Thouvenin Rechtsanwälte
Klausstrasse 33
CH - 8024 Zürich

Phone +41 44 421 45 45
Fax +41 44 421 45 00
E - Mail info@thouvenin.com

www.thouvenin.com

Arbitration Newsletter Switzerland

Footnote 5 of the Revised IBA Guidelines on Conflicts of Interest in International Arbitration or: CAS *quo vadis*?

1. Introduction

Art. 3.1.3. of the IBA Guidelines on Conflicts of Interest in International Arbitration, as adopted on 23 October 2014 ("the IBA Guidelines"), suggests under the orange list disclosure if:

> *"[T]he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties."*

In the 2004 edition of the IBA Guidelines there was already a footnote 5 to this provision, exempting maritime and commodity arbitration from such a restriction. In the revised IBA Guidelines 2014 the wording of such footnote has, apparently upon motion of CAS[1], been amended by simply introducing sports arbitration as a third type of arbitration - besides commodity and maritime arbitration - qualifying for such an exemption.

Footnote 5 reads now as follows:

> *"It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or a specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."*

The authors are of the view[2] that CAS arbitration should not be exempted from this duty to disclose multiple appointments of an arbitrator in the sense of Art. 3.1.3 of the IBA Guidelines and explain their position[3] as follows.

2. The CAS in General

After CAS's foundation on 30 June 1984 it had for its first two years no cases to handle at all but then its caseload started to grow slowly but gradually. Once FIFA recognized the CAS jurisdiction in 2002 the case load was then more than doubling - from 107 to 271 cases per year, reaching its peak in 2013 with a record number of 407 new cases being registered. Starting in 2000 CAS has also put an *ad hoc* Division in place for all Olympic Games since then. In short, CAS is indispensable to the world of sports[4].

Nevertheless, athletes have tried on various occasions to question the independence of CAS. The Federal Supreme Court's first leading decision, issued in 1993, recognised CAS as an arbitral institution but voiced some concerns about its closeness to the

1 Standing for "Court of Arbitration for Sports", having its seat in Lausanne; also referred to in French as TAS: "Tribunal Arbitral du Sport".

2 Advocated by Michael Bösch already at a DIS below 40 seminar in May 2015, *cf.* SchiedsVZ 2015, pp. 247 *et seq.*

3 Since transparency will be an issue in these arguments the authors should also disclose that Hansjörg Stutzer applied in 2012 to be appointed to the list of CAS arbitrators but his application was then turned down by CAS.

4 Jan Paulsson, Assessing the Usefulness and Legitimacy of CAS, SchiedsVZ 2015, pp. 263 *et seq.*: "*My own view is that the function that CAS seeks to fulfil in the international community is indispensable. That does not mean that CAS is indispensable. But it does mean that those who raise existential criticisms of CAS have a duty to explain how they consider that this indispensable function would be fulfilled if we listened to them.*" p. 264.

International Olympic Committee ("IOC")[5]. After certain structural changes were undertaken by CAS in 1994 the Federal Supreme Court had, in 2003, the next opportunity to review CAS's independence and it confirmed CAS's full independence from the IOC[6]. Whenever the independence of the CAS was challenged subsequently, the Federal Supreme Court referred to this Lazutina case as its leading decision[7]. In questioning CAS's independence the fact that the parties have to choose from the closed list of arbitrators has always been an issue[8]. In order to be admitted to this list an arbitrator had - up to 1 January 2012 - to fulfil both subjective and objective criteria. S 14 of the CAS Code 2004 edition stated as to the subjective side:

> *"In establishing the list of CAS arbitrators, the ICAS[9] 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 good command of at least one CAS working language."*

In addition, ICAS, in appointing arbitrators to the CAS list, had to respect, on the objective side, quota allocations in the sense that 1/5 of the arbitrators were to be proposed by each of (i) the IOC, (ii) the International Federations ("IFs"), (iii) the National Olympic Committees ("NOCs") and (iv) the athletes. The last 20% was to be *"chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article"*[10]. In the 2012 edition of the Code, S 14 retained the above wording for the subjective criteria but eliminated the 1/5 quota requirement by simply stating that the ICAS, in establishing the CAS list of arbitrators, shall call upon personalities *"whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs."*

CAS has recently changed this provision twice: in its Code edition 2013 it added that "*ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes*" and now, effective as of 1 January 2016, it has further added that the names and qualifications shall not only be brought up to the attention of ICAS by the IOC, IFs and NOCs but also *"by the athletes' commissions of the IOC, IFs and NOCs."* Whether CAS has thereby remedied the structural imbalance to the detriment of the athletes remains to be seen.

So far, however, the way the list of arbitrators was established had not raised any concerns in the eyes of the Federal Supreme Court, neither by the selection procedure nor by the restricted number of arbitrators[11].

3. The present CAS List of Arbitrators

The present list of CAS arbitrators[12] names 356 arbitrators, comprising 24 from Africa, 76 from the Americas, 37 from Asia, 190 from Europe and 29 from Oceania. Among individual countries the United States of America leads with 37 arbitrators, followed by Switzerland with 29, the UK with 28 and Australia with 23 arbitrators. For each arbitrator listed in alphabetical order there exists a very short biography and some, but very few, arbitrators attach an extended CV to their biography. These notes do, however, reveal neither (i) when the individual was appointed a CAS arbitrator nor (ii) by which organisation such arbitrator has been proposed; even less so does this list reveal how often a particular arbitrator has acted as a CAS arbitrator.

This information would be relevant because many practitioners pleading cases at CAS consider that in fact, the choice of arbitrators is rather limited and it seems that only about 70 arbitrators are appointed regularly. Many of the arbitrators listed have in fact never been appointed at all, either due to their origin or due to their lack of established experience in arbitration. Some prominent, *i.e.* very experienced, arbitrators do not accept certain cases since their professional exposure does not provide adequate time to do so. In short: the choice suggested by a list

---

5 BGE 119 II 271, in the matter of Gundel *vs* FEI.

6 BGE 129 III 445, in the matter of Lazutina and Danilova *vs* IOC.

7 Such as in BGE 136 III 605 and notably in the matter of Pechstein *vs* ISU (4A_602/2009).

8 S 12 - S 17 of the CAS Code.

9 ICAS stands for "International Council of Arbitration of Sports" and is the organising body of CAS, in charge of adopting and amending the CAS Code, appointing the CAS arbitrators to the CAS list and the financing of CAS (S 4 - S 5 of the CAS Code).

10 S 14 of the CAS Code 2004 edition, at the end.

11 At the time the Lazutina case was issued in 2003 approximately 200 arbitrators were listed as CAS arbitrators. *"As developed by the changes in 1994 the list of the arbitrators does today meet the constitutional requirements as to independence and impartiality of an arbitrator for an arbitral tribunal."* (BGE 129 III 457) and confirmed subsequently at various occasions, *cf.* footnote 6 above.

12 As visited on the website of CAS on 25 February 2016.

of 356 potential arbitrators is in practice a much more limited one and contradicts the purely numerical approach of the Federal Supreme Court in this respect[13].

This conclusion can be corroborated by an analysis of the arbitrators appointed in the cases listed on the CAS website under the heading "Recent decisions"[14]. In those 66 cases only 70 different arbitrators were appointed whereas - if spread statistically on an even basis - there should have been actually 198 different arbitrators[15]. Of the 70 different arbitrators two were appointed 9 times, one 8 times, two 7 times, one 6 times and five 5 times. All these multiple appointments were for arbitrators from Europe. There is certainly nothing wrong with those multiple appointments - so long as they do not come from the same appointing party[16].

4. The View of the German Courts

Whilst for the Swiss Federal Supreme Court the way CAS is structured does not cause any concerns, German courts have developed different views, *e.g.* in the now famous case of Claudia Pechstein, a speed ice skater banned for doping and now seeking damages from the international federation ISU for its allegedly unjustified ban. Claudia Pechstein has to date unsuccessfully pleaded its case twice at CAS[17] and at the Federal Supreme Court[18] but has obtained two decisions in her favor in Munich, both raising concerns with regard to CAS's independence. In essence, the Landesgericht Munich held, as court of first instance, that the agreement to arbitrate under the CAS rules was invalid since CAS had, to the detriment of the athletes, built a structural imbalance in the way that arbitrators were appointed to the CAS list. Nevertheless, the Munich court held itself bound by CAS's decision and did not review the sanction again[19]. In appeal proceedings at the Oberlandesgericht Munich the court held that the arbitration agreement was invalid as well but on a different argument, namely that CAS was abusing its predominant market position. In addition, this court held that it was not bound by the terms of the decision in the CAS award and could, therefore, unrestricted deal with Pechstein's claim for damages[20]. Whether such damages are to be awarded has, however, not yet been decided. The case is presently at the Bundesgerichtshof in Karlsruhe.[21]

In the shadow of the Pechstein case a further case from the German courts has thrown - at least indirectly - into question CAS's position. In the matter of SV Wilhelmshaven *vs* FIFA the Bremen Court of Appeal held that CAS had no authority to charge the claimant club training compensation relating to the transfer of an Italian football player since such sanction violated the mandatory provisions of Art. 45 TFEU (freedom of movement)[22]. This case is also now at the Bundesgerichtshof in Karlsruhe.

The Pechstein case has been the topic of numerous contributions in the media and found also wide coverage in scholarly writing in the arbitral field[23]. It is not the purpose of this newsletter to add any further analysis of those two cases, but it suffices to say that

---

13 *Cf.* footnote 11 above: 200 arbitrators listed is enough. The choice is even much more limited in cases of doping items where only a small number of CAS arbitrators are experienced.

14 In total 66 cases, 16 in French and 50 in English, covering the period 2011 - 2015.

15 A small number of the listed decisions have, however, been rendered by sole arbitrators only.

16 As was the case in the matter of Paulisson *vs* Union Cycliste Internationale ("UCI") in BGE 4A_110/2012, where it came to light that the arbitrator appointed by UCI was appointed in the period from October 2010 up to the end of 2012 7 (!) times by said federation without properly disclosing such multiple appointments. Regretfully, the Federal Supreme Court did not sanction such apparent lack of disclosure. See in this respect also our Newsletter of 14 November 2012 "*Multiple appointments of an Arbitrator: Does the Federal Supreme Court really see no limit?*".

17 CAS 2008/A/1912 and 1913.

18 BGE 4A_612/2009 and BGE 4A_144/2010.

19 LG München I, 37 O 28331/12, of 26 February 2014.

20 OLG München, U 1110/14, of 15 January 2015.

21 We understand that the case will be deliberated next Tuesday, March 8, 2016 and that the decision will be rendered presumably on the same day.

22 Hanseatisches Oberlandesgericht in Bremen, 2 U 67/14, of 30 December 2014.

23 To name just a few:
Peter F. Schlosser, Kompetenzfragen in der Sportschiedsgerichtsbarkeit, SchiedsVZ 2015, pp. 257 *et seq.*, Ulrich Haas, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, ASA Bulletin 2014, pp. 707 *et seq.*; Peter W. Heermann, Freiwilligkeit von Schiedsvereinbarungen in der Sportsgerichtsbarkeit, SchiedsVZ 2014, pp. 66 *et seq.*; *idem*, Zukunft der Schiedsgerichtsbarkeit sowie entsprechende Schiedsvereinbarungen im Lichte des Pechstein-Verfahrens sowie des § 11 RegE-AntiDopG, SchiedsVZ 2015, pp. 78 *et seq.*, Christian Duve/Karl Ömer Rösch, Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege, SchiedsVZ 2015, pp. 69 *et seq.*, Antonio Rigozzi and Fabrice Robert-Tissot, "Consent" in Sports Arbitration: Its Multiple Aspects, in: Sports Arbitration: A Coach for Other Players?, ASA Special Series, No. 41, 2015, pp. 59 *et seq.*, in particular pp. 71.

CAS is encountering some headwind in Germany. In noting this, it should, however, also be stated that the CAS award in the Pechstein case had been rendered under S 14 of the CAS Code 2004 edition requiring the 1/5 quota representation of the arbitrators.

5. Is CAS Arbitration really compatible to maritime and commodity Arbitration?

The view of the present authors is that CAS should not have sought for the exemption provided for under footnote 5 to Art. 3.1.3 of the IBA Guidelines. CAS, with approx. 400 cases registered annually, does neither compare to (i) maritime arbitration such as handled by the London Maritime Arbitrator's Arbitration Association, which in 2014 registered a total of 3,408 new cases nor to (ii) commodity arbitration. The needs and the proceedings in maritime and commodity arbitration cannot be compared with sports arbitration where a standard CAS arbitration proceeds generally within the same lines as a commercial arbitration (exchange of written submissions, witness statements, hearings, closing submissions). The authors fail to understand why under these circumstances CAS arbitrators should not be bound to the same restrictions regarding multiple appointments as any other commercial arbitrator. The "specificity of sports arbitration"[24] cannot be a legitimate reason for doing so. If independence is put into question by multiple appointments of the same arbitrator by the same party such perception must remain the same, both for sports and commercial arbitration.

6. The most recent Developments at ICC

As per 1 January 2016 the ICC has introduced interesting changes as to transparency. For all cases registered as from that date the ICC Court will publish on its website the names of the arbitrators, their nationality, as well as whether the appointment was made by the ICC Court or by the parties and which arbitrator serves in the tribunal as chair person. Such information will be published once the tribunal is constituted and updated in case of changes, however, without mentioning the reasons for such a change.

Furthermore, on 22 February 2016 the ICC presented its "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" ("the Note"). Amongst other, the ICC confirmed its strict policy that a prospective arbitrator must disclose at the time of appointment

> *"any circumstance that might be of such nature as to call into question his or her independence in the eyes of any of the parties or give raise to reasonable doubts as to his or her impartiality. Any doubt must be resolved in favour of disclosure. A disclosure does not imply the existence of a conflict. On the contrary, arbitrators who make disclosures consider themselves to be impartial and independent, notwithstanding the disclosed facts, or else they would decline to serve."*[25]

It is quite clear that the IBA Guidelines are not - and actually never were - the relevant yardstick for the ICC in this respect because it expects also disclosures of facts listed in the green section of the IBA Guidelines. This can be highlighted by making reference to the last constellation of facts listed by the ICC in its non-exhausting enumeration constellations where it requires disclosure:

> *"The prospective arbitrator or arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm."*

By coincidence, Global Arbitration Review published around the same time two interesting decisions dealing with conflicts of interest[26], evidencing that transparency in arbitration is a key issue in arbitration and the standards and the expectations in this field continue to grow.

It is to be expected that other arbitral institutions will follow up on the extended transparency policy of the ICC and publish similar information as to the independence of the arbitrator[27]. CAS's policy of excluding sports arbitration from the restriction of the IBA Guidelines on multiple appointments stands in sharp contrast to these new developments in support of transparency in arbitration.

---

[24] The term "*La specifité de l'arbitrage sportif*" has been used by the Federal Supreme Court in a number of its decisions, such as 136 III 605, 4A_110/2012, 4A_506/2007 and 129 III 45.

[25] N 18/19 of the ICC Note of 22 February 2016.

[26] "Alvarez conflict of interest ruling upheld in France" on 29 January 2016 and "Construction arbitrator resigns following court ruling" on 23 February 2016.

[27] The same happened *vice versa* when LCIA decided to publish its reasoned decisions in cases of challenges of an arbitrator in late 2011. The ICC followed now in October 2015.

7. What are the CAS's Options?

Of course, CAS can continue to operate with the list of arbitrators in the way it does now. To change nothing is always an option - but by general experience usually not the best one[28].

What else might CAS consider?

It could, whilst still maintaining its list of arbitrators, add additional information to the biography of each individual CAS arbitrator, mentioning when he or she has been appointed to such list, which institution had supported this proposal[29] and how many cases he or she has sat on so far.

But CAS might also consider leaving the parties full choice in nominating their arbitrators (*i.e.* no longer binding the parties to the CAS list of arbitrators) and restrict the use of the CAS list of arbitrators to the nomination of the presiding arbitrator, where either the parties themselves cannot mutually agree on such presiding arbitrator or CAS itself chooses the presiding arbitrator. With having "control" over the nomination of the presiding arbitrator CAS would still maintain the consistency of its decisions.

Therefore: CAS *quo vadis*?

4 March 2016

Hansjörg Stutzer and Michael Bösch

For further information please contact:
Hansjörg Stutzer (h.stutzer@thouvenin.com)
Michael Bösch (m.boesch@thouvenin.com)

[28] Or, to phrase it in the words of Jan Paulsson: *"The most excellent institutions should always be conscious of the possibility of improvement and reform. CAS is no exception."*, *op. cit.* in footnote 4, p. 267.

[29] A suggestion already raised by the Federal Supreme Court back in 2003 in the "Lazutina case": *"Nevertheless, it seems appropriate to raise a reservation as to the readability of the list of arbitrators. It would indeed be advisable that this list would indicate for each of the arbitrators the category of the arbitrators he belongs to under the five categories mentioned in S 14"* (129 III 459). But it seems that CAS never implemented such suggestion. Jan Paulsson was also raising this suggestion most recently, *op. cit.* in footnote 4, p. 267.