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Challenging Awards of the Court of Arbitration for Sport

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The Court of Arbitration for Sport (CAS), sitting in Lausanne, Switzerland, is the pinnacle of the worldwide dispute settlement system for sport matters. CAS enjoys significant autonomy from states, despite the great importance of its decisions for the lives of athletes. Setting aside proceedings against CAS arbitral awards may only be filed with the Swiss Supreme Court due to the seat of CAS tribunals being in Lausanne. The number of such setting aside proceedings has greatly increased, to the point that almost half of the Supreme Court's case load relating to international arbitration now concerns CAS awards. The present article critically reviews the most important questions that arise in the context of such setting aside proceedings, with an eye to the practical needs of the actors involved in such procedures.

1. *Introduction*

The present article addresses the most important questions that arise in the context of setting aside proceedings before the Swiss Supreme Court against awards rendered under the aegis of the Court of Arbitration for Sport (CAS). The answers proposed here to these questions are primarily based on the analysis of all the decisions rendered by the Swiss Supreme Court in CAS matters, from the *Gundel* case[1] to the present day.[2] I will start with an overview of the conditions for the admissibility of actions to set aside CAS awards and the main procedural issues which may arise in that context (Section 2). This is primarily a subject of interest for counsel to the parties. I shall then examine, in turn, each of the grounds for annulment of international arbitration awards which may be invoked before the Supreme Court (Section 3). This topic is addressed not only to counsel, but also to arbitrators looking for some guidance

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[1] Decision 4P.217/1992 of 15 March 1993 (*Gundel v FEI*), ATF 119 II 271, translated in CAS Digest I, p. 545 and *Mealey's Int'l Arb Rep* 8 (10 October 1993) 12.

[2] Up to date as of 15 June 2009.

on how to make their awards as 'challenge-proof' as possible as a matter of Swiss law. Finally, I will briefly discuss the main features of the application for revision of CAS awards (Section 4).

Before turning to the heart of the matter, I would like to point out that this article will deal exclusively with the remedies available against CAS awards in *international* matters, i.e. awards rendered under Chapter 12 of the Swiss Private International Law Act (PILA). CAS arbitrations are governed by Chapter 12 PILA if at least one of the parties had, at the time when the arbitration agreement was entered into, neither its domicile nor its habitual place of residence in Switzerland (Article 176(1) PILA). As a matter of fact, almost all CAS awards which were sought to be set aside until today were international awards.[3]

2. *The Action to Set Aside: Procedural Questions*

From a procedural point of view, the main questions that the parties (and their lawyers) must ask themselves are whether the action to set aside the award is admissible (Section 2B), whether the parties can be held to have validly waived their right to bring such an action (Section 2C) and what the applicable procedural rules are (Section 2D). As a preliminary matter, it may be useful to outline the main characteristics of the action to set aside international arbitral awards (Section 2A). The rules governing these issues are to be found in Articles 190–2 PILA and in the Swiss Supreme Court Act (*Loi sur le Tribunal Fédéral,* SCA),[4] and in the Supreme Court's case law interpreting these provisions.

A. *Nature of the Action to Set Aside*

The action to set aside an arbitral award under the PILA is a 'one shot' appeal, to be brought directly before the Swiss Supreme Court, the highest judicial body in Switzerland. This solution, which is unique in comparative law,[5] is obviously advantageous to the extent that the appeal process for awards is greatly simplified and accelerated. In practice, one may expect the Supreme Court to render its final decision within four to six months (usually, approximately two to four months are required for the notification of the

[3] The only real exception was a case concerning a (domestic) transfer of player between two Swiss clubs. The other exception was the *Hondo* case, which was in fact a truly international case that happened to be domestic because the German rider was domiciled in Switzerland for tax reasons (and UCI and WADA are incorporated in Switzerland).

[4] Loi du 17 juin 2005 sur le Tribunal fédéral (RS 173.110), which entered into force on 1st January 2007. The SCA notably provides that an appeal against an arbitral award is a *'recours en matière civile'*. The new law takes into account the specificities of an appeal against an arbitral award, in particular in its Article 77(2) and (3), so that the changes are minor and mostly relate to terminology.

[5] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* No. 772 (Sweet & Maxwell, London 2007), 705.

operative part of the decision, and two more months for the reasoned decision to be made available to the parties).

According to Article 190 PILA, an arbitral award can be set aside upon certain specific grounds. The only grounds allowed are those spelled out in Article 190(2) PILA:[6] if (i) the arbitral tribunal was not properly constituted, (ii) the arbitral tribunal wrongly accepted or declined jurisdiction, (iii) the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one or more of the claims submitted to it, (iv) the parties' fundamental procedural rights were breached, or (v) the award is incompatible with public policy (see Section 3).

The action may only seek the annulment of the award.[7] Thus, the Supreme Court can only confirm or set aside the award (or parts of the award), and if the challenge is upheld, the matter ought to be sent back to the arbitrators for a new decision.[8]

The appeal is to be filed as a *recours en matière civile* before the Supreme Court, in accordance with the conditions set out in Articles 190–2 PILA (Article 77(1) SCA). The Supreme Court renders its decision only on the basis of the facts as previously established by the arbitrators (Article 107(2) SCA), with very limited exceptions which I will discuss when dealing with the Supreme Court's scope of review with respect to international arbitral awards (see Section 2D(vi)).

In practice, the Supreme Court will decide on the action to set aside on a documents-only basis (ie the parties' briefs and submissions, together with any exhibits attached thereto). No other evidentiary measures will be taken. In the vast majority of the cases, the Supreme Court decides 'by circulation', without holding a public hearing.[9] In substance, the Supreme Court has adopted a hands-off approach. Once the jurisdiction of the arbitrators is established, the Supreme Court considers that it is not its role to supervise or second-guess the arbitrators' decision-making process.

B. *Admissibility of the Action to Set Aside*

The Supreme Court examines *ex officio* and with full power of review (*plein pouvoir d'examen*) the admissibility of any actions which are brought before it.[10]

[6] ATF 128 III 50, *53*; ATF 127 III 279, *282*.

[7] *See* Article 77(2) SCA, which rules out the applicability of Article 107(2) SCA.

[8] Decision 4A_244/2007 of 22 January 2008, at 3, ASA Bull (2008) 353 at 356, where the Supreme Court indicates that pursuant to Article 77(2) SCA, Article 107(2) SCA, which makes it possible for the Supreme Court to decide the matter itself, is not applicable to appeals against international arbitration awards.

[9] For the very limited exceptions to this rule, see Sébastien Besson, 'Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux)' (2007) ASA Bull 2 at 31. In practice, a hearing takes place only if the judges do not reach unanimity over the draft decision proposed by the law clerk or the judge to which the President of the 1st Civil Section of the Court has allocated the case (the so-called *Referat*). Such a hearing will be devoted exclusively to the discussion of the different views held by the judges and to the decisive vote. The court will not hear submissions from the parties.

[10] ATF 126 III 274, at 275.

In the context of setting aside proceedings against international awards, the Supreme Court will examine (i) whether it has jurisdiction to hear the appeal, (ii) whether the challenged decision qualifies as a challengeable award, taking into consideration the issue of awards based on multiple reasons, (iii) whether the requirements for admissibility are met, namely whether the challenging party has standing to appeal, (iv) whether the challenge was filed within the applicable time limit. It is submitted that the specific condition relating to the amount in dispute which is set forth in Article 74 SCA does not apply to appeals against CAS awards.

(i) *The Court of competent jurisdiction*

Since the seat of CAS arbitrations is always Lausanne, Switzerland, the court of competent jurisdiction to hear actions to set aside CAS awards is the Swiss Supreme Court (Article 191(1) PILA).[11] This holds true also for awards rendered outside Switzerland, or for proceedings where the hearings have been held elsewhere, such as the awards made by the CAS Ad Hoc Divisions which are set up for competitions taking place in countries other than Switzerland,[12] or the CAS awards rendered in the United States in doping matters pursued by the US Anti-doping Agency (USADA).

(ii) *Challengeable awards*

As a preliminary matter, it bears emphasizing that the action to set aside is available only against arbitral awards *stricto sensu*. It is not admissible against procedural orders,[13] or against decisions on applications for provisional measures rendered by CAS Panels, irrespective of how a Panel chooses to name such orders or decision. *A fortiori*, the action is not available against any such decisions rendered during the course of the arbitration by the CAS Court Office, the President of the relevant CAS Division or the International Council of Arbitration for Sport (ICAS).

According to the Supreme Court's case law, a distinction is to be made between final awards and partial awards on the one hand and preliminary or interlocutory awards on the other hand, including awards on jurisdiction. Awards based on multiple reasons deserve a separate mention.

(a) *Final Decisions and Partial Decisions.* It follows implicitly from Article 190(2) and (3) PILA that the action to set aside is admissible against *final*

[11] As will be seen further below (see Section 2C), the parties can, according to the conditions set forth in Article 192(1) PILA, exclude the jurisdiction of the Supreme Court. This does not mean that a foreign court can be substituted in its place (Elliott Geisinger and Viviane Frossard, 'Chapter 8 – Challenge and Revision of the Award' in Kaufmann-Kohler and Stucki (eds) *Arbitration in Switzerland* (Kluwer, The Hague 2004) 136).

[12] Thus, in the in *Raducan* case the Supreme Court did not object as to the admissibility of the appeal even though the entire procedure had taken place in Sydney, Australia (see Decision 5P.427/2000 of 4 December 2000, ASA Bull (2001) 508).

[13] ATF 122 III 492, at 494.

awards, that is to say against such awards where the arbitral tribunal has finally decided the case upon substantive or procedural grounds and thereby ended the arbitral proceedings.[14] Final awards can be appealed for all the grounds for setting aside listed in Article 190(2) PILA.

In the case of CAS, such decisions are not necessarily only those rendered by the Panel. Administrative decisions refusing to entertain an appeal or to set an arbitration in motion can also qualify as challengeable awards. This was true, for instance, of an Order by the Deputy President of the CAS Appeals Arbitration Division stating that an appeal was deemed to be withdrawn and closing the proceedings, due to the appellant's failure to pay all the required advances on costs,[15] or of a letter from the CAS Secretary General informing the parties that since the Statement of Appeal was not completed within the set time-limit, the appeal was considered withdrawn pursuant to Article 48(3) of the CAS Code, and no proceedings would thus be opened.[16] Decisions such as these constitute final determinations on admissibility dismissing a case on procedural grounds, and are therefore in the nature of a final award.

Partial awards within the meaning of Article 188 PILA may also be appealed under the same conditions as final awards, that is for all the grounds set out in Article 190(2) PILA.[17] A partial award is that by which (i) 'an arbitral tribunal decides on part of the relief sought by either party in relation to a certain *quantum* or one or many claims',[18] or (ii) puts an end to the proceedings with respect to some of the parties.[19]

(b) *Preliminary or Interlocutory Decisions.* *Preliminary or interlocutory awards* are those 'which decid[e] one or more preliminary questions of substance or procedure',[20] for instance awards determining the law applicable to the merits, dismissing an objection based on the statute of limitations or deciding on the principle of liability. According to Article 190(3) PILA, such preliminary or interlocutory awards can only be appealed on the grounds mentioned in Article

[14] The same also results from Article 90 SCA. Under the heading 'final decisions' this article states '[t]he action is admissible against decisions that put an end to the proceedings' (free translation). ATF 130 III 755 at 761ff.

[15] Decision 4A_600/2008 of 20 February 2009, at B and 2.3, ASA Bull (2009) 568 at 569–571, where the Supreme Court rejected the CAS's argument that 'the decision sought to be challenged is not an arbitral award, to the extent that it has not been adopted by a Panel, but by the Deputy President of the Appeals Arbitration Division, who is a member of the International Council of Arbitration for Sport (ICAS), elected by said Council to replace the President of the Division when he is unavailable (Article S6(2) of the Code) and to exercise the latter's functions such as the constitution of Panels (art. R52 of the Code)' (free translation).

[16] By way of contrast, a letter by the CAS confirming that no proceedings were opened to hear an appeal on the ground that the appellant had failed to file an appeal brief within the time limit as extended by the CAS is not a decision capable of being challenged (Decision 4A_126/2008 of 9 May 2008, Swiss Int'l Arb L Rep (2008) 249, at 255).

[17] ATF 130 III 755, at 761.

[18] Decision 4A_ 370/2007 of 21 February 2008, translated in Swiss Int'l Arb L Rep (2008) 89, at 108, referring to ATF 128 III 191, at 194.

[19] Article 91 SCA, loose translation. See also Bernard Corboz, commentary of Article 77 SCA, in Corboz/Wurzburger/Ferrari/Frésard/Aubry Girardin, Commentaire de la LTF, Bern 2009, at 54 p. 623.

[20] Decision 4_A 370/2007 of 21 February 2008, translated in Swiss Int'l Arb L Rep (2008) 89, at 108.

190(2) lit. a and b PILA; improper constitution of the arbitral tribunal and lack of jurisdiction. For those grounds, the action to set aside must be filed immediately or will be deemed to have been forfeited; for all other grounds, the action to set aside is inadmissible and must be filed against the final award (even if the preliminary decision causes irreparable harm to the petitioner).[21]

With respect to Article 190(3) PILA, it should be emphasized that according to the Supreme Court's case law developed before the enactment of the SCA, the action to set aside must be brought against the first preliminary decision in which the arbitral tribunal acknowledges, at least implicitly, its constitution and/or its jurisdiction.[22] The Supreme Court seems[23] to endorse the view that this case law shall be maintained despite the fact that Article 92 SCA now provides that an appeal is only possible against preliminary decisions that have been 'notified separately'.[24] Hence, even though the application of Article 92 SCA would bring more clarity and enhance legal security, unless or until the Supreme Court explicitly reverses its current case law, parties ought to be very careful in this respect.

The legal situation is even more complicated given that the distinction between a partial award (which is subject to an immediate appeal on any of the grounds set forth in Article 190(2)) and a preliminary award (which can be appealed only on the limited grounds of Article 190(2)(a) and (b) PILA) is not always easy to make, as illustrated by the well-known *N'Zgobia* case:

> The award dated 27 October 2005 has a hybrid character. Under points 1 and 2 of its operative part, the award declared that the respondent's appeal against the decision made on 26 November 2004 by the [FIFA Dispute Resolution Chamber (DRC)] was admissible, it allowed the appeal in part and set aside the decision in so far as the DRC had declared that it did not have jurisdiction in order to rule on the claims based on the training agreement; in this respect such an award is considered an interlocutory award dealing with matters of procedure. The same is true of the part of the award reserving the decision on the fees and expenses of the arbitration until the final award, as stated in point number 7 of the 26 November 2004 award. In so far as the award held that the petitioner had breached his contractual duties to the respondent and stated that the parties would soon be directed to file their submissions on the further compensation which the petitioner possibly owed to the

[21] ATF 130 III 76, at 79–80; see also Decision 4P.298/2006 of 14 February 2007, Swiss Int'l Arb L Rep (2007) 31, at 36.

[22] Decision 4P.168/1999 of 17 February 2000, ASA Bull (2001) 781, at 784–5; ATF 130 III 76, at 80. In any event, the decision must be a decision by the Panel. The notification by the CAS Court Office as to the composition of the panel called upon to determine the dispute does not constitute a challengeable decision (Decision 4A_506/2007 of 20 March 2008 at C, Swiss Int'l Arb L Rep. (2008) 191, at 201). The same was true of a letter from the CAS Secretary General informing the parties that the CAS considered it had jurisdiction to hear the case, and that the reasoning in that respect would be set out in the final award. Such a letter cannot be considered as a formal decision on jurisdiction (Decision 4A_460/2008 of 9 January 2009, at 4), ASA Bull (2009) 540 at 543.

[23] Decision 4A_370/2007 of 21 February 2008 at 4.2, Swiss Int'l Arb L Rep (2008) 116–17, referring to what 'was already the case under the old Federal Judiciary Organisation Act'.

[24] Jean-François Poudret, Les recours au Tribunal fédéral Suisse en matière d'arbitrage international (Commentaire de l'art. 77 LTF), ASA Bull (2007) 669, at 694.

> respondent (points 3 and 4 of the operative part of the award), the award of 27 October 2005 decided a preliminary point of substance – the player's liability to his former club for breach of contract – and gave procedural directions which followed the answer given to the issue of liability; as to the decision on the principle of liability, one is dealing with a preliminary award. As for the rest, the award presently under consideration confirmed points 2, 3, and 4 of the decision by the DRC and rejected all other claims made by the parties (points 5 and 6 of the operative part of the award). Thus, the award firstly confirmed FIFA's refusal to require the petitioner to return to his former club and sign a contract with them; secondly, it confirmed the authorisation given to the petitioner to register as a player for [Newcastle]; and thirdly, it confirmed the duty of this club to pay the respondent the sum of EUR 300,000.00 in training compensation; one is then dealing with a partial award proper as far as these three points are concerned.[25]

A CAS award that sets aside a decision, remitting the matter to the lower previous instance for a fresh decision qualifies as an interlocutory decision which is not subject to appeal.[26]

(c) *Awards on Jurisdiction.* *Awards on jurisdiction* can (and should) be subject to immediate appeal (irrespective of their denomination by the CAS).[27] The available grounds will vary depending on whether the tribunal accepts or declines jurisdiction:

— if the panel declines jurisdiction, the award qualifies as a final award (ending the proceedings on procedural grounds) and the action to set aside is available for all the grounds of Article 190(2) PILA;
— if the panel asserts jurisdiction, such an award shall be considered a preliminary award pursuant to Article 186(3) PILA, and the action to set aside is available for the grounds of Article 190(2) lit. a and b PILA. According to the Supreme Court, the party which opposes such decision cannot wait for the final award in order to contest this finding.[28]

(d) *Awards Based on Multiple Reasons.* Irrespective of the type of award, when an award which is sought to be set aside rests on several different and independent reasons, whether these are alternative or subsidiary to each other,

[25] Decision 4A_370/2007 of 21 February 2008 (*Charles N'Zgobia vs. le Havre AC*), at 2.3.2 as translated in Swiss Int'l Arb L Rep (2008) 89, 110–11.

[26] Decision 4P.298/2006 of 14 February 2007, Swiss Int'l Arb L Rep (2007) 31, at 35–6. In this case, which concerned an appeal against a decision by the FIFA Players' Status Committee, the CAS panel had determined the points in dispute regarding the validity of the option clause and the breach of contract, but not the consequences arising out of that breach.

[27] The Supreme Court considered it irrelevant that a CAS decision regarding its jurisdiction had been entitled 'Preliminary Decision' (Decision of 25 March 2004, 4.P/253/2003, at b. and 4.1, SRIEL 2005, p. 222, at 224).

[28] ATF 121 III 495. Along the same lines, it bears pointing out that it is not possible to revert to this issue in an appeal against the final award on the merits after the Supreme Court has already decided on the jurisdiction of the arbitral tribunal following an appeal against the decision on jurisdiction or any other such decision.

all of them sufficient to ground the award, each of them must be challenged on the basis of the appropriate ground, on pain of inadmissibility.[29]

(iii) *Standing to act*

According to the Supreme Court, the petitioner in setting aside proceedings must be (i) a party to the arbitration, (ii) directly affected by the final award under appeal and (iii) have a personal, actual and legally protected interest at stake.[30]

The purpose of the first condition is to avoid the irruption of third parties into the proceedings at such a late stage, which would dramatically change the nature of the dispute. However, it does not preclude parties who were prevented from participating in the arbitration proceedings from challenging the award.[31] Hence, it is submitted that a third party can file an action to set aside a CAS award if the procedural rules applicable before the CAS did not allow that party to participate in the arbitration. This could be the case for instance in doping matters because the World Anti-Doping Code does not allow other athletes (including direct competitors with a clear interest in the outcome of the arbitration) to appeal anti-doping decisions.[32]

Indeed, such a third party would also undoubtedly meet the second condition as that party would be directly affected by the final award. The same will obviously be true with respect to the party to the arbitration that loses the arbitration, either entirely or partially.[33]

The third condition raises the question of whether or not a petitioner's interest is (still) actual, in particular when an athlete who has already served his or her suspension asks for the CAS award confirming the suspension to be set aside. The petitioner would lack standing as he or she has in fact already served the suspension.[34] This would, in particular, be the case if no other sanctions, such as the restitution of prize money won in previous competitions, was imposed.[35] It is submitted that the action to set aside should be admissible in order to take into account the personal and financial consequences resulting from the gravity of the punishment, in particular its stigmatizing character, despite the sanction having itself been served.[36]

Only in exceptional cases will the Supreme Court be prepared to waive the requirement of standing, namely when the petitioner raises a question of law

[29] Decision 4A_392/2008 of 22 December 2008, at 2.5.2, ASA Bull (2009) 547, 554.

[30] Decision 4A_370/2007 of 21 February 2008, at 2.2 Swiss Int'l Arb Rep (2008) 89, 107, see also ATF 133 III 235, Swiss Int'l Arb L Rep (2007) 65, 75–6; Corboz (n 19) at 68, 628.

[31] Corboz (n 19) at 69, 628.

[32] See Article 13(2)(3) of the WADA Code as applied for instance in CAS 2004/A/748 ROC & *Viatcheslav Ekimov v IOC, USOC & Tyler Hamilton*.

[33] The appeal is admitted without being subjected to this test whenever the challenged decision imposes a fine on the petitioner (Decision 4P.98/2005 of 10 November 2005, consid. 1).

[34] ATF 127 III 429, at 431.

[35] Decision 4P.172/2006 of 22 March 2007, at 3, not reproduced in the reported version at ATF 133 III 235.

[36] ATF 119 II 271, at 281.

capable of arising in the same terms and in such a manner that the Court will not ever be in a position to make a decision in a timely manner.[37]

(iv) *Time limit*

The action to set aside must be filed within 30 days from the notification of the complete decision (Article 100(1) SCA) either with the Supreme Court itself, or to the Court's attention with a Swiss postal office or a Swiss diplomatic representation.[38]

Article 44 SCA provides that the day on which the 30-day time limit begins to run is not included in the computation and that, if the expiry date is a Saturday, Sunday or public holiday[39] the time limit expires on the next working day (Article 44 SCA). In accordance with Article 46 SCA, the time limits do not run from (i) the seventh day before Easter until and including the seventh day after Easter, (ii) from 15 July to 15 August, and (iii) from 18 December to 2 January.

The time limit to file the action cannot be extended (Article 47(1) SCA). On a very exceptional basis, when the appealing party or its counsel was impeded from acting in timely fashion through no fault of its/his own, a new time limit can be given upon reasoned request to be filed within 30 days from the moment in which the impediment has disappeared (Article 50 SCA).

When, as is often the case in CAS matters, the reasoned decision is forwarded to the parties after the operative part of the award (Article R59 CAS Code), the time limit to file the appeal only starts to run upon notification to the parties of the reasoned decision. It is submitted that a party is allowed to file an appeal based solely on the operative part of the award in order to include a request to stay (see Section 2D(ii)).[40]

(v) *Is there a need for a minimal value of the claim/amount in dispute?*

Pursuant to Article 74 SCA, an appeal is not admissible if the amount in dispute is (i) less than 15,000 Swiss Francs (CHF) for labour and tenancy law matters and (ii) less than CHF 30,000 in all other matters.

The legislator has not excluded arbitration from this condition, which will be often difficult to meet in sports arbitration. Indeed, the amount in dispute is often left undetermined before the CAS, as the parties' claims usually tend towards either the annulment or the confirmation of the decisions of sports-governing bodies. Hence, one can only hope that the Supreme Court

[37] ATF 133 III 235, Swiss Int'l Arb L Rep (2007) 65, at 75, quoting ATF 127 III 429.

[38] With the exception of Lichtenstein, a filing with a foreign postal office will not stop the time limit from running. The same applies to a filing by telecopier (Decision 4A_258/2008 of 7 October 2008, at 2, ASA Bull (2009) 137).

[39] An official list of the relevant Swiss public holidays is available at: <http://admin.fr.ch/spe/de/pub/formulaires.htm>.

[40] It is doubtful that one could apply Article 112(2) SCA by analogy in order to request the reasoned award within 30 days.

will follow the quasi-unanimous recommendations of commentators to the effect that Article 74 SCA is not applicable to arbitration in general, as was the case under the previous statute.[41]

That said, the Supreme Court has left the question open. Hence, for the time being, if the amount in dispute is undetermined, I would strongly advise the petitioner to ensure that his application mentions all the elements which may enable the Court to make its own (discretionary) assessment pursuant to Article 51(2) SCA.[42] In those cases where the amount in dispute cannot reach the prescribed value, I would advise the petitioner to consider filing also an appeal pursuant to Article 74(2)(a) SCA, which allows challenges against awards irrespective of the amount in dispute, provided such appeals raise fundamental legal questions of principle.[43]

C. *Exclusion Agreements*

Article 192(1) PILA allows the parties to waive in advance any right to challenge the award or to exclude certain grounds for setting it aside, if none of the parties is domiciled in Switzerland.[44] Technically, the absence of a valid exclusion agreement within the meaning of Article 192(1) PILA constitutes an independent precondition to the admissibility of an action to set aside an arbitral award.

An exclusion agreement must be passed in express terms and in writing, either in the arbitration agreement itself or in a subsequent agreement. According to the Supreme Court, it is necessary and sufficient that the parties' express declaration indisputably manifests their common intention to waive all future setting aside proceedings.[45] An exclusion 'agreement' contained in the applicable arbitration rules, as, for instance, Articles R46(2) and R59(4) of the CAS Code, or set out in any other distinct, pre-existing document to which the parties may have referred in concluding the arbitration agreement, does not fulfil this requirement.[46]

The application of Article 192(1) PILA in sports matters has been criticized, in particular because it discriminates between Swiss and foreign athletes and

[41] In fact, this should be considered as a legal loophole, whereby the legislator simply forgot to add arbitration to the list of exceptions found in Article 74(2) SCA (Poudret (n 24) 687–9 and the references; more hesitant, Corboz (n 19) at 65, 627).

[42] Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage International – Droit et pratique à la lumière de la LDIP* no 742 (Weblaw, Bern 2006) 314.

[43] Ibid no 743.

[44] Under the heading 'Waiver of annulment' Article 192 provides as follows: '*1.* 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 Article 190(2) [PILA]. *2.* If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.'

[45] ATF 131 III 173, at 178.

[46] Decision 4P.62/2004 of 1 December 2004, at 1.2, ASA Bull (2005) 483.

because professional athletes often have to subscribe such exclusion agreements as a precondition for participating in their sport.[47] In the well-known *Cañas* decision of 22 March 2007, the Supreme Court followed this view and declared that in sports matters, the athletes' purported consent to such exclusion agreements does 'obviously not rest on a free will' and is therefore 'tainted a*b ovo*'.[48] It is worth quoting the reasoning of the Supreme Court as, in my view, it establishes the specificity of sports arbitration (when compared to traditional commercial arbitration):

> Th[e exclusion] agreement, as any other contract, comes into existence only provided that the parties have expressed their mutual intention to waive setting aside proceedings. As a constituent element of party autonomy, freedom of contract requires that such a declaration should not rest on an intent which has been coerced in any way whatsoever. It is all the more important that the intent to waive setting aside proceedings should not be tainted by any form of duress or undue influence because such waiver will deprive its author of the ability to challenge any future award, whether the award disregards fundamental principles in force in any state based on the rule of law, such as public policy, or fundamental procedural guarantees such as the proper constitution of the arbitral tribunal, arbitral jurisdiction, equal treatment for the parties as well as the parties' right to present their case before the arbitrator. Sports competition is characterized by a highly hierarchical structure, as much on the international as on the national level. Vertically integrated, the relationships between athletes and organisations in charge of the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties (see the decision of this court in ATF 129 III 445 paragraph 3.3.3.2, p. 461). This structural difference between the two types of relationships is not without influence on the volitional process driving the formation of every agreement. In principle, when two parties are on equal footing, each party expresses its intention without being dependent on the other. This is the usual structure in the case of international commercial relations. However, the situation is very different in the sports arena. Aside 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 organised competition under the control of a sports federation whose rules provide for recourse to arbitration will

[47] Kaufmann-Kohler and Rigozzi (n 42) no 766, 319.

[48] ATF 133 III 235, Swiss Int'l Arb L Rep (2007) 65, *passim*. In the case at hand, 'as a condition of entering or participating in any event organized or sanctioned by the ATP', the players had to deliver to ATP a signed 'PLAYER'S CONSENT AND AGREEMENT TO ATP OFFICIAL RULEBOOK [according to which, inter alia,] the undersigned player, consent[s] and agree[s] as follows: [. . .] 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.[. . .]'.

> 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. Such an athlete will face the following alternative: to consent to arbitration or to practice his sport merely non-professionally (on the question of forced arbitration, see ANTONIO RIGOZZI, International Arbitration in Sports-related Disputes [L'arbitrage international en matière de sport], paragraph 475 et seq. and paragraph 811 *et seq.*, with a number of references to different opinions in this respect). Put before the alternative of submitting to arbitral jurisdiction or else practice his sport just 'in his own garden' (KNOEPFLER/SCHWEIZER, International Arbitration [Arbitrage international], p. 137 latter part) and watch competition 'on the television' (RIGOZZI, International Arbitration in Sports-related Disputes [L'arbitrage international en matière de sport], p. 250, note 1509 and the first author cited), any athlete wishing to engage in true competition or having to do so as his sport is his only source of income (financial or in kind, advertising income, etc) will in fact, *nolens volens*, have to opt for submitting to arbitral jurisdiction.

In substance, the Supreme Court held that sports arbitration is intrinsically mandatory or at least not truly consensual in nature and that one could thus not accept that athletes can be forced to waive the jurisdiction of their natural judge (by 'agreeing' to arbitration) *and* the supervisory jurisdiction of the state courts over arbitral awards. This is certainly justified in most Olympic sports.[49] To avoid any misunderstanding, it bears emphasizing that the *Cañas* decision shall not be interpreted as questioning (or be used to question) the validity of the arbitration agreements contained in sports regulations (see below II.B).

D. *Procedure* stricto sensu

With the entry into force of the SCA on 1 January 2007, the procedural framework governing setting aside proceedings against arbitral awards underwent various changes. In particular, as already mentioned, the new Act has subjected applications to set aside international arbitral awards to the provisions governing appeals in civil matters (*recours en matière civile*). For the most part, the legislator took into account the specificities of appeals against arbitral awards, notably in Article 77(2) and (3) SCA. The changes, apart from the terminology, are not as important as they seem.[50] For this reason, the following paragraphs will only focus on specific questions which may arise in connection with sport matters, such as those relating to costs (i), the possible stay of the enforceability of the award (ii), the requirement of representation by Swiss counsel (iii), the required form and content for the

[49] It should be noted here that the Supreme Court did not really discuss the arguments of Claimant according to which the specificity of professional tennis should be taken into consideration.

[50] For a comprehensive analysis of the procedural framework, see the seminal works of Corboz (n 19) and Poudret (n 24).

appeal brief and accompanying documents (iv), for the response brief (v) and finally the scope of review of the Supreme Court (vi).

(i) *Costs*

It makes sense to begin with the issue of costs since this is one of the most pressing questions for clients (together with the chances of success of the appeal): an honest response should dissuade most applicants.

Pursuant to Article 62 SCA the petitioner must pay an advance on costs corresponding to the anticipated court fees.[51] The advance on costs is calculated in accordance with Article 65 SCA, which states that the amount of the court fees should take into account the amount in dispute, the scope and complexity of the issues to be decided, as well as the financial situation of the parties.[52] In disciplinary matters, where the amount in dispute is often not determined, the advance on costs usually varies between CHF 2,000 (the minimum amount according to the Supreme Court's practice) and CHF 8,000 (CHF 5,000 being the amount most frequently requested). In commercial cases like those concerning the termination of labor agreements in football matters, the Supreme Court usually fixes the costs according to the amount in dispute. To my knowledge, the highest amount of court fees in a sports matter was ordered in the *Del Bosque* case (CHF 40,000 for a case valuing around CHF 10 million). It should be mentioned that if the petitioner loses the case, which is statistically highly probable,[53] he or she will have to bear the entirety of the costs, offset against the advance on costs already paid.

Moreover, one should remember that the Supreme Court may, upon request by respondent, order the posting of a security for costs (*cautio judicatum solvi*) if the petitioner is not domiciled in Switzerland or in a State with which Switzerland has concluded an international treaty excluding such requirements.[54] It bears emphasizing that Switzerland has not entered into such treaties, for example, with African States or with the vast majority of Latin American States (with the notable exception of Argentina), which places Latin American football clubs, in particular Brazilian clubs, in a precarious situation when they wish to appeal a CAS award regarding the transfer of players. In fact, Article 62 SCA may allow their adverse parties, usually European clubs,

[51] The time limit set for the payment of the advance on costs or for providing security is generally of 20–30 days. Extensions can be requested by submitting reasoned applications. Article 62 SCA provides that an additional final (non-extendable) time limit may be granted by the Supreme Court. If the petitioner fails to pay the advance on costs within the applicable time limit, the Supreme Court shall declare the application to set aside inadmissible (Order 4A_204/2007 of 5 November 2007; Swiss Int'l Arb L Rep (2007) 341).

[52] In practice, the Court fees are determined by reference to a progressive scale, which is now set out in the *Tarif des emoluments judiciaires du Tribunal Fédéral* (RS 173.110.210.1).

[53] See Felix Dasser, 'International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis' ASA Bull (2007) 444.

[54] See in particular the Hague Conventions of 1905 and 1954 on civil procedure and the Hague Convention of 1980 on International Access to Justice (available together with status tables at: <http://www.hcch.net/index_en.php?act=conventions.listing>) accessed 22 January 2010.

to force them to withdraw their appeals.[55] The amount awarded as security for costs is calculated on the basis of the anticipated legal costs.

As a rule, the Supreme Court grants to the prevailing party an 'indemnity for legal costs' in an amount corresponding to the (advance on) costs, increased by 10–20%.[56]

In light of the above developments, access to the Supreme Court is almost impossible for the vast majority of athletes, in particular because legal aid (Article 64 SCA)[57] is granted to financially weak parties only if their case appears to have reasonable chances of success, a notion that the Supreme Court has interpreted quite narrowly.[58] The 'good news' is that the Supreme Court seems to take into account the specificity of sports arbitration in awarding lower costs than those usually awarded in commercial cases.[59] This is a welcome development. In my opinion, the Supreme Court should also refrain from awarding security for costs when an athlete or a club is challenging a decision by a sports governing body if the arbitration clause is contained in the regulations of that governing body. It would be inconsistent to ensure that the athlete is afforded at least the right to file an action to set aside the decision and at the same time to allow the federation the render such a right *de facto* impossible to exercise. After all, failing such an arbitration agreement, the athlete could have sued the federation before his/her own state courts and security for costs would thus not have been an issue.

(ii) *(No) stay of the enforceability of the award*

In sports matters, the interest in challenging an award will often depend on whether the filing of the action to set aside has the effect of staying the enforcement of the award. Assuming for example that the CAS Ad Hoc Division for the FIFA World Cup or the UEFA European Football Championship were to render a decision that in fact would determine which team would qualify for the successive rounds, the federation of a non-qualifying team will have no interest in appealing said decision unless the appeal will stay the enforceability of the decision.

In principle the filing of an action to set aside an award does not stay the enforcement of the award. It is nonetheless always possible to request a stay by seeking to obtain an order granting the so-called 'suspensive effect'

[55] The Supreme Court may order the petitioner to pay the respondent's legal costs and disbursements pursuant to Article 8(3) of the Rules on the Allocation of Indemnities for Legal Costs of 31 March 2006 (see Order 4A_286/2007 of 30 November 2007, Swiss Int'l Arb L Rep (2007) 357).

[56] See Article 68 SCA and the recently adopted *Règlement sur les dépens judiciaries alloués à la partie adverse* (RS 173.110.210.3).

[57] When granted, legal assistance exempts the petitioner from the payment of the court fees and security for costs. The Supreme Court can also appoint an attorney who will be paid by the Court. It is submitted that the most efficient way to proceed would be to request the appointment of the attorney who has prepared the request since he or she is already familiar with the case.

[58] Decision 4P.94/86 of 8 May 2006, unreported.

[59] ATF 133 III 235, Int'l Arb L Rep (2007) 65, at 98–9.

(Article 103(3) SCA) or any other provisional measure (Article 104 SCA) which is deemed necessary to secure the *status quo* or to protect any threatened interests. According to the Supreme Court, such a stay is only to be granted in exceptional circumstances, namely if (i) the award causes serious and irreparable harm, (ii) upon a weighing of opposing interests at stake, the 'balance' is in favour of the petitioner and (iii) the *prima facie* examination of the appeal allows for a good chance of success. According to the Supreme Court's practice, the stay of the enforcement of the award is also granted when neither the CAS nor the respondent party explicitly or implicitly oppose a request to that effect.[60]

When the award at issue condemns a party a monetary payment, as is often the case, for instance, in disputes concerning transfers of players, the weighing of the interests at stake will favour the petitioner if the payment will cause him difficulties and/or restitution is uncertain due to the respondent's dubious financial situation. In disciplinary matters, the interests of an athlete which may have been wrongly suspended should prevail over the other interests at stake, including those of other athletes,[61] unless the request for a stay really only aims at moving the suspension to a more favourable or convenient time for the athlete.

In a recent decision in a CAS matter the Supreme Court considered that its practice is evolving 'towards a reinforcement of the conditions to be satisfied for a request for stay of enforcement to be granted in international arbitration matters', and required that the *prima facie* examination of a case not only show good chances of success, but also that the appeal was 'in all likelihood well-founded'.[62] It is submitted that this more stringent approach should apply only in commercial cases and not in sports cases opposing an athlete or a club to a sports governing body, in particular disciplinary cases.[63]

Inasmuch as the request for the stay of the enforcement was denied on the ground that the chances of success were insufficient, depending on the wording of the decision, the petitioner may be well advised to consider withdrawing or not pursuing[64] the appeal in order to avoid unnecessary costs.

On a final note, it bears noting that in football cases where the award condemns one of the parties to pay an amount of money, there is no real need to seek the stay of enforcement of the CAS award. Indeed, it is FIFA's

[60] See among many other decisions, Order 4A_600/2008 of 21 January 2009, unreported.

[61] Order 4P.148/2006 of 3 July 2006, p. 4, unreported.

[62] Order 4A_204/2007 of 12 June 2007, p. 3, unreported (free translation).

[63] I am reinforced in that conclusion by Justice Corboz's recent indication that the purpose of the Supreme Court's restrictive approach is to avoid that actions are filed only to delay the payment of the (often very substantial) amounts of money awarded in international commercial arbitration (Corboz (n 19) at 78, 631).

[64] Where the petitioner brings setting aside proceedings, yet fails to pay the advance on costs within the applicable time limit, and subsequently fails to pay within a final time limit set by the Court, the Supreme Court shall declare the application to set aside inadmissible and order the payment of reduced fees, *see* Decision 4A_204/2007 of 5 November 2007, Swiss Int'l Arb L Rep (2007) 341, at 344.

standard policy to wait for the Supreme Court's decision before taking any action within the meaning of Article 64 of the FIFA Disciplinary Code.[65]

(iii) *Is there a need for Swiss Counsel?*

As a matter of fact, most athletes before the CAS are represented by 'their local lawyer'. Irrespective of whether this is a judicious choice, the question arises whether the same choice of counsel can be made when appealing against arbitral awards before the Swiss Supreme Court.

Pursuant to Article 40 SCA only lawyers admitted to the Swiss Bar or lawyers authorized by an international treaty to practice in Switzerland may represent parties in actions to set aside arbitral awards. Neither Swiss lawyers who are not admitted to the Swiss Bar,[66] nor lawyers who are admitted only to foreign bars[67] are thus allowed to sign submissions to the Supreme Court.

This is, in effect, a restriction on the previous regime governing the so-called public law appeal procedure, whereby any foreign lawyer was allowed to challenge an arbitral award before the Supreme Court. Whether such a restriction is desirable is questionable,[68] in particular in view of the widespread practice of having Swiss counsel or the party itself signing appeal briefs prepared by counsel who are not admitted.

(iv) *Appeal brief, motivation threshold and accompanying exhibits*

As the Supreme Court will issue its decision on the sole basis of the facts established by the arbitrators,[69] it is completely pointless to include a summary of the facts in the appeal brief. Using such a summary in an attempt to 're-fashion' the facts established by the arbitrators is highly counterproductive. Not only will the Supreme Court completely 'disregard such pseudo-summaries of the dispositive facts',[70] but also and more importantly, this will cast a negative light on the entire appeal brief.

According to Article 77(3) SCA, the Supreme Court only reviews the grounds for appeal which are raised in a reasoned manner in the appeal.[71]

[65] The first paragraph of this provision reads as follows: 'Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA or CAS: (i) will be fined at least CHF 5,000 for failing to comply with a decision; (ii) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision; (iii) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.'

[66] Decision 4A_506/2007 of 20 March 2008 at C, Swiss Int'l Arb L Rep (2008) 191, at 199.

[67] Order 4A_528/2007 of 29 January 2008, unreported.

[68] Bernhard Berger, 'Appeals in International Arbitration under the new Swiss Federal Tribunal Statute' in *New Developments in International Commercial Arbitration* (Schulthess, Zurich 2007) 88.

[69] Decision 4A_18/2008 of 20 June 2008, at. 2.2, ASA Bull (2008) 771, 774.

[70] Decision 4A_370/2007 of 21 February 2008 at 3, Swiss Int'l Arb L Rep (2008) 89, at 114.

[71] ATF 133 II 249, at 254.

The Appeal brief shall thus indicate the ground(s) invoked and show, in detail, which principles have been violated by the arbitrators and how.[72]

This 'motivation threshold' is a high one: for instance, one cannot simply contend that the CAS award 'violates elementary legal principles'.[73] Similarly, it is not sufficient simply to refer to a legislative text without pointing to the pertinent provision: 'it is not for the Supreme Court to go and look for a provision which might support the petitioner's arguments in a legislative or regulatory act, what's more, a foreign one'.[74]

According to Article 42(1) SCA, the appeal brief must be submitted in one of the Swiss official languages, ie French, German, Italian or *Rumantsch grischun*.[75]

Furthermore, the appeal brief must be accompanied by the challenged decision and any evidence relied upon by the petitioner, if in his possession (Article 42(3) SCA). According to Article 54(3) SCA, if a party submits evidence which is not drafted in an official language, the Supreme Court may, with the consent of the parties, forego the translation of such documents. Such consent may also be implicit.[76] However, Article 54(4) SCA specifies that in all other cases the Court may order a translation, if it deems it necessary. Pursuant to this provision the Supreme Court was able to continue its practice of not requiring the translation of awards drafted in the English language. In other cases, i.e. when awards are drafted in foreign languages other than English, the Supreme Court has ordered translations to the extent that this was necessary to enable it to examine properly the grounds invoked[77] by the petitioner. In any event, the prudent petitioner should translate the most important passages of the challenged award and set them out in the appeal brief.[78]

(v) *Answer and observations to the appeal brief; right to reply*

Unless the action to set aside is manifestly inadmissible or unfounded, the Supreme Court will forward a copy of the petitioner's brief to the respondent

[72] Bernard Corboz, Le recours au Tribunal federal en matière d'arbitrage international, SJ II (2002) 1–32, at 15.

[73] Decision 4A_18/2008 of 20 June 2008, at 2.2, ASA Bull (2008) 771, 774.

[74] Decision 4P.149/2003 of 31 October 2003, at 2.2.2 (free translation). In this case, the Supreme Court criticized the rider for merely stating 'the hypothesis according to which French public law imposes a double degree of jurisdiction in cases relating to disciplinary sanctions for doping [...]' by referring to a Decree [n° 2001-36 of 11 January 2001] 'with no further explanations [when] he should have indicated which provision in that Decree sets forth such a requirement'.

[75] See Article 54(1) SCA which further specifies that the proceedings will be held in the official language of the award under appeal unless the parties use another official language. If the arbitral award is drafted in a non-official language (which before the CAS will be mainly English, but also Spanish), the language of the proceedings and of the Supreme Court's decision will be the official language chosen by the parties or that used by the petitioner in his brief if the parties have made no such choice (...).

[76] Decision 4A_176/2008 of 23 September 2008, at 1.2.

[77] In this sense see Decision 4A_18/2008 of 20 June 2008, at 1, where the Supreme Court indicated that the Spanish translation of the award was not necessary in the case at hand since the inadmissibility of the appeal could be determined without analyzing the challenged decision.

[78] Kaufmann-Kohler and Rigozzi (n 42) at 782 and footnotes.

and to the CAS and give them a time limit to file an answer (for respondent) and observations (for the CAS).

The applicable time limit is generally of 30 days. Contrary to the time-limit to file the action, the time-limit to respond can be extended upon reasoned request filed before the lapse of the original time-limit (Article 47(2) SCA). The answer must be filed either by a representative of the respondent or by a Swiss lawyer. Normally, the observations of the arbitrators are filed by the presiding arbitrator on behalf of the tribunal. Oddly, in CAS cases, it is the Secretary General who files the comments. Although one can fairly submit that such a practice is objectionable as it necessarily affects the institution's independence vis-à-vis the Panel, the Supreme Court has shown no hesitation in relying on the institution's observations.

As already mentioned, as a matter of principle, there is one single exchange of written submissions (Article 102(3) SCA). A second exchange is ordered only in very exceptional circumstances, that is when the Supreme Court considers that 'the submission of a reply and a rejoinder is really indispensable to decide the case in compliance with the right to be heard'.[79]

The answer of the respondent(s) and the comments of the Panel (if any) are communicated to the petitioner for information purposes only ('*zur Kenntnisnahme zugestellt werden*'). It is submitted that, pursuant to the most recent case law of the European Court of Human Rights,[80] the right to be heard encompasses a right to reply which should apply also in setting aside proceedings against arbitral awards. This was acknowledged by the Supreme Court in a recent decision in which it made clear that the petitioner is free to file a reply irrespective of the Court's decision not to order a second exchange of written submissions, provided it does so immediately ('*unverzüglich*') after having received the respondent's answer.[81]

(vi) *Scope of review*

In principle, there is no limit to the scope of the Supreme Court's review of the claims submitted by the parties. Thus, subject to the requirements of good faith, the petitioner may reargue and even further develop[82] his case by invoking all the arguments it had raised before the arbitrators, as long as they

[79] See Decision 4P.117/2004 of 6 October 2004, at 1.4.

[80] See, in particular, the Decisions of the Court in *Contardi v Switzerland* of 12 July 2005, at 36, 45 and *Spang v Switzerland* of 11 October 2005, at 14, 33 and the other cases summarized in ATF 132 I 42, at 47.

[81] Decision 4A_416/2008 of 17 March 2009, at 2. It is submitted that a time limit of one week is to be considered reasonably short (comments along these lines were made by a Supreme Court clerk during a speech made on 2 October 2008 before the Geneva local group of the Swiss Arbitration Association (handouts on file with the author; see also the report of Laurence Ponty in ASA Bull (2009) 171).

[82] According to the case law relating to Article 86(1) of the Federal Judicial Organisation Act (FJOA), the petitioner is not entitled to rely on points of fact or law which were not raised in the prior proceedings, except where, amongst other exceptions, the reasons of the decision sought to be set aside provide the petitioner with the first opportunity to raise such points (Decision 4P.168/2006 of 19 February 2007, at 4 (Swiss Int'l Arb L Rep (2007) 39, at 48), not reproduced in the reported version (ATF 133 III 139)), free translation.

serve to support one of the grounds for setting aside the award which are spelled out in Article 190(2) PILA.

The opposite principle applies, by contrast, with respect to the establishment of the relevant facts. Indeed, as mentioned above, the Supreme Court issues its decision on the basis of the facts established by the arbitral tribunal.[83] It may not *ex officio* rectify or supplement the factual findings of the arbitrators even if the facts were established in a manner that is manifestly inaccurate or unlawful.[84] The only exceptions where the Supreme Court may review an alleged wrong in the factual findings are the following:

— if new facts or new evidence can exceptionally be taken into account pursuant to Article 99(1) SCA,[85] facts which 'result from the decision of the previous instance' or, more precisely, facts whose relevance results from the challenged decision;[86]
— if the facts have been established in breach of the fundamental rules of procedure set out in Article 182(3) PILA,[87] or against procedural public policy[88] and, even more exceptionally, if they result from an inadvertence which can qualify as a formal denial of justice (see Section 3D(ii)).[89]

3. *Grounds upon which an Award can be Set Aside*

The existence of grounds upon which an arbitral award can be set aside are of primary importance to the parties as they provide a sort of 'security net' in cases where something has gone seriously wrong in the arbitration. The available grounds for appeal are of course also pertinent to the arbitrators to the extent that they wish to hand down an award that will withstand further legal action.

[83] This obviously does not mean that the petitioner cannot refer to other facts, which 'form part', so to speak, of the record of the arbitration (to which the Supreme Court has access), as long as such facts are only relied upon to establish the admissibility of the appeal or that it is well founded, and not in an attempt to amend the factual framework established by the arbitrators, see Besson (n 9) 27 (free translation).

[84] See Article 77(2) SCA, which rules out the applicability of Article 105(2) SCA, thus confirming the solution applicable under the previous law.

[85] Decision 4A_160/2007 of 28 August 2007, Bull ASA (2008) 133, Swiss Int'l Arb L Rep (2007) 247 at 255 quoting ATF 129 III 727 at 733.

[86] One could mention in this respect (i) new facts relating to flaws in the proceedings which have become apparent after the notification of the award, in particular those concerning the regularity of the decision-making process and the arbitrators' deliberations; (ii) new facts upon which depends the admissibility of the appeal, such as the date of notification of the award, or, more fundamentally, (iii) new facts the petitioner intends to rely upon to rebut arguments which have been developed in the award without having been debated in the proceedings (see Poudret (Fn. 24), 680).

[87] Swiss Int'l Arb L Rep (2008) 113 citing *inter alia* ATF 128 III 50, at 54.

[88] The alleged irregularity in the fact-finding process will be corrected only if it actually led to a result contravening such fundamental procedural principles (see Poudret (Fn 24) 680).

[89] ATF 127 III 576.

A. *Improper Constitution of the Panel*

According to Article 190(2)(a) PILA, an arbitral award can be set aside 'if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted'.

As a preliminary matter, it bears pointing out that this provision does not require the petitioner to establish that the tribunal, if properly constituted, would have handed down a different decision.

The constitution of an arbitral tribunal or the appointment of an arbitrator will be deemed to be improper within the meaning of Article 190(2)(a) PILA when the appointment procedure provided for by the parties (whether contractually or by reference to specific procedural rules) was not respected[90] or when the arbitrators lack independence or impartiality.[91]

The question of the arbitrators' (lack of) independence (i) was often invoked in CAS cases but was never really crucial since the Supreme Court always found that the parties were estopped from bringing forward this argument (ii).

(i) *(Lack of) independence of the arbitrator(s)*

According to Article 180(1)(c) PILA, an arbitrator may be challenged 'if circumstances exist that give rise to justifiable doubts as to his independence'. In CAS arbitrations, 'challenges are in the exclusive power of the ICAS which may exercise such power through its Board' (Article R34(2) and S6(4) CAS Code). Thus, an action based on Article 190(2)(a) PILA allows the petitioner to seek enforcement of the grounds for disqualification previously rejected by the ICAS, or to raise any such grounds which he has discovered after the award was rendered.

This section will not delve into the well-known case law of the Supreme Court on the independence of arbitrators. It suffices to recall that the jurisprudence of the Court is based on the fundamental principle that an arbitral tribunal must, like any state court, offer sufficient guarantees of independence and impartiality, whilst also taking into account the specificity of arbitration, especially international arbitration and in particular the peculiarities of the 'small circle of international arbitration', where 'encounters are frequent'.[92]

In sports matters, the Supreme Court has held that the fact that an arbitrator and counsel to one of the parties sat together in another CAS Panel[93] or that an arbitrator and representative of one of the parties had both been members of the same CAS Ad Hoc Division at the Olympic Games[94] do not constitute

[90] Corboz (n 72) 16.
[91] ATF 118 II 359 at 3b.
[92] ATF 129 III 445, at 466–7.
[93] Decision 4P.105/2006 of 4 August 2006, at 4; ASA Bull (2007) 105, 110–11.
[94] ATF 129 III 445, 467 at 3.3.3 and at 4.2.2.2.

grounds for challenge.[95] In a very recent decision concerning the issue of independence, the Supreme Court was faced with the case of a party represented by a former CAS Counsel who publicises on his firm's website that, in such prior capacity, he has 'handled more than 400 CAS arbitrations'. The petitioner argued that the fact that the former CAS Counsel had worked at CAS for several years enabled him to enjoy a relationship with CAS arbitrators which went far beyond normal professional contacts, in particular because he had assisted to the hearings, had acted as ad-hoc clerk and had taken part in numerous training sessions in which the arbitrators participated as speakers. The Supreme Court did not decide the question but noted that it was 'doubtful' that such circumstances would be sufficient to challenge an arbitrator.[96]

In another recent CAS case, the petitioner complained that two out of three arbitrators as well as the representative of the opposing party were members of the same association.[97] Interestingly, the Supreme Court decided the case in direct application of the IBA Guidelines on conflicts of Interest in International Arbitration.[98] The Supreme Court noted that '[t]he fact that an arbitrator has a relationship with another arbitrator or the counsel acting for one of the parties through membership in a professional or social association is a situation that falls on the green list' of the Guidelines.[99] As a consequence, so the Supreme Court, only additional circumstances could justify a different appreciation of the situation. In this case, the petitioner's main allegations can be summarised as follows: (i) that despite its purported academic purposes, the association in question represented in fact 'a closed network for the exchange of information, enabling members to use the privileged contacts established in that context to further their professional and business activities in the field of sport',[100] (ii) that the representatives of a party affiliated with this association systematically chose arbitrators from said association,[101] and (iii) that each time a representative of a party and one of the arbitrators were affiliated with the association, the Chair of the Panel would also be chosen

[95] Note that this case relates to clause 4.4.2 of the *Guidelines*, according to which 'The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel'.

[96] Decision 4A_176/2008 of 23 September 2008, 3.3. *in fine*, ASA Bull (2009) 128, at 133. It is submitted that the outcome could have been different had the appealing party been able to prove its submission that 'the former CAS Counsel's strong personal relationship with the arbitrators became evident by the way in which 'he continued to engage, both before and after the hearings, in collegial discussions of the case with them' (Ibid at 3.1, loose translation).

[97] Decision 4A_506/2007 of 20 March 2008, at 3.3.2.2 *ab initio*, Swiss Int'l Arb L Rep (2008) 191, at 212.

[98] See Antonio Rigozzi, Chronique de Jurisprudence en matière d'arbitrage sportif, Cahiers de l'arbitrage 2008/2, Gaz. Pal. 2–3 July 2008, pp. 27–31.

[99] Decision 4A_506/2007 of 20 March 2008, at 3.3.2.2, Swiss Int'l Arb L Rep (2008) 191, at 215.

[100] Ibid at 3.3.1 (free translation).

[101] Regardless of the relevance this argument, which is more than doubtful, it is worth mentioning that the scenario evoked by the appellant occurred in another case recently brought before the Supreme Court (Decision 4A_528/2007 of 4 April 2008, at 1, Swiss Int'l L Rep (2008) 227, at 231–2).

from among the members of the association.[102] The Supreme Court did not go further than to state that the allegations brought by the petitioner had not been proven.[103] In this regard, it should not be overlooked that with respect to the allegation of 'systematic nomination', the Supreme Court made a point of specifying that it would still have been necessary to show, ideally by means of statistical evidence, that the Panels composed in such a way also systematically decided in favour of the party represented by counsel who is also a member of the association.[104] This requirement seems excessive in light of the secrecy of arbitral deliberations, whereby it is impossible to know the role played by the arbitrator in question in the decision-making process of the Panel. In addition, the practice of the CAS is that minority arbitrators do not draft a dissenting opinion and normally do not insist for their disagreement to be recorded in the award. Finally, since Panels decide on a majority vote (Article 189 PILA as well as R46 and R59 of the CAS Code), even if an arbitrator was completely committed to the cause of a party, that party may still lose the case.

In practice, the more problematic cases are those where a party quasi-systematically, or at least very frequently, nominates the same arbitrator. It is submitted that CAS arbitrators should disclose their prior appointments by the same party in previous arbitrations, irrespective of the outcome of those cases.[105] Such a situation is the subject matter of clause 3(1)(3) of the IBA Guidelines, which places the fact that '[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties' on the 'orange list' of situations that must be disclosed in any case although they do not necessarily warrant the disqualification of the arbitrator. Whether such circumstances should disqualify an arbitrator depends primarily on the frequency of the previous appointments and on the types of disputes in which such appointments occurred. If the nomination of an arbitrator by a party is quasi-systematic, I do not believe his independence to be objectively guaranteed;[106] in particular, if such nominations occurred in very similar cases, for example in doping matters.[107]

More generally, the issue of arbitrators' independence is particularly important in CAS arbitration, given that CAS arbitrators must be selected

[102] Decision 4A_506/2007 of 20 March 2008, at 3.3.1, Swiss Int'l Arb L Rep (2008) 191, at 211. In the case cited in the previous footnote the Chairman of the Panel was not a member of the Association G. That in itself however did not suffice to invalidate the argument of the Organizer on this point. In fact, the case was clearly governed by the appeals procedure, meaning that the Chairman had been appointed directly by the CAS without such choice having been influenced by the co-arbitrator who was a member of Association G. (Decision 4A_528/2007 of 4 April 2008).

[103] Decision 4A_506/2007 of 20 March 2008, at 3.3.2.2, Swiss Int'l Arb L Rep (2008) 191, at 215, where the Supreme Court stated that the petitioner's 'complaints [in this respect] have remained, however, pure allegations'.

[104] Ibid.

[105] Antonio Rigozzi, *L'arbitrage international en matière de sport* no 974 (Basel 2005) 502.

[106] Ibid, no 949, Fn. 2669 *in fine*.

[107] I would like to point out that in a recent case I was positively surprised when an arbitrator spontaneously declined appointment, indicating that '*I have been appointed by [. . .] too frequently*'.

from a closed list, thus making the 'small circle' referred to by the Supreme Court even smaller. In a recent ruling, the Supreme Court expressly recognized that 'in this regard sports-related arbitration instituted under the CAS has particular features [. . .], such as the closed list of arbitrators who may be called upon to serve on a CAS panel, and which should be taken into account even if there is no reason to apply less stringent standards of independence in sports-related arbitration than in commercial arbitration'.[108] This remark is undoubtedly welcome, to the extent that the Court seems to be distancing itself from its previous case law, whereby more lenient standards appeared to be applied in sports matters.[109] Indeed, in my view the existence of a closed list of arbitrators, in addition to the fundamentally non-consensual nature of sport arbitration, should rather call for *stricter* standards of independence and impartiality of arbitrators.[110]

For the time being, it is difficult to predict whether the Supreme Court will follow this approach, since in all cases brought before it, it did not have to go through an in-depth analysis of the actual merits of the challenge, having invariably found that the petitioner was estopped from questioning the arbitrators' independence and impartiality.

(ii) *Estoppel in case of belated challenge of the arbitrator(s)*

Counsel to the parties must keep in mind that the Supreme Court considers that challenges based on the arbitrators' alleged lack of independence or impartiality are admissible only if (i) the ground for challenge was already put forward in a timely manner during the arbitration proceedings or (ii) was only discovered after the tribunal handed down its award and could not have been known before.

In CAS arbitrations, the challenge shall be brought within 7 days after the ground for the challenge has become known (Article R34 of the CAS Code).[111] A party is estopped from challenging an arbitrator if the challenge is not undertaken within this time-limit.[112] The Supreme Court has further specified that a party who has reason to doubt an arbitrator's impartiality or independence cannot simply settle for the evidence at its disposal but, if a piece of potentially relevant evidence is not available, it must seek out any additional

[108] Decision 4A_506/2007 of 20 March 2008, at 3.1.1, 1st paragraph *in fine*, Swiss Int'l Arb L Rep (2008) 191, at 204.

[109] See also Rigozzi (n 105), no 950, 490; Kaufmann-Kohler and Rigozzi (n 42), no 368.

[110] Ibid.

[111] Moreover, Article 180(2) PILA expressly states that a party may only challenge an arbitrator whom it has appointed, or in whose appointment it has participated, on grounds of which it became aware after such appointment. The challenge must be notified to the panel and the other party without delay.

[112] ATF 118 II 359, at 361 and ATF 129 III 445, at 465 indicating that in accordance with the principle of good faith and the prohibition against abuse of rights, it is inadmissible for a party not to raise formal objections, which could have been raised at an earlier stage in the proceedings, until after the outcome of these proceedings has turned out to be unfavourable to such party.

necessary information, or failure to do so may be held against it at a later stage.[113]

As I have already pointed out in other occasions, it seems excessive to require such a high degree of diligence from athletes, from the earliest stages of a procedure.[114] As an example, one could refer to the case where the Supreme Court blamed an athlete for not having *constantly* monitored the CAS website, thus missing the opportunity of spotting an award (posted there for a limited time only) which would have revealed to him the very ground upon which the challenge he later brought against the arbitrator was based.[115] In a recent case, the Supreme Court appears to be correcting that jurisprudence, stating very clearly that the level of diligence required will vary depending on the type of arbitration at issue:

> [...] one is dealing here with a dispute governed by the ordinary arbitration procedure under article R38 ff. of the Code, and not by the arbitral procedure applicable to appeals against decisions taken by an organ of a sports federation having accepted the jurisdiction of the CAS (see art. R47 ff. of the Code), contrary to that which is the case for the large majority of CAS matters submitted to the Federal Supreme Court. In this respect, the dispute submitted to the CAS panel relating to the performance of the international contract in dispute takes on all of the characteristics of the disputes which are at the heart of an ordinary commercial arbitration, leaving aside the sports context in which the dispute has its factual matrix. The present dispute involved parties on equal footing who chose to have their disputes resolved by reference to arbitration and who were well aware of the financial stakes; in this respect, their position was certainly different from that of a simple professional athlete facing a powerful international federation in an arbitration (see the decision of this court in BGE/ATF 133 III 235, paragraph 4.3.2.2 [= 1 Swiss Int'l Arb. L. Rep. 65, 83 ff. (2007)]). In these circumstances, the importance of the choice of arbitrators could not have reasonably escaped the petitioner, who sought damages estimated at more than one million euros. The most basic degree of care would therefore have required the petitioner to investigate the matter in order to be assured that the arbitrators entrusted with the arbitration and called upon to decide on his claims presented sufficient guarantees of independence and impartiality. The petitioner could not simply take the general declaration of independence made by every arbitrator on an ad hoc form at face value.[116]

[113] Decision 4P.217/1992 of 15 March 1993; ASA Bull (1993) 398, at 408.

[114] Rigozzi (n 105), no 972 and Kaufmann-Kohler and Rigozzi (n 42) no 804.

[115] Decision 4P.105/2006 of 4 August 2006 (*X. [Hazza Bin Zayed] v 1. Y [Lissarague], 2. Fédération Française d'Equitation, 3. Emirates International Endurance Racing, the Organising Committee of the FEI Endurance World Championship 2005, 4. Fédération Equestre Internationale [& TAS]*), at 4; ASA Bull (2007) 105, *111*; SRIEL (2007) 99, note Knoepfler.

[116] Decision 4A_506/2007 of 20 March 2008, at 3.2, Swiss Int'l Arb L Rep (2008) 191, at 208. One notes here also that the Supreme Court mentioned that the CAS website expressly indicated that the President of the Panel was the President of the Association (to which the counsel of one of the parties and another arbitrator were also affiliated) and that, given the ease of access to such information, 'the petitioner ought to have at the very least asked himself what this association was all about and whether the other arbitrators, and counsel for the respondent, were members of it', and, as the case may be, to enquire directly with the other arbitrators. As the petitioner did not do so, the Supreme Court concluded that he was 'estopped from complaining that the panel

In other words, though the challenge concerned a CAS arbitration, the Supreme Court did not consider it to be a 'genuine sport arbitration',[117] but rather an ordinary commercial arbitration (which happened to be related to sport). Conversely, one would assume that a more nuanced approach would be required if the arbitration concerned an 'appeal against a decision taken by an organ of a sports federation having accepted the jurisdiction of the CAS' and in which 'a simple professional athlete [is] facing a powerful international federation'. As indicated by the Supreme Court, the two situations differ notably, since ordinary commercial arbitration 'involve[s] parties on equal footing who chose to have their disputes resolved by reference to arbitration and who were well aware of the financial stakes'.[118]

The solution adopted by the Supreme Court is to be welcomed insofar as it further consolidates the principle of the specificity of sports arbitration. That said, it should be qualified in the sense that only the 'weaker' party in the arbitration, that is, the athletes should benefit from this more lenient standard of diligence in discovering grounds for challenge. Moreover, one could question whether the same standard should also apply to athletes represented by experienced counsel. In my opinion, this should not be the case. Accordingly, counsel is requested to undertake all necessary steps to ensure the independence of the arbitrators upon receipt of their disclosure forms. It is true that, in general, arbitrators tend to be rather succinct in their disclosures so that it is legitimate to put additional questions to them, such as, for instance, how often in the past they have been nominated by the federation in question. In my experience, arbitrators are not offended by these questions as they understand very well that such disclosures are a legitimate expectation of the parties. It must be stressed that the relevant questions should be asked at this (early) stage in the proceedings in order not to forfeit one's rights.

As a final matter, it bears emphasizing that a violation by arbitrators of their duty to disclose any conflict of interest does not in itself justify the annulment

was improperly constituted either because he had knowledge at that time of the ground for challenge invoked today or because he would have known such ground if he had acted with the [degree of] diligence required under these circumstances.'

[117] The determining factor is less the procedure before the CAS (appeals or ordinary procedure), but rather the relationship between the parties (subordination or equality). In a recent matter regarding the due diligence required when the independence of an arbitrator is questioned in an application for revision (see Section 4C(ii)), the Supreme Court specifically mentioned that the case involved two parties on equal footing (*«[ein] Schiedsverfahren, in welchem sich zwei gleich starke Parteien gegenüber stehen »*), irrespective of the fact that, technically, the arbitration was conducted according to the CAS appeals procedure (Decision 4A_528/2007 of 4 April 2008, at 2.5.1, Swiss Int'l Arb L Rep (2008) 227, at 238).

[118] It is interesting to note that the Supreme Court refers here to ATF 133 II 235, i.e. the above mentioned *Cañas* case, in which the Court expressly recognized the non-consensual nature of sports arbitration for athletes and notably prohibited the possibility of waiving the right to appeal. In the same judgment, as will be seen further below, the Supreme Court also took into account the specificity of sport arbitrations to allocate lower costs than what it usually orders in commercial arbitrations (Decision 4P.172/2006 of 22 March 2007, at 6, not reproduced in the reported version, ASA Bull (2007) 592, at 609).

of the award.[119] The same applies, *a fortiori*, to the additional 'obligations' resulting from ICAS directives concerning conflicts of interest, in particular the duty (i) for prospective arbitrators to disclose any mandate as counsel—be it in person or by someone from the same law firm—in other cases pending before CAS, and (ii) for appointed arbitrators not to act (or promptly to disclose any mandate accepted) as counsel in another CAS procedure during the same time period.[120]

B. *Jurisdiction Wrongly Assumed or Denied by the Panel*

According to Article 190(2)(b) PILA the arbitral award can be appealed 'if the arbitral tribunal wrongly accepted or declined jurisdiction'.

In cases where the jurisdiction of the CAS is contested, arbitrators should bear in mind that the Supreme Court can freely examine any legal questions arising with regard to their jurisdiction (or lack thereof), including all of the preliminary questions of substance that determine whether the arbitral tribunal has jurisdiction.[121] However, even in jurisdictional challenges, the Supreme Court stresses that it 'is not a court of appeal' and it is not its task to seek in the award sought to be set aside the legal arguments that could justify the jurisdictional complaint: 'it is rather for the petitioner to make such arguments in order to conform to the [above mentioned][122] substantiation requirements'.[123] The Supreme Court's 'hands off' policy in supervising arbitral tribunals is justified because (and only if) the parties have agreed to 'transfer' the jurisdiction of state courts to the arbitrators. Indeed, the statistical data suggest that jurisdictional challenges are significantly more likely to succeed than challenges based on other grounds.[124]

[119] Decision 4P.188/2001 of 15 October 2001, at 2f, ASA Bull (2002) 321, at 327.

[120] In order to 'avoid a situation where the parties acting before the CAS and represented by counsel who are not CAS members, would feel that they are disadvantaged if the opposing party is represented by a CAS member' the ICAS issued the following guidelines: '1. It is the position of the International Council of Arbitration for Sport that a CAS member appointed as an arbitrator in a CAS Panel shall not act as counsel in another CAS procedure during the same time period. 2. In the event that a CAS member is appointed as an arbitrator in a CAS Panel, he/she shall disclose any activity as counsel that he/she or his/her law firm has before the CAS. If, after appointment to a CAS Panel, a CAS member agrees nevertheless to act as counsel in another CAS procedure, he/she must immediately disclose such information to the CAS. 3. In the appeals procedure, the president of a panel shall be appointed only from among the CAS members who do not or whose law firm does not represent a party before the CAS at the time of such appointment' (CAS Press Release of November 2006).

[121] In accordance with this definition, the Supreme Court's power of review may enable it to decide on the arbitrators' competence on the basis of grounds other than those referred to in the award sought to be challenged. In so far as the facts as established by the arbitrators with a view to determining their jurisdiction may allow for and justify such a 'substitution' of grounds by the Supreme Court (a delicate question, in my opinion), the latter will not infringe upon [the principle of] the arbitrators' *Kompetenz-Kompetenz* (Decision 4A_392/2008 of 22 December 2008, at 3.2).

[122] See above, I.4.

[123] Decision 4A_160/2007 of 28 August 2007 at 3.1, Swiss Int'l Arb L Rep (2007) 247, at 255. That said, the obligation to substantiate is limited to the grounds actually put forward by the petitioner and does not extend to the additional arguments that the opposing party put forward in the arbitration against the jurisdictional challenge and that the Panel did not need to discuss in the award (Decision 4A_392-2008 of 22 December 2008, at 2.5.2).

[124] Dasser (n 53) 455.

That said, the Supreme Court will not review the facts found by the Panel to make its ruling on jurisdiction. This can lead to tricky distinctions with respect to the interpretation of the arbitration agreement: under Swiss law, the determination of the parties' actual and common intent is a finding of fact (as such not subject to review by the Supreme Court), whereas the interpretation of the parties' presumed intent is a question of law (that the Supreme Court can review freely).[125]

Article 190(2)(b) PILA allows the parties to challenge the arbitrators' decision as to the arbitrability of the dispute. Under Swiss law, any dispute involving an economic interest may be the subject matter of arbitration (Article 177(1) PILA). This provision comprises all claims that have a financial value for the parties, whether they concern assets or liabilities, i.e. all rights that, for at least one of the parties, involve some interest which can be assessed in financial terms. This ground to set aside plays a minor role in sports matters since the Supreme Court has held that any dispute involving a professional athlete is to be deemed as having a financial value and is thus arbitrable,[126] whatever the nature of the underlying proceedings, in particular irrespective of the fact that disciplinary proceedings are functionally similar to criminal law.[127]

Traditionally, the main problem with respect to the jurisdiction of CAS has been the fact that, more often than not, the arbitration agreement is contained in the regulations of a sports governing body of which the athlete in not a member or is only a so-called indirect member, which raises the well-known issue of the validity of arbitration agreements by reference.[128] The Supreme Court has adopted an increasingly pro-arbitration approach in sports matters. In one of its latest decisions, the Supreme Court has held without hesitation that a player who was a member of a national football federation was bound by the arbitration agreement contained in the FIFA Statutes:

> Art. 1(2) of the [Brazilian FA]'s Statutes provides, *inter alia,* that the athletes affiliated to [it] must abide by FIFA Regulations. This global reference to the FIFA Regulations, and thereby to FIFA's and WADA's right of appeal which is set out in the FIFA Statutes, suffices to establish the jurisdiction of CAS under article R47 of the CAS Code, *in accordance with the case law recognising the validity of a global reference to an arbitration agreement contained in a Federation's statutes.*[129]

[125] See the decisions cited in Berger and Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz no 417 (Bern 2006) 143, specifying that the only possible ground for setting aside in these cases is the violation of the fact-finding procedure as set out in Article 182(3) PILA.

[126] Decision 4P.230/2000 of 7 February 2001 at 1, ASA Bull (2001) 523, at 526.

[127] Decision 4P.149/2003 of 31 October 2003, SRIEL (2005) 177.

[128] On these issues, see Stephan Netzle, Jurisdiction of arbitral tribunals in sports matters: arbitration agreements by reference to regulations of sports organizations, in Arbitration of sports-related disputes (Basel 1998) 45–58.

[129] Decision 4A_460/2008 of 9 January 2009, 6.2., ASA Bull (2009) 540, 545 loose translation, emphasis added.

Article 190(2)(b) PILA also allows for the setting aside of awards where the CAS has accepted jurisdiction even though the relevant federation's internal review mechanisms had not been exhausted.[130] By way of contrast, the question whether a party has standing to appeal before CAS concerns the merits of the dispute and can thus not be reviewed by the Supreme Court pursuant to Article 190(2)(b) PILA.[131] Similarly, it is submitted that the question whether an appeals procedure before CAS was filed within the applicable time-limit according to Article R49 of the CAS Code also relates to the merits and should thus not be reviewed by the Supreme Court.[132]

By relying on Article 190(2)(b) PILA, athletes can challenge the arbitration agreement by invoking the fact that they did not consent to that arbitration agreement or clause or that the consent given by way of a signature on a license or registration form was not freely given. In the *Cañas* case, however, the Supreme Court clearly stated that the inherently compulsory nature of sports arbitration does not affect the validity of the arbitration agreement. This departure from the principle of the consensual nature of arbitration is justified in sports matters mainly based on the consideration that CAS arbitration is aimed at 'favouring the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality'.[133] Accordingly, as recently recalled by the Supreme Court, the *Cañas* decision shall not be interpreted as questioning (or be used to question) the validity of the arbitration agreements contained in sports regulations.[134]

The preceding developments show that, with respect to the validity of the arbitration agreement, the Swiss Supreme Court has developed a clear 'pro-CAS arbitration' case law. Indeed, in practice the only real jurisdictional problems tend to occur in contractual disputes, such as those arising in football matters, where the parties have concluded various contracts containing different arbitration clauses, with the result that one agreement may provide for CAS arbitration while another calls for recourse to, say, a national arbitration institution,[135] or in cases where the various applicable sports regulations contain overlapping or contradictory arbitration clauses.[136]

[130] Decision 4P.149/2003 of 31 October 2003, at 2.2.1, SRIEL (2005) 117.

[131] Decision 4A_424/2008 of 22 January 2009, at 3.3.

[132] See Antonio Rigozzi, Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente, in Le temps et le droit – Recueil de travaux offerts à la Journée de la Société suisse des juristes 2008 (Helbing and Lichtenhahn, Basel 2008) 267–9. The issue was left open by the Supreme Court in its Decision 4A_392-2008 of 22 December 2008, *passim*.

[133] ATF 133 III 235, *245*, Swiss Int'l Arb L Rep (2007) 65, at 88; see also Decision 4a_18/2008 of 20 June 2008 at 3.3, ASA Bull (2008) 771, at 776, emphasizing that the *Cañas* decision cannot be relied upon to challenge the Panel's jurisdiction.

[134] Decision 4A_18/2008 of 20 June 2008, at 3.3, where the Supreme Court has explicitly held that 'the validity of arbitration agreements (and therefore of the parties' waiver of their right to bring disputes before state courts and to benefit from the Supreme Court's attendant power of review) is subject to requirements which are less strict than those applicable to waivers under Article 192 PILA'.

[135] Decision 4A_42/2007 of 13 July 2007, at 5, ASA Bull (2008) 121, at 126–8.

[136] Decision 4A_392/2008 of 22 December 2008, at 3.2, ASA Bull (2009) 547, 556.

As a final matter, it should be recalled that when a CAS Panel—as for instance in the *Stanley Roberts* case[137]—decides on its jurisdiction in a preliminary award pursuant to Article 186(3) PILA, the action to set aside can and must be filed immediately against that award (Article 190(3) PILA).[138] More generally, the Swiss Supreme Court considers that in accordance with the principle of good faith and the prohibition against abuse of rights, it is inadmissible for a party not to raise formal objections, which could have been raised at an earlier stage in the proceedings, until after the outcome of these proceedings has turned out to be unfavourable to such party.[139] This principle is reflected in Article 186(2) PILA, which provides that a plea of lack of jurisdiction must be raised prior to any defence on the merits. Hence, the athlete who himself filed the original appeal[140] with the CAS or did not challenge the Panel's jurisdiction in a timely manner during the arbitration cannot later contest such jurisdiction in an action to set aside the award. On the other hand, arbitrators should remember that questions regarding their jurisdiction only arise if the latter is contested. Recently, however, a CAS Panel declined jurisdiction even though respondents had not raised objections in that respect.[141]

C. *Award* Ultra *or* Infra *Petita*

Pursuant to Article 190(2)(c) PILA an arbitral award can be set aside 'if the arbitral tribunal's decision went beyond the claims submitted to it, or if it failed to decide one of the items of the claim', the latter being a concept by which 'one should understand the parties' prayers for relief'.[142]

Arbitrators decide *ultra* or *extra petita* when they adjudicate more or something different from what was sought in the parties' prayers for relief,[143] and *infra petita* when they omit or fail, without specific legal arguments, to deal with a claim brought before them.[144]

The grounds set out in Article 190(2)(c) PILA should not be underestimated by CAS arbitrators, in particular as long as the CAS does not have the resources to carry out a genuine scrutiny of the award such as that performed,

[137] CAS 2000/A/262, *Stanley Roberts v FIBA*, CAS Digest II, 377.

[138] The same applies to any other preliminary decision handed down by the CAS in which it recognizes, at least implicitly, its jurisdiction (Decision 4A_370/2007 of 21 February 2008, Swiss Int'l L Rep (2008) 89, at 115–17).

[139] ATF 132 II 485, at 496.

[140] Decision 4a_18/2008 of 20 June 2008, at 3.3, ASA Bull (2008) 771, 776, see also Poudret and Besson (n 5), no 796, 777, who state that this would constitute *venire contra factum proprium*.

[141] CAS 2007/A/1227 of 4 May 2007; Decision 4A_204/2007 of 5 November 2007, ASA Bull (2008) 165.

[142] The Supreme Court has translated '*chefs de la demande*' (or *Rechtsbegehren, conclusioni, prayers for relief*) with 'claims' in English. Decision 4P.96/2002 of 9 January 2007, at 4.2, ASA Bull (2007) 560, at 564.

[143] ATF 120 II 172, at 175. Note that the ground of *infra petita* coincides with the formal denial of justice as found in Article 29(1) of the Swiss Constitution (ATF 115 II 288, at 293).

[144] Corboz (n 72), 20.

for instance, by the Court of Arbitration of the ICC. Indeed, inadvertences as to what is actually awarded can have far reaching consequences. For instance, in a recent doping case, a CAS Panel ordered the restitution of prizes won—a remedy provided for by the applicable regulation—though the appellant had simply requested the disqualification based on the doping offence and the other parties' claims were limited to the dismissal of the appellant's claims.[145] As a general rule, arbitrators should keep in mind the danger of deciding *ultra petita* in doping matters where the appealing athlete requests the lifting of the sanction while the responding federation only requests that the first instance decision be confirmed. In such cases, the arbitrators cannot go beyond what the federation has requested even if they believe a higher sanction would be appropriate.

By contrast, *ultra* or *extra petita* grounds for setting aside the award will not be applicable in situations where an arbitral tribunal grants relief for legal reasons different from those raised by the parties. In application of the principle *iura novit curia* arbitrators, like judges, are free to rely on legal arguments other than those invoked by the parties,[146] to make changes to the parties' legal reasoning[147] or to draw logical conclusions from the parties' submissions, even when these do not contain express prayers in the same sense.[148]

One may find it somewhat paradoxical that the ground of *infra petita* may lead to the setting aside of an award that deals with certain prayers for relief because it does not deal with others. Even though the CAS Code does not provide for the possibility of requesting an additional award, it is submitted that in order to file an action to set aside based on *infra petita* a party should first exhaust the possibility of asking the Panel or the CAS Court Office to render an additional award (deciding the point left open). That said, until the Supreme Court has ruled on this point, it is recommended to file, in parallel, both a request for an additional award with CAS and setting aside proceedings against the award based on the *infra petita* ground with the Supreme Court, whilst also requesting the latter to stay the proceedings until the CAS has ruled on the request for an additional award. Be it as it may, and to conclude on a pragmatic note, it is suggested that arbitrators who wish to avoid frivolous appeals based on *infra petita* should specify at the end of the operative part of their award that 'all other or further claims are rejected'.[149]

[145] CAS 2006/A/1046 of 9 August 2006, available at <http://old.fei.org/legal/PDFS/CAS_2006_A_1046.pdf> accessed 22 January 2010.
[146] ATF 120 II 172, *175* at 3a.
[147] Decision of 2 March 2001, ASA Bull (2001) 531, at 535; ATF 120 II 172, 175 at 3 a.
[148] Decision 4P.143/2001 of 18 September 2001, at 2 c., ASA Bull (2002) 311, at 315 according to which an appeal under Article 190(2)(c) PILA in these circumstances could constitute an abuse of rights.
[149] Decision 4P.269/2003 of 6 May 2004, ASA Bull (2005) 477.

D. *Violation of Due Process*

Pursuant to Article 190(2)(d) PILA, an arbitral award can be set aside 'if the principle of equal treatment of the parties or the right of the parties to be heard in adversarial proceedings was violated'. This ground sanctions (i) the violation of the procedural guarantees set out in Article 182(3) PILA, (ii) as well as a specific aspect of the parties' right to be heard, namely the arbitrators' failure to consider important allegations, (iii) and the prohibition against taking the parties by surprise.

(i) *The procedural rights guaranteed by Article 182(3) PILA*

The Supreme Court has reiterated at various times that this ground for setting aside an award is intended to safeguard the fundamental principles of due process that, pursuant to Article 182(3) PILA, the arbitrators have to observe irrespective of the applicable procedural rules.

In order to avoid any misunderstanding, one should clarify that this ground does not concern the rules of procedure adopted by the parties or contained in the applicable arbitration rules.[150] Thus, for example, the fact that the CAS accepts a party's submission after the time limit fixed by the CAS Code has expired will not entail the setting aside of the award. However, if the CAS refuses to accept a reply to that submission, if submitted with a similar delay, this may give rise to a violation of the principle of equal treatment of the parties.

(a) *The Principle of Equal Treatment of the Parties.* The first fundamental right guaranteed by article 182(3) PILA and sanctioned by Article 190(2)(d) PILA is the principle of equal treatment of the parties. This principle requires that the arbitrators regulate and conduct the proceedings in such a way as to afford each party the same opportunity to bring forward its case.[151]

(b) *The Right to be Heard in Adversarial Proceedings.* The expression 'right to be heard in adversarial proceedings' entails two separate procedural principles which are guaranteed by article 182(3) PILA and sanctioned by Article 190(2)(d) PILA.

The principle of *adversarial process* (*principe du contradictoire*) guarantees to each party the right to examine all evidence adduced by the opposite party and to rebut the latter's allegations by its own factual allegations, legal arguments and evidence.[152]

The *right to be heard* guarantees each party's right to present its views on the essential facts, to argue its legal points, to produce pertinent evidence, to

[150] ATF 117 II 347.
[151] Decision 4A.244/2007 of 22 January 2008, at 6.2, ASA Bull (2008) 360, 368.
[152] Corboz (n 72) 22.

participate in the evidentiary proceedings and to have access to the arbitration file.[153]

In practice, and sports litigation is no exception, among the procedural rights guaranteed by Article 190(2)(d) PILA, the right to be heard plays the main role, in particular the right to present evidence. However, in light of the Supreme Court's jurisprudence, this ground to set aside an award has little chances of success for the following three main reasons:

— To avoid problems at the appeals stage the arbitrators are generally careful to specify that the evidence they disregarded was either (i) not presented within the time limit or not submitted in the manner prescribed or (ii) did not pertain to a relevant fact.[154]
— The Supreme Court refuses to set aside an award when the challenged decision rests on several alternative reasons and where only one of those reasons is tainted by a breach of the right to be heard.[155]
— As with the other grounds for setting aside arbitral awards, the Supreme Court requires that the party considering that its right to be heard has been breached must protest immediately during the arbitration proceedings (and not only after receiving the award),[156] failing which it is deemed to have waived the right to complain at a later stage.[157] Experienced arbitrators will ask the question at the end of the hearing and mention in the award that none of the parties has raised objections as to conduct of the proceedings. A party claiming that it did raise procedural objections will have to establish its claim by showing that the panel's factual findings were made in violation of the fundamental principles of procedural law (See Section 2D(v)).[158]

Therefore, it does not come as a surprise that the only cases in which the Supreme Court has set aside a CAS award based on a breach of the right to be heard were related to two very peculiar elements of this ground to set aside, namely (i) the arbitrators' failure to consider important allegations, and the (ii) 'prohibition of taking the parties by surprise'.

(ii) *Failure to consider important allegations or arguments*

According to the Supreme Court's case law, the parties' right to be heard in adversarial proceedings does not require that an international arbitral award should set out its reasons but it does include a minimum duty for the

[153] ATF 127 III 576, consid. 2c, JdT 2002 I 208, *210.*
[154] Indeed, the parties do not have an unlimited right to adduce evidence, but only such evidence which is material and relevant to adjudicate the case (ATF 119 II 386, *389*).
[155] Decision 4P.62/2004 of 1 December 2004, ASA Bull (2005) 483, at 487 quoting ATF 115 II 300.
[156] Of course, this restriction does not apply when a party becomes aware of the violation of its right to be heard only once it reads the award.
[157] ATF 119 II 386, at 388.
[158] Decision 4A_176/2008 of 23 September 2008, 3.2.

adjudicator to examine and deal with the issues relevant to the decision.[159] Accordingly, the parties' right to be heard is breached when the arbitrators, whether by inadvertence or due to a misunderstanding, fail to consider allegations or arguments made and evidence filed or tendered by either party which are important for the decision to be made.[160] This would constitute a formal denial of justice given that in such case the affected party is placed in the same position as if it had not been able to present its case to the arbitrators at all.[161]

This ground for appeal was successfully invoked in the well known *Cañas* case. In this matter, an Argentinean tennis player challenged his suspension based on a variety of reasons, which the CAS Panel summarized in the factual part of the award. However, in the section of the award where it discussed the merits of the case, the CAS Panel reviewed all arguments but one—namely, the (alternative) argument that (if the conditions for an imposition of a sanction under the applicable anti-doping regulations were met) the suspension imposed was incompatible with the relevant national law, in particular competition law, and general principles of law, in particular the principle of proportionality. Cañas submitted that by ignoring these arguments, the Panel had breached his right to be heard.

The Supreme Court held that the party invoking a formal denial of justice has the burden to prove (i) the omissions by the arbitrators and, on the basis of the reasons set out in the award, and (ii) that these omissions were such as to have a bearing on the outcome of the dispute. Where, as in *Cañas*, 'the award entirely fails to mention points which are important for the resolution of the dispute', then it will be for the arbitrators or the respondent to explain (in their answer and comments to the application to set aside) the reason(s) for such omission by demonstrating that the elements omitted were not relevant to the dispute or if they were, that they had been implicitly rejected by the arbitrator.[162] In the case at hand, the Supreme Court noted that since the CAS Panel had 'completely failed to mention the petitioner's alternative arguments when it examined the merits of the case' and 'did not make any comments on the application to set aside [...] the reasons for the tribunal's silence are unknown to this court' and it thus set aside the award. [163]

What can CAS arbitrators learn from *Cañas*? First of all, and this is the most obvious answer, that their awards must indicate why they do not address

[159] Decision 4P.26/2005 of 23 March 2005 at 3.2, ASA Bull (2005) 704, at 706. Even assuming that the arbitrators were under the same requirement to provide reasons as state judges, they would not have a duty to discuss each and every argument made by either party; therefore, they will not be regarded as being in breach of the parties' right to be heard and their own duty to provide minimum reasons for failing (even by implication) to dismiss a point which is objectively devoid of any relevance to their decision (ATF 133 III 235, *249,* Swiss Int'l Arb L Rep (2007) 65, at 96).

[160] ATF 121 III 331, at 333.

[161] ATF 127 III 576, at 579.

[162] ATF 133 III 235, at 249, Swiss Int'l Arb L Rep (2007) 65, at 95, noting that requesting the petitioner to establish the reason(s) why the point under consideration was omitted from the reasons would be tantamount to ask him 'to provide a *probatio diabolica*'.

[163] ATF 133 III 235, at 250, Swiss Int'l Arb L Rep (2007) 65, at 97.

arguments put forth by the parties, unless it is easily recognizable that such arguments were either irrelevant or implicitly dismissed. Should the arbitrators fail to comply with this obligation (or the CAS Counsel in charge of the matter fail to draw their attention to it), the CAS Court Office must ensure that it is observed when scrutinizing the award. Of course this implies that the CAS should be given the resources to perform a proper scrutiny of the ever increasing number of awards rendered. In any case, should such an oversight occur and survive scrutiny, the CAS has another chance to rectify the situation at the stage of the setting aside proceedings, as arbitrators are allowed to supplement the reasons of their award when the Supreme Court invites them to file their observations on the application to set aside.[164] If the CAS fails to do so, it exposes (not only the award to the risk of being set aside, but, much worse) the respondent to the risk of being ordered to pay unnecessary costs and expenses in relation to the proceedings before the Supreme Court, for failures for which it bears no fault whatsoever.[165] One could even wonder if, in such cases, the CAS should not reimburse those costs.

(iii) *Taking the parties by surprise*

As already mentioned and in accordance with the maxim of *iura novit curia*, an arbitral tribunal may base its findings on legal principles that were not argued by the parties. However, the arbitral tribunal may not take the parties by surprise by applying legal provisions or principles that neither party could reasonably have expected it to apply.[166]

This principle recently led to the setting aside of a second CAS award in the so-called *Urquijo Goitia* case between a Spanish player's agent and a Brazilian player domiciled in Portugal.[167] The CAS Panel considered that the agency contract was governed by the FIFA Regulations and, subsidiarily by Swiss law. On that basis, the arbitrators held that the contract was null and void pursuant to the Swiss Federal Act on Service of Labour and Lease of Services (LSE)[168], despite the fact that none of the parties had ever relied upon the LSE during the proceedings. The Supreme Court held that such a decision had taken the parties by surprise since the dispute had no objective link with Switzerland (besides the subsidiary application of Swiss law) and because it considered

[164] Poudret and Besson (n 5) No 748, 699.

[165] While it is easy for the arbitrators to say why, in their reasoning, the elements omitted were either not relevant to the dispute or, if relevant, implicitly rejected by them, such a showing is almost impossible for the respondent. In other words, if the arbitrators fail to provide comments, the respondent will bear the very *probatio diabolica* the Supreme Court wanted to spare the petitioner by shifting the burden to the arbitrators and the respondent (see n 162 above).

[166] AFT 130 III 35, at 38–40; ASA Bull (2002) 548, at 550; ASA Bull (1997), 316, at 329.

[167] Decision 4A_400/2008 of 9 February 2009, at 3.2, ASA Bull (2009) 495, 498–500.

[168] Loi fédérale sur le service de l'emploi et la location de service (LSE), available at: <*http://www.admin.ch/ch/f/rs/c823_11.html*> accessed 22 January 2010. For a brief summary of the bearing of the LSE in sport agency matters, see Antonio Rigozzi, 'Switzerland' in Robert Sieckmann and others (eds) *Players' Agents Worldwide* (The Hague 2007) 525–40.

manifest that the LSE would be applicable only if the agent had its place of business in Switzerland. Hence, it set aside the award.

The lessons to be drawn by arbitrators from the *Urquijo Goitia* matter are spelled out in the Supreme Court's decision: 'the CAS should, at the very least, have solicited the parties' comments on the issue of the applicability of the LSE, and invite them to put their arguments forward in this respect'. Even if in most cases a failure to do so is an innocent inadvertence, arbitrators should be very cautious in this respect, as it will not always be easy to spot this kind of flaw in the course of the scrutiny of the award that is to be carried out pursuant to Articles R46 and R59 of the CAS Code.

Here too, the CAS or the respondent may well try to explain why such legal reasoning cannot be deemed to have taken the parties by surprise, but that would be, in any event, an arduous undertaking.

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The specific breaches of the parties' right to be heard discussed in this section, failure to consider important elements and taking the parties by surprise, constitute the only instances in which the Supreme Court will accept to discuss, albeit indirectly, the merits of the award.[169] In all other cases, the Supreme Court will 'review an award [...] from a substantive point of view only as to the question whether it is compatible with public policy',[170] the point I shall turn to now.

D. *Violation of Public Policy*

According to Article 190(2)(e) PILA an award can be set aside 'if the award is incompatible with public policy'. The definition of the contours and contents of the notion of public policy has given rise to passionate discussions, both in the jurisprudence and among commentators.[171] The Supreme Court considers that it covers only fundamental principles that are widely recognized and should underlie any system of law according to the prevailing conceptions in Switzerland.[172]

In the words of Justice Corboz—the former Chairman of the 1st Civil Law Chamber dealing with actions to set aside arbitral awards—the invoked principle does not need to be universally recognized, as the Swiss Supreme Court is willing to maintain control and to defend if necessary fundamental values strongly embedded in the Swiss legal tradition, even if such values are

[169] The result is quite paradoxical. It the panels in *Cañas* and *Urquijo Goitia* had come to the same result by a manifestly incorrect application of the legal principles (invoked as a subsidiary argument by *Cañas* or actually discussed by the parties in *Urquijo Goitia*) the awards would not have been set aside because, despite such legal flaws, they would not have been considered as being against public policy.

[170] Decision 4A_17/2007 of 8 June 2007, Swiss Int'l Arb L Rep (2007) 235, at 241 referring to ATF 121 III 331, at 333.

[171] See the summary in ATF 132 III 389, at 392 *ss.*

[172] ATF 132 III 389, at 395.

not necessarily shared in other (equally important) parts of the world.[173] This means for instance that the Supreme Court will not consider whether an award is compatible with EU competition law, irrespective of whether such an award could be enforced within the EU. Among the principles that can be considered as belonging to public policy within the meaning of Article 190(2)(e) PILA the Supreme Court invariably lists 'the doctrine *pacta sunt servanda*, the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition against discrimination and the protection of minors and other persons incapable of legal acts'.[174]

The principle *pacta sunt servanda*, which is the one more often relied upon before the Supreme Court, is breached only when an arbitral tribunal finds that a given contract exists between the parties, but ignores the consequences resulting therefrom, or—conversely—when the arbitral tribunal finds that there is no contract between the parties and yet it finds that a party owes a contractual duty to the other.[175] Complaints that the arbitrators failed to apply, wrongly applied, misinterpreted or misconstrued a given contractual provision do not amount to a violation of *pacta sunt servanda*. In sports matters, the same is true with respect to any given provision of sports statutes, bylaws or regulations.[176] Accordingly, the Supreme Court has held that the following allegations are not sufficient to establish a violation of the principle *pacta sunt servanda*:

— The CAS panel considered that the contract at stake had been concluded under a condition precedent and that such condition had not been met in the case at hand.[177]
— The CAS panel considered that the parties were bound by a contract and awarded a remedy which was not provided for by that contract.[178]
— The CAS panel's analysis of the contract was 'beside the point' and its decision legally wrong.[179]

The other principles often relied upon to challenge CAS awards pursuant to Article 190(2)(e) are the prohibition against abuse of contractual or legal rights and the principle of good faith. The Supreme Court discussed these principles in a case in which the CAS upheld an appeal by World Anti Doping Association (WADA) seeking (as it often does) a sanction more severe than that imposed on an athlete by the decision in the first instance, despite the fact that WADA had not made use of its faculty to challenge that decision already before

[173] Corboz (n 19), at 154, 650–1.
[174] Decision 4A_17/2007 of 8 June 2007 at 4.1, translated in Swiss Int'l Arb L Rep (2007) 235, at 242.
[175] Decision 4A_258/2008 of 7 October 2008 at 4.2, ASA Bull (2009) 137, 142.
[176] Decision 4A_370/2007 of 21 February 2008 at 5.5, Swiss Int'l Arb L Rep (2008) 89, at 125.
[177] Decision 4A_176/2008 of 23 September 2008, at 5.2, ASA Bull (2009) 128, 135.
[178] Decision 4A_370/2007 of 21 February 2008 at 5.5, translated in Swiss Int'l Arb L Rep (2008) 89, at 124.
[179] Decision 4A_42/2007 of 13 July 2007 at. 6.3, translated in Swiss Int'l Arb L Rep (2007) 211, at 229.

the internal bodies of the federation. The Supreme Court ruled out a violation of the principle of good faith since the WADA Code explicitly grants WADA such a right to appeal against the last instance decision irrespective of its participation in the internal proceedings, so that the athlete had to expect that the WADA might appeal against the last-instance decision to the CAS. Moreover, since the right of appeal to CAS is meant to ensure that national bodies will comply with the international standards of the WADA Code and given that the CAS arbitration rules provide for a *de novo* hearing (Article R58 of the CAS Code), the athlete could not be surprised that WADA used its right to appeal to seek a longer suspension (according to what it considers to be required by the WADA Code).[180]

Recently, athletes have also tried to invoke the principle of *prohibition against discrimination*. The Supreme Court has adopted a very narrow interpretation of this principle by holding that an act, measure, or decision is discriminatory only if it unlawfully infringes the personality rights of a person by considering that person 'solely on the basis of his or her sex, race, health condition, sexual preference, religion, nationality or political opinions'.[181]

In the field of sports arbitration, the violation of public policy is most often raised (without success) with regard to doping sanctions. Applying the above-mentioned principles, the Supreme Court has found in particular that:

— The so-called 'strict liability' principle and the imposition of doping sanctions regardless of the effect of prohibited substances on athlete's performances are not contrary to public policy.[182] Doping sanctions being private in nature, the athletes cannot rely on the principle of the presumption of innocence under Article 190(2)(e) PILA.
— Both the automatic annulment of the results obtained and the imposition of a two-year ineligibility period as a consequence of doping, without taking into account the degree of fault attributable to the athlete, do not amount to breaches of public policy.[183] The fact that athletes may be (and often) are treated unequally does not amount to a discrimination giving rise to a breach of Article 190(2)(e) PILA as interpreted by the Supreme Court.

It is submitted that only sanctions that would appear as totally at odds with the principle of proportionality could possibly, under the circumstances, amount to a violation of public policy.

Moreover, the Supreme Court has consistently held that an award will be set aside only when it is incompatible with public policy not just because of its

[180] Decision 4A_17/2007 of 8 June 2007 at 5, translated in Swiss Int'l Arb L Rep (2007) 235, at 244.
[181] Decision 4A_370/2007 of 21 February 2008 at 5.4, translated in Swiss Int'l Arb L Rep (2008) 89, at 123, referring to Decision 4P.12/2000 of 14 June 2000 at 5a/aa.
[182] Decision 4P.105/2006 of 4 August 2006, at 8(2), ASA Bull (2007) 105 at 120–1.
[183] Decision 4P.148/2006 of 10 January 2007, at 7. (concerning arbitrariness under the *Concordat*), ASA Bull (2007) 569 at 576ff.

reasons, but also because of the result to which it gives rise.[184] Furthermore, the Supreme Court considers that even a manifestly wrong application of a rule of law or an evidently false factual finding do not justify the setting aside of an award.[185] As a result, one can fairly say that, in practice, arbitrators enjoy an almost absolute freedom as to how they decide a case on its merits—the Supreme Court's control in this respect being virtually non-existent.

In the light of the foregoing discussion it comes as no surprise that that no award, not since the coming into force of the PILA in 1989, has ever been annulled for non-compliance with public policy, although there has been no dearth of attempts.[186]

One may think that such restraint in the control exercised over the merits of awards is unfair towards the athletes, given that, as accepted by the Supreme Court, arbitration is imposed upon them by their federations. It is thus possible to argue that a slightly less restrictive definition of public policy should be adopted in sports matters[187] that would allow the Supreme Court to set aside grossly unfair decisions against athletes. Recently, Professor Margareta Baddeley has even called for a 'redefinition of the public policy' under which the Supreme Court could freely review whether CAS has complied with the 'essential rights of the athletes'.[188] Such a broad redefinition would run against the principle that state courts do not review arbitral awards on the merits. On the other hand, one can also think that some sort of control by the Supreme Court would constitute a minimum quality guarantee of the arbitrators' work on the merits and that the athletes should be allowed such a guarantee given that they were compelled to accept arbitration.

So far, the Supreme Court has not gone down this road.[189] It is submitted that this hands off approach is acceptable as far as CAS awards are fundamentally fair on the merits. Of course, CAS arbitrators and CAS as an arbitral institution bear the main responsibility of ensuring that such remains the case, but athletes' counsel also have to play their role in making sure that the arbitrators have been presented with all the arguments that could be made on behalf of the athlete so as to ensure that the arbitrators will have to address all the relevant issues to come to a correct and fair result.

[184] Decision 4A_42/2007 of 13 July 2007 at 6.1 translated in Swiss Int'l Arb L Rep (2007) 211 at 228 quoting *inter alia* ATF 120 II 155, 166ff.
[185] Decision 4A_18/2008 of 20 June 2008, at 2.2, ASA Bull (2009) 771, 774.
[186] Dasser (n 53).
[187] In this sense, see the analysis in Rigozzi (n 105), 732ss.
[188] Margareta Baddeley, La décision *Cañas* : nouvelles règles du jeu pour l'arbitrage international du sport, Causa Sport (2007) 155 at 161; and 'Droits de la personnalité et arbitrage - le dilemme des sanctions sportives' in: Peter Gauch and others (eds) *Mélanges en l'honneur de Pierre Tercier* (Zurich 2008) 707, at 722–3.
[189] Walter (n 1) 165.

4. *Revision (révision) of CAS Awards*

In Swiss legal terminology, *révision* (*Revision*, *revisione*) constitutes an extraordinary legal remedy which allows for the reconsideration of an award, whose substance has already become *res iudicata*, for very specific and limited reasons. For the purposes of this article, I will use the term 'revision' to refer to this remedy.

The PILA contains no express provisions relating to the revision of arbitral awards. The Supreme Court considered that this was a *lacuna* that needed to be filled and has declared that Federal law provides the parties to an international arbitration with the exceptional remedy of revision, whereby jurisdiction lies with the Court itself.[190]

A. *Admissibility* (Recevabilité)

The Supreme Court is the court of competent jurisdiction to hear requests for revision of all international arbitral awards, be they final, partial or interlocutory, including awards on jurisdiction.[191]

In my opinion, the jurisdiction of the Supreme Court is not mandatory, so that it should be possible for a party to derogate from it by contractually assigning jurisdiction to the arbitrators. Indeed, a CAS Panel has asserted jurisdiction to hear a request for revision submitted to it by way of an ad hoc arbitration agreement following the publication of a scientific study showing that the prohibited substance found in the body of the athletes in question could derive from the digestion of certain plants typically found in the region where the competition and the anti-doping test took place.[192] Of course, the Supreme Court's jurisdiction remains available to the parties if they fail to agree to the jurisdiction of the CAS or if the latter refuses to hear the application for revision.

With specific regard to interlocutory awards, what matters is not whether they cause irreparable damage to the petitioner, but rather whether said awards are 'final', in the sense that the arbitrators will not revisit their decision, as they would be able to do, for instance, when they expressly reserve their right to do so.[193] In practice, one will have to distinguish such interlocutory awards from 'simple procedural orders or directives which can be modified in the course of the proceedings'.[194]

[190] Decision 4A_528/2007 of 4 April 2008, Swiss Int'l Arb L Rep (2008) 227 at 233 quoting ATF 129 III 727 at 728 and the leading *Perrodo* case ATF 118 II 199.

[191] ATF 122 III 492; Decision 4P.102/2006 of 29 August 2006, at E. 1, extracts published in SRIEL (2007) 102. In other words, the limitations which normally apply to the admissibility of actions to set aside interlocutory awards (see Section 2B(ii)(b)), do not apply to requests for revision of such awards, which is open for all the grounds for revision.

[192] CAS 2000/A/1270 *Meca Medina & Majcen v FINA*, unreported. See also CAS 2008/A/1557 of 22 July 2009 at 4.2, reported in Zeitschrift für Sport und Recht 46.

[193] ATF 134 III 286, *287*.

[194] Decision 4A_234/2008 of 14 August 2008, at 1 (free translation).

The formal conditions for admissibility of applications for revision are those set out in Articles 124 *et seq*. SCA, applied by analogy. These provisions are self-explanatory and do not call for specific remarks.[195]

Pursuant to Article 124(1)(d) SCA for the revision of the Supreme Court's own judgments, the application is to be filed within 90 days from the discovery of the ground for revision, but at the earliest after publication of the reasoned (*vollständigen*) decision.[196]

The Supreme Court has held that it was doubtful that the remedy of revision could fall within the scope of Article 192(1) PILA and could thus be excluded contractually by the parties.[197]

B. *Procedural Issues*

In international arbitration, the only grounds for revision that can be relied upon are those set out in 123 SCA, which is applicable by analogy.[198] Article 123 SCA provides for two possible cases of revision:

— First, where the decision 'has been influenced to the petitioner's detriment by a crime or a felony' (Article 123(1) SCA);
— Secondly, where 'the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which he could not rely upon during the previous proceedings' (Article 123(2)(a) SCA).

In order to illustrate the possible scenarios, one could imagine a doping case in which the athlete claims, but is unable to prove, that he or she has been a victim of sabotage:

— If the athlete were to lodge a criminal complaint against unknown persons and this were to result, subsequent to the award, in the conviction of a person for having sabotaged, say, the athlete's toothpaste, the circumstances would fall squarely within the scope of Article 123(1) SCA, which would not be the case if the criminal proceedings had ended in an acquittal or dismissal of the case.
— If the criminal proceedings, without identifying the authors of the sabotage, were nonetheless to establish that sabotage did take place (ie by means of

[195] For the issues which may arise in connection with the application by analogy of these provisions to arbitral awards, see Antonio Rigozzi and Michael Schöll, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG (Basel 2002) 26–9, whose comments apply *mutatis mutandis* to the new regime under the SCA.

[196] ATF 134 III 286 at 287. The time limit for revision for matters covered by Article 123(2)(a) SCA expires ten years from the coming into force of the arbitral award (Article 124(2)(b) SCA).

[197] Decision dated 2 July 1997, ASA Bull (1997) 494 at 497. Another argument against the legality of such an exclusion is that the possibility of a revision becomes even more important given that under Swiss law, the parties can exclude appeals against the arbitral award (Laurent Lévy: Observations, Stockholm International Arbitration Review, 2006, p.186).

[198] The Supreme Court's case law was developed under the procedural system of the now repealed Federal Judicial Organisation Act (FJOA), according to which the parties were entitled to rely on the grounds for revision set out in Art 137 FJOA and Arts 140–143 FJOA were applicable to the proceedings *mutatis mutandis*. The principles set out in these decisions still apply as part of the procedural system contained in the new SCA (see Decision 4A_528/2007 of 4 April 2008, Swiss Int'l Arb L Rep (2008) 227 at 234 quoting ATF 134 III 45 at 47).

fingerprint evidence or telephone taps), then Article 123(2)(a) SCA would apply.

— The hypothetical announcement by the manufacturer of that particular brand of toothpaste that a defect in the manufacturing process has led to the contamination of several batches of toothpaste, including those sold in the athlete's country of residence, with the prohibited substance which was discovered in the athlete's body would also be a new development that could pave the way for a revision under Article 123(2)(a) SCA.
— In my view, if the athlete could prove that a change in the 'jurisprudence' of the competent internal sports bodies or of the CAS has occurred, which would be more favourable, this too could be a basis for a revision.[199] By contrast, the entry into force of the revised WADA Code does not constitute a ground for revision, since Article 25.3 allows the athlete sanctioned under the more stringent provision of the previous version of the Code to apply for a 'reduction in the period of ineligibility in light of the 2009 Code' if such period has not elapsed yet.
— The fact that a substance is removed from the prohibited list does not constitute a ground for revision for the athletes who were disqualified or suspended under the previous list. For instance, Andreea Raducan could not have filed for revision of the IOC's decision to strip her gold medal in gymnastics at the Sydney Olympics following WADA's subsequent decision not to include Pseudoephedrine in the prohibited list.[200] If WADA acknowledges that a substance was removed from the list as a consequence of expanding scientific knowledge with respect to its influence on the performance, one could think that this new scientific evidence can be taken into account as a ground for revision to seek to reduce the length of the sanction, but not to set aside the disqualification and the finding that an anti-doping rule violation was committed. After all, the substance was prohibited at the relevant time and revision is not designed to promote fairness as such.

As a matter of principle, an application for revision based on 'breach of procedural rules' according to Article 121 SCA[201] is not available in arbitration matters because those violations can already be invoked in an action to set aside pursuant to Article 190(2)(a) (c) or (d). The only exception could be Article 121(a) SCA, which provides for revision in case of breach of the provisions regarding the composition of a court or the challenge and withdrawal of a judge. Indeed, according to Article 124(1)(a) SCA, such a

[199] See Rigozzi and Schöll (n 195) 40, where we nonetheless recall a much older decision which indicated that a change in jurisprudence is not a case for revision.

[200] Pseudoephedrine was on the banned substances IOC list until 2004, when the WADA list replaced the IOC list.

[201] Under the heading 'violation of procedural rules', Article 121 SCA provides that 'revision can be requested [. . .] a. if the provisions concerning the composition of the tribunal or relating to challenges have not been complied with; b. if the tribunal has granted to a party relief which is either in excess of or, in the absence of a legal provision authorizing it to do so, different from that which had been requested, or lesser than that which the opposing party had acknowledged as due; c. if the tribunal has left certain points undecided; d. if the tribunal, by inadvertence, has failed to take into consideration relevant facts which result from the record.'

ground for revision can be brought forward within 30 days form the day on which the ground for a revision based on the lack of impartiality 'was discovered', whereas, where a party complains of a breach of 'other rules of procedure', the time limit will start running on the day when the 'decision is notified'. In other words, from a chronological point of view, the ground for revision of Article 121(a) SCA is more comprehensive than the ground for setting aside of Article 190(2)(a) PILA and one could thus argue that it should also be available in arbitration matters. It is submitted that a ground for challenge discovered subsequent to the rendering of the award amounts in any event to a relevant fact discovered subsequently within the meaning of Article 123(2)(a) SCA. Accordingly, an application for revision on that basis should be admissible at least where the existence of a relationship between an arbitrator and a party was denied or the arbitrator deceitfully failed to disclose it. Since the Supreme Court has decided to leave this question open, for the time being, counsel would be well advised to rely on both Articles 121(a) and 123(2)(a) SCA and to do so within the (shorter) 30-day time limit applicable to Article 121(a).

C. *Prerequisites for Revision (*Admissibilité*)*

(i) *Award obtained through a criminal offence (Article 123(1) SCA)*

Pursuant to Article 123(1) SCA, an application for revision may be filed when criminal proceedings establish that the decision sought to be revoked was influenced, to the detriment of the petitioner, by a crime ('*crime*/*Verbrechen*') or felony ('*délit*/*Vergehen*'), even if the proceedings did not result in a conviction.

Under Swiss criminal law, the terms '*crime*' and '*délit*' are to be understood in a technical sense: according to Article 10 of the SPC, 'offences liable to a sentence of imprisonment for more than three years' qualify as '*crimes*', and 'offences liable to a sentence of imprisonment for less than three years' qualify as '*délits*'.[202] In practice, the revision of an arbitral award can be envisaged for the following two main groups of offences:

— The forgery of documents and certificates (Articles 251–255 SCP), in particular the production of forged evidence, false declarations by a party (Articles 306–309 SCP), false statements by witnesses or experts or forged translations (Articles 307–309 SCP). Such actions can also constitute or be committed as part of what is commonly known as procedural fraud (Article 146 SCP).
— Active and/or passive corruption (Articles 322^{ter} and 322^{quater} SCP) as well as the offering and/or accepting of advantages (Articles $322^{quinquies}$ and $322^{sextiest}$ SCP). In this respect, reference is made here to the particular

[202] All other criminal offences qualify as 'contraventions' and can thus not lead to the revision of a decision under the SCA.

importance of transparency in the remuneration of the arbitrators. Any payment made by a party to an arbitrator in connection with an arbitration, if it is not provided for in the rules or ordered by the arbitral tribunal, may be criminally relevant and thus provide a ground for revision pursuant to Article 123(1) SCA.

Article 123(1) SCA was relied upon only once with respect to a CAS award. On that occasion, the Supreme Court pointed out that this ground for revision presupposes that two cumulative conditions are met:

— First of all, as is apparent from the use of the verb 'establish' in the text of Article 123(1) SCA, the criminal proceedings should in principle[203] have come to their term before an application for revision can be made. Thus, revision is excluded as long as the proceedings are pending, meaning that it is not sufficient to lodge a criminal complaint in order to be able to file an application for revision of an award. This condition also excludes the possibility of revision when the criminal proceedings end with an acquittal or a dismissal of the case. Only exceptionally will the constitutive elements of a criminal offence be deemed to be established without criminal proceedings. In essence, the judge will only be free to examine and establish the existence of a criminal offence when prosecution is not (or no longer) possible, whether by operation of the statute of limitations or due to the mental incapacity or death of the offender.[204]
— The criminal offence in question must also have had a bearing on the outcome of the arbitration, to the detriment of the petitioner. The relation between the criminal offence and the arbitrators' decision may be direct or indirect, but the bearing of the offence on the decision must be effective.[205] Such a relation will not be found, for instance, when the offence concerns facts or circumstances which the arbitrators have deemed not to be relevant to their decision, or when they have only taken such facts and circumstances into consideration under a subsidiary[206] or alternative reasoning. An effective relation between the criminal offence and the outcome of the arbitration will also not be found when any false declarations rendered during the proceedings concerned points not essential for the purposes of the decision, when the tainted evidence is not of decisive importance, or when the corrupt arbitrator was outvoted [when the corruption affected a minority arbitrator]. In order for an application for revision to be considered, for instance further to a finding of false testimony, a showing is required that in a three-member arbitral tribunal at least two of the three arbitrators found the testimony to be essential/important and credible, which will already no longer be the case

[203] Article 123(1) SCA makes express allowance for the cases in which criminal proceedings are not possible, by providing that in such cases 'the proof [of a crime or a felony] can be established in another manner'.
[204] Rigozzi and Schöll (n 1955) 33. For a recent case, see Decision 4A_596/2008 of 6 October 2009, discussed in L. Hirsch, 'Révision d'une sentence arbitrale 12 après', JusLetter of 4 January 2010.
[205] Ibid 38 and the references therein.
[206] Decision 4A_234/2008 of 14 August 2008, at 3.2.2.

when one of them comes to the same conclusion on the basis of other evidence.[207]

When applied, by way of analogy, to arbitral awards rendered in Switzerland, Article 123(1) SCA should be interpreted as encompassing criminal proceedings conducted outside Switzerland. In my opinion, the Supreme Court should only make sure that the offence prosecuted in the foreign criminal proceedings qualifies, under Swiss law, as a '*crime*' or *'délit'* within the meaning of Article 10 SPC. In this respect, one can usefully refer to the case law concerning the so-called 'double incrimination' requirement developed in international mutual assistance in criminal matters.[208] For instance, the well known offence of '*escroquerie au procès*' pursuant to Article 313(1) of the French Criminal Code does not exist as a separate offence under Swiss criminal law, but is comprised within the general definition of fraud. Similarly, the Swiss Supreme Court is allowed to deny the revision of a decision if the respondent can establish that the judicial proceedings did not comply with the minimum due process rights guaranteed to any person accused of a criminal offence.[209] Here again, one can usefully refer to the case law regarding the refusal of extradition.[210]

(ii) *New circumstances (Article 123(2)(a) SCA)*

Pursuant to Article 123(2)(a) SCA, a party may apply for revision only provided that it has uncovered relevant facts or dispositive evidence upon which it was unable to rely in the previous proceedings, to the exclusion of facts and evidence which materialised after the award was rendered.

The aim of a revision is not to adapt or change an award that is already *res iudicata* to a change in facts, but to re-examine the situation based on facts that actually existed at the time of the award, thereby redefining the factual basis of the award—which, through no fault of the petitioner—was incomplete or inexact. Two consequences follow from this:

— First, Article 123(2)(a) SCA only applies to *facts that existed at the time of the first procedure*—and were thus already part of the factual circumstances upon which the first award was based[211]—to the exclusion of facts and evidence which materialised after the decision was made (ie the so-called *faits nouveaux anciens* or *unechte Noven*). Therefore, as already mentioned, the simple fact that a substance was removed from the prohibited list after an athlete had been sanctioned further to a positive test for that substance

[207] Rigozzi and Schöll (n 195) 39.

[208] See for instance Decision of the Criminal Federal Court, RR.2008.115, of 25 September 2008 at para 2 and the useful references therein; see also Robert Zimmermann, La coooperation judiciaire internationale en matière pénale (Stämpfli, Bern 2009) 575 at 530ff.

[209] As recently confirmed by the Supreme Court in the Decision 4A_596/2008 of 6 October 2009.

[210] See for instance Decision 1A.15/2007 of 13 August 2007 at para 2.4 and the useful references therein; see also Zimmermann (n 208) 683 at 634ff.

[211] Rigozzi and Schöll (n 195) 47.

is not a ground for revision.[212] However, the scientific (counter) proof that the method of detection of a substance was not reliable could probably constitute a ground for revision.[213]

— Second, the facts in question became only known by the petitioner *after* the award, or more precisely, after the point in time when, according to the applicable procedure, no new allegations of fact or further evidence can be produced. The CAS Procedural Rules do not contain any provision in this regard, except Rule R56 of the CAS Code, which relates to the Appeals Procedure, and provides that '[u]nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer'. The same requirement applies with respect to new evidence:

> The new evidence has to prove either the new facts on which the application for [revision] is based or facts which, although known [or alleged] in earlier proceedings, remained unproven to the detriment of the petitioner. Where the petitioner seeks to prove facts already alleged in previous proceedings with new evidence, it must show that it was impossible for him to provide such evidence in the earlier proceedings. New evidence is relevant when it can be assumed that the court would have made a different decision if such evidence had been on the record.[214]

It goes without saying that the party that discovers new facts or evidence after the deposition of the final submission must formally file for a re-opening of the procedure or else forfeit the right to a revision as the new facts or evidence will not be considered 'new' in the sense required by Article 123 SCA.[215]

The purpose of a revision is also not to grant to the parties the possibility to heal possible errors committed or negligence exhibited during the previous proceedings. Hence, the requirement is that the new facts or evidence in question *could not have been raised during the previous procedure*. In a recent case concerning a CAS award, the Supreme Court held that, assuming a newly uncovered ground for challenge can constitute a ground for revision (under either Article 121(a) SCA or 123(2)(a) SCA), revision 'would be admissible

[212] Thus, the gymnast Andreea Raducan could not request a revision of the award confirming the IOC's decision that she had to return the gold medal she had won in the competition where she was found to have taken a pill against colds containing pseudoephedrine, on the ground that pseudoephedrine was no longer on the list of prohibited substances.

[213] As such, it may be possible that a new scientific discovery could determine that a substance on the prohibited list did not have any effect on the performance of the athlete. In this scenario, however, a revision would nonetheless be excluded as the CAS cannot take into account such facts.

[214] ATF 134 III 286, Swiss Int'l Arb L Rep (2008) 153 at 163–4.

[215] Rigozzi and Schöll (n 1955) 46–7.

only provided that the petitioner could not have known and relied on the ground for disqualification in the arbitration proceedings'.[216] The Supreme Court exercises 'restraint before accepting that it was impossible for a party to rely on a fact in earlier proceedings as [revision] based on newly uncovered facts is not a remedy designed to allow a party to make up for failures in the conduct of the earlier proceedings'.[217] That said, similar to the action to set aside an award based on the subsequent discovery of grounds for challenge (see Section 3A(ii)), it is submitted that the Supreme Court would be prepared to lower the due diligence standard required for parties in disciplinary disputes or in other disputes where athletes (or clubs) face 'their' sports governing body. Indeed, in the mentioned case, the Supreme Court specifically stressed the fact that it was a CAS arbitration 'proceedings involv[ing] parties on equal footing'.[218]

In order to ground an application for revision according to Article 123(2)(a) SCA, the new facts must be relevant (*important*, *erheblich*) and the new evidence dispositive (*conclusive*, *entscheidend*):

— Relevant facts within the meaning of Article 123(2)(a) SCA are those capable of altering the factual basis on which the decision sought to be revoked was made in such a manner that such new facts, properly characterised, would lead to a different decision.[219] Hence, any fact relating to a circumstance that was expressly rejected as irrelevant by the arbitral tribunal is not important for the purpose of Article 123(2)(a) SCA.[220]
— Evidence is only conclusive if it 'contributes not just to the evaluation of the facts, but to their determination'.[221] The ground for revision based on new evidence cannot be relied upon when a court in earlier proceedings has failed to appreciate or characterise proven facts properly; rather, it is necessary that the court should have failed to appreciate or characterise facts properly because important facts remained unproved.[222] Thus, for example, evidence is not conclusive if it pertains to a fact which, in the

[216] Decision 4A_528/2007 of 4 April 2008 at 2.5 *in fine* and 2.5.2.2 *in fine*, Swiss Int'l Arb L Rep (2008) 227 at 237 and 240. In the case at hand, the petitioner relied on the fact—allegedly unknown to him—that counsel to the opposing party and one of the arbitrators were members of the same association. The Supreme Court held that the petitioner's ignorance regarding the affiliation of the party-representative and the arbitrator to the same association was due to the petitioner's own negligence, as such affiliation could have been brought to light at the commencement of the proceedings with 'the slightest efforts' (for instance, because the association's logo was apposed on every submission by the opposing counsel and because the entry for the arbitrator on the CAS website, which is publicly accessible, mentions that he is the president of that association).
[217] Ibid 240.
[218] Ibid 238.
[219] ATF 118 II 199 at 205, loose translation.
[220] Decision of 5 July 1994, at 4(b), unreported.
[221] Decision 4P.102/2006 of 29 August 2006, at 2.1, Bull ASA (2007) 550 at 555, loose translation.
[222] ATF 134 III 286 at 4.1, Swiss Int'l Arb L Rep (2008) 153 at 164.

award, was held to be' without incidence on the outcome of the case'[223] or which is related to an argument rejected by the arbitrators.[224]

Moreover, the new facts or new evidence should be 'such as to result in the decision being amended in a sense favourable to the petitioner'.[225]

In dealing with an application for revision of a CAS award, the Supreme Court will have to determine whether the new facts are relevant and/or the new evidence conclusive according to a hypothetical analysis based on the findings of the arbitrators. Thus, assuming that by way of a new scientific discovery one could establish that the WADA has erroneously included a substance on the prohibited list, this would not justify a revision, as the applicable rules expressly state that 'WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List shall be final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk, or violate the spirit of sport' (Article 4(3)(3) WADC). Along the same lines, the fact that an athlete is acquitted from a doping offence in a criminal procedure does not necessarily provide a ground for revision of the previous award imposing a sport sanction for the same facts. Indeed, even assuming that the elements constituting the offences are the same, the standard of proof required is notoriously different.[226]

To sum up, it should be emphasized that revision is an *extraordinary* legal remedy, to be used only in *exceptional circumstances*. The only known example where the Supreme Court declared a revision admissible was mainly due to the exceptional nature of the case in question,[227] which led the Supreme Court,

[223] Decision of 2 July 1997, ASA Bull (1997) 494 at 502, loose translation.

[224] Decision of 9 July 1997, ASA Bull (1997) 506 at 511–12. Nonetheless, new evidence could be considered conclusive if it relates to a fact raised before the arbitrators and rejected by them as not proven (Decision 4P.102/2006 of 29 August 2006, at 4).

[225] ATF 118 II 199 at 205. See also Decision 4P.102/2006 of 29 August 2006 at 2.1, ASA Bull (2007) 550 at 555.

[226] See, eg TAS 2002/A/403 & TAS 2002/A/408, *Pantani v UCI* and *FCI v UCI*, 52 (para. 223), where the Panel held that it 'only had to determine, in accordance with the standards of proof applicable in sports matters, whether there had been a breach of the [applicable rules]. Whilst the Panel is convinced that such was the case in this instance, it is conscious that the criminal court may come to a different conclusion based on its own standards of proof' (loose translation).

[227] Decision 4P.102/2006 of 29 August 2006, ASA Bull (2007) 550. The dispute concerned the sale of a stake in a Russian telecommunications company. The seller refused to execute the sale on the grounds that the trade intended by the parties would be illegal, ie constitute money laundering. In support of its contentions, the seller stated in particular that the economic beneficiary of the buyer was in fact a senior Russian bureaucrat. In the arbitration that ensued, the tribunal found that the seller could not prove his allegations and held that the economic beneficiary of the buyer would be a Danish lawyer, which excluded the accusation of money laundering. In January 2006—after an appeal against the award had been rejected by the Supreme Court—the seller discovered the existence of an affidavit (produced in connection with another procedure) by one of the directors of the buyer, who stated under oath that he could no longer maintain his earlier assertions that the Danish lawyer was the only economic beneficiary of the purchaser. The Supreme Court accepted the revision based on the ground of the new evidence contained in the affidavit: Decision 4A_596/2008 of 6 October 2009: The decision was obtained by fraud.

for once, not to take too restrictive a stance in the interpretation of a party's ignorance of a newly discovered element.

D. *What if an Application for Revision is Granted?*

If the Supreme Court finds that a revision is granted, it will not decide on the matter itself but remit the decision to the arbitral tribunal that had decided on the matter or, if this should not be possible, to a newly constituted arbitral tribunal.[228]

5. *Conclusion*

Remedies against awards must ensure a certain equilibrium between two opposing principles: on the one hand, the finality of the arbitral award and on the other, the desire to guarantee the fairness and quality of the award (and of the arbitration process). Every legislator must weigh these interests and put in place a system which ensures certain equilibrium between the autonomy of the arbitrators and judicial control.

If the action to set aside is limited to only the most serious of faults, this is often conceived as an essential prerequisite to an environment in which arbitration can prosper, though many believe, and for good reason, that the long-term autonomy of arbitration will depend nonetheless on the existence of a real possibility of setting aside awards. At the end of the day, it is undisputable that 'aberrant decisions reduce community confidence in the arbitral process'.[229] The possibility of an appeal, no matter how limited, thus avoids that the parties are '*complètement livrées aux arbitres*'[230] and therefore represents a sort of 'security net' that comes to their rescue in case the arbitral process derails,[231] thereby reconciling the principles of finality and fairness.

The question is thus whether the Supreme Court's case law constitutes such a security net in CAS cases and contributes to ensure the quality of CAS awards. As a matter of fact, it is clear that while the number of actions filed is increasing exponentially, the number of awards set aside remains very limited. In the discussion that followed the oral presentation on which the present article is based, the participants were divided: some thought that this is due to simple ignorance of the extremely restrictive character of the available grounds for appeal, whilst others were of the opinion that this is rather due to the quality of the awards rendered. If this paper can help avoid that the first

[228] Decision 4A_528/2007 of 4 April 2008, Swiss Int'l Arb L Rep (2008) 227 at 233, referring to Decision 4P.102/2006 of 29. August 2006, at 1, ASA Bull (2007) 550 at 554.

[229] William Park, 'Why courts review arbitral awards' in: *Liber amicorum Boeckstiegel* (Cologne 2001) 595–606, at 596.

[230] Peter Gottwald, 'Die sachliche Kontrolle internationaler Schiedssprüche durch Staatliche Gerichte' in: *Festschrift Heinrich Nagel* (Aschendorf, Münster 1987) 54.

[231] Marc Blessing, *Introduction to Arbitration: Swiss and International Perspectives* (Basel 1999) n°377, 160.

hypothesis remains true in the future, it will already have achieved its main goal. If, at the same time, the quality of the awards rendered by CAS could remain such as to make that same hypothesis moot, all the better.

How does this translate in practical terms? The lessons to be learned from the developments in the present article can be summarized as follows:

— For the counsel to the parties: an analysis of the chances of success and of the costs of a proceedings before the Swiss Supreme Court should induce them to be very prudent in advising an athlete to file an action to set aside or a request for revision of an award.
— For the parties, notably for the athletes: the foregoing makes it clear that the CAS is becoming the only instance where they can assert their rights.

This, in turn, highlights the heavy responsibility resting on the shoulders of CAS arbitrators and of CAS as an institution, as well as the real need for a jurisprudence of the highest quality.