

International Arbitration Insights: CAS & *Lex Sportiva*

Dear International Arbitration Committee Colleagues,

It is our honor and privilege to present you with “International Arbitration Insights: CAS & *Lex Sportiva*.” Inspired by the 2016 Summer Olympics in Rio, this publication could not be more timely and shines a spotlight on an important but often overlooked area of the law.

In the past year, decisions of the Court of Arbitration for Sport (CAS) have frequently made the headlines of major news outlets. Recognizing the importance of international arbitration in the sports arena, the International Arbitration Committee has sought to highlight this quickly growing area of law. Our initiatives have included a teleconference program on August 30, 2016 (mere days after the Closing Ceremony in Rio), featuring Mr. Michael Lenard, President of the CAS’s Ad Hoc Division for the 2016 Rio Summer Olympics – a program which had record participation even though it was organized in just two weeks! In addition, we have posted a “Factsheet” on the CAS on the International Arbitration Committee’s website. The Factsheet, prepared by Mr. Rodrigo Garcia da Fonseca (a member of our Committee), provides an introduction to the CAS.

This edition of International Arbitration Insights offers a more detailed examination of CAS from a range of different perspectives, with a special focus on the 2016 Rio Olympics. Indeed, this edition covers a wide array of issues, from interviews of prominent CAS leaders to articles focusing on specific legal topics such as CAS jurisdiction and diversity within the CAS, as well as case reviews of some landmark CAS decisions.

We would like to give a very special mention to Mr. Lenard. As a leading authority in *lex sportiva*, his support for our initiatives has been phenomenal. Despite tirelessly working at the Ad Hoc Division in Rio, he always found time to respond to our most pressing questions. For this and so much more, we cannot thank

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him enough. In addition, we would like to thank all the authors for their valuable contributions. Without them, this edition would not have been possible. We would also like to thank our Committee Co-Chairs, Judge Delissa A. Ridgway and Kirstin Dodge, who have encouraged, supported, and motivated us. And, finally we would like to thank the staff of the ABA for their assistance. We hope you enjoy this edition of International Arbitration Insights dealing with this fascinating area of law.

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Foreword

Michael B. Lenard

Olympic Games media reports from Rio de Janeiro have piqued many lawyers' interest in the Swiss-based Court of Arbitration for Sport (CAS). Using arbitration to resolve disputes in sport is not new, but it certainly has grown in importance and media coverage. CAS, whose primary purview is international sport disputes, has become one of the largest arbitral tribunals in the world. The global scope and import of sport arbitration is even greater when one includes the numerous national and other specialized sport tribunals.

I heartily support opportunities to explain and increase the understanding of CAS (and other sport policy issues, e.g., governance). I often give lectures or speak at seminars for law students, lawyers, athletes and sport administrators on these topics. An important goal in my doing such is to promote informed discourse about these issues. We all must be open to learning from each other to ensure that CAS will continue to evolve and improve in light of changes in both international arbitration and international sport.

When speaking to an American audience, it is necessary to prepare the path to informed discourse via a few preliminary observations – none of which will be novel to lawyers with experience in comparative national and international law. Of course, it is fundamentally important to understand the organizational framework of international sport and the roles of International Federations (IFs), National Federations, the International Olympic Committee (IOC), National Olympic Committees, and other organizations such as the World Anti-Doping Agency (WADA) and the National Anti-Doping Organizations. CAS is an important part of that framework. To achieve this position, CAS and its jurisdiction had to be accepted by the IOC and IFs, virtually all of which are located in Europe, and

WADA. The policies and rules of the European Union (EU) and the IOC drive international sport. The EU called for the establishment in sport of alternative dispute resolution systems with expert adjudicators instead of using national courts. Similarly, the IOC called for appeals from its and other sport organizations' decisions to be determined by an independent body within sport's jurisdiction. And to those calls, CAS has been the primary answer. In order to understand the rationale underlying those calls and, more importantly, the international sport framework, one must first understand the "European Model of Sport" and the concept of "sport specificity". International sport is structured and operates quite differently than the "American Model" of professional leagues and collegiate sports. Although small points of convergence are appearing, the two models remain different in critical and fundamental respects, and informed discourse cannot occur if those are unknown or, worse, ignored.

I wish to thank the ABA Section of International Law's International Arbitration Committee for its initiative and hard work in publishing this newsletter. It is not my role here to comment on or even correct any inaccuracies in the articles which follow. But I do hope this publication will pique your interest to learn more and foster informed discourse about resolving disputes in international and national sport.

Michael B. Lenard currently serves as Vice President of the International Council of Arbitration for Sport (ICAS), the governing body for the Court of Arbitration for Sport (CAS). Among other positions, he recently served as President of the CAS's Ad Hoc Division at the 2016 Summer Olympics in Rio de Janeiro.

Q & A with ICAS Vice President Michael B. Lenard

Would you share with us a little about your background and experience?

The short version involves a number of different, often intertwined, threads. One of those threads was being an athlete: I was a member of the U.S. National Team and 1984 Olympic Team in Team Handball. I won (among other things) seven National Championships, and was named the 1985 Team Handball Male Athlete of the Year and the United States Olympic Committee's SportsMan of the Year for Team Handball.

One more thread is as a student: I was graduated with distinction from the University of Wisconsin with a bachelor's degree in business with majors in both accounting and finance. I was inducted into Phi Kappa Phi, Beta Gamma Sigma and other scholastic honors societies. I was graduated from the University of Southern California Law School where I was a member of Law Review and Order of the Coif.

Another thread is my professional career: I was an associate and then a partner at Latham & Watkins, then was a senior managing director (among other related positions and board seats) at an international private equity firm that sponsored a variety of funds and left that firm's ultimate incarnation. Now, I am a partner in a boutique international law firm, Wilson Williams LLC, and remain engaged in private equity, e.g., as a senior advisor to the international private equity firm 7 Bridges Capital Partners.

Still another thread is as a sport administrator and executive: among other things, I served on the United States Olympic Committee's Athletes' Advisory Council (including as its Vice Chairman), then was Vice President of the USOC for eight years, where I was involved with various international matters and negotiations, chaired its joint marketing committee and created and oversaw its high performance sports group, and served on the board of the organizing committee for the 1996 Atlanta Olympic Games

(including on its Audit and Ethics Committee). In addition, I have been a member since its creation of the International Council of Arbitration for Sport, which oversees and manages the Court of Arbitration of Sport and am currently its Vice President; and I have been President of numerous of its Ad Hoc Divisions for Olympic Games, FIFA World Cups and other major international events. [My most important thread is my children and their activities, but I will spare you those paternal musings...]

I always have been interested in international matters, and I have been fortunate that most of these threads wove through an international fabric that allowed me to accumulate a great deal of international exposure and experience. I also learned many important skills in order to successfully intertwine so many of them. Most importantly, I learned to be able to sleep anywhere, at any time, in any position, and to greatly value the remarkable benefits of naps.

How is a typical arbitration case at the Ad Hoc Division conducted?

A party wishing to appeal a decision of a sport body at the Olympic Games files its appeal with the Ad Hoc Division. Prior to an Olympic Games, we generally will arrange and educate, through and with the local bar association, a specified pool of pro bono lawyers who make themselves available to advise potential parties and represent them in front of the Ad Hoc Division. After we receive the appeal, we will notify all of the parties and any interested parties specified by the appellant or that we also may deem appropriate.

The President of the Ad Hoc Division will review the application and, inter alia, may stay challenged decisions or grant preliminary relief. The President will determine whether one or three arbitrators should be used and then appoint the panel. The panel also may stay the decision or grant preliminary relief, will determine whether or not a hearing is required, and

schedule and conduct any hearing. Almost always, the panel will hold a hearing.

We have to react very quickly during an Olympic Games; awards are to be rendered within 24 hours of the appeal filing, although the deadline may be extended by the President (with such extensions usually due to delays requested by the parties). After the panel has reached a decision it may – and often does for the sake of expediency – issue the operative part of its award prior to its reasoned award. We issue media releases throughout the Games, e.g., announcing from time to time filings and issuance of the awards. All awards are reviewed by the President in draft form and she or he may “make amendments of form” and “without affecting the panel’s freedom of decision, draw the panel’s attention to points of substance”. [Note: The Anti-Doping Division, which was a new procedure in Rio de Janeiro, operates differently in certain key respects. Its decisions could be appealed to the Ad Hoc Division.]

Rio saw a record number of cases filed with the Ad Hoc Division. What role do you foresee for the Ad Hoc Division at the 2020 Summer Olympics in Tokyo?

The Ad Hoc Division in Rio de Janeiro was confronted with the unique situation of having to decide a large number of high profile cases concerning decisions taken by international sports federations and the International Olympic Committee with respect to the participation of the Russian athletes and sports federations and issues related to doping. While I do not foresee this specific situation happening again, something like it in scope or import could.

Our workload in Rio de Janeiro was grueling and required some innovative internal processes. Because of that experience, I am confident that we also will be able to handle such situations in the future. At an Olympic Games, we normally have received, and in Rio de Janeiro did receive, appeals concerning nationality, allocations of competition

slots by the international sport federations, doping, team selection, disciplinary actions, and referee decisions. I fully expect these types of appeals in future Olympic Games. Although these cases may be “normal,” they always involve difficult and emotional facts, hearings and awards.

What is your most memorable experience at CAS?

Some of our cases have created memorable experiences – especially the ones that were unique, if not downright strange, or of major public interest. Certain stories about my colleagues and other people I have met in the course of my ICAS duties also have been memorable. But ranking them is hard, and in any event selecting one or more anecdotes does not seem the best use of my opportunity here.

There were two pillars to the nascent U.S. Olympic athletes’ movement that were critically important to us: that we have meaningful participation in the sport bodies’ governance and decision-making and that we could resolve our disputes involving those bodies in a fast and fair (i.e., arbitral) process. Although massive amounts of hard work were involved, I feel fortunate to have been an Olympian, and thus I always have felt compelled to “give back” to sport and to make a difference. Thus, my most memorable CAS experience was the time that an athlete, after losing his appeal, said to me, “Thank you. I do not agree with the decision and am disappointed. But at least I was able to tell my story to someone who took me seriously, who was impartial and knowledgeable – and who listened.” Actually, versions of this have happened numerous times, and I hope and strive to have many more of the same “most memorable experience”.

The Ad Hoc Division at the Rio Olympics was praised for being diverse. What role do you think diversity plays in international arbitration?

We are a specialized arbitral institution providing our services to international sport, especially the Olympic Family. It is not only “right” for an adjudicatory body to be diverse, it also is “smart” for a professional service organization to mirror the makeup of clients that it serves. We serve international sport and international sport provides competitive opportunities to both male and female athletes. Thus, although having qualified arbitrators is critical, geographic and gender diversity in our arbitrators is very important. We strive to ensure all of those. One half of ICAS, the governing board of the Court, are women. One half of the Ad Hoc Division arbitrators in Rio de Janeiro were women. These did not happen by accident; both are manifestations of a determined and deliberate effort by ICAS, and with respect to the ICAS composition, also the assistance of the International Olympic Committee. We actively have been trying to increase the overall number of CAS arbitrators who are women. We also actively have been trying to increase the number of CAS arbitrators who were athletes that have competed at an international level – which needless to say is a harder task.

Do you have any tips for aspiring CAS arbitrators? How does one become a CAS arbitrator?

The specific goals of CAS are to provide swift, cost-effective, expert sport-specific resolutions of disputes in an impartial process, and we are judged on how well we deliver on these goals. However, most importantly we are and will be judged by the quality (not necessarily the outcome) of our awards. We are judged by the Swiss Federal Tribunal which has jurisdiction to review our awards (or even other national courts which may become involved) and ultimately by the international sport bodies through their choice to use our services. Our awards and our

body of awards (the *lex sportiva*) should and do provide certainty and harmonization in sport and help prevent future disputes by, inter alia, promoting changes to sport bodies’ rules and procedures. Only by delivering quality awards can we induce this behavior.

In order to achieve quality in our awards, it is essential that we have quality arbitrators. By our rules, to be appointed as a CAS arbitrator one must have appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language (i.e., French or English). Lawyers interested in being CAS arbitrators apply to CAS *sua sponte*. There are no quotas for or automatic appointments by sport bodies or groups. A recommendation by an international sport body official or sport lawyer is not required, but many applications do have them, and it is helpful. An ICAS membership commission reviews the applications and performs any necessary diligence. Increasingly we are seeking (in addition to our diversity efforts) retired judges and very experienced arbitrators.

For aspiring CAS arbitrators, I would recommend that they hone their legal skills and increase their experience in international arbitration and provide pro bono service (or volunteer in a non-legal capacity) to a national sport body, a sport event or host committee or athletes. For a national sport body, many times one must start local with its regional or state bodies or with a club in order to move up to a national level, but even there one will begin to learn about sport administration and governance.

If you could make any one change to improve efficiency in CAS, what would that be?

With over 500 (and trending to 600) cases per year, CAS is one of the largest arbitration tribunals in the world. Although the lengths of our procedures in a non-Ad Hoc environment are substantially shorter

than international commercial arbitrations, we are constantly aware of and monitor the issue of efficiency. The format here gives too short shrift for any meaningful discussion of this issue. However, there are a number of conceptual points that can be made. We are not immune to some of the efficiency problems confronting arbitration in general. We are constrained in potentially curing some of these problems because arbitration traditionally and (perhaps) legally does not have available to it some important tools and remedies available to a court. Nonetheless, at CAS we will continue to identify when and why our procedural delays occur. It is especially relevant to determine whether these delays are caused by one or more parties (which includes, of course, their counsel), by our arbitrators or even by us administratively. Some of these causes, if we deem it necessary, are easier to correct than others.

I often have stated in speeches on good governance that every organizational structure (every set of rules) has strengths and weaknesses in different scenarios, no matter what certain pundits or consultants may be pitching about their latest best practices and the rote application thereof. This applies to CAS and its rules and processes. This awareness is the precondition to our commitment that we will and must ensure that the CAS rules and processes continue to evolve and improve in light of changes in both international commercial arbitration and international sport and also to address weaknesses in them (including rectifying any gamesmanship we detect in using them).

What is your favorite city and why?

I have been afforded the opportunity to travel internationally in unique ways – as an athlete, a lawyer, an investor and sport administrator and executive – that have provided me special and sometimes extended experiences in many cities throughout the world and with their denizens. Since virtually all of my international travel has been related to these roles, I undoubtedly have missed out on some of the great cities that would appear in anyone else’s vacation-based list. But I do indeed

have a “favorite cities” list, although there is no numerical ranking. I have concluded in the course of making my list that I am, unfortunately, fairly boring because one criterion that must be satisfied is that I must know the city well and feel comfortable there doing the small everyday things. Another criterion is that it cannot be a city in the U.S. or Canada (which is quite unfortunate for Vancouver) because I like to have a substantial dash of foreign culture. Thus, in conclusion and with apologies to Rio de Janeiro and Sydney – which are oh-so-close to making it – my cities are Hong Kong, Barcelona and Istanbul. Which is not to say that I would turn down a sabbatical in Lausanne or Paris or ...

What are your hobbies when you are not resolving disputes?

Well, “resolving disputes” aka my roles on ICAS (and my prior Olympic and other sport positions) technically are my hobby. I always have wanted and had a “real” job outside of sport. However, to quote my Olympic Team coach: “Never confuse being a professional with getting paid. Being a professional is a way of doing things.” Great coach; wise man. I always have treated my ICAS, Olympic and other sport positions as if they were (also) my profession. My children, clearly not a hobby, were paramount, and I happily made it a priority to attend or participate in their sport, art or school events. But they are now young adults, so now I have some free time. My hobbies now? I have a number of art (sculpture, photography and assemblage), graphic design, book and legacy projects on which I am trying to work. But even now I do not seem to have enough time – and the ideas keep coming. Maybe I can sneak out on a sabbatical....

The interview was conducted by Sean Stephenson and Kabir Duggal.

Michael B. Lenard has a broad and deep background in international and domestic sport, business and law. Based in Los Angeles, California,

he has served on the boards of many international and domestic public and private companies, organizations, and financial vehicles.

Mr. Lenard is Vice President of the International Council of Arbitration for Sport (ICAS), the governing body for the Court of Arbitration for Sport (CAS), and has been a member of ICAS since its creation in 1994. He has been President of numerous CAS Ad Hoc Divisions at Olympic Games, the FIFA World Cup and other major sport events.

Mr. Lenard has held many senior positions in international and Olympic sport. He has served as a member and Vice Chair of the USOC's Athletes' Advisory Council and as USOC Vice President (where, inter alia, he chaired its marketing committee and founded and oversaw its high performance sport group). He was a member of the Board of Directors (and the Audit and Ethics Committee) of the 1996 Olympic Games organizing committee. He also has served as a member of the USOC's Olympic Overview Commission, as the Executive Committee's liaison to the independent ethics investigation of the USOC President, and as Chair of the USOC's Key Strategies Task Force. He provided the USOC's lead testimony to Congress, and later provided testimony to both the internal and Congressionally-appointed USOC governance reform committees.

Previously, Mr. Lenard was Senior Managing Director (and later also Chief Compliance Officer) of William E. Simon & Sons/Paladin Realty Partners, an international private equity firm, and prior to that, a partner in Latham & Watkins, an international law firm. Currently, he is a partner in Wilson Williams LLC, a boutique international law firm and a senior adviser in 7 Bridges Capital Partners, an international private equity firm.

Q & A with CAS Arbitrator the Honorable Annabelle Bennett

Can you tell us a little about your background and experience?

It's hard to know where to begin and how much to include. I started my tertiary experience in Science majoring in Biochemistry, did an Honors year in research on mitochondrial populations and then did a PhD on sperm of different species (in a cell biology sense). I then did a year of post-doc and simultaneously did law part-time to fulfill a long-held wish to be a lawyer. I had earlier been talked out of it on the basis of geographical restriction and that it was too hard for a woman to succeed.

While studying law, I had two children and so I gave up the research and finished law. I then went to the Bar, which in Australia means the independent Bar, as a sole practitioner who goes to court and gives advice, being briefed by other lawyers. Over time, my main specialty became intellectual property, in particular patents, including cases in biotechnology and pharmaceuticals. This made use of my science background, which was then an unusual combination of skills – really it meant less fear of technologies. I went on to become a Senior Counsel and then was appointed to the Federal Court of Australia, where judges sit on trials and also on appeals (not in the same case). While there, I sat on cases across the breadth of the Court's jurisdiction and on many intellectual property cases, including a very long running matter, *Apple v. Samsung*. We do not have juries in such cases. I resigned from the Federal Court (by choice) in 2016, to enable a new career to include arbitrations and mediations.

Along the way, I had a third child. I also did a number of things outside the practice of law, such as acting as Pro Chancellor of a major research university, sitting on the board of major city parks, on the board of the government body that advised on the release of genetically-modified organisms, on the boards of

hospitals and research institutes, and on Australia's Takeovers Panel, among other things.

I was also appointed to the CAS and was on the Ad Hoc Division for Sochi and for Rio.

I have since accepted positions as Chancellor of a university (which is non-executive) and on the board of a medical research institute.

How is a “typical” arbitration case adjudicated by the Ad Hoc Division?

The assumption is that there is a “typical” case. In Rio, the bulk of the cases were not typical, as they related to the situation with the Russian athletes following the release of the McLaren Report on doping. The “typical” aspect is, of course, the speed with which the parties have to prepare the case and the speed with which the arbitrators must assimilate the facts and the principles, make a decision and write the reasons that explain that decision. Where there are numerous cases, it means that you can be working on them simultaneously on different Panels.

However, the overriding pressure is the knowledge that the decision is of crucial importance to the athlete for all of the obvious reasons and also important to the Federations and to the conduct of the Olympic Games themselves.

Otherwise, in my experience, the cases run much like they would in a court but with less formality. The athlete is typically represented by a *pro bono* lawyer, who is generally passionate about the case. The lawyers on both sides are under the same time pressures to prepare the case and present written submissions and oral argument. At peak times, they can't be getting much sleep but the standard is generally very good and helpful for the Panel.

Also, I cannot praise highly enough the Counsel of the CAS who assist in each case and who, together with the staff of the CAS, deal with most of the procedural matters. I can tell you that, in Rio, the CAS Secretariat worked extraordinary hours. That workload extended to the Secretary General of the CAS and to the President of the Ad Hoc Division (Michael Lenard, who is also answering these questions and worked tirelessly).

What role do you envisage for the Ad Hoc Division at the Summer 2020 Olympics in Tokyo, compared to Rio?

I do not have a crystal ball but I doubt that the Ad Hoc Division in Tokyo will need to deal with the number of cases that we had in Rio. Having said that, there are a range of cases that come before the Ad Hoc Division, which has jurisdiction concerning decisions made for a fixed time prior to the Opening Ceremony. Those cases will still have to be determined quickly, efficiently and fairly.

What has been your most memorable experience in working with the CAS?

Whether you are asking about the CAS generally or about the Ad Hoc Division, it is without question working with the people. In particular, there developed a fellowship among the arbitrators. It may have been a fellowship born out of common pain and pressure but it made the process, including the making of decisions and the writing of them, very collegial, professional and based on mutual liking and respect.

Otherwise, so far as Rio was concerned, I have a distinct memory of one morning when I was finally on my way to my first event (and my first chance to shop for my family in the Olympic store) and the phone rang calling me back for another new matter. The other moment was when we finally came to a definite decision and issued the operative part of the award in a complex matter at 1:45 am after 15 hours in a windowless room.

The Ad Hoc Division in Rio was hailed for its diversity. Do you think diversity is important in international arbitration?

It's a no-brainer. The Ad Hoc Division in Rio was 50-50 male and female and that made sense. I was quite impressed on learning that the appointment process had resulted in this outcome. There was also diversity across experience and across countries and cultures. The six continents were represented. Diversity is important, especially when the cases concern male and female athletes from so many different countries and cultures, but it is also relevant to any arbitration. The Ad Hoc Division also reflected both common law and civil law approaches which in my view was important, in particular where cases involved principles of autonomy and natural justice.

How does one become a CAS arbitrator?

I cannot really give any "tips", other than to be a good judge, meaning someone who can run cases while remaining polite, who can listen and who can make a decision and then explain the reasons for that decision.

What change would you make to the efficiency of CAS?

That is actually quite hard. I have found the CAS to be very efficient. The only change that could have been made in Rio, but which could not have been foreseen, was to have had more backup to deal with all of the administration and all of the correspondence with the various parties and lawyers. However, no one could have predicted the number of cases. In addition, I know that other CAS staff were also very busy with the CAS Anti-Doping Division in Rio and with the management of the "regular" cases at the CAS headquarters in Lausanne, Switzerland.

What is your favorite city and why?

I don't wish to sound parochial but Sydney really is the best. Outside of that, who couldn't love New

York? There is so much to do – theatre, restaurants, shopping (not necessarily in that order) – and the people are incredibly friendly. I will add though that I am very happy to spend more time at the CAS in Lausanne!

Do you have any hobbies?

Well, I was hoping to have more time for hobbies when I ceased being a judge but that hasn't happened. Are my husband, children and now grandchildren a hobby? If so, they are my favorite. It sounds trite but I love spending time with friends, especially over really good food and wine. I love travelling; I ski; and I try to find time for reading when I am not desperately trying to keep up with emails.

The interview was conducted by Sean Stephenson and Kabir Duggal.

Dr. Annabelle Bennett AO SC is an arbitrator of the Court of Arbitration for Sport. She is a former Judge of the Federal Court of Australia, and presently works in private practice in Sydney, Australia.

Jurisdiction of the CAS – The Basics

Clifford J. Hendel

I. Introduction

Recent years have seen the proliferation of disputes in the area of international sport. The Court of Arbitration for Sport (CAS) has become one of the most active international arbitral institutions, with recent annual intakes in excess of 500 cases, and the 2016 caseload reaching 600 cases. It has also become one of the most visible of these institutions, resolving cases of high profile sports icons bearing names such as Sharapova, Platini, Contador and many others.

Given the insular nature of U.S. sport, the CAS is not particularly well-known in the United States outside of Olympic circles, even for internationally active practitioners.

This article (like the publication in which it appears) aims to remedy this situation, by setting out in basic terms the jurisdiction of the CAS, i.e., the nature of the matters that can be brought to the so-called “Supreme Court of Sports Law”.

II. The Starting Point – Sports Arbitration Seated in Switzerland

As is the case with any arbitral institution, the consent of the parties is required in order for a dispute to be considered properly removed from the default jurisdiction of the applicable state courts and subjected to the jurisdiction of the CAS.

The first specificity of CAS practice in this area is that, given the sports-related focus of the institution, in the vast majority of CAS cases the requisite consent to arbitration is not found in one-off arbitration clauses embedded in contracts signed by the parties, but rather in the rules or statutes of federations or of organizations supervising or

organizing competitions which contain CAS submission agreements that are incorporated by reference into the contractual relationship.

The second specificity is that, to be brought before the CAS, a case must be “sports related”: “(...) Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport”¹.

To date, the outer limits of what can be considered a matter “*relating to*” or “*connected to*” sport have not been fully tested. In the (probably unlikely) event that parties were to agree to submit a dispute having no bearing whatever on sport to this specialized body with a closed list of arbitrators having special expertise in sports law, it could be expected that the case would be rejected by the CAS Secretariat or, if not, by the CAS panel of arbitrators ultimately assigned to the case.

That the CAS is based in Switzerland and all of its arbitrations have their legal seat in Lausanne is important. Since CAS arbitrations (wherever the hearings may actually be held) are legally seated in Switzerland, Swiss law and jurisprudence – and its generally arbitration-friendly approach, the Swiss Federal Tribunal being well-known for limiting its review of awards to matters of due process – will apply as *lex arbitri*. One key consequence is that for CAS arbitration, arbitrability is determined according to Swiss law, as a function of the nature of the dispute. Essentially, all pecuniary cases are arbitrable, except for cases of criminal or bankruptcy law. Thus arbitration is available not only for commercial disputes arising, say, out of a contract of employment between a club and a player but also for

¹ Rule 27 of The Code of Sports-related Arbitration, in force as from January 2016.

disciplinary cases (like anti-doping rule violations) due to their potential economic consequences. In this context, a request for annulment of a suspension from competition represents a legal interest that can be expressed in money, and thus is considered to have a pecuniary character.

III. The Core Business – The Two Principal CAS Divisions and the Special Character of CAS Appeals

The CAS is composed of two principal divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division.

The Ordinary Division, as its name reflects, deals essentially with one-off commercial disputes connected with sports, in which the parties have agreed to submit resolution of their dispute (whether through a clause in the relevant contract or by a special arbitration agreement) to the CAS as a first instance adjudicator. “Ordinary” cases amount to some 10% of the CAS caseload: they are thus the exception, not the rule.

The Appeals Arbitration Division, responsible for roughly 90% of the CAS caseload, is the workhorse of the institution. It handles cases involving appeals from the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. The applicable rule (Rule 47) provides “*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 (...)*”.

CAS practice and jurisprudence provide guidance as to many of the key terms contained in this critical

article, including what is to be considered a “*decision*” falling within its scope and how the requirement of “*exhaustion of legal remedies*” is to be construed. Simplifying the state of play on these two issues, a “*decision*” is generally considered to be a communication resolving in a binding matter a legal situation or state, that is intended to affect and does affect the addressee; and the requirement of “*exhaustion of remedies*” is given a practical meaning, requiring only that ordinary remedies (not extraordinary or futile remedies) be exhausted as a prerequisite for coming to the CAS.

A special distinguishing element of CAS practice is the “*de novo*” nature of the CAS appellate procedure. Pursuant to Rule 57, “*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*” Similarly, the parties are free to raise facts and arguments that they did not raise in the prior proceeding and – albeit in a restricted fashion – introduce evidence not submitted in the prior proceeding. Thus, a CAS appeal is not a classic, limited appeals proceeding, but a special hybrid, a new proceeding which may cure possible violations of due process that occurred during the previous instance (typically an internal body of a sports federation, not meeting Swiss criteria to be considered an independent arbitral tribunal)².

Two very recent and particularly high-profile CAS decisions available on the CAS website illustrate the operation of these principles in practice.

In CAS 2016/A/4643, *Maria Sharapova v. International Tennis Federation*, the Russian tennis star succeeded in reducing from two years to 15 months the period of ineligibility imposed on her by an independent tribunal appointed by the International Tennis Federation for her use of the recently-prohibited substance Meldonium on the

² See generally D. Mavromati, M. Reeb, *The CAS Code: Commentary, Cases and Materials*, 2015, pp. 503 *et seq.*

basis of a finding of “no significant fault” (and no intention to cheat) in her use of the substance.

Referring to the Panel’s *de novo* powers under Rule 57, the award notes that:

“As a result, this Panel is not bound by the findings of the [independent] Tribunal, however well reasoned they are. More specifically, this Panel has full power to examine de novo the Player’s actions, and the evidence before it, in order to verify whether the Player’s plea of NSF [no significant fault], dismissed by the [independent] Tribunal, is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings.” [emphasis supplied]

Similarly, in CAS 2016/A/4474, Michel Platini v. Fédération Internationale de Football Association (FIFA) dated September 16, 2016, the French football legend and former Union of European Football Associations (UEFA) President succeeded in reducing from six to four years his prohibition from participating in any respect in national and international football activities for various ethical violations arising from his acceptance of funds from FIFA in 2011 pursuant to an alleged oral contract agreed in 1998 with FIFA’s then-President.

Referring to Rule 57, and underscoring the Panel’s ability to cure possible procedural irregularities in the case being appealed, the award notes that:

“Tout d’abord, la Formation rappelle qu’en vertu de l’article R57 du Code, le TAS jouit d’un plein pouvoir d’examen en fait et en droit. Ce pouvoir lui permet d’entendre à nouveau les parties sur l’ensemble des circonstances de fait, ainsi que sur les arguments juridiques que les parties souhaitent soulever, et de statuer définitivement sur l’affaire en cause. [footnote with authorities omitted]

Ainsi, la procédure devant le TAS guérit toutes les violations procédurales qui auraient pu être commises par les instances précédentes.

Il n’est donc pas nécessaire que la Formation statue sur l’existence ou non des violations procédurales alléguées par l’Appelant, ni qu’elle tranche si les exigences de l’article 6 CEDH [Convention de sauvegarde des droits de l’homme et des libertés fondamentales, du 4 novembre 1950] doivent être suivies ou non dans la procédure devant les instances internes.

Devant le TAS, les parties ont produit de très nombreuses pièces, dont les déclarations écrites de plusieurs témoins, des avis de droit d’experts, ainsi que les transcriptions des interviews menés par la chargée d’instruction. Etant donné que M. Platini a eu accès au dossier devant les instances internes de la FIFA, il a eu loisir d’en extraire tous les documents qu’il estimait pertinents et de les annexer à son appel, ce qu’il a d’ailleurs fait. Les parties ont ensuite eu l’occasion de se prononcer par écrit sur le litige, de citer des témoins et des experts et de les questionner lors de l’audience devant le TAS. La Formation a aussi pu poser toutes les questions qu’elle estimait utiles aux témoins, aux experts et aux parties. Elle a en outre étudié les nombreux documents présentés. Enfin, les deux parties ont confirmé à l’audience que leur droit à un procès équitable avait été respecté par la Formation, de sorte que la présente procédure a permis de rectifier les éventuelles irrégularités antérieures.” [emphasis supplied]

IV. The CAS Ad Hoc Division at the Olympic Games (CAS AHD) and the CAS Anti-Doping Division (CAS ADD)

Since the Summer Olympics of 1996 in Atlanta (where there was a concern that U.S. courts might be asked to interfere with the smooth running of the Games), the CAS has created so-called “Ad Hoc Divisions” (AHDs) for use at international sporting events, principally but not exclusively the Olympic Games.

Based on Rule 61 of the Olympic Charter, which confers upon the CAS exclusive jurisdiction to hear “any dispute arising on the occasion of, or in connection with, the Olympic Games”, the rules governing the CAS AHD provide for jurisdiction when the dispute arises during the Olympic Games or during the 10 days preceding the Opening Ceremony³. The participating athletes submitted themselves to CAS jurisdiction by signing the Entry/Eligibility Conditions Form of the IOC issued for the 2016 Summer Olympic Games in Rio. This form contains an arbitration agreement, which establishes the jurisdiction of the CAS over disputes in connection with the Olympic Games.

The AHD provides for on-site, round-the-clock availability of CAS arbitrators and staff in order to process and resolve disputes in very accelerated fashion – often in 24 hours – so as to permit the orderly administration of the event. It is a special, super-fast-track procedure for the resolution of highly time-sensitive disputes in connection with Olympic Games.

This year, the 12 CAS arbitrators assigned to the Rio AHD heard and resolved a record of 28 cases, a majority (16) of which were brought by Russian athletes declared ineligible to participate as a consequence of the World Anti-Doping Agency’s report on state-sponsored doping at the Sochi Olympics and the implementation by the various international sports federations of the eligibility criteria adopted as a consequence of the report by the

International Olympic Committee and discussed elsewhere in this publication.

In addition, at the recent Rio Games, the CAS for the first time was also in charge as a first instance authority for all doping-related matters arising during the Olympic Games through the newly-implemented CAS Anti-Doping Division (ADD).

Final decisions rendered by the CAS ADD may be appealed before the CAS AHD, or if the CAS AHD is no longer in operation, before the CAS in Lausanne after the end of the Olympic Games. In Rio, the CAS arbitrators assigned to the ADD registered eight cases.⁴

The success of these temporary Divisions (the AHD and, now, the ADD) has played a large part in making the Court of Arbitration for Sport well known among athletes, sports organizations, the media and – yes – lawyers all over the world.

V. Proposal to Give CAS Permanent Authority to Resolve First Instance Doping Disputes

During the International Olympic Committee’s 5th Olympic Summit, held in Lausanne in early October 2016, it was disclosed that the IOC has proposed to make the CAS a permanent court of first instance for doping disputes.⁵ This proposed arrangement, similar to what was in place at the Rio Olympics as noted above, would relieve sports federations from the responsibility of deciding doping cases (and would

³ See Article 1 CAS Ad Hoc Rules.

⁴ After its offices closed in Rio, the CAS ADD shifted its operations to Lausanne, remaining active in order to handle additional cases related to positive doping tests reported in the final days of the Olympic Games. Altogether, the Rio ADD registered a total of 13 cases, including the eight that it registered while based in Rio. See CAS Media Release, Last Decision Issued by the Anti-Doping Division of the Court of Arbitration for Sport (CAS) in Rio (21 Aug. 2016), available at <http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_ADD_English_21_August.pdf>; CAS Report on the activities of the CAS Divisions at the 2016 Rio Olympic Games, available at:

<http://www.tas-cas.org/fileadmin/user_upload/Report_on_the_activities_of_the_CAS_Divisions_at_the_2016_Rio_Olympic_Games_short_version_FINAL.pdf>; Message from the CAS Secretary General, CAS Bulletin 2016/2 at 4, available at <http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_2_final.pdf> .
⁵ Tom Jones, “CAS to decide doping sanction at first instance?,” Global Arbitration Review 10, October 2016, available at: <http://globalarbitrationreview.com/article/1069053/cas-to-decide-doping-sanctions-at-first-instance>.

reduce inconsistencies among decisions by different federations, such as those made this summer involving the participation of Russian athletes in the Rio Games).

This would constitute a major expansion of the CAS' role and would likely require a substantial increase in its roster of arbitrators, staff and budget. The CAS would continue to be an appeals body, but the scope of appeal of doping cases decided by it in first instance would need to be reviewed and the *de novo* review discussed above would in all likelihood be replaced by a more limited scope of review.

VI. Conclusion

The CAS is an increasingly active player in the global arbitral community and already the clear leading light in the area of international sports law. Still relatively unknown in the U.S., its visibility can be expected to increase in tandem with its caseload, and its relevance to the U.S. sporting and arbitral communities can be expected to grow in the areas – and very possibly, increasing areas – in which it has jurisdiction.

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The Role of the Swiss Federal Tribunal and Its Impact on CAS Arbitration

Despina Mavromati

I. Introduction

The Court of Arbitration for Sport (CAS) is an arbitral institution with its seat in Lausanne, Switzerland. As such, it has adopted its procedural rules (CAS Rules) in accordance with the 12th chapter of the Swiss Private International Law Act (Swiss PILA),¹ which provides a general legal framework for international arbitration in Switzerland. The main characteristics of the Swiss PILA are the wide autonomy of the parties to an arbitration and the discretion of the arbitral tribunal in the organization of the arbitral proceedings. Within this context, there are only a few mandatory rules, principally aiming at guaranteeing due process. Under the relevant provisions of the Swiss PILA, arbitral awards are final upon their notification and can only be challenged before the Swiss Federal Tribunal (SFT) on a very limited number of grounds.² This is also foreseen in Article R46 and Article R59 of the CAS Rules, which have been drafted in line with the – more general – provisions of the 12th chapter of PILA.

The grounds for challenging an arbitral award (including a CAS award) are exhaustively enumerated in Article 190(2) PILA.³ The SFT only hears arguments substantiated in the appeal and not arguments of an appellate nature and bases its judgment on the facts as they have been established by the CAS.⁴ The first ground for challenge relates to

the improper appointment of the arbitrators or the constitution of the panel. The second ground for challenge (and the one that is invoked far more often than all the others in challenges of CAS awards) is granted when the arbitral tribunal wrongly accepts or declines jurisdiction. A further ground for challenge arises when the arbitral tribunal either decides beyond the claims submitted to it or fails to decide on one of the prayers for relief. The fourth ground for challenge concerns violation of the parties' right to be heard and the equality of the parties; and the fifth (and last) ground controls the compatibility of the arbitral award with procedural and substantive public policy.⁵

Since the creation of the CAS in 1984, the SFT has rendered numerous judgments on motions to set aside CAS awards. Notwithstanding the limited number of grounds enumerated in Article 190(2) PILA (and statistically the lower prospects of having a CAS award overturned before the SFT), the possibility of parties' recourse to a state court – and more particularly to Switzerland's Supreme Court – is of major importance: first, the SFT controls both the legality of the CAS as an arbitral institution and the legality of CAS awards as such; and, second, the SFT may confirm, reject or more generally interpret some of the procedural provisions of the CAS Rules and the law applicable to the merits.

¹ As long as the conditions of Art. 176(1) PILA are met.

² Although the parties have the option of contractually excluding the application of the 12th chapter of PILA (see Art. 176(2) thereof), the SFT has held that it is not possible for the parties to contractually exclude appeal to the SFT, see Cañas judgment, ATF 133 III 235.

³ Article 74(1)(b) of the Swiss Federal Tribunal Act (LTF) provides that, in case of appeal, the SFT applies the grounds for challenge of the second paragraph restrictively, and does not review the award on the merits. See Von Segesser, G. / Schramm, D., 'Swiss Private International Law Act', in

Concise International Arbitration, ed. Mistelis, L. (Alphen aan den Rijn: Wolters Kluwer, 2010), p. 955, at Article 190, para. 1.

⁴ *Inter alia* SFT 4P.105-2006 at 6. For an extensive analysis of the grounds for appeal to the SFT as well as SFT judgments related to CAS awards, see Mavromati / Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Wolters Kluwer 2015, p. 563 et seq.

⁵ See Art. 190(2)(a)-(e) PILA.

II. Control of the Legality of the CAS as an Institution / Control of the Proper Constitution of CAS Panels

The SFT has issued a series of judgments that have impacted the development of the CAS as an independent arbitral tribunal. All arbitral tribunals with their seat in Switzerland must comply with a number of conditions in order to qualify as “true” arbitral institutions. In this context, the SFT has issued some judgments dealing with the structural independence of the CAS. The widely known “Gundel” judgment was a cornerstone judgment in the CAS’s history and development.⁶ Elmar Gundel, a German horse rider, had filed a motion with the SFT challenging a doping-related CAS award in 1992, alleging that the CAS did not meet the conditions of impartiality and independence required to qualify as a true court of arbitration. The SFT recognized the CAS as a true court of arbitration but also drew the attention of the CAS to the numerous links which existed at the time between the CAS and the IOC, mostly in terms of financing and modification of the CAS Statutes by the IOC.⁷ This led to a series of structural reforms within the CAS, the creation of a CAS supervising board (the International Council of Arbitration for Sport or ICAS) and the drafting of the CAS Code. Ten years later, the SFT issued another judgment dealing with the issue of the CAS’s structural and institutional independence and confirmed – after extensive analysis – its view that the CAS is sufficiently independent of the IOC and that CAS awards are true arbitral awards, comparable to state court judgments.⁸

Apart from the control of the legality of the CAS as an institution, Article 190(2)(a) PILA provides that (CAS) arbitral tribunals must be properly constituted in order to guarantee the parties’ right to a fair decision. Said provision is linked to the appointment of the panel enshrined in Articles 179-180 PILA and violation of the appointment procedure. Most

importantly, however, this ground refers to the lack of independence or impartiality in the sense of Article R33 of the CAS Code. The dismissal of a legitimate challenge of an arbitrator by the CAS supervising body, namely ICAS, may therefore lead to the setting aside of the arbitral award based on this ground. The irregular constitution of a tribunal must be objected to during the proceedings and within the deadline provided for by the applicable procedural rules. The most frequent argument raised for the irregular constitution of the arbitral tribunal is the lack of impartiality and independence of the arbitrator(s). This question is answered on a case-by-case basis; and concrete facts must be presented objectively establishing the alleged lack of independence. The arbitrator’s independence is not put into question through the subjective perception of the parties, but rather by the perception of a reasonable observer. What is more, the SFT has held that the parties / their counsel must undertake the necessary research and investigation in order to detect any possible grounds for challenge (the so-called “duty of curiosity”).⁹

III. Control of the Legality of CAS Awards by the SFT

Jurisdiction / Lack of Jurisdiction of CAS Panels

A basic prerequisite in arbitration is the existence of an arbitration agreement between the parties. Obviously, this is a condition that has to be met in CAS arbitration (according to Articles R27, R38, R47 and R48 of the CAS Code and the more general provisions of Article 178 PILA). Apart from the formal conditions of Article 178(1) PILA, there are some substantive conditions for the validity of the arbitration agreement in Article 178(2) PILA. Said agreement is valid if it complies with the law chosen by the parties, or with the law governing the subject-

⁶ CAS 92/63 G. v/ FEI in Digest of CAS Awards 1986-1998.

⁷ SFT 4P.217/1992, Gundel.

⁸ SFT 4P.267-270/2002, Lazutina / Danilova.

⁹ SFT 4A_256/2009.

matter of the dispute, or with Swiss law.¹⁰ Article 186 PILA includes some cornerstone provisions on the jurisdiction of the arbitral tribunal. These provisions have been adopted – and tailored to sports arbitration – by the CAS Rules (Article R39 and Article R55 of the CAS Code).¹¹ Another important principle enshrined in this provision is that objections to (CAS) jurisdiction must be raised before any submissions on the merits; otherwise, the parties are deemed to have accepted the jurisdiction of the arbitral tribunal.

The SFT has dealt with a number of motions to set aside CAS awards invoking the alleged absence/invalidity of an arbitration agreement. The lines drawn by the SFT regarding the jurisdiction of the CAS have been lenient, in order to facilitate the resolution of sports disputes by the CAS. Although the SFT has significantly helped establish important jurisprudential principles drawing the limits of the CAS's jurisdiction, this remains a case-by-case exercise, not least due to the particularities of each International Federation and the different regulations among federations, with different facts and circumstances surrounding each case.¹²

Although the SFT seems to be strict when controlling the existence of an arbitration clause (because its existence excludes recourse to state courts), the SFT follows a more liberal approach when examining or interpreting the scope of a clause.¹³ To date, the SFT has discussed the interpretation of arbitration clauses in numerous judgments. According to the principle of trust, an arbitration clause through a global reference is binding on a party that is aware of its existence and does not raise any objections. For example, if an athlete validly consents through his signature on a

specimen agreement / entry form for a major competition whose regulations expressly contain an arbitration clause, the arbitration agreement will be valid.¹⁴ However, when an athlete signs a player entry form for a specific championship, this does not constitute a broader arbitration agreement (or a general consent / blanket consent) beyond the scope of the event.¹⁵

The SFT further controls – upon relevant arguments raised by the parties – whether the dispute submitted to the CAS can be subject to arbitration (i.e., whether the dispute is “arbitrable”). The Swiss legislature has adopted a quite liberal approach on the arbitrability of disputes, providing (in Article 177 PILA) that “any dispute of financial interest may be subject to arbitration”. This applies to all claims of pecuniary value, where the financial interest of at least one of the parties is essential.¹⁶ In CAS proceedings, the SFT has found that it is not decisive (for the purposes of determining arbitrability) that prohibition of arbitration under foreign law may lead to non-enforcement of the award. However, any abuses are de facto restricted by the general prohibition of the abuse of law and by possible problems related to the recognition and enforcement of the award in a foreign country.¹⁷

SFT Control of Ultra Petita / Infra Petita Awards

A further ground for a motion to set aside a CAS award exists when the arbitral tribunal either decided beyond the claims submitted to it or failed to decide on one of the prayers for relief (Article 190(2)c PILA).¹⁸ Specifically, in CAS-related judgments, the

¹⁰ Müller, at Art. 178 PILA, in *Arbitration in Switzerland – The Practitioner’s Guide*, p. 62.

¹¹ The Swiss legislature thus has adopted the Kompetenz-Kompetenz principle, according to which the arbitral tribunal decides itself on its own jurisdiction: Berger, at Art. 186 PILA, in *Arbitration in Switzerland – The Practitioner’s Guide*, p. 147.

¹² See SFT 4P.162/2003, at 4.3. SFT 4P.105/2006, at 6.3.

¹³ SFT 4A_103/2011, at 3.2.1. Also SFT 4A_246-2011, at 2.2.3.

¹⁴ SFT 4C_44/1996, Nagel v. FEI; SFT 4P.230/2000, S. Roberts v. FIBA; SFT 4A_460/2008, Dodô v. FIFA & WADA.

¹⁵ SFT 4A_358/2009, at 3.2.3.

¹⁶ Orelli, at Art. 177 PILA, in *Arbitration in Switzerland – The Practitioner’s Guide*, p. 48 et seq.

¹⁷ SFT 4A_654/2011; SFT 118 II 353.

¹⁸ Rigozzi, Antonio, *Le recours contre les sentences du Tribunal Arbitral du Sport (TAS)*, *Revue de l’Avocat*, 5/2008, p. 219.

SFT has held that there is no obligation for the arbitral tribunal to examine separately and in detail all possible legal grounds of the prayers for relief.¹⁹ Also, in case of a request for a specific amount, the arbitral tribunal does not rule *ultra petita* if it grants higher or lower amounts for specific parts of the claim, as long as the total amount is in harmony with the total amount requested.²⁰

SFT Control of Respect for the Parties' Right to be Heard

As to the parties' right to be heard, Article 182(3) PILA provides that the parties are free to determine the arbitral procedure, provided that the arbitral tribunal ensures equal treatment of the parties and their right to be heard in adversarial proceedings. The parties' right to be heard is respected when, e.g., the arbitral tribunal has duly taken into consideration all the parties' legal and factual submissions which are relevant to reaching a decision.²¹ To date, four CAS awards have been found by the SFT to be in violation of the parties' right to be heard. In such cases, the CAS panel re-hears the case and remedies the elements violated through the previous award.²²

Control of Conformity of CAS Awards with Public Policy

CAS panels must also respect "widely recognized values that should according to the prevailing concepts in [Switzerland] form the basis of every legal system".²³ Violation of these fundamental values results in violation of the principle of public policy. The last ground for appeal in Article 190(2) PILA includes both substantive and procedural public policy, such that awards must comply not only with Swiss but also with international public policy.²⁴

The SFT judgments related to CAS awards have given numerous examples as to what constitutes public policy, without however giving an exhaustive list. The SFT has, e.g., held that the principle of strict liability for doping and the shifting of the burden of proof to the athlete do not violate public policy.²⁵ Also, questions related to the burden of proof fall beyond the scope of substantive public policy.²⁶ In a landmark judgment in the history of the CAS (and international arbitration in Switzerland, more generally), the SFT held that a sanction imposed on a player by FIFA (and confirmed by the CAS) violated (substantive) public policy and Articles 27-28 Swiss Civil Code (CC) on excessive commitments because the athlete was sanctioned for an indefinite period for not having paid compensation to his former club.²⁷

Procedural public policy is more specific and has a subsidiary character in that it can only be invoked when none of the other grounds for annulment can be applied. Violation of the principle of the *res judicata* effect of previous awards falls under procedural public policy but only the operative part of the award is covered by the *res judicata* effect and not the reasons. The SFT vacated a CAS award based on this ground where the CAS panel had adjudicated a claim that had been previously judged by a Swiss state court according to Article 75 CC. Due to the *erga omnes* effect of decisions issued based on Article 75 CC, it is not possible for members of an association to bring the same matter again before arbitral tribunals or state courts and therefore CAS panels should refuse to entertain such claims.²⁸

¹⁹ SFT 4P.269/2003, at 2.

²⁰ SFT 4P.54/2006 of 11 May 2006, A., at 2.1.

²¹ Knoll, at Art. 182 PILA, in *Arbitration in Switzerland – The Practitioner's Guide*, p. 111.

²² E.g., CAS 2005/A/951, Cañas, revised award of 23 May 2007; SFT 4P.172/2006.

²³ SFT 132 III 389 at 2.2.3.

²⁴ Von Segesser / Schramm, *Concise International Arbitration* (ed. L. Mistelis), 2010, p. 958.

²⁵ SFT 4P.105/2006, at 8.

²⁶ SFT 4A_304/2013.

²⁷ SFT 4A_558/2011, *Matuzalem v. FIFA*, at 4.3.5.

²⁸ SFT 4A_490/2009, *Atlético v. Benfica*, at 2.1.

IV. Interpretation by the SFT of the CAS Rules and the Law Applicable to the Merits of the Dispute

The SFT has also had the opportunity to control, verify and interpret some of the procedural rules of the CAS Code through its judgments. By means of example, the SFT has held that ICAS's decision not to grant legal aid (through its legal aid fund) does not violate the equality of the parties / public policy.²⁹ Furthermore, the SFT has interpreted Article R34 on the challenge of CAS arbitrators by holding that CAS arbitrators are not obliged to disclose information that they reasonably thought that the parties already knew.³⁰ The SFT has also dealt with the scope and the evidentiary power of experts (Articles R44.2 and R44.3) and differentiated between panel- and party-appointed experts.³¹ In another judgment, the SFT has held that a CAS award reverting the case back to the previous instance (under Article R57) is an interlocutory award which may be attacked before the SFT only based on Articles 190(2)(a) and (b) PILA.³² Most importantly, the SFT has interpreted Article R57 and held that there is no "right" to two degrees of jurisdiction that would constitute a motion to set aside a CAS award under Article 190(2) PILA.³³

Under Article R58 CAS Code (for appeal procedures), which provides for the law applicable to the merits of the dispute, the arbitral tribunal applies the "*applicable regulations*" and, subsidiarily, "*the rules of law chosen by the parties*" or, in the absence of such a choice, "*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*". The arbitral tribunal is free to apply the law within this framework and the arbitral award

cannot be attacked based solely on the ground that the arbitral tribunal did not apply the "right law". However, the SFT held that this might be an indirect ground for annulment of an award if, e.g., a panel issued an award after applying a legal provision without previously consulting the parties (where the parties could not have expected the application of this provision, "*effet de surprise*").³⁴

V. Conclusions

The Swiss arbitration system limits the intervention of state justice to the strict minimum for evident reasons of economy of the procedure. Within this framework, all arbitral awards rendered in Switzerland are final upon notification. The SFT's control is limited to the exhaustively-enumerated grounds of Article 190(2) PILA and aims mostly at guaranteeing due process. Furthermore, the SFT's control is not *ex officio* but is exercised only upon the filing of a motion to set aside a CAS award by the affected parties, who must establish legal interest. Notwithstanding the above, the Swiss Federal Tribunal has been a catalyst in the functioning and development of the CAS as an arbitral institution based in Switzerland. The SFT notably has rendered a series of important judgments drawing the limits of CAS panels and also interpreting Article 190(2) PILA and numerous provisions of the CAS Code.

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²⁹ The provision on legal aid is foreseen in Article S6 of the CAS Code. See 4A_178/2014, Sinkiewitz. See a detailed table of the CAS Code provisions interpreted by the SFT in Mavromati / Reeb (fn above), pp. 598-600.

³⁰ SFT 4A_110/2012, Paulissen; see also an interpretation of the procedure of Article R34 CAS Code in SFT 4A_620/2012, La Coruña.

³¹ SFT 4A_274/2012, Chess Federation.

³² SFT 4A_6/2014, B. FC v. J. FC.

³³ SFT 4A_386/2010; 4A_530/2011; 4A_558/2011; 4A_90/2014.

³⁴ SFT 4A_400/2008; but see SFT 4A_544/2013, at 3.2.2.

Diversity & The Court of Arbitration for Sport

Kabir Duggal and José Manuel Maza

I. Introduction

International arbitration has experienced substantial growth in the past few decades, which has led to a more critical examination of the arbitral regime. One of the main criticisms of international arbitration is the lack of diversity. The legitimacy of the system has been called into question because, even today, arbitral tribunals are too often “pale, male, and stale.”

Diversity has long been an area of focus for many professions, including the legal profession. Indeed, slowly but steadily there has been an increase in the number of women and racial minorities in the legal profession, including in international arbitration practice. Recently, perhaps as a consequence of the increased focus on diversity, numerous articles on the subject have been published, and various initiatives have been undertaken to increase diversity. We are, however, still a long way from achieving true diversity.¹

This article provides a general overview of diversity focusing on gender and race in international arbitration. It then discusses the example of the Court of Arbitration for Sport (“CAS”), which stands out due to its unique focus on diversity, particularly in the 2016 Rio Olympics.

II. Diversity in International Arbitration: The Case for Legitimacy

Professor Thomas Franck famously defined legitimacy as “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.”² A frequently utilized mechanism to increase legitimacy in international law is the quest for “equitable geographic representation” in the composition of international dispute resolution bodies. International arbitration, in contrast, has no such comparable requirements. This is due to its reliance on the underlying principle of party autonomy.

There have been some nascent efforts to promote diversity in international arbitration. There seems to be a strong consensus in the global arbitration community that professionals in the sector ought to strive for greater diversity in the field. This is despite the fact that some practitioners argue that inclusion is a natural process, and that the field must simply wait for the ranks of diverse arbitration counsel to trickle into the ranks of arbitrators. However, this “pipeline” theory ignores the fundamental reason why a tribunal’s diversity is so significant, and why such diversity is difficult to attain. Diversity is not merely valuable to young people, women, and minorities selfishly desiring to push aside the old guard for their own professional gains; rather diversity on the tribunal is crucial to sustain arbitration as a modern, flexible, and desirable method of dispute resolution.

¹ See, e.g., Lucy Greenwood, C. Mark Baker, Getting a Better Balance on International Arbitration Tribunals, 28(4) ARBITRATION INTERNATIONAL (LCIA 2012), p. 653; M. Goldhaber, Madame La Presidente – A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?, 1 TRANSNATIONAL DISPUTE MANAGEMENT (3) (July 2004); Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment

Arbitration Boom, CORPORATE EUROPE OBSERVATORY & TRANSNATIONAL INSTITUTE (2012), p. 36 (“Most of the members of this club are men from a small group of developed countries.”).

² Thomas M. Franck, “Legitimacy in the International System,” in *The American Journal of International Law*, Vol. 82, No. 4 (Oct. 1988), pp. 705-759.

Indeed, for arbitration to survive as a global mechanism for resolving disputes, it is imperative to have a global, diverse composition of participants.

III. The Diversity Paradox

Arbitrators usually join an institution's roster or are appointed *ad hoc* by a party and its external counsel after a long and successful career in the legal field and, in particular, after holding senior positions at major law firms, in academia, or as civil servants in their home countries or international organizations. Experience is usually weighed as much as knowledge or reliability. Both institutions and counsel are necessarily conservative players because they must protect their own and legitimate interests, and are usually reluctant to improvise. Institutions and counsel usually seek out individuals with name recognition among colleagues in the field. Given this context, the fact that women and minority lawyers tend to encounter the same difficulties reaching the upper echelons of the legal profession as they do when attempting to enter the legal profession is significant. Women and minority professionals find themselves in a more difficult starting position, and the system is self-perpetuating: you are not going to

get appointed until you have a track record, and you will not get a track record because of your gender or race.

Women have long comprised between 45-50% of law students in the United States,³ but currently make up only about 22% of partners at large U.S. law firms and an even smaller fraction of equity partners.⁴ The disparity is even more pronounced for racial and ethnic minority candidates, with some firms not reporting any minority partners at all.⁵ Whereas minority students account for approximately 27% of law school graduates, minorities account for only 7.52% of partners at major law firms.⁶ Female minorities suffer particularly from pipeline leak, representing a mere 2.55% of law firm partners.⁷

Women partners are even less represented in arbitration practices than in the general practice of law, comprising only 11% of partners in the top arbitration practices in the world. The absence of female and minority partners in senior positions, both in international arbitration and in other legal practices that feed into arbitrator pools, such as mergers and acquisitions or energy and construction, exacerbates the pipeline leak. Diverse candidates have a more

³ According to the National Association of Women Lawyers, women have comprised more than 40% of law school graduates since the mid-1980s. See Stephanie A. Scharf *et al.*, *Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms* (Feb. 2014),

4. In fact, as of 2016, women now make up the majority of law students. See Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, NEW YORK TIMES (Dec. 16, 2016), available at <https://nyti.ms/2jANgBi>.

⁴ See National Association for Law Placement (NALP), 2016 Report on Diversity in U.S. Law Firms (Jan. 2017), available at <http://www.nalp.org/uploads/Membership/2016NALPReportonDiversityinUSLawFirms.pdf> (noting that, in 2016, women accounted for 22.13% of U.S. law firm partners); see also NALP, *Women and Minorities Maintain Representation Among Equity Partners, Broad Disparities Remain* (March 2016), available at <http://www.nalp.org/0316research?print=Y> (stating that, in 2015, women accounted for 17.4% of equity partners at U.S. law firms).

⁵ See NALP, *Women and Minorities at Law Firms by Race and Ethnicity – New Findings for 2015* (Jan. 2016), available at

<http://www.nalp.org/0116research> (reporting on data for all employers listed in 2015-2016 NALP Directory of Legal Employers).

⁶ See NALP, *NALP 2015-2016 Diversity Infographic: Minorities* (June 2016), available at <http://www.nalp.org/uploads/Membership/DiversityInfographic-Minorities.pdf> (stating that minorities made up almost 27% of law school graduates in the class of 2014, but only 7.52% of partners at major law firms).

⁷ See NALP, *Women and Minorities at Law Firms by Race and Ethnicity – New Findings for 2015* (Jan. 2016), available at <http://www.nalp.org/0116research> (stating that, in 2015, only 2.55% of partners were minority women); see also NALP, *Women and Minorities Maintain Representation Among Equity Partners, Broad Disparities Remain* (March 2016), available at <http://www.nalp.org/0316research?print=Y> (noting that, in 2015, only 5.6% of equity partners were racial/ethnic minorities).

difficult time identifying mentors and role models to emulate in the arbitration field. Many commentators cite demanding travel schedules, and the 24-hour culture of Big Law, and in particular, international arbitration, as contributors to pipeline leak. The scarcity of female mentors who have “made it” in arbitration can lead women lawyers, in particular, to believe that the travel and time commitments make it impossible – or at least impracticable – for lawyers who want to have families to succeed in the field.⁸

That said, efforts have been made to facilitate gender and racial diversity in international arbitration, some of which are discussed below.

ArbitralWomen

ArbitralWomen has existed informally since 1993, actively since 2000, and officially, as a non-profit organization, since 2005. An international non-governmental organization, its primary objective is to advance the interests of women and promote female practitioners in international dispute resolution.⁹ Many initiatives have been promoted by this organization, and it enjoys observer status at UNCITRAL Working Group Sessions.

Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the History of Arbitration for Gender Equality¹⁰

The Equal Representation in Arbitration (“ERA”) Pledge was published on May 18, 2016, a date that marked a historic moment for diversity in international arbitration. As described by one of its members, the Pledge is “*a call to the international*

dispute resolution community to commit to increase the number of female arbitrators on an equal opportunity basis.”¹¹ The Pledge has already been signed by more than 1,300 individuals¹² and around 70 organizations.

Arbitrator Intelligence

Arbitrator Intelligence, a non-profit, interactive website, aims to promote transparency, fairness, and accountability in the selection of international arbitrators, and to facilitate increased diversity in arbitrator appointments. By making information more widely available, Arbitrator Intelligence seeks to promote a more fair, reliable, and efficient process for selecting arbitrators. In addition, by providing a neutral clearinghouse for information regarding international arbitrators, Arbitrator Intelligence strives to increase the visibility of newer arbitrators and accelerate their ability to establish international reputations. The website ensures that parties can more readily assess newer arbitrators, and thereby encourages diversity in the arbitrator pool.¹³

IV. Diversity in the CAS

The CAS is an independent institution that provides services to facilitate the resolution of sport-related disputes, through arbitration or mediation and by means of sets of procedural rules adapted to the specific needs of the sports world. Since November 22, 1994, the Code of Sports-related Arbitration (hereinafter, “the Code”) has governed the organization and arbitration procedures of the CAS. The 70-article Code is divided into two parts: the Statutes of bodies working for the resolution of sports-related disputes (articles S1 to S26), and the

Equality, available at <http://kluwerarbitrationblog.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/>.

¹² This information is accurate as of October 12, 2016.

¹³ See Arbitrator Intelligence, *available at* <http://www.arbitratorintelligence.org/about/>.

⁸ All data were compiled by Bahrain Chamber for Dispute Resolution “International Arbitration Review,” Vol. 2, Number 2, December 2015.

⁹ See generally, ArbitralWomen, *available at* <http://www.arbitralwomen.org/AboutUs>.

¹⁰ Full text available here: The Pledge, *available at* <http://www.arbitrationpledge.com/>.

¹¹ Mirèze Philippe, *Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender*

Procedural Rules (articles R27 to R70). Since 1999, the Code has also contained a set of mediation rules instituting a non-binding, informal procedure that offers parties the option of negotiating an agreement to settle their dispute with the help of a mediator. The Code thus establishes rules for three distinct procedures:

- the ordinary arbitration procedure;
- the appeals arbitration procedure; and
- the mediation procedure.

There are two classic phases to arbitration proceedings: written proceedings, involving an exchange of statements of case, and oral proceedings, where the parties are heard by the arbitrators, generally at the seat of the CAS in Lausanne. The mediation procedure follows the pattern decided by the parties. Failing agreement on this, the CAS mediator decides the procedure to be followed.

The CAS has played a pivotal role in promoting diversity and has made great strides in increasing both race and gender equality, being one of the arbitral institutions that has the most diverse representation in its panels and rosters of arbitrators.

The International Council of Arbitration for Sport (ICAS) is the supervisory body of the CAS, safeguarding the independence of the CAS and the rights of the parties by overseeing the administration and financing of the CAS.¹⁴ As of October 2016, the ICAS website lists 20 “members,” of which 10 are women.¹⁵ These experienced jurists are appointed for four-year terms and in the following manner:

- four members are appointed by the International Federations (IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of the

Winter Olympic IFs (AIOWF), chosen from within or outside their memberships;

- four members are appointed by the Association of National Olympic Committees (ANOC), chosen from within or outside its membership;
- four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
- four members are appointed by the 12 ICAS members listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; and
- four members are appointed by the 16 ICAS members listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

The institution’s commitment to diversity is similarly reflected in the leadership of the CAS’ two standing Divisions – the Ordinary Arbitration Division and the Appeals Arbitration Division. As of December 2016, both are headed by women. Specifically, Ms. Carole Malinvaud serves as President of the Ordinary Arbitration Division and Ms. Corinne Schmidhauser serves as President of the Appeals Arbitration Division.¹⁶

In addition to the two standing Divisions of the CAS, the institution also establishes Ad Hoc Divisions to resolve sports-related disputes arising during the Olympic Games by applying the CAS Arbitration Rules for the Olympic Games. Such tribunals also have been established for the Commonwealth Games, Union of European Football Associations (UEFA) European Football Championships, FIFA World Cup and other major sporting events.

¹⁴ See Code: Statutes of ICAS and CAS, s2 (“The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.”).

¹⁵ Available at <http://www.tas-cas.org/en/icas/members.html>.

¹⁶ See List of ICAS Board Members, available at <http://www.tas-cas.org/en/icas/the-board.html>.

Like the ICAS, the Rio Olympics Ad Hoc Division also achieved gender parity. Indeed, the Ad Hoc Division had a female Co-President (Justice Ellen Gracie Northfleet) in addition to a male President (Mr. Michael Lenard), and of its 12 arbitrators, six were female and six were male.¹⁷

In Rio, for the first time in the history of the Olympic Games, the CAS was in charge of doping-related matters arising on the occasion of the Games, as a first-instance authority. To complement the Ad Hoc Division (which has been constituted for every Olympic Games since the 1996 Summer Olympics in Atlanta), a new Anti-Doping Division was established for the Olympic Games in Rio, to conduct proceedings and to issue decisions relating to alleged violations of anti-doping rules. Final decisions rendered by the Anti-Doping Division were appealable to the Ad Hoc Division in Rio or to the CAS in Lausanne after the end of the Olympic Games. Although the Anti-Doping Division for the Rio Olympics did not reflect gender parity (one female to five males), its President was a woman (Ms. Carole Malinvaud).

The CAS is currently trying to increase the overall number of CAS arbitrators who are women and is also actively working on increasing the number of arbitrators who were athletes that have competed at an international level.

Therefore, the CAS' efforts vis-à-vis gender diversity are virtually unprecedented.

Below is a detailed chart including all of the CAS' arbitrators, gleaned from its general list (which includes the universe of its arbitrators), divided by region and gender. This chart has been put together

by the authors and compiles data from the CAS website (as of June 2016).

Table 1: List of CAS arbitrators by region and gender.¹⁸

Region	Countries	Arbitrators	Men	Women
Africa	23	23	23	0
North America	3	54	44	10
Central America & The Caribbean	3	3	3	0
South America	8	18	18	0
West Asia	5	8	8	0
East Asia	10	28	24	4
Europe	32	190	170	20
Oceania	3	28	24	4
Total	87	352	314	38

The CAS' general list of arbitrators is composed of 352 members from eight different regions covering the entire globe. Out of these 352 members, 314 are men and 38 are women. As a general matter, the numbers seem low both for gender and for race/ethnicity and/or national origin.

¹⁷ Announcing the composition of the Ad Hoc Division for the 2016 Summer Olympics, the CAS explained: "In selecting the arbitrators for the Rio 2016 Games ad hoc division, the ICAS ensured that all regions of the world have been considered, and that the selection of arbitrators is representative of the athletes taking part in the Rio 2016 Games. The ICAS notes that 46% of the athletes will be female (a figure which is expected to increase to 50% in Tokyo 2020), and accordingly, it has, for the first time taken the deliberate decision to recognize gender equality among the arbitrators appointed to comprise the Rio

2016 Games ad hoc division." See CAS Media Release, "Rio 2016 Olympic Games – Preparations for the Court of Arbitration for Sport (CAS) Ad Hoc Division at the Rio 2016 Games Are Underway" (Dec. 7, 2015), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Rio_2016_ad_hoc.pdf.

¹⁸ See the link for further information: http://www.tas.cas.org/fileadmin/user_upload/Liste_des_arbitres_par_nationalite_2016_JUN_.pdf.

Further, more difficulties are encountered when examining women acting as arbitrators from certain regions (mainly Central America and The Caribbean, South America, West Asia, and Africa). From the table above, it is evident that the *pale, male, and stale* paradigm persists within the CAS. However, we cannot ignore the improvements that the arbitral institution is currently pushing. In particular, one must remember the institution's efforts, such as the fact that the Ad Hoc Division for the recent Olympic Games in Rio was composed of 50% women – a remarkable achievement and a demonstration of the CAS' efforts to improve gender equality.

V. Conclusion

Diversity in international arbitration remains a goal that all dispute resolution lawyers must strive for, both because it is worthwhile and admirable, but also because it adds to the field's legitimacy. The CAS has recognized the importance of diversity, and its efforts, particularly in the Rio 2016 Olympics, have been extraordinary. It is hoped that the CAS will continue its efforts in making even greater strides when it comes to diversity, and that other institutions and lawyers will soon follow suit.

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The Rio 2016 Olympic Games Pro Bono Arbitration Counsel Program

Joaquim de Paiva Muniz, Rodrigo Garcia da Fonseca, and Ricardo Loretti Henrici

In the world of sports, conflicts are resolved before the Court of Arbitration for Sport (CAS), seated in Lausanne, Switzerland. The rulebook everyone has to follow is its Code of Sports-related Arbitration.

The superstars of sport and the most powerful National Olympic Committees can afford lawyers if the need arises. Some even bring their own lawyers to the host city and have them standing by during the Games. However, the Olympic Games are truly universal, and many competing nations and most athletes do not have the means to represent themselves in such a specialized setting, abroad, and particularly on such short notice.

I. The Rio Olympics Pro Bono Team

With this situation in mind, and given the importance of conflict resolution in the Olympic context, a team of local *pro bono* lawyers was organized to assist athletes during the Rio 2016 Games. The Arbitration Commission of the Rio de Janeiro Bar Association gathered a group of lawyers specialized in arbitration with the mission of working *pro bono* for unrepresented athletes or federations before the CAS Ad Hoc and Anti-Doping Divisions. The list of the 24 lawyers involved in this initiative can be seen at the website of the Rio de Janeiro Bar Association: <http://www.oabRJ.org.br/noticia/101088-legado-juridico-advogados-ja-atuam-como-voluntarios-nos-jogos-olimpicos->

The selection of the 24 lawyers was by invitation. Complete fluency in English and/or French, the two official languages of the CAS, was mandatory. These lawyers would have to interview clients, review evidence, draft papers and hold hearings in a very short timeframe and all this work would be in English or French. Experience in arbitration was also a very important factor, so that they would not have to learn

everything from scratch. Preference was given to the younger generation, lawyers in their 20s and 30s. Involvement in this project meant a commitment to make oneself available and to be able to work hard during the Olympic Games, so anyone planning to travel or to take time off or who had a tight schedule could not participate. Fortunately, the Arbitration Commission of the Rio de Janeiro Bar Association was able to assemble a group of exceptionally talented and qualified lawyers, who performed outstandingly in the cases they worked on.

During the first quarter of 2016, months before the Opening Ceremony in the iconic Maracanã Stadium, the Rio de Janeiro Bar Association organized various training sessions for the lawyers who would work *pro bono* during the Games. With the help of the CAS, a local specialized law firm (Bichara e Motta Advogados) and the CBMA (Brazilian Center of Mediation and Arbitration), a number of seminars and lectures were held with the participation of staff and arbitrators from the CAS and lawyers with experience in CAS arbitrations, so that the *pro bono* lawyers could acquaint themselves with the peculiarities of sports arbitration and understand the cases that were arbitrated before the Ad Hoc Division in past Olympic Games.

The Rio de Janeiro Bar Association's *pro bono* team was divided into four groups, with six lawyers per group. Lawyers had to be available at all times throughout the period of jurisdiction of the CAS Ad Hoc and Anti-Doping Divisions, a timeframe of four weeks. One of the four groups remained on call each week to ensure full availability. The three coordinators of the team were each responsible for one of the first three weeks, and all coordinators worked together for the last week. Experience from past Games showed a higher number of cases early

on and close to the end, a pattern that was repeated in Rio.

II. The Pro Bono Team's Cases

During the Games, the *pro bono* team ended up acting in four cases, representing athletes from South Sudan, Vanuatu, China and Kyrgyzstan. The work could hardly be more international.

The first case worked on by the *pro bono* team dealt with the nomination of Mangar Makur Chuot Chep, who was to compete for South Sudan in the men's 200m running event. The South Sudan Athletics Federation nominated Mr. Chep to be one of its representatives in Rio. However, the country's National Olympic Committee ultimately did not include his name on its list, and instead listed female sprinter Margret Hassan (for a different event), even though she was not the country's fastest female sprinter and her athletic performance in the 12 months before the Olympic Games did not match that of Mr. Chep. The Secretary General of South Sudan's National Olympic Committee admitted in the press that the replacement was due to the fact that Ms. Hassan was the star of a TV commercial for a major multinational corporation.

As a result of not being listed by his National Olympic Committee, Mr. Chep's South Sudanese Olympic Committee credentials were withdrawn and he could not travel to Rio de Janeiro. On July 31, 2016, less than one week before the Opening Ceremony of the Games, Mr. Chep, who was still in Australia, where he lives, filed a complaint on his own by email and then contacted the *pro bono* team by telephone. A group of nine lawyers worked on the case, and after a five-hour hearing at the CAS's headquarters in Rio, including oral arguments and the examination of witnesses, including Mr. Chep's testimony by telephone, his case was eventually dismissed. The arbitral tribunal found that under the applicable rules the National Olympic Committee had discretion to select the athletes that would compete and had not abused its discretion. The whole case, a consolidation of two arbitrations (CAS OG

16/05 and 16/07), took a total of 83 hours and 30 minutes, from start to finish.

In a second case that was handled by the same group of lawyers, because it arose in the same week they were on duty, the *pro bono* team represented a beach volleyball female duo from Vanuatu, in the Pacific Ocean. The case revolved around the Vanuatu players' claim to replace an Italian team because an athlete from an Italian double had tested positive for doping, a result that was confirmed on August 3, 2016. The Vanuatu team was the next team in the Olympic rankings. The *pro bono* team acted within a few hours. The first contact from the Vanuatu representative was made at 11:00 p.m. on August 4. The submission was drafted through the night and filed at 5:30 a.m. on August 5, given that the athletes had to immediately fly from Vanuatu to Rio to compete if they succeeded before the CAS. The sole arbitrator determined that the Italian athlete who tested positive could be replaced by another Italian national, and the Vanuatu case was also dismissed. The decision was issued less than four hours after the submission, illustrating the impressive response time of the CAS Ad Hoc Division.

The two other cases the *pro bono* lawyers were involved in were related to doping. Chinese swimmer Xinyi Chen, who won 4th place in the women's 100m butterfly, was disqualified following a positive doping test. She voluntarily agreed to her disqualification and to a provisional suspension in a hearing before the CAS Anti-Doping Division she attended without counsel. Her trainer then contacted the *pro bono* team, and a group of 10 lawyers was assigned to the case. Within a couple of days the lawyers drafted papers, tested numerous samples in local laboratories, interviewed and hired experts from Brazil, China and the USA, and attended a hearing that lasted eight hours, including the examination of its own experts and those of WADA, the international anti-doping organization. Her disqualification from the Olympics stood, but the suspension from other competition was lifted pending a new analysis of the situation by the international swimming federation,

FINA, so Chen is able to continue to compete in the meantime (CAS OG AD 16/05).

The last case came up very late, when the coordinators of the *pro bono* team were contacted by phone the night before the Closing Ceremony, in the middle of the celebrations for Brazil's men soccer gold medal. Weightlifter Izzat Artykov of Kyrgyzstan, the bronze medalist in the 69kg category, tested positive for doping, was disqualified and had his medal removed. Considering the CAS Ad Hoc Division would be dissolved the following day, and the athlete was already back in his country in Asia, there was no time to secure a hearing in Rio. The *pro bono* lawyers filed an appeal the next day, a Sunday, the last day of the Olympics, to make sure the athlete's rights were preserved, but his case was referred to the regular standard proceedings of the CAS in Lausanne, and the *pro bono* lawyers had no further involvement in his case (CAS OG AD 16/07).

Cases before the CAS Ad Hoc Division and the Anti-Doping Division during the Olympic Games are tough by nature. They are frequently about an athlete challenging a prior decision of some well-recognized body (his/her own committee or an international federation, for example). These cases are always uphill battles to be prepared and argued in a hurry, which is not easy at all. For the group of Brazilian lawyers who had the opportunity to take part in the *pro bono* program and appear before the CAS Ad Hoc Division and Anti-Doping Division during the Rio 2016 Games, it was all a truly amazing and unique experience.

The Arbitration Commission of the Rio de Janeiro Bar Association is proud to have organized this *pro bono* program. It delivered high-quality professional services to athletes in need, and it also left a true Olympic legacy among local practitioners who had the chance to be trained and get acquainted with sports arbitration at its best. The Summer Olympic Games will move to Tokyo in 2020, but in the meantime a new generation of lawyers from Rio de Janeiro will be ready and able to enter the new, exciting and growing market of sports arbitration.

Joaquim de Paiva Muniz, Rodrigo Garcia da Fonseca and Ricardo Loretti Henrici are attorneys based in Rio de Janeiro and admitted to practice in Brazil. All three are officers of the Arbitration Commission of the Rio de Janeiro Bar Association and directors of the Brazilian Center of Mediation and Arbitration (www.cbma.com.br). They were the coordinators of the Rio 2016 Olympics Pro Bono Arbitration Counsel Program.

Arbitrating Anti-Doping Disputes in Professional Tennis

Andrew B. Loewenstein and Peter R. Shults

I. Introduction

On January 26, 2016, after losing to Serena Williams in the quarterfinals of the Australian Open, Russian tennis star Maria Sharapova was drug tested pursuant to the rules of the International Tennis Federation (ITF). Sharapova's sample tested positive for Meldonium, a substance that became prohibited less than a month earlier, on January 1, 2016. On June 6, 2016, a three-member tribunal appointed by the ITF suspended Sharapova from participating in professional tennis tournaments for two years. The ruling hit the tennis world by storm and made international headlines. Sharapova admitted that she used Meldonium but contested her suspension, appealing the ITF tribunal's ruling to the Court of Arbitration for Sport (CAS). On October 4, 2016, the CAS, after finding that Sharapova was not at significant fault for her anti-doping violation, reduced her suspension to 15 months.

Sharapova arbitrated her anti-doping dispute with the ITF through all adjudicative levels available to professional tennis players: an ITF Review Board, which reviews a player's positive test for a prohibited substance and makes an initial determination as to whether the player has committed an anti-doping violation; an Independent Tribunal, which conducts proceedings, determines whether the player has committed a violation, and decides the length (if any) of the player's suspension; and ultimately, the CAS, which has final authority to decide whether players have committed anti-doping violations and to impose disciplinary measures.

This article uses Sharapova's case to illustrate the anti-doping rules and testing protocols to which

professional tennis players are subject and as a lens through which to examine the process for adjudicating anti-doping disputes in professional tennis.

II. The Anti-Doping Rules

The ITF is the governing body of professional tennis. Players who compete in professional tournaments are subject to the 240 pages of drug-testing policies and procedures found in the ITF's Tennis Anti-Doping Programme 2016. The Anti-Doping Programme sets out a player's anti-doping responsibilities; defines anti-doping violations; lists prohibited substances and methods; and explains the process for applying for a therapeutic use exemption that allows use of an otherwise prohibited substance. The Anti-Doping Programme also establishes the methods for drug testing and sample analysis, imposes confidentiality rules, and provides an adjudication process for disputes.

The Anti-Doping Programme mandates that it is the "sole responsibility of each Player . . . to acquaint him/herself" with all of its requirements.¹ These rules are complex. The Anti-Doping Programme is implemented "pursuant to the mandatory provisions" of the World Anti-Doping Code and incorporates "the Anti-Doping Rule Violations identified" therein, "based on the List of Prohibited Substances and Prohibited Methods" maintained by the World Anti-Doping Agency (WADA). Players must thus be familiar with both the World Anti-Doping Code and List of Prohibited Substances and Methods, in addition to the ITF's Anti-Doping Programme.

¹ International Tennis Federation, Tennis Anti-Doping Programme 2016 art. 1.12.1 ("Anti-Doping Programme"),

available at <http://www.itftennis.com/media/224382/224382.pdf>.

Players may be tested in and out of competition, and many must provide daily or hourly whereabouts information to the agency in charge of testing. A player may be subject to testing by both WADA and by the player's National Anti-Doping Agency, which may have different requirements. An American player, for instance, may be subject to testing by WADA and the U.S. Anti-Doping Agency.

Players found to have committed anti-doping violations may lose prize money, have results disqualified, and forfeit ranking points. Most significantly, they face lengthy suspensions, the duration of which is determined by the type of anti-doping violation and the player's degree of fault. If, for instance, the violation involves a "Specified Substance"² and the player can establish No Significant Fault or Negligence, the period of ineligibility is between none and two years, depending on the player's degree of fault. If the violation does not involve a Specified Substance, even if a player can establish No Significant Fault or Negligence, the "period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable."

III. The Adjudication Process

The ITF Review Board

When a player tests positive for a prohibited substance, a three-member ITF Review Board determines such matters as whether the player has a valid therapeutic use exemption that covers the prohibited substance; whether the player has applied for a retroactive therapeutic use exemption or may want to do so; and whether there was a departure from the International Standard for Testing that may have caused the positive test. If the Review Board

determines that the player has committed an anti-doping violation, it sends the player a Notice of Charge that lists the alleged violation, the consequences, and the player's rights (including the right to respond to the charge).

The ITF Independent Tribunal

If the player does not admit to the anti-doping violation or does not submit to the full consequences for the violation, the dispute is referred to an Independent Tribunal, the members of which are selected by the ITF. The player also is provisionally suspended unless he or she can show cause for why a provisional suspension should not be imposed. The Tribunal conducts a hearing in which each side may submit evidence and call witnesses. The Tribunal is not bound by judicial rules regarding the admissibility of evidence. The ITF bears the burden of proving that the player committed an anti-doping violation "to the comfortable satisfaction of the Independent Tribunal, bearing in mind the seriousness of the allegation that is made." This standard is "greater than a mere balance of probability but less than proof beyond a reasonable doubt." Within 14 days after the hearing's conclusion, the Tribunal must issue a written decision setting out its findings as to whether the player committed an anti-doping violation and, if so, the punishment. Subject to an appeal to the CAS, the Tribunal's ruling is full, final, and binding on all parties.³

The Court of Arbitration for Sport

The parties may appeal an Independent Tribunal's decision exclusively to the CAS.⁴ An appeal must commence within 21 days from the date of receipt of the Tribunal's decision.⁵ The CAS's jurisdiction is

² All prohibited substances are Specified Substances except (a) anabolic agents and hormones and (b) stimulants and hormone antagonists and modulators, as identified on the Prohibited List. *Id.* art. 3.4.

³ *Id.* arts. 7-8.

⁴ If the parties agree, charges asserting anti-doping violations may be heard directly by the CAS without first being heard by an Independent Tribunal. *Id.* art. 8.9.

⁵ The World Anti-Doping Agency has a longer deadline in which it can appeal. *Id.* art. 12.5.2.

based on Rule 47 of its Code of Sports-related Arbitration, which states that “[a]n appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide.” In an appeal of a Tribunal’s decision, English law governs subsidiarily to the Anti-Doping Programme’s rules and regulations,⁶ the CAS’s Code of Sports-related Arbitration applies, and the scope of review includes all issues relevant to the matter. The CAS does not need to give deference to the Tribunal’s decision, and, as in Sharapova’s case, it has often imposed shorter suspensions than have Tribunals. Prior to its decision in Sharapova’s case, the CAS, for instance, reduced tennis players’ suspensions from 18 to 12 months;⁷ from nine to four months;⁸ from 12 to eight months;⁹ and from 24 to 15 months.¹⁰ The CAS’s decision is final and binding.¹¹

IV. Sharapova’s Anti-Doping Dispute

Sharapova’s History with Meldonium

On March 2, 2016, Sharapova received a Notice of Charge from the ITF that she presumptively had committed an anti-doping violation by testing positive for Meldonium, a substance that became prohibited on January 1, 2016. According to the ITF’s subsequently-constituted Independent Tribunal, which heard witness testimony and reviewed evidence presented by the parties, Sharapova began taking Meldonium through one of its brand names, Mildronate, in 2006 on the advice of Dr. Anatoly Skalny. The Tribunal found that Mildronate generally is prescribed by cardiologists to treat ischemic heart disease and cerebrovascular disorders and that it “acts as a metabolic modulator”

to enhance an athlete’s performance by positively affecting energy, metabolism and stamina.¹²

The Tribunal determined that, at the age of 18, Sharapova had visited Dr. Skalny because she had frequent cold-related illnesses, tonsil issues, and upper abdomen pain. Dr. Skalny concluded Sharapova had a mineral metabolism disorder, insufficient nutrient supply, and other abnormalities, and he recommended a regime of 18 medications and supplements, including Mildronate. By 2010, on Dr. Skalny’s recommendation, Sharapova was taking 30 substances. Although the Tribunal critiqued Dr. Skalny’s recommendation that Sharapova take Mildronate even though she did not have a cardiac condition, it found “no basis for criticising” her decision “to accept and act upon the clinical judgment of a reputable expert in the field of mineral imbalances.” The Tribunal concluded that Sharapova “did not seek treatment from Dr. Skalny for the purpose of obtaining any performance enhancing substances, but for the treatment of her recurrent viral illnesses.”¹³

At the end of 2012, Sharapova stopped seeing Dr. Skalny. She retained a nutritionist, and although she ceased following the 30-substance-regime that he had recommended, she continued to take Mildronate. The Tribunal found that Sharapova “did not seek any advice about the therapeutic need to continue using Mildronate,” did not inform her nutritionist that she was taking Mildronate, and did not disclose her use of Mildronate to the medical practitioners who treated her between 2012 and 2015, except to the team doctor of the Russian Olympic Team. Nor, the Tribunal found, did she inform her coach, trainer, physiotherapist, nutritionist, or the doctors she consulted through the Women’s Tennis Association.

⁶ In her appeal to the CAS, Sharapova argued that Swiss law governed, but the CAS, following Article 12.6.4 of the Anti-Doping Programme, held that English law governs, subsidiarily to the Anti-Doping Programme’s rules and regulations. See *Sharapova v. ITF* ¶ 72 (CAS 2016/A/4643).

⁷ *Troicki v. ITF* (CAS 2013/A/3279).

⁸ *Cilic v. ITF* (CAS 2013/A/3327).

⁹ *Kendrick v. ITF* (CAS 2011/A/2518).

¹⁰ *Kutrovsky v. ITF* (CAS 2012/A/2804).

¹¹ Anti-Doping Programme art. 12.6.7.

¹² *ITF v. Sharapova*, ITF Independent Tribunal, ¶¶ 1-20 (June 6, 2016).

¹³ *Id.* ¶¶ 15-25.

By the end of 2015, Sharapova was continuing to take 500 mg of Mildronate on match days.¹⁴

Absence of a Therapeutic Use Exemption

Under the Anti-Doping Programme, the presence of a prohibited substance in a player's sample constitutes an anti-doping violation unless the player has a therapeutic use exemption that allows use of the substance to treat a diagnosed medical condition. Sharapova did not have a therapeutic use exemption for Meldonium. Nor did she argue to the Independent Tribunal or to the CAS that she should have received a retroactive exemption after testing positive for the substance, which can be granted when the ITF and WADA agree that "fairness" so requires.¹⁵ Thus, Sharapova was determined to have committed an anti-doping rule violation under Article 2.1 of the Anti-Doping Programme.¹⁶

Significant Fault or Negligence

Meldonium is not a "Specified Substance" under the Anti-Doping Programme. For a first anti-doping violation concerning a non-Specified Substance, a player is suspended for four years "unless the Player or other Person establishes that the Anti-Doping Rule Violation was not intentional." If so, the player is suspended for two years. Additionally, if the player establishes that he or she does not bear significant fault or negligence, the suspension may be further reduced to a minimum of one year. Players who establish they bear no fault or negligence are not suspended.

The Independent Tribunal concluded that Sharapova did not know in January 2016 that Meldonium had become a prohibited substance and that she had *not*

intentionally committed an anti-doping violation. The main issue was thus whether Sharapova could establish that she did not have significant fault or negligence, which would allow her suspension to be reduced to less than two years.

Sharapova argued that she did not bear significant fault or negligence because the ITF had failed to warn her properly that Meldonium had been added to the 2016 Prohibited List. The Tribunal disagreed. Article 3.1.2 of the Anti-Doping Programme provides that it is "the responsibility of each Player and each Player Support Personnel to be familiar with the most current version of the Prohibited List." Although Article 3.1.3 states that "the ITF shall take reasonable steps to publicise any amendments made by WADA to the Prohibited List" and Article 4.1 of the World Anti-Doping Code imposes on the ITF the duty to "take appropriate steps to distribute" the Prohibited List, the Tribunal concluded that the ITF had fulfilled these obligations by, on December 7, 2015, publishing on its website WADA's summary of modifications to its Prohibited List and by publicizing the full 2016 Prohibited List via its website and on wallet cards which it distributed to players.¹⁷

The Tribunal also rejected Sharapova's argument that she did not bear significant fault or negligence because she had taken reasonable steps to ascertain that Mildronate was not on the Prohibited List.¹⁸ In particular, Max Eisenbud, Sharapova's manager and a Vice President of IMG (a major sports management firm), testified that in 2013 he assumed responsibility for checking Sharapova's medications and supplements against the Prohibited List and that each year he printed a copy that he took with him on vacation to the Caribbean in November, where he checked Sharapova's medications and supplements

¹⁴ *Id.* ¶¶ 26-31.

¹⁵ Anti-Doping Programme art. 3.5.2; *see also id.* app'x 4, pt. 2. If the retroactive therapeutic use exemption is granted, it is as though the player had the exemption at the time of the positive drug test, such that no anti-doping rule violation for the covered substance(s) is deemed to have occurred. *Id.* art. 7.5.2.

¹⁶ The CAS's award noted that Sharapova requested a therapeutic use exemption but that the ITF rejected the request, which "in part precipitated her appeal." *Sharapova v. ITF* ¶ 93 (CAS 2016/A/4643).

¹⁷ *ITF v. Sharapova*, ITF Independent Tribunal, ¶ 83.

¹⁸ *Id.* ¶ 85.

against the Prohibited List. He testified that in November 2015 he did not travel to the Caribbean and thus did not review the 2016 Prohibited List.

The Independent Tribunal refused to credit this explanation:

*The tribunal is not required to accept evidence which it finds wholly incredible. The idea that a professional manager, entrusted by IMG with the management of one of its leading global sporting stars, would so casually and ineptly have checked whether his player was complying with the anti-doping programme, a matter critical to the player's professional career and her commercial success, is unbelievable.*¹⁹

In determining Sharapova's degree of fault, the Independent Tribunal gave weight to the fact that, between October 22, 2014, and January 26, 2016, Sharapova had completed seven doping control forms that required her to list "any prescription/non-prescription medications or supplements, including vitamins and minerals" which she had taken over the prior seven days. Sharapova had not disclosed her use of Mildronate on these forms even though, according to the Tribunal, the evidence indicated that on at least four occasions she had taken Mildronate within the seven-day period. The Tribunal declined to accept her explanation that she had understood the form to require her to list only medications or supplements that she had taken on each of the prior seven days, holding that "[t]he wording of the doping control form was clear and could not reasonably be misunderstood" and that she "must have known that taking a medication before a match, particularly one not currently prescribed by a doctor, was of considerable significance." The Tribunal concluded that she had made a "deliberate decision, not a mistake," and that her concealment "was a very serious breach of her duty to comply with the rules." It thus held that Sharapova was unable to prove "that she exercised any degree of diligence, let alone

utmost caution, to ensure that her ingestion of Mildronate did not constitute a contravention." The Tribunal imposed the full two-year suspension for an unintentional anti-doping violation.²⁰

The Decision of the Court of Arbitration for Sport

Sharapova exercised her right to appeal the Independent Tribunal's decision to the CAS. In such appeals, the CAS observed, it is "not bound by the findings of the Tribunal, however well reasoned they are," and the CAS "has full power to examine *de novo* the Player's actions, and the evidence before it, in order to verify whether the Player's plea of [no significant fault], dismissed by the Tribunal, is grounded or not."²¹

In conducting its *de novo* review, the CAS held that, "except as otherwise specifically indicated," it "has determined that it does not agree with many of the conclusions of the Tribunal." In particular, the CAS disagreed with the Tribunal's conclusion that Sharapova bore significant fault for her anti-doping violation. The CAS determined that, even though Article 2.1.1 of the Anti-Doping Programme mandates that it is the player's "personal duty to ensure that no Prohibited Substance enters his/her body," Sharapova could delegate this responsibility to someone else. The CAS found that Sharapova's delegation of this responsibility to Eisenbud was reasonable in light of his senior position at IMG. It also found that Sharapova justifiably had a reduced perception of the risk that Meldonium was a prohibited substance because (1) she had been taking the drug for 10 years without any anti-doping issue; and (2) the ITF had not specifically warned players about the change in status of Meldonium. For these reasons, the CAS held that Sharapova did not bear significant fault or negligence for her anti-doping violation.²²

¹⁹ *Id.* ¶ 61.

²⁰ *Id.* ¶¶ 89-92.

²¹ *Sharapova v. ITF* ¶ 63 (CAS 2016/A/4643).

²² *Id.* ¶¶ 78-94.

The CAS could have reduced Sharapova's suspension to as little as 12 months. Instead, it held that Sharapova's fault was greater than the minimum degree of fault within the no-significant-fault-or-negligence zone because Sharapova did not discuss with Eisenbud how to ensure that she was meeting her anti-doping obligations and did not monitor Eisenbud's actions in taking on this responsibility. The CAS also noted that Sharapova did not disclose her use of Meldonium on the anti-doping control forms she filled out. In contrast to the Tribunal, the CAS emphasized that Sharapova "did not endeavor to mask or hide her use of Mildronate and was in fact open about it to many in her entourage." The CAS made clear that Sharapova's case "was not about an athlete who cheated," and "under no circumstances" could Sharapova "be considered to be an 'intentional doper.'"²³ The CAS thus determined that, in the circumstances, a 15-month suspension was appropriate.²⁴

V. Observations

Sharapova's is the most high-profile anti-doping case in tennis to date, but it is not the only one where significant discipline has been imposed for an unintentional violation.²⁵ The consequences for such unintentional violations are severe. In addition to reputational harm, lost prize money, and the inability to compete, suspensions can have other significant financial consequences. Sharapova, for example, is reported to have lost tens of millions of dollars in endorsements.²⁶

Sharapova's case highlights the importance of undertaking the significant effort that complying with the ITF's anti-doping rules requires. Although the ITF published the 2016 Prohibited List and the summary of modifications on its anti-doping website, and it sent Sharapova and other players emails with

links to the website, it did not highlight those links or explain the changes that had been made in the 2016 Prohibited List. Thus, to learn that Meldonium had been added, a player such as Sharapova would need to visit the ITF's anti-doping website and review the myriad generic substances listed there to find Meldonium. The player would also have to review the summary of modifications to the 2016 Prohibited List to learn that Mildronate contains Meldonium.

Players may delegate compliance-related tasks, but doing so does not absolve them of their own responsibility. To protect themselves, they should, at a minimum, ensure that the person to whom they assign responsibility is a reasonable choice and take actions to supervise and direct that person's actions. The most elite players in professional tennis have advisors to help them comply with the anti-doping rules and procedures. The vast majority of professional players, however, do not have such an entourage. They must therefore navigate this regulatory system alone, with potentially career-ending consequences for even unintentional violations of its complex rules.

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²³ *Id.* ¶¶ 100-01.

²⁴ *Id.* ¶¶ 95-98.

²⁵ See, e.g., *Cilic v. ITF* (CAS 2013/A/3327) (glucose powder); *Troicki v. ITF* (CAS 2013/A/3279) (failure to consent to blood

testing); *Kendrick v. ITF* (CAS 2011/A/2518) (medication for jet lag).

²⁶ Lara O'Reilly, *Maria Sharapova Is Losing Sponsorship Deals Worth Tens of Millions of Dollars After Her Failed Drug Test*, BUSINESS INSIDER (Mar. 8, 2016).

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Dutee Chand v. Athletics Federation of India & the International Association of Athletics Federations

CAS Case Note

Raphaëlle Favre Schnyder

I. Introduction

When is a female athlete not female enough for women's competition, and who gets to decide this thorny question of fairness in sports? The case of *Dutee Chand v. Athletics Federation of India* ("AFI") & The International Association of Athletics Federations ("IAAF") concerns a challenge by Ms. Dutee Chand to the validity of the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations")¹.

The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally-occurring (endogenous) testosterone to participate in competitive athletics. In particular, pursuant to Article 6.5 of the Hyperandrogenism Regulations, an Expert Medical Panel shall recommend that an athlete "is eligible to compete in women's competition if: (i) she has androgen levels below the normal male range; or (ii) she has androgen levels within the normal male range but has an androgen resistance such that she derives no competitive advantage from having androgen levels in the normal male range."² For the purposes of Article 6.5, androgen levels are measured by the levels of Total Testosterone in serum. Normal male range Total Testosterone levels are ≥ 10 nmol/L.

¹ IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition, dated 1 May 2011.

² Hyperandrogenism Regulations Art. 6.5: The Expert Medical Panel shall recommend that the athlete is eligible to compete in women's competition if: (i) she has androgen levels below the normal male range; or (ii) she has androgen levels within the

In this case, Ms. Chand challenged the Hyperandrogenism Regulations on the basis that: (a) they discriminate unlawfully against female athletes and against athletes who possess a particular natural physical characteristic; (b) they are based on flawed factual assumptions about the relationship between testosterone and athletic performance; (c) they are disproportionate to any legitimate objective; and (d) they are an unauthorized form of doping control. The IAAF rejected each of those arguments.

II. Background of the Case

Dutee Chand is a young female athlete born in 1996 in Orissa, India. She has won a number of national and international junior athletics events, including gold medals in the 200 m sprint at the Asian Junior Track and Field Championships in Taipei in May 2014.³

After a series of medical examinations, the AFI informed Ms. Chand, by letter dated 29 August 2014, that she was "provisionally stopped from participating in any Competition in athletics with immediate effect" and advised her to "follow the annexed IAAF Guidelines to be eligible for participation," thereby referring to the Hyperandrogenism Regulations.

Ms. Chand requested a revocation of the AFI's decision, considering that she was "born a woman,

normal male range but has an androgen resistance such that she derives no competitive advantage from having androgen levels in the normal male range.

³ CAS 2014/A/3759, para. 27.

reared up as a woman,” that she identified herself as a woman and that she believed she should be allowed to compete with other women, many of whom are either taller than her, or from more privileged backgrounds, without having to “undergo medical intervention” to reduce her “naturally-produced androgen level.”⁴ After the AFI declined to revoke the suspension, Ms. Chand filed an appeal with the CAS on 26 September 2016, naming both the AFI and the IAAF as respondents.⁵ In her appeal, Ms. Chand requested the CAS to declare the Hyperandrogenism Regulations invalid and void and to overturn the AFI’s decision and clear her to compete.⁶ The second prayer for relief was subsequently dropped leaving the CAS panel to decide only the issue of the validity of the Hyperandrogenism Regulations.⁷

III. The Issues Examined

As a preliminary matter, the CAS allocated to the IAAF the burden of proof on the issue of whether the discrimination is justified, after the IAAF conceded that the Hyperandrogenism Regulations apply only to female athletes and place restrictions on eligibility solely on the basis of natural physical characteristics (namely the amount of testosterone that a woman’s body produces naturally) and are thus *prima facie* discriminatory.⁸

The second issue addressed by the panel was the scientific basis for the Hyperandrogenism Regulations.⁹ After having heard a number of experts and witnesses, the panel came to the conclusion that Ms. Chand had “not established that testosterone is not a material causative factor in athletic ability or

sports performance”. The panel further determined that she had not “met her onus, on the balance of probabilities, of establishing that exogenous testosterone [e.g., supplemental testosterone] has a different effect on athletic performance than endogenous testosterone [naturally-occurring testosterone].”¹⁰ Hence, the panel was satisfied that, “to the requisite standard of proof, there is a scientific basis in the use of testosterone as a marker for the purposes of the Hyperandrogenism Regulations.”¹¹

The issue of proportionality was raised both as a freestanding ground of challenge and in relation to the specific question of whether the IAAF can justify the discriminating effect of the Hyperandrogenism Regulations recognized in issue 1.¹² Having held that levels of endogenous testosterone are a key biological indicator of the difference between male and female, the panel considered that this is not the use to which endogenous testosterone is put under the Hyperandrogenism Regulations.¹³ The issue was therefore whether the IAAF could justify the existence of a rule that excludes certain women from competing in the female category on the basis of a natural physical characteristic. After hearing numerous witnesses and experts, the panel accepted that exogenous testosterone enhances athletic performance in both male and female athletes. The panel reiterated its finding that Ms. Chand had failed to prove that exogenous and endogenous testosterone have different effects on the body. However, the panel also determined that, while elevated endogenous testosterone may have some performance-enhancing effect, this was not sufficient “to justify excluding an individual from competing in

⁴ CAS 2014/A/3759, para. 29.

⁵ CAS 2014/A/3759, paras. 75 and 76.

⁶ CAS 2014/A/3759, para. 104.

⁷ CAS 2014/A/3759, para. 105.

⁸ CAS 2014/A/3759, paras. 112-118 and 448 to 450. The panel held that the onus shifts to the IAAF to establish that the Hyperandrogenism Regulations are necessary, reasonable and proportionate for the purpose of establishing a level playing field for female athletes.

⁹ CAS 2014/A/3759, paras. 119 to 228 and 451 to 499.

¹⁰ CAS 2014/A/3759, para.498.

¹¹ CAS 2014/A/3759, para. 499.

¹² CAS 2014/A/3759, paras. 229 to 356 and 500 to 538.

¹³ CAS 2014/A/3759, para. 511: The Hyperandrogenism Regulations are not “being used to determine whether an athlete should compete either as a male or as a female. Instead, [the regulations are] being used to introduce a new category of ineligible female athletes within the female category. The necessity and proportionality of that restriction therefore requires particularly careful analysis.”

a particular category on the basis of a naturally occurring characteristic”.¹⁴ In particular, the panel found that the IAAF has not established that “the characteristic in question confers such a *significant performance advantage* over other members of the category that allowing individuals with that characteristic to compete would subvert the very basis for having the separate category and thereby prevent a level playing field.”¹⁵

As for the fourth issue, Ms. Chand argued that the Hyperandrogenism Regulations constituted an impermissible form of doping control. The panel addressed this argument only briefly before rejecting it, reasoning that the regulations are eligibility rules and are not framed in terms of prohibiting conduct or specifying sanctions to be imposed in case of violations.¹⁶

Hence, the CAS panel issued an interim award suspending the Hyperandrogenism Regulations for two years pending a demonstration by the IAAF that androgen-sensitive women with atypically high serum testosterone levels enjoy such a substantial performance advantage that their participation in women’s competition is unfair.

The panel’s decision to issue an interim award temporarily suspending the Hyperandrogenism Regulations has allowed Ms. Chand and other similarly-situated athletes to compete in the female category.¹⁷ The IOC’s reaction to the panel’s interim award was to convene a Consensus Meeting on Sex Reassignment and Hyperandrogenism in November 2015, where the IOC stated that rules should be in place for the protection of women in sport and for the promotion of the principles of fair competition.¹⁸ The IOC further stated that, to avoid discrimination, an athlete who is not eligible for women’s competition should be allowed to compete in men’s competition.

However, the issue having not been decided upon definitively by the CAS panel, and the IAAF having announced its intention to return to the CAS after consultations with its expert and the IOC, the story will continue. For the time being, for lack of persuasive scientific evidence, there is no conclusive answer possible to the difficult legal and ethical question of when a female athlete is not female enough for competition.¹⁹

¹⁴ CAS 2014/A/3759, para. 528.

¹⁵ CAS 2014/A/3759, paras. 528 and following, in particular 532: “On the basis of the evidence currently before the Panel, the Panel is unable to conclude on the balance of probabilities that androgen-sensitive hyperandrogenic female athletes enjoy such a substantial performance advantage over non-hyperandrogenic female athletes that excluding them from competing in the female category, and thereby excluding them from competing at all unless they take medication or undergo treatment, is a necessary and proportionate means of preserving fairness in athletics competition and/or policing the binary male/female classification. In particular, while the evidence indicates that higher levels of naturally occurring testosterone may increase athletic performance, the Panel is not satisfied that the degree of that advantage is more significant than the advantage derived from the numerous other variables which the parties acknowledge also affect female athletic performance: for example, nutrition, access to specialist training facilities and coaching, and other genetic and biological variations. Further evidence as to the quantitative relationship between androgen levels in hyperandrogenic

females and increased athletic performance is therefore required before the IAAF can discharge its onus of establishing that the Hyperandrogenism Regulations are a necessary and proportionate means of achieving the IAAF’s stated objective.”

¹⁶ CAS 2014/A/3756, paras. 357 to 368 and 539 to 546.

¹⁷ Dutee Chand qualified for the Rio 2016 Olympics where she finished seventh in the women’s 100 m heat with a time of 11.69 seconds. She therefore did not qualify for the 100 m semi-final.

¹⁸ IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, November 2015.

¹⁹ For additional information about the Dutee Chand case and its implications, see, e.g., Cindy Boren, For Two Olympians, a Humiliating Journey to Rio Filled with Gender-Questioning, WASHINGTON POST (16 August 2016), *available at*: <<https://wpo.st/hJNd2>>; Ruth Padawer, The Humiliating Practice of Sex-Testing Female Athletes, NEW YORK TIMES (28 June 2016), *available at*: <<https://nyti.ms/2kjCMna>>; Olympians Divided About Women with High Testosterone Levels, Associated Press (17 August 2016), *available at*:

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<<http://bigstory.ap.org/article/e734bf253b164f37a22e943af0fb911f/caster-semenya-enters-olympics-questions-go-unanswered>>; Jeré Longman, Understanding the Controversy Over Caster Semenya, NEW YORK TIMES (18 August 2016), available at: <<https://nyti.ms/2kpriT9>>; Chased by Controversy: A Timeline of Caster Semenya's Career,

Associated Press (21 August 2016), available at: <<http://bigstory.ap.org/article/3da46623e1f24452a91233b26b174470/chased-controversy-timeline-caster-semenyas-career>>; Associated Press, Transgender Athletes Can Now Compete in Olympics Without Surgery, NEW YORK TIMES (25 Jan. 2016), available at: <<https://nyti.ms/2lxuTMu>>.

The Case of Narsingh Yadav – An Introduction to the Doping Cases Before the CAS Divisions at the Rio Olympic Games and the World-Wide Anti-Doping System

Nicolas Klein and Shivam Singh

I. Introduction

Leading up to the Rio Olympic Games it was obvious that doping would be one of the most prevalent and heatedly discussed subjects. The world-wide fight against doping seems to present sports federations, anti-doping agencies and athletes with an ever-increasing multitude of political, financial, ethical and last but certainly not least legal challenges. Consequently, it is not surprising that also the majority of cases dealt with by the Divisions of the Court of Arbitration for Sport (CAS) during the Rio Games were related to doping in one way or the other.¹ In this contribution we would thus like to place a special focus on the doping case of Indian wrestler Narsingh Yadav in order to illustrate the functioning of the current world-wide anti-doping system and its omnipresent institutional and legal challenges.²

II. Reform in Practice: The CAS Anti-Doping Division

Since its creation the CAS has formed an integral part of the world-wide fight against doping.³ In 2016, however, the Rio Olympic Games were of particular interest to sports arbitration and anti-doping practitioners alike, because the Rio Games marked the first time in the history of the CAS that the international sports tribunal was in charge of doping-related matters arising out of the Olympic Games as a first instance authority, through its newly-established CAS Anti-Doping Division (ADD).⁴

The International Council of Arbitration for Sport (ICAS), which is the supervising authority of CAS, adopted the CAS Arbitration Rules applicable to the CAS ADD on 18 April 2016, just prior to the Rio Games.⁵ The creation of the CAS ADD was concluded in order to delegate to the CAS, as an independent judicial body, the adjudication of alleged

¹ For an overview of the CAS Divisions' activities at the Rio Games, see CAS Report on the activities of the CAS Divisions at the 2016 Rio Olympic Games, available at: <http://www.tas-cas.org/fileadmin/user_upload/Report_on_the_activities_of_the_CAS_Divisions_at_the_2016_Rio_Olympic_Games__short_version__FINAL.pdf> (last seen on 20.09.2016).

² Although many eligibility cases decided by the CAS Divisions, particularly with regard to the eligibility of Russian athletes, could also be construed to be doping cases, in this article we refer to doping cases only as those cases in which direct anti-doping rule violations (ADRVs) of athletes were at the center of the dispute.

³ The second case ever brought before the CAS, a (non-binding) advisory opinion, dealt with the admissibility of a life ban. Int'l Olympic Comm., Advisory Opinion No. 86/02 (CAS 1986), in CAS COMPILATION 61 (1993); Cf. F. Oschütz, Harmonization of Anti-Doping Code Through Arbitration: The

Case Law of the Court of Arbitration for Sport, 12 Marquette Sports Law Review (2002) 675 ff.

⁴ With regard to these innovations and institutional aspects of the scope and jurisdiction of the CAS Ad Hoc and Anti-Doping Divisions at the Olympic Games see also D. Mavromati, Rules, scope and jurisdiction of the CAS Ad Hoc and Anti-Doping Divisions at the Olympic Games, 01/09/2016, lawinsport article, available at: <<http://www.lawinsport.com/articles/item/rules-scope-and-jurisdiction-of-the-cas-ad-hoc-and-anti-doping-divisions-at-the-olympic-games>> (last seen on 20.09.2016).

⁵ CAS ADD Rules of 18 April 2016, available at: <http://www.tas-cas.org/fileadmin/user_upload/Arbitration_Rules_for_the_Anti-doping_Division__final_.pdf> (last seen on 20.09.2016).

anti-doping rule violations (ADRVs) during the Olympic Games pursuant to Article 59.2.4 of the Olympic Charter and Article 8.2.2 of the IOC Anti-Doping Rules for Rio 2016. This reform was part of the Olympic Agenda 2020 and was enacted to make anti-doping testing procedures more independent of sports organizations such as the IOC.

Unfortunately, the topic of doping at the Rio Games was not limited to disputes before the CAS ADD. The CAS ADD dealt with a total of eight cases during the Rio Games. However, out of the total of 36 cases that were handled in Rio by the CAS ADD and the CAS Ad Hoc Division (AHD) combined, a majority dealt with allegations of doping (if one also counts eligibility cases that involved allegations of doping as grounds for ineligibility).⁶

III. The Facts of the Narsingh Yadav Case

The second anti-doping case heard by the CAS AHD in Rio, which concerned the wrestler Narsingh Yadav, can serve as an excellent example in order to illustrate some of the most important aspects of the current anti-doping framework. It is particularly instructive because it was a case decided by the CAS AHD in its “traditional” appellate function in doping cases and not in the first instance capacity of the CAS ADD.

In *World Anti-Doping Agency (WADA) v. Narsingh Yadav & National Anti-Doping Agency of India* (CAS OG 16/25), the WADA filed an urgent application before the CAS AHD to challenge the decision of National Anti-Doping Agency India (NADA India) which “exonerate[d]”⁷ Narsingh Yadav following two positive anti-doping tests conducted on 25 June and 5 July 2016 (prior to the beginning of the Rio Games). These tests confirmed the presence of certain metabolites of the exogenous androgenic steroid methandienone, which is a non-specified substance under Article 1.1a of the Prohibited Substances List. On 16 July 2016 Yadav was provisionally suspended from competition.⁸

Yadav asserted, however, that he was the victim of sabotage (food/drink tampering) by another person. He subsequently filed a complaint with the police alleging that his energy drink had been spiked with the prohibited substance. Another plea taken up by Yadav was that he had an impeccable career with no prior history of doping infractions. He argued that Sushil Kumar was his direct competitor for the Olympic berth and that, upon being overlooked for selection, Kumar had unsuccessfully challenged⁹ the Wrestling Federation of India’s nomination decision before the Delhi High Court. Yadav contended that the entire set of events resulting in his doping infraction was orchestrated either directly or indirectly by Kumar upon receiving an unfavorable verdict from the Delhi High Court. On 1 August 2016

⁶ See CAS Report on the activities of the CAS Divisions at the 2016 Rio Olympic Games, available at: <http://www.tas-cas.org/fileadmin/user_upload/Report_on_the_activities_of_the_CAS_Divisions_at_the_2016_Rio_Olympic_Games_short_version_FINAL.pdf> (last seen on 20.09.2016). Moreover, after the Closing Ceremony in Rio, the CAS ADD remained active, working from Lausanne to handle additional cases related to positive doping tests reported in the last days of the Olympic Games. The total number of cases registered by the Rio ADD ultimately climbed to 13. See CAS Media Release, Last Decision Issued by the Anti-Doping Division of the Court of Arbitration for Sport (CAS) in Rio (21 Aug. 2016), available at <http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_ADD_English_21_August.pdf>; Message from the CAS Secretary General, CAS Bulletin 2016/2 at 4, available at

<http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_2_final.pdf>.

⁷ Cf. the wording of the NADA India Anti-Doping Panel Decision of 1 August 2016, *World Anti-Doping Agency (WADA) v. Narsingh Yadav & National Anti-Doping Agency of India* (CAS OG 16/25), para. 2.18.

⁸ Under Section 7.9.1 of the NADA India Code of 2015 a mandatory provisional suspension generally applies if analysis of an A Sample has resulted in an Adverse Analytical Finding (AAF) for a Prohibited Substance that is not a Specified Substance.

⁹ Delhi High Court, Writ Petition (Civil) No. 4514/2016, *Sushil Kumar v. Union of India & Ors* <<http://lobis.nic.in/ddir/dhc/MMH/judgement/06-06-2016/MMH06062016CW45142016.pdf>> (last seen on 20.09.2016).

(just four days prior to the Rio Games) NADA India's Anti-Doping Disciplinary Panel determined that Yadav was the victim of sabotage, bearing no fault or negligence for the presence of the substance in his body, and he was cleared of having committed an ADRV.

On 13 August 2016 WADA filed an application with the CAS AHD requesting that the decision of the NADA India Disciplinary Panel be set aside.

The CAS Panel heard the parties and their representatives on 18 August 2016 between 13:00 and 17:00. NADA India argued that the CAS AHD did not have jurisdiction to determine the application by WADA as it arose outside the mandated 10-day period immediately preceding the Rio Games. Additionally, NADA India submitted that the CAS Ad Hoc Rules require applicants to exhaust all internal remedies available to them before making an application to the CAS and that this precondition was not met in the case at hand. The same day at 18:45 the parties were informed that WADA's application was being upheld, that Narsingh Yadav was sanctioned with a four-year ineligibility period starting the day of the award and that any period of provisional suspension or ineligibility effectively served before the entry into force of the award was to be credited against the total period of ineligibility to be served. Furthermore, all competitive results obtained by Yadav from and including 25 June 2016 were disqualified, with all resulting consequences.

IV. The Panel's Reasoning

With regard to NADA India's objection to the jurisdiction of the CAS AHD, the Panel held that, while the testing occurred outside the 10-day period prior to the Rio Games, the NADA India Disciplinary Panel's decision was issued within this period, which

constitutes the relevant event giving rise to the dispute. The Panel further found that the relevant Anti-Doping Rules (Article 13.1.3 NADA 2015 ADR) provide that where a decision is made under the NADA processes, such as the decision by the NADA India Disciplinary Panel, and this decision has not been appealed, WADA has the right to appeal the decision to the CAS.

Substantively, the Panel found that there was no evidence that Yadav had been the victim of sabotage, no evidence that he bore no fault for the ADRV and no evidence that the violation was not intentional. Crucial to this finding was WADA's expert evidence offered by Professor Christiane Ayotte, who stated that the test results indicated multiple ingestions of the prohibited substance and in large quantities, which would occur through the ingestion of tablets rather than powder mixed with water. This was inconsistent with Yadav's claim that his energy drink had been contaminated. The Panel noted that Yadav's theory was "possible, but not probable and certainly not grounded in any real evidence".

The standard sanction for a violation of this type is a four-year period of ineligibility for competition, unless the athlete can demonstrate that the violation was not intentional, in which case the period will be reduced to two years. The burden of proof is on the athlete to establish this lack of intention, on the balance of probabilities. This proposition also finds resonance with the evidentiary procedures in India wherein Section 106 of the Indian Evidence Act, 1872 deals with burden of proving a fact especially within knowledge.¹⁰ It is submitted that, as a professional athlete, it was incumbent upon Narsingh Yadav to demonstrate that he was unaware of the contents of his food, and his inability to discharge this burden made him liable to face prosecution. Because in the case at hand Yadav did not meet this standard

¹⁰ Section 106 of the Indian Evidence Act, 1872 reads: "106. Burden of proving fact especially within knowledge – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

of proof, the WADA application was rightfully upheld and the athlete was sanctioned with a four-year period of ineligibility.

V. The Current Anti-Doping Framework in Light of the Narsingh Yadav Case

The Narsingh Yadav case can serve as a good case study in order to highlight the functioning of the world-wide anti-doping framework. The framework itself is well established. In a nutshell, WADA acts as the overarching regulator and, in addition to obligations on sports governing bodies to investigate anti-doping rule violations, there is a network of National Anti-Doping Organizations (NADOs), whose purpose is to investigate doping violations. In this framework the CAS is of particular importance because of its appellate jurisdiction in doping cases. It serves as the highest instance for disputes over the sanctioning of an ADRV.

Substantively, the WADA Code of 2015 sets out the fundamental rules pursuant to which ADRVs are sanctioned. As part of its responsibility to monitor Code compliance by its signatories, WADA has a right of appeal against any decision rendered under the Code. At the Rio Games the WADA Code was implemented through adoption of the IOC Anti-Doping Regulations for the 2016 Rio Games (IOC ADR). The rules include, e.g., important information on the definition of “in-competition” and “out-of-competition” testing, general provisions defining doping, testing, investigations, analysis of samples, results management, and sanctions and consequences for teams, as well as provisions related to the right to be heard, appeals and other procedural issues.

In the case of Narsingh Yadav it was up to NADA India to ensure implementation of the WADA Code through the application of the NADA Anti-Doping

Rules of 2015. However, the decision of the CAS AHD Panel establishes serious doubts as to whether NADA India lived up to its responsibility to implement the relevant anti-doping rules. As such, the case exemplifies one of the key institutional challenges of the anti-doping system: Ensuring objective implementation of international anti-doping standards by independent bodies. Not all NADOs are organized in a way to adequately safeguard their independence. The decision in Narsingh Yadav’s case was seen as an acute embarrassment in India, especially since Yadav had replaced a double Olympic medalist and was seen as a medal hope. To investigate the slip-ups and examine issues of criminal culpability, the case has been entrusted to India’s premier investigation agency, namely the Central Bureau of Investigation.¹¹

VI. Doping Cases before the CAS ADD at the Rio Olympic Games

The decisions of the CAS ADD were mainly interesting because of their institutional and jurisdictional scope – exactly how far does the jurisdiction of the new Division go and how does its jurisdiction relate to that of the CAS AHD? In the very first case brought before the CAS ADD in Rio, *Pavel Sozykine & Russian Yachting Federation (RYF) v. World Sailing (WS) and IOC* (CAS OG AD 16/01), the Panel dealt with the scope of the CAS ADD’s jurisdiction. The Panel found that it is an essential condition of the CAS ADD’s jurisdiction “that an alleged anti-doping rule violation (‘ADRV’) has been asserted and referred to it under the IOC ADR.” The Panel therefore denied jurisdiction since the case involved a decision by World Sailing rejecting an applicant’s entry for Rio 2016. The IOC ADR only applies to doping controls over which the IOC has jurisdiction “in connection with the Olympic Games Rio 2016”.¹² The Panel further dealt with the

¹¹ “Narsingh Yadav Doping Case: CBI to begin probe soon”, available at: <<http://indianexpress.com/article/sports/sport-others/cbi-to-begin-probe-in-narsingh-yadav-doping-case-3039734/>> (last seen on 20.09.2016).

¹² See also D. Mavromati, Rules, scope and jurisdiction of the CAS Ad Hoc and Anti-Doping Divisions at the Olympic

question of whether it is possible to transfer an application from the CAS ADD to the CAS AHD where the ADD lacks jurisdiction. The Panel found that the rules do not provide for such transfers and that “each CAS Division has its own requirements, notably in terms of filing, deadlines, etc.” It also found that neither the existing procedure of the CAS Code, whereby a case can be transferred from the CAS Ordinary Division to the CAS Appeals Division and vice-versa (under S20 of the CAS Code), nor considerations of Swiss law, can be applied by analogy. However, nothing prevents an applicant whose application to the CAS ADD has been rejected for lack of jurisdiction from filing the same application with the CAS AHD, or even filing applications before both Divisions simultaneously. The first case of the CAS ADD thus clarified in a coherent and consistent manner some of the most pressing jurisdictional questions: The jurisdiction of both Divisions is exclusive while leaving applicants free to file simultaneous applications in cases of doubt.¹³

VII. Conclusion

On the one hand, the Narsingh Yadav case highlights the institutional challenges confronting the current world-wide anti-doping framework. On the other hand, the case also gives reason for cautious optimism. Once an Adverse Analytical Finding (AAF) is established, the system is working. In the Yadav case, the WADA and the CAS AHD lived up to their respective roles as overarching enforcers of anti-doping standards. If the world-wide fight against doping is meant seriously, however, further reform is needed on a national and international level. Anti-doping bodies need further financial and institutional support in order to fulfill their institutional roles in the system. Increasing independence, objectivity and

transparency of the relevant bodies and proceedings is key to protecting the system’s most vulnerable stakeholders of all: clean athletes.

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Games, 01/09/2016, lawinsport article, available at: <<http://www.lawinsport.com/articles/item/rules-scope-and-jurisdiction-of-the-cas-ad-hoc-and-anti-doping-divisions-at-the-olympic-games>> (last seen on 20.09.2016).

¹³ All other cases decided by the CAS ADD during the Rio Games dealt with specific issues of first instance anti-doping

cases (involving the abuse of substances such as nandrolone, EPO CERA, hydrochlorothiazide, strychnine and testosterone). Because these cases do not further clarify structural or procedural aspects of the anti-doping framework they are not discussed in further detail here.

Fair Play: Reforming the CAS in the Aftermath of Pechstein

Amanda J. Lee and Harald Sippel

I. Introduction

Benjamin Franklin reportedly once asked “*When will mankind be convinced and agree to settle their difficulties by arbitration?*” As regards sports, where arbitration is now the most common way of settling disputes, the answer is “the 21st century”. This can be largely attributed to the Court of Arbitration for Sport (“CAS”), founded in 1984, which is now not only the “last instance” for all disputes relating to the Olympic Games and anti-doping proceedings under the World Anti-Doping Code but for sports disputes generally, handling disputes in respect of disciplines ranging from aquatics to yachting.¹

While this development has generally been received positively, it came hand in hand with criticism and calls for more checks and balances in sports arbitration. Indeed, when the Swiss Federal Supreme Court famously set aside a CAS award for a violation of public policy in 2012, it was the first time it had ever done so.²

More recently, the *Pechstein* saga caused uproar in the sports arbitration community: Found guilty of a doping offense in 2009, German ice skater Claudia Pechstein was banned from competition for two years by the International Skating Union (“ISU”). Her CAS proceedings, in which her appeal was rejected, were characterized by several “procedural particularities”. Nevertheless on appeal the Swiss Federal Supreme Court rejected Pechstein’s request for annulment,

together with other arguments based on alleged bias of the CAS.

Having exhausted her legal remedies in Switzerland, Pechstein turned to the German courts, suing the ISU for damages. While her claims were rejected by all three instances, including the German Supreme Court (“BGH”), the findings by the courts of first and second instance were notable.

In particular, the first instance *Landesgericht Munich* ruled that the CAS arbitration agreement was invalid because of a structural imbalance; Pechstein had had no choice but to sign the agreement in order to be admitted to ISU-held competitions.³

The second instance *Oberlandesgericht Munich* reached the same conclusion, holding that the ISU held a market-dominant position as the only international skating association offering competitions.⁴ While “forcing” athletes to sign arbitration agreements by otherwise prohibiting their participation was generally found to be unproblematic, the second instance court concluded that, in the case at hand, such “force” was abusive. According to the court, the CAS arbitrator selection process unilaterally favored sports federations over athletes. This criticism went to the heart of the CAS, the International Council of Arbitration for Sport (“ICAS”).

¹ For jurisprudence in different domains, see <http://jurisprudence.tas-cas.org/Shared%20Documents/Forms/PerSport.aspx>.

² BGE vom 27. März 2012 (4A.558/2007), http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2011/Entscheide_4A_2011/4A.558_2011.html (Ger.), setting aside Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) &

FIFA, May 19, 2009, CAS 2008/A/1520, <http://arbitration.kiev.ua/uploads/kucher/1519;%201520.pdf>.

³ Landgericht Munich I [LG] [Munich District Court], Feb. 26, 2014, 37 O 28331/12, <https://openjur.de/u/678775.html> (Ger.).

⁴ Oberlandesgericht Munich [OLG] [Munich Provincial Court of Appeal], Jan. 15, 2015, U 1110/14 Kart, <https://openjur.de/u/756385.html> (Ger.).

In June 2016, the BGH confirmed the court of second instance's findings regarding the market-dominant position of the ISU.⁵ However, the BGH did not see a structural imbalance. The BGH concluded that, although the ICAS, a body with a majority of representatives of sport organizations, selected the arbitrators on the CAS arbitrator list from which parties to CAS proceedings must nominate an arbitrator, it was nevertheless composed in a sufficiently independent way.⁶

A bitter aftertaste nevertheless remains and, indeed, Pechstein immediately indicated that she would file a constitutional challenge. The criticisms voiced by the court of second instance, in particular, are worthy of closer examination due to concerns raised about the CAS, ICAS and the arbitrator selection process.

II. CAS and the Arbitrator Selection Process at the Time of Pechstein's Appeal

The ICAS, established in 1994, plays a pivotal role in the facilitation of the settlement of sports disputes. Responsible for funding and administration of the CAS, the ICAS is tasked with protecting the independence of the CAS and the rights of the parties using the CAS. Its functions are identified in Article S6 of the CAS Code and include the power to designate the members of the list of arbitrators maintained by the CAS and the power to address challenges to and remove arbitrators.

The composition of the membership of the ICAS is set out in Article S4 of the CAS Code, which prescribes that of the 20 appointed members four are

to be appointed by the International Sports Federations ("IFs"). Of these four, three are selected by the Summer Olympic IFs ("ASOIF") and the fourth by the Winter Olympic IFs ("AIWF"). A further four members are appointed by the Association of National Olympic Committees ("ANOC") and the International Olympic Committee ("IOC") respectively. In each case, the appointees may be chosen from within or outside the membership of the respective sporting organizations.

The 12 appointed members of the ICAS (as specified above) are responsible for consulting to enable the appointment of four further members "*with a view to safeguarding the interests of the athletes*".⁷ The 16 appointed members then proceed to appoint four additional members, who are required to be independent from the various bodies involved in identifying the first 16 members. All members of the ICAS sign a declaration pursuant to which they undertake to exercise their function with total independence and objectivity (Article S5).

The CAS Code provides various levels of protection for participants in CAS proceedings, permitting challenges to be made to members of the ICAS or its Board in the event that circumstances permit "*legitimate doubt*" to be cast on the independence of a member vis-à-vis a party to an arbitration subject to an ICAS decision (Article S11) and to arbitrators, such challenges to be determined by the ICAS or its Board.

Despite these safeguards, it is clear that Article S4 affords sporting bodies a significant role in the appointment of the members of the ICAS. As the

⁵ Bundesgerichtshof [BGH] [Federal Court of Justice], Jun. 7, 2016, KZR 6/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=2016-6&Seite=9> (Ger.).

⁶ Media Release, Statement of the Court of Arbitration for Sport (CAS) on the decision made by the German Federal Tribunal (Bundesgerichtshof) in the case between Claudia Pechstein and the International Skating Union (Jun. 7 2016), http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.0

6.16_English_.pdf; see also D. Mavromati, "The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law: The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016," CAS Bulletin 2016/1, at 27 f., http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_1.pdf.

⁷ Court of Arbitration for Sport Code of Sports-related Arbitration, Art. S4 (d)

ICAS is responsible for the appointment of arbitrators to the closed CAS list of arbitrators, the inevitable consequence is that sporting bodies also have a significant influence in the selection of CAS arbitrators. At the time of Pechstein's appeal the arbitrator selection process was governed by the CAS Code introduced in 2004 (the "2004 Code"), which "*in principle*" required the ICAS to respect distribution proportions that mirrored the membership of the ICAS.⁸

Article S13 of the 2004 Code required the appointment of at least 150 arbitrators. Of those selected, a fifth were to be appointed from candidates proposed by the IOC, a further fifth from candidates proposed by the IFs and a fifth from candidates proposed by the National Olympic Committees ("NOCs"). In each case candidates could be derived from within or outside the membership of the sports organizations. A further fifth of candidates were to be selected by the ICAS with a view to safeguarding athletes' interests, with the final fifth selected from candidates independent of the parties responsible for identifying the balance of the list.

A stark contrast may accordingly be drawn between the significant role played by sporting organizations in selecting the ICAS membership and the CAS arbitrators and the limited role of organizations tasked with safeguarding athletes' rights in these key processes.

III. Reform in the Post-2009 Period

The CAS Code has been amended on a number of occasions since Pechstein's appeal and the subsequent rulings of the Swiss and German courts. A revised CAS Code entered into force on 1 March 2010, followed by further revisions in 2010, 2011, 2012 and 2013. Until very recently, the most current version of the Code came into effect on 1 January

2016 (the "2016 Code").⁹ Each revision has presented a valuable opportunity to address criticisms raised by Pechstein concerning the legitimacy of the CAS.

Against this background it is noteworthy that there has been no substantial reform of the composition of the membership of the ICAS since its creation in 1994, although the way in which the ICAS exercises its functions has been the subject of limited reform. In particular, with effect from 1 January 2010, the procedure by which the President and Vice Presidents of the ICAS are elected from the ICAS membership was amended, eliminating the requirement that the President be proposed by the IOC and the Vice Presidents by sporting bodies and introducing the requirement that election take place after consultation with the IOC, ASOIF, AIOWF and the ANOC. The consultation requirement remains in the 2016 Code (Article S6 (2)). However, in the absence of reform to the membership of the ICAS, the impact of this change, while not insignificant in addressing bias in favor of the IOC, is of limited consequence.

Despite the lack of substantive reform, the CAS has succeeded in addressing, at least to a limited extent, concerns raised in respect of the membership of the ICAS. Indeed, the CAS' position is that as of 2016 it has managed to deliver "[a] real diversity in the composition of ICAS ..."¹⁰ In particular, the CAS asserts that a majority of the present members of ICAS are not linked to sports organizations and emphasizes that an equal representation of men and women has been achieved in the ICAS membership.¹¹ The importance of achieving such diversity in the membership of the ICAS cannot be dismissed but the CAS' statement must be approached with caution. Unless and until such developments are enshrined in a formal amendment to the CAS Code the extent to which such achievements can be regarded as

⁸ Court of Arbitration for Sport Code of Sports-related Arbitration, Art. S14.

⁹ An amended version of the Code entered into force as from 1 January 2017.

¹⁰ See *supra* note 6.

¹¹ *Ibid.* Members available at <http://www.tas-cas.org/en/icas/members.html>.

mitigating factors when evaluating the risk of systemic bias in the ICAS membership is limited.

However, substantive amendments have been made to the process by which arbitrators are selected for inclusion on the closed list. In particular, the ICAS is no longer required to respect the distribution proportions identified in the 2004 Code. Instead the ICAS must consider those candidates who have appropriate training, competence and knowledge whose names and qualifications are brought to its attention. Names for inclusion may be highlighted by the IOC, the IFs, the NOCs and, as introduced in the 2016 Code, by the athletes' commissions of these bodies (Article S14). There is accordingly greater scope in the arbitrator selection process for the participation of those protecting the interests of athletes.

Further, CAS arbitrators are now required to sign an "official" declaration by which they must undertake to act with impartiality, in addition to the pre-existing requirement that they exercise their function with total objectivity and independence (Article S18). This more stringent requirement may provide greater reassurance to athletes of the impartiality of arbitrators appointed by the CAS.

Accordingly, while the CAS has sought to address a number of core criticisms by effecting reform, cause for concern remains due to the lack of reform of S4 and the ICAS' key role in the selection of arbitrators for inclusion on the closed list.

IV. Possible Improvements

Perfect objectivity is an unrealistic goal; fairness however, especially in sports, is not. Although the BGH overturned the decision by the court of second instance, failing to find a structural imbalance of the kind which would be sufficient to render the arbitration clause in the *Pechstein* case invalid, the

above clearly shows that more change is required. Since the CAS is to be regarded as "the Supreme Court of Sports", it should arguably be held to the highest possible standard. At present, the contrary holds true.

Regarding the ICAS, the authors acknowledge the "soft" reforms, which are clearly a step in the right direction. However, such measures are insufficient: The CAS should seek to rise above any appearance of bias or even of slight imbalance. Additionally, contrary to the CAS' own statement, out of the 20 current ICAS members, 13 have links to sports organizations/federations.

The authors welcome the fact of equal representation of men and women in the ICAS. However, one's independence and impartiality is naturally not linked to one's gender. This innovation – which has not even been enshrined in the CAS Code – appears to be nothing but window dressing.

Furthermore, the grave imbalance that the vast majority of ICAS members are appointed by sports organizations/federations remains. Even worse, the four ICAS members who allegedly are the athletes' "representatives" are not even selected by the athletes themselves – they are selected by the very ICAS members who are linked to those sports organizations/federations against which athletes often arbitrate before the CAS.¹²

The authors opine that the only way to "fix" this imbalance would be to allow true equal opportunity, e.g., to have 50% of all ICAS members selected directly by the athletes, or to have five members selected by the sports organizations/federations and five members by athletes, with the remaining 10 members selected jointly. Clearly ICAS members appointed by sports organizations/federations have a conflict of interest and should accordingly have no

further seven were "athlete vs. sports organization/federation & other athlete".

¹² As of 13 September 2016, out of the 40 latest published CAS awards on the CAS website, 24 arbitrations were "athlete vs. sports organization/federation" or the other way around and a

involvement in the appointment of the athletes' representatives.

To achieve this, the CAS could create an online voting system to which athletes have access. Furthermore, athletes are often members of labor unions and these labor unions, of which a particular number exist in respect of football (by far the most high-volume sport in CAS disputes), could become involved in the selection process.¹³ The authors acknowledge that enabling every concerned athlete to cast a vote may be very difficult in practice. However, this does not mean that it is impossible.

The much easier way to remedy the current imbalance would naturally be the abolition of the requirement to make a selection from the arbitrator list altogether and the limitation of the role of any sports organizations/federations in the arbitration process itself. Today, very few arbitral institutions limit the selection of arbitrators solely to their own lists; many arbitral institutions do not maintain such lists.

Keeping fairness in sports in mind and mindful that the CAS should be at the forefront of transparency, the authors would urge the CAS to undertake deeper reforms related to arbitrators. For example, a number of arbitral institutions have recently adopted the policy of publishing decisions on challenges to arbitrators. With the high caseload the CAS enjoys, making it one of the busiest arbitral institutions in the world, there is no reason why the CAS should not follow suit. Additionally, the authors take the view that the Statutes should provide for a statement of declaration and independence, which is sent to the parties. This is commonly required by other arbitral institutions and would go beyond the current requirements of the CAS.

¹³ In recognition of its significant football-related caseload, the CAS maintains a 'List of Arbitrators (football list)',

V. Conclusion

It is noteworthy that the CAS has a history of introducing reforms in order to address judicial criticisms. Indeed, the ICAS was introduced in the aftermath of the 1993 judgment of the Swiss Federal Tribunal in *Grundel v. International Equestrian Federation*,¹⁴ in which the involvement of the IOC in the creation, administration and funding of the CAS was closely scrutinized, leading to significant reform and the establishment of the ICAS in 1994.

The evolution of the CAS Code in the period following *Pechstein* and the developments in the composition of the ICAS are representative of the CAS' capacity to change. However it is clear that despite progress being made genuine cause for concern remains. It is accordingly incumbent on the CAS, if it wishes to maintain its legitimacy, to effect real change to silence its critics.

In the meantime, for *Pechstein*, the fight continues. It remains to be seen what the next battle, which will be fought before the German Federal Constitutional Court, will reveal about the future of the CAS.

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<http://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html>.

¹⁴ Mar. 15, 1993, ATF 119 II 271.

The Importance of Jumping Through Hoops: The CAS Lets Long-Jumper Darya Klishina Compete in Rio After the IAAF Fails to Follow Its Own Protocols

Mel Andrew Schwing and Chris Kaias

I. Introduction

On August 16, 2016, the Ad Hoc Division of the Court of Arbitration for Sport (CAS) set aside a decision of the Doping Review Board (DRB) of the International Association of Athletics Federations (IAAF), which had declared Darya Klishina, a Russian long jumper, ineligible to compete in the 2016 Rio Olympic Games.¹ As a result, Klishina would end up being the only member of the Russian track and field team to compete in the Rio Games, where she finished ninth in the long jump. But the CAS decision was notable for more than just producing this novelty.

In finding Klishina ineligible, the DRB had reversed its earlier decision which had authorized Klishina to compete in Rio. The DRB based its second decision on new evidence that suggested that Russian officials may have interfered with Klishina's drug tests in 2014. As the CAS recognized, however, that new evidence did not impugn the clean record that Klishina had established in tests conducted outside of Russia since 2014. In setting aside the second DRB decision, the CAS demonstrated its willingness to force International Federations (IFs) like the IAAF to adhere to their own rules and procedures.

II. The First DRB Decision

In December 2014, the World Anti-Doping Agency (WADA) launched an Independent Commission to investigate systematic doping by Russian athletes alleged in a German documentary entitled "The Secrets of Doping: How Russia Makes Its Winners." The Independent Commission ultimately found evidence of systemic and State-sanctioned doping by Russian athletes.² In response, the IAAF, in November 2015, suspended the All-Russia Athletic Federation (ARAF) until it could comply with various reinstatement criteria.³ When the IAAF subsequently concluded in June 2016 that the ARAF's successor, *i.e.*, the Russian Athletics Federation (RAF), had not met those criteria, it meant that Russian track and field athletes would be banned from the Rio Games⁴ – unless they could show compliance with certain new amendments to the IAAF Competition Rules.

To ensure that Russian athletes were not unfairly penalized by the ban on the RAF, the IAAF had introduced Rule 22.1A, which provided terms by which an athlete whose National Federation was suspended could nonetheless be eligible to compete in an "International Competition" like the Rio Games. Among other ways, an athlete like Klishina

¹ *Klishina v IAAF*, CAS OG 16/24 (Aug. 15, 2016) <http://www.tas-cas.org/fileadmin/user_upload/Award_FINAL_16-24.pdf>.

² World Anti-Doping Authority, *The Independent Commission Report #1: Final Report* (Nov. 9, 2015) <https://wada-main-prod.s3.amazonaws.com/resources/files/wada_independent_commission_report_1_en.pdf>.

³ IAAF, *IAAF Provisionally Suspends Russian Member Federation ARAF* (Press Release, Nov. 13, 2015) <<https://www.iaaf.org/news/press-release/iaaf-araf-suspended>>.

⁴ IAAF, *RUSAF has not met Reinstatement Conditions* — *IAAF Council Meeting, Vienna* (Press Release, Jun. 17, 2016) <<https://www.iaaf.org/news/press-release/iaaf-council-meeting-vienna>>.

could be ruled eligible if she could demonstrate the following:

- She had been subject to “other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity;” and
- She had “for such period been subject to fully compliant drug testing in- and out-of-competition equivalent in quality to the testing to which [her] competitors in the International Competition(s) in question are subject.”

Applying this exception, the DRB issued a decision on July 9, 2016 that Klishina was eligible to compete in the Rio Games (the First Decision), because she had been subject to fully adequate and compliant testing systems outside of Russia during a sufficiently long period (determined by the DRB to be since January 1, 2014). Significantly, Klishina, who had relocated permanently to the United States in March 2014, had spent 86.6% of her time outside of Russia, and had 11 samples collected from her outside of Russia, during that period.

III. The Second DRB Decision

On July 16, 2016, exactly one week after the First Decision, Professor Richard McLaren issued his WADA-commissioned report into allegations of State-sanctioned doping in Russian sport (the McLaren Report).⁵ The McLaren Report did not identify any individual athletes. However, upon requests from WADA and IFs to provide information about individual athletes, Professor McLaren swore an affidavit suggesting that Klishina, among others, had benefitted from the State-sanctioned doping scheme. Specifically, the Russian Ministry of Sport had prevented the recording of a February 2014 sample from Klishina indicating an elevated level of testosterone. In addition, a sample collected from Klishina in October 2014 had not only displayed marks and scratches consistent with tampering, but

also contained evidence corroborative of urine swapping. In light of this new information, the DRB issued a new decision on August 10, 2016, revoking its First Decision and rendering Klishina ineligible to compete at the Rio Games (the Second Decision).

IV. The CAS Award

Klishina appealed the DRB’s Second Decision to the CAS Ad Hoc Division, which has jurisdiction over appeals relating to Olympic eligibility that arise within 10 days of an Olympic Games. Klishina argued that the DRB was not entitled as a matter of law to revisit its decision, even though it had expressly reserved that right if new evidence came to light. She also complained that the “extremely tight timeframe” she was given to respond to Professor McLaren’s affidavit was unfair, even though the timeframe was not of the IAAF’s making but rather the unfortunate result of the issuance of Professor McLaren’s report so close to the Rio Games. Both arguments were swiftly rejected by the Tribunal.

Klishina’s remaining argument, which was accepted by the Tribunal, was that the Second Decision was not in accordance with the applicable rule, *i.e.*, Rule 22.1A. In the Tribunal’s view, the DRB “effectively adopted and applied” Rule 22.1A in its First Decision in determining that Klishina had demonstrated that she had been subject to fully compliant testing outside of Russia and thus her eligibility was not affected by any possible “taint” from the actions of the RAF. Neither the McLaren Report nor Professor McLaren’s affidavit changed that fact. As the Tribunal emphasized, the fact that Klishina “was *subjected to* or *the subject of* drug testing that was not fully compliant during the Relevant Period does not derogate from the fact that she was, during the Relevant Period ... *subject to* fully compliant testing in- and out-of-competition by reason of the fact that she was during that time training in and resident in the United States and not in Russia.”

⁵ Richard McLaren, *The Independent Person Report* (Jul. 18, 2016) <<https://wada-main->

prod.s3.amazonaws.com/resources/files/20160718_ip_report_newfinal.pdf>.

One might find it strange that the Tribunal found in favor of Klishina notwithstanding evidence that she had tested positive for elevated testosterone in 2014; but the Tribunal emphasized that its focus was on whether Klishina had fulfilled the criteria for eligibility and not on whether she had been doping or “affected by the Russian system.” In the end, this case was simply about whether the IAAF had followed its own rules – and the Tribunal determined it had not.

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