



**Arbitration CAS 2013/A/3272 Ik-Jong Kim v. Fédération Internationale de Luttres Associées (FILA), award of 28 February 2014**

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Hans Nater (Switzerland)

*Wrestling*

*Exclusion from membership from a federation's commission*

*CAS jurisdiction*

*Exhaustion of internal remedies*

*Inadmissibility of a request for declaratory relief*

*Inadmissibility of a request for "fair and just" relief*

*Standing to appeal*

*Illegality of a federation's decision voted on by correspondence*

*Estoppel from invoking the illegality of a decision*

1. The jurisdiction of CAS cannot be challenged by a federation that expressly acknowledges that, as a principle, CAS has competence to rule on disputes between itself and its members pursuant to its statutes. The challenge of the standing of another party is a different issue. Jurisdiction and standing to appeal are two distinct legal concepts.
2. According to Article R47 of the CAS Code and to the applicable regulations of a federation, an appeal is only admissible if any and all internal legal remedies have been exhausted within the federation prior to the appeal to CAS. Likewise, according to Article 75 of the Swiss Civil Code (CC), decisions can only be challenged if they are internally final, i.e. cannot be appealed against within the association. This requirement is met where no internal remedies are available against the challenged decision. In this respect, a decision which is not of a disciplinary nature cannot be heard by a federation's adjudicating disciplinary body.
3. According to well-settled CAS jurisprudence, declaratory relief can be granted only if the requesting party establishes a special legal interest to obtain such declaration.
4. Prayers for relief must be so specific as to allow the adjudicating body to determine the subject matter and the panel's scope of review (also to avoid violating the principle of *ne ultra petita*), and to enable the other party to defend itself against the request. Neither is possible with a request for "fair and just" relief.
5. It is well accepted under Swiss law and in CAS jurisprudence that not only so-called "direct members", but also "indirect members" of an association are entitled to challenge a decision of such association, provided of course that they can prove to

have a sufficient, justified, reasonable interest to do so. The exclusion from the commission to which he/she was elected is sufficient to grant a member the right to subject the challenged decision to legal scrutiny, i.e. to give him/her standing to appeal.

6. According to Article 66(2) CC, an association's General Assembly can take a resolution by correspondence only if all members vote in favour of the resolution. Likely, according to the Swiss Federal Tribunal jurisprudence, unless there is an express provision in the association's statutes allowing for a vote by correspondence, a single member can prevent the General Assembly from taking a resolution by correspondence.
7. A federation's member is estopped from invoking the illegality of a decision excluding him from a commission to which he/she was elected neither on the basis of not having challenged a vote by correspondence earlier nor because the challenged decision allegedly protected the federation against great harm in terms of the federation's sport discipline not being included in the programme for future Olympic Games. Due to the express reservation made by that member, casting his/her vote cannot be regarded as implicitly agreeing with the vote by correspondence.

## **I. FACTUAL BACKGROUND**

### **1. Parties**

1. Mr. Ik-Jong Kim (hereinafter the "Appellant") is a South Korean citizen who has been a wrestling referee since 1973. He became an instructor and a member of the FILA Refereeing Commission in 1987 and was appointed President of that commission on 16/17 February 2013. He was elected to the FILA Bureau in 2006 and 2012.
2. The Fédération Internationale de Luttres Associées (hereinafter "FILA" or the "Respondent") is the international association for all wrestling styles. It is associated under the laws of Switzerland.
3. The Appellant and the Respondent are hereinafter collectively referred to as "the Parties".

### **2. Facts**

4. By a majority decision of the FILA Bureau dated 25 June 2013 and notified on 15 July 2013 (hereinafter the "Decision"), those FILA Bureau members who were also members of the FILA Refereeing Commission – including the Appellant – were excluded from that commission, and Mr. Karri Toivola was appointed its new President. This Decision is the subject matter of the present appeal (hereinafter the "Appeal").

5. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and their pleadings at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows.
6. Mr. Kim was appointed President of the FILA Refereeing Commission during the FILA Bureau Meeting in Phuket on 16/17 February 2013. At this time, he was one of four members of the FILA Bureau who sat on the FILA Refereeing Commission. The composition of the FILA Refereeing Commission, including Mr. Kim's Presidency, was later approved by the Extraordinary Congress in Moscow on 18 May 2013.
7. In the wake of the International Olympic Committee's (IOC) decision of February 2013 not to include wrestling on the list of core sports for the 2020 Summer Olympic programme, FILA made a presentation to the Executive Board of the IOC in St. Petersburg on 29 May 2013 in order to try to convince the IOC that wrestling should be included in the Olympic programme.
8. On 3 June 2013, FILA's Secretary General, Mr. Michel Dusson, sent an email to Mr. Kim, informing him as follows:

*"[...] We were informed by the IOC that they don't want Bureau Members as Responsible or President of the commissions.*

*We have therefore modified the commission members' list and added Mr. Toivola (FIN) as President of the Commission. [...]"*

9. On the following day (4 June 2013), Mr. Kim's name was replaced by Mr. Toivola's name on FILA's website for the Refereeing Commission.
10. Mr. Kim then sent a letter dated 7 June 2013 to FILA's President, Mr. Nenad Lalovic, which reads (in relevant part) as follows:

*"[...] I have received one-email dated June 3rd 2013 from Mr. Michael Dusson, General Secretary of FILA that I was eliminated as the chairmanship in the Refereeing Commission by the IOC. It was very shocked me and try to find out myself what I did wrong.*

*We just finished FILA Congress at Moscow last May 18th and, it was adapted all the official agenda including the list of refereeing commission. [...]"*

*I have a question to you*

*1. IOC has recommended to FILA that FILA Bureau member can not involve in the IF's commission?*

*2. If it is true, how about the other FILA Bureau members in Refereeing Commission?*

*3. Did I have any wrong doing during my serving in refereeing department in the past several years?*

*By the FILA regulation, I should stay as chairmanship at least two years. [...]" (sic).*

11. By letter dated 7 June 2013, Mr. Lalovic replied as follows:

*"[...] I will first answer your questions:*

1. *Many persons were asking us in St Petersburg about the composition of the Refereeing [sic] Commission, having in mind that we have made many changes and improvements in our Federation, what we have done about it. According to the IOC members the Bureau members can be members of different commissions, except the Refereeing Commission, in order to keep its integrity from the governance of the Federation.*

2. *As you can see, when I saw what happened, I gave orders to change it on our website and you are one of the controllers. They omitted this and we changed it; it is a simple error in writing (they also left Brudzinski twice).*

3. *No, you did not do anything wrong, and this is certainly not the reason for the Secretary General's concern. His concern was the criticism against our organization.*

*The term of President of Commission is not specified by any internal document.*

*In addition, during the mandate of Mr. Martinetti, the rules and regulations of the refereeing [sic] department were set in the way that the problems of this department can be submitted, discussed and only solved by the Bureau. No other institution has power over these issues.*

*You will find attached a letter from the IOC concerning the governance of FILA regarding the refereeing commission. It arrives this morning. Our situation is very delicate and we have to take care of every details [sic]. If we had worked on time, it would not be so difficult now. It is certainly an issue that we have to discuss within a short time, at least in Budapest, or even before and if needed by e-mails.*

*Certain discussion took place in St. Petersburg but no decisions were taken concerning this issue and they cannot be taken without a Bureau's decision.*

*Once again, I apologize for what happened, and it will be reconducted as it was before until the next Bureau's decision. [...]"*

12. The attachment to the aforementioned letter from Mr. Lalovic was an email sent by Mr. Christophe Dubi, the IOC Sports Department Director, to Mr. Lalovic on 7 June 2013. According to this email

*"[...] In recent past, a number of questions were raised regarding the composition of the Referees Commission. It was in particular outline that its composition did not insure [sic] full independence. Could you confirm that this has been taken in consideration in the number of measures adopted recently? [...]"*

13. On 9 June 2013, Mr. Kim was again mentioned on FILA's website as President of the Refereeing Commission.

14. By letter dated 17 June 2013, Mr. Lalovic requested the FILA Bureau members to vote on two items by completing and returning a ballot paper that was attached to the letter. In its relevant part, the letter reads as follows:

*"[...] A large number of IOC members attended this [ANOC Extraordinary] General Assembly [...]. I have been questioned many times on [...] the Refereeing Commission and the guarantees of its total independence.*

*This being, I propose to the FILA Bureau to vote on the following topics:*

[The first item related to the competition formula for wrestling for the 2016 Olympics]

*2. You have already received a copy of the IOC Sports Director Mr Dubi who asked for some precisions on the independence of the Refereeing Commission issue. As for any modern federation, it must be totally independent from the FILA bureau, the President and the General Secretary.*

*Therefore I propose you to vote on the withdrawal of all Bureau members from the Refereeing Commission and appoint Kari Toivola as the Head of this Commission (Mr Brudzinski will the [sic] take seat of Vice-President for Europe). Mr. Toivola will be responsible in front of the FILA Bureau for all the commission's activities and the impartial implementation of the Wrestling Rules.*

*I kindly ask you to use this table for your votes and returned [sic] it to FILA by email [...] or fax [...] until **Friday, 21<sup>st</sup> June 2013**.*

*Without any reply from you, we will consider that you approve these proposals”.*

15. The ballot paper attached to the aforementioned letter listed the two items to vote on, the second one of which reads as follows:

*“Kari Toivola – President of Refereeing Commission”.*

Below the two items to vote on, the ballot paper indicated:

*“Additionally I inform you that a call for nominations for these commissions will be sent to all federations very soon”.*

16. By letter of 21 June 2013, Mr. Kim voted against item 2 of the ballot paper and added that:  
*“[...] I wish all the issues (Format 6/6/6 – Rio2016, and President of Referring [sic] Commission) should be disused and exchanged our view at Budapest during the Senior Wrestling Games in Sept. 2013. [...]”*  
(sic).
17. By email of 10 July 2013, Mr. Jean-Daniel Rey of FILA informed Mr. Kim as follows:  
*“[...] As you may know, Mr. Toivola will be the Commission President and we asked him to organize the referees' course in the Senior World Championship. I hope that you will understand that your assignment as instructor during this Championship is cancelled but you will be there as a FILA Bureau Member. [...]”.*
18. By email of 15 July 2013, Mr. Kim wrote to Mr. Lalovic as follows:  
*“[...] Since I sent you the letter (dated on June 7th) regarding the Refereeing Commission, you added my name as a president of Refereeing Commission on the FILA-website with your apologizing letter.*  
*I believe that the composition of Refereeing Commission should be clear and normalized until next FILA Bureau meeting in September at Budapest.*  
*Then, FILA sent a letter asking two topics [...] to all FILA members. However, there is no information regarding the results you asked to vote.*  
*In addition, I unfortunately found again the same error on the FILA-website showing that MR. Toivola as a president of Refereeing Commission. Also, I received [the aforementioned letter from Mr. Rey].*

*Mr. Lalovich, do you think it is right way to manage an international organization? Why do you change it so oftenly by yourself. It is very unacceptable und unbelievable to me. Please correct the error and explain to me about these happening as soon as possible.*

*We should discuss this matter at FILA Bureau meeting in Budapest. [...]” (sic).*

19. Later on the same day, Mr. Carlos Roy of FILA sent an email to the FILA Bureau members apologizing for the delay in communicating the results of the vote and attaching a document signed by Mr. Lalovic which reads (in relevant part) as follows:

*“[...] I would like to inform you that, following our voting on the aforementioned topics, the results are the following:*

*[...]*

*Referring [sic] Commission:*

*In favour: 17 votes*

*Against: 8 votes*

*In view of these results, these two topics are considered as approved by the majority of the FILA Bureau. [...]”.*

### **3. Proceedings before CAS**

20. By letter dated 31 July 2013, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) against the Decision. The Appeal Brief was filed by letter dated 15 August 2013.
21. By letter dated 16 August 2013, the CAS Court Office invited the Respondent to file an Answer within 20 days of receipt of that letter. On 9 September 2013, the Respondent requested an extension of the time limit to 30 September 2013. The CAS Court Office suspended the time limit by letter of the same day and invited the Appellant to comment on the request. By letter dated 11 September 2013, the Appellant objected to any extension beyond 13 September 2013. The CAS Court Office informed the parties by letter of 12 September 2013 that the Respondent shall file its Answer by 17 September 2013.
22. On 17 September 2013, the Respondent filed its Answer.
23. After being invited by the CAS Court Office on 19 September 2013 to do so, the Appellant (by letter dated 25 September 2013) and the Respondent (by letter dated 26 September 2013) indicated that they preferred that a hearing be held.
24. On 26 September 2013, the CAS Court Office issued a notice to the Parties that the Panel was constituted in the following composition: Mr. Michele A. R. Bernasconi as Arbitrator appointed by the Appellant, Mr. Hans Nater as Arbitrator appointed by the Respondent and Mr. Dirk-Reiner Martens as President.

25. By letter dated 4 October 2013, the Appellant informed CAS that the Respondent had opened disciplinary proceedings against the Appellant, seeking his expulsion for life on the ground that he seriously infringed the FILA Constitution by filing an appeal before CAS.
26. A copy of the award in the case CAS 2013/A/3106 & 3127 was provided to CAS on 10 October 2013 by the Respondent, i.e. after the time limit to file the Answer had expired. The Respondent submitted that it followed from that award that the present Appeal was inadmissible because the Appellant had not exhausted the internal remedies available to him before filing the appeal.
27. By letter dated 18 October 2013, the Appellant commented on the CAS award 2013/A/3106 & 3127 and on the submissions made by the Respondent in its letter of 10 October 2013.
28. On 22 October 2013, an Order of Procedure was sent to the Parties. This order was signed and returned by the Appellant on 28 October 2013. The Respondent returned a signed copy on 29 October 2013, but modified one paragraph by hand so that it reads as follows:  
*“The jurisdiction of the CAS is contested by the Respondent. The standing of the appellant is also challenged”.*
29. By letter dated 5 November 2013, the Appellant commented on the Respondent’s modifications to the Order of Procedure, noting that the jurisdiction of CAS had been expressly acknowledged in the Answer. The Appellant also attached a copy of an email from the Respondent’s counsel (which had been mentioned in the Statement of Appeal and Appeal Brief) in which he had confirmed before the Appeal was filed that no jurisdictional objection would be raised. The Appellant requested that the objection to the jurisdiction of CAS be held inadmissible as being belated or be dismissed on the merits as being without foundation.
30. By letter dated 2 December 2013, the Appellant informed the CAS that the FILA Sports Judge had rendered a decision dated 13 November 2013 (notified on 21 November 2013) ordering the suspension of the Appellant for two years for having initiated the present CAS proceedings. A copy of that decision was attached to the Appellant’s letter.
31. A hearing was held in Lausanne on 11 December 2013 (the “Hearing”).
32. The Appellant was present and was assisted by Messrs. Xavier Favre-Bulle and Daniel Durante as counsel. The Respondent was represented by its Secretary General, Mr. Michel Dusson, and Messrs. François Carrard and Yvan Henzer as counsel.
33. At the Hearing, the Panel heard oral arguments by the Parties’ legal counsel. The following witnesses were heard:
  - Mr. Csaba Hegedüs (by telephone), called by the Appellant
  - Mr. Raphaël Martinetti, called by the Appellant
  - Mr. Tzeno Tzenov, called by the Respondent

- Ms. Rodica Yaksi, called by the Respondent

34. The Appellant answered questions asked by his counsel, while the Respondent waived its right to question the Appellant. The Respondent's Secretary General left the hearing shortly before the Appellant intended to ask him questions.
35. During the Hearing, the Respondent expressly submitted that it accepted the jurisdiction of the Panel, but maintained its challenge as to the admissibility of the appeal.
36. At the end of the Hearing, the Parties confirmed that they had no objections to raise regarding the conduct of the proceedings and their right to be heard.

#### **4. The Parties' Submissions**

37. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by them. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

##### *A. The Appellant's Submissions*

38. In substance, the Appellant submits that the Decision can be challenged pursuant to Article 75 Swiss Civil Code ("CC") based on the following arguments:
39. According to the Appellant, it is well-settled under Swiss law that the decision of an executive body of an association can be challenged under Article 75 CC if all of the internal procedures have been exhausted and the decision is, therefore, final. The FILA Bureau is the executive body of FILA, and there are no internal procedures applicable to the exclusion of commission members.
40. The Appellant argues that he has standing to bring the Appeal because he is a "member" within the meaning of Article 75 CC: The Appellant has a voting right within the body which took the decision (and even in the General Assembly), which makes him a "member" for the purposes of Article 75 CC. In addition, the statutes of an association may allow parties other than members to challenge a decision under Article 75 CC. Article 34 of the FILA Constitution allows "members" to challenge FILA's decisions before the CAS. The Appellant is a FILA "member" within the meaning of the FILA Constitution, as is clear from Article 28 of the FILA Constitution ("*The [national federations] and all the FILA members (FILA Bureau members, [etc.]) can only, through their FILA membership [...]*").
41. In the Appellant's opinion, as required under Swiss law, the Appellant has an interest in having the Decision submitted to a judicial (or arbitral) body. This interest is interpreted in a broad manner, and it suffices that the party is directly affected by a decision, which is the case here. It must also be noted that the Appellant voted against the Decision.



42. Moreover, the Appellant asserts that the Respondent's argument as to the exhaustion of internal remedies must be rejected pursuant to Article R56 of the Code of Sports-related Arbitration (the "CAS Code") because it was made after the time limit for the Answer had expired. In addition, there were no internal remedies available to the Appellant to challenge the Decision. This was also expressly acknowledged by the Respondent in its Answer.
43. The Appellant contends that the Decision violates the FILA Constitution in three ways:
44. First, the voting procedure was flawed because Article 21.4 of the FILA Constitution at least implicitly requires an in-person meeting of the FILA Bureau in order to adopt a resolution. The FILA Bureau has never before voted on personnel matters by correspondence, and the FILA Constitution does not contain any provision that would allow the FILA Bureau to take a vote by correspondence.
45. Second, the FILA Bureau was (and is) improperly constituted because three of its members are so-called "co-opted" members, a status which was abolished in the FILA Constitution before the Decision was taken. In addition, Article 17(c) of the FILA Constitution provides that the FILA Bureau may not comprise more than one elected member of the same nationality. Even assuming that this rule does not apply to co-opted members (which include one Russian national), there are still two Russian nationals on the FILA Bureau.
46. Third, the ballot paper was unclear and misleading because the item voted on was labelled "*Kari Toivola – President of Refereeing Commission*" even though the vote was supposed to (also) be about the withdrawal of all Bureau members from the Refereeing commission.
47. The Appellant's prayers for relief are as follows:
- "The Appellant respectfully requests the CAS Panel to:*
- *make an award to annul the Decision dated 25 June 2013 excluding all FILA Bureau members from the Refereeing Commission;*
  - *make an award to annul the Decision dated 25 June 2013 excluding Mr Ik-Jong Kim as the president of the Refereeing Commission;*
  - *make an award to annul the Decision dated 25 June 2013 appointing Mr Karri Toivola as the president of the Refereeing Commission;*
  - *declare that the Bureau of the Fédération Internationale des Luttres Associées (FILA) is improperly constituted;*
  - *order the Fédération Internationale des Luttres Associées (FILA) to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the Appellant;*
  - *dismiss any other relief sought by the Respondent;*
  - *order any such other relief as the CAS Panel may deem fair and just".*

B. *The Respondent's Submissions*

48. According to the Respondent, the Appellant has no standing to appeal for two reasons. First, the Appellant is not a member of FILA because only national federations can be FILA members according to Article 6.1 and 6.2 of the FILA Constitution. Second, even if the Appellant were a member, the Decision would not infringe upon his membership rights. In particular, he has no right to be a member of a FILA commission.
49. Furthermore, the Respondent submits (in its letter of 10 October 2013, i.e. after the time limit for the Answer had expired) that the Appeal is inadmissible because the Appellant failed to exhaust all internal FILA remedies before turning to CAS. He should have first challenged the Decision before the FILA Sports Judge pursuant to Articles 28 et seq. of the FILA Constitution.
50. The Respondent argues that the Appellant's request for declaratory judgment is inadmissible because the composition of the FILA Bureau does not derive from, nor is it affected by the Decision. According to Article 34 of the FILA Constitution, only a "decision" may be appealed to CAS, meaning that there is no arbitration agreement covering this prayer for relief. Furthermore, the Appellant has no legal interest in a declaration that the FILA Bureau is or was improperly constituted – he can seek and, in fact, has sought a constitutive decision, so there is no need for a declaratory one.
51. Also, the Respondent considers that the request for "*any such other relief as the CAS Panel may deem fair and just*" is inadmissible. It is unclear, not enforceable and not linked to the challenged decision. In addition, there is no agreement between the parties that would give the Panel a mandate to decide *ex aequo et bono*.
52. Moreover, the Respondent contends that the Decision does not violate the FILA Constitution for the following reasons:
53. As to the vote by correspondence, the FILA Constitution does not provide that the FILA Bureau cannot decide by correspondence. Such vote by correspondence was necessary in the present case because a decision had to be made before the IOC Session starting on 7 September 2013, and the next FILA Bureau meeting was scheduled for 16 September 2013. Also, the Appellant acted in bad faith by challenging the voting mechanism only after being told the result. In addition, the Appeal constitutes an abuse of his right in light of the very sensitive context surrounding the vote (the Appellant remaining in commission could have severely harmed FILA).
54. Contrary to the Appellant's contention, the FILA Bureau was properly constituted. The three co-opted members were elected to the FILA Bureau on 17 May 2013, i.e. before this status was abolished in the FILA Constitution on 18 May 2013. In addition, before his Appeal, the Appellant did not object to these members or to the multiple Russian members voting. Moreover, the Appellant cannot complain about multiple persons with the same nationality voting because he himself is not the only Korean on the FILA Bureau.

55. Lastly, the Respondent asserts that the ballot paper was attached to a letter which made perfectly clear what exactly was to be voted on. Nobody raised any objections against the ballot paper before the vote.

56. The Respondent's prayers for relief are as follows:

*"The Respondent respectfully seeks the following relief and orders:*

1. *The Appeal filed by Mr Ik-Jong Kim is inadmissible or, alternatively, it should be dismissed.*
2. *The Respondent Fédération Internationale des Luttes Associées (FILA) be granted an award for costs".*

## II. LAW

### 1. Jurisdiction

57. The Panel shall decide upon its own jurisdiction pursuant to Article R55(4) of the CAS Code.

58. Article R39 of the CAS Code requires that the Answer contain "*any defence of lack of jurisdiction*". This is in line with Article 186(2) of the Swiss Private International Law Act ("PILA"), which requires that a challenge of jurisdiction be raised prior to any defence on the merits.

59. The Panel notes that the Respondent not only did not challenge the jurisdiction in its Answer: it even expressly acknowledged that "*as a principle, the CAS has jurisdiction to rule on disputes between FILA and its members pursuant to art. 34 of the FILA Statutes*", and only noted that "*however, as will be shown below, the standing of the Appellant [...] is disputed*". Because jurisdiction and standing to appeal are two distinct legal concepts, the Respondent must be taken to not have challenged the CAS' jurisdiction in its Answer.

60. The jurisdictional challenge raised in the Order of Procedure was made more than one month after the time limit for the Answer had expired. It was, thus, late pursuant to Article R39 of the CAS Code and Article 186(2) of the PILA. Also, that very challenge was expressly withdrawn during the hearing. Therefore, the Panel need not decide whether the Respondent would have been estopped from challenging the jurisdiction of the Panel based on the email from the Respondent's counsel in which he indicated to the Appellant's counsel prior to the Statement of Appeal that no such challenge would be raised.

61. Its jurisdiction not having been validly challenged, the Panel finds that it has jurisdiction to entertain the Appeal. In any event, the Panel fails to see why Article 34 of the FILA Constitution should not grant the Panel jurisdiction over the Appeal.

### 2. Law applicable to the merits

62. Article R58 of the CAS Code stipulates 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

63. There is no choice of law provision in the FILA Constitution (2013 edition) or in any agreement between the Parties. Hence, given that FILA is seated in Switzerland, the FILA Constitution and regulations and, subsidiarily, the laws of Switzerland are applicable to the merits of the Appeal.

### 3. Admissibility

64. The Panel finds that the Appeal is, in principle, admissible. In particular, the Appellant did not fail to exhaust internal remedies available to him (*infra* A). However, two of the Appellant’s prayers for relief must be dismissed as inadmissible (*infra* 0 and 0).

#### A. Exhaustion of Remedies

65. According to Article R47 of the CAS Code and Article 34 of the FILA Constitution, an appeal is only admissible if the Appellant has exhausted any and all internal legal remedies within FILA prior to the appeal to CAS. Likewise, according to Article 75 CC, decisions can only be challenged if they are internally final, i.e. cannot be appealed against within the association (BK-ZGB/RIEMER, Art. 75 N. 14, 17 with further references). The Panel is satisfied that this requirement is met in the present case because there were no internal FILA remedies available to the Appellant against the Decision.
66. Specifically, and contrary to the Respondent’s contention, the Decision could not be appealed to the FILA Sports Judge. It is clear from the FILA Constitution that the jurisdiction of the FILA Sports Judge is limited to disciplinary matters. Article 28 of the FILA Constitution, which is the introductory provision of the section “*Sports Justice*”, is titled “**Disciplinary procedure**” (emphasis added). In paragraph (b) of Article 28, the FILA Sports Judge and, in the second instance, the FILA Appeals Commission are expressly labelled as “**disciplinary bodies**” (emphasis added). In addition, Article 32 of the FILA Constitution, which is the only provision devoted solely to the Sports Judge, provides as follows: “*The Sports Judge rules in first instance on all **disciplinary** infringements submitted to him by the Federal Prosecutor*” (emphasis added).
67. Thus, because it is clear that the FILA Sports Judge only has jurisdiction over disciplinary matters, there can be no doubt that the Decision could not be appealed to the FILA Sports Judge, given that the Decision was not of a disciplinary nature. It is not decisive that FILA asserted during the Hearing (in response to a question from the Panel) that the Decision was, in fact, a disciplinary decision. The Panel is not bound by such statement – which was contested by Mr. Kim’s counsel – because the nature of a decision is a matter of law. A disciplinary decision presupposes, at the very least, that there is an allegation of wrongdoing against an individual. That is not the case here: The President of FILA expressly confirmed in his letter to Mr. Kim dated 7 June 2013 (*supra* para. 11) that Mr. Kim had not done anything wrong. In addition, FILA expressly and repeatedly stressed during the Hearing that Mr. Kim’s

removal from the Refereeing Commission had nothing to do with him personally but was solely due to alleged IOC requests or recommendations.

B. *Inadmissibility of request for declaratory relief*

68. The Panel finds that the request to “*declare that the Bureau of the Fédération Internationale des Luttres Associées (FILA) is improperly constituted*” is inadmissible.
69. According to well-settled CAS jurisprudence, declaratory relief can be granted only if the requesting party establishes a special legal interest to obtain such declaration (see, *ex multis*, CAS 2009/A/1870, para. 132; CAS 2011/O/2574, para. 49; CAS 2011/A/2612, para. 48). The Panel does not see any reason to deviate from that case law, which is also supported by an arbitral award rendered by an ICC tribunal sitting in Zurich (cf. SCHNEIDER/KNOLL, *Performance as a Remedy: Non-Monetary Relief in International Arbitration*, page 29; it should be noted that MICHAEL E. SCHNEIDER himself holds a different view, *ibid.*, page 30).
70. Mr. Kim has not alleged – let alone proven – any legal interest in the declaration sought. Such interest was expressly contested by FILA. While Mr. Kim certainly has a legal interest in having the Decision set aside, this interest does not require the declaration sought in addition to the requested annulment of the Decision. Because Mr. Kim failed to show any further legal interest that he could have in that declaration, his prayer for declaratory relief is inadmissible.

C. *Inadmissibility of request for “fair and just” relief*

71. The Panel finds that the request to grant “*any other relief that CAS deems fair and just*” is inadmissible.
72. First, this request is too vague. Prayers for relief must be so specific as to allow the adjudicating body to determine the subject matter and the Panel’s scope of review (also to avoid violating the principle of *ne ultra petita*), and to enable the other party to defend itself against the request. Neither is possible with a request for “fair and just” relief.
73. Second, Mr. Kim is not asking for relief that would have its basis in the FILA regulations, a contractual provision or a statutory provision. Rather, he seeks relief on the basis of fairness and justice. Hence, he is effectively asking the Panel to decide *ex aequo et bono*. Such request exceeds the Panel’s mandate. Article 187(1)(1) of the PILA makes the arbitral tribunal’s power to decide *ex aequo et bono* contingent upon an agreement of the parties to that effect. No such agreement has been submitted by the Parties.
74. This finding is not called into question by the Swiss Federal Tribunal’s decision dated 19 December 2001 (4P.114/2001), which was referred to by the Appellant’s counsel during the Hearing. Although in para. 3.b) of its judgment, the Swiss Federal Tribunal indeed rejected a challenge against an arbitral award that was based on a similar prayer for relief (“*tout autre remède que le Tribunal arbitral estimerait équitable et approprié selon la loi*”), it did so solely because the challenging party had not raised any objection against that prayer for relief during the arbitration. In contrast thereto, as already mentioned, FILA did object to the “fair and just”

request in its Answer, arguing that it was inadmissible. Hence, the Swiss Federal Tribunal's decision does not help Mr. Kim with respect to the admissibility of his "*fair and just*" request.

#### 4. Merits

75. The Panel finds that the challenge of the Decision under Article 75 CC is well-founded. Mr. Kim has standing to appeal (*infra* 0), the Decision is illegal (*infra* 0) and Mr. Kim is not estopped from invoking this illegality (*infra* 0).
76. As a preliminary matter, the Panel notes that it interprets Mr. Kim's first three prayers for relief (*supra* para. 47) as one single request to set aside the Decision. It is not possible to separate the Decision into three parts, i.e. the exclusion of all FILA Bureau members from the Refereeing Commission, the ousting of Mr. Kim as President of that commission and the appointment of Mr. Toivola as its new President. First, these parts of the Decision are all intimately linked: The exclusion of all FILA Bureau members from the Refereeing Commission necessarily meant that Mr. Kim could no longer be its President, as did the appointment of Mr. Toivola; conversely, had Mr. Kim not been removed as President, Mr. Toivola could not have been appointed to this position. Second, and crucially, the FILA Bureau only took one vote, not three. Under these circumstances, the Panel does not find it possible to break up the Decision into three pieces. Also, even if it were logically possible to separate three elements of the Decision, the Panel does not find it appropriate to take itself the seat of the political decision-maker (see also CAS 2010/A/2275, paras. 4.24 et seqq. with further references) and replace the Decision on which the FILA Bureau voted with a different decision.

##### A. *Standing to Appeal*

77. The Panel finds that Mr. Kim has standing to appeal pursuant to Article 75 CC because he is a "member" within the meaning of Article 75 CC and the Decision violates his membership rights.
78. According to the wording of Article 75 CC, only a "*member who has not consented to a resolution*" (unofficial translation) can challenge a resolution of an association. Because Mr. Kim voted against the Decision, the question that remains is whether he is a "member" within the meaning of Article 75 CC. There can be no doubt that this term covers at least persons who are not only members of certain association bodies but of the association itself.
79. FILA asserts that Mr. Kim is not its member. Indeed, this would be in line with the common practice of not having individual persons as members of international sports federations. Also, FILA's assertion finds some support in Article 5 and 6 of the FILA Constitution. Article 5 provides that:

*"The FILA is composed of:*

*Affiliated Members*

*Associated Members"*.

In the context of affiliation and association of members, Article 6 of the FILA Constitution mentions only National Federations.

80. However, Article 6 of the FILA Constitution does not say that *only* National Federations can be members. And, as correctly noted by the Appellant, Article 28 of the Constitution is unambiguous in that:

*“[t]he Affiliated National Federations and **all the FILA members (FILA Bureau members, wrestlers, coaches, referees, doctors and leaders)** can only, **through their FILA membership**, appeal to the FILA in the event of disputes arising from the current Constitution”* (emphasis added).

Hence, the Appellant, as a FILA Bureau member, is quite clearly regarded as a FILA member by the plain language of the FILA Constitution. This membership status is also supported by the fact that FILA Bureau members have a right to vote in the General Assembly according to Article 12 of the FILA Constitution. Finally, the Panel notes that it is well accepted under Swiss law and in CAS jurisprudence that not only so-called “direct members”, but also “indirect members” of an association are entitled to challenge a decision of such association, provided of course that they can prove to have a sufficient, justified, reasonable interest to do so (CAS 2011/A/2563, § B; CAS 2009/A/1828 & 1829, para. C; CAS 2008/A/1705, para. 8.2.8; Swiss Federal Tribunal, decision ATF 119 II 271).

81. Having been established as a FILA member under the FILA Constitution, the Panel does not need to address whether Mr. Kim’s status as FILA Bureau member would in any event make him a “member” within the meaning of Article 75 CC as far as decisions of the FILA Bureau are concerned.
82. It is well-settled under Swiss law that Article 75 CC allows members not only to challenge resolutions of the General Assembly, but also decisions of executive bodies (BK-ZGB/RIEMER, Art. 75 N. 17 with further references; see also CAS 2008/A/1700 & CAS 2008/A/1710, para. 56). However, according to the prevailing view, this requires an infringement of the challenging party’s membership rights (ATF 108 II 15, 18/19; BK-ZGB/RIEMER, Art. 75 N. 17 with further references). The Respondent argues that, even if the Appellant were a member of FILA, no membership rights would have been infringed because no FILA member has a right to be member, let alone the president, of a FILA commission.
83. It is certainly true that Mr. Kim had no right to *become* a member (much less the President) of any FILA commission. However, once he was elected to the FILA Refereeing Commission and appointed its President, he had a vested right to *remain* in that position for his term of office, i.e. for four years as provided in Article 40 of the FILA Constitution, unless lawfully removed from such position. Whether or not the Decision lawfully removed Mr. Kim from the Refereeing Commission cannot be decisive for the standing to appeal. Rather, the fact that the Appellant was excluded from the commission to which he was elected is sufficient to grant him the right to subject the Decision to legal scrutiny, i.e. to give him standing to appeal.

B. *Illegality of the Decision*

84. The Panel finds that the Decision is illegal because it was voted on by correspondence.
85. It can be left open whether Article 21 of the FILA Constitution implicitly requires that any vote of the FILA Bureau be taken during meetings in person, as asserted by the Appellant. Even assuming for the benefit of the Respondent that Article 21 only stipulates that the procedures set out in this Article need to be followed *if* meetings are held in person, the Decision still could not be validly taken by correspondence.
86. According to Article 66(2) CC, an association's General Assembly can take a resolution by correspondence only if all members vote in favour of the resolution. In other words, unless there is an express provision in the association's statutes allowing for a vote by correspondence (cf. ATF 132 III 503, 511), a single member can prevent the General Assembly from taking a resolution by correspondence (ATF 132 III 503, 510). Even though the wording of Article 66(2) CC limits its scope to the General Assembly, the Panel follows the prevailing view that Article 66(2) CC applies *per analogiam* to the board of the association (HEINI/PORTMANN, Schweizerisches Privatrecht, Bd. II/5: Das Schweizerische Vereinsrecht, 3rd edition, Basel 2005, N. 495, 499; BK-ZGB/RIEMER, Art. 69 N. 65 with further references; also the Swiss Federal Tribunal appears to sympathise with this view, cf. ATF 132 III 503, 510 *et seq.*). Hence, if a single member of the board calls for a debate in person, the board cannot vote by correspondence unless expressly entitled to do so under the statutes of the association (HEINI/PORTMANN, Schweizerisches Privatrecht, Bd. II/5: Das Schweizerische Vereinsrecht, 3rd edition, Basel 2005, N. 499).
87. Therefore, the Decision violates Article 66(2) CC, applied here *per analogiam*. There is neither a provision in the FILA Statutes expressly allowing the FILA Bureau to vote by correspondence, nor was the Decision unanimous. The alleged urgency of the Decision and the costs that another FILA Bureau meeting would have entailed (as invoked by the Respondent during the Hearing) cannot derogate Article 66(2) CC or substitute for an express provision in the FILA Statutes allowing for a vote by correspondence. In addition, even if it were true that the Decision needed to be taken before the IOC Session in Buenos Aires, this session took place two and a half months after the Decision – ample time to call a meeting in person of the FILA Bureau. The FILA President could have convened the FILA Bureau at any time, as provided by Article 21.4 of the FILA Constitution:  
  
“*The FILA Bureau shall meet whenever convened by its President, or at the request of one third of its members [...]*”.
88. Also, as required for a challenge under Article 75 CC (BK-ZGB/RIEMER, Art. 75 N. 26 with further references), it cannot be ruled out that the violation in the voting procedure had an impact on the result of the vote. The FILA Bureau might well have voted against the Decision if the vote had been held during a meeting in person. Contrary to the vote by correspondence, a meeting would have allowed Mr. Kim and other opponents of the Decision to try and convince additional FILA Bureau members during a live debate (ATF 132 III 513 *et seq.*). Even if one assumed that all members who voted, in fact, had a right to vote (which is at least



questionable for co-opted members and multiple members of the same nationality), the result would have been different if only 5 of the 17 members who voted in favour of the Decision changed their mind after said debate. This is not a wholly unrealistic scenario.

C. *No estoppel*

89. Contrary to FILA's assertion, Mr. Kim is not estopped from invoking the illegality of the Decision – neither on the basis of not having challenged the vote by correspondence earlier nor because the Decision allegedly protected FILA against great harm in terms of wrestling not being included in the programme for the 2020 Olympic Games.
90. The Respondent is correct that, in principle, procedural flaws can only be invoked under Article 75 CC if the defects were brought forward prior to the decision being taken (ATF 132 III 508; BK-ZGB/RIEMER, Art. 75 N. 59). However, contrary to the Respondent's allegation, the Appellant did object to the vote by correspondence before the vote had ended. In his letter of 21 June 2013, in which he cast his vote, the Appellant requested that a discussion about the items to be voted on take place in Budapest, i.e. at the next FILA Bureau meeting. For him as a layperson, it was not necessary to use legal terms such as "objection" because it is clear from his words that he did not approve of the vote by correspondence. It also cannot be held against him that he still cast his vote. Due to the express reservation made, casting his vote cannot be regarded as implicitly agreeing with the vote by correspondence. This holds true even more so given that the vote had been called with the announcement that anyone not casting a vote would be considered to have voted in favour; this made it a logical decision by Mr. Kim to vote against the Decision even though he thought vote by correspondence should not be held at all.
91. Likewise, Mr. Kim does not abuse his rights because he is challenging a decision that FILA submits is protecting it against great harm. It is true that members of an association have a duty of loyalty whereby they must, in principle, refrain from any behaviour that harms the association. However, at the same time, members have no duty to ignore their own interests at all cost. Hence, whether or not a member must refrain from challenging a decision is ultimately decided by weighing the interests involved.
92. However, it can even be left open whether or not the Respondent's interests in wrestling being included in the Olympic programme for 2020 would outweigh the Appellant's interest in remaining a member or even the President of the FILA Refereeing Commission. On the basis of the parties' submissions, the Panel is not satisfied that excluding all FILA Bureau members from the Refereeing Commission (or even ensuring that its President is not a FILA Bureau member) was required in order for wrestling to be included in the 2020 Olympic programme.
93. The Appellant contested such requirement and the burden of proof lies with the Respondent because it seeks to rely on the argument that the Appellant is estopped from bringing this Appeal. The only direct evidence of recommendations made by the IOC is the email of Mr. Dubi to the FILA President dated 7 June 2013. This email, however, is quite vague as it merely speaks of "*questions [...] raised regarding the composition of the Referees Commission*" and that this composition "*did no insure [sic] full independence*". These statements might just as well have

alluded to the high number of FILA Bureau members on the Refereeing Commission – as suggested by the Appellant’s witness, Mr. Martinetti – and not have meant that all FILA Bureau members needed to be excluded. The only document on the record that supports the Respondent’s assertion is the email of its President to the Appellant dated 7 June, stating that “[a]ccording to the IOC members the Bureau members can be members of different commissions, except the Refereeing Commission”. However, the Panel does not find a letter from the Respondent’s President, which is indirect evidence, sufficient for the Respondent to discharge its burden of proof. If the IOC made such statement, the Panel would have expected the Respondent to call a person from the IOC with knowledge of the situation as a witness, or at least produce a communication which would have unambiguously confirmed the assertion made by the FILA President in his aforementioned letter. In the absence of such direct evidence, the Panel is not prepared to come to the very far-reaching conclusion that the Appellant is abusing his rights by challenging the Decision.

## ON THESE GROUNDS

**The Court of Arbitration for Sport hereby rules:**

1. The decision of the FILA Bureau dated 25 June 2013, whereby all FILA Bureau members were excluded from the FILA Refereeing Commission and Mr. Karri Toivola was appointed that commission’s President, is set aside.
2. All other further-reaching motions or prayers for relief are dismissed.
3. (...).
4. (...).