# EGMR 40575/10_67474/10 vom 2. Oktober 2018

Hudoc Ch, 2018-10-02, FR

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FR: CourEDH 40575/10_67474/10 du 2 octobre 2018

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## Regeste

Remainder inadmissible (Art. 35) Admissibility criteria;(Art. 35-3-a) Ratione personae;No violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings;Disciplinary proceedings;Article 6-1 - Impartial tribunal;Independent tribunal);Violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings;Disciplinary proceedings;Article 6-1 - Public hearing);Pecuniary damage - claim dismissed (Article 41 - Pecuniary damage;Just satisfaction);Non-pecuniary damage - award (Article 41 - Non-pecuniary damage;Just satisfaction); Violation: 6;6-1; No violation: 6;6-1

## Erwägungen

### E. 2

Rules on the designation of CAS arbitrators, as in force at the material time

### E. 3

Whether the second applicant has exhausted domestic remedies

### E. 3.2

Secondly, the applicant complains that the president of the arbitral panel, F., was biased. He allegedly informed one of her current legal representatives in October 2007 that he took a ‘hard line on doping issues’ when the latter wished to appoint him as arbitrator in other proceedings for an athlete whom he represented. The appellant claims that F.’s appointment by G., a former member of the National Olympic Committee and president of an international sporting association and member of the IOC Sport and Law Commission, thus meant that the decision had in fact already been made. The complaint is unfounded. The accusation directed at the president of the arbitral panel to the effect that he had stated in another context that he took a ‘hard line’ on doping issues is too vague and general to give rise to reasonable doubt about the independence of F., especially since there is no direct relationship to these proceedings (compare ATF 133 I 89 at 33 p. 92; and ATF 105 Ia 157 at 6a p. 163). The complaints that the president of the arbitral panel was biased and that the IOC influenced the composition in an unlawful manner are thus unfounded.

### E. 3.3

The appellant’s further complaint that the IOC and the international sporting associations could have influenced the decision through the intermediary of the CAS Secretary General, in that the latter had subsequently ‘amended’ the decision under appeal, is speculative and is not based on established facts. The appellant herself states that she does not know whether the Secretary General made use of the possibility of ‘rectification’ of the decision or not. Moreover, she did not submit a complaint within the meaning of section 190(2)(a) PILA when she argued that, under Article R59 of the CAS Code, the decision had to be

communicated to the CAS Secretary General, who was entitled to make ‘rectifications of pure form’ and ‘to draw the attention of the [arbitral] panel to fundamental issues’. Contrary to the allegation in the appeal, this process does not give rise to any doubt that the decision was taken solely by the arbitral panel. There is nothing to suggest any undue influence on the tribunal such that its independence can be called into question. The complaint about a lack of independence and the unlawful composition of the arbitral panel (section 190(2)(a) PILA) is unfounded and the procedural applications made in this connection must therefore be rejected. 4. The appellant further claims that there has been a violation of her right to a public hearing.

**E. 3.4**

Accordingly the complaint of a breach of section 190 (2)(a) PILA fails with regard both to the president [F.] and to arbitrator [M.].” B. Facts relating to application no. 67474/10

**E. 4**

The second applicant complained of violations of Article 6 §§ 1 and 2 of the Convention.

**E. 4.1**

In this connection she incorrectly invokes Article 6 § 1 ECHR, Article 30 § 3 of the Federal Constitution and Article 14 § 1 ICCPR, since these are not applicable to voluntary arbitration proceedings according to the case-law of the Federal Tribunal (see judgments 4P.105/2006 of 4 August 2006 at 7.3; and 4P.64/2001 of 11 June 2001 at 2d/aa, unreported ATF 127 III 429 ff.). It is not possible to derive from the above-cited provisions a right to a public hearing in arbitration proceedings. The CAS did not disregard the appellant’s right to a public hearing in rejecting her application to allow her agent to attend the hearing as Article R57 of the CAS Code only provides for a public hearing if the parties so agree. The appellant does not show to what extent the right to be heard (section 190 (2) (d) PILA) and public policy (section 190 (2) (e) PILA) should require a public hearing in international arbitration proceedings, which are not public as a rule. Regardless of the question as to the existence of such a right, in view of the key role of the CAS in the field of sport, it would be desirable [ wünschenswert ] for a public hearing to be held if the athlete concerned so requests, to strengthen trust in the independence and fairness of its awards.

**E. 4.2**

Unlike the proceedings before the CAS, which freely assesses factual and legal issues, the Federal Court’s scrutiny in an appeal against an arbitral award is significantly restricted. The present case thus lends itself to a decision on the basis of the record; the holding of a public hearing (section 57 FCA), as requested by the appellant, is not called for. A mandatory public hearing before the Federal Tribunal, as is exceptionally required by a law that is higher than domestic law – for example, in the case of an application under section 120 (1) (c) FCA or where the Federal Court decides to adjudicate the matter itself (see section 107 (2) FCA) based on its own findings of fact – (see HEIMGARTNER/WIPRÄCHTIGER, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, nos. 9 ff. on section 57 FCA; and JEAN-MAURICE FRÉSARD, in: Commentaire de la LTF , 2009, nos. 8 ff. on section 57 FCA), is not an option in the context of arbitration proceedings pursuant to section 77 FCA. The application for a public hearing before the Federal Court must therefore be rejected.”

**E. 5**

Notice of the applications was given to the Government on 12 February 2013.

**E. 6**

On 23 May 2013 Chelsea Football Club Ltd. (also referred to hereinafter as “Chelsea” or “the third-party intervener”) was given leave to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court) in the context of application no. 40575/10.

**E. 7**

Neither the Romanian Government nor the German Government, to which copies of applications nos. 40575/10 and 67474/10, respectively, had been transmitted (Article 36 § 1 of the Convention and Rule 44 § 1 (a)), wished to exercise their right to intervene.

**E. 8**

On 6 December 2016 the Court decided to join the two applications in accordance with Rule 42 § 1. THE FACTS I. THE CIRCUMSTANCES OF THE CASES A. Facts relating to application no. 40575/10

**E. 9**

On 11 August 2003, the applicant, who was a professional footballer, signed an employment contract with Chelsea Football Club, expiring on 30 June 2008, stipulating that it would be governed by English law. The next day he was transferred from the Italian club AC Parma to Chelsea for the sum of 22,500,000 pounds sterling (GBP), equivalent to about 26,343,000 euros (EUR). Under the contract the applicant was to receive a gross annual salary of GBP 2,350,000 (about EUR 2,751,000), and a “once only signing-on fee” of GBP 330,000 (about EUR 386,000) payable in five instalments.

**E. 10**

On 1 October 2004 a targeted drug test was held by the English Football Association (FA) and the applicant tested positive for cocaine. On 28 October 2004 Chelsea terminated the applicant’s employment contract with immediate effect. He was also suspended.

**E. 11**

As soon as the suspension ceased to have effect, the applicant returned to Italy, where he started playing again professionally in the spring of 2005, successively with Juventus FC, AC Fiorentina and AC Cesena. He was suspended again in 2010 for six months on account of drug use. He later played in the French first division for the Corsican club Ajaccio.

**E. 12**

On 26 January 2005 the applicant and Chelsea decided jointly to refer to the Football Association Premier League Appeals Committee (the “FAPLAC”), affiliated to the Fédération Internationale de Football Association (“FIFA”), the issue of whether the applicant had acted in breach of his employment contract “without just cause”, within the meaning of Article 21 of the FIFA Regulations for the Status and Transfer of Players (“the 2001 Regulations”). The applicant was not obliged to accept arbitration, in view of the possibility under Article 42 of the 2001 Regulations for players to seek redress before a domestic court in any dispute with their clubs.

**E. 13**

On 20 April 2005 the FAPLAC decided that the applicant had committed such a breach.

**E. 14**

The applicant lodged an appeal with the Court of Arbitration for Sport (the "CAS"), which had jurisdiction in respect of the FAPLAC's decisions. A panel presided over by German lawyer Mr D. ■ R. M upheld the decision in question on 15 December 2005. It interpreted the term "unilateral breach" in Article 21 of the 2001 Regulations and reached the conclusion that it referred to the act of breaking a contract and not its termination. The applicant did not challenge that award. On 11 May 2006 Chelsea requested that the FIFA Dispute Resolution Chamber (the "DRC") should award it compensation following the established breach of the employment contract by the applicant. The DRC initially decided that it did not have jurisdiction. Chelsea lodged a new appeal with the CAS, which referred the case back to the DRC on 21 May 2007 for a ruling on the merits. In a decision of 7 May 2008, the DRC ordered the applicant to pay Chelsea the sum of EUR 17,173,990. The DRC calculated this amount on the basis of the unamortised costs payed by Chelsea for the applicant's transfer under Article 22 of the 2001 Regulations, in accordance with English law.

**E. 15**

On 2 September 2008 the applicant filed a statement of appeal with the CAS claiming that no compensation was due by him to Chelsea. He appointed Mr J.-J. B. as arbitrator. On 22 September 2008, relying on Article R34 of the Code of Sports-related Arbitration (the "Code of Arbitration"), the applicant challenged the appointment of Mr D. ■ R. M, the arbitrator chosen by Chelsea, who had presided over the CAS panel which made the award of 15 December 2005. In a decision of 13 January 2009 the International Council of Arbitration for Sport (the "ICAS") dismissed the challenge. On 14 January 2009 the CAS informed the parties that the panel would be constituted by Mr J.-J. B., Mr D. ■ R. M. and Professor L. F., a lawyer practising in Milan, who would be its president. In an award of 31 July 2009 the CAS dismissed the applicant's appeal. It found that the only question still in dispute, namely the amount of the compensation, had been settled by the DRC in accordance with Article 22 of the 2001 Regulations and English law.

**E. 16**

On 14 September 2009 the applicant lodged an appeal with the Swiss Federal Court (the "Federal Court"), submitting that the award should be annulled on the ground that the CAS had not presented sufficient guarantees of independence and impartiality. In his view, arbitrators L. F. and D. ■ R. M. should not have been part of the arbitral panel. As to the former, the applicant relied on an anonymous e-mail according to which the law firm in which he worked represented the interests of Chelsea Football Club's owner. As to the latter arbitrator, the applicant indicated that he had sat on the arbitral panel which had made the first award, that of 15 December 2005. The applicant further argued that the impugned award was incompatible with substantive public policy, with the prohibition on forced labour and with his right to respect for his private life.

**E. 17**

In a judgment of 10 June 2010 (4A_458/2009) the Federal Court dismissed the applicant's appeal, mainly on the ground that the arbitral panel could, in its view, be regarded as "independent and impartial". It rejected the other grounds of appeal that it had declared admissible. The relevant part of the Federal Court's judgment reads as follows: "3.1 Like a national court, an arbitral tribunal must present sufficient guarantees of independence and

impartiality (ATF [Federal Court judgment] 125 I 389 at 4a; 119 II 271 at 3b and cases cited). Failure to comply with this rule entails unlawful composition under the aforesaid legal provision (ATF 118 II 359 at 3b). In order to determine whether an arbitral tribunal presents such guarantees, reference must be made to the constitutional principles developed with regard to national courts (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However, the specificities of arbitration and in particular those of international arbitration must be taken into account when examining the circumstances of a given case (ATF 129 III 445 at 3.3.3 p. 454). In this connection, sports arbitration as instituted by the CAS has some particularities which have already been outlined elsewhere (ATF 129 III 445 at 4.2.2.2), such as a closed list of arbitrators. These should not be disregarded, even though they do not per se mean that one should be less demanding of sports arbitration than of commercial arbitration. ... 3.2.1 The appellant claims that on 1 September 2009 his English counsel received an anonymous e-mail advising him, in substance, that the Milan law firm in which Professor [L. F.] worked represented the interests of [R. A.], an important Russian businessman who controlled the respondent, a circumstance that the president of the arbitral panel had failed to disclose in his declaration of independence. On 13 October 2009 [L. F.] filed a detailed written statement attached to the CAS answer, in which he vigorously denied the appellant's allegations derived from that anonymous e-mail. That statement was communicated to the appellant, who did not deem it useful to challenge its content as he abstained from filing submissions in reply. 3.2.2 As the appellant claims to have become aware of the ground for revision upon receipt of the 1 September 2009 e-mail, namely before the deadline for appeal, he rightly raised that argument in the present appeal on the basis that the arbitral panel was unlawfully composed (section 190(2)(a) PILA [Private International Law Act]) and not by seeking revision (judgment 4A_234/2008 of 18 August 2008 at 2.1). That being said, the appellant himself concedes in his observations (n. 58 and 62) that he is not in a position to verify the accuracy of the information he was given anonymously and that the facts mentioned in the aforesaid e-mail would constitute ground for a challenge only if they were established. It must be admitted, however, having regard to the detailed written statement of Professor [F.], not called into question by the appellant, that this requirement is not met. Indeed, in that statement the president of the arbitral panel refutes item by item all allegations challenging his independence in relation to the respondent. He has not been contradicted and his presence on the arbitral panel which made the award under appeal does not appear unlawful, such that the appellant has no cause to complain about it a posteriori . 3.3.1 The appellant also challenges the independence of arbitrator [D.-R. M.], chosen by the respondent, on the ground that this arbitrator presided over the arbitral panel which issued the first award in favour of the English club in the dispute between the parties. In this connection, the appellant refers to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration approved on 22 May 2004 (http://www.ibanet.org/publications/Publications_home.cfm; hereinafter 'the Guidelines'; on this subject see judgment 4A_506/2007 of 20 March 2008 at 3.3.2.2 and the authors cited therein). In his view, the alleged circumstance fell within paragraph 2.1.2 of the Guidelines, which concerns the situation where 'the arbitrator has previous involvement in the case', under the so-called 'waivable red list' covering instances in which the arbitrator must withdraw unless otherwise expressly agreed by the parties (paragraph 2 of Part II of the Guidelines). According to the appellant, that circumstance could also come under the 'orange list' (intermediate situations which must be disclosed but do not necessarily justify a challenge), and specifically paragraph 3.1.5, which applies to an

arbitrator ‘who currently serves or has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties’. The appointment of [D.-R. M.] as arbitrator by the respondent was a reflection, in the appellant’s view, of the appreciation of the party which had won the first case between the same parties (appeal n. 75 in fine ). ... 3.3.3.1 Whatever the appellant may claim, it is far from certain that the two rules of the Guidelines he relies upon would apply in the present case. The first one supposes that the arbitrator was previously involved in the case (para. 2.1.2); this implies the same dispute on the basis of the heading under which that rule appears (‘2.1 Relationship of the arbitrator to the dispute’). From that perspective and on the basis of a purely formal criterion, the present case is not the same as that which gave rise to the first award dated 15 December 2005. Evidence of that is the fact that the two cases were registered under different docket numbers by the CAS Court Office (CAS 2005/A/876 for one, CAS 2008/A/1644 for the other). A third case was initiated and disposed of in the meantime through an award of 21 May 2007, made by three other arbitrators (CAS 2006/A/1192). As to the second rule, when also taken to the letter, it deals with cases where the arbitrator acts, or has acted over the three previous years, as arbitrator in another arbitration concerning one of the parties (or an entity affiliated to one of the parties) but not both of them as is the case here. Moreover, that rule falls under the orange list and any breach thereof does not justify the automatic replacement of an arbitrator who falls foul thereof. That being said, the weight of these formal arguments should not be overestimated. Indeed, one should not forget that the Guidelines, while admittedly a precious working instrument, do not have legislative value. Hence the circumstances of the case at hand, like the case-law of the Federal Court in this field, will remain decisive in settling any conflict of interest (judgment 4A_405/2007, cited above, ibid.). 3.3.3.2 The fact that a judge has already acted in a case may give rise to a suspicion of bias. Acting in both cases is therefore admissible only if the judge, when participating in previous decisions concerning the same case, has not already taken a position as to certain issues such that he will no longer appear to be free from bias in the future and, accordingly, the outcome of the proceedings appears to be pre-determined. To decide that issue, the facts, the procedural specificities and the specific issues raised at the various stages of the proceedings must be taken into account (ATF 126 I 168 at 2 and the cases cited). The same applies in the field of arbitration. An arbitrator’s behaviour during the arbitration proceedings may also cast doubt on his independence and impartiality. However, the Federal Court has shown itself to be demanding in assessing whether there is a risk of bias. Thus there is case-law to the effect that procedural measures, whether right or wrong, are not sufficient per se to justify an objective suspicion of bias on the part of the arbitrator who has taken them (ATF 111 Ia 259 at 3b/at p. 264 and cases cited). That remark also applies to an arbitrator who has actively participated in a partial award, even if it is erroneous (ATF 113 IA 407 at 2a p. 409 i.f.). In the present case, the task entrusted to the CAS panel which made the first arbitral award with arbitrator [D.-R. M.] as its president was clearly circumscribed. Indeed, appearing before that appellate body, the appellant already no longer denied having committed a serious breach of his contractual obligations by taking cocaine. However, he argued that to the extent that the initiative of terminating his employment contract on that ground had been taken by the respondent, he could not be blamed for a ‘unilateral breach of the contract without cause or without sporting cause’ within the meaning of Article 21 of the 2001 Regulations and accordingly he could not be ordered to compensate his former employer. The arbitrators’ task was therefore only to interpret the words ‘unilateral breach’ in the

English version of Article 21 of the 2001 Regulations. The panel decided that issue of principle by finding that the aforesaid wording referred to the breaking of an employment contract and not to its termination. Moreover it rejected a second argument whereby the appellant had called for a distinction to be drawn between a player who left his club without cause and one who seriously breached his contractual obligations. In so deciding, the panel certainly made an award in the respondent's favour, as it dismissed a major objection by the party from whom the former sought damages. However, besides the fact that the appellant never challenged the first award, and unless one attributes ulterior motives to arbitrator [M.], it is not possible to find objectively that by deciding the two aforesaid issues, essentially of a theoretical nature, the arbitrator acted in a manner which could cast doubt on his impartiality and give credence to the idea that he had already chosen to take the respondent's side. Moreover, it does not appear from the 15 December 2005 award that the panel prejudged in any way the issue of the amount of compensation due by the appellant. It must also be emphasised that we are talking here about three awards issued in the same matter, substantively speaking, which could if appropriate have been made by the same panel, the first two being interlocutory in relation to the third, namely the final award now under appeal. As a matter of principle, save in exceptional circumstances, it is not admissible to challenge a posteriori the lawfulness of the composition of the arbitral panel which made the final award simply because its members had already ruled on the matter by participating in interlocutory or partial awards. To admit this would be tantamount to a call for the abolition of such awards, whilst their usefulness is no longer in issue. The appellant invokes no such circumstances. Consequently, the doubts he casts retrospectively as to the independence and impartiality of arbitrator [M.] are not justified.

**E. 18**

The applicant is a professional speed skater and she is affiliated to the Deutsche Eisschnelllauf-Gemeinschaft ("the DESG"), which is itself a member of the International Skating Union ("ISU"), whose seat is in Lausanne.

**E. 19**

On 6 February 2009, all the athletes taking part in the World Speed Skating Championships taking place on 7/8 February 2009 in Hamar (Norway), including the applicant, underwent anti-doping controls. On 18 February 2009 further blood samples were taken from the applicant. After reviewing her blood profile, the ISU filed a complaint with its Disciplinary Commission against the applicant. After a hearing held in Berne on 29 and 30 June 2009 the Commission, in its decision of 1 July 2009, imposed a two-year ban on her with retroactive effect from 9 February 2009.

**E. 20**

On 21 July 2009 the applicant and the DESG appealed against that decision to the CAS. On 17 August 2009 the CAS announced the composition of the arbitral panel for this dispute. No objections were raised by any of the parties during the course of the CAS proceedings. The hearing was held in Lausanne on 22 and 23 October 2009. In spite of the applicant's request for the hearing to be public, it was held in camera. Twelve experts were called by the parties, who were able to question them freely.

**E. 21**

On 23 and 24 November 2009 the applicant sought the reopening of the proceedings. On 25 November 2009 the CAS dismissed that request and confirmed the two-year ban.

**E. 22**

On 7 December 2009 the applicant lodged an appeal with the Federal Court, submitting that the CAS award should be annulled. She argued that the CAS was not an “independent and impartial tribunal” on account of the process for the appointment of the arbitrators, that its president had not been impartial because he had previously taken a “hard line” against doping, and that its Secretary General had amended the arbitral award a posteriori . She also complained that the CAS had not held a public hearing. She further alleged a breach of her right to be heard and raised various public policy grounds.

**E. 23**

In a judgment of 10 February 2010 the Federal Court dismissed the applicant’s appeal. The relevant part reads as follows: “3.1.2 If an arbitral tribunal proves deficient with respect to independence or impartiality, this is a case of unlawful composition within the meaning of section 190(2)(a) PILA. In accordance with the principle of good faith, however, the right to invoke this ground of appeal is forfeited if it is not raised immediately (ATF 129 III 445 at 3.1 p. 449 with references). The appellant herself appealed to the CAS and signed the procedural order of 29 September 2009 without raising objections with respect to its independence or impartiality. Under these circumstances it is not compatible with the principle of good faith to have raised the issue of the impartiality of the arbitral panel for the first time in an appeal before the Federal Court. The complaint that the arbitral panel lacked independence must therefore be dismissed. 3.1.3 Moreover, contrary to the appellant’s view, the CAS must be regarded as a proper arbitral tribunal. In addition, according to the case-law of the Federal Court, the CAS is sufficiently independent from the IOC [International Olympic Committee] for its awards, even in matters which concern the IOC’s interests, to be regarded as proper judgments comparable with those of a national court (ATF 129 III 445 at 3 p. 448 ff. with references). Regardless of the fact that the appellant’s factual allegations are not based on the factual findings of the award under appeal (see section 105(1) FCA [Federal Court Act]), her submissions of a general nature do not give rise to reasonable doubt as to the independence of the CAS. The complaint that the CAS lacks independence would thus in any event be ill-founded.

**E. 24**

After losing her case before the Federal Court and having lodged an application with this Court, the applicant also brought proceedings against the ISU in the German courts. Initially she won her case in the Munich Court of Appeal, which, in a judgment of 15 January 2015, found the CAS awards to be inapplicable in Germany. According to that court, while it could be considered that athletes voluntarily agreed to defer to the jurisdiction of an arbitral tribunal, that could not be valid in the case of the CAS as a result of the decisive weight of sports federations in its composition. In the view of the Bavarian court, this imbalance was accepted by athletes solely because they would otherwise be unable to take part in professional competitions. It thus considered this situation to constitute an “abuse of a dominant position”.

**E. 25**

That judgment was quashed by the German Federal Court of Justice on 7 June 2016. In that court’s view, while it was true that the ISU had a monopoly within the meaning of German competition law, athletes nevertheless freely agreed to the arbitration clause providing for the jurisdiction of the CAS and that practice did not therefore constitute an abuse of a

dominant position. C. The operation of international sports arbitration

**E. 26**

The CAS was officially set up on 30 June 1984, the date of the entry into force of its statutes, to procure the arbitral resolution of disputes arising within the field of sport. Its seat was established in Lausanne. Being an autonomous arbitral institution in terms of organisation, albeit without legal personality, it was composed at the outset of sixty members who were appointed, for each quarter thereof, by the International Olympic Committee ("IOC"), the International Sports Federations ("the IFs"), the National Olympic Committees ("the NOCs") and the President of the IOC. The operating expenses of the CAS were borne by the IOC, which was competent to amend the court's statutes (for further details, see Federal Court judgment ATF 119 II 271, at 3b).

**E. 27**

In a judgment of 1993 the Federal Court expressed reservations as to the independence of the CAS in relation to the IOC, on account of the structural and economic links between the two institutions. It found it desirable for the CAS to become more independent of the IOC (ibid.). That judgment led to a major reform of the CAS.

**E. 28**

The main innovation consisted in the creation of the ICAS, in Paris on 22 June 1994, and in the drafting of the Code of Sports-related Arbitration (the "Code"), in force from 22 November 1994.

**E. 29**

The ICAS, a private-law foundation under Swiss law, with its seat in Lausanne, is composed of twenty members who are high-level jurists. Its members are appointed for a renewable term of four years.

**E. 30**

A major role of the ICAS is to safeguard the independence of the CAS and the rights of parties. Among its various functions, it adopts and amends the Code, it manages the CAS and looks after its financing, it establishes the list of CAS arbitrators from which parties can choose, it takes decisions concerning the challenge and removal of arbitrators and appoints the CAS Secretary General.

**E. 31**

The CAS constitutes the panels whose task it is to resolve disputes in the field of sport. It comprises an Ordinary Arbitration Division and an Appeals Arbitration Division. The former deals with disputes submitted to the CAS under the ordinary single-instance procedure (performance of contracts, civil liability, etc.), while the latter entertains appeals against disciplinary decisions taken at last instance by sports-related bodies such as federations (for example, the banning of an athlete for doping, misconduct on a pitch or insults directed at a referee). 1. Rules on the appointment of ICAS members, as in force at the material time

**E. 32**

At the material time, the twenty members of the ICAS were appointed in accordance with Article S4 of the Code, which read as follows: "a. four members are appointed by the

International Sports Federations (‘IFs’), viz. three by the Summer Olympic IFs (ASOIF) and one by the Winter Olympic IFs (‘AIWF’), chosen from within or from outside their membership; b. four members are appointed by the Association of the National Olympic Committees (‘ANOC’), chosen from within or from outside its membership; c. four members are appointed by the International Olympic Committee (‘IOC’), chosen from within or from outside its membership; d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; e. four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.” 2. Rules on the designation of CAS arbitrators, as in force at the material time

**E. 33**

There had to be at least one hundred and fifty arbitrators on the CAS list and they were not assigned to a particular division. The list was established in accordance with Article S14 of the Code, which read as follows: “In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, the ICAS shall respect, in principle, the following distribution : • 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside; • 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside; • 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside; • 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; • 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.”

**E. 34**

Only the arbitrators thus listed – who remained on the list for a renewable period of four years (Article S13 of the Code) – were entitled to serve on a panel (Articles R33, R38 and R39 of the Code).

**E. 35**

Under Article R54 of the Code, the president of the panel was appointed by the president of the CAS Appeals Arbitration Division after consulting the arbitrators chosen by the parties.

**E. 36**

When called upon to serve on a panel, the arbitrators were required to sign a declaration stating that they were independent (Article S18 of the Code). Moreover, every arbitrator was obliged to disclose immediately any circumstances likely to affect his independence with respect to any of the parties (Article R33 of the Code). Any arbitrator could be challenged if the circumstances gave rise to legitimate doubts over his independence. Challenges, in the exclusive power of the ICAS, had to be brought promptly as soon as the ground for the challenge became known (Article R34 of the Code). An arbitrator could be removed by the ICAS if he refused to carry out or was prevented from carrying out his duties or if he failed to fulfil his duties pursuant to the Code. The ICAS could exercise such power through its Board, giving “brief reasons for its decision” (Article R35 of the Code). In the case of a panel of three arbitrators, unless otherwise agreed, each party would choose

its arbitrator and the president of the panel was chosen by those two arbitrators, or, in the absence of an agreement, appointed by the president of the Division (Article R40.2 of the Code). Arbitrators chosen by the parties or by other arbitrators were deemed appointed only after confirmation by the Division president. Once the panel was formed, the file was transferred to the arbitrators for their examination of the case and their award.

**E. 37**

Initially composed of sixty members, the CAS had almost three hundred arbitrators at the material time. 3. Subsequent amendments to the rules on the appointment of CAS arbitrators

**E. 38**

On 1 January 2012 Article S14 of the Code was amended by the removal of the rules on the appointment of arbitrators by fifths. The new wording reads as follows (as shown in a file on the CAS website): “In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs . In addition, the ICAS shall respect, in principle, the following distribution : • 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside; • 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside; • 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside; • 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; • 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.

**E. 39**

As regards the relevant provisions for the present case, the Code in force on 1 January 2017 reads as follows: “S6 ICAS exercises the following functions: ... 3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists ... S14 The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes’ commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes. The ICAS shall appoint personalities to the list of CAS mediators with experience in mediation and a good knowledge of sport in general. S15 ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof. S16 When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures.” II. RELEVANT DOMESTIC LAW 1. Private International Law Act of 18 December 1987

**E. 40**

The relevant provisions of the Federal Law on Private International Law of 18 December 1987 (the “PILA”) read as follows: Chapter 12: International Arbitration Section 176 “1 The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time when the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. 2 The provisions of this chapter shall not apply if the parties have excluded its application explicitly in writing and agreed to the exclusive application of the cantonal rules of procedures concerning arbitration. 3 The arbitrators shall determine the seat of the arbitral tribunal if the parties or the arbitration institution designated by them fail to do so.” Section 190 “1 The award shall be final when communicated. 2 It can be challenged only: a. If a sole arbitrator was designated unlawfully or the arbitral tribunal was constituted unlawfully; b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction; c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; d. If the equality of the parties or their right to be heard in adversarial proceedings was not respected; e. If the award is incompatible with Swiss public policy (ordre public). 3 An interlocutory award may only be challenged on the grounds stated in paragraph 2, letters a and b; the time-limit for lodging an appeal shall run from the communication of that award.” Section 191 “An appeal may be taken only to the Federal Court. The procedure shall be governed by section 77 of the Federal Court Act of 17 June 2005.” Section 192 “1 If neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral tribunal. They may also exclude an appeal only on one or several of the grounds enumerated in section 190, paragraph 2. 2 If the parties have excluded all appeals against the award and enforcement of the awards is sought in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply mutatis mutandis .” 2. Federal Court Act of 17 June 2005, as in force at the relevant time

**E. 41**

The relevant provisions of the Federal Court Act of 17 June 2005 (“the FCA”), as in force at the material time, read as follows: Art. 57 Oral proceedings “The President of the Court may order oral proceedings.” Art. 58 Deliberation “1 The Federal Court deliberates at a hearing: (a) if the President of the Court so orders or if a judge so requests; (b) if there is no unanimity. 2 In other cases, the Federal Court issues its decisions by means of circulation.” Art. 59 Publicit y “1 Any oral proceedings, and deliberations and votes at a hearing, shall take place at a public sitting. 2 The Federal Court may order the hearing to be held totally or partly in camera in the event of a threat to safety, public order or morals, or if the interest of an implicated person so requires. 3 The Federal Court shall make available to the public, for a period of 30 days from the date of notification, the operative part of any judgment which has not been delivered at a public sitting.” Art. 61 Authority of res judicata “The Federal Court’s judgments shall acquire the authority of res judicata on the day of their delivery.” Art. 77 International arbitration “1 A civil-law appeal shall be admissible against decisions of arbitral tribunals, under the conditions provided for in sections 190 to 192 of the Federal Law of 18 December 1987 on Private International Law. 2 In the said cases, the following provisions hereof shall be inapplicable: section 48 (3), section 93 (1) (b), sections 95 to 98, 103 (2), 105 (2), and 106 (1), together with section 107 (2) in so far as the latter provision enables the Federal Court to rule on the merits of the case. 3 The Federal Court shall

examine only those complaints which have been relied upon and substantiated by the appellant." Art. 122 Violations of the European Convention on Human Rights "An application for review of a judgment of the Federal Court on account of a violation of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms may be submitted if the following conditions are satisfied: (a) the European Court of Human Rights, in a final judgment, has found a violation of the Convention or the Protocols thereto; (b) compensation cannot remedy the effects of the violation; (c) the review is necessary to remedy the effects of the violation." 3. Relevant case-law of the Federal Court

**E. 42**

As to the question whether a professional athlete had to be regarded as "obliged" to accept arbitration, in a case concerning a professional tennis-player the Federal Court found as follows, in a judgment of 22 March 2007, published in the official reports (ATF 133 III 235): "4.3.2.2 ... Competitive sport is characterised by a very hierarchical structure whether at international or national level. On a vertical axis, the relationship between the athletes and the organisations which deal with various sports can thus be distinguished from horizontal relationships between parties to a contractual relationship (ATF 129 III 445 point 3.3.3.2 p. 461). This structural difference between the two types of relationship is not without influence on the meeting of the minds which leads to the formation of any agreement. In principle, where two parties do business on an equal footing, each one expresses its intention without being bound to submit to the wishes of the other. This is generally the case in international commercial relations. The situation is very different in the field of sport. Leaving aside the case – which is rather academic – where a well-known athlete, on account of his or her fame, would be in a position to dictate conditions to the international federation governing the relevant sport, experience shows that, most of the time, a sportsperson will not have free rein in his or her dealings with the federation and will be required to submit, for better or for worse, to its desires. Thus an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause, in particular by signing up to the instrument of the sports federation in question in which the clause is to be found, all the more so in the case of a professional. He or she will be confronted with the following dilemma: to agree to arbitration or practise his or sport in a non-professional context ... Presented with the choice between abiding by arbitration or practising the sport 'in the garden' ... while watching competitions 'on the TV' ..., an athlete who wants to play against real competitors or who must do so because it is his/her sole source of income (monetary or in kind, advertising revenue, etc.) will be obliged in actual fact, nolens volens , to opt for the first of those alternatives. For similar reasons, it is obvious that a refusal to appeal against a future arbitral award, i.e. on the part of an athlete, will not generally be the result of a freely expressed will. The agreement stemming from the concordance between the will thus displayed and that expressed by the sports organisation concerned will consequently be affected thereby ab ovo on account of the mandatory consent given by one of the parties. By accepting beforehand to abide by any future award, the athlete, as has been shown, deprives himself at the outset of the right to seek redress at a later stage for any violation of fundamental principles or of essential procedural safeguards that could be committed by the arbitral tribunal ruling in his case. In addition, as regards any disciplinary penalty that may be imposed, such as suspension, which does not require an enforcement procedure, he will not be able to submit his complaints on such grounds to

the enforcements judge. Accordingly, having regard to its importance, the objection that the athlete has waived any right of appeal may not, in principle, be raised, even where such a waiver would satisfy the formal conditions laid down in section 192 (1) PILA ... That conclusion is strengthened by the consideration that any refusal to examine the appeal of an athlete who had no choice other than to accept a waiver of a right of appeal in order to be allowed to participate in competitions also appears questionable in terms of Article 6 § 1 ECHR ..."

**E. 43**

One year later the Federal Court ruled as follows in a case concerning an organiser of football matches (judgment of 20 March 2008, 4A_506/2007): "3.2 ... It must be pointed out that this is a case involving ordinary arbitral proceedings, within the meaning of Article R38 et seq. of the Code as opposed to the vast majority of CAS cases reviewed by the Federal Tribunal, which involve the arbitral appeal procedure following the challenging of a decision issued by the organs of a sports federation having accepted CAS jurisdiction (see Article R47 et seq. of the Code). To that extent, the dispute submitted to the CAS with regard to the international contract involved had all the characteristics of an ordinary commercial arbitration, except for its sports context. The dispute was between two parties on an equal footing, which sought to have it adjudicated in arbitration and were fully aware of the financial issues involved; from that point of view, their situation was quite different from that of the humble professional sportsman confronting a powerful international federation (see ATF 133 III 235 at 4.3.2.2)."

**E. 44**

As regards the independence of the CAS, especially on account of the mechanism for the appointment of arbitrators, in a judgment of 27 May 2003 published in the Official Reports (ATF 129 III 445), the Federal Court ruled as follows: "3.3.3.2 ... As it has been implemented since the 1994 reform, the system of the list of arbitrators now satisfies the constitutional requirements of independence and impartiality applicable to arbitral tribunals. The arbitrators included on the list are at least 150 in number and the CAS has about 200 at the present time. The parties' ability to choose is thus certainly genuine, whatever the appellants may claim, even if one takes account of the nationality, language and sport of the athlete whose case is before the CAS. ... It must further be pointed out that the CAS, in so far as it functions as an external appellate body for the international federations, is not comparable to an association's permanent arbitral tribunal responsible for settling internal disputes at last instance. Reviewing the facts and the law with a full power of examination and having complete freedom to give a new decision in the place of the body which ruled previously (REEB, Revue, ibid.), it is more like a judicial authority that is independent of the parties. In respect thereof, the system of the list of arbitrators does not therefore raise the same objections as those encountered when it is used by arbitral tribunals set up by associations. Moreover, it is not certain that the so-called 'open list' system – providing the parties (or one of them) with the possibility of choosing an arbitrator outside the list, unlike the system of closed lists applied by the CAS (see CLAY, op. cit., n. 478 p. 400) –, which is preferred by certain authors (see esp.: BADDELEY, op. cit., p. 274; STEPHAN NETZLE, 'Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren', in Sportgerichtsbarkeit, in Recht und Sport , vol. 22, p. 9 ff., 12), constitutes a panacea. On the contrary, from the perspective of the efficiency of the arbitral tribunal, this system carries the risk that there might be, within the tribunal, one or more

arbitrators who are not specialised and who may be inclined to act as if they were the lawyers of the parties who appointed them (see, on this subject, SCHILLIG, op. cit., p. 160).” III. INTERNATIONAL MATERIAL Rules of the International Court of Arbitration

**E. 45**

The relevant provisions of the Rules of Arbitration of the International Court of Arbitration (the “ICC Rules”) read as follows: Article 12 “... 4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the [International] Court [of Arbitration]. 5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the [International] Court [of Arbitration], unless the parties have agreed upon another procedure ...” IV. RELEVANT LAW AND PRACTICE OF THE EUROPEAN UNION

**E. 46**

Towards the end of the 1990s, following a number of complaints, the European Commission opened an in-depth investigation into the FIFA rules concerning international transfers of football players. The investigation led to a communication of complaints to FIFA on 14 December 1998. Following that communication and further exchanges with the European Commission, FIFA agreed to amend its regulations, so as to provide, in particular, that in the event of any dispute concerning their implementation, the players could have recourse to voluntary arbitration or take their cases to national courts. The European Commission took the view that the new rules addressed its concerns and discontinued the procedure.

**E. 47**

In a decision published on 8 December 2017, following a complaint by two professional ice-skaters, the European Commission found that the ISU regulations providing for harsh sanctions against athletes who took part in speed-skating competitions that were not recognised by the ISU breached EU rules on anti-competitive practices. It thus gave the ISU three months to amend its regulations accordingly. V. RELEVANT FIFA RULES 1. The 2001 Regulations

**E. 48**

The relevant provisions of the 2001 Regulations read as follows: Article 21 “1. a. In the case of all contracts signed up to the players’ 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable. b. In the case of contracts signed after the 28th birthday, the same principles shall apply but only during the first two years. c. In the cases cited in the preceding two paragraphs, unilateral breach of contract a without just cause is prohibited during the season. 2. a. Unilateral breach without just cause or sporting just cause after the first two or three years respectively will not result in sanctions. However, sports sanctions may be pronounced on a club and/or a players’ agent for inducing a breach of contract. Compensation shall be payable. b. A breach of contract as defined on the preceding paragraph is prohibited during the season. c. Disciplinary measures may he applied In the Dispute Resolution Chamber if notice is not given within the 15 days following the last official match of the national season of the club with which the player is registered.” Article 22 “Unless specifically provided for in the contract, and without prejudice to the provisions

on training compensation laid down in Art. 13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as: 1. Remuneration and other benefits under the existing comma and or the teat co tract. 2. Length of time remaining on the existing contract (up to a maximum of 5 years). 3. Amount of any fee or expense paid or incurred by the former club, amortized over the length of the contract. 4. Whether the breach occurs dating the periods defined in Art. 21.1. ...” Article 42 “Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established which shall consist of the following elements ...” 2. FIFA Disciplinary Code

**E. 49**

The relevant provision of the FIFA Disciplinary Code reads as follows: Article 64 “1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision): a) will be fined for failing to comply with a decision; b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision ; ... 4. A ban on any football-related activity may also be imposed against natural persons.” VI. RELEVANT ISU RULES

**E. 50**

The relevant provisions of the ISU Regulations, as applicable at the material time, read as follows: IV. Judicial Bodies Article 24 “