DISCIPLINARY AND ARBITRATION PROCEDURES OF THE SPORT MOVEMENT

Good practice handbook, n° 6

Enlarged Partial Agreement on Sport

epas

Accord partiel élargi sur le sport

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DISCIPLINARY AND ARBITRATION PROCEDURES OF THE SPORT MOVEMENT

Good practice handbook – for judicial authorities

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Council of Europe

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Foreword

The member states of the Council of Europe share the conviction that the sport movement is in principle better placed to organise itself in order to enable the public to access sports activities and therefore generate the public benefits expected from sport (such as public health, education and social integration). Various Council of Europe bodies have accordingly stressed their commitment to the principle of the autonomy of sport, according to which organisations are free to regulate themselves and lay down the rules of their sport without undue political or financial influence. This principle of autonomy is recognised internationally and enables the sport movement to function on the basis of harmonised rules, which guarantee co-operation and fairness between sportsmen and women from different countries.

However, this autonomy does not exempt sports organisations from complying with the law. Nor does it place the sport movement beyond governmental authority but, on the contrary, commits them to negotiate and interact with governments to implement this autonomy without calling into question the primacy of the law. For 40 years, the Council of Europe has played a key role in facilitating complementary action between the authorities and the sport movement, especially when an overriding public interest is threatened and requires government action in the field of sport. The European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985), the Anti-Doping Convention (ETS No. 135, 1989) and the Convention on the Manipulation of Sports Competitions (CETS No. 215, 2014) are evidence of this work to bring about international harmonisation, carried out in close co-operation with the sport movement.

At disciplinary level too, there may be interaction between the sport movement and the authorities. Appeals against decisions of sports organisations and, in particular, disciplinary sanctions, may be lodged before national courts. There is a rich body of case law concerning decisions of national civil courts on disputes between sportsmen and women and their professional organisations. At international level, the European Court of Justice's Bosman judgment (1995), which came as a shock to the organisation of player transfers on the basis of European Community law, is on everyone's mind where conflicts between a sports organisation and legal requirements are involved.

In the last few years, appeals have been lodged with national courts against several decisions by sports disciplinary bodies before being finally submitted to the European Court of Human Rights. The question of the sharing of competences between those bodies and national courts is therefore naturally relevant for the Council of Europe.

The Enlarged Partial Agreement on Sport (EPAS) is the Council of Europe's intergovernmental body responsible for dealing with sports policy issues. It wants to go into these questions in greater depth and adopt a didactic approach, especially in order to introduce civil justice staff to the organisation and operation of the disciplinary and arbitration bodies responsible for taking decisions on sport matters. This work will be supplemented by another handbook, this time for legal professionals of the sports organisations, aimed at raising their awareness of the requirements arising from respect for fundamental rights, especially the European Convention on Human Rights (ETS No. 5, also referred to as "the Convention"). EPAS would like these publications to contribute to better mutual understanding between the sporting world and the sports justice authorities and thereby prevent lawsuits.

Stanislas Frossard

Executive Secretary of EPAS

Introduction

The legal disputes faced by sports organisations and their members have risen over recent years. This is no doubt due to the economic stakes involved in sport: more and more athletes are taking up sport as a career, and any disciplinary sanctions imposed on them temporarily – sometimes even definitively – prevent them from participating in their sport. An athlete's livelihood may depend on qualification or selection for major events, such as the Olympic Games, and an appreciable rise in income for team sport players may depend on whether or not the opportunity arises to be transferred from one club to another. A club's qualification for major competitions, such as the trophies organised by European federations, may generate extremely high profits, particularly in football, a sport in which transfer fees for players can run into millions of euros. Sports federations themselves may find their economic interests adversely affected by particular events, such as the cancellation of a broadcasting rights contract relating to their competitions, or by incidents that happen during play (a clear handball by a French footballer that went unpunished by the referee, for example, deprived Ireland's team of qualification for the final phase of the 2010 FIFA World Cup, an event that would have led to the Football Association of Ireland making a profit of several million euros).

Another reason for the multiplication of disputes is the wish of federations to keep order in their ranks, to develop their competitions and to ensure a degree of equality of opportunity within those competitions. This has led them to extend their regulations into new fields, such as the financial supervision of clubs, doping, match fixing and all that goes with it. This regulatory expansion necessarily increases the scope for disputes, especially when severe disciplinary sanctions are imposed on athletes and clubs under new or tightened rules.

Another reason worth citing for the rise in the number of disputes is sport's increasingly important place in society. Sport is no longer just a pastime. Defeat and sanctions are no longer simply an inherent aspect of sport, something the parties concerned can live with because it is "part of the game". They are sometimes perceived as intolerable slurs on local, or even national, pride that must be challenged using all the legal means that the system makes available.

The time has gone when the leaders of sports federations could apply their own criteria, without fear of contradiction, and decide who could, and who could not, take part in their competitions, sometimes even determining the arrangements for this.

The rise in the number of disputes, their implications and their increasingly legal nature have gradually led sports federations to adapt their structures in order to meet this challenge. The rules are becoming more precise. Federations' internal procedures are developing through the setting up or consolidation of a system that is becoming more like the judicial system, within which their own specialised bodies apply rules increasingly similar to those governing civil, criminal and administrative procedures and issue rulings that are, in terms of wording, more and more like court decisions.

There are many different kinds of dispute in the world of sport. Clubs may challenge each other on matters such as the transfer fee for a player. They may come into dispute with their federation, particularly about the criteria for the sharing of TV broadcasting fees for their matches. Disputes are also likely to arise out of the contractual relations between an athlete and his or her sponsors or club, or between a league and its members. Analysis of the mechanisms whereby this kind of dispute can be settled would, however, fall outside the scope of this handbook, which is to focus solely on disciplinary matters.

Hence this handbook will first underline the importance of the principle of autonomy of the sport movement, then look in turn at the substance of this principle and its implications for the resolution of disputes relating to sport (Chapter 1), the disciplinary procedures of sports federations (Chapter 2), arbitration (Chapter 3) and, finally, the role of the state court system in sport-related matters (Chapter 4).

1. Principle of autonomy of the sport movement

1.1. General description of the principle of autonomy of the sport movement

Sports organisations, be they international or national federations, clubs or entities on a smaller scale, are usually set up as private-law associations. Thus they benefit from the principle of freedom of association enshrined in the law of a very large number of states, which ensures their independence from public authorities. Associations may therefore be set up without state intervention; they are also free to determine their own social purpose, subject to compliance with the public policy of the state where they are based.

Freedom of association is the foundation on which sports organisations' independence from public authorities rests. But frequently sports federations are recognised to have a degree of autonomy that goes well beyond that enjoyed by the associations active in other areas of community life.

That greater autonomy stems firstly from the policy of non-intervention in sports matters pursued by the huge majority of states: the public authorities hardly ever intervene in matters relating specifically to the conduct of sports competitions, thus giving sports organisations the freest possible hand in terms of regulation. That greater autonomy is also due to the specific features of the sport movement, which constitutes a highly integrated social entity in its own right, based on a pyramid structure topped by the international federations that ensure that the system is coherent. The national and international monopoly enjoyed by federations over their sports boosts this coherence, although some sports organisations are exceptions to this monopolistic, pyramid-shaped organisation, examples being the North American professional leagues, especially those responsible for basketball (National Basketball Association, NBA), ice hockey (National Hockey League, NHL) and association football (Major League Soccer, MLS). These two features – pyramid structures and monopolistic organisation – ensure that sports organisations exercise their regulatory powers in a highly effective manner, so that there is no need for them to rely on public authorities to maintain "good sporting order" within the sport movement.

Thus the principle of autonomy of the sport movement is central to the whole system for the regulation of sport, even when states seek to regulate certain aspects of it, such as the economic aspects (Chappelet 2010).

This is a principle very widely recognised by states. At European level, the institutions of the European Union regard it as the cursor of any initiative to regulate the commercial or societal aspects of sport.[1] The principle is also central to the Council of Europe's work on sport. Resolution 1602 (2008) of the Parliamentary Assembly on the need to preserve the European Sports Model, for instance, states that "[t]he independent nature of sport and sports bodies must be supported and protected, and their autonomy to organise the sport for which they are responsible should be recognised."

1. See for example the European Commission's 2007 White Paper on Sport and the Declaration by the European Council in Nice in 2000, which pointed to the latter's support for "the independence of sports organisations and their right to organise themselves through appropriate associative structures", and also the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a European Union Work Plan for Sport for 2011-2014.

The Committee of Ministers' Recommendation CM/Rec(2011)3 on the principle of autonomy of sport in Europe defines the principle in the following terms:

> the autonomy of sport is, within the framework of national, European and international law, the possibility for non-governmental non-profit-making sports organisations to:
> – establish, amend and interpret the "rules of the game" appropriate to their sport freely, without undue political or economic influence;
> – choose their leaders democratically, without interference by states or third parties;
> – obtain adequate funds from public or other sources, without disproportionate obligations;
> – use these funds to achieve objectives and carry out activities chosen without severe external constraints;
> – co-operate with public authorities to clarify the interpretation of the applicable legal framework in order to prevent legal uncertainty and contribute, in consultation with public authorities, to the preparation of sports rules, such as competition rules or club rules of sports NGOs, which are legitimate and proportionate to the achievement of these objectives;

Even more recently, the Convention on the Manipulation of Sports Competitions (CETS No. 215), opened for signature on 18 September 2014, acknowledged that "sports organisations are responsible for sport and have self-regulatory and disciplinary responsibilities in the fight against manipulation of sports competitions".

Sports organisations themselves take the view that their autonomy is essential to their existence and protects them from excessive and counterproductive intervention by public authorities in the organisation of sports competitions, the state not being the most appropriate party to intervene in this sphere as sport is not always noted for its legal rationality (particularly where establishing the "rules of the game" specific to each sport is concerned). In other words, sports organisations consider this self-regulatory capacity to be intrinsic to sport, which would lose its authenticity were public authorities to intervene too much.

Sports organisations' capacity to regulate themselves implies both a capacity to draw up their own rules (self-regulation in the strict sense) and a capacity to enforce them. The whole point of this handbook is to describe the enforcement procedures set up by sports organisations, both the disciplinary and the arbitration procedures specific to sport.

The following sections of this chapter will thus focus on the main implications of the sport movement's self-regulatory capacity in the strict sense, while Chapters 2, 3 and 4 will cast light specifically on sports organisations' capacity to enforce their own rules.

1.2. Necessary self-regulation of the sport movement

The sport movement's main self-regulatory instruments are their autonomous standard-setting power and autonomous disciplinary power.

1.2.1. Sports organisations' autonomous standard-setting power

Sports organisations have the capacity to set standards for themselves, insofar as they themselves produce the standards applied to themselves and their members. In other words, sports organisations have the power to create rules that they apply without state intervention.

This power is exercised in practical terms through the adoption by the sports organisation of its own Articles of association and rules and regulations defining how the organisation, its representatives and its members are to behave. There are also rules governing the conduct of sports competitions: the rules of the sport or game. However, sports organisations also adopt rules on other aspects of sports activities, such as financial and commercial aspects. All the rules adopted and implemented by sports organisations themselves constitute a veritable legal order for sport, distinct from the legal order of states, albeit inevitably linked thereto.

The ultimate manifestation of this self-regulatory capacity is the emergence of a true *lex sportiva*, defined as all the rules of transnational scope drawn up by sports organisations themselves to regulate the conduct of sports competitions.[2]

2. For a more detailed analysis of the nature and substance of *lex sportiva*, see Sorbonne/ICSS 2014: Part 2, 456 ff.

1.2.2. Sports organisations' autonomous disciplinary power

Sports organisations have not only their own standard-setting power, but also a power of enforcement, again in principle without intervention by public authorities: this is the disciplinary power of sports organisations. They are in practice free to adopt substantive disciplinary standards by which their members must abide and to organise their own enforcement system.

The body of disciplinary standards encompasses rules:

- defining the behaviour expected of, or prohibited for, members of the organisation. Anyone in breach of the rules is committing a disciplinary offence;
- governing the organisation and functioning of the disciplinary bodies;
- establishing the disciplinary procedure;
- determining the sanctions applicable to anyone found guilty of a disciplinary offence.

The instruments in which these rules are laid down take an extremely wide variety of forms. Most commonly, they are found in sports organisations' disciplinary rules, but they are occasionally also contained in their Articles of association. However, sports organisations may adopt other texts, such as the codes of ethics of the Fédération Internationale de Football Association (FIFA), the Fédération Internationale de Basketball (FIBA) and the International Olympic Committee (IOC) codes of conduct; or even more specific texts such as the anti-corruption codes of the International Cricket Council (ICC 2014) and the International Hockey Federation (FIH 2012).

Sports organisations are also free to organise their "judicial system" as they wish. That is the main reason for the extremely wide variety of models that exist (see Chapter 2 on sports federations' disciplinary procedures and Chapter 3 on arbitration).

The principle of the autonomy of sports organisations' disciplinary power has a notable exception in states that have adopted a system whereby responsibility for a public sport service is delegated to sports federations (as in France, and

certain states of southern and eastern Europe). Such systems are based on the principle that sports federations that hold a monopoly over the organisation of competitions within their sports are, in their field of action, given a public service role in respect of sport. In that context, sports federations, particularly when they adopt disciplinary sanctions, act on behalf of the state. So the autonomy they enjoy is closely regulated by the legislature or the regulatory authority. In the disciplinary sphere, public authorities may thus lay down the rules and define the procedures to be followed by sports organisations. The French Sport Code (2016), an instrument of governmental origin, provides for a model set of disciplinary regulations to be adopted by the executive authority of the state, and this must be complied with by all the sports federations to which a public sport service has been delegated. There are nevertheless few such cases.

1.3. Harmonisation of the rules of sport at international level

Some degree of harmonisation of the rules of sport at international level seems necessary to combat certain kinds of behaviour that undermine the integrity of sport. In practice, however, this is not systematic.

1.3.1. Need for harmonisation in order to combat behaviour that undermines the integrity of sport

Harmonisation may concern the rules of the sport and/or disciplinary rules.

1.3.1.1. Harmonisation of the rules of the sport

As the sport movement is organised with a pyramid structure based on a monopolistic principle, the rules of the sport, or rules of the game, need to be harmonised at international level (with the exception of professional sport in North America, where leagues, principally the NHL, NBA and MLS, are independent of their respective international federation

and may – and sometimes do – adopt rules that depart from those applied by those federations). For the purposes of the Olympic Games, it may even be the case, although only exceptionally, that the IOC imposes certain specific rules about the conduct of competitions within a sport (in weightlifting, for example, the International Weightlifting Federation (IWF) gives awards for the clean and jerk, the snatch and the two combined, whereas at the Olympic Games, medals are awarded only for the combination of the two movements). The IOC nevertheless remains strongly attached to the principle that each international federation "maintains its independence and autonomy in the administration of its sport" (IOC 2015).[3]

1.3.1.2. Harmonisation of disciplinary rules

The need for harmonisation may also extend to other rules drawn up by sports organisations: standards of behaviour, rules governing the conduct of disciplinary proceedings or rules determining the sanctions applicable to disciplinary offences. There should be a degree of unification, taking account of the specific features of each sport, whenever the aim is to combat transgressions that concern the integrity of competitions and may have an international dimension: doping, corruption and match fixing are examples. Effective action against such behaviour requires internationally harmonised regulations to be implemented. This is the case with doping, where it is vital for the definition itself of the conduct that undermines integrity, as well as the sanctions regime, the burden of proof, the standard of proof and so on, to be harmonised. In contrast, unification of the composition of organisations' disciplinary bodies does not seem essential.

i. Non-binding harmonisation mechanisms

With a view to harmonisation, two sports organisations acting as an umbrella for international federations, namely SportAccord and the Association of Summer Olympic International Federations (ASOIF), have drawn up model rules (relating to integrity, good governance and the combating of corruption) and made these available to their members,

3. CAS 2000/C/255, CONI, 16 June 2000.

who remain free to decide whether to incorporate them wholly or partly into their own regulations. These are rules of "soft law", but their effectiveness should not be overlooked, since they provide sports organisations with models of predefined regulations that they may incorporate as they stand or at least use as a basis, without feeling that they are under an obligation that clashes with the principle that they are autonomous.

ii. Harmonisation mechanisms specific to each sport

Where more binding harmonisation initiatives are concerned, the simplest mechanism is that whereby an international federation lays down compulsory rules for its affiliated national federations. Those rules may then be directly applicable or may require formal transposition into the national federations' regulatory instruments.

FIFA uses this method: Article 146 of the FIFA Disciplinary Code (FDC) contains a list of rules that must be incorporated into national federations' regulations. In certain cases, affiliated federations have no room for manoeuvre and must include the provisions laid down in the FDC word for word (associations are, for instance, required to incorporate into their regulations the provisions on discrimination, Article 58 of the FDC, and those on doping, Article 63 of the FDC) (FIFA 2011). In other cases, national associations may choose their own wording and implementation arrangements, on the understanding that they have to effect this transposition in order to ensure that disciplinary rules are harmonised.

In cricket, the ICC Anti-Corruption Code is directly applicable to national federations. However, Article 1.6 of the code stipulates that participants in international competitions may also be subject to distinct and complementary anti-corruption rules adopted by national federations and applicable to national competitions. The document nevertheless specifies that no national rule may prevent application of the ICC Anti-Corruption Code (ICC 2014).

In basketball, FIBA has also provided minimum procedural safeguards in disciplinary matters, in that FIBA zones' and national member federations' regulations "must provide for a hearing by an independent body, the entity/person implicated shall have the right to be heard, and a right of appeal by the entity/person implicated from the decision of the first body" (Article 140, Book 1, FIBA 2010).

iii. General harmonisation mechanisms

In the context of the harmonisation mechanisms considered in the previous paragraph, the scope for unification of the rules is limited to the sport for which the international federation is responsible. Where the most fundamental rules of conduct are concerned, these could nevertheless be easily unified in more general fashion for all sports: one example is fraud in sport, in respect of which, while each sport has a few unique features of its own, most standards in terms of behaviour, such as the prohibition of corruption, may be applied to all sports.

a) Initiatives taken by multi-sport organisations

Certain initiatives emanating from multi-sport organisations may have broader scope.

One example is that of certain compulsory rules imposed by the IOC, which lays down various conditions for the recognition of federations (such as the need for organisations wishing to obtain IOC recognition to comply with the Olympic Charter and to submit their statutes for IOC approval, Article 25, IOC 2015). It can also take measures against federations that do not offer sufficient guarantees of good governance (it can, for example, withdraw its recognition of those federations under Article 59 (1.2) of the Olympic Charter, ibid.). The IOC nevertheless takes care not to get too involved in the internal affairs of the federations recognised by it. Thus there are significant limits to its unifying work.

The fight against doping, however, is one example of an effort to harmonise sports rules that has gone well beyond the possibilities of each international federation, even beyond the framework of IOC action. The setting up of the World Anti-Doping Agency (WADA) in 1999 seemed to be a way of harmonising the standards and practices adopted by the various sports authorities on doping, whether these relate to the definition of the term, the list of prohibited substances, the establishment of standardised testing procedures, the approval of laboratories or the determination of sanctions. Previously, notwithstanding certain IOC initiatives to ensure a degree of harmonisation among members of the sport movement (IOC 1988, 1989, 1995, 2000), the anti-doping arrangements were essentially the responsibility of each international federation within its own sport.

The harmonisation arrangements have been put in place, under the aegis of WADA, which has adopted the World Anti-Doping Code (WADA 2015) and the International Standards relating to the Prohibited List, Testing and Investigations, Laboratories, Therapeutic Use Exemptions, and the Protection of Privacy and Personal Information. Those instruments make up the World Anti-Doping Program, which is now binding for the vast majority of organisations in the sport movement. The World Anti-Doping Code provides for the IOC to make compliance with the code a condition of recognition and thus of participation in the Olympic Games (Article 20.1.2) and to require sports organisations to comply with it as a condition for Olympic funding (Article 20.1.3). The code makes a distinction between international federations and sports organisations, the latter being more numerous since they include, *inter alia*, National Olympic Committees and the authorities responsible, at national level, for ensuring that the code is properly applied. International federations, in their turn, must make it a condition of a national federation's membership that it complies with the code (Article 20.3.2). This enables the code to permeate the sport movement as a whole. It has even reached beyond the IOC-recognised international federations (Article 23.2), although it is not always applicable to the sports organisations independent of international federations, which may nevertheless accept it (Article 23.1.2). The effect of this limitation is that athletes who are members of the North American professional leagues, in particular, are subject to the code only insofar as they take part in competitions organised by the IOC or by an international federation (insofar as those leagues have not – or not yet – acceded to the code).

This harmonisation effort has a major feature that also ensures its effectiveness: WADA is a hybrid organisation within which there are representatives of sports organisations and of states. The latter were thus involved in the preparation of the World Anti-Doping Program, though its component instruments are not directly applicable to them (the comment on Article 22 of the code points out that "Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code", WADA 2015). States have nevertheless, in parallel, made efforts to harmonise anti-doping arrangements. In 2003, for example, they adopted at the second World Conference on Doping in Sport (on the sidelines of which the code was adopted by WADA), the Copenhagen Declaration on Anti-Doping in Sport, in which they expressed a "political and moral understanding" among themselves to support the code (WADA 2003). That understanding speedily led to the drafting within UNESCO, with WADA's support, of the UNESCO International Convention against Doping in Sport, which was adopted in 2005 and came into force on 1 February 2007 (UNESCO

2005). Through that convention, the states parties undertook to "adopt appropriate measures at the national and international levels which are consistent with the principles of the Code" (Article 3, ibid.).

b) Need for harmonisation in the field of the manipulation of sports competitions

The fight against the manipulation of sports competitions – another major abuse threatening the sport movement – requires a degree of harmonisation and consultation among public authorities and sports organisations at least as high as that observed in the fight against doping. Practices whereby sports competitions are manipulated, often a form of corruption, are increasingly cross-border, particularly when linked to sport betting (Sorbonne/ICSS 2014). Thus the effective combating of these is possible only if a minimum number of common rules defining fraudulent conduct and applicable sanctions are implemented. Such harmonisation may be envisaged for all sports, to the extent that the manipulation of sports competitions, in addition to the fact that it concerns virtually every sport, has the same effect on the integrity of competitions, irrespective of the sport concerned.

In this field, a first international instrument was recently adopted at the Council of Europe, namely the Convention on the Manipulation of Sports Competitions, of 18 September 2014 (CETS No. 215). The initiative for the convention was taken by states, but the main stakeholders – particularly sports organisations – were involved in the preparatory work. The convention is a first step towards harmonisation of the relevant rules where action by states is concerned. It seems desirable for sports organisations to take a final step and consider unifying as well the rules against the manipulation of sports competitions (Sorbonne/ICSS 2014).

Depending on the fields in which harmonisation of the rules of sport is desirable, it may be necessary for sports organisations to work with public authorities. The Council of Europe Convention on the Manipulation of Sports Competitions states, for example, that: "dialogue and co-operation among public authorities, sports organisations, competition organisers and sports betting operators at national and international levels on the basis of mutual respect and trust are essential in the search for effective common responses to the challenges posed by the problem of the manipulation of sports competitions" (Preamble, CETS No. 215).

1.3.2. Non-systematic harmonisation of the rules of sport

Irrespective of the cross-border nature of the challenges facing the sport movement, which require international harmonisation, the principle of legal certainty and, more generally, the aim of simplifying the law and sport's procedures may also lead us towards harmonisation. But that is neither achievable nor desirable in every case. It should be considered only insofar as it contributes to better achievement of the sport movement's own objectives, especially the integrity of sports competitions and good governance of sports organisations.

Thus it is not always reasonable to envisage systematic harmonisation of the rules governing the conduct of disciplinary proceedings, rules of procedure or disciplinary sanctions.

1.3.2.1. Conduct of disciplinary proceedings

Where the organisation of disciplinary proceedings is concerned, it is not necessarily desirable to have harmonisation. Some federations may, for example, confine themselves to a single body when national law does not oblige them to have an appeals body as well as a first level of jurisdiction (on these issues, see Chapter 3, 3.3.3.1., "Ordinary procedure").

1.3.2.2. Rules of procedure

Rules of procedure – the taking of evidence, conduct of hearings, and so on – may differ from one sport to another, and even from one level to another within the same sport, without this being detrimental to action against sport-related offences, so as to take account of the specific features of each sport.

Each federation should nevertheless have rules enabling its disciplinary bodies to operate promptly and effectively (see Chapter 4, 4.4., "State courts as courts of appeal against arbitral awards").

1.3.2.3. Disciplinary sanctions

A qualified answer also has to be given to the question of the relevance of international harmonisation where disciplinary sanctions are concerned. A suspension of several years tends to put an end to a gymnast's career, since gymnastics requires an extremely high level of physical ability that cannot be maintained as the years go by, whereas it might just be an unpleasant hiatus in the career of a dressage rider or a participant in curling, for instance.

Another big difference between sports is the number of competitions in which an athlete may take part each year: a North American baseball player may play around 180 matches per season, while a boxer takes part in only a few bouts during the same period, making the results of a suspension for a specific number of competitions not at all the same for the two.

As for fines, the level of athletes' income in different sports inevitably plays a role: someone who competes in orienteering should not be subject to the same financial sanctions as a multimillionaire footballer (nor should the latter be treated exactly the same, in this context, as a footballer playing in a minor league and earning little or no money).

1.4. Limitations of the sport movement's self-regulation: compliance with state law

The principle of sports organisations' autonomy is sometimes seen as conferring actual legal immunity, placing the organisations concerned outside state law (Arnaut 2006). However, like any social activity, sport cannot fall completely outside regulation by the public authorities. As stated in a judgment delivered by the Belgian courts in 1992, "sports organisations can no longer claim their autonomy if a potential conflict arises between the rules laid down by them and those of the state legal order, the activity concerned coming within the scope of the state's public policy".[4] Labour

4. Civ. Liège, 11 June 1992, Bosman, J.T. 1993, p. 284.

law, tax law, contract law, criminal law and industrial property law are thus applicable to these private entities, in the name of the principle of equality before the law.

Sports organisations' autonomy may also be limited by certain international standards. Firstly, international sport law as derived from unilateral instruments produced by certain international organisations that have sport on their agenda (the Council of Europe, UNESCO and the UN, for example) or from international conventions, such as the Council of Europe's Anti-Doping Convention and European Convention on Spectator Violence, as well as the UN's International Convention Against Apartheid in Sport (1985) is binding on sports organisations. Similarly, in the sphere of labour law, certain International Labour Organization conventions may apply to sports organisations' practices. Finally, international human rights instruments may also restrict sports organisations' autonomy.

Sports activities and the context in which they take place nevertheless present many specific features, and sport, defined in very general terms, encompasses a multitude of situations, not every aspect of which is subject in the same way to ordinary law. A distinction therefore needs to be made among different cases in order to appreciate the areas where sports organisations' autonomy is greatest and those where state law is most firmly in control.

The greatest autonomy of sports organisations undeniably relates to regulation of the sport itself. When standards are to be laid down concerning the conduct of sport competitions – the technical rules of the sport – it is perfectly logical to leave sports organisations the greatest discretion. State intervention in this sphere is neither justified nor appropriate, since the rules that have to be drawn up have a rationale of their own, one that has to be under the control of sports organisations. State courts generally have considerable reservations in this sphere, refusing to supervise the lawfulness of the rules of the game. In this respect they follow the line taken by the Swiss Federal Tribunal (TFS) that, in a noteworthy judgment of 1993 in the case of Gundel, clearly stated that the "application of the rules of the game … does not in principle lend itself to court supervision".[5]

5. TFS, 15 March 1993, *G. v. FEI and TAS*, ATF 118 II 15.

The Court of Arbitration for Sport (CAS) also expresses the same reservations. In a ruling of 13 July 2012, it explained that:

> According to well-established jurisprudence of the CAS, *"CAS arbitrators do not review the determination made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometimes called 'rules of the game'"*. In other words, CAS arbitrators should not interfere with the application of the rules governing the play of the particular game – this is to be left to field officials, who are specifically trained to officiate the particular sport and are best placed (being on-site) to settle any questions. CAS arbitrators are not, unlike on-field judges, selected for their expertise in officiating the sport concerned. This position is consistent with traditional doctrine and judicial practice which have always stated that rules of the game, in the strict sense of the term, should not be subject to the control of judges. (CAS 2012/A/2731)[6]

The question nevertheless arises concerning whether these rules of the sport are by their nature and in all circumstances exempt from supervision of their compatibility with state law. Certain sports organisations claim that this is so where "purely sporting" rules are concerned, relating to the proper conduct and integrity of sports competitions (Arnaut 2006). However, in reality, even the rules of the sport, however technical they may be, may have effects that go beyond the framework of sports law alone and connect with certain rules issued by the state. Both CAS and the TFS have acknowledged that the distinction between rules of the game and legal rules is irrelevant.[7] More specifically, it is clear from this case law that, if the rules of the game are capable of having financial or economic consequences, they cannot enjoy any kind of legal immunity and must therefore be able to be the subject of supervision of their compatibility with state law. Similarly, in the famous Bosman judgment, the Court of Justice of the European Union (CJEU), after suggesting that some purely sporting rules have been excluded from the scope of treaties, dismissed the very idea of an exception for sport, stating that any rule of sport, if it could have economic consequences, had to be able to be the subject of supervision of its compatibility with European Community rules.[8] A fortiori, a rule of the

6. CAS 2012/A/2731, *Brazilian Olympic Committee & Brazilian Taekwondo Confederation & Márcio Wenceslau Ferreira v. World Taekwondo Federation & Comité Olímpico Mexicano & Federación Mexicana de Taekwondo & Damian Alejandro Villa Valadez*, 13 July 2012, paragraph 104.
7. CAS JO 96/006, M. v. AIBA, 1 August 1996; TFS, 6 December 1994, *Ligue Suisse de Hockey sur Glace v. Dubé*, ATF 120 II 369, No. 67.
8. Case C-415/93, *Union Royale Belge des Sociétés de Football* Association *ASBL v. Bosman*, *Royal club liégeois SA v. Bosman and Others*, *UEFA v. Bosman*, 15 December 1995, European Court Reports 1995, page I-04921.

game that contravenes the rules of criminal law (particular reference is made here to certain extreme sports, such as ultimate fighting, which allow extreme violence) must be able to be the subject of supervision of its lawfulness under state law (on the issue of the distinction between rules of the game and legal rules, see below, 4.1.).

When there are rules for the sole purpose of regulating a sports competition, the courts should nevertheless exercise only limited supervision, in order to protect the scope for discretion of sports organisations. It may be pointed out in this respect that even the French administrative courts, when supervising decisions taken by the federations with a delegated public service role, confine themselves to minimal supervision (Conseil d'État 1991).

The autonomy of sports organisations is far narrower – and their subjection to state law relatively greater – when sport is considered to be an economic activity. In respect of labour relations, commercial contracts and also sponsorships, sport must effectively be regarded as an activity like all others. The clearest illustration of this ordinary treatment of the economic aspects of sports activities comes from the aforementioned Bosman judgment, which concerned, on the one hand, the FIFA rule that any transfer of a football player to a new team is subject to the agreement of his current club and to the payment, by the receiving club, of a transfer or training and development fee, and, on the other hand, the rule restricting the number of professional players who are nationals of other member states allowed to take part in national competitions.

Finally, the autonomy of sport may also be limited when sport is viewed in terms of its social, health, educational and even environmental benefits. Some states thus develop policies in these sectors without any involvement of the sport movement (Miège and Jappert 2013). Others involve the sport movement in this process, but in a context managed by the public authorities, under the responsibility of the ministries of health, education or culture. This development clearly shows that sport can, to some extent, go beyond the control of sports organisations and be covered by states' public policies.

2. Disciplinary procedures of sports federations

As we have already seen, sports federations enjoy a broad measure of autonomy in disciplinary matters, in terms of defining the kinds of behaviour that they intend to prohibit or prescribe for their members, the types of sanctions that may be imposed (suspension, fine, exclusion from certain types of competitions, etc.), the scope of the sanctions to be applied in certain kinds of cases, the organisation of the bodies they set up to deal with these matters, and the procedure to be followed by those bodies.

This chapter is concerned with the purpose of disciplinary regulations and the foundations on which disciplinary authority rests, disciplinary offences and sanctions, and a few specific questions relating to disciplinary bodies and the procedure that the latter have to follow.

2.1. Disciplinary regulations

Disciplinary regulations enable action to be taken and sanctions imposed on anyone who commits acts contrary to the integrity of sport, provided that those persons are under the relevant organisation's jurisdiction (athletes, clubs, officials, etc.). Another aim is to deter persons who may be tempted to commit such acts. Usually relatively informal, disciplinary regulations make – or should make – simple and speedy procedures possible, so that the disturbance caused by the offence to the orderly running of sport can be eliminated without undue delay.

The basis of the disciplinary authority of sports federations is the subject of two different schools of thought, one referring to contractual theory, the other to institutional theory. According to the former, competitors, coaches, officials and clubs enter into a partnership agreement with the sports federation through their request for, and the issuing of, a licence to participate in a sports activity organised by that federation, or through their link to the federation via other relations of a contractual nature. Most authors and courts now, however, refer to institutional theory, according to which competitors, coaches, officials and clubs are not parties to the contract of association whereby federations are set up and are only indirectly connected to their national and international federation through their licence and/or their participation in competitions. This is "insufficient to establish a direct contractual link between members and sports organisations" (Rizzo, Poracchia and Durand 2010). English case law draws on this conclusion (cited by Gardiner et al. 2012),[9] and the Commercial Court of Charleroi, in a case between a football club and FIFA, ruled that the latter, when issuing its rules and regulations, acted more as though it were exercising authority than as a partner in membership contracts with clubs, and that those rules were evidence of true rule-making authority. These were commonly recognised and applied as legal rules by courts, insofar as they did not conflict with the provisions of national or international public policy.[10] The rules adopted by federations are thus the expression of a true rule-making power of their own (Simon 2012: 30; Fritzweiler et al. 2007: 175-6). Disciplinary regulations therefore derive from sports federations' regulatory and "quasi-judicial" authority.

2.2. Disciplinary offences and sanctions

Disciplinary offences are autonomously defined and distinct from those defined in terms of civil and/or criminal responsibility. They are assessed relative to the conduct prescribed by the specific rules of the body (institution, grouping, association, etc.) to which an individual belongs.

9. *Enderby Town Football Club Ltd v. The Football Association Ltd* (1971) Ch. 591.
10. Case RG A/05/03843, Commercial Court of Charleroi, 1st chamber, 15 May 2006, *SA Sporting du Pays de Charleroi & G-14 Groupement des clubs de football européens v. FIFA*.

The disciplinary body considers whether the individual (athlete, coach, official, etc.) or legal person (club, federation, etc.) did commit the acts as charged, determines their legal classification under the applicable rules and conducts an overall evaluation of the offender's behaviour. If applicable, it imposes disciplinary measures, the effect of which is confined to the body to which the offender belongs.

The sanction is not an end in itself, and the disciplinary body usually has the power to decide not to impose a sanction if, in the specific case, that is unnecessary to maintain or restore order within the entity (including the image of the organisation concerned among other organisations and the public). Disciplinary regulations are thus governed by the discretionary principle.[11]

The disciplinary sanctions most commonly imposed are suspension, that is exclusion of the offender from some or all of the association's competitions or activities for a specified period – which may even be for life – and fines, which may be large sums when imposed for acts of a certain level of seriousness committed by persons (such as clubs and professional athletes) thought to be capable of paying them. Other types of sanctions are also fairly common, such as the loss of a match by a club (for instance when an unqualified player takes part or spectators misbehave during a match) or disqualification of the athlete or club from a specific competition, or withdrawal of the prize won or of the other advantages obtained through the competition.

The TFS, which is regularly required to deal with sport-related procedures (particularly because it has jurisdiction in respect of applications to set aside the decisions of CAS), has on several occasions ruled on the nature of the disciplinary sanctions imposed by sports associations. It considers these to be private sanctions (as opposed to state sanctions), which are solely a matter of civil law, and not criminal law. Those sanctions are a form of contractual penalty and are therefore based on the parties' autonomy. They are unconnected with the criminal courts' power to punish, although they sometimes penalise conduct also punished by the state.[12] That said, the private nature of sport's disciplinary sanctions does not preclude their submission to review by a court, in sport as in the other fields of sports organisations' activity.

11. TFS, 7 May 2009, *X. v. Commission de surveillance des offices des poursuites et des faillites du canton de Genève*, 5A_112/2009, paragraph 2.2.
12. TFS, 15 March 1993, *Gundel v. FEI*, ATF 119 II 271.

2.3. Disciplinary bodies

In this section, we shall examine a few specific issues concerning disciplinary bodies, namely those relating to federations' freedom to organise their disciplinary system, the separation of powers within a sports federation and the disciplinary bodies themselves, before concluding with a few considerations on the independence and impartiality of those bodies.

2.3.1. Freedom to organise

Sports federations, in principle, have considerable freedom to set up, organise and appoint members to their disciplinary bodies.

In Switzerland, for example, where many international federations have their headquarters, this freedom is particularly broad, since the Swiss Civil Code's Article 60 (and those that follow) lay down no requirements as to the nature, number and membership of such bodies. In France, on the other hand, sports federations' freedom to organise is very much restricted by state law, the standard disciplinary regulations (Appendix I-6, Government of France 2016) requiring, *inter alia*, that disciplinary bodies have at least five members and that an appeal procedure exists. Thus federations subject to French law must have a first level of jurisdiction and another body to rule on appeals against the former's decisions.

National legislation in most countries, however, allows far more leeway than French law, sometimes even allowing sports federations to organise their disciplinary bodies as they wish. Federations make considerable use of the freedom that they enjoy in this sphere, according to their sport's inherent needs and the material and human resources available to them.

2.3.2. Separation of powers

Almost all sports federations basically reproduce the classic formula of separation of powers within the entity, in that they not only have "legislative" bodies (general assembly, congress, etc.) and "executive" bodies (committee, management, etc.), but also, for the purposes of exercising their disciplinary authority, bodies on which they confer the authority to open and conduct proceedings and, if necessary, impose sanctions.

These "judicial" bodies are usually also made responsible for resolving other kinds of disputes between members or between members and the federation, but here we shall examine only their disciplinary role.

There are nevertheless certain exceptions to the separation of powers, particularly in the North American professional leagues, where the "commissioner", the league's executive authority, generally also holds and exercises disciplinary authority.

2.3.3. Disciplinary bodies

2.3.3.1. General

Unless prohibited from doing so by law, federations may provide for disciplinary cases to be dealt with by a single body, the rulings of which are not open to appeal within the federation, or they may set up a two-tier procedure, with a first level of jurisdiction and an appeal body (Beloff et al. 2012: 241).

Federations that deal with a significant amount of litigation and/or cases with significant implications tend to choose to make internal appeals possible, even if this means a fairly summary procedure at first instance, so that the mass of cases is dealt with promptly and without excessive cost. The Union of European Football Associations (UEFA), for example, has adopted a summary procedure, whereby the parties are in principle not given an oral hearing by its first-instance disciplinary body, so that the dozens of cases that it deals with every month can be settled. However, the right to be heard is unrestricted at the next stage, in the appeal body (UEFA 2014).

The main advantage of the existence of two disciplinary bodies is that any incorrect decisions can be rectified internally. The obvious disadvantage is that two-tier proceedings inevitably take longer, which may be damaging where decisions relate, for example, to the running of competitions.

Federations may also, again where this is not prohibited by the law of the state in which they are headquartered, freely decide on the membership of their disciplinary bodies, providing for a single-judge system (as in Major League Baseball, MLB, and the National Football League, NFL), more than one judge (as in the International Boxing Association, AIBA, and FIFA), or a single judge for some kinds of cases and more than one for others (as in UEFA and the Swiss Football League).

Similarly, federations may themselves determine the methods of appointment of their disciplinary bodies' members. Some have opted for election by their regulatory body (general assembly, for example in the Swiss Football Association, the ASF), though appointment by the executive body is more common (executive committee, for example with UEFA), and some federations even have the president of the organisation make the appointment (examples are the IOC and AIBA).

2.3.3.2. Separation of investigating and adjudicating functions

Since the *De Cubber v. Belgium*[13] judgment by the European Court of Human Rights, it has been inadmissible in criminal proceedings for the functions of an investigating judge and trial judge to be exercised by the same person in the same case.

The question arises as to whether the combination of the investigating and adjudicating functions is admissible in disciplinary proceedings. In other words, must the investigation and adjudication functions be separate by having, within each federation, certain persons who are responsible for investigation and others who are responsible for taking decisions? To date, it has to be said that no rule or general principle compels federations to separate the investigating

13. *De Cubber v. Belgium*, 26 October 1984, Application No. 9186/80.

and adjudicating functions within their disciplinary bodies. In the interests of the federation and of the athletes and clubs concerned, the main thing is that proceedings should be fair and prompt.

Some federations make a body equivalent to a prosecutor responsible for (deciding on) opening disciplinary proceedings, conducting the investigation, submitting the case to an adjudicating authority and arguing the case against the accused before that body. In football, for example, those functions are exercised by the "prosecuting officer" of the Italian Football Federation (FIGC) in domestic cases relating to Italian football (Article 32, FIGC 2014), and by a Disciplinary Inspector for UEFA (Article 25, UEFA 2014). In cricket, it is the ICC's Anti-Corruption and Security Unit (ACSU) that investigates and brings charges in corruption cases (Article 4, ICC 2014), whereas in tennis this role is performed by the Tennis Integrity Unit (Article X (F)(2)(a), TIU 2009). FIFA's system for dealing with cases relating to ethics differs slightly, in that its Ethics Committee is divided into two chambers, one responsible for investigation and the other for adjudication (Article 26 (1), FIFA 2012), although, in complex cases, the investigatory chamber may "engage third parties – under the leadership of the chief of the investigation – with investigative duties", the work of those third parties having to be clearly defined (Article 66 (3), ibid.). Other federations prefer to ask their first-instance disciplinary authority to open proceedings and conduct investigations before making a decision on the case. One such federation is AIBA (Article 13.2.1, AIBA 2013).

Some suggest that a "central integrity unit" should be set up as an independent body to conduct match-fixing investigations on behalf of some or all sports federations, which would retain a subsequent right to decide on any sanction. Those who advocate such a mechanism note that many federations do not have the necessary resources – and may not have the necessary will – to set up sufficiently developed investigation units with competent staff, preventing them from dealing effectively with corruption cases in the broad sense (Sorbonne/ICSS 2014: Part 3, 43).

One drawback of separating the investigation and adjudication functions is that this creates a potential source of conflict within the federation concerned (in 2014, for example, the chairs of the FIFA Ethics Committee's investigatory and adjudicatory chambers disagreed publicly about the action to take on an investigatory chamber report on possible corrupt acts at the time of the awarding of the FIFA World Cups of 2018 and 2022 to, respectively, Russia and Qatar). Another drawback is the additional time taken when a case is examined by two different persons or groups of persons.

It may also seem odd for a disciplinary body to have a right of appeal against the decisions taken at first instance by the same federation's decision-making body, insofar as it is not really clear what interest the federation's internal disciplinary body might have in the amendment of a disciplinary decision taken by another body within the same federation. The counter-argument to all these objections is that the separation of functions preserves the impartiality of the decision-making body, which thus has no need to involve itself in seeking evidence, and that it may be helpful for an internal body to ensure, if need be by lodging appeals, that the first-instance disciplinary body issues its rulings in full accordance with the provisions of the federation's regulations and Articles of association and regulations.

2.3.4. Independence and impartiality of disciplinary bodies

Some federations make provision, in their Articles of association and regulations, for their disciplinary bodies to be independent of their other bodies (see Article 26, UEFA 2014; Article 34, FIFA 2012; Article 85, FIFA 2011; Appendix 1, ICC 2014).

That is not enough for them to be considered independent and impartial tribunals within the meaning of Article 6, paragraph 1, of the Convention, on the right to a fair hearing, according to which:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (ETS No. 5).

Indeed, the method of appointment of the members of disciplinary bodies, the financing of their activities (fully financed by the federation itself), the functional relationships between them and the federation (with the latter, in particular, generally providing the disciplinary bodies' secretariat) and other aspects mean that those bodies are not true courts or tribunals. Nor do sports federations claim true judicial status for their disciplinary bodies, whatever terms may be used to refer to them in their Articles of association and regulations.

The fact that organisations' disciplinary bodies lack the status of independent and impartial tribunals within the meaning of Article 6, paragraph 1 of the Convention is not in itself a problem: within all systems, as we shall see below,

disciplinary decisions may be reviewed by a state court or by an independent and impartial arbitration body, so the decisions taken by organisations' own bodies are not final (on the subject of the independence and impartiality of sports federations' bodies, also see Rabu 2013: 11 ff.).

That said, it is nevertheless in the interest of federations themselves and their members for their disciplinary bodies to appear to members and the public alike to have sufficient independence to prevent any suspicion of undue influence: a federation has a clear interest in the majority of its disciplinary cases being resolved internally, without referral to a state court or an arbitration body. That can be achieved only if the disciplinary bodies follow procedures that respect individual rights and take decisions that the persons concerned are able to regard as impartial in principle. Failing this, referral of cases to state courts or to arbitration bodies would surely become more or less systematic, and that would be detrimental to the independence, functioning and image of the federation concerned.

2.4. Disciplinary proceedings

The purpose of this section is to make the point that sports federations are in principle free to determine their disciplinary procedures and that, as the law stands, they are not formally and directly bound by Article 6 of the Convention, although it is in their interest to offer fair proceedings. We will then look at some specific issues relating to disciplinary proceedings, namely their public or non-public nature, equal treatment of the parties, the burden of proof, the standard of proof and arrangements for taking evidence.

2.4.1. Freedom to establish procedure

In principle, sports federations have the right to determine as they see fit the manner of conducting disciplinary proceedings and the rules of procedure needed for that purpose.

Nevertheless, national lawmakers have differing views on this subject, as they do on the question of disciplinary bodies. To take the example of Switzerland again, Articles 60 and those that follow of the Civil Code (CC) do not lay down any rules that sports organisations would have to apply in this field. In France, however, the standard disciplinary regulations (see 1.2.2. and 2.3.1 above) require them to observe a whole series of procedural rules, such as the public nature of proceedings (with some exceptions), the requirement to inform defendants of the charges against them, the setting of time limits for hearing and deciding cases, the exclusion of persons other than lawyers to represent the parties, and so on. Regulations of this kind are however the exception in the European legislative landscape.

Except where otherwise determined by national law, sports federations are not directly and formally bound by the procedural principles deriving from Article 6 of the Convention (for a more nuanced view and the state of debate on this question, see the Council of Europe handbooks: EPAS 2017; Mole and Harby 2006). However, it should be noted in this connection that if a party's rights to a fair hearing within the meaning of Article 6 of the Convention have been violated in disciplinary proceedings, the procedural defects are in principle "cured" in the subsequent proceedings before a state court or an arbitration tribunal. In fact, according to the case law of CAS, appeal proceedings before it are proceedings *de novo* and the advantage of a procedure permitting a full rehearing before an appeals body is that any issues relating to the fairness of the first-instance proceedings are therefore only of peripheral importance. The system that the appellants have signed up to enables any defects in the first-instance proceedings to be cured through the proceedings before CAS.[14]

However that may be, it is in any case in the interest of sports federations themselves to design and apply their rules of disciplinary procedure in a manner consistent with the concept of a fair hearing. Indeed, if they want to be able to settle the bulk of the disputes involving their members internally, they cannot content themselves with procedures that violate individual rights, and first and foremost those provided for in Article 6 of the Convention.

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14. See CAS 98/208, N., J., Y., W. v. FINA, 22 December 1990, which refers, *inter alia* to Moor 1991: 19, which in turn cites TFS judgments ATF 114 Ia 307 and ATF 110 Ia 81.

Furthermore, each federation should have rules allowing its disciplinary bodies to function quickly and efficiently and to make use of the full range of available evidence. For example, the procedural apparatus should include rules allowing disciplinary bodies to consider all evidence, whether on their own initiative or at the parties' request; rules giving disciplinary bodies the power to exercise discretion in the assessment of evidence and to reject irrelevant evidence so as not to delay proceedings unnecessarily; and rules on the procedure to be followed in the event of a recusal, so that any disputes in that connection can be quickly settled.

2.4.2. Disciplinary proceedings – Specific issues

2.4.2.1. Introduction

The disciplinary proceedings of sports organisations tend to resemble judicial and arbitral proceedings, despite the considerable freedom of action enjoyed by these organisations (except in those legal systems that regulate this matter by way of legislation, as in France).

For example, if, under Article 6, paragraph 1, of the Convention, defendants have the right to a hearing within a reasonable time, this requirement should also apply to sports organisations' disciplinary bodies. This is both in the interests of the defendants, who should be able to have their fate promptly decided, and in the interests of the federations themselves, who must show their members and the public that they are capable of dealing with these cases without undue delay. As in ordinary law, what constitutes a reasonable time has to be assessed in each specific case, according to its nature and difficulty. It is important to weigh up interests that may be conflicting, such as a federation's interest in speedy settlement of the dispute and that of the defendant in having the necessary time to prepare a defence. In complex cases where the burden of proof lies with the defence, such as doping cases, the athlete in question may have to produce evidence – witness statements, expert reports, and so on – that takes time to obtain, and there should be no question of setting excessively short time limits for the sole purpose of expediting the proceedings. Conversely, the disciplinary body must ensure, for example where an athlete is not provisionally suspended, that the proceedings are not prolonged indefinitely through unreasonable time limits.

Informing the defendant of the specific charges against him or her is a key requirement in criminal proceedings, and a prerequisite if the defendant is to be able to mount an effective defence. The same is true in disciplinary proceedings: the defendant must be informed of the charges levelled in time for him or her to be able to organise a defence and, for example, submit evidence refuting the charges. In practice, disciplinary bodies can meet this requirement by specifying the charges in a notice announcing the opening of an investigation, in a final investigation report submitted to the parties, or in a summons to appear before the body with jurisdiction over the case (for an example of a practice showing great respect for the rights of the defendant, see Article 4.5, ICC 2014). If the charges are clear from the case file, its timely disclosure may be sufficient. For example, it is probably unnecessary to issue a special notice to a handball player who is accused of striking an opponent in the course of play if this fact is mentioned in a report by the match referee that is brought to the player's attention prior to the hearing. On the other hand, some form of special notice setting out the charges should be the norm in complex corruption cases involving a certain number of people.

Sports procedures also have a number of distinctive features, some examples of which are given below.

2.4.2.2. Public nature of proceedings

As a rule, disciplinary proceedings are not public. This is because these are proceedings internal to the sports organisation in question, which, by definition, are private. In principle, therefore, the parties to disciplinary proceedings are not entitled to a public hearing, despite Article 6 of the Convention (one exception to this is Article 4 of the standard disciplinary regulations imposed on state-approved sports federations in France, under which disciplinary hearings must in principle be public, in Annex I-6, Government of France 2016). Moreover, confidentiality of disciplinary proceedings vis-à-vis third parties is the rule in most sports organisations.

In this connection, it should also be observed that athletes and, perhaps to a lesser extent, clubs involved in disciplinary proceedings rarely want their dirty linen to be washed in public and usually prefer their cases to be settled relatively discreetly.

2.4.2.3. Equal treatment of parties and adversarial procedure

When the rules of an association make no provision for any prosecuting authority (a "sports prosecutor"), the accused athlete or club is in principle the only party to disciplinary proceedings. In this context, there can therefore be no question of equal treatment of the parties. However, where a sports prosecutor exists, the right to procedural equality takes on full significance, and there should be appropriate procedural provisions to ensure equal treatment.

In practical terms, equal treatment of the parties to proceedings is assessed in relation to certain criteria, such as:

- access to the entire case file;
- possibility of being assisted or represented during the proceedings;
- possibility of presenting one's factual and legal arguments on the subject-matter of the proceedings;
- number of exchanges of submissions and time limits for filing those submissions;
- possibility of citing relevant evidence (such as witness statements and expert opinions);
- possibility of attending hearings, if any;
- allocation of speaking time at hearings.

Consequently, there can be no question, for example, of a disciplinary body disclosing certain case file items to one party only, conferring with one party without the other being present, allowing one party to file more submissions than the other, or restricting speaking time at the hearing in an unequal manner.

2.4.2.4. Presumption of innocence, in general

In criminal proceedings, the presumption of innocence as defined in Article 6, paragraph 2, of the Convention postulates, in substance, that any person charged with an offence is presumed innocent until proved guilty. It implies, among other things, that it is not for the accused to prove his innocence, but rather for the prosecution to prove his

guilt (burden of proof) and that guilt cannot be established unless it is proved beyond all reasonable doubt (standard of proof that gives the benefit of doubt to the accused, namely the principle of *in dubio pro reo*).

The situation is different in disciplinary proceedings, where the presumption of innocence does not apply. That does not mean that a sanction can be imposed in a random way. But disciplinary procedure may provide that that the onus for proving certain facts lies with the defendant (burden of proof) and a finding of guilt may be made even if some doubt remains (standard of proof).

2.4.2.5. Assistance of a lawyer or other representative

The parties to disciplinary proceedings must have the option of being assisted or represented by a person of their choice.

It would seem that, in some sports, assistance and representation are not permitted in disciplinary proceedings. However, in the current context of sport and related litigation, it cannot be seriously argued that a ban on athletes receiving assistance in disciplinary proceedings is an acceptable practice, especially as disciplinary bodies themselves are tending to become increasingly professional. In any event, if the charges are of some degree of seriousness, such a ban precludes fair proceedings (Lewis and Taylor 2014: 398; Beloff et al. 2012: 225 ff.).

Federations could require representatives to have legal training so proceedings run smoothly, but the norm is to refrain from setting any such conditions. The advantage of this is that defendants can genuinely be assisted by the person of their choice (see Article R30, CAS 2016; Rule 46, ASF 2015). The general rule is that parties themselves must bear the cost of representation (for example section 7.3, ASOIF 2012; Article 40, FIFA 2012; Article 145, Book 1, FIBA 2010). It would seem that no exception is made to this rule in proceedings before disciplinary bodies.

One might wonder whether sports organisations should not in fact introduce a system similar to that adopted recently by CAS, which instituted a form of free legal aid (CAS 2013). Here, legal aid may be granted to any natural person who cannot cover the cost of his or her defence. It is subject to the condition that the case is not devoid, from the outset,

of any chance of success. When the conditions are satisfied, the president appoints a counsel acting *pro bono*, that is without charging the client any fees, who is chosen from a list established by CAS. Legal aid may also take the form of an exemption from having to pay an advance on costs and/or a lump sum granted to the applicant by CAS to cover costs (such as travel and accommodation costs of the beneficiary and those of his or her witnesses and experts, as well as those of the *pro bono* counsel).

2.4.2.6. Assistance of an interpreter

In criminal proceedings, an accused party who does not speak the language in which the proceedings are conducted is entitled to the assistance of an interpreter (Article 6, paragraph 3, ETS No. 5). The Court infers from this that interpreters' fees cannot be charged to the accused and must therefore be borne by the public authority concerned.

While the right to the assistance of an interpreter is recognised in disciplinary proceedings (see section 7.3, ASOIF 2012), it is generally not accepted that this service should be free of charge. Generally, the defendant has to choose an interpreter and pay the fees incurred, although some federations leave it to the disciplinary body to decide who should bear these costs (see Article 8, IWF 2015). The same applies to any costs involved in translating documents in the case file that the defendant does not necessarily understand, particularly in proceedings before international federations.

This state of affairs puts defendants in a potentially difficult situation when they lack sufficient resources. Disciplinary case files can be voluminous and complex and hearings can last several days (in corruption and doping cases, for example). Interpretation costs can therefore represent significant sums.

2.4.2.7. Hearing

The parties' right to a hearing before a tribunal is in principle absolute, in both criminal and civil proceedings (Article 6, paragraph 1, ETS No. 5). However, an accused party may validly waive this right, notably in proceedings for a sentence order (*ordonnance de condamnation*).

Sports federations' disciplinary procedures generally provide for the possibility of a hearing, at least before an appeals body when the system provides for one. Some have introduced a procedure similar to the *ordonnance de condamnation* (see Article 13 and those that follow, ASF 2015). Often, first-instance disciplinary proceedings are conducted exclusively in writing and defendants can only state their case in writing (see Article 162, Book 1, FIBA; Article 34, paragraph 2, UEFA 2014; Article 94, FIFA 2011; Article 5.1, ICC 2014, which provides for an exchange of briefs between the ICC as prosecuting party and the defendant), whereas some federations provide for a hearing in the event of an appeal (see Articles 4.7 and 5.1, ICC 2014; Article 162, Book 1, FIBA 2010). ASOIF's Model Rules propose restricting the right to a hearing to cases where the facts and/or proposed sanctions are disputed (Article 7.1, ASOIF 2012). It should be noted that the standard disciplinary regulations in French law require the holding of a hearing, which, furthermore, must be public unless public policy or privacy considerations require otherwise (Article 4, Annex I-6, Government of France 2016).

2.4.2.8. Burden of proof

The onus for proving that an offence has been committed rests in principle with the disciplinary body – or the federation concerned, if the disciplinary proceedings are considered to be between the federation and the defendant – and not with the defendant (Lewis and Taylor 2014: 397). There are two possible models, depending on how the sports federation is organised. In the first, there is a prosecuting authority, which may or may not be responsible for the investigation, and the burden of proof is on that authority (for example the ACSU General Manager, Article 3.1, ICC 2014; the UEFA disciplinary inspector, Article 25, UEFA 2014; the Professional Tennis Integrity Officer, Article 3, TIU 2009). In the second model, in the absence of a prosecuting authority, the burden of proof is on the decision-making authority itself (for example, Article 52, FIFA 2012; Article 99, FIFA 2011).

In some situations, however, the rules of procedure may state that if certain facts are proved, an offence is found to have been committed unless the defence provides evidence to the contrary (Lewis and Taylor 2014: 397). For example, the anti-doping system is based on testing of biological samples and a (rebuttable) presumption of guilt when the test produces a positive result (Article 2.2.1, WADA 2015). It is for the federation to prove the positive test result and to show that it was obtained by a procedure of sample taking and analysis consistent with the rules in force. If this proof is provided,

the athlete can only exonerate himself or herself by proving certain facts, such as how the prohibited substance got into his or her body and the absence of any fault, that is negligence or intent, on his or her part. As far as the principle is concerned, there is no objection to disciplinary rules establishing presumptions (Beloff et al. 2012: 212-13). But reliance on presumptions must be proportional to the aim pursued and should not violate the principle of a fair trial. For example, a federation may provide for a presumption of accuracy of the facts established, in final decisions that are not appealable, by a state court, an arbitration tribunal, a disciplinary body or any other competent state or sports tribunal. A case in point is the ICC. This federation's Anti-Corruption Code specifies that its anti-corruption tribunal may – but is not obliged to – accept such facts as established and that, if it does so, the presumption is then irrebuttable. The defendant may, however, attempt to prove that the procedure that led to the decision in question violated the principles of a fair trial (Article 3.2.1, ICC 2014). In football, there are also several rules stipulating an irrebuttable presumption of accuracy of the reports produced by match officials, particularly referees and match commissioners (Article 38, UEFA 2014; Article 98, FIFA 2011).

Independently of any presumption, defendants may be required to prove the facts they allege in disciplinary proceedings. If, for example, an athlete is accused of having been approached by a third party to rig a result and not having reported this fact and the athlete claims that he or she did in fact notify a federation official, it is for the athlete to prove that he or she did so. In the same situation, if the athlete claims that he or she only spoke with the alleged briber because he or she was a childhood friend, it is for the athlete to prove these pre-existing ties.

2.4.2.9. Standard of proof

In criminal law, according to the rule *in dubio pro reo*, the standard of proof applied by the courts is that the facts must be proved beyond reasonable doubt. This means, in other words, that no conviction may be handed down if there is any remaining doubt as to the defendant's guilt that cannot be reasonably dispelled.[15]

15. For a definition of this concept as applied in English law, see the ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraph 27, citing Denning J. in *Miller v. Minister of Pensions*, 1947 2 All ER 372 at 373 H.

Application of the principle *in dubio pro reo* is not an obligation in disciplinary proceedings. In their rules of procedure, sports federations can therefore provide for their disciplinary bodies to make do with a lower standard of proof.

Some federations adopt the standard applied in civil proceedings in some legal systems, mainly in the English-speaking world, namely that of the "balance of probabilities", also known as the "preponderance of the evidence", the two terms being synonymous. What is applied here is the "more likely than not" test (Beloff et al. 2012: 214), meaning that a fact is considered sufficiently proved when, in the light of the evidence, that hypothesis appears more likely than any other. A 51% probability of guilt may therefore suffice to impose a sanction. This system is adopted in tennis, for example, in corruption cases (Article 3.a, TIU 2009).

CAS has developed another standard of proof, namely that of "comfortable satisfaction".[16] This standard lies between the standard of proof beyond reasonable doubt and the preponderance of the evidence in that it is necessary, but also sufficient, for the evidence provided to be such that the decision-making body can be comfortably satisfied that the facts are proved, a complete absence of doubt being unnecessary. The standard varies according to the gravity of the offence: the more serious the offence and the more severe the proposed sanction, the more substantial the body of evidence must be to meet with the satisfaction of the body responsible for resolving the dispute (Beloff et al. 2012: 215; Lewis and Taylor 2014: 397). The comfortable satisfaction standard has been adopted in cricket, for example, for offences against anti-corruption regulations (Article 3.1, ICC 2014).

It is legitimate for sports organisations not to make the imposition of sanctions conditional on the facts being proved beyond all reasonable doubt. Of course, there is a risk, and even some likelihood, that innocent people will be punished. But this kind of injustice must be accepted in the higher interest of integrity in sport. As CAS has stated:

> The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or by negligence of unaccountable persons, which the law cannot repair ... [i]t appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors.[17]

16. See, *inter alia* CAS 98/208, *Wang v. FINA*, 22 December 1990; CAS 98/211, *B. v. FINA*, 7 June 1999, No. 10.2; CAS 2011/A/2625, *Mohamed Bin Hammam v. FIFA*, 19 July 2012.
17. CAS 94/129, *USA Shooting & Q. v. UIT*, 23 May 1995.

In the field of doping, for example, this means that it is perhaps unfair to punish an athlete who may have unintentionally absorbed doping substances, but it would be even more unfair if other athletes were to suffer a disadvantage in terms of their ranking because one of their fellow competitors was probably doped.

Lastly, it should be noted that, to accept facts as proved, it is unnecessary to have direct evidence. Circumstantial evidence may suffice, in other words a combination of circumstances that, taken separately, would not be sufficient, but that, taken together, may create a strong suspicion of guilt.[18] CAS has held that circumstantial evidence may be sufficient to prove that samples were tampered with in a doping context.[19]

2.4.2.10. Evidence and evidence taking, in general

In evidentiary matters, sports disciplinary bodies are not bound by such strict rules as those with which state judicial authorities have to comply. They can confine themselves to applying the organisation's internal rules, in principle without having to refer to the formal rules of evidence applied by the courts, but nevertheless while observing the general principles of a fair trial (Beloff et al. 2012: 190).

As a result, the judicial rules on the admissibility of evidence do not apply for the purpose of establishing the facts in disciplinary proceedings. For example, courts in the English-speaking world reject hearsay evidence, but this exclusion does not apply in disciplinary proceedings. Furthermore, even unlawfully obtained evidence may sometimes be used (see below, 2.4.2.17). Another difference is that there are no restrictions on the types of evidence that can be used in disciplinary proceedings and the facts can be established by any appropriate means. In theory, therefore, the only exceptions are methods that are unsuitable for establishing the truth because they are random, unscientific or inappropriate for other reasons (ordeals, divination, etc.; the issue of lie detectors is discussed below, 2.4.2.16) and

18. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif & Mohammad Amir*, Doha, January 2010, paragraph 30, citing Pollock C. B. in *R v. Exall* 1866 4 F F 922.
19. CAS 98/211, *B v. FINA*, 7 June 1999, paragraph 56.

methods that violate human dignity (torture, truth serums, etc.). Subject to these exceptions and any provisions to the contrary contained in sports organisations' internal regulations, all types of evidence are therefore admissible. Consequently, the question facing disciplinary bodies is not that of the admissibility of evidence, since blanket admissibility is the rule, but rather that of its probative value.[20]

Nevertheless, regulations may set limits on the bringing of evidence. For example, they may stipulate that certain types of evidence cannot be used or can only be used in a limited fashion. Usually, however, they recognise that all types of evidence may be brought (see Article 3.1, ICC 2014; Article X, section G.3.c, TIU 2009; Article 46, FIFA 2012; Article 96.1, FIFA 2011, followed by a list of examples; Article 37, UEFA 2014; Rule 17, Section 2, Article 3, NFL 2015).

2.4.2.11. Right of the parties to bring evidence

The evidence-related rights of persons charged with a criminal offence are enshrined in Article 6, paragraph 3.d, of the Convention, which provides that they have the right to "examine or have examined witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]" (ETS No. 5).

In disciplinary proceedings, too, the parties have the right to adduce evidence, particularly in the form of witnesses and documents (for example Articles 162 and 168, Book 1, FIBA 2010; Article 94, FIFA 2011; Article 7.3, ASOIF 2012; Article 39.1, FIFA 2012).

This right is not absolute, however, because the disciplinary body – like a judge in criminal proceedings – can refuse to admit evidence it deems irrelevant, in order to limit the proceedings to what is necessary to resolve the dispute. For example, the disciplinary body may consider that it is unnecessary to hear a witness because the facts on which the witness was to be questioned are already sufficiently well established, because the witness is manifestly lacking

20. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif & Mohammad Amir*, Doha, January 2010, paragraph 29.

in credibility, or because several other witnesses proposed by the same party are to be heard on the same subject. Nevertheless, some degree of restraint should be observed in this regard: on the one hand, a piece of evidence that may at first sight not appear strictly relevant may turn out to be useful in the end, and on the other, the person proceeded against should be able to defend himself by his or her chosen means, as long as he or she does not abuse his or her rights.

Furthermore, it is not inconsistent with a fair trial to make the right of evidence subject to formal requirements, especially as regards the time limits within which evidence must be submitted in order to be admissible. *Mutatis mutandis*, the TFS has held that in arbitration proceedings, anyone wishing to call witnesses must exercise this right within the time limits and in the form prescribed by the applicable rules of procedure, failing which the arbitration tribunal may reject the evidence.[21]

Some disciplinary regulations require the parties themselves to bear the costs relating to their witnesses (for example Article 145, Book 1, FIBA 2010). In practice, these rules restrict the possibility for defendants to have exonerating facts admitted into evidence as some might not have sufficient resources to finance travel and accommodation for their witnesses and experts to attend a hearing held in a distant place, as is often the case with proceedings conducted by international federations' disciplinary bodies. The only means of remedying this situation would be, as CAS has done, to allow the body responsible to grant legal aid to parties needing it (see above, 2.4.2.5).

2.4.2.12. Examination of the parties – Obligation to co-operate

In criminal proceedings, persons charged with an offence have the right not to incriminate themselves, in particular the right to refuse to answer questions, without this refusal being interpreted to their detriment.

21. TFS, 20 July 2011, Milutinovic, ATF 4A_162/2011.

This right does not exist in disciplinary proceedings, where defendants are in principle obliged to co-operate with the investigation and provide any information the disciplinary body may require from them. As the sports federations see it, this obligation is justified by the importance of their being able to prosecute and punish offenders, particularly in corruption cases (see, *inter alia* Article 1.1.4, ICC 2014). It stems from practical imperatives, given that defendants often possess valuable information. For example, an athlete has sole access to his bank statements, detailed telephone bills and e-mail correspondence, while a club necessarily possesses information about the contracts signed with its employees and their lifestyle (type of vehicle owned, social life, addictions of various kinds such as gambling, alcohol, etc.). If sports organisations do not have rules requiring defendants to co-operate, their disciplinary bodies cannot have access to information that may prove essential. The obligation to co-operate is also justified sometimes by the fact that sports organisations do not have coercive investigation methods at their disposal, such as searches of premises or telephone tapping, which means that a minimum of co-operation is needed from the persons concerned if the facts are to be established. The persons subject to this obligation will not necessarily be enthusiastic about the idea of revealing confidential information concerning themselves, because this information may lead disciplinary bodies to draw conclusions that might be unfavourable to them (for example proof of numerous telephone contacts with a person suspected of rigging competitions) or because it will provide ammunition for proceedings already instituted against them.

So, unlike criminal procedure, disciplinary procedure does not recognise the defendant's right to remain silent and refuse to provide evidence against him or herself (right not to incriminate oneself). Disciplinary rules may accordingly impose an obligation to co-operate on persons subject to the organisation's jurisdiction and even make it a disciplinary offence to refuse to co-operate or to be insufficiently co-operative.

Various organisations actually provide for this type of obligation in their regulations, in the form of a fairly general clause stipulating, for example, that players must fully co-operate with the federation in its fight against corruption (for example Article 12, paragraph 1, UEFA 2014; Article 41, paragraph 2, FIFA 2012; Article 110, paragraph 1, FIFA 2011), or making it a disciplinary offence not to make all reasonable efforts to co-operate with investigations (Section 3.2.11, Badminton World Federation, BWF 2015). Some federations have chosen to adopt more detailed and/or specific provisions, requiring persons charged with corruption offences to submit any information and documents they possess

that may be of relevance to the investigation (such as a written statement on the facts of the case, detailed phone bills, text messages, bank statements, Internet service records, computers, data storage and retrieval devices, documents relating to sources of income), for example in Article 2.4.4, ICC Anti-Corruption Code (2014).

If co-operation is withheld, the disciplinary body reaches its decision on the basis of the documents in its possession (for example if the parties fail to collaborate, the adjudicatory chamber of the FIFA Ethics Committee "may reach a decision on the case using the file in its possession, taking into account the conduct of the parties to the proceeding", Article 41, paragraph 5, FIFA 2012; Article 110, paragraph 4, FIFA 2011) and may, in its assessment of the evidence, draw adverse inferences from a person's refusal to co-operate (for example Article 3.2.2 ICC 2014; Article 39, paragraph 1 *in fine*, UEFA 2014). Failure to co-operate may in itself constitute a disciplinary offence or lead to the person's provisional exclusion from all competitions until he or she has provided the information requested (Article X, section F.2, TIU 2009).

The obligation to co-operate is no doubt necessary if effective action is to be taken against certain particularly serious offences, such as the manipulation of sports results. However, sports bodies must not use it as an excuse to make people provide information that is unrelated to the case or the facts in question or is totally out of proportion to the aim pursued and the importance of the case. Rules restricting the obligation to what is reasonable and necessary are therefore required and, in applying them, sports federations should observe a degree of restraint with regard to any confidential information that their rules allow them to demand from persons involved in disciplinary proceedings. Their rules should reflect a concern not to intrude excessively on the privacy of their members, but should be flexible enough to permit effective proceedings against them.

2.4.2.13. Hearing of witnesses

Witnesses are persons who are not parties to the proceedings and who, at first sight, are able to furnish useful information.

As in criminal proceedings, a person under disciplinary investigation has the right to have witnesses heard, subject to the relevance of their testimony and compliance with certain procedural rules. This applies both to witnesses against

the person, to whom he or she may wish to put questions, particularly in order to try to undermine their credibility, and to witnesses on his or her behalf, whom it is obviously in his or her interests to call to the witness stand.

Specific problems arise when statements by witnesses expose them to danger to themselves and/or those close to them, which leads disciplinary bodies and arbitration tribunals to hear them in such a way that their anonymity is preserved.

In criminal proceedings, the right to a hearing (Article 6, ETS No. 5) is considered to be affected when facts are established based on statements by anonymous witnesses. This right is not violated, however, if the statements are backed up by other evidence adduced before the court, that is if they are not the only incriminating evidence in the case in point. In principle, the Court recognises a party's right to rely on anonymous witness evidence and to prevent the opposing party from questioning its witnesses if that is justified by the safeguarding of legitimate interests, particularly when the personal safety of witnesses and those close to them is in danger. Nevertheless, the right to a hearing and to a fair trial must be protected as far as possible by other means, such as the use of audiovisual techniques to protect witnesses and detailed identity and background checks by the court to ascertain whether a witness is reliable.[22]

Similar principles may be applied *mutatis mutandis* in disciplinary proceedings. Hence, some federations have adopted procedural rules allowing for the possibility of anonymous witness evidence (for example Article 40, UEFA 2014; Articles 47 and 48, FIFA 2012). Others, currently the majority, have so far dispensed with this possibility.

The rules adopted by UEFA (for example Article 40, UEFA 2014) are based partly – but only partly – on the criteria developed by European case law for anonymous witness evidence in criminal proceedings:

- this form of evidence is reserved for cases where a person's testimony may endanger his or her life or put his or her family or close friends in physical danger;
- the chairman of the competent disciplinary body may order that the witness not be identified in the presence of the parties, that the witness not appear at the hearing and that all or some of the information that could be used to identify the witness be included only in a separate, confidential case file;

22. For a summing-up of the relevant case law, see TFS, ATF 133 I 33.

- in contrast to criminal procedure, the UEFA procedure allows a finding of guilt to be made solely on the basis of statements by an anonymous witness;
- in the light of all the circumstances, and in particular if no other evidence is available to corroborate that of the anonymous witness, and if it is technically possible, the chairman of the disciplinary body may exceptionally order that the witness's voice be distorted, that the witness's face be masked, that the witness be questioned outside the courtroom or that the witness be questioned in writing;
- anonymous witnesses are identified behind closed doors in the absence of the parties, and the witness identification is recorded in minutes containing the witness's personal details. These minutes are not communicated to the parties, who, however, receive a brief notice confirming that the anonymous witness has been formally identified but containing no details that could be used to identify this witness;
- the rules provide for sanctions against anyone who discloses the identity of an anonymous witness or any information that could be used to identify him or her.

2.4.2.14. Documents

Disciplinary bodies can obviously use documents as evidence. This may prove problematic, however, when the persons proceeded against are firmly requested, subject to sanctions or other restrictive measures, to file documents pertaining to their private sphere. For example, in the case of Salman Butt, Mohammad Asif and Mohammad Amir, Pakistani cricketers accused of "spot fixing", the disciplinary bodies of the ICC demanded that they file records of their phone calls in the form of detailed bills. These played a major part in the assessment of the evidence and served as the basis for the imposition of sanctions because they were used to prove that the accused had contacted each other and their agent by phone and by text message at particular times, and to establish a link between those contacts and secretly recorded meetings between a journalist and the agent, in the course of which the agent had guaranteed, in return for

payment, that his players would fix aspects of a forthcoming match at particular times, which they subsequently did.[23] Records of the same type also played a major part in the outcome of the Danish Kaneria case.[24]

In the above example, the federation in question was able to demand the production of these documents because the rules governing the ICC's disciplinary proceedings stipulate that persons involved in corruption cases are obliged to provide the competent bodies, at their discretion, with copies of or access to any records that may be relevant to the investigation, such as current or past telephone records, bank statements or Internet service records (Article 4.3, ICC 2014). Except in certain specific circumstances, the ICC bodies must then ensure that this information remains confidential. Without an express provision in their rules or, failing that, in any contract the person might have signed with the federation, it would appear that sports organisations' disciplinary bodies cannot require participants in their competitions to produce documents that pertain so clearly to their private sphere.

2.4.2.15. Expert opinion

In some circumstances, disciplinary bodies may call on experts to help establish facts requiring scientific knowledge in a particular area.

However, such evidence is only credible, and hence admissible, if the expert enjoys sufficient independence; gives an objective and impartial opinion based on facts and deductions while also taking account of any contrary facts; clearly defines his or her area of expertise; and is ready to inform the disciplinary body or arbitration tribunal of any new facts that might lead him or her to revise his opinion (Beloff et al. 2012: 192, 212).

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23. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif & Mohammad Amir*, Doha, January 2010, paras. 48, 51, 53, 56, 59, 120.
24. Appeal Panel of the Cricket Disciplinary Commission of the England and Wales Cricket Board, decision of May 2013.

For example, in the aforementioned Butt, Asif and Amir case, a statistician with a good knowledge of cricket was asked to give an opinion on the probability of three no balls being bowled by chance at three particular times in the same match. He estimated the odds at 1.5 million to 1 against, which confirmed the disciplinary body in its belief that the events that had occurred during the match at issue were not a "fluke" but a "fix".[25]

A more questionable instance of reliance on expert opinion occurred when an expert was asked to determine on the basis of recorded images whether or not a goalkeeper had deliberately let in goals. The expert entrusted with this task was a sports commentator who had once played in goal for Arsenal (Beloff et al. 2012: 211). As the members of disciplinary bodies should normally be people with a good knowledge of the sport in question, it is debatable whether this type of expert opinion can really be accepted as incriminating evidence, if indeed it is actually possible for anyone to tell the difference between a deliberate error and an error due, for example, to miscalculation of the ball's trajectory or a lack of fitness. Consequently, there are limits to reliance on expert opinion, which have to do with the scientific merit of the methods employed, the pertinence of any findings based on them and also the credibility of the experts themselves.

2.4.2.16. Lie detectors

A lie detector is a device that is connected to a person in order to measure and record several physiological parameters, such as blood pressure, pulse rate, breathing and skin conductance, all while the person is asked a series of questions. The system is based on the belief that untruthful replies will produce physiological responses that can be distinguished from those associated with truthful answers (Odell 2013).

The use of lie detectors is fairly common in criminal proceedings in some states of the USA, although it should be noted that they should not usurp the role of the jury in deciding the truth (Gibbs 2013). In the United Kingdom, lie detector tests are not admissible as evidence in the courts, but their use for certain criminals subject to licence conditions has

25. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif & Mohammad Amir*, Doha, January 2010, paragraph 40.

been legalised and sex offenders can now be assessed for release based in part on such investigations (ibid.). In Australia, a judge of the New South Wales District Court rejected lie detector evidence in a 1982 case,[26] *inter alia* on the grounds that the method had no accepted and proven scientific basis, combined with the fact that it was for the jury to assess the credibility of the accused and to weigh up the evidence (Odell 2013). On the other hand, lie detectors appear to be used fairly commonly by the police in India (ibid.), though use of this type of method is not permitted in the Swiss courts (see in particular an award of CAS in the Jessica Foschi case).[27]

A former captain of the Australian cricket team recently suggested that lie detectors should be used in disciplinary proceedings as part of the fight against corruption. He himself took a test, which apparently demonstrated convincingly that he had never participated in match fixing. His initiative met with some degree of scepticism, however (Gibbs 2013). The president of a Bulgarian football club reportedly made his players take a lie detector test after a match had been lost in what he considered to be suspicious circumstances (Bailey 2012). The world cricket authorities do not rule out this method altogether, but they consider that a wide-ranging debate should take place before its use is envisaged (Gibbs 2013).

Is it possible, then, to contemplate the use of lie detectors in disciplinary proceedings? The first problem is that opinions differ on the reliability of the results of these tests, which ranges from 60% to 95% depending on the source (ibid.). In one case that came before CAS, an expert who was heard claimed a reliability of 95%.[28] It can be objected, however, that this expert was himself involved in this type of testing and could therefore hardly describe it as unreliable.

Another problem is that it is apparently possible to fool the lie detector through countermeasures such as hypnosis, drug use or other methods (ibid.). Detective and spy novels abound with examples of criminals and spies being

26. Raymond George Murray 1982 7A Crim R48.
27. CAS 96/156, *Foschi v. FINA*, 6 October 1997, paragraph 14.1.1; see also CAS 99/A/246, *W. v. FEI*, 11 May 2000, paragraphs 5 to 9, with the references cited.
28. CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC*, 6 February 2012.

trained successfully to pass this type of test. The fact that Lance Armstrong offered in 2012 to take a lie detector test to prove that he was "clean" shows, moreover, that he seriously expected to be able to take the test without suffering any adverse consequences, whereas it has now been established – on his own admission – that he used doping agents on a large scale.

Until recently, CAS refused to admit evidence based on a lie detector test, referring to the applicable Swiss procedural law. It said that it would take account of statements made by a person during a test of this kind, but without according them a different probative force from that of statements made in other circumstances.[29] Subsequently, in a doping case, CAS admitted such evidence, but not as decisive proof that the athlete's statements during the test had been truthful, in the absence of any indication to the contrary detected by the device. It held that the results of the lie detector test gave some additional force to the defendant's statements during the proceedings, but not sufficiently to outweigh other pieces of evidence. The rationale for its decision not to reject the evidence was the fact that the World Anti-Doping Code provides, in Article 3.2, that facts relating to violations of anti-doping rules may be established by all appropriate means.[30] However that may be, it would be inconceivable, for purely practical reasons, to use this type of test if the person concerned does not consent to it.

2.4.2.17. Unlawful evidence

In criminal proceedings, the use of unlawfully obtained evidence is in principle prohibited. However, it is permitted under the law of some countries subject to compliance with some fairly strict conditions (see Articles 140 and 141 of the Swiss Criminal Code, which totally prohibits the use of evidence obtained through threats, deception or the use of force, but allows the use of evidence obtained by the authorities in an unlawful manner or in violation of the rules of

29. CAS 2008/A/1515, *WADA v. Swiss Olympic & Daubney*, 2 October 2008, paragraph 119, drawing on the case law in CAS 99/A/246, *W. v. FEI*, 11 May 2000, paragraph 4.5, and CAS 96/156, *Foschi v. FINA*, 6 October 1997, paragraph 14.1.1.

30. CAS 2011/A/2384, Alberto Contador Velasco & RFEC, 6 February 2012.

validity if the use of such evidence is essential to investigate serious offences; Swiss law also allows without restriction the use of evidence obtained in violation of regulatory provisions).

The question of the use of such evidence arises regularly in disciplinary proceedings, for example in the case of unauthorised and secret audio and video recordings or stolen documents. For example, the ICC Anti-Corruption Tribunal admitted as incriminating evidence the secret recording of conversations that a journalist had had with a person close to several Pakistani cricketers. The tribunal noted that the parties did not dispute the authenticity of these recordings and that the legal defence of a fundamentally unfair entrapment was not raised. It made extensive use of the transcripts to find the players guilty.[31] The defence of unlawfulness was apparently not raised in the proceedings before CAS concerning two of the players on whom the ICC imposed sanctions.[32]

On the other hand, CAS had to give the question very careful consideration in a case concerning a high-ranking FIFA official on whom this federation had imposed sanctions for corruption on the basis of secret recordings made by *The Sunday Times* journalists posing as lobbyists purporting to support a bid to host the FIFA World Cup.[33] CAS considered that the evidence was probably illegal under Swiss law, but reiterated the well-established principle of arbitration law – that an international arbitration tribunal is not bound by the rules of evidence applicable before the civil or criminal state courts, in view of the arbitrator's discretionary power to admit evidence, which is limited only by the public policy of the state in which the tribunal has its seat. CAS also noted that the FIFA Disciplinary Code only excluded evidence that violated human dignity (Article 96), which was not the case with a secret recording. CAS then weighed the interests at stake, in particular the right to protection of privacy and freedom of expression of the media. It noted that FIFA itself, as a party to the proceedings, had not committed any unlawful act in relation to the secret recordings, given that the recordings had been made by third parties unconnected with it. CAS took account of the fact that many details contained in the

31. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif & Mohammad Amir*, Doha, January 2010, paras. 37-8, 19, 80-1.
32. CAS 2011/A/2364, *Salman Butt v. ICC*, 17 April 2013; CAS 2011/A/2362, *Mohammad Asif v. ICC*, 17 April 2013.
33. CAS 2011/A/2426, *Amos Adamu v. FIFA*, 24 February 2012.

recordings were already in the public domain, because excerpts from the conversations had been published in *The Sunday Times* and on the Internet, and held that the interest of FIFA and the public in general in ensuring that proper procedures are followed for awarding the right to host competitions outweighed the interest of the official in question in preserving the confidentiality of his conversations. CAS concluded that the use of recordings – even if unlawfully obtained – in a disciplinary context was not incompatible with the values recognised in a state governed by the rule of law and did not violate Swiss procedural public policy, having regard also to the nature of the conduct in question and its seriousness; the ethical need to discover the truth and punish any wrongdoing; the accountability linked to the holding of an elite position; and the general consensus among sporting and governmental institutions that corruption is a serious threat that strikes at the heart of sport's credibility and must be fought with the utmost earnestness.

It can be seen from the foregoing that the use of unlawfully obtained evidence may be accepted in disciplinary proceedings, but that a weighing of interests must be performed to determine in each specific case whether the evidence is admissible, depending on the particular circumstances.

2.4.2.18. Reasoned decision

The right to a reasoned decision is one of the fundamental rights enjoyed by anyone charged with a criminal offence.[34] There may, however, be legal provisions allowing an accused to waive this right and make do with the operative part of the decision. In Switzerland, for example, the procedure for a sentence order generally does not require reasons to be given and, in some circumstances, the parties to criminal proceedings may waive receipt of the reasons after notification of the operative part of the judgment, either expressly or tacitly, simply by not asking for them.

Under disciplinary procedure, the defendant generally has the right to receive a reasoned decision (for example Article 39, paragraph 1, FIFA 2012; Article 94, FIFA 2011), but, to simplify matters, some federations allow the parties

34. *Gomez Cespon v. Switzerland*, 5 October 2010, No. 45343/08.

to waive this right and make do with the operative part, at least in straightforward cases. The rule in such cases is that a decision not giving reasons is notified to the parties, who then have a short period in which to ask for the reasons, failing which they are deemed to have waived receipt (for example Article 52, paragraph 1, UEFA 2014, which also makes the requesting of a decision with grounds a precondition for lodging an appeal; FIFA applies the same system, see Article 78, FIFA 2012 and Article 116, FIFA 2011).

It seems unnecessary to give reasons for disciplinary decisions in all cases: when the parties themselves do not wish to know the reasons, an obligation to give reasons would entail unnecessary work for the bodies concerned.

3. Arbitration

Sports organisations have always displayed a degree of distrust towards traditional courts, preferring to settle their disputes internally.

At national level, the handling of sports litigation both by sports bodies and by the state justice system revealed its limits at an early stage. In the case of sports disciplinary proceedings, the problems included the excessive number of internal remedies; the imposition, sometimes, of sanctions not provided for in the regulations; the lack of independence of the members of bodies responsible for judging breaches of rules often made by those very persons; and the use of fairly vague concepts more closely associated with morality or ethics than with law. As a result, state courts were increasingly called upon. However, other disadvantages subsequently emerged: a fairly poor knowledge of the specific features of sport; the failure of the sports world to accept, or indeed apply, the decisions taken by state courts; territorial limits placed on the domestic jurisdiction of state courts; decisions sometimes quite far removed from the practical realities of the sports world; the slow pace and cost of proceedings, and so on.

These limits to the handling of sports litigation by sports bodies and state courts led to consideration being given to alternative ways of settling disputes, including, for example, mediation, conciliation, compromise and arbitration. When applied to sport (as with politics, the stock market and tax issues), arbitration has certain specific characteristics: among other things, it is usually "forced". CAS is central to this system.

3.1. Arbitration: an alternative method of dispute settlement

> For lawyers, arbitration denotes the institution whereby a third party settles a dispute between two or more parties by exercising the judicial function assigned to him by the parties. This form of justice does not call on a state-appointed judge, but leaves it to the parties themselves to choose a third party who will act as judge and whose decision they accept in advance. The defining characteristics of arbitration are therefore as follows: a dispute between two or more parties, a choice on their part to entrust its settlement to a third party (thus, arbitration is voluntary in origin) and the judicial nature of the arbitrator's power in that he settles the dispute as a judge would do (Alland and Rials 2003: 76).

This "private justice" has many advantages: the possibility of choosing one's judge or tribunal, thus guaranteeing a certain level of competence that usually facilitates acceptance of the decision; speed of proceedings; confidentiality; the possibility of departing to some extent from legal rules to allow for the specific features of the matter submitted to arbitration; and lastly, where international arbitration is concerned, the possibility of avoiding conflicts of state jurisdiction and conflicts of laws (thus ensuring that the same rules are applied to all the participants in an international competition, whatever their nationality and wherever the competition takes place).

Although there are some differences between them, domestic arbitration and international arbitration are governed by common general rules derived from the common law of arbitration.

For arbitration to take place, a dispute must be arbitrable,[35] thus ruling out certain disputes for which state courts have mandatory jurisdiction. Arbitration also presupposes a prior agreement between the parties to have recourse to it. In other words, it presupposes the common consent of the parties, which has been freely given, to entrust a third party with settlement of the dispute. This, it must be stressed, is not the case in sport, where, in the very great majority of cases, arbitration is "forced". Referral of the dispute to an arbitration tribunal will be based on an arbitration agreement concluded

35. Before considering the arbitrability of a dispute, and given the central role of the arbitration agreement, one must first consider whether the parties have the capacity or power to submit to arbitration. Arbitrability may be defined as "the ability of a dispute to be resolved by arbitration" (Fouchard, Gaillard and Goldman 1996: 329).

by the parties in the form of an arbitration clause whereby they agree to submit future differences to arbitration. Recourse to arbitration may also occur after the dispute has arisen. The adjudicating tribunal must offer guarantees of impartiality and independence, on which the validity of the arbitration is dependent. Lastly, decisions are open to appeal.

3.1.1. Arbitrability of disputes

With regard more specifically to the matters that can be submitted to arbitration, national legislation defines the jurisdiction *ratione materiae* of arbitrators and the matters left to the exclusive jurisdiction of state courts. As a rule, only disputes over rights that can be freely disposed of by the relevant parties are arbitrable. The following are accordingly excluded from arbitration: all matters of public policy (for example status of persons, individual freedom, freedom of trade and industry, status of aliens), matters subject to mandatory jurisdiction (in some countries, labour law or competition law),[36] and matters relating to inalienable things. Because the arbitration agreement is a contract, it must have a lawful basis that is not contrary to public policy. Public policy laws deal with matters relating to social, political or economic organisation or to morality. However, it should be noted on the one hand that the agreement is not rendered null and void by the fact that the dispute concerns matters of public policy, but solely by the fact that public policy has been violated. On the other hand, it is possible to submit matters of public policy to arbitration when the arbitration agreement is concerned only with the parties' private interests. The arbitrator must check that he or she has jurisdiction and, if he or she considers the agreement contrary to public policy, decline jurisdiction. Also excluded from arbitration are matters that may not be subject to legal transactions. These are things that may not be the subject of an agreement or be sold, lent or acquired by prescription (this mainly refers to things of a sacred nature or things intimately and necessarily linked to the individual, such as the human body, the moral aspect of personality rights, tombs and graves; the same applies to attributes of sovereignty, such as the right to vote or political appointments, or dangerous substances and objects such as drugs and weapons). Lastly, national

36. For a very recent illustration, which has already given rise to much debate, see the decision by the Munich Court of Appeal on 15 January 2015 in the case of *Pechstein v. ISU*. The court held that the provisions of German anti-trust law were part of German public policy.

legislation confers mandatory jurisdiction in respect of some matters when third-party rights may be involved in the decision to be taken. In contrast, arbitrable disputes include civil and commercial disputes and, among the latter, disputes relating to a professional activity, potentially including, therefore, a professional activity in the sports sector.

3.1.2. Arbitration agreements

An arbitration agreement may first take the form of a clause whereby the parties to one or more contracts undertake to submit to arbitration any differences that might arise between them in connection with the contract(s). It may also take the form of an agreement whereby the parties to an existing dispute submit the dispute to arbitration by one or more persons.

Whatever type of clause is involved, arbitration agreements are governed by the same conditions as contracts in general: consent of the parties, capacity to be bound, lawful subject-matter and purpose. Consent must be in writing. A clause submitting future disputes to arbitration is accordingly in writing and may result from an exchange of documents between the parties or from a document referred to in the main agreement. It is therefore considered valid if the party against which it is sought to be enforced was aware of it and consented to it when the main agreement was concluded. A clause submitting existing disputes to arbitration may take several forms (written proceedings before the arbitrators, notarial act, private document, etc.). It should be noted, however, that, in international arbitration, arbitration agreements are not subject to any requirements as to form. Furthermore, on the question of the validity of consent, it happens quite often, especially in sport arbitration, that consent to arbitration is deemed implicit or indirect when membership of an entity that is itself a member of a larger entity entails acceptance of the regulations or statutes of the latter, which provide for disputes to be submitted to arbitration. Recognition of indirect consent to arbitration varies from one national jurisdiction to another.[37]

37. See, in the case of Belgium, Case RG A/05/03843, Commercial Court of Charleroi, 1st chamber, 15 May 2006, *SA Sporting du Pays de Charleroi & G-14 Groupement des clubs de football européens v. FIFA*. Where French law is concerned, see Conseil d'Etat, 31 May 1989, *Union sportive de Vandœuvre v. French Basketball Federation*, Application No. 9990. In the case of Germany, see the previously cited decision of the Munich Court of Appeal of 15 January 2015, *Pechstein v. ISU*.

3.1.3. Content of arbitration agreements

The content of arbitration agreements is also governed by precise rules (particularly as regards the subject-matter of disputes) and may in certain respects refer to regulations governing arbitration: the parties' freedom of action is circumscribed by the arbitration law of the state in which the arbitration tribunal has its seat.

Generally, while a clause submitting future disputes to arbitration may identify the arbitrators, it usually only specifies the procedure for appointing them. A clause submitting an existing dispute to arbitration must specify the subject-matter of the dispute and may also identify the arbitrators or specify the procedure for appointing them. In both cases, the powers and terms of reference of the arbitration tribunal are defined more or less broadly, as is the arbitration procedure. Depending on the country, arbitration bodies may have the power to order provisional or conservatory measures, if necessary with penalties for non-compliance. It should be pointed out at this stage that in sport, these interim measures are often the main reason why an athlete or club has recourse to arbitration (to obtain a speedy decision permitting access to a future competition). The applicable law must also be designated, and if not, it is for the arbitration tribunal to make the choice.[38] Of course, any provisions that are contrary to the rules of national law on arbitration are deemed null and void, such as those governing the composition of the arbitration tribunal or the basic procedural principles. Some provisions are specific to domestic arbitration and are unnecessary in international arbitration, while others may apply them in that context unless otherwise provided for by a treaty. It is therefore possible to identify three main categories of provisions in arbitration agreements: those relating to the appointment of the arbitrators and the functioning of the arbitration tribunal, those relating to the choice of applicable law and those relating to adjudication of the dispute.

An arbitration agreement produces two major effects: it means that the parties renounce the jurisdiction of the ordinary courts, subject to a right of appeal, and consequently, that these courts lack jurisdiction, and direct implementation

38. Article 187 of the Swiss Federal Act on Private International Law (LDIP) provides that "the tribunal shall decide the case in accordance with the legal rules chosen by the parties or, if no choice is made, in accordance with the legal rules with which the case is most closely linked". Swiss law holds pride of place in sports arbitration owing to the fact that most international sports federations have their headquarters in Switzerland and have accepted the jurisdiction of CAS, which is based in Lausanne and whose awards may be appealed to the TFS.

of the arbitral award is permitted. Furthermore, like any other contract, an arbitration agreement cannot be enforced against third parties that are alien to the agreement. Hence, a third party cannot be called to appear before an arbitration tribunal, nor a fortiori be issued with a summons to appear, except as a witness.

3.1.4. Arbitral award

Once it has performed its function, the arbitration body makes an award that must comply with certain rules, otherwise it will be invalid (mode of deliberation; rules on majorities; signatures and names of the arbitrators; name, forename, residence and main place of business of the parties; statement of their claims and arguments, etc.).

An arbitral award has all the characteristics of a judgment, the arbitrators having been entrusted by the parties with the task of settling a dispute by a decision that will be binding on them and enforceable. Once made, the award constitutes res judicata even before a decision is given authorising its enforcement. It therefore produces all the effects of a court judgment, except for enforceability, which it will not acquire until execution has been authorised. The award rendered terminates the jurisdiction of the arbitrators in respect of the dispute that it settles. It is then notified to or served on the parties. It then remains to execute the award. If the parties are in good faith and the award is not vitiated by any defect, execution should normally ensue on an amicable basis. That is a consequence of the partly contractual nature of the arbitration agreement. But if execution on an amicable basis proves impossible, it will then be necessary to seek forced execution of the award and, to that end, obtain an enforcement order from a state judge, thus giving it the enforceability it was lacking, whatever the powers conferred on the arbitrators.

3.1.5. Remedies against arbitral awards

Remedies are available against arbitral awards. An award may be overturned on appeal. Depending on the country and the period, arbitral awards are either open to appeal, except where the parties have waived this possibility in the arbitration agreement, or are not open to appeal, unless the parties have expressed a wish to the contrary (France

switched from the first to the second option after the enactment of Decree No. 2011-48 of 13 January 2011 reforming arbitration, Government of France 2011). In the latter case, the choice of arbitration is deemed to imply that the parties wish to forego the state courts. Another possible remedy is an application to set aside. This remedy is only available in a limited number of cases (complaints relating to the jurisdiction or composition of the arbitration tribunal, the poor performance of its task, violation of certain key procedural principles, a formal defect, etc.); an application to the Swiss Federal Tribunal against the awards of CAS is an application to set aside.

3.2. Arbitration in sport

Arbitration as applied to sport has a number of distinctive features. It has been described as:

> a dispute settlement method … [that] operates away from the usual canons of traditional arbitration. Thus, the contractual nature of arbitration is, in the field of sports, largely altered given the fact that recourse to arbitrators is in fact imposed by the statutes of the sport organisation or by the different regulations it enacts. Therefore, by adhering to an organisation, the member has no other choice but to accept arbitration as the exclusive method of resolving disputes. Similarly, the freedom that the parties have in the organisation of the procedure and in the choice of applicable law is completely neutralised, for the members of the organisation at least, since these issues are determined beforehand by the rules adopted unilaterally by sports organisations. Concerning the specificities of arbitration in sport, it should also be noted that in some cases that raise many questions, the removal of State control is such that any recourse to the ordinary courts – including any action for annulment before a judge in charge of ensuring that justice was done in accordance with the principles of public order – is excluded. Finally, while ordinary arbitral tribunals do not possess the *imperium* (powers of constraint) and must defer to state judges to adopt the coercive measures that are sometimes necessary for the proper enforcement of awards, most decisions rendered in the framework of sports arbitration benefit from a de facto enforceability which is available without the need to request the support of the public authorities (this is the case of sporting sanctions such as suspension or exclusion of athletes). (Sorbonne/ICSS 2014: Part 3, Title 2, 276-7).

Among the applicable provisions, an important position is held by Swiss arbitration law, governed – in the case of international arbitration, that is where one of the parties to a dispute has its registered office or domicile outside Switzerland – by the Federal Act on Private International Law (LDIP) of 18 December 1987. It is well known that, in

addition to the IOC, many international federations have their registered offices in Switzerland. Furthermore, the LDIP applies to arbitrations performed by CAS, again in the case of international disputes. With this in mind, we will now quickly review the main features of arbitration described above as they apply to sport.

To the extent that they are of a civil or commercial nature, arbitrable disputes may concern, for example, the right of sportspersons to their image, conflicts between sportspersons and their agents, sponsorship contracts with businesses, the purchase or provision of sports equipment, the acquisition or transfer of broadcasting rights, the exploitation of sports brands, and so on. More specifically, in the case of professional athletes, disputes between them and their employers, particularly those concerning disciplinary sanctions against them, are arbitrable. On the other hand, disputes under criminal law are not arbitrable, and neither are disputes deriving from decisions taken by the federations to which public authority powers are delegated, which are therefore administrative acts. This applies, for example (particularly in French law), to disciplinary sanctions taken by these federations. In some countries, the provisions of the labour code, or some of them, are matters of public policy, in particular those governing relations between employees and their employers; as a result, any disputes that may arise between a sportsperson's employee and his or her employer cannot be subject to arbitration, including, as is the case in France, where he or she is employed under an international employment contract. The situation is different, for example, in Swiss law, under which recourse may be had to CAS arbitration. This may be applied in employment-related disputes (see Article 177, LDIP 1987).

It is often the case in sport that the arbitration agreement is separate from the main contract, which is the source of the arbitrable dispute: the clauses submitting future disputes to arbitration are actually contained in the statutes or regulations of the international federations of which national federations are members, and are referred to in the statutes of the latter. As a result, disputes arising between a sportsperson under contract to a national federation or a club will, by a knock-on effect, be arbitrable as if he or she had subscribed directly to the statutes of the umbrella federation. However, this indirect consent is not universally recognised (see above, Conseil d'État 1991 and Commercial Court of Charleroi, footnote 10), and a German court even held that a declaration signed by an athlete before a competition

acknowledging the jurisdiction of CAS to settle disputes was devoid of legal effect because the athlete's participation in the competition was conditional on her signing the document in question; in the court's view, because the athlete had no real choice, other than to miss the competition and thus jeopardise her career, her agreement was not freely given. In other words, her consent was not sufficiently free to produce legal effects (see above the previously cited decision of the Munich Court of Appeal of 15 January 2015 in the case,[39] already heard at first instance by the Landgericht of Munich, which gave its decision on 26 January 2014).[40]

3.3. Court of arbitration for sport

CAS is the main centre for international sports arbitration. Some commentators have even described it as the "supreme court" of the sport movement (Casini 2011: 1317-40).

After looking at how CAS was set up, its jurisdiction and its functioning, we will consider the remedies available against its awards.[41] We will then assess its advantages before going on to discuss the controversies to which it has given rise and the resulting reforms.

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39. *Pechstein v. ISU*, Court of Appeals (Oberlandesgericht) München, 15 January 2015, file No. U 1110/14 Kart.
40. *Pechstein v. ISU*, District Court (Landgericht München), 26 February 2014, file No. 37 O 28331/12. See www.disputeresolutiongermany.com/2014/02/sports-arbitration-munich-court-finds-arbitration-clause-invalid-in-pechstein-case/#sthash.3ETE4o51.dpuf, accessed 25 February 2016. The Court of Appeal also considered that the arbitration clause binding Claudia Pechstein to the ISU and the German Skating Federation (DESG) was not valid. But it went further: it held that the German courts are not bound by the findings of CAS when a CAS award is rendered in violation of German national public policy.
41. The case law of CAS may be consulted at www.tas-cas.org/fr/index.html, accessed 25 February 2016. However, not all its decisions are listed there. It is worthwhile consulting Articles by legal authors, which sometimes refer to unpublished decisions. The CAS website contains some other useful resources.

3.3.1. Setting up CAS

CAS was set up in 1983 on the initiative of the IOC. Its statutes came into force on 30 June 1984 after being ratified by the IOC. They were accompanied by a set of regulations (appointment of members, approval of the annual budget, conciliation, procedure, opinions, etc.). Following allegations that it was too close to the sport movement,[42] its functioning was extensively reformed to ensure its independence. The reform was approved in Paris on 22 June 1984 with the signing of the agreement on the constitution of the International Council of Arbitration for Sport (ICAS). This agreement was signed by the Presidents of the IOC, ASOIF, the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC). As well as looking after the administration and financing of CAS, ICAS has the task of safeguarding the rights of the parties to proceedings before CAS and the independence of CAS (drawing up the list of CAS arbitrators and mediators, electing the Presidents of the Ordinary Arbitration Division and the Appeals Arbitration Division of CAS, etc.). In a judgment of 27 May 2003,[43] the TFS acknowledged the effective independence of CAS from the IOC. In practice, in joining a federation, sportspersons indirectly recognise the jurisdiction of CAS, *inter alia* through their licence. As already mentioned, this is what is known as an arbitration clause "by reference". The validity of this type of clause was recognised first by CAS itself (Reeb 2002: 808), then by the TFS.[44] However, there is a danger that the very recent decision by the Munich Court of Appeal on 15 January 2015[45] will weaken this legal position by opening the doors to actions before the state courts in some countries despite the existence of an arbitration clause in the statutes and regulations of the federations concerned, or the signing of an arbitration clause by athletes when enrolling for a competition.

42. See TFS, 15 March 1993, *Gundel v. FEI*, ATF 119 II 271.
43. See TFS, 27 May 2003, *Lazutina & Danilova v. IOC*, International Ski Federation & CAS, 4P267-270/2002.
44. TFS, 7 February 2001, *Roberts v. FIBA*, 4P230/2000.
45. *Pechstein v. ISU*, Court of Appeals (Oberlandesgericht) München, 15 January 2015, file No. U 1110/14 Kart.

For the sake of comprehensiveness, we should add to this overview the Code of Sports-related Arbitration, which came into force on 22 November 1994 and was last revised on 1 January 2016. Despite its name, CAS is not itself a court. It is actually a centre for administration of the arbitration awards rendered under its aegis.

3.3.2. CAS jurisdiction[46]

By including in their statutes or regulations an arbitration clause that is binding on all their members, sports organisations consent in advance to the jurisdiction of CAS for all types of dispute that may arise in connection with the enforcement of the rules applying within them. Athletes, few of whom take the trouble to read in full the various statutes and rules adopted by the sports organisation they wish to join, have no choice but to accept recourse to arbitration and to forego domestic law remedies (Pinna 2013: 29-30).[47]

The aim of this procedure, whereby sports organisations recognise in their statutes the jurisdiction of their chosen arbitration tribunal, is to ensure the consistency of dispute settlement in sport. This aim has been amply achieved by CAS because, although many international federations preferred to ignore its existence in its early years, nearly all international federations and around half of National Olympic Committees have now opted for prior recognition of

46. These remarks on the jurisdiction of CAS are based on the above-mentioned report "Fighting against the manipulation of sports competitions", report of the research programme on sport ethics and integrity, Part 3, Title 2, pp. 278-81, available at http://sorbonne-icss.univ-paris1.fr/presse, accessed 25 February 2016.

47. See the following example from the case law of the TFS: "Experience has shown that, by and large, athletes will often not have the bargaining power required and will therefore have to submit to the federation's requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the Articles of association of the sports federation in question, in which the arbitration clause was inserted, all the more so if the athlete in question is a professional" (TFS, 22 March 2007, *Cañas v. ATP & CAS*, ATF 133 III 235, p. 243).

its jurisdiction. This virtual monopoly of international cases was further reinforced by the adoption of the World Anti-Doping Code in 2003 (entry into force in 2004), which makes CAS the sole international appeals body in doping cases (Article 13 of the code).

Several examples can be provided of arbitration clauses in favour of CAS. ASOIF recommends that sports federations accept the jurisdiction of CAS. In its Model Rules (ASOIF 2012), it suggests the following wording for the arbitration clause to be inserted into the relevant statutes or regulations:

> 9. RIGHT OF APPEAL
>
> 9.1 The following decisions made under these Rules may be appealed either by the [International Federation] or the Participant who is the subject of the decision exclusively to the Court of Arbitration for Sport (CAS) in accordance with this Rule 9:
>
> (a) a decision that a charge of breach of these Rules should be dismissed on procedural or jurisdictional grounds;
>
> (b) a decision that a Violation has been committed;
>
> (c) a decision that no Violation has been committed;
>
> (d) a decision to impose a Sanction, including a Sanction that is not in accordance with these Rules;
>
> (e) a decision not to impose a Sanction;
>
> (f) any other decision that is considered to be erroneous or procedurally unsound.
>
> 9.2 The time for filing an appeal to CAS shall be twenty-one days (21) from the date of receipt of the decision by the appealing party.
>
> 9.3 Any decision and any Sanctions imposed shall remain in effect while subject to the appeal process, unless CAS directs otherwise.
>
> 9.4 The decision of CAS shall be final and binding on all parties and on all National Federations and there shall be no right of appeal from the CAS decision. No claim may be brought in any other court, tribunal or via any other dispute resolution procedure or mechanism.

The ICC gives CAS sole jurisdiction for appeals against the decisions of its Anti-Corruption Tribunal (Article 7, ICC 2014). An appeal may be lodged by the ICC itself or by the person who is the subject of the decision, against a decision not to lift a provisional suspension, against a decision that "a charge ... should be dismissed for procedural or jurisdictional reasons", against a decision that "an offence under the Anti-Corruption Code has (or has not) been committed" and

against a decision "to impose (or not to impose) sanctions". The appeal is dealt with according to the rules of CAS, except that it is limited to consideration of the question of whether the decision "was erroneous", that is no "re-hearing *de novo*", except "where required in order to do justice (for example to cure procedural errors at the first-instance hearing)". The ICC stipulates that English law shall apply and that proceedings shall be conducted in English, unless the parties agree otherwise. The decision of CAS is "final and binding on all parties, and no right of appeal shall lie from the CAS decision".

In corruption cases concerning tennis, the following rules apply:

> 1. Any Decision (i) that a Corruption Offense has been committed, (ii) that no Corruption Offense has been committed, (iii) imposing sanctions for a Corruption Offense, or (iv) that the AHO lacks jurisdiction to rule on an alleged Corruption Offense or its sanctions, may be appealed exclusively to CAS in accordance with CAS's Code of Sports-Related Arbitration and the special provisions applicable to the Appeal Arbitration Proceedings, by either the Covered Person who is the subject of the Decision being appealed, or the TIB.
>
> 2. Any Decision appealed to CAS shall remain in effect while under appeal unless CAS orders otherwise.
>
> 3. The deadline for filing an appeal with CAS shall be twenty business days from the date of receipt of the Decision by the appealing party.
>
> 4. The decision of CAS shall be final, non-reviewable, non-appealable and enforceable. No claim, arbitration, lawsuit or litigation concerning the dispute shall be brought in any other court or tribunal. (Art. X.I, TIU 2009).

FIBA provides for the possibility of appealing to CAS against decisions of the Appeals Panel (Article 178, Book 1, FIBA 2010).

The ASF recognises unconditionally the jurisdiction of CAS to hear appeals against disciplinary decisions:

> clubs, and their members, players and officials are subject to the jurisdiction of the governing bodies, standing committees and other competent authorities of the ASF, its sections and its subordinate bodies, and to the arbitral jurisdiction of the Court of Arbitration for Sport (CAS) (Article 89 of its Statutes).

It also stipulates as follows:

> 1. The CAS shall have sole jurisdiction to hear appeals against decisions of the ASF, its sections and subordinate bodies. There shall be no recourse to the ordinary courts. The time limit for lodging an appeal shall be 10 days starting from the day on which the reasons for the impugned decision were notified in writing. 2. An appeal may not be lodged with the CAS until internal

remedies have been exhausted. 3. The appeal shall not have suspensive effect unless the competent division of the CAS so orders. 4. The CAS shall have sole jurisdiction to order interim measures in respect of the decisions of the CAS, its sections and its subordinate bodies. There shall be no recourse to the ordinary courts (Article 93 of the Statutes).

Having said that, it is important to stress that the parties may decide to limit the jurisdiction and power of review of CAS by excluding, for example, appeals against certain types of decision (for example, disciplinary decisions imposing only relatively minor sanctions) or the admission of fresh evidence during proceedings in CAS.

3.3.3. Functioning of CAS

The organisational and procedural aspects of arbitration are governed by the Code of Sports-related Arbitration (CAS 2016). This code is divided into two parts: the "Statutes of bodies working for the settlement of sports-related disputes" (Articles S1 to S26) and the "Procedural rules" (Articles R27 to R70).

CAS has two decentralised offices, in Sydney and New York, which are attached to the CAS court office in Lausanne and are competent to receive and notify all procedural acts. Decentralisation has made it easier for parties domiciled in Oceania and North America to have access to CAS. In any event, the headquarters of CAS are in Lausanne. If a party wishes to appeal against an award of CAS, it must do so before the TFS even if the proceedings took place in a decentralised office.

In 1994, two arbitration divisions were created: an Ordinary Arbitration Division and an Appeals Arbitration Division. The division presidents can order provisional and conservatory measures, which are very important in practice. No party may request such measures until all the internal remedies available within the sports federation or organisation concerned have been exhausted. The president of the relevant division, prior to the transfer of the file to the panel, and thereafter the panel, may order provisional or conservatory measures at the request of a party. In deciding to submit a dispute to the Code of Sports-related Arbitration under ordinary arbitration procedure or appeals arbitration procedure, the parties relinquish the possibility of requesting such measures from the state authorities or courts. On receiving a request for provisional measures, the president of the relevant division or the panel asks the other party/parties to give their comments within 10 days, or less if circumstances so require. The division president or the panel promptly issues an order and decides first of

all on the prima facie jurisdiction of CAS. The division president can terminate the arbitration procedure if he or she rules that CAS clearly has no jurisdiction. In cases of utmost urgency, the division president, prior to the transfer of the file to the panel, and thereafter the panel president, can issue an order on mere presentation of the request, provided that the opposing party is subsequently heard. In deciding on provisional measures, the division president or the panel considers whether such measures are necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim and whether the interests of applicant outweigh those of the respondent(s). The provisional measures procedure and any interim relief already awarded are automatically annulled if the party that requested them fails to file a request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit set in Article R49 of the code (appeals procedure, CAS 2016). These time limits cannot be extended. Provisional or conservatory measures may be made conditional on the provision of security.

In 1996, ICAS created an ad hoc division of CAS with the task of settling finally and within a 24-hour time limit any disputes arising during the Olympic Games in Atlanta. For this purpose, designated arbitrators were in the city throughout the games, ready to act immediately in the event of a dispute. A special procedure, which was simple, flexible and free of charge, was created for the occasion. Since then, ad hoc divisions have been created for each edition of the Summer and Winter Olympic Games. Ad hoc divisions have also been set up for the Commonwealth Games, the UEFA European Championship and the FIFA World Cup. Arbitrators are present on site throughout the competitions to ensure the smooth running of these ad hoc divisions.

As regards the judicial settlement of disputes, there are two distinct procedures, ordinary procedure and appeals procedure,[48] and each of these includes a preparatory phase, the proceedings proper and the rendering of the award. Lastly, consideration must be given to the available remedies.

48. Some procedures in CAS are of secondary importance. There is an ad hoc procedure specially designed for certain large-scale international sports events, such as the Olympic Games, which involves having a special panel on site during the competition. CAS can also adopt interim measures to preserve the rights of the parties. It may be asked to do so by the parties immediately after notification of a final decision given by a sports federation and before a formal appeal is lodged with it (Article R37 of the Code of Sports-related Arbitration, as amended on 1 March 2013).

3.3.3.1. Ordinary procedure

Ordinary procedure is implemented by the Ordinary Arbitration Division in respect of contractual disputes that mainly include commercial disputes relating to sport (such as broadcasting rights for sports competitions, disputes relating to athletes' employment contracts) and disputes relating to the transfer of players. The panels of CAS act here as courts of first and last instance. Ordinary procedure is restricted to disputes that have not yet been the subject of any judgment by a sports or state authority.

i. Preparatory phase

The preparatory phase includes forming a panel, appointing arbitrators and dealing with any challenges to them.

The panels, usually consisting of three arbitrators, are formed by the Ordinary Arbitration Division. Each party selects an arbitrator and the President of the Ordinary Arbitration Division appoints the panel president (there are, however, some exceptions, such as when a single arbitrator is appointed). Cases are referred to CAS through the filing of a request for arbitration, which must show that CAS does indeed have jurisdiction, and be accompanied by a brief statement of the facts and legal arguments on which the request is based as well as a copy of the contract containing the arbitration agreement. Upon filing the request, the claimant must pay a non-refundable court office fee of 1 000 Swiss francs, failing which CAS will not proceed (Article R64.1, ibid.).

If the arbitration agreement does not specify the number of arbitrators (a panel may consist of a sole arbitrator), it will be for the President of the Ordinary Arbitration Division to determine the number, taking into account the circumstances of the case (Article R40.1, ibid.). In most cases, however, the panel consists of three arbitrators, including one selected by each party.

As is often the case in arbitration proceedings, there is a procedure for challenging arbitrators. Furthermore, given the existence of a closed list of international sports arbitrators, the question of the independence of arbitrators often arises.

ii. Proceedings

Details related to the proceedings are set out in directions issued by the panel president. Conciliation is possible at any stage of the proceedings up to the rendering of the award.

The parties may agree on a settlement. This will take the form of an award "by consent of the parties", which has the same effect as an arbitral award.

As with judicial proceedings, the proceedings are initially in written form (exchange of submissions, production of evidence, etc.). The oral proceedings include in principle a hearing during which the panel hears the parties, any witnesses and any experts, and the parties' final oral submissions, for which the respondent is heard last. After consulting the parties, the panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing (Article R44.1, paragraphs 1 and 8, ibid.).

Article R44.4 of the code provides for an expedited procedure to ensure speedier settlement of disputes of a particularly urgent nature.

iii. The award

Article R45 of the code, on the law applicable to the merits, provides as follows: "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*" (ibid.).

No time limit is set for the rendering of the award unless the parties so wish.

The conditions relating to the majority needed to make an award, the form of the award and its effects, and the conditions relating to appeals, are set out in Article R46 of the code, according to which "[t]he award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons" (ibid.). The signature of the panel president suffices.

The award is final and binding on the parties, and "[i]t may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration" (ibid.).

These provisions are mirrored by those of Article 192, paragraph 1 of the LDIP (1987). Swiss law permits the exclusion of all setting aside proceedings if the parties so wish. The waiver of appeals after notification of the award takes the form of a special agreement concluded in writing. The express nature of the waiver means that it must be stated clearly in the arbitration agreement or a special written agreement. The TFS interprets this requirement very strictly.[49] However, as most sports organisations have their headquarters in Switzerland, this provision is of limited import.

Like all arbitral awards, those made by CAS are not directly enforceable. In the event of a challenge, the parties must bring enforcement proceedings before the state courts of the place of execution.

3.3.3.2. Appeals procedure

The appeals procedure, which is implemented by the Appeals Arbitration Division, allows CAS to review all decisions given by sports institutions that recognise its jurisdiction. Consequently, it is not confined to disciplinary disputes, although in practice, these account for a large proportion of the cases brought before the Appeals Arbitration Division. Because jurisdiction is transferred to CAS, its panels can uphold, set aside or amend the decisions at issue. However, this procedure also serves another purpose, namely the submission to CAS of awards made under the ordinary procedure, if such an appeal has been expressly provided for in the rules of the federation or sports body concerned (Article R47, paragraph 2, CAS 2016).

49. TFS, 19 December 1990, *Sonatrach (II) v. KCA Drilling*, ATF 116 II 639.

i. Preparatory phase

An appeal may not be lodged with CAS unless all the remedies available within the sports institution concerned have first been exhausted (ibid.). Before 2004, this procedure was limited to disciplinary disputes, but it was extended to all types of dispute after the 2004 revision of the code. An appeal may be suspensive at the appellant's request and if the President of the Appeals Arbitration Division so rules (Articles R48 and R52, ibid.).

In the absence of a time limit set in the statutes or regulations of the sports body concerned, Article R49 of the code provides for a time limit of 21 days from the receipt of the decision appealed against (ibid.).

As in proceedings before the ordinary courts, the statement of appeal must include a certain number of items: a statement of the facts and the appellant's claims, a copy of the decision appealed against, the statutes or regulations or the specific agreement providing for an appeal to CAS, and the name of the arbitrator chosen from the list of arbitrators, or a reasoned request for the appointment of a sole arbitrator (Article R50, ibid.).

An application may be made for a stay of execution of the decision appealed against until the final award is made and conservatory or provisional measures may be ordered to safeguard the parties' rights (Article R48, ibid.).

The panel is composed of three arbitrators unless the parties have agreed to the appointment of a sole arbitrator or, in the absence of an agreement between them, and after they have been consulted, the division chamber decides to submit the appeal to a sole arbitrator (Article R50, ibid.).

ii. Proceedings

The statement of appeal having been filed in good time, the appellant has another 10 days in which to file an appeal brief. Among other things, this must contain a statement of the facts and legal arguments on which the appeal is based and be accompanied by all the exhibits and evidence on which the appellant intends to rely (Article R51, ibid.).

The appellant may also ask that the statement of appeal be considered as the appeal brief. In this eventuality, in the absence of a time limit set in the statutes or regulations, the 21-day time limit logically applies.

The respondent must file submissions in reply within 21 days of the receipt of the appeal brief. The submissions in reply must include a statement of defence, any defence of lack of jurisdiction, all the exhibits and evidence on which the respondent intends to rely, the names of any witnesses, including a brief summary of their expected testimony, any written witness statements, the names of any witnesses the respondent wishes to call, and any other requested evidentiary measure (Article R55, ibid.).

The evidentiary procedure may end following this first exchange, but a second exchange may take place if the parties so agree or if the panel so authorises it by reason of exceptional circumstances (Article R56, ibid.). The parties are in principle called to a hearing, but the panel may decide to dispense with a hearing after consulting the parties if it deems itself to be sufficiently well informed (Article R57, ibid.).

iii. The award

The question of the applicable law is dealt with in Article R58 of the code: "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 … is domiciled" (ibid.). If the applicable law has not been determined by the parties, the panel chooses the law of the country in which the sports body whose decision was appealed against is domiciled.

Article R59 (ibid.) provides as follows:

> The award shall be rendered by a majority decision, or in the absence of a majority, by the President alone. It shall be written, dated and signed. The award shall state brief reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice.
>
> …
>
> The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.
>
> The award … shall be final and binding upon the parties … It may not be challenged by way of an action for setting aside to

the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential.

3.3.4. Appeals against decisions of CAS

If the parties have not clearly waived any review of the award in the arbitration agreement or in a subsequent agreement, they can apply to the TFS for setting aside, but only in a limited number of cases.

The first possible scenario is a waiver. If the parties have no domicile, habitual residence or business establishment in Switzerland, they may expressly waive the right of appeal[50] in the arbitration agreement or a subsequent agreement (Article 192, paragraph 1, LDIP 1987; Article R46, CAS 2016). This possibility of waiver has raised many issues, particularly under Article 6 of the Convention, because, more often than not, parties applying to the arbitration tribunal have no alternative. It was for this reason that, in an important ruling, the TFS very strictly regulated the possibility of parties waiving any appeal against the decisions of CAS.[51]

The second is an application to set aside a CAS award. When the seat of arbitration is in Switzerland, the provisions of the LDIP apply if international arbitration is involved, while those of the Swiss Civil Code apply if domestic arbitration is involved. An application may be made to the TFS for setting aside of the federal arbitral award within 30 days from

50. TFS, 19 December 1990, *Sonatrach (II) v. KCA Drilling*, 4P_143/1990, ATF 116 II 639, 2. c).

51. TFS, 22 March 2007, *Cañas v. ATP Tour & CAS*, 4P_172/2006, ATF 133 III.

the communication of the award in the cases listed exhaustively in Articles 190 and those that follow of the LDIP. For a discussion of appeals to the TFS against arbitral awards, see section 4.4.2 below.

3.3.5. Advantages of CAS

The advantages of CAS are broadly the same as those of the arbitration procedure in general.

It may be added, however, that the highly international character of sports disputes, their distinctive nature and the increase in their number fully justified the establishment of a body such as CAS. Its recourse to specialists and the speed and simplicity of its proceedings were intended as a response to these characteristics of sports disputes.[52]

Regarding the differentiation between waiver of the right to appeal against a future award and the inclusion of an arbitration agreement in sports regulations, the TFS held as follows in its famous Cañas judgment:[53]

> In spite of appearances, this difference in treatment is logical insofar as it promotes the swift settlement of disputes, particularly in sport, by specialised arbitral tribunals that offer sufficient guarantees of independence and impartiality … while at the same time ensuring that the parties, especially professional athletes, do not give up lightly their right to appeal awards issued by a last instance arbitral body before the supreme judicial authority of the state in which the arbitral tribunal is domiciled.

3.3.6. Controversies surrounding CAS and successive reforms

The controversies surrounding CAS and the reforms to which they gave rise can be partly explained in some cases by the sometimes strongly marked specific features of the procedures applied by it, in particular the appeals arbitration

52. See, in the introduction to the first digest of CAS awards, the explanation given by its Secretary General, Mathieu Rebb, of the reasons behind the setting up of CAS.
53. CAS 2005/A/951, *Cañas v. ATP Tour*, 23 May 2007.

procedure. In the latter case, in terms of both cases heard and the parties having recourse to this procedure, there are more differences than similarities in relation to traditional arbitration.

Regarding the cases heard, debate focuses on the arbitrability of disputes. This is usually assessed with reference to Swiss law, under which, according to Article 177, paragraph 1 of the LDIP (1987), the defining criterion of an arbitrable dispute is that it has to do with assets. In a number of cases, however, this is not easy to establish with certainty.[54]

Regarding the parties, and this point has already been raised above, the clause by which they waive the jurisdiction of the state courts in favour of that of an arbitration tribunal is rarely accepted of their own free will by athletes, who, as members of a national federation, for example, adhere to the stipulations of the statutes binding them to that federation, which include an arbitration clause. In other cases, it is a reference in the statutes of the national federation to those of the international federation that makes athletes subject to the arbitration clause. This clause is said to be "stipulated by reference". In yet other cases, it is explicitly provided for in the enrolment forms for a sports competition. For instance, the enrolment form for the Olympic Games contains an arbitration clause based on Article 61, paragraph 2 of the Olympic Charter, which reads as follows: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration" (IOC 2015). This form has to be completed and signed by all participants, not only athletes but also, more broadly, all those who participate in the staging of the sports event: referees, jury members, trainers, doctors, journalists, and so on. In these various cases, the arbitration of CAS is more imposed than consented to. This situation is all the more problematic in that it was sports organisations that had the idea for CAS and set it up. Furthermore, these organisations made the rules that serve as a reference for CAS when, for example, athletes are in

54. For example, regarding the inferences to be drawn by CAS from mandatory recourse to state courts imposed by the law of the state under whose jurisdiction the dispute arose, see the more nuanced approach adopted by the TFS (18 March 2013, *A. v. Bulgarian Football Union*, 4A_388/2012).

dispute with them (rules of procedure, list of punishable acts, etc.). Here again, the previously mentioned decision of 15 January 2015 of the Munich Court of Appeal should fuel further debate.

Above and beyond this, the very independence of CAS has been called into doubt, particularly as a result of the constant questioning concerning its organisation. Its very close financial and administrative links with the IOC in its early years led the TFS to express reservations about its independence,[55] at least for the hearing of disputes concerning the IOC (see the previously cited judgment of 15 March 1993;[56] ASA 1993: 398). This judgment led directly to a large-scale reform, resulting, *inter alia* in the setting up, under the Paris Agreement of 22 June 1994, of ICAS, now a private-law foundation under Swiss law, and in the drafting of the Code of Sports-related Arbitration, which came into force on 22 November 1994. This reform did not meet with unanimous approval, even if the TFS, in its previously mentioned judgment of 27 May 2003, held that CAS is an arbitration body independent of the IOC and renders real arbitral awards, even where the decision submitted to it originates from the IOC. Supposing, however, a state court in another country deemed itself to have jurisdiction in respect of a CAS arbitral award, it is not certain that it would consider CAS as meeting all the requirements for independence (see previously cited decision of 15 January 2015).[57]

Lastly, because of the sometimes very onerous consequences of the awards made by CAS, particularly in disciplinary matters, parties must be provided with adequate procedural and substantive safeguards (Haas 2012: 43-60; Veuthey 2013: 105-15). Whether it is a case of the procedures followed, the solutions found to disputes or the sanctions imposed and their appropriateness to the offence, it may be considered that CAS has not always gone far enough in reviewing their compatibility with fundamental rights. It should be noted, however, with particular reference to penalties for doping, that the case law of CAS relating to the application of the principle of proportionality shows

55. Initially, CAS statutes required arbitrators to be chosen from a list drawn up by the IOC.

56. TFS, 15 March 1993, *Gundel v. FEI*, ATF 119 II 271.

57. *Pechstein v. ISU*, Court of Appeals (Oberlandesgericht) München, 15 January 2015, file No. U 1110/14 Kart.

a trend towards greater protection for athletes.[58] However, this trend should not obscure the need for a nuanced interpretation of the awards made by CAS in this field or the need for greater harmonisation of the rules guiding its application of the principle of proportionality.

58. See CAS 99/A/234, *David Meca-Medina v. FINA*, 29 February 2000; CAS 99/A.235, *Igor Majcen v. FINA*, 29 February 2000; CAS 2005/A/830, *S. v. FINA*, 15 July 2005; CAS 2006/A/1025, *Mariano Puerta v. ITF*, 12 July 2006; CAS 2005/A/951, *Cañas v. ATP Tour*, 23 May 2007; CAS 2007/A/1252, *FINA v. M. & FTN*, 11 September 2007. In these cases, it may be seen that CAS strove to strike the right balance where the athlete suspected of doping was adjudged to not have been guilty of any significant fault or negligence, for instance because he or she had either received the wrong prescription or had not been vigilant enough. Acknowledging that prescribed sanctions could have the effect of significantly shortening or even ending an athlete's career, which would be neither proportionate or just in comparison to cases where athletes have intentionally engaged in doping, CAS sought to reduce sanctions if it considered it justified, keeping in mind the necessary strictness of the system, and the potential difficulties such judgments could generate for future cases.

4. The role of the state justice system in sports-related matters

As we have seen in Chapter 1, the autonomy enjoyed by sports organisations does not mean that they are not subject to ordinary law or that their decisions – particularly in disciplinary matters – cannot be reviewed by arbitration tribunals and/or state courts. The role of arbitration tribunals was described above. That of the state justice system will now be discussed.

In disciplinary matters, the ordinary courts usually become involved after the sports bodies, either immediately afterwards or following an intermediate stage before an arbitration tribunal. In other matters, jurisdiction is determined according to the nature of the dispute.

We will first look at cases in which, under current case law, certain decisions taken by sports bodies might be removed from the scrutiny of state courts, then at cases of exclusive state jurisdiction and those in which a state court acts as a court of appeal against decisions of sports organisations, or against an arbitral award. Finally, we will consider questions relating to provisional measures.

4.1. Exclusive jurisdiction of sports organisations

The sport movement generally accepts that some of its rules or decisions should not be actionable, in other words, that it should not be possible to submit them to a state court or even an arbitration tribunal (Oswald 2010: 151; Baddeley 1993: 43 ff.; Rigozzi 2005: 443 ff.).

The courts have adopted basically the same approach and – as we saw in Chapter 1 – draw a distinction between "rules of the game" and legal rules (ibid.).

Rules of the game are technical rules the purpose of which is to ensure the smooth running of sports competitions. They are actually rules to do with everything that takes place on the field of play, such as all rules concerning the conduct of matches and competitions, selection and qualification rules, and technical rules (Baddeley 1993: 43; Zen-Ruffinen: 478). Their application involves taking decisions, such as whether or not to award a free kick in a football match or whether to blow the final whistle after 93 or 95 minutes, depending on the amount of playing time lost during the game.

Legal rules are all the other rules that may be used to impose disciplinary sanctions on a player, a club or a sports organisation (Zen-Ruffinen: 478) outside the game. There are other organisational rules and rules governing relations within the organisation itself that are not really legal rules and therefore have an intermediate status (ibid.: 478-9).

The courts initially held that rules of the game were not actionable, whereas legal rules were. The TFS in fact stated that "play should not be constantly interrupted by appeals to the courts" (Oswald 2010: 15).[59] It has delivered several judgments in which it considered this question. In its 1982 judgment in the case of *FC Zürich v. Ligue nationale de l'Association suisse de football*,[60] it held that "in games and in sport, there is an area outside the ambit of the law", (ibid.:

59. TFS, ATF 118 II 12, paragraph 2, JdT 1995 I 547.

60. TFS, *FC Zürich v. Ligue nationale de l'Association suisse de football*, ATF 118 II 15, JdT 1983 I p. 162, paragraph 4.

167) before adding that there are "special sanctions internal to the association which can be handed down outside the field of play … What is at issue here is a sanction imposed by the association, which is related to a rule of the game but which was nevertheless taken separately and which can perfectly well be the subject of a court review" (ibid.: 168). This judgment seems to suggest that there are indeed certain types of decision that are simply not actionable and are therefore outside the ambit of the law. They are, as it were, immune. This case law was partly confirmed in the subsequent Dubé judgment. In this case, an ice hockey trainer had been suspended for assaulting a referee. The Valais cantonal court had granted an application for a finding that the trainer's personality rights had been unlawfully infringed. Following an appeal by the Swiss ice hockey league, the TFS stated that "the distinction between rules of the game and legal rules (was) irrelevant in the case of an infringement of personality rights".[61] However, it did not go so far as to say that the courts should review decisions, such as sending-off decisions, taken in the course of play. So the rule of the game/legal rule distinction retains some value.

CAS has also focused on this distinction. In the Mendy award,[62] the panel acknowledged the existence of a distinction between rules of the game and legal rules. In the case in point, it held that a disqualification for hitting below the belt in boxing was not an actionable decision. It specified, however, that even the application of rules inherent to the game could be submitted to an arbitral tribunal or a state court if such an application was in violation of the law, the rules of an organisation or general principles of law (Baddeley 1994: 377). CAS held that, in the absence of any violation of the law, abuse or malicious intent, such a decision was not actionable.

The case law is therefore not very clear when it comes to the criteria for distinguishing between rules of the game and legal rules. One may in fact wonder whether a classification according to the nature of the rule is really appropriate, because decisions taken on the basis of the same rule can lead to different findings. If, for example, a handball referee sends a player off for committing such a bad foul that the player is subsequently suspended for a certain period, the

61. TFS, *Swiss Ice Hockey League v. Dubé*, ATF 120 II 369, paragraph 2.

62. CAS ad hoc Division for the Olympic Games 96/006, *Mendy v. AIBA*, 1 August 1996.

sending off in itself is not an actionable decision, but the suspension is. Consequently, it is not the nature of the rule that must be taken into consideration to determine whether a decision based on it is actionable or not, but rather the nature of the sanction imposed: if the sanction produces its effects during the competition, such as a sending off, a goal allowed or disallowed, and so on, the decision should not be actionable; if, on the other hand, the decision produces its effects after the competition, for example through a suspension for a certain number of matches or the deduction of a certain number of points from a team, then it is actionable.

It follows from the above that state courts should not review decisions taken on the field of play by referees and other officials, but that, on the other hand, any subsequent disciplinary decisions are actionable in principle and may be submitted to them, subject to the jurisdiction of an arbitration tribunal.

4.2. Exclusive jurisdiction of state courts

In various cases, state courts may have exclusive jurisdiction, to the exclusion of sports bodies and arbitration tribunals. The most important case concerns the application of criminal law, although other cases are possible.

4.2.1. Criminal law

Criminal cases obviously cannot be dealt with by disciplinary bodies or by arbitration tribunals. This does not preclude an organisation from bringing disciplinary proceedings at the same time for the same offence.

Criminal law prosecution and disciplinary prosecution do not have the same aims. Whereas the former takes into account the general interests of morality and society, the latter serves the interests of the group in question (although these interests may coincide with the general interest, for example in the anti-doping and anti-corruption fields) and seeks to maintain standards of behaviour within that group, in its own interests and those of the public.

Criminal and disciplinary offences do not necessarily coincide. While, generally, the criminal offences committed by athletes in a competition also constitute disciplinary offences (for example an ice hockey player who punches an opponent and injures him), the reverse is not true: there are many cases of offences liable to disciplinary action that are not at the same time criminal offences (for example a footballer who pulls back an opposing player by his shirt without injuring him).

Furthermore, a disciplinary punishment can only be applied if the offender is a member of the group in question or has a sufficiently close relationship with it, whereas a criminal sanction can obviously be imposed without any prior condition on any individual who has committed a criminal offence.

The disciplinary action is independent of the criminal action. Where disciplinary and criminal offences coincide, criminal authorities and disciplinary bodies can in principle investigate the same facts at the same time, although their decisions may differ. In France, it is said that "disciplinary proceedings must not await the outcome of criminal proceedings", which means that disciplinary bodies can decide to punish an individual without having to wait for criminal proceedings brought separately to be completed.

Disciplinary punishment and criminal law punishment are not subject to the same legal rules (see Dellis 1998). For instance, the rule *nulla poena sine lege*, which prohibits the imposition of penalties not expressly provided for by law, applies strictly in criminal law, but disciplinary systems sometimes grant decision-making bodies a certain amount of latitude regarding the nature and quantum of penalties (for example Article 9.15, AIBA 2013). Similarly, the rule *nullum crimen sine lege*, which in criminal law means that a person cannot be charged with an offence not specifically provided for by law, does not necessarily apply to disciplinary law: any breach of obligations, duties, morality, ethics or sports ethics may in principle constitute a disciplinary offence and disciplinary rules may in any case include catch-all definitions of punishable offences (for example "any breach of the obligations of loyalty and integrity"), which would be unacceptable in criminal law. The rules of evidence are not the same and, for example, evidence not admissible in criminal proceedings may be admissible in disciplinary proceedings. The standard of proof applied in disciplinary law may differ from that followed by the criminal courts ("comfortable satisfaction" or "preponderance of the evidence"

in disciplinary proceedings, as opposed to "proof beyond all reasonable doubt", which is the standard in criminal proceedings).[63]

Furthermore, the principle *ne bis in idem* (no one may be prosecuted or punished twice for the same offence) does not apply in this regard and does not preclude the initiation of disciplinary proceedings if a criminal prosecution is already in progress or has already been completed, just as it does not preclude the initiation of criminal proceedings if the same facts have already been prosecuted at the disciplinary level (for a history of how the principle has been applied, see Geraats 2013: 1-14). As noted by the TFS, the application of the principle *ne bis in idem* presupposes the same legally protected assets (same subject-matter), which means that while a person may not be prosecuted twice for the same offence, he may nevertheless be punished twice when the same behaviour can have not only criminal, but also civil, administrative and/or disciplinary consequences (Beffa and Ducrey 2012: 195).[64] The French courts have reached the same conclusion. The French Constitutional Council allows cumulative punishments but holds that the combination of criminal and administrative sanctions must not, however, produce consequences that are incompatible with the principle of proportionality.[65] In administrative matters, the French Conseil d'État has always accepted that disciplinary proceedings are independent of any criminal proceedings and, above all, that cumulative penalties are legally possible when imposed for different legal reasons, and in particular on the basis of different legislative provisions. France's Court of Cassation takes the same line and states consistently that the *ne bis in idem* rule is only applicable in criminal law and does not preclude cumulative prosecutions and sanctions

63. In this connection, see High Court of Justice Queen's Bench Administrative Court, *Bhatt v. General Medical Council* (2011) EWHC 783 (Admin), 1 April 2011, paragraph 53.

64. This reference cites TFS, 3 January 2011, *Belmonte v. WADA & ICU & RFEC*, ATF 4A_386/2010 and TFS, October 29 2010, *Belmonte v. WADA & ICU & RFEC*, ATF 4A_420/2010.

65. Const. Council, 17 January 1989. N.88-248 DC, High Council for Broadcasting (CSA), RFDA, 1989, pp. 215 ff., study by Genevois; Const. Council, 28 July 1989, N.89-260 DC, Stock Exchange Commission (C.O.B.), RFDA, 1989, p. 671, study by Genevois; Genevois, commentary, AIJC, 1989: pp. 481-2, pp. 486-7, pp. 498-507.

under criminal law and under tax, customs, administrative and disciplinary law.[66] However, the principle *ne bis in idem* may apply to disciplinary proceedings to the extent that the imposition of a disciplinary sanction by a disciplinary body with jurisdiction for this generally precludes the imposition of further disciplinary sanctions for the same offence by a body of the same type (Geraats 2013: 184 ff.). Furthermore, there is nothing to prevent disciplinary bodies from taking account of a criminal sanction already imposed on the same person for the same offence in their general assessment of the circumstances of the case prior to determining the disciplinary sanction. This is all the more conceivable in that some criminal courts have already agreed to take account of disciplinary sanctions already adopted by sports federations in determining the most appropriate penalty. For example, in a case of rigged cricket matches, Southwark Crown Court in London, in a decision of 3 November 2011,[67] took account of the fact that the sports authorities had already handed down a disciplinary penalty of 10 years' suspension, seriously jeopardising the defendant's future career, in determining its own sentence. In some cases, the imposition of disciplinary sanctions might also conceivably justify the discontinuation of criminal proceedings, in accordance with the principle of discretionary prosecution, when the criminal court considers that the disciplinary sanction imposed is sufficient to meet the criminal law goals of general and special prevention (ibid: 184 ff.)

4.2.2. Other disputes

For the record, it should be noted that, in some legal systems, such as that of France, disputes under labour law, namely disputes between an employer and a worker, cannot be dealt with outside the state courts and, in principle, are not

66. "Le non-cumul des peines ne s'applique pas aux sanctions disciplinaires", see. Cass. Crim., 20 June 1996, Ponsetti, Rev. Jurisp-fiscale, 5/97-287, note Austry; Cass. Crim., 27 March 1997, D.1998, p. 172, obs. Pradel, Rev. sc. crim, 1997, p. 830, obs. Bouloc; Cass. Crim., 6 Nov. 1997, JCP/ GII, 10087, note Cliquenois; Cass. Crim., 1 March 2000, D. 2000, 229, note Lienhard ; Cass. Crim., 7 Sept. 2004 - D.2004 - p. 2691. For a general study of disciplinary punishment of criminal offences, see also Pralus-Dupuy 1992: 229.

67. CAS 2011/A/2364, *Salman Butt v. ICC*, 17 April 2013.

arbitrable, even if the rules of some organisations require the parties to a contract of employment to submit to a conciliation attempt before a sports body (for example Article 50.1.d., ASF 2016).

Similarly, commercial disputes involving sports bodies may come under the sole jurisdiction of the state courts if no arbitration clause was included in the contract in question. However, a discussion of these questions would be outside the scope of this handbook.

4.3. State courts as courts of appeal against decisions of sports organisations

State courts may be called on to act as courts of appeal against disciplinary decisions issued by sports federations.

As already mentioned, most international sports federations and various other sports organisations have their headquarters in Switzerland; Swiss law therefore takes on a certain importance in this field. According to Article 75 of the CC,[68] any member of an association may challenge a decision of that association in the courts for infringement of state law or the rules of the association and have the rules of the association reviewed in relation to state law (Oswald 2010: 114) (according to the Gundel judgment,[69] this possibility is also available to indirect members of the association, that is in particular to athletes who are members of a club that is itself a member of the association), provided all the federation's internal remedies have first been exhausted.[70] However, the practical scope of this provision is severely limited by the fact that Swiss law does not prohibit recourse to arbitration in these matters. Consequently, if the decision can be submitted to an arbitration tribunal, within the

68. Article 75, CC: "All members are permitted by law to challenge before the courts, within one month of becoming aware of them, any decisions to which they did not consent and which violate legal provisions or regulations".
69. TFS, ATF 119 II 271, paragraph 3b, *Gundel v. International Federation for Equestrian Sports*, 1993.
70. TFS, ATF 118 II 12, paragraph 3, *Kindle c. Fédération Motocycliste Suisse*, 1992; Bondallaz, p. 21.

meaning of the applicable rules, state courts do not have jurisdiction to hear appeals brought directly against the association's decision (Oswald 2010: 116).[71]

The German model resembles the solution adopted in Switzerland. All matters that are not purely sport-related or have not been submitted to an arbitration body are subject to the scrutiny of the ordinary courts. Failing any arbitral jurisdiction, the ordinary courts verify, with due regard to the autonomy of sports organisations, whether decisions, disciplinary measures and sanctions taken by organisations that infringe sportspersons' rights have any basis in the statutes or other rules of the organisation and are consistent with them. They then consider whether the rule on which the sanction is founded satisfies the criteria of fairness and good faith (see BGHZ: 105, 306); whether the sanction was imposed by the body with jurisdiction under the statutes and in accordance with the prescribed procedure; whether the internal procedure is consistent with the basic principles of the rule of law; whether the decision-making body established beyond doubt the facts on which the sanction was based; whether the sanction is contrary to public policy or morality; and whether it is manifestly unfair or disproportionate. It should be remembered, however, that a Munich court recently called into question the CAS arbitration system (see section 3.2), which might lead the German courts, if the judgment is upheld, to recognise their jurisdiction to hear appeals lodged directly against the decisions of sports organisations, even in cases where the statutes and regulations of the federation concerned provide for an appeal to CAS. If confirmed, such a development would cause serious problems for the organisations concerned, particularly in the case of decisions issued by international federations, which could be challenged by German sportspersons and clubs.

A minority of legal systems do not permit the exclusion of direct appeals to the ordinary courts, in favour of arbitration tribunals, in the field of disciplinary sanctions.

In France, disciplinary decisions issued by approved sports federations are reviewed directly by the administrative court, then by the administrative court of appeal, and at last instance by the Conseil d'État. The decisions of sports

71. See also Article 75, CC.

federations are regarded as administrative acts. Any clause aimed at denying access to the courts to licence-holders and members of the federation would be null and void (Buy et al. 2009: 194-5), which rules out any possibility of replacing the jurisdiction of the administrative authorities with arbitration. Among other things, the administrative courts can set aside disciplinary sanctions if they are unduly severe and disclose a manifest error of assessment.[72] The French administrative courts do, however, observe a certain restraint in these matters. A similar solution is in place in Spain.

The jurisdiction of the ordinary courts cannot be excluded in the United Kingdom either (Gardiner et al. 2012: 105-6). The disciplinary rules of the English Football Association (Schedule C, FA Disciplinary Procedures, FA 2015) provide that "a decision of the Appeal Board shall be final and binding and there shall be no right of further challenge", except for appeals to FIFA's CAS or the World Anti-Doping Agency in doping cases. But this rule does not extinguish the right of appeal to the ordinary courts (Lukomski 2012: 63). Still, in the United Kingdom, the state courts only exercise limited scrutiny, by way of a "supervisory jurisdiction", over the decisions of sports bodies, for which they have jurisdiction even if the rules provide for recourse to arbitration. However, the courts observe great restraint in this matter as they consider that they should not review *de facto* decisions taken by sports bodies unless their decisions are not supported by relevant evidence or appear unreasonable for other reasons; but, in principle, they freely review points of law (Beloff et al. 2012: 258). In principle, ordinary jurisdiction will be exercised in the form of a claim under private law and not in the form of a judicial review, which comes under public law (Gardiner et al. 2012: 93 ff.). Legal writers criticise the virtual impossibility of obtaining a judicial review, which is a faster and more straightforward procedure, among other things because it allows the court to give a ruling on the basis of written evidence and submissions without a hearing (Beloff et al. 2012: No. 8.18 and following, 262 ff.). In Australia and New Zealand, however, judicial review has already been allowed (Beloff et al. 2012: Nos. 8.26 and 8.27, 265).

72. CAA Lyon, 6th division, 31 May 2012, n° 11LY02776, French Horse-riding Federation, published in *Les Cahiers de droit du sport*, No. 29, 2012, p. 35; see also Lamy Droit du sport, No. 612.75 in fine, with the references.

It may be seen from the foregoing that in most national systems, disciplinary decisions taken by the governing bodies of sports federations cannot – where the parties to the dispute are bound by an arbitration clause – be challenged directly before the state courts, but must first be taken before an arbitration body, subject to the issue of provisional measures.

4.4. State courts as courts of appeal against arbitral awards

State judges may be called on to act as support judges in the hearing of appeals against arbitral awards. The TFS plays a special role in sport matters, particularly when called on to hear appeals against arbitral awards rendered by CAS.

4.4.1. State judges as support judges

Arbitration is inconceivable without the support of the state judicial apparatus. In every arbitration case, there is a state support judge whose role is to ensure that arbitration takes place in accordance with the rules set by the state in which the federation in question is headquartered. In particular, the support judge can act to set aside arbitral awards.

The parties to arbitration proceedings can waive in advance any appeal to the ordinary courts against the award, but such a waiver is not valid unless it is freely consented to.[73] Where appeals against the awards of CAS are concerned, a waiver is only permissible if none of the parties has its domicile or headquarters in Switzerland (see above, 3.3.3.2.iii.).

73. TFS, *X v. ATP Tour* (2007), ATF 133 III 244-5.

4.4.2. Role of the Swiss Federal Tribunal

4.4.2.1. General

A key role is played in this field by the TFS, which hears appeals against the awards of CAS. It is a key role because arbitration clauses in favour of CAS have become the norm for international and national sports federations where the national law to which they are subject does not preclude this (see section 4.3. above).

Although the awards published on the CAS website are only a small minority of the awards actually rendered, they show that very many sports organisations not only recognise the jurisdiction of CAS but have already pleaded one or more cases before it. The list obviously includes the organisers of the Olympic Games (IOC), the Commonwealth Games and other international competitions, but also the international federations for football (FIFA), handball (FIH), basketball (FIBA), athletics (IAAF), tennis (ITF), cycling (UCI), gymnastics (FIG), hockey (FIH), judo (FIJ), wrestling (FILA), swimming (FINA), equestrian sports (FEI), modern pentathlon (UIPM), yachting (ISAF), skiing (FIS), ice hockey (IIHF), ice skating (ISU), curling (WCF), biathlon (IBU) and bowling (FIQ). Those involved in proceedings before CAS also include many European (for example UEFA and CAF) and national (for example ASF and RFEF) sports federations, as well as National Olympic Committees and national anti-doping agencies.

A look at the list of the cases scheduled to be heard by CAS is enough to get an idea of the large number of cases submitted to it.[74] The following sections will focus on appeals to the TFS against awards rendered by CAS.

4.4.2.2. Jurisdiction of the TFS for appeals against arbitral awards

The TFS has jurisdiction to hear appeals against arbitral awards, whether in a national arbitration (Article 389, CPC) or international arbitration (Article 176, paragraph 1, LDIP 1987), if the seat of the arbitration tribunal is located in Switzerland. Arbitration is deemed to be international if at least one of the parties has its domicile or residence outside Switzerland.

74. See www.tas-cas.org/en/general-information/news-detail/article/list-of-cas-hearings.html, accessed 25 February 2016.

In practice, an appeal lies to the TFS against all awards rendered by CAS. Article R28 of the Code of Sports-related Arbitration provides as follows:

> The seat of CAS and of each Arbitration Panel (Panel) is Lausanne, Switzerland. However, 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. (CAS 2016)

The seat of this arbitration tribunal is therefore in Switzerland, wherever the panel actually sat. An Australian court before which an action had been brought against a CAS award rendered by a panel sitting in Sydney acknowledged this, while noting that the rules that the arbitration panel was called on to apply were transnational, universal and global, and that their application was not dependent on a territorial nexus (McLaren 2001: 383).[75]

4.4.2.3. Grounds for appealing to the TFS

i. National and international arbitrations

According to Article 393 of the CPC and Article 190, paragraph 1 of the LDIP (1987), a national or international award may be the subject of an appeal to the TFS in the following cases (some additional grounds of appeal, specific to national and international arbitrations respectively, are discussed below):

- the sole arbitrator was not appointed in the proper way or the arbitration tribunal was not formed in the proper way;
- the arbitration tribunal wrongly accepted or declined jurisdiction;[76]

75. This reference cites *Raguz v. Sullivan & ORS N.S.W.C.A.* 290 (2000).
76. TFS, 19 December 1990, *Sonatrach (II) v. KCA Drilling*, 4P143/1990, ATF, 116 II 639, 2c.

- the arbitration tribunal's decision went beyond the claims submitted to it, or it failed to decide on one of the items of the claim;[77]
- the principle of equal treatment of the parties or their right to an adversarial hearing was not respected.[78]

ii. National arbitrations only

Other grounds of appeal are specific to national arbitrations (Article 393, CPC):

- the award is arbitrary in terms of its result because it is based on findings that are clearly inconsistent with the facts as they emerge from the case file or because it constitutes a manifest breach of the law or of fairness;
- the costs and arbitrators' fees set by the arbitration tribunal are manifestly excessive.

As we will see below, awards for national arbitration are therefore more open to appeal than in the case of international arbitration.

iii. International arbitrations only: public policy

In international arbitration, an appeal is also admissible under Swiss law if it is lodged on the ground that the award is incompatible with public policy (Article 190, paragraph 2, LDIP 1987). In this connection, the TFS has held that "generally, the public policy proviso is designed to allow judges not to afford the protection of the Swiss courts to situations that are blatantly at variance with the most fundamental principles of the legal order as it is conceived in Switzerland".[79]

The TFS considers that, as an international treaty, the Convention seeks to protect individuals against measures taken by states, that disciplinary sanctions are not measures taken by a state, that violation of the Convention is not one of

77. TFS, 1990, *B. AG v. H. & TAS*, ATF 116 II 85, paragraph 3a.
78. TFS, 1981, *C. & W. v. B*; 107 Ia 246, paragraph 3a and TFS, 22 March 2007, *Cañas v. ATP Tour & TAS*.
79. TFS, ATF 125 III 443 paragraph 3d.

the grounds of appeal provided for in Article 190, paragraph 2 of the LDIP (1987) and that, accordingly, the Convention does not in principle apply directly to arbitration proceedings to which the parties have freely consented. However, the TFS accepts that certain guarantees derived from Article 6 of the Convention may be indirectly applied because they fall within the ambit of Swiss public policy. These are the right to an independent and impartial tribunal, the right to have one's case determined within a reasonable time and the right to a fair procedure.[80]

This view is shared by CAS,[81] as well as by some authors (for example Rigozzi 2005: 471-2). However, Besson (2006: 395, 402) envisages the possibility of the direct application of Article 6 of the Convention by ordinary courts hearing appeals against arbitral awards.

In addition, Article 182, paragraph 3 of the LDIP, applying to international arbitration, stipulates that arbitration panels must comply with certain mandatory procedural principles, including equal treatment of the parties (for example, numbers of exchanges of documents and time limits for producing them, the same opportunities for calling witnesses and experts, allocation of speaking time during hearings, access to the arbitration file) and the right to an adversarial hearing (for example, the right to submit factual and legal arguments relating to the subject-matter of the proceedings, right to submit relevant evidence, right to participate in hearings, right to be represented or assisted in the proceedings before the arbitrators).

In this connection, the TFS refers to the concept of procedural public policy, which is violated:

> where fundamental and commonly recognised principles are breached, leading to an unbearable contradiction with the sense of justice, such that the award seems incompatible with the values prevailing in a state governed by the rule of law. These principles include the right to a fair trial.[82]

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80. TFS, 10 February 2010, *Pechstein v. ISU*, 4A_612/2009; 10 June 2010, *Mutu v. FIFA*, 4A_458/2009; 11 June 2001 *Xavier v. UEFA*, 4P_64/2011, 127 III 429; 14 December 2012, *X. v. FIBA*, 4A_198/2012; 21 February 2008, *X. v. Association A.*, 4A_370/2007.
81. CAS 2011/A/2384, Alberto Contador Velasco & RFEC, 6 February 2012.
82. TFS, 11 June 2001, *Xavier v. UEFA*, 4P_64/2001.

The concept of public policy is construed narrowly by the TFS, which only sets aside an arbitral award for a violation of public policy if the award is genuinely shocking in terms of its result.

In sports disciplinary matters, it has availed itself of this possibility only once, in a case involving a football player.[83] This player had signed a fixed-term employment contract with FC Shakhtar Donetsk that ran from 1 July 2004 to 1 July 2009. On 2 July 2007, he terminated the contract unilaterally, without just cause, and signed another with the Spanish club Real Zaragoza SAD. Shakhtar brought proceedings before FIFA's Dispute Resolution Chamber, which ruled that the player owed it, jointly and severally with his new club, the sum of 6.8 million euros by way of compensation for breach of contract. The parties lodged an appeal with CAS, which decided that the player should pay Shakhtar 12 million euros, Real Zaragoza being jointly and severally liable for payment. The sum was not paid. FIFA's Disciplinary Committee granted a final, 90-day extension of time for payment of the debt, stipulating that, failing payment, and on application by Shakhtar, the player would be suspended indefinitely until the sum had been paid in full and/or six points would be deducted from Real Zaragoza in its domestic championship. The player subsequently met his obligations in part by paying Shakhtar 500 000 euros, while Zaragoza paid nothing. Both lodged an appeal with CAS against FIFA's decision. The appeal was dismissed. The player then took the case to the TFS. In its judgment delivered on 27 March 2012, the TFS held that FIFA had jurisdiction to impose sanctions for the failure of a player or club to comply with a CAS award. Since the sanction provided for in the decision was dependent on Shakhtar making a request to that effect, the player's fate was in the hands of this club. The threat of a life suspension was in breach of Article 27 of the CC, which provides that no one may bind himself by contract in a manner that limits his or her personal freedom to an excessive degree. The sanction, which was not limited in time, was valid throughout the world and applied to all football-related activities, and jeopardised the player's economic freedom. In the view of the TFS, FIFA could not claim an overriding interest, for itself or its members. Furthermore, the sanction was unnecessary since the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards made it possible to initiate a recovery procedure against the player. The TFS accordingly found that the CAS award violated Swiss public policy and set it aside.

83. TFS, 27 March 2012, *Matuzalem v. FIFA*, 4A_558/2011.

The explanatory memorandum shows that the case involved a quite exceptional breach of the appellant's occupational and economic freedom, which was motivated purely by a desire to oblige him to honour a pecuniary debt. This is no doubt what led the TFS to consider the sanction as being so excessive that it exceeded the limits of what was tolerable in a state governed by the rule of law. It cannot therefore be inferred from the judgment of 27 March 2012 that the TFS would be prepared to set aside every award that it considered harsh, or even intrinsically too harsh, by finding it to be contrary to public policy.

iv. Principle of procedural good faith

According to the TFS, any party that considers its rights to have been violated during proceedings must raise an immediate objection, and must do so already during the arbitration proceedings if the grievance is known before the arbitral award is rendered. Failing this, the appeal will be declared inadmissible.

For example, an appeal by a party that became aware during the proceedings of a ground for challenging an arbitrator but did not report it during the proceedings will be declared inadmissible.

4.5. Provisional measures

State courts may sometimes be asked to give a ruling on applications for provisional or conservatory measures filed by persons on whom interim or final sanctions have been imposed by the disciplinary bodies of sports federations.

These applications are a commonly used means of challenging disciplinary decisions: the party asks the judge to order a sports federation not to execute a decision, thus obliging it, for example, to admit a person or a club to one of its competitions. In many sports disputes, obtaining such an order is the primary and often sole aim of the appellant, who does not always intend to initiate or subsequently continue proceedings on the merits (Beloff et al. 2012: No. 862 and following, 278 ff.). This is due to the very nature of sports disputes: an athlete or club suspended or excluded from a

forthcoming competition cannot afford to await the outcome of proceedings on the merits against the disciplinary decision, whether before an arbitration tribunal or a state court, which could take months or even years, during which time the effects of the unfavourable decision will be felt. The athlete or club wants to be able to participate immediately in competitions.

In systems where the state courts have sole jurisdiction, to the exclusion of arbitration tribunals, to hear appeals against decisions by sports federations, jurisdiction to decide on applications for provisional measures naturally lies with the ordinary courts, for example under urgent applications procedures, as in France.

Things become more complicated where the appeal, if any, has to be lodged with an arbitration tribunal. This question featured prominently in a case concerning the football club FC Sion, which was set against FIFA, UEFA and the ASF in a complex affair related to the transfer of a player. The manner in which the transfer had taken place had resulted in FIFA imposing a transfer ban on the club for a specified period. Decisions were given at various levels and FC Sion filed applications for provisional measures against several of them. It obtained such measures in two cases, one of which concerned its exclusion from the 2011-12 UEFA Europa League following a decision by UEFA's disciplinary bodies, it was disqualified from competing in the group stage for fielding players who were ineligible for this competition. By an order for "super-provisional" measures, that is issued without the other party being given a hearing, a judge of the Vaud cantonal court ordered UEFA to reinstate FC Sion in the competition, without, however, prescribing the exclusion of the team that had qualified in place of FC Sion.[84] This ruling was upheld in the form of provisional measures after the parties had been heard. The problem with which UEFA was then faced was the practical difficulty, not to say impossibility, of turning a four-team group into a five-team group, given the very busy national and international schedule at that time of the year, a problem that the state court had evidently not considered. UEFA did not act on the court's order, which triggered a further wave of proceedings, which ended a few months later in defeat for FC Sion on the merits, first before CAS, then before the TFS, and in the club's withdrawal from all the other pending actions.

84. Civil Court of the Canton of Vaud, order for super-provisional measures of 13 September 2011, in the case CM11.0337, *Y. SA v. UEFA*.

Sports organisations would prefer it if jurisdiction to rule on applications for provisional measures were reserved for an arbitration tribunal in cases where jurisdiction to adjudicate on the merits lies with an arbitration tribunal. They have more confidence in an arbitration tribunal, and especially CAS, to assess complex situations in the sports world and order measures that take account of the practical possibilities open to the federations.

To avoid a recurrence of cases similar to that of FC Sion, some federations have revised their statutes and now exclude the jurisdiction of state courts to order provisional measures. Examples include FIFA, whose statutes (Article 68, paragraph 2, FIFA 2015) provide that "[r]ecourse to ordinary courts of law is prohibited", and the ASF, whose regulations (Article 93.4, ASF 2016) provide that "the CAS has sole jurisdiction for provisional measures against decisions of the ASF, its sections and subordinate organisations, recourse to the ordinary courts being excluded".

CAS also reacted. The old Article R37 of its code provided that "[n]o party may apply for provisional or conservatory measures under these Procedural Rules before the request for arbitration or the statement of appeal, which implies the exhaustion of internal remedies, has been filed with the CAS". Since 1 January 2012, this Article has stated in substance that parties may apply for provisional measures once the federation's remedies have been exhausted, that is even before any appeal has been filed with CAS against the decision in question. By allowing for this possibility once the sports federation has given its final decision, CAS makes it possible to avoid situations where the parties apply to a state court in the interval between that decision and the filing of an appeal. The state court would have to accept jurisdiction in the absence of that of CAS. The latter obviously also has jurisdiction to decide on any applications for provisional measures that are submitted to it after a request for arbitration or an appeal has been filed with it.

It remains to be seen whether the exclusion of recourse to a state court in the event of proceedings being brought before CAS, due to the fact that the latter has jurisdiction once the sports organisation has given its final decision, is admissible under Swiss law. It probably is in the case of international arbitrations, since Article 183 of the LDIP (1987) provides that "unless otherwise agreed, the arbitration tribunal may order provisional or conservatory measures at a party's request". However, this is debatable in the case of national arbitrations, since Article 374, paragraph 1 of the Swiss Code of Civil Procedure provides that "the court or, unless otherwise agreed by the parties, the arbitration tribunal

may, at a party's request, order provisional measures, *inter alia* for the purpose of preserving evidence"; it would appear that the parties cannot exclude the jurisdiction of state courts, for example by means of a provision to that effect in the sports organisation's statutes or regulations. However, this question remains in abeyance.

When CAS receives a request for provisional measures, it conducts a prima facie review, in which it considers whether the appeal has reasonable prospects of success and whether irreparable harm might be caused if provisional measures were not granted, and it weighs up the different interests.[85] The criteria are in principle the same when an application for provisional measures is filed with a state court.

4.6. Comments

Given the high level of development attained by the sports justice system, especially in doping matters, it is not surprising that the number of problem cases in which the domestic courts are called on to give a decision has gradually decreased. It is true that there have always been cases in which sports regulations – especially those of a technical nature – were deemed contrary to national or supranational provisions: we need merely think of the *Bosman* case already referred to. In these cases, however, the development of the sports system seems to have considerably limited the risk of conflicts of rules. Doping is a case in point: the setting up of a world programme with joint public-private participation makes it increasingly difficult for situations like that of the Meca-Medina case to occur in practice.

85. See CAS 98/200, *AEK Athens FC & Slavia Prague FC v. UEFA*, 20 August 1999, paragraphs 29 and 40, for the order for provisional measures of 17 July 1998.

Concluding remarks

Three main conclusions may be drawn from this overview of the sport movement's disciplinary and arbitration procedures.

First, it is clear that sports procedures are becoming increasingly judicial in nature. For example, when sportsmen and women are called before a disciplinary body, they enjoy safeguards that make the proceedings similar to those of the ordinary courts.

Second, while this tendency is becoming more widespread, there are still some appreciable differences among sports organisations. Although most federations try to adopt procedures that respect the main procedural principles, the very frequent use of arbitration ensures that disputes remain confined to the world of sport.

Last, this edifice is threatened by recent developments, the importance of which can be gauged by the recent decisions of the German courts in the *Pechstein v. ISU* case, so that it is difficult today to present a concrete picture of the sport movement's disciplinary and arbitration procedures.

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List of abbreviations and acronyms

ACSU: ICC's Anti-Corruption and Security Unit

AIBA: International Boxing Association

AIWF: Association of International Winter Sports Federations

ANOC: Association of National Olympic Committees

ASA: Swiss Arbitration Association (*Association suisse de l'arbitrage*)

ASF: Swiss Football Association (*Association suisse de football*)

ASOIF: Association of Summer Olympic International Federations

BGHZ: Bundesgerichtshof in Zivilschafen

BWF: Badminton World Federation

CAS/TAS: Court of Arbitration for Sport/Tribunal arbitral du sport

CC: Swiss Civil Code

CCP: Swiss Code of Criminal Procedure

CJEU: Court of Justice of the European Union

Court (the): European Court of Human Rights

CPC: Swiss Civil Procedure Code

EPAS: Enlarged Partial Agreement on Sport

FA: Football Association

FCE: FIFA Code of Ethics

FDC: FIFA Disciplinary Code

FIBA: International Basketball Federation

FIFA: International Federation of Association Football

FIGC: Italian Football Federaton *(Federazione Italiana Giuoco Calcio)*

FIH: International Hockey Federation

ICAS: International Council of Arbitration for Sport

ICC: International Cricket Council

ICSS: International Centre for Sport Security

IOC: International Olympic Committee

IWF: International Weightlifting Federation

LDIP: Swiss Federal Act on Private International Law (*Loi sur le droit international privé*)

MLB: Major League Baseball

MLS: Major League Soccer

NBA: National Basketball Association

NFL: National Football League

NHL: National Hockey League

PTIO: Professional Tennis Integrity Officer

TIU: Tennis Integrity Unit

TFS: Swiss Federal Tribunal (*Tribunal fédéral suisse*)

UEFA: Union of European Football Associations

UIT: International Shooting Union

WADA: World Anti-Doping Agency

About the authors

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After a judicial career spanning 24 years, first as an investigating magistrate, then as a public prosecutor, Pierre Cornu, a lawyer by training, worked for a year with UEFA, where he was responsible for disciplinary matters and questions relating to integrity and regulations. In 2012, he joined the International Centre for Sports Studies in Neuchâtel (Switzerland) as a legal adviser. For many years he chaired the disciplinary bodies of the Swiss Football Association. He is currently co-chair of the International Weightlifting Federation (IWF) anti-doping committee. In the course of his judicial career, he often worked as an expert for the Council of Europe on judicial reform projects in central and eastern Europe. Since August 2015, Pierre Cornu has been a judge at the cantonal court in Neuchâtel, where he has mainly been active in the criminal appeals division.

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Since the Enlarged Partial Agreement on Sport (EPAS) was set up in 2007, its major priority has been to address the current challenges facing sport in Europe. To this end, it has developed a pan-European programme involving a variety of stakeholders from public authorities and the world of sport.

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