



**Arbitration CAS 2017/A/5155 Necmettin Erbakan Akyüz v International Wushu Federation (IWUF), award of 21 September 2017**

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

*Wushu*

*Disciplinary sanction against an athlete behaving in an “unsporting manner”*

*De novo hearing*

*Application of the principle nulla poena sine lege certa to an unsporting behaviour*

1. The whole purpose of Article 57 of the CAS Code giving a CAS panel power to review a case brought before it on a *de novo* basis means that procedural complaints ventilated on a party’s behalf such as the fact to have been denied the opportunity to defend oneself has no purchase. The virtue of an appeal system which allows for a full re-hearing before an appellate body is that issues of the fairness or otherwise before the tribunal of first instance fade to the periphery. The *de novo* hearing itself cures such procedural defects.
2. The principle *nulla poena sine lege certa* is part of the law governing Swiss associations and indeed, being a general principle of law drawn from a comparative or common denominator reading of various domestic legal systems part of the *lex sportiva*. While this principle may be applied more flexibly in the context of domestic disciplinary proceedings than of criminal proceedings it cannot be ignored. It is not necessary for the principles of predictability and legality to be respected that the athlete should know, in advance of his/her infringement, the exact rule s/he may infringe, as well as the measure and kind of sanction s/he is liable to incur because of the infringement. Such fundamental principles are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. However, if no legal instruments of the federation provide for “unsporting behaviour” or even “trouble-making” to be a disciplinary offence to which specific sanctions can be attached, the link between offence and sanction “directly or by reference” is missing.

## I. INTRODUCTION

1. This is an appeal by Necmettin Erbakan Akyüz (“the Athlete”) against a decision of the International Wushu Federation (“the IWUF”) dated 4<sup>th</sup> May 2017 (“the Decision”), disqualifying him from International Competition for two years from 1<sup>st</sup> January 2017 (“the Sanction”).

2. Although the sport of Wushu dates back thousands of years, it has only been the subject of international competition since 1991 and this is the first appeal against any decision of the IWUF. It arises out of incidents unprecedented in the experience of those who gave evidence to and before the Sole Arbitrator.

## II. PARTIES

3. The Athlete is a junior Turkish athlete practising Wushu at national and international level.
4. The IWUF is the international governing body for the sport of Wushu. It is constituted as a Swiss association within the meaning of article 60 of the Swiss Civil Code.

## III. BACKGROUND FACTS

5. Wushu, which is also referred to as kung-fu, is the collective term for the martial art practices which originated and developed in China. Over its long history, Wushu has developed into numerous distinct styles and systems, each incorporating their own techniques, tactics, principles and methods, as well as the use of a wide variety of traditional weaponry. The differing styles that have emerged focus on many aspects of combat, but more importantly they have absorbed the popular philosophies and moral practices of the people in China over the past 5000 years of development.
6. Wushu has developed into more than just a simple system of attack and defence and has become a way to cultivate the body, mind and spirit in a positive way that is beneficial to all that practice it. The character “Wu” in wushu is composed of two Chinese characters, namely “Zhi” which means “to stop” and “Ge” which is an ancient weapon of war. With that the essence of the character Wu is indeed to stop conflict and promote peace. Wushu not only aims to produce a strong and healthy body, but also a strong mind with high moral values, as its practices focus on “Wu De” or martial ethics.
7. In 2016 the Athlete took part in several international competitions, including the 6<sup>th</sup> World Junior Wushu Championships in Burgas, Bulgaria (“the First Event”) and the 2<sup>nd</sup> World Taijiquan Championships in Warsaw, Poland (“the Second Event”).
8. On 3<sup>rd</sup> October 2016, the Athlete took part in the qianghsu (spear) competition at the First Event. In the wake of the display of his routine results the Athlete behaved in an unsporting manner.
9. On the same day, the IWUF Technical Committee issued a report, sent to the IWUF Executive Board, describing that behaviour. It stated:  
*“The athlete was gesturing to the judges tables and verbally expressing discontent which he then proceeded to throw his spear on the floor as well. This is not only out of the line, but displays to all spectators and athletes present a serious degree of immoral manners. This is the 2<sup>nd</sup> time this athlete has done this, the first being in Macau in 2012”.*

The Technical Committee suggested that there be a further investigation into the occurrence and also that the Athlete be banned from future IWUF championships.

10. Again on the same day, the Supervision Committee at the First Event, consisting of four officials, after deliberation recommended the imposition of a two-year ban on the Athlete with effect from 1<sup>st</sup> January 2017 and dissemination of the case via IWUF channels.
11. On 17<sup>th</sup> October 2016, at the Second Event, the Athlete once again displayed discontent with the judges' decision by making angry gestures towards the Head Judge and throwing his own number to the ground.

#### **IV. THE PROCEDURE BEFORE IWUF**

12. All reports and statements describing the incidents involving the Athlete that occurred at the First and Second Events as well as a video recording of the Athlete's behaviour at the former were sent to the IWUF Executive Board, President and Vice-President.
13. On 17<sup>th</sup> March 2017, Messrs Alinejad, Tang and Warr were appointed by the President to serve on the Disciplinary Committee to investigate the Athlete's case.
14. On or shortly before 2<sup>nd</sup> April 2017, the Disciplinary Committee issued a recommendation to sanction the Appellant with a two-year ban from 1<sup>st</sup> January 2017 until 31<sup>st</sup> December 2018 and to warn the Turkish federation that it should emphasize compliance with IWUF regulations, with an emphasis on sportsmanship and proper conduct.
15. On 2<sup>nd</sup> April 2017, this recommendation was sent to all members of the IWUF Board, who were invited to provide their comment and vote on the proposed sanction.
16. On 24<sup>th</sup> April 2017, the IWUF Secretary General informed all members of the Executive Board that 16 board members voted in favour of sanctioning the Appellant as per the recommendations issued by the Disciplinary Committee.
17. On 4<sup>th</sup> May 2017 the IWUF Secretary General then issued the reasoned Decision reflecting the recommendation issued by the Disciplinary Committee. The Decision was sent to the Turkish Federation ("TWF") and the European Federation ("EWUF").
18. On 8<sup>th</sup> May 2017, the Athlete was invited to the headquarters of TWF. During the course of the meeting the Athlete received both the Cover Letter, stating that a disciplinary sanction was being imposed on the Athlete and that the TWF and EWUF are responsible for implementing the sanction and the Notice of the Decision itself ("the Notice").

## V. PROCEDURE BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

19. On 24<sup>th</sup> May 2017, the Athlete filed his Statement of Appeal, pursuant to Article R47 of the Code of Sports-related Arbitration (“CAS Code”).
20. On 5<sup>th</sup> June 2017, the Athlete indicated that the Statement of Appeal should be considered as his Appeal Brief pursuant to Article R51 of the CAS Code.
21. On 6<sup>th</sup> July 2017, the Parties were notified that the Hon Michael J Beloff QC had been appointed Sole Arbitrator, pursuant to Article R54 of the CAS Code.
22. On 24<sup>th</sup> July 2017, the IWUF filed its Answer pursuant to Article R55 of the CAS Code.
23. On 23<sup>rd</sup> September 2017, a hearing was held at the Royal Savoy Hotel in Lausanne, Switzerland, before the Sole Arbitrator assisted by Ms. Andrea Zimmermann, CAS Counsel.

There were present

for the Athlete: Mr Adbülkadir Güzeloğlu, Representative  
Mr Faith Selim Yildizhan, Representative

for the IWUF: Mr Claude Ramoni, Representative  
Mr Sebastien Permain, Representative  
Ms Lirong Ren, IWUF Director  
Ms Dana Morales, Internal Counsel IWUF  
Ms Lu Xiaolin, witness (by Skype phone)  
Mr Urs Krebs, witness

24. At the start of the hearing the Parties confirmed that they had no objection to the appointment of the Sole Arbitrator and at its conclusion that they had had a fair hearing in complete conformity with their legal rights.

## VI. JURISDICTION

25. 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.*

26. Article 36.6 of the IWUF Constitution states:

*“Any dispute arising from the decisions made by the IWUF shall be handled in accordance with the Code of Sports-related Arbitration and submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland”.*

27. It is not disputed by the IWUF that the CAS has jurisdiction. Jurisdiction is confirmed by the Parties’ signature of the Order of Procedure.

#### **VII. ADMISSIBILITY**

28. Article R49 of the CAS 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.*

29. The Decision was issued on 4 May 2017. The Statement of Appeal was filed on 24<sup>th</sup> May 2017. It is accordingly not disputed by the IWUF that the appeal is admissible.

#### **VIII. APPLICABLE LAW**

30. Article R58 of the Code provides as follows:

*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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

31. The applicable regulations are the Constitution, Rule and Regulations of the IWUF. By registering for the First and Second Events the Athlete accepted to “*abide by and follow the Rules established by the Organizing Committee*” for each competition (Waiver of Liabilities form).
32. Both the Competition Rules for the First Event (Section C.2, page 7) and the Competition Rules for the Second Event (Section G.1, page 4) expressly provide that each is governed by the 2005 IWUF Rules for Wushu Taolu Competition.
33. The IWUF is domiciled in Switzerland. Swiss law therefore applies subsidiarily.

#### **IX. SUBMISSIONS OF THE PARTIES**

34. The following is a summary of the Parties’ submissions and does not purport to be comprehensive. Further submissions by both Parties will be considered in the Section on Merits below. The Sole Arbitrator, in any case, has thoroughly considered in his discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

35. The Athlete's key submissions are in summary as follows:

- (i) The IWUF violated his right to be heard by failing to notify him of the internal disciplinary investigation being conducted by the IWUF into his conduct during the approximately 7½ months which elapsed between the incidents under investigation until the provision to him of the Notice. Moreover, the untoward actions of the Athlete that had allegedly occurred during Macau Championships yet earlier were also taken into consideration in imposition of the sanction, again without any prior warning.

("No hearing")

- (ii) The IWUF breached the principle of *nulla poena sine lege certa* in failing to have in place the specific provisions that he allegedly violated in any of the applicable regulations.

("No certainty")

- (iii) The IWUF violated the principles of legality by following a procedure not vouched for by the applicable regulations in that, inter alia, the sanction was recommended and implemented by a body without authority to do so.

("No proper procedure")

Even if (*quod non*) the sanction had a legal basis, in all the circumstances the IWUF violated the principle of proportionality.

("No proportionality")

36. The Athlete made the following requests for relief:

- “1. To annul the disciplinary sanction imposed on the Appellant for violating utmost fundamental rights of the Appellant, together with the IWUF's non-compliance with its internal regulations.

*Eventualiter, in the event that the Sole Arbitrator considers that the sanction that is imposed by the IWUF is legal and in conformity with the explained principles and internal regulations of the IWUF:*

2. To re-evaluate the situation thoroughly with all available evidence and most importantly with the defense of the Appellant in order to produce a disciplinary sanction that is proportionate to circumstances at the case at hand.

*In any event:*

3. To order the IWUF to halt the execution of the disciplinary sanction as the relevant and cumulative conditions are present until issuance of the arbitral award:

- i. *If the provisional measure of halting the execution of the ban would not be granted; the career of the Appellant would be irreparably damaged so that the 15-years old Appellant would not be able to concentrate on his physical and mental development along with success, his academic life which is in close connection with his career in sports. In this vein, an irreparable harm already emerged on the receipt date of the Notice and will unfortunately increase during the term of the ban.*

- ii. *Then, in the light of above legal explanations with given CAS case law and factual circumstances that brought the Athlete to date; as well as violation of the inherent rights of the Appellant it seems that it is not an illusory outcome for the Appellant to succeed in his case.*

- iii. *After that, in the event of granting the requested provisional measure, the balance of interests between the Parties i.e. would be immensely equalized positively on the Appellant's side as the latter, being the weaker party, would be provided with its legal rights and would be able to participate in the upcoming international wushu competitions. Indeed, if the stay of execution is provided, the Appellant would be able to compete at international wushu organizations whereas this situation would not bring any harm, detriment or damage to the Respondent.*
4. *To order the IWUF to bear and reimburse the Appellant for all costs arising out of this appeals arbitration procedure before the CAS, including but not limited to legal, expert fees, arbitration costs and translation costs.*
5. *The Appellant reserves the right to supplement, vary and/or complete the content of this Statement of Appeal and to present such further arguments and evidence as may be necessary at any time up to the date of the filing of the appeal brief".*
37. The IWUF's submissions in summary were as follows:
- (i) Wushu, has philosophical and moral, as well as physical, elements
  - (ii) The complete loss of self-control, displayed by the Athlete at the two events constituted extremely serious breaches of IWUF philosophy and rules.
  - (iii) Article 9.2 of the 2005 Rules for International Wushu Taolu Competition ("Competition Rules") expressly provides that any "*trouble-making caused by disobedience*" shall lead to "*strict measures*" depending on the severity of the case. The importance of complying with the protocol is further reflected in the IWUF Competition Rules Article 12 requiring the participant to give the head judge a "fist-palm salute" at the announcement of the scores.
  - (iv) All the officials who witnessed the Athlete's conduct at both events were shocked by his behaviour and recommended that an investigation be conducted and sanctions be issued.
  - (v) The IWUF fully complied with its Constitution and rules by appointing three individuals to investigate the matter and recommend to the Executive Board the imposition of a sanction (as per article 36.4 of the IWUF Constitution). The Decision was based on the recommendation by the three-member disciplinary panel and taken by 16 members (out of 17) of the IWUF Executive Board.
  - (vi) The Decision is clear; it sanctions breaches of applicable regulations, albeit they are general in content and is fully proportionate to the offence. The IWUF Constitution expressly states that disciplinary actions include warnings, fines, penalties and suspension (Article 36.5).
  - (vii) In point of fact, at the latest by mid-October 2016, the Athlete was aware of the fact that a disciplinary case had been initiated against him further to his misbehaviour at the Events. Materially in the evening of the day when the Athlete competed in the Second Event (i.e. 18<sup>th</sup> October 2016), two members of the Supervision Committee went to the Turkish delegation in order to inform the team leader Fatma Akyuz, the Athlete's mother, that an investigation into the Athlete's behaviour had been initiated, that it would continue after the Event, and that the final decision would be duly notified.

(viii) In any case, Article R57 of the CAS Code grants the CAS full power to review the matter on a *de novo* basis. This full power of review means that procedural flaws, if any, in a first instance decision can be cured by a CAS proceeding. In particular, the CAS consistently held that alleged violations of an athlete's "right to be heard" can be cured by its own proceedings.

38. The IWUF made the following prayers for relief:

- i. The appeal filed on 24<sup>th</sup> May 2017 by the Athlete is dismissed.*
- ii. The decision passed by the IWUF on 4<sup>th</sup> May 2017 is upheld.*
- iii. The Athlete is sanctioned with a ban from all international wushu competitions, effective 1<sup>st</sup> January 2017 through 31<sup>st</sup> December 2018.*
- iv. The costs of the arbitration shall be borne in their entirety by the Athlete who shall be ordered to reimburse to the IWUF the share of the advance of costs paid by the latter.*
- v. The Athlete shall be ordered to pay to the IWUF a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel.*

## **X. MERITS**

### **A. The Incidents**

39. The facts underlying the two incidents were not in issue.

40. The incident of 3<sup>rd</sup> October 2016 was captured on video. Further to the display of his routine results the Athlete started to scream at the judges, made several inappropriate gestures, first with his hand and then with his spear, before throwing his spear down. In so far as necessary the facts were corroborated by the report of Dr. Mahdi Alinejad, President of the Iran Wushu Federation, dated 18<sup>th</sup> December 2016, which stated:

*"During B Group Boys Qianshu Competition at the 6<sup>th</sup> World Junior Wushu Championships in Burgas Bulgaria regarding the athlete Mr Necmettin Erbakan Akyüz and his actions following the display of his routine result, unfortunately, he started to show unsporting behaviour meaning by showing his qianshu to judges and pushing forward and backward it which could have different meanings and all are very shameful to explain, and after dropping down it and started to shout and saying some words which from the position where I was, it wasn't clear what he was saying".*

41. The incident of 17<sup>th</sup> October 2016 was not recorded, but the Athlete's untoward behaviour was evidenced by:

- The incident report, issued on 17<sup>th</sup> October 2016, by the Supervision Committee at the Competition and the Chairman of the Federation's Technical Committee, which stated:

*"Behaviour of Athlete Necmettin Erbakan Akyüz. After receiving the final result the Athlete Necmettin Erbakan Akyüz of Turkey made angry gestures towards the Head judge and threw his Start Number angrily on the floor. The final result was 7.52.*



*As it is a repetitive behaviour and situations are already discussed by TC and EB we propose to exclude him from the events he would participate in this Championships”.*

- A report issued by the Supervision Committee, (detailing also all contacts between the Federation officials with the Athlete and his federation during the Championships after the incident occurred,) which stated:

*“The Matter of this issue began actually in Burgas, when Turkish athlete Necmettin Erbakan Akyüz reacted angrily towards the Head Judge and throw his weapon and his starting number on the floor. The same (without weapon) happened at 2<sup>nd</sup> World Taijiquan Championships in Poland. We made an immediate report to Mr. Goh, which was sent out to the EB in the same night. The next day in the evening session (the Turkish Team was not present in the morning session), Petru Grindeanu and Urs Krebs went to the Turkish Team to inform the Team Leader Fatma Akyüz that an investigation is underway because of the behaviour of their athlete. As the athlete didn’t have any more events to compete in, we didn’t communicate the immediate ban but told them that the investigation will not end during the Championships and the final decision would be communicated after the Championships. We also didn’t hand out the Certificate for the 2<sup>nd</sup> Prize in the Demonstration Event. They apologized for the behaviour and said it would never happen again. The next day, the athlete also went to TC Chairman Chen Guorong and also apologized for his behaviour. The next day, the Sister of the athlete Elif Akyüz came to Urs Krebs to ask for the Certificate. Urs Krebs explained to her, that the Certificate is kept back until a final decision is made. She said okay. On the last day between the last event and the closing ceremony Urs Krebs was asked again for the Certificate by the Team Leader Fatma Akyüz. Urs Krebs explained again the Situation. Afterwards Mrs Akyüz stated that the Turkish Team is not satisfied with the results they achieved. They believe that the judges gave the Turkish athletes less points as they should get and other teams like the USA had advantages. Urs Krebs answered that the judges worked correct and didn’t give advantages to a team. Then they said the the Swiss Athlete Kenny Krebs had many technical problems during the competition but get very high scores. Urs Krebs ended discussion saying this is not the level a discussion should go (the athlete Kenny Krebs is the son of Urs Krebs and this was a try for a personal attack)”.*

- A report issued by Mr. Urs Krebs, member of the Supervision Committee at the Second Event, which stated:

*“I Urs Krebs, born on 18<sup>th</sup> January 1967 in Bern Switzerland was a Member of the Supervision Committee of the 2<sup>nd</sup> World Taijiquan Championships 2016 in Pruzskov/Poland. In this function I witnessed the behaviour of athlete Necmettin Erbakan Akyüz after the Head Judge Gao Chulan announced the final result for this athlete. He made an angry gesture towards the Head Judge with his right hand and then angrily threw his Starting Number (an A3-Sheet with the Starting Number) on the floor.*

*This incident was also witnessed by Martha Burr, Chief Media Officer of the International Wushu Federation who was just sitting near me”.*

42. Ms. Xiaolin Lu, member of the Board of the USA Wushu Federation, present at both Events, gave a witness statement confirming the Athlete’s behaviour, which stated:

*“I was present on Burgas in 6th World Junior Wushu Championships when Turkey Wushu Athlete threw away Wushu Equipment and Warsaw in 2nd World Taijiquan Championships when Turkey Wushu Athlete threw away the athlete’s number during the competition”.*

Neither Mr. Krebs nor Ms. Xiaolin Lu, each of whom gave oral evidence, were cross-examined as to the incidents themselves or, accordingly, challenged as to their description of them.

## **B. No hearing**

43. The Sole Arbitrator finds that the Athlete himself was denied a hearing of any kind before the Sanction was imposed. The Sole Arbitrator accepts that in respect at any rate of the second incident, it appears that the Athlete's mother, as head of the Turkish team, was apprised of the fact that the Athlete was at risk of sanction, but it is common ground that he himself was not personally notified of how the Federation were dealing with his case until he received the Notice.
44. In the view of the Sole Arbitrator this was regrettable. The primary and historic rule of natural justice requires that someone faced with the risk of a sanction is entitled to an opportunity to defend himself – *audi alterem partem*. Moreover, the Federation's Constitution at Article 35 (quoted below at paragraph 56) expressly envisages hearings in such a context. The according of such a hearing, in whatever form (written or oral), desirable in itself, may have the additional advantage of rendering redundant the need for an appeal to CAS.
45. Be that as it may, the whole purpose of Article 57 of the CAS Code giving a CAS panel power to review a case brought before it on a *de novo* basis means that procedural complaints of the kind ventilated on the Athlete's behalf have no purchase. In 98/208 a CAS panel said at para 10 "*the virtue of an appeal system which allows for a full re-hearing before an appellate body is that issues of the fairness or otherwise before the tribunal of first instance fade to the periphery*". The *de novo* hearing itself cures such procedural defects.
46. Moreover, in the present case the Athlete has not given evidence before the Sole Arbitrator. It is unknown therefore what he might have said in his defence in addition to the points advanced so ably by his advocate. The denial of the opportunity which the Athlete should in principle have been accorded may in practice have had negligible, if indeed any, adverse effect since the nature of the incidents was not in dispute, and the nature of the Athlete's personal circumstances was common ground nor does the record show that the alleged earlier Macau incident (about which no evidence was given by either party) was taken into account in determining the sanction.

## **C. No certainty**

47. The principle *nulla poena sine lege certa* is, it is common ground, part of the law governing Swiss associations and indeed, being "*a general principle of law drawn from a comparative or common denominator reading of various domestic legal systems*", part of the *lex sportiva*, as delineated by a CAS panel in CAS 98/200 at para 156
48. While this principle may be applied more flexibly in the context of domestic disciplinary proceedings than of criminal proceedings it cannot be ignored. The Sole Arbitrator is content to adopt the approach of a CAS Panel in CAS 2014/A/3665, 3666 & 3667, at para 73.

*“...However, it is not necessary for the principles of predictability and legality to be respected that the football player should know, in advance of his infringement, the exact rule he may infringe, as well as the measure and kind of sanction he is liable to incur because of the infringement. Such fundamental principles are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. [...]”*

49. While the Sole Arbitrator has no doubt that the Athlete knew that his behaviour was unacceptable – and indeed he has apologised for it – it does not necessarily follow that it contravened any disciplinary rule for which a sanction is provided directly or indirectly.

50. Three candidates were proposed at various times on behalf of IWUF for rules contained in the Competition Rules or Constitution, which, singly or collectively, provided that certainty or predictability which legal principle requires. The Sole Arbitrator considers them in turn.

51. Article 12 provides:

*“Protocol. At the roll-call and the announcement of final scores, the competitors should give the head judge a fist-palm salute”*

52. The title of the Article “Protocol” is redolent of something short of a mandatory regulation, breach of which attracts a disciplinary sanction. Moreover the Article’s vocabulary is also inconsistent with such an interpretation: it speaks of “*should*” not “*shall*”. It specifies what ought to be done, not what must be done. In any event the mere failure to comply with the Protocol is not the essence of the complaint made against the Athlete. It is what he did do after his results were announced, not what he did not do, which agitated the disciplinary procedure.

53. Article 9 provides

*“Appeals*

*9.1 Scope of Appeals*

*The Jury of Appeal shall handle appeals submitted by a participating team which disagrees with deductions made by the head judge or with Panel C’s judgment against members of the team in the process of competition.*

*9.2 Procedures & requirements for appeals*

*If a participating team disagrees with the judges’ decisions against its members, the appeal shall be submitted by the team leader or coach in written form to the Jury of Appeal within 15 minutes after the conclusion of the event concerned, together with an appeal fee of US\$100. Each appeal is limited to one issue.*

*The Jury of Appeal shall examine the case through videotapes. If the judgment made by the jury proves to be correct, the appealing team shall abide by it. If any trouble-making is caused by disobedience the Jury of Appeal may, according to the severity of the case, propose to the IWUF Technical Committee to take strict measures, including cancellation of the competition results. If the judgment made by the jury proves to be wrong the Jury of Appeal shall propose to the IWUF Technical Committee to take measures, in accordance with regulations concerned, against the wrong judgment. The appeal fee shall be returned. But the original results shall not be changed”*

54. However the title to this Article is “Appeals”, and both its sub-paragraphs confirm that it is concerned with appeals only. In neither case, with which the Sole Arbitrator is concerned, did the Athlete appeal against the judges’ scores – a precondition for the engagement of Article 9. The Advocate for IWUF sought ingeniously to isolate the second sentence and designate it as free-standing of the balance of the Article. But, in the Sole Arbitrator’s view, it cannot be wrenched from its context. Even if (*quod non*) it could, nonetheless it still requires the process which would lead to the taking of “*strict measures*” by the IWUF Technical Committee to be instituted by the Jury of Appeal, which did not happen at either the First or Second Events.
55. Nor is it clear to the Sole Arbitrator to what the concept of “*trouble-making caused by disobedience*” relates. The Advocate for IWUF suggested that it was disobedience by the competitor, if not to Article 12, then to the spirit of good behaviour inherent in the wushu philosophy. But the sentence prayed in aid seemingly refers to disobedience to the original jury’s own decision by the appealing team, which is expressly obliged to abide by the judgment made by that jury. Nor are the “*strict measures*” themselves specified other than by express inclusion of the cancellation of the competition results which, again, suggests that the measures are those contemporaneously relating to the competition, not to what might happen thereafter.
56. The IWUF Constitution provides:  
*“Article 36: Ethics, Arbitration and Discipline*  
*36.1 The IWUF shall promote the spirit of sportsmanship through the implementation of its constitution in accordance with the ethical principles of the IOC.*  
*36.2 Issues related to competition or technical matters will be investigated and handled by the Technical Committee through relevant hearings and report.*  
*36.3 Issues related to anti-doping matters will be investigated and handled by the Anti-Doping Disciplinary Committee through relevant hearings. Decisions by the Anti-Doping Disciplinary Committee may be appealed as provided for under the IWUF Anti-doping Rules.*  
*36.4 The President will appoint three (3) individual, including at least one member of the IWUF Executive Board to investigate and handle issues related to other matters through relevant hearings, including imposing disciplinary actions or recommending to the Executive Board to impose disciplinary actions.*  
*36.5 IWUF disciplinary action includes: issuing warnings, fines and penalties, the suspension or removal of office bearers, the suspension of NFs, Continental Federations or Associated Members, the termination of membership / expulsion of NFs, Continental Federations or Associated Members. [...]*”
57. The Athlete’s case falls within the rubric “*other matters*” in Article 36.4, being not a competition, technical or anti-doping matter.
58. According to Article 36.5, the listed disciplinary action which can be imposed by the 3 individuals appointed under Article 36.4 is not exhaustive (the governing participle is “*including*”) and refers, *inter alia*, to penalties for which suspension from competition would in principle be embraced. As against this, suspension is indicated as a specific penalty for office bearers, NFs, Continental Federations or Associated Members. There is significantly no provision for

suspension of a competitor. The maxim of construction “*inclusio unius, exclusio alterius*” seems apposite and dominant.

59. In any event, the link between offence and sanction “directly or by reference” – to use the language of CAS 2014/A/3665, 3666 & 3667 – is missing.
60. In short, none of the three provisions relied on by the IWUF come, in the view of the Sole Arbitrator, within measurable distance of providing the clarity which sports disciplinary law requires as a precondition of punishment. The jigsaw of provisions lacks key pieces.
61. In the Sole Arbitrator’s view, the ruling in CAS A/3665, 3666 & 3667 cannot simply be transposed into the present appeal. The relevant issue in that case was whether biting was a form of assault within Article 48, a *lex specialis*, even if it is not specifically referred to therein (paras 77 and 78). Had, by analogy, the relevant IWUF legal instruments provided for “unsporting behaviour” or even “trouble-making” to be a disciplinary offence to which specific sanctions could be attached, the Athlete’s case on this point would fail, since his behaviour was clearly unsporting and trouble-making. But no such provision can be found.
62. It may be because, to its credit, the sport of Wushu on the international plane has not hitherto had to deal with incidents of the kind involved in this appeal, the draftsman of the provisions did not ponder too deeply on their implications. But, whatever the reason, insufficient attention has been paid to the drafting of the IWUF’s disciplinary code.

#### **D. No Proper Procedure**

63. It was also argued on the Athlete’s behalf, that the decision was in any event taken by the wrong body. This argument the Sole Arbitrator rejects. The process leading up to the Decision involved a plurality of committees but it is not in issue that the IWUF President did appoint a three person Disciplinary Panel (see III and IV above) and that the Decision itself was finally vouched for by the IWUF’s governing body, the Executive Board. That procedure is expressly provided for by the Constitution Article 35.4-5.
64. The Sole Arbitrator, however, is constrained to comment that for the Disciplinary Panel to be chaired by a person who himself was a witness to the first incident is inconsistent with basic fairness and violates the second rule of natural justice *nemo iudex in causa sua* (as well as the *lex ludica*). The point was not taken on behalf of the Athlete, maybe because the facts of the incidents could not be gainsaid. But it is easy to envisage circumstances where an athlete might wish to challenge a prosecution witness’s account of an event. If the same witness then played a second role as adjudicator, in that capacity he would be fatally compromised because he would be bound – certainly be seen to be bound – to uphold his own version. He would not be either actually or apparently impartial.

## **E. No Proportionality**

65. It was argued that even if otherwise unimpeachable the sanction was disproportionate on the following main grounds: (1) the Athlete was only 15 years old at the time of the incident; (2) he had previously a clean disciplinary record; (3) he was recognised as an accomplished practitioner of the sport; (4) his inability to compete in the International Wushu events in 2017 and 2018 would seriously damage his career. He should, it was contended, have been treated with mercy and further educated in Wushu's values rather than punished.
66. The IWUF's response was (1) although young in years, the Athlete was experienced in his sport and would have been taught Wushu values by his family and coaches; (2) he had acknowledged himself the impropriety of his behaviour which was displayed on two, if not three, occasions; (3) at most he would be denied the opportunity to compete in the six international competitions for which he might otherwise qualify in 2017-2018; (4) during those years he could still train and compete in national or lesser competitions during that period without disciplinary inhibition; (5) he would only ordinarily reach his peak as a Wushu practitioner in his third decade. The purpose of the suspension, it was contended, was indeed not so much to punish as to teach him to reflect on his behaviour with a view to improving it.
67. The Sole Arbitrator bears in mind that, despite the ambit of his powers under Article R57 of the CAS Code, CAS panels act with a measure of self-restraint in relation to sanctions. Sometimes they say they will interfere only "*where the sanction is evidently and grossly disproportionate to the offence*" (e.g. *CAS/2016/A/4501*, para 313). Sometimes they refer to "*the deference shown to the expertise of the body from whom an appeal is brought*" (*CAS 2015/A/4338*, para 51). Moreover in the light of his conclusion that the Decision was invalid on the "no certainty" ground, the Sole Arbitrator recognizes that any views he would express on proportionality would be *obiter*.
68. The Sole Arbitrator therefore contents himself with this comment briefly to address the parties' competing submissions. The paucity of international competition in the next year and a half on which both parties relied cuts both ways. Balancing out the other competing factors the Sole Arbitrator would himself have been inclined to opt for one year rather than two years as an appropriate period of ineligibility for a repentant young first time offender, whose misbehaviour was not aggravated by any act of violence (Although two years at least would certainly have been appropriate had the Athlete already been penalised for one incident but repeated it on a second occasion).

## **F. General**

69. There are, in the Sole Arbitrator's respectful view, lessons to be learned by both Parties to this unique appeal. The Athlete must learn never again to display the kind of lack of self-control which shocked experienced observers on two occasions. He must appreciate that he has been fortunate, in circumstances for which he can claim no credit, to be given the opportunity to resume his international career at once. The IWUF must learn that the historic traditions of this ancient sport and its cultural and moral foundations are not a reason for failing to adopt the best modern principles applicable to sports disciplinary powers. They must appreciate that

unless and until they bring clarity and certainty to that portion of their rules, they may find themselves unable to control their sport by deployment of sanctions in accordance with their legitimate wishes.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed on 24 May 2017 by Necmettin Erbakan Akyüz against the decision issued by the International Wushu Federation on 4 May 2017 is upheld.
2. The decision rendered by the International Wushu Federation on 4 May 2017 is annulled.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.