

THOUVENIN rechtsanwälte

## Ordinary Arbitration and Appeal Arbitration Rules before CAS

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## 1. Introduction: Do I have authority to speak?

- **No**, because...
- **Yes**, because...

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## 2. How to proceed?

- I am not going to explain every step of the proceedings at CAS in detail because:
  - CAS maintains a very informative website ([www.tas-cas.org](http://www.tas-cas.org)), which answers many questions you may have.
  - The CAS Rules are clear and in essence self-explanatory.
  - Arbitration proceedings at CAS are, in essence, not any different from those in commercial arbitration.



## 3. What is the Mission of CAS?

- To serve as worldwide Appeal Body for any sports related disputes, thus granting “equally treatment” of all athletes in the world.
- This applies in particular to doping related sanctions where WADA is the custodian for an uniform application of its code.

#### 4. Structure of the “CAS Statutes and Rules”

- “Statutes of the Bodies Working for the Settlement of Sports-Related Disputes” (S 1-26)
  - a) Joint Dispositions
  - b) The International Council of Arbitration for Sport (“ICAS”)
  - c) The Court of Arbitration for Sport (“CAS”)



#### 4. Structure of the “CAS Statutes and Rules”

- Procedural Rules (R 27 – 70)
  - A. General Provisions (R 27 – 37)
  - B. Special Provisions Applicable to the Ordinary Arbitration Procedure (R 38 – 46)
  - C. Special Provisions Applicable to the Appeal Arbitration Procedure (R 47 – 59)
  - D. Special Provision Applicable to the Consultation Proceedings (R 60 – 62)
  - E. Interpretation (R 63)
  - F. Cost of the Arbitration Proceedings (R 64 – 66)
  - G. Miscellaneous Provisions (R 67 – 70)





## 5. In which legal Frame Work do Arbitration Proceedings at CAS take place?

- The seat of any proceedings held under the CAS Rules is always in Lausanne (Switzerland):

“The seat of the CAS and of each Arbitration Panel (“Panel”) is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division may decide to hold a hearing in another place and issues the appropriate directions related to such hearing.”

- This restriction to Lausanne as the sole seat is of paramount importance for the mission of CAS, namely to maintain equal treatment of each athlete on a worldwide basis.



## 5. In which legal Frame Work do Arbitration Proceedings at CAS take place?

- Every international arbitral tribunal operating under the CAS Rules in Switzerland is deemed to be an international arbitral tribunal in the sense of Article 176 (1) of the Federal Statute on Private International Law of December 18, 1987 (“SPILA”).
- This *lex arbitri* is based on 19 Articles only ([Exhibit 1](#)).
- Of particular relevance is Article 190 SPILA defining the circumstances a CAS award can be challenged by an action for annulment.



## 6. How does the CAS operate?

- Attention: the “Code of Sports-Related Arbitration” of the CAS has been amended as per January 1, 2010. (Exhibit 2 and 3)
- Languages: English or French, but R 29 (2): “*The parties may request that an other language be selected provided that the Panel and the CAS Court Office agree...*”
- Notifications and Communication (R 31).
- Time limits (R 32).
- Provisional and Conservatory Measures (R 37).



## 7. The Organisation of the CAS

- The CAS is composed of two divisions:
  - The Ordinary Arbitration Division (R 38-46)
  - The Appeal Arbitration Division (R 47-59)
- What is the difference?
  - Selection procedure of chairman (R 40.2 vs. R 54)
  - Confidentiality (R 43 vs. R 59(6))
- Furthermore, there is an “Ad Hoc division”, based on Arbitration Rules for the Olympic Games.

## 8. The Statistics of the CAS for 2008 and 2009

	2006	2007	2008	2009
Ordinary Procedures	17	22	26	25
Appeals Procedures	175	230	276	244
Consultation Procedures	0	0	2	5
Ad Hoc	12	0	9	0
<b>Total</b>	<b>204</b>	<b>252</b>	<b>313</b>	<b>274</b>

In total CAS handled from its beginning up to December 31, 2009, 1244 cases.

(Exhibit 4)



## 9. The Ordinary Arbitration Procedure

- Anything special? No!





## 10. The Appeals Procedure

How to start it:

- Statement of Appeal; 21 days (R 48/49)
- Appeal Brief; +10 days (R 51)
- Court Office fee of CHF 500 (R 64.1)
- Time limits are strict! (R 32)



## 11. How to choose “your” Arbitrator to be nominated in the Statement of Appeal?

- This is a particularity of CAS: you can not appoint “your” arbitrator of choice but you have to select your arbitrator from a list of 270 arbitrators (Exhibit 5).
- How is this list established?:

“... Personalities with full legal training, recognized competence with regard to sports law and / or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.” (S 14)

One 1/5 of each of such arbitrators is selected by the IOC, the International Federations, of these listed arbitrators is the National Olympic Committees, the Athletes and independent nominations (S 14).





## 11. How to choose “your” Arbitrator to be nominated in the Statement of Appeal?

Does the list is of arbitrators established by CAS correspond to generally accepted arbitration standards?

- Two decisions of the Swiss Federal Supreme Court have confirmed this:
  - BGE 119 II 271, Gundel vs. FEI (which needs to be qualified)
  - and, in particular BGE 129 III 445, Lazutina vs. CIO and FIS
- Furthermore, as of 2010 it is now specially spelled out that:  
“CAS arbitrators and mediators may not act as counsel for a party before the CAS” (S 18(3))



## 11. How to choose “your” Arbitrator to be nominated in the Statement of Appeal?

- Two Supreme Court decisions called for this by now clear borderline:
  - 4P 105/2006: Sheikh Hazza Bin Sultan Bin Zayed al Nayhan vs. FEI ([Exhibit 6](#))
  - 4A\_234/2008: Paul Heiderscheid vs. Frank Ribéry ([Exhibit 7 and 8](#); English translation of the Supreme Court decision provided by courtesy of Maître Charles Poncet, [www.praetor.ch](http://www.praetor.ch))



## **11. How to choose “your” Arbitrator to be nominated in the Statement of Appeal?**

- How to choose your arbitrator from the CAS list?
  - Sole Arbitrator or Co-Arbitrator?
  - Language?
  - Availability?
  - Capability?
- Neither the citizenship of the arbitrator nor his knowledge of a particular law are triggering points.



## **12. Once the two Parties to the Appeal Proceedings have made their choice who designates then the Chairman?**

- The President of the Division, after having consulted the arbitrators (R 54 (2)).

### 13. The Appeals Procedure

- Procedural Timetable
- Intervention and Joinder (R 41.3 – R 41.4)
- Briefs (R 44.1)
- Production of Documents (R 44.3)
- Hearing with Witnesses and Experts (R 44.2)
- Timeframe: six months according to R 59 (6), but what is the reality?



### 14. The Award

- The Award rendered, be it partial or in full, is final and notified by the CAS Court Office (R 59(4))
- Scrutiny of the Award as at ICC? Yes! (R 59(2))
- No dissenting opinions (R 59 (2))





## 15. The Annulment of the Award based on Article 190 SPILA

- Swiss Federal Supreme Court as sole Instance
- Reasons for Annulment  
Art. 190 (2) (a) – (e) SPILA:

"The award may only be annulled:

- (a) if the sole arbitrator was not properly appointed or if the Arbitral Tribunal was not properly constituted;
- (b) if the Arbitral Tribunal wrongly accepted or declined jurisdiction;
- (c) if the Arbitral Tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- (d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
- (e) if the award incompatible with public policy."



## 16. The Chance of Success

The statistics as to actions for annulment	Success rate
• overall	6.5 %
• as to improper constitution	3.1 %
• as to jurisdiction	10.1 %
• as to ultra or infra petita	5.0 %
• as to the right to be heard	3.9 %
• as to international public policy	0 %
• <u>Exhibit 9</u> : Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis, ASA Bulletin 2010, pp. 82 – 100.	

## 17. Three actions for annulment of a CAS Awards were so far successful only

- Two for Violation of the Right to be Heard
  - Cañas vs. ATP, BGE 133 III 235 (4A\_400/2008), (Exhibit 10)
  - José Urquijo Goitia vs. Liedson da Silva Muñiz, 4A\_400/2008, (Exhibit 11 and 12)
- One for Lack of Jurisdiction:
  - Florian Busch vs. WADA, 4A\_358/2009, (Exhibit 13 - 15)

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## 18. Time and Costs

- At the CAS the deviation of the proceedings is difficult to predict; it mainly depends on the quality of the counsel and the arbitrator.
- The Federal Supreme Court is very efficient. There is just one exchange of briefs and no hearing and, therefore, in average the decisions are rendered within 117 days only.
- The costs at CAS are fairly moderate (R 64 – 66).
- The costs in sports related proceedings at the Federal Supreme Court are relatively low since the Federal Supreme court charges usually CHF 5'000 (to be paid in advance) and awards a compensation to the prevailing party between CHF 5'000 – CHF 10'000.

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## 19. Conclusions

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