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Sports Arbitration: A Coach for Other Players?

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"Consent" in Sports Arbitration: Its Multiple Aspects*

Lessons from the Cañas decision, in particular with regard to provisional measures

*Antonio Rigozzi*** *and Fabrice Robert-Tissot*±

"Any customer can have a car painted any colour that he wants so long as it is black."
—John Ford

1. INTRODUCTION

This quote from the celebrated automobile pioneer Henry Ford[1] is the embodiment of the proverbial "Hobson's choice"; to have Hobson's choice is to have no choice at all. Its origin lies in the practice of the 17th century Cambridgeshire horse trader Thomas Hobson, whose customers, in theory, had a free choice but in practice always ended up with the horse closest to the stable door, which was Hobson's "take it or leave it" choice.

By including an arbitration clause in their regulations, sports governing bodies place athletes in a situation that is quite similar to Hobson's customers, namely to accept the arbitration or to refrain from participating in the relevant sport. In other words, sports arbitration is far from the traditional idea of arbitration being the consensual alternative dispute adjudication process that we read about in every textbook on arbitration.[2] This reality was explicitly acknowledged by

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* This article is based on a previous article published in French in: Antonio Rigozzi & Fabrice Robert-Tissot, *La pertinence du « consentement » dans l'arbitrage du Tribunal Arbitral du Sport, in* JUSLETTER of 16 July 2012. The English version takes into account the recent amendments of the CAS Code of 1 March 2013 and recent publications and decisions on this topic. It further analyses the legal aid system before the Court of Arbitration for Sport (CAS).

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1 HENRY FORD, MY LIFE AND WORK 71 (Wayne State University Press 1923).

2 *See* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND 3 para. 11 (Sweet & Maxwell, 2nd ed. 2010): "The principle of party autonomy is without doubt the distinguishing characteristic of arbitration. To begin with, the jurisdiction of the arbitral tribunal rests solely upon the parties' wills, whereas any State court, even if the forum was selected by the parties, derives its

the Swiss Federal Supreme Court (the Supreme Court) in the well-known *Cañas* decision of 22 March 2007:

> Aside from the (theoretical) case of a famous athlete who, due to this notoriety, would be in a position to dictate his requirements to the international federation in charge of the sport concerned, experience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation's requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the articles of association of the sports federation in question in which the arbitration clause was inserted, all the more so if the athlete in question is a professional athlete." [3]

In other words, it is clear that sports arbitration is fundamentally non-consensual in nature, since athletes have no other choice but to agree to whatever is contained in the statutes or regulations of their sports governing bodies. This article commences with an analysis of the relevance of the *Cañas* decision as to the validity of the waiver of the right to bring setting aside proceedings against an arbitral award before the Supreme Court (Section 2), which was the issue at stake in that case. It will then address the issue of whether, and to what extent, the ruling of *Cañas* is also applicable to the waiver of state court jurisdiction to rule on the merits of the dispute (being the essence of the arbitration agreement—Section 3) and to order provisional measures (on which the parties may agree in connection with an arbitration agreement—Section 4).

After the analysis of the *Cañas* ruling, we will also discuss the recent decision rendered by the *Landgericht* of Munich in the well-known *Claudia Pechstein v. DESG & International Skating Union* matter (the "*Pechstein* decision").[4]

territorial and subject-matter jurisdiction from national and international legal norms"; ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 11 para. 2.01 (Oxford University Press 2012): "Consent is the controlling factor of jurisdiction in international arbitration"; GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, ARBITRAGE INTERNATIONAL, DROIT ET PRATIQUE À LA LUMIÈRE DE LA LDIP 5 para. 21 (Weblaw, 2nd ed. 2010).

[3] ATF 133 III 235, 243 para. 4.3.2.2 [*Guillermo Cañas v. ATP Tour*], 25 ASA BULL. 592, 602 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 84-85 (2007).

[4] *Landgericht [LG] München I*, 26 Feb. 2014, case no. Az. 37 O 28331/12, *available at* http://openjur.de/u/678775.html (last visited 27 June 2014).

2. THE ACTUAL BEARING OF THE *CAÑAS* DECISION

The *Cañas* decision was rendered in relation to setting aside proceedings initiated by Guillermo Cañas, a professional tennis player, against an award of the Court of Arbitration for Sport (CAS) upholding a doping ban issued by the Association of Tennis Professionals (ATP). The applicability of the relevant anti-doping rules was not disputed since, as with any other player participating to the ATP tournaments, Mr. Cañas had been required to sign a document (entitled "Player's Consent and Agreement to ATP Official Rulebook") containing the following wording:

> I, the undersigned player, consent and agree as follows:
>
> 1. I consent and agree to comply with and be bound by all of the provisions of the 2005 ATP Official Rulebook ("the ATP Rules"), including, but not limited to, all amendments to the ATP Rules and all the provisions of the Anti-Doping Program incorporated in the ATP Rules. I acknowledge that I have received and had an opportunity to review the ATP Rules.
> 2. I also consent and agree that any dispute arising out of any decision made by the Anti-Doping Tribunal, or any dispute arising under or in connection with the Anti-Doping Program, after exhaustion of the Anti-Doping Program's Anti-Doping Tribunal process and any other proceedings expressly provided for in the Program, shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Code of Sports-Related Arbitration. The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable. I agree that I will not bring any claim, arbitration, lawsuit or litigation in any other court or tribunal. The time limit for any submission to CAS shall be 21 days after the decision of the Anti-Doping Tribunal has been communicated to me.
> 3. I have read and understand the foregoing Player's Consent and Agreement.

In other words, any professional tennis player who wished to participate in the ATP World Tour had to waive both: (i) her or his

right to bring an action on the merits before state courts in favour of CAS jurisdiction; and (ii) her or his right to bring setting aside proceedings against the arbitral award rendered by the CAS. Only this second issue was disputed before the Supreme Court as the ATP contended that the appeal was inadmissible on the ground that Mr. Cañas had waived his right to file setting aside proceedings against the arbitral award pursuant to Article 192(1) of the Federal Act on Private International Law (PILA), which reads as follows:

> If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2) [PILA].

The Supreme Court rejected the ATP's plea for inadmissibility despite the fact that by signing a consent form, where he had explicitly "consent[ed] and agree[d]" that "[t]he decisions of CAS shall be final, non-reviewable, non-appealable and enforceable [...]", Mr. Cañas had entered into a waiver agreement that fulfilled the formal requirements of Article 192(1) PILA. Indeed the Court found that in view of the pyramidal ("highly hierarchical structure")[5] and vertically integrated[6] organisation of sport,[7] athletes had no other choice but to accept the sports regulations imposed by the federations and concluded as follows:

> [...] the waiver of the right to bring setting aside proceedings, when it emanates from an athlete, will obviously not rest on a free will, as a general rule. The agreement arising out of an intention expressed in such circumstances and the intention expressed by the sports organisation concerned will therefore

[5] ATF 133 III 235, 243 para. 4.3.2.2, 25 ASA BULL. 592, 602 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 84 (2007).

[6] *Id.*

[7] For an illustration of how the sports movement is organised, *see e.g.* Serena Hedley-Dent & Kitty Arbuthnot, *Organisational Structures for Sports Entities*, *in* SPORT: LAW AND PRACTICE 1009 et seq. (Adam Lewis & Jonathan Taylor eds., Tottel publishing, 2nd ed. 2008); Nick Craig & Andy Gray, *Sports Governance*, *in* SPORT: LAW AND PRACTICE 1028 et seq. (Adam Lewis & Jonathan Taylor eds., Tottel publishing, 2nd ed. 2008); ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT 13 et seq. paras. 14 et seq.; more recently Thilo Pachmann, *Struktur und Governance des nationalen und internationalen Sportverbandswesens*, *in* SPORTRECHT, Band I, at 19 et seq. (Jan Kleiner, Margareta Baddeley & Oliver Arter eds., Stämpfli Verlag 2013).

> be tainted *ab ovo* by reason of the compulsory consent given by one of the parties. Now, by accepting in advance to abide by any future awards, an athlete deprives himself forthwith of the right to complain in due course of subsequent breaches of fundamental principles and essential procedural guarantees which may be committed by the arbitrators called upon to decide in his case. Moreover, concerning a disciplinary measure issued against him such as a suspension which requires no enforcement proceedings, an athlete will have no opportunity to make any complaints against the award before a court competent to enforce the award. Therefore, having regard to its consequences, a waiver of the right to bring setting aside proceedings should not, in principle, be raised against an athlete to dispute the admissibility of an application to have an award set aside even if the formal requirements set out in article 192(1) PILA are met [...][8]

The Supreme Court's reasoning cannot be clearer. The obvious result is that athletes will always be free to challenge the CAS awards in setting aside (or in revision)[9] proceedings, irrespective of any waiver that the applicable sports regulation might provide for in addition to the CAS arbitration agreement. The obvious issue that arises is whether there are other consequences to be drawn from the non-consensual nature of sports arbitration. The following sections seek to address this issue.

3. THE VALIDITY OF ARBITRATION CLAUSES CONTAINED IN SPORTS REGULATIONS

The first follow-up issue relates to the consequences of the *Cañas* ruling with respect to the validity of the arbitration agreement itself when it is contained in sports regulations that an athlete had no choice but to accept. Indeed arbitration agreements contain a waiver of the parties' (constitutional) right of access to a state court (*see* Article 30(1) of the Federal Constitution of the Swiss Confederation [Fed. Cst.]; *see also* Article 6(1) of the European Convention on Human Rights

[8] ATF 133 III 235, 244 para. 4.3.2.2, 25 ASA BULL. 592, 602 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 86 (2007).

[9] For a case where an athlete requested the revision of a CAS' award before the Supreme Court, *see* Supreme Court, decision 4A_144/2010 of 28 Sept. 2010 [*Pechstein*], 29 ASA BULL. 147 (2011).

[ECHR]).[10] In the following sub-sections, we will examine whether such a compulsory waiver is enforceable under Swiss law (Section 3.1), in particular in cases where the athlete cannot afford the arbitration without proper legal aid (Section 3.2).

3.1 Compulsory Arbitration in Sports Matters Is Enforceable in Switzerland

The entry form signed by Mr. Guillermo Cañas as a precondition for participating in the ATP Tour contained, in the same paragraph, both: (i) an arbitration clause referring disputes to the CAS; and (ii) a waiver of the right to bring an action to set aside the award. It would seem only logical that any issue as to consent would apply to both the waiver of the state court jurisdiction on the merits in favour of CAS (the arbitration clause) and the waiver of the right to bring an action to set aside the award rendered by CAS (the exclusion clause) as they were contained in the same document and thus subscribed in the same circumstances. Indeed, a former CAS arbitrator questioned the validity of arbitration clauses in sports matters on the basis of the *Cañas* decision:

> Athletes who wish to compete in the Olympic Games are required, in their entry form, to submit all disputes to the CAS AHD [Ad Hoc Division] whether they wish to do so or not; otherwise they will not be allowed to participate. Is this a valid and legally binding consent to arbitration and what are the legal and practical consequences if an athlete steps out of line and refers a dispute to the ordinary courts instead of to the CAS AHD? [...] If an athlete, in effect, is forced into agreeing to arbitration by the CAS AHD on pain of not being allowed to compete in the Olympic Games—the pinnacle of every athlete's ambitions and dreams—can his/her consent be said to be real and genuine? It is, I think, arguable that it cannot. Therefore under general principles of contract law, the athlete—I think—can 'renege' on the so-called written arbitration agreement with legal impunity.[11]

[10] According to the Supreme Court, when entering into an arbitration agreement, the parties waive a constitutional right. Therefore, "[...] one will avoid to admit too easily that an arbitration agreement was entered into, if this point is disputed" (ATF 128 III 50, 58 para. 2 c/aa).

[11] Ian Blackshaw, *Arbitration: Olympic athlete consent to CAS arbitration*, WORLD SPORTS LAW REPORT (Nov. 06, 2009), *available at* http://www.e-comlaw.com/world-sports-law-report/ (last visited 27 June 2014).

Along similar lines, the *Tribunal de Grande Instance de Paris* held that "[s]ince the right of any person to proceed before the state courts is an issue of public policy, the athlete shall not be deprived of this right through regulations issued by sports governing bodies".[12] In other words, the dispute resolution systems provided for in sports regulations cannot exclude the members' (i.e. athletes' and clubs') "right to have access to a judge". Such clauses are void under French law.[13]

This approach is not isolated and has also prevailed, for instance, in Portugal[14] and, most notably, in Germany. In a decision of 3 April 2000 rendered in the so-called *Körbuch* case, the German Supreme Court (*Bundesgerichtshof* [BGH]) held that compulsory arbitration clauses were null and void as a matter of (German) constitutional law.[15] This position has been recently confirmed by the *Landgericht* of Munich in the so-called *Pechstein* case. Referring specifically to the *Cañas* ruling, the court held that, , as Ms. Pechstein's signature on the entry form containing the arbitration clause referring disputes to CAS was a precondition of her participation in the World Ice Skating Championship, such arbitration clause was null and void as a matter of German and Swiss law, as well as under Article 6(1) of the ECHR, for lack of consent from the athlete.[16] This finding seems to have been favourably received in the German legal community.[17]

Is the *Pechstein* Court's analogy with and reliance on *Cañas* sound? As a preliminary note, it is worth mentioning that in *Cañas* the Supreme Court did not have to address the issue of the validity of the arbitration agreement, since Mr. Cañas did not challenge the jurisdiction of the CAS. However, in a very important *obiter dictum*, the Supreme Court felt compelled to address this issue. The Supreme

[12] *Tribunal de Grande Instance de Paris*, 26 Jan. 1983, RECUEIL DALLOZ [D.] 1986, Somm. at 366, obs. Gabriel Baron (our translation) ("*La faculté pour toute personne de saisir la justice étant d'ordre public, le participant à une épreuve sportive ne saurait être privé de ce droit par le règlement de la compétition* [...]"). *See also Conseil d'État*, 19 Dec. 1980, Hechter, D. 1981 at 296, note Joël-Yves Plouvin; JURIS-CLASSEUR PÉRIODIQUE (SEMAINE JUDICIAIRE) [JCP] 1982 II 10784, note B. Pacteau. These decisions are cited in: Laura Weiller, *The Major Principles of Arbitration Law and their Application in Sports Related Matters*, CAH. ARB. 337, 338 (2013).

[13] Weiller, *supra* note 12, at 338.

[14] As to the Portuguese legislature's attempts to mandate the arbitration of sports disputes which were bristled by the Portuguese Constitutional Court, *see* Antonio Júdice Moreira, *Portuguese Court of Arbitration for Sports: Constitutional Award No. 781/2013 of November 20, 2013*, EIAR 257, 259, 262 (2013).

[15] *Bundesgerichtshof* [BGH], *in* NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1713 (2000) quoted by Dirk Monheim, *Das Ende des Schiedszwangs im Sport – Der Fall Pechstein*, SPURT 90, 91 (2014).

[16] *Pechstein* decision, *LG München I*, *supra* note 4.

[17] Monheim, *supra* note 15, at 92, 94.

Court explained that the vertically integrated nature of professional sport gives the athletes no choice but to accept the rules contained in the regulations issued by the sports governing bodies. The Supreme Court noted that the same is true for the arbitration agreement contained therein.[18] However, remarkably, the Supreme Court found that the issue of the validity of the arbitration agreement should not necessarily be treated in the same way as the waiver of the right to bring setting aside proceedings:

> [...] Doubtlessly, it may be true that it is to some extent illogical, in theory, to treat differently the requirements of formal and intrinsic validity for an arbitration agreement on the one hand, and the same requirements for a waiver of setting aside proceedings [...].[19]

How can the Supreme Court reconcile this apparent fundamental contradiction? We can see three reasons at least, two of which are explicitly mentioned in the Court's opinion and one that implicitly results from the decision.

The first reason mentioned by the Supreme Court is that sports arbitration constitutes the most appropriate means for settling sports disputes. In other words, compulsory arbitration is acceptable because of its inherent advantages in sports-related disputes:

> [...] in spite of appearances, this different treatment obeys a certain logic that consists, on the one hand, of favouring the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality [...] and, on the other hand, ensuring that the parties, and specifically professional athletes, do not lightly waive their right to challenge final arbitral awards before the highest court of the country in which the arbitration has its place.[20]

[18] ATF 133 III 235, 243 para. 4.3.2.2, 25 ASA BULL. 592, 602 (2007), 1 SWISS INT'L ARB. L. REP. 65, 85 (2007). *See supra*.

[19] ATF 133 III 235, 245 para. 4.3.2.3, 25 ASA BULL. 592, 603 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 88 (2007).

[20] ATF 133 III 235, 245 para. 4.3.2.3, 25 ASA BULL. 592, 603-604 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 88-89 (2007). *See also* in connection with Article 6(1) ECHR: Ulrich Haas, *Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures*, SWEET AND MAXWELL'S INTERNATIONAL SPORTS LAW REVIEW [I.S.L.R.] 43, 51 (2012), referring to the "interest of good administration of justice". In connection with Article 6(1) ECHR, the *Pechstein* decision (*LG München I, supra* note 4, para. 116) also refers to the balance of interests test set out by the European Court of Human Rights [ECtHR] in its decision *Suda / Czech Republic* of 28 October 2010, no. 1643/06. Applying this test, the *Landgericht* of Munich concludes that compulsory CAS arbitration is not valid under Article 6(1) ECHR because the interest of sports governing bodies alone shall not be a legitimate ground for forcing the athlete to waive her or his right to proceed before state courts.

The second reason mentioned by the Court is that arbitration agreements in sport regulations are deemed valid despite their compulsory nature precisely because the Court has ruled that an action to set aside the award is always available (even when the applicable sports regulation contains a waiver to that effect):

> [...] maintaining the right to challenge an award is the proper counterbalance to the liberal approach underlying the examination of [the validity of] arbitration agreements in sports-related disputes [...][21]

This second reason alone is not particularly convincing, given the very narrow grounds on which an athlete can seek the setting aside of a (CAS') award (Article 190(2) PILA).[22]

We think that the "real" reason the arbitration agreement should enjoy a preferential treatment as far as the requirement of consent is concerned relates to the nature of such agreement. Indeed (unlike the agreement to waive the action to set aside the award) the arbitration agreement does not constitute a waiver *stricto sensu*. While it certainly excludes the state court jurisdiction, it does so *in exchange for* the opportunity for the parties to have their dispute settled through arbitration. In other words, arbitral jurisdiction constitutes the *quid pro quo* for the waiver of the state court jurisdiction.

Of course to speak of *quid pro quo*, one must assume that arbitration is equivalent to litigation before state courts, in particular that it offers the same guarantees of *independence and impartiality*. Since the Supreme Court has already ruled that this was the case for the CAS, it is understandable that it is prepared to examine the issue of

[21] ATF 133 III 235, 245 para. 4.3.2.3, 25 ASA BULL. 592, 604 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 89 (2007).

[22] *See* Andreas Bucher, *Art. 192, in* COMMENTAIRE ROMAND, LOI SUR LE DROIT INTERNATIONAL PRIVÉ, CONVENTION DE LUGANO 1740 para. 13 (Andreas Bucher ed., Helbing Lichtenhahn 2011); Margareta Baddeley, *Unterwerfungserklärungen von Athleten – ein Anwendungsfall allgemeiner Geschäftsbedingungen*, 144 REVUE DE LA SOCIÉTÉ DES JURISTES BERNOIS [RJB] 357, 381 (2008). According to these scholars, in view of the (very) limited likelihood of success before the Supreme Court in setting aside proceedings (*see* the limited grounds of Article 190(2) PILA), the invalidity of the waiver of the right to bring an action to set aside the award rendered by the CAS does not compensate the loss of protection that the (compulsory) arbitration clause entails for the athlete. This point is also raised in the *Pechstein* decision, *LG München I, supra* note 4, paras. 99, 111.

consent in a less stringent way than it does with respect to the waiver of the action to set aside the award.[23] We consider that this approach is reasonable in sports arbitration as it can be validly argued that arbitration in sports matters is *more efficient* than court litigation. To the extent that the CAS provides the athletes with a better alternative, one can understand that it is sufficient that arbitration is provided for by the sports regulations, irrespective of whether the athletes had a chance to agree. In other words, as CAS constitutes a genuine (and arguably better) option than state courts in sports disputes, sports governing bodies are allowed to compel the athletes to arbitrate. From this perspective, the exclusion of the state court jurisdiction does not constitute (an invalid) waiver of a right, but rather a (valid)[24] trade-off.

By contrast, the waiver of the right to bring an action to set aside the award actually deprives the athlete of a remedy without any consideration (in exchange for such deprivation):

> [...] by accepting in advance to abide by any future awards, an athlete deprives himself forthwith of the right to complain in due course of subsequent breaches of fundamental principles and essential procedural guarantees which may be committed by the arbitrators called upon to decide in his case.[25]

This approach is in line with the pragmatic, or even utilitarian, Supreme Court's case law with respect to arbitration in general and sports arbitration in particular. As a matter of principle, we believe that acknowledging the non-consensual nature of sports arbitration and identifying reasons to justify such lack of consent, is preferable to the approach of the English courts, which appear to have arrived at the

[23] In substance the same result was reached in an often neglected *Nagel* case of 31 October 1996 where the Supreme Court held that arbitration agreement by reference was valid under Article 27 of the Swiss Civil Code (CC) which prohibits excessive commitments and protects the personality rights of individuals, since the CAS was independent. *See* Supreme Court, decision 4C.44/1996 of 31 October 1996 [*Nagel v. Fédération Equestre Internationale*], para. 4b, *in* DIGEST OF CAS AWARDS 1986-1998 at 577, 583-584 (original text in French) and at 585, 591-592 (English translation) (Matthieu Reeb ed., Staempfli 1998).

[24] *Contra* Jan Lukomski, *Arbitration clauses in sport governing bodies' statutes: consent or constraint? Analysis from the perspective of Article 6(1) of the European Convention on Human Rights*, THE INTERNATIONAL SPORTS LAW JOURNAL [INT SPORTS LAW J] 60, 65-70 (2013). According to this author, compulsory arbitration in sports matters does not comply with Article 6(1) ECHR.

[25] ATF 133 III 235, 244 para. 4.3.2.2, 25 ASA BULL. 592, 602-603 (2007), as translated *in* 1 SWISS INT'L ARB. L. REP. 65, 86 (2007).

same result (i.e. the validity of compulsory arbitration in sports disputes) by creating a *fiction* of consent:

> [...] It is submitted on [Mr Stretford's] behalf that the waiver was not voluntary [...] because he had no option but to agree, if he wished to continue his business as a players' agent. [...]
>
> True it is that Mr Stretford would be inhibited in carrying on his business of a players' agent if he had not concluded it. But such an inducement to contract does not vitiate the necessary consent and is quite unlike the "Hobson's Choice" exemplified in *Deweer v Belgium*[26] and other cases [...]
>
> The commercial inducement to getting a players' agents licence [...] is not constraint in any relevant sense. [...][27]

However, despite the express statement that there is "no constraint", a closer reading of English case law shows that the rationale guiding the English courts does not fundamentally differ from that of the Swiss Supreme Court in upholding compulsory arbitration in sports disputes. Indeed, both the trial[28] and the appellate courts[29] in the *Stretford* proceedings emphasised the advantages of

[26] *Deweer v. Belgium*, no. 6903/75, 35 PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS [EUR. CT. H.R.] 1 (1980). In this case, the applicant, a Belgian butcher, paid a fine to settle a dispute in the face of an order for the closure of his shop until judgment was given in an intended criminal prosecution or until such fine was paid.

[27] *Stretford v. Football Association Ltd*, High Court (Chancery) [EWHC (Ch)] 479 (2006), published *in* I.S.L.R. SLR39-48, 46-47 paras. 42, 45, 48 (2006). This decision was upheld by the Court of Appeal [EWCA (Civ)] 238 (2007), published *in* I.S.L.R. SLR41-54, 49 et seq. paras. 48 et seq. (2007). At this time, Mr. Stretford was Mr. Wayne Rooney's agent. The dispute stemmed from a Players Agent's license containing an arbitration clause. The Football Association [hereinafter: FA] initiated disciplinary proceedings against Mr. Stretford who in turn commenced proceedings before the English courts in order to challenge the disciplinary proceedings. The FA requested the suspension of the proceedings pursuant to Article 9 Arbitration Act 1996. Mr. Stretford contended that the arbitration clause was invalid on the basis of Article 6(1) ECHR. The Appellate Court rejected this argument.

[28] *Stretford v. Football Association Ltd*, EWHC (Ch) 479 (2006), I.S.L.R. SLR39-48, 47 para. 46 (2006) : "[...] to uphold and enforce the arbitration agreement is to implement the public policy behind the Arbitration Act 1996. I am unable to accept that such a policy is outweighed by all or any of the considerations on which counsel for Mr Stretford relied. [...]"

[29] *Stretford v. Football Association Ltd*, EWCA (Civ) 238 (2007), I.S.L.R. SLR41-54, 53 para. 66 (2007): "[...] Nor is there any relevant public interest consideration to stand in the way of arbitration. On the contrary, it seems to us that the public interest encourages arbitration in cases of this kind."

arbitration in their respective decisions.[30] It appears that the existence of such advantages was directly related to the English courts' readiness to find that there was no constraint, even if one of the parties clearly did not have any choice but to accept to arbitrate according to the clause contained in the sports governing body's regulations.

Moving from legal theory to the practical consequences of the *Cañas* finding, the issue is whether the CAS is indeed an independent arbitration system that constitutes a better alternative to state court litigation for the resolution of sports disputes.

As mentioned above, the Supreme Court has already ruled on several occasions that the CAS constitutes an independent arbitral tribunal offering guarantees equivalent to those of state courts, in particular in light of the advantages that CAS arbitration offers in terms of special expertise, speed and costs.[31] We do not intend to revisit the various criticisms that have been put forward against such decisions (in particular those raised against the closed list of arbitrators)[32] as they were discussed and dealt with by the Supreme Court, which has confirmed its case law on a number of occasions since then.[33]

[30] Whereas English courts tend to emphasise the overall advantages of arbitration for settling sports disputes, the Swiss Supreme Court is more inclined to promote CAS arbitration for reasons inherent to sport.

[31] *See* ATF 129 III 445, 462 para. 3.3.3.3 [*Larissa Lazutina & Olga Danilova v. IOC, FIS & CAS*], 21 ASA BULL. 601, 619 (2003), *in* YEARBOOK COMMERCIAL ARBITRATION [YEARBOOK COMM. ARB.] – VOLUME XXIX - 2004 at 206-231 (Albert Jan van den Berg ed., Kluwer Law International 2004): "It is not clear whether other solutions exist, which may replace an institution [i.e. the CAS] that resolves international disputes in sports matters in a speedy and cost-effective manner" (our translation) (*"Il n'est pas certain que d'autres solutions existent, qui soient susceptibles de remplacer une institution à même de résoudre rapidement et de manière peu coûteuse des litiges internationaux dans le domaine du sport."*).

[32] As to the independence and impartiality of the CAS, *see recently*: Piermarco Zen-Ruffinen, *La nécessaire réforme du Tribunal Arbitral du Sport*, *in* CITIUS, ALTIUS, FORTIUS, MÉLANGES EN L'HONNEUR DE DENIS OSWALD 483, 497 et seq. (Helbing Lichtenhahn 2012); Charles Poncet, *The Independence of the Court of Arbitration for Sport*, EUROP. INT'L ARB. REV. 31 (2012); Jean Marguerat, *Indépendance et impartialité de l'arbitre : le devoir de révéler de l'arbitre éclipsé, Commentaire de l'arrêt du Tribunal fédéral 4A_110/2012 du 9 octobre 2012*, para. 22, *in* JUSLETTER of 15 April 2013; Luca Beffa, *Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?*, 29 ASA BULL. 598, 604-605 (2011).

[33] *See* ATF 136 III 605, 614-615 para. 3.3.3, 29 ASA BULL. 80, 93-94 (2011) [*Alejandro Valverde v. CONI, AMA & UCI*]. For a recent case where the independence and impartiality of the CAS arbitrators was (unsuccessfully) challenged before the CAS: *see* CAS 2011/O/2574 *UEFA v. Olympique des Alpes SA/FC Sion*, award of 31 January 2012, paras. 252 et seq. (referring to the above-mentioned *Lazutina* decision). In the case *Pechstein v. Switzerland*, which is pending before the ECtHR, the athlete is challenging the independence and impartiality of the CAS on the basis of Article 6(1) ECHR. The ECtHR is therefore expected to rule on this issue. *See* Daniel Rietiker, *Introduire une requête à la Cour européenne des droits de l'homme*, REVUE DE DROIT SUISSE [RDS] I 259, 271 (2013).

We would like to stress however that the compulsory nature of sports arbitration requires athletes to have no doubts as to the independence and impartiality of the CAS arbitrators *vis-à-vis* the particular sports governing body which compelled the athlete to arbitrate.[34] The recent *Pechstein* decision shows that the current system may not be perceived as being completely satisfactory in this regard, in particular outside of Switzerland.[35] The *Landgericht* of Munich upheld the athlete's argument that the arbitration clause referring the dispute to CAS was null and void, in particular because the CAS did not offer guarantees equivalent to those of state courts. This decision expressly referred to (i) the closed list of arbitrators, (ii) the fact that the President of the (CAS) arbitral tribunal (the "panel") is directly appointed by the institution, and (iii) the obligation to submit the draft award to the CAS Secretary General before the notification of the final award to the parties. The *Landgericht* of Munich held that the lenient approach taken by the Swiss Supreme Court (*"wohlwollende Prüfungsmassstab"*) was not appropriate given that the athlete was compelled to arbitrate in such circumstances. In substance, the *Pechstein* Court conducted a balance of interests test to assess the validity of sports arbitration under Article 27(2) of the Swiss Civil Code (CC) (prohibiting excessive commitments and protecting the personality rights of the athlete).[36] Accordingly the court accepted that sports governing bodies might benefit from a uniform dispute resolution system for sports disputes,[37] but found that the CAS system currently in place did not provide sufficient benefit for the athlete and thus held that the arbitration agreement was invalid.[38]

We certainly agree that Article 27 CC requires a balance of interests test in order to assess the validity of the arbitration agreement despite the lack of consent (as acknowledged by the Supreme Court in the *Cañas* decision). That said, the way in which such test was carried out by the *Pechstein* Court is not convincing as it mischaracterized the nature and the functioning of the CAS. In particular, the aim of the

[34] Antonio Rigozzi, *L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux*, RDS I 301, 303-308 (2013). In a previous publication, one of the authors of this contribution contended that, because of the non-consensual nature of sports arbitration, a strict scrutiny should apply to the assessment of the independence and impartiality of the CAS arbitrators (*see* KAUFMANN-KOHLER & RIGOZZI, *supra* note 2, at 204 para. 368). However, in the recent *Valverde* decision, the Supreme Court has noted that the same scrutiny shall apply to the assessment of the independence and impartiality of both CAS and commercial arbitrators. *See* ATF 136 III 605, 614 para. 3.3.3 [*Alejandro Valverde v. CONI, AMA & UCI*], 29 ASA BULL. 80, 93-94 (2011).

[35] *See Pechstein* decision, *LG München I*, *supra* note 4, paras. 118, 153.

[36] *Id.*, paras. 112-113.

[37] *Id.*, paras. 109, 112.

[38] *Id.*, para. 116.

CAS arbitration list is not to restrict the arbitrators' independence as suggested by the *Pechstein* Court, but rather to ensure that they are sufficiently qualified to be in a position to act quickly in a way that is ultimately also beneficial to the athlete. While it would be preferable to abandon the compulsory nature of the CAS arbitrators list, in particular given the fact that it is compiled with a predominant influence by the sports governing bodies, one can agree with the Supreme Court that the list has been sufficiently expanded over the years to provide all parties with a genuine possibility to select an arbitrator that has no particular link with the sporting establishment. Moreover, the CAS arbitrators are not bound by any recommendation that the CAS Secretary General might make during the scrutiny of the draft award.[39] Furthermore, the paramount rationale for (compulsory) CAS arbitration is to ensure sports specific disputes are decided in a single forum on a level playing field without being affected by national laws' idiosyncrasies.[40] In other words, this does not only entail an obligation for the athlete to arbitrate before CAS, but also ensures that all athletes are subject to the same rules and that these rules are interpreted and applied in the same manner to all athletes irrespective of their nationality. Thus it limits any "unfair" advantage that some athletes might have as a result of their nationality or domicile. For instance an athlete may benefit from such "unfair" advantage because she or he is domiciled in the country where the competition takes place or where the sports governing body is incorporated.[41] Moreover, the CAS' process offers better guarantees to the athletes to the extent that, if they win their case, the relevant governing body will comply with the award without delay. Experience shows that the same remedy ordered by a state court may come at a time when the athlete's career has already come to an end.

To sum up, a balance of interests test shows that CAS arbitration does in fact ultimately benefit athletes and, therefore, compulsory arbitration in sports matters is valid. Prior to discussing the lessons from the *Cañas* ruling with regard to provisional measures, we would like to focus in the next section on a particular situation that was only mentioned in passing in the *Pechstein* decision[42] and which may have consequences on the validity of compulsory arbitration in sports

[39] CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, award of 31 Jan. 2012, paras. 120 and 260.

[40] *See* Laurent Lévy & Fabrice Robert-Tissot, *L'interprétation arbitrale*, REV. ARB. 861, 946 (2013).

[41] RIGOZZI, *supra* note 7, at 425 para. 816; JENS ADOLPHSEN, INTERNATIONALE DOPINGSTRAFEN 563-564, 701 (Mohr Siebeck 2013).

[42] Obviously, as an iconic athlete in Germany, Ms. Pechstein has ample financial resources.

matters. Namely we will now analyse the situation where an athlete does not have the financial resources to benefit from the "advantages" offered by CAS arbitration.

3.2 Legal Aid

It is a matter of common sense that a person cannot be compelled to arbitrate if she or he cannot afford to pay the costs related to the arbitration and is thus deprived of her or his fundamental right to have access to justice. Contrary to a (widespread)[43] belief, CAS arbitration is far from being cheap, let alone free, and has become increasingly (more) difficult to access for individual athletes (than it would be to access state courts in the absence of any arbitration agreement).

It is true that until 2004, challenging a decision of a sport governing body in CAS was free of charge.[44] However, in the 2004 edition, Articles R64 and R65 of the CAS Code[45] were amended to provide that CAS proceedings would be free only for (very limited) types of disputes, i.e. "[a]ppeals against decisions issued by international federations in disciplinary matters". In other words, the "free of charge" rule became limited to specific cases.[46] With the amendment of the CAS Code on 1 January 2012, the scope of the "free of charge" rule has been further narrowed down to "decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body". Therefore, the new Article R65.1 of the CAS Code excludes, in particular, cases which would be deemed to be of an international nature but involve decisions rendered by a national federation acting on the basis of a delegation of power by the international federation.[47] Furthermore, "if the circumstances so warrant", the Division President may decide (*ex officio* or upon request by the President of the Panel) to apply Article R64's provisions even in cases which would normally be "free of charge" and thus have the parties bear the costs of the arbitration (Article R65.4 of the CAS Code).[48] In all cases that are not exclusively disciplinary in nature (for

[43] *See e.g.*, Ian Blackshaw, *The Contribution of the Court of Arbitration for Sport to an Emerging* "Lex Sportiva", 2 YEARBOOK ON ARBITRATION AND MEDIATION 176, 229-231 (2010) (using the wording "relatively inexpensive").

[44] Antonio Rigozzi, *The recent revision of the Code of sports-related arbitration (CAS Code), in* JUSLETTER of 13 Sept. 2010, para. 44.

[45] Articles R64 and R65 of the CAS Code were amended on 1 January 2012 and 1 March 2013.

[46] Antonio Rigozzi, Erika Hasler & Brianna Quinn, *The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, in* JUSLETTER of 3 June 2013, para. 88.

[47] *Id.* para. 89.

[48] *Id.* para. 93.

instance a decision regarding eligibility) and/or where the decision under appeal was not rendered by an international federation (for example a significant number of doping cases), the athlete will have to pay not only the CAS court fee of CHF 1,000 but also a significant advance of costs simply to get the arbitration started.

Irrespective of how fast and specialised it may be, compulsory CAS arbitration is not justifiable when the associated costs prevent an athlete from protecting (and exercising) her or his rights. Therefore, if an athlete can show that the compulsory arbitration mechanism is so expensive as to actually prevent her or him from having access to justice, she or he could then seek to rescind the arbitration agreement.[49] Indeed, on the basis of Article 30(1) Fed. Cst. and Article 6(1) ECHR, the athlete may contend in such circumstances that she or he was deprived of her or his fundamental right of access to justice "without any consideration", i.e. in exchange for a mechanism that is inaccessible to her or him as a result of her or his financial capabilities (or lack thereof). This is all the more true given that the state (at least Switzerland) does not grant legal aid for arbitral proceedings (see Article 380 of the Swiss Code of Civil Procedure (CPC)). The athlete would thus be compelled to pay arbitration costs she or he cannot afford. Furthermore, she or he would not be entitled to be represented by a counsel and/or to appoint her or his own experts in the arbitral proceedings against her or his federation, so that the principle of the equality of arms (see Article 182(3) PILA; Article 6(1) of the ECHR) would be infringed.

Consequently, unless there is an effective system of legal aid, an athlete who cannot afford the arbitration because of her or his indigence can therefore validly terminate the arbitration agreement and bring her or his claim before state courts (where legal aid is available).[50] As mentioned in the *Pechstein* decision,[51] the validity of the

[49] *Id.* note 129; KAUFMANN-KOHLER & RIGOZZI, *supra* note 2, at 158 para. 280. In a recent decision, the Supreme Court has left this question open. *See* decision 4A_178/2014 of 11 June 2014, para. 4. *See also Hanseatisches Oberlandsgericht* [Court of Appeal], *Hamburg*, decision of 15 November 1995, para. 9, *in* YEARBOOK COMM. ARB. – VOLUME XXI - 1996 at 845, 848 and the references (Albert Jan van den Berg ed., Kluwer Law International 1996): "[...] termination of an arbitration agreement is possible where circumstances arise under which no effective legal protection can be guaranteed in the arbitral proceedings [...]".

[50] *Id. See also* BERGER & KELLERHALS, *supra* note 2 at 162 para. 572, at 298 para. 1043; Felix Dasser, *Art. 380, in* KURZKOMMENTAR ZPO 1587, 1587-1588 para. 3 (Paul Oberhammer, Tanja Domej & Ulrich Haas eds., Helbing Lichtenhahn, 2nd ed. 2014); Christoph Müller, *Art. 380, in* KOMMENTAR ZUR SCHWEIZERISCHEN ZIVILPROZESSORDNUNG (ZPO) 2721, 2722-2723 para. 4 (Thomas Sutter-Somm, Franz Hasenböhler & Christoph Leuenberger eds., Schulthess, 2nd ed. 2013). *See also* in France: François-Xavier Train, *Impécuniosité et accès à la justice dans l'arbitrage international (à propos de l'arrêt de la Cour d'appel de Paris du 17 novembre 2011 dans l'affaire LP c/ Pirelli)*, REV. ARB. 267, 291 (2012). *But see* Andrea Pinna, *La confirmation de la jurisprudence* Pirelli *par la Cour de cassation et les difficultés pratiques de garantir au plaideur impécunieux l'accès à la justice arbitrale*, CAH. ARB. 479, 484-486 (2013): this author notes that the arbitration clause remains binding upon an indigent party. The latter cannot proceed before the state courts, unless the arbitrator does not accept her or his mandate (*e.g.*, because of the risk not being paid at the end of the arbitration). The arbitrator (and the arbitral institution) is (are) responsible for ensuring that indigent parties have a right of access to justice. According to this author, if the arbitral institution unduly refuses to grant judicial assistance to the applicant, the arbitrators should then refuse to abide by the decision of the arbitral institution (*"faire acte de désobéissance au centre d'arbitrage"*) and examine all the claims submitted by the parties (including counterclaims of the indigent respondent). It is only when the arbitrator (and the arbitral institution) unduly dismisse(s) the application for judicial assistance, that the applicant may initiate proceedings before the state courts.

In our opinion, in CAS proceedings, the indigent party must of course file an application to receive legal aid. It is only when the request is denied that the applicant can then envisage proceedings before state courts. Indeed, in case of non-payment of the advance of costs within the time limit set by the CAS, the case shall be deemed withdrawn and the CAS shall terminate the arbitration (Article 64.2 of the CAS Code). To preserve her or his rights, the indigent appellant would be well advised (i) to request a stay of the time limit to file the Statement of Appeal (Article R49 of the CAS Code) until the ICAS has rendered its decision on her or his legal aid application, and (ii) to initiate proceedings before state courts within the time limits for Appeal of Article R49 of the CAS Code (as well as within the deadline of Article 75 CC), which would then run as from the notification of the ICAS decision denying judicial assistance, instead of awaiting the CAS' confirmation that the case shall be deemed withdrawn because of the non-payment of the advance of costs.

[51] *Pechstein* decision, *LG München I*, *supra* note 4, paras. 112, 147. When assessing the validity of compulsory arbitration in sports matters, the *Landgericht* of Munich failed to take into account the (new) "Guidelines on Legal Aid before the Court of Arbitration for Sport" of 1 September 2013 (*see infra*).

[52] Rigozzi, Hasler & Quinn, *supra* note 46, para. 92.

[53] The CAS Guidelines on Legal Aid are *available at* http://www.tas-cas.org/d2wfiles/document/7099/5048/0/Legal_Aid_Guidelines.pdf (last visited 27 June 2014).

arbitration agreement is thus contingent upon the fairness and effectiveness of the legal aid system recently put in place by CAS.[52] In the following paragraphs we will briefly examine the effectiveness of the CAS legal aid system.

3.2.1 Requirements for the granting of legal aid

Since its first version of 1994, the CAS Code provided that the International Council of Arbitration for Sport (ICAS) could "creat[e] a legal aid fund to facilitate access to CAS arbitration" (Article S6 of the CAS Code). In March 2013, the Code was revised to state that the fund was "for individuals without sufficient financial means" and that the ICAS "may create CAS legal aid guidelines for the operation of the fund". On 1 September 2013, the ICAS issued the "Guidelines on Legal Aid before the Court of Arbitration for Sport" (hereinafter: "the Guidelines").[53] Article 5 of the Guidelines reads as follows:

> Legal aid is granted, based on a reasoned request and accompanied by supporting documents, to any natural person provided that his income and assets are not sufficient to allow him to cover the costs of proceedings, without drawing on that part of his assets necessary to support him and his family.
>
> Legal aid will be refused if it is obvious that the applicant's claim or grounds of defence have no legal basis. Furthermore, legal aid will be refused if it is obvious that the claim or grounds of defence are frivolous or vexatious.

Indigent athletes may request legal aid before ICAS by submitting the "Legal Aid Application Form" (*see* Article 8 of the Guidelines), which can now be downloaded from the CAS website.[54] Prior to the adoption of the Guidelines, the ICAS tended to follow the requirements of Swiss law for granting legal aid in domestic arbitration (*see* Article 29(3) Fed. Cst.; Articles 117-123 CPC).[55] In international arbitration, the ICAS referred to the "general principles of law",[56] which may be drawn from Article 6(1) ECHR.[57]

[54] The "Legal Aid Application Form" is *available at* http://www.tas-cas.org/d2wfiles/document/7229/5048/0/Legal20Aid20Form20_English_.pdf (last visited 27 June 2014).

[55] *See* TAS 2012/A/2720 *FC I.N. v. LA de l'ASF, & ASF & FC C.*, ICAS order of 16 July 2012, para. 11, which refers to Swiss legal commentaries and to the Supreme Court's case law on legal aid. Note: both authors acted as counsel in this matter.

[56] *See* CAS 2012/A/2935 *WADA v. M. & FIBA*, order on request for legal aid pronounced by the President of the ICAS of 13 Dec. 2012, para. 6. In this decision, the ICAS referred to the "general principles of law", according to which "legal aid shall be granted to any natural person who requests it, provided that his/her income and capital are not sufficient to allow him/her to cover the costs of proceedings before CAS without drawing on that part of his/her assets necessary to support him/herself. The Applicant shall however establish that his/her claim has a legal basis and that he/she would have begun the proceedings at his/her own expense". *See also* CAS 2012/A/3080 *A. B. D. v. Turkish Athletics Federation*, order on request for legal aid by the President of the ICAS of 20 Mar. 2013, para. 7. *See also* the "Legal Aid Application Form", p. 1.

[57] *See Airey v. Ireland*, no. 6289/73, 32 EUR. CT. H.R. 1 (1980) para. 26: "Despite the absence of a similar clause for civil litigation, Article 6 § I [ECHR] may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case." In any event, anti-doping cases should be covered by Article 6(3)(c) ECHR. Under the ECHR, legal aid shall be granted when (i) the applicant does not have sufficient financial means to mandate an attorney, and (ii) the "interests of justice" require a lawyer to be officially assigned to the case (e.g. because of the severity of the sanction or/and the complexity of the case). *See Hoang v. France*, no. 13191/87, 243 EUR. CT. H.R. 1 (1993) paras. 40-41, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57791#{"itemid":["001-57791"]} (last visited 27 June 2014).

The requirements that the applicant must (i) be indigent and (ii) have a reasonable case are totally in line with both Swiss law and the general principles on legal aid. The sole, limited, discrepancy concerns the definition of the persons that are eligible for legal aid. Indeed, Article 5 of the Guidelines limits legal aid to natural persons (that is individuals within the meaning of Article S6(9) of the CAS Code) while under Swiss law legal aid can be granted also to non-profit organisations, e.g. foundations or associations (*see* Article 117 CPC).[58] In the sports context, the limitation to individuals could be problematic in cases involving amateur clubs or local sports associations composed and managed by volunteers with limited financial resources generated from the members' annual contributions, local sports events and possible donations. As experience suggests that cases involving such parties seldom arise, it is submitted that ICAS should be able to adjust its practice accordingly, and to grant legal aid to such other non-profit organisations if necessary and appropriate in the circumstances.

A more serious concern arises out of ICAS' practice of denying legal aid on the ground that the attorney requesting legal aid on behalf of an athlete was already assisting the athlete before the start of the CAS proceedings.[59] It is obvious that athletes may need legal advice from a specialised counsel before deciding to initiate proceedings before CAS, or simply to learn of the possibility of legal aid and to file a request for that purpose (while at the same time safeguarding their rights at the crucial initial stage of the proceedings, for instance by requesting a stay of the time limit to file the Statement of Appeal until the ICAS has rendered its decision on the legal aid application).[60]

[58] *See* Denis Tappy, *Art. 117, in* CPC, CODE DE PROCÉDURE CIVILE COMMENTÉ 466, 471 para. 17 i.f. (François Bohnet et al. eds., Helbing Lichtenhahn 2011). Article 117 CPC ("Entitlement [to Legal Aid]") reads as follows: "A person is entitled to legal aid if: (a) that person does not have sufficient financial resources; and (b) that person's case does not seem devoid of any chances of success." For a case where legal aid was granted by a Swiss state court to a non-profit amateur football association contesting the decision of its national federation, *see Tribunal d'arrondissement de La Côte*, decision of 8 Nov. 2012, case no. AJ12.038542. By contrast, the ICAS denied legal aid to the same club on the ground that it was limited to individuals. *See* TAS 2012/A/2720 *FC Italia Nyon v. LA de l'ASF & FC Crans*, award of 11 Apr. 2014, paras. 3.9 et seq., 3.30 et seq.

[59] CAS 2012/A/2935 *WADA v. M. & FIBA*, *supra* note 56, para. 10: "[...] the ICAS President notes that the Applicant was already assisted by Counsel before the start of the arbitration procedure and that Counsel for the Applicant had already accepted to represent his client before CAS, without knowing the outcome of the present request for legal aid." Note: one of the authors acted as counsel in this case.

[60] According to Article R49 of the CAS Code, the athlete will lose her or his rights if she or he does not file the Statement of Appeal (and pay the filing fee) within the relevant

Furthermore, in order to obtain legal aid, the athlete will have to show that her or his claim or grounds of defence have a legal basis, which proves difficult without the assistance of a legal counsel.

3.2.2 Scope of legal aid

To ensure that the CAS can provide effective protection which is at least comparable to state courts, the legal aid mechanism must be effective also with respect to the scope of the legal aid. In other words, the aid must be real and not symbolic or theoretical. Article 6 of the Guidelines defines the scope of legal aid before the CAS as follows:

> According to an applicant's needs and the decision of the ICAS President, legal aid may apply as follows:
>
> - The applicant may be released from having to pay the costs of the procedure, or to pay an advance of costs;
> - "Pro bono" counsel may be chosen by the applicant from the list established by the CAS;
> - The applicant may be granted a lump sum to cover his own travel and accommodation costs and those of his witnesses, experts and interpreters in connection with any CAS hearing, as well as the travel and accommodation costs of "pro bono" counsel.[61]

In general, the scope of CAS legal aid appears to be wide enough to cover both arbitration costs and legal representation costs where a pro bono lawyer is appointed from the CAS list. However, the following areas of concern remain.

(short) time limit to appeal. Moreover, complex issues (for example challenge of the arbitrators or the language of the proceedings) might have to be dealt with before the decision on legal aid is rendered.

[61] It is worth mentioning that such "lump sum" should be high enough to cover the costs of the applicant's expert (drafting the report and attending the hearing) rather than simply the "travel and accommodation costs" of the expert – the present wording of Article 6 indicates that the lump sum is in fact restricted to the latter. Such costs – which are decisive in some cases, e.g. in anti-doping cases – may be high and the ICAS must therefore ensure that the applicant will be able to provide such (counter-)evidence against her or his federation. Indeed, according to the ECtHR's case law, "[...] the Convention [ECHR] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (*Artico v. Italy*, no. 6694/74, 37 EUR. CT. H.R. 1 (1980) para. 33). In other words, we submit that the applicant may invoke a breach of Article 6(1) ECHR (*see also* Article 182(3) PILA), in particular a violation of the principle of the equality of arms, when such "lump sum" is not adequate to cover such costs.

First of all, legal aid will only cover future costs and cannot be granted retroactively (Article 7 of the Guidelines). Upon filing the Statement of Appeal, the athlete shall pay the CAS Court Office fee of CHF 1,000, as provided for in Article R64.1 and Article R65.2 of the CAS Code (see Article R48(2) of the CAS Code). Moreover, in the majority of cases, the appellant will be asked to pay an (initial) advance on costs within a time limit that is usually shorter than the time that the ICAS requires to decide on legal aid applications. Furthermore, the 10-day time limit for the filing of the appeal brief will also elapse well before a decision on legal aid is made. It is thus paramount that (the applicant requests and) the CAS allows a stay of: (i) the arbitral proceedings; and (ii) of the time limit to pay the advance on costs pending the ICAS' decision on legal aid. As far as the CHF 1,000 Court Office fee is concerned, it is submitted that, in the vast majority of cases, it is not unfair to require that the athlete pays that amount at the outset. Where the athlete can demonstrate that she or he cannot even afford that amount, the CAS has discretion to provisionally waive the payment of the Court Office fee pending the ICAS decision on the request[62] or to require payment of the fee, subject to refund in case the ICAS grants legal aid.[63]

Secondly, legal aid should cover the appointment and the remuneration of an attorney if this is necessary to protect the rights of the party concerned and in particular if the opposing party is represented by a counsel (principle of equality of arms) (Article 118 CPC[64] and Article 6(1) ECHR).[65] While, before the enactment of the Guidelines, the ICAS awarded moderate amounts to finance legal representation (in our experience no more than CHF 5,000), the Guidelines now provides that the indigent athlete may have the right to the appointment of a "Pro bono" counsel "according to [the] applicant's needs" (Articles 6, 18-20 of the Guidelines). Limiting an athlete's choice of counsel to the list of pro bono lawyers compiled by the CAS is difficult to square with the principle of Swiss law, according to which the applicant may propose a specific counsel in her or his

[62] CAS 2011/A/2503 *G.R. v. CONI*, order of 5 Sept. 2011.

[63] TAS 2012/A/2720,*FC I.N. v. LA de l'ASF & ASF & FC C.*, letter of 8 Feb. 2012.

[64] Art. 118(1) CPC ("Extent [of the Legal Aid]") reads as follows: "Legal aid comprises: (a) an exemption from the obligation to pay advances and provide security; (b) exemption from court costs; (c) the appointment by the court of a legal agent under the legal aid system if this is necessary to protect the rights of the party concerned, and in particular if the opposing party is represented by a legal agent; the legal agent under the legal aid system may be appointed prior to the court hearing in order to prepare the proceedings."

[65] *See supra* note 57.

legal aid application.[66] Even though the applicant has no right to the appointment of a specific counsel,[67] the judge should not depart from the applicant's choice unless "compelling reasons" require otherwise. The appointment of the applicant's existing counsel is particularly sound when she or he has already been dealing with the case before the start of the proceedings on the merits or in lower instances. The same rules should therefore apply in CAS proceedings, especially when the applicant's counsel has been involved in earlier stages of the dispute, e.g. before the sports governing body whose decision is challenged before the CAS. Indeed, in such cases, a relationship of trust has been built up between the applicant and the counsel, to which due consideration should be given.[68]

Under the newly enacted system, the "athlete's counsel" must now be prepared to work entirely on a pro bono basis (Articles 19-20 of the Guidelines). This will give the athlete no choice but to either (i) change counsel and engage one of the pro bono lawyers on the CAS list or (ii) convince her or his original lawyer to work pro bono. This consequence of the Guidelines is certainly not athlete- (and counsel-) friendly but is acceptable both under Swiss law and Article 6(1) ECHR. Should the athlete's counsel not be prepared to work without any contribution from the CAS legal aid fund, there will of course be some delays but the effectiveness of the athlete's defence will not be jeopardized, in particular if the pro bono lawyer is: (i) as experienced as the athlete's lawyer;[69] and (ii) is given the necessary time to properly study the case and prepare the appeal brief.

A more complicated issue is whether the ICAS can impose one of the lawyers on the "CAS pro bono counsel list" even though the

[66] *See* Article 119(2) 2nd sentence CPC: "[The applicant] may name a preferred legal agent in the application."

[67] *See also* with respect to Article 6(1) ECHR: *M. v. the United Kingdom*, 36 D.R. 155, 158 (1984).

[68] *See* under Swiss law: Denis Tappy, *Art. 119, in* CPC, CODE DE PROCÉDURE CIVILE COMMENTÉ 483, 486-487 para. 9 (François Bohnet et al. eds., Helbing Lichtenhahn 2011) and the reference to ATF 113 Ia 69, 71 para. 5c.

[69] While one fails to understand why the CAS list of pro bono lawyers is not published, there is no reason to doubt that the CAS will ensure that the lawyers on the list have the necessary skills and experience. Some concerns in that regard could arise from the fact that the CAS "pro bono" counsel are in a worse legal position than counsel appointed by the state courts (at least in Switzerland): whereas the latter receive an "appropriate compensation" (see Article 122 CPC) and the State may be liable to the applicant for any negligence committed by the appointed counsel (see Article 61 CO and the relevant cantonal regulations; Denis Tappy, *Art. 118, in* CPC, CODE DE PROCÉDURE CIVILE COMMENTÉ 475, 480-481 para. 20 (François Bohnet et al. eds., Helbing Lichtenhahn 2011)), CAS pro bono counsel work for free (Article 19 of the Guidelines) and are personally liable for the activities undertaken (Article 18 *in fine* of the Guidelines).

athlete's lawyer is prepared to work on a pro bono basis. We submit that such approach would be unfounded. As mentioned above, only "compelling reasons" may allow a departure from the applicant's choice. Unless the ICAS has good reasons to believe that the athlete's counsel does not have the required skills or experience (in particular as far as language is concerned) or that her or his engagement would cause genuinely excessive costs (in particular with respect to travel), we submit that the athlete's choice and the relationship of trust between the athlete and her or his chosen counsel should be respected.[70]

To sum up, while it is certainly too early to assess the way in which the Guidelines will be applied by the ICAS, we believe that the enactment of the Guidelines is certainly an element that will significantly contribute to the consolidation of the CAS as an adjudicative system. If implemented with regard to the considerations above, the Guidelines will provide athletes with the same kind of (if not a more effective) access to justice than they would have in state courts if the sports governing bodies had not included a CAS arbitration agreement in their regulations. In other words, if properly applied, the Guidelines will reinforce the Supreme Court's approach that CAS arbitration clauses contained in sports regulations are valid despite the non-consensual nature of the arbitration.

4. THE VALIDITY OF THE WAIVER OF STATE COURT JURISDICTION OVER PROVISIONAL MEASURES

The last consent-related issue that we will address in the present contribution is whether athletes can be compelled (not only to subscribe to CAS arbitration to decide upon the merits of the dispute but also) to waive, in advance, their right to request provisional measures from the competent state courts. Indeed, it is a consolidated principle of comparative arbitration law that the conclusion of an arbitration agreement does not exclude the competence of state courts to order interim measures.[71] It is also commonly accepted that under

[70] In our experience, athletes tend to feel uncomfortable when the lawyer is imposed on them (in addition to having to agree to the arbitration, being significantly limited in the choice of their arbitrator and having no choice whatsoever on the selection of the President of the Tribunal). While such concerns might be irrational, they are understandable and they should be taken into account to ensure that the entire system is perceived by the athletes to be fair. *See* Rigozzi, *supra* note 34, at 303-308.

[71] Christopher Boog, *Interim Measures in International Arbitration, in* ARBITRATION IN SWITZERLAND, THE PRACTITIONER'S GUIDE 1355, 1366 para. 59, 1368 para. 70 (Manuel Arroyo ed., Wolters Kluwer 2013).

Article 183 PILA (and Article 374 CPC) the parties have the choice to seek provisional measures both before the competent state courts or, once constituted, before the arbitral tribunal.[72] However, pursuant to Article R37(3) 2nd sentence of the CAS Code, the parties waive this principle of "concurrent jurisdiction" in CAS arbitrations. In the following paragraphs we will discuss how this waiver operates and discuss its validity drawing from the previous discussion on the relevance of the *Cañas* decision.

If the relevant sports regulations provide for CAS arbitration, the parties will have to conduct the arbitration in accordance with the CAS Code. Pursuant to Article R37(3) 1st sentence of the CAS Code (amended on 1 March 2013),[73] prior to the constitution of the Panel, the arbitral institution (specifically, the President of the relevant CAS Division),[74] or thereafter, the Panel,[75] may, upon application by a party, render an order for provisional measures[76, 77] In addition, Article R37(3) 2nd sentence of the CAS Code provides that:

[72] *See e.g.* Andreas Bucher, *Art. 183, in* COMMENTAIRE ROMAND, LOI SUR LE DROIT INTERNATIONAL PRIVÉ, CONVENTION DE LUGANO 1611 para. 6 (Andreas Bucher ed., Helbing Lichtenhahn 2011); Elliott Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesures provisionnelles*, SJ 2005 II 375, 375; JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 524-525 paras. 611-612 with further references (Sweet & Maxwell, 2nd ed. 2007). *See also* Article 28(2) ICC Arbitration Rules [2012], Article 26(5) Swiss Rules of International Arbitration [2012], Article 25.3 LCIA Arbitration Rules [1998]; Article 26(9) UNCITRAL Arbitration Rules [2010].

[73] The temporal scope of Article R37 of the CAS Code has been expanded effective 1 March 2013: whereas former Article R37(1) of the CAS Code originally stated that the parties could not request provisional measures before (the request for arbitration or) the statement of appeal had been filed, the CAS now has jurisdiction to hear requests for provisional measures as from the notification of the decision under appeal. This is of course subject to the exhaustion of "all internal legal remedies provided for in the rules of the federation or sports-body concerned" (Article 37(1) of the CAS Code, as amended on 1 March 2013). This amendment is a result of the FC Sion judicial saga against FIFA, UEFA, and the Swiss Football Association [ASF] before various Swiss Cantonal courts between 2011 and 2012. Its purpose is to prevent parties from circumventing the waiver set out in Article R37(3) 2nd sentence by requesting provisional measures before state courts prior to the expiry of the time limit to appeal, and then relying on the *perpetuatio fori* principle to oust CAS jurisdiction in that respect. For more details, *see* Rigozzi, Hasler & Quinn, *supra* note 46, paras. 37-42.

[74] In appeals arbitration, i.e. the kind of CAS arbitration that is compulsory in nature, the President of the Appeals Arbitration Division is competent to render an order for provisional measures.

[75] Pursuant to Article R37(4) 2nd and 3rd sentences, the President of the relevant Division or the Panel shall first rule on the *prima facie* CAS' jurisdiction. The Division President may terminate the arbitration procedure if she or he rules that the CAS clearly has no jurisdiction. *See* Rigozzi, Hasler & Quinn, *supra* note 46, para. 40.

[76] Article R37 is entitled "Provisional and Conservatory Measures". The CAS Code then goes on to use the wording "provisional measures", "provisional and conservatory measures", "preliminary relief" (Article R37) and "interim measures" (Article R52) interchangeably. In this article, the term "provisional measures" is used to refer to all these concepts, which collectively correspond to all types of orders that are intended to safeguard the parties' rights or to regulate the situation between them pending the final outcome of the proceedings.

[77] This solution has been adopted by other arbitral institutions such as the SCC (Article 32(4) and Appendix II ["Emergency Arbitrator"] of the SCC Arbitration Rules [2010]) and, more recently, the Swiss Chambers' Arbitration Institution (Article 43 of the Swiss Rules [2012]) and the ICC (Article 29 and Appendix V ["Emergency Arbitrator Rules"] of the ICC Arbitration Rules [2012]).

[78] *Pro* (validity of the waiver of courts' jurisdiction over provisional measures): *see e.g.* Christopher Boog & Sonja Stark-Traber, *Art. 374, in* BERNER KOMMENTAR, SCHWEIZERISCHE ZIVILPROZESSORDNUNG, BAND III, ARTIKEL 353-399 ZPO, ARTIKEL 407 ZPO at 398 para. 92 (Marco Stacher ed., Stämpfli 2014); Ramon Mabillard, *Art. 183, in* BASLER KOMMENTAR, INTERNATIONALES PRIVATRECHT 1864 para. 5 (Heinrich Honsell et al. eds., Helbing Lichtenhahn, 3nd ed. 2013); Markus Wirth, *Interim or preventive measures in support of international arbitration in Switzerland*, 18 ASA BULL. 31, 44 (2000); Georg von Segesser & Christopher Boog, *Interim Measures, in* INTERNATIONAL ARBITRATION IN SWITZERLAND, A HANDBOOK FOR PRACTITIONERS 107, 125 (Elliott Geisinger & Nathalie Voser eds., Angelina M. Petti ass. ed., Kluwer Law International, 2nd ed. 2013); GERHARD WALTER, WOLFGANG BOSCH & JÜRGEN BRÖNNIMANN, *Art. 182-186, in* INTERNATIONALE SCHIEDSGERICHTBARKEIT IN DER SCHWEIZ, KOMMENTAR ZU KAPITAL 12 DES IPR-GESETZES 146 (Stämpfli 1991); Urs Zenhäusern, *Art. 374, in* SCHWEIZERISCHE ZIVILPROZESSORDNUNG (ZPO) 1362 para. 8 (Baker & McKenzie ed., Stämpfli 2010); Ulrich Haas & Anne Hossfeld, *Die (neue) ZPO und die Sportschiedsgerichtsbarkeit*, 30 ASA BULL. 312, 344-345 (according to these authors, the waiver is valid to the extent that the arbitral tribunal has already been constituted and is therefore able to render interim reliefs); Boog, *supra* note 71, at 1366-1367 paras. 61-62 (once the arbitral tribunal is constituted, the parties are free to exclude state court jurisdiction over provisional measures; as long as the arbitral tribunal is not constituted, it is appropriate to restrict the party autonomy in this regard only in exceptional cases in which such exclusion would amount to an actual waiver of a party's right to justice, and not merely be a limitation of its entitlement to an effective protection of its rights).

Contra (invalidity of the waiver of courts' jurisdiction over provisional measures): Daniel Summermatter, *Einstweiliger Rechtsschutz im Sport nach der eidgenössischen Zivilprozessordnung – Unter Berücksichtigung der nationalen Schiedsgerichtsbarkeit*, CAS 351, 355 (2009); DOMINIK GASSER & BRIGITTE RICKLI, *Art. 374, in* SCHWEIZERISCHE ZIVILPROZESSORDNUNG (ZPO), KURZKOMMENTAR 342 para. 2 (Ivo Schwander, Dominik

> [...] In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunal. [...]

There is clearly no agreement among scholars with respect to the validity of waivers of state court jurisdiction over provisional measures in general,[78] in particular as to the waiver of Article R37(3) 2nd sentence of the CAS Code.[79]

Relying on the principle of party autonomy, state courts tend to decline jurisdiction to hear requests for provisional measures in disputes that fall under CAS' jurisdiction, thus giving full effect to Article R37(3) 2nd sentence of the CAS Code. For instance, in a decision of 16 August 2005, the *Bezirksgericht Zürich* held as follows:

> Pursuant to Article 183(1) PILA, the arbitral tribunal may order provisional or conservatory measures upon request of a party. The arbitration rules of the Court of Arbitration for Sport (CAS) clearly provide for the ability to order provisional measures. The petition for provisional measures is [...] therefore dismissed.[80]

Gasser & Alexander Brunner eds., Dike Verlag 2011); Tanja Planinic & Nadja Kubat Erk, *Art. 374, in* ZPO KOMMENTAR, SCHWEIZERISCHE ZIVILPROZESSORDNUNG 615 para. 2 (Myriam A. Gehri & Michael Kramer eds., Orell Füssli 2010); Felix Dasser, *Art. 374, in* KURZKOMMENTAR ZPO 1565 para. 5 (Paul Oberhammer, Tanja Domej & Ulrich Haas eds., Helbing Lichtenhahn, 2nd ed. 2014); Philipp Habegger, *Art. 374, in* BASLER KOMMENTAR, SCHWEIZERISCHE ZIVILPROZESSORDNUNG 2203 para. 19 (Karl Spühler, Luca Tenchio and Dominik Infanger eds., Helbing Lichtenhahn 2013).

Without taking any position: Regina E. Aebi-Müller & Anne-Sophie Morand, *Die persönlichkeitsrechtlichen Kernfragen der "Causa FC Sion"*, CAS 234, 245 (2012).

[79] ***Pro*** (validity of the waiver of Article R37(3) 2nd sentence of the CAS Code): RIGOZZI, *supra* note 7, at 576-577 para. 1132; KAUFMANN-KOHLER & RIGOZZI, *supra* note 2, at 381-382 paras. 573-578; Hans Roth, *Der vorsorgliche Rechtsschutz im internationalen Sportrecht, in* EINSTWEILIGER RECHTSSCHUTZ IM INTERNATIONALEN SPORT, PRELIMINARY REMEDIES IN INTERNATIONAL SPORTS LAW 11, 40 (Urs Scherrer ed., Schulthess 1999); Boog & Stark-Traber, *supra* note 77, at 400 para. 98.

Contra (invalidity of the waiver of Article R37(3) 2nd sentence of the CAS Code): Stephan Netzle, *Die Praxis des Tribunal arbitral du sport (TAS) bei vorsorglichen Massnahmen, in* THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT 133, 136-138 (Antonio Rigozzi & Michele Bernasconi eds., Schulthess 2007), referring to *Landgericht Berlin*, decision of 6 Feb. 2006 [*Sawtschenko, Szolkowy und Steuer v. Nationales Olympisches Komitee für Deutschland (NOK)*]; HENK FENNERS, DER AUSSCHLUSS DER STAATLICHEN GERICHTSBARKEIT IM ORGANISIERTEN SPORT 225-226 para. 699 (Schulthess 2006); Simon Osterwalder & Martin Kaiser, *Vom Rechtsstaat zum Richtersport? – Fragen zum vorsorglichen Rechtsschutz in der Sportschiedsgerichtsbarkeit der Schweiz*, SpuRT 230, 235 (2011); Andreas Bucher, *Art. 183, in* COMMENTAIRE ROMAND, LOI SUR LE DROIT INTERNATIONAL PRIVÉ, CONVENTION DE LUGANO (update of 27 Mar. 2014) para. 21 (Andreas Bucher ed., Helbing & Lichtenhahn 2011), *available at* http://www.andreasbucher-law.ch/NewFlash/bis.html (last visited 27 June 2014).

Without taking any position: Saverio Lembo & Vincent Guignet, Interim Measures of Protection: The Concurrent Jurisdiction of Courts and Arbitral Tribunals in Switzerland (Conference paper prepared for the 2011 Fall Meeting of the American Bar Association, International Section, in Dublin) 7 (on file with authors).

[80] *Bezirksgericht Zürich*, decision of 16 Aug. 2005, para. 6.2 (unreported; our translation), cited *in* KAUFMANN-KOHLER & RIGOZZI, *supra* note 2, at 381 para. 576.

Of course, reliance on party autonomy is not necessarily a convincing argument in cases where the arbitration is not consensual in the first place. The issue of consent has been discussed in more detail in the judicial saga involving *FC Sion* against the Swiss (ASF), European (UEFA) and international (FIFA) football governing bodies. In line with its strategy, which consisted of challenging the jurisdiction of the CAS, FC Sion filed (or asked its players to file) numerous petitions for provisional measures before the state courts of the Swiss Cantons of Valais (where the club and its players were domiciled) as well as Vaud, Zurich and Berne (i.e. the respective places of incorporation of UEFA, FIFA and the ASF). These various state courts addressed the issue of the validity of the waiver as follows:

The *Tribunal* [trial court] *de Martigny et St-Maurice*[81] and the *Tribunal cantonal* [appellate court] *du Canton de Vaud*[82] both considered that the validity of the waiver of Article R37(3) 2nd sentence of the CAS Code was not self-evident, but found a way not to decide this issue. In particular, in an order of 27 September 2011, the *Tribunal cantonal du Canton de Vaud* found the following:

> The legality of such waiver [provided by Article 37 of the CAS Code] is discussed among scholars. [...]
>
> In the instant case, the solution according to which the parties may validly exclude the jurisdiction of the courts may lead to practical obstacles that are difficult to overcome. The risk exists, indeed, that [...] enforcement measures must be considered; the CAS however, which has the *iurisdictio* but not the *imperium* [...], would be unable to order them and would have to request the support of the civil judge. This may cause delays that are hardly in line with the requirements of efficiency of the provisional measures. [...]
>
> In any event, this legal issue may remain open in the instant case. Article 37 of the CAS Procedural Rules expressly provides that the waiver to proceed before the civil judge does not apply to provisional or conservatory measures related to disputes subject to the ordinary arbitration procedure.[83]

[81] *Tribunal de Martigny et St-Maurice*, superprovisional measures order of 3 Aug. 2011 [*S.G. et al. v. ASF & FIFA*], at 4-5.

[82] *Tribunal cantonal du Canton de Vaud (TC VD) (Cour civile)*, provisional measures order of 27 Sept. 2011 [*O.A. S.A. v. UEFA*], para. IV/c.

[83] *Id.* (our translation)

Since, after the latest revision of the CAS Code, the distinction between ordinary and appeals CAS proceedings is no longer relevant for the purposes of Article R37 of the CAS Code,[84] it is worth considering the decision of the courts of the Canton of Berne, which could not avoid the issue as the case in front of them concerned a claim against a decision of a sport governing body (the ASF) and thus fell within the scope of the appeals proceedings. In a decision of 14 February 2012, the *Tribunal régional* [trial court] *de Berne-Mittelland* found that the principle of concurrent jurisdiction (Article 374(1) CPC) interpreted in accordance with the principle of the right to justice (Article 29(1) Fed. Cst.) prevents the parties from waiving in advance state court jurisdiction to order provisional measures.[85] In its decision of 19 April 2012, the *Cour suprême* [appellate court] *du canton de Berne* disagreed with the lower court and explicitly held that the waiver of Article R37(3) 2nd sentence of the CAS Code is not invalid in and of itself.[86] However, the appellate court agreed with the trial court that such waiver is enforceable only if it is contained in the arbitration agreement itself. As the arbitration clause contained in the ASF's regulations did not contain such a waiver and the exclusive jurisdiction of the CAS (only) resulted from Article R37(3) 2nd sentence of the CAS Code, the Appellate court concluded that, in the specific case at hand, it was not prevented from hearing FC Sion's request for provisional measures.[87]

In our view, this formalistic approach is not convincing. The enforceability of the waiver is not an issue of formal validity: it is an issue of consent. Contrary to the waiver of the right to bring an action to set aside the award (*see* Article 192(1) PILA),[88] the waiver of state court jurisdiction over provisional measures is not subject to any formal requirements, which would exclude "waivers by reference", i.e. those contained in Arbitration Rules to which the arbitration

[84] Since 1 March 2013, the waiver of the state court jurisdiction applies to both the ordinary and the appeal arbitration procedures (Article R37(3) 2nd sentence of the CAS Code).

[85] *Tribunal régional de Berne-Mittelland*, provisional measures order of 14 Feb. 2012 [*O.A. SA v. ASF*], paras. 11-31, published in part *in* CAS 79 (2012).

[86] *Cour suprême du canton de Berne*, provisional measures order of 19 Apr. 2012 [*O.A. SA v. ASF*], para. 2/a-g, published in part *in* CAS 171 (2012).

[87] *Id.*, para. 2/h.

[88] As to the formal requirements for the waiver of the right to bring an action to set aside the award: *see e.g.* Supreme Court, decision 4P.62/2004 of 1 Dec. 2004 [*FECOTRI v. ITU & CNOC*], para. 1.2, 23 ASA BULL. 483, 485-486 (2005). In this decision rendered prior to the *Cañas* decision, the Supreme Court did not have to examine the (substantive) validity of the waiver incorporated by reference in the applicable sports regulation since the formal requirements of Article 192(1) PILA were not satisfied.

agreement refers. The acceptance of the arbitration clause clearly entails that the Arbitration Rules to which the arbitration agreement refers are binding (except the non-mandatory provisions from which the parties have agreed to derogate).[89] According to the Supreme Court's case law, arbitration clauses contained in sports regulations are enforceable with respect to the form in case of a general reference ("incorporation by reference"); in such cases, "[...] the problem is transferred [...] from form to consent".[90] A (direct) waiver contained in the underlying sports regulations is not more consensual than an (indirect) waiver contained in the arbitration rules referred to by the arbitration clause in the sports regulations. This is why we believe that useful guidance can be derived from the rationale of the *Cañas* decision discussed above to assess the validity of the waiver contained in Article R37(3) 2nd sentence of the CAS Code.

If the Supreme Court applies the same—pragmatic and sensible—rationale of the *Cañas* decision, it should find that the waiver of Article R37(3) 2nd sentence of the CAS Code is compulsory by nature. Therefore, the legal consequences of such lack of consent must be assessed. To this effect, we submit that one should try to determine whether the compulsory waiver of Article R37(3) 2nd sentence of the CAS Code is similar to the waiver of the right to bring an action to set aside the award (such "waiver of a right" is not enforceable) or rather to the waiver of state court jurisdiction on the merits (such waiver is enforceable on the basis of a "trade-off").[91]

In our view, the waiver contained in Article R37(3) 2nd sentence of the CAS Code differs from the waiver of the right to bring an action to set aside the award, because it does not deprive the athlete from a legal remedy without any "consideration": the athlete may request provisional measures before the arbitral institution or the arbitral tribunal. The situation is thus much more similar to the situation of the arbitration agreement where the parties "waive" state court jurisdiction "in exchange" for arbitral jurisdiction. It results from this "trade-off" rationale that the waiver of Article R37(3) 2nd sentence of

[89] As to the ICC Arbitration Rules: *see* Robert H. Smit, *Mandatory ICC Arbitrations Rules*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER 845, 846-847 (Gerald Aksen et al. eds., ICC Publishing 2005).

[90] Supreme Court, decision 4C.44/1996 of 31 Oct. 1996 [*Nagel v. FEI*], para. 3/c, *supra* note 23. The Supreme Court has recently upheld this case law: it found that the mere fact of being an international athlete entailed the acceptance of the arbitration clause contained in the regulation of the concerned international sports federation. *See* decision 4A_460/2008 of 9 Jan. 2009 [*A. v. FIFA & WADA*], para. 6.2, 27 ASA BULL. 540, 544-545 (2009).

[91] *See supra.*

the CAS Code is valid provided that the CAS' system regarding provisional measures offers similar guarantees to those found before state courts. Therefore, the waiver of the state court jurisdiction over provisional measures is enforceable only to the extent that the CAS is: (i) as independent and impartial; and (ii) in a position to be as effective as state courts would be. Let us examine these two requirements in turn.

As already mentioned, the issue of CAS independence is well-settled in the Supreme Court's case law.[92] A CAS Panel being the equivalent of a state court, one fails to see why the parties could not agree to grant the arbitral tribunal an exclusive jurisdiction over provisional measures.[93] The situation is significantly different when the arbitral tribunal is not yet constituted and is thus not in a position to act as the equivalent of the state courts. In such situations, the waiver is clearly unenforceable. This distinction is less obvious in CAS arbitrations as Article R37(3) of the CAS Code provides that the President of the relevant CAS Division has (exclusive) jurisdiction to hear request for provisional measures prior to the constitution of the arbitral tribunal. The issue is thus the following: is the CAS Division President sufficiently independent to be considered as the equivalent of a state court for this purpose? From a dogmatic point of view, an arbitral institution is certainly not the equivalent of an arbitral tribunal. However, the institution has been "entrusted" by the parties, in exactly the same manner as the arbitrators, with a specific judicial task, limited *precisely* to those situations in which the arbitrators cannot (at this stage) fulfill such task. As the Division President is elected by the ICAS (*see* Article S6(2) of the CAS Code) and not by one of the parties, we see no reason *a priori* to have any doubts as to her or his independence and impartiality. It is thus only if the applicant can convincingly show that, in light of the specificities of the case at hand, (neither) the Division President (nor his deputy)[94] can be considered as sufficiently independent that the state court should disregard the waiver contained in Article R37(3) 2nd sentence of the CAS Code and assert jurisdiction. Furthermore, as soon as it is constituted, the Panel may reconsider the provisional measures rendered by the Division President. Therefore, in

[92] ATF 129 III 445, 454-463 para. 3 [*Larissa Lazutina et Olga Danilova v. CIO, FIS et TAS*], 21 ASA BULL. 601, 605-620 (2003).

[93] The fact that there is certainly room to improve the independence of the CAS in disputes between an athlete and a governing body (the regulations of which compel the athlete to arbitrate) does not mean that the CAS does not afford the guarantees that the Supreme Court considers to be sufficient in this respect. ***Contra*** Bucher, *supra* note 79, para. 21; *Pechstein* decision, *LG München I*, *supra* note 4, paras. 147, 153.

[94] *See* Article S20(b) of the CAS Code.

any event, the arbitral tribunal should have at some point the opportunity to reconsider this issue.[95]

Consequently, the crucial issue is whether and to what extent the CAS (that is (i) either the Panel or (ii) the Division President) is in a position to deal efficiently with the request for provisional measures. This is why, we submit, the above-mentioned decision of the *Tribunal régional de Berne-Mittelland* insisted on the constitutional "right to effective legal remedies" ("*effektiven Rechtsschutz*").[96] In our view, the issue of efficiency relates to both the timing of the decision (i.e. the speed of the process) and to its effectiveness.

As far as speed is concerned, it is often said that only state courts can act literally within hours.[97] However, in reality, so can the CAS. Indeed, "in cases of utmost urgency", both the Panel and the Division President can issue decisions on an *ex parte* basis (*see* Article R37(4) 4th sentence of the CAS Code). More importantly, exchanges of procedural correspondence in CAS proceedings are made by fax and, to some extent under the latest version of the Code, by email (*see* Article R31 of the CAS Code), meaning that the CAS can issue decisions in very short time frames—and, by the same token, limit the need for rulings on an *ex parte* basis (by fixing very short time limits to the parties). Under these circumstances, we fail to see how an applicant could convince a state court to ignore the CAS' exclusive jurisdiction by arguing that the CAS is not in a position to grant the measure sought in due time.

The situation is less obvious, at least in theory, as far as effectiveness is concerned. Indeed, it is undisputed that only state courts have the power to force a party to comply with an order on provisional measures. In the above-mentioned *FC Sion* decision, the *Tribunal cantonal du Canton de Vaud* emphasised the arbitrators' lack of *imperium*.[98] We believe however that this does not necessarily imply that the CAS is not an effective forum for provisional measures. First, the effectiveness of an order on provisional measures rendered by a state court is also limited, in particular as to its territorial scope. Except

[95] Antonio Rigozzi & Erika Hasler, *Article R37 CAS Code*, *in* ARBITRATION IN SWITZERLAND – THE PRACTITIONER'S GUIDE 937 para. 6 (Manuel Arroyo ed., Wolters Kluwer 2013)..

[96] *Tribunal régional de Berne-Mittelland*, *supra* note 85, para. 26, CAS 83-84 (2012).

[97] *See e.g.* the seminal case *Stanley Roberts*, where the *Oberlandesgericht [OLG] München* found that the waiver did not exclude the state court jurisdiction, in particular because the CAS was not offering an expeditious dispute resolution procedure. However, it should be noted that this decision was based on the (incorrect) allegation of the respondent (FIBA) that the CAS was "[...] in a position to render a decision within 15 days [...]" (our translation). The *OLG München* considered that this process was too lengthy. *OLG München*, decision of 26 Oct. 2000, U(K) 3208/00, SpuRt 64, 65 (2011).

[98] *TC VD (Cour civile)*, *supra* note 82, para. IV/c.

when the athlete can proceed before the courts of the place of incorporation of the sports federation concerned or the place where the contested decision is meant to be enforced, a decision rendered by a state court will not be directly effective. In most cases, in particular in international disputes, the argument of the *Tribunal régional de Berne-Mittelland*, according to which arbitration is an "unnecessary loop back" in case of enforcement proceedings[99] is thus not relevant. Second, even when the petitioner initiates proceedings before the state courts of the place of incorporation of the sports federation concerned, a decision of the judge is not necessarily more effective than an order of an arbitrator, even if the non-compliance to the state court's decision may involve contempt (*see* Article 292 Swiss Criminal Code [SCC]: "Contempt of official orders").[100] Third, and most importantly, it is undisputable that sports governing bodies spontaneously abide by provisional measures ordered by the CAS, meaning also that there is no need to resort to state courts to enforce such orders. Therefore, we do not agree with the *Tribunal régional de Berne-Mittelland*'s finding that:

> whether or not a party can request provisional measures before a state court cannot depend upon the circumstances of the individual case and the Respondent's presumed willingness to abide by the measure to be ordered [by the CAS].[101]

The relevant test is not whether it is likely that the parties will spontaneously abide by the decision of the arbitral tribunal. The issue is rather whether, in light of the spontaneous deference to CAS orders by sports governing bodies, the waiver of the state court jurisdiction over provisional measures is enforceable despite the athlete's lack of consent. Spontaneous deference by sports governing body is a fact. Indeed, non-compliance with a CAS order would be particularly misplaced, given the fact that it is the sport governing body that unilaterally decided that the dispute should be arbitrated.[102] This approach has been described as naive[103] but is clearly supported by the fact that there is no known precedent where a sport governing body

[99] *Tribunal régional de Berne-Mittelland*, *supra* note 85, para. 26, CAS 79, 83-84 (2012).

[100] *See e.g. TC VD (Cour civile)*, *supra* note 82, noting that UEFA refused to comply with a previous order.

[101] *Tribunal régional de Berne-Mittelland*, *supra* note 85, para. 29, CAS 79, 84 (2012) (our translation).

[102] ADOLPHSEN, *supra* note 41, at 583.

[103] *See* Bucher, *supra* note 79, para. 21, whose skepticism is based on a mistrust of the CAS system and the lack of evidence as to "spontaneous compliance".

has decided to ignore a CAS order on provisional measures. Hence, a state court should ignore the waiver of Article R37(3) 2nd sentence of the CAS Code only if the applicant convincingly shows that, in the particular circumstances of the case, there is a reasonable likelihood that the sports governing body will not comply with the CAS order. In the absence of any such precedent, a judge should assert jurisdiction only if, in the case at hand, the sport governing body has acted in a way that clearly indicates that it will ignore an unfavourable order by the CAS.[104]

It could be argued that such presumption in favour of the effectiveness of the CAS is unwarranted, as the limited geographical scope of provisional measures ordered by state courts is no longer an issue since the entry into force of the Lugano Convention (CL)[105] and the Council Regulation (EC) No 44/2001 of 22 December 2000.[106, 107] However, such legal instruments only apply at the European level while it is an obvious reality that professional sport is played worldwide. We believe that one of the main reasons that sports arbitration should be viewed favourably is that it provides a coordinated system of dispute resolution which is immune from national idiosyncrasies. While such idiosyncrasies are of course not damaging *per se*, they may entail that certain athletes or clubs will be in a preferable procedural position than others simply because they are domiciled in a specific country. For instance, Swiss-based athletes would have an intrinsic advantage as they obviously have a preferential access to the local courts in the numerous cases where the governing body is incorporated in Switzerland.[108] European athletes

[104] Regrettably, it is not unheard of for a sports governing body to clearly indicate that its decision will stand irrespective of any state court's decision. While we think that such attitude can only be damaging, the fact remains that the same does not apply to the CAS.

[105] The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention; SR 0.275.12).

[106] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001 O.J. (L 12) 1), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF. This regulation will be replaced by the new ("cast") Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2012 O.J. (L 351) 1), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012: 351:0001:0032:en:PDF (last visited 27 June 2014). *See* Guido Carducci, *The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration, With Notes on Parallel Arbitration, Court Proceedings and the EU Commission's Proposal*, 29 ARB. INT. 467 (2013).

[107] *See* Bucher, *supra* note 79, para. 21.

[108] The way in which FC Sion, a Swiss football club, rushed to the local courts is particularly telling. *See supra*.

will be better off as they would be able to enforce local judgments on provisional measures in Switzerland through the Lugano Convention, while non-European athletes would not have that chance. After all, equal treatment is an inherent principle of sports law[109] (*see e.g.* Article 1(1) FIFA Regulations Status and Transfer 2014[110] and the purpose of the World Anti-Doping Code[111]) that is guaranteed through the (compulsory) resort to a single *forum*, namely the CAS. Conversely, forum shopping would prevent equal treatment between athletes and might result in conflicting decisions and a lack of uniformity in the interpretation and application of sports regulations.

For all these reasons we continue to believe that, as a matter of principle, the waiver of Article R37(3) 2nd sentence of the CAS Code is enforceable, despite the athlete's lack of consent. State courts before which provisional measures are sought should therefore decline jurisdiction, *unless* the applicant can show that, in the circumstances of the specific case, the CAS is not in a position to provide an effective remedy either because of the urgency of the matter and/or on the ground that the sought preliminary relief will need to be enforced in a specific manner (i.e. by resorting to the *imperium* of the State) and that only the competent state court is able to order and/or enforce the provisional measures requested. For instance, the waiver of Article R37(3) 2nd sentence of the CAS Code is not enforceable when the petitioner is requesting an injunction against a third party (e.g. an attachment order on assets located in Switzerland pursuant to Articles 271 et seq. of the Swiss Debt Enforcement and Bankruptcy Law [LP]);[112] or when it results from the respondent's clear indication

[109] Jens Adolphsen, *Eine lex sportiva für den internationalen Sport, in* JAHRBUCH DER GESELLSCHAFT JUNGER ZIVILRECHTSWISSENSCHAFTLER 281, 283 (2002); Ulrich Haas, *Die Vereinbarung von "Rechtsregeln" in (Berufungs-) Schiedsverfahren vor dem Court of Arbitration für Sport*, CAS 271, 275 (2007); Michael Beloff, *Is there a lex sportiva?*, I.S.L.R. 49, 53 (2005).

[110] "These regulations lay down *global and binding rules* concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations" (emphasis added). These regulations are *available at* http://www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html (last visited 27 June 2014).

[111] "The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are: [...] To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and *equality* for Athletes worldwide [...]" (emphasis added). The Code is *available at* http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf (last visited 27 June 2014).

[112] In any event, the interim measures requested by the petitioner must not conflict with the state monopoly on execution (the so-called *"monopole de la contrainte"* or *"Zwangsvollstreckungsmonopol des Staates"*). *See* Supreme Court, decision 4P.240/2006 of 3

that it will not abide by the CAS order and that the enforcement proceedings pursuant to Article 183(2) PILA will not be efficient or will be too lengthy (i.e. arbitration would constitute an "unnecessary loop back" in such cases).[113]

5. CONCLUSION

The *Cañas* decision, which upholds the validity of compulsory arbitration before the CAS in sports-related matters, but denies the validity of the waiver of the right to bring setting aside proceedings, is sensible and pragmatic. Legal aid before the CAS is essential to sustain the validity of (compulsory) arbitration in sports matters. Therefore, the legal aid mechanism provided by the "Guidelines on Legal Aid before the Court of Arbitration for Sport" must be welcomed, provided that they are enacted and applied in accordance with the fundamental considerations set out herein.

The *Cañas* decision also sets out the specificities of sports arbitration, which allows us to assess the validity of the waiver of the state court jurisdiction over provisional measures provided by Article R37(3) 2nd sentence of the CAS Code (exclusive jurisdiction of the CAS for provisional measures). This analysis shows that the waiver of Article R37 is enforceable, unless the applicant can prove that, in the circumstances of the specific case, the CAS is not in a position to provide an effective remedy.

To conclude, it is notable that the conference that inspired the present paper was suggestively entitled "Sports Arbitration as a Coach for other Players". As discussed at that conference the contents of the present contribution are difficult to apply to commercial arbitration precisely because the non-consensual nature of CAS arbitration is specific to sports disputes. Indeed, the Supreme Court explicitly held that the *Cañas* jurisprudence does not apply to commercial arbitration.[114] The issue of the validity of the arbitration agreement in case of lack of consent could possibly be applied to arbitration in specific industries such as securities in the United States where arbitration is known to be *de facto* mandatory[115] or, to a certain extent,

Jan. 2007, para. 4.2. *See also* Ulrich Haas, *The enforcement of football-related arbitral awards by the Court of Arbitration for Sport (CAS)*, I.S.L.R. 12, 15 et seq. (2014).

[113] *See Tribunal régional de Berne-Mittelland, supra* note 85, para. 26, CAS 79, 83-84 (2012).

[114] ATF 133 III 235, 243-245 paras. 4.3.2.2, 4.3.2.3, 25 ASA BULL. 592, 601-604 (2007), SWISS INT'L ARB. L. REP. 65, 83-88 (2007).

[115] See the paper of Laurence Shore & Robert Rothkopf, *Mandatory Arbitration of Securities Disputes in the United States—Not Statutory, But De Facto Mandatory*, published in the present collection.

to employment or consumer disputes. To the extent that the parties' unequal bargaining power can be considered as tantamount to a lack of genuine consent, useful analogies could be drawn with the requirement that the imposed arbitration must be fair to the weak party and provide them with sufficient protections and/or advantages. By way of contrast, the discussion regarding the validity of the waiver of state court jurisdiction contained in Article R37(3) 2nd sentence of the CAS Code, in particular as far as the (exclusive) jurisdiction of the arbitral institution is concerned, is genuinely sports specific and must be approved as it constitutes a crucial measure to ensure sports specific disputes are decided in a single forum on a level playing field.

Chapter 5

"Consent" in Sports Arbitration: Which Lessons for Arbitrations Based on Clauses in Bylaws of Corporations, Associations, etc.?

*Philippe Bärtsch**

1. INTRODUCTION

Arbitration is a consensual dispute resolution method. The touchstone of arbitration is indeed the parties' consent to refer an existing dispute, or future disputes, to arbitration and to exclude the jurisdiction of national courts.[1]

Whether arbitration is consensual in sports disputes between athletes and sports federations is, however, often doubtful. As pointed out by the Swiss Federal Tribunal in the *Cañas v. ATP* decision:

> [a]side from the (theoretical) case of a famous athlete who, due to his notoriety, would be in a position to dictate his requirements to the international federation in charge of the sport concerned, experience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation's requirements, whether they like it or not. Accordingly, *any athlete wishing to participate in organized competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause*, in particular by subscribing to the articles of association of the sports federation in question in which the arbitration clause

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[1] According to the Swiss Federal Tribunal, an arbitration agreement is "an agreement under which two or more defined or determinable parties undertake to submit one or more existing or defined future differences between them to arbitration in accordance with a directly or indirectly defined legal order, thereby excluding the original jurisdiction of State courts" (*see, e.g.*, Swiss Federal Tribunal decision 4P.162/2003 of 21 November 2003, DFT 130 III 66, par. 3.1).