

Sports Arbitration

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Given that the sports industry is estimated to account for between 3 and 6 per cent of total world trade,¹ it comes as no surprise that it is also a major source of legal disputes. Of particular interest to the international arbitration community, however, is the fact that arbitration is now firmly established as the dispute resolution method of choice throughout the sports industry, with the Court of Arbitration for Sport (CAS) in Lausanne now receiving a new case almost every working day.

Although sports arbitration shares many characteristics with commercial or investment arbitration, and although many sports arbitrators also sit in standard commercial and investment cases, it also has many interesting features that distinguish it from non-sports-related arbitration. For example, most arbitration practitioners would probably be surprised to learn that some of the world's leading sports arbitral awards were issued at the conclusion of an expedited 24-hour arbitral process involving all-night deliberations by the arbitral tribunal. Another striking feature of sports arbitration is publicity: CAS arbitrators must be prepared not only to have their awards pored over by the parties to the arbitration, but also to have their findings analysed in detail by the world's media and critiqued over morning coffee by millions of sports fans around the globe. The Swiss Supreme Court has even suggested that, although CAS cases are heard in private, should an athlete request it, it would be desirable for a public hearing to be held.²

What are the advantages and unique aspects of sports arbitration?

Speed

The most obvious and perhaps the most important differentiating feature of sports arbitration is its speed. The legal maxim that 'justice delayed is justice denied' could not be more apposite than when discussing the resolution of sports disputes. The particular urgency in the sporting context stems from the fact that the entire sports industry revolves around a series of regular sporting events and competitions: for the resolution of a sports dispute to be effective, it generally must be concluded before a particular competition or event takes place. For example, a finding by an arbitral tribunal that a particular athlete may compete at the Olympic Games, or that a certain team may participate in the World Cup final, would be of limited value if the arbitral award were issued after the competition in question has already been completed.

Swift resolution of sports disputes is also necessary due to the fact that the careers of sportspeople are generally very short, so any lengthy period of time spent in litigation would have a very significant negative impact on a sportsperson's career.

The most striking example of the speed of sports arbitration is the Ad Hoc Division of CAS. This is an arbitral body that is active only for the duration of specific international sporting events, including the Olympic Summer and Winter Games, the Commonwealth Games, the UEFA European Football Championships and the FIFA World Cup. For each of these events, CAS appoints a panel of arbitrators, who remain in the

host city throughout the event (except for multi-venue football tournaments, where the arbitrators are simply on standby to travel to the appropriate venue) and must remain available at all times, in case they are selected by the CAS to sit on one of the (one or three-person) arbitral tribunals appointed to resolve any legal disputes arising during the event. According to the Ad Hoc Rules for the Olympic and Commonwealth Games, arbitral awards should be issued within 24 hours of the lodging of the application for arbitration, and the equivalent time limit for football's European Championships and World Cup is 48 hours.

At the CAS Ad Hoc Division there is normally a 24-hour period in which the parties will make written and oral submissions, before the tribunal deliberates and issues its award. Arbitrations heard by the Ad Hoc Division generally consist of at least one round of written submissions followed by an oral hearing, after which the tribunal immediately enters deliberation. At the recent London Olympics where 11 cases were dealt with, there was even a case where a matter was concluded within four hours of its filing.

The swift resolution of these, often very important, disputes allows the sporting competition to proceed on schedule and ensures the integrity of the final sporting results, by avoiding retroactive appeals or protests to change sporting results. The Ad Hoc Division is a very positive demonstration of what can be achieved through arbitration when all parties and arbitrators are present and available in one location. However, it is also an environment in which the arbitrators must tread very carefully in order to ensure that the procedural rights of all parties are upheld, particularly given the extremely short time limits within which the latter are to prepare their written and oral submissions.³

A no less impressive example of the speed of sports arbitration is that of the expedited proceedings which regularly take place under the standard arbitration rules of the various sports arbitration institutions. For these arbitrations to be completed successfully in a very short period of time the cooperation of all parties is required, as the tribunal cannot impose upon the parties the same extremely short procedural time limits as apply under the Ad Hoc Rules without their agreement. However, due to the fact that event organisers and sporting federations usually wish to safeguard the integrity of a sporting competition's final results, quite often all parties are willing to agree to a highly expedited arbitration procedure in order to conclude all legal issues in advance of the competition. In such instances, the usual time limits are shortened and disputes may be arbitrated in a matter of days, if not hours. For example, the world governing body of swimming (FINA) sought an urgent appeal from the CAS against a decision adopted by the Brazilian national swimming federation on 1 July 2011, issuing only warnings to four Brazilian swimmers who had tested positive for a specified banned substance.⁴ This was an urgent matter as the heats of the World Aquatic Championships were scheduled to start in Shanghai on 24 July 2011. FINA lodged appeal papers with the CAS on 8 July and after the four athletes filed their submissions on 15 July the CAS Panel was convened and a hearing

was held in Shanghai on 20 July, allowing a final award to be made on 24 July, just before the commencement of the competition.

As demonstrated by this case, another important and interesting characteristic of sports arbitration, which facilitates the speedy resolution of sports disputes, is the availability of effective provisional and conservatory measures as soon as an arbitration has been commenced, even before the constitution of the arbitral tribunal. Sports arbitration tribunals regularly issue orders in response to requests for provisional measures – typically requests for a stay of execution of the decision under appeal – and in instances where the tribunal has not yet been appointed, sports arbitration bodies often have a mechanism whereby a designated person, or a member of a designated group (eg, the president or vice president of the CAS Appeals Arbitration Division), may grant provisional measures pending the appointment of the tribunal.

Provisional measures issued by an arbitral tribunal are a much more effective remedy in sports arbitration than in other types of arbitration due to the fact that sports governing bodies almost invariably voluntarily comply with any orders issued, and the system of enforcement of arbitral awards in sporting disputes, discussed in more detail below, is very effective. As a result, parties to sports arbitrations very rarely seek judicial assistance from the courts during the course of an arbitration. Another specific feature of sports arbitration is that several sports arbitration rules provide that the sport arbitral institution can issue provisional measures even before the constitution of the arbitral tribunal and expressly prohibit the parties from seeking provisional measures from state courts. The enforceability of such prohibition was challenged in the well-known *FC Sion v UEFA* case. Having been prevented from taking part in the lucrative UEFA Europa League due to a breach of a transfer embargo, FC Sion sought and obtained an injunction from a local court ordering UEFA to reinstate the club in the competition. UEFA's refusal to comply with the local court order and its insistence on the strict adherence to the arbitration requirements is an indication of the sports governing bodies' reliance on arbitration as an effective method to resolve disputes quickly and without interference by local courts.⁵ Time will tell whether state courts will adhere to the clear preference for resolving such disputes in accordance with the arbitration clauses which are to be found within the statutes of sports federations and in sporting agreements. It is submitted, however, that the only means by which the CAS system can effectively demonstrate that state court intervention is not needed is to clearly prove that the CAS is capable of issuing its own effective interim protection. Our experience with the CAS suggests that when the situation is really urgent, the CAS is able to give a very short time limit to the respondent⁶ and to issue an order within a time period that is comparable to the time limits in which state courts grant *ex parte* relief.⁷

Consistent with the practice generally followed in international commercial arbitration, when considering an application for provisional measures, sports arbitration tribunals generally consider:

- whether the relief is necessary to protect the applicant from irreparable harm;
- the likelihood of success on the merits of the claim; and
- whether the interests of the applicant outweigh those of the other parties.

It is interesting to note that the scope of the third criterion is potentially wider in the context of a sports arbitration than when considered in the context of a commercial arbitration. Article 14 of the CAS Ad Hoc Rules provides that not only shall the interests of the other parties to the arbitration be considered when evaluating an application for provisional measures, but also that

the interests of 'the other members of the Olympic Community' shall be taken into consideration. In the large majority of sports disputes, the interests of a number of additional parties are directly affected by the granting of provisional measures, and this is something that may be considered by the arbitral tribunal, even in cases that are not governed by the CAS Ad Hoc Rules.⁸ One recent example occurred when the Turkish football club Fenerbahçe sought provisional measures to get entry in the 2011/2012 UEFA Champions League tournament, following their non-admittance against the backdrop of match-fixing allegations. The CAS rejected the provisional measures request largely on the grounds that such an intervention would directly affect another club, that would then be eliminated and which was not a party to the proceedings.⁹

Special expertise

The CAS policy of maintaining a closed list of arbitrators effectively limits the fundamental freedom of the parties to appoint the arbitrator of their choice but was upheld by the Swiss Supreme Court in the *Lazutina* case on the ground that it ensures that the arbitrators are specialists in the area of sports and will thus be able to issue fast and consistent decisions.¹⁰

It is not the case that all sports arbitrations are concluded quickly, but even in regular sports arbitrations, in which there has been no agreed expedited timetable and no request for provisional measures, the standard time limits would be regarded by most arbitration or litigation practitioners as being very short indeed. For example, in a CAS Appeals Arbitration, the statement of appeal must be filed with the CAS within 21 days from the communication of the decision under appeal, unless the applicable regulations provide for a different time limit (either shorter or longer). This time limit cannot be extended and any delay will lead to the dismissal of the appeal.¹¹ Once the statement of appeal has been filed, the appellant has a further 10 days to file an appeal brief stating the facts and legal arguments giving rise to the appeal and to produce the evidence being relied upon. The respondent must then file its complete answer within a time limit of 20 days. Finally, the panel sets itself the objective of issuing its final award within three months of having received the case file.¹²

The widespread adoption by default of an expedited process for resolution of sports disputes, even for those cases that could be regarded as not being urgent in nature, is intended both to assist sports people and to prevent disruption of the sporting calendar. However, notwithstanding the undoubtedly positive effect of resolving sporting disputes quickly, parties and their counsel should be acutely aware of the potential practical difficulties associated with such expedited proceedings. Parties will often be afforded time limits of one day or less to file submissions on procedural issues and as a result, sports arbitration, and CAS arbitration in particular, is generally a challenging process for both parties and their counsel. For that reason, it is not a forum in which lawyers who are unfamiliar with either the procedural aspects of international arbitration, or the substantive aspects of sports law, can easily 'cut their teeth', as the very short nature of the time limits to file submissions leaves very little time for research during the arbitration. As a result, parties who are familiar with the CAS and its unique pressures tend to appoint counsel whom they know to have already appeared regularly before the CAS, and who are familiar with the processes and jurisprudence of the institution. It is a common complaint among lawyers that in the same way as one tends to see many of the same CAS arbitrators being appointed repeatedly, the parties' counsel are more often than not selected from a relatively small pool of experienced practitioners.

Although the presence of experienced arbitrators and counsel generally assists the arbitration process, it is regrettable that the expanding volume of case law with which arbitrators and counsel should be familiar, coupled with the increasing procedural sophistication of parties and counsel, make it ever more difficult for new lawyers to become established in sports arbitration. This has created a somewhat vicious circle, whereby it is becoming increasingly difficult for parties to place their faith in counsel whose experience of CAS arbitration is limited.

Consistency and transparency

There exists a very strong wish throughout the sporting world for consistent legal precedents in sports matters, upon which reliance may be placed by the bodies and individuals inhabiting the sporting arena. In an environment in which the protagonists are used to exercising their profession in accordance with the usually very clearly defined rules of their respective sports, they wish to also have clearly defined rules off the field of play, and to be fully aware of the consequences of any breach of those rules. Unfortunately, the achievement of this goal has historically been hampered by the issuance of inconsistent and sometimes conflicting decisions by various national courts.

However, the emergence of the CAS as an 'international supreme court' for sports disputes has provided greater consistency between legal decisions in the sports world and has created a body of case law – the *lex sportiva* – upon which sports arbitration users can rely. The creation of a consistent body of case law has been made possible by the provisions of the Code of Sports-Related Arbitration (the procedural rules of the CAS, known as the CAS Code) regarding confidentiality, as although all CAS arbitrators are subject to a general duty of confidentiality, and although CAS ordinary proceedings remain confidential unless the parties agree otherwise, article R59 of the Code provides that in all CAS appeals cases, which account for approximately 90 per cent of the total CAS caseload, 'the award ... shall be made public by the CAS, unless both parties agree that [it] shall remain confidential'. As a result, the CAS has published a large proportion of its awards, initially through its three-volume Digest of CAS Awards,¹³ and more recently through its online database.¹⁴

One of the most interesting aspects of sports arbitration is that awards issued by an arbitral tribunal tend to be regarded as authoritative precedent by subsequent arbitral tribunals from the same sports arbitration institution. While sports arbitration awards are not binding legal precedents, previous awards are regarded as being of highly persuasive value and, as such, arbitral tribunals that deviate from an established line of 'jurisprudence' are generally expected to provide reasons for such a deviation in the text of their award.¹⁵

Many sports arbitration bodies have adopted a similar regime to the CAS with respect to the publication of awards and, increasingly, awards issued not only by the institution under whose rules an arbitration is taking place but also awards issued by other arbitral institutions, are being cited both in the submissions of counsel and in arbitral awards. This is particularly apparent in anti-doping matters, as the anti-doping rules of the vast majority of sports are based directly upon a set of internationally agreed regulations known as the World Anti-Doping Code, which means that a national anti-doping tribunal will generally be applying the same set of rules as the tribunal of an international federation, or a CAS panel.

Of course, different tribunals inevitably reach different conclusions in relation to some issues, particularly when such issues are novel. However, once a body of consistent case law has been established in relation to any issue, tribunals may generally be relied upon to show deference to the rulings of prior tribunals.

Cost

There is very often a distinct inequality of arms between the parties in a sports arbitration, as the disputes generally involve one large body (typically a national or international federation) and one much smaller body or individual (a club or an athlete for example). A typical case would involve an athlete in dispute with a club, a club in dispute with a large federation or association, or even a single athlete opposing the joint forces of an international federation and the World Anti-Doping Agency (WADA),¹⁶ which regularly appeals decisions of national anti-doping bodies to the CAS. Contrary to the prevailing stereotype of millionaire footballers and golfers, individual athletes are often entirely dependent upon government subsidies or minor sponsorship agreements to survive in professional sport, whereas their counterpart in an arbitration will be able to rely upon significant financial resources. Given the prevalence of this type of situation, it is particularly important that the proverbial Goliath is not permitted to financially bully the weaker party into submission, particularly as many athletes or players already feel significant pressure not to enter into a legal dispute with their employer or their sport's governing body, in view of the dominant and often monopolistic position of the latter within the sport.

Three aspects of CAS arbitration that should provide comfort to impecunious athletes are:

- the moderate filing fee of 1,000 Swiss francs;
- the system of contribution towards legal costs; and
- the arbitration costs regime which applies in disciplinary cases of an international nature.

In the context of legal costs and pursuant to article R64 of the CAS Code, 'the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses'. Although on the face of it the language of this provision provides little reassurance for an impecunious party considering whether it should file an appeal against a decision of a large organisation, the CAS's practice when applying article R64 is for any contribution towards a victorious party's loss to be limited to an amount below 10,000 Swiss francs, with few exceptions. Although this cannot be strictly relied upon, the CAS's practice in this regard provides comfort to all parties acting in good faith that the maximum contribution towards legal costs that they would be ordered to make in the event of an unsuccessful arbitration would unlikely exceed 10,000 Swiss francs. Of course, considering this practice from a different perspective, it is also true that even when parties are fully successful in their appeal, they can still only hope to recover a certain proportion of their legal costs.¹⁷

The positive financial aspect for athletes related to arbitration costs specifically concerns those athletes who become involved in 'disciplinary cases of an international nature', commonly anti-doping cases. In such cases, article R65 of the CAS Code provides that no arbitration costs shall be paid by the parties. As a result, in international disciplinary cases, the parties are liable only for their own legal costs, if any, as well as any contribution that they may be required to make towards the opposing party's legal costs. It should also be noted that even in cases where the parties are required to pay the arbitration costs, CAS arbitrators work for an hourly rate that is generally significantly less than their usual commercial rate.

Given the mandatory nature of sports arbitration, whereby the athlete generally has no option but to sign up to arbitration if he wishes to compete at a high level within his sport,¹⁸ another area which needs to be considered in this context is the availability of legal aid for the parties, as the submission of disputes to arbitration deprives the athlete of any legal aid that may have been

available to him before state courts. The revised Article S6 of the CAS Code,¹⁹ provides that '[i]f it deems such action appropriate, [the International Council of Arbitration for Sport] creates a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means' and that 'the operation of the legal aid fund including criteria to access the funds is set out in the CAS legal aid guidelines'. Unfortunately, there seems to be a lack of knowledge and awareness amongst potential parties to CAS arbitration regarding the CAS's system of legal aid, and given the short time that a potential litigant generally has to decide whether or not to proceed with an arbitration, the CAS is often criticised for not making the relevant information more readily available. Some commentators have raised the possibility of an athlete without sufficient financial resources rescinding an arbitration agreement contained in a sports regulation on the grounds that it does not afford him fair access to justice.²⁰ Hopefully these concerns will be addressed with the publication of the CAS legal aid guidelines, which it is hoped will be issued in 2013. If legal aid is granted, the athlete will be exempted from paying the court office fee, the advance on arbitration costs and, in some cases, provided with a limited amount of money for legal representation.²¹

(No need for) enforcement

Aside from its speed, perhaps the most important advantage that sports arbitration has over classic commercial arbitration is the ease of enforcement of sports arbitration awards. Although the option of enforcing a sports arbitration award pursuant to the New York Convention²² is of course available to parties, in practice it is almost never necessary to pursue this course of action, as sports governing bodies spontaneously comply with arbitral awards, and have sufficient internal authority and enforcement mechanisms to impose the awards against their members.²³ In this respect it is interesting to note that the Swiss Supreme Court has explicitly upheld such 'private enforcement systems' by deciding that a CAS award confirming the imposition by FIFA of a sanction against a football club on the ground that it did not comply with a FIFA Disciplinary Committee decision was not inconsistent with public policy.²⁴

Court of Arbitration for Sport

Despite the vast and varied nature of international sport, the landscape of sports arbitration is dominated by one institution in particular – the Court of Arbitration for Sport in Lausanne, Switzerland. The CAS is colloquially referred to as a Supreme Court for sports disputes, and evidence of its influence is to be found throughout the sporting world. Since its establishment in 1984 it has registered approximately 2,700 separate arbitration proceedings.

How is the CAS organised?

In addition to the CAS headquarters in Lausanne, the CAS also has two 'decentralised offices' in Sydney and New York. A very recent development has been the addition of a number of alternative hearing centres in Kuala Lumpur, Shanghai, Abu Dhabi and Cairo as a result of a number of individual partnership arrangement deals struck by CAS. All four of CAS's new partners officially applied to be alternative venues for cases and were considered by the court to fulfil the requirements and to represent regions where professional sport is developing quickly. It remains to be seen how popular this opportunity will become and whether more venues will be added. The CAS provides four separate and distinct dispute resolution services: Ordinary Arbitration, Appeals Arbitration, Ad Hoc expedited Arbitration at major sporting events and Mediation. The Ordinary and Appeals

Arbitration divisions are each headed by a president, who can take charge of the initial steps in an arbitration before the arbitral tribunal is appointed.

The CAS Ordinary Division is a classic arbitration service, resolving mainly commercial disputes, and its general structure and workings will be familiar to any practitioners with experience of the ICC, AAA or other commercial arbitration institutions. Arbitrations which take place under the CAS's Ordinary Arbitration Rules are those that have been referred to the CAS as a first instance arbitral body, usually pursuant to an arbitration agreement contained in a commercial contract, such as sponsorship or licensing agreements. The CAS Ordinary Division also receives a certain number of 'political' disputes that are referred to arbitration pursuant to an arbitration clause in the statutes or regulations of a sporting body. Such arbitration clauses generally provide that any disputes arising under the statutes of the body or between members of the body shall be referred to the CAS for arbitration. These types of disputes often concern disputed election results or appointments within an organisation. Ordinary CAS Arbitration proceedings usually consist of two rounds of written submissions followed by an oral hearing. It is generally not an expedited process and the arbitral Tribunal is not required to issue its award within any particular time limit.

Appeals arbitration, while very commonplace in the sporting world, is usually somewhat of a novelty for other arbitration practitioners. Appeals arbitration consists of appeals filed against decisions issued by other arbitral or disciplinary tribunals, typically either national sports arbitration bodies or the internal disciplinary or judicial bodies of international sports federations. The cases brought before the CAS Appeals Arbitration Division, which is discussed in more detail below, account for approximately 90 per cent of the CAS's caseload.

The CAS also has a mediation service through which certain sporting stakeholders can request a legal opinion from the CAS. In addition, as previously mentioned, the CAS establishes an expedited arbitration service during major sporting events, which is referred to as the CAS Ad Hoc Division.

The CAS has an annual budget of 9 million Swiss francs. About 3 million Swiss francs originates from users by way of fees charged by the CAS, with the balance, approximately two-thirds of the budget, provided by the Olympic Movement (ie, the IOC, the International Sports Federations and the National Olympic Committees).²⁵

Independence

There has been a certain level of criticism both in the media and in academic journals referring to a lack of independence of the CAS. A long standing claim has been that the CAS is not sufficiently independent from the International Olympic Committee (IOC), which founded the CAS in 1984. Indeed, following a landmark case before the Swiss Supreme Court case in 1993²⁶ a number of reforms to the CAS structure were put in place which sought to insulate the CAS from any potential or perceived lack of independence. The decision in *USOC v IOC* provides possibly the most eloquent example of the independence of CAS in relation to the IOC.²⁷ In this case CAS held as invalid and unenforceable an IOC decision which prohibited athletes who had been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiry of their suspension.

In what legal framework does the CAS operate?

Pursuant to article R28 of the CAS Code, '[t]he seat of the CAS and of each Arbitration Panel ('Panel') is in Lausanne, Switzerland'.

The same provision applies to the arbitral tribunals of the CAS Ad Hoc Divisions sitting, for example, at the Olympic Games (see article 7 of the Ad Hoc Rules). The location of the hearing has no consequence on the legal seat of the arbitration, which remains in Lausanne.²⁸ As each CAS panel constitutes an international arbitral tribunal seated in Switzerland, all CAS proceedings are subject to the provisions of Switzerland's Private International Law Act (PILA), which ensures that there is procedural consistency between all CAS cases. Chapter 12 of the PILA is widely regarded as being 'arbitration-friendly'.²⁹

Pursuant to article 190 of the PILA, CAS awards are final upon communication to the parties and can only be challenged on very limited grounds before the Swiss Supreme Court.³⁰ In addition, the Swiss Supreme Court has held that advance waivers of any right to challenge the award pursuant to article 192(1) of the PILA are in principle unenforceable in sports arbitrations, given that the athletes' purported consent to such exclusion agreements 'obviously [does] not rest on a free will' and is therefore 'tainted ab ovo'.³¹

The procedure before the Appeals Arbitration Division is governed by the General Provisions of the CAS Code, (article R27 to R37), and by the Special Provisions Applicable to the Appeals Arbitration Proceedings, (article R47 to R59 of the CAS Code).

What kind of disputes does the CAS resolve?

In 2011, the CAS initiated 365 arbitrations – marking an increase of 12 per cent on 2010 figures (298). The previous record for CAS initiated arbitrations in a single year stood at 311 for 2008 which is reflective of an increased caseload in an 'Olympic' year. On that basis it is conceivable that the final figures for 2012 will indicate that it has been another record year for the CAS. The disputes resolved by the CAS are extremely diverse in nature, and can vary between straightforward commercial disputes which happen to exist in a sporting context, to very sport-specific disputes concerning actions or incidents arising on the field of play.

Football employment disputes

The type of disputes that most commonly arise before the CAS are appeals from decisions of FIFA, the world governing body for football, which has its own internal judicial system. This type of dispute typically arises from the termination of the employment contracts of players or coaches, or the movement of players between clubs. As a consequence of such movement, remuneration is generally payable to the player's previous clubs, either pursuant to contractual agreements between the parties or according to the complex series of regulations that apply to football transfers, both in a national and international context.³²

Disciplinary disputes

The second most common type of dispute before the CAS are appeals against disciplinary sanctions. The largest subsection within this group is appeals against sanctions for anti-doping rule violations. Article 13.2.1 of the World Anti-Doping Code provides that: 'In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision (concerning an anti-doping rule infraction) may be appealed exclusively to CAS in accordance with the provisions applicable before such court.' Since the CAS was designated as the exclusive appeals body for all international anti-doping cases, including in sports such as rugby where the CAS previously had no jurisdiction, the CAS has received a constant stream of appeals against decisions based on anti-doping rules. In many cases, the appellant in an anti-doping case is a sportsperson who is appealing against a suspension imposed upon him or her, but the CAS also regularly

receives appeals from WADA, requesting that a sanction against a particular sportsperson be increased.

CAS anti-doping cases typically involve factual evidence regarding the circumstances of the alleged breach, expert evidence regarding the validity or otherwise of the scientific findings and the positive test, and legal arguments regarding the interpretation and implementation of the relevant anti-doping rules.

Match-fixing and ethical disputes

An evolving trend of cases in the area of match fixing and corruption has emerged in recent years. In the opinion of the authors the number of cases in this area is likely to grow as the workload of CAS reflects the issues that are prevailing in sport at the time. One particular problem faced by CAS in its ability to adjudicate upon these activities is the difficulty faced by parties in gathering sufficient evidence. Whilst some CAS Panels have expressly noted that the panel should keep in mind the fact that corruption is, by nature, concealed and that those involved will seek to use evasive means to ensure that they leave no trace of their wrongdoing,³³ in a recent high-profile corruption case this logic was not followed.³⁴ As sports governing bodies do not have the coercive investigatory powers often needed to uncover the truth, one could legitimately fear that the ability of sports bodies to effectively fight corruption is impaired.

Main features of the CAS Appeals Procedure

The Appeals Arbitration Procedure is the most frequently used within CAS and it provides a distinctive framework for sports arbitration. It is a *de novo* procedure, the arbitral tribunal having 'full power to review the facts and the law'.³⁵ The following paragraphs will outline the main features of this procedure.

Arbitral tribunal

Unless the appellant establishes in the Statement of Appeal that the parties have agreed to a Panel composed of a sole arbitrator or that a sole arbitrator would be more appropriate due, for instance, to the urgent nature of the appeal, appeals are submitted to a tribunal composed of three arbitrators. In cases where the appeal is to be heard by a sole arbitrator, the arbitrator is appointed by the president of the Appeals Arbitration Division. If a three-member tribunal is to hear the appeal, the applicant nominates an arbitrator in the Statement of Appeal. The respondent then nominates an arbitrator within 10 days of receiving the Statement of Appeal and the president of the Appeals Division nominates the president of the tribunal.³⁶ The constitution of the tribunal becomes final only after the president of the Division confirms that each arbitrator is independent of the parties.

Article R33 of the CAS Code provides that '[e]very arbitrator shall appear on the list drawn up by the ICAS', ie the CAS List of Arbitrators. Having originally comprised 60 members, the CAS list now consists of approximately 280 arbitrators, each appointed for a renewable period of four years. This is a closed list and in CAS arbitrations all arbitrators must be appointed from this list. The practice of maintaining a closed list has been criticised by several commentators, although the Swiss Supreme Court upheld the system in the case of *Larissa Lazutina*.³⁷

The status of the members of the CAS List of Arbitrators changed on 1 January 2010 when the CAS introduced a new rule (article S18 of the CAS Code) according to which 'CAS arbitrators and mediators may not act as counsel for a party before the CAS'. This rule prevents CAS members from appearing as counsel in CAS cases, but on its face it does not extend to the arbitrators' partners and other members of their law firms.

Rules of law applicable to the merits of the dispute

With regard to the applicable substantive law in CAS arbitrations, article R58 of the CAS Code provides that the arbitral tribunal 'shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties, or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-body that has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision'. In practice, as most international sports federations are domiciled in Switzerland, Swiss law is applied as the substantive law in the majority of cases before the CAS.

As each international federation has its own set of statutes and regulations, arbitral tribunals can often apply these regulations and issue an award without any explicit reference to national law. However, given that Swiss procedural law is applicable in every CAS case, and Swiss substantive law is applicable in the majority of CAS cases, Swiss law clearly has an important role to play in CAS arbitration. As a result, non-Swiss lawyers in CAS arbitrations are increasingly assisted by Swiss lawyers or legal experts.

On the procedural side, there is an increasing level of sophistication in CAS disputes where evidential practices more familiar to civil/criminal courts and commercial arbitration are becoming identifiable in sports arbitration. Recent examples include significant document production requests involving e-mail searches³⁸ and the submission and acceptance of polygraph evidence.³⁹ In the area of football specifically, and with the anticipated enforcement by UEFA of its new financial fair-play rules against football clubs, it is likely that these matters will soon come before CAS where the involvement of financial experts giving evidence will become more common.

Other sports arbitration forums*International sports dispute resolution bodies*

Many international sports federations have their own system of dispute resolution and appoint tribunals for the resolution of disputes arising in their sport. However, in the majority of instances, these systems could not accurately be described as independent arbitration, due to the tribunals not being sufficiently independent from the sports organisation responsible for their constitution.

One example of a 'true' arbitration system is the Basketball Arbitral Tribunal (BAT), which was set up by the world governing body for basketball (FIBA) for the resolution of disputes between players, agents and clubs. BAT arbitration, seated in Geneva, involves a simple, English language procedure with a sole arbitrator, who is appointed by the BAT president. Provisional and conservatory measures are available to the parties and the final award is issued by the arbitrator within six weeks of the end of proceedings. Some notable features of BAT arbitration are that hearings are held only upon application, and the arbitrators decide the cases *ex aequo et bono*, that is, on the basis of general considerations of justice and fairness, without reference to any particular national or international law.

Although the majority of international federations allow for an appeal of their own decisions to the CAS, some sports such as rugby and Formula One do not provide for such an appeal, except where mandated by the WADA Anti-Doping Code. Similarly, the protocols governing the last editions of the America's Cup provided for an arbitration scheme separate from the CAS.⁴⁰

National sports dispute resolution bodies

On the national level, the establishment of national sports dispute resolution bodies is on the increase. Again, while the term

'arbitration' is often used to describe the services provided, the true nature of these bodies varies considerably. Although there are some exceptions, many of these bodies cannot be considered as arbitration tribunals in the true sense of the term.

In Italy, the Italian Olympic Committee has set up its own dispute resolution body called the Tribunale Nazionale di Arbitrato per lo Sport (TNAS). This body resolves disputes between sports federations and affiliated persons, provided that internal remedies have been exhausted. Doping matters and sanctions that exceed 120 days of suspension or fines exceeding €10,000 remain outside the competence of the TNAS.⁴¹ While this body aspires to be a true arbitration tribunal, some doubts in this regard have been raised by commentators.⁴²

In France, the *Chambre Arbitrale du Sport* is a dispute resolution body which resolves sports-related disputes that have been referred to it by national sports federations, as well as regional, national and departmental sporting organs, the sporting groups that are affiliated to them, and their members.⁴³ Although this body can provide an arbitration service to resolve disputes referred to it by various individuals and entities, given that it was created and is controlled by the French Olympic Committee, which appoints all the body's arbitrators, it could not be regarded a true arbitral body for the resolution of all sporting disputes in France, notably those involving the French Olympic Committee.⁴⁴

Although many national bodies only allow for an appeal to the CAS when the dispute in question is international in nature, some national dispute resolution systems provide for first instance arbitration by a national body, with the possibility to appeal the award to the CAS. This option has been adopted in the Australian and United States anti-doping dispute resolution systems, which provide for a first instance arbitration under the procedures of CAS Oceania and the American Arbitration Association⁴⁵ respectively, with the possibility of an appeal to the CAS.⁴⁶

Whereas many national arbitration services are controlled by one particular sporting federation, or by a country's National Olympic Committee, some countries have established their own national CAS, independent from a particular sport or National Olympic Committee. Two examples of a national CAS can be found in Ireland and in the United Kingdom.

In Ireland, Just Sport Ireland (JSI) has been in operation since 2007 and is experiencing an ever-increasing caseload, having already established itself within the Irish sporting community. It is an independent dispute resolution body, which provides accessible and cost-effective mediation and arbitration services to the sporting community. Its arbitration rules provide for an expedited appeals arbitration procedure, with a potential further appeal to the CAS, depending on the arbitration clause adopted by the parties.⁴⁷

In the UK, Sport Resolutions provides independent arbitration and mediation services for sport and is also the provider of the National Anti-Doping Panel (NADP) service. Like JSI, it serves as a national CAS for the UK, with three-quarters of its enquiries and referrals coming from Olympic, Paralympic and English high-performance sports, and the remaining quarter coming from community sport.⁴⁸

In conclusion, arbitration has proven to be an extremely successful method of resolving sports disputes, and as a result it has gained the favour and confidence of the sporting world. This success has inevitably led to a massive increase in the number of sports arbitrations taking place in recent years. Unfortunately,

the expectations of the sports community, created largely by the high-profile activity of the CAS, are somewhat at odds with the reality of many national level sports dispute resolution bodies, as well as some of the international 'arbitral' bodies that have been created by international federations.

Perhaps the greatest challenge that the sports arbitration community is now faced with is the need to put structures in place to ensure that the increase in the number of arbitrations does not lead to a decrease in the quality of the awards being issued. To this end, it is arguable that the bulk of resources, both financial and intellectual, should be dedicated to the establishment of a high-quality 'national CAS' in every country for the resolution of national level disputes, and a similarly high-quality arbitral body in each sport, to resolve international disputes.

If these two types of bodies became established in each individual country and sport, the right of appeal to the CAS could be restricted, and the role of the CAS could evolve from that of a body which re-hears appeals on a de novo basis, to that of a review body whose primary function would be to scrutinise the procedural fairness of the arbitral proceedings at previous instances. In effect, it would fulfil a similar role to that which is currently performed by the Swiss Supreme Court in relation to the CAS.

This development would eventually lead to a pyramidal structure in the world of sports dispute resolution. National level athletes would have access to high-quality dispute resolution services in their own countries, which would eliminate language barriers and reduce the costs that are currently associated with international tribunals, thereby increasing access to justice. In addition, each sport would have its own independent arbitral service for international disputes, which would ensure even greater understanding of disputes by arbitral tribunals.

This structure would allow the CAS to utilise its resources in a new way. During the early stages of this development, it could share its institutional knowledge and the experience of its secretariat to assist with the creation of the new arbitral bodies. Then, once the bodies are established, the role of the CAS, at the top of the pyramid, would be that of a watchdog, or a safety net, to ensure that fairness and independence were being maintained at all times. In this way, the CAS would play a significant role in ensuring that both domestic and international arbitral tribunals maintain a high standard of arbitral awards in sports arbitration, while providing an even more accessible and specialised arbitral service to sports people and sporting entities worldwide.

Notes

- 1 See among many others Ian Blackshaw, *TV Rights and Sport*, TMC Asser Press (2009); José Luis Arnaut, *Independent European Sports Review 2006*; Presentation of the United Nations Environment Programme (UNEP), November 2004.
- 2 Decision of the Swiss Supreme Court 4A_612/2009 of 10 February 2010 (para 4.1). In the authors' view, from a purely legal perspective, this is a legitimate suggestion as the Supreme Court is cognisant of the special nature of sports arbitration and the fact that it is mandatory. However, when one bears in mind the particular emotions that are invoked by sport and the behaviour of certain sports fans, whether it would be feasible to hold such cases in public is debatable, especially considering the limitations on a private arbitral institution to provide security capable of coping with public disturbances.
- 3 See Gabrielle Kaufmann-Kohler, *Arbitration at the Olympics*, The Hague (2001).
- 4 CAS 2011/A/2495, *FINA v Cesar Augusto Cielo Filho & CBDA*; CAS 2011/A/2496; *FINA v Nicholas Araujo Dias dos Santos & CBDA*; CAS 2011/A/2497 *FINA v Henrique Ribeiro Marques Barbosa & CBDA*; and CAS 2011/A/2498 *FINA v Vinicius Rocha Barbosa Waked & CBDA*.
- 5 It is particularly striking to see the 53 UEFA member national associations unanimously declaring their support for UEFA in its determination to uphold the statutes and regulations of football on the ground that '[t]he independent sports justice system is the best guarantor of equality and fairness for all participants in sports' (see www.uefa.com/uefa/aboutuefa/news/newsid=1683607.html).
- 6 In CAS case 2011/A/2472 the CAS ordered the Saudi Arabian Football Federation (SAFF) to answer within 24 hours a request by a club to be allowed to play the King's Cup Final. The CAS was then in a position to issue an order avoiding the disruption of the competition.
- 7 In cases of utmost urgency, the CAS can also issue ex parte orders.
- 8 See Antonio Rigozzi, *Provisional Measures in CAS Arbitrations*, in Robert Siekmann et al. (eds) *The Court of Arbitration for Sport 1984-2004*, The Hague (2006) pp216 et seq.
- 9 CAS 2011/A/2551 *Fenerbahçe v UEFA & Turkish Football Federation*; 20 September 2011.
- 10 Decision by the Swiss Supreme Court of 27 May 2003, reported in ATF 129 III 445, *Larissa Lazutina & Olga Danilova v CIO, FIS & CAS*, at para. 3.3.3.2, *Yearbook Comm. Arb'n XXIX (2004)*, p206, 219. The complete original French text is reported in *ASA Bull. 2003*, p601 et seq.
- 11 Antonio Rigozzi, *Le délai d'appel devant le Tribunal arbitral du sport – Quelques considérations à la lumière de la pratique récente in*

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Established in 2007, Lévy Kaufmann-Kohler is headed by Laurent Lévy, Gabrielle Kaufmann-Kohler and Antonio Rigozzi. The Geneva-based firm specialises and is widely recognised as a leading practice in international commercial, investment and sports arbitration. In addition to acting as arbitrators, the firm's members also give advice with regard to all aspects of arbitration and international law and regularly act as counsel in arbitration and arbitration-related proceedings both in Switzerland and abroad.

Lévy Kaufmann-Kohler provides exceptional services in the field of sports arbitration. Antonio Rigozzi is recognised as one of the foremost experts in the field and has represented parties in high-profile cases before the Court of Arbitration for Sport (CAS), the Basketball Arbitral Tribunal (BAT) and a variety of other dispute-resolution bodies and proceedings involving sports matters.

In addition to Antonio Rigozzi and William McAuliffe, the firm benefits from the vast experience and expertise of Gabrielle Kaufmann-Kohler, who was closely involved in the setting up of the CAS; in particular the CAS ad Hoc Division for the Olympic Games, over which she presided until the 2000 Sydney Olympic Games. Professor Kaufmann-Kohler has also chaired the BAT from its inception in 2006 until 2011 and was a member of the International Jury of the 32nd Edition of the America's Cup.

- Le temps et le droit – Recueil de travaux offerts à la Journée de la Société suisse des juristes, Basel (2008), pp255-272, 271.
- 12 This time limit was introduced in the fourth edition of the CAS Code, which entered into force on 1 January 2010. Previously, the CAS Code provided that 'The operative part of the award shall be communicated to the parties within four months after the filing of the statement of appeal'.
 - 13 Matthieu Reeb, *Digest of CAS Awards Volume I*, Bern (1998) and Volumes II & III, The Hague (2002 and 2004).
 - 14 <http://jurisprudence.fas-cas.org/sites/caselaw/help/home.aspx>.
 - 15 See Gabrielle Kaufmann-Kohler, *Arbitral precedent: Dream, Necessity or Excuse?*, *Arbitration International* 2007, pp357-378.
 - 16 WADA was established in 1999 as an independent agency composed and funded equally by the sport movement and governments of the world. Its stated mission is to promote, coordinate and monitor the fight against doping.
 - 17 The Swiss Federal Supreme Court has noted in passing that 'it would be desirable for the CAS to specify the concept of 'contribution' within the meaning of Art. R64.5 of the Code, in order to give a framework to the discretionary power of the arbitrators in these matters' [See decision by the Swiss Supreme Court 4A_600/20101 of 17 March 2011 at 4.2, free translation]. While this would undoubtedly increase predictability, it might also reduce the arbitrators' discretion to take all the circumstances of the case into account. It is anticipated that until the CAS arbitrators do not abuse such discretion and as long as they justify their decision on costs in the award there is no need to issue specific guidelines.
 - 18 See decision by the Swiss Supreme Court X [Guillermo Canas] v ATP Tour [& TAS], 4P.172/2006 of 22 March 2007, reported in the Official Collection of the Supreme Court's Decisions (ATF) ATF 133 III 235, 243; also reported in ASA Bull, 2007, p592 and commented in *Gazette du Palais, Les Cahiers de l'arbitrage* 2007/2, p35 (note by Pinna), in *Causa Sport* 2007, p 145 (note by Baddeley), and in *SpuRt* 2007, p 113 (note by Oschütz [p 177]).
 - 19 See Antonio Rigozzi. The recent revision of the Code of Sports related Arbitration (CAS Code), in *Jusletter* 13. September 2010 (http://jusletter.weblaw.ch/article/en/_8656?lang=fr).
 - 20 On the conditions upon which a party may terminate an arbitration agreement under Swiss law, see Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, 2nd edition, Bern (2010), pp155 ss.
 - 21 In our experience, this amount is limited to 5,000 Swiss francs.
 - 22 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
 - 23 The New York Convention plays an important role in excluding the jurisdiction of State courts to hear actions on the merits where there is a CAS arbitration agreement.
 - 24 Decision by the Swiss Supreme Court 4P.240/2006 of 5 January 2007.
 - 25 See Charles Poncet, 'The Independence of the CAS', *European International Arbitration Review*, 2012 Vol. 1 Issue 1, p32.
 - 26 See *Elmar Gundel v Fédération Équestre Internationale*. Decision by the Swiss Supreme Court 4P.217/1992 of 15 March 1993, reported in ATF 119 II 271.
 - 27 See CAS Award in CAS 2011/O/2422 USOC v IOC.
 - 28 *Angela Raguz v Rebecca Sullivan & Ors*, [2000] NSW 240, at para 97, ASA Bull. 2001, p335, 349, underscoring the 'vital distinction between the so-called place (or seat) of arbitration and the place or places where the arbitrators may hold hearings, consultations or other meetings'. Moreover, referring to 'the unqualified choice of Lausanne as the 'seat' of all CAS arbitrations' provided by article R28 of the CAS Code, the Court held that, despite the range of factors connecting it to Australia, the CAS arbitration in Raguz was not a 'domestic arbitration' but an 'arbitration in a country other than Australia'.
 - 29 See *Elmar Gundel v Fédération Équestre Internationale*: Decision by the Swiss Supreme Court 4P.217/1992 of 15 March 1993, reported in ATF 119 II 271; ASA Bull. 1993, p398. An English translation is reported in CAS Digest I, p545. See also Mealey's International Arbitration Report Vol. 8 Issue 10 October 1993, p12, with a note by Jan Paulsson.
 - 30 For a comprehensive analysis of the remedies available against CAS awards, see Antonio Rigozzi. *Challenging Awards of the Court of Arbitration for Sport*, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp217-254, available at <http://jids.oxfordjournals.org/cgi/reprint/1/1/217>.
 - 31 See decision by the Swiss Supreme Court X [Guillermo Canas] v ATP Tour [& TAS], 4P.172/2006 of 22 March 2007, reported in ATF 133 III 235, 244, supra footnote 18.
 - 32 See, for example, the FIFA Regulations on the Status and Transfer of Players.
 - 33 CAS 2010/A/2172, *UEFA v Oriekhov* (para 54).
 - 34 CAS 2011/A/2621, *Bin Hammam v FIFA*.
 - 35 For an analysis of the CAS Ordinary Proceedings, see Gabrielle Kaufmann-Kohler, Philippe Bärtsch, *The Ordinary Arbitration Procedure of the Court of Arbitration for Sport*, in Robert Siekmann et al. (eds), *The Court of Arbitration for sport 1984-2004*, The Hague (2006), pp134-159. For a comprehensive review and analysis of the CAS Ad Hoc Division for the Olympic Games, see Gabrielle Kaufmann-Kohler, *Arbitration at the Olympics* (supra footnote 3), passim.
 - 36 It is important to emphasise that, contrary to what has often been written (see for instance Michael Straubel, 'Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better', 36 *Loy. U. Chic. L.J.* (2005) p1228), the president of the Appeals Division does not consult with the parties before appointing the president of the panel.
 - 37 *Larissa Lazutina & Olga Danilova v CIO, FIS & CAS*, Swiss Supreme Court, 27 May 2003, supra footnote 10.
 - 38 CAS 2011/A/2621 *Bin Hammam v FIFA*.
 - 39 CAS 2011/A/2384 & 2386 *UCI and WADA v Contador and RFEC*.
 - 40 Thomas Schultz, *Sailing away from judicial interference: arbitrating the America's Cup*, *International Sports Law Journal*, Jan-April, 2006, pp27-39.
 - 41 http://ficr.it/fileadmin/arbitrato/TNAS_3_Regolamento_sn.pdf.
 - 42 See, for example, Giuseppe Liotta & Laura Santoro, *Lezioni di Diritto Sportivo*. Giuffrè Editore Milano 2009, pp244-245.
 - 43 www.franceolympique.com/art/40-la_chambre_arbitrale_du_sport_html.
 - 44 See also www.dis-arb.de/sport/default.htm for details on the German sports arbitration tribunal, das Deutsche Sportschiedsgericht, established in 2008.
 - 45 The proceedings are governed by the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes.
 - 46 For an example describing this mechanism, see *Mark French v Australian Sports Commission & Cycling Australia*, CAS 2004/A/651, (Appeal) Award of 11 July 2005.
 - 47 For further information see www.justsport.ie.
 - 48 For further information see www.sportresolutions.co.uk.



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Antonio Rigozzi is the partner in charge of the sports arbitration practice at Lévy Kaufmann-Kohler. He has extensive arbitration, litigation and dispute resolution experience across all the main areas of sports law, including anti-doping, contract, disciplinary, labour, image rights, regulatory, and sponsorship disputes in a wide array of sports including football, Formula One, sailing, athletics, ice hockey, swimming and cycling. Over the years, he has attracted an impressive range of clients, whom he has represented and advised in arbitration proceedings and before the Swiss courts, including the Swiss Supreme Court: from high-level athletes, including many Olympic and World Champions, to prestigious clubs and teams, including UEFA Champions League winners, as well as prominent sports governing bodies such as FIFA, UEFA and the United States Olympic Committee.

Antonio Rigozzi also serves as an arbitrator or mediator in sports-related disputes outside the CAS. He is the chairman of the Arbitral Tribunal of Swiss Athletics and a member of FIA's International Court of Appeal (ICA) for cases relating to Formula One.

As a professor of law at the University of Neuchâtel, Switzerland, Antonio Rigozzi teaches international arbitration law and sports law. Professor Rigozzi also lectures for several LLM programmes in Switzerland and abroad, including the LLM in international sports law at the Instituto Superior de Derecho y Economía, Madrid, and the FIFA Master in Management, Law and Humanities of Sport, of which he is the scientific director for the legal module. He is the author of one of the main reference works on sports arbitration, the co-editor of the CAS Seminar Series of books, and the head of the Sports Law Scientific Committee of the Swiss Bar Association. In addition, Professor Rigozzi regularly publishes in various law journals, including a yearly contribution on sports arbitration law in *Les Cahiers de l'Arbitrage – The Paris Journal of International Arbitration*.



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William holds a law degree from University College Cork and an LLM in European Law from University College Dublin. He is also a graduate of the FIFA Masters in management, law and humanities of sport organised by the International Centre for Sports Studies (CIES) in Neuchâtel, Switzerland incorporating academic courses in De Montfort University (Leicester), SDA Bocconi (Milan) and the University of Neuchâtel. William currently sits as a committee member of the FIFA Master Alumni Association.

He has given lectures on sports law and arbitration law in Ireland and is also a member of the Institute for International and European Affairs.



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