Arbitration CAS 2021/A/8417 European Wushu Kungfu Federation (EWUF) v. International Wushu Federation (IWUF), award of 31 August 2022

Panel: Prof. Philippe Sands QC (United Kingdom), Sole Arbitrator

Wushu
Ethics
CAS jurisdiction – final decision
Standing to sue
Duration of a "provisional" suspension
Purpose of a provisional suspension under the IWUF regulations

1. **The IWUF Constitution confers jurisdiction on CAS to hear appeals relating to the imposition of a sanction by the IWUF Executive Board. Likewise, Article J.3 of the Code of Ethics confers jurisdiction on CAS to hear appeals against a *"final decision of the IWUF Executive Board imposing a sanction or a measure"*. Additionally, there is no further appeal mechanism within IWUF to challenge a provisional suspension. Whereas the sanction is provisional in nature, the decision imposing it is "final" in the sense that there is no legal mechanism by a member can challenge that decision, only IWUF can do so. As a result, should IWUF not do so, the provisional suspension could remain "provisional" forever, without any possibility of judicial review.**

2. **An appellant has a standing to sue against a challenged decision directly addressed to him and that has had the effect of suspending his recognition as a member of an international sports federation.**

3. **A provisional suspension which has been in place for more than fifteen months, while the investigation phase of the facts surrounding the relevant event was announced for more than eight months, has been imposed for too long, ceasing to be truly of a "provisional" nature.**

4. **There is no provision in the IWUF Constitution or in the Code of Ethics allowing for provisional suspension to be used as a mechanism for encouraging or coercing cooperation, in the absence of a violation of the Code of Ethics, or to convince a person or entity to provide information/documents.**

I. PARTIES

1. The European Wushu Kungfu Federation (the "Appellant" or "EWUF") was incorporated in Belgium on 11 March 2011 as a non-profit organisation. At the time the Appeal Brief was filed, the Appellant provided a current address in Southampton, England. EWUF is a Continental Federation of the International Wushu Federation.

2. The International Wushu Federation (the "Respondent" or "IWUF") is an international non-governmental, not-for-profit association constituted in accordance with Article 60 *et seq* of the Swiss Civil Code, and is recognised by the International Olympic Committee as the worldwide governing body for wushu in all its forms. IWUF maintains headquarters in Lausanne (Switzerland) and operational office(s) in Beijing (China).

3. Wushu is defined in the Preamble to the IWUF Constitution as follows:

"Wushu, also referred to as kungfu, is the collective term for the martial art practices which originated and developed in China over thousands of years. It has produced numerous styles and systems, each one incorporating its own techniques, tactics, principles and methods, as well as a wide variety of traditional weaponry. Wushu not only encompasses combat, but also practices for health and philosophy. Today, wushu has developed into a global sport, which is practiced and enjoyed by athletes worldwide due to its unique and exciting content".

II. FACTUAL BACKGROUND

4. What follows is a concise summary of the relevant facts and allegations based on the parties' written and oral submissions, correspondence and supporting documentary evidence. Additional facts adduced in the parties' written and oral submissions, correspondence and evidence may be referred to elsewhere, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has carefully considered all the facts, allegations, legal arguments, correspondence and evidence submitted by the parties, the Sole Arbitrator refers in this Award only to the matters he considers necessary to explain his reasoning and conclusions.

5. This is an appeal by EWUF against the decision of the IWUF *ad hoc* Jury of Appeal, adopted by telephone on 15 September 2021 (subsequently confirmed by the IWUF Executive Board on 15 October 2021) which upheld an earlier decision of the IWUF Executive Board, dated 15 April 2021, to provisionally suspend the recognition of EWUF as a Continental Federation of IWUF within the meaning of Article 4.1 of the IWUF Constitution (the "provisional suspension").

6. On 10 July 2020, IWUF received a complaint (or complaints) from a *"certain number"* of European IWUF members against EWUF and *"certain members"* of the EWUF Executive Board (the "complaint"). Despite making a number of requests, EWUF – and it must be noted, also the Sole Arbitrator – have not been provided with a copy of the original complaint(s). Rather, IWUF relies on a two-page bullet-point summary of the complaint, which is undated and does not disclose the names of the persons/entities who made the complaint. The summary of complaint makes allegations of *inter alia*:

a. impropriety with regard to the legal structure of EWUF, including the *"illegal dissolution"* of the former EWUF non-profit organisation in Belgium and incorporation of a purported successor limited company in the United Kingdom;

b. failure to notify IWUF of changes to the legal structure of EWUF;

c. *"[i]llegal transfer of funds"* to a *"private New Zealand company fully owned by Mr Raymond Smith"* (the former President of EWUF);

d. failure to record revenues and expenses, including *"diverting revenues from the organisation of championships, seminars and courses to certain individuals and companies"*;

e. *"anti-democratic measures and bullying of members to enforce arbitrary and unnecessary measures"* including provisions in the EWUF Constitution which allegedly make it *"impossible for countries to freely present candidates for the elected functions"*;

f. *"[i]ncomplete and misrepresentation of financial details during the Congress, forcing members to vote to accept accounts without sufficient effort to present the whole financial picture"*;

g. improper use of sanctions for *"the sole purpose of discrediting [individuals] and silencing them"*;

h. *"[i]intimidation of small countries"* and *"interference with internal matters of IWUF members"*;

i. *"[e]xcessive fees and fines"* including obliging competitors to buy EWUF shoes and apparatus at inflated prices and imposing cash payments; and

j. *"[l]ack of vision regarding the promotion of Wushu in Europe"* including a lack of effort to raise the level of athletes and judges.

7. The IWUF Ethics Committee (the "Ethics Committee") was charged with conducting an investigation into the complaint. The Ethics Committee comprises of three members, including Mr Walt Missingham (chairperson), who is also the Vice President of the IWUF Executive Board. A First Interim Report was presented by the Ethics Committee to the IWUF Executive Board on 24 November 2020.

8. On 17 December 2020, Mr Missingham wrote to Mr Raymond Smith, the President of EWUF, requesting *"all relevant documents"* relating to *inter alia* all major EWUF competitions from 2011 to 2019 as well as the minutes of, and financial reports presented to, all EWUF congresses held during the period 2011 to 2019. This request was reiterated by letter dated 11 March 2021.

9. On 23 December 2020, Mr Smith wrote to Mr Gou Zhongwen, the President of IWUF, stating that IWUF had not indicated *"the normative basis"* for seeking information from EWUF, which *"makes it impossible to understand what case is at stake and the stage of the process"*. Mr Smith noted that *"in case there is already an open case against EWUF, we have no indication of its nature, namely if it is disciplinary and/or related to ethical issues"*. Mr Smith further stated that *"bearing in mind that the IWUF Code of Ethics only entered into force last October 2020, we do not understand how and why the IWUF Ethic [sic] Committee is exercising its competences and requesting information/data related to the period comprised*

between 2011 and 2019". Mr Smith expressed EWUF's willingness to cooperate with IWUF and, *"taking into considering both our right of access to information and our right against self-incrimination"*, requested IWUF to provide information relating to: (i) the nature and purpose of the *"file opened against EWUF"*; and (ii) *"the alleged breaches involved and the invoked complaints"*.

10. On 21 January 2021, Mr Missingham wrote to IWUF members in Europe inviting them to *"provide information connected to or present additional information that may assist the Ethics Committee […]"*.

11. On 22 March 2021, Mr Missingham wrote to Mr Smith requesting that each member of the EWUF Executive Board provide the Ethics Committee, within seven days, with the names of the members of the Organising Committees for 11 separate EWUF events.

12. On 25 March 2021, Mr Smith wrote to Mr Zhongwen and reiterated his position that the investigation into EWUF is "not valid" because the Ethics Committee does not have the authority to carry out an investigation relating to allegations predating the entry into force of the IWUF Code of Ethics. Mr Smith added that:

"The burden of proof rests with the accuser it is not the responsibility of the 'defendant' to prove their innocence. To date we have received no evidence related to any allegations referred to in the so called complaints and therefore under law we have nothing to defend and no obligation to respond to these allegations".

13. On 29 March 2021, Mr Missingham wrote to Mr Smith stating that the matter was being *"handled by the IWUF Ethics Committee and is therefore to be considered a disciplinary/ethics matter in the meaning of Article 26 of the IWUF Constitution"*. Mr Missingham went on to state that:

"At this moment, we are not in position to provide you with more detailed information. However, already in November 2020 EWUF, through four of its [Executive Board] members, has been provided with a copy of the Interim Report of the IWUF Ethics Committee. The Interim report and the document sent to you on 11 March 2021 provide you with all the necessary information to understand the importance for EWUF to cooperate with IWUF properly and timely. Be assured you will be provided with a formal opportunity to respond when this phase of our investigation has been finalized.

In this connection, please be reminded that the deadline to provide the information requested with our letter of 11 March 2021 is expiring on 1 April 2021. IWUF has to reserve the right to take all the appropriate measures in case this deadline is not respected, including but not limited to the provisional suspension of EWUF as the IWUF recognized Continental Federation for Europe.

We therefore reiterate our request that the EWUF [Executive Board] provide the IWUF Ethics Committee with the following information within the indicated deadline:

1. *the Minutes of each EWUF Congress from 2011 to 2019;*
2. *the Financial Reports as presented to each EWUF Congress from 2011 to 2019;*
3. *the bank statements for EWUF (Belgium) account from 2011 to the date of its closure;*
4. *any Reports on the conduct of the European Wushu Championships from 2011 to 2019"*.

14. On 1 April 2021, Mr Missingham wrote to Mr Smith, again requesting that certain documents and information be provided by the EWUF to the IWUF. Mr Missingham stated that:

"In this connection and in view of the additional information requested the deadline to provide the information requested is now extended to 9 April 2021. The IWUF has to reserve the right to take all the appropriate measures in case this deadline is not respected, including but not limited to the provisional suspension of EWUF as the IWUF recognized Continental Federation for Europe".

15. On 10 April 2021, the Ethics Committee submitted its Second Interim Report to the Executive Board, recommending *inter alia* a provisional suspension.

16. On 12 April 2021, Mr Zhang Qiuping, the IWUF Secretary General, acting on behalf of Mr Zhongwen, submitted the Second Interim Report to the Executive Board and invited its members to make a decision on the recommendations therein. It was noted that pursuant to Article 23.18 of the IWUF Constitution members who have a conflict of interest must abstain from the vote. Accordingly, all *"non-European [Executive Board] and non-Ethics Committee [Executive Board] members"* were invited to vote by replying *"YES/NO/ABSTENTION"* by email.

17. On 15 April 2021, Mr Qiuping wrote to members of the Executive Board to inform them that the Secretariat had received eight votes (from a total of eight voting members of the Executive Board) with all members voting in favour of the Ethic Committee's recommendation in the Second Interim Report to impose the provisional suspension.

18. On 16 April 2021, the Mr Qiuping wrote to Mr Smith to notify him of the decision of the Executive Board to impose provisional measures in accordance with Article J.3 of the IWUF Code of Ethics 2020 (the "Code of Ethics") and Article 36 of the IWUF Constitution. The provisional measures imposed on EWUF – which mirror those recommended by the Ethics Committee in the Second Interim Report – are as follows:

"1. The recognition of EWUF as Continental Federation for the European Continent in the meaning of Art. 4.1 of the IWUF Constitution is provisionally suspended;

2. The provisional suspension of the recognition of EWUF as Continental Federation shall not prohibit any European IWUF member nor any European athlete to continue to be a member of IWUF and/or continue to participate at any competition supported, approved or organized by IWUF and/or its members.

3. Upon request by the IWUF Ethics Committee, the EWUF must provide any information which the IWUF Ethics Committee considers may be relevant to investigate the complaints, including but not limited to bank account details, itemised telephone bills, bank statements, internet service records, computers, hard drives and other electronic information storage devices and / or a statement setting out the relevant facts and circumstances around the complaint/s. Where bank records and statements are, for whatever reason, unavailable the EWUF shall provide an appropriate authorization to enable the Ethics Committee to obtain such records as required directly from the banking institution concerned.

4. *A final decision on the recognition of EWUF as Continental Federation for the European Continent in the meaning of Art. 4.1 of the IWUF Constitution shall be taken by the IWUF Executive Board once the IWUF Ethics Committee has completed its investigation and submitted to the IWUF Executive Board its Final Report on the matter.*

Please note that, as indicated above, the above measures are of provisional nature. Accordingly, the decision of the IWUF Executive Board of 15th April is not a final decision in the meaning of Art. J.3 of the IWUF Code of Ethics.

In accordance with Art. J.2 of the IWUF Ethics Code, the IWUF Ethics Committeee [sic] *has decided to hold a hearing and hear EWUF in connection with the investigated matter. Because of the worldwide Covid-19 travel restrictions, the hearing will be held by video- conferencing. The IWUF Ethics Committee is proposing to hold the hearing on a date to be fixed".*

19. On 7 May 2021, EWUF filed an appeal against the provisional suspension pursuant to Article 36.8 of the IFUW Constitution.

20. On 22 July 2021, IWUF informed EWUF that an *ad-hoc* Jury of Appeal (the "**Jury of Appeal**") would commence work on 26 July 2021.

21. On 30 July 2021, EWUF submitted written comments to the Jury of Appeal.

22. On 2 September 2021, IWUF submitted its response to EWUF's written comments of 30 July 2021.

23. On 8 October 2021, Mr Marc Cavaliero, acting on behalf of IWUF, wrote to Mr Smith attaching the decision of the Jury of Appeal (the "Appeal Jury Decision") which is recorded to have been *"[p]assed by telephone conference on 15 September 2021"*. The Jury of Appeal determined that that *"[g]enerally, under Swiss law, a decision on interim measures is not subject to appeal"*, relying on a decision of the Swiss Federal Tribunal. The Appeal Jury Decision goes on to state that:

"44. The Jury of Appeal deems it necessary to recall that the provisional measures are not only limited in time but also limited in their effect. Indeed, the IWUF Executive Board expressly provided that the measures should not go beyond what is apparently necessary, given that the status of the European IWUF members and of European athletes are not affected by the provisional measure imposed: according to the Appealed Decision:

'[t]he provisional suspension of the recognition of EWUF as Continental Federation shall not prohibit any European IWUF member nor any European athlete to continue to be a member of IWUF and/or continue to participate at any competition supporter, approved or organized by IWUF and/or its members.'

45. Furthermore, based on the documentation currently at its disposal, the Jury of Appeal is satisfied that the IWUF Ethics Committee has been conducting the investigations and the proceedings in an appropriate manner. Numerous steps, enquiries and reports have already been prepared and presented to the IWUF Executive Board. In light of the work undertaken so far, the Jury of Appeal is hopeful that a final

decision will be passed swiftly to ensure that the effects of the present provisional sanction are effectively and concretely limited in time.

46. Based on the foregoing considerations, the Jury of Appeal considers that this appeal is premature, as it was not directed at a final and binding decision. Consequently the appeal shall be declared inadmissible on this ground".

24. The Jury of Appeal went on to consider – and reject – EWUF's arguments on the merits *"[f]or the sake of completeness"*. On this basis, the Appeal Jury rejected the EWUF's appeal and confirmed the Executive Board decision.

25. On 16 October 2021, the Executive Board confirmed the Appeal Jury Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. In accordance with Articles R47 and R48 of the 2021 edition of the Code of Sports-related Arbitration (the "Code"), the Appellant filed its Statement of Appeal on 29 October 2021. In its Statement of Appeal, the Appellant requested the appointment of a sole arbitrator.

27. On 3 November 2021, the CAS Court of Office acknowledged receipt of the Statement of Appeal and informed the parties that pursuant to Article S20 of the Code these proceedings were assigned to the CAS Appeals Arbitration Division. The Respondent was invited to inform the CAS Court Office within five days whether it agreed to the appointment of a sole arbitrator.

28. On 12 November 2021, having been granted a short extension of time, the Respondent informed the CAS Court Office that it did not agree with the Appellant's proposal to appoint a sole arbitrator and requested that the case be assigned to a panel of three arbitrators. The Respondent also notified the CAS Court Office that it does not recognise the jurisdiction of CAS, the admissibility of the Statement of Claim, nor the Appellant's standing to bring these proceedings.

29. On 15 November 2021, the CAS Court Office wrote to the parties noting that the Respondent did not agree with the Appellant's request for the appointment of a sole arbitrator. The CAS Court Office informed the parties that in view of their disagreement, pursuant to Article R50(1) of the Code, it would be for the President of the CAS Appeals Arbitration Division (or her Deputy) to decide on the number of arbitrators.

30. By letter of the same date, the Appellant informed the CAS Court Office of its view that the current dispute relates solely to the application of disciplinary sanctions and thus the procedure should be free of charge pursuant to Article R65 of the Code. On 16 November 2021, the CAS Court Office informed the Parties that the President of the CAS Appeal Arbitration Division would consider the Appellant's representations with regard to Article R65 of the Code and that the time limit to file the Appeal Brief was suspended.

31. On 17 November 2021, the Respondent informed the CAS Court Office of its position that the present dispute is not disciplinary in nature, but rather procedural (*"i.e. an attempted appeal*

against provisional measure") and therefore falls within the terms of Article R64 of the Code. The Respondent further stated that *"in view of the clear inadmissibility and meritless nature"* of the appeal, it would not pay its share of the advance of costs. The Respondent reiterated its request that the appeal should be heard by a three-member panel.

32. By letters of the same date, the CAS Court Office informed the parties that pursuant to Article R50 of the Code, the Deputy President of the CAS Appeals Arbitration Division decided to submit the present case to a sole arbitrator. The CAS Court Office also informed the parties that the Deputy President of the CAS Appeals Arbitration Division determined that the present procedure does not fall within the terms of Article R65 of the Code on the grounds that the Respondent is not a signatory to the Agreement constituting the International Council of Arbitration for Sport and is not a member of the Association of Summer Olympic International Federations. As such, pursuant to Article R65.4 of the Code, Article R64 of the Code applies to the present procedure.

33. On 25 November 2021, the CAS Court Office notified the parties that following the request by the CAS Finance Director for payment by the parties of the advance of costs, the suspension of the Appellant's deadline to file its Appeal Brief was lifted with immediate effect.

34. In accordance with Article R51 of the Code, the Appellant filed its Appeal Brief on 26 November 2021.

35. On 2 December 2021, the Respondent wrote to the CAS Court Office to request that the deadline to file its Answer Brief is fixed after payment by the Appellant of its share of the advance of costs, pursuant to Article R55 of the Code. Accordingly, by letter of the same date, the CAS Court Office informed the parties that the deadline for the Respondent to file its Answer would be fixed upon the Appellant's payment of the advance of costs.

36. On 20 December 2021, the CAS Court Office informed the parties that the Deputy President of the CAS Appeals Arbitration Division had appointed Professor Philippe Sands QC as Sole Arbitrator pursuant to Article R54 of the Code. The CAS Court Office also confirmed receipt of the Appellant's payment for the advance of costs in this procedure and invited the Respondent to file its Answer within 20 days pursuant to Article R55 of the Code.

37. In accordance with Article R55 of the Code, the Respondent filed its Answer on 2 February 2022, having been granted two extensions of time by the Sole Arbitrator on 6 January and 1 February 2022. Within the Answer, the Respondent argued *inter alia* that the present appeal is inadmissible and disputed the jurisdiction of CAS.

38. By letter of 2 February 2022, the parties were invited to inform the CAS Court Office whether they would prefer that a hearing be held in this matter, or for the Sole Arbitrator to issue an award based solely on the parties' written submissions.

39. On 4 February 2022, the Respondent indicated its preference that there be no hearing and reiterated its position that the present appeal is inadmissible. By letter of 8 February 2022, the

Appellant contested the Respondent's arguments with respect to admissibility and informed the CAS Court Office that it would prefer for a hearing to be held.

40. By letter of the CAS Court Office dated 10 February 2022, the Sole Arbitrator invited the Appellant to comment on the Respondent's objections to jurisdiction and admissibility pursuant to Article R55(5) of the Code. Accordingly, on 17 February 2022, the Appellant filed written submission on the Respondent's objections to jurisdiction and admissibility.

41. On 22 February 2022, the CAS Court Office informed the parties that pursuant to Article R57 of the Code, the Sole Arbitrator decided to hold a hearing in this matter which would be conducted by videoconference.

42. On 25 February 2022, the CAS Court Office sent an Order of Procedure to the parties. The parties duly transmitted signed copies of the Order of Procedure to the CAS Court Office on 7 March 2022 (the Appellant) and 14 March 2022 (the Respondent).

43. In accordance with Article R57 of the Code, a hearing was held on 18 March 2022 by videoconference (the "hearing"). The Appellant was represented by Mr Alexandre Miguel Mestre (EWUF legal counsel) and Mr Raymond Smith (former President of EWUF). The Respondent was represented by Mr Lukas Stocker (counsel) and Mr Walt Missingham (Vice President of IWUF and chairman of the Ethics Committee). The Sole Arbitrator was assisted at the hearing by Ms Pauline Pellaux (Counsel to CAS) and Mr Remi Reichhold (*ad hoc* clerk).

44. At the closing of the hearing, both Parties expressly confirmed that their respective rights to be heard and to be treated equally had been respected in the present proceedings.

IV. SUBMISSIONS OF THE PARTIES

45. What follows is a concise summary of the legal arguments advanced by the parties on the issues of jurisdiction, admissibility and the merits. This summary is not exhaustive and contains only those arguments the Sole Arbitrator considers necessary to give context to the decision reached in each of the sections below in relation to the jurisdiction of the CAS to hear the case, the admissibility of the appeal and the merits of the appeal. For the avoidance of doubt, the Sole Arbitrator has carefully considered all of the written and oral submissions of the parties, including the exhibits.

A. Jurisdiction and Admissibility

46. In the Statement of Appeal, the Appellant contends that CAS has jurisdiction to hear this appeal pursuant to Articles R47 and R48 of the Code and Articles 38.8 and 38.9 of the 2021 edition of the IWUF Constitution, which entered into force on 14 July 2021 (the "2021 Constitution"). However, in the Appeal Brief, the Appellant relies on Articles 36.8-36.10 of the 2017 edition of the IWUF Constitution (the "2017 Constitution") as the basis for the jurisdiction of the CAS to hear the appeal. The Appellant further contends that the appeal is admissible on the basis that:

a. There is no further appeal beyond the Jury of Appeal within IWUF.

b. CAS case law supports the proposition that decisions of international federations are final once internal procedures have been exhausted (CAS 2008/A/1468).

c. This case concerns disciplinary sanctions which fall within the scope of Article 36.3 of the IWUF Constitution (whereas the Appellant does not expressly state which version of the IWUF Constitution it is referring to, this would appear to be a reference to the 2017 Constitution).

d. The case law relied upon by the IWUF in correspondence is inapplicable because it is *"purely civil"* and the Appeal Jury Decision is *"final and not provisional"*.

e. The practical consequence of the provisional suspension is that EWUF ceases to be recognised by IWUF and that competitors *"obviously do not want to take part in competitions organised by EWUF, even if they could, because they know that they cannot achieve any sports result or classification from them"*.

f. By reference to CAS jurisprudence relating to denial of justice (CAS 2008/A/1634 and CAS 2017/A/5042), EWUF points out that more than six months has *"already elapsed without a final decision being issued"*.

47. In the Answer Brief and amplified at the hearing, the Respondent argues that the CAS does not have jurisdiction to hear the appeal and that the provisional suspension is *"not appealable"* and therefore the appeal is inadmissible. The Respondent's arguments on jurisdiction and admissibility may be summarised as follows:

a. Both as a matter of Swiss law and pursuant to the applicable IWUF regulations, *"only a final and binding decision may be appealed to CAS: the provisional measure at stake, however, is not such a decision"*. The decision to temporarily suspend recognition of EWUF is not a *"final decision"* because it can be revoked or changed at any time.

b. The Appellant errs in its assertion that the present case is not a matter of civil law. Article 1.2 of the IWUF Constitution provides that IWUF is an association under the rules of the Swiss Civil Code. Decisions of the Swiss Federal Tribunal have confirmed on several occasions that decisions on provisional measures are not appealable (Decision of the Swiss Federal Tribunal 4A_582/2009, 13 April 2010).

c. Pursuant to Article 38.9 of the 2021 Constitution and Article J.3 of the Code of Ethics, only a *"final decision"* of the IWUF Executive Board imposing a sanction can be appealed to the CAS. Article 38.10 of the 2021 Constitution also provides that *"[a]ny dispute arising from the final decisions made by the IWUF shall be handled in accordance with the Code […]"*. The provisional suspension is, by its nature, of a provisional character and, as such, the appeal is not admissible.

d. In the Appeal Brief, and contrary to the position adopted in the Statement of Appeal, the Appellant relies on outdated and inapplicable provisions of the 2017 Constitution.

e. Article R47(1) of the Code confirms that the provisional suspension is not appealable because the Appellant has failed to exhaust legal remedies available to it prior to the appeal.

48. In its further written and oral submissions in response to the Respondent's objections to jurisdiction and admissibility, the Appellant argues (in summary) that:

a. Article R47(1) of the Code provides that *"[a]n appeal against a decision of a Federation, association of sports-related body may be filed with CAS if the statutes or regulations of the said body so provide … and if the Appellant has exhausted the legal remedies available prior to the appeal, in accordance with the statutes or regulations of that body"*.

b. The provisional suspension is a disciplinary sanction. Article 38.8 of the 2021 Constitution describes the procedure available to a party given notice of a disciplinary decision. This provides a right to appeal within 21 days and triggers the appointment of a Jury of Appeal, as occurred in this case. The decision of the Jury of Appeal must then be confirmed by the IWUF Executive Board, which also occurred in this case. This in turn gives rise to a right of appeal to CAS. The Appellant has therefore exhausted internal remedies and has appealed to CAS against a *"final decision"*.

c. A *"final decision"* is a decision from which there is no appeal within the federation.

d. Article 38.10 of the 2021 Constitution further confirms that *"final decisions made by the IWUF shall be handled in accordance with the Code […]"*.

e. Further, in Article J.3 of the Code of Ethics, *"provisional suspension"* falls under the heading of *"sanctions"*. Article J.3 goes on to state that *"[a] final decision of the IWUF Executive Body imposing a sanction or a measure can be appealed"* to CAS. This confirms that a provisional suspension is not excluded from the range of decisions from which an appeal lies.

f. Whereas the sanction imposed by IWUF is provisional in nature, the decision under appeal in this case is a final decision *"because no further appeal lies from it within IWUF"*.

g. The case law of the Swiss Federal Court relied upon by the Respondent is distinguishable on the basis that the provisional suspension is not a *"procedural order"*, is not the result of a *"partial award"* or *"interlocutory award"* and is not a *"decision on provisional […] measures"* within the meaning of Article 183 of the Swiss Federal Act on Private International Law. There is also considerable CAS case law which concerns appeals against provisional suspensions.

B. The Merits

49. In the Appeal Brief and in the course of submissions at the hearing, the Appellant accuses the IWUF of pursuing a *"persecutory attitude against the EWUF"* and advances eight grounds of challenge:

a. First, the Appeal Jury Decision is *"null and void"* because it *"violates Article 12.1 of the IWUF Constitution"*, which provides that *"Continental Federations […] are required to protect and maintain their autonomy and independently manage all internal affairs without any pressure or interference from a third party"*. The Appellant argues that this provision entails that *"no third party, namely the IWUF, may interfere with the autonomy and independence of the management of EWUF, so far as its internal affairs are concerned"*. The Appellant adds that as a *"jurisdictional body of an international sports federation"*, the IWUF Executive Board *"has no jurisdiction to consider and decide"* on the matters giving rise to the Appeal Jury Decision, including allegations of criminality. These matters remain to be decided in proceedings before the Belgian courts.

b. Second, the Appeal Jury Decision violates the procedure enshrined in Articles 23.13 to 23.18 of the IWUF Constitution. It is not known when or how the IWUF Executive Board reached its decision on 15 April 2021. For instance, there was no discussion prior to the casting of votes and representatives of the EWUF Executive Committee were only informed after the event. As a result of failing to meet the procedural requirements of Article 23.13 to 23.18 of the IWUF Constitution, the decision of the IWUF Executive Board is *"null and void, and wholly ineffective"*.

c. Third, the provisional suspension *"violates the principle of the presumption of innocence"* because it seeks to *"pre-empt and usurp a real court"* by making findings of illegality.

d. Fourth, the provisional suspension also violates the corollary principle of legality (*nulla poena sine lege*). None of the provisions of the IWUF Constitution which the Appellant is alleged to have breached impose any penalty. Moreover, Article 36 of the IWUF Constitution is only applicable to alleged violations of the Code of Ethics. However, the IWUF has not identified any provision of the Code of Ethics which the Appellant is alleged to have violated.

e. Fifth, the provisional suspension violates the principle of non-retroactivity because the Code of Ethics only came into force on 28 October 2020, a considerable period of time after the facts at issue in these proceedings. Part L of the Code of Ethics states that: *"[a] person can be sanctioned under the present Ethics Code only if he/she committed an act that at the time of its taking place was prohibits (principle of prohibition on retroactivity)"*. Counsel for the Appellant further developed this argument at the hearing, submitting that the Appeal Jury Decision is not based on alleged breaches of the Code of Ethics, but rather alleged failures to adhere to the IWUF Constitution. However, Article 36.3 of the 2017 Constitution only allows for disciplinary investigations and sanctions in the event that there has been a violation of the Code of Ethics.

f. Sixth, the provisional suspension *"violates the principle of proportionality"*. The Appellant relies on CAS jurisprudence to the effect that sanctions must be in proportion with the seriousness of the misconduct/infringement (CAS 2005/A/830; CAS 2010/A/2268).

g. Seventh, the provisional suspension *"violates the principle of protection of legitimate expectation"* because EWUF is being punished for conduct *"that occurred, for example, ten years ago"*. EWUF cannot be *"indefinitely and unlimitedly at risk of the commencement of successive disciplinary proceedings with regard to conduct [that] allegedly took place decades ago"*.

h. Eighth, in any event, EWUF has not violated Articles 5.6, 5.7, 11.2 and 11.5 of the IWUF Constitution, as alleged by the Respondent.

50. The Respondent's arguments set out in the Answer and further developed at the hearing, may be summarised as follows:

a. Following receipt of the complaint on 10 July 2020 *"a wide-ranging investigation"* was initiated by the Ethics Committee, which is still in progress. Legal proceedings were initiated in several countries to obtain information. *"As of today, the complaints seem to have been filed with merit"*. At the hearing, Counsel for the Respondent described the complaint of 10 July 2020 as setting out *"serious allegations and concerns in relation to the operation of EWUF and the possible conduct of several high officials thereof covering a number of illicit behaviours"*.

b. The Appellant's appeal to CAS *"is nothing else than an attempt to delay the investigations"*. The provisional suspension was imposed by the competent body (the IWUF Executive Board) based upon a proposal of the Ethics Committee. The provisional suspension falls within the applicable IWUF regulations, and is justified and fully appropriate, particularly in light of EWUF's *"total lack of cooperation"*. Moreover, the provisional suspension does not *"have any effect on any of the EWUF National Federations nor any EWUF athletes"*. The provisional suspension is *"merely of nominal nature: the Appellant does not suffer any disadvantage […] and, therefore, lacks any genuine interest"*.

c. The ongoing ethics proceedings relate to *"very serious and concerning allegations"*. EWUF failed to cooperate and repeatedly *"denied providing any information"*. IWUF contends that following requests for information *"only a very limited set of documents and information were eventually provided"* by EWUF. At the hearing, counsel for the Respondent added that EWUF was seeking to *"obstruct and prevent"* investigation into the allegations made in the complaint.

d. The Appeal Jury Decision was *"made in line with the applicable IWUF Regulations"*. Article L of the Code of Ethics states that procedural and organisational rules are exempted from the principle of non-retroactivity. Article J.3 of the Code of Ethics on *"Sanctions"* falls under the heading of *"J Procedural Rules"*. This demonstrates that the Code of Ethics was implemented in the knowledge that Article J may be applied retroactively. Pursuant to Article L, the Code of Ethics applies to *"all pending investigations"*, irrespective of when the act under investigation took place. Therefore, there can be no violation of the principle of non-retroactivity.

e. The Appeal Jury Decision is not a final decision. The final decision is still outstanding. The provisional suspension is *"more of a 'formal warning' for non-compliance with the applicable*

procedural obligations to comply with an investigation and to cooperate; however it is not a decision on the merits". It follows that the Appellant's unfounded allegations as to the principle of legality and *nulla poena sine lege* are legally wrong and irrelevant.

f. There is no violation of the procedural rules in Articles 23.12 o 23.18 of the IWUF Constitution. The provisional suspension was adopted by the IWUF Executive Board on an informed basis, with the benefit of the Second Interim Report. Members of the Executive Board were provided with appropriate information and were given a reasonable timeframe to vote. Members of the IWUF Executive Board with conflicts of interest were excluded from the vote pursuant to Article 23.18 of the IWUF Constitution and the vote complied with the rules on majority and quorum. The vote of the IWUF Executive Board was further carried out in accordance with Article J.3 of the Code of Ethics and Article 23.1 of the IWUF Constitution.

g. The Second Interim Report: (i) describes several *"possible violations"* of the Code of Ethics and the IWUF Constitution by EWUF and/or some EWUF representatives; and (ii) makes clear that EWUF has *"not (materially) responded to multiple requests for information and document production"* from the Ethics Committee *"thereby categorially and constantly refusing to comply with its obligations to cooperate"*.

h. The Ethics Committee imposed the provisional suspension hoping to *"convince EWUF, or at least some of its representatives, to cooperate with IWUF and assist in the investigations"*. As such, the provisional suspension is *"totally proportionate"* and *"nothing more than a kind of 'formal warning'"*.

i. The provisional suspension does not violate Article 12.1 of the IWUF Constitution, which *"speaks of interferences from third parties"*. This relates to entities outside Wushu Kungfu, namely private interest groups and state governing bodies. EWUF *"cannot hide behind"* Article 12.1 of the IWUF Constitution when failing to comply with its obligations under Articles 5 and 11.

j. The provisional suspension does not violate the principle of presumption of innocence because the measure is, by its nature, provisional.

k. The provisional suspension does not violate the principle of proportionality, particularly in light of EWUF's *"total lack of any cooperation with the ethics investigations"*. The provisional suspension is *"if anything, very lenient"*. The provisional suspension does not prohibit any European IWUF member nor any European athlete from continuing to be a member of the IWUF and/or to continue to participate at competitions supported, approved or organised by the IWUF and/or its members.

C. The parties' requests for relief

51. In the Appeal Brief, the Appellant makes the following request for relief:

"The Appellant respectfully requests the CAS the following requests for relief:

- *To revoke the decision issued by the IWUF ad-hoc Appeal Jury on 8 October 2021, considering admissible the appeal, and, consequently, immediately deciding on the merits of the case by considering that:*

  (i) The decision of the IWUF Executive Board is null and void, since it:

  a) Violates Article 12.1 of the IWUF Constitution

  b) Violates the procedure enshrined at Articles 23.13 to 23.18 of the IWUF Constitution;

  c) Violates the principle of presumption of innocence;

  d) Violates the principle of legality and its corollary concept 'nulla poena sine legge';

  e) Violates the principle of non-retroactivity;

  f) Violates the principle of proportionality;

  g) Violates the principle of the protection of legitimate expectation.

  (ii) The EWUF did not violate Articles 5.6; 5.7; 11.2 and 11.5 of the IWUF Constitution.

- *That IWUF be ordered to pay the costs of the present procedure.*

Subsidiary request:

On a subsidiary basis, in case the CAS has a different understanding (which is herein conjectured as a mere hypothesis):

- *To revoke the decision issued by the ad-hoc Appeal Jury of the IWUF on 8 October 2021, therefore considering the appeal as admissible, and, consequently, ordering that the IWUF Executive Board issues a decision on the merits of the case.*

Furthermore, the IWUF Executive Board should also be ordered to issue its decision within a reasonable period of time, under the penalty of committing an offense of denial of justice and seriously harming the Appellant's rights.

Finally, that IWUF be ordered to pay the costs of the present procedure".

52. In its Answer, the Respondent makes the following requests for relief:

"1. To declare that CAS does not have jurisdiction to hear this case;

2. In the alternative, to declare the Appeal inadmissible;

3. In any event, to dismiss the Appeal and to confirm the Appealed Decision;

4. In any event, to order Appellant to bear any and all arbitration costs and to grant a contribution to the legal fees of Respondent at an amount of CHF 10,000.00".

V. JURISDICTION

53. Article R47 of the Code provides 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.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

54. Article R47 of the Code imposes two requirements for the conferring of jurisdiction on CAS: (i) the statutes and/or regulations of IWUF must make provision for appeal to CAS; and (ii) EWUF must have exhausted the legal remedies available to it prior to the appeal.

55. The parties disagree as to which version of the IWUF Constitution applies to these proceedings. At the hearing, counsel for the Appellant submitted that 2017 Constitution is applicable because *"at the precise moment of the application of the sanction"*, the 2021 Constitution was not in force yet. Counsel for the Respondent argued that this issue is *"academic"* because both versions of the IWUF Constitution (2017 and 2021) do not foresee appeal to CAS against a provisional suspension.

56. The Sole Arbitrator notes that the Respondent has objected both to the jurisdiction of CAS to hear the appeal and also the admissibility of the appeal. IWUF's objections are, in essence, threefold:

a. the decision under challenge in this appeal (*i.e.* the dismissal of the Appellant's appeal against the imposition of the provisional sanction) is not, by its nature, a decision that is appealable to CAS under the terms of the IWUF Constitution and the Code of Ethics;

b. EWUF *"lacks any genuine interest"* in the appeal because of the *"nominal nature"* of the provisional suspension; and

c. EWUF has not exhausted legal remedies available to it prior to the appeal.

57. The first two of these objections (pertaining to the characterisation of the challenged decision and the standing of the Appellant) are properly understood as objections to the admissibility of the appeal. For the purposes of determining whether CAS has jurisdiction to decide this case, the Sole Arbitrator must determine whether the requirements of Article R47 are met (including whether EWUF has exhausted the legal remedies available to it prior to the appeal).

58. Both versions of the IWUF Constitution relied upon by the parties make provision for appeals to CAS against specified decisions of IWUF.

59. Articles 36.8 to 36.10 of the 2017 Constitution state that:

> *"36.8 The IWUF shall give written notice of a disciplinary action by registered mail and email to the party that is the subject of the action. If the alleged party does not agree with the result of the decision they have the right to appeal within twenty-one (21) days receiving notice of the decision. The President of the International Wushu Federation will then appoint a Jury of Appeal consisting of three (3) individuals including at least one member of the IWUF Executive Board and one lawyer. No member of the Ethics and Disciplinary Commission who made the recommendation concerning the disciplinary action shall be a member of the Jury of Appeal, and all Jury of Appeal members shall be free from all forms of conflict of interest. The Jury of Appeal shall have access to all relevant documents, minutes of meetings and notes that the Ethics and Disciplinary Commission used for their decision. The Jury of Appeal has the authority to conduct further investigation. Once a decision is made by the Jury of Appeal and confirmed by the Executive Board, the alleged party or parties shall be informed by registered mail and by email. If the alleged party intends to dispute the decision, they shall have the right to submit the case exclusively to Court of Arbitration of Sport (CAS) in Lausanne.*
>
> *36.9 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.*
>
> *36.10 In any case, any dispute between IWUF, an [National Federation], a Continental Federation, or an Associated Member, or any individual or entity affiliated with any [National Federation], Continental Federation or Associated Member which cannot be solved within 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".*

60. Articles 38.8 to 38.11 of the 2021 Constitution provide that:

> *"38.8 In matters that are not dealt by the IWUF Ethics Committee, the IWUF shall give written notice of a disciplinary action by registered mail and/or email to the party that is the subject of the action. If the alleged party does not agree with the result of the decision they have the right to appeal within twenty-one (21) days receiving notice of the decision. The President of the International Wushu Federation will then appoint a Jury of Appeal consisting of three (3) individuals including at least one member of the IWUF Executive Board and one lawyer. No member of the Disciplinary Commission who made the recommendation concerning the disciplinary action shall be a member of the Jury of Appeal, and all Jury of Appeal members shall be free from all forms of conflict of interest. The Jury of Appeal shall have access to all relevant documents, minutes of meetings and notes that the Disciplinary Commission used for their decision. The Jury of Appeal has the authority to conduct further investigation. Once a decision is made by the Jury of Appeal and confirmed by the Executive Board, the alleged party or parties shall be informed by registered mail and by email. If the alleged party intends to dispute the decision, they shall have the right to submit the case exclusively to Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.*

38.9 In matters that are dealt by the IWUF Ethics Committee, a final decision of the IWUF Executive Board imposing a sanction or a measure can be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, pursuant to the Code of Sport-Related Arbitration. The time limit for such an appeal is twenty-one (21) days after communication of the decision to the individual or organization appealing.

38.10 Any dispute arising from the final 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.

38.11 In any case, any dispute between IWUF, an [National Federation], a Continental Federation or an Associated Member, or any individual or entity affiliated with any NF, Continental Federation or Associated Member, which cannot be solved within 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".

61. Further, Article J.3 of the Code of Ethics, which is headed *"Sanctions"*, states that:

"The IWUF Ethics Committee recommends to the IWUF President and the IWUF Executive Board which measures or sanctions shall be imposed in a given case. The possible sanctions are in particular those provided under the IWUF Constitution (incl. warnings, fines, penalties, suspensions or the removal of athletes, coaches, managers, judges, office bearers, etc.) or any other appropriate measures, in particular those provided by the implementing provisions of the IWUF Code of Ethics.

Sanctions may include provisional measures, like e.g. a provisional suspension as well as measures against National (Territorial) Federations, Continental federations, associated members or any other group that may have violated the present Ethics Code.

A final decision of the IWUF Executive Board imposing a sanction or a measure can be appealed to the Court for Arbitration for Sport (CAS), Lausanne, Switzerland, pursuant to the Code of Sport-Related Arbitration. The time limit for such an appeal is twenty-one (21) days after communication of the decision to the individual or organisation appealing".

62. The Sole Arbitrator notes that Article 38.9 of the 2021 Constitution and the third paragraph of Article J.3 of the Code of Ethics specify that only a *"final decision"* of the IWUF Executive Board may be appealed to CAS. The question of whether the decision challenged in this case is a *"final decision"* within the meaning of Article 38.9 of the 2021 Constitution and the third paragraph of Article J.3 of the Code of Ethics is addressed in the section below, on admissibility.

63. The Sole Arbitrator will now consider whether the requirements of Article R47 are met. First, both versions of the IWUF Constitution (Article 36.8 of the 2017 version, and Article 38.9 of the 2021 version) confer jurisdiction on CAS to hear appeals relating to the imposition of a sanction by the IWUF Executive Board. Likewise, Article J.3 of the Code of Ethics – which came into force before the decision of the IWUF Executive Board to impose the provisional suspension – confers jurisdiction on CAS to hear appeals against a *"final decision of the IWUF Executive Board imposing a sanction or a measure"*. Further, the Sole Arbitrator accepts the

Appellant's submission that there is no further appeal mechanism within IWUF to challenge the provisional suspension.

64. It follows that both requirements of Article R47 of the Code are met: (i) the IWUF Constitution (both the 2017 and 2021 versions) and Code of Ethics provide for an appeal against a decision of the IWUF Executive Board imposing a sanction; and (ii) EWUF has exhausted the legal remedies available to it prior to the appeal in accordance with the IWUF Constitution and Code of Ethics. Therefore, the Sole Arbitrator concludes that the CAS has jurisdiction to hear this appeal.

VI. ADMISSIBILITY

65. In addition to the question of CAS' jurisdiction, the Sole Arbitrator must determine if the appeal is admissible (*i.e.* whether the appealed decision is one which falls within the range of decisions which may be appealed to CAS pursuant to IWUF Constitution and the Code Ethics, and whether EWUF has standing to bring the appeal).

66. As noted in paragraph 54 above, the parties disagree on which version of the IWUF Constitution applies to the present dispute.

67. The 2017 Constitution was in force: (i) when the complaint was made; (ii) when the IWUF Executive Board first imposed the provisional suspension; and (iii) when EWUF appealed against the provisional suspension to the Jury of Appeal. The 2021 Constitution entered into force on 14 July 2021, following which: (i) the Jury of Appeal dismissed EWUF's appeal against the provisional suspension; and (ii) EWUF filed the present appeal to CAS.

68. By contrast, the Code of Ethics entered into force on 28 October 2020, before the IWUF Executive Board imposed the provisional suspension. Article L of the Code of Ethics, headed *"Entering into Force"* provides that:

> *"The present Ethics Code shall enter into force as per October 28, 2020 and has priority towards the old rules contained in the IWUF Constitution. IWUF shall amend the IWUF Constitution in due course to remove any inconsistencies and bring the Constitution in line with the present Ethics Code.*
>
> *A person can be sanctioned under the present Ethics Code only if he/she has committed an act that at the time of its taking place was prohibited (principle of prohibition of retroactivity). This however does not apply on procedural nor on organizational rules. Any pending or future investigation or procedure shall be carried out under the new procedural rules of this Ethics Code, independently on when the act under investigation has been committed".*

69. Pursuant to Article L, the Code of Ethics *"has priority"* over the *"old rules"* contained in the 2017 Constitution. Article L further states that in relation to a *"pending or future investigation or procedure"*, the *"new procedural rules"* in the Code of Ethics are applicable. It follows that for the purposes of this appeal, insofar as there may be inconsistencies, Article J.3 of the Code of Ethics takes precedence of Articles 36.8 to 36.10 of the 2017 Constitution.

70. Article J.3 of the Code of Ethics (quoted in paragraph 60 above) states *inter alia* that:

    a. *"Sanctions include provisional measures, like e.g. a provisional suspension"*; and

    b. only a *"final decision"* of the IWUF Executive Board imposing a sanction or measure can be appealed to CAS, and must be filed no more than 21 days after the communication of the decision to the impugned organisation.

71. As expressly stated in Article J.3, the provisional suspension is a *"sanction"* within the meaning of the Code of Ethics, notwithstanding its provisional nature.

72. The Sole Arbitrator will now consider the Respondent's two objections relating the admissibility of this appeal. First, IWUF argues that the decision to impose the provisional suspension is not a *"final decision"* within the meaning of Article J.3 of the Code of Ethics (and within the meaning of Article 38.9 of the 2021 Constitution) because the suspension is, by its nature, provisional. The Sole Arbitrator does not agree. IWUF fails to distinguish between the challenged decision and the sanction which was imposed by that decision. Whereas the sanction is provisional in nature, the decision imposing it is "final" in the sense that there is no legal mechanism by which EWUF can challenge that decision. The Sole Arbitrator is not persuaded by IWUF's argument that the challenged decision is not a *"final decision"* because it can be revoked or changed at any time. Only IWUF could do so. And assuming that the IWUF would not do so, the provisional suspension could remain "provisional" for ever, without any possibility of judicial review. As noted in paragraph 63 above, there is no further appeal mechanism available to the Appellant within IWUF beyond the Jury of Appeal. For these reasons, the Sole Arbitrator concludes that the Appeal Jury Decision is a *"final decision"* within the meaning of the Code of Ethics (and correspondingly within the meaning of Article 38.9 of the 2021 Constitution), and that as such it may be appealed to CAS.

73. Second, IWUF argues that the provisional sanction is *"nominal"* in nature, as a consequence of which EWUF lacks *"any genuine interest"* in this appeal. The Sole Arbitrator does not accept this submission. The challenged decision is directly addressed to the Appellant and has had the effect of suspending EWUF's recognition as a Continental Federation. It is difficult to see how EWUF *"does not suffer any disadvantage"* as a result, not least because EWUF is for a period of time estopped from organising and managing wushu activities in Europe pursuant to the IWUF Constitution. The Sole Arbitrator therefore concludes that EWUF has sufficient interest in the challenged decision to bring this appeal and unquestionably has standing to do so.

74. For completeness, the Sole Arbitrator does not accept IWUF's contention that decisions of the Swiss Federal Tribunal confirm that the provisional suspension is not appealable. The jurisprudence mentioned by the Respondent (ATF 4A_582/2009) concerns the admissibility of an appeal at the SFT against an order for provisional measures which had been erroneously titled "preliminary award" and was clearly not a final decision. As set out in the section immediately below, for the purposes of this appeal, the rules and regulations of IWUF are to be applied in priority, rather than those of Swiss law. Those rules and regulations provide for appeal to CAS against a final decision of the IWUF Executive Board imposing a sanction.

Article J.3 of the Code of Ethics expressly defines a *"sanction"* as including a *"provisional suspension"*.

75. Finally, the Sole Arbitrator notes that the Appellant's Statement of Appeal was filed on 29 October 2021 (*i.e.* within 13 days of notification of the Appeal Jury Decision) in compliance with the requirements of Article J.3 of the Code of Ethics and Article R47 of the Code. The Appeal Brief was filed on 26 November 2021 in compliance with Article R51 of the Code.

76. For these reasons, the Sole Arbitrator concludes that the present appeal is admissible and that EWUF has standing to bring these proceedings against IWUF.

VII. APPLICABLE LAW

77. Article R28 of the Code provides that:

"The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing".

78. Article R58 of the Code states that:

"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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

79. The Sole Arbitrator notes that pursuant to Article 1.1 of the IWUF Constitution (both the 2017 and 2021 versions), IWUF is constituted in accordance with Article 60 *et seq* of the Swiss Civil Code.

80. In its Answer, the Respondent contends that *"[t]he present dispute is governed by the rules and regulations of the IWUF, and subsidiarily, Swiss law"*. The Appellant has not disagreed with this contention.

81. On this basis, the Sole Arbitrator is satisfied that the law applicable to this dispute is the rules and regulations of the IWUF, and subsidiarily, Swiss law.

VIII. MERITS

82. The Appellant challenges the Appeal Jury Decision, which dismissed EWUF's appeal against the decision of the IWUF Executive Board dated 15 April 2021 to impose the provisional measures set out in paragraph 18 above. These measures include the provisional suspension and seek to impose a requirement on EWUF to "provide any information which the IWUF Ethics Committee considers may be relevant to investigate the complaints". The decision of the IWUF Executive Board dated 15 April 2021 also states that a "final decision on the

recognition of EWUF as [a] Continental Federation within the meaning of Art. 4.1 of the IWUF Constitution" shall be taken by the IWUF Executive upon completion of the investigation by the Ethics Committee.

83. At the hearing, the Sole Arbitrator sought to establish what steps had been taken by IWUF following the Appeal Jury Decision. As there was no evidence before the Sole Arbitrator on any such steps, at the close of the hearing the parties were invited to file further written submissions pursuant to Article R44.3 of the Code. The Respondent was invited to submit: (i) a concise account of all the steps taken by IWUF since the imposition of the Appellant's provisional suspension to reach a final decision together with any supporting documents; and (ii) any minutes, notes and/or voting records of any meetings of the IWUF Executive Board during the period 12 to 16 April 2021 which led to the provisional suspension being imposed. The Appellant was given permission to file written observations on the documents submitted by the Respondent.

A. Post hearing briefs

84. In accordance with the Sole Arbitrator's request following the hearing on 18 March 2021, the parties duly filed further written submissions on 4 April 2022 (the Respondent) and 19 April 2022 (the Appellant).

(i) IWUF's further written submissions

85. IWUF's further written submissions set out the following timeline of events:

a. Following the imposition of the provisional suspension, the IWUF Ethics Committee *"continued to investigate the hundreds of documents submitted to it in the complaint file"*. These further steps to reach a *"final decision"* have been focused on: *"(i) completing the analysis and investigation into the case file and (ii) to offer the accused parties the opportunity to be heard"*.

b. The IWUF submitted that *"numerous meetings"* were held, including *"34 Zoom-meetings"*. However, there is no evidence before the Sole Arbitrator as to the timing, purpose, content or outcome of those meetings.

c. IWUF further submitted that the parties were involved in *"ongoing court proceeding[s] in Belgium in order to obtain further information on allegations, where Respondent is currently preparing an appeal against the first instance decision"*. Again, there is no evidence before the Sole Arbitrator relating to the Belgian court proceedings.

d. On 19 October 2021 – three days after the IWUF Executive Board confirmed the Appeal Jury Decision – Mr Missingham (Chairman of the Ethics Committee) wrote to Mr Smith and Mr Grindeanu (respectively the President and Vice President of EWUF) stating that *"I have determined that a prima facie case has been established, against you, for various breaches of the IWUF Code of Ethics"*. Mr Missingham added that *"[y]ou will receive further information in the course of the coming weeks; further you will be granted the possibility to submit your views and arguments at a hearing"*.

e. The following day, on 20 October 2021, Mr Missingham wrote in similar terms to Mr Paulo Araujo, a member of the EWUF Executive Board. Mr Araujo did not respond to Mr Missingham's letter, resulting in a further letter dated 2 November 2021 by which Mr Araujo was requested to confirm within four days whether he would attend a hearing. Mr Araujo was warned that *"if you choose not to attend it will be assumed that you are waiving your right to be heard and that you accept the IWUF Ethics Committee to decide the case on the basis of the evidence available"*.

f. IWUF submits that on 10 November 2021 there was *"an attempt to hold a hearing"* at which Mr Smith *"completely refused to provide any information, and simply repeated the position that the EWUF Ethics Committee would not be competent to conduct this investigation"*.

g. On 18 November 2021, Mr Missingham wrote to the EWUF Executive Board, referring to the Second Interim Report and setting a *"final deadline"* of 30 November 2021 for the provision of information including *inter alia* (i) bank statements for all EWUF bank accounts for the period 2016-2020; (ii) information pertaining to an IWUF Solidarity Fund Grant of $50,000 USD paid to EWUF on 22 December 2016; and (iii) reports on the conduct of the European Wushu Championships from 2011 to 2019.

h. On 30 November 2021, Mr Smith responded to Mr Missingham's letter dated 18 November 2021, refusing to provide the requested information on the basis that it relates to *"facts that occurred"* before the Code of Ethics entered into force. Mr Smith further stated that: *"we remain available to collaborate with the IWUF Ethics Committee to provide any necessary information/data related to facts that have occurred after October 28 2020"*.

i. On 8 December 2021, Mr Missingham wrote to Mr Smith, Mr Grindeanu and another member of the EWUF Executive Board (Mr Henk Verschuur), acknowledging receipt of Mr Smith's letter dated 30 November 2021 and stating that: *"it makes no sense to call for a further hearing, nor to submit further questions to you, since we note that you categorically refuse to cooperate, answer the questions put to you and/or to provide us with the requested information and documents"*. Mr Missingham went on to state that: *"[w]e will therefore now close this investigation and prepare a final report. Such report will be provided to you for final comments, before it will be submitted to the IWUF President and the IWUF Executive Board, together with a possible recommendation which measures or sanctions shall be imposed"*.

j. The Respondent filed an undated and partially redacted 'Third Interim Report' (which IWUF submits is dated 11 January 2022). The Third Interim Report notes that members of the EWUF Executive Board *"have been given, variously, the opportunity to attend hearings and to answer questions"*. It is also noted that the EWUF Executive Board *"has showed its position as they 'will not collaborate' in what they described as an 'illegal investigation'"*. The Third Interim Report states that the IWUF Ethics Committee *"will move towards the tabling of its 'Final Report' on this matter"*, which is anticipated *"within the first half of 2022"*. The Sole Arbitrator notes that, save for the reference to the preparation of a *"Final Report"*, the redacted version of the Third Interim Report does not describe any further significant investigative steps taken by the Ethics Committee.

k. On 10 March 2022, Mr Missingham wrote again to *inter alia* Mr Grindeanu and Mr Araujo, providing *"a last opportunity to inform the IWUF Ethics Committee (i) if you want to be heard, (ii) if you have any statements to make to, or information to share with the IWUF Ethics Committee and (iii) if you have any evidence that could support your position and/or EWUF's position"*.

l. On 30 March 2022, Mr Verschuur wrote to the IWUF Secretariat expressing concern about *"proper procedure"* being *"ignored"* and he added that: *"I have been invited to be heard not understanding the relevancy"*. Mr Verschuur also expressed his willingness to *"submit my view and arguments in a hearing"*.

m. Finally, the IWUF submitted that: *"the Ethics Committee is in the final stages of closing its investigation and is expected to submit its final report to the IWUF Executive Board shortly"*.

86. In addition to providing the above timeline of events, IWUF also submitted evidence of the eight votes of the "non-conflicted' Executive Board members in favour of the proposal of the Ethics Committee in Second Interim Report to provisionally suspend recognition of EWUF. The Respondent submitted that pursuant to Article 23.13 of the 2021 Constitution, meetings of the IWUF Executive Board may be held by teleconference, video conference or by any other means of communication. As a result of the Covid-19 pandemic, the IWUF President exercised his discretion to hold the Executive Board meeting on 12 April 2021 by email.

(ii) EWUF's written observations

87. In its written observations filed on 20 April 2022, EWUF submits that *"IWUF persists in its failure to state when, in what terms, and by whom, the complaint, or complaints were made that gave rise to the disciplinary proceedings"*. In relation to the complaint, EWUF notes that IWUF *"now claims, for the first time, that there are hundreds of documents"*.

88. EWUF argues that following assurances made by IWUF on 29 March and 19 October 2021, no "detailed information" or "further information" was provided to EWUF about the complaint.

89. EWUF further argues that it was not "unwilling to collaborate" and relies on: (i) correspondence from Mr Araujo seeking to arrange a hearing date; (ii) the letter of Mr Smith dated 30 November 2021, referred to in paragraph 84(h) above; and (iii) email correspondence dated 31 March 2021 addressed to the IWUF Secretariat purportedly attaching "EWUF financial documents and audit reports" and stating that minutes of all EWUF congresses since 2011 are publicly available on the internet. It should be noted that the Sole Arbitrator was not provided with the documents attached to the email dated 31 March 2021.

90. Finally, in relation to the hearing on 10 November 2021, referred to in paragraph 84(f) above, the EWUF submits that the Ethics Committee *"failed to provide any information regarding the purpose and scope"* of the hearing. Mr Smith *"reiterated the need for access to the complete and appropriate information, in order to be able to exercise his right of defence fully and effectively"*. EWUF submits that the hearing was therefore suspended pending further information from IWUF, which was never provided.

(iii) Further unsolicited written submissions

91. On 25 May 2022, the Appellant made further unsolicited written submissions by email alleging *inter alia* that IWUF has taken steps with *"the intention to expel the EWUF from IWUF membership in view to replace it with EUWUF, created by two members of the IWUF Committees"*. The CAS Court Office invited the Respondent to submit its observations on the Appellant's unsolicited submissions. By letter dated 3 June 2022, the Respondent objected to the admission of EWUF's unsolicited submissions on grounds of relevance and on the basis that there were no exceptional circumstances within the meaning of Article R56 of the Code.

92. The Sole Arbitrator has reviewed the Appellant's unsolicited submissions of 25 May 2022 and agrees with the Respondent that these are not relevant to the issues that fall to be determined, and that in any event, the Appellant has not advanced any exceptional circumstances within the meaning of Article R56 of the Code, such as to allow them to be admitted.

93. By letter of the CAS Court Office dated 8 June 2022, the Sole Arbitrator advised the parties that they should make no further written submissions.

B. Decision on the merits

94. At the outset, the Sole Arbitrator emphasises that his task is limited to determining the Appellant's challenge against the Appeal Jury Decision. The investigation into EWUF by the Ethics Committee is ongoing. The Sole Arbitrator has not been provided with any evidence to prove (or disprove) the allegations described in paragraph 6 above. As such, the Sole Arbitrator expresses no view on the merits of the complaint and the underlying allegations.

95. As is often the case in proceedings of this nature, the hearing provided an opportunity for the central issues in dispute to be clarified. Counsel for EWUF built upon his written submissions on matters of procedural fairness, arguing *inter alia* that: *"[i]t all began with an investigation ordered by the Respondent's Ethics Committee on the basis of complaints made by persons who are unknown to the Appellant because it has never had access to the Respondent's case papers"*. Counsel for the Appellant submitted that EWUF had never seen the *"original complaint"*. Counsel for the Appellant further submitted that EWUF only received the Second Interim Report on 12 April 2021, three days before the provisional suspension was voted upon by the IWUF Executive Board and that it was only at this point that EWUF *"discovered which rules it had supposedly contravened"*.

96. Upon questioning by the Sole Arbitrator, counsel for IWUF sought clarification from his client as to whether the document titled *"[c]omplaints against European Wushu Kungfu Federation"* filed as exhibit R-6 to IWUF's Answer Brief was the *"original complaint"* received by IWUF on 10 July 2020. In response, Mr Missingham stated:

> *"This document is a point-by-point précis of the original complaint (…) this was to the best of my recollection authored by Patrick Van Campenhout and (…) another person (…) whose name escapes me but he was a member of the Belgian Federation (…) but there was a larger document submitted and it was reduced to this for, basically, ease of communication, the original complaint was, I think, something like 40 odd pages"*.

97. In answer to the Sole Arbitrator's question whether it would be possible for the *"original complaint"* to be provided, counsel for IWUF – after being given an opportunity to take instructions during a coffee break – submitted that:

> *"IWUF has been sharing a lot of information on the investigation, however, at the same time, because these are very serious allegations which have been put forward there is also the need to protect the confidentiality and also the security of witnesses. This is why certain information has not been disclosed. However, we submit that this is in line with the CAS jurisprudence that in exceptional (…) for exception reasons, for example if the security of witnesses are at danger, it is of course possible to redact or not to disclose certain information"*.

98. No evidence has been adduced by IWUF to support any *"exceptional reasons"* justifying non-disclosure of the original complaint to EWUF. There is no evidence before the Sole Arbitrator on the *"need to protect confidentiality"* or to protect *"the security of witnesses"*. These are mere assertions by counsel, unsupported by any evidence. To the extent that there may be concerns about confidentiality or the security of potential witnesses, IWUF should, at least, have considered the possibility of providing a copy of the original complaint, with certain information redacted. Contrary to the opinion of the IWUF, it is indeed for CAS, *i.e.* the Sole Arbitrator, to determine whether evidence is to be considered as confidential and, if so, whether it should be added to the record of the case in a redacted form.

99. Counsel for IWUF acknowledges that the allegations made against EWUF are *"very serious"*. In the view of the Sole Arbitrator, this does not justify non-disclosure of the original complaint, at least in a redacted form. To the contrary, the more serious an allegation, the more important it is for the subject of the complaint to be provided with details of the case against them.

100. In this regard, it is a matter of some concern that there is a distinct lack of clarity as to the precise scope and nature of the complaint. Whereas at the hearing Mr Missingham described the original complaint as *"40 odd pages"*, the IWUF's further written submissions dated 4 April 2022 refer to *"hundreds of documents submitted to it in the complaint file, as summarized in Exhibit R-6"*.

101. Counsel for the Respondent submitted at the hearing that whereas EWUF had not been provided with the original complaint, *"plenty"* of documentation was shared with EWUF, including the Second Interim Report. The Second Interim Report does indeed set out a concise summary of the *"investigation discovery"* in relation to some of the allegations made against EWUF. However, this report (which is dated 10 April 2021) does not appear to have been provided to EWUF until around 12 April 2021, just three days before the provisional suspension was imposed by the IWUF Executive Board, leaving very little time for EWUF to respond to the allegations.

102. On 29 October 2021, three days after the IWUF Executive Board confirmed the Appeal Jury Decision, Mr Missingham undertook to provide EWUF with *"further information in the course of the coming weeks"*. It does not appear that any such further information was provided. As recently as 30 March 2022, a member of the EWUF Executive Board (Mr Verschuur) has expressed concerns about *"proper procedure"* being *"ignored"* and being invited to attend a hearing without *"understanding the relevancy"*.

103. The Sole Arbitrator acknowledges that the IWUF Constitution and the Code of Ethics do not contain detailed rules on the precise procedure to be adopted in the course of an ethics/disciplinary investigation. Article J.3 of the Code of Ethics requires the Chairman of the Ethics Committee to inform any person or entity against whom a *prima facie* case has been found to exist *"about the procedure"* and to arrange for an investigation to be carried out. Thereafter, the Ethics Committee may hold a hearing, or invite the IWUF Executive Board to make a decision on the papers. Whereas Article J.3 is somewhat skeletal in describing these steps, the principle of procedural fairness, inherent in the conduct of disciplinary/ethics investigations and proceedings conducted by international sports federations, requires that a person or entity accused of wrongdoing must be made aware of the details of the case against them, at least to the extent required to answer to each of the allegations.

104. In the case CAS 2017/A/5086 – an authority relied upon by EWUF – the appellant argued that FIFA had violated his "due process rights" by *"failing to provide him with the full investigation files"* at the time of the FIFA adjudicatory proceedings. In that case, the panel found that the CAS proceedings had rectified any arguable procedural violation because the appeal was heard *de novo* without affording any deference to the appealed decision. Significantly, the appellant in CAS 2017/A/5086 was ultimately provided with the relevant files and had the opportunity to *"comment on all the additional produced documents"*. As such, the panel was satisfied that any procedural violation that might have occurred had been "cured". The same cannot be said in this case. In particular, IWUF has failed to provide the original complaint, or any evidence in support of its assertion that the original complaint cannot be disclosed to EWUF, even in redacted form. Beyond the two-page bullet point summary described in paragraph 6 above, EWUF was not provided with a copy of the Second Interim Report (which provides a more detailed description of the allegations) until just three days before the provisional suspension was imposed. Thereafter, it does not appear that there has been any further meaningful disclosure to EWUF. For these reasons, the Sole Arbitrator concludes that the requirements of procedural fairness have not been adhered to in such a manner as to ensure compliance with the requirements of the Code of Ethics, the IWUF Constitution and the requirements of natural justice.

105. There are two further factors which reinforce the Sole Arbitrator's conclusion that the provisional suspension does not accord with the requirements of the Code of Ethics and the IWUF Constitution.

106. First, the investigation of the Ethics Committee does not appear to have been carried out with any real sense of promptitude. At the hearing, counsel for IWUF argued that delays in the investigation were a result of the Appellant's *"attitude"*. The Sole Arbitrator recognises that the allegations against EWUF may be complex and multifaceted, and that EWUF and members of its Executive Board have not been forthcoming in responding to requests for information. Nevertheless, by 8 December 2021, Mr Missingham acknowledged Mr Smith's repeated refusal to provide information and stated that IWUF would *"close this investigation and prepare a final report"*. At the hearing, counsel for IWUF submitted that the case is *"almost closed"* and that a final decision could be expected *"shortly within … a few months, maybe even weeks"*. In its further written submissions dated 4 April 2022, IWUF stated that: *"the Ethics Committee is in the final stages of closing its investigation and is expected to submit its final report to the IWUF Executive Board shortly"*. The

Sole Arbitrator notes that as of the date of this Award, the CAS Court Office has not been notified of any final report being submitted to the IWUF Executive Board, nor does it appear that the investigation has been completed.

107. At the hearing, counsel for the Respondent accepted – in principle – that if a provisional measure were to persist for a period of, for example, four years, it would be difficult to say that it is 'provisional'. In this case, the provisional suspension has been in place for more than fifteen months, and more than eight months has elapsed since Mr Missingham informed Mr Smith that in light of EWUF's failure to provide documents, the Ethics Committee would *"close this investigation and prepare a final report"*. In these circumstances, the Sole Arbitrator concludes that the Ethics Committee has not conducted its investigation with sufficient speed or efficiency, resulting in the provisional suspension being imposed for too long, ceasing to be truly of a *"provisional"* nature within the meaning of Article J.3 of the Code of Ethics.

108. Second, the Sole Arbitrator is concerned by IWUF's submission that the provisional suspension is *"more of a 'formal warning' for non-compliance with the applicable procedural obligations to comply with an investigation and to cooperate"* and that it was imposed in the hope of *"convinc[ing] EWUF, or at least some of its representatives, to cooperate with IWUF and assist in the investigations"*. As noted in paragraph 105 above, the Sole Arbitrator is not convinced that EWUF and the members of its Executive Board (Mr Smith in particular) have cooperated with the investigation of the Ethics Committee. To the extent that EWUF has expressed willingness to cooperate, this appears to be only on its own terms. However, under the IWUF Constitution (in particular Articles 31 and 38 of the 2021 edition and Article 36 of the 2017 edition) and Article J.3 of the Code of Ethics, sanctions may be imposed only on those who violate the Code of Ethics. There is no provision allowing for provisional suspension to be used as a mechanism for encouraging or coercing cooperation, in the absence of a violation of the Code of Ethics, or to convince a person or entity to provide information/documents. To the extent that the provisional suspension has been imposed for that purpose, it does not appear to accord with the terms of the IWUF Constitution (Articles 31 and 38 of the 2021 edition and Article 36 of the 2017 edition) and Article J.3 of the Code of Ethics.

109. Relatedly, it is noted the decision of the IWUF Executive Board dated 15 April 2021 also seeks to impose an obligation on EWUF to *"provide any information which the IWUF Ethics Committee considers may be relevant to investigate the complaints"*. There does not appear to be any legal basis in the IWUF Constitution or in the Code of Ethics for a provisional measure of this nature. Ultimately, it is a matter of the EWUF to decide whether and what extent it will cooperate with the investigation carried out by the Ethics Committee (with the inherent risk that adverse inferences may well be drawn if there is a refusal to cooperate or a failure to adduce evidence). It may well be that in certain circumstances a failure to cooperate could, of itself, give rise to a violation of the Code of Ethics, but the record before the Sole Arbitrator does not indicate this to be a case made by the IWUF.

110. Against this background, including the findings of fact based on the evidence before him, the Sole Arbitrator concludes that the Appeal Jury Decision should be annulled, on the basis that the provisional measures imposed by the Executive Board on 15 April 2021 do not comply with the requirements of Article J.3 of the Code of Ethics and the IWUF Constitution (in particular

Articles 31 and 38 of the 2021 edition and Article 36 of the 2017 edition). In sum, the Decision adopting provisional measures did not follow a procedure that gave the EWUF a full opportunity to know the complaint made against it, and appears to have been adopted (in part at least) for the improper purpose of encouraging or coercing further cooperation. As a result, the provisional measures imposed by the Executive Board on 15 April 2021 (including the provisional suspension of EWUF as a Continental Federation of IWUF) is hereby rescinded.

111. For the avoidance of doubt, the Sole Arbitrator reiterates that he expresses no view on the merits of the allegations made against EWUF in the complaint. The Sole Arbitrator's task in this case is strictly limited to determining whether the Appeal Jury Decision, upholding the provisional measures imposed by the Executive Board on 15 April 2021, has been made in accordance with the rules and regulations of the IWUF (and subsidiarily, Swiss law). The Sole Arbitrator's ruling which annuls the Appeal Jury Decision is wholly without prejudice to the ongoing investigation by the Ethics Committee and the powers of the IWUF Executive Board under the IWUF Constitution and Code of Ethics to impose sanctions on EWUF in light of that investigation (should it decide to do so).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS has jurisdiction to determine the appeal filed by the European Wushu Kungfu Federation (EWUF) against the International Wushu Federation (IWUF) on 29 October 2021.

2. The appeal filed by the European Wushu Kungfu Federation (EWUF) against the International Wushu Federation (IWUF) on 29 October 2021 is admissible.

3. The appeal filed by the European Wushu Kungfu Federation (EWUF) against the International Wushu Federation (IWUF) on 29 October 2021 is partially upheld.

4. Without prejudice to the ongoing investigation of the IWUF Ethics Committee, the decision of the IWUF *ad hoc* Jury of Appeal dated 15 October 2021, confirmed by the IWUF Executive Board on 15 October 2021, is annulled, with the effect that the provisional measures imposed on the European Wushu Kungfu Federation (EWUF) by the IWUF Executive Board on 15 April 2021 are hereby rescinded.

5. (…).

6. (…).

7. All other motions or prayers for relief are dismissed.