex sportiva. Recherche sur le droit transnational*, Leiden-Boston, Martinus Nijhoff Publishers, 2007, 36.

¹³¹ J.A.R. NAFZIGER, *Lex Sportiva*, in *The International Sports Law Journal*, 2004, vol. 1-2, 3-8, at 3.

¹³² See M. COCCIA, *Fenomenologia della controversia sportiva e dei suoi modi di risoluzione*, in *Rivista di diritto sportivo*, 1997, 605-628, at 621.

¹³³ For the first clear reference to *lex sportiva* (although termed *lex ludica*) in a CAS award, see CAS 98/200 *AEK Athens and Slavia Prague v. UEFA*, at para. 188.

¹³⁴ See awards CAS OG 96/06 *Mendy v. AIBA*, CAS OG 00/13 *Segura v. IAAF*.

¹³⁵ See award CAS OG 12/10, *Swedish National Olympic Committee & Swedish Triathlon Federation v. International Triathlon Union*, at para. 7.1.

¹³⁶ Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 4.7.

review of a field of play decision”.¹³⁷ Indeed, sport does not easily tolerate that results obtained on the field are reversed in court, and “any contract that the player has made in entering into a competition is that he or she should have the benefit of honest ‘field of play’ decisions, not necessarily correct ones”.¹³⁸

Another principle of *lex sportiva* which has often been applied by CAS panels, yielding the annulment of several decisions adopted by international sports organizations, is the requirement of “procedural fairness”. It is indeed a fundamental principle accepted by the whole sporting community that participants in sporting events (athletes, clubs, etc.) should be treated fairly by sports regulators and organizers: “under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations”.¹³⁹

An illustration of the application of the principle of procedural fairness can be found in CAS 2008/O/1455, where the panel annulled the decision of an international federation to change at a very late stage the Olympic qualification system for the athletes of one continent, to the detriment of some competitors who had already planned their training and competitions on the basis of the previous qualification system: “the Panel is of the opinion that an attempt to alter the Olympic qualification process with retrospective effect at such a late stage – a few months before the Olympic Games – would violate the principle of procedural fairness. [...] The Panel notes that the Olympic Charter requires international federations to propose to the IOC their qualification systems ‘three years before the Olympic Games’. Even if this term was not to be intended as a strict deadline, it is nonetheless a clear indication that crucial considerations of procedural fairness towards its members require international federations to announce at a reasonably early stage the Olympic qualification process and not to alter it when the national federations and their athletes have already started the sporting season leading to the Olympic Games”.¹⁴⁰

9. Appeals against CAS Awards

As already mentioned, since the seat of each CAS arbitration is in Switzerland (Article R28 of the CAS Code), the action to set aside a CAS award must be lodged with the Swiss Supreme Court, i.e. the Federal Tribunal. It must be noted that only true arbitral awards (either partial or final) can be challenged and not mere orders or other procedural instructions issued by the CAS panel or the President of a CAS Division.

¹³⁷ See award CAS OG 02/07 *Korean Olympic Committee v. International Skating Union*, at para. 5.2.

¹³⁸ Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 3.13.

¹³⁹ Award CAS 98/200 *AEK, Slavia v. UEFA*, at para. 190. See also the awards CAS 2002/O/410 and CAS OG 02/006, *NZOC v. FIS, IOC, SLOC*.

¹⁴⁰ Award CAS 2008/O/1455, paras. 6.11 and 6.17.

Pursuant to Article 192.1 PILA, parties might in principle waive their right to challenge a CAS arbitral award by agreeing to exclude the jurisdiction of the Federal Tribunal. However, the Federal Tribunal has specified that a sports organization may not validly insert in its rules such waiver agreement in relation to disputes between the sports organization itself and an athlete – a so-called “vertical dispute” – given that the athlete’s consent to such a waiver of any challenge against a future CAS award would not rest on a completely free will.¹⁴¹

There is a limited number of situations that may allow a party that has received an unfavourable CAS award to try and obtain that the Federal Tribunal set aside such award.¹⁴² Limiting here the analysis to CAS international awards,¹⁴³ a party may only invoke the following grounds for annulment pursuant to Article 190.2 PILA:

“[The award] may be challenged only:

- a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
- b. if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- c. if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- d. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
- e. if the award is incompatible with public policy”.

It must be noted that the Federal Tribunal does not reopen the case as it issues its decisions only on the basis of the facts that were established by the CAS panel; essentially, the Federal Tribunal merely examines whether or not the arguments raised against the award are well-founded and does not rectify or supplement *ex officio* the findings of the arbitrators, even when the facts were established in a manifestly inaccurate manner or in violation of the law.¹⁴⁴

The five grounds for annulment set forth by Article 190.2 PILA are shortly addressed hereinafter.

9.1 Irregular Constitution of the CAS Panel

Pursuant to Article 190.2(a) PILA, a CAS award may be challenged if the sole

¹⁴¹ Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*, at 4.3.2.2.

¹⁴² See A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, in *Journal of International Dispute Settlement*, 2010, vol. 1, no. 1, 217-265; D. AKIKOL, *Review of the Recent Case Law of the Swiss Federal Tribunal*, in C. Müller, A. Rigozzi (eds.), *New Developments in International Commercial Arbitration*, Zurich, 2011, 119-175.

¹⁴³ A CAS arbitration, and thus the ensuing award, is “international” if at least one of the parties to the dispute has neither its domicile nor its habitual residence in Switzerland at the time of conclusion of the arbitration agreement (Article 176 PILA). In such case, the CAS arbitration is governed by Chapter 12 PILA. A CAS “domestic” awards (i.e. with all parties domiciled or habitually resident in Switzerland) must also be challenged before the Federal Tribunal (Article 389 Civil Procedure Code) but on grounds which slightly differ from those listed under Article 190.2 PILA.

¹⁴⁴ Federal Tribunal, Judgment 4A_234/20101 of 29 October 2010, *Valverde I*, at 2.1-2.2.

arbitrator was designated irregularly or, in instances where an arbitral panel is appointed, if the panel was constituted irregularly.

Such ground for annulment may be invoked if (i) the appointment procedure set forth by the applicable rules was not complied with, or if (ii) an appointed arbitrator was not independent or impartial. The first situation is unlikely to occur in CAS proceedings; in fact, only the latter situation can be considered as actually problematic. In any event, even though several CAS awards have been challenged on the basis of lack of independence or impartiality of an arbitrator, thus far the Federal Tribunal has never set aside a CAS award for this reason.

The issue of the independence and impartiality of CAS arbitrators has already been discussed *supra* at 4.4, and it is here made reference to those considerations.

9.2 *Jurisdiction Wrongly Retained or Declined*

According to Article 190.2(b) PILA, a party can appeal an award if it believes that the CAS panel erroneously assessed whether it had jurisdiction. The Federal Tribunal annulled for this reason the following CAS awards: CAS 2008/A/1564 *WADA v. Busch & IIHF*,¹⁴⁵ CAS 2009/A/1767 *Thys v. ASA*,¹⁴⁶ CAS 2010/O/2250,¹⁴⁷ and CAS 2010/O/2197.¹⁴⁸

To challenge a CAS award for having wrongly retained jurisdiction, the interested party must have already raised the jurisdictional issue at the outset of the arbitration proceedings: “the defence of lack of jurisdiction must be raised before any defence on the merits. This is in conformity with the rule of good faith embodied at Article 2.1 CC, which applies to all realms of the law, including civil procedure. Stated differently, the rule at Article 186.2 PILA means that the arbitral tribunal in front of which the respondent proceeds on the merits without reservation acquires jurisdiction from that very fact. Hence he who addresses the merits without reservation in contradictory arbitral proceedings involving an arbitral matter thereby recognizes the jurisdiction of the arbitral tribunal and definitely loses the right to challenge the jurisdiction of the tribunal. However, the respondent may state its position on the merits in an alternate way, only for the case in which the defence of lack of jurisdiction would be rejected, without thus tacitly accepting the jurisdiction of the arbitral tribunal”.¹⁴⁹

Interestingly, in the light of a recent judgment rendered by the Federal Tribunal, it would seem that the non-compliance with the time limit for an appeal to the CAS should not be considered as a jurisdictional issue, but rather as a matter of inadmissibility.¹⁵⁰ Therefore, in case of challenges against a CAS award based

¹⁴⁵ Annulled by the Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*.

¹⁴⁶ Annulled by the Federal Tribunal, Judgment 4A_456/2009 of 3 May 2010, *Thys*.

¹⁴⁷ Annulled by the Federal Tribunal, Judgment 4A_627/2011 of 8 March 2012, *IIHF*.

¹⁴⁸ Annulled by the Federal Tribunal, Judgment 4A_244/2012 of 17 January 2013.

¹⁴⁹ Federal Tribunal, Judgment 4A_386/2010 of 3 January 2011, *Valverde II*, at 5.2.

¹⁵⁰ Federal Tribunal, Judgment 4A_488/2011 of 18 June 2012, *Pellizzotti*., at 4.3.1.

on this point, the Federal Tribunal would probably hold that the expiry of the time limit for the appeal to the CAS is not reviewable under Article 190.2(b) PILA. However, the Federal Tribunal has ultimately left the issue open because it has deemed as “not necessary to issue a definitive decision as to whether or not failure to comply with the time limit affects the jurisdiction of the CAS”.¹⁵¹

The relevant issue of the legitimacy of CAS arbitration clauses “by reference” has already been discussed *supra* at 3.3, and it is here made reference to those considerations.

9.3 Award Ultra, Extra or Infra Petita

Article 190.2(c) PILA allows a party to challenge an award if the arbitrators have made an adjudication *ultra petita* or *extra petita* or *infra petita*. The petitioner must thus demonstrate that the CAS panel adjudicated beyond (*ultra*), or differently than (*extra*), what the parties sought in their motions for relief (*petita*), or that the CAS panel omitted to adjudicate (*infra*) a claim included in the parties’ motions for relief (*petita*).

It must be considered that the challenged award’s ruling must only be compared to what the parties have actually requested in their prayers for relief and not to the legal arguments that the parties have submitted to support their requests. Indeed, arbitral tribunals sitting in Switzerland may rely on legal arguments different than those submitted by the parties: “In application of the principle ‘*jura novit curia*’, insofar as a conclusion is sufficiently reasoned, [an arbitral tribunal] does not adjudicate *ultra* or *extra petita* if it relies on legal arguments that were not invoked, as in such instance it merely gives a different qualification to the facts of the case”.¹⁵²

In any event, it must be noted that, thus far, the Federal Tribunal has set aside no CAS award for this reason.

9.4 Violation of Due Process

Pursuant to Article 190.2(d), the parties may challenge a CAS award if there exists a violation of due process during the arbitral proceedings. To date, the Federal Tribunal has set aside three CAS awards (or parts thereof) for having violated due process rights: CAS 2005/A/951 *Cañas v. ATP*,¹⁵³ CAS 2007/A/1371 *Urquijo Goitia v. da Silva Muñiz*,¹⁵⁴ and CAS 2010/O/2166.¹⁵⁵

One of the due process rights protected by this provision is the principle of *equal treatment*. Under this principle, the parties must be reasonably given the

¹⁵¹ *Id.*

¹⁵² Federal Tribunal, Judgment AFT 120 II 172, at 175. Cf. *supra* at 7.3.

¹⁵³ Annulled by the Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*.

¹⁵⁴ Annulled by the Federal Tribunal, Judgment 4A_400/2008 of 9 February 2009, *Urquijo Goitia*.

¹⁵⁵ Annulled by the Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*.

same opportunity to present their cases during the arbitral proceedings. In other terms, the arbitrators must treat the parties in a similar manner at every stage of the CAS proceedings.¹⁵⁶

The second due process right that is protected by Swiss law is the *right to be heard in adversarial proceedings*. The requirement that a party be heard gives each party the right to submit evidence and arguments with respect to all the facts which are essential to the judgment, to represent their legal standpoint, to take part in the hearings and to have access to the arbitration file.¹⁵⁷ The requirement of adversarial proceedings (in French “*principe du contradictoire*”) guarantees that the parties will have the right to examine each others’ evidence and arguments, as well as be given the opportunity to rebut them.

The right to be heard also implies that, as already mentioned, a CAS panel cannot take the parties by surprise and must render its ruling only on grounds that the parties had the opportunity to discuss.¹⁵⁸

It is important to point out that the right to be heard does *not* guarantee that a CAS panel’s findings must be correct and not contradict the evidence. In this regard, the Federal Tribunal stated that “a finding that is obviously wrong and in contradiction to the records is not in itself sufficient to set aside an arbitral award. The right to be heard does not contain any right to a substantively correct decision”.¹⁵⁹ Moreover, the right to be heard does not entitle the parties to require that a CAS international arbitral award set out detailed reasons for the decision taken, even though there is a “minimum requirement arising from the principle of the right to be heard to review the issues relevant for the decision and to address them”.¹⁶⁰

Then, the right to be heard does not require that a hearing be public;¹⁶¹ in fact, a public CAS hearing might often pose serious security problems in view of the fact that many parties to CAS cases are clubs or athletes with plenty of supporters, while CAS arbitrators do not dispose of bailiffs or guards for maintaining order and security in the courtroom.¹⁶²

9.5 Violation of Public Policy

Finally, Article 190.2(e) PILA requires that a CAS award be set aside if it is incompatible with “public policy”, which must be distinguished between “procedural public policy” and “substantive public policy”. To date, the Federal Tribunal has

¹⁵⁶ Federal Tribunal, Judgment 4A_488/20111 of 18 June 2012, *Pellizotti*, at 4.4.1.

¹⁵⁷ Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazza*, at 7.1.

¹⁵⁸ See *supra* at 7.3.

¹⁵⁹ Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazza*, at 7.4.

¹⁶⁰ Federal Tribunal, Judgment 4A_162/2011 of 20 July 2011, *Milutinovic*, at 2.1.2 (citation omitted).

¹⁶¹ Federal Tribunal, Judgment 4A_612/2009 10 February 2010 *Pechstein*, at 4.1.

¹⁶² The issue of the lack of public hearing in CAS proceedings is currently pending before the European Court of Human Rights, as Ms Pechstein has argued that this is incompatible with Article 6.1 of the European Convention on Human Rights; European Court of Human Rights, Application no. 67474/10, *Claudia Pechstein v. Switzerland*, filed on 11 November 2010.

set aside two CAS award based on this ground for annulment, one for having violated procedural public policy (CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*¹⁶³) and one for having violated substantive public policy (CAS 2010/A/2261-2263 *Matuzalem & Real Zaragoza v. FIFA*¹⁶⁴).

A CAS award may be held in violation of public policy whenever it breaches the essential and widely recognized values which, according to conceptions prevailing in Switzerland, should constitute the foundation of all legal systems.¹⁶⁵

Procedural public policy is breached “in case of violation of fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal system of a state ruled by laws”.¹⁶⁶ For example, an award that disregards the conclusive and preclusive effects of *res judicata*¹⁶⁷ is in clear breach of procedural public policy.¹⁶⁸

Substantive public policy is breached when an award “disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order”.¹⁶⁹ As an illustration, the Federal Tribunal routinely puts forward a non-exhaustive list of principles of substantive public policy, such as “the rule of *pacta sunt servanda*, the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of individuals lacking the legal capacity to act”.¹⁷⁰

9.6 Concluding Remarks on Appeals against CAS Awards

The Federal Tribunal operates as a welcome deterrent against possible unsound administration of arbitration proceedings by CAS arbitrators.

However, considering that as of late the number of challenges against CAS awards has exponentially increased, to the point that “almost half of the Supreme Court’s case load relating to international arbitration now concerns CAS awards”,¹⁷¹ the number of annulled CAS awards is statistically aligned with that of annulled

¹⁶³ Annulled by the Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*.

¹⁶⁴ Annulled by Federal Tribunal, Judgment 4A_558/2011 of 27 March 2012, *Matuzalem*.

¹⁶⁵ See Federal Tribunal, Judgment 4P.278/2005 of 8 March 2006, ATF 132 III 389, *Tensacciai*, at 2.2.2.

¹⁶⁶ Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, at 2.1.

¹⁶⁷ Cf. International Law Association, *Final Report on Res Judicata and Arbitration*, Report of the ILA Seventy-First Conference, Toronto, 2006, International Commercial Arbitration Committee, in www.ila-hq.org/en/committees/index.cfm/cid/19.

¹⁶⁸ See Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*.

¹⁶⁹ Federal Tribunal, Judgment 4A_558/2011 27 March 2012, *Matuzalem*, at 4.1.

¹⁷⁰ *Id.*

¹⁷¹ A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, in *Journal of International Dispute Settlement*, 2010, vol. 1, no. 1, 217-265, at 217.

awards resulting from commercial arbitration.¹⁷²

In view of that, parties and their counsel should carefully study the legal situation before challenging a CAS award, as the chances of winning an appeal are quite limited, while the costs are unfortunately not negligible.

10. Concluding Remarks

In 2014 the CAS will have been in existence for thirty years. There can be no doubt that in these thirty years the CAS has reshaped sports law through the constant development of a true *jurisprudence*.

Indeed, CAS panels invariably tend to follow CAS precedents, something that is quite unusual in arbitral justice.¹⁷³ Almost all CAS awards include multiple references to previous CAS awards. Unsurprisingly, parties appearing before the CAS regularly invoke the precedential value of earlier CAS decisions or, conversely, distinguish their cases from previous ones.

A prominent commentator submitted that there exists a true *stare decisis* doctrine within CAS arbitration.¹⁷⁴ CAS panels themselves, however, seem more cautious: “in arbitration there is no *stare decisis*. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes”.¹⁷⁵ Similarly, another CAS panel stated as follows: “In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel”.¹⁷⁶

Accordingly, it does not seem that there is a true *stare decisis* doctrine in CAS arbitration; this is confirmed by the fact that some CAS panels have decided differently from previous panels on the same issue.¹⁷⁷ However, the fact that CAS panels always accord to previous CAS awards a substantial precedential value cannot be underestimated. Indeed, CAS arbitrators follow as much as possible the

¹⁷² See H. STUTZER, M. BÖSCH, *Federal Supreme Court overturns a CAS Award for lack of jurisdiction – has the CAS a quality issue? No!*, in *Arbitration Newsletter Switzerland*, 3 April 2013, in www.thouvenin.com.

¹⁷³ See G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, in *Arbitration International*, 2007, vol. 23, no. 3, 357-378.

¹⁷⁴ *Id.* at 366.

¹⁷⁵ Final Award CAS 2009/A/1545 *Anderson et al. v. IOC*, at para. 116, quoting CAS 97/176 *UCI v. Jogert & NCF*, at para. 40.

¹⁷⁶ Award CAS 2004/A/628 *IAAF v. USA Track & Field and Jerome Young*, at para. 73.

¹⁷⁷ See for example the contradicting awards issued by CAS panels with regard the application of article 17 of the FIFA Regulations for the Status and Transfer of Players to the issue of compensation for breach of contract due by football players to their former clubs: CAS 2007/A/1298-1299-1300 *Wigan Athletic FC & Webster v. Heart of Midlothian*; CAS 2008/A/1519-1520 *FC Shakhtar Donetsk v. Matuzalem, Real Zaragoza & FIFA*.

solutions arising from CAS precedents and are very reluctant to depart from them, unless there are very compelling reasons to do it. If it is not *stare decisis*, it is not very far from it.

As a result, the most important legacy of the first thirty years of CAS arbitration is the undeniable fact that CAS arbitrators have been building a consistent body of case law and, in doing so, they have given credibility and predictability to the CAS dispute settlement process and contributed to the steadiness and coherence of the whole international sports legal system.