Court of Arbitration for Sport (CAS) and its case law significance in the advancement of Lex Sportiva

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# TABLE OF CONTENTS

List of Abbreviations.........................................................................................p. 4-5

Abstract............................................................................................................p.6

Chapter 1: Introduction......................................................................................p. 7

Chapter 2: History of the Court of Arbitration for Sports (CAS)..........p.8-12
  2.1) The inception of the Court of Arbitration for Sports (CAS) ...............p. 8-9
  2.2) Formation of CAS from 1984 to 1994....................................................p.9-10
  2.3) The need for financial and structural delinking of CAS from International Olympic Committee (IOC).................................................................p. 10-11
  2.4) The reform of CAS leading to the creation of International Council of Arbitration for Sports (ICAS) .................................................................p. 11-12

Chapter 3: Organization and structure of Court of Arbitration for Sport (CAS), International Council of Arbitration for Sport (ICAS) and Ad Hoc Division (AHD).................................................................p.13-20
  3.1) The Court of Arbitration for Sport (CAS)..............................................p. 13-14
  3.2) The International Council of Arbitration for Sport (ICAS).................p.15-16
  3.3) Ad Hoc Division (AHD)........................................................................p. 16-17
  3.4) The procedure of the Ad Hoc Division (AHD).....................................p.17-20

Chapter 4: Case law of CAS and its significance in the harmonization of global sports law and the advancement of “lex sportiva”.................................p.21-40
  4.1) Defining “lex sportiva”..........................................................................p. 23-26
  4.2) CAS jurisprudence as a separate legal code........................................p.26-27
  4.3) Applicable law in CAS Arbitrations.....................................................p. 28-30
4.4) Compliance of CAS principles with Article 6 of the European Convention on Human Rights (ECHR)………………………………………..p. 30-32

4.5) Universal legal principles used by CAS in its adjudications………………p. 32-40

Lex Ludica……………………………………………………………………………..p. 32-35

Good Governance………………………………………………………………………..p. 35-36

Procedural fairness………………………………………………………………………..p. 37

Harmonization of standards……………………………………………………………p. 37-38

Fairness and equitable treatment…………………………………………………………p. 38-40

Chapter 5: Interview with Dr. Achilleas Mavromatis, Legal Advisor of PAOK Football Club ………………………………………………………………………p. 41-45

Chapter 6: Conclusions……………………………………………………………………p. 46-47

Bibliography………………………………………………………………………………p. 48-50
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AHD</td>
<td>Ad Hoc Division of the CAS</td>
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<tr>
<td>AIBA</td>
<td>Association Internationale de Boxing Amateur</td>
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<td></td>
<td>FIBA International Basketball Federation</td>
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<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<td></td>
<td>Swiss Civil Procedure Code (CPC)</td>
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<tr>
<td>CJEC</td>
<td>Court of Justice of the European Communities</td>
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<tr>
<td>CONI</td>
<td>Comité Olympique National Italien</td>
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<td></td>
<td>CPC Canadian Paralympic Committee</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>FCI</td>
<td>Federazione Ciclistica Italiana</td>
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<tr>
<td>FEI</td>
<td>International Equestrian Federation</td>
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<tr>
<td>FI</td>
<td>Fédération Internationale</td>
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<tr>
<td>FIBA</td>
<td>Fédération Internationale de Basketball</td>
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<tr>
<td>FIN</td>
<td>Federazione Italiana Nuoto</td>
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<tr>
<td>FINA</td>
<td>Federation Internationale de Natation</td>
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<tr>
<td>FIS</td>
<td>Fédération Internationale de Ski</td>
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<tr>
<td>FISA</td>
<td>International Rowing Federation</td>
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<tr>
<td>FN</td>
<td>Fédération nationale</td>
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<tr>
<td>ICAS</td>
<td>International Council of Arbitration for Sport</td>
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<td>ICF</td>
<td>Italian Cycling Federation</td>
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<td>IF</td>
<td>International Federation</td>
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<tr>
<td>IIHF</td>
<td>International Ice Hockey Federation</td>
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<td></td>
<td>IJF International Judo Federation</td>
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<tr>
<td>IOC</td>
<td>International Olympic Committee</td>
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<tr>
<td></td>
<td>ITF International Tennis Federation</td>
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<tr>
<td>IADT</td>
<td>International Tennis Federation Anti-Doping Tribunal</td>
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<tr>
<td>NF</td>
<td>National Federation</td>
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<td>NOC</td>
<td>National Olympic Committee</td>
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<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>NZOC</td>
<td>New Zealand Olympic Committee</td>
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<td>SFT</td>
<td>Swiss Federal Tribunal</td>
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<td>SLOC</td>
<td>Salt Lake Organizing Committee of the Olympic Games</td>
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<td>OG</td>
<td>Olympic Games</td>
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<td>PIL Act</td>
<td>Swiss Private International Law Act</td>
</tr>
<tr>
<td>UCI</td>
<td>Union Cycliste Internationale</td>
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<tr>
<td>UEFA</td>
<td>Union of European Football Associations</td>
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<tr>
<td>USOC</td>
<td>United States Olympic Committee</td>
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<td></td>
<td>WADA World Anti-Doping Agency</td>
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ABSTRACT:

The aim of this dissertation is to analyze the structure of Court of Arbitration for Sport (CAS) and its case law significance in the advancement of Lex Sportiva. The Court of Arbitration for Sport (CAS) was created as a final and binding court of arbitration for all sports related disputes, including doping cases.

The CAS is developing universal principles that are becoming recognized as the “lex sportiva” and has established a worldwide reputation of competence in dealing with sports-related disputes throughout the thirty years of its existence.

The following dissertation provides history of CAS by its inception until today, its organization and structure, the contribution of its case-law to “lex sportiva”. The applicable law in its proceedings, its jurisprudence as well as universal legal principles applied in its adjudications is further examined. In addition an interview of Dr. Achilleas Mavromatis, Legal Advisor of PAOK FC, provides an inside view of the way CAS works in practice. Concluding, CAS has evolved to a Supreme Court for Sport recognized by all important international Olympic and many non Olympic Organizations as the final and binding appeal body for sport.
Chapter 1

1. INTRODUCTION

The Court of Arbitration for Sport (CAS) established in the early 1980s due to an intense demand on finding an ultimate, authoritative and neutral solution to judicial disputes among athletes, international and national sports federations, national Olympic committees and Olympic and other games organizers.\(^1\) Therefore, in 1983 Court of Arbitration for Sport (CAS) was created as final and binding court of arbitration for all sports related disputes, including doping cases.

The CAS is developing universal principles that are becoming recognized as the “lex sportiva” and has established a worldwide reputation of competence in dealing with sports-related disputes throughout the thirty years of its existence. Its role as a law-maker is of great significance and will be further examined in this dissertation.

The Court of Arbitration for Sport (CAS) is recognized as the world’s supreme court of sport\(^2\) tied in its beginning to the International Olympic Committee (IOC). It is located in Lausanne, Switzerland however, has established offices in New York, USA and Sydney, Australia as well as temporary courts in current Olympic host cities. Therefore, it is an international not a national body. Since Lausanne, Switzerland is the seat of all CAS arbitrations Swiss Arbitration Law applies and due to that fact, it has been criticized for its pronounced Swiss influence. Furthermore, the only possibility for an appeal against a CAS decision is before the Swiss Federal Tribunal (SFT).

An analysis of the structure of the Court of Arbitration for Sport (CAS), International Council of Arbitration for Sports (ICAS) and Ad Hoc Division (AHD), arbitration rules applied at its proceedings, its case law and the way it contributed to the advancement of lex sportiva will follow in the next chapters. The aim of this dissertation is to provide an in depth view of CAS and its recognition as a law-maker for sport-related issues.

\(^1\) Richard H. McLaren, Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games, Marquette Sports Law Review, Volume 12 Issue 1Fall, Article 20, available at: http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1222&context=sportslaw

Chapter 2

2. HISTORY OF THE COURT OF ARBITRATION FOR SPORTS (CAS)

2.1) The inception of CAS

In the early 80’s the need for an international dispute settlement mechanism for sport related issues was very intense. An independent body which would offer rapid and cost effective dispute resolution for sports had to be initiated. The creation of the Court of Arbitration for Sports (CAS) was for the first time decided at 1982 in Rome by the International Olympic Committee (IOC), during its 85th session, and came as an answer to that demand. The President of IOC, Juan Antonio Samaranch, was the first who visualized the creation of a “supreme court of world sport” and the IOC accepted his vision.

The statute of the Court of Arbitration for Sports (CAS) was drafted by a working group of three members of the IOC. H.E Judge Keba Mbaye of Senegal, judge at the time of the International Court of Justice in Hague, acted as a chairman. In March 1983, IOC officially accepted and ratified the statute at its New Delhi Session and the statute of CAS was entered into force on 30 June 1984, under the leadership of the President Mbaye and Mr. Gilbert Schwaar as Secretary General. A set of procedural regulations were as well complemented to the CAS statute. The first

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4 H.E. Judge Keba Mbaye, President of ICAS and CAS, in DIGEST OF CAS AWARDS II 1998-2000 xi, xii (Matthieu Reeb ed., 2002)


CAS arbitration proceedings were held in 1986 and the first arbitral award was rendered in 1987.\footnote{Richard H. McLaren, Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror, Marquette Sports Law Review, Volume 20 Issue 2 Spring, Article 2, available at: http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1482&context=sportslaw}

The initial statute provided for a settlement attempt before referring to CAS. The operating costs of the court shall be borne by the IOC. Furthermore, concerning jurisdiction of the CAS it shall remain available to the parties and not imposed on federations or athletes.\footnote{Matthieu Reeb, The Court of Arbitration for Sport (CAS) in Mathieu Reeb(ed), Digest of CAS Awards I 1986-1998, I 1986-1998 (Kluwer Law International 1998) pp. XXIII-XXXI}

\subsection*{2.2) Formation of CAS from 1984 to 1994}

At the beginning CAS had both executive and judicial functions. Under its initial statute and procedural regulations it was composed by sixty (60) members. The IOC, the International Federations (IF), the National Olympic Committees (NOC) and the IOC President had to appoint fifteen (15) members each.\footnote{Matthieu Reeb, The Court of Arbitration for Sport (CAS) in Mathieu Reeb(ed), Digest of CAS Awards I 1986-1998, I 1986-1998 (Kluwer Law International 1998) pp. XXIII-XXXI} As initially planned, CAS was exclusively financed by the IOC. In addition, IOC Executive Board was the only who could modify the CAS statute. The close connection to IOC both financially and administratively was the reason why CAS was challenged for its independence and impartiality later on\footnote{See Swiss Federal Tribunal in Gundel. v. Federation Equestre Internationale and Court of Arbitration for Sport, (CAS) (1993), Arret Du Tribunal Federal Suisse, 1st Civil Division, 15 March 1993.}

The CAS statute provided for one type of procedure. Conciliation shall be attempted first and in case of failure regular arbitration proceedings had to be initiated. Furthermore, a consultation proceeding open to all existed. CAS would give a legal opinion on any sport related issue. That procedure still exists though modified and its access has been eliminated.\footnote{See Chapter VI of Matthieu Reeb, The Court of Arbitration for Sport (CAS) in Mathieu Reeb(ed), Digest of CAS Awards I 1986-1998, I 1986-1998 (Kluwer Law International 1998)}

A Guide to arbitration was published by CAS in 1991 which included several model arbitration clauses. One of them stated: "Any dispute arising from the present Statutes and Regulations of the ... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and
Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way hinder its execution.”

The above clause augured for an appeal procedure and was adopted for the first time by the International Equestrian Federation (FEI). Many national and international federations followed, creating a sort of “appeal” procedure, though it didn’t formally exist in such terms.

Before 1991 the type of cases which were referred to CAS arbitration concerned athletes’ nationality, contacts, sponsorship and television rights. However, after 1991 a great amount of doping cases were referred to CAS and its structure was challenged due to its strong link to the IOC.

2.3) The need for financial and structural delinking of CAS from International Olympic Committee (IOC)

Finally, CAS structure changed in 1994 after the Swiss Federal Tribunal ruling in Gundel v. Federation Equestre Internationale and Court of Arbitration for Sport, which challenged the independence and impartiality of CAS from the IOC. At this case, Gundel, a horse rider appealed an International Equestrian Federation (FEI) horse-doping decision to CAS. The CAS rendered its award on 15 October 1992. Gundel wasn’t satisfied with the award, therefore, appealed to the Swiss Federal Tribunal. Gundel disputed the validity of the award, arguing that CAS did not meet the independence and impartiality requirements for an arbitration court under Swiss law. The Federal Tribunal in its judgment of the 15th March 1993 found that CAS was a true court of arbitration sufficiently independent from the FEI as CAS was not an organ of the FEI. However, the Federal Tribunal held that the links between the IOC and CAS were so strong that the independence of CAS would be questioned again if the IOC became a party in proceedings before CAS. Actually, the facts that CAS was financed exclusively by the IOC, CAS Statute could only be modified by the IOC, and that IOC and its President had the power to appoint the CAS members could provide a

12 Model Arbitration Clause available at: http://www.tas-cas.org/en/infogenerales.asp/4-3-235-1011-4-1-1/5-0-1011-3-0-0/
13 See arbitration TAS 92/63 G. v./ FEI p. 115
reasonable doubt concerning CAS independence from IOC in future disputes. Therefore, CAS organization, structure and financing had to change and the link with the IOC had to be cut.

2.4) The reform of CAS leading to the creation of ICAS

The Gundel case led to the reformation and restructure of the Court of Arbitration for Sports. Initially both the CAS Statute and Regulations were totally revised. As a result the International Council of Arbitration for Sports (ICAS) was created replacing IOC in its financial and organizational duties. Other reforms were the creation of two arbitration divisions, into ordinary arbitration and appeal arbitration. That division was necessary in order to distinguish disputes of the first instance and those arising by disputes coming from decisions taken by sport-related bodies like international federations or the IOC.14 Furthermore, arbitration rules of CAS were also revised to meet the new changes. To endorse all these reforms on 22 November 1994, a new Code of Sports-Related Arbitration came into force.

The creation of the Code of Sports-Related Arbitration and of ICAS came after the signing of the Agreement concerning the constitution of the International Council of Arbitration for Sport better known as the Paris Agreement15 on 22 June 1994. This codification affirmed all of these changes, clarified the governance of the organization, and codified the arbitration procedures offered by CAS.16

After the signing of the Paris Agreement all Olympic International Federations and many National Olympic Committees have recognized the jurisdiction of the Court of Arbitration for Sport and included in their statutes. Conference on Doping in Sport, held in March 2003, the Olympic Movement and numerous governments have

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15 The Paris Agreement was signed by the highest authorities representing the sports world, viz. the presidents of the IOC, the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC).
16 JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW 43 (2d. ed. 2004). The Code has since been revised in 2003 (in force as of 2004) to incorporate certain long-established principles of CAS case law and practices.
promulgated the World Anti-Doping Code, Article 13 of this states that the CAS is the appeals body for all international doping-related disputes. 17
3. Organization and structure of Court of Arbitration for Sport (CAS), International Council of Arbitration for Sport (ICAS) and Ad Hoc Division (AHD).

3.1) The Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport CAS functions independently of sport organizations and national federations as an arbitral tribunal for sports-related issues.\(^{18}\) It is composed of around 150 arbitrators, organized by a Court office under the supervision of the Secretary General. As mentioned in the second chapter after the reform of CAS two divisions were created. One Ordinary Division and one Appeal Division in order to distinguish disputes of the first instance, resulting from contractual relations or wrongful acts and those arising by disputes coming from decisions taken by sport-related bodies like international federations or the IOC, to which Appeal Division is applicable. Each of those divisions is headed by a president, in charge for the procedure before the appointment of the arbitrators. Furthermore, they can issue orders for interim relief, upon request of the parties.

The CAS arbitration is based on the Code of Sports-Related Arbitration,\(^{19}\) which is divided in two parts: Statutes of the Bodies Working for the Settlement of Sports-related Disputes (S1-S26) and Procedural Rules (R27-69). CAS Arbitration is based on contractual agreement. As the Code in Article S1 states: “The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of

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\(^{18}\) However, there were at least two bodies of great influence in the Sports world which did not recognize CAS as an independent arbitral tribunal. Those bodies were the International Amateur Athletic Federation (IAAF) and Federation Internationale de Football Association (FIFA). However, concerning IAAF it should be noted that at its Congress in Edmonton, Alberta, Canada in August 2001, the IAAF passed a resolution adopting CAS arbitration. Specifically the article stated: «Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration». Furthermore, recognition by FIFA of the CAS jurisdiction came later on 2002.


the bodies or a specific agreement so provide. The seat of both ICAS and CAS is Lausanne, Switzerland”. As party to CAS arbitration can be any sports-related body, television broadcasters and radio sponsors may have recourse to it. Arbitration Clauses providing for CAS arbitration are part of many regulations, constitutions and athlete forms such as the Olympic Charter, and the Olympic Athlete Entry Form-Eligibility Conditions.

ICAS is responsible for the appointment of the 150 CAS arbitrators for a four year period. As the Code in Article S14 states: In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes.21

The CAS arbitrators must sign a declaration of independence and objectivity, disclosing any information which may cause reasonable doubts concerning their impartiality, in order to avoid future challenge.

The arbitrators may serve on panels of either ordinary or appeal division as Art. S18 of the Code states. The panels are composed by either one or three arbitrators, who are bound by the duty of confidentiality, provided for in the Code. Therefore, they shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS. 22

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3.2) The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. It replaced the IOC in financing and controlling CAS and formed a buffer layer of governance between the two organizations. Its main duty is to preserve CAS as an independent organization and to ensure that the parties’ rights are secured and respected.

The twenty (20) members of ICAS are jurists with high knowledge in sports law and arbitration. All have to sign a declaration of independence and impartiality so as to safeguard the neutrality of the organization.

The Code of Sports-Related Arbitration states the functions of ICAS through an exhaustive list in its Article S6. However, ICAS is not authorized for all the

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24 The International Council of Arbitration for Sport (ICAS)

1 Composition

S4 ICAS is composed of twenty members, experienced jurists appointed in the following manner:

a. four members are appointed by the International Sports Federations (IFs), viz.

b. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;

c. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;

d. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;

e. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;

f. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

25 ICAS exercises the following functions:

1. It adopts and amends this Code;

2. It elects from among its members for one or several renewable period(s) of four years:

• the President;

• two Vice-Presidents who shall replace the President if necessary, by order of seniority in age; if the office of President becomes vacant, the senior Vice-President shall exercise the functions and responsibilities of the President until the election of a new President;

• the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS;

• the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions.

The election of the President and of the Vice-Presidents shall take place after Consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The election of the President, Vice-Presidents, Division Presidents and their deputies shall take place at the ICAS meeting following the appointment of the
functions. For instance, for any formation to the Code of Sports-Related Arbitration a full ICAS meeting is needed with a majority of two-thirds of its members. The President of CAS who is also the President of ICAS is elected by ICAS as well as two the two Vice-Presidents.

3.3) Ad Hoc Division (AHD)

The governing body of CAS, the International Council of Arbitration for Sport (ICAS), has created Ad Hoc Division (AHD) in order to manage disputes arising during the Olympic Games. The basic reason of its existence is to increase and support the rights of the athletes competing in the Olympic Games (OG).

The jurisdiction of the AHD during the Olympic Games derives from Art. 74 of the Olympic Charter and an arbitration clause contained in each Olympic Athlete Entry Form. The Ad Hoc Division Arbitration is ruled by the Ad Hoc Arbitration Rules for the Olympic Games under which a panel of three CAS arbitrators is appointed in order to rule on disputes which may arise. ICAS preselects the CAS

ICAS members for the forthcoming period of four years.
3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists;
4. It resolves challenges to and removals of arbitrators, and performs any other functions identified in the Procedural Rules;
5. It is responsible for the financing of CAS. For such purpose, inter alia:
5.1 it receives and manages the funds allocated to its operations;
5.2 it approves the ICAS budget prepared by the CAS Court Office;
5.3 it approves the annual accounts of CAS prepared by the CAS Court Office;
6. It appoints the CAS Secretary General and may terminate his duties upon proposal of the President;
7. It supervises the activities of the CAS Court Office;
8. It provides for regional or local, permanent or ad hoc arbitration;
9. It may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund;
10. It may take any other action which it deems necessary to protect the rights of the parties and to promote the settlement of sports-related disputes through arbitration and mediation.

26 Art S6.8 of the Code.
27 International Olympic Committee art. 74, Available at: http://www.olympic.orgliocle/facts/charter/charter-protocol-e.html.
The Article states: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration”.
arbitrators who will be present during each Olympiad\textsuperscript{29} and the AHD proceedings are designed and enacted before the beginning of each OG, in addition to the Code\textsuperscript{30}. Furthermore, the proceedings are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). Due to Article 17 of the Arbitration Rules of the Olympic Games and Article 7, the PIL Act applies to arbitration as a result of the express choice of law contained in Article 17 of the Arbitration Rules of the Olympic Games, and as a result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division, pursuant to Article 7 of the OG Rules. The decisions of AHD are final and binding and a future appeal is not possible.\textsuperscript{31} Furthermore, as Article 17 of the OG Rules provides, \textit{Arbitration Panels must decide pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate}.\textsuperscript{32} Finally, Article 16 of the OG Rules States that a Panel has \textquote{\textit{full power to establish the facts on which the application is based.}}\textsuperscript{33}

\section*{3.4) The procedure of the Ad Hoc Division (AHD)}

As mentioned above, the AHD proceedings are governed by the Arbitration Rules of the Olympic Games. The arbitration begins upon request and the President of

\textsuperscript{29} Article 2 Ad hoc Division

For the period fixed in Article 1, the ICAS shall establish an ad hoc Division of the CAS (hereinafter the \textquote{ad hoc Division}), the function of which is to provide for the resolution by arbitration of the disputes covered by Article 1 by means of Panels set up in accordance with the present Rules.

The ad hoc Division consists of arbitrators appearing on a special list, a President and a Court Office.

\textbf{Article 3 Special List of Arbitrators}

The ICAS, acting through its Board, shall draw up the special list of arbitrators referred to in Article 2. This special list consists only of arbitrators who appear on the CAS general list of arbitrators and who are present at the OG.

The special list of arbitrators shall be published before the opening of the OG. It may be subsequently modified by the ICAS Board where necessary.


\textsuperscript{31} Raducan v. Comitee Int’l Olympique, (Arret Du Tribunal Federal Suisse 4/12/2000). This was a rare appeal attempt on an Ad Hoc Decision.

\textsuperscript{32} Article 17 Applicable Law of the Arbitration Rules of the Olympic Games available at: \texttt{http://www.tas-cas.org/adhoc-rules}

\textsuperscript{33} Article 16 The panel’s power to review of the Arbitration Rules of the Olympic Games available at: \texttt{http://www.tas-cas.org/adhoc-rules}
the AHD forms an arbitral panel of three arbitrators.\textsuperscript{34} The ADH is responsible to provide to the respondent, as well as to third parties which could be affected by the arbitration, notice of the hearing. Interim relief can also be granted under certain circumstances.\textsuperscript{35}

As Article 18 of the Arbitration Rules for the Olympic Games states, the AHD is required to provide a decision within twenty-four hours of the lodging of the application, unless the President extends the time limit. The decisions are final and binding, and may not be appealed or challenged.\textsuperscript{36} However, because the seat of CAS arbitrations is Lausanne, Switzerland, Swiss municipal law governs all arbitration proceedings, regarding the procedural rules followed. Therefore, according to the Swiss Federal Code on Private International Law,\textsuperscript{37} CAS awards are receptive to judicial review by the Swiss Federal Tribunal on narrow grounds.\textsuperscript{38} A CAS award may not otherwise be appealed to, or judicially reviewed by another national court.

A very good example of the prohibition of judicial reviews by other national courts would be the famous case \textit{Raguz v. Sullivan} \textsuperscript{39}. In that case, two Australian judokas unsuccessfully sought to challenge a CAS award before the New South Wales Court of Appeal. Pursuant to the Commercial Arbitration Act the Court of Appeal

\textsuperscript{34} Art 11 of the Arbitration Rules of the Olympic Games provides that in the event that it appears appropriate under the circumstances, the President of the ad hoc Division may, in his discretion, appoint a sole arbitrator. Available at: http://www.tas-cas.org/adhoc-rules.

\textsuperscript{35} Art 14 of the Arbitration Rules of the Olympic Games provides that When deciding whether to award any preliminary relief, the President of the ad hoc Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community. Available at: http://www.tas-cas.org/adhoc-rules.

\textsuperscript{36} Art. 21 enforceability, no remedies of the Arbitration Rules of the Olympic Games. Available at: http://www.tas-cas.org/adhoc-rules. However, there are rare cases of appeal see supra 33.

\textsuperscript{37} See Swiss Federal Code on Private International Law. Chapter 12 [CPIL]

\textsuperscript{38} The grounds of review are set out in Article 190 of the CPIL.

\textsuperscript{39} \textit{Raguz v. Sullivan}, 2000 NSWCA 240
had jurisdiction to review an arbitration decision only if the dispute involved a domestic arbitration agreement. However, the Court of Appeal held that because the “seat” of all CAS arbitrations is Lausanne, Switzerland, the arbitration agreement in question could not be deemed a domestic agreement, and thus the CAS decision could not be reviewed.

The seat of CAS arbitrations in Switzerland also affects the nationality of the award. Therefore, a CAS award is a foreign arbitral award in all countries, except Switzerland. As a foreign arbitral award, CAS awards maybe judicially recognized and enforced in all countries that have ratified the New York Convention.\(^4\) Under the New York Convention, only the Swiss Federal Tribunal has the authority to set aside a CAS award, as the award is considered to be a “Swiss” award.\(^5\) However, Art. V (2)(e) of New York Convention gives to a national court the possibility of refusing to recognize and enforce a CAS award if it is contrary to the public policy of that country.\(^6\) However, CAS awards are generally recognized and enforced and attempts of challenging their enforcement have failed.\(^7\)

Concluding, the Olympic Games have always been a ground for the development of lex sportiva as many disputes arise during the duration of each Olympiad. As Richard H. McLaren has described\(^8\) these disputes include issues regarding: i) The jurisdiction of the CAS, ii) Affected Third Parties and National eligibility rules, iii) Validity of athlete suspensions by the International Olympic Committee and International Federations iv) The principle of non-interference with the decisions of sports officials, v) Doping violations and the existence of strict liability regime, vi)


\(^5\) Art. V 1(e) of the New York Convention, Recognition and enforcement if the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

\(^6\) Art. V (2) (b) of the NYC, Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award, would be contrary to the public policy of that country.

\(^7\) See Slaney v. IAAF, 244 F.3d 580 (7thCir. 2001) and Gatlin v. U.S. Anti-Doping Agency Inc., 2008 WL 2567657 (N.D. Fla. 2008).

\(^8\) Richard H. McLaren, Introducing the Court of arbitration for Sport: The Ad Hoc Division at the Olympic Games, Marquette Sports Law Review, Volume 12 Issue 1Fall, Article 20, page 523 available at: [http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1222&context=sportslaw](http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1222&context=sportslaw)
The resolution of commercial advertising issues at the Games and vii) The manipulation of sporting rules for strategic advantage.

The significance of CAS and Ad Hoc Division case law in the advancement of the “lex sportiva” describing in details the types of disputes which have arisen and the way they were resolved, will be examined in the following chapter.
Chapter 4

4. Case law of CAS and its significance in the harmonization of global sports law and the advancement of “lex sportiva”.

From 1986 until 2012, as the following statistic describes, CAS has accepted 3044 requests for arbitration and 82 requests for advisory opinions. Therefore, a total of 3126 cases have been submitted to CAS in 26 years. From those requests 1933 led to an arbitral award and 26 to an advisory opinion. In total, 1959 cases have been resolved leading either to an arbitral award or an advisory opinion.

However, CAS did not handle such a great amount of cases from the beginning of its existence. The first decade its case load was very limited. During the second decade, the establishment of AHD, recognition by the International Association of Athletics Federations (IAAF) in 2001 and Federation Internationale de Football Association (FIFA) in 2002, lead to a great rise of cases submitted to CAS, with FIFA now accounting for about 30-40% of the CAS caseload.45

Furthermore, due to the adoption of World Anti-Doping Code (WADC) by the International Olympic Committee, a major amount of Doping-related cases has been submitted to CAS. The above facts lead to recognition of CAS jurisdiction on doping issues in sports.

CAS is recognized worldwide, as the major institution for sport arbitration. Its case law competes those of great commercial arbitration organizations like the London Court of International Arbitration and the International Chamber of Commerce. The rise in the submitted cases leads to the establishment of arbitration as an alternative dispute resolution for sports. The following statistic shows the impressive increase in the cases submitted to CAS from 1986 to 2012:

STATISTIQUES / STATISTICS

TABLE 1

Tableau répertoriant les affaires soumises au TAS depuis sa création. L'année se rapporte à la date d'enregistrement des demandes uniquement et non à celle de la publication des sentences ou avis consultatifs.

This table lists the cases submitted to the CAS since its creation. The year refers only to the date when the requests were filed, not when the awards or advisory opinions were published.

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Remarques:
1) la procédure consultative a été supprimée le 1er janvier 2011
2) le tableau englobe les affaires soumises aux chambres ad hoc du TAS.

Comments:
1) the consultation procedure was deleted on 1 January 2011
2) the table includes the cases submitted to the CAS ad hoc divisions.

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4.1) Defining “lex sportiva”

The above analysis leads us to conclude that CAS has established a worldwide reputation of competence in dealing with sports-related disputes. However, in order for the CAS to be considered a court with a clear and consistent jurisprudence, it must impose which law should be used at its proceedings during the Olympics. Furthermore, consistency of the same law in CAS arbitrations would improve the
quality and efficiency of arbitrations. Anderson argues that “the current arbitrariness and unpredictability of CAS awards is such that it might be limiting their usefulness as precedent in resolving sports disputes more generally”. 47

However, despite their unpredictability CAS decisions have developed a type of precedent. However, the notion of “lex sportiva” as long as CAS’s jurisprudence as part of “lex sportiva” has been immensely disputed.

The term “Lex Sportiva”, has coined for the first time in 199048 used to describe the gradual formation of a body of a distinct sports law. However, there is no uniformity in defining this principle since the definitions of numerous academics vary significantly. Foster understands “Lex Sportiva” as the “global sports law”. He believes that it is ‘a cloak for continued self-regulation by international sports federations’, 49 suggesting that sports federations wish to evade court decisions on sporting issues and the legislation on national governments. Criticizing Foster’s view that “Lex Sportiva” elevates sports law above state or public law, Anderson pleads an affair took part during the Turin Winter Olympics in 2006. 50

A doping violation committed by the Austrian cross-country skiing team highlighted a tussle between IOC and Italian authorities who would control and rule on doping cases. Doping is considered a criminal offence in Italy, which can be punished with a suspended prison sentence. But IOC insisted it should be dealt with inside of the sport circle and therefore, wanted the Italian government to relax its doping provisions during the Olympics. Finally, they reached to an agreement which has been seen by Anderson as a compromise between state law and “lex sportiva”. At his view a combination of public law with sports law in order to create a “corpus of law that is identifiably transnational in nature” 51 should be the solution.

Erbsen takes the view that the term “lex sportiva” is an “oversimplified motto” which should not be considered to be the appropriate terminology. Apart from covering CAS precedent, it also includes equitable principles found in all legal systems.

Nafziger comments that the arbitral decisions of CAS provide guidance in later cases and therefore, function as a precedent. CAS awards form a body of source of law which is recognized as “lex sportiva” since they establish rules and principles of international sports law. Therefore, Nafziger adheres to the classical view that “lex sportiva” is restricted to the law making role of the CAS. However, to describe “lex sportiva” as a private legal order that produces positive law, Teubner’s theory of global legal pluralism in defining lex mercatoria could be used.

Teubner defines Lex mercatoria as the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one numerous international business transactions, standardized contracts of international professional associations, model contracts of international organizations and investment projects in developing countries. However, as soon as these contracts claim transnational validity, they cut off not only their national roots but their roots in any legal order.

Borrowing Teubner’s description of “Lex Mercatoria” Mazzucco defines “lex sportiva” in a sense of global sports law as follows:

*Lex sportiva is the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one. It consists of the*

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52 See 47 in p.441


55 Lex mercatoria is the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one numerous international business transactions, standardized contracts of international professional associations, model contracts of international organizations and investment projects in developing countries. However, as soon as these contracts claim transnational validity, they cut off not only their national roots but their roots in any legal order.
Olympic Charter, the WADA Code and the by-laws, rules and regulations of international and national sport bodies that impose binding rights and obligations on private actors in the international sport community. As soon as these contracts claim transnational validity, they are cut off from any pre-existing legal order; however, this is not fatal to their existence. The legal source of their authority is derived from their own self-validation which is ultimately judged and verified through a process of external arbitration that is provided for in the contracts themselves. Emerging from this process is official and organized law that is functionally equivalent to that produced by national legal systems.\textsuperscript{56}

4.2) CAS jurisprudence as a separate legal code.

Although the notion of “lex sportiva” cannot be defined in an absolute way using an exhaustive list, it is accepted that decisions of CAS play a significant role to the advancement of “lex sportiva” and therefore constitute part of it. The case which established the jurisprudence of CAS as a separate legal code, using a unique set of universal legal principles\textsuperscript{57} was the Norwegian Olympic Committee and Confederation of Sports (NOCCS) \& others v International Olympic Committee (IOC).\textsuperscript{58} As the tribunal has concluded ‘CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as part of an emerging ‘lex sportiva’. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties’ reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations’.\textsuperscript{59}

In the above case the Court of Arbitration for Sport concluded that there were three sources which would govern the case: The Olympic Charter, Swiss procedural law and “CAS jurisprudence relating to doping cases”. Foster comments, that CAS
holds a distinct jurisprudence for itself and suggesting a specific and limited use for the concept of lex sportiva. However, it has several important elements to it. Being a transnational autonomous private order, it is constituted by the legislative and constitutional order created by international sporting federations.60

Foster also makes a further distinction between “lex sportiva” which he views as a global sports law and “lex Ludica”, which includes both the formal rules of each sport and the equitable principles of sport. Therefore, the concept of “lex Ludica” contains the actual rules of the game and their enforcement by match officials, as well as, the “sporting spirit” covering those ethical principles of sport that should be followed by sports persons.61

The Court of Arbitration for Sport has ruled that “lex sportiva” and “lex Ludica” should also be respected by national and international sports federations, in the case AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA)62

“Sports law has developed and consolidated along the years, particularly through the arbitration settlement of disputes, a set of unwritten legal principles - a sort of lex mercatoria for sports or, so to speak, a lex Ludica - to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» («ordre public») provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex Ludica”. 63

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61 See 61.
63 AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA), CAS 98/200, award of 20 August 1999, par. 156.
4.3) Applicable law in CAS Arbitrations

Considering the applicable law in CAS arbitrations, the Code suggests that the parties decide on the applicable law and Swiss Law applies in absence of their choice. Arbitrators may also decide *ex aequo et bono* (*in equity and fairness*) if the parties authorize them to do so. However, this flexibility in the choice of the applicable law leads to lack of uniformity of the law of the merits applied on CAS arbitrations. The problem which arises by the absence of consistent law is that of unpredictability of CAS awards. Furthermore, since CAS acts or aspires to act as a Supreme Court for sports the applicable law used at its proceedings shall be specific and uniform.

Since Lausanne, Switzerland is the seat of all CAS arbitrations Swiss Arbitration Law applies. Under Swiss Law there is a distinction between domestic and international arbitration. Domestic arbitrations are governed by the Swiss Law on Domestic Arbitration, which is set out in Part 3 of the Swiss Civil Procedure Code (CPC) and the international arbitrations by Swiss Private International Law Act (PIL Act), Chapter 12. Since, most of the cases brought before the CAS involve a party not domiciled in Switzerland, the CAS arbitrations are characterized as international and therefore, PIL Act applies.

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See for example, in the CAS award FIN/FINA the Panel held that it could intervene in the sanction imposed by the international swimming federation (FINA) «if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanctions provided by the rules can be deemed excessive or unfair on their face» (CAS 96/157 FIN v. FINA, award of 23 April 1997, in Digest of CAS Awards 1986-1998, op. cit., p. 358, para. 22; see also CAS OG 96/006 M. v. AIBA, award of 1 August 1996, p. 415, para. 13).

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64 R45 Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.

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65 Available at: https://www.swissarbitration.org/sa/download/cpc_part_3_english.pdf

66 Available at: https://www.swissarbitration.org/sa/download/IPRG_english.pdf

67 Chapter 12: International Arbitration

Article 176

1. Field of application; seat of the arbitral tribunal

1. The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and 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.
However, Swiss PIL Act provides for further flexibility since the parties may decide on different procedural rules.\(^6^8\) The only restriction that parties face when choosing a foreign law to govern the procedures of CAS arbitration is that the law chosen should not be contrary to the Swiss public policy.

The only possibility for an appeal against a CAS decision is before the Swiss Federal Tribunal (SFT). An exhaustive list of five grounds for appeal is set in Art 190 par. 2 of the PIL Act.\(^6^9\) Therefore, though appeals are very rare, in case of irregular composition of the tribunal, lack of jurisdiction of the tribunal, tribunal ruling beyond its mandate or failing to rule on a claim, violation of the principle of equal treatment or the right of fair hearing and incompatibility to Swiss public police an appeal can be brought before the SFT.

The first and very famous case of an appeal was the *Gundel v. Federation Equestre Internationale and Court of Arbitration for Sport* in 1992. Until 1999 there were no appeals and in 2007 there were nine of them. However, only one has been successful.\(^7^0\) Another famous case of appeal on the ground of irregular constitution of the tribunal was that of *Lazutina & Danilova v. IOC, Swiss Federal Tribunal, (2003)*\(^7^1\). In this case the tribunal ruled:

> An arbitrator’s independence . . . can only be evaluated on a case-by-case basis; there are no absolute grounds for a challenge. Doubts about the independence

\(^{6^8}\) Article 182  PIL Act
VI. Procedure
1. Principle
   The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

\(^{6^9}\) Article 190
2. The award may only be annulled:
   a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
   b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
   c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
   d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
   e) if the award is incompatible with public policy.


\(^{7^1}\) Lazutina & Danilova v. IOC, Swiss Federal Tribunal, (2003) 4P. 267/2002,
of an arbitrator must be based on the existence of objective facts which are likely, for a rational observer, to arouse suspicion concerning the arbitrator’s independence. On the other hand, the purely subjective reactions of one party should not be taken into account.

The ruling of the SFT recognized CAS as an independent arbitral tribunal by explaining that a CAS arbitrator’s independence is not compromised simply because he ruled against a party in a prior arbitration proceeding, or because he has served as counsel in a prior CAS arbitration, before one or more of his co-arbitrators in the present proceeding.72

However, the grounds of appeal are very limited. The most important and well respected ground of appeal is that of the violation of a fair hearing and denial of equality. In Canas v. ATP, the SFT ruled in favour of the appellant canceling a CAS award that violated the athlete’s right to a fair hearing by not providing well structure reasoning for rejecting arguments that Canas’ doping sanction violated United States and European Union laws. The SFT ruled that CAS arbitrators are required to discuss all of the parties’ arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national or transnational laws have been violated. The panel must explain “if only briefly” their reasons “so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately.” 73

After that decision of the SFT and since CAS would like to be considered a Supreme Court of sports law, considering also the doubts for influence by the IOC, principle of fair hearing is treated with great respect. As Blackshaw states, “the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing”.74

4.4) Compliance of CAS principles with Article 6 of the European Convention on Human Rights (ECHR)

74 Ian S. Blackshaw, Sport, Mediation and Arbitration (T.M.C. Asser Press, 2009) 174
As mentioned above principle of fair hearing is treated with great respect by CAS, especially after its recognition by the SFT as an independent arbitral tribunal. Article 6 of the ECHR establishes the right to a fair trial stating:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The problem here is whether CAS arbitration can be compulsory without infringing Art.6 of ECHR. Since CAS would like to be considered a Supreme Court in sports law and since the SFT has recognized it as an independent arbitral tribunal, it has to be clarified that its actions are not incompatible to Art.6 ECHR.

Arbitration Clauses providing for CAS arbitration are part of many regulations, constitutions and athlete forms such as the Olympic Charter, and the Olympic Athlete Entry Form-Eligibility Conditions. Therefore, athletes are banned from bringing their cases before any other court of law. However, since CAS produces final and binding awards which can be appealed on very limited grounds, leads to the conclusion CAS compulsory arbitration clauses infringe Art.6 ECHR.

However, in the case Stretford v Football Association [2007] EWCA 21 March 2007 & Sumukan Ltd v The Commonwealth the court ruled the circumstances under which, Article 6 would apply in arbitration.

“Where parties have voluntarily or freely entered into an arbitration agreement they are to be treated as waiving their rights under article 6 ECHR”.  

In this case, the court found that it was possible for an individual to waive his rights under the ECHR if he expressly agrees with an association to conform to their internal rules.

Since ensuring fairness is the optimum goal of every court of law or arbitral tribunal, CAS shall aim at fair administration of justice to increase its authority as a

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75 Article 6 of the ECHR, Right to a fair trial, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf
Court of Arbitration, which acts as a supreme court for sport related issues. Therefore, compliance of CAS principles with Article 6 of ECHR is of great importance. One way to achieve that compliance is to refer more to Art. 6 ECHR in its awards. Parties will be better protected if CAS proceedings respect Art.6. As Anderson states “parties must see that fairness is an integral part of how a sports body’s disciplinary process operates, rather than taking it on trust that claims or appeals will be dealt with fairly.”

4.5) Universal legal principles used by CAS in its adjudications

Apart from the procedural law which rules CAS arbitration, the Court has to respect and guarantee the application of some basic legal principles at its jurisprudence, which Foster divides into five main categories: Lex Ludica, good governance, procedural fairness, harmonization of standards, fairness and equitable treatment.

Lex Ludica

Lex Ludica, covering the rules of the game is not arbitrable by CAS. The tribunal in its decisions has illustrated the autonomy of match officials. There are very limited grounds for challenging the decisions that officials make during a game. For example, this autonomy does not cover the technical equipment operated by the officials nor the situation where the jurisdiction of an official is disputed.

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79 See Neykova v International Rowing Federation (FISA) & International Olympic Committee (IOC) (CAS OG Sydney 2000/12, ) the losing Bulgarian rower questioned the photo-finish that placed her second in her event at the Sydney Olympics. The Court of Arbitration for Sport felt that this was different to that of a typical official’s field of play decision. But they found it unnecessary to determine to what extent a field of play decision based on faulty equipment may be reopened, as the rower had not discharged her burden of proof basing her application solely on television cameras which, unlike the official cameras, were not placed directly on the finishing line.

80 See Canadian Paralympic Committee (CPC) v International Paralympic Committee (IPC) (2000/A/305, Digest of CAS awards Vol.2 p. 567), the Court of Arbitration for Sport had to decide whether a race referee had the power to order a rerun of the race when there had been a collision between athletes in the first 200 meters. The rules made the starter the sole judge of whether to restart the race. The IPC, as the governing body, objected strongly to the referee’s decision to restart being
A famous example of the autonomy of match officials is the *Mendy v Association Internationale de Boxing Amateur* (AIBA). At this case a boxer had been disqualified for a forbidden hit below the belt. However, he insisted that the hit was clearly above the belt and he shouldn’t be disqualified. The governing body rejected his protest and the boxer appealed to the Ad Hoc Division of the Court of Arbitration for Sport during the OG of 1996 in Atlanta. The tribunal declined to review the decision, arguing that purely technical rules of the sport were “the responsibility of the federation concerned”. The panel said this was necessary because they were “less well placed to decide than the referee in the ring or the ring judges. The above award supports the view that CAS considers the decisions of match officials as final and binding. The tribunal has however noted some limitation, allowing a review in a decision of a technical match official in the case of an error of law, an arbitral decision or malicious intent and in the case the decisions taken violate social rules or general principles of law.

Another case which supported this view was *Segura v International Amateur Athletic Federation* (IAAF). The tribunal held that:

“CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what are sometimes called ‘rules of the game’...They are not, unlike on-field judges, selected for their expertise in officiating the particular sport”

challenged, arguing that it infringed their control over technical matters and the “rules of the game”. Nevertheless the Court of Arbitration for Sport upheld the original result and declared the referee’s decision invalid because he had no power under the rules.


See OG 96/006, Digest Vol 1. P.413 para. 13

See OG 96/006, Digest Vol 1. P. 413 para. 13

See OG 96/006, Digest Vol 1. p. 413 para. 13-14


CAS OG Sydney 2000/13: Digest Vol.2 p.680, para 17
However, this autonomy may not cover neither the technical equipment operated by the officials, 87 nor a situation where there is a conflict as to which official has jurisdiction. 88

In addition, the principle of autonomy extends to team punishment, concerning the sanctions applied by federations for breaches of the rules in team sports, even in the case of infringement of individual rights by these sanctions. 89 An example is *Federazione Italiana Nuoto (FIN) v Federation Internationale de Natation (FINA)*. 90 In this case, due to violent episodes between the Italian and Croatian water-polo teams in the World Junior Championships, FINA imposed sanctions on the Italian team. Italians were disqualified from the rest of the championships and excluded from the next world junior championships. CAS found that FINA has acted within their rules, which have been correctly followed:

“The panel can intervene in the sanction imposed only if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary or if the sanctions provided by the rules can be deemed excessive or unfair on their face” 91

Another area where the autonomy of match officials extends is the expert knowledge. Sporting decisions shall be made by those who have a technical knowledge of the sport and no further interference shall be allowed. 92 The advisory

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87 See *Neykova v International Rowing Federation (FISA) & International Olympic Committee (IOC)* (CAS OG Sydney 2000/12).

88 See *Canadian Paralympic Committee (CPC) v International Paralympic Committee (IPC)*, 2000/A/305, Digest Vol.2 p. 567


90 CAS 96/157: Digest Vol.1 p. 351

91 CAS 96/157: Digest Vol.1 p.351: para. 22

opinion of CAS in *Australian Olympic Committee (AOC)* \(^{93}\) extends this principle of non-interference by granting autonomy to federations over all aspects of the interpretation and application of their rules, even when is no need for urgency or finality.\(^{94}\)

**Good governance**

In order to achieve good governance clear authority by federations in their rules is demanded. In the case *R. v International Olympic Committee (IOC)* \(^{95}\) the gold medal winner snowboarder in the Nagano Winter Olympics of 1998 and was therefore disqualified by International Ski Federation (FIS). CAS however, reversed the decision, as marijuana was not prohibited under the IOC’s Medical Code and is not banned unless the IOC agrees it with the specific sporting federation. This had not occurred, and so the panel could find no authority for the disqualification.\(^{96}\) The tribunal ruled that:

“If sports authorities wish to add their own sanctions to those that are evicted by public authorities they must do so in explicit fashion. They ‘cannot invent prohibitions or sanctions where none appear. The sanction here lacked the requisite legal foundation’”\(^{97}\)

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\(^{93}\) *Australian Olympic Committee (AOC)*, CAS 2000/C/267: Digest Vol.2 p.725. In this case, a company had developed a new full-body swimsuit that increased a swimmer’s speed by reducing drag. FINA, the governing body, approved its use for the 2000 Olympic Games. They ruled that its use did not infringe their rule about artificial devices, which stated that no “swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance during a competition”. The swimsuits were not performance-enhancing technology, but merely an improved swimsuit. Worried about challenges to its use during the games, the Australian Olympic Committee asked for an advisory opinion from the Court of Arbitration for Sport. The opinion refused to question the substance of FINA’s ruling, and was not prepared to query FINA’s interpretation of its rules. The opinion emphasized procedural issues. As long as the federation had firstly followed its rules and secondly had not infringed minimum standards of due process, such as an unfair procedure, bad faith or unreasonableness, their technical decision was immune from legal challenge.


\(^{95}\) CAS OG Nagano 98/002: Digest Vol.1 p.419

\(^{96}\) See also *USA Shooting & Q. v. International Shooting Union (UIT)* (CAS 94/129; Digest Vol.1 p. 187)

\(^{97}\) CAS OG Nagano 98/002: Digest Vol.1 p.419; par. 26-27
When there is a dispute considering the legal interpretation of the rules CAS has exclusive competence.\textsuperscript{98} In the case \textit{B. v International Judo Federation (IJF)}\textsuperscript{99} the federation disqualified an athlete and removed his silver medal gained at the world championships because of being tested positive seven days prior to the competition, however, outside the competition. The athlete argued, that the federation’s rules only allowed disqualification when testing positive only during competitions and not before. The tribunal ruled in his favour:

\begin{quote}
“\textit{if regulatory documents define sanctions and how they should be applied to particular offences, they should be strictly interpreted by the sports authorities and the CAS}”.\textsuperscript{100}
\end{quote}

However, the jurisdiction of the CAS cannot go beyond the competence of the body, usually a federation, whose decision the appeal is lodged against.\textsuperscript{101} The only exception to this would be a federation acting in bad faith or taking an objectively irrational decision.

It is clear that the need for transparency and objective criteria especially concerning the selection of athletes to compete in the Olympic Games was always very intense and many disputes have been brought before CAS on that basis. The most famous case is the \textit{Sullivan v Judo Federation of Australia, Judo Federation of Australia Appeal Tribunal & Raguz}.\textsuperscript{102} In this case the Judo federation had announced that selection for the Olympic Games would be based solely on points awarded for finishing places in three selection events. However, the federation had retrospectively altered its criteria and the tribunal judged that the federation had no power for retrospective alteration of its criteria as this defeats a legitimate expectation.\textsuperscript{103}

\textsuperscript{99}CAS 99/A/230, Digest Vol.2 p.369
\textsuperscript{100}CAS 99/A/230 Digest Vol.2 p.369 para.10
\textsuperscript{101}R v International Basketball Federation (FIBA), CAS 2000/A/262: Digest Vol.2 p.377
\textsuperscript{102}CAS 2000/A/282 Digest Vol.2. p. 542
\textsuperscript{103}See also \textit{Watt v Australian Cycling Federation (ACF) & Tyler-Sharman}, CAS 96/153, Digest Vol.1 p. 335 and \textit{Beashal & Czisowski v Australian Yachting Federation (AYF )}, CAS 2000/A/260 Digest Vol.2 p. 527
Procedural fairness

Procedural fairness as a principle shall be respected by all sport bodies. It uses general principles of law, in order to establish minimum fairness standards. Those general legal principles applied to international sport shall be respected by all national and international federations and CAS ensures their application.

In the case *AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA)*, the tribunal held that “under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations”.

Harmonization of standards

Harmonizing standards among different sports especially in doping cases is common for the CAS. These way federations can follow specific norms. For that reason, CAS has established a sort of hierarchy among the sport related bodies. Under that principle, international sporting federations have the power to review and to revise the sanctions that have been imposed by national sporting federations. However, IOC is in the top of hierarchy during the Olympic Games and both national and international federations have to accept IOC’s jurisdiction since they participate in the Olympics.

Another role of CAS is to suggest amendments to federations’ rulebooks when it ascertains that there are deficiencies which lead to problematic situations. In

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104 CAS 98/200; Digest Vol.2 p. 38

105 Union Cycliste Internationale (UCI) v M. & Federazione Ciclistica Italiana (FCI), CAS 98/212, Digest Vol.2 p. 274


107 See Baumann v International Olympic Committee (IOC) & International Amateur Athletic Federation (IAAF), CAS OG Sydney 2000/006, Digest Vol.2 p. 633

108 See Union Cycliste Internationale (UCI) v C. & Federazione Ciclistica Italiana (FCI), CAS 98/213, Digest Vol.2
those cases, CAS advises federations to adopt the appropriate rules in order to avoid similar problems in the future.\textsuperscript{109}

**Fairness and equitable treatment**

The principle of proportionality has always been used as a criterion of fairness and justice and is also applied in sports law. The idea of proportionality is that punishment should fit the crime. Therefore, penalties imposed should be in analogy to the alleged violation.\textsuperscript{110} In *N., J., Y., W. v. FINA*,\textsuperscript{111} CAS imposed a two-year suspension on four Chinese swimmers for doping violations. The athletes appealed to the SFT claiming that CAS award violated the principle of proportionality because the sanction imposed was the hardest provided by the international swimming federation rules, and the amount of the banned substance found in their urine was very low.\textsuperscript{112} The SFT rejected the argument of the appellants’ and ruled that:

*Their suspension is admittedly a serious penalty, liable to restrict their international careers as top-level athletes, but the fact remains that it is restricted to two years and arises from a proven violation of an anti-doping rule whose application the appellants have accepted as members of a national federation affiliated to the FINA.*

Application of the principle of proportionality can also be found at the persistent repulsion of CAS for fixed punishments. Sport federations have obligatory penalties on their rulebooks. That fact leads to the result that different situations are treated in the same way, which provides for unfair treatment of the individual athletes. Criticizing this tactic CAS in *B. v International Judo Federation (IJF)* ruled that:

\textsuperscript{109}See *Canadian Olympic Association (CAO) v Federation Internationale de Ski (FIS)*, CAS OG Salt Lake City 02/002
“These regulations leave no discretion for the disciplinary authority to order the period of suspension to reflect all the circumstances. The case law of the CAS has had occasion to clarify this matter. According to this case law, it is undesirable to have a fixed tariff system governing the sanctions in doping cases, a more flexible system being preferred, that makes allowances for suspensions for periods whose ranges vary as a function of the athlete’s culpability. The CAS has even held that the doping control regulations of an international federation, laying down a system of fixed penalties, could be amended to take account of the specific circumstances of each case provided that such amendment was the subject of a specific reasoned opinion.”

A very recent case of the Court of Arbitration for Sport (CAS) was that of Marin Cilic v International Tennis Federation (ITF). Both the tennis player and the federation appealed to the CAS against a decision of the ITF’s Anti-Doping Tribunal (IADT) in which the Cilic was sanctioned with a nine month ban. The Panel determined that the degree of fault committed by the athlete was inferior to that established in the IADT decision. The Panel also determined that the sanction imposed was too severe in view of the degree of fault and concluded that it should be reduced to four months.114

Another very recent case issued by the Court of Arbitration for Sport (CAS) at 5 November 2013 Viktor Troicki v the International Tennis Federation (ITF). The CAS has determined that the player had committed a doping offence, but that his fault was not significant, and has decided to reduce the suspension imposed by the ITF Anti-doping Tribunal (IADT) from 18 months to 12 months.115

Another example of using the principle of proportionality in order to guarantee fair and equitable treatment is the application of the “seasonality” doctrine.116 Since all sports have time periods which are more important due to the amount of races

113 CAS 98/214 Digest Vol.2 p.308, para. 21

114 Available at: http://www.tas-cas.org/en/infogenerales.asp/4-3-7151-1092-4-1-1/5-0-1092-15-1-1/

115 Available at: http://www.tas-cas.org/en/infogenerales.asp/4-3-7175-1092-4-1-1/5-0-1092-15-1-1/

held, the exact time frame at which a sanction for exclusion is imposed is of great importance. In addition, considering that the critical period differs among sports seasonality shall be always examined when imposing such penalties. For example in *W. v International Equestrian Federation (FEI)*[^117] an equestrian rider’s exclusion for abusing horses was reduced from eight months to six months so that the rider would be able to compete in the qualifying event for the Olympics.

Another doctrine which is applied by CAS is that of “estoppel”.[^118] Under this doctrine a person shall be prevented from relying upon certain rights, or upon a set of facts (e.g. words said or actions performed) which is different from an earlier set of facts. An example of the application of estoppel can be found in *New Zealand Olympic Committee (NZOC) v Salt Lake Organizing Committee (SLOC) & Federation Internationale de Ski (FIS) & International Olympic Committee (IOC)*[^119]

In the above case, by accepting the entries of two athletes for both Slalom and Giant Slalom, SLOC induced them to prepare and train for both disciplines for which they were properly entered. To exclude them from competing in these two disciplines a few days before the events would be unfair and contrary to the doctrine of estoppel which CAS applies as a general principle of law “*An estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person's reasonable and detrimental reliance on the belief*”. Given the interaction of the International and National Federations with the Organizing Committees of Olympic Games (SLOC), both the athletes and the NOC which entered them are entitled to rely on the acts and omissions of SLOC as if they were acts or omissions of FIS.[^120]

[^117]: See CAS 99/A/246 Digest Vol.2 p. 505
[^119]: CAS OG Salt Lake City 02/006
Chapter 5

5. Interview with Dr. Achilleas Mavromatis\textsuperscript{121} Legal Advisor of PAOK Football Club, 20\textsuperscript{th} November 2013.

Dr. Achilleas Mavromatis has recently participated in proceedings before the Court of Arbitration for Sport, as the Legal Advisor of PAOK FC. UEFA has decided on 14\textsuperscript{th} August 2013 to suspend the Ukrainian Metalist FC from its competitions for 2013/2014 due to a match fixing inquiry. Metalist FC was scheduled to compete Schalke FC in a Champions League play-off. However, due to the UEFA ban, PAOK FC was to replace Metalist FC.

Metalist immediately appealed the decision before CAS and asked to suspend the sanction and reinstate them into European competition in 2013/14. However, the Court of Arbitration for Sport has dismissed Metalist Kharkiv's appeal. Therefore, UEFA's decision to replace Metalist with PAOK FC for the Champions League clash with Schalke remained in force.

The facts were as follows:

"The Court of Arbitration for Sport (CAS) has considered the urgent request for provisional measures filed by FC Metalist Kharkiv against the decision taken by the UEFA Appeals Body on 14 August 2013, under which FC Metalist Kharkiv was disqualified from the 2013/2014 UEFA competitions. FC Metalist Kharkiv was then replaced by PAOK FC. On the same day Metalist FC filed an urgent request for provisional measures at the CAS, requesting a stay of the challenged decision and its reinstatement to the 2013/2014 UEFA competitions. On 15 August 2013, UEFA and PAOK FC each filed a written submission in response to the club's request for provisional measures. After having considered the parties' submissions, the Deputy President of the Appeals Arbitration Division decided to dismiss FC Metalist's

\textsuperscript{121} Achilleas Mavromatis is a lawyer, holding a doctoral degree in law from AUTH, thesis concerning "Criminal offenses in sport." He was a member of WADA and ESKAN and the Legislative Committee of the Law 3057/2002. Legal advisor of PAOK FC, Secretary of Legal Committee of the European and World Federation of Volleyball, General Secretary of the Balkan Union Volleyball, Board member of ECOPE and Chairman of EPESTH.
request. Consequently, the UEFA decision remains in force, which means that FC Metalist Kharkiv is excluded from the 2013/2014 UEFA competitions.”

Dr. Achilleas Mavromatís participated in the proceedings as the Legal Advisor of PAOK FC and quotes his personal experience in the interview he gave me on 20th November at PAOK FC offices:

What is your personal experience from CAS, since you participated recently, as the Legal Advisor of PAOK FC in the proceedings for provisional measures considering the case of FC Metalist Kharvic v. UEFA?

To begin with a general framework, a sport dispute can be brought before Court of Arbitration for Sport CAS in the form of an appeal against decisions of International Federations, for example in cases of Doping violations, or for disputes between an athlete or a coach and his club or federation. The amount of sport disputes which are referred to CAS increases each year, especially from the football field.

In the case FC Metalist Kharvic v. UEFA, which was an appeal against a UEFA decision, PAOK FC participated as a third party. Metalist asked for provisional measures since it was banned from Champion League due to the decision of UEFA.

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122 CAS MEDIA RELEASE, FOOTBALL- UEFA CHAMPIONS AND EUROPA LEAGUES, APPEALS FILED BY METALIST KHARKIV DISMISSED BY THE CAS

FC Metalist Kharkiv v. UEFA

Following a decision taken by a CAS Panel on 2 August 2013 in relation to an appeal against a decision of the Ukrainian Football Federation, UEFA excluded FC Metalist Kharkiv from the UEFA club competitions edition 2013/2014, due to match-fixing. The Ukrainian club then appealed to the CAS to request that the UEFA decision be suspended pending the outcome of the CAS proceedings. This request for provisional measures was dismissed on 16 August 2013. A second request for provisional measures was then filed by the Ukrainian club on the same day and was rejected on 20 August 2013. The parties agreed to an expedited procedure, and a hearing was held at the CAS on Tuesday, 27 August 2013. Pursuant to the UEFA decision, which is now confirmed by the CAS, FC Metalist Kharkiv is excluded from the UEFA club competitions 2013/14.

Available at: http://www.tascas.org/d2wfiles/document/6677/5048/0/Media20Release20decision20final20_English_2028.08.pdf

The procedure of provisional measures was extremely fast and efficient, due to the fact that the next match Metalist wanted to compete in was in four days. Therefore, at the same day, on August 15th we tested our opinions within a few hours and by the noon of the next day August 16th the request for provisional measures was dismissed. Immediately, Metalist on the reason that there is new evidence on the case filed a second request for provisional measures. However, it was rejected as well on the 20th of August.

After the request was filled, both parties had the possibility to choose one arbitrator and the presiding arbitrator was chosen by the tribunal. This procedure was completed between twenty four hours. Therefore, again it was very rapid. After that Metalist took a three day time limit to submit its reasons and after that another time limit was given to us to oppose and the whole file was ready a couple of days before the hearing.

The procedure of the hearing was excellent and very well organized. The whole hearing was recorded and everything went as scheduled. The procedure itself did not differ from the one followed in Commercial Arbitration generally, though I have to admit that the quality CAS offered was very high and the decision was rendered the following day.

I don’t have anything to criticize regarding the way arbitral procedures before CAS are executed, since I have personally been very satisfied from both the procedure followed and the outcome of the specific case. Generally I believe that CAS follows a certain route in the way it rules and its notion of sporting justice is reasonable. In the end, whether you are satisfied or not with a decision depends more on your personal interest on the case and not on the way the tribunal ruled.

**How common it is for Greek sport disputes to be brought before CAS?**

It is very common especially for financial disputes between athletes or coaches and their clubs or federations. The number of Greek cases submitted to CAS increases each year and in my personal belief it is trustworthy since it provides a supreme degree of fairness for sports. The vast majority of cases are from the football world considering usually financial disputes and doping violations.
What is your personal view for the future of CAS as a Supreme Court for sports and the sports legal order in general?

In my personal view sports legal order differs significantly from other legal orders and therefore, it deserves to be treated as a separate legal field under its own rules. However, being autonomous and self-governed might have the exact opposite effect, as we have seen many times in football. Of course there should be a national legal framework however, the existence of autonomous international organs of justice is necessary in sports. Since sports are governed by their own legal rules and sport related disputes demand special knowledge, separate sport courts should exist. Therefore, I believe the existence of CAS as a Supreme Court for sports is of great importance, since it is on the top of the pyramid of justice for sports.

If CAS is recognized as the Supreme Court for sports by the entire sporting world, as I believe it is and will be, bringing more cases before it, it would be a great gain for sport legal justice.

Do you believe that the possibility for an appeal against CAS decisions before the Swiss Federal Tribunal, even on restricted grounds shall cease to exist?

No. In my personal view, in every arbitral preceding you have to permit the filing of an appeal, though on very restricted reasons connected to the proceeding itself or the constitution of the tribunal. The most important thing is to ensure that the arbitral process itself was conducted properly. Why the Swiss Federal Tribunal is the only court before which you can appeal on CAS decisions it is an issue. However, as I said before, it is crucial to maintain a level of control on the arbitral concerning procedural factors. However, this shall in no way eliminate CAS’s jurisprudence as a Supreme Court.
What is your opinion for CAS mediation procedure? Will be preferable in the future, in order to facilitate the settlement of sports-related disputes considering the advantages it provides? Specifically, being adapted to sport, quick, simple, flexible, confidential and cost effective?

I think and I hope that in the years to come more people will understand that mediation is a dispute resolution, alternative to court litigation. As such it has produced convincing results in the countries where it has been applied. Unfortunately in our country, Greece, people are very reluctant to try to resolve their disputes through mediation. Most of them believe that bringing their case before a court is the only solution. However, this is not truth. Mediation can assist parties who honestly want to resolve their disputes, by finding a concrete mutual solution. Especially in the field of sport disputes, when parties are willing to reach mutual settlement, CAS mediation could be very successful since it provides for mediators specialized in sports.

Do you believe that CAS mediation should be compulsory under certain circumstances?

I believe it could be compulsory under certain and specific grounds. However, I retain my doubts on whether it could remain effective if being compulsory. Again the important thing here is that the parties are willing to find a solution in their dispute. Specifically for sport disputes mediation could be an ideal solution. The only obstacle especially speaking for our country is the reluctance of the people to trust sport mediation and for that reason being offered as a mandatory procedure might be helpful. However, in international level sport mediation is an accepted and trustworthy alternative dispute resolution. Therefore, I believe that CAS mediation will develop further in the future.
Chapter 6

6. Conclusions

The Court of Arbitration for Sport (CAS) exists almost thirty years now. It has been established on the one hand, due to an intense demand on finding an ultimate, authoritative and neutral solution to judicial disputes among athletes, international and national sports federations, national Olympic committees and Olympic and other games organizers. On the other hand its originators indented to remove from the ordinary Courts of law, Sport-related disputes demanding special knowledge.

CAS has succeeded in being considered the Supreme Court for Sport. Recognized by all international Olympic and many non Olympic Organizations as the final and binding appeal body for sport, it managed to establish its independence from IOC by ruling against it, it has become in the words of the Swiss Federal Tribunal, a true world Court of Sport. The largest international sporting competitions worldwide, like the Olympic Games, Commonwealth Games and World Cup have hosted CAS Ad Hoc Division, during their performance. Furthermore, the most important International Federations have asked for advisory opinions on matters which have actually shaped the sports involved.

Despite being located in Lausanne, Switzerland CAS has established offices in New York, USA and Sydney, Australia as well as temporary courts in current Olympic host cities. Therefore, it is an international not a national body. Since

Lausanne, Switzerland is the seat of all CAS arbitrations Swiss Arbitration Law applies and due to that fact, it has been criticized for its pronounced Swiss influence. Furthermore, the only possibility for an appeal against a CAS decision is before the Swiss Federal Tribunal (SFT) and many Secretary Generals have been Swiss.

However, its arbitrators, which are more than 270 by now, come from every place around the world. Parties have the possibility to choose the substantive law to apply and although English and French are considered as its working languages, Spanish may soon be added to them. The above facts, lead to a future delinking of CAS from its Swiss origins and provide it with a more international character.

CAS jurisdiction now includes the world’s major sports. Its recognition by Federation Internationale de Football Association (FIFA), Union of European Football Associations (UEFA) and International Association of Athletics Federations (IAAF), brought with them a spectacular rise in the number of cases going to CAS, with FIFA now accounting for about 30-40% of the CAS caseload.

CAS arbitrators are nominated by the International Olympic Committee, or International Federation or a National Olympic Committee. The intervention from common law arbitrators is more dominant in comparison to those from civilian jurisdictions therefore, taking of evidence follows a very open-minded attitude.

CAS has handled many important cases leading to decisions which either gained great publicity or had highly political implications. It has developed universal principles that are becoming recognized as the “lex sportiva” and has established a worldwide reputation of competence in dealing with sports-related disputes.

The years to come will be characterized by the consolidation of the process made so far. A potential source for further development could be CAS mediation and legal aid. However, CAS will continue to be the ultimate “law-maker” for sport-related disputes and its case law will contribute to the advancement of lex sportiva.

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