



Arbitration CAS 2015/A/4095 Bernardo Rezende & Mario da Silva Pedreira Junior v. Fédération International de Volleyball (FIVB), award of 6 October 2015

Panel: Mr Alasdair Bell (United Kingdom), Sole Arbitrator

Volleyball

Disciplinary sanctions against a player and a coach

Legal interest of a party to bring an appeal to the CAS in case of a suspension having already expired

Powers of a CAS panel circumscribed by the statutory basis of the appeal proceedings

Full power of review of a CAS panel and guarantees afforded under the European Convention of Human Rights

Middle finger gesture to an accredited journalist as a conduct sanctioned by an international federation

Revision of a sanction imposed in a disciplinary case by the adjudicatory instance of a sports federation

1. Even if the period of suspension has expired for a party to CAS proceedings, it cannot be lightly accepted that such party lacks a legal interest to pursue an appeal. An “*aggrieved party*” may have a legal interest in bringing an appeal. The concept of an “*aggrieved party*” may be rather wider than the narrow question of whether a coach or an athlete may resume their professional activities. For example, a “*grievance*” might also consist of having a strongly held conviction of being unjustly treated or “*wrongly convicted*”, in a manner that might be damaging from a professional or moral or reputational point of view.
2. The powers of a CAS panel are circumscribed by the statutory basis of the appeal proceedings. The power of review of a CAS Panel is also determined by the relevant statutory legal basis and is limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively: if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and the motion must be rejected.
3. While CAS panels have consistently held that the ECHR does not apply to an association’s disciplinary bodies, which cannot be qualified as “*Tribunals*” within the meaning of the Convention, the overall scheme of the Convention, in particular Article 6 thereof, may be a convenient reference point to determine whether or not the procedural rights of respondents have been respected. Accordingly, even if a violation of procedural rights may be cured by the CAS appeal proceedings, given the power of CAS to consider matters *de novo* and to review the facts and the law under Article R57 of the Code, it may nevertheless be a useful practical exercise to consider whether guarantees afforded under the ECHR have been respected. This is also against the background of any further possible appeal of a CAS award to the Swiss Tribunal Federal.

4. **It is self-evident that giving a middle finger gesture to an accredited journalist can fall within the category of conduct that may be sanctioned by the FIVB judicial bodies, as such conduct may clearly bring the FIVB into disrepute (sanction any “action” or “attitude” which might defame the FIVB or its guests).**
5. **CAS, as a matter of general principle, is slow to intervene and to revise a sanction imposed in a sports disciplinary case, unless it is clear that the measure imposed is clearly inappropriate or otherwise wrong. In this respect, CAS recognises that international federations enjoy a wide margin of discretion in disciplinary matters.**

I. PARTIES

1. Bernardo Rezende (the “Coach” or “First Appellant”) is a Brazilian national and Head Coach of the Brazilian Men’s National Volleyball Team.
2. Mario da Silva Pedreira Junior (the “Player” or “Second Appellant”) is a Brazilian national who is a professional volleyball player and member of the Brazilian Men’s National Volleyball Team.
3. The Fédération Internationale de Volleyball (the “FIVB” or “Respondent”) is the international governing body of volleyball and exercises regulatory, supervisory, and disciplinary functions over continental confederations, national associations, clubs, officials, and players worldwide.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
5. This case concerns the FIVB Men’s World Championship which took place in Poland between 30 August and 21 September 2014 (the “Competition”). More specifically, the case relates to incidents which occurred during or shortly after the match that took place between Brazil and Poland in the city of Lodz on 16 September 2014 (the “Match”).

6. The Match was close and was won by Poland following a challenge made by the Polish coach to a point scored in the final seconds by Brazil. That challenge resulted in the referee changing his decision which, in turn, meant that Poland won the Match.
7. In the immediate aftermath, it appears that members of the Brazil team, including coaching staff, remonstrated with FIVB officials including Mr. Philip Berben, who was the responsible FIVB official and Game Jury President. According to his match report, Mr. Berben stated that Brazilian players and staff were angered about the outcome of the Match, in particular, the decision of the referee to accept the challenge made by the Polish coach. Mr. Berben stated that players and officials of the Brazilian team conducted themselves in an impolite and insulting manner and that he (Mr. Berben) had a wet towel thrown in his face by a member of the Brazilian team.
8. Mr. Tomasz Wolfke, the Event Press Director, also reported that, at the end of the Match, the Coach made a middle-finger gesture towards a radio commentator sitting by the court and refused to participate in the post-match press conference. The Coach was fined US 1,000 for failing to appear at the press conference after the Match. Following the subsequent match between Brazil and Russia on 17 September 2014, neither the Coach nor the captain of the Brazil team appeared at the post-match conference either.
9. On 21 September 2014, following the match in which Brazil lost to Poland in the final of the Competition, the Coach gave an interview to Brazilian television in which he stated, *inter alia*, that “*The FIVB plays dirty*”; “*referee’s lineup chose to destabilise Brazilian team*”; “*The FIVB put two referees who they know that are the only referees with whom we had serious problems in the World League*”; “*the ‘dirty game’ that has been permanently really worries me about the future of Volleyball ...*”; “*The FIVB is doing whatever they want with us*”.

B. Proceedings before the FIVB Tribunals

10. On 18 September 2014, the FIVB Control Committee President, Mr. Aleksander Boricic, informed the Brazilian team and certain individual members of the Brazil delegation that a disciplinary procedure had been opened in connection with the conduct of the Brazilian team after the Match.
11. In a decision dated 12 December 2014, the FIVB Disciplinary Panel found the Player guilty of throwing a towel in the face of Mr. Berben in violation of Articles 11.4 and 11.5 of the FIVB Disciplinary Regulations, as this constituted both physical abuse and discourteous behaviour towards an FIVB official. As a result, a suspension of six matches was imposed on the Player.
12. The FIVB Disciplinary Panel found that the middle finger gesture given by the Coach defamed the FIVB and warranted a three-match suspension. The failure of the Coach to participate in the post-match press conference on 18 September 2014 was sanctioned with a fine of US 2,000 and the comments made to the Brazilian media on 21 September 2014, which

were considered to impugn the reputation and impartiality of the FIVB, were sanctioned with a seven-match suspension.

13. The decision of the FIVB Disciplinary Panel was appealed to the FIVB Appeals Panel. By decision dated 2 June 2015, the FIVB Appeals Panel upheld the findings of the Disciplinary Panel. The FIVB Appeals Panel confirmed the sanction of a six-match suspension imposed on the Player for physical abuse and discourteous behaviour. As regards to the Coach, the FIVB Appeals Panel also confirmed all of the findings and sanctions imposed (three-match suspension for the middle finger gesture; US 2,000 fine for non-attendance at the post-match press conference on 18 September 2014; seven-match suspension for comments made to the Brazilian media with regard to the FIVB).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 12 June 2015, the Appellants filed their statement of appeal serving as appeal brief against the Respondent with the Court of Arbitration for Sport (the “CAS”) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). The Appellants proposed that the appeal be submitted to a Sole Arbitrator and suggested the names of Prof. Philippe Sands QC, Mr. Jose Maria Alonso, or Mr. Alasdair Bell. The Appellants also requested that the procedure be handled on an expedited basis.
15. On 15 June 2015, the Respondent objected to the Appellants’ request that that appeal be handled on an expedited basis and also objected to the proposal that the appeal be referred to a Sole Arbitrator, stating instead a preference for a three-member Panel.
16. On 16 June 2015, the CAS Court Office informed the parties that given the Respondent’s objection, the appeal would not be handled on an expedited basis in accordance with Article R44.4 of the Code. In addition, given the Respondent’s objection concerning the number of arbitrators, that issue would be referred to the President of the Appeals Arbitration Division in accordance with Article R50 of the Code. The CAS Court Office also confirmed that the procedure would be conducted in English based upon the parties’ consent and in accordance with Article R29 of the Code.
17. On 23 June 2015, the CAS Court Office informed the parties that the Division President had decided to submit the appeal to a Sole Arbitrator in accordance with Article R50 of the Code.
18. On 29 June 2015, the Respondent requested that the Division President reconsider her decision to refer the case to a Sole Arbitrator.
19. On 1 July 2015, the Appellants objected to the Respondent’s request for reconsideration and requested the Division President’s decision be maintained.
20. On 6 July 2015, the CAS Court Office informed the parties that the Division President denied the Respondent’s request for reconsideration.

21. Later that same day, 6 July 2015, the Respondent informed the CAS Court Office that given the Division President's decision, it would consent to the appointment of Mr. Alasdair Bell as Sole Arbitrator.
22. On 6 July 2015, the Respondent filed its answer in accordance with Article R55 of the Code.
23. On 10 July 2015, the CAS Court Office, on behalf of the Division President, informed the parties that Mr. Alasdair Bell, UEFA Director of Legal Affairs in Nyon, Switzerland, had been appointed Sole Arbitrator in accordance with Article R54 of the Code.
24. On 31 July 2015, the CAS Court Office informed the parties that the Sole Arbitrator, after considering the parties' silence on this issue, determined that he was sufficiently well informed to render a decision based solely on the parties' written submissions, without a hearing, in accordance with Article R57 of the Code.
25. On 3 and 12 August 2015, the Respondent and Appellant, respectively, signed and returned the Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

26. The Appellants' submissions, in essence, may be summarized as follows:
27. Generally, the Appellants allege that there was a sudden change to the Competition rules which had the effect of destabilizing the Brazilian team. In particular, it is alleged that even though the Brazilian team had finished top in its group, it was nevertheless included in a drawing of lots for the subsequent stages of the Competition, which meant that the Brazilian team eventually had to travel to another town (Lodz) for the match against Poland. It is alleged that this change was illegal and had the effect of disadvantaging the Brazilian team. For example, when the team travelled to its new hotel in Lodz, team members had to wait for two hours in the lobby of the hotel because their accommodation was not ready.
28. The Appellants allege that these factors contributed to a highly charged atmosphere for the match that subsequently took place between Brazil and Poland on 16 September 2014. Furthermore, a point scored by the Brazilian team in the closing seconds of the Match was reversed following a challenge made by the Polish coach. The Appellants also argue that, contrary to usual practice, the FIVB deliberately did not show a video replay of the incident in question, further contributing to the heated atmosphere. It was against all this background that certain conduct occurred which resulted in disciplinary proceedings being opened against the Brazilian team.
29. The FIVB opened disciplinary proceedings on 17 and 18 September, largely based on the match report of Mr. Berben. In this respect, the Appellants allege that Mr. Berben provided narrow and partial descriptions of the incidents in question. They further allege that, by inviting the CBV to provide its comments by the end of 18 September, this violated due process and the right to be heard. In particular, the Appellants submit that the Brazilian team

and CBV delegation was tired, that important matches were still coming up in the Competition, and consequently it was unreasonable and not justifiable to allow the CBV such a short deadline to respond.

30. In this connection, the Appellants argue that the FIVB Appeal sub-Committee did not, in any event, render any decision until the end of the Competition and only forwarded the relevant documents, including the Appellant's reply to the FIVB Disciplinary Panel on 22 September 2014.
31. The Appellants also dispute the impartiality of the FIVB judicial bodies. In this connection, the Appellants allege that messages sent to the FIVB Appeals Panel are routinely received and read by the FIVB's outside attorney (Mr. Andreas Zagklis). The Appellants argue that because the FIVB is a client of Mr. Zagklis, it is unacceptable for him to be involved, in an advisory capacity, with decisions made by the FIVB judicial bodies. The Appellants further argue that because Mr. Zagklis is in the same law firm as a well-known CAS arbitrator (Mr. Dirk-Reiner Martens) this also results in a "conflict of interests".
32. In support of these arguments, the Appellants refer to the provisions of various international conventions, including Article 10 of the Universal Declaration of Human Rights 1984, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 14 of the International Covenant on Civil and Political Rights, which all generally provide that everyone is entitled to a full and fair hearing "by an independent and impartial tribunal". Against the background of these legal provisions, the Appellants call for "profound reform" of the FIVB judicial bodies.
33. As regards the merits of the case, the Coach admits that he had no excuse for failing to attend the post-match press conference on 18 September 2014 and therefore he does not contend the fine imposed (US 2,000).
34. As regards to the three-match suspension imposed for the alleged middle finger gesture at the end of the Match on 16 September 2014, the Coach alleges that no proper evidence is provided that any such gesture was made and that witness statements made by FIVB officials are not impartial. He therefore considers that the FIVB has not discharged the burden of proof in establishing that any such offensive gesture was made by him. The Coach further alleges that, even if it could be established that an offensive hand gesture had been made, then it would have been directed to a media officer and not an FIVB official within the meaning of Article 1 of the FIVB DR. It would follow that there would be no violation of the FIVB DR in any event. Finally, the Coach argues that a three-match suspension for such a gesture, even if it could be proven to have taken place, would be a disproportionate sanction, having regard to the circumstances and to relevant CAS jurisprudence, and so if any sanction would be imposed it should only be a warning, rather than a suspension.
35. As regards to the interview given by the Coach to the Brazilian media (which resulted in the imposition of a seven-match suspension), it is argued first of all that these remarks were made by the Coach "*in the heat of the moment*", just shortly after Brazil had lost the final match in the Competition to Poland.

36. It is further argued that making such remarks was justified on the basis of fundamental rights, namely, the right of free speech and expression, as recognised in Article 10 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, and Article 16(2) and 17 of the Swiss Federal Constitution.
37. The Coach further argues that the remarks made in the interview do not violate the dignity of the FIVB, nor were they detrimental to the reputation of the FIVB, that these remarks were justified under the constitutionally protected right of freedom of expression and that they went no further than legitimate criticism of the manner in which the FIVB operates.
38. The Coach doubts the legality of Article 11(5) of the FIVB DR and argues that this rule cannot be applied in a manner designed to “*censor opinion*” and to protect the FIVB from any form of criticism. Finally, while the Coach considers that no sanction should be imposed in respect of the remarks made to the Brazilian media, it is further argued that if a sanction should be imposed then it ought to be reduced, in application of the proportionality principle. In this respect, the Coach argues that a more appropriate sanction would be a warning or a much shorter period of suspension.
39. The Player argues that the decision to sanction him with a six-match suspension is based on poor evidence, in particular, since there is allegedly no clear video footage establishing that he threw a towel in the direction of Mr. Berben. The Player argues that in the absence of concrete evidence incriminating him the CAS should determine that the alleged disciplinary violation was unproven.
40. Since the Player considers there to be insufficient evidence of any rule violation by him he requests the CAS to annul the six-match suspension imposed. Alternatively, should the CAS determine that there was a rule violation, the Second Appellant requests that the sanction be reduced to a warning which, he submits, would be a more proportionate sanction.
41. In their statement of appeal/appeal brief, the Appellants request the following relief:
 - 1.1 *In view of the foregoing, the Appellants submit the following requests for relief:*
 - a) *That the Appeals of Messrs. Bernardo Rezende and Mario Pedreira Junior are admissible;*
 - b) *That the decision rendered by the FIVB Appeals Panel shall be set aside;*
 - c) *Mr. Bernardo Rezende hereby reinforces his main and alternative requests detailed in paragraphs 93, 94 and 95 above (First Request for Relief); and paragraphs 106, 107 and 108 above (Second Request for Relief);*
 - d) *Mr. Mario Pedreira Junior hereby reinforces his main and alternative request detailed in paragraphs 125, 126, 127 and 128 above (Second Appellant’s Requests for Relief);*
 - e) *Order FIVB to bear any and all legal costs and attorneys’ fees incurred by the Appellants in connection with the present proceedings, as well as during the lower instances – and partial – proceedings, in an amount not lower than CHF 30,000.00 (thirty thousand Swiss Francs);*

- f) *Order FIVB to reimburse the administrative fees paid by the Appellants in the lower instance proceedings – in accordance with Article 22.2 of the FIVB DR – in case the present appeals are successful and the Appealed Decision is set aside or partially upheld;*
- g) *Sanction FIVB and order a deep reform in its structure in view of the strong evidences that confirm the partiality and lack of independence of its judicial bodies, namely the FIVB Disciplinary Panel and the FIVB Appeals Panel, which ultimately violate and disrespect international principles of law, the Olympic Charter and the Olympism.*

42. The Respondent's submissions, in essence, may be summarized as follows:
43. First of all, the Respondent makes the general observation that neither Appellant has actually denied that he engaged in the conduct which resulted in the imposition of disciplinary measures. Thus, the Coach does not deny that he made an offensive hand-gesture, he rather contends that there is insufficient evidence that he was guilty of such an offence. Similarly, the Player does not deny that he threw a wet towel at Mr. Berben, rather he contends that the evidence on which the FIVB disciplinary bodies relied was insufficient. As regards to the interview given to the Brazilian media on 21 September 2014, the Coach contends that he was legally entitled to make such remarks based on his right of freedom of expression under various international conventions as well as Swiss law.
44. As regards to the alleged middle finger gesture made by the Coach, the Respondent refers to the Witness Statement of Mr. Tomasz Goradzowski (a Polish accredited journalist), the e-mail report of the event Press Director (Mr. Thomas Wolfke), and an e-mail from Ms. Anna Tomas, FIVB press delegate. Both Mr. Wolfke and Ms. Tomas have also provided Witness Statements confirming the content of their e-mails.
45. As regards to the wet towel incident, the Respondent refers to the video sequence contained in footage recorded by a handheld camera showing that the Player was holding a wet towel and was in the vicinity of Mr. Berben at one moment and then, a few seconds later, his hand was empty, during exactly which time Mr. Berben was hit in the face by a wet towel.
46. The Respondent generally refers to the testimony of Ms. Aragona, a representative of the Brazilian team, as given to the FIVB on 18 September 2014. Here Ms. Aragona apologises for the conduct of the Brazilian team and states that Mr. Berben "*is right*". Ms. Aragona further explains that the match against Poland on 17 September 2014 was very intense, that the Brazilian team was disturbed by having to play the match in Lodz and having to wait to get their hotel rooms in the city. At the same time, she states that the Brazilian team is "*not proud of what happened*".
47. The Respondent argues that neither Appellant has a legal interest in continuing with the Appeal since all the relevant suspensions have been served and the fine imposed for not attending the press conference was not challenged by the Coach. The Respondent argues that CAS cannot grant the relief as requested by the Appellants owing to the fact that the suspensions have been served, meaning that the Appeal has become moot.

48. The Respondent rejects the allegation that the FIVB Disciplinary bodies are not independent. In this respect, the Respondent refers to the fact that members of the FIVB Appeals Panel are independent of the FIVB itself, that the Disciplinary Rules have been drafted to preserve their independence, that the members are appointed for a four-year term and do not receive any remuneration, that they must have legal training and that there is an established process for removing any member who might have a conflict of interests. The Respondent points out that in the present case the Chairman of the FIVB Disciplinary Panel stepped down since the matter involved members of the Brazilian national team. The Respondent states that the members of the Appeals Panel can render any decision as they see fit and in the present case the appealed decision was drafted entirely by Ms. Emba Leung, Chair of the FIVB Appeals Panel and an attorney-at-law in Hong Kong.
49. The Respondent further argues that communication to an outside lawyer (such as Mr. Zagklis, in his capacity as advisor to the FIVB) does not compromise the independence of the FIVB Appeals Panel. In this respect, the fact that an outside lawyer might have read an e-mail does not prove that the decision of a sports disciplinary body has been improperly influenced.
50. In its Answer, the Respondent request the following relief:
168. *FIVB requests that CAS:*
- *Dismiss in full the appeal filed by Mr. Bernardo Rezende and Mr. Mario da Silva Pedreira Junior;*
 - *Confirm the 2 June 2015 decision rendered by the FIVB Appeals Panel insofar as it has been challenged with the Appeal;*
 - *Order Mr. Bernardo Rezende and Mr. Mario da Silva Pedreira to pay FIVB an amount of at least EUR 20,000 for its legal fees and expenses in this case.*

V. JURISDICTION

51. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

52. Article 45.11.2 of the FIVB Sports Regulation provides as follows:

45.11.2 FIVB Tribunal and CAS

c) Decisions of the FIVB Tribunal can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within twenty-on (21) days from the

receipt of the decision. Decisions of the FIVB/Confederation under Article 45.11.1 above may not be appealed to the FIVB Appeals Panel.

53. Moreover, Article 23 of the FIVB Disciplinary Regulations provides as follows:

A further appeal against the decision by the Appeals Panel can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland in Lausanne, Switzerland, within twenty-one (21) days following receipt of the decision.

54. Based on the foregoing, the Sole Arbitrator determines that the CAS has jurisdiction to render a decision in this case. Moreover, it is noted that the Respondent does not object to the jurisdiction of CAS, and confirmed such jurisdiction when it signed the order of procedure.

VI. ADMISSIBILITY

55. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

56. As set forth above, both Article 45.11.2 of the FIVB Sports Regulation and Article 23 of the FIVB Disciplinary Regulations require an appeal of a decision rendered by the FIVB Tribunal to be filed within twenty-one (21) days receipt of the decision. The Appealed Decision was rendered on 2 June 2015 and notified to the Appellant on 3 June 2015. Therefore, the Sole Arbitrator determines that the present appeal, which was filed on 12 June 2015, is timely.

VII. APPLICABLE LAW

57. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

58. In the present appeal, the Sole Arbitrator notes that the Respondent is domiciled in Switzerland. Moreover, it is noted that there is no dispute between the parties that the FIVB Regulations govern this dispute, and that Swiss law should be applied in subsidiary order. The Sole Arbitrator will therefore apply the FIVB Regulations, with Swiss law in subsidiary order, to determine this appeal.

VIII. PRELIMINARY ISSUES

A. Legal Interest

59. The Respondent has contended that the Appellants have no legal interest in maintaining the appeal, owing to the fact that their periods of suspension have been served. In this respect, the Respondent refers to case *Olympique des Alpes SA*, where the Swiss Federal Tribunal held as follows: “*A legally protected interest consists in the practical use that admitting the appeal would have for the Appellant, by preventing him from undergoing some damage of an economic, ideal, substantive or other nature that would be caused by the decision under appeal (ATF 137 II 40 at 2.3 p.43)*”. The Respondent also refers to CAS jurisprudence in which it has been held as follows: “*The CAS has already clarified that if a party does not have a cause of action or legal interest (‘intérêt à agir’) to act against the Appealed Decision [such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing (‘pas d’intérêt, pas d’action’)*” (CAS 2009/A/1880-1881, at para. 152 et seq.).
60. In addition, the Respondent refers to CAS jurisprudence in which it has been held that having a “grievance” is an important aspect of having a legal interest in a dispute: *The Panel is in fact of the view that only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision. ... The Panel is of the opinion that the above described “aggrievement requirement” is an essential element to determine the legal interest and the standing of a party of appeal before the CAS a sports body’s decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision...*”.
61. In support of the argument that the Appellants have no legal interest in maintaining the appeal, the Respondent also refers to a case where the Swiss Federal Tribunal declared that an appeal had become moot in circumstances where an athlete had already served an 18-month suspension imposed for an anti-doping violation and in circumstances where standing to appeal had been based entirely on the fact that the contested decision prevented the appellant from practising his sport.
62. The Sole Arbitrator notes, however, that in the case referred to in the preceding paragraph, the appellant did not seek a stay of enforcement. By contrast, in the present case, the Appellants did at least request expedited proceedings, which were denied by the CAS in accordance with Article R44.4 of the Code. In addition, the Sole Arbitrator observes that the Appellants generally argue that the proceedings before the FIVB judicial bodies were too slow, in particular, owing to the fact that the FIVB Appeals Panel decision was not issued until 2 June, 2015, following the FIVB Disciplinary Panel decision, issued on 12 December 2014. In such circumstances, the Sole Arbitrator considers that, even if the respective periods of suspension have expired, it cannot be lightly accepted that the Appellants lack a legal interest to pursue this Appeal.
63. In addition, the Sole Arbitrator observes that the Respondent itself acknowledges that an “aggrieved party” may have a legal interest in bringing an appeal. In this context, the Sole Arbitrator considers that the concept of an “aggrieved party” may be rather wider than the

narrow question of whether a coach or an athlete may resume their professional activities. For example, a “grievance” might also consist of having a strongly held conviction of being unjustly treated or “wrongly convicted”, in a manner that might be damaging from a professional or moral or reputational point of view. Thus, for example, in CAS 2014/A/3832 & 3833, the Panel had to consider whether a professional skier had a legal interest in appealing a period of suspension in circumstances where it was alleged that she had ended her skiing career anyway. While the Panel noted that she had, in fact, testified to the effect that she intended to resume her skiing career (thus clearly establishing a legal interest in the appeal) it further noted as follows: *“In addition, the Panel holds that the Appellant can also avail herself of a legal interest to rehabilitate her reputation which can be deemed tarnished by the FIS HP Decision concluding and declaring that she was either an active or knowing participant in a manipulation”*.

64. Furthermore, the Sole Arbitrator notes that according to Article 5.9 of the FIVB Disciplinary Regulations *“the otherwise applicable sanction may be increased (up to double) in case of a recurrence of the offence. Recurrence occurs if a sanction has to be imposed again within five years of a previous offence of a similar nature”*. Thus, against this legal background, it is also possible that each Appellant could have a legal interest as regards their respective disciplinary decisions. In particular, the fact that these decisions might have a future or potential impact on their individual disciplinary status (based on the recidivism principle) again indicates that their legal interest in pursuing the current appeal cannot be dismissed. In this respect, the potential annulment of the decisions subject to appeal could also be said to have a “practical use”, as per the *dicta* of the Swiss Federal Tribunal in the *Olympique des Alpes* case.
65. In summary, therefore, the Sole Arbitrator considers that, in the present case, a cautious approach suggests that it does not automatically follow that the Appellants lack legal interest in pursuing the appeal simply because the respective periods of suspension have expired. The Sole Arbitrator considers that, in all the circumstances of the case, the Appellants still have a “grievance” and the appeal still has a “practical use”, sufficient to establish a legal interest for the purposes of maintaining the appeal.

B. Alleged Procedural Flaws

66. The Appellants have argued that the proceedings before the FIVB Disciplinary bodies were flawed and did not respect due process. They argue that the FIVB Disciplinary bodies are not impartial or independent and, as a result, not only should the appealed decisions be set aside but CAS should also: *“order a deep reform in its [the FIVB’s] structure”*.
67. The Respondent argues that the scope of review in these CAS proceedings is limited to the disciplinary decisions that are the object of the appeal(s). Accordingly, the form of relief claimed by the Appellants (namely, that CAS should: “order a deep reform” in the structure of the FIVB) cannot be granted in this case. The Respondent further argues that the Appellants failed to bring any of the alleged procedural failures to the attention of the FIVB Appeals Panel when they had the opportunity to do so. Nor did they give the FIVB an opportunity to address these alleged problems before taking the matter to CAS, meaning that

they failed to exhaust all internal remedies before launching CAS proceedings and, as a result, their claim should be dismissed.

68. As regards to the issue of whether CAS would be competent to grant the form of relief requested by the Appellants (“reform of the structure” of the FIVB) the Sole Arbitrator observes that his powers are, indeed, circumscribed by the statutory basis of the appeal proceedings. Thus, it may be noted that authoritative commentary on the CAS Code states as follows: “*The power of review of a CAS Panel is also determined by the relevant statutory legal basis and is limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively: if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the Panel does not have the power to decide on it and the motion must be rejected. See also CAS 2006/A/1206, M. Zivadinovic v. IFA, award of 2 April 2007. See CAS 2005/A/835 & CAS 2005/A/942, PSV N.V., v. FIFA & Federação Portuguesa de Futebol & L. Bomfim, award of 3 February 2006, para. 83. See also TAS 2009/A/IBZ9, A. Valverde, CONI & UCI & AMA, award of 16 March 2010, para. 72. CAS 2007/A/1396 & 1402, WADA and UCI v. A. Valverde & RFEC, award of 31 May 2010, para. 72, 73. 2007/A/1204, Club Barcelona FC v/FIFA, award of 3 July 2007, para. 37: in a disciplinary procedure involving a party against FIFA, the Panel held that the object of the appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed in the decision, See also CAS 53” (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases, and Materials*, Commentary on Article R57: Scope of Panel’s Review, p. 522, fn. 91).*
69. While it would follow that the CAS cannot grant the particular form of relief requested in this case (which relief is, in any event, wide-ranging and non-specific in nature), that does not, in the opinion of the Sole Arbitrator, necessarily exclude the possibility for CAS to comment, in circumstances that might be deemed useful and appropriate, on the manner in which sports judicial bodies discharge their given tasks, in particular, as regards matters of due process.
70. In this respect, the Sole Arbitrator is generally not convinced by the argument that such matters lie outside the jurisdiction of CAS owing to the fact that “internal legal remedies” have not been exhausted. In fact, it may be inquired as to what “internal remedies” would actually be available to address the alleged procedural deficiencies complained of by the Appellants and whether any such remedies are real or illusory.
71. In addition, given the consistent CAS jurisprudence concerning the power of CAS to review the facts and the law and to assess a case *de novo* it would appear somewhat unbalanced if CAS proceedings could be used to cure each and every procedural deficiency at the level of the sports judicial body but, at the same time, CAS would be precluded from commenting on the manner in which these proceedings were conducted by that very same body.
72. In continuation, and while CAS Panels have consistently held that the ECHR does not apply to an association’s disciplinary bodies, which cannot be qualified as “Tribunals” within the meaning of the Convention (see e.g. CAS 2000/A/290), the Sole Arbitrator nevertheless considers that the overall scheme of the Convention, in particular Article 6 thereof, may be a convenient reference point to determine whether or not the procedural rights of respondents have been respected.

73. Accordingly, even if a violation of procedural rights may be cured by the CAS appeal proceedings, given the power of CAS to consider matters *de novo* and to review the facts and the law under Article R57 of the Code, it may nevertheless be a useful practical exercise to consider whether guarantees afforded under the ECHR have been respected. This is also against the background of any further possible appeal of a CAS Award to the Swiss Tribunal Federal. In this connection, and as noted by one respected commentator:
- a. *“Even if the ECHR has no direct third-party effect in legal relations between private individuals, it does not follow from this that the ECHR is of no relevance to arbitral proceedings before the CAS. In proceedings relating to arbitration, the state courts remain addressees of the ECHR and, thus, bound by its provisions. The points of contact between state jurisdiction and arbitral jurisdiction therefore constitute the openings for the ECHR to apply in relation to arbitration proceedings.”*
 - b. *In proceedings relating to arbitration, the state courts are under a duty to guarantee that the inalienable values of the ECHR that form part of public policy (‘ordre public’) are observed. From this it follows that the arbitral tribunals like the CAS are at least indirectly bound by this system of values under ECHR”*
- (HAAS, U., *Role and Application of Art 6 of the European Convention on Human Rights (ECHR) in CAS procedures*, CAS Seminar, Montreux, 2011).
74. In this respect, it may first of all be noted that the principle of an independent judicial system has its origins in the classic theory of separation of powers (i.e. a system of mutual checks and balances aimed at preventing abuses of power). Only an independent judicial body is able to render justice impartially on the basis of law. This is the background to Article 6 of the ECHR, which provides as follows: *“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”*. The way in which the Court of Human Rights has interpreted this article is based on two requirements: the subjective and the objective element. In this sense, not only must the tribunal be impartial, in that *“no member of the tribunal should hold any personal prejudice or bias”*, but it must also *“be impartial from an objective viewpoint”*, in that *“it must offer guarantees to exclude any legitimate doubt in this respect”* (Cf. *Daktaras v. Lithuania*, Judgment of 10 October 2000).
75. Turning to the facts of the present case, the Sole Arbitrator does not find any procedural deficiency in the manner in which the FIVB judicial bodies have taken their decisions, either in terms of the subjective element or the objective element, as described above. In particular, no evidence has been provided to support the contention that the FIVB Appeals Body failed to discharge its functions in an impartial and independent manner.
76. In the same general context, the Sole Arbitrator further notes that in other international sports federations, the role of an “internal” or “external” administrative support function does not necessarily compromise the independence of the final decision making body. For example, according to Article 84 of the current FIFA Disciplinary Code *“the general secretariat of FIFA provides the judicial bodies with a secretariat and the necessary staff at FIFA headquarters”*. Among other

important tasks, the “internal administration” of FIFA “*takes charge of the decisions of the meetings*” (Cf. para 3).

77. In conclusion, even if *quod non*, the ECHR were to be deemed applicable to the matter and even if the procedure before CAS had not served to cure any alleged procedural violation, the Sole Arbitrator cannot, on the basis of the evidence put forward by the Appellants, find any reason to conclude that their fundamental procedural rights were not respected.

IX. MERITS

78. As regards to the merits of the respective appeals, the Sole Arbitrator considers that the matter may be disposed of summarily. First of all, and as pointed out by the Respondent, it is significant that neither the Coach nor the Player has denied engaging in the conduct that resulted in the application of disciplinary sanctions. The Sole Arbitrator considers that if either Appellant was really convinced that he had been wrongly convicted or found guilty of an offence which he had not committed then it might have been expected that they would have denied the offence. Instead, however, the Appellants generally make arguments in connection with due process, the burden of proof, or whether the conduct in question is actually covered by the relevant provisions of the FIVB Disciplinary rules.
79. As regards to the middle finger gesture which resulted in the three-match suspension, the Sole Arbitrator considers first of all that such conduct would be covered by Article 11.1 of the FIVB DR, in particular, insofar as that provision may be legitimately employed to sanction any “action” or “attitude” which might defame the FIVB or its guests. The Sole Arbitrator considers it self-evident that giving a middle finger gesture to an accredited journalist could fall within the category of conduct that may be sanctioned by the FIVB judicial bodies, as such conduct may clearly bring the FIVB into disrepute.
80. As regards to establishing the burden of proof as to whether this offence was committed, the Sole Arbitrator is comfortably satisfied, on the basis of the witness statements and other reports, that it was. As mentioned above, the Sole Arbitrator also notes that the Coach has not denied making the gesture.
81. As regards to the public statements made by the Coach which resulted in the seven-match suspension, the Sole Arbitrator generally notes that these statements may infer that the FIVB does not discharge its functions in an impartial manner and may be biased against the Brazilian team. In this respect, it hardly needs to be explained that such allegations of bias against an international sports federation are serious and can be very damaging for the reputation and standing of the body concerned, even when such statements are unfounded. An allegation that there was a deliberately biased selection of referees for a tournament, with a view to disadvantaging a certain team, is particularly damaging.
82. The Sole Arbitrator finds that the published statements made by the Coach fall within the scope of Article 11.1 of the FIVB DR (since such comments can defame the FIVB) and also

within Article 11.5 of the FIVB DR (since such comments can be detrimental to the image and reputation of the FIVB).

83. With regard to the level of sanction imposed (seven-match suspension) the Sole Arbitrator observes that CAS, as a matter of general principle, is slow to intervene and to revise a sanction imposed in a sports disciplinary case, unless it is clear that the measure imposed is clearly inappropriate or otherwise wrong. In this respect, CAS recognises that international federations enjoy a wide margin of discretion in disciplinary matters.
84. In this respect, CAS has previously held as follows:
- “CAS ‘enforces a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by the disciplinary body of an association to set a sanction’ (cf. CAS 2006/A/1175, para 90). This Panel confirms the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules, can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (cf. CAS 2004/A/690, para 86; CAS 2005/A/830, para 10.26; CAS 2006/C/976 & 986, para 143)” (see CAS 2011/A/2525, para 8.52).*
85. In the present case, the Sole Arbitrator finds no evidence to support an argument that the respective sanctions (three-match suspension for the middle finger gesture and seven-match suspension for the comments to the media) were *“evidently and grossly disproportionate”*. The gesture and the comments were made by an experienced coach during or, in relation to, the FIVB’s flagship competition (the 2014 World Championships). Neither the gesture nor the comments are denied; they clearly damage the image of the FIVB and the sport of volleyball more generally.
86. Accordingly, the FIVB judicial bodies did not exceed their legitimate discretionary powers in sanctioning these matters in the way that they did. Nor is there any force in the argument that the Coach was entitled to make his public comments on the basis of *“freedom of expression”*. Were that argument to prevail, it would be possible for officials to accuse international sports federations of systematic bias and cheating, and then avoid any potential disciplinary consequences based on a right to *“free speech”*.
87. As regards to the sanction imposed on the Player (six-match suspension for throwing a wet towel at the match official) the Sole Arbitrator finds that such conduct is clearly a disciplinary offence within the meaning of the applicable FIVB rules (Article 11.4 and 11.5 of the FIVB DR).
88. As regards proof of the incident, the Sole Arbitrator is comfortably satisfied, on the basis of the video evidence provided by the Respondent, that this offence was committed by the Player. In particular, it may be seen from this evidence that the Player was holding a wet towel in his hand at the time of the incident, it may be seen that an official has been hit in the face by a wet towel, and then it may also be seen (almost contemporaneously) that the Player has no towel in his hand anymore. The Player has not specifically denied throwing the wet towel

at the match official and his previous explanation, given to the FIVB Appeals Panel, that he “dropped” the wet towel at the time of the incident is less than convincing.

89. As regards to the level of sanction imposed (six-match suspension) the Sole Arbitrator considers this to be in a reasonable spectrum and certainly not “*evidently and grossly disproportionate*”. Accordingly, there are no grounds for CAS to intervene in order to revise the sanction imposed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. Bernardo Rezende and Mr. Mario da Silva Pedreira Junior against the decision of the FIVB Appeals Panel dated 2 June 2015 is dismissed.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.