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THE INDEPENDENCE OF THE COURT OF ARBITRATION FOR SPORT

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I. Introduction

The Court of Arbitration for Sport ("CAS") is established in Lausanne (Switzerland) and provides for the resolution of sports-related disputes through arbitration. The arbitral proceedings are conducted by arbitral tribunals ("Panels") appointed in accordance with a set of rules known as the Code of Sport-related Arbitration and Mediation Rules ("the Code"). The CAS has an Ordinary Arbitration Division ("OAD") and an Appeals Arbitration Division ("AAD"). As the names suggest, OAD cases are ordinary disputes referred to the CAS for arbitration pursuant to an arbitration clause or a subsequent agreement of the parties, as opposed to the AAD matters, which feature appeals against the decisions of sport federations and other sport related bodies when their statutes or regulations provide for an appeal to the CAS. The latter procedure was introduced in 1994.

The CAS was also empowered to issue non-binding advisory opinions ("AOs") at the request of the International Olympic Committee ("IOC") or the World Anti-Doping Agency ("WADA") or other international sport federations. There have been 26 such opinions issued since its inception but numbers decreased significantly from 1995 as the Code set new and more restrictive conditions to seeking an AO. From 2012, the CAS will no longer issue such opinions.

Finally, the CAS also provides mediation services, which are outside the scope of this article and in any event, are less significant than its arbitration activities.

On 1 January 2011 the CAS had 181 cases pending. It issued 186 awards in 2011 and 365 new cases were registered. Since the establishment of the CAS in 1984 2,670 arbitration proceedings have been registered.[1] The "peak" year was 2008 with 311 cases but the increase has been constant since 2000. That year the CAS had 75 new arbitration requests.

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[1] The statistical data hereunder are available on the CAS website www.tas-cas.org as of the end of 2010. The rest have been provided by the CAS and I am indebted to Secretary General Dr. Mathieu Reeb, who met my repeated enquiries with constant kindness and precision.

In 2005, 194 new cases were registered and in 2010 the number of new case registrations was 298. The Code came into force at the end of 1994 and the AAD handles the majority of the work: since the creation of the appeals procedure in 1994, 2,191 appeals were registered as opposed to 333 ordinary cases. As of the end of 2010, 1,421 cases had been disposed of by way of awards (or AOs), 411 had been withdrawn and 243 settled or were otherwise terminated (*i.e.* not by way of an award).

The CAS has an annual budget of CHF 9 million (approximately $ 9.8 million). About $ 3.2 million originates from users by way of fees charged by the CAS, with the balance, approximately two thirds of the budget, provided by the Olympic Movement *lato sensu* (*i.e.* the IOC, the International Sports Federations and the National Olympic Committees).

The CAS maintains a list of arbitrators and therefore the parties in OAD or AAD proceedings have limited freedom to choose "their" arbitrator as only an arbitrator on the CAS list may be appointed. At the time of writing the list comprises 264 arbitrators appointed for a renewable period of four years. While there is no formal geographic quota, it is clear that a balance between the various parts of the word is a consideration; although the majority of arbitrators are from Europe (130), there are 39 North Americans, 27 Asians and 21 Africans as of January 2012. The countries most represented are the United States (29), Australia (21), Switzerland (20) and France (18).

The selection process is entrusted to the International Council of Arbitration for Sport ("ICAS"), a twenty members body appointed by the IOC, the International Federations and the Association of the National Olympic Committees ("ANOC"), who are represented by four members each, with the other eight members chosen by the ICAS members themselves. Arbitrators admitted to the CAS list are expected to be "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."[2] In practice the vetting of suitable candidates is conducted by an ICAS Committee and approximately 75 applications are received yearly,[3] about 12 of which eventually lead to an appointment.[4] A small number of CAS arbitrators are women but the majority are men. "Renewal rates" are difficult to quantify as some arbitrators simply drop out for lack of interest after a while. Only one arbitrator failed to be confirmed after a first term

[2] Art. S 14 of the Code. The working languages are French and English.

[3] An application form will soon be available on the CAS Website.

[4] However the numbers may vary from year to year with perhaps 25 new arbitrators one year and only 5 the following, etc.

survey of the challenges suggests the following trends, although a "statistical" basis of fewer than 60 cases in more than 20 years is probably insufficient to draw any accurate conclusions: (i) the number of challenges tends to increase; (ii) arbitrators frequently appointed by a sport federation run a higher risk of being challenged; (iii) a number of challenges are clearly whimsical or needlessly disruptive or reflect a party's lack of previous exposure to international arbitration.

Only three arbitrators have been removed by the ICAS to date. Two were employed by a federation to which one of the parties belonged. One arbitrator was rightly dismissed because he was acting in two cases before the CAS at the time: in one case he was counsel to a party against a federation and in the other he intended to sit as arbitrator when the same federation was a party! This clearly inappropriate situation led to an amendment of Article 18 of the Code, pursuant to which "CAS arbitrators and mediators may not act as counsel for a party before the CAS". The figure of three challenges upheld out of some fifty-five lodged is somewhat deceptive as a survey shows that a number of arbitrators resigned upon being challenged, whether out of pique or because they thought the challenge might well be upheld is impossible to say. Some challenges were withdrawn upon clarifications being provided, or for some other reason.

While the "true" figure of potentially justified challenges might be approximately one fifth of the total, it would be meaningless to work out a "ratio" of challenges accepted or apparently persuasive because the arbitrator dropped out. However, here again a "trend" of sorts appears from the records: (i) the ICAS is not different from other institutional arbitration centres in taking a fairly strict view of its arbitrators' independence (ii) sport arbitration being a somewhat tighter subculture than its commercial or investment counterparts, the independence of some arbitrators towards large sport federations is an issue that is unlikely to go away. That the concern has not escaped the ICAS Board should be clear from the following excerpt of one of its decisions removing an arbitrator:

> The doubts that Federation X may legitimately have are based in the present case on concrete facts which, on the opinion of the ICAS Board, objectively and reasonably justify a feeling of suspicion with a person reacting normally. (....) The CAS must guarantee to the parties the total independence and impartiality of the arbitrators. Such guarantee is possible only in the absence of any appearance of presumption. This is not the case in the present matter.

Furthermore in a recent decision, the ICAS Board was confronted with an arbitrator challenged because (in a case before the state courts) he was acting against a litigant—not party to the arbitration—but represented by

because he was found to have behaved in a totally partisan way in a doping matter involving a sporting federation of his own country, extending as far as filing a challenge against his co-arbitrators. There are otherwise no limitations as to how many times an arbitrator may be reappointed. While the list of CAS homologated arbitrators is published on the CAS website[5] and includes each arbitrator's year of birth, it does not specify the year of first appointment or the number of renewals. There is no official retirement age or age limit.

CAS arbitrators must sign a declaration "undertaking to exercise their functions personally with total objectivity and independence."[6] They may not act as legal counsel on behalf of a party before the CAS.[7] The President of the OAD or AAD[8] and any CAS arbitrator[9] may be challenged if circumstances exist casting legitimate doubts on his independence, as the Code[10] requires their being "independent of the parties". Thus Article R34 states that "An arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence."

Should a party wish to challenge an arbitrator for lack of impartiality it must do so within seven days after the ground for challenge becomes known and the ICAS Board or the ICAS itself decides the challenge in a briefly reasoned decision.[11] There have been between 53 and 56 challenges[12] since the CAS began operations in 1984. Since 2004 the average amounts to six challenges per year. While this is still a small proportion compared to the number of cases filed, the tendency is towards more challenges in sport arbitration as is the case in its commercial or investment counterparts. In CAS arbitrations the predominant ground on which challenges are based is the alleged existence of relations between the appointing party and the arbitrator that question the latter's independence. Arbitrators may be challenged for belonging to the same professional organization as counsel for the opposing party or for being in the same town as the laboratory conducting anti-doping tests on behalf of a sport federation and friendly relations, actual or alleged, with opposing counsel are also a frequent source of recriminations. So too are repeated nominations by a sport federation or being the employee of a federation to which the other party belongs. A

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[5] www.tas-cas.org.

[6] Art. S 18.

[7] *Ibidem.*

[8] Art. S 21.

[9] Art. R 34.

[10] Art. R 33.

[11] Art. R 34.

[12] Statistics were not fully accurate in the beginning.

survey of the challenges suggests the following trends, although a "statistical" basis of fewer than 60 cases in more than 20 years is probably insufficient to draw any accurate conclusions: (i) the number of challenges tends to increase; (ii) arbitrators frequently appointed by a sport federation run a higher risk of being challenged; (iii) a number of challenges are clearly whimsical or needlessly disruptive or reflect a party's lack of previous exposure to international arbitration.

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While the "true" figure of potentially justified challenges might be approximately one fifth of the total, it would be meaningless to work out a "ratio" of challenges accepted or apparently persuasive because the arbitrator dropped out. However, here again a "trend" of sorts appears from the records: (i) the ICAS is not different from other institutional arbitration centres in taking a fairly strict view of its arbitrators' independence (ii) sport arbitration being a somewhat tighter subculture than its commercial or investment counterparts, the independence of some arbitrators towards large sport federations is an issue that is unlikely to go away. That the concern has not escaped the ICAS Board should be clear from the following excerpt of one of its decisions removing an arbitrator:

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Furthermore in a recent decision, the ICAS Board was confronted with an arbitrator challenged because (in a case before the state courts) he was acting against a litigant—not party to the arbitration—but represented by

counsel appearing in the arbitration. Rightly rejecting such a challenge the Board nonetheless emphasised the following:[13]

> The requirement of independence thus defined in PILA[14] is essentially based on the case law of the Swiss Federal Tribunal (FT) relating to Article 30(1) of the Swiss Federal Constitution (FC). An arbitrator must accordingly meet the same requirements of independence and impartiality as a state judge (citations omitted). In order to decide whether these requirements were complied with or not it is necessary to refer to the constitutional principles developed as to ordinary state courts and to take into account the specificities of arbitration, in particular those of international arbitration, when examining the particular circumstances of the case at hand (citations omitted). The constitutional guarantee of impartiality stated at Art. 30(1) FC "purports to avoid that some circumstances external to the case influence the decision in favour of a party or to its detriment" (citations omitted). In reality, there is no absolute ground for a challenge (citations omitted). Article 180(1)(c) PILA states that the notion of independence must be examined according to the "circumstances" of the species and cannot be based on mere subjective suppositions not verified in the specific case. A doubt as to impartiality must therefore appear objectively justified. Therefore a mere subjective impression may be taken into account only if it is based on specific facts and when the latter are susceptible to justify such an impression objectively and reasonably in a person acting reasonably[15] (citations omitted).

As is clear from the foregoing, the provisions of the CAS Code, in and of themselves, are not substantially different from what is found in any other institutional system of arbitration. Yet doubts have been cast as to the independence and objectivity of CAS arbitrations because the parties have to choose from a pre-defined list of arbitrators, a minority of whom handle the majority of cases. In other words "repeat appointments" by counsel specializing in sport arbitration of arbitrators practicing the same kind of law and equally specialized would create a web of professional and personal relationships that ultimately could deprive an arbitrator of his independence

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[13] Translated from the French original.

[14] PILA is the most frequently used English abbreviation for the Swiss Federal Law of December 18, 1987, on Private International Law, RS 291.

[15] The reasons are strikingly similar to those found in a recent survey of challenges in front of the London Court of International Arbitration, which commendably reasons and frequently publishes its decisions as to challenges. *See* William W. Park, Rectitude in International Arbitration, 27 Arbitration International 473-526 (2011).

or cause him to be biased in favor of a specific sport federation or international body.

Such criticism cannot be dismissed out of hand. An arbitration system based on a closed list might be problematic if a few arbitrators were appointed again and again by the same lawyers to handle cases involving frequently the same issues—such as the use of illicit substances in sport for instance—or if these same appointees occasionally advised Federation X on legal issues which happened to be the ones at hand in an arbitration involving Federation Y. While questioning the closed list system, sometimes vociferously, the criticism expressed against the CAS appears to be at times more in the realm of personal grudges[16] than based on a real desire to achieve arbitral impartiality. The CAS list is published as we have seen and information as to the source of possible conflicts of interest is easily found either from the biographical data available on each arbitrator or by making enquiries from the Secretariat or elsewhere. Many awards are published on the CAS website and they include the names of the arbitrators, making cross checking very simple. Also, the relatively limited scope of the sport arbitration "subculture" makes pinning down potential conflicts of interest rather easier than in commercial arbitrations. Moreover a possible abolition of the list would not make matters easier at all, quite to the contrary: arbitrators who do not appear on a closed list also have conflicts of interest. Specialised arbitrators who know the intricate world of football inside out for instance, cannot be deemed to have more biases than patent specialists who, by necessity, have their own views on certain specific issues of patent law. The same applies to investment arbitration with some frequently appointed arbitrators being deemed "pro investor" or indeed "pro state", whether accurately or not. Repeat appointments in a specific field of law or in specific types of cases are not a problem *per se* unless one wishes to penalise competence, an obviously self-defeating move when the common goal should remain the speedy disposition of disputes by well qualified and fair minded arbitrators. Much has been made of the fact that one arbitrator[17] was appointed 120 times in football cases since 2003. Many CAS cases are simpler and shorter than their commercial counterparts and are often disposed of in a matter of a few months, sometimes weeks, so a specialist in football regulations may very well be appointed several times a year by players, trainers, sponsors, clubs or federations, without necessarily compromising his independence. The issue is one of disclosure rather than of statistics and the criticism voiced might owe more to the disappointment of losing one's case or even to jealousy than to objective considerations.

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[16] *See* an article in Le Temps—a Swiss daily (www.letemps.ch)—of December 17, 2011 "Le Tribunal arbitral en cause".

[17] Spanish arbitrator José Juan Pinto.

II. The Swiss Understanding of Arbitral Independence

The Swiss Federal Law on International Private law of 18 December 1987 ("PILA[18]") does not define independence at any great length as Art. 180(1)(c) PILA merely provides for the right to challenge an arbitrator when circumstances permit legitimate doubt as to his independence. Impartiality is not specifically mentioned in the provision.

The parties may not opt out of the requirement of independence[19] and its violation results in an irregularly constituted arbitral tribunal for the purposes of Art. 190(2)(a) PILA. According to that provision an appeal to the Federal Tribunal—which is Switzerland's Supreme Court—is possible and an award can be set aside in certain cases.[20] A biased arbitrator or a tribunal lacking independence may therefore cause the award to be annulled. Swiss legal writing[21] and case law[22] have developed a concept of

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[18] Unless otherwise stated the translation used herein is by the Zurich law firm Umbricht. *See* www.umbricht.com.

[19] Pierre-Yves Tschanz, *op.cit.* hereunder at note 21, 1576.

[20] As to how and when such applications should be made, *see* Charles Poncet, When is a "Swiss" "Award" appealable, 2012 Paris Journal of International Arbitration 135-156 (2012) and particularly the legal writing quoted at note 18.

[21] Among recent legal writing, see the excellent commentary in French by Pierre-Yves Tschanz *ad* Art.180 PILA in Andreas Bucher (Ed) Loi sur le droit international privé Convention de Lugano, Commentaire Romand 1574–1585 (2011). In English, see Matthias Leeman, Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator 29 ASA Bulletin Bulletin 10-32 (2011); Pierre-Yves Tschanz, Arbitrator's Conflicts of Interests, 2001 ASA Bulletin Conference 65-79 (2001); Bernhard Berger / Franz Kellerhals International and domestic arbitration in Switzerland 208-212 (2010). In French, see Gabrielle Kaufmann-Kohler / Antonio Rigozzi, Arbitrage international 195-206 (2010) ; Pierre Lalive, Sur l'impartialité de l'arbitrage international en Suisse 112 Sem.Jud. 362-371 (1990) ; Pierre-Yves Tschanz Indépendance des arbitres en droit suisse, 2000 Rev.Arb. 523-535 (2000); Andreas Bucher, Le nouvel arbitrage international en Suisse 62-65 (1988) ; Antonio Rigozzi Arbitrage Sportif IV Cahiers de l'arbitrage 525-530 (2008) ; by the same author, L'arbitrage international en matière de sport 486-502 (2005). In German, see Eugen Bucher, Zur Unabhängigkeit des parteibenannten Schiedsrichters, Recht und Wirtschaft heute 599-616 (1980); Philipp Dickenmann, Optimierung in der Tas-Rechtsprechung, 2010 Causa Sport 202-211 (2010); Ulrich Haas, Internationale Sportschiedsgerichtsbarkeit und EMRK, 7 SchiedVZ 73-84 (2009).

[22] As to cases dealing with the CAS specifically, the following are required reading : ATF 119 II 271 (1993); ATF 129 III 445 (2003), 21 ASA Bulletin 601 (2003); 4P.105 2006 of August 4 2006, 25 ASA Bulletin 105-122 (2007); 4A_612/2009 of February 10, 2010, 28 ASA Bulletin 612 (2010), full English translation from the original German at http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/; 4A_234/2010 of October 29, 2010 ATF 136 III 605 (2010), 29 ASA Bulletin 80 (2011) full English translation from the original French at http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/. Among recent decisions also see 4A_530/2011 of October 3, 2011, full English translation from the original French at http://www.praetor.ch/arbitrage/failure-to-raise-a-violation-of-the-right-to-be-heard-immediatel/.

independence for the purposes of Art.190(2)(a) PILA which presents a number of salient features and generally appears in line with the transnational understanding of how "independent" arbitrators—including party appointed arbitrators—should be. The starting point has been that arbitrators, like judges, are called upon to adjudicate disputes and their awards can be enforced through the courts, therefore they should present basically the same guarantees of independence and objectivity as are expected from state judges in a system governed by the rule of law. However, the specificities of international arbitration must also be taken into account, as reflected for example in the IBA Guidelines on Conflicts of Interest in International Arbitration.[23] While a detailed analysis of the Guidelines would be beyond the scope of this article[24] they feature a "Red list", an "Orange list and a "Green list".

The non-waivable conflicts of interest ("Red list") are circumstances making it quasi-impossible to be unbiased: the arbitrator is a director of the party, a significant investor, a regular adviser. Other "red" conflicts can be waived: previous legal advice or involvement in the case, shareholding or family ties, representation of the party in another matter, commercial relationships and the like are unacceptable unless waived by the other party. "Orange" conflicts are those which may or may not lead to a challenge depending on the circumstances, the attitude of the parties or the arbitrator. These include previous services having been provided to the party within the past three years or, more importantly in sport arbitration, appointment in a related arbitration involving the same party on a related issue, or current services, for instance when a firm represents a party on a regular basis but is not involved in the current dispute where its member is an arbitrator. These are not unknown occurrences in sport matters. Yet the most significant "orange" cases in sport arbitration arise from a relationship between the arbitrator and a party or its counsel. This is inevitable within a relatively narrow community of specialised lawyers and by no means limited to sport (maritime arbitration is probably a case in point). Besides formal professional ties, such as a partnership or sharing facilities, which are clearly problematic, a close personal friendship would be "orange" and so would repeated appointments by the same party or law firm. Considering the rumours sometimes circulated as to the mysterious connections that would

[23] *See* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_ materials.aspx#conflictsofinterest For a direct reference to the IBA Guidelines by the Swiss Federal Tribunal *see* 4A_506/2007 of March 20, 2008, 26 ASA Bulletin 565 (2008), 2 Swiss International Arbitration Law Reports, 191-(2008), full English translation from the original French at http://www.practor.ch/arbitrage/application-of-iba-rules-to-assess-an-international-arbitrators-/.

[24] *See* Gary Born, International Commercial Arbitration Vol I 1537-1540 (2009); also Matthias Scherer, The IBA Guidelines on Conflicts of Interest in International Arbitration: the first five years 2004–2009, 4 Dispute Resolution International 5-53 (2010).

be developed in sport associations, it is worth remembering that the activities of professional associations and/or social organizations are specifically exempted from the Orange list. The International Association of Sports Law ("IASL") is an example[25] and the allegedly "mysterious" association of RexSport—supposedly a kind of Masonic lodge where some arbitrators and lawyers would plot their sinister moves[26]—is so "secret" that it features a website[27] with a list of members. Admittedly it takes a user ID and a password to access the site but they are unlikely to puzzle even the most amateurish cryptographer for very long.[28]

Among the "Orange" situations is the advocacy of a specific position regarding the case being arbitrated, in a published paper, a speech or otherwise. It will be seen hereunder that this issue arose before of the Federal Tribunal with regard to sport arbitration, yet it would appear quite disingenuous to require sport arbitrators to have a "neutral" view of doping for instance. The use of illicit substances in sport is inadmissible and cases involving doping issues cannot be adjudicated by people who would be "neutral" to the idea of drugged athletes. The only requirement must be for the arbitrators to be capable of assessing the evidence carefully, bearing in mind that in sport too, no one should be found guilty of a violation unless the evidence is thoroughly convincing. A survey of the doping related awards of the CAS—most of which are available on the CAS web site[29]—reveal no indication at all that CAS arbitrators would somehow be biased against athletes charged with doping violations. Requiring them to be "impartial" as to the use of illicit substances in sport is hard to understand.

"Impartiality" is the quality of that which is not "partial". The Latin root *pars*—party—suggests the idea of a faction, a group, an individual to whom one would be connected and become "a part" of his sphere. Partiality can be either the reverse of favour[30] or its synonym. An impartial arbitrator is therefore one who has no favour or animosity towards any party. Partiality is in the realm of sentiments and feelings but it can also express itself. Whether a judge or arbitrator is subjectively impartial cannot be measured unless the feeling is translated into circumstances or behavior which objectively speaking, display a lack of impartiality or cause legitimate doubt.

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25 http://iasl.org/pages/en.php.

26 The allegation was made in case 4A_506/2007, 26 ASA Bulletin 565 (2008). Full English translation from the French at http://www.praetor.ch/arbitrage/application-of-iba-rules-to-assess-an-international-arbitrators-/.

27 http://www.rexsport.org/.

28 The user ID is "rex" and the password "sport"!

29 www.cas-tas.org.

30 As in the Medieval Latin admonition to witnesses: *Promittunt testimonium perhibere veritati omnibus prece, pretio, odio, partialitate, vel favore repulsis.*

The regrettable albeit inevitable consequence is that a subjectively biased arbitrator can get away with it as long as he is clever enough to give himself the appearance of impartiality whilst another, although impartial subjectively, may inadvertently fall prey to an "objective" appearance, which may or may not have anything to do with reality. This is the price to pay for living in an imperfect world, yet requesting compliance with "objective" criteria creating the appearance of a bias is the only possible approach.

There has been some discussion as to the difference between "independence" and "impartiality"[31] : the latter would be in the realm of subjective feelings while the former reflects the absence of connections or relations between the arbitrator and a party or counsel in the arbitration. In other words, impartiality is an appearance which can be disproved by the arbitrator's behavior or questioned on the basis of circumstances casting doubt as to his independence. To that extent, the difference between independence and impartiality is one of appearance rather than substance. As Gary Born points out,[32] the inquiry is the same and attempting a distinction between impartiality and independence is not persuasive. Art.180(1)(c) PILA must be understood as demanding both independence and impartiality.

As understood in Swiss practice, an arbitrator may not have an economic or business connection to one of the parties, for instance by being its shareholder[33] or representative, even in another case, or that of a company committed to take over the debt which is the object of the arbitration.[34] Swiss case law found for instance that a part time judge could not sit as alternate judge in a case involving a bank that he otherwise represented as counsel in another, unrelated matter.[35] On the other hand, having a partner who, in an unrelated case, acts against a company of the group to which one of the parties belongs will not cause the arbitrator to lose his independence in the Federal Tribunal's view.[36] Being a consultant in related

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[31] *See* Emmanuel Gaillard and John Savage, Fouchard/Gaillard/Goldman on International Arbitration 564-571 (1999); Julian Lew, Lukas Mistelis and Stefan Kröll Comparative International Arbitration 256-265 (2003); Alan Redfern and Martin Hunter Law and Practice of International Commercial Arbitration 199-206 (2004). A remarkable analysis of the concept of independence in French is to be found in Thomas Clay's *J.D.* thesis, see Thomas Clay, L'arbitre 234-316 (2001). Clay refers to the equally remarkable but older analysis by Charles Jarrosson , La notion d'arbitrage 125ff (1987).

[32] *Op.cit* above at note 24 p.1475.

[33] Tschanz, *op.cit* p.1579 would make an exception for "a few shares of little value", which appears doubtful: an arbitrator should not be a shareholder at all, no matter how "few" shares he owns.

[34] ATF 111 Ia 72, 74 (1985).

[35] ATF 116 Ia 485 (1990).

[36] *See* 4P.224/1997 16 ASA Bulletin 634 (1998).

matters, albeit in a scientific perspective, may also be problematic as will be seen hereunder. As rightly pointed out by Tschanz,[37] the risk of bias inherent to *future* business or appointments should not be considered too lightly, particularly if the party is an institution playing an important part in the arbitrator's field of activity. The international arbitration community is a limited subculture, comprising a few hundred practitioners world-wide and people know each other and inevitably develop connections and friendships which may or may not affect an arbitrator's objectivity. The Swiss view is that while it is not acceptable for an arbitrator to be *married* to an associate of the (small) firm acting for the party appointing him,[38] friendly relations with counsel do not *per se* create the appearance of a bias, unless the arbitrator derives a significant part of his income from them.[39]

An arbitrator who wrote the contract and the arbitration clause appointing him, inserting a penalty in case of challenge is biased[40] but not the arbitrator who sought a release from the parties from the fact that before the arbitration he was counsel to one of them.[41] *Per se* a previous appointment in a case involving one of the parties is not inconsistent with the appearance of independence[42] and sitting in an arbitral tribunal called upon to adjudicate the quantum of a claim is not inadmissible in the eyes of the Federal Tribunal although in another arbitration the same arbitrator decided the interpretation of the contract on which the claim now rests.[43] More delicate—in investment arbitration particularly—is the situation in which the arbitrator would have expressed a view on one of the potential issues in the case in a law journal article. Should a generally "*pro state*" or "*pro investor*" arbitrator be deemed incapable of taking an objective view in *any* investment dispute? In sport arbitration the Federal Tribunal took the position that only a view directly pertinent to

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[37] *Op.cit* above at note 21 p. 1579.

[38] ATF 92 I 271 (1966).

[39] *See* 4P.224/1997 of February 9, 1998, 16 ASA Bulletin 646 (1998).

[40] 15 ASA Bulletin 262 (1997).

[41] The issue came up in a recent case but the FT declined to review it because the parties had opted out of any appeal in the arbitration clause. *See* 4A_514/2010 of March 1, 2011. Full English translation from the French original at http://www.praetor.ch/arbitrage/valid-waiver-of-appeal-clear-renunciation-to-all-setting-aside-p/.

[42] The same applies to state judges, see ATF 114 Ia 278 (1988), ATF 113 Ia 407 (1987) and ATF 105 Ib 301 (1979).

[43] 4A 458 2009 of June 10, 2010, 28 ASA Bulletin 520 (2010). The case involves the CAS and addresses that issue as well as a challenge against one of the arbitrators because his firm allegedly rendered legal services to the owner of the club. The opinion is quite interesting. Full English translation from the French original at http://www.praetor.ch/arbitrage/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-/.

the issues in the arbitration could create such a situation and only if it appears to be so strongly held that a change of opinion is most unlikely.[44]

A delicate question is whether or not party appointed arbitrators should meet the same standards of independence that are expected from the chairman.[45] The fact that an arbitrator is generally appointed by a party to the arbitration—as opposed to the chairman, frequently selected or proposed by the co-arbitrators—makes it somewhat fictitious that he could be totally objective. Within reasonable limits, his task will *also* be to ensure that the arbitral tribunal, particularly its chairman, perceives all important elements and that nothing significant escapes his attention. Depending on the circumstances—and on the arbitrator's skills or experience—this may come uncomfortably close to a bias and one may wonder if a certain lack of objectivity necessarily casts doubt as to an arbitrator's independence from the party appointing him or indeed suggests a bias against the other party. Swiss case law prior to the entry in force of PILA in 1989 took the view that no distinction was to be made between the level of objectivity expected from the chairman and that of the co-arbitrators.[46] Subsequent case law left the issue open at first[47] and then wavered between independence and impartiality[48] before settling the matter in favour of the restrictive view taken in a sport arbitration case which will be discussed hereunder.

Swiss law is quite demanding as to what a party suspecting bias should do. While the arbitrator has a duty to disclose any circumstances which could cast doubt as to his independence, the parties are also required to investigate, identify and raise the challenge immediately if there are any reasons to do so. This is in conformity with the basic principle stated at Article 2(1) of the Swiss Civil Code ("CC"), which imposes a general duty to act in good faith in all matters, including litigation and prohibits the abuse of one's rights at Article 2(2). Keeping a challenge "in reserve"—in case the award is unsatisfactory for example—is inconsistent with Art. 2(2) CC and failure to proceed in a timely fashion causes the procrastinating party to forfeit the right to bring a challenge. The duty to act promptly

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[44] *See* 4P_247 2006, ATF 133 I 89 (2006).

[45] The issue is discussed thoughtfully and in details by Gary Born *op.cit* above at note 24 at 1492-1508. Among other pertinent comments the author points out the total lack in practice of any dissenting opinions by a party-appointed arbitrator when the award is *in favour* of the party that appointed him, suggesting that the "total" independence required from and postulated for party-appointed arbitrators may be more apparent than real.

[46] *See* ATF 105 Ia 247 (1979) and ATF 113 Ia 407 (1987).

[47] ATF 118 II 359 (1992), 11 ASA Bulletin 255 (1993).

[48] *See* 4P.224/1997 of February 9, 1998, 16 ASA Bulletin 634 (1998), 4P.188/2001 of October 15, 2001, 20 ASA Bulletin 321 (2002) and ATF 129 III 445 (2003), 21 ASA Bulletin 601 (2003).

extends not only to the facts known to the challenging party but also to those it could and should have discovered by exercising proper diligence and even if the arbitrator is appointed by an institution—as opposed to a party-appointed arbitrator—one loses the right to challenge on the basis of those facts that the party could have become aware of earlier.[49] As to one's own arbitrator, the grounds for challenge must have been discovered after the nomination. Once discovered—and that includes suspicions which are not fully proved—the grounds for challenge must *immediately* be brought to the attention of the arbitral tribunal and the other party.[50] In sport arbitrations before the CAS, Article R 34 of the Code requires the challenge to be brought within seven days after the ground for challenge becomes known.

III. The Independence of the CAS in Swiss Case Law

The independence of the CAS has been the subject of several important decisions of the Swiss Federal Tribunal ("FT").[51] Yet one should not conclude that somehow the CAS has been the object of special attention by the FT. Its significant presence in Swiss case law derives from four factors: (i) the absence of a *certiorari* system in Switzerland as *any* final award can be appealed. In doping related matters for example, some utterly hopeless appeals have been filed, simply because the consequences are so drastic for the appealing athlete that counsel refuse to forgo *any* appeal and try their luck at the FT even against infinitesimal odds; (ii) the existence of a list of arbitrators has generated doubts and challenges; (iii) the sport arbitration community[52] being quite small and fairly tightly knit, created the suspicion of incestuous relations among arbitrators and counsel, as reflected in the prohibition of CAS arbitrators from acting as counsel in front of the CAS;[53] (iv) finally, to the extent that the CAS receives part of its funding from international sport organizations such as the International Olympic Committee ("IOC") its independence was bound to be questioned in Court. The following section concentrates on five significant cases as a review of all decisions concerning sport arbitration would go beyond the scope of this article.

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[49] *See* 4A_506/2007 of March 20, 2008, 26 ASA Bulletin 565 (2008), 2 Swiss International Arbitration Law Reports 191 (2008). Full English translation from the French original at http://www.practor.ch/arbitrage/application-of-iba-rules-to-assess-an-international-arbitrators-/.

[50] *See* art. 180(2) PILA.

[51] This article concentrates on five important cases involving the CAS. All cases involving the CAS since 2008 are available in English at www.practor.ch and case law relating to the CAS can also be found in print in the CAS Bulletin, on line since 2010. *See* www.tas-cas.org.

[52] To which this writer wishes to point out that he does *not* belong.

[53] Art. S 18 of the Code.

1993: The CAS Is Independent from the International Sport Federations

On 5 October 1991 a German professional rider's horse was subjected to a doping test. A sample of blood and urine was taken and the analysis showed the presence of isoxsuprine.[54] A second analysis was carried out and gave the same result so the *Fédération Equestre Internationale* ("FEI") disqualified the rider and his horse from the competition involved, revoked the prizes obtained, banned the rider for three months and fined him. An appeal was made to the CAS. A three arbitrators Panel[55] rejected the appeal in an award dated 10 September 1992.[56] The FT addressed the issue of the independence of the CAS because under the Swiss law organising the FT at the time, an appeal was allowed only against an international arbitral award dealing with legal issues, as opposed to a challenge against the rules of a particular sport, which would not be subject to judicial review.

Referring to its previous case law relating to arbitral tribunals instituted within federations or similar bodies in which the arbitral "tribunal" is created by the body as to which it is supposed to "impartially" adjudicate disputes concerning its own members,[57] the FT proceeded to review the independence of the CAS.[58] The Court described the origin of the CAS instituted in June 1984 and its functioning at the time and referred to the then generally held opinion[59] that as an appeal jurisdiction with regard to decisions taken by International Sport Federations, the CAS was independent as long as the IOC was not involved. The case at hand involved the FEI and the Court stated the following:[60]

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[54] Isoxsuprine is a vasodilator drug used in humans. It also treats hoof-related problems in horses. It is a prohibited class B drug in international equestrian competitions.

[55] Gerard Rasquin, chairman, Reiner Klimke and Hans-Ulrich Sutter.

[56] The award is published on the CAS website: www.tas-cas.org.

[57] ATF 97 I 489 (1971). The case involved the Swiss football Club Bellinzona. After the arbitral "tribunal" of the National League—a body purely internal to the League—issued a warning, Bellinzona appealed and the Court of appeals of Bern held that the matter was not capable of appeal because the body instituted by the Swiss League lacked the independence required and was accordingly not an arbitral tribunal. The FT upheld the decision.

[58] *G. v. Fédération Equestre International et Tribunal Arbitral du Sport*, ATF 119 II 271 (1993).

[59] *See* Keba Mbaye, Sport et arbitrage, 8 ASA Bulletin 114 (1990); Gilbert Schwaar Le Tribunal arbitral du sport, 2 PJA 396 (1992) ; Adam Samuel/Richard Gearhart, Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport, 14 Journal of International Arbitration 39 (1989) ; Stephan Netzle, The Court of Arbitration for Sport, 9 The Entertainment and Sports Lawyer 1 (1992); Denis Oswald, Le règlement des litiges et la répression des comportements illicites dans le domaine sportif, Mélanges Grossen 67 (1992).

[60] Translation from the French original text.

> The CAS is not a body of the FEI; it receives no instructions from this Federation and retains sufficient personal autonomy towards the FEI to the extent that the latter only provides it with three of the 60 arbitrators of which it is composed (...). Moreover Art. 7 of the CAS Statute requires that at least 15 members should be chosen outside the IOC, the International Federation, the National Olympic Committees and their Federation, thus affording the parties the possibility to appoint an arbitrator or a chairman among the 15 persons depending neither from the FEI nor from one of its sections. The guarantee of independence of the arbitrators in a specific case is moreover ensured by Art. 16 of the CAS Statute relating to challenges. Under such conditions, it may be admitted that the CAS presents the guarantees of independence to which Swiss law subjects a valid renunciation to the ordinary judicial course of action.

The FT pointed out that, however, "certain objections as to the independence of the CAS cannot be rejected out of hand, in particular those which question the organic and economic connections between the CAS and the IOC. Indeed the latter has authority to modify the CAS Statutes; it also finances the operating costs of this tribunal and plays a considerable role in appointing its members."[61]

2003: The CAS Is Independent from the International Olympic Committee ("IOC")

Cross country skiing would provide the FT with an opportunity to decide the next issue, namely the independence of the CAS in relation to the IOC. During the Salt Lake City Winter Olympic Games of 2002, two cross country skiers were tested positive for darbepoetin.[62] For one of the athletes, this was in addition to a previous occurrence in December 2001. Both athletes were banned for two years and an appeal was made to the CAS, this time with the IOC as a party. A three arbitrators Panel[63] issued four arbitral awards on 29 November 2002[64] rejecting the appeals and upholding the sanctions against the athletes. The IOC also disqualified the skiers and revoked the gold medal Larisa Lazutina had obtained in Salt Lake City. An appeal was made to the Federal Tribunal and it was argued that the CAS could not be independent in a dispute involving the IOC. In a detailed

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[61] *Ibidem* p. 280.

[62] Darbepoetin alfa is a drug that increases red blood cell levels. Authorized for treatment of anaemia in certain patients it can cause severe cardiovascular problems and is banned for athletes.

[63] Peter Leaver, chairman, Barbara Shycoff and Dirk-Reiner Martens.

[64] The award involving Larisa Lazutina is published on the CAS website: www.tas-cas.org.

opinion[65] the FT recalled its 1993 decision with regard to the independence of the CAS from Sport Federations and stated that as a consequence of that decision the CAS organisation had been substantially modified, the International Council of Arbitration for Sport (ICAS) had been created as well as the Code of Sports-Related Arbitration.[66] The Court pointed out that the ICAS had been instituted to safeguard the independence of the CAS and the rights of the parties[67] and that among other things the Council would decide when the independence of a CAS arbitrator was under challenge.

Three arguments were raised against the independence of the CAS. Firstly the appellants argued that the ICAS could not be independent from the IOC as it was composed of several members effectively subordinated to the IOC due to their belonging to the Olympic Movement. Thus the president of the ICAS was a former vice-president of the IOC and still an honorary member. The two vice-presidents sat in various IOC Committees. The president of the Appeal Chamber was a vice-president of the IOC, etc. Secondly, the appellants put in question the very system of the list of arbitrators, claiming that the alleged faculty given to the athletes to choose an arbitrator was really an illusion as choosing an arbitrator who knew the sport involved, spoke the athlete's language and lived in the same country would reduce the number of potential arbitrators to almost naught. Thirdly, the appellants claimed that the financing of the ICAS and of the CAS effectively gave complete control to the IOC, which in particular would pay for travel expenses, accommodation and fees of the arbitrators called upon to sit in the *ad hoc* chambers during sport events such as the winter Olympic Games.

As to the first argument, the FT pointed out that as of 2002 the ICAS comprised one former IOC member, one IOC vice-president and one IOC member whilst all other members belonged neither to the IOC nor to any of its Committees. It could not be claimed that the ICAS would be dependent on the IOC because its organs belong to the Olympic Movement as the ICAS, an independent foundation, could modify its statutes itself, had no instructions to receive from the IOC and was not bound by its decisions. When deciding a challenge against a CAS arbitrator, any ICAS member would have to recuse himself if the matter involved a

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[65] *A. and B. v. International Olympic Committee, International Skiing Federation and Court of Arbitration for Sport*, 4P.267/2002, ATF 129 III 445 (2003), 21 ASA Bulletin 601 (2003). The opinion is in French.

[66] *See* Matthieu Reeb, Le Tribunal Arbitral du Sport (TAS) 18 ans déjà, une institution devenue majeure 5 Revue de l'avocat 10 (2002) ; Pier-Marco Zen-Ruffinen, Droit du sport par.1461ff (2002).

[67] Art. S 2 of the Code. See the criticism by by Dietmar Hantke, Brauchen wir eine Sport-Schiedsgerichtsbarkeit ? 5 Zeitschrift für Sport und Recht 187 (1998); Rémy Wyler, La convention d'arbitrage en droit du sport, 116 Revue de droit suisse 45 (1997).

sport body to which he belonged and ICAS members could not be on the list of CAS arbitrators or act as counsel in front of the CAS.

By far the most important analysis in the opinion, however, is that which relates to the list of arbitrators. Granting that the very existence of the list was controversial, the FT pointed out that while previous case law had always refused to reject it *per se*,[68] authoritative criticism had been expressed.[69] Yet the Court upheld the view of the Secretary General of the CAS that the list served the purpose of making specialised arbitrators available and stated the following: "this is effectively a valid reason which speaks in favour of maintaining the status quo. In sport competitions, particularly the Olympic Games, quick, simple, flexible and inexpensive disposition of disputes by specialist with both legal and sport competences is indispensable for the athletes as well as for smooth competitions (...). The system of a list of arbitrators practiced by the CAS is adept at favouring the pursuit of such goals".[70]

The Court also pointed out that the existence of a list of arbitrators would make it easier to ensure a certain unity of views in the CAS decisions as the arbitrators are regularly informed of doctrinal and case law developments in their field. Since there were in excess of 150 names on the list, the possibility of choice given to the parties was real and in any event an athlete has no legally protected right to be judged by arbitrators who practiced the same sport. Whilst it is important for the list to afford multiple choices, there are many issues, such as doping, which require no specific or particular knowledge of the sport involved.

Having said so, the Court nevertheless pointed out that it would be advisable for the list of arbitrators to be published in a format which would enable the reader to understand by which body each specific arbitrator had been appointed.[71]

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[68] ATF 107 Ia 155 (1981), involving an arbitral tribunal in labour collective agreements; more interestingly, see ATF 93 I 265 (1967): the case involved the then existing German Democratic Republic; ATF 84 I 39 (1958), an enforcement case in Switzerland involving the then existing arbitration mechanism in Czechoslovakia.

[69] Thomas Clay, *op.cit.* hereunder at note 82 399-400 is decidedly opposed to any system of closed lists (*"Ce qu'il faut éviter ce sont les listes fermées, c'est-à-dire obligatoires, mais on peut tolérer les listes ouvertes, c'est-à-dire celles qui n'empêchent pas les parties de choisir des arbitres en dehors des listes."*).

[70] ATF 129 III 457 (2003). Translated from the French original.

[71] The list of CAS arbitrators is available on the CAS website http://www.tascas.org/d2wfiles/document/452/5048/0/liste20nationalités20nov202011.pdf . The site also features some biographical data on arbitrators. Awards are frequently published on the CAS website www.tas-cas.org and include the names of the arbitrators on the Panel: cross-checking for appointments by federations in particular or for repeated appointments is thus sufficiently easy to generate additional enquiries if necessary.

Finally, as to the argument of financial dependence on the IOC, the Court pointed out that the IOC provided one-third of the financing of the ICAS and therefore of the CAS. Admittedly, the other two-thirds provided by the International Federations and the Association of National Olympic Committees were also dependent on the amounts received by the IOC from the broadcasting rights of the Olympic Games. Moreover the Court took into consideration that there was no alternative way of financing than the carefully devised system created with a view to ensuring fair arbitral proceedings in sport matters which, in the Court's view, are quite different from ordinary arbitrations as "when an arbitral tribunal is called upon to review the validity of a sanction issued by the supreme body of a sport federation against one of its members (...), the financial capacity of the parties (the federation and the athlete sanctioned) is by far unequal (with rare exceptions) to the detriment of the person at the bottom of the pyramid, namely the athlete". Furthermore, said the FT, there is no necessary connection between the financing of a judicial body and its independence as is clear from the fact that state courts, whilst financed by the state, regularly adjudicate against it.

Having rejected the three arguments raised by the appellants the Court also proceeded to point out that the arbitrators involved had all belonged to one of the four Panels which found against the IOC in twelve decisions since 1996. Their independence could therefore not be put in question and the Court referred to the 2003 World Conference on Doping in Sport held in Copenhagen which adopted the World Anti-Doping Code, also instituting the CAS as appeal body for all disputes relating to doping in connection with international competitions or athletes practicing at the international level and the FT added: "this is a tangible sign of the trust that the States and the organisations involved in the fight against doping place in the CAS. One hardly imagines that they could have consecrated in such a clamorous way the jurisdictional authority of that arbitral institution if they had had the impression that it was under the influence of the IOC".

2006: Sheikh Hazza Bin Zayed Contributes to Swiss Jurisprudence

Having dealt with the issue of the independence of the CAS towards the Federations and then the IOC, case law would then consider the independence of CAS arbitrators *per se*. At the Endurance World Championship of the Fédération Equestre Internationale ("FEI") in Dubai in 2005, Sheikh Hazza's horse tested positive and he was disqualified but the FEI Judicial Committee dismissed the disciplinary proceedings for violation of due process in April 2005, whereupon Barbara Lissarrague, the French Equestrian Federation and the organizing committee of the race appealed to the CAS. A three arbitrators Panel was constituted[72] and issued

[72] Carole Barbey chair, Massimo Coccia and Olivier Carrard.

an award on 9 March 2006 overturning the decision of the FEI Judicial Committee and disqualifying Sheikh Hazza. A subsequent appeal to the Federal Tribunal raised the issue of the independence of a CAS arbitrator who sits as arbitrator in another case with the lawyer representing one of the parties. The arbitrator had been appointed by the deputy president of the Appeal Division of the CAS because the FEI and Sheikh Hazza as respondents could not agree on a common designation. The appellant argued that he had been deprived of the right to appoint his own arbitrator and challenged the independence of the arbitrator appointed on his behalf.

As to the first argument the Court found that the CAS had correctly applied the provisions of the Code as to the appointment of an arbitrator when several respondents cannot agree on a joint nomination[73]. As to the alleged lack of independence of the arbitrator because he had a friendly relationship with counsel acting for three appellants before the CAS, the FT dismissed the argument and stated the following:

> Thus the appellant expresses merely a subjective assumption but not a circumstance which could justify objectively a suspicion of bias of arbitrator Carrard. It can be expected from a judge that irrespective of such contacts he would maintain his capacity to decide independently in a dispute in front of him (...). This is particularly true when the two combinations—arbitrator/counsel and arbitrator/coarbitrator—appear in two pending cases at the same time. Even then it must be assumed that a judge knows how to retain the necessary internal and external independence and to stay above relations with a colleague.

The Court also reiterated the point already made in the 2003 decision quoted above,[74] namely that although arbitrators in general and CAS arbitrators in particular have a duty to disclose circumstances which could affect their independence, it behooves the parties to investigate and find out if, for instance, an arbitrator appointed in a case may have some inadmissible connection with one of the parties. While addressing the merits of the argument—and finding that in the 2003 case the arbitrators involved had found against the IOC in several decisions—the Court nonetheless reiterated the somewhat demanding requirement that a party failing to *investigate* will forfeit the right to raise a subsequent challenge.[75]

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[73] *See* R 41.1 and R 54 of the Code.

[74] *See* above note 64.

[75] *See* the commentary by Andrea Pina and Antonio Rigozzi, *in* IV Cahiers de l'arbitrage 525-531 (2008).

2010: Claudia Pechstein Does Not Skate Through

The well-known German speed skater Claudia Pechstein was suspected of taking illicit substances and in July 2009 she was banned for two years by the Disciplinary Commission of the International Skating Union. The decision was appealed to the CAS and a three members Panel[76] upheld the decision of the Disciplinary Commission, whereupon an appeal was made to the Federal Tribunal raising several issues, including that of the independence of the CAS. In an opinion of 10 February 2010,[77] the Court restated the following as to the general independence of the CAS,

> (...) the CAS must be regarded as a proper arbitral tribunal contrary to the Appellant's view. According to the case law of the Federal Tribunal, the CAS is furthermore sufficiently independent from the IOC, which is why its decisions, even in matters which concern the IOC's interests, can be regarded as judgments comparable with those of a state court.[78]

There was also an allegation that the Chairman had stated in another context that he would take a hard line on doping issues, thus making him biased in this case. The argument was rejected by the FT as being speculative and vague but also because there was no direct relationship to the proceedings at hand, thus strongly suggesting that the views of an arbitrator on a specific issue—particularly one as generally loathed as the use of illicit substances in sport—would not *per se* justify a challenge, unless a direct connexion could be made to the case at hand.

2010: Alejandro Valverde Belmonte Puts the Final Touch

In October of the same year the FT was seized by the Spanish cyclist Alejandro Valverde. He had been banned for two years for taking unauthorised substances, a decision confirmed by the CAS, which upheld the ban in an award of 16 March 2010 that was appealed to the Federal Tribunal.[79] At issue in the appeal was the fact that the Word Anti-Doping Agency (WADA) had been made a party to the arbitration proceedings and

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[76] Massimo Coccia, Stephan Netzle and Michele Bernasconi.

[77] 4A_612/2009 of February 10, 2010, 28 ASA Bulletin 612 (2010). *See* ATF 129 III 445 and 21 ASA Bulletin 601 (2003). The opinion is in German. A full English translation is at http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/.

[78] *Ibidem* at 3.1.3.

[79] Romano Subitto, José Juan Pinto and Ulrich Haas. Case 4A_234/2010 of October 29, 2010, partially published at ATF 136 III 605 and at 29 ASA Bulletin 80 (2011). The opinion is in French. A full English translation is at http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/.

arbitrator Ulrich Haas disclosed that as a legal expert he had chaired a nine members group chosen by WADA to observe how the anti-doping program was applied at the Athens Olympic Games of 2004, with a view to providing a written report on that program. Rejecting the challenge, the ICAS Board took the view that having been an independent observer in 2004 in no way compromised the arbitrator's independence several years later although the case involved doping.

The Belmonte decision is interesting in two respects, firstly the Federal Tribunal rejected the argument that CAS Panels should be held to higher standards as to independence and impartiality as a consequence of the specificities of sport arbitration. The FT pointed out the following in this respect:

> according to case law, sport arbitration as instituted by the CAS shows some specificities, such as the closed list of arbitrators, which could not be disregarded even though they do not justify per se to be less demanding for sport arbitration than for commercial arbitration (citations omitted). In other words, respect for the guarantees of independence and impartiality demanded from each arbitrator must be reviewed in the same way in both fields. There is accordingly no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and their impartiality. (...) One must take into account the fact of the choice of arbitrators is limited, but they must have legal training and they have to be acknowledged as competent in the field of sport. These peculiarities may lead CAS arbitrators to meet sport organizations, specialized lawyers and other experts in sport law without these contacts being by themselves such as to necessarily compromise their independence. Not to take into account such particularities would be self-defeating as this would merely multiply the possibilities of challenges and procedural disputes when the purpose of institutional sport arbitration is to provide speedy resolution of sport disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality.[80]

Secondly the Belmonte decision gave the Federal Tribunal the possibility to adjudicate on an issue heretofore left open, namely the degree of independence and impartiality required from party appointed arbitrators. The issue has been much debated in legal writing with some writers holding the view that in international arbitrations it would be somewhat illusory to expect that a party appointed arbitrator would be as independent and impartial as the

[80] *Ibidem* at 3.1.3.

chairman.[81] Other commentators pointed out that if arbitration is to remain a credible system of *dispute resolution*, the criteria must be the same for a party appointed arbitrator as for the chairman or a sole arbitrator.[82] In opting for the latter approach the Court held the following:

> (...) whether one wishes it or not, the way of appointing the members of an arbitral tribunal creates an objective nexus, subtle as it may be, between the arbitrator and the party appointing him because the former, as opposed to a state judge, derives his power and his place only from the latter's will. Yet this is an inherent consequence of the arbitral procedure with which one must live. It implies that an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute. Yet the so called system of the party-arbitrator must be ruled out, in which the party appointed arbitrator would not be subject to the same requirement of independence and impartiality as the chairman of the arbitral tribunal. The idea that the arbitrator may merely be the advocate of "his" party within the arbitral tribunal must be categorically rejected, failing which the very institution of arbitration would be jeopardized.[83]

IV. The Transnational Understanding of Independence

The foregoing shows that Swiss Courts have taken the view that the organisation and the functioning of the CAS meet the Swiss requirements for an institutional system of arbitration to be considered independent and impartial. In view of the improvements made to the system in the last decade, it is most unlikely that the findings of the Swiss Federal Tribunal

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[81] *See, among others,* Pierre Lalive, Sur l'impartialité de l'arbitre international en Suisse, in SJ 1990 p. 362 ss, 368 à 371; Pierre Lalive / Jean-François Poudret / Claude Reymond, Le droit de l'arbitrage interne et international en Suisse, 1989, n° 4 ad art. 180 LDIP; Andreas Bucher, Le nouvel arbitrage international en Suisse, 1988, nos 168 à 170; Frank Vischer, Zürcher Kommentar zum IPRG, 2e éd. 2004, n° 8 ad art. 180 LDIP; Michele Patocchi / Elliott Geisinger, Internationales Privatrecht, 2000, n° 5.5 ad art. 180 LDIP; Wolfgang Peter / Sébastien Besson, Commentaire bâlois, Internationales Privatrecht, 2e éd. 2007, nos 13/14 ad art. 180 LDIP; Frank Oschütz, Sportschiedsgerichtsbarkeit, 2004, p. 125 ss.

[82] *See, among others,* Gabrielle Kaufmann-Kohler / Antonio Rigozzi, Arbitrage international, 2e éd. 2010, nos 362 s.; Bernhardt Berger / Hans Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, n° 738; Thomas Rüede / Reimer Hadenfeldt, Schweizerisches Schiedsgerichtsrecht, 2e éd. 1993, p. 173 s.; Bernard Dutoit, Droit international privé suisse, 4e éd. 2005, n° 4 ad art. 180 LDIP, p. 635; François Knoepfler / Philippe Schweizer, Arbitrage international, 2003, p. 613 s.; Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis, 3e éd. 2008, nos 974 ss; Philippe Fouchard / Emmanuel Gaillard / Berthold Goldman, Traité de l'arbitrage commercial international, 1996, n° 1046 i.f.; Thomas Clay, L'arbitre, 2001, nos 343 ss.

[83] *Ibidem* at 3.3.1.

recalled above will be rescinded or reversed in future. In other words, the independence of the CAS has been tested in court throughout the years and the CAS is here to stay. While a substantive comparative law survey would require another study, a brief attempt at measuring the criteria chosen by the Swiss FT against internationally recognized concepts of arbitral independence[84] is therefore appropriate in order to determine if Swiss courts may have been too liberal in assessing the independence of the CAS, which is based in Lausanne.

The requirement of independence serves one principal purpose, ensuring the integrity of the arbitration process. As international conventions do not address the issue of independence, at least not directly, there are three main sources of law as to arbitrators' independence: the various national laws applicable to arbitrations held in a given territory, the institutional rules and the arbitration agreements themselves. In agreement with the well founded views favoring the existence of a specific arbitral legal order detached from national laws and germane to transnational arbitration,[85] whether regarded as "soft law"[86] or not, a number of additional sources must also be taken into account because they often impact upon the determination of independence by national courts,[87] whether in set aside proceedings against awards issued in a specific country or at the enforcement stage pursuant to the New York Convention.

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[84] See the thorough analysis by Gary Born, *op.cit.* above at note 24 Vol I 1461-1552. Also Emmanuel Gaillard, Regain de sévérité dans l'appréciation de l'indépendance et de l'impartialité de l'arbitre, 2003 Revue de l'arbitrage 1240-1247 (2003) ; Yves Derains, L'indépendance de l'arbitre, mythe ou réalité in *Liber Amicorum* Horsmans 377-383 (2004); Hilmar Raeschke-Kessler, Unabhängigkeit des Schiedsrichters: ein transnationales Rechtsproblem ? 26 ASA Bulletin 3-17 (2008); The Independence of Arbitrators, ICC Bulletin Special Supplement, with articles by Anne-Marie Whitesell, Independence in ICC Arbitration : ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators ; Ahmed S. El-Kosheri and Karim Youssef, The Independence of Arbitrators, an International Perspective; Louis Epstein, Arbitrator Independence and Bias: the View of a Corporate In-House Counsel; Dominique Hascher, A Comparison between the Independence of State Justice and the Independence of State Arbitration; Johan Steyn, The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration; François Terré, Independence and Arbitrators; Otto L.O de Witt Wijnen, The IBA Guidelines on Conflicts of Interest in International Arbitration Three Years on (2007); *see also* Jacques van Compernolle/Giuseppe Tarzia L'impartialité du juge et de l'arbitre : étude de droit comparé (2006).

[85] Emmanuel Gaillard, Aspects philosophiques du droit de l'arbitrage international 60-101 (2008).

[86] Gabrielle Kaufmann-Kohler, Soft Law in International Arbitration: Codification and Normativity, 1 Journal of International Dispute Settlement 1-17 (2010).

[87] An example was seen above at note 23 with the Federal Tribunal resorting to the IBA guidelines.

With the possible exception of the United States—which seem to accept the view that in a three arbitrators panel party-appointed arbitrators can be partisan[88]—there appears to be general consensus that arbitrators should be independent. Yet authoritative legal writing points out that an agreement as to what independence actually is appears far more elusive.[89]

A detailed survey of many national laws to ascertain their views as to the requirement of independence would go beyond the scope of this article and a better starting point is probably the UNCITRAL Model Law,[90] which can be deemed to reflect a large degree of international consensus as to its contents. Article 12 (2) provides that an arbitrator may be challenged only "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if it does not possess qualifications agreed to by the parties." This is very similar to Article 180 (1) PILA which makes a challenge possible when the arbitrator does not meet the qualifications agreed upon by the parties or if circumstances allow legitimate doubt as to his independence or if there is another ground for challenge contained in the rules of arbitration adopted by the parties. This seems to be the almost ubiquitous approach,[91] with a tendency to hold arbitrators—including party appointed arbitrators—to the same standards, without necessarily giving examples of what "independence" should mean in a specific case.[92] A noticeable exception is the Swedish Arbitration Act of 1999,[93] which refers to impartiality in general at Section 8 but adds four examples of circumstances that require the arbitrator to be replaced: besides a personal interest in the outcome of the dispute or a close association with one of the parties, they include circumstances in which the arbitrator "has taken a position in the dispute, as an expert *or otherwise.*" It also provides that it is illicit for the arbitrator to be compensated other than by his fee in the arbitration.

Such wording does not appear to differ from the "justifiable doubts" in Article 12 of the Model Law or in the Swiss PILA or from the "reasonable

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[88] *See* Gary Born,*op.cit.* above at note 24 1492-1507.

[89] *See* W.Craig/W.Park/J.Paulsson International Chamber of Commerce Arbitration par.13.03 (2000).

[90] 1985,UNCITRAL Model Law on International Commercial Arbitration, amended in 2006.

[91] *See,* in this respect, Gary Born, *op. cit.* p. 1467 ff.

[92] *Commonwealth Coatings corp. v. Continental Casualty.* Co, 393 US 145 for the United States. As to France, *see* Emmanuel Gaillard and John Savage, Fouchard/Gaillard/Goldman on International Arbitration 571-586 (1999). English law and German law do not appear differently at all either. *See* Julian Lew, Lukas Mistelis and Stefan Kröll Comparative International Arbitration 256-265 (2003); Alan Redfern and Martin Hunter Law and Practice of International Commercial Arbitration 199-206 (2004); Reinhold Geimer §1036 *in* R.Zöller Zivilprozessordnung (2007).

[93] *See* www.sccinstitute.com.

suspicion" found in the English speaking world, as the test will essentially be the same: the appearance of a bias is decisive.

The standards of independence are frequently deemed to be the same as those applicable to the judiciary. Swiss law takes this view,[94] so do German[95] and French[96] law and doubt has rightly been cast[97] on the accuracy of transposing into arbitration the criteria applicable for national judges. Besides the fact that they may not be the same in all jurisdictions, there are significant differences. Judges do not compete for appointments but arbitrators do. On the other hand there are appeals in ordinary judiciary proceedings but an arbitral tribunal wrongly applying the law is most likely to be upheld in set aside proceedings as well as in subsequent enforcement proceedings, thus suggesting that the standards of competence expected from arbitrators should perhaps be *higher* than for judges in state courts. Be this as it may, the only sensible approach is to apply similar standards based on transnational definitions in recognition of the existence of a specific legal order setting forth standards of independence irrespective of the venue of a particular arbitration. The IBA Guidelines mentioned above[98] are quite appropriate in this respect and the interpretation given to the requirement of independence by Swiss law is consistent with the IBA Guidelines and other similar instruments.[99]

To the extent that the agreement of the parties can be a source of "law", the question arises as to whether legal provisions such as Art. 180 PILA are mandatory or not. The Swiss understanding of Art. 180 PILA[100] is that the parties may not opt out of the requirement of independence at Art. 180 (1) (c) PILA but that they may waive the right to challenge an arbitrator for lack of independence under specific circumstances. The issue has not been tested in court and it is unlikely that it will ever be for no party would contract into an arbitration with biased arbitrators but the existence of some non-waivable conflicts of interest in the IBA Guidelines suggests that an award issued by an arbitrator under the employment of one party for instance, would probably be contrary to public policy for Swiss purposes.[101]

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[94] *See* above § 39.

[95] *See* Adolf Baumbach/ Wolfgang Lauterbach/ Jan Albers and Peter Hartman, Zivilprozessordnung § 1036 (2008).

[96] Emmanuel Gaillard, Regain de sévérité dans l'appréciation de l'indépendance et de l'impartialité de l'arbitre, 2003 Revue de l'arbitrage 1240-1247 (2003).

[97] *See* Gary Born, *op. cit.*p. 1483.

[98] *See* above § 14-15.

[99] *See* the 1986 IBA Ethics or the 2004 AAA/ABA Code of Ethics for instance.

[100] *See Tschanz op.*cit above at note 21, p.1576.

[101] According to Swiss case law, substantive public policy is breached when an award is inconsistent with some fundamental legal principle which according to the dominating

Be this as it may the interpretation of the requirement of independence by Swiss case law is clearly consistent with the transnational perception of a requirement essential to the integrity of the arbitration process, which can be waived in specific circumstances but not in all cases: a chairman or sole arbitrator with a financial interest in the case or receiving instructions from one party would be unacceptable on public policy grounds anywhere.

To conclude this brief survey, it is equally clear that Swiss case law is fully consistent with the definitions of impartiality and independence existing under institutional arbitration rules, such as the ICC rules,[102] the LCIA rules[103] or indeed the 2006 Swiss Rules which require at Article 9 that the arbitrator be and remain at all times impartial and independent of the parties, disclose any circumstances likely to give rise to justifiable doubts and face a challenge in case of breach.

V. Conclusion

As was probably to be expected for a new arbitral institution the independence of the CAS has been challenged in the Swiss courts in the last twenty years. However the international system of institutional sport arbitration has been consistently upheld by Swiss case law and legal writing since its inception in 1984, sometimes in the light of vigorous criticism questioning in particular whether the various reforms adopted have fully served their purposes. The standards of independence required by the Swiss Federal Tribunal as to any international arbitration taking place in Switzerland have been applied to the CAS and they have been the source of some adjustments to the system. The distinguishing feature of the CAS—a closed list of arbitrators—has been upheld by the Federal Tribunal and is fully consistent with international standards. The attacks to which the CAS has been subjected in the media and elsewhere appear to owe more to the personal discontentment of some litigants or former officials of the CAS than to serious and objective legal analysis.

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opinion in Switzerland should constitute the basis of any legal order. For a recent example see the landmark decision of March 27 2012, in which the Federal Tribunal held that an automatic ban imposed on a football player for an unlimited time until payment of an amount due to a football club was in breach of Swiss public policy. Full English translation from the German at http://www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/.

[102] Art.7 and 11 of the ICC Rules.

[103] Art.10 of LCIA Rules.