Arbitration CAS 2019/A/6275 Mauricio Álvarez-Guzman v. Anti-Corruption Hearing Officer (AHO) & Professional Integrity Tennis Officers (PTIOs), partial award of 24 February 2020

Panel: Mr Andre Brantjes (The Netherlands), President; Mr George Abela (Malta); Prof. Ulrich Haas (Germany)

Tennis
Match-fixing and corruption
Power of a CAS panel to bifurcate the proceedings
Standing to be sued of the Anti-Corruption Hearing Officer

1. **The CAS Code only expressly deals with the question of whether or not a CAS panel may bifurcate the proceedings in order to decide the preliminary question of its competence (Article R55 para. 4 of the Code). However, the Code does not contain any provision on whether or not a CAS panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits). Nonetheless, it is undisputed that a CAS panel has the power to bifurcate the proceedings, for reasons of, e.g. reduction of costs and efficiency (see e.g. Articles R44.3 and R55 of the CAS Code). In the absence of any specific provisions in the CAS Code, a CAS panel is entitled – according to Article 182 para 2 PILA – to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. According to Article 125 lit. a of the Swiss Code of Civil Procedure ("CCP"), a court may *"in order to simplify the proceedings … limit the proceedings to individual issues or prayers for relief"*. This power of the court is directly connected to Article 237 CCP according to which a court *"may issue an interim decision"*. When exercising its discretion according to Article 125 lit. a of the CCP, a court will take into account whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs, as well as why a preliminary decision – according to the requesting party's opinion – is necessary to safeguard its interests and to prevent it from possible harm or why a decision on the preliminary issue, for some other reasons, is urgent.**

2. **A party has only standing to be sued and may be summoned before CAS, if it has some stake in the dispute. An Anti-Corruption Hearing Officer (AHO) operates as an independent arbitrator to give a judgement in a case between the Professional Integrity Tennis Officers (PTIOs) and a player. The AHO himself is not the debtor of the disputed right. He is only called on to rule as a first instance jurisdictional body. Once he has disposed of the matter before him by issuing his decision, he no longer is entitled to amend or withdraw the decision. Therefore, he is not the proper entity to address the appeal against. This is all the more true considering that the decision is taken by the AHO on behalf of the PTIOs. In view of the above, the AHO has no standing to be sued.**

I. PARTIES

1. Mauricio Álvarez-Guzmán (the "Appellant") is a professional tennis player of Chilean nationality.

2. The Anti-Corruption Hearing Officer ("AHO" or the "First Respondent") issued the decision of 14 March 2019 appealed against by the Appellant. The AHO is an independent decision-maker who is appointed by the Tennis Integrity Board ("TIB"), and who is responsible for determining whether corruption offences have been committed.

3. The Professional Tennis Integrity Officers (the "PTIOs" or the "Second Respondent") fall under the umbrella of the Tennis Integrity Unit ("TIU") − i.e. the anti-corruption body − of the International Tennis Federation ("ITF"), which is the International Olympic Committee-recognized international sports federation for the sport of tennis that has its headquarters in London, United Kingdom.

II. FACTUAL BACKGROUND

4. The relevant facts according to the Parties' submissions to date are briefly summarized below, without prejudice to any eventual findings of fact by the Panel.

5. On 16 May 2018, the PTIOs brought charges against the Appellant. Such charges alleged that in […] 2016, the Appellant attempted to purchase wild cards for the singles and doubles competition of the […] tournament in […]. In addition, it is alleged that on […] 2016, the Appellant offered another player, X., approximately EUR 1,000 to lose a set in his match against Y. at the […] Tournament in […].

6. A hearing took place on 11 March 2019 before the AHO, Mr Charles Hollander QC. The Appellant appeared by video conference and was represented by counsel. He denied all of the charges.

7. On 14 March 2019, the AHO issued his decision (the "Appealed Decision"), finding that all of the charges had been proven, and sanctioning the Appellant with a life ban *"in relation to any event organised or sanctioned by any Governing Body"*.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

8. On 10 April 2019, the Appellant filed a Statement of Appeal/Appeal Brief before the Court of Arbitration for Sport ("CAS") in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (2019 edition) (the "Code") against the ITF with respect to the Appealed Decision.

9. The Appellant submitted the following request for relief:

> *"I beg you, please revoke the resolution which condemns my represented to a life ban to participate in tennis events and ultimately proceed to apply a temporary suspension or sanction arising from a legal and correct appraisal of the evidence.*
>
> *Instead of the above this defense comes in requesting clemency from his grace, considering that my represented is a young person full of dreams and aspirations, and that, if he had made a mistake, this was because of his immaturity and his hardworking life as a professional tennis player, as he was separated from his parents at a very young age for his long path of professional tennis.*
>
> *Err is human, and in this case my represented cloud have made a mistake without measuring the consequences, is for this reason we respectfully ask you to not to apply the sanction of lifetime ban, since such punishment would destroy the dreams of a young person who just entered the threshold of life"* [sic].

10. The Appellant nominated Dr George Abela, Attorney-at-Law, Valetta, Malta, as arbitrator.

11. On 19 April 2019, 25 April 2019 and 11 May 2019, further to invitations from the CAS Court Office, the Appellant completed his appeal by submitting additional information, pursuant to, e.g., Article R48 of the Code, including filing a Request for a Stay of the Appealed Decision.

12. On 15 May 2019, the CAS Court Office initiated an appeals arbitration proceeding under the reference *CAS 2019/A/6275 Mauricio Álvarez-Guzman v. International Tennis Federation (ITF)* and invited the Respondent to file its response to the Request for a Stay within 10 days.

13. On 21 May 2019, the PTIOs, who were not then named as a respondent, responded to the CAS' 15 May 2019 letter, stating that they should be the only Respondent in this proceeding and that the case was improperly filed against the ITF. Therefore, the PTIOs accordingly asked that the case be amended to reflect the proper Parties.

14. On the same date, 21 May 2019, the CAS Court Office invited the Appellant to clarify whether he would like to withdraw his claim against the ITF and substitute the PTIOs as the Respondent. In addition, the CAS Court Office suspended the deadlines laid out in the CAS' letter dated 15 May 2019.

15. On 5 June 2019, the Appellant stated that the Respondents in this proceeding were: (i) the AHO; (ii) the PTIOs; and (iii) the ITF.

16. On 6 June 2019, the CAS Court Office informed the Parties that, in light of the Appellant's designation of the Respondents, the deadlines set out in CAS letter dated 15 May 2019 were resumed, and that the case reference was now *CAS 2019/A/6275 Mauricio Álvarez-Guzman v. International Tennis Federation (ITF), Anti-Corruption Hearing Officer & Professional Tennis Integrity Officers*.

17. On 10 June 2019, the PTIOs reiterated that they were the only proper Respondent, and asked again that the Appellant amend his appeal to name only the PTIOs as Respondent, and not the ITF or the AHO.

18. By letters dated 11 and 14 June 2019, the CAS Court Office invited the Appellant to comment on the PTIOs' 10 June 2019 letter, and further suspended the deadlines set out in CAS' 15 May 2019 letter.

19. On 21 June 2019, the Appellant stated that the Respondents in this proceeding were: (i) the PTIOs; and (ii) the AHO.

20. On the same date, 21 June 2019, the CAS Court Office informed the Parties that, in light of the Appellant's designation of the Respondents, the deadlines set out in CAS letter dated 15 May 2019 were reset and that the case reference was now *CAS 2019/A/6275 Mauricio Álvarez-Guzman v. Anti-Corruption Hearing Officer & Professional Tennis Integrity Officers*.

21. On 27 June 2019, the Second Respondent filed its Response opposing the Appellant's Request for a Stay.

22. The First Respondent did not file a Response on the Appellant's Request for a Stay within the deadline (or subsequently).

23. On 28 June 2019, the PTIOs filed an application requesting the CAS Court Office to remove the AHO as a Respondent.

24. On 9 July 2019, the PTIOs asked the CAS Court Office to extend the deadline for the Answer until 14 days after the Panel had made its decision concerning whether to remove the AHO as a Respondent in this proceeding.

25. On 17 July 2019, the PTIOs nominated Mr Ulrich Haas, Professor in Zurich, Switzerland, as an arbitrator.

26. On 26 July 2019, the Appellant objected to the request of the PTIOs concerning the extension of the Answer deadline.

27. On 5 August 2019, the CAS Court Office informed the Parties that only the Appellant could designate the Respondents in the proceeding, and that the PTIOs must file the Answer within 14 days of 29 July 2019.

28. On 7 August 2019, the Deputy President of the CAS Appeals Arbitration Division issued an Order on the Request for a Stay, denying the Appellant's request.

29. On 8 August 2019, the PTIOs filed their Answer in accordance with Article R55 of the Code. The AHO did not file an Answer.

30. On 4 September 2019, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the arbitral tribunal for the present matter was constituted and comprised of:

President:	Mr Andre Brantjes, Attorney-at-Law, Amsterdam, the Netherlands
Arbitrators:	Dr George Abela, Attorney-at-Law, Valetta, Malta
	Mr Ulrich Haas, Professor, Zurich, Switzerland

31. On 13 September 2019, the CAS Court Office invited the Appellant and the Second Respondent to file their responses to the First Respondent's requests: (i) to remove the AHO as Respondent; and (ii) that the Panel take a preliminary decision on the issue of whether or not the AHO has standing to be sued in the present matter.

32. On 23 September 2019, the Appellant responded that he did not agree to remove the AHO as a Respondent.

33. On 24 September 2019, the AHO responded that he considered it inappropriate for him to be joined to the appeal as he was involved as an arbitrator earlier, but that it was a matter for the CAS (a position he had previously expressed in this proceeding).

34. On 14 October 2019, the CAS Court Office informed the Parties that, pursuant to Article R 44.2 of the Code, the Panel had decided to make a preliminary determination on the issue of the AHO's standing to be sued and deemed itself sufficiently well informed to decide about the status of the AHO based on the written submissions only, without the need to hold a hearing.

IV. JURISDICTION OF THE CAS

35. In accordance with Article 186 of the Swiss Private International Law Act ("PILA"), the CAS has power to decide upon its own jurisdiction.

36. Article R47 of the Code states that *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body"*.

37. In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.

38. The jurisdiction of CAS, which is not disputed, derives from, e.g., Article I(1) of the Tennis Anti-Corruption Program ("TACP"). In addition, the Appealed Decision states in para 47 that *"Under Section I, this decision may be appealed to CAS by the parties in this proceeding within a period of twenty business days from the date of receipt of the Decision by the appealing party"*.

39. None of the Parties have objected to the jurisdiction of the CAS.

40. In light of the above, the Panel finds that the CAS has jurisdiction to hear this matter.

V. ADMISSIBILITY

41. According to Article R49 of the Code, *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against"*.

42. Paragraph 47 of the Appealed Decision states that *"Under Section I, this decision may be appealed to CAS by the parties in this proceeding within a period of twenty business days from the date of receipt of the Decision by the appealing party"*; Section I (3) provides that *"The deadline for filing an appeal with CAS shall be twenty business days from the date of receipt of the decision by the appealing party"*.

43. The Appealed Decision was issued on − and notified to − the Appellant on 14 March 2019. The Appellant filed his complete Statement of Appeal on 10 April 2019.

44. Therefore, the Panel finds that the appeal is admissible.

VI. APPLICABLE LAW

45. Article R58 of the CAS Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

46. The Appellant did not make any submissions with respect to the applicable law, but submitted with his Statement of Appeal a version of the 2019 edition of the TACP.

47. The PTIOs state that the Appellant is subject to the TACP, without specifying which edition of the TACP. The AHO made no submissions in this regard.

48. The Panel observes that the events in question occurred in 2016, and that the Athlete was found in the Appealed Decision to have violated the 2016 TACP. However, the Panel observes that neither Party submitted a version of the 2016 edition of the TACP; however, the Panel was able to locate one in the public domain.

49. With regard to applicable law, Article K.3 of the 2016 TACP determines the following:

"This Program shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Florida, without reference to conflict of laws principles".

50. Notwithstanding the above, the Panel further observes that CAS has its seat in Switzerland; therefore, for matters of procedure, Swiss law applies (see *CAS 2016/A/4846* para 77).

51. As such, the Panel is satisfied that it should accept the primary application of the TACP and, subsidiarily, the laws of the US State of Florida and Swiss law.

VII. THE STATUS OF THE FIRST RESPONDENT IN THESE PROCEEDINGS

a) Starting Point

52. As a starting point, the Panel notes that the question of whether or not to bifurcate proceedings in order to decide on a preliminary question (such as the status of First Respondent) is a procedural issue that is, in principle, governed by the Code and Article 182 of the PILA. The Code, to which the Parties submitted, only expressly deals with the question of whether or not a Panel may bifurcate the proceedings in order to decide the preliminary question of its competence (Article R55 para 4 of the Code). However, the Code does not contain any provision on whether or not a Panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits). Nonetheless, it is undisputed that the Panel has the power to bifurcate the proceedings, for reasons of, e.g. reduction of costs and efficiency (see e.g. Articles R44.3 and R55 of the CAS Code).

53. Furthermore, in the absence of any specific provisions in the Code, the Panel is entitled – according to Article 182 para 2 PILA – to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. The Panel is inspired by Article 125 lit. a of the Swiss Code of Civil Procedure ("CCP"). According thereto a court may *"in order to simplify the proceedings … limit the proceedings to individual issues or prayers for relief"*. This power of the court is directly connected to Article 237 CCP according to which a court *"may issue an interim decision"* (KuKo-ZPO/WEBER, 2nd ed. 2014, Art. 125 no. 3). When exercising its discretion according to Article 125 lit. a of the CCP, a court will take into account whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs (CPC-HALDY, 2011, Art. 125 no. 5). The view held by this Panel that an arbitral tribunal is entitled to issue decisions on preliminary questions is also backed by the legal literature according to which, in the absence of an agreement by the parties, a panel is vested with the power to issue interim/partial or final awards. Such power is a particular aspect of the mandate of an arbitral tribunal to organise the arbitral proceedings (POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, no. 725).

54. The Panel further notes that it has discretion whether to render a decision on preliminary issues or to rule upon them together with the merits in the final award. When applying such discretion the Panel, in principle, is guided by the reasoning submitted by the respective Parties, in particular why a preliminary decision – according to the requesting party's opinion – is necessary to safeguard its interests and to prevent it from possible harm or why a decision on the

preliminary issue, for some other reasons, is urgent or, otherwise, how and why the requesting party should legitimately benefit from a preliminary decision. When taking its decision, the Panel also takes into account aspects of procedural efficiency.

b) Applying the above Principles to the Case-at-Hand

55. In application of the above principles, the Panel finds that it follows from the principle of procedural efficiency that the question whether or not the AHO needs to be involved in the remainder of this appeal must be clarified at the outset of these proceedings. Thus, exercising its discretion under the applicable rules, the Panel finds it is entitled to take a preliminary decision on the issue whether the AHO has standing to be sued.

56. The Panel notes that the Appellant has switched Respondents during the course of this appeals proceeding. The motives for such changes are unclear. The Appellant, however, has not changed his request for relief which still has the objective to *inter alia* revoke and/or squash the decision of the life ban taken by the AHO in the case between the PTIOs and the Appellant.

57. The Panel notes that the PTIOs have requested several times to remove the AHO from the file before filing their Answer.

58. The Panel notes that a party has only standing to be sued and may be summoned before CAS, if it has some stake in the dispute. If so this decision is related to the merits, thus leading to a dismissal of the case and not its rejection.

59. The Panel therefore has to establish whether the AHO is the person/entity against which a specific claim needs to be made.

60. The Panel notes that the AHO operates as an independent arbitrator appointed by the TIB to give a judgement in a case between the PTIOs and the Appellant. The AHO himself is not the debtor of the disputed right. He is only called on to rule as a first instance jurisdictional body. His mandate is restricted. Once he has disposed of the matter before him by issuing his decision, he no longer is entitled to amend or withdraw the Appealed Decision. If, however, the AHO no longer has any power to dispose of the dispute, he is not the proper entity to address the appeal against. This is all the more true considering that the Appealed Decision is taken by the AHO on behalf of the PTIOs. In view of the above, in the opinion of the Panel, the AHO has no standing to be sued (see also *TAS 2009/A/1828 & 1829*).

61. Now that the Panel has established that the AHO has no standing to be sued, the appeal of the Appellant insofar as it is directed against the AHO must be dismissed.

62. The appeal against the PTIOs will be continued and the Panel will communicate through the CAS Court Office how the proceedings against the remaining party, i.e. the PTIOs, will proceed.

VIII. Costs

63. According to standard CAS practice, the cost of this interim or partial decision will be settled in the final award or in any other final disposition of this arbitration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Mauricio Álvarez-Guzman against the decision rendered on 14 March 2019 by the Anti-Corruption Hearing Officer of the ITF, Charles Hollander, is dismissed with respect to Charles Hollander for lack of standing to be sued.

2. The procedure *CAS 2019/A/6275* shall continue with the following parties: Mauricio Álvarez-Guzman as Appellant and the Professional Tennis Integrity Officers (PTIOs) as Respondent.

3. The costs of this Partial Award shall be determined in the final award or in any other final disposition of this arbitration.