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## Is Arbitration for Olympic Athletes Arbitrary?

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## IS ARBITRATION FOR OLYMPIC ATHLETES ARBITRARY?

*Shelby Ehrmann*<sup>1</sup>

### I. INTRODUCTION

In December of 2021, Professional Russian Figure Skater Kamila Valieva completed a doping control test during a Russian National Figure Skating Championship.<sup>2</sup> On February 7, 2022, a World Anti-Doping Agency (WADA) accredited laboratory detected the presence of a banned substance from Kamila's December 2021 test.<sup>3</sup> The Russian Anti-Doping Agency, (RUSADA) which is in charge of the application of WADA, first implemented a provisional suspension on Kamila, prohibiting her from competing in the 2022 Olympic Winter Games.<sup>4</sup> The RUSADA's Disciplinary Anti-Doping Committee (DADC) then moved to lift this provisional suspension.<sup>5</sup> The International Olympic committee, the WADA and the International Skating Union appealed this decision to lift the provisional suspension.<sup>6</sup> Because this appeal was brought during the period of the 2022 Olympic Winter Games, the Court of Arbitration for Sports' Ad Hoc Division obtained jurisdiction of the case.<sup>7</sup> Ultimately the Ad Hoc Division decided that the lifted suspension would remain in place and Kamila would compete in the women's Single Skating event during the Winter Games on Feb 15, 2022.<sup>8</sup>

Achieving a spot at the Olympics is said to be a dream for most athletes. The Court of Arbitration for Sport (CAS) and its Ad Hoc Division (AHD) can be a last ditch effort for an athlete being considered for the Olympics—as when an athlete is disputing a drug testing policy and the CAS can choose whether to admit the athlete into the Olympics.<sup>9</sup> During the Games, many athletes challenge judgements during their sporting events, such as referee calls, and look to the CAS for resolution.<sup>10</sup> The AHD can resolve these “competition-related

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<sup>1</sup> B.A., Stephen F. Austin State University, 2013; J.D. Candidate, University of Missouri School of Law, 2023; Associate Member, *Journal of Dispute Resolution*, 2021-2022. I am grateful to Professor Rafael Gely for his insight, guidance, and support during the writing of this Note, as well as the *Journal of Dispute Resolution* for its help in the editing process.

<sup>2</sup> COURT OF ARBITRATION FOR SPORT, AD HOC DIVISION – XXIV OLYMPIC WINTER GAMES IN BEIJING, IOC, WADA, & ISU v. RUSADA, KAMILA VALIEVA, ROC, CAS ARB. (2022), [https://www.tas-cas.org/fileadmin/user\\_upload/OG\\_22\\_08-09-10\\_Arbital\\_Award\\_publication\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbital_Award_publication_.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> COURT OF ARBITRATION FOR SPORT, AD HOC DIVISION – XXIV OLYMPIC WINTER GAMES IN BEIJING, IOC, WADA, & ISU v. RUSADA, KAMILA VALIEVA, ROC, CAS ARB. (2022), [https://www.tas-cas.org/fileadmin/user\\_upload/OG\\_22\\_08-09-10\\_Arbital\\_Award\\_publication\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbital_Award_publication_.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> Christian Keidel & Alexander Engelhard, *Key CAS Ad Hoc Division Cases Handed Down At The Olympics*, LAWNSPORT (Aug. 4, 2016), <https://www.lawnsport.com/topics/item/key-cas-ad-hoc-division-cases-handed-down-at-the-olympic-games>.

<sup>10</sup> *Id.*

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decisions.”<sup>11</sup> This division, created in 1996, aims to “provide all participants in the Games with free access to justice within time limits to keep pace with the competition.”<sup>12</sup>

There are several factions that led to the creation of the AHD. The International Olympic Committee (IOC) is the “guardian of the Olympics and the leader of the Olympic Movement.”<sup>13</sup> The International Council of Arbitration for Sport (ICAS) is an organization that resolves disputes within the sporting community through arbitration and mediation.<sup>14</sup> CAS is financed by the ICAS, maintains the arbitrator list, and “provides for the arbitral resolution of sports-related disputes.”<sup>15</sup> Finally, the AHD is a temporary tribunal that settles disputes at the Olympics within 24 hours of the initial dispute.<sup>16</sup>

Each member of these organizations intermingles with the next. Is it fair to have IOC members a part of and establishing the ICAS? Should the CAS and its AHD arbitration selection processes mirror each other to ensure just dispute resolutions? This Note analyzes these questions to demonstrate that the AHD does not afford athletes a just process for dispute resolution during the Olympics. The IOC is not independent from the CAS because of the organization of IOC and the member appointment process. The AHD should be restructured to resemble the procedural processes of the CAS Ordinary Tribunal to ensure fair and just dispute resolution decisions throughout the Olympics.

Part II discusses the establishment and history of the IOC and CAS and the later implementation of the ICAS. It also discusses the history and reasons why the CAS established their AHD for the Olympics. Part III discusses the organizational alignment of the ICAS in relation to its IOC members and the structure of the CAS and its AHD. Part IV explains the arbitrator selection process and waiver requirement that athletes must abide by through the CAS and their AHD. Part V argues that because of the arbitration process through the AHD during Olympics and those differences in reference to the CAS Ordinary Tribunal, athletes are under a disadvantage during their arbitration process. Part V also argues that because of the ties between the IOC, ICAS, and CAS, athletes are at the discretion of the IOC during arbitration at the Olympics and do not maintain due process of law while competing in a world class event. This Note will conclude with recommendations on how to rectify this issue, primarily by restructuring the AHD to resemble procedural processes of the CAS Ordinary Tribunal.

## II. HISTORY OF THE IOC TO THE CAS AHD

The history of the IOC, including the establishment of the ICAS, CAS, and the AHD, spans over a century.<sup>17</sup> Each organization’s implementation created assistance for the

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<sup>11</sup> *Id.*

<sup>12</sup> Elizabeth Kantor, *Performance-Enhanced Arbitration? The CAS Ad Hoc Division*, MEDIATE (Aug. 2012), <https://www.mediate.com/articles/KantorEbl20120827.cfm>.

<sup>13</sup> *International Olympic Committee*, <https://olympics.com/ioc/overview> (last visited Nov. 26, 2021).

<sup>14</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION (2020), [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Code\\_2020\\_EN\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2020_EN_.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *History of the CAS*, TAS / CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Nov. 26, 2021).

<sup>17</sup> Ansley C. Christine, *International Athletic Dispute Resolution: Tarnishing the Olympic Dream*, 12 ARIZ. J. INT’L & COMP. L. 277, 277 (1995).

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growing Olympic Movement and established codes to improve disputes within the international sporting world.<sup>18</sup> Throughout history, athletes viewed these organizations as intertwined associations that did not provide an impartial venue for athletes to resolve disputes.<sup>19</sup> History shows each organization has expanded upon itself in hopes to diminish the scrutiny it has received involving autonomy and impartiality.<sup>20</sup>

**A. IOC to CAS**

In 1894, the International Athletic Congress of Paris, created the IOC to revise ancient Olympic Game traditions into a “modern Olympics.”<sup>21</sup> Prior to the 1800s, only men from Greek city-states were allowed to compete in the Games, held every four years in Olympia.<sup>22</sup> The creation of the modern games allowed women and other nations to compete, and expanded the locations of the games.<sup>23</sup> In the 1980s, the steady increase in international sports-related disputes and the lack of authority specializing in these disputes to create a binding decision prompted IOC leaders to create an organization that “resolved disputes directly or indirectly related to sport.”<sup>24</sup> As generally provided by arbitration, IOC leaders wanted this organization to encompass “flexible, quick, and inexpensive procedures.”<sup>25</sup> In creating statutes that embodied arbitration for sport-related instances and financially developing and maintaining the organization, the IOC created the Court of Arbitration for Sport (CAS).<sup>26</sup> The CAS is independent of all other sports entities and provides services to assist sports-related disputes using mediation and arbitration with procedural rules related to the particular needs of the sporting industry.<sup>27</sup>

**B. CAS reform to ICAS and establishing the Ad hoc Division**

In 1992, a horse rider named Elmar Gundel brought notice to the CAS’s lack of independence and autonomy from the IOC.<sup>28</sup> During Gundel’s time as a horse rider, the

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<sup>18</sup> *Id.*

<sup>19</sup> James Carter & Alexander Chaize, *Caster Semenya ruling and the pros and cons of the Court of Arbitration for Sport*, DLA PIPER (Sep. 6, 2019), <https://www.dlapiper.com/en/uk/insights/publications/2019/09/sport-now/caster-semenya-ruling-and-the-pros-and-cons-of-the-court-of-arbitration-for-sport/>.

<sup>20</sup> *History of the CAS*, TAS / CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Nov. 26, 2021).

<sup>21</sup> David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 PACE INT’L L. REV. 97, 98 (1992).

<sup>22</sup> *A Short History of the Olympics*, OLYMPICS, <https://www.allthingstopics.com/uploads/2/3/2/9/23290220/lesson-olympics-history1.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *History of the CAS*, TAS / CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Nov. 26, 2021).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Frequently Asked Questions*, TAS/CAS, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html#c194> (last visited Nov 26, 2021).

<sup>28</sup> Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center*, 24 MARQ. SPORTS. L. REV. 1, 4 (2013).

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International Equestrian Federation (FEI) disqualified, suspended and fined Gundel for participating in horse doping; Gundel appealed this decision to the CAS.<sup>29</sup> In this appeal, the CAS shortened Gundel’s suspension from three months to one month, however, Gundel remained displeased with the decision.<sup>30</sup> He challenged the CAS’s decision stating that CAS was not independent or impartial from the FEI because the FEI utilized arbitration clauses created by the CAS; thus, CAS should not be considered a “proper arbitration court.”<sup>31</sup> In hearing this appeal the Swiss Federal Tribunal (Tribunal), the ultimate authority for CAS appeals, found the CAS to be impartial from the FEI and recognized the CAS as a “proper arbitration court.”<sup>32</sup> However, during this hearing, the Tribunal noticed numerous connections between the CAS and the IOC.<sup>33</sup> The Tribunal noticed the “considerable power given to the IOC and its President to appoint members of the CAS, that the CAS was largely financed by the IOC, and that the IOC could modify CAS statutes.”<sup>34</sup> This called into question “the independence of the CAS in the event of the IOC being a party to proceedings before it.”<sup>35</sup> The Tribunal, held that the CAS needed to be independent of the IOC in its organizational and financial structure.<sup>36</sup>

This holding led to the creation of the ICAS to run and finance the CAS, which ensured the CAS established autonomy from the IOC.<sup>37</sup> This structural change enabled the ICAS to help facilitate arbitration and mediation with the CAS and be responsible for administration and financing of the CAS.<sup>38</sup> The ICAS is essentially the middleman between the IOC and CAS.

In 1996, the ICAS created the AHD for the Atlanta Olympics. This division was created to increase the “speed and efficiency” for major sporting events.<sup>39</sup> Its purpose is to “settle finally and within a 24-hour time-limit any disputes arising during the Olympics.”<sup>40</sup> The AHD has been implemented into every Olympics since its establishment in 1996.<sup>41</sup> In fact, the CAS’s AHD extends outside the Olympics; these other sporting events that utilize the AHD include “the European Football Championships, the Commonwealth Games, the AFC Asian Cup, the FIFA World Cup, and the Asian Games.”<sup>42</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Blackshaw, *supra* note 28.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 4–5.

<sup>38</sup> *Code: ICAS Statutes §2, TAS/CAS*, <https://www.tas-cas.org/en/icas/code-icas-statutes.html> (last visited May 30, 2021).

<sup>39</sup> *Sports Arbitration: Certain Unique Features and the Court of Arbitration for Sport (the “CAS”), ACERIS LAW* (Mar. 22, 2021), <https://www.acerislaw.com/sports-arbitration-certain-unique-features-and-the-court-of-arbitration-for-sport-the-cas/>.

<sup>40</sup> *Id.*

<sup>41</sup> Blackshaw, *supra* note 28, at 7.

<sup>42</sup> *Id.* at 16; *see also Everything about the CAS Ad Hoc Division*, SENSATO SPORTS LAW (Sept. 9, 2021), <https://www.sensatosportslaw.com/post/everything-about-the-cas-ad-hoc-division>.

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**III. ORGANIZATION OF THE ICAS AND CAS AHD**

The IOC, ICAS, and CAS are organizations created within and by each other.<sup>43</sup> The IOC created the CAS, and in turn also created the ICAS, and the CAS then established the AHD. Each organization's composition consists of executive and appointed members selected by members of their superior organization.<sup>44</sup> The ICAS has members exclusively from the IOC; CAS has members, and its executive board, exclusively from the ICAS; and the AHD's executive board is made up of the ICAS's executive board.<sup>45</sup> Although each of these entities have independent purposes from their counterparts, their organizational structures intertwine, making it difficult to understand where one ends and the other begins.

**A. ICAS and CAS: Structure**

The ICAS consists of twenty members.<sup>46</sup> Four members are appointed by the International Sports Federations, consisting of the Association of the Summer and Winter Olympic International Federations.<sup>47</sup> These federations include international sporting entities such as basketball, badminton, golf, and more.<sup>48</sup> Then the National Olympic Committees and IOC each appoint four members, chosen from within or outside their own organizations.<sup>49</sup> These twelve members then appoint an additional four members, making sixteen, who altogether appoint the final four members—who are independent of the bodies of organizations who have already been selected as members – bringing the total to twenty.<sup>50</sup>

The IOC, Summer and Winter Olympic International Federations, and the National Olympic Committee consult with one another before electing the President and Vice President of the ICAS.<sup>51</sup> Those who win the election also become the President and Vice President of the CAS.<sup>52</sup>

The CAS is broken into three subdivisions: (1) The Ordinary Arbitration Division, also known as the Ordinary Tribunal; (2) the Anti-Doping Division; and (3) The Appeals Arbitration Division.<sup>53</sup> The CAS Ordinary Tribunal is most comparable to the AHD. This Ordinary Tribunal consists of a panel whose responsibility entails resolving disputes using ordinary procedures, and performs all other functions to efficiently manage those procedures.<sup>54</sup> The arbitration panel formed during a AHD dispute remains assigned throughout the resolution process, similarly to the Ordinary Tribunal.<sup>55</sup> The applicable law

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<sup>43</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>44</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>45</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B2 §6 (2020).

<sup>46</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>47</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>48</sup> *International Sports Federations*, INT'L OLYMPIC COMMITTEE, <https://olympics.com/ioc/international-federations> (last visited Feb. 27, 2022).

<sup>49</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>50</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §4 (2020).

<sup>51</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B2 §6 (2020).

<sup>52</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B3 §9 (2020).

<sup>53</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. C3 §20 (2020).

<sup>54</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. C3 §20 (2020).

<sup>55</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. C3 §20 (2020).

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utilized during arbitrations in the CAS Ordinary Tribunal is established by what the parties deem the applicable law is based on “the merits of their dispute,”<sup>56</sup> unlike the AHD’s law, which is dependent on the arbitration panel.<sup>57</sup> Under Article 17 of the AHD rules “the panel must decide the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”<sup>58</sup> In the arbitration of Kamila Valieva, the applicable law deemed appropriate by the AHD’s arbitration panel included the All-Russian Anti-Doping Rules (ADR), and the World Anti-Doping Code to determine whether Kamila was a “protected person” because she is a minor, and would not be of an intellectual capacity to understand prohibitions in the ADR.<sup>59</sup> Appointed members of ICAS are not allowed on the CAS arbitrator list and cannot represent any party during an arbitration proceeding.<sup>60</sup> However, the ICAS appoints and removes members who constitute the list of CAS arbitrators, showing the intertwined intricacies of these organizations.<sup>61</sup>

### B. CAS AHD: Structure

Like the CAS, the AHD’s President and Co-President are selected from members within the ICAS.<sup>62</sup> The President and the Co-president must be independent to all parties during arbitration and must disqualify themselves “in one another’s favor.”<sup>63</sup> The AHD is established ten days before the Opening Ceremony of the Olympic Games through the completion of the Olympics.<sup>64</sup> The law deemed applicable for disputes in the AHD depends on the arbitration panel.<sup>65</sup> The panel deems which law is appropriate in pursuant to the Olympic Charter, applicable regulations to the Olympics, and general principles of law.<sup>66</sup> The IOC’s mission is to fulfill the roles and responsibilities assigned to it by the Olympic Charter.<sup>67</sup>

The IOC holds annual sessions, and any decisions rendered during these sessions are final.<sup>68</sup> One role of these sessions is for the IOC to adopt or amend the Olympic Charter.<sup>69</sup> This shows a dominance of power for the IOC even before a dispute arises regarding an

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<sup>56</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. C §R58 (2020).

<sup>57</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 17 (2021). Article 17 states, “The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”

<sup>58</sup> IOC, WADA, ISU v. RUSADA, Kamila Valieva, ROC, CAS Arb. found at [https://www.tas-cas.org/fileadmin/user\\_upload/OG\\_22\\_08-09-10\\_Arbital\\_Award\\_publication\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbital_Award_publication_.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B1 §5 (2020).

<sup>61</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION art. B2 §6.4 (2020).

<sup>62</sup> COURT OF ARBITRATION FOR SPORT, AD HOC DIVISION, art. 4 (2021).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* art. 1.

<sup>65</sup> *Id.* art. 17.

<sup>66</sup> *Id.*

<sup>67</sup> INT’L OLYMPIC COMM., *Olympic Charter* 15.3 (July 17, 2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

<sup>68</sup> *Id.* at 18.1.

<sup>69</sup> *Id.* at 18.2.1.

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athlete.<sup>70</sup> These athletes, who file disputes against the IOC during the Olympics, do not get to choose the law applicable to their dispute and must rely on the AHD arbitration panel to do so.<sup>71</sup> The Olympic Charter is automatically viewed during disputes, deemed by Article 17 of the CAS AHD Rules, giving the IOC an upper hand because they themselves amend the charter.<sup>72</sup>

#### IV. ARBITRATION SELECTION AND WAIVER REQUIREMENT

In general arbitration disputes, parties normally choose their arbitrators.<sup>73</sup> Three methods are utilized for determining an arbitrator: (1) parties can request a list of arbitrators from organizations to review; (2) parties can agree on a single arbitrator; or (3) parties can mutually agree on a panel of arbitrators that are selected on a rotating basis.<sup>74</sup> However, in the AHD there are narrower bounds of which a party to a dispute may choose its arbitrator and ultimately asks the parties to waive any arguments they have in regards to the narrow process, number, and selection of arbitrators for the Olympics.<sup>75</sup>

##### A. Arbitration Selection and Process

The CAS Ordinary Tribunal selects a panel of three arbitrators when an arbitration request is submitted to the CAS.<sup>76</sup> In this process, each party to the arbitration selects one arbitrator from the CAS arbitration list; the third arbitrator, who becomes president of the arbitration panel for that dispute, is chosen by the two arbitrators selected by the parties.<sup>77</sup> When selecting an arbitrator, the parties have a choice between at least 150 arbitrators.<sup>78</sup> Within the course of a CAS Ordinary Tribunal, arbitration can last anywhere from a few months to a year.<sup>79</sup>

In the AHD, arbitrators are selected from a “special list” composed by the ICAS who select arbitrators from the CAS’s general list of arbitrators. This special list is published before the Opening Ceremony, and the ICAS can modify it at their discretion.<sup>80</sup> Although there is not a definite number of arbitrators published for the special list, the Tokyo 2020 Olympics consisted of ten arbitrators.<sup>81</sup> Generally, three arbitrators form a panel for disputes

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<sup>70</sup> *Id.*

<sup>71</sup> IOC v. RUSADA, CAS OG 22/08 at ¶ 165.

<sup>72</sup> *Id.*

<sup>73</sup> *How Are Arbitrators Chosen?*, ARB. INFO (Oct. 14, 2015), <https://law.missouri.edu/arbitrationinfo/2015/10/14/how-are-arbitrators-chosen/>.

<sup>74</sup> *Id.*

<sup>75</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 20(c) (2021).

<sup>76</sup> *Frequently Asked Questions*, TAS/CAS, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at art. 13.

<sup>80</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 3 (2021).

<sup>81</sup> Mark Lebbon & Martin Ross, *A Summary of CAS Decisions at the Tokyo 2020 Olympics*, L. IN SPORT (Aug. 19, 2021), <https://www.lawinsport.com/topics/sports/item/a-summary-of-CAS-decisions-at-the-tokyo-2020-olympic-games>.



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during the Olympics. However, it is under the discretion of the president of the AHD to appoint a sole arbitrator if they deem it necessary.<sup>82</sup> If a dispute arising from or in connection with the Olympics occurs, it will be submitted, by a written application from any individual or entity the dispute involves, to the AHD.<sup>83</sup> These individuals and entities included athletes, coaches, or sporting organizations such as associations and federations.<sup>84</sup> Disputes can be filed against any entity in correlation with the Olympics; this includes the “IOC, the National Olympic Committee, an International Federation or an Organizing Committee for the Olympic Games.”<sup>85</sup> The AHD’s panel has 24 hours to process, hear, and make a decision on the party’s dispute.<sup>86</sup> Athletes can file a complaint with the AHD for multiple reasons and against different entities.<sup>87</sup> The panel reaches their decision by the process of majority.<sup>88</sup> However, if there is not a majority, the president of the panel has discretion to make the final decision.<sup>89</sup>

### B. Waiver Requirement

Athletes are aware that “any dispute arising on the occasion of, or in connection with, the Olympics shall be submitted to the Court of Arbitration of Sport, in accordance with the Code of Sports-Related Action.”<sup>90</sup> Furthermore, athletes must abide by a narrower guideline when resolving disputes through the AHD.<sup>91</sup> This additional rule does not allow athletes to argue the differences of the CAS from their AHD.<sup>92</sup> Article 20(c)(iii) of the CAS’s rules for the Olympics states that “parties waive any provision to the contrary in the Code of Sports-related Arbitration or in their agreement concerning the number of arbitrators and the way in which the Panel is formed.”<sup>93</sup> Athletes must waive any concern they have with the arbitrator selection process or how the arbitration panel is formed while using the AHD. A potential example is an athlete’s exclusion from contesting the number of arbitrators on the AHD’s special list. An athlete could not challenge the fact that, unlike the Ordinary Tribunal and its 150 arbitrators to choose from, the AHD’s list has too few of a selection.

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<sup>82</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 11 (2021).

<sup>83</sup> INT’L OLYMPIC COMM., *supra* note 67, at 61.

<sup>84</sup> *Recent Decisions*, TAS/CAS, <https://www.tas-cas.org/en/jurisprudence/recent-decisions.html> (last visited March 26, 2022) (in recent decisions from the CAS AHD, cases decided include Jazmine Fenlator-Victorian v. International Bobsleigh & Skeleton Federation (IBSF), and Irish Bobsleigh & Skeleton Association v. International Bobsleigh & Skeleton Federation (IBSF) & International Olympic Committee (IOC).

<sup>85</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 1 (2021).

<sup>86</sup> *Id.* art. 18.

<sup>87</sup> Manali Kulkarni, *A Summary of the CAS Ad Hoc Division Decisions at the Rio Olympic Games*, LAWINSPO (Sep. 15, 2016), <https://www.lawinsport.com/topics/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games>.

<sup>88</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 19 (2021).

<sup>89</sup> *Id.*

<sup>90</sup> INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER 103 (2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

<sup>91</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 20 (2021).

<sup>92</sup> *Id.*

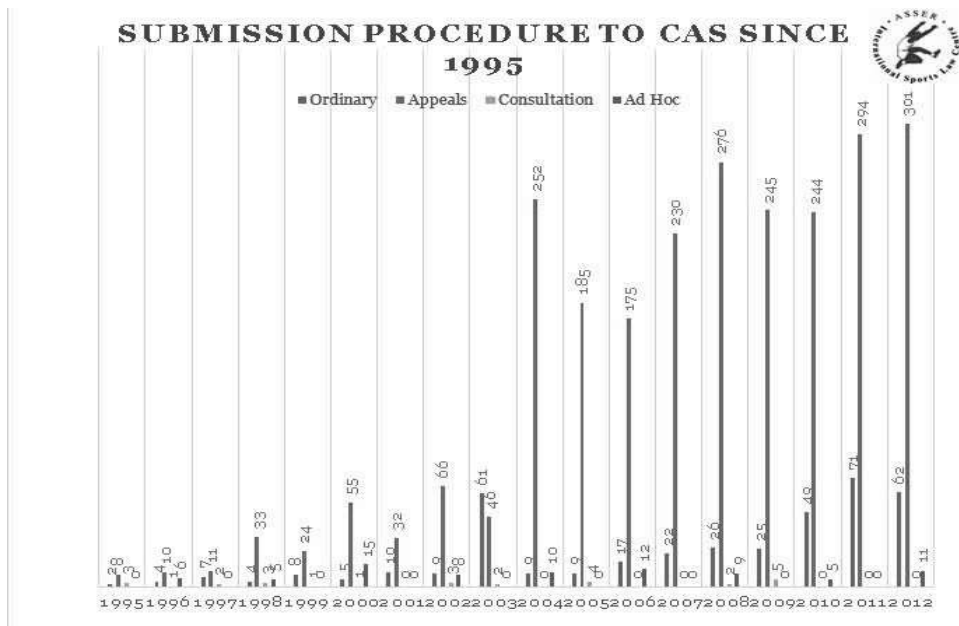
<sup>93</sup> *Id.*

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**C. Relevancy of the Ad Hoc Division**

The AHD has seen a steady increase of disputes since its establishment in 1996.<sup>94</sup> As depicted in the graph below, there are an average of 10.2 arbitration cases through the AHD for each Summer Olympics and an average of 7.5 arbitration cases through the AHD for each Winter Olympics.<sup>95</sup> Although this is considerably fewer than the number of the Ordinary Tribunal or appeals cases, the Olympics only span over the course of a month or, like the Tokyo three2020 Olympics, as little as 16 days.<sup>96</sup> Starting in 1996, there were only four ordinary arbitration cases through the CAS for the year; however, the Olympics generated six AHD cases.<sup>97</sup> In 2002, there were eight ordinary arbitration cases through the year and eight AHD cases during the Olympics.<sup>98</sup> In 2004, there were eight ordinary arbitration cases through the year, and ten AHD cases during the Olympics.<sup>99</sup>

This data shows that the AHD is relevant and that athletes are utilizing the system. Since athletes are arbitrating through the Olympics, they deserve an impartial judgement.



<sup>94</sup> Antoine Duval & Giandonato Marino, *Quantifying the Court of Arbitration for Sport*, INT’L SPORTS LAW CTR: ASSER INT’L SPORTS L. BLOG, Graph 5 (May 23, 2014), <https://www.asser.nl/sportslaw/about-the-centre>.

<sup>95</sup> *Id.*

<sup>96</sup> Victor Mather, *When Are the Olympics? Here’s the schedule for Tokyo.*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/article/olympics-sports-schedule.html>.

<sup>97</sup> Duval & Marino, *supra* note 94.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

## V. ANALYSIS

### A. Intermingling of organizations

In reviewing Gundel's claim, the Tribunal acknowledged a lack of autonomy and impartiality between the IOC and CAS and called into question the independence of the CAS from the IOC.<sup>100</sup> In order to combat the autonomy issue, the CAS underwent a reform.<sup>101</sup> The leading reform change was the creation of the ICAS, which intended to replace the IOC in "running and financing" the CAS.<sup>102</sup> As noted earlier, four members of the twenty member ICAS team are appointed by the IOC.<sup>103</sup> These four appointed members of the IOC then assist in appointing an additional eight members of the ICAS.<sup>104</sup> This means the IOC is able to appoint or assist in appointing 60% of the members of the ICAS team.<sup>105</sup>

Before the election of the ICAS president and vice president, there must be a consultation with other sport entities, including the IOC.<sup>106</sup> Furthermore, the president of the ICAS is also the president of the CAS.<sup>107</sup> There is a straight line from the IOC to the CAS through the appointed members of the ICAS and their election process.<sup>108</sup>

Although the ICAS runs and finances the CAS, the IOC remains embedded in the CAS through their ability to appoint multiple members of the ICAS. Not only does the IOC appoint these members they also have input into the election of the ICAS President, who is also the CAS President, creating the line between the IOC and CAS, regardless of the ICAS's intervention.

### B. Comparing arbitration panels between Ordinary CAS and its Ad Hoc Division

There are distinct differences between the ordinary arbitrator selection process through the CAS and the arbitrator selection process through their AHD. The CAS's Ordinary Tribunal has a panel of three arbitrators, with one arbitrator being selected by each of the parties from a list of no less than 150 arbitrators; those two selected arbitrators select the final arbitrator/panel president.<sup>109</sup> Contrasting from the ordinary selection process, the AHD's president establishes the three-arbitrator panel from an average list of ten arbitrators for the dispute or may choose to appoint a sole arbitrator.<sup>110</sup>

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<sup>100</sup> Blackshaw, *supra* note 28.

<sup>101</sup> *History of the CAS*, TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited May 30, 2022).

<sup>102</sup> *Id.*

<sup>103</sup> *Code: ICAS Statutes §4*, TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT, <https://www.tas-cas.org/en/icas/code-icas-statutes.html> (last visited Nov. 26, 2021).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* § 6.2

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at § 9.

<sup>108</sup> *Code: ICAS Statutes, supra* note 103, at § 4.3.

<sup>109</sup> *Frequently Asked Questions, supra* note 27.

<sup>110</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES APPLICABLE TO THE CAS AD HOC DIVISION FOR THE OLYMPIC GAMES, art. 11.

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Impartiality is a critical point in arbitration decisions; selecting an arbitrator panel is debatably the most important step in the arbitration process.<sup>111</sup> Usually, parties mutually choose their arbitrator to maintain confidence that their disputes can be resolved with an impartial and unbiased arbitrator.<sup>112</sup> Multiple agencies allow parties to choose their arbitrators. For example, the American Arbitration Association (AAA) ensures that parties have a chance to choose their arbitrators.<sup>113</sup> Only when parties do not appoint an arbitrator does the AAA send a list of ten arbitrators for the parties to agree upon an arbitrator from the specific list.<sup>114</sup> Not only do parties get to choose their arbitrators, but they have the chance to contact the arbitrator to determine if they will be impartial and fair.<sup>115</sup>

The Hong Kong International Arbitration Centre lists one of its main advantages as neutrality, where the parties “have the ability to appoint independent arbitrators of their choice to form a neutral tribunal.”<sup>116</sup> The Singapore International Arbitration Centre utilizes a president to establish arbitrators.<sup>117</sup> However, the president takes into consideration any arbitrators nominated by the parties.<sup>118</sup>

Impartiality is crucial to negate bias in dispute resolution processes.<sup>119</sup> Arbitrators are supposed to be neutral third parties who “consider evidence, law, and arguments presented by the parties.”<sup>120</sup> Selecting a neutral third-party arbitrator is the first step in maintaining a neutral and effective form of fair dispute resolution.<sup>121</sup>

When arbitrators are selected by an agency or through a pool list, the arbitration procedure could lose its impartiality.<sup>122</sup> A depiction of this is seen in the AHD. Not only do the parties not choose their arbitrator but the arbitration list for the AHD comes from the CAS’s list of arbitrators that is previously selected by the ICAS, who are still presided by members of the IOC.<sup>123</sup> Article three of the Arbitration Rules applicable to the AHD states that the special list of arbitrators is selected from the board members of the ICAS.<sup>124</sup> The IOC has input into who the primary positions of board members are; the IOC is one of the

<sup>111</sup> Michael Konen, *A New (Deepwater) Horizon for Arbitrator Bias*, 13 ARB. L. REV. 1, 1 (2021).

<sup>112</sup> *The Advantages and Disadvantages of Arbitration*, SAC ATTORNEYS LLP, <https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html> (last visited Nov. 26, 2021).

<sup>113</sup> See *Commercial Arbitration Rules and Mediation Procedures, R-12*, AM. ARB. ASS’N (Oct. 1, 2013), [https://www.adr.org/sites/default/files/CommercialRules\\_Web-Final.pdf](https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> Staff, *Whose Side is the Arbitrator On and Where Do You Find One?*, ARB. INFO (Aug. 20, 2015), <https://law.missouri.edu/arbitrationinfo/2015/08/20/whose-side-is-the-arbitrator-on-and-where-do-you-find-one-4/>.

<sup>116</sup> *What is Arbitration?*, HKIAC, <https://www.hkiac.org/arbitration/what-is-arbitration> (last visited Nov. 26, 2021).

<sup>117</sup> *SIAC Rules 2016 R-9*, SIAC (2016), [https://siac.org.sg/our-rules/rules/siac-rules-2016#siac\\_rule9](https://siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule9).

<sup>118</sup> *Id.* at 9.5.

<sup>119</sup> See Anagha M V, *The A-Z of ADR*, BIMACC (Sep. 22, 2000), <https://www.bimacc.org/a-z-of-adr-independence-and-impartiality-of-arbitrators/>

<sup>120</sup> *Alternative Dispute Resolution – Neutral Third-Party Mediation and Arbitration*, SANDERS LLP, <https://www.sandersfirm.com/mediation-arbitration> (last visited Feb. 27, 2022).

<sup>121</sup> Anagha, *supra* note 119.

<sup>122</sup> *Advantages and Disadvantages*, *supra* note 112.

<sup>123</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES APPLICABLE TO THE CAS AD HOC DIVISION FOR THE OLYMPIC GAMES, art. 3 (2021).

<sup>124</sup> *Id.*

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organizations who assist in electing the President and Vice-President of the ICAS, who then hold these same positions in the CAS.<sup>125</sup> The arbitrator list for the AHD is not neutral because its members come from an organization that is intertwined with the IOC. Allowing the AHD's President to choose its arbitrators from a list that maintains ties with the IOC fosters an environment for impartiality, thus, creating an unfair and unjust dispute resolution process.

### C. Compare and Contrast Waiver Requirements

The CAS AHD requests the athletes to waive their grievances with the Olympic arbitration process in the Olympic Athlete Entry Form, which gives the AHD jurisdiction over the games.<sup>126</sup> Article 20(c)(iii) of the CAS's rules for the Olympics states, "parties waive any provision to the contrary in the Code of Sports-related Arbitration or in their agreement concerning the number of arbitrators and the way in which the Panel is formed."<sup>127</sup> This creates a barrier for athletes to challenge selected arbitrators who may seem biased towards the opposing party.

Although other arbitration organizations ask for waivers, these waivers do not usually include waiving objection to the arbitration process, and if they do, the waiver comes with stipulations.<sup>128</sup> The International Centre for Dispute Resolution's procedures state that failing to disclose circumstances surrounding impartiality of an arbitrator within a reasonable time of acknowledging that impartiality results in a waiver of "the right to challenge an arbitrator based on those circumstances."<sup>129</sup> The International Centre also states, "a party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object."<sup>130</sup> Within the International Centre, parties can waive an award even if there are valid concerns.<sup>131</sup> The forementioned differs from the AHD, which allows no stipulations in its waiver.<sup>132</sup>

The difference in waiver requirements is not limited to the United States. The London Court of International Arbitration includes waiver of a party's opportunity to propose an arbitrator, waiver of a party to re-nominate an arbitrator, waiver of rights to receive excess amounts of awards, and waiver of rights to the arbitration process when a party knew of improper standards but did not object to them.<sup>133</sup> Each of these waivers comes with

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<sup>125</sup> Statutes for the Bodies Working for the Settlement of Sports-Related Disputes, CODE OF SPORTS-RELATED ARB. § 8 (2020).

<sup>126</sup> See generally Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympics*, 12 MARQ. SPORTS L. REV. 515, 521 (2001) (noting the provision that grants AHD its jurisdiction).

<sup>127</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 20 (2021).

<sup>128</sup> INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 14 (2021).

<sup>129</sup> *Id.*

<sup>130</sup> INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 31 (2021).

<sup>131</sup> *Id.*

<sup>132</sup> COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 20 (2021).

<sup>133</sup> LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES art. 2.4 (2020).

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stipulations and are not blanket waivers to the arbitration process altogether.<sup>134</sup> These stipulations include objections in writing and responses within a timely manner.<sup>135</sup>

There is no way around this waiver for athletes at the Olympics.<sup>136</sup> The Olympics' binding arbitration clause prohibits an athlete from competing unless the clause is signed.<sup>137</sup> Stipulations within waivers, as discussed, provide parties with the opportunity to present concerns over impartiality or rule compliance. When stipulations are non-existent, parties either accept potentially unfair dispute resolution procedures, or in the case of the Olympics, cannot compete if they do not sign the waiver.<sup>138</sup>

#### D. Appealing Ad hoc Decisions

Although the right to appeal is narrow in general arbitration, it is possible.<sup>139</sup> The Federal Arbitration Act (FAA) allows overturning of an award for "grudgingly narrow" reasons.<sup>140</sup> These narrow reasons include (1) where the award was obtained by corruption, fraud or other unwarranted measures; (2) where the arbitrators acted corruptly; (3) where the arbitrators acted in bad faith in procedural regards to arbitration and prejudiced the parties; or (4) where arbitrators have exceeded their power.<sup>141</sup> Under AAA rules, the organization can handle an appeal on an additional basis if "the parties agreed that an appeal is allowed."<sup>142</sup> Arbitration is a "creature of contract"; parties agree to a binding arbitration as if they are in a contract, thus allowing parties to agree on a potential appeal.<sup>143</sup>

Appealing a decision made by the CAS Ordinary Tribunal is allowed, but the CAS limits appealable matters.<sup>144</sup> The allowable issues include: "(1) lack of jurisdiction, (2) violation of elementary procedural rules, such as the violation of the right to a fair hearing, and (3) incompatibility with public policy."<sup>145</sup>

Although there are narrow instances to appeal through the AAA, FAA and CAS they do hold an opportunity for it. Decisions rendered by the AHD are final, with no right to appeal.<sup>146</sup> A final decision by the AHD can hinder an athletes' opportunity to attend future Olympics or dismiss what they have accomplished at the Olympics the dispute arose in.<sup>147</sup> In 2018, Sun Yang, an international swimmer, averted the collection of a blood test for anti-

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Jason Gubi, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 997, 998 (2008).

<sup>137</sup> *Id.*

<sup>138</sup> *See id.*

<sup>139</sup> *What Happens After the Arbitrator Issues an Award*, AM. ARB. ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/AAA229\\_After\\_Award\\_Issued.pdf](https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf) (last visited Apr. 22, 2022).

<sup>140</sup> *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994).

<sup>141</sup> 9 U.S.C. § 10(a).

<sup>142</sup> *What Happens After the Arbitrator Issues an Award*, *supra* note 139.

<sup>143</sup> INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 33 (2021).

<sup>144</sup> *Frequently Asked Questions*, *supra* note 27.

<sup>145</sup> *Id.*

<sup>146</sup> McLaren, *supra* note 126, at 523.

<sup>147</sup> *See id.* at 521.

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doping screening.<sup>148</sup> A CAS panel of arbitrators held that Sun was ineligible to compete in any competitions for eight years.<sup>149</sup> In 2020, Sun alleged that this Panel was not properly constituted because of racial prejudice.<sup>150</sup> A new Panel was formed in 2021 who dismissed the first award and rendered a new ban of four years and three months.<sup>151</sup> If the initial award had been decided by the AHD, Sun Yang would have had no right to appeal and would have been banned from competing in two Olympics rather than one.

### E. The AHD's Rationale for Procedures and Arguments Against Them

The AHD was created to hasten the timeline of disputes during the Olympics.<sup>152</sup> The AHD's mission is to "settle finally and within a 24-hour time limit any disputes arising during the Olympics."<sup>153</sup> The AHD is known to be faster and more flexible than normal arbitration proceedings.<sup>154</sup> The AHD focuses on being fast, free and just.<sup>155</sup> This expedited timeline enables dispute decisions to "keep pace with the competition."<sup>156</sup> Referee calls are a compelling example for the need of this quick pace resolution; one call in a game would need determined quickly to establish the winner of an event in time for the next round of competition or by the completion of the Olympics.

Although there are rationales for the AHD's processes, these need to be balanced with the importance of the Olympics to an athlete's career. The Olympics are at the height of most athletes' careers, and it is the most critical sporting event for many athletes.<sup>157</sup> Thus, a mishap in the arbitration process could hinder an athlete's future opportunities in a sport.

Due process is also a concern for athletes.<sup>158</sup> The Due Process Clause, as stated in *Mullane v. Central Hanover Bank*, requires notice and the opportunity to be heard.<sup>159</sup> Much like Due Process through Constitutional law, arbitration applies measures of the right to be heard in adversarial proceedings.<sup>160</sup> The Swiss Federal Tribunal, which governs the CAS and its AHD, Ordinary, and Appeals divisions, uses the Swiss Federal Act on Private International law in pursuing arbitration procedures.<sup>161</sup> Art 182(3) of this act gives its own form of Due Process for parties during arbitration; "the arbitrator tribunal shall ensure equal treatment of

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<sup>148</sup> *World Anti-Doping Agency v. Sun Yang & Fédération*

*Internationale de Natation (FINA)*, CAS No. 6148 (2019) (Jan Paulsson & Bernard Hanotiau, Arbs).

<sup>149</sup> *Id.* at p. 6.

<sup>150</sup> *Id.* at p. 5.

<sup>151</sup> *Id.* at p. 88.

<sup>152</sup> *History of the CAS*, *supra* note 16.

<sup>153</sup> *Id.*

<sup>154</sup> *Institutional vs. 'ad hoc' arbitration*, PINSENT MASONS (Aug. 12, 2011), <https://www.pinsentmasons.com/out-law/guides/institutional-vs-ad-hoc-arbitration>.

<sup>155</sup> *Blackshaw*, *supra* note 28, at 6.

<sup>156</sup> *Kantor*, *supra* note 12.

<sup>157</sup> *Maidie Oliveau, The Olympic Arbitration Procedures in a Nutshell*, OPINOJURIS (Aug. 8, 2008), <http://opiniojuris.org/2008/08/08/the-olympic-arbitration-procedures-in-a-nutshell/>.

<sup>158</sup> *Gubi*, *supra* note 136, at 1017.

<sup>159</sup> *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

<sup>160</sup> Richard H. McLaren, *Sports Law Arbitration by CAS: is it the Same as International Arbitration?* 29 PEPP. L. REV. 101, 104 (2001).

<sup>161</sup> *Id.*

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the parties and their right to be heard in adversarial proceedings.<sup>162</sup> The AHD and its potential for deciding to not hold a hearing and render an award immediately if the panel deems itself sufficiently informed can disrupt Due process in this regard.<sup>163</sup>

Due Process in arbitration also requires the right to cross-examine opposing party's witnesses.<sup>164</sup> CAS and its AHD do not provide for cross-examination of witnesses during their dispute resolution procedures.<sup>165</sup> Due process in arbitration encompasses the key concept of procedural fairness."<sup>166</sup> Arguably, the IOC is directly involved with CAS; there is not a "neutral decision-maker" or third party during these arbitration proceedings, creating an instance that a party can be treated unfairly or with bias.<sup>167</sup> Without the availability to cross-examine the opposing party, the potential for an award rendered without a hearing, or the unavailability of a neutral decision maker, unfair decisions are likely to be made, thus violating due process for these athletes. To aggravate the process further, the AHD denying the right to appeal compounds on due process issues, essentially rendering an athlete the inability to challenge a due process claim during their arbitration procedures.<sup>168</sup>

The AHD's previous arbitration panelist have argued that the decline in growth of cases submitted to the AHD stems from athletes fearing the judge and the rules they emplace; thus, serving its purpose in providing strictly followed rules and fair and immediate recourse.<sup>169</sup> Based on the arguments of this note however, this decline of cases submitted and fear of athletes to submit them may be entwined with impartiality or injustice.<sup>170</sup>

Potential remedies for the issues analyzed above should include: (1) selecting arbitrators for the AHD that are not within the CAS but who continue to meet Section 14 of the ICAS Statutes in maintaining a general knowledge of sport;<sup>171</sup> (2) allow appeals for decisions made during the Olympics; and (3) create stipulations in the athletes' waiver to utilize arbitration. Selecting arbitrators outside the CAS would sever the link between the IOC and AHD during the Olympics and help negate impartiality concerns. An appeals process would allow athletes to challenge decisions in their current Olympics that could render them the opportunity to compete in the future, like Sun Yang's appeals through the CAS. This appeals process could mimic the CAS's in submitting the appeal to the Tribunal to determine the athlete's eligibility for future Olympics or reestablishing awards or accomplishments during the Olympics in which the dispute took place. In order to maintain the speedy process of the AHD, an appeals AHD could be incorporated to the procedural timeline, the appeals AHD would need to establish a neutral third party, potentially a member of an international committee involved in sport that is not from the same nation as the athlete or entity bringing

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<sup>162</sup> Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 18, 1987, SR 291, art. 182(3) (Switz.), [https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en).

<sup>163</sup> ARBITRATION RULES APPLICABLE TO THE CAS AD HOC DIVISION FOR THE OLYMPIC GAMES, art. XV, § c.

<sup>164</sup> *Due process*, ARB. INFO. (Oct. 11, 2015), <https://law.missouri.edu/arbitrationinfo/2015/10/11/due-process/>.

<sup>165</sup> Gubi, *supra* note 136, at 1018.

<sup>166</sup> Simon Sloane & Emily Wyse Jackson, *Arbitration awards-due process and procedural irregularities: Challenges*, FIELDFISHER (Jun. 30, 2021), <https://www.fieldfisher.com/en/insights/arbitration-awards---due-process-and-procedural-ir>.

<sup>167</sup> Gubi, *supra* note 136, at 1017.

<sup>168</sup> McLaren, *supra* note 126, at 523.

<sup>169</sup> Oliveau, *supra* note 157.

<sup>170</sup> *Id.*

<sup>171</sup> *Code: ICAS Statutes*, *supra* note 38, at § 14.



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the dispute or the opposing party. Stipulations would provide athletes the right to object to any impartial or unfair procedures, without denying them the right to compete. These stipulations could include the right to increase the timeframe from 24 hours to what is necessary to enact a proper hearing if the timeline would not constrain an athlete or entity involved in the dispute; the right to have a new arbitrator selected if impartiality or bias is apparent, and a parties right to challenge applicable law if the party to the dispute has had the ability to influence the law themselves.

## VI. CONCLUSION

Most athletes do not have a choice in choosing the CAS and its AHD as their arbitrator of choice.<sup>172</sup> These athletes must sign contracts that establish the CAS as their dispute resolution method to compete in their desired sport at the Olympics.<sup>173</sup> Athletes' entry forms for the Olympics confirm the AHD as the method of dispute resolution during the games.<sup>174</sup>

Because of these constraints, athletes are forced to settle for an arbitration process that, although courts have tried to establish its impartiality, is not completely neutral. The IOC still has a strong threshold over the CAS through its appointed members in the ICAS. Arbitrators are selected for athletes by members of the ICAS, who are convoluted with members of the IOC. Athletes are restrained by final decisions for a once in a four-year opportunity, for most, a once in a lifetime opportunity. And athletes do not have the opportunity to fight these procedures and must waive their rights to a fair process. Each of these issues shows that although the AHD resolves disputes in a timely manner for a condensed sporting event, it does not afford athletes a fair chance to resolve their disputes while participating in a world-renowned, once in a lifetime, career breaking opportunity such as the Olympics. Implementing the remedies above can be one step in correcting the imbalance of dispute resolution in the Olympics and relieve the IOC, ICAS, and CAS of any impartiality concerns that athletes have attributed to them for the past century.

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<sup>172</sup> Carter & Chaize, *supra* note 19.

<sup>173</sup> *Id.*

<sup>174</sup> McLaren, *supra* note 126, at 517.