

VULNERABLE WITNESSES BEFORE THE COURT OF ARBITRATION FOR SPORT: STRIKING A BALANCE BETWEEN COMPETING RIGHTS

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ABSTRACT

The paper deals with the solutions adopted before the Court of Arbitration for Sport (CAS) to deal with a peculiar evidentiary challenge faced in cases concerning corrupt practices, such as match-fixing. In some of them it might happen that a party presenting a witness in support of its case submits that there are reasons not to disclose the identity of the witness, who might be otherwise exposed to threats and dangers. The use of anonymous witnesses, however, impacts on the other party's right to rebut such evidence, assess its credibility and cross-examine the witness. In such cases, therefore, two rights conflict: the right of the witness to have their life and security protected; and the right to be heard of the other party. The paper examines the attempt to strike a balance between those conflicting rights. For such purposes, some considerations are offered regarding the fundamental role played by the "right to be heard" in the adjudication proceedings. Then, focus is put on the principles and practice relevant to the protection of "vulnerable" witnesses in CAS arbitration, before offering some final considerations.

KEYWORDS

Match-fixing; evidence; witnesses; protection of witnesses; anonymous witnesses; right to be heard; European Convention on Human Rights; Court of Arbitration for Sport

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Summary: 1. Evidentiary challenges in the fight against corruption. 2. The right to be heard as a fundamental right: the legal framework. 3. The right to be heard in the jurisprudence of the Swiss Federal Tribunal and of the European Court of Human Rights. 4. Vulnerable witnesses in CAS jurisprudence. 5. Final considerations and FIFA rules. Notes. Bibliography.

1. EVIDENTIARY CHALLENGES IN THE FIGHT AGAINST CORRUPTION.

The fight against corrupt practices (such as match-fixing, illegal betting, bribery, but also sexual harassment or other major ethical violations) and the enforcement of the rules adopted to contrast them in the world of football poses arduous challenges for all the entities involved, from investigators to adjudicators, at all levels, from a domestic to an international dimension.

Such challenges are of various nature and origin. They go from practical difficulties to the complexity of purely legal issues. Indeed, sporting authorities do not enjoy the powers of criminal prosecutors (wiretapping, searches, seizures, etc.) and therefore face difficulties in identifying whether violations have been committed by an entity bound by the sporting rules. In addition, some behaviours (such as offering gifts) might be felt to be socially permissible (if not due, as a sign of respect and deference to an authority) and perfectly legal from a disciplinary point of view and therefore difficult to detect and distinguish from plainly illegal activities (such as offering bribes).

In general terms, those difficulties stem from the very nature of the illegalities to be fought. Match-fixing or other corrupted practices are by their nature elusive: "corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing".¹ As a result, evidence is difficult to gather, since little documentary evidence is left and the parties involved in (for instance) match-fixing go to great lengths to conceal their involvement in illegal schemes; and when evidence collected in criminal proceedings (such as transcripts of intercepted phone conversations, or printouts of messages exchanged) is brought to the attention of the sporting authorities, its admissibility and interpretation might be doubtful (and in many cases is challenged).

As a consequence, in the absence of contemporary evidence, sporting authorities have, to a very large extent, to rely on witness depositions, mainly offered by the victims of the violations. Consider, for instance, sexually related offences: in many cases, the only person in a position to expose the crime and testify is the offended individual. Depositions, however, are rendered *post-factum* and may be fallacious (also if rendered by eye witnesses and in good faith). In addition, they may be influenced by other elements, including the fear of retaliation, and chiefly so when the corrupt practice is implemented in the framework of organised crime or the offence was committed by a person holding a powerful position. Hence, the need arises to protect the witnesses and secure their deposition in a "secure" environment, free of the threats to which the testifying persons might be subject as a result of their exposure to the investigated alleged perpetrator, also because otherwise the witness would be reluctant to testify. Only on that basis can evidence be collected and the observance of the rules (together with the corresponding right to enforce them) be secured, in the interests of the system.

In that context, however, other fundamental interests (and corresponding rights) come into play and must be respected. In particular, the imperatives

¹ The point has been expressed by CAS 2010/A/2172, *Oriekhov*, award of 18 January 2011, § 54.

of “due process”, which imply the right to be heard and the right to contradict, have to be protected. In fact, as will be seen, the accused must be put in a position to defend themselves and to provide evidence in support of their plea. At the same time, they have the right to confront the evidence brought by deposition by the other party. Such a right, therefore, seems to be in conflict with the interests of the system that infringements are effectively punished and the expectation of the witnesses that their cooperation with law enforcement does not expose them to threats and dangers.

In summary, diverging rights have to be reconciled, keeping in mind the overall interest that the law (in all its aspects) is guaranteed.²

The observations which follow examine the solutions adopted before the Court of Arbitration for Sport (CAS) to deal with such challenges, in an attempt to strike a difficult balance between those conflicting rights. For such purposes, in the next section, some considerations are offered regarding the fundamental role played by the “right to be heard” in the adjudication proceedings: for such purposes, its meaning and scope is explored in the relevant normative context, as defined by domestic and supranational rules. The sections which follow, then, focus on the principles, and their implementation in CAS arbitration, relevant to the protection of “vulnerable” witnesses, before offering some final considerations regarding the FIFA rules adopted in that regard.³

2. THE RIGHT TO BE HEARD AS A FUNDAMENTAL RIGHT: THE LEGAL FRAMEWORK

The examination can start with a basic observation: there is no doubt that the “right to be heard” is a fundamental right, recognised by international instruments, such as the European Convention on Human Rights (ECHR),

² In general terms see on this matter the overall examination conducted by Soublière, Hessert, *Safeguarding and beyond – The role of sports regulations, human rights and the balance between the rights of the interested parties in sports investigations and the disciplinary proceedings that arise therefrom*, in *CAS Bulletin*, 2024/1, 6-32.

³ As already underlined, the problem examined in this paper is often linked to another challenge posed to the effective prosecution of corrupt practices: the difficult interplay (from conflict to cooperation) between sporting investigation and criminal proceedings conducted by domestic authorities. Such challenges will not be further examined. For an overview of the experience of another arbitral institution see Feris, Torkomyan, *Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration. Selected ICC Cases*, in *ICC Dispute Resolution Bulletin*, 2019/3, 50-70.

as well as at national level, including by Swiss law.⁴ In fact, in any regulatory framework defining it, the “right to be heard” is treated as a part of the broader concept of the “right to a fair trial”: its respect marks the conduct of adjudication proceedings as “just”, and applies therefore in court proceedings as well as in arbitration (including CAS arbitration). In other words, the right to be heard is an obvious feature of every dispute settlement system wishing to be defined as “fair”. It is therefore more than obvious that the “product” of such proceedings (the judgment, the award) cannot stand scrutiny (and can therefore be nullified) if that right is disregarded, and rightly so, because no justice is done if that fundamental right is not respected. Indeed, no arbitration can be defined to be fair if the parties’ right to be heard is not respected.

As mentioned, the right to be heard is protected by the ECHR under its Article 6, regarding the “right to a fair trial”. More specifically, it falls within the scope of application of Article 6(1) (under which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law), which covers both civil and criminal proceedings; and is mentioned by Article 6(3), applicable to criminal proceedings (providing that everyone has the following minimum rights: to be informed promptly of the nature and cause of the accusation; to have adequate time and facilities for the preparation of their defence; to defend themselves; to examine witnesses against them and to obtain the attendance and examination of witnesses against them).

In that respect, it is to be noted that in the ECHR system the requirements inherent to the concept of a “fair hearing” are not necessarily the same in cases concerning the determination of civil rights and obligations as they

⁴ The relevance of Swiss law in CAS proceedings is obvious, since the seat of CAS arbitration is in Switzerland (Article R28 of the Code). Switzerland is a Contracting State to the ECHR, opened for signature in Rome on 4 November 1950, having ratified it in 1974. The ECHR guarantees the respect in the Contracting States of fundamental rights, such as the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of expression, and the prohibition of discrimination. The ECHR is supplemented by various Additional Protocols, which extend the catalogue of protected rights. In general terms, on the ECHR see Jacobs, White, *The European Convention on Human Rights*, 7th ed., Oxford, 2017; Schabas, *The European Convention on Human Rights: A Commentary*, Oxford, 2015. The relevance of the ECHR with respect to CAS proceedings has also been considered by the European Court of Human Rights (ECtHR) in its well known decision of 2 October 2018, in the case of *Mutu and Pechstein v. Switzerland* (applications No. 40575/10 and No. 67474/10). In general terms on the relations between arbitration and the “right to a fair trial” under the ECHR see Benedettelli, *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Arbitration International*, 2015, 631–659.

are in cases concerning the determination of a criminal charge. In fact, the requirements of Article 6(1) as regards cases concerning civil rights are less onerous than they are for criminal charges. However, some points have to be noted: with respect to civil cases, inspiration can be drawn from principles applicable to criminal cases; the core tenets of the right to a fair trial (including chiefly the right to be heard) cannot be sacrificed even in civil cases; sporting disciplinary proceedings, even though based on a “contract” (linked to the consent expressed by the individuals through their affiliation to the sports system), share many aspects of criminal proceedings and therefore call for a regulation akin to that applicable in criminal cases.⁵

As a result, also in civil cases (and chiefly so in disciplinary proceedings), the parties have the fundamental right to present the observations which are relevant to their case, and this right can be seen as effective only if their observations are actually “heard” by the adjudicator. In addition, the concept of a fair trial in civil cases comprises the fundamental right to adversarial proceedings, *i.e.*, to have knowledge of and the right to comment on all evidence adduced and observations filed, with a view to presenting their case to the court. In other words, it may be submitted that the ECHR mandates a fully-fledged respect of the right to be heard before Swiss courts and tribunals.

As also mentioned, the right to be heard is recognised not only as a fundamental principle by the ECHR. It is similarly (and directly) affirmed in Swiss law, and chiefly by the Swiss Federal Constitution of 18 April 1999, in its Article 29(2), as part of the general procedural guarantees, under which “each party to a case has the right to be heard”.

In the Swiss international arbitration context, then, the “right to be heard” is mentioned by Article 182(3) of the Swiss Federal Act on Private International Law of 18 December 1987 (PILA),⁶ which expressly states that “irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in adversarial proceedings”.⁷ In other

⁵ It is well known that the so called “Engel criteria” have been adopted by the ECtHR to identify the criminal nature of the proceedings. They involve the application of three tests to the case under scrutiny: 1) the legal classification of the offence in domestic law; 2) the nature of the offence; 3) the degree of severity of the possible sanction. See the judgment of 8 June 1976, *Engel and Others v. The Netherlands* (applications No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), at § 82.

⁶ CAS arbitration proceedings are indeed most likely to be governed by the provisions set by Chapter 12 of the PILA, since the seat of CAS arbitration is in Switzerland and in the majority of cases at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland (Article 176(1) of the PILA).

⁷ Lalive, Poudret, Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, 353-354.

words, the mandatory nature of the guarantee to reserve the right to be heard does not allow departures: the parties and/or the tribunal can define, directly or by reference, the procedural rules applicable to the arbitration, but in any case the right to be heard must be respected. As a result, and being consistent with this approach, disrespect of such a right leads to the annulment of the award. Under Article 190(2)(d) of the PILA, an award may be annulled if the principle of equal treatment of the parties or the right to be heard is violated.⁸ In that respect, it is to be underlined that the mere observance of the applicable procedural rules is not sufficient, since the right to be heard must, in any case, be respected.

Corresponding provisions, then, can be found with respect to domestic arbitration in the Swiss Code of Civil Procedure,⁹ in Article 373(4), dealing with the conduct of the arbitration and the procedural rules applicable thereto, and in Article 393(d), setting the grounds for the annulment of the award.¹⁰

It is to be noted, finally and moving back to the international level, that the disrespect of the right to be heard may lead to a denial of enforcement abroad of an arbitral award under the New York Convention of 10 June 1958: enforcement can be refused if the party against which it is sought proves that said party was unable to present its case (Article V(1)(b) of the Convention), or if the award is contrary to the public policy of the country of enforcement (Article V(2)(b) of the Convention).¹¹

⁸ Kaufmann-Kohler, Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2e éd., Berne, 2010, 512-522.

⁹ The provisions on arbitration set by the Swiss Code of Civil Procedure apply the proceedings before arbitral tribunals based in Switzerland, unless the provisions of the PILA apply (Article 353(1) of the Swiss Code of Civil Procedure).

¹⁰ Article 373(4): "The arbitral tribunal must guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings." Article 393: "An arbitral award may be contested on the following grounds: ... (d) the principles of equal treatment of the parties or the right to be heard were violated."

¹¹ Van den Berg, *The New York Arbitration Convention of 1958*, Deventer-Boston, 1981, 306-310, underlining, for the purposes of the New York Convention, that the equal opportunity to be heard does not imply that in each and all cases an oral hearing must take place, that short time limits for the preparation of a defence are generally not a violation of the right to be heard, and that denials of requests to postpone a hearing because of the unavailability of a witness do not lead to the refusal of enforcement of the award. In essence, the principle of due process implies that the tribunal informs a party of the arguments and evidence adduced by the other party and allows them to express their position on them. However, a violation of the due process requirement is grounds for denial of enforcement only in the most serious cases.

3. THE RIGHT TO BE HEARD IN THE JURISPRUDENCE OF THE SWISS FEDERAL TRIBUNAL AND OF THE EUROPEAN COURT OF HUMAN RIGHTS

In light of the relevance of Swiss law and of the ECHR for the CAS proceedings, understanding the point of view of the Swiss Federal Tribunal (the SFT) and of the European Court of Human Rights (ECtHR) as to its scope is therefore vital.

Under Swiss law, the SFT found that the right to be heard in contradictory proceedings combines two aspects:¹² the right to be heard in a narrow meaning, which gives each party the right to state its arguments as to the facts and the law on the disputed matter, to submit the necessary evidence, to participate in the hearings and to be represented before the Tribunal; and the right to contradict, which gives each party the right to express its views on the evidence and arguments brought by the other party, as well as to rebut the other party's evidence by submitting contrary evidence. In that regard, it is stressed¹³ that, in the field of international arbitration, it has been found that, on its basis, each party has the right to express their views on the facts essential for the decision, to submit their legal arguments, to propose evidence on pertinent facts, to participate in the hearings, and to access the record.

However, the right to be heard calls for regulation: even though it cannot be derogated from by the parties when setting the rules applicable to the procedure, it must be exercised according to the relevant rules of procedure. As a result, it has been held that the right to produce evidence must be exercised timely and according to the applicable formal rules. Therefore, the arbitral tribunal can refuse to examine evidence, without violating the right to be heard, if the evidence proposed is unfit to ground a persuasion, if the fact to be proven has already been established or is irrelevant, or, lastly, if the tribunal, assessing the evidence in advance, reaches the conclusion that it is already convinced and that the result of the evidentiary measure would not modify its conclusion. In addition, the right to be heard does not encompass an unlimited right, in time and substance, to interrogate an expert called by the other party. As a result, a tribunal is not prevented, in principle, from putting time limits on the interrogation by a party or from refusing certain questions, if already asked, irrelevant, or unnecessary.

¹² SFT, 4 September 2003, 4P.100/2003.

¹³ The point is underlined in nearly all decisions of the SFT dealing with the matter: see 7 January 2011, 4A_440/2011; 17 February 2011, 4A_402/2010; 17 March 2011, 4A_600/2010; 19 September 2012, 4A_274/2012; 8 October 2014, 4A_199/2014. On the right to access the record: SFT, 24 February 2015, 4A_544/2014.

Such jurisprudence corresponds, by and large, to the principles that can be derived from the case law of the ECtHR with respect to the ECHR.

The ECtHR has always emphasised the prominent place held in a democratic society by the right to a fair trial, of which the right to be heard is a part.¹⁴ This guarantee, indeed, “is one of the fundamental principles of any democratic society, within the meaning of the Convention”.¹⁵ Therefore, and *inter alia*, the desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle.¹⁶

It is to be noted that the ECtHR has stressed the importance of appearances in the administration of justice; it is important to make sure that the fairness of the proceedings is apparent. The ECtHR made it clear, however, that the standpoint of the persons concerned is not in itself decisive; the misgivings of the individuals before the courts with regard to the fairness of the proceedings must be capable of being held to be objectively justified.¹⁷

As a result, it is stressed that the parties to the proceedings have the right to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are actually “heard”, that is to say duly considered by the trial court.¹⁸ In other words, the “tribunal” has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.¹⁹ However, while the parties have the right to present the observations which they regard as relevant to their case, Article 6(1) of the ECHR does not guarantee a litigant a favourable outcome.²⁰

The concept of a fair trial comprises the fundamental right to adversarial proceedings. This is closely linked to the principle of equality of arms.²¹ It is to be noted that the requirements resulting from the right to adversarial proceedings are in principle the same in both civil and criminal cases.²² The right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on

¹⁴ Judgments of 9 October 1979, *Airey v. Ireland* (application No. 6289/73), § 24; and of 17 January 2012, *Stanev v. Bulgaria* [GC] (application No. 36760/06), § 231.

¹⁵ Judgment of 8 December 1983, *Pretto and others v. Italy* (application No. 7984/77), § 2.

¹⁶ Judgment of 18 February 1997, *Niederöst-Huber v. Switzerland* (application No. 18990/91), § 30.

¹⁷ Judgment of 19 April 1993, *Kraska v. Switzerland* (application No. 13942/88), § 32.

¹⁸ Judgment of 7 March 2006, *Donadze v. Georgia* (application No. 74644/01), § 35.

¹⁹ Judgments of 19 April 1993, *Kraska v. Switzerland* (application No. 13942/88), § 30; and of 12 February 2004, *Perez v. France* [GC] (application No. 47287/99), § 80.

²⁰ See judgment of 9 October 1997, *Andronicou and Constantinou v. Cyprus* (application No. 86/1996/705/897), § 201.

²¹ 19 September 2017, *Regner v. Czech Republic* [GC] (application No. 35289), § 146.

²² 24 November 1997, *Werner v. Austria* (application No. 21835/93), § 66.

all evidence adduced or observations filed, with a view to influencing the court's decision.²³

However, the ECHR does not lay down rules on evidence as such.²⁴ The admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts.²⁵ The same applies to the probative value of evidence and the burden of proof: it is also for the national courts to assess the relevance of proposed evidence.²⁶

4. THE PROTECTION OF VULNERABLE WITNESSES IN CAS CASE-LAW

In light of the foregoing, a difficult question arises whenever a party, presenting a witness in support of its case, submits that there are reasons not to disclose the identity of the witness. Such a request impacts the other party's right to rebut such evidence, to assess the credibility of the witnesses and eventually to cross-examine them.

The matter is not new or peculiar only to sporting investigation. In fact, it was analysed by the SFT and by the ECtHR, which came to the conclusion, mainly with respect to criminal investigations, that anonymous witness statements do not breach the right to be heard, when they support the other evidence provided to the court.

More specifically, according to the SFT,²⁷ if the applicable procedural code provides for the possibility to prove facts by witness statements, a party cannot be prevented from relying on anonymous witness statements. However, the use of such statements must be subjected to strict conditions: the right to be heard and to a fair trial must be ensured through other means, namely by cross examination through audio-visual protection and by an in-depth check of the identity and the reputation of the anonymous witness by the court.

²³ 23 June 1993, *Ruiz-Mateos v. Spain* (application No. 12952/87), § 63; 24 February 1995, *McMichael v. United Kingdom* (application No. 16424/90), § 80; 20 February 1996, *Vermeulen v. Belgium* [GC] (application No. 19075/91), § 33; 20 February 1996, *Lobo Machado v. Portugal* [GC] (application No. 15764), § 31; 7 June 2001, *Kress v. France* [GC] (application No. 35594/98), § 74.

²⁴ 19 March 1997, *Mantovanelli v. France* (application No. 21497/93), § 34.

²⁵ 23 October 1990, *Moreira de Azevedo v. Portugal* (application No. 11296/84), §§ 83-84; 21 January 1999, *García Ruiz v. Spain* [GC] (application No. 30544/96), § 28.

²⁶ 7 June 2012, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC] (application No. 38433/09), § 198.

²⁷ Judgment of 2 November 2006, 6S.59/2006, ATF 133 I 33, § 4.

In the same way, the ECtHR allowed the use of “protected” or “anonymous” witnesses in criminal cases, provided procedural safeguards are adopted.²⁸ More specifically, it was held that Article 6(1) of the ECHR does not require in itself that the interests of the witnesses are taken into consideration. However, the interests of the witnesses (with regard to their life, liberty and security) may be protected by other provisions of the EHCR (e.g., Article 8). This means that States must organise criminal proceedings in a way that these interests are not unjustifiably put in danger. The relevance of the right to a fair trial implies that the interests of the defence must be balanced against those of the witnesses. In any case, a conviction cannot be based either solely or to a decisive extent on anonymous statements; the party should not be prevented from testing the witness’ reliability, and the evidence derived should be treated with extreme care.

The matter also came before CAS, and the CAS panel have consistently found that, when evidence is offered by means of anonymous witness statements, the right to be heard, guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution, is affected, but that a panel may still admit the deposition of anonymous witnesses without violating such right, if the circumstances so warrant and provided that some conditions are met.

In such regard, in the *Pobeda* case, for example, the CAS held that the use of anonymous witnesses, although held admissible, had to be made subject to strict conditions (CAS 2009/A/1920, award of 15 April 2010). Relying on the jurisprudence of the SFT and ECtHR, therefore, the CAS adopted measures to ensure the right to be heard and to a fair trial of the party opposed to the witnesses’ anonymity: the witnesses were heard through “audiovisual protection” and an in-depth check of the identity and the reputation of the anonymous witnesses was conducted by the court. The panel, in other words, sought to strike a balance between the procedural rights of the party opposed to the witnesses’ anonymity, on the one hand, and the necessity to protect the life and personal safety of the witnesses, on the other.

Similarly, in the *Contador* case (CAS 2011/A/2384 & 2386, award of 6 February 2012), the CAS held that the use of protected witnesses could be allowed subject to the following conditions: (i) that the witnesses motivate their request to remain anonymous in a convincing manner; (ii) that the witnesses would concretely face a risk of retaliation by the party they are testifying against, if their identities were known; (iii) that the panel had the possibility to see the witnesses; (iv) that the witnesses would be questioned

²⁸ 26 March 1996, *Doorson v. The Netherlands* (application No. 20524/92); 23 April 1997, *van Mechelen and others v. The Netherlands* (applications No. 21363/93, 21364/93, 21427/93 and 22056/93); 28 February 2006, *Krasniki v. Czech Republic* (application No. 51277/99); 23 June 2015, *Balta and Demir v. Turkey* (application No. 48628/12).

by the panel itself, which had the opportunity to check their identities and the reliability of their statements; and (v) that the witnesses be cross-examined, even though through an “audiovisual protection system”.

On that basis, in *Karim* (CAS 2019/A/6388, award of 14 July 2020, § 130), the panel noted, in line with the *Pobeda* and *Contador* cases, that “*it [was] a necessary step [to] assess stated existing/potential threats and after that to find a proper balance between the position of witnesses and the right of an accused to cross exam[ine] witnesses*”. The panel therefore found that all such conditions for the admission and the hearing of protected witnesses were satisfied.

In the *Karim* case, the first question was whether the party presenting the witnesses had proven that their anonymity was necessary. In this regard, the panel noted that the witnesses were alleged victims of serious crimes, including sexual harassment, assault and rape from an individual with significant political power in Afghanistan, still at large notwithstanding an arrest warrant pending on him, and who had, according to their witness statements, directly threatened their lives (even at gun point). Moreover, the panel noted that, because of their alleged situations, all of the witnesses had fled their country of origin and obtained asylum – a protective status which, generally speaking, is only granted to individuals that demonstrate a legitimate fear of persecution and threat or danger to his or her physical integrity and life. The panel found this to be sufficient proof that disclosing their identity would create a serious potential threat to the lives and personal safety of the witnesses. Given the circumstances of the case, the panel had no reasons to ignore those fears and could not disregard the possibility of such threats and the assertion that the life and/or the personal safety of the witnesses and their families were at risk.

In light of the witnesses’ interest in keeping their identities anonymous, the panel found that it could strike a proper balance between the accused’s right to be heard and to a fair trial and the necessity to protect witnesses’ interest. It did so by checking the identity, through a CAS counsel, of the witnesses, and giving the accused the opportunity to confront the anonymous witnesses as required under Article 6(1) ECHR, while placing certain limitations to protect them. Indeed, the panel granted the accused the opportunity to directly cross-examine the witnesses over the phone, while protecting the identities of the witnesses by (i) having them use a voice scrambler, and (ii) requiring the accused to provide the panel, in advance of the hearing, the questions he intended to ask the witnesses in order for the panel to ensure that they were not aimed at, or have even the unintentional effect of, identifying the witnesses, all the while allowing the accused to ask additional questions not sent in advance so long as they were not translated/posed until after the panel had an opportunity to approve them. The panel also sent a CAS

counsel to the secret location from which the protected witnesses testified to properly identify them and ensure that they testified without any undue interference from any third party during the cross-examination. In summary, the panel found that the limitations imposed on the accused, linked to the fact that he was not given the names of the witnesses adduced by the prosecuting authority, was counterbalanced by the measures adopted to guarantee the sincerity of the depositions.²⁹

5. THE 2023 GUIDELINES FOR THE HEARING OF VULNERABLE WITNESSES AND TESTIFYING PARTIES IN CAS PROCEEDINGS

The importance and sensitivity of the issue called for regulation, in order to allow predictability and consistency. As a result, in December 2023, the International Council of Arbitration for Sport (ICAS) (the legal entity governing the CAS system) adopted the Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS proceedings (the Guidelines), in order to recommend best practices for the protection of vulnerable witnesses and parties in CAS arbitrations, more specifically in relation to CAS hearings.³⁰ It was noted, in fact, that special procedural safeguards are necessary in cases in which a witness giving testimony may be vulnerable, so that testimony can be delivered in a safe manner, and reluctant vulnerable witnesses are incentivised to testify.

There is a preliminary point to be underlined: the Guidelines are not binding on the parties and the panels. In other words, they do not have the same legal force and effect as the provisions set in the Code of Sports-related Arbitration (the CAS Code), which governs the procedure before CAS. In other words, the Guidelines do not constitute mandatory procedural rules and, consequently, cannot be used by the parties seeking to challenge their application or non-application by any CAS panel. In principle, in fact, the Guidelines are recommendations with respect to the implementation of Articles R44.2 and R57 (hearing), as well as Articles R46 and R59 (publication of award) of the CAS Code, when there is a vulnerable witness, but do not prevail over the Code. Each CAS panel (sitting in an ordinary or an appeal

²⁹ A similar approach was taken by the CAS in CAS 2016/A/4650, *Skënderbeu*, award of 26 July 2018; CAS 2019/A/6669, *Aghazada*, award of 28 April 2022; and CAS 2021/A/7661, *Jean-Bart*, award of 14 February 2023.

³⁰ Their presentation was the object of a report disseminated at the CAS Seminar held in Geneva on 1 December 2023 by Alma M. Mozetic (*Protecting Witnesses & Other Vulnerable Persons in CAS Arbitrations: Best Practices*). The Guidelines can be read in the CAS website (www.tas-cas.org).

arbitration) is however encouraged to take them into account when facing a situation involving vulnerable witnesses, bearing in mind its duty to comply with the parties' right to a fair trial, including the right to be heard and to benefit from equal treatment.³¹

A second point to be underlined with respect to the Guidelines is their definition of "vulnerable witness". In that regard, a preliminary aspect is to be noted. The Guidelines, in fact, apply not only to witnesses in a proper (and narrow) meaning (*i.e.*, independent individuals, not having an interest in the litigation), but also to the parties rendering a deposition in the course of the arbitration. By the specification that they cover "vulnerable witnesses and testifying parties", the Guidelines avoid taking a position as to the assimilation of the role of a party rendering a sworn declaration (and undergoing cross-examination) to that of the "witnesses".³² As a result, for the purpose of the Guidelines, a reference to a vulnerable witness includes a vulnerable testifying party. The protected category is then widely defined: a witness or testifying party should be considered as vulnerable in the meaning of the Guidelines when testifying may risk (re)traumatising the witness, present a threat to the personal safety of the witness (and possibly others), or create a significant risk to their reputation or of retribution. Minors and witnesses with a mental disability will also generally qualify as vulnerable witnesses.

A third point concerns the measures that can be adopted. They include general protections with regard to the general public, for instance, in order to ensure the anonymity of the witness in any external communication regarding the arbitration, or within the arbitration. Then, they consist in measures that can be adopted prior to the hearing, during the examination at the hearing, or after it.

With respect to the general measures, it is to be noted that CAS proceedings are confidential and held in private, unless otherwise agreed or determined (Articles R57 and R43 of the CAS Code), and that the awards rendered in ordinary cases are not public, unless the parties otherwise agree (Article R43). In appeal cases, on the other hand, the award is, in

³¹ It must, in fact, be stressed that, as already noted above, only the violation of the principle of equal treatment of the parties or of the right of the parties to be heard constitutes a ground for the setting aside of the award by the SFT pursuant to Article 190(2)(d) of the PILA. Focus should therefore be put by the panel on the respect of those fundamental rights: the Guidelines apply only in their light and in a way consistent with them.

³² The practice of the CAS tends to follow the principles expressed by Article 4(2) of the IBA Rules on the Taking of Evidence in International Arbitration, according to which "any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative".

principle, made public by CAS (Article R59, last paragraph of the CAS Code). However, the Guidelines confirm that, in cases involving protected witnesses, once the proceedings are complete, the CAS Court Office may prevent the disclosure in public records of sensitive information, such as the identity of the vulnerable witnesses, and that, if the award is published, the CAS Court Office has the authority to redact sensitive portions of the award, at its discretion, prior to publication of the award. In any event, prior to any publication of the award, a party may request, whether on its own initiative or following a request from a vulnerable witness, that the CAS Court Office anonymize the identity of such witness in the award. In the event that the other party or parties object to the anonymization request, the CAS Court Office has the authority to decide. A measure of caution is however recommended. The CAS Court Office may inform, through parties' counsel or directly, vulnerable witnesses prior to testifying that their identity might be disclosed (directly or indirectly) to the public, including in the final award.

With regard to the specific measures of protection that are suggested for adoption and implementation prior to the hearing of vulnerable witnesses, the Guidelines invite the CAS panels, when appropriate, to proactively notify parties and witnesses of the procedural accommodations available during the proceedings to safeguard a vulnerable witness, so that the parties may seek appropriate protections for them. Procedural accommodations may either be requested by a party on behalf of their witness(es), in the written submissions or at any reasonable time prior to the hearing, or adopted by a CAS panel in its discretion. In both cases, the other party or parties should have the opportunity to respond within the time period set by the CAS panel: the right to be heard and contradict is also to be guaranteed at the stage of the adoption of the procedural measures of protection. At this stage, however, not only the concrete measures available have to be discussed, but also the existence of the preconditions for their adoption, such as the issue of whether the witness qualifies as vulnerable, eligible for protection.

As indicated, in fact, CAS panels also have discretion to adopt necessary measures on their own initiative, in the event that a party is not fully aware of the right to make the request, and/or certain procedural accommodations would be appropriate, but were either not requested by a party or different from those that were so requested. In all such cases, the CAS panel shall discuss these measures and their implementation in advance with the parties and possibly during a case management conference. Likewise, CAS should provide the other party or parties with information about available safeguards to protect the parties' right to a fair trial.

The measures of protection that can be adopted regard mainly the hearing of the vulnerable witnesses. Such measures correspond to those

already adopted in the CAS practice and include, as appropriate under the circumstances of the case, decisions to:

- i. permit remote or other means of providing testimony such that the witness may avoid direct contact with the adverse party;
- ii. permit a witness to testify anonymously;
- iii. require advance review and approval by the CAS panel of questions for cross-examination (to prevent identification of witnesses and/or to avoid (re)traumatizing them);
- iv. exercise a degree of control over the manner of questioning to avoid (re)traumatizing alleged victims of abuse, particularly with respect to highly sensitive and traumatic questions during cross-examination; and
- v. permit CAS panels, rather than the adverse party, to ask certain questions to the witness, to accommodate the witness' vulnerability.

More specifically, the Guidelines confirm in the list of measures which can be adopted that CAS panels may allow anonymous witness testimony involving vulnerable witnesses, where appropriate. When determining whether anonymous testimony is appropriate in a particular instance, CAS panels are recommended to balance the need to protect vulnerable witnesses with the rights of the parties, including the right to a fair trial. In particular, such witnesses should justify their request for anonymity as to the adverse party, by sufficient proof that disclosure of the witness' identity would create a serious potential threat to the personal safety of the witness (or their relative(s)). If a CAS panel approves the use of anonymous witness testimony, the CAS Court Office has the responsibility to arrange that the identity of such witness can be officially verified; such witness is located in a safe place together with CAS counsel, away from the CAS hearing room and from CAS arbitrators and parties; and such witness' voice and face cannot be recognised (including by utilising encrypted communication, voice distortion, face mask, etc.). Furthermore, the CAS panel may request the advance review and approval of the questions for cross-examination to ensure that no questions would, directly or indirectly, identify such witness. The transportation of such a witness to the hearing location should also guarantee anonymity.

The list of measures mentioned in the Guidelines (remote witness testimony, advance approval of questions, controlling manner of questioning, panel to ask questions, deposition from secret location, audio-visual protection) are not exclusive. For instance, the assistance of a psychologist during the hearing may be envisaged. In any case, the Guidelines, because of their peculiar flexibility, give each panel ample flexibility to identify and adopt the measures proper to the case.

6. THE FIFA RULES ON THE PROTECTION OF VULNERABLE WITNESSES

The (non binding) rules adopted by CAS find a binding equivalent in the provision in force in the FIFA system. Reference in that respect is specifically made to Articles 43 and 44 of the FIFA Disciplinary Code (2025 Edition: the FDC),³³ which deal exactly with the topics covered by the Guidelines and considered in the CAS practice. The mentioned articles of the FDC so provide:

43. Anonymous participants in proceedings

1. When a person's testimony in proceedings conducted in accordance with this Code could lead to threats to them or put them or any person particularly close to them in physical danger, the chairperson of the competent judicial body or the deputy chairperson may order, inter alia, that:

- a) the person not be identified in the presence of the parties;*
- b) the person not appear at the hearing;*
- c) the person's voice be distorted;*
- d) the person be questioned outside the hearing room;*
- e) the person be questioned in writing;*
- f) all or some of the information that could be used to identify the person be included only in a separate, confidential case file.*

2. If no other evidence is available to corroborate the testimony provided by the person concerned, such testimony may only be used in the context of imposing sanctions under this Code if:

- a) the parties and their legal representatives had the opportunity to pose questions to the person concerned in writing; and*
- b) the members of the judicial body had the opportunity to interview the person concerned directly and in full awareness of their identity and to assess their identity and record in full.*

3. Disciplinary measures shall be imposed on anyone who reveals the identity of any person granted anonymity under this provision or any information that could be used to identify such person.

44. Identification of anonymous participants in proceedings

1. To ensure their safety, persons granted anonymity shall be identified behind closed doors in the absence of the parties. This identification shall be conducted by the chairperson of the competent judicial body alone, the deputy chairperson and/or the members of the competent judicial body present and shall be recorded in minutes containing the relevant person's personal details.

2. These minutes shall not be communicated to the parties.

3. The parties shall receive a brief notice which:

- a) confirms that the person concerned has been formally identified; and*
- b) contains no details that could be used to identify such person.*

³³ Relevant to this topic are also Articles 46 and 47 of the FIFA Code of Ethics (the FCE), which contain rules identical to those set by the FDC.

Such provisions reproduce in the FIFA disciplinary system the measures applicable before CAS and appear to follow the indications of the SFT with regard to Swiss law³⁴ in all material respects: indeed, the protection measures are the same; and so are the precautions to be adopted before the hearing, in order to accurately identify the testifying protected individual. A couple of additional points can, however, be underlined as peculiarly valuable for the protection of the witnesses. The FIFA rules (wisely) give express relevance not only to direct threats against the testifying person, but also to those “particularly close to them”; and they provide for the imposition of disciplinary measures on anyone revealing the identity of the anonymous witness. In other words, the FIFA system is designed to offer, to the maximum possible extent for a “private” organisation, measures of protection which are comprehensive and effective.

7. PRACTICAL ISSUES AND CONCLUDING REMARKS

The provisions so adopted, as applicable before CAS (or in the internal FIFA disciplinary proceedings), while setting important guiding principles for the hearing of witnesses in a protected environment, face some practical issues.

The difficulties to be overcome do not concern so much the finding of the practical arrangements for a “remote” and “anonymized” deposition of the protected witness: modern technologies are easily available and no issue should arise with respect to the organisation and conduct of the examination of the witness in a safe environment.

The main difficulties are linked to other aspects.

A first point concerns the implementation within the internal disciplinary system (at FIFA level) of the rules applicable according to the FDC. The enforcing internal authority should in fact bear in mind that an appeal to CAS would be in principle open against any final disciplinary decision rendered. As a result, it is important, in granting the protection according to the FDC, to meet the standards required by the CAS panel for such purposes.

The second difficulty comes from the unavoidable need to explain the procedure envisaged, and the risks involved, to the relevant witness/victim.

³⁴ FIFA is a Swiss law entity and is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights (Article 3 of the FIFA Statutes). As a result, it is bound to observe human rights (such as those expressed by the ECHR) not only as a result of being subject to Swiss law, but also because of its self-commitment expressed in the Statutes.

Without “instructing” the witnesses about their statements (which should be rendered freely and in full knowledge and conscience), the testifying parties should be made aware of the responsibility undertaken by their deposition, as well as of the possible pitfalls they might encounter while being examined, including the possibility that the identity could, in the end, be exposed. Such a *caveat* appears in any case necessary (not only to test the determination of the witness, but also) to avoid responsibilities. Any explanation should, however, be offered without dramatization, with the assistance, if such is the case, of a psychologist, and together with an accurate description of all the measures of protection implemented.

On a substantive level, another difficulty to be faced consists in the determination of the eligibility for the status of anonymous/protected witness in proceedings before CAS (to be replicated at the internal level in order to avoid the granted status then being revoked on appeal), and more exactly of the evidence necessary to grant it. Many questions arise in that regard: is the allegation of having received threats in person but without any supported evidence sufficient? Is it sufficient that the prospective witness lives in a non-democratic country or under a conflict to make it vulnerable? Can this status be granted because the witness/victim has only agreed to speak out if they remain anonymous, or because they requested it for fear of public stigma, shame or retaliation (e.g., by a coach, or club manager), but with no supporting evidence?

No absolute answer can be given to those questions. Indeed, a minimum due diligence has to be observed by the relevant judicial body before granting anonymity. Overall, however, any decision should be based on a case-by-case analysis, examining the reasons offered by the individual seeking the protection, any evidence advanced in support, as well as any other objective elements that might justify the granting of the protection.

Then, there is a final, and fundamental issue: what is the evidentiary impact of the deposition rendered by the “anonymous” witness? It must in fact be underlined³⁵ that the SFT and the ECHR came to the conclusion (at least with respect to criminal investigations) that anonymous witness statements do not breach the right to be heard, when they support the other evidence provided to the court, that a conviction cannot be based solely or to a decisive extent on anonymous statements, and the evidence derived therefrom should be treated with extreme care. Bearing this in mind, any evaluation by the deciding body should be based on an overall evaluation of all the evidence available. Even a single deposition (e.g., by the victim of a sexual assault) may be sufficient to ground a comfortable satisfaction (if this

³⁵ See paragraph 4 above.

is the applicable standard: Article 39(3) FDC) of the hearing body if genuine, open, internally consistent and objectively predictable. In any case, the evaluation of the evidence is left to the prudent appreciation of the panel.

The mentioned problems, however, are inherent to any judicial determination on the rights of the parties and do not prevent a positive overall evaluation from being made with respect to the treatment of vulnerable witnesses before the CAS.

As said, two competing rights have to be reconciled.

In one direction, the right of the witness has to be taken into account, and in that sense the procedural measures that can be adopted to secure the deposition without exposing the testifying party to any danger or threat. In the other direction, the rights of the accused have to be guaranteed. The accused is to be given a concrete chance to contradict the evidence brought against them and to test the credibility of the witness offering the said evidence.

Overall, however, the principles emerging from the CAS practice and summarised in the Guidelines seem to be able to strike a fair balance between these competing rights, in a way consistent with the basic requirements of Swiss law.

In any case, caution and wisdom are the key elements, keeping in mind that adjudicators do not provide their services only in the interest of the parties, or even of the sporting system to which they belong. Their task is indeed to do justice, and justice is best served by a careful approach, which balances the rights of all entities involved.