



Bulletin TAS CAS Bulletin

2019/02



TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

CAS procedures and their efficiency*

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I. Introduction

Efficiency is intended to be one of arbitration's key attributes. It is an aspect that has been fairly widely described and debated in the commercial field,¹ but much less in sports arbitration. This article intends to provide both practical and theoretical insights that demonstrate the efficiency of CAS procedures.

The reasons that can lead to the choice of arbitration are manifold.² One of the most prominent reasons is the wide margin of freedom in determining and conducting the

proceedings. On the other hand, arbitration rules frequently empower arbitral tribunals with procedural discretion to ensure effective case management and to avoid unnecessary delay or expense. Indeed, too much unconstrained freedom for the parties can lead to dilatory tactics that impact the efficiency of the procedure.

Given that all stakeholders in arbitration are concerned with the efficiency of proceedings, many guidelines, rules, and protocols have been published to assist in the management of disputes.³ Recently, a Working Group comprised of representatives from around 30

* This article draws on: BOISSON DE CHAZOURNES / COUTURIER, "Comment rendre les procédures du TAS aussi efficientes que possible? Le rôle des conseils de parties", in: *International Sport Arbitration*, 7th Conference CAS&SAV/FSA, Lausanne 2018, BERNASCONI M. (Ed.), Editions Weblaw, Bern, (forthcoming).

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¹ FORTESE / HEMMI, "Procedural Fairness and Efficiency in International Arbitration", *Groningen Journal of International Law*, vol 3(1): International Arbitration and Procedure, 2015, pp. 110-124; CLAXTON J., "Tailoring International Arbitration for

Efficiency , Harmonizing Trade Law to Enable Private Sector Regional Development", *Hors Serie Volume XX*, 2016, Victoria University Wellington; HEISKANEN V., "[Key to Efficiency in International Arbitration](#)", Kluwer Blog Arbitration, 29 May 2015; EARNEST / GALLARDO / GUNNARSSON / KACZOR, with Foreword by BERNARDINI P., "Four ways to sharpen the sword of efficiency in international arbitration", Young ICCA Group Paper, 2012; "Towards Greater Efficiency in International Arbitration", 11th AIJA Annual Arbitration Conference, Zurich, June 2019.

² KAUFMANN-KOHLER / RIGOZZI, "Arbitrage international: droit et pratique à la lumière de la LDIP", 2nd ed. Bern: Weblaw, 2010.

³ For instance, the IBA Guidelines on Conflict of Interest in International Arbitration ("IBA Rules"), approved by the IBA Council on 22 May 2004, contain

– mainly civil law – countries adopted Rules on the Efficient Conduct of Proceedings in International Arbitration.⁴⁵ These initiatives show that efficiency is at the core of arbitration concerns and that there is a willingness to achieve this objective.

On closer observation, however, the notion of efficiency is not easy to grasp.⁶ It is often seen as the mere pursuit of optimizing time and cost in the procedure.⁷ However, in the field of justice the understanding of efficiency cannot be limited to this restrictive utilitarian approach. Indeed, the quest of time and cost optimization can be at the expense of quality. That is the reason why the metaphor of the triangle is frequently used to consider the issue of the efficiency of arbitral proceedings.⁸ In this context, efficiency is imagined as the optimal balance achieved between three aspects in tension: speed, economy and quality.⁹

The issue of efficiency is particularly important in sports arbitration where decisions can directly affect the outcome of an ongoing competition or championship. This has made the timeliness of proceedings an unavoidable objective of the CAS. The other key objective of the CAS is to offer a cost-efficient procedure accessible to all athletes. The latter is particularly important in an arbitration context often qualified as

a number of provisions that enable efficient proceedings.

⁴ *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules), Prague, 14 December 2018, <https://praguerules.com>; ARGERICH S., A Comparison of the IBA and the Prague Rules: Comparing Two of the Same, Kluwer Arbitration Blog, 2 March 2019: “The Prague Rules are intended as a framework providing guidance to conduct effective arbitration proceedings. They do not replace institutional rules which govern arbitral procedure and are only applicable upon the parties’ agreement or at the arbitral tribunal’s own initiative after consultation with the parties and, even then, only to the extent to which the parties have agreed”.

⁵ STAMPA G., “The Prague rules”, *Arbitration International*, Volume 35, Issue 2, June 2019, Pages 221–244.

⁶ It is worth noting that a distinction can be made between effectiveness and efficiency. The two terms, which are often wrongly amalgamated, reflect in reality

“forced”, or imposed by law, by the rules and statutes of sports federations or associations. While predictability was not initially a formalized objective, it has become a feature of dispute resolution before the CAS. Indeed, special needs related to the field of sport have led to a specific organization that increase the consistency of the awards and the predictability of the outcome of the litigated issues. This feature significantly contributes to improving the quality of procedures.

This article aims at assessing whether the CAS has struck the right balance between timeliness, cost-effectiveness and quality of the rendered decision. This evaluation of the efficiency of the CAS proceedings will only focus on those before the permanent Divisions, i.e. the procedure before the “Ordinary Arbitration Division” which determines first-instance disputes between sporting stakeholders that are generally commercial (rather than disciplinary) in nature, the procedure before the Anti-Doping Division (created in 2019) which hears first-instance anti-doping cases and the Appeals Arbitration Division which hears disputes arising from first-instance decisions made by sports governing bodies.¹⁰ Due to their contextual specificity, the proceedings before the ad hoc Divisions will not be dealt with.

different phenomena. Indeed, effectiveness is based solely on the capacity to achieve a determined result, while efficiency deals with the means used to attain that result. Therefore, a procedure can be effective but not efficient if it uses disproportionate means. Efficiency can therefore be seen as the intention not to allow the fulfillment of objectives at all costs.

⁷ CLAXTON J., “Tailoring International Arbitration for efficiency”, Harmonising Trade Law to Enable Private Sector Regional Development, Hors Serie Volume XX, 2016, Victoria University Wellington.

⁸ FORTESE / HEMMI, “Procedural Fairness and Efficiency in International Arbitration”, Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure, 2015, pp. 110-124.

⁹ HEISKANEN V., “Key to Efficiency in International Arbitration”, *ICSID Review - Foreign Investment Law Journal*, Volume 30, Issue 3, Fall 2015, pages 481–485.

¹⁰ Art. S3 of the Code of Sports-related Arbitration (“the Code”).

The mandatory nature of sports arbitration could have been a disadvantage or even a problem. It has been well handled by the CAS with the provision of high-quality procedures (I). In addition, the CAS has not hesitated to implement particularly rigorous procedures to meet the expectations of stakeholders (II).

II. An obligatory arbitration: consequences on efficiency

The issue of consent to arbitration is one of the *raisons d'être* of arbitration. It is addressed in a very different way in the context of the settlement of sports-related disputes than in other arbitration fields. The purpose of this section will be to understand the causes and consequences of such an approach on the efficiency of CAS procedures.

A. A forced arbitration

To be properly understood, the issue of the use of forced arbitration must be contextualized. To this end, it is necessary to look back to the beginnings of sports justice, where sport institutions had their own judicial bodies to enforce their regulations and to hear appeals against their disciplinary decisions. While sports disputes often involved sports institutions, athletes and clubs were reluctant to lodge a case before the judicial bodies of these institutions. For their part, the national courts have long been rather reluctant to review the decisions of these bodies.¹¹

Over time, in view of the growing importance of the economic interests at stake, athletes and clubs have been less reluctant to lodge a case before the mechanisms of sport justice.

¹¹ Many sports federations provided for the exclusion of members who dared to turn to the courts. See, OSWALD D., “Le pouvoir juridictionnel des organisations sportives et ses limites” in: Séminaire “Droit et Sport” du 11 septembre 2002, Publications FSA (vol. 18), Berne 2003, pp. 41–52, 44; RIGOZZI A., “L’arbitrage international en matière de sport”, Basel 2005, para. 178.

¹² COCCIA M., “Sports Arbitration: Which Features Can Be “Exported” to Other Fields of Arbitration?”, in: *Sports Arbitration: A Coach for Other Players?*, ASA

National courts positioned themselves differently and began to abandon their initial inhibition to intervene in sports disputes. However, sport inherently needs a level playing field for athletes, which cannot be ensured in the context of fragmented justice rendered by different national authorities.¹² The sporting community could not accept different outcomes in disputes dealing with the same issues. The sport sector presents many peculiarities that can be better understood by specialized bodies than by ordinary judges. The general consensus among the sport sector’s stakeholders is that arbitration is preferable over ordinary litigation before State courts. Consequently, in order to harmonize sport justice and offer a single procedure for more equality and legal security, the CAS was created in 1984.¹³

The CAS has now been accepted by almost all sport federations as the supreme instance in sports arbitration. According to the Swiss Federal Tribunal (“SFT”), the CAS has become the “*Supreme court of world sport*” and “*an inescapable institution in the world of sport*”.¹⁴ Every sport association has its own internal instances, whose decisions are subject to appeal to the CAS. Most of the time, the athletes are therefore subject to standard arbitration agreements contained in statutes, regulations and athletes’ declarations (i.e. by reference) and not to negotiated arbitration agreements.

This indirect and forced consent, from which athletes cannot escape, has opened the door to ethical debates. Nevertheless, arbitration clauses by reference to statutes or athletes’ declarations are usually accepted by state courts and especially by the SFT.¹⁵ The latter

Special Series No. 41, GEISINGER / TRABALDO / DE MESTRAL (eds.), 2015, p. 12.

¹³ RIGOZZI A., “L’arbitrabilité des litiges”, ASA Bulletin, 3/2003.

¹⁴ PATOCCHI P.M., “Justice by Specialists: Advantages and Risks (Real and Perceived)”, in: *Sports Arbitration: A Coach for Other Players?*, ASA Special Series No. 41, GEISINGER / TRABALDO / DE MESTRAL (eds.), 2015, p. 34.

¹⁵ SFT 133 III 235 (Canas), E.4.4.

recognized that sports arbitration is a forced arbitration but confirmed its validity, due to the fact that it constitutes a genuine alternative to state courts, for several reasons. First of all, given that it is a specialized institution, the CAS is the most appropriate forum to render justice in this area. Secondly, it provides sufficient guarantees of independence and impartiality. Finally, there is the possibility of challenging CAS awards before a national court, in this case the SFT, in the event of an arbitration going wrong.¹⁶

The European Court of Human Rights ('EctHR') in the Mutu and Pechstein case¹⁷ has stressed that if arbitration is compulsory, in the sense of it being required by law, it must afford the safeguards secured by Article 6 para. 1 of the Convention.¹⁸ This clarification brought by the Court shows that the validity of a forced arbitration clause is conditioned by the respect of procedural rights guaranteed by the Convention.¹⁹ The fact that consent to the CAS' jurisdiction is, in many cases, not voluntary, has led the CAS to adopt high quality procedures and be extremely vigilant with regard to respect for the procedural rights of the parties.

B. The application of Swiss law: a safeguard

¹⁶ RIGOZZI A., "Le recours contre les sentences du Tribunal arbitral du sport (TAS)", in *Anwälts Revue de l'arbitrage*, 16 November 2015.

¹⁷ Mutu and Pechstein v. Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018)), para. 95.

¹⁸ In support of this argument, the Court in the Mutu and Pechstein case (para. 95) refers to a precedent: Suda v. Czech Republic, no. 1643/06, 28 October 2010, para. 49.

¹⁹ Ibid. para. 92: "The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, § 84, 29 November 2016, and Golder v. the United Kingdom, 21 February 1975, § 36, Series A no. 18)".

²⁰ Art. R28 of the Code

The CAS has a fixed seat in Lausanne for all arbitration proceedings and parties are not allowed to change it.²⁰ The establishment of a fixed arbitral seat in a given country can be seen as an element of legal security. Indeed, the arbitration proceedings will be governed by the law of the country of the seat, irrespective of where the hearings actually take place. This favours procedural uniformity that contributes to greater predictability. The choice of seat is therefore particularly important since arbitration proceedings will be influenced in many ways by the legal system of the chosen country.²¹ The permanent location of the seat in Lausanne means that all CAS arbitrations are governed by Swiss arbitration law and in particular by Chapter 12 of the Private International Law Act ("PILA") which deals with international arbitrations.²² This almost systematic submission of CAS arbitrations to the PILA is a guarantee of an equal "procedural" treatment between athletes, regardless of their own domicile or to that of the sports federation in question, or even the place where the disputed competition took place.²³

Moreover, this submission to Swiss law gives jurisdiction to the SFT to hear cases concerning CAS awards under certain conditions.²⁴ This control confers rather

²¹ COCCIA M., op. cit., p 11.

²² The vast majority of arbitral proceedings before the CAS are governed by Chapter 12, but it should be noted that for the arbitration to be submitted to Chapter 12 it is imperative that at least one of the parties had not, at the time the arbitration agreement was concluded, his other domicile or habitual residence in Switzerland (art. 176 para. 1 of the PILA).

²³ Art. 176.1 of the PILA: "The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland".

²⁴ Art. R46 and R59 of the Code: The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the award by mail or courier. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in

broad prerogatives on the SFT.²⁵ Indeed, the latter may rule on: the irregular constitution of the arbitral tribunal, the jurisdiction or lack of jurisdiction of an arbitral tribunal, an *ultra petita* decision and a denial of justice, the violation of fundamental procedural principles and a conflict with substantive public policy.²⁶ The SFT therefore participates directly and actively in the development of sports law by promoting the emergence of key principles which will be referred to by the CAS.²⁷ As such it contributes to the consistency and predictability of arbitral awards in sports.

Finally, the fact that the Swiss system has only one instance of appeal is advantageous in terms of speed compared to other systems. In this context, the parties may reasonably consider that they will be definitively determined on the fate of their arbitration within four to six months from the filing of the appeal against an award.²⁸

C. Cost-accessible justice?

While, for many reasons, arbitration is desirable in sport, it is a choice that is far from being a trivial issue from a financial perspective for athletes. The procedures of the CAS have a reputation for being cost-effective. This affirmation has been recognized on several occasions by the SFT

Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

²⁵ Section 190 of the PILA lists the grounds for lodging a complaint before the SFT. This is considered by some to be too limited for the remedy before a State jurisdiction to be considered alone as sufficiently burdensome in the face of forced arbitration.

²⁶ Art. 190 para. 2 of the PILA.

²⁷ See in particular the question of pathological clauses, which is discussed below.

²⁸ RIGOZZI A., “Le recours contre les sentences du Tribunal arbitral du sport (TAS)”, in *Anwalt's Revue de l'Avocat*, 16 November 2015, pp. 216-222.

²⁹ STF 129 III 445 c. 3.3.3.3 p. 462 [Larissa Lazutina and Olga Danilova v. IOC, FIS and CAS].

³⁰ Mutu and Pechstein, op. cit., para. 98.

³¹ The CAS makes available online to the parties a schedule arbitration costs, with the administrative costs and the arbitrators' costs and fees, both of which

and recently by the EctHR. According to the SFT: ‘*It is not certain that other solutions exist that could replace an institution [the CAS] capable of resolving international disputes in the field of sport quickly and inexpensively*’.²⁹ For its part, the EctHR in the Mutu and Pechstein case, recognized that the CAS is able to rule in a timely and cost-effective manner.³⁰

CAS proceedings, whose cost varies depending on the composition of the arbitration panel are deemed to be cost-effective compared to certain other arbitration proceedings.³¹ They can nevertheless remain costly for some athletes. In accordance with its objective of making CAS procedures accessible to all athletes, CAS has set up a number of facilities to assist athletes who may be in financial difficulty. First of all, it should be remembered that arbitration procedures before the CAS are free of charge for “*disciplinary disputes of an international nature judged on appeal*”, the latter include a large proportion of so-called forced arbitration cases.³² Secondly, the International Council of Arbitration for Sport (“ICAS”) has established a fund to provide assistance.³³ Athletes in difficulty may in particular be granted an exemption from paying the procedural fees and a flat-rate amount to cover the travel and accommodation expenses of the beneficiary as well as those of witnesses, experts,

are indexed to the amount in dispute. The arbitrators' costs and fees are also fixed, but the final amount will vary depending on the hours spent on the file and therefore on the complexity of the case. However, these hourly rates are considered reasonable by the literature as a whole in comparison to other areas of arbitration.

³² Art. R64 and R65 of the Code: Free arbitral proceedings before an ad hoc arbitral tribunal constituted for a major sporting event must also be reserved; in particular, free arbitral proceedings before the ad hoc Chamber for the Olympic Games, which issues an award within 24 hours to ensure the continuity of the competition (for more details on this ad hoc chamber, see RIGOZZI A., “L'arbitrage international en matière de sport”, Basel 2005, pp. 137-138, n° 242-244, pp. 682- 684, n° 1348-1352).

³³ Guidelines on legal aid from the Court of Arbitration for Sport (entered into force on 1 September 2013: amended on 1 January 2016).

interpreters and public defenders. The services of a *pro bono* counsel approved by the CAS are also available.³⁴

These efforts of the CAS with respect to the costs of proceedings contribute significantly to their efficiency. Indeed, this allows the institution to achieve one of its main objectives, that of economy which is also one of the three poles of the efficiency triangle (speed-economy-quality).

They are essential in the context of arbitration considered as forced. The consent to arbitration implies a waiver of state jurisdiction, which raises difficulties when this arbitration is deemed to be forced. As we have already seen, the validity of the obligatory character of arbitration is conditioned by the respect of certain fundamental rights, such as compliance with Article 6 para. 1 of the ECHR³⁵ or Article 30 par. 1 of the Swiss Federal Constitution, and both guarantee the right of access to justice. This compliance can only be ensured as long as there is a genuine and effective “compensation” for the dismissal of state jurisdiction. This is the case, in the present case, insofar as the CAS is unanimously recognised as the most appropriate court in the field of sport. In addition, its constant efforts to make procedures financially accessible to everyone lead to the conclusion that this renunciation of state justice has been counter-balanced by a valuable judicial alternative.

Lastly, it should be borne in mind that the CAS, like all permanent institutions, has incompressible administrative costs. Reducing prices without affecting the operating costs and quality of the services provided by the CAS would require funding support that can only be provided by sports institutions directly involved in the settlement

of the disputes. In this context, independence challenges have resulted. The SFT has consistently held that the CAS is an independent and impartial institution. In 2017, in the Seraing case, the SFT confirmed the independence and impartiality of the CAS with regard to the issue of CAS funding by sports organizations. It firstly pointed out that it is not appropriate to ask athletes and sports organizations to contribute equally to the operating costs of the CAS as it is the case in an ad hoc commercial arbitration.³⁶ It further added that it has never been proved by statistical analyses or in any other way that the CAS would be inclined to support a sports body, in this case FIFA, when it is a party to an arbitration procedure conducted by it.³⁷

D. The closed list of arbitrators: an issue of independence and impartiality

The independence and impartiality of the CAS has also been an issue of attention due to the fact that the list of arbitrators is a closed one established by the ICAS. To this challenge, the SFT and the EcHR have consistently replied that the list was sufficiently broad³⁸ to guarantee the parties’ freedom of choice.³⁹

In the Lazutina case, dating from 2003, the SFT considered that even though athletes were not free to choose “their” arbitrator since their choice was limited to arbitrators on a closed list, the list was now extensive enough to allow sufficient choice while ensuring “*a rapid, simple, flexible and inexpensive settlement of disputes, by specialists with both legal and sporting backgrounds, [...] essential both for athletes and for the proper conduct of competitions*”.⁴⁰ In this case, the SFT had confirmed the validity of the CAS’ closed list of arbitrators system, as it was suitable for promoting the effective resolution of sports disputes and

³⁴ For more details on eligibility requirements, refer to the *Guidelines on legal aid from the Court of Arbitration for Sport*.

³⁵ Mutu and Pechstein, op. cit., para. 95.

³⁶ SFT 4A 260/2017.

³⁷ Ibid, para. 3.4.3.

³⁸ It currently has around 400 arbitrators.

³⁹ REEB M., Revue, p. 10; BADDELEY M., L’Association Sportive Face au Droit, p. 267.

⁴⁰ SFT 129 III 445 S.457, [Larissa Lazutina and Olga Danilova v. IOC, FIS and CAS], 21 ASA Bull. 601, 605-620 (2003).

was compatible with the “constitutional requirements of independence and impartiality applicable to arbitral tribunals”.⁴¹

In turn, the EctHR in its joint Mutu and Pechstein cases of 2018 had to rule on the independence and impartiality of the CAS in particular in the light of Article 6 of the ECHR. The Court recognized that organizations which may oppose athletes before the CAS have a real influence on the appointment of arbitrators. However, this influence alone is not sufficient to conclude that arbitrators are dependent on or biased towards these organizations. The Court concluded that the CAS’ closed list system of arbitrators itself complies with the requirements of independence and impartiality applicable to arbitral tribunals and there has been no violation of Article 6 para. 1 of the Convention on account of an alleged lack of independence and impartiality on the part of the CAS.⁴² In addition, it should be remembered that the CAS has taken rather drastic measures to prevent the accumulation of certain mandates. Indeed, since 1 January 2010 CAS arbitrators may not act as counsel for a party before the CAS.⁴³ This has not yet happened in other arbitration areas.

Although the EctHR’s 2018 “tilts the balance of European human rights justice in favor of CAS arbitration”,⁴⁴ the CAS Code was reformed in 2019 in order to strengthen the independence and good governance of the Tribunal. On this occasion, three commissions have been created in ICAS. Each of them is in charge of the CAS’s main missions, namely: the CAS Membership Commission, the Legal Aid Commission, and the Challenge Commission. The composition of these commissions has been elaborated to ensure

that athletes are more effectively represented within the ICAS.⁴⁵

III. Public and detailed procedures

It is well known that arbitral procedures are much more flexible than judicial procedures, because they are chosen and tailored by the parties. Institutional arbitration – to which the CAS belongs – is at a crossroads between freedom for the parties to adjust the organization of the dispute settlement and the rigor of judicial proceedings. Within this category, the CAS holds a special place that stands out from other arbitration procedures. Indeed, in order to keep control over the conduct of the proceedings and in consideration of the specificities of the sporting field, the CAS did not hesitate to implement rigorous procedures, leaving little room for the choice of the parties. This unusual interventionism for arbitration, as well as the public nature of a number of its procedures, brings the CAS closer to judicial institutions than to classical arbitral tribunals, which has implications with regard to its efficiency. The CAS has to be vigilant, to the extent that, excessive rigidity and control run counter to the values of arbitration, which could lead to an imbalance between the three aspects of the efficiency triangle: speed, economy, quality. The purpose of the following section will be to assess the balance that has been struck.

A. Completeness and rigor of the CAS proceedings

CAS procedures recognized for their efficiency in terms of length, are short in comparison with other arbitration systems.⁴⁶ It is not the ordinary procedure, which lasts about one year that makes the CAS different from other arbitration procedures, but rather

⁴¹ Ibid

⁴² Mutu and Pechstein, op. cit., para. 157.

⁴³ Art. S18.3 of the Code.

⁴⁴ LATTY F., “Le TAS marque des points devant la CEDH”, *Jurisport* 192, December 2018, pp. 31- 36.

⁴⁵ Art. S7 of the Code.

⁴⁶ COCCIA M., “Sports Arbitration: Which Features Can Be “Exported” to Other Fields of Arbitration?”

and NETZLE S., “Sports Arbitration: What Are Its Limits as a Model for Other Fields of Arbitration?” in: *Sports Arbitration: A Coach for Other Players?*, GEISINGER / TRABALDO / DE MESTRAL (eds), ASA Special Series No. 41, 2015 ; MORONEY / RAHMAN, “An introduction to sports arbitration in the UAE”, LawInSport, 20 June 2019.

the appeal procedure, which is particularly expeditious. Indeed, the procedural code sets a three-month target for communicating the operative part of the award to the parties from the time the case is transferred to the arbitration panel.⁴⁷

This time efficiency does not mean that CAS procedures may not be affected by hurdles that may elongate the process, which many arbitral institutions face.⁴⁸ The three-month time limit is in fact often closer to 5 or 6 months. The attractiveness of an institution is a reason for this situation and the CAS may be a victim of its own success in this respect. The Court has experienced an exponential increase of cases since its creation, from two cases handled in 1986 to 599 in 2016.⁴⁹ The phenomenon has rather been well absorbed and managed. But combined with the ever-growing sophistication of the cases presented, particularly in doping or commercial matters, the institution's task has not been made easier. It should be kept in mind that the time spent on a file is not compressible *ad libitum* if one does not want to affect the quality of the procedure. Adjudicative institutions must be careful not to trade quality for speed.

The promptness of CAS proceedings is the result of several procedural measures that are unusual in arbitration. The strength of the CAS system, compared to other arbitral fora, in dealing with the length issue is the rigor of

its procedure associated with the completeness of its code. Indeed, these two characteristics, which are not really attuned to arbitration, allow the Court to limit the influence of the parties on the procedures and the possible dilatory tactics that may result from it. In the context of the appeal procedure the appellant has 21 days for filing the application through a Statement of appeal.⁵⁰ Within the 10-day time limit after the expiry of the time limit for the appeal, the appellant has to file an appeal brief or shall inform the CAS Court Office in writing whether the statement of appeal shall be considered as the appeal brief.⁵¹ The appeal brief must contain all the documents which the appellant intends to rely on during the procedure, namely all the written evidence, the list of witnesses with their written testimony and finally the list of experts who will intervene.⁵² The appeal shall be deemed to have been withdrawn if the appellant fails to meet such time limit.⁵³ The answer of the Respondent shall contain the same documents.⁵⁴ After the exchange of the written submissions, the parties are no longer authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, based on exceptional circumstances. It should be stressed that only the appeal procedure is concerned by these strict procedural rules since in the ordinary procedure there are more exchanges of written submissions.⁵⁵

⁴⁷ Art. R59 of the Code.

⁴⁸ REICH A., "The effectiveness of the WTO Dispute Settlement System: A statistical analysis", European University Institute Working Papers, Law 2017/11, Department of Law, p 21; "2018 International Arbitration Survey regarding the Evolution of International Arbitration", Queen Mary University of London; J. CLAXTON, "Tailoring International Arbitration for Efficiency, Harmonizing Trade Law to Enable Private Sector Regional Development", Hors Serie Volume XX, 2016, Victoria University Wellington; D. HACKING and M. E. SCHNEIDER, "Towards More Cost-Effective Arbitration"; International Bar Association Newsletter Arbitration and ADR, (1998) Vol. 3, No. 1.; C. DAVIES, "More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012", P. BERNARDINI, "International Arbitration: How to Make it More Effective", in Liber Amicorum en

l'Honneur de Serge Lazareff, LÉVY / DERAINS (eds.), 2011; ESQUIRE / JOHNSON, "The Top 10 Ways to Make Arbitration Faster and more Cost effective", American Arbitration Association 114, www.adr.org.

⁴⁹ See on the CAS website, in the statistics, the table lists the cases submitted to the CAS since its creation. (1986-2016).

⁵⁰ It should be noted that federations are free to determine a longer time limit.

⁵¹ MAVROMATI / REEB, "The Code Court of Arbitration for Sport, Commentary, Cases and Materials", Wolters Kluwer, The Netherlands, 2015, p. 453.

⁵² Art R48 of the Code.

⁵³ Art. R51 of the Code.

⁵⁴ Art. R55 of the Code.

⁵⁵ Art R44.1 of the Code for the Ordinary procedure and art. R51 for the Appeal procedure.

Taking into consideration the particularly short and peremptory deadlines of the appeal procedure, the CAS had to be vigilant and find a balance between the rigor of a procedure and the rights of the parties. Indeed, the right of the parties to bring evidence to the attention of the Panel is one of the primary procedural rights. As has been said, “[s]uch evidence must be relevant and adduced in due time and in due form”.⁵⁶ The fact that article R44.2 and R.44.3 apply *mutatis mutandis* to appeal proceedings for both the appeal brief and the answer allow the Panel at any time to order the production of additional documents.⁵⁷

B. Elements beyond the control of the CAS

A procedure may be effective and rigorous, but if the arbitration clause is poorly drafted (referred to as a “pathological clause”), its efficiency will necessarily be negatively impacted. Indeed, the general or unclear wording of the arbitration clause can lead to doubts with regard to the will of the parties to consent to CAS jurisdiction. In this context, the validity of the clause⁵⁸ could be challenged either at the stage of preliminary objections before the CAS, or later in the context of an application before the SFT. This would slow down and lengthen the overall dispute resolution process.

On several occasions, the SFT has had the opportunity to clarify what it meant by a pathological clause.⁵⁹ In a 2011 ruling it characterized this clause as an incomplete, ambiguous, or inconsistent clause.⁶⁰ On this basis, the CAS in a 2017 award drew up a non-exhaustive list of criteria for recognizing the pathology of a clause. Among the characteristics mentioned by the SFT, the vague or ambiguous nature of the clause was taken up, to which were added, *inter alia*, statements containing contradictory statements or lacking precision in the designation of the institution chosen by the parties. Finally, the non-exclusion of the intervention of State courts or any other court (at least before the award is rendered) may, according to the CAS, lead to competition in the establishment of its jurisdiction and result in the invalidity of the arbitration clause.⁶¹

Although the quality of the clause is not a component as such of the CAS procedure, the Court did not ignore this phenomenon and acted in response. Party counsel in their drafting role are central to avoiding these procedural inconveniences. This is why CAS regularly offers training. In addition, standard clauses are at the disposal of the drafters on the Tribunal’s website. Finally, the publication of the case law provides a corpus to which arbitrators can refer to avoid certain pitfalls.

⁵⁶ MAVROMATI / REEB, op. cit.; and see ATF 119 II 386 of September 1993, F. SpA, c. 1b.

⁵⁷ Art R57 of the Code.

⁵⁸ In the context of an international arbitration having its seat in Switzerland, as is the case for arbitration before the CAS, to verify the validity of a clause, reference should be made to the Federal Act on Private International Law (PILA). Under Swiss law, to be considered valid, a clause must meet formal and substantive requirements set out in Article 178 (1) (2) of the PILA.

⁵⁹ Judgment of the SFT of 21 November 2003 No. 130 III 66; judgment of the Federal Court 4A_246/2011.

⁶⁰ Judgment of the SFT No. 4A_246/2011, para. 2.2.3.

⁶¹ Heap sentence of 25 October 2017 (2017/A/5065): “A clause is therefore generally said to be pathological

if it contains any of the following features that are not common in arbitration agreements:

- (A) if it is vague or ambiguous as regards private jurisdiction contains gold contradicting provisions;
- (B) if it fails to mention with precision the institution which will fill the referee’s body chosen by the parties;
- (C) if it fails to produce procedural mandatory consequences for the parties in the event of a dispute;
- (D) if it fails to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award;
- (E) if it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and
- (F) if it does not permit the putting in place of a procedure leading sous le best conditions of efficiency and speed to the rendering of an award *that is likely of judicial enforcement*.

CAS procedures are not only unusual in the field of arbitration because of their rigor but as well because they are more transparent than other procedures, at least in some aspects. It remains to be seen what role this transparency plays with regard to the efficiency of CAS procedures.

C. Transparency

Today, in arbitration, there is a trend towards increasing transparency. This is exemplified with the United Nations Commission on International Trade Law (UNCITRAL) “Rules on transparency in investor-state arbitration” adopted in 2013. It is a well-known example of this proclivity which generally concerns modern governance.⁶² However, this objective of transparency is especially difficult to achieve in arbitration, where confidentiality is one of the main pillars.

As regards the CAS, it has a particular relationship with transparency since, in comparison with other arbitral fora, most of its awards are published. Indeed, before the appellate procedure, which represents about 85 percent of CAS cases, the award and summary and/or a press release setting forth the results of the proceedings shall be made public by CAS (unless the parties agree otherwise).⁶³ This specificity is mainly explained by the fact that the decisions appealed to the CAS are first instance decisions adopted by federations, associations or sports organizations which are generally made public⁶⁴. It would therefore make little sense, if any, to make them confidential later on. In addition to the availability of awards on the CAS database

which is public, summaries and press releases are also provided for important cases. Finally, in some situations, the cases concern renowned figures in sport or concerns the ranking of a well-known championship, which necessarily involves significant media coverage.

By contrast, confidentiality remains the rule before the Ordinary Division. Indeed, when the CAS rules in first instance, the award may only be made public if the parties agree.⁶⁵ In this context, only 10 or 20 percent of cases are published.⁶⁶

This procedural feature of the CAS combined with universal access to the awards via the online database, make the CAS system a unique model in arbitration and contribute to its legitimacy and its efficiency.

For a variety of reasons, this pooling of CAS awards and their publication on the CAS website contribute to the efficiency of the proceedings. It can be firstly considered as a guarantee of equality between individuals which is especially necessary in doping disputes. In addition, this system facilitates the emergence of key principles that ensure the consistency of case law. This process leads to the development of a *lex sportiva* which fosters the consistency and predictability of sports law.⁶⁷

Another facet of transparency is the publicity of hearings. With regard to this issue, Article 6 (1) ECHR entitles everyone “*to a public (...) hearing (...) by an impartial and independent tribunal*” and expressly provides for various exceptions to this principle. The total or partial *in camera* hearing must be strictly

⁶² The UNCITRAL rules on transparency in arbitration between investors and States based on the treaties (the ‘Rules on transparency’), which entered into force on 1 April 2014; BOISSON DE CHAZOURNES / BARUTI, *Transparency in Investor-State arbitration: Year incremental approach*. In: Bahrain Chamber for Dispute Resolution International Arbitration Review, 2015, vol. 2, No. 1, p. 59–76.

⁶³ Art. R59 of the Code.

⁶⁴ In this respect, the new FIFA Disciplinary Code entered into force on 15 July 2019 provides in its

Article 51.7 that the FIFA General Secretariat publishes the decisions taken by FIFA’s judicial bodies.

⁶⁵ Art. R43 of the Code.

⁶⁶ Information given by the Registry of the CAS.

⁶⁷ CASINI L., “The Making of a Lex Sportiva by the Court of Arbitration for Sport”, Vol. 12 No. 05, *Beyond Dispute International Judicial Institutions as Lawmakers*, 1 May 2011, German Law Journal.

determined by the circumstances of the case. In the Pechstein case, the SFT had concluded that article 6 (1) did not apply to the proceedings before the CAS, since, according to it, it was a voluntary arbitration.⁶⁸ The European Court, by recognizing the forced character of the Pechstein arbitration, found article 6 (1) of the ECHR applicable, and concluded that a breach of the same article had occurred due to the fact that the proceedings before the CAS had not been made public when the athlete had made the request. The Court considered that the controversy concerning the infamous nature of the sanction for the athlete should have required that the hearing be held under public control. This was understood as a way of preserving confidence in the justice system in question.

In 2019, the CAS Code was subsequently adapted to the requirements of Article 6 of the Convention. Previously, Article R57 of the CAS Code provided that, at the hearing, the proceedings take place in camera, unless the parties agree otherwise. With the 2019 reform of the Code, the new Article R57 provides that: “*at the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature*”. The implementation of this new provision will not have been long in coming as on 15 November 2019 a public hearing was held in the context of an appeal procedure before the CAS involving the World Anti-Doping Agency (WADA) against the Chinese swimmer Sun Yang and the Fédération Internationale de Natation (FINA). In this context, a public viewing area was available for written media and members of the public to observe the proceedings, and in parallel, the hearings were available by livestream on the internet.⁶⁹

IV. Concluding remarks

Sports arbitration is a specialized model of arbitration with peculiar features of its own.

⁶⁸ SFT, 10 February 2010, Pechstein v. ISU, 4A_612/2009, para 4.1, and para. 23 of the ECtHR award.

The explosion of the number of cases handled since the CAS was created demonstrates that the institution has for now managed to strike an appropriate balance between the efficiency of its procedures in terms of length and costs, and has at the same time been able to maintain a rather unique quality in the conduct of the procedures.

These qualities, although consciously cultivated and developed, stem from the specificities of the field of sport. In other words, the CAS has taken advantage of the particular expectations of litigants to impose an unusual regime of arbitration, midway between arbitral procedure and judicial procedure.

This particular regime has been and continues to be the subject of attention, especially with regard to issues relating to independence and impartiality. That said, the CAS is unanimously recognized as the supreme court in sport, is often taken as an example for other areas of arbitration, and continues to be a reference for efficiency. It is also important to bear in mind that efficiency is a continuous quest that requires constant effort, which for the time being the CAS appears to be making.

⁶⁹ Media release, CAS public hearing – WADA v. Sun Yang & FINA, Registration for the public viewing area, 4 November 2019.