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THE ROLE OF THE ARBITRATOR IN CAS PROCEEDINGS

Reflections on How to Prepare for and Conduct a Hearing of a CAS Case

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A personal note:
This paper sets out the personal views of the author and is based on his 25 years of experience as a CAS arbitrator. It is in no way intended to be an official CAS guideline nor is it designed to describe the "best way" of proceeding as a CAS arbitrator.

Furthermore, this paper is not an academic treatise, rather, it simply aims at providing guidance to newcomers to the family of CAS arbitrators and attempts to give some suggestions as to the most efficient way of conducting a CAS hearing.

1. Introduction

The Court of Arbitration for Sport ("CAS") is not simply another organisation offering arbitration services. CAS operates in a very special sector of society and at the same time resolves disputes in one of the largest industries of the world, which is estimated to account for 3% of world trade. Just as an arbitrator at the London Metal Exchange should be familiar with the peculiarities of trading in copper and steel, the ideal CAS arbitrator not only has experience in arbitration but also an in-depth understanding of the world of sport which is special in many ways.

The features of arbitration that are commonly mentioned as being the advantages to resolving disputes through arbitration (rather than through state court litigation) must be examined through the prism of sport (2. below).

CAS cases are primarily international disputes and are decided by arbitrators from a variety of countries with markedly diverse legal traditions[1], a fact which makes CAS popular with members of the sports community from around the world and which – incidentally – makes the work as a CAS arbitrator so challenging. There can be no question that an arbitrator from Los Angeles has a different approach to conducting arbitration than his or her colleague from Switzerland. The different perception of the role of the judge in common law and civil law may not necessarily produce different end results, but it certainly accounts for some of the major differences from a procedural point of view (3. below). This, in turn, leads to differences in how CAS arbitrators act from the initial phase of a CAS arbitration, being the

[1] It should be noted that S16 of the CAS Code ("the Code") expressly postulates that in establishing the list of CAS arbitrators, the International Council for Arbitration in Sport (ICAS) "*shall, whenever possible, ensure fair representation (…) of the different juridical cultures*".

appointment of the arbitrator to the matter until the hearing (4. below), and will have a major impact on how a hearing is conducted (5. below) and also on how an award is drafted (6. below).

The author of this paper has been trained in civil law but has always thoroughly enjoyed being part of panels of arbitrators with different legal backgrounds. My colleagues from the other side will forgive me for showing a certain preference for the civil law approach to arbitration which will clearly show in the reflections which follow.

2. The Perceived Advantages of Arbitration from a Sports Law Perspective

Promoters of arbitration commonly mention at least the following features when praising the advantages of arbitration versus state court litigation, particularly in an international environment:

- speed
- low cost
- confidentiality
- procedural versatility
- easier to enforce

2.1. Is Arbitration Quicker?

It certainly should be, but often is not!

It has become commonplace to complain about the increasing duration of commercial arbitration and the most popular arbitration institutions put significant efforts into speeding up the process.

CAS arbitrators operate in the short-lived world of sport and have an absolute duty to bring their cases to a quick resolution. The fact that they do not always succeed cannot always be blamed on them (and in fact often cannot be blamed on them). Frequent delays are often the result of the parties' actions – or non-actions! Nevertheless, a lot can be done by the arbitrators to accelerate the proceedings and the following chapters will touch upon ways of how to do it.

2.2. Low Cost?

To a large extent, the low cost argument in comparison with state court litigation in complex international cases speaks in favour of arbitration only for the reason that unlike state court judgements, arbitration awards cannot be appealed (disregarding the mostly very limited review by state courts of arbitral awards primarily for procedural flaws[2]).

In respect of CAS proceedings, the cost argument clearly works in favour of using this specialised arbitral institution. Due to contributions from the sports family, the court costs are relatively moderate and so are the fees of the arbitrators. Moreover, CAS jurisdiction has been fairly conservative when it comes to awarding "*a contribution towards legal fees and other expenses*" of the prevailing party.[3]

2.3. Confidentiality

According to R 43 of the CAS Code of Sports-related Arbitration (the "Code")[4],

> *"(P)roceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of the CAS. Awards shall not be made public unless all parties agree or the Division President so decides."*

R 43 refers to the Ordinary Procedure[5] (R 38 to R 46). In appeal cases[6] (art. R 47 to R 59) the awards are not confidential.[7] This is a very sound rule because it enables parties (or their counsel) to contemplated CAS appeals to assess their chances of success by reviewing decisions rendered in similar circumstances. Furthermore, the ability to review CAS case law in appeal matters is particularly useful for those who

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[2] In Switzerland the appeal according to Art. 190 of the Federal Code on Private International Law, "PILA, see 6.3 below.

[3] R 64.5 of the Code reads: "*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

[4] References to S (…) or R (…) are references to articles of the Code.

[5] The CAS is composed of two divisions: the Ordinary Arbitration Division which deals with disputes arising "*out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings)*" and the Appeals Arbitration Division which rules on appeals "*against a decision rendered by a federation, association or sports-related body, where the statutes of regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings)*" (R 27).

[6] See footnote 4.

[7] In either case, the hearings are not public unless parties decide otherwise. (R 44.2 and R 57 / R 44.2)

have to administer anti-doping codes and need to rely on CAS decisions in their work of applying the WADC. In reality, therefore, the non-confidentiality turns out to be an advantage of CAS proceedings in appeal cases.

In this context, it must be pointed out that under the general rule of S 19 the "*CAS arbitrators (…) are bound by the duty of confidentiality which is provided for in the Code and in particular shall not disclose to an third party any facts or other information relating to proceedings conducted before CAS.*" This rule is also the basis for the strict CAS policy that CAS arbitrators should refrain from speaking to the media on any CAS cases, no matter whether they were involved or not.

2.4. Procedural Versatility

It is obvious that arbitration proceedings generally allow the arbitrators greater flexibility than would be available to a state court judge who is bound by very detailed procedural laws.

This general principle equally applies to CAS arbitrators as is evidenced by R 44.2[8] and R 44.3[9]. Nowhere does the Code give any guidance as to whether proceedings shall be held in the "Anglo-American" or "Continental European" style. This leaves a great deal of flexibility to CAS panels which are well-advised to structure their proceedings not only as they best fit the particular circumstances of the case but also best correspond to the practice with which they are most familiar.

2.5. Easier to Enforce

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is most likely the most successful international treaty from a lawyer's perspective. It renders arbitral awards enforceable in practically all

[8] "R 44.2 *Hearing*
Once the exchange of pleadings is closed, the President of the Panel shall issue directions with respect to the hearing and in particular set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, the witnesses and the expert as well as the parties' final oral arguments, for which the Respondent has the floor last.
The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant …."

[9] "*R 44.3 Evidentiary Proceedings Ordered by the Panel*
A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant.
If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural act."

relevant countries and thus makes arbitration the preferred option in international commercial disputes.

Unlike ordinary arbitration proceedings at CAS which very often have a commercial background and thus at times require enforcement, the New York Convention is less of an argument in favour of CAS appeal proceedings where the awards are "self-enforcing".[10] A CAS award upholding a federation's decision to suspend an athlete from competition for a doping violation is "enforced" by the sports community by simply not allowing this athlete to compete during the applicable period.

3. The Role of the Judge in the Civil Law and Common Law Tradition

It is undisputable that the question as to the role of the judge/arbitrator will be answered differently depending on whether the judge/arbitrator has been brought up in the civil law or common law tradition and it is equally unquestionable that the professional background largely influences the way a CAS case is conducted.

In civil law, the judge directs and controls the proceedings (the "inquisitorial" system). He/she determines which facts are relevant for the outcome of the case. It is the judge who decides which witnesses proffered by the parties will be heard (and denies hearing witnesses whose testimony he believes is irrelevant) and it is the judge who examines the witnesses in the first place with the parties having the right to ask "additional" questions. There is no cross-examination common-law style.

The role of the judge is markedly different in the common law tradition (the "adversarial" system). His/her role is much more passive. He/she listens to the presentations of oral argument by the parties and the testimony of "their" witnesses (very often on the basis of written witness statements) and to the cross-examination. Unlike in civil law, the principal actors in common law proceedings are the lawyers, not the judge.

In international arbitration, there appears to be a trend towards conducting the proceedings "common-law style". The parties are given considerable freedom in shaping their case and the evidence. The arbitrators very often do not give any indication as to what arguments/evidence they consider to be crucial for the outcome of the case. As a result, parties very often inundate the panel with written submissions, documents and witness statements, which the arbitrators – due to their prior study of the case – already know will be irrelevant. Similarly, during the hearing, counsel go to great lengths in

[10] As the Tribunal Fédéral says in re Canas (ATF 4P. 172/2006 of 22nd March 2007, at 4.3.2.1: "*Par ailleurs, les sanctions infligées aux sportifs, telles que la disqualification ou la suspension, ne nécessitent pas de procédure d'exequatur pour être mises en œuvre.*"

examining/crossexamining the witnesses on issues which have no impact whatsoever on the ultimate decision, thus ignoring the general advice to counsel never to tire or irritate the minds of those they seek to persuade. A lot of time and money is wasted that way!

To avoid any misunderstanding: the author does not advocate any system which does not provide the parties with the full right to be heard, a requirement under almost all procedural codes.

It is not for the author of this paper to pass judgement on which system is preferable in CAS arbitration. On the other hand, it is not surprising that he argues in favour of a system which makes more use of certain features of the civil law system and of a technique which – in varied forms – is common in parts of Continental Europe and which is briefly described below:

On the basis of the parties' submissions in the statement of claim and the answer, the arbitrators make a preliminary assessment which of the contentions of the parties will likely determine the outcome of the case. In doing so, the arbitrators will assume the veracity of the contested contentions of the claimant and will determine whether these contentions, together with the uncontested facts, support the claimant's case. As a next step, the arbitrators will do a similar exercise with the respondent's contested contentions, which they will assume to be true, and will subsequently examine whether they, together with the uncontested facts, would lead to an inadmissibility of the claimant's case, or would lead to it being dismissed on the merits. On the basis of the foregoing two steps, the arbitrator will make an order as to which evidence needs to be taken. The arbitrator may also issue a procedural order setting out additional elements which he/she considers relevant and which shall require further submissions by one or both parties.

The foregoing describes the so-called "*Relationstechnik*", which is standard in German civil procedure, but the author is far from suggesting that it should be adopted slavishly in CAS proceedings. Yet, certain elements of this technique may in fact help streamline CAS proceedings and make them more efficient and less expensive. And this is exactly what R44.2, 2d paragraph attempts to achieve by providing that "*(T)he President of the Panel shall (…) ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant.*"

The chapters below will pick up certain features of the *Relationstechnik* and suggest their use in CAS proceedings. It is interesting to note that the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") in fact do exactly that by encouraging the Arbitral Tribunal "*to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate*".

4. From the Appointment as Arbitrator to the Hearing

4.1. The Appointment of the Arbitrator(s)

The Code establishes certain qualifications for an arbitrator to be appointed to a case.[11] These requirements relate to language skills, availability and independence/impartiality. It is essential for the swift disposition of CAS cases that the arbitrators are completely honest about these issues.

4.1.1. Availability

R 33 expressly stipulates that "*every arbitrator (…) shall have the availability required to expeditiously lead the arbitration.*"

This requirement is more than a formality! Very often proceedings are unduly delayed because not only the parties but also the arbitrators are unable (or unwilling) to find dates convenient to everyone. There is nothing wrong with an arbitrator refusing to be part of a panel if he/she is unable to devote the necessary time for the fulfilment of his/her tasks.

4.1.2. Language skills

A delicate issue is the requirement provided for in S 14 and R 33 according to which CAS arbitrators shall have "*a good command of at least one CAS working language*". The same requirement is stipulated with respect to the appointment to an individual case (R 33). Frequently, arbitrators underestimate the level of skill required to draft an award in a foreign language. In order to overcome these difficulties, CAS panels frequently seek assistance of an ad hoc clerk[12] who will not only assist the panel with research etc., but also to help draft the award in a language which is his/her native tongue. However, it would be improper for a panel/its President to leave (part of) the decision-making to an ad hoc clerk (S 18): "*(…) CAS arbitrators (…) sign a declaration undertaking to exercise their functions personally (…*)".

[11] It should be noted that both in ordinary and appeal cases, party-nominated arbitrators require a confirmation by the President of the respective division of CAS (R 40.3 for the Ordinary Division and R 54.2 for the Appeals Arbitration Procedure).

[12] R 40.3, 3d paragraph and R 54, 4th paragraph read as follows: "*An ad hoc clerk may be appointed to assist the Panel. He must be independent from the parties. His fees shall be included in the arbitration costs.*"

4.1.3. Independence

It is a matter of course that "*every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties*". (R 33)

Conflict of interest is a delicate matter in arbitration. This is particularly true in CAS arbitration for two reasons: (a) CAS operates in a closed society (especially in appeal matters) where the "players" involved regularly meet within the same circles, and (b) it works on the basis of a closed list of arbitrators who have known or have come to know each other well over the years.

As a response to rising criticism that the problem of conflict of interest has been taken too lightly, CAS has introduced a new rule which has taken effect on 1st January 2010 and according to which "*CAS arbitrators (…) may not act as Counsel for a party before the CAS".* This provision has proven its worth in that it takes away the concern that the closeness of a number of arbitrators – inevitable as a result of the closed list of CAS arbitrators – have led to embarrassing situations where on one day two arbitrators were sitting on the same panel, and on the next day one of them appears before the other as counsel for a party.

Despite a confirmation by the Swiss Federal Court in *Mutu*[13] and *Valverde*[14] that the same standards with respect to conflicts of interest must be applied in commercial and sports arbitration, scepticism still prevails that the particularities of CAS arbitration are being used as a justification for a more relaxed approach regarding the requirements of independence and impartiality, particularly before the background that in reality athletes have no choice but to accept CAS as the ultimate competent court.

A further area of concern is the fact that as a result of the closed list of arbitrators, some of them are repeatedly appointed by the same litigants. Repeated appointments have the potential of putting into question the independence and impartiality of the arbitrator. In a commercial context, the Swiss Supreme Court has confirmed its liberal approach and rejected a challenge based on repeated appointments by the same party[15], holding in essence that this would not cast doubts on impartiality. In contrast, the IBA Rules on Conflict of Interest in International Arbitration have put "previous services" on the Orange List[16] if "*(T)he arbitrator has within the past three years been*

[13] Decision 4A 458/2009, dated 10 June 2010
[14] Decision 4A 234/2010 dated 29 October 2010
[15] Decisions 4A 256/2009 and 4A 208/2009, both dated 11 January 2010.
[16] IBA Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004
"*3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the*

appointed as arbitrator on two ore more occasions by one of the parties …" (3.1.3 above), softening in a footnote this fairly rigid approach with respect to specialized courts of arbitration[17]. Despite the relatively soft approach by the Swiss Federal Tribunal and in the IBA footnote, it may be prudent to disclose previous appointments in CAS cases during a period of, say, three (3) years preceding the new appointment. In an extreme case, the President of the respective division of CAS may exercise his authority to refuse confirmation of a party-appointed arbitrator should he accept an appointment despite an obvious conflict of interest.

In summary, in the interest of CAS' reputation, CAS arbitrators should be particularly sensitive about conflicts of interest and especially about their relationship with the parties (and their counsel) and should refrain from giving any signs of a bias in favour of the party that appointed them (in the interest of repeated appointments?).[18]

4.2. Single Arbitrator or a full Panel?

In both divisions of CAS, single arbitrators or panels of three (3) are provided for.

In respect of ordinary cases, the parties can agree, in their arbitration agreement or after the dispute has arisen, on the number of arbitrators. In the absence of such choice, *"the President of the Division shall determine the number [of arbitrators], taking into account the amount in dispute and the complexity of the dispute"* (R 40.3).

In appeal matters, the case shall be submitted to a panel of three arbitrators unless there is an agreement of the parties in favour of a sole arbitrator, or unless the President of the division *"decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case*".

As a result of mounting pressure in international arbitration as to cost and time, the respective organisations increasingly push towards appointing single arbitrators. In fact, most of the problems relating to challenges and scheduling can be avoided if a case is tried before only one arbitrator. This applies to CAS arbitration as well.

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facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a))."

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

[18] It should be noted that "*(D)issenting opinions are not recognized by the CAS and are not notified."* (R46, 1st paragraph, *in fine*; R59, 2nd paragraph *in fine*)

However, unquestionably the right of the parties to appoint an arbitrator with known arbitration experience and expertise in the subject matter of the case is not only a psychological advantage but a clear means to ensure that the necessary know-how is available to decide the case. This advocates for a prudent use of single arbitrators.

4.3. The Role of the Chairman vis-à-vis Party-Appointed Arbitrators

The role of the President is defined differently in the provision regulating the two types of proceedings. While in ordinary proceedings the President *"shall issue directions with respect to the hearing and in particular set the hearing date*" (R 44.2, 1st paragraph), the authority of the President of an appeal panel is more detailed in R 57, 1st paragraph according to which he "*shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal.*" Despite his ample power in pre-hearing procedural matters, the President of the panel will consult with his co-arbitrators in non-routine matters.

To avoid any misunderstanding: when it comes to taking a decision within the full panel, be it on procedural matters or the final award, the President has no greater voting power than his co-arbitrators, except in the absence of a majority within the panel, when the "*award is rendered (…) by the President alone*". (R 46 and R 59)

4.4. Pre-Hearing Procedural Measures

4.4.1. Provisional or Conservatory Measures

The outcome of a case may often be heavily influenced by a panel's willingness to make – upon application by one of the parties – an order for provisional or conservatory measures (R 37). There is ample CAS case law regarding the requirements for such an order (irreparable harm, likelihood of success on the merits, balance of the interests of the parties) and panels should not hesitate to make use of this authority, for instance in cases where important evidence may get lost or where there are serious doubts of an anti-doping rule violation and a risk that an athlete would miss an important competition because he is unable to compete in qualifying events.

4.4.2. Pre-Hearing Telephone Conference?

Modern information technology provides very sophisticated tools to facilitate the flow of information, but it cannot and should not fully replace the direct communication!

It can be utterly frustrating when countless e-mails/faxes are being exchanged over several weeks between the parties and their counsel, the members of the panel, the clerk of the panel and the CAS court office/CAS counsel in search of a convenient hearing date. Paper (also "electronic paper") is patient and it is simply all too easy to send an e-mail stating that one is "regrettably" unavailable at a particular date – not infrequently because this fits well with one's own strategy. Why not organise a telephone conference between the panel (or even the President alone), the parties' counsel and the CAS counsel in which procedural issues (and only those!!!) such as hearing dates and deadlines for submissions or a general procedural time table (as is provided for in 18 (4) of the ICC Rules) are being discussed? Considerable time can be saved and frustration avoided!

4.4.3. Pre-Hearing Evidentiary Measures

R 44.3, 2nd paragraph provides the following, both with respect to ordinary cases and the appeal proceedings (R 57, 1st paragraph, *in fine*):

> "*R 44.3: Evidentiary Proceedings Ordered by the Panel*
>
> *A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant.*
>
> *If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural act. …*"

This rule provides CAS panels with the necessary tools to prepare a case for swift resolution. In order to make appropriate use of these tools, the panel (or at least its President) must familiarize itself with the file early on and, in particular, with the parties' submissions, so that it can make a timely assessment whether a request for production of (relevant!) documents should be granted, whether the panel wishes additional documents to be produced and/or whether experts must be heard. It should also be mentioned that the panel has the power to "*limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance*." (R 44.1, 5th paragraph)

The panel can also "*proceed with any other procedural act*", e.g. it can undertake its own investigations relative to the case. In this context, a word of caution should be added: Whatever "procedural act" the panel takes, it must give the parties an opportunity to comment on this "act" or the relative findings. A failure to do so opens the door to an appeal to the Swiss Federal Tribunal for a violation of the parties' right to be heard.

The Code provides the CAS panels with ample flexibility in respect of the way it intends to conduct the evidentiary hearing. From the parties' perspective, this flexibility has the disadvantage that they are unable to predict what to expect from the panel. This is particularly true if a panel is comprised of arbitrators from different legal backgrounds. Will the panel hear the witnesses "common law style"; will there be cross-examination; will there be concerns as to the extent as to the witnesses have been coached? In these instances, it may be helpful to give the parties an indication of what to expect and one of the ways of doing that would be a reference (e.g. in a procedural order or, preferably, as early as the pre-hearing telephone conference, see 4.4.1 above) to the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") which – as is stated in its foreword – "*may be particularly useful when the parties* [and – in the opinion of the author hereof – when the arbitrators] *come from different legal cultures*". The IBA Rules are increasingly popular in international commercial arbitration in that they strike a reasonable balance between the common law and civil law traditions. The detailed provisions on important evidentiary issues like document production, witness statements and expert testimony will give the parties an indication of how the panel intends to deal with these and other evidentiary measures.

If a CAS panel intends to make use of the IBA Rules, it should advise the parties accordingly, as early as possible, and could do so by stating that, in addition to the Code, the panel will be "guided" by the IBA Rules. By using the word "guided" the panel will maintain the necessary degree of flexibility in dealing with evidentiary issues.

A particularly difficult problem in appeal arbitration proceedings relating to doping sanctions is created by the necessary reliance by the panel on expert testimony on complex physiological and chemical issues. Such experts are called by the parties "*to be heard by the Panel*" (R 44.2, 3rd paragraph). For CAS arbitrators who have been sitting on numerous doping cases, there is almost no need to hear the expert of the two sides as they have heard these experts many times before and can predict with little difficulty what their testimony (and their probative value) is going to be. This may be an opportunity to exercise – preferably at an early stage in the proceedings - the power granted to the panel to "appoint and hear experts" after consulting "*the parties*

with respect to the appointment and terms of reference of such experts." (R 44.3, 2nd and 3rd paragraph). One has to recognise though that in this highly-specialized area it may be difficult to find a fully independent expert who has not testified on behalf of either an athlete or the prosecuting body and/or has not manifested in a publication his/her view on a particular matter thus putting in question his/her impartiality.

4.4.4. "Guidance" by the Panel on Relevant Questions?

As has been explained in 3. above, in the interest of expediting the proceedings, the author advocates a limited use of techniques which are common in Continental Europe.

It is not uncommon in CAS proceedings that in the absence of guidance from the panel, hundreds of documents and hundreds of pages of witness statements are being produced by the parties on issues which in the panel's opinion, formed hopefully at an early stage of the proceedings, are completely irrelevant for the outcome of the litigation. In these circumstances, it would be very helpful if the panel were to give some indication to the parties of what it believes to be particularly relevant by stating in a communication to the parties that "*without in any way restricting the parties' freedom to make whatever submissions they see fit and considering the current status of the proceedings, the panel suggests that the parties focus their submissions and their presentation at the oral hearing particularly on the following issues: (…)"* Ideally, this indication should be given after a thorough study of the grounds of appeal and the answer and before a possible second round of submissions.

It goes without saying that the foregoing "guidance" by the panel requires an early in-depth study and constant re-assessment of the case so that an informed statement as to the likely relevant issues can be made. In any event, the proper use of this technique can help reduce time and cost of the proceedings.

4.4.5. Bifurcation

According to Article 188, 2nd paragraph of the PILA "*(u)nless the parties have agreed otherwise, the arbitral tribunal may render partial awards.*" In the interest of saving time (and money), CAS panels should make use of this authority if its jurisdiction is in question so that no unnecessary efforts are wasted should admissibility/jurisdiction eventually be denied.

5. The Oral Hearing

5.1. Must a Hearing be held?

In ordinary cases, "*the procedure before the Panel comprises written submissions and, if the Panel deems it appropriate, an oral hearing*" (R 44.1).

In appeal arbitration, "*after consulting the parties, the Panel may if it deems itself to be sufficiently well-informed decide not to hold a hearing*." (R 57, 2nd paragraph).

Ultimately, in either case, it is in the panel's discretion to hold or not to hold a hearing. If both parties request a hearing, the panel will only in very exceptional circumstances decide not to hold one. Similarly, if both parties do not want a hearing, the panel will most likely respect that wish[19]. A more difficult decision must be taken if only one party requests a hearing: Despite the panel's decision-making power, it will most likely follow the request for a hearing in the interest of the parties' right to be heard.

5.2. Keeping Track of Time

The more "guidance" the panel has given to the parties (4.4.2 above), the more focussed the parties presentation at the hearing will be. In this context, it is worth mentioning the directions given to the President of CAS panels (both in ordinary and appeal cases) in R 44.2, 2nd paragraph:

> "*The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant.*"

In addition, depending on the circumstances of the case, the panel may allocate certain time slots to the parties' (their counsels') opening and closing statement. In extreme cases, where there are extensive submissions and a great number of witnesses, the panel may – after consultation with the parties - go so far as granting to each side a specific number of hours for "their case" including the hearing of their witnesses. In such cases, the time would be monitored by a chess clock.

[19] In a recent case a CAS panel decided, contrary to both parties' request, to schedule a hearing because the arbitrators will have to draw negative inferences from one of the parties' failure to produce certain documents and want to ensure that that party is heard.

5.3. Documents

The Code attempts to strike a balance between sweeping requests for production of documents US-style and the rather restrictive concept in most countries of Continental Europe by providing in R 44.3, 1st paragraph that

> "*(A) party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant.*"

Here again, the arbitrators will only be able to apply the "relevance test" and make the appropriate order if they are fully familiar with the case and can thus assess such relevance. In addition, the panel itself has the authority to "order the production of additional documents" of its own initiative (R44.3, 2nd paragraph).

5.4. Witnesses

It has become common practice for CAS panels to just "swear in"[20] the witnesses[21] and then hand him/her over to the party for direct testimony. The examination of the witnesses in both ordinary and appeal proceedings is done mostly with reference to a "*brief summary of their [the witnesses'] expected testimony"* or on the basis of *"witness statements*" (R 44.1, 3rd paragraph, R 51, 2nd paragraph), which, it should be noted, are almost without exception prepared by counsel and thus do not necessarily reflect the witness' own perception.

Once again, considerable time could be gained if the arbitrators were to take the lead in examining the witnesses because they know best what is relevant in their eyes for the outcome of the proceedings. It goes without saying that regardless of the method of proceedings the parties must be given an opportunity to ask additional questions and to cross-examine the witnesses.

With respect to the physical presence of witnesses and experts at the hearing, the Code provides the following (R 44.2, 4th paragraph, R 57, 1st paragraph, *in fine*):

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[20] "*Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanction of perjury*". (R 44.2, 6th paragraph)

[21] Technically, a party cannot be a witness under Swiss law (Article 168, 1st paragraph Swiss Code of Civil Procedure: "*The admissible means of evidence are: a) witness testimony, (…) f) party testimony (…)*". In practice, however, the testimony of a party is an important part of the evidence and it is for the arbitrators to assess the probative value of such testimony.
In contrast, see Article 4, 2nd paragraph of the IBA Rules: "*Any person may present evidence as a witness, including a Party (…)".*

> "*The President of the Panel may exceptionally authorize the hearing of witnesses and experts via tele- or video-conference. With the agreement of the parties, he can also exempt a witness/expert from appearing at the hearing if the latter has previously filed a statement*."

Panels should take the word "exceptionally" literally and, as a rule, should order the personal presence of the witnesses. Telephone connections are frequently very bad or get constantly interrupted and, in practice, a meaningful cross-examination is impossible. Testimony by tele-conference is particularly problematic and in fact at times useless if the witness speaks a language other than the language of the proceedings and needs an interpreter. How can the panel verify whether what is being translated is in fact what the witness said?

In a number of jurisdictions, witnesses are routinely asked to leave the room while other witnesses are being examined so as to avoid the risk of testimony being "influenced" by others. At CAS, the panels should assess that risk and take their decision – after consultation with the parties – on the presence of witnesses accordingly. More often than not, all witnesses are allowed in the hearing room in CAS proceedings, but this practice should be reconsidered as far as fact witnesses are concerned so that the last to be heard cannot adapt his testimony to what has been said before him. The contrary is true for expert witnesses where interaction/discussion between them produces the best results.

Finally, a word of caution with respect to witnesses, who do not speak the language of the proceedings and thus require the assistance of an interpreter: According to R 44.2, 2nd paragraph, R 57, 1st paragraph, *in fine, "(A)ny person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person*". It is common practice at CAS that the interpreter is not only paid for, but also brought to the hearing, by the respective party. In instances where there is no "risk" of one of the panel members understanding the witness' native tongue, the interpreter (and the witness???) may be tempted to apply the rule of "who pays the piper calls the tune" and to "translate" what is good for "his party" and not what is being said.[22] To counter this, CAS may want to consider establishing a list of CAS interpreters from which the parties have to select.

5.5. Encouragement to settle

Both in ordinary and appeal cases *"… the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award*

[22] In extreme cases CAS panels may want to listen to the tape recording with the help of an independent translator in order to verify what the witness said.

rendered by consent by the parties" (R 42 and R 56, 2d paragraph[23]). The extent to which the panel will make use of such authority will again largely depend on whether its members come from common law or civil law countries. Arbitrators from the former will be more reluctant to take the initiative for fear of a challenge for lack of impartiality if information has been disclosed during settlement discussions which would otherwise not have been revealed and if a settlement is ultimately not reached. Civil law arbitrators, in contrast, are more forthcoming in actively seeking to bring the parties together.[24]

Obviously, an early settlement saves time and cost and given the express authority in the Code it should be actively promoted whenever possible.

6. The Award

6.1. Short reasons

For ordinary cases, R 46 provides the following with respect to the award:

> "*R 46 Award*
>
> *The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The signature of the President of the Panel shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified.*"

An almost identical rule can be found in R 59 for appeal proceedings with one additional rule according to which *"(T)he Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such written communication."*

Despite the call for "brief reasons" in R 46 and R59, CAS awards are usually fairly long and at times fill pages by partly stating the obvious.

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[23] R56, 2nd paragraph has been introduced into the code as of 1 January 2010. Before this amendment panels drew their authority to encourage settlement in appeals proceedings by applying R42 *per analogiam*.

[24] For instance, Section 32.1 of the rules of the German Institution for Arbitration (DIS) provides that the arbitral tribunal should encourage an amicable settlement at any stage of the proceedings.

6.2. Apply the rules, don't re-write them

CAS operates in a very specialised environment that is highly political at the same time. Therefore, it is at times difficult for CAS arbitrators to remain uninfluenced by considerations of perceived sporting fairness and political governance. This is dangerous for CAS' reputation. CAS arbitrators should not forget that CAS is a court of law and is called upon to apply the rules of sporting bodies, not to re-write them.

Finally a word on precedent: while CAS panels are not bound by findings of other arbitrators in earlier cases, it should be a matter of course for the arbitrators to discuss precedent in the award and if necessary, distinguish their award from other CAS decisions.

6.3. Finality of Awards

CAS awards are final and binding (R 46, 2d paragraph and R 59, 4th paragraph) but they can be appealed to the Swiss Federal Tribunal (Art. 191, 2nd paragraph PILA) for the very limited reasons listed in Art. 190, section 1, subsection 2 of the PILA:

> *"a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;*
>
> *b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;*
>
> *c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;*
>
> *d. If the equality of the parties or their right to be heard in an adversarial proceeding was not respected;*
>
> *e. If the award is incompatible with Swiss public policy (ordre public)."*

Of the possible challenges of CAS awards before the Federal Tribunal, the ones that have been successful, and that require particular attention of CAS panels were violations of the principles of "*ne ultra* [or *infra*] *petita*" (lit c) PILA) or a failure by the panel to properly grant the right to be heard (lit. d) PILA).

It is therefore critical to give the parties at all times an opportunity to comment on any procedural act and on issues of the merits on which the award will be based. Better to give the party that opportunity once too often than to risk a successful appeal to the Federal Tribunal!

With respect to the parties' "*petita*", it is crucial to carefully read the parties' request for relief or, as the case may be, to ask the parties to clarify them in order not to rule on something which is not requested or to leave out issues on which the parties request a ruling.

7. Conclusion

The Code provides CAS arbitrators with a variety of tools to bring cases to a speedy resolution without sacrificing any aspects of fair proceedings and high quality judgements. Let's make use of them!!

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