

# Update

Newsflash January 2012

## Amendments to the CAS Code

**A new version of the Code of Sports-related Arbitration entered into force on 1 January 2012 after the International Council of Arbitration for Sport had announced in mid-December some amendments decided at its latest meeting.**

The Code of Sports-related Arbitration (the "Code") governing arbitration proceedings before the Court of Arbitration for Sport ("CAS") was adopted in 1994, and its first main revision entered into force in 2004. Thereafter it remained unchanged for six years until a major revision which came into force in 2010. On 1 July 2011, the Code was again amended on a minor point: the Court Office fee was increased from CHF 500 to 1000 (the fee, charged for the filing of a request/statement of appeal, had remained the same since 1994).

A few months later, on 13 December 2011, the International Council of Arbitration for Sport ("ICAS") officially announced some significant new amendments to the Code to come into force only some two weeks later on 1 January 2012. The main modifications can be summarised as follows:

### **The Consultation Procedure no longer exists**

In the prior versions of the Code, the main sports bodies (such as the International Olympic Committee ["IOC"], the National Olympic Committees ["NOCs"], the International Federations ["IFs"], the World Anti-Doping Agency ["WADA"], etc.) could request an advisory opinion from the CAS about any legal issue arising in sports. The advisory opinions were non-binding. This consultation procedure was rarely used, and according to the official press release

this led the ICAS to delete the relevant section in the Code (Articles R60 ff.).

An issue recently arose in relation to the so-called Osaka Rule of 2008 (Rule 45 of the Olympic Charter prohibiting athletes from participating in the Olympic Games if they have been suspended for more than six months for an anti-doping rule violation). The CAS had originally given a favourable advisory opinion supporting this rule in consultation proceedings. However, in an award of 4 October 2011 in an arbitration between the United States Olympic Committee and the IOC, a CAS Panel declared the Osaka Rule invalid and non-enforceable. Such a contradiction between an advisory opinion and a subsequent award highlighted the weakness of the consultation procedure. In addition, providing opinions on any kind of legal issue is a difficult and lengthy task, and in the light of the increasing number of tasks the CAS is requested to perform this may have been an additional reason for dropping this procedure.

### **The designation of arbitrators on the CAS list by the ICAS is governed by more flexible rules**

Under the 2004 version of the Code, the ICAS had in principle to follow strict allocation requirements when putting together the list of CAS arbitrators from five categories of arbitrators selected by different sports bodies (category 1: the IOC, 2: the IFs, 3: the NOCs, 4: the athletes) or chosen from among persons independent of these bodies (one-fifth for each of these five categories).

As of 1 January 2012 (Article S14), the ICAS will designate arbitrators "whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and

NOCs" (in addition to other credentials required from the arbitrators, which remain the same). This will give more flexibility and discretion in the selection process; the ICAS will no longer be bound by the requirement to choose an equal number from the categories of arbitrators proposed by sports bodies.

The statutes governing the ICAS in the Code have been amended on further minor points, mainly relating to the election process.

### **Appeals against decisions made by national federations are no longer free of charge**

Until now, disciplinary cases of an international nature have been administered by the CAS without charge (except the Court Office fee to be paid by the appellant when filing his appeal), regardless of whether the decision appealed had been made by an international or national federation. From 2012, only appeals against decisions issued by international federations will remain free of charge (Articles R65 ff.). In cases where the decision appealed was made by a national federation, the arbitration costs will have to be borne by the parties.

From the CAS's perspective, this change may be seen as a means of managing costs more efficiently. Since the appeal caseload is increasing significantly, the CAS had to save money somewhere. From the athletes' perspective, however, it is not certain whether this new regime will be welcomed, as the resolution of sports disputes will be more expensive. In doping matters, this might lead to a difference of treatment (in terms of the costs to be borne) between athletes in disciplines where the international federation makes its disciplinary decisions itself and those in disciplines where the international federation has chosen to delegate the disciplinary proceedings to the athlete's member federation.

The provisions of the Code governing costs have also been amended as regards the situation when arbitration proceedings are terminated before a Panel has been constituted (ruling by the Division President in the Termination Order with specific requirements for legal costs).

### **Other miscellaneous amendments**

The Procedural Rules of the Code have been supplemented at several points "to make the arbitration proceedings quicker and more efficient" as stated in the CAS press

release. The new provisions include the following: express confirmation that the parties who agree on the method of appointment of the arbitrators must choose arbitrators from the CAS list; confirmation of the practice that a hearing may be conducted by video-conference and witnesses/experts may be heard via tele- or video-conference; timing requirements regarding the removal of an arbitrator and the hearing.

Most amendments, though, relate to CAS jurisdiction. In essence, the Code now provides for a regime inspired by Article 186 of the Swiss Federal Private International Law Act (1987) in terms of the following: the power of the Panel to rule on its own jurisdiction (competence competence principle); when such decision shall be made (either in a preliminary decision or in an award on the merits) and how (after the parties have been invited to file written submissions on the CAS jurisdiction when a jurisdictional objection has been raised); *lis pendens* (the Panel shall rule on its jurisdiction irrespective of any other actions pending between the same parties, unless substantive grounds require a suspension of the proceedings); and the consolidation of two proceedings relating to similar arbitration agreements and facts.

Other developments expected from the CAS, such as the CAS legal aid guidelines, might occur in 2012. These guidelines will include criteria for accessing the legal aid fund created to facilitate access to CAS arbitration to athletes without sufficient financial means.

Further information on the CAS Code and its revision may be obtained from the CAS website at: [www.tas-cas.org](http://www.tas-cas.org).

**Please do not hesitate to contact us if you have any questions.**

**Lenz & Staehelin also publishes a Sports Law Newsletter. The next issue will be available in the course of January 2012 and will be sent to anyone interested.**

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