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# An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes

Louise Reilly\*

## I. INTRODUCTION

The founding purpose of the Court of Arbitration for Sport (CAS) was to take international sports disputes out of national courts and provide a highly specialized forum where those disputes could be heard and decided, quickly and inexpensively, according to a flexible procedure. Since its inception, CAS has gained the recognition and trust of the international sports community and today, is the last instance of appeal for parties involved in a wide-range of sports-related disputes, including those related to all Olympic sports and many non-Olympic sports, football disputes, doping infractions and international commercial contracts. CAS has come to provide sportsmen and women, their respective governing bodies and other entities involved in the sports world with an efficient, cost effective and final resolution to their disputes. This paper will predominantly provide an introduction to the CAS (parts II – VIII); as to the role of national courts in international sports disputes and the “skirmishes” that can arise, part IX of this paper looks at this issue by reference to recent case law.

## II. INDEPENDENCE OF CAS

CAS is based in Lausanne, Switzerland,<sup>1</sup> and was established in 1984 by Juan Antonio Samaranch, the then President of the International Olympic Committee (IOC), and Judge Kéba Mbaye, an IOC member and judge on the International Court of Justice.<sup>2</sup> Although CAS was set up as an independent arbitral institution, in the early 1990’s there was some concern that CAS might not be seen as truly independent *vis à vis* the IOC in light of the organizational and financial links between the two bodies. These concerns were voiced *obiter* in a judgment of the Swiss Federal Tribunal (the Swiss Supreme Court) in a case involving a German horse rider and the International Equestrian Federation.<sup>3</sup>

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1. The CAS has decentralized offices in New York and Sydney and has established alternative hearing centres in Abu Dhabi, Shanghai, Kuala Lumpur and Cairo.

2. See Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 31, 31-39 (Ian S. Blackshaw et al. eds., 1st ed. 2006).

3. Tribunal fédéral [TF] [Swiss Federal Tribunal] Mar. 15, 1993, Arrêts du Tribunal Fédéral Suisse [ATF] 119 271 (Switz.), translated into English in *MATTHIEU REEB, DIGEST OF CAS AWARDS I*, 1986-1998 545 (2001).

In this hugely important decision for the CAS, the Federal Tribunal recognized the independence of CAS and effectively gave it a legal seal of approval; nevertheless, the Federal Tribunal drew attention to a number of “organic and economic” links existing between CAS and the IOC. As a result, CAS significantly altered its organizational structure in 1994 to create a governing body<sup>4</sup> empowered with administrative functions and with responsibility for amending the CAS procedural rules. CAS’ independence from the IOC was confirmed by the Swiss Federal Tribunal in 2003 when, dismissing a challenge to a CAS award by two Russian cross-country skiers against the IOC and the International Ski Federation, the Federal Tribunal referred to CAS as the “true Supreme Court of world sport” and stated CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, whose awards are comparable to the judgments of a state court.<sup>5</sup>

### III. CAS PROCEDURES

The Code of Sports-related Arbitration and Mediation Rules (CAS Code)<sup>6</sup> is the set of procedural rules which govern CAS procedures. Although people tend to think automatically of appeals against drug bans or football disputes when they hear of CAS, the CAS Code actually provides for four<sup>7</sup> distinct types of procedure:

- The Ordinary Arbitration Procedure: this procedure governs disputes on a first-instance basis. The types of cases which are assigned to the Ordinary Division are classic international commercial arbitration cases and include disputes concerned with sponsorship contracts; licensing; and broadcasting and media rights;
- The Appeal Arbitration Procedure: this procedure governs appeals against decisions of sports bodies, including transfer and compensation

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4. The International Council of Arbitration for Sport (ICAS) is a Board of Trustees of 20 members, which meets twice a year and looks after the administration and financing of the CAS. The IOC, International Federations (IFs), National Olympic Committees (NOCs) and athletes each appoint four representatives to ICAS; the final four are appointed from outside the sports world (former senior magistrates, judges, ambassadors and ministers of sport), the most famous of whom was probably the former President of the United States, Gerald Ford, who was an ICAS member for two years.

5. Tribunal fédéral [TF] [Swiss Federal Tribunal] May. 27, 2003, III Arrêts du Tribunal Fédéral Suisse [ATF] 129 445 (Switz.), translated into English in MATTHIEU REEB, DIGEST OF CAS AWARDS III, 2001-2003 688 545 (2004).

6. COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION AND MEDIATION RULES, available at [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220\\_en\\_2001.01.pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.pdf) (last visited Feb. 13, 2012) [hereinafter CAS CODE].

7. Previous editions of the CAS Code provided that the IOC, IFs, the NOCs and the World Anti-Doping Agency (WADA) could request a non-binding advisory opinion from CAS “about any legal issue with respect to the practice or development of sport or any activity related to sport”. The provision of advisory opinions was seen in the past as a useful service to sports bodies in the development of their rules and regulations. However, in later years, the role of CAS as a body providing advisory opinions to IFs had significantly decreased and had the potential to conflict with its primary role as an impartial arbitral body, particularly when a regulation on which the federation sought an advisory opinion was subsequently challenged in a CAS arbitration. As of 1 January 2012, the CAS no longer provides advisory opinions.

disputes related to football and disciplinary sanctions for anti-doping rule violations;

- The Ad hoc Division: during the Olympic Games and other major sports events,<sup>8</sup> CAS sets up an *ad hoc* Division on-site at the event; in practice, this means that a Panel of arbitrators is on-call to hear appeals as they arise and to issue decisions within 24 hours of the appeal being filed; and
- Mediation: this is not widely used<sup>9</sup> but is offered to all parties before engaging in an ordinary arbitration procedure.

The vast majority of the CAS caseload – about 90% – is heard by the Appeals Arbitration Division<sup>10</sup> and this paper will focus on CAS appeals. Appeals are heard by a Panel of one or three arbitrators,<sup>11</sup> selected from a closed list of 264 CAS members. The list is geographically representative<sup>12</sup> and all CAS members are required to have full 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.<sup>13</sup> ICAS appoints arbitrators<sup>14</sup> to the list on the basis of proposals by all stakeholders in sport – including the IOC, the IFs and the NOCs – for a renewable period of four years.<sup>15</sup>

The closed list is subject to some criticism, including because of the obvious restriction on a party's choice to nominate its arbitrator and fears that it allows an elite club of arbitrators to develop. The counter-argument is that disputes heard at CAS are submitted to legal experts in the area of sports law. Those experts have experience and knowledge in the application of the rules and regulations of sports bodies while having an understanding of how the world of sport operates; this advances the fundamental objectives of CAS: to ensure that the best-suited Panel

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8. These include the Commonwealth Games; the FIFA World Cup; certain editions of the Europa League; and from 2014, the Asian Games.

9. Since 1999, CAS has handled 30 mediations.

10. CAS arbitrations are assigned to either the Ordinary Arbitration Division or the Appeals Arbitration Division. Each Division is headed by a President who confirms and appoints arbitrators and takes procedural decisions before the Panel of arbitrators is constituted.

11. The Appellant(s) nominate an arbitrator, the Respondent(s) nominate an arbitrator and the third arbitrator, the President of the Panel, is appointed by the President of the Appeals Arbitration Division.

12. Although CAS arbitrators represent 71 countries, the list does have a disproportionately high number of Swiss lawyers, perhaps reflecting the fact that Swiss procedural law is always applicable and quite often the substantive law is Swiss. The CAS list is not however gender balanced – of the 264 CAS arbitrators, only 20 are women. (ICAS does slightly better – of the 20 ICAS members, 3 are women.)

13. The CAS working languages are English and French.

14. The ICAS Board, which is composed of five ICAS members, decides on challenges to arbitrators. Furthermore, an arbitrator may be removed by the ICAS if he refuses to or is prevented from carrying out his duties or if he fails to fulfil his duties pursuant to the CAS Code within a reasonable time. See CAS CODE, *supra* note 6, art. R35.

15. The CAS Code was amended in 2010; one significant amendment was that CAS arbitrators and mediators may no longer act as counsel for a party before the CAS. Occasionally, lawyers from the same law firm as a CAS arbitrator act as counsel before the CAS but this practise is discouraged.

resolves the parties' dispute competently and expeditiously.<sup>16</sup> A quick look through the CAS list will reveal a diverse range of lawyers with backgrounds as former athletes and Olympians as well as law professors and recognized leaders in international commercial arbitration.

#### IV. CAS JURISDICTION

As with all arbitration, the parties' consent to CAS arbitration is paramount.<sup>17</sup>

An 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, or insofar as the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.<sup>18</sup>

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16. Jan Paulsson (who is a member of the CAS list of arbitrators) recently expressed support for the system of a closed list:

Some [CAS] cases are of international notoriety, involving the disqualification of famous champions or the transfer fees of wealthy professional athletes. Most CAS arbitrations, however, involve far more modest disputes and are resolved after hearings that take less than a full day. Of present importance is that (i) the parties come from all parts of the globe, and (ii) that most of them are involved in such proceedings for the first time of their lives. If they were given the unfettered right to make a unilateral nomination, they would in all likelihood – out of ignorance, fear, or calculation – appoint someone unknown, and practically speaking shielded from any meaningful verification by reason of coming from an environment wholly unfamiliar to the other participants in the process. Such an appointee would have no moral standing with the presiding arbitrator beyond what is possible to reveal in a few hours of collaboration – which is not very much, nor very reliable. The result might be that the presiding arbitrator would tend to decide alone, thus defeating the purpose of three-member tribunals.

Jan Paulsson, *Are Unilateral Appointments Defensible?*, KLUWER ARBITRATION BLOG, (Apr. 2, 2009), <http://kluwcrarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/>.

17. The CAS Code provides:

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings). Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport.

CAS CODE, *supra* note 6, art. R27. The “connection to sport” requirement is interpreted broadly. See *L. v. Y. SA*, TAS 92/81 (Nov. 30, 1992), available at <http://jurisprudencce.tas-cas.org/sites/CasLaw/Shared%20Documents/81.pdf>.

18. CAS CODE, *supra* note 6, art. R47; see, e.g., INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, COMPETITION RULES, art. 42.3 (2010-2011) (“Appeals Involving International-Level Athletes: in cases involving International-Level Athletes or their Athlete Support Personnel, the decision of the relevant body of the Member may be appealed exclusively to CAS in accordance with the provisions set out below”); FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, STATUTES, art. 62.1 (2011) (“FIFA recognises the independent Court of Arbitration for Sport (CAS) with head-

In addition, it is often a condition of entry to sports events that the athlete signs an entry form which includes a provision for CAS arbitration.

The latter form of arbitration agreement raises questions as to whether consent is really validly given when the athlete's only alternative is to refuse to sign the entry form and consequently bar himself from competing in the relevant sports event. However, the Swiss Federal Tribunal has consistently held that the need for a quick and uniform dispute resolution system in international sport prevails over the right of an athlete to have his case adjudicated by ordinary courts, provided that the dispute resolution system observes the fundamental requirements of due process; furthermore, the Swiss Federal Tribunal premised its acceptance of 'arbitration by reference' for sports cases on the basis that "it promotes the swift settlement of disputes, particularly in sport, by specialised arbitral tribunals that offer sufficient guarantees of independence and impartiality."<sup>19</sup> More recently, the Federal Tribunal has stated that

[t]he arbitration clause must meet the requirements of Art. 178 PILA. However the Federal Tribunal reviews the agreement of the parties to call upon an arbitral tribunal in sport matters with some 'benevolence'; this is with a view to encouraging quick disposition of disputes by specialized tribunals which, like the CAS, offer adequate guarantees of independence and impartiality. The generosity which characterizes case law of the Federal Tribunal in this context appears in the assessment of the validity of arbitration clauses by reference. The Federal Tribunal has accordingly found valid at times a general reference to the arbitration clause contained in the statutes of a federation. Thus in the case of a football player who was a member of a national federation this Court considered as a legally valid reference to the arbitration clause contained in the FIFA Statutes the provision contained in the Statutes according to which the sportsmen belonging to the federation had to comply with FIFA rules.<sup>20</sup>

Today, all Olympic International Federations and several non-Olympic federations recognize CAS as the final instance of appeal for international disputes, to the exclusion of national courts. One notable exception where the CAS does not have jurisdiction is in relation to North American professional sports leagues, which operate their own form of arbitration.<sup>21</sup>

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quarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents").

19. Tribunal fédéral [TF] [Federal Supreme Court] Mar. 22, 2007, III Arrêts du Tribunal Fédéral Suisse [ATF] 129 445 (Switz.). The *Cañas* Judgment is also noteworthy as it was the first time the Swiss Federal Tribunal annulled a CAS award.

20. Tribunal fédéral [TF] [Federal Supreme Court] Apr. 18, 2011, 4A\_640/2010 (Switz.), available at <http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-a-reference-to-a/> (internal citations omitted).

21. For a discussion of dispute resolution regarding baseball arbitration, see Brien M. Wassner, *Major League Baseball's Answer to Salary Disputes and the Strike: Final Offer Arbitration: A Negotiation Tool Facilitating Adversary Agreement*, 6 VAND. J. ENT. L. & PRAC. 5 (2003). An interesting comment to Article 23.1.2 of the World Anti-Doping Agency (WADA) Anti-Doping Code provides that "Those professional leagues that are not currently under the jurisdiction of any government or International Federation will be encouraged to accept the Code." WORLD ANTI-DOPING AGENCY,

## V. APPLICABLE LAW

The arbitral seat for all CAS procedures is Lausanne, Switzerland, regardless of where the Panel holds hearings or meetings.<sup>22</sup> The same provision applies to CAS cases heard by an *ad hoc* Division during the Olympic Games<sup>23</sup> or any other sports event for which an *ad hoc* Division is set up. CAS arbitrations are governed by Chapter 12 of the Swiss Act on Private International Law (PILA) if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.<sup>24</sup> The application of PILA to CAS cases helps to ensure procedural consistency and predictability.

The most significant source of substantive law applicable to the merits of the parties' dispute for appeal cases is the rules and regulations of the relevant sport organization which issued the challenged decision.<sup>25</sup> It is therefore crucial that

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CODE, art. 23.1.2 (2009), available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf).

22. The CAS Code provides:

The seat of the CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division may decide to hold a hearing in another place and issues the appropriate directions related to such hearing.

CAS CODE, *supra* note 6, art. R28.

23. The CAS Arbitration Rules for the Olympic Games provide:

The seat of the *ad hoc* Division and of each Panel is in Lausanne, Switzerland. However, the *ad hoc* Division and each Panel may carry out all the actions which fall within their mission at the site of the Olympic Games or in any other place they deem appropriate. The arbitration is governed by Chapter 12 of the Swiss Act on Private International Law.

COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES, art. 7, available at [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220\\_en\\_2001.01.pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.pdf). In a case involving selection for the Australian judoka team at the Sydney 2000 Olympic Games, the New South Wales Court of Appeal handed down the first Australian judgment in relation to an appeal from CAS. The threshold issue in the appeal was whether the Supreme Court had jurisdiction under the Commercial Arbitration Act 1984 (NSW) to entertain the appeal. In declining to review the CAS award owing to a lack of jurisdiction, the Court of Appeal underscored 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" and referred to "the unqualified choice of Lausanne as the 'seat' of all CAS arbitrations"; the Court of Appeal concluded that the CAS arbitration in *Raguz* was not a domestic arbitration but an "arbitration in a country other than Australia." *Raguz v. Sullivan*, [2000] 50 NSWLR 236 (Austl.); see also Damian Sturzak & Kate Godhard, *The Olympic Legal Legacy*, 2 MELBOURNE J. OF INT'L L. 241 (2001).

24. PRIVATE INTERNATIONAL LAW ACT, art. 176(1) (1987), available at [https://www.secam.org/sa/download/IPRG\\_english.pdf](https://www.secam.org/sa/download/IPRG_english.pdf). Where neither of the parties has its domicile or habitual residence outside Switzerland, the Code of Civil Procedure of 19 December 2008 applies. See generally "CODE DE PROCÉDURE CIVILE (CPC) (2008) (Switz.), available at <http://www.admin.ch/ch/f/as/2010/1739.pdf> (in French).

25. The CAS Code provides:

The Panel 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-related body which has issued the challenged decision

both the arbitrators and parties' counsel are fully versed in the relevant regulations, which are often contained in a series of documents, including the organization's constitution; statutes; disciplinary regulations; competition rules; licensing regulations; and anti-doping rules. Where regulations are unclear, incomplete or ambiguous, the Panel will have regard to the law of the country where the federation that issued the challenged decision is domiciled. As many international federations are established in Switzerland,<sup>26</sup> frequently Swiss law is applied as the subsidiary substantive law to complement sports regulations.

Of the cases heard at CAS, approximately 45% relate to appeals rendered by an organ of the Fédération Internationale de Football Association (FIFA), the governing body for football worldwide.<sup>27</sup> The FIFA Dispute Resolution Chamber (DRC) is competent to hear employment-related disputes between clubs and players which have an international dimension as well as disputes between clubs related to Training Compensation and Solidarity Mechanism.<sup>28</sup> The money involved in football cases varies widely, depending on the player and club involved. A much-publicized high value case involved the Romanian football player, Adrian Mutu, and the English football club, Chelsea FC. In July 2009, the CAS dismissed an appeal filed by Mutu against the decision rendered by the FIFA DRC, pursuant to which Mutu was ordered to pay € 17,173,990<sup>29</sup> in compensation to his former club, Chelsea FC, for breach of contract.<sup>30</sup> The business of football continues to generate huge revenue and at its 2010 Congress, FIFA reported to have "made it through the turbulence in the financial markets and the global financial crisis unscathed and has emerged in a stronger position."<sup>31</sup>

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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.

CAS CODE, *supra* note 6, art. R58.

26. Approximately 36 IFs are established in Switzerland, including FIFA (International Football Federation), IBAF (International Baseball Federation), AIBA (International Boxing Association), UCI (International Cycling Union), FEI (International Equestrian Federation), FIVB (International Volleyball Federation), FISA (International Rowing Federation), FINA (International Swimming Federation), FIBA (International Basketball Federation), FIG (International Gymnastics Federation), FIH (International Hockey Federation), IJF (International Judo Federation), ISU (International Skating Union), BWF (Badminton World Federation), IWF (International Weightlifting Federation), WTF (World Taekwondo Federation), IHF (International Handball Federation), FIS (International Ski Federation) and IIHF (International Ice Hockey Federation). One notable exception is the IAAF (International Athletics Federation) which is domiciled in Monaco, list of federations available at [http://www.ifsports-guide.ch/english/navigation/annuaire\\_cn.html#suisse](http://www.ifsports-guide.ch/english/navigation/annuaire_cn.html#suisse).

27. FIFA was founded in 1904 and has its headquarters in Zurich, Switzerland.

28. See FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, RULES GOVERNING THE PROCEDURES OF THE PLAYERS' STATUS COMMITTEE AND THE DISPUTE RESOLUTION CHAMBER (2010); see also FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, RULES GOVERNING THE PROCEDURES OF THE PLAYERS' STATUS COMMITTEE AND THE DISPUTE RESOLUTION CHAMBER (2008), available at <http://www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html>.

29. US\$ 22,574,700.00 (<http://www.oanda.com/currency/converter/>, exchange rate as of Feb. 6, 2012).

30. Mutu v. Chelsea Football Club Ltd., CAS 2008/A/1644 (Jul. 31, 2009), available at <http://jurisprudencet.as-cas.org/sites/CasLaw/Shared%20Documents/1644.pdf>.

31. 61ST FIFA CONGRESS, FIFA FINANCIAL REPORT (2010). The Report also contains figures for FIFA's revenue over the four-year period from 2007-2010 and records that "Overall, FIFA recorded a positive four-year result of USD 631 million. This result is based on total revenue of USD 4,189 million and total expenditure of USD 3,558 million." FIFA FINANCIAL REPORT (2010), available at



A further 30% of cases heard at CAS relate to doping violations. The creation of the World Anti-Doping Agency (WADA)<sup>32</sup> in 1999 and introduction of the World Anti-Doping Code (WADA Code) in 2004 were major steps towards harmonizing anti-doping policies in all sports worldwide.<sup>33</sup> The WADA Code<sup>34</sup> has no direct effect but international federations are bound to adopt anti-doping rules which are in compliance with the WADA Code.<sup>35</sup> In practice, this means that international federations which want recognition – and more importantly funding – from the IOC are obliged to draft and implement anti-doping rules for their particular sport which are compliant with the WADA Code and which are binding on their national federations, athletes and athlete-support personnel. Similarly, each national government's commitment to the principles of the WADA Code is evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003, and by ratifying, accepting, approving or acceding to the UNESCO Convention.<sup>36</sup>

The remaining 25% of cases are made up of 15% of other types of appeal cases and 10% of international commercial cases, which are heard by the Ordinary Arbitration Division. The 15% of other appeal cases include selection and eligibility disputes; political disputes over governance; challenges to elections; and challenges to the granting of hosting rights for championships. The 15% also includes appeals against findings of match-fixing and corruption, an increasing and serious threat to the integrity of sport.<sup>37</sup>

[http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web\\_fifa\\_fr2010\\_eng\[1\].pdf](http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng[1].pdf).

32. WADA is an international independent agency composed and funded equally by the sport movement and national governments. Its key activities include scientific research, education, development of anti-doping capacities, and monitoring of the WADA Code. WADA is a Swiss private law Foundation, with its seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

33. WORLD ANTI-DOPING AGENCY, CODE, art. 13.2.1 (2009) (providing that the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes), available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf) (last visited Feb. 13, 2012) [hereinafter WADA CODE].

34. The WADA Code was revised in 2009. WADA CODE, *supra* note 33. The WADA CODE is currently undergoing review, culminating in the World Conference on Doping in Sport to be held in November 2013; at this Conference, WADA's Foundation Board will approve the next edition of the Code to come into operation in January, 2015.

35. WADA CODE, *supra* note 33, art. 20.1.2 & 20.1.3.

36. The International Convention against Doping in Sport was adopted by the 33rd session of the UNESCO General Conference on October 19, 2005; see UNESCO, *International Convention against Doping in Sport*, available at [http://portal.unesco.org/en/cv.php-URL\\_ID=31037&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/cv.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html). The IOC will only accept bids for the Olympic Games from countries where the government has ratified, accepted, approved or acceded to the UNESCO Convention. WADA CODE, *supra* note 33, art. 20.1.8.

37. Spot-fixing or match-fixing occurs when players and/or a referee agree in advance of a match how certain plays will occur or what the outcome of the match will be. The persons who organise the fix – often criminal gangs – then bet on the match. This type of betting, which is illegal, has been described by the IOC President Jacques Rogge as representing as much of a danger to the integrity of sport as illegal drug use, describing it as “potentially crippling” and a “cancer” with links to “mafia” organisations. See Robin Scott-Elliott, *Illegal Bets are “Cancer” Killing Sport, says Rogge*, THE INDEPENDENT (Mar. 1 2011), <http://www.independent.co.uk/sport/olympics/illegal-bets-arc-cancer-killing-sport-says-rogge-2228572.html>; see DECLAN HILL, *THE FIX: SOCCER & ORGANIZED CRIME* (1st ed. 2008) (regarding match-fixing in football). The CAS issued its first decision on match-fixing on 15 April 2010, in the football case FK Pobeda v. UEFA, CAS 2009/A/1920 (Apr. 15, 2010), avail-

## VI. SPEED

The need for speed is no more evident than in resolving sports disputes. As mentioned above, Panels sitting at the *ad hoc* Division during the Olympic Games or other major sports event have 24 hours from the time an appeal is filed to render its decision. For the arbitrators on-site at Games, the filing of an application at the CAS Office results in 24 hours of intense activity, during which time the respondent parties are notified with a copy of the appellant's application; the named parties and other interested parties (e.g., other athletes or federations which may be affected by the decision) are summoned to a hearing at which the parties make oral submissions, file any relevant evidence and witnesses are heard; and the Panel deliberates and issues its reasoned decision. This extremely expedited procedure allows disputes to be decided within time limits that keep pace with the Games, so that athletes can obtain meaningful results; needless to say, it would be utterly useless for an athlete competing in the Olympic Games to win his selection or eligibility dispute six months after the Games close. The speed with which the *ad hoc* Division issues its decisions also ensures that sporting fixtures can continue on schedule and without interruption.<sup>38</sup>

For cases administered by the CAS Appeals Arbitration Division, time is also often of the essence and the CAS Code contains relatively short time limits for the filing of written submissions and the conduct of the procedure. As a general rule, a prospective Appellant has 21 days from receipt of the decision he wishes to challenge to file a statement of appeal at the CAS;<sup>39</sup> the Appellant has a further 10 days to file his appeal brief which sets out the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which the Appellant intends to rely; the Appellant must also name his witnesses and experts, including a brief summary of their expected testimony,<sup>40</sup> failing which, he may be barred from calling such witnesses or experts at the hearing. The Respondent is granted 20 days from receipt of the appeal brief to file its answer, containing a statement of defence; any defence of lack of jurisdiction; any exhibits or specification of other evidence upon which the Respondent intends to rely; and the names of any witnesses and experts, including testimony.<sup>41</sup> Thereafter, neither side may file further submissions or produce additional evidence unless the parties agree otherwise or the President of the Panel orders otherwise on

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able at <http://www.tas-cas.org/d2wfiles/document/4129/5048/0/AWARD20192020Pobeda20INTERNET.pdf>. Three Pakistani cricketers who were sanctioned by the International Cricket Council to terms of suspension varying from five to ten years for their part in an alleged plot to bowl deliberate no-balls in the Lord's Test in London in August 2010 filed appeals at the CAS, which are currently suspended pending the outcome of related criminal proceedings in the United Kingdom. In March 2012, the CAS issued an award in the first case of match-fixing in tennis. Daniel Köllerer v. Assoc. of Tennis Professionals, Women's Tennis Assoc., Int'l Tennis Federation & Grand Slam Committee, CAS Case No. 2011/A/2490 (March 23, 2012) available at <http://www.tas-cas.org/d2wfiles/document/5865/5048/0/20120426161618925.pdf>.

38. The CAS Office for the London 2012 Olympic Games will be based in London; starting from 10 days before the Games open and for the duration of the Games, a Panel of 12 arbitrators will be on-site and available to deal with disputes as they arise.

39. CAS CODE, *supra* note 6, art. R49.

40. *Id.* art. R51.

41. *Id.* art. R55.

the basis of exceptional circumstances.<sup>42</sup> Once the answer is filed, or the time limit to do so has expired, the Panel decides whether to hold a hearing, which rarely lasts longer than one day. In principle, the award is issued three months after the case file is transferred to the Panel.<sup>43</sup>

The time limits fixed in the CAS Code may be shortened if the parties so agree.<sup>44</sup> One example of an expedited procedure was the case of Ryan Napoleon, an Australian swimmer, who on 20 August 2010, was sanctioned with a three-month period of ineligibility for an anti-doping rule violation. On 2 September 2010, Napoleon filed an appeal at the CAS, including his appeal brief, and requested an urgent decision as he wished to compete at the Commonwealth Games beginning in New Delhi, India, on 3 October 2010. FINA, the international swimming federation, agreed to an expedited procedure and filed its written submission on 9 September 2010; a hearing was held on 10 September 2010 before a three-member Panel, with the athlete appearing by video-conference from Sydney and FINA participating from Lausanne. The President of the Panel participated in the hearing by video-conference from London, with one of the arbitrators sitting in Lausanne and the third arbitrator sitting in Sydney. The Panel deliberated by video-conference and issued the operative part of its award on 13 September 2010 – 11 days after the appeal was filed.<sup>45</sup>

In addition to conducting expedited procedures, the CAS may grant provisional and conservatory measures.<sup>46</sup> “Consistent with the practice generally followed in international commercial arbitration, when considering whether to grant an application for provisional measures, the CAS will consider: (i) whether the relief is necessary to protect the applicant from irreparable harm; (ii) the likelihood of success on the merits of the claim; and (iii) whether the interests of the applicant outweigh those of the other parties.”<sup>47</sup> The granting of provisional relief can be particularly useful to an athlete who wants a stay of his ban in order to allow him compete in an upcoming competition.<sup>48</sup>

## VII. COSTS

One of the purposes of the CAS is to provide access to justice for athletes who might not otherwise have the financial means to pursue a claim. Although

42. *Id.* art. R56. Although the CAS Code envisages only one written submission per side, the Panel has the power to order the production of documents, which sometimes results in the filing of an additional round of written submissions; the Panel also has a general discretion to “proceed with any other procedural act.” *Id.* art. R44.3.

43. *Id.* art. R59.

44. *Id.* art. R52 (“[W]ith the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure . . .”).

45. Napoleon v. FINA, CAS 2010/A/2216 (Sept. 14, 2010). Napoleon’s appeal was partially upheld, leaving him eligible to compete at the Commonwealth Games where he won silver in the 400m freestyle and gold as part of the 4x200m freestyle relay team.

46. CAS CODE, *supra* note 6, art. R37; *see also* PRIVATE INTERNATIONAL LAW ACT, art. 183 (1987).

47. *See* Antonio Rigozzi, *Provisional Measures in CAS Arbitration*, in THE COURT OF ARBITRATION FOR SPORTS 1984-2004 216-234 (Ian S. Blackshaw et. al. eds., 1st ed. 2006).

48. The decision on an application for provisional measures is made by the Panel or the President of the Appeals Arbitration Division prior to the constitution of the Panel. In case of “utmost urgency,” provisional measures may be granted on an *ex parte* basis. CAS CODE, *supra* note 6, art. R37.

the media regularly carry reports detailing multi-million dollar contracts and lucrative endorsement deals entered into by high-profile athletes, the reality is that for every David Beckham or Tiger Woods there are hundreds of professional athletes who barely earn enough to subsist. In recognition of this, the ICAS President may decide to grant legal aid to natural persons without sufficient financial means, which will cover the costs of arbitration and may include a contribution towards legal fees.<sup>49</sup>

In terms of advising parties on the potential costs of a CAS procedure, firstly, every case submitted to the CAS must be accompanied by a filing fee of CHF 1,000.<sup>50</sup> Thereafter, the costs of CAS procedures are determined by the type of procedure and nature of the dispute. For Ordinary Arbitration Procedures, the parties contribute to the costs of the arbitration and are requested to pay an advance of costs at the outset of the procedure.<sup>51</sup> For Appeal Arbitration Procedures, appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body are free – the fees and costs of the arbitrators, together with the costs of the CAS are born by the CAS.<sup>52</sup> For all other appeal procedures, the parties contribute to the costs of the arbitration.

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into ac-

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49. "If it deems such action appropriate, [ICAS] creates a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means. The operation of the legal aid fund including criteria to access the funds is set out in the CAS legal aid guidelines." CAS CODE, *supra* note 6, art. S6.9. Although CAS legal aid guidelines have not yet been published, applicants for legal aid are required to fill out a form detailing their income and expenses, assets and liabilities. *Id.* The ICAS President considers certain criteria when deciding whether to grant an application for legal aid: "[i]n application of the general principles of law, legal aid shall be granted to any natural person who requests it, provided that his/her income and capital are not sufficient to allow him/her to cover the costs of proceedings before CAS without drawing on that part of his/her assets necessary to support him/herself. The applicant shall however establish that his/her claim has a legal basis and that he/she would have begun the proceedings at his/her own expense." Source: previous Orders on Legal Aid, all confidential Orders.

50. Approximately USD 1,084 (<http://www.oanda.com/currency/converter/>, exchange rate as of Feb. 6, 2012). The exception is that all cases heard at the *ad hoc* Division are free. In addition, it is customary during Games time for the local Bar to appoint a pool of lawyers who offer to represent athletes *pro bono*.

51. The advance of costs is however, relatively modest compared to other arbitral institutions. For example, in a recent case assigned to the CAS Ordinary Arbitration Division, heard by a Sole Arbitrator and with an amount in dispute of approximately USD 2,100,000, the advance of costs was fixed at CHF 36,000 (USD 38,920). An ICC case submitted to a Sole Arbitrator with the same amount in dispute would generate an advance of costs of USD 93,402 (without arbitrator expenses); see *Arbitration Cost Calculator*, INTERNATIONAL CHAMBER OF COMMERCE, available at <http://www.iccwbo.org/court/arbitration/index.html?id=4097>.

52. CAS CODE, *supra* note 6, art. R65.1 & R65.2; this applies to athletes contesting a disciplinary sanction – usually doping – issued by an international federation. ICAS receives annual funding from the Olympic Movement (IOC; IFs; and NOCs) which is used to partially finance the CAS, including financing free procedures.

count the outcome of the proceedings, as well as the conduct and the financial resources of the parties.<sup>53</sup>

In practice, the costs of arbitration are born by the losing party who will reimburse to the prevailing party any advance of costs paid; the losing party is also generally ordered to pay a contribution towards the prevailing party's legal fees and other expenses. This contribution is often nominal – particularly where the losing party is an impecunious athlete. Panels do have discretion to award higher amounts though and may do so, taking into account the conduct and financial resources of the parties.<sup>54</sup>

It is possible to keep arbitration costs to a minimum thanks in part to CAS arbitrators who work for an hourly rate of CHF 250 (US\$ 270) which is often below their commercial rate.<sup>55</sup> Fortunately, given the nature of the work, there is no shortage of excellent candidates willing to serve as CAS arbitrators. A further way in which costs are kept to a minimum is that in general, the procedure is short and straightforward and hearings, usually of no longer than one day, are held at the CAS headquarters in Lausanne.<sup>56</sup> In addition, CAS Panels increasingly authorize the hearing of witnesses and experts by telephone or video-conference.<sup>57</sup>

## VIII. CAS AWARDS

As a result of the transnational nature of international sports organizations, sports law has developed and consolidated over the years a *lex sportiva* or general

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53. CAS CODE, *supra* note 6, art. R64.5.

54. The highest ever costs award against an athlete was ordered against Floyd Landis, the American cyclist and winner of the 2006 Tour de France, a title of which he was subsequently stripped for an anti-doping rule violation. Following a week-long hearing in New York, the Panel decided to grant the United States Anti-Doping Agency (USADA) USD 100,000 as a contribution towards its legal fees and other expenses; in coming to its decision on costs, the Panel made the following comments:

[I]f there was any litigation misconduct it may be ascribed to the Appellant . . . although the Appellant had the right to pursue a comprehensive de novo appeal in such an important matter, all of its multiple defenses have been rejected as unfounded . . . the Appellant should have presented a much more focused challenge before this Panel especially since a number of his challenges were barely arguable...the Appellant gave notice requiring a number of witnesses to be present in person for cross-examination in New York but then elected not to call them thus causing the Respondent to incur significant and ultimately unnecessary cost . . . the Appellant chose to pursue in its post-hearing brief serious allegations of misconduct against [the French anti-doping laboratory] which had not only been rejected by the AAA Tribunal but in respect of which no sufficient evidence had been adduced before this Panel.

Landis v. USADA, CAS 2007/A/1394 (Junc. 30, 2008), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1394.pdf>.

55. The CAS Code was revised in 2010 to provide an increasing scale for arbitrators' fees based on the amount in dispute, up to a maximum of CHF 400/hour for amounts in dispute greater than CHF 10,000,000. The figures above are based on the new 2010 costs scale. See *supra* notes 50 & 51 and accompanying text.

56. Where parties and witnesses are all located on another continent, the hearing may be held there. This happens regularly for American athletes where hearings are generally held in New York, Mexico or Buenos Aires.

57. CAS CODE, *supra* note 6, at R44.2.

principles to be applied to sporting disputes.<sup>58</sup> CAS publishes its awards issued in appeal proceedings<sup>59</sup> and these decisions are available on the CAS website.<sup>60</sup> The public availability of CAS jurisprudence adds to the development of a *lex sportiva* and although CAS awards are not binding on subsequent Panels, they are of persuasive authority and Panels will take care to distinguish earlier cases if their decision is going in a different direction.<sup>61</sup>

Any challenge to a CAS award is made to the Swiss Federal Tribunal.<sup>62</sup> The number of such challenges has greatly increased, to the point that currently, over half of the Federal Tribunal's case load relating to international arbitration now concerns CAS awards.<sup>63</sup>

58. See James A.R. Nafziger, *Lex Sportiva and CAS*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 409, 409-19 (Robert C. R. Sickmann & Janwillem Sock eds., 2006).

59. "The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential." CAS CODE, *supra* note 6, art. R59. In practice, the award is first communicated to the parties only; at that point, the parties may be granted a short time limit to advise the CAS of any requests regarding confidentiality; the parties may either advise the CAS that they agree that the award should remain confidential, or alternatively, one party may request that certain information be redacted from the award before it is published on the CAS website. Awards issued under the Ordinary Arbitration Procedure (generally international commercial disputes) remain confidential and are not made public unless all parties agree or the Division President so decides. See CAS CODE, *supra* note 6, art. R43.

60. Initially, the CAS published its awards in periodical Digests (three in total). Today, its awards are published online. See Recent CAS decisions, available at <http://www.tas-cas.org/recent-decision>; Archived CAS decisions, available at <http://www.tas-cas.org/jurisprudence-archives>.

61. See Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Comm. (IOC), CAS 2008/A/1545 (July 16, 2010) ("On the issue of the precedential value of CAS awards, the Panel shares the view of other CAS Panels"). In the case of *Union Cycliste Internationale (UCI) v. Jogert & NCF*, the Panel stated as follows: "in arbitration there is no stare decisis. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS Panels, in order to help developing legitimate expectations among sports bodies and athletes." *Union Cycliste Internationale (UCI) v. Jogert & NCF*, CAS 97/176, ¶ 4 (Jan. 15, 1998) (quoting *UCI v. Jogert & NCF*, CAS 97/176 (award of Jan. 15, 1998)). The Panel continued:

[A]lthough a CAS Panel in principle might end up deciding differently from a previous Panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect. Accordingly, the CAS 2004/A/725 award is a very important precedent and the Panel will draw some significant guidance from it.

*Id.* at ¶ 118.

62. Article 190(2) of the PILA provides limited grounds on which an arbitral award can be challenged; these are: a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction; c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; d. If the equality of the parties or their right to be heard in an adversarial proceeding was not respected; and e. If the award is incompatible with Swiss public policy ("ordre public"). A recent analysis of challenges of arbitral awards made to the Swiss Federal Tribunal reveals that the Federal Tribunal continues to interpret and apply the grounds for annulment in a restrictive manner. See generally Diana Akikol, *Recent Case Law of the Swiss Federal Tribunal*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2011* 119, 119-175 (Christoph Müller & Antonio Rigozzi Schulthess eds., 2011).

63. See Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISP. SETTLEMENT 217 (2010).

This may lead to the impression that CAS awards are constantly being challenged as – literally – every second Judgment relating to international arbitration rendered by the Federal Tribunal in recent years concerns a CAS award. However, two things should be born in mind in this regard: firstly, unlike other arbitral institutions whose awards may be challenged at the arbitral seat wherever that may be in the world, all challenges to CAS awards are made to the Swiss Federal Tribunal; secondly, the exponential increase in the number of Judgments on challenges to CAS awards can be directly pegged to the exponential growth in the number of cases being filed at the CAS; in 2001 CAS registered 42 new cases, by 2011 that number had jumped to 364. The figures regarding Judgments rendered by the Swiss Federal Tribunal on challenges to CAS awards are proportionately comparable: in 2001 the Federal Tribunal issued two Judgments on challenges to CAS awards (both rejected); in 2011 the Federal Tribunal issued 15 Judgments on challenges to CAS awards (one award was partially annulled for violation of the parties' right to be heard with regard to the Panel's decision on costs and sent back to the CAS Panel to allow the parties make submissions on costs).<sup>64</sup>

The eight-fold increase in cases filed at the CAS over the ten year period from 2001–2011 slightly exceeds the seven-fold increase in CAS-related Judgments rendered by the Swiss Federal Tribunal during that same period. It cannot be gainsaid that no judicial system is infallible and the Swiss Federal Tribunal plays an important role in ensuring procedural fairness of CAS arbitrations.

CAS awards are enforceable under the New York Convention<sup>65</sup> and applications for enforcement of CAS awards may be made to the Swiss Federal Tribunal or other national courts in signatory countries; in practice however, this mechanism is rarely used in appeal cases as many sports organisations have internal procedures for ensuring compliance with CAS awards.<sup>66</sup>

## IX. ROLE OF NATIONAL COURTS IN INTERNATIONAL SPORTS DISPUTES

As mentioned in the preceding section, the Swiss Federal Tribunal plays a valuable role in its review and enforcement of CAS awards. In addition, pursuant to Articles 184 and 185 PILA, the court at the seat of the arbitral tribunal may assist in the taking of evidence and shall have jurisdiction if further judicial assistance is required. Although neither provision is frequently used in CAS procedures, they are useful tools provided by Swiss courts in aid of arbitration.<sup>67</sup>

64. Bundesgericht [Bger][Federal Supreme Court] Mar. 17, 2011, 4A\_600/2010 (Switz.), available at <http://www.praetor.ch/arbitrage/cas-award-allocating-fecs-and-costs-in-violation-of-the-right-to/>. The law firm Zeigler Poncet Grumbach in Geneva, Switzerland very helpfully provides English translations of the Judgments of the Swiss Federal Tribunal in international arbitration, dating from January 1, 2008.

65. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

66. For athletes suspended subsequent to a doping ban, they will simply not be allowed to register or compete in official competitions for the duration of their ban. FIFA can impose financial and disciplinary sanctions on players and clubs who fail to comply with CAS awards, including imposing playing bans, transfer bans and the deduction of points.

67. In the case of the Spanish cyclist Alejandro Valverde, the CAS Panel issued a production order requesting that the cantonal court of Vaud resubmit a request for evidence (a sample of blood) to the Spanish and Italian authorities. However, the production order was not published in the award. World

A feature of the relatively new problem of spot-fixing and match-fixing is that it may give rise to athletes being the subject of criminal proceedings, in addition to any disciplinary hearings before their respective sport's governing body. Criminal proceedings before national courts have the potential to be beneficial in providing additional evidence to the disciplinary procedure, as national policing bodies generally have far greater powers to investigate and procure evidence than an arbitral tribunal. In the case of the Pakistani cricketers,<sup>68</sup> at the parties' request, the proceedings before CAS were suspended pending the outcome of related criminal proceedings in the United Kingdom, on the premise that evidence may emerge from the criminal proceedings that may exculpate the cricketers on appeal.

One area where the intervention of national courts might be less welcome is when it is seen to infringe on the autonomy of sports governing bodies. The operation of these bodies is largely successful due to the generally accepted principle of the autonomy of sport.<sup>69</sup> IOC President, Jacques Rogge, recently commented on this principle in the following terms:

What does "autonomy of sport mean"? Let me first say what it does not mean: It does not mean that we are above the law or we should not be expected to adhere to principles of good governance. It simply means that the world of sport and sports administration should be free from direct political or government interference. It means that governments should not interfere with fair elections for National Olympic Committees, or seek to force the selection of coaches or athletes. We should be allowed to freely form sports organizations, federations and clubs. We should be allowed to freely determine the rules of sport, and to establish structures and procedures for the practice of sport. The autonomy of sport is grounded in the unique nature of sport. Sport is a global endeavour that is built on globally accepted norms of fair play and fair competition. It is easy to see how political interference could upset that accepted ethos.<sup>70</sup>

The principle of the autonomy of sport has been recognised by national courts, which are slow to intervene in sporting regulation, as they consider it to be

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Anti-Doping Agency (WADA) & Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federacion Espanola de Ciclismo (REFC), CAS 2007/A/1396 & 1402 (May 31, 2010), available at <http://www.tas-cas.org/d2wfiles/document/4238/5048/0/Award20Valverdi20139620&201402.pdf>

68. See *supra* note 36.

69. For further discussion on the autonomy of sport see Commission of the European Communities, *White Paper on Sport*, COM 391, 13 (2007), available at [http://ec.europa.eu/sport/documents/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/documents/wp_on_sport_en.pdf); Jean-Loup Chappelet, Amandine Bousigue & Benjamin Cohen, *The Autonomy of Sport in Europe*, Enlarged Partial Agreement on Sport (EPAS) (2008), available at [http://www.coc.int/t/dg4/epas/Source/Ressources/EPAS\\_INFO\\_Chappelet\\_en.pdf](http://www.coc.int/t/dg4/epas/Source/Ressources/EPAS_INFO_Chappelet_en.pdf); Ken Foster, *Is There a Global Sports Law?*, 2 ENT. L. 1 (2003); and Marcus F. Mazzucco, *Lex Sportiva: Sports Law as a Transnational Autonomous Legal Order*, available at [http://independent.academia.edu/MarcusMazzucco/Papers/418551/Lex\\_Sportiva\\_Sports\\_Law\\_as\\_a\\_Transnational\\_Autonomous\\_Legal\\_Order](http://independent.academia.edu/MarcusMazzucco/Papers/418551/Lex_Sportiva_Sports_Law_as_a_Transnational_Autonomous_Legal_Order).

70. Jacques Rogge, President of the International Olympic Committee, Address at the First World Olympic Sport Convention in Acapulco (Oct. 23, 2010) (transcript available at [http://www.olympic.org/Documents/Conferences\\_Forum\\_and\\_Events/2010-ACNO-Acapulco/ANOC2010-First-World-Olympic-Sport-Convention-Acapulco-eng-final-2010.pdf](http://www.olympic.org/Documents/Conferences_Forum_and_Events/2010-ACNO-Acapulco/ANOC2010-First-World-Olympic-Sport-Convention-Acapulco-eng-final-2010.pdf)).



part of the autonomous preserve of national and international federations.<sup>71</sup> Another commentator has suggested that “The establishment and development of the CAS has provided an effective mechanism for resolving Olympic and international sports disputes in an expert and internationally coherent manner, thereby largely avoiding the problems of inconsistent rulings by national courts unfamiliar with international sports association governance and rules.”<sup>72</sup> Notwithstanding the foregoing, numerous international sports disputes have been brought before national courts, a couple of which I will mention below. In July 2008, the British sprinter Dwain Chambers brought an action before the High Court in London, challenging the lawfulness of the statutes of the British Olympic Association (BOA) on grounds of unreasonable restraint of trade. He served a two-year ban for using steroids but after his ban had ended, the BOA excluded him from the Beijing 2008 Olympic Games in accordance with its Bye-Law,<sup>73</sup> whereby athletes convicted of doping were banned for life from the Games. Ultimately, the High Court found against Chambers (citing Chambers’ delay in bringing his application among other reasons), but in considering whether to grant an injunction allowing him to compete, Mr Justice Mackay stated “I have to consider whether it is proportionate for [the BOA] to enact a law which says that an athlete proved to have cheated over drugs...is not a proper or appropriate person to represent his country.”<sup>74</sup>

The IOC subsequently introduced a rule barring any athlete who had been sanctioned for doping with a suspension of longer than six months from competing in the next edition of the Olympic Games after his or her ban ended.<sup>75</sup> This rule provoked a lot of commentary since its introduction and was viewed as having the potential to cause mayhem regarding eligibility in the run-up to the London 2012 Olympic Games. The American sprinter LaShawn Merritt was one athlete potentially affected by the rule. The United States Olympic Committee (USOC) and the IOC, in a pragmatic move to avoid potential litigation and applications for injunctions on the eve of the Games, agreed to submit the question of the validity of the rule to CAS.<sup>76</sup> In an award dated 4 October 2011, CAS found

71. Judge Richard Posner, a federal judge on the United States Court of Appeals for the Seventh Circuit, has observed: “[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.” *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

72. Matthew J. Mitten, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 292 (2010).

73. BRITISH OLYMPIC ASSOCIATION, BYELAWS ,74 (2009); the relevant Bye-Law adopted approximately twenty years ago by the BOA, has been amended several times since; the most recent version is in force since 1 January 2009. The Bye-Law essentially provides that any British athlete

who has been found guilty of a doping offence . . . shall not . . . thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.

74. *Dwain Chambers v British Olympic Ass’n*, [2008] EWHC (QB) 2028, [40] (Eng.).

75. The IOC Executive Board, at its meeting in Osaka, Japan on 27 June 2008, enacted an amendment to Rule 45 of the Olympic Charter, which came to be known as the “Osaka Rule” or “Rule 45.”

76. Generally, CAS Panels do not play a legislative role and are bound to apply rules and regulations as they find them, without having the power to determine the validity of those rules, except where

that the IOC's rule was invalid and incapable of being enforced, as it constituted double jeopardy and went beyond the sanctions outlined in the WADA Code.<sup>77</sup>

Following the decision in the *USOC v. IOC* case, the question remained whether the BOA would continue to enforce its Bye-Law, imposing a life-time ban on drug offenders, and whether such rule would withstand judicial scrutiny, should an athlete challenge it before the English Courts in the run up to the London 2012 Olympic Games.

However, in November 2011 the WADA Foundation Board issued a decision that the BOA's Bye-Law was "non-compliant" with the WADA Code. In December 2011 the BOA submitted an appeal to the CAS against the decision of the WADA Foundation Board.<sup>78</sup> In April 2012, CAS found that the Bye-Law was a doping sanction and therefore not in compliance with the WADA Code; the CAS confirmed the view of the WADA Foundation Board; therefore, the appeal of the BOA was rejected and the Decision of the WADA Foundation Board was confirmed.<sup>79</sup>

Another example of an international sport dispute being played out before the national courts (and which received huge media attention in Europe) is the case of the Swiss football club FC Sion. In 2009, FIFA sanctioned FC Sion with a transfer ban for two registration periods for signing Egyptian goalkeeper Essam El-Hadary, as he was under contract to another club.<sup>80</sup> FIFA's decision was confirmed by the CAS<sup>81</sup> and a challenge against the CAS award taken by El-Hadary to the Swiss Federal Tribunal was unsuccessful.<sup>82</sup>

FC Sion subsequently signed and fielded six players against the Scottish football club Celtic FC in a qualifying match for the Europa League in August 2011. The Union of European Football Associations (UEFA), the administrative and controlling body for European football and the body responsible for running the Europa League, ruled that FC Sion had fielded ineligible players and sanctioned the club by expelling it from the Europa League, with FC Sion's place being taken by Celtic FC. In response, FC Sion and the affected players filed a series of claims before Swiss cantonal courts<sup>83</sup> requesting among other things, to be re-

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those rules may violate public policy; here, the parties concluded a specific arbitration agreement to submit the validity of the IOC rule for determination by the CAS.

77. United States Olympic Comm. (USOC) v. Int'l Olympic Comm. (IOC), CAS 2011/O/2422 (Oct. 4, 2011), *available at* <http://www.tas-cas.org/d2wfiles/document/5314/5048/0/Final20award202422.pdf>.

78. See WADA's statement on BOA's appeal to CAS, *available at* <http://www.wada-ama.org/en/News-Center/Articles/WADA-Statement-on-BOA-appeal-to-CAS/>.

79. British Olympic Ass'n (BOA) v. World Anti-Doping Agency (WADA), CAS 2011/A/2658 (Apr. 30, 2012), *available at* <http://www.tas-cas.org/d2wfiles/document/5879/5048/0/Award20265820FINAL.pdf>.

80. FIFA also found El-Hadary and FC Sion jointly and severally liable to pay the amount of EUR 900,000 to Al Ahly Sporting Club and imposed a four-month ban on El-Hadary's eligibility to play in official matches.

81. FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club, CAS 2009/A/1880 and E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club, CAS 2009/A/1881 (June 1, 2010) (appeals consolidated), *available at* <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1880,%201881.pdf>.

82. Bundesgericht [Bger][Federal Supreme Court] Jan 12, 2011, 4A\_394/2010 (Switz.), *available at*, <http://www.practor.ch/arbitrage/no-violation-of-due-process-if-wrong-assessment-of-evidence-no-v/>.

83. Switzerland operates a federal system of 26 states (known as cantons). Each canton has its own administrative and judicial organs. The CAS is located in the canton of Vaud.

integrated into the Europa League. Although a Swiss cantonal court granted interim relief in FC Sion's favour, UEFA did not implement the court's decision, as it said to do so would be in violation of its own statutes. Both UEFA's and FIFA's Statutes prohibit members from pursuing cases in civil courts.<sup>84</sup>

In a press release issued in October 2011, UEFA stated that "The CAS is accessible, unlike Swiss civil justice, to all of FC Sion's opponents. This guarantees that all clubs are equal and receive the same treatment. UEFA is constitutionally unable to apply measures decided by a civil court."<sup>85</sup> FIFA also commented that the actions of FC Sion threatened the autonomy of sport and pointed out that if every club went to a local court when it disagreed with a decision of its federation, the organisation of international football would become unworkable.<sup>86</sup>

It is likely that the Swiss Federal Tribunal will have the last word on the procedures before the CAS and Swiss cantonal courts relating to the FC Sion/UEFA dispute, the outcome of which could have a major impact for the future of football's governing bodies and the autonomy of sport generally.

## X. CONCLUSION

As to the role of national courts in international sports disputes and the "skirmishes" that can arise, I briefly referred above to the positive role of national courts as an aid to arbitration. The extent to which national courts will encroach on the autonomy of sport will perhaps be directly related to sports associations' ability to properly govern themselves and respect legal norms when drafting and applying their rules and regulations. As the Swiss Federal Tribunal provides a quality assurance for CAS procedures, so too the supervisory power of national courts could provide a fundamental safeguard for the members and athletes who are governed by sports organizations.

Having celebrated its 25<sup>th</sup> birthday in 2009, the CAS is today firmly established as the Supreme Court for sport internationally. The CAS Code provides a flexible and efficient procedure for the resolution of sports disputes and CAS arbitrators work closely with the CAS Court Office in Lausanne to ensure that decisions are rendered in an expeditious manner. Mindful of the financial implications that bringing a case can involve, the CAS is continuing to find ways to reduce parties' costs through the appropriate use of technology and the establishment of regional hearing centres. Although sports cases can involve huge sums of

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84. See UEFA STATUTES, ART. 61.1 (2010), available at [http://www.uefa.com/MultimediaFiles/Download/Rgulations/uefaorg/General/01/47/69/97/1476997\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Rgulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.pdf) ("The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration: a) disputes between UEFA and associations, leagues, clubs, players or officials; b) disputes of European dimension between associations, leagues, clubs, players or officials"); FIFA STATUTES, ART. 64.2 (2011), available at [http://www.fifa.com/mm/document/affederation/generic/01/48/60/05/fifastatuten2011\\_e.pdf](http://www.fifa.com/mm/document/affederation/generic/01/48/60/05/fifastatuten2011_e.pdf) ("Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations").

85. Press Release, UEFA Executive Committee, UEFA Statement on FC Sion/Olympique des Alpes (Oct. 11, 2011), available at <http://www.uefa.com/uefa/aboutuefa/organisation/cxexecutivecommittee/news/newsid=1694975.html>.

86. Interview by FIFA.com with Marco Villiger, FIFA Director of Legal Affairs, (Sept. 30, 2011), transcript available at <http://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=1519729/index.html>.

money and high stakes for the parties' involved, the CAS continues to operate a relatively simple yet flexible procedure. It is to be hoped that the evolution of CAS will continue in this positive vein, providing an invaluable service to its users in the world of sport. In the words of the Swiss Federal Tribunal, "There appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively."<sup>87</sup>

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87. Tribunal fédéral [TF] [Swiss Federal Tribunal] May. 27, 2003, III Arrêts du Tribunal Fédéral Suisse [ATF] 129 445 (Switz.), translated into English in MATTHIEU REEB, DIGEST OF CAS AWARDS III, 2001-2003 688 545 (2004).

