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IS THE COURT OF ARBITRATION FOR SPORT REALLY ARBITRATION?

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Abstract

The Court of Arbitration for Sport is an arbitral tribunal, which was originally created with the aim of resolving disputes that have some connection to sports. Its predominant dispute settlement method is arbitration. Thus far the Court of Arbitration for Sport has achieved a great reputation for being a highly fair, effective and respected forum for the settlement of sports disputes in a relatively inexpensive and speedy manner since its inception in 1984.

This paper seeks to test CAS's arbitral procedure to see whether or not certain traditional elements of arbitration are present and, as a result, whether or not the various benefits of arbitration are offered to sports disputants. The elements discussed are: party consent, party autonomy, institutional independence, independence and impartiality of arbitrators, privacy and confidentiality, and enforcement of awards. Also, this paper provides recommendations where it has found that CAS ought to reflect the listed elements better, so that sports disputants can extract more advantages offered by arbitration.

Word Length

The text of this paper (excluding title page, table of contents, contents of this page, list of abbreviations, footnotes (but including substantive footnotes), appendix and bibliography) comprises approximately 14,972 words.

Subject and Topics

Court of Arbitration for Sport (CAS) — International Olympic Committee (IOC) — International Arbitration — Dispute Settlement — Sports

List of Abbreviations

ANOC	Association of National Olympic Committees
ARISF	Association of IOC Recognised International Sports Federations
CAS	Court of Arbitration for Sport
CAS Code	Code of Sports-related Arbitration
CPC	Swiss Civil Procedure Code
FIFA	Fédération Internationale de Football Association
ICAS	International Council of Arbitration for Sport
ICC	International Commercial Chamber
ICC Court	ICC's International Court of Arbitration
IF	International Federation
IOC	International Olympic Committee
NOC	National Olympic Committee
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Olympic Committees	IOC, Summer Olympics Association, Winter Olympics Association and the ANOC
PILS	Switzerland's Federal Code on Private International Law 1987
Summer Olympics Association	Association of Summer Olympic International Federations
Swiss Federal Tribunal	Federal Supreme Court of Switzerland
UEFA	Union of European Football Associations
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WADA	World Anti-Doping Agency
Winter Olympics Association	Association of Winter Olympic International Federations
WIPO	World Intellectual Property Organisation

I Introduction

The Court of Arbitration for Sport (CAS) is a specialised arbitral tribunal, which was originally created to avoid the intervention of State courts in the resolution of sports-related disputes.[1] To encourage more sports disputants to bring forward their claims, CAS was meant to offer a quick, inexpensive and flexible procedure for the resolution of disputes independently from other sports bodies.[2] Using the words of CAS's originator Juan Antonio Samaranch, CAS was ultimately hoped to be the "supreme court of world sport".[3]

This paper seeks to test CAS's arbitral procedure to see whether or not certain traditional elements of arbitration are present and, as a result, whether or not the various benefits of arbitration are offered to sports disputants.

To introduce the topic, an explanation is provided of world sport organisation and sports dispute settlement followed by a more informative section on CAS. The next segment explains what arbitration generally is and, more importantly, why arbitration is the preferred method of dispute settlement for sports disputes. The main body then discusses CAS's arbitral procedure tested against the following elements of arbitration: party consent, party autonomy, institutional independence, independence and impartiality of arbitrators, privacy and confidentiality, and enforcement of awards. Where it has been

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1 Antonio Rigozzi, Erika Hasler and Michael Noth "Part I – Introduction to the CAS Code" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 885 at [1].

2 Matthieu Reeb "The Role And Functions Of The Court Of Arbitration For Sport (CAS)" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 31 at 32; and see also Despina Mavromati and Matthieu Reeb "Introduction: The International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS): 30 Years of History" in *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International, The Netherlands, 2015) 1 at 1.

3 Juan Antonio Samaranch quoted in H E Judge Kéba Mbaye "Foreword" in Matthieu Reeb (ed) *Digest of CAS Awards II 1998–2000* (Kluwer Law International, The Hague, 2002) xi at xii; and see also Richard H McLaren "Twenty-Five Years Of The Court Of Arbitration For Sport: A Look In The Rear-View Mirror" (2010) 20(2) Marq Sports L Rev 305 at 306.

found that CAS ought to reflect the listed elements better, recommendations are made which, if implemented, would help sports disputants extract more benefits of arbitration that users of arbitration in other contexts currently extract.

II General Background

A Understanding the Organisation of World Sport

It is best to view the whole system of world sport through the eyes of an athlete, in order to appreciate the complexity of the organisation of world sport. An athlete is typically a member of a sports club and any one club would usually have multiple members.[4] Multiple sports clubs create a federation,[5] which then cumulatively with other federations create national federations.[6] National federations become members of international federations, which together form an international system of world sport.[7]

The relationship between an athlete and his or her club, between clubs and federations, and between national and international federations is contractual in nature.[8] Through his or her membership with a particular club,[9] an athlete is granted a licence, by a federation to which the club belongs, which allows the athlete to participate in the various events the federation organises.[10]

The world of sport becomes more complex because there is a hierarchical organisational structure within the international system, with the International Olympic Committee

4 See Mauro Rubino-Sammartano "The Sports Arbitral Tribunal" in *International Arbitration: Law and Practice* (3rd ed, JurisNet, New York, 2014) 1683 at 1685.

5 At 1685.

6 At 1684.

7 At 1684.

8 At 1685.

9 At 1685.

10 At 1685, n 7.

(IOC) playing a significant role in world sport.[11] The IOC was created in 1894 and has now become an international, not-for-profit organisation based in Lausanne, Switzerland.[12] It is the supreme authority for the Olympic Movement because it is effectively the guardian of the Olympic Charter.[13] The IOC is famous for organising Olympic Games every four years in summer and winter seasons,[14] and Youth Olympic Games since 2010.[15] The IOC is a nongovernmental organisation: members are elected to represent the IOC in the members' countries, as opposed to being representatives of their countries in the IOC.[16]

The IOC's significant power stems from the fact that, inter alia, it:[17]

(a) recognises which sport is an Olympic sport;

(b) chooses Olympic cities;

(c) recognises other sports international federations; and

(d) recognises National Olympic Committees.

A National Olympic Committee (NOC) is a body independent from its country's government with the exclusive power to send teams and athletes to participate in the

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11 See also David Thorpe and others "Organisational Structure" in *Sports Law* (2nd ed, Oxford University Press, South Melbourne (Victoria), 2013) 7 at 14–17.

12 International Olympic Committee "Factsheet: The Olympic Movement" (16 April 2015) Olympic Movement <www.olympic.org> at 1.

13 At 1; International Olympic Committee "Olympic Charter" (September 2015) Olympic Movement <www.olympic.org> at r 1.1 [Olympic Charter]; and see also Bruno Simma "The Court Of Arbitration For Sport" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 21 at 22–23.

14 International Olympic Committee "The Modern Olympic Games" (2012) Olympic Movement <www.olympic.org> at 3; and see generally Olympic Movement "Olympic Games" <www.olympic.org>.

15 International Olympic Committee "The Youth Olympic Games Facts and Figures" (25 June 2014) Olympic Movement <www.olympic.org> at 1.

16 International Olympic Committee "Factsheet: IOC Members" (July 2014) Olympic Movement <www.olympic.org> at 1; Olympic Charter, above n 13, at r 16(1.4); and see generally Olympic Movement "The IOC: The Organisation - Members" <www.olympic.org>.

17 Olympic Charter, above n 13, at rr 18 and 19; and see also Simma, above n 13, at 22–23.

Olympic Games.[18] There are currently 206 NOCs representing different countries,[19] collectively making an association (ANOC).[20]

As listed above, the IOC recognises NOCs, international federations and the sports those federations represent,[21] thereby highlighting that the IOC is truly the supreme authority in world sport.[22] More importantly, the IOC recognises other Olympic Movement members such as the Association of Summer Olympic International Federations (Summer Olympics Association) and Association of Winter Olympic International Federations (Winter Olympics Association).[23] Starting from now, this paper will refer to the IOC, Summer and Winter Olympics Associations, and the ANOC collectively as 'the Olympic Committees'.

This section attempted to highlight that the organisation of world sport is very complex, especially if viewed from the eyes of an athlete.[24] It is important to maintain connections between parties in the chain of world sport in order for the whole system to function — next section explains how those connections can be kept well together.

B Sports Dispute Settlement

Before explaining what dispute settlement methods are available to sport disputants, it is important to appreciate their need for them. Despite the development of modern rules for sport since the middle of 19th century, only since 1980s has there been great commercialisation and professionalisation of sports boosted by the fact that Olympic Games have become officially open to professional athletes, as opposed to just amateur

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18 At 22; and Olympic Charter, above n 13, at rr 27(3) and 27(6).

19 Olympic Movement "Countries" <www.olympic.org>.

20 Simma, above n 13, at 22–23.

21 See generally Olympic Movement "The IOC: Governance Of The Olympic Movement - Recognised Organisations" <www.olympic.org>.

22 See also James A R Nafziger "Introduction" in James A R Nafziger (ed) *Transnational Law of Sports* (Edward Elgar Publishing, Cheltenham, 2013) xiii at xvi–xvii.

23 Olympic Movement "The IOC: International Sports Federations - Mission" <www.olympic.org>.

24 See Annex 1 for a diagram with an example of New Zealand Rugby Union.

athletes, in 1984.[25] Consequently, sports have become the main employment, source of income and career for athletes, and millions of dollars have become at stake for a multitude of other interested parties trying to protect their legal rights in, for instance, trade marks, designs, other items of intellectual property, player transfers, sponsorship contracts, organisation of tournaments, broadcasting rights, betting, provision of telecommunications and much more.[26] In such a context it is easy to see that adequate settlement of sports disputes is not a frivolity, but actually a bare necessity.

In order to resolve a sports dispute, the disputing party would typically turn to the sports club or federation first. The primary methods of dispute settlement are mediation and negotiation because many clubs and federations would usually have internal procedures in place for resolving the various types of conflicts.[27] However, for *disciplinary* measures against athletes — for the breach of rules in respect of on-field and off-field conduct, and for breaching the rules contained within the governing charter of the organisation — most rules of the sports-governing bodies ordinarily state that a disciplinary tribunal would decide on the appropriate measure.[28] Such disciplinary tribunals are established through a sports parent organisation; therefore, the dispute resolution procedure is still internal in its nature.[29] Clearly, however, such method of dispute resolution resembles adjudication better than mediation or negotiation.

If a sports disputant is dissatisfied with the decision rendered via internal means, litigation in State courts is the next available dispute resolution method; but litigation is not without its own difficulties.[30] In fact, in 1980s many athletes began challenging their doping suspensions before their national courts; the damages claimed were so high that it

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25 See David Thorpe and others "Introduction" in *Sports Law* (2nd ed, Oxford University Press, South Melbourne (Victoria), 2013) 1 at 3–4.

26 See generally at 3–4.

27 See Nafziger, above n 22, at xx–xxi.

28 David Thorpe and others "Domestic Disciplinary Tribunals" in *Sports Law* (2nd ed, Oxford University Press, South Melbourne (Victoria), 2013) 31 at 32; and see generally Michael Beloff and others "Disciplinary Proceedings in Sport" in *Sports Law* (2nd ed, Hart Publishing, Oxford, 2012) 188 at [7.1]–[7.224].

29 Thorpe and others, above n 28, at 33.

30 At 66 and 68–69.

could mean bankruptcy for the sports-governing bodies that issued the challenged decisions (an illogical result for many).[31]

Moreover, State courts have shown their reluctance to interfere with the determinations rendered by sports bodies[32] saying that "in general Courts should be a last resort for the determination of club and association disputes"[33] unless there are "flagrant cases of injustice, including corruption or bias".[34] The most probable reason for such reluctance was the "considerable legal uncertainty which surrounded sporting disputes when they came before the courts",[35] making it difficult to decide in most common law countries whether a court would consider it had jurisdiction over sports disputes.[36]Also, a generally accepted principle had developed called autonomy of sport, which was recognised by national courts as evidenced by their reduced intervention in the affairs of "the autonomous preserve of national and international federations".[37]

With litigation being the last recourse, arbitration became a very appealing alternative method of dispute resolution, which could issue binding awards independent of sports-governing bodies. Certain States — Germany, France, UK, Canada and New Zealand — have set up sports tribunals that typically offer arbitration and mediation services for resolution of sports disputes.[38] Additionally, there have been international arbitral institutions set up for specific sports (eg Basketball Arbitral Tribunal).[39]

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31 Rigozzi, Hasler and Noth, above n 1, at [1].

32 See Nafziger, above n 22, at xxi–xxii.

33 *Cox v Caloundra Golf Club Inc* Supreme Court of Queensland, 27 September 1995 at 9.

34 *Calvin v Carr* [1979] 1 NSWLR 1 at 12.

35 Paul David "The Rise of Arbitration in the World of Sport" (15 July 2013) <www.pauldavid.co.nz> at [3].

36 At [5].

37 Louise Reilly "An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes" (2012) 1 J Disp Resol 63 at 77–78.

38 Deutsches Sportschiedsgericht <www.dis-sportschiedsgericht.de>; France Olympique "Juridique: Chambre arbitrale du sport" <www.franceolympique.com>; Sport Resolutions <www.sportresolutions.co.uk>; Sport Dispute Resolution Centre of Canada <www.crdsc-sdrcc.ca>; and Sports Tribunal of New Zealand <www.sportstribunal.org.nz>.

39 Rubino-Sammartano, above n 4, at 1710–1715; and see FIBA "Activities & Services: Basketball Arbitral Tribunal (BAT)" <www.fiba.com>.

Nevertheless, CAS — originally set up to avoid the interference of national courts in sports disputes — is an institution that has somewhat altered the ground in favour of arbitration because it is the most widely used institution for sports dispute resolution.[40] The main idea behind CAS was that its awards would be just as final and binding as decisions of a State court, thereby preventing sports disputants from appearing in their national courts.[41] Moreover, CAS achieved significant prominence because it may hear appeals from other sports arbitral tribunals in certain circumstances (eg an athlete can appeal New Zealand sports tribunal's award to CAS).[42] It is important to have a good understanding of CAS as a whole; therefore, next section discusses CAS in more detail.

C Overview of CAS

CAS is an arbitral tribunal, headquartered in Lausanne, Switzerland, which began its operations in June 1984 after being legally created by the IOC.[43] Currently CAS has two additional permanent branches situated in Sydney, Australia and New York, USA.[44] CAS is governed by the Code of Sports-related Arbitration (CAS Code), made up of Statutes and Procedural Rules, which effectively acts as its constitution.[45] The CAS Court Office primarily handles CAS's day-to-day administration of cases.[46]

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40 See Rigozzi, Hasler and Noth, above n 1, at [2].

41 At [1].

42 Sports Tribunal of New Zealand "Rules Of The Sports Tribunal Of New Zealand 2012" (6 March 2012) <www.sportstribunal.org.nz> at r 28(b); and see also Rubino-Sammartano, above n 4, at 1715.

43 Mavromati and Reeb, above n 2, at 2; and Ian Blackshaw "Introductory Remarks" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 1 at 1.

44 At 1; Mavromati and Reeb, above n 2, at 6; and see generally Thorpe and others, above n 11, at 17–21.

45 TAS/CAS "Arbitration: Code: Procedural Rules" (2013) <www.tas-cas.org> [CAS Code]; and see also Mavromati and Reeb, above n 2.

46 See CAS Code, above n 45, at S22; and see also Reeb, above n 2, at 36.

As long as there is agreement between sports disputants, CAS offers services in mediation and arbitration.[47] Once CAS declares its jurisdiction over the submitted dispute, any attempt to bring the same claim in national courts is likely to be met by an application of stay based on the fact that the parties agreed to arbitration.[48] The scope of disputes that CAS may hear is incredibly broad:[49]

> Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.

In practice, CAS has never declared itself as lacking jurisdiction on the ground of a dispute not being related to sport.[50] In principle, two types of disputes are submitted to CAS:

(1) commercial disputes typically involving matters relating to contracts (eg sponsorship, staging of sports events, television rights sales, relations between athletes, coaches and clubs, and player transfers); and
(2) disputes relating to decisions of other sports bodies, in particular disciplinary disputes (eg violence on the play field, abuse of referees and doping).[51]

CAS panels hear those disputes via either the Ordinary Division: where disputes are originally submitted with CAS through the ordinary sole instance procedure, or via its Appeals Division: where disputes concern the decisions of federations, associations or other sports-related bodies.[52]

Another division of CAS called the ad hoc division, which abides by its own arbitration rules in addition to the CAS Code rules, has been operational since 1996.[53] The ad hoc

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47 CAS Code, above n 45, at S1 and S12; and TAS/CAS "Arbitration: Ad hoc rules for the Olympic Games" <www.tas-cas.org> [Ad Hoc Rules].

48 David, above n 35, at [17].

49 CAS Code, above n 45, at R27.

50 TAS/CAS "General Information: History of the CAS" <www.tas-cas.org>.

51 TAS/CAS, above n 50; and see also Rigozzi, Hasler and Noth, above n 1, at [13].

52 CAS Code, above n 45, at S20.

53 Ad Hoc Rules, above n 47.

division was tasked with settling disputes finally and within a 24-hour time frame, and pursuing this aim it enjoys a special procedure, which is simple, flexible, and free of charge.[54] CAS's ad hoc division has been created for each and every edition of the summer and winter Olympic Games since 1996, for Commonwealth Games since 1998, for UEFA European Championships since 2000, for FIFA World Cup since 2006 and for Asian Games since 2014.[55]

The Federal Supreme Court of Switzerland (Swiss Federal Tribunal) is the only court that can review CAS awards because the seat of every dispute is in Switzerland.[56] For international arbitration[57] — where at least one party has its domicile or habitual residence outside Switzerland — a challenge to the award can be brought on the very narrow grounds listed in art 190(2) of Switzerland's Federal Code on Private International Law (PILS):[58]

(a) the improper constitution of the tribunal or improper appointment of the sole arbitrator;[59]

(b) wrong findings of the arbitral tribunal on jurisdiction;[60]

(c) an award made on claims beyond those submitted to the tribunal or a failure to rule on one of the claims;[61]

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54 See McLaren, above n 3, at 310–315.

55 Mavromati and Reeb, above n 2, at 7; Georg von Segesser and Aileen Truttmann "Swiss and Swiss-based Arbitral Institutions" in Elliott Geisinger and Nathalie Voser (eds) *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd ed, Kluwer Law International, The Netherlands, 2013) 275 at 297; and see Ian Blackshaw "ADR And Sport: Settling Disputes Through The Court Of Arbitration For Sport, The FIFA Dispute Resolution Chamber, And The WIPO Arbitration & Mediation Centre" (2013) 24(1) Marq Sports L Rev 1 at 15–16.

56 CAS Code, above n 45, at S1.

57 Rigozzi, Hasler and Noth, above n 1, at [19].

58 Manuel Arroyo "Article 190" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 204 at [3]; see also Antonio Rigozzi "Challenging Awards of the Court of Arbitration for Sport" (2010) 1(1) JIDS 217 at 219; and see also Stephan Netzle "Appeals against Arbitral Awards by the CAS" (2011) 2 CAS Bull 19 at 21–22.

59 Compare BGE vom 9 October 2012 (4A_110/2012) in (2013) 31 ASA Bull 174; and compare BGE vom 29 May 2013 (4A_620/2012) in (2014) 32 ASA Bull 57.

60 Compare BGE vom 20 June 2013 (4A_682/2012) in (2014) 32 ASA Bull 305; and compare BGE vom 17 January 2013 (4A_244/2012).

(d) the violation of either the principle of equality of parties or their right to be heard;[62] and

(e) violation of Swiss public policy.[63]

But no challenge can be brought if such parties have expressly excluded all setting aside of proceedings in their arbitration agreement.[64]

However, domestic rules apply for domestic arbitration — where no party has its domicile or habitual residence outside of Switzerland — unless those parties have excluded domestic rules in favour of PILS.[65] The difference in treatment of Swiss parties vis-à-vis non-Swiss parties is discussed in more detail later.[66]

Notwithstanding the review system against its awards, CAS achieved a great reputation for being a highly fair, effective, and respected forum for the settlement of sports disputes in a relatively inexpensive and speedy manner since its inception in 1984.[67] The rising popularity of CAS arbitration measured by its use — 1 case in 1986, 75 cases in 2000 and 407 registered cases in 2013 — would only confirm CAS's well-known title badge as the supreme court of world sport.[68] As one commentator said:[69]

> … there has been little general objection to a system which sees the "day in court" for an athlete like Floyd Landis or Oscar Pistorius (in relation to his running blades) take place before CAS, and not before a national court. The underlying reason for this has, perhaps, been the general acceptance, at national and international level of

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61 Compare BGE vom 29 April 2013 (4A_730/2012) in (2014) 32 ASA Bull 68; and compare BGE vom 10 December 2012 (4A_635/2012).

62 Compare BGE vom 11 June 2014 (4A_178/2014); and compare BGE vom 5 August 2013 (4A_274/2013).

63 Compare BGE vom 27 March 2013 (4A_448/2013).

64 CAS Code, above n 45, at R46 and R59.

65 Rigozzi, Hasler and Noth, above n 1, at [19].

66 See *Part IV.E.2:* Criticism of the seat at 50–51.

67 Blackshaw, above n 43, at 1; and see also Rigozzi, Hasler and Noth, above n 1, at [2].

68 TAS/CAS "General Information: Statistics 1986–2013" <www.tas-cas.org>.

69 David, above n 35, at [25] (footnotes omitted).

> the need to have specialist tribunals for sports-related disputes, and the growing trust which is placed in arbitration generally, and in CAS specifically.

However, over the years there have been multiple cases, which might shake the trust placed in CAS. Those cases, discussed or referred to in the body of the text, would certainly make one wonder whether CAS offers the benefits of arbitration that should be reasonably available to sports disputants, especially in a context where for many CAS is the last available forum for dispute resolution.[70] But before diving into a discussion of CAS's status as an arbitration court, it is important to explain what arbitration generally is, in order to appreciate why it is the preferred method of dispute settlement for sports.

III The Meaning and Significance of Arbitration

A No Agreed Definition of Arbitration

When tasked with developing the provisions of the Model Law on International Commercial Arbitration, the UNCITRAL Working Group decided that it was not desirable to have a comprehensive definition of arbitration.[71] Instead "various attempts to define arbitration have sought to reflect the evolving general understanding and essential legal forms of arbitration".[72] For example, a judge in a recent Australian case, after a

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70 The most recent case being of Claudia Pechstein — a speed ice skater who allegedly used prohibited substances — who to date successfully annulled her CAS award in German national courts after failing to do so in the Swiss Federal Tribunal: see Oberlandesgericht (OLG) München, 15 Januar 2015, Az U 1110/14 Kart (translated ed: Antoine Duval (translator) "Translation of the Pechstein Ruling of the OLG München" (6 February 2015) Social Science Research Network <www.ssrn.com>) [OLG München].

71 See Howard M Holtzmann and Joseph E Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (TMC Asser Instituut, The Hague, 1989) as cited in *ASADA v 34 Players and One Support Person* [2014] VSC 635 at [9], n 9.

72 Julian D M Lew, Loukas A Mistelis and Stefan M Kröll "Arbitration as a Dispute Settlement Mechanism" in *Comparative International Commercial Arbitration* (Kluwer International Law, The Hague, 2003) 1 at [1-5].

discussion of academic commentary on the meaning of arbitration, has listed the following features as those most commonly found in arbitration:[73]

(a) It is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case;

(b) It is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communications from the parties and disclose all communications with one party to the other party;

(c) The hallmarks of an arbitral process are the provision of proper and proportionate procedures for the provision and for the receipt of evidence;

(d) The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will *make a decision which is binding* on the parties to the procedural agreement;

(e) The procedural agreement must contemplate that the *process will be carried on between those persons* whose substantive rights are determined by the tribunal;

(f) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties *must derive either from the consent of the parties*, or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;

(g) The *tribunal must be chosen*, either by the parties, or by a method to which they have consented;

(h) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an *impartial manner, with the tribunal owing an equal obligation of fairness towards both sides*;

(i) The agreement of the parties to refer their disputes to the decision of the tribunal *must be intended to be enforceable in law*; and

(j) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed.

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73 *ASADA v 34 Players and One Support Person*, above n 71, at [21]–[46].

International arbitration is comparable with the features listed above, but some evidential or procedural rules may vary between institutions that are in the business of providing arbitration services.[74] Nevertheless, institutional arbitration, despite constraining the parties somewhat, typically retains the most common features found in arbitration: independence of the institution, impartiality towards disputants, party consent to arbitration, party autonomy, privacy and confidentiality, and enforcement of awards. These elements play a significant role in the later analysis of CAS's arbitration, but in the meantime they might assist in developing an appreciation why arbitration is the preferred method of dispute resolution in sports.

B Benefits of Arbitration When Resolving Sports Disputes

As already noted, arbitration has evolved to become a popular dispute resolution method for sports because arbitral awards are binding, just like a State court's decision, and arbitral panels are external to the sports-governing bodies.[75] In an attempt to explain additional benefits of arbitration in contrast to other dispute settlement methods, it is best to use the Olympic Games motto *Citius*, *Altius*, *Fortius*, which is Latin for *Faster*, *Higher, Stronger*.[76]

1 Citius/Faster

It is crucial for sports disputes to be resolved in a speedy manner because many competitive events are held in a fixed period of time, leaving parties unable to wait months before a decision is reached.[77] Hence, this is why disputing parties typically avoid litigation because court decisions may take months and even years to eventuate, especially if an appeal procedure is exhausted before a final verdict is made.

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74 See generally Gary B Born "Introduction to International Arbitration" in *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) 3 at 29–34.

75 See *Part II.B:* Sports Dispute Settlement at 11.

76 International Olympic Committee "Olympism and the Olympic Movement" (2012) Olympic Movement <www.olympic.org> at 5.

77 Reilly, above n 37, at 71–72; and see Thorpe and others, above n 11, at 17.

The best example of the need for speed is for those disputes that arise during the Olympic Games, which typically last for no more than 16 days.[78] It is not surprising that CAS's ad hoc division was originally set up to deal exclusively with Olympic Games disputes. It is also natural that other sports federations like UEFA and FIFA have signed up to CAS's exclusive jurisdiction for its championships.[79]

It is true, however, that not all sports disputes demand a resolution within a day: some disputes may, in principle, take several months (or longer) if need be. Nevertheless, it is important to appreciate that disputes involving athletes should not take a long period of time because, for most, professional sports is their job and main source of income. The longer the delay, the more unfair the whole process becomes on the athlete vis-à-vis the club or federation. Moreover, sportspeople retire at a much younger age compared to other employees, simply due to the nature of their profession, which demands physical fitness and wellbeing.[80]

With regards to other disputes among businesses, event organisers, clubs, and associations, it is, on one hand, arguable that they could wait longer for their verdicts. However, on the other hand, the various contracts of sponsorship, player transfers, television or radio communications sales and other typical matters might need to be decided just as quickly, especially if they have connections to competitions that last between two to eight weeks. Overall, it is very desirable for all sports disputes to be resolved as soon as possible.

2 Altius/Higher

The meaning of the word higher in this section refers to the higher *quality* of decisions: arbitration is more equipped to provide a better answer to the questions posed by the

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78 International Olympic Committee, above n 14, at 6.

79 See *Part II.C:* Overview of CAS at 14.

80 Suzanne Cosh, Shona Crabb and Amanda LeCouteur "Elite athletes and retirement: Identity, choice and agency" (2013) 65(2) Australian Journal Of Psychology 88 at 88; and see generally Jay J Coakley "Leaving Competitive Sport: Retirement or Rebirth?" Academia <www.academia.edu>.

dispute. It is not surprising that the various arbitral tribunals choose to be specialised in the particular sport or in sports generally.[81]

It is the experience and the expertise of an arbitral tribunal that proves very useful when accommodating for the various industries or fields in which disputes arise. This feature of expertise in arbitration is very important to sports, especially because there is a huge list of sports games and tournaments.[82] It is very desirable that when bringing a claim to an arbitral tribunal, a sports disputant has confidence that educated in the particular field individuals hear the dispute. Furthermore, expertise of the arbitrators can reduce the time needed to resolve a dispute; providing another reason why arbitration is generally faster than litigation and, possibly, mediation.

3 Fortius/Stronger

Another major advantage of arbitration is its stronger enforcement. In a domestic sphere, an arbitral award can usually be enforced just like the national court's decision.[83] In an international sphere, arbitral awards are enforced more easily than foreign court judgments because of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention),[84] which has been accepted by 156 countries.[85]

Sports have become very globalised since 1980s.[86] Consequently, there is a need for a dispute resolution forum that not only provides a decision, but also that such decision can be enforced internationally if it were to have any legitimacy: arbitration offers both an award and international enforcement.

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81 See *Part II.B:* Sports Dispute Settlement at 11.

82 See Thorpe and others, above n 11, at 17.

83 Lew, Mistelis and Kröll, above n 72, at [1-21].

84 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (signed 10 June 1958, entered into force 7 June 1959).

85 United Nations "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" <www.treaties.un.org>.

86 See *Part II.B:* Sports Dispute Settlement at 9.

4 Additional benefits

There are certain other advantages of arbitrating sports disputes. One notable benefit is the reduced cost of arbitration compared to litigation:[87] particularly present in CAS's ad hoc division in which the proceedings are free of charge (the disputant must, however, pay for his own representation and use of experts, witnesses or interpreters).[88]

Another benefit of an arbitral proceeding is its privacy and confidentiality, also extending to the award.[89] This is in contrast to litigation in which the whole proceeding is public; arguably, however, mediation offers the same advantage. From the point of view of sports parties, privacy and confidentiality is important especially when dealing with sensitive topics. There is a contrary argument, however, that some disputants may prefer publicity in certain cases. Such debate is analysed in a later part.[90]

In addition, arbitration is usually really flexible because it needs to be very particular to the needs of the parties to the dispute: even more so when parties come from different origins and systems, as is the practice in the world of sport.[91]

Overall, this section tried to make it clear that arbitration is likely to be the most preferred method of dispute resolution for sports: it has strong advantages because of its speed, cost, privacy, expertise, enforceability, and because a binding arbitral award is likely to eventuate in most circumstances.

IV Is CAS Really Arbitration?

After discussing the many benefits of arbitration, it becomes obvious why CAS was initially created to resolve sports disputes using arbitration only. The natural question to

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87 Reilly, above n 37, at 72–74; and see Thorpe and others, above n 11, at 17.

88 Ah Hoc Rules, above n 47, at art 22.

89 Thorpe and others, above n 11, at 18.

90 See *Part IV.F.2:* Are CAS's confidentiality rules justified? at 56.

91 See Lew, Mistelis and Kröll, above n 72, at [1-16]–[1-18].

ask is whether or not CAS provides the prominent advantages of arbitration to sports disputants after its 30 years of operation. In order to answer that question, the main body of the paper discusses whether or not CAS is really arbitration using the following sections: party consent to arbitration, institutional independence, appointment of arbitrators, prohibition of role-switching, seat of arbitration — Switzerland, different treatment of awards between Ordinary and Appeals Divisions, ad hoc division and enforcement of awards.

A Party Consent to Arbitration

This section highlights how fundamental mutual consent is to arbitration, followed by a discussion of how consent is found in sports arbitration. It is then observed that the element of mutual consent is eroded in sports context, inciting some to believe that consent to sports arbitration is entirely fictional.

1 Consent in arbitration

Arbitration differs from litigation because consent of the parties to the dispute is the foundation stone of arbitration:[92] "mutual consent … is indispensible to any process of dispute resolution outside national courts".[93] In other words, arbitration depends on the very existence of the agreement between parties; "[h]ence, this element of mutual consent

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92 David Williams and Daniel Kalderimis "Introduction" (paper presented to New Zealand Law Society Arbitration - contemporary issues and techniques seminar, September 2011) 1 at 2; see Paul D Friedland "Drafting An Effective Arbitration Agreement" in *Arbitration Clauses For International Contracts* (2nd ed, JurisNet, New York, 2007) 57 at 58–59; see Gary B Born "Introduction To International Arbitration Agreements" in *International Commercial Arbitration* (Kluwer Law International, The Netherlands, 2009) 197 at 197–200; see generally Mauro Rubino-Sammartano "The Sources Of International Arbitration Law" in *International Arbitration Law and Practice* (2nd ed, Kluwer Law International, The Hague, 2001) 47 at 56; and see generally Gary B Born "Legal Framework For International Arbitration Agreements" in *International Commercial Arbitration* (2nd ed, Kluwer Law International, The Netherlands, 2014) 229 at 229–230.

93 Andrea Marco Steingruber "Introduction" in *Consent In International Arbitration* (Oxford University Press, Oxford, 2012) 1 at [1.05].

is essential, as without it there can be no valid arbitration."[94] Various courts have repeatedly highlighted that a contract between parties is the "fundamental constituent of arbitration".[95]

Consent is defined as "[a]greement by choice, by one who has the freedom and capacity to make that choice. … Consent must be given freely, without duress or deception".[96] One cannot but agree that freedom to make a choice is elementary to consent; thus, consent is one expression of another foundational principle of arbitration known as party autonomy: "parties have ultimate control of *their* dispute resolution system".[97] It is, therefore, sensible that consent of the parties establishes jurisdiction of an international arbitral tribunal and also determines its extent.[98]

2 Consent in sports arbitration

Consent to arbitrate a sports dispute is very commonly found in an arbitration clause of the sports-governing bodies' *regulations*.[99] As such, there has been a decline in the consensual character of arbitration in sports[100] because an athlete is effectively forced "to accept the arbitration or to refrain from participating in the relevant sport".[101]

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94 At [1.05] (footnotes omitted); and see Andrea Marco Steingruber "The Evolution Of Arbitration And Its Consensual Nature" in *Consent In International Arbitration* (Oxford University Press, Oxford, 2012) 11 at [2.10].

95 David A R Williams and Amokura Kawharu "Nature and Sources of Arbitration Law" in *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) 3 at 1.3.1; see *Forestry Corp of New Zealand Ltd (in rec) v Attorney-General* [2003] 3 NZLR 328 (HC) at 332; and see also Williams and Kalderimis, above n 92, at 4–6.

96 Jonathan Law (ed) *A Dictionary of Law* (7th ed, Oxford University Press, New York, 2009) at 121; and see generally John P Grant and J Craig Barker (eds) *Parry & Grant Encyclopaedic Dictionary of International Law* (3rd ed, Oxford University Press, New York, 2009) at 118.

97 Lew, Mistelis and Kröll, above n 72, at [1-11] (emphasis in original).

98 Steingruber, above n 94, at [2.01].

99 Antonio Rigozzi and Fabrice Robert-Tissot "'Consent' in Sports Arbitration: Its Multiple Aspects – Lessons from the Cañas decision, in particular with regard to provisional measures" in Elliott Geisinger and Elena Trabaldo - de Mestral (eds) *Sports Arbitration: A Coach for Other Players? (*JurisNet, New York, 2015) 59 at 59; but see CAS award annulled on the ground of lack of jurisdiction: BGE vom 6 November 2009 (4A_358) in (2011) 30 ASA Bull 166.

100 Steingruber, above n 94, at [2.38]–[2.39].

101 Rigozzi and Robert-Tissot, above n 99, at 59.

Consequently, the substantive validity of the arbitration agreement may be questioned.[102] Certain regulations contain a clause similar to the following:[103]

> Any dispute arising from or related to the present contract will be submitted *exclusively* to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of Sports-related Arbitration.

In other words, the governing sports bodies — the IOC,[104] World Anti-Doping Agency (WADA),[105] FIFA,[106], UEFA,[107] and many more — have chosen CAS as the exclusive dispute resolution institution for their disputes.[108]

There is also a suggestion that the mutual consent element is further eroded in sports, precisely because WADA designates CAS as the body hearing appeals from its decisions relating to doping.[109] WADA Code has been accepted by more than 570 sport organisations[110] and many governments have committed to it by signing the Copenhagen

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102 Steingruber, above n 94, at [2.40], [2.45] and [2.47].

103 Blackshaw, above n 43, at 2 (emphasis added); and see also Despina Mavromati and Matthieu Reeb "R27: Application of the Rules" in *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International, The Netherlands, 2015) 19 at 58–59.

104 Olympic Charter, above n 13, at art 61.

105 World Anti-Doping Agency "World Anti-Doping Code 2015" <www.wada-ama.org> at arts 4, 8.5, and 13.

106 Fédération Internationale de Football Association "FIFA Statutes" (August 2014) <www.fifa.com> at arts 66–68.

107 UEFA "UEFA Statutes" (2014) <www.uefa.org> at arts 60–63.

108 Mavromati and Reeb, above n 2, at 7; see Antonio Rigozzi and Erika Hasler "Article R47: Appeal" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 982 at [11]–[30]; see also Blaise Stucki and Elliott Geisinger "Chapter 10 – Swiss and Swiss-based Arbitral Institutions" in Gabrielle Kaufmann-Kohler and Blaise Stucki (eds) *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International, The Hague, 2004) 181 at 198–202; and see also Reeb, above n 2, at 37.

109 See Steingruber, above n 94, at [2.52].

110 At [2.52].

Declaration of Anti-Doping in Sport in 2003,[111] and later by committing to the UNESCO International Convention against Doping in Sport[112] (accepted, approved, ratified or acceded by 182 States as of July 2015).[113] Consequently, as provisions for CAS arbitration of WADA decisions make their way into national legislations, "arbitration before the CAS … [would become] *de facto* compulsorily provided for by the law".[114] In other words, mandatory arbitration of such types of sports disputes would imply there is *no* mutual consent to arbitrate.

3 Criticism of consent in sports arbitration

Jan Paulsson — a former CAS arbitrator — has described the consensual process of sports arbitrations as "an abuse of language".[115] The author likened an accused participant who faces sports proceedings to "a tourist [that] would experience a hurricane in Fiji: a frightening and isolated event in his [life], and for which he is utterly unprepared".[116] This is contrasted to sports federations, which give jurisdiction to sporting authorities via by-laws and which grant licences to those wishing to compete in various events.[117] Those federations have existed for very long periods of time and have, without a doubt, "developed a more or less complex and entirely inbred procedure for resolving [disputes]".[118] Hence, according to Jan Paulsson, the purported consent of sports authorities or their athletes is entirely fictional.[119]

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111 See World Anti-Doping Agency "Anti-Doping Community: Governments" <www.wada-ama.org>.

112 International Convention against Doping in Sport 2419 UNTS 201 (signed 19 October 2005, entered into force 1 February 2007).

113 UNESCO "International Convention against Doping in Sport 2005: List in chronological order" <www.unesco.org>.

114 Steingruber, above n 94, at [2.52] (emphasis in original).

115 Jan Paulsson "Arbitration Of International Sport Disputes" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 40 at 42.

116 At 41.

117 At 41.

118 At 41.

119 At 41.

The author acknowledges that his analogy to the tourist in Fiji is also applicable to most litigants in ordinary courts.[120] However, practitioners in litigation that represent the accused have vast experience and, more importantly, appear before the court as equals.[121] In contrast, Jan Paulsson argues that the sports federations' procedures for disputes are closely connected to the organisation itself such that "no outsider has the remotest chance of standing on an equal footing with his adversary – which is of course the federation itself".[122]

Other authors likewise highlight the inequality of bargaining power of sports-governing bodies. In particular, it is said that major sports bodies tend to have an absolute or near monopoly in sport governance.[123] Such monopolistic position allows the sports bodies to withdraw any participant's right to take part in sports.[124] It becomes easy to see how "[t]o assert that sports arbitration is voluntary because one can avoid it by abstaining from taking part in the sport is to take intellectual purity to an absurd extreme."[125]

On the point of sports bodies being monopolistic, a German court recently decided that the International Skating Union "could not require … [the complainant] to agree to the arbitration clause" because of its dominant market position in world championships of speed skating.[126] Hence, a monopolist was prevented from abusing its power over the athlete.

4 In support of sports arbitration

In contrast to the critiques above, the Swiss Federal Tribunal is adamant that there is a valid CAS arbitration agreement *despite* the lack of consent, because of "a certain logic

120 At 42.

121 At 42.

122 At 42.

123 See Michael Beloff and others "Remedies: The Resolution of Legal Disputes in Sport" in *Sports Law* (2nd ed, Hart Publishing, Oxford, 2012) 257 at [8.135].

124 At [8.135].

125 At [8.135].

126 OLG München, above n 70, at [80]–[82].

… favouring the *prompt* settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting *sufficient guarantees of independence and impartiality*".[127] The Swiss Federal Tribunal provided the following reasons for its view:[128]

(1) Compulsory arbitration in sports is acceptable because of its inherent advantages for sports-related disputes; and

(2) An action to set aside the award is always available to an athlete, *counterbalancing* the liberal approach of examining the validity of a sports arbitration agreement.

Two commentators have generally shared the view of the Swiss Federal Tribunal, but have questioned its second reason given how narrow the grounds are in PILS on which the athlete can set aside a CAS award.[129] The scholars do, nonetheless, agree that sports arbitration agreements are valid:[130]

> We think that the "real" reason the arbitration agreement should enjoy a preferential treatment as far as the requirement of consent is concerned relates to the nature of such agreement. Indeed (unlike the agreement to waive the action to set aside the award) the arbitration agreement does not constitute a waiver *stricto sensu*. While it certainly excludes the state court jurisdiction, it does so in exchange for the opportunity for the parties to have their dispute settled through arbitration. In other words, arbitral jurisdiction constitutes the *quid pro quo* for the waiver of the state court jurisdiction.
>
> Of course to speak of *quid pro quo*, one must assume that arbitration is equivalent to litigation before state courts, in particular that it offers the same guarantees of *independence and impartiality*. … We consider that this approach is reasonable in sports arbitration as it can be validly argued that arbitration in sports matters is *more*

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127 ATF 133 III 235, at [4.3.2.3] (emphasis added) (translated ed: Paolo Michele Patocchi and Matthias Scherer (eds) *The Swiss International Arbitration Law Reports: 2007–2009, Vols 1–3, Consolidated* (JurisNet, New York, 2012) at 65–69).

128 At [4.3.2.3].

129 Rigozzi and Robert-Tissot, above n 99, at 67; and see *Part II.C:* Overview of CAS at 14–15.

130 Rigozzi and Robert-Tissot, above n 99, at 67–68 (emphasis in original).

> *efficient* than court litigation. To the extent that the CAS provides the athletes with a better alternative, one can understand that it is sufficient that arbitration is provided for by the sports regulations, irrespective of whether the athletes had a chance to agree. In other words, as CAS constitutes a genuine (and arguably better) option than state courts in sports disputes, sports governing bodies are allowed to compel the athletes to arbitrate. From this perspective, the exclusion of the state court jurisdiction does not constitute (an invalid) waiver of a right, but rather a (valid) trade-off.

Later it was emphasised that the athletes must have no doubts as to the independence and impartiality of CAS vis-à-vis the body that compelled the athlete to arbitrate, in order for the compulsory nature of arbitration to be legitimate.[131]

5 Recommendation

This section opened with the concept that if there is no mutual consent, there is no valid arbitration agreement. Hence, if a sports disputant does not consent to arbitration then resort to national courts for dispute resolution is the next logical step. However, it is not desirable for courts to interfere in the affairs of sports-governing bodies, as explained earlier;[132] thus, the view of Swiss Federal Tribunal that arbitration is the most preferred method for resolving sports-related disputes because of its inherent benefits is acknowledged. But that reason alone cannot be prioritised over the fundamental requirement that gives arbitration its validity: mutual consent to arbitrate. Therefore, a compromise has to be made. As such, the recommendation of this paper wishes to draw upon advice given by another commentator:[133]

> In reality, the athlete often may not know that the arbitration clause exists, especially when the clause is buried within a lengthy list of by-laws.
>
> Perhaps this potential oversight would present fewer conflicts if the arbitration clause required a higher level of consent, relative to other portions of the license

131 At 71.

132 See *Part II.B:* Sports Dispute Settlement at 10–11.

133 Stephen A Kaufman "Issues In International Sports Arbitration" (1995) 13 BU Intl LJ 527 at 544.

> agreement. For example, the governing body could require the athlete to separately sign the arbitration clause or affix his initials next to it. Or the arbitration clause could be printed in red, extra large, bold print, to ensure the athlete does not overlook it.

In summary, it is vital that consent, the one ingredient most important to arbitration, is preserved in sports arbitration, but that it should take a more attenuated form because of the need to keep the interference of litigation out. The stated recommendation would not demand a drastic change in the current practice of sports-governing bodies: they may still retain the arbitration clause in their regulations and they may still retain CAS as the exclusive dispute resolution institution; the only difference would be to inform the athlete of such arbitration clause, which can be perhaps indicated by the athlete's initials or signature next to it.

It is true that the recommendation is not a 'silver bullet' against the forceful nature of arbitration in sports, but it is still better than having no mutual consent at all if arbitration were to become mandatory (ie supported by national legislations as seen by their support of WADA Code arbitral provisions naming CAS as the exclusive body, already noted earlier).[134] Informed consent is, indeed, consent, which would give validity to arbitration and, therefore, avoid the interference of courts in sports-related disputes. Moreover, CAS might not be questioned as an arbitral tribunal if a fully informed sports disputant agrees to a clause stipulating CAS's exclusiveness in hearing sports disputes.

B Institutional Independence

It will be recalled that the Swiss Federal Tribunal's decision suggested CAS is impartial and independent, and the two commentators who supported the decision have emphasised that impartiality and independence of CAS is important.[135] This section is the first of three in this paper that collectively challenge CAS's impartiality and independence.

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134 See *Part IV.A.2:* Consent in sports arbitration at 24–25.

135 See *Part IV.A.4:* In support of sports arbitration at 26–27.

Specifically, this section questions CAS's institutional framework, while the next two sections question its arbitrators.[136]

1 Independence defined

One rule, which is fundamental to upholding the rule of law, is that each and every decision maker remains impartial and independent.[137] Independence requires that there be no actual or past dependent relationship between the parties that could affect the decision maker's judgment in favour of either party, or no such relationship even if it *appears* to affect the decision maker.[138]

In order to achieve the independence of arbitrators, it is crucial that the institution that appoints those arbitrators is also independent or at least does not *appear* to be dependent. This section discusses whether or not CAS arbitrators appear to be dependent because a body, which is administered and financed by the Olympic Committees, governs CAS. The natural conclusion of arbitrators' lack of independence, even if it appears to be so, is that their awards against sports disputants could be prejudiced.

2 CAS's evolution in achieving independence

Upon its inception, CAS was comprised of 60 members chosen by the Olympic Committees and the IOC President.[139] The IOC paid for all of CAS's operating costs,[140] and the CAS Statute could only be modified by the IOC Session on the proposal of the

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136 See *Part IV.C:* Appointment of Arbitrators at 41; and see *Part IV.D:* Prohibition of Role-Switching at 46.

137 See generally Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association "Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers" in *Professional Training Series No 9: Human Rights in the Administration of Justice – A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, New York and Geneva, 2003) 113 at 113–158.

138 Pedro Sousa Uva "A Comparative Reflection On Challenge Of Arbitral Awards Through The Lens Of The Arbitrator's Duty Of Impartiality And Independence" 20 Am Rev Intl Arb 479 at 485.

139 Simma, above n 13, at 23.

140 Reeb, above n 2, at 32–33.

IOC Executive Board.[141] In brief, IOC had a very predominant role in the affairs of CAS. Despite wishing CAS to be an independent arbitral tribunal, criticism of its lack of independence soon emerged.

In 1994 CAS's lack of independence from the IOC was challenged in a landmark Swiss Federal Tribunal decision initiated by Elmar Gundel, a horse rider who was dissatisfied with his award from CAS.[142] The Swiss Federal Tribunal did acknowledge CAS as a true court of arbitration; however, it did point to various links between CAS and the IOC that could seriously jeopardise CAS's independence.[143] Specifically, the Swiss Federal Tribunal pointed to the IOC's almost exclusive funding of CAS, IOC's power to modify CAS's Statute and the vast power held by the IOC and its President in appointing CAS members.[144] Overall, the Swiss Federal Tribunal thought that such connections between the IOC and CAS would raise sufficiently serious questions as to CAS's independence, especially if the IOC were a party to an arbitral dispute.[145]

As a direct consequence of the Gundel decision, CAS was restructured to ensure that organisationally and financially it became independent from the IOC. In 1994 an agreement known as the Paris Agreement was entered into by the "highest authorities representing the sports world" that was to become the foundation of CAS Code that is in force nowadays.[146] Despite the desirable consequence of Gundel judgment causing CAS's restructuring, it is argued that CAS and the IOC only *seem* to be independent. The details of the Paris Agreement are discussed next.

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141 At 33.

142 ATF 119 II 271 (translated ed: Matthieu Reeb "Extract of the judgement of March 15, 1993, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case G versus Fédération Equestre Internationale and Court of Arbitration for Sport (CAS) (public law appeal)(translation)" in *Digest of CAS Awards 1986–1998* (Stæmpfli Editions SA, Berne, 1998) 561).

143 ATF 119 II 271, above n 142, at [3b].

144 At [3b].

145 At [3b].

146 Reeb, above n 2, at 33.

3 CAS and the IOC only seem to be independent

The Paris Agreement of 1994[147] created a new structure for CAS, but, more importantly, it led to a creation of an institution known as the International Council of Arbitration for Sport (ICAS), which was meant to take the place of the IOC in CAS's affairs.[148] ICAS is composed of 20 members appointed using the following procedure:[149]

(1) 4 members are appointed by the IOC (chosen from within or outside its membership);
(2) 3 members are appointed by the Summer Olympics Association and 1 member by the Winter Olympics Association (chosen from within or outside their membership);
(3) 4 members are appointed by the ANOC (chosen from within or outside its membership);
(4) 4 members are appointed by the 12 members listed above, after appropriate consultation with a few of safeguarding the interests of athletes; and
(5) 4 members are appointed by the 16 members listed above, chosen from among *personalities independent of the bodies designating the other members* of ICAS.

In addition, ICAS is funded by the IOC deductions from sums the following bodies are entitled to as part of IOC's revenue from television rights for the Olympic Games: 3/12 by Summer Olympics Association, 1/12 by Winter Olympics Association, 4/12 by ANOC and 4/12 by IOC.[150] In essence, these Olympic Committees appoint members of ICAS and actually fund it as well. On its face, this might not seem like an inappropriate

147 Matthieu Reeb "Agreement related to the constitution of the International Council of Arbitration for Sport (ICAS)" in *Digest of CAS Awards III 2001–2003* (Kluwer Law International, The Hague, 2004) 767 at 767–769.

148 Reeb, above n 2, at 34.

149 CAS Code, above n 45, at S4.

150 Reeb, above n 147, at 768.

arrangement, but a problem arises when one understands the relationship between ICAS and CAS.[151]

ICAS was specifically set up to facilitate the resolution of sports disputes and to safeguard CAS's independence and the rights of the parties.[152] ICAS is also *responsible* for the administration and financing of CAS because in practice the CAS Court Office undertakes its administration and financial accounting.[153] ICAS members are not involved in CAS proceedings directly because they are forbidden from being arbitrators or counsel for any party in the proceedings;[154] but the President of CAS is also President of ICAS, who is naturally a member of ICAS Board, exercising ICAS's functions in most circumstances.[155]To list some of ICAS's functions vis-à-vis CAS, it:

(a) adopts and amends the CAS Code;[156]

(b) elects the Presidents (and deputies) of Ordinary and Appeals Divisions from among its own members;[157]

(c) appoints and may terminate the Secretary General[158] (who with other Counsel constitutes the CAS Court Office and who acts as ICAS's Secretary having a consultative voice in the decision-making);[159]

(d) appoints and removes CAS arbitrators to and from a list;[160]

(e) resolves any challenges of arbitrators;[161] and

(f) supervises activities of the CAS Court Office.[162]

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151 See also Jason Gubi "The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns" (2008) 18 Fordham Intell Prop Media & Ent LJ 997 at 1018.

152 CAS Code, above n 45, at S2.

153 At S2.

154 At S5.

155 At S7 and S9.

156 At S6(1).

157 At S6(2).

158 At S6(6).

159 At S10 and S22.

160 At S6(3).

161 At S6(4).

162 At S6(7).

This paper argues that the 1994 reforms have made the connection between CAS and the IOC *seem* wider by placing in its place a body with a different name as an intermediary, but not actually so much wider because that same intermediary is funded and appointed by the IOC and other constituents of the Olympic Committees — associations that gain their *own* recognition from the IOC. Hence, the ICAS (intermediary) institution does not remove the substantive lack of CAS's independence from the IOC as much as it would have been hoped for. Because ICAS is key to CAS's independence from the IOC or other Olympic Committees, it is best to see whether Gundel judgment's concerns have been dealt with properly.

4 Swiss Federal Tribunal strongly believes in CAS's independence

Another landmark Swiss Federal Tribunal case, while referring to the Gundel judgment, confirmed CAS's independence from the IOC in 2003.[163] It will be recalled that the Gundel decision raised an issue with IOC's exclusive financing of CAS.[164] The Swiss Federal Tribunal in 2003 concluded that the financing of CAS, via ICAS, from contributions made by *all* Olympic Committees "is not likely to jeopardise the independence of [CAS]".[165] The Swiss Federal Tribunal added that "there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence";[166] in order to prove its point, the following example was used:[167]

> State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the ground that they are financially linked to the State. Similarly, the CAS arbitrators should be presumed capable of treating the IOC on an equal footing

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163 ATF 129 III 445 (translated ed: "Switzerland: Tribunal Fédéral [Federal Supreme Court], 27 May 2003" (2004) XXIX Yearbook of Commercial Arbitration 206).

164 See *Part IV.B.2:* CAS's evolution in achieving independence at 31.

165 At [3.3.3.2].

166 At [3.3.3.2].

167 At [3.3.3.2].

> with any other party, regardless of the fact that it partly finances the Court of which they are members and which pays their fees.

Arguably, the analogy of national court's administration and financing to an international arbitral tribunal is inappropriate for the following reasons:

(a) At its basic level, a State court is a court of law presided by the appointed judiciary, whereas CAS is an arbitral tribunal presided by (party-appointed) arbitrators. Each dispute settlement method has its own rules and procedures and, as mentioned above, arbitration differs in many respects from litigation.[168] Hence, the Swiss Federal Tribunal was too swift in presuming that the same equal treatment is accorded to the parties in a dispute;

(b) The IOC or other international sports federations are not comparable in their roles and functions with the State, and thereby are not comparable in their relationship with the judiciary. The State's role is to govern its own citizens on a wide variety of issues and judiciary in fact makes up a leg in the tripod of State government.[169] The same cannot be said for CAS — it is not a judiciary branch in the same sense. Hence, sports federations are not equivalent to the legislative and executive branches of the State and CAS is not equivalent to the judiciary; and

(c) The reason judicial independence is preserved in a domestic sphere is said to be because of the separation of powers doctrine and because of 'checks and balances' in place among the judicial, legislative and executive branches of a State.[170] In contrast, there are no procedures for the Olympic Committees, ICAS or CAS to check on each other. In fact, the Olympic Committees effectively control ICAS through their funding and appointment of it and, in turn, ICAS holds responsibility over CAS: this chain suggests there is a vertical relationship as opposed to a horizontal one among the institutions.

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168 See *Part III.B:* Benefits of Arbitration When Resolving Sports Disputes at 18–21.

169 Gerard McCoy "Judicial recusal in New Zealand" in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 322 at 324.

170 Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies" in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 3 at 9.

In addition, it will be recalled that the Gundel judgment raised concerns over IOC's power to alter CAS's constituting document.[171] Since 1994 CAS Code can no longer be changed solely by the IOC (which is a step in the right direction), but instead requires approval of 2/3 of ICAS members.[172] In essence, the CAS Code can be amended as long as 13 ICAS members agree (ie 2/3 of 20). There is a problem here because the 13 members could be individuals chosen by the Olympic Committees from within 'the Olympic family', meaning that the ICAS members that are *truly* independent from the Olympic Committees may be outvoted. Furthermore, the quorum for ICAS resolutions is 10 members, which makes it even easier to affect change in CAS (ie 2/3 of 10 is just over 6 members). There is a danger that those members may be sourced purely from within the Olympic world or *only* from the IOC. On this point, the Swiss Federal Tribunal in 2003 actually stated:[173]

> Of course, the wording of Article S4 of the Code does not totally exclude the possibility of the former [IOC] having control over the latter [ICAS]: if each of the bodies mentioned under letters a (IFs) and b (ANOC) of the said Article were to appoint four IOC members to the ICAS, which they are perfectly at liberty to do ("chosen from within or <u>from outside</u> their/its membership"), and if the IOC appointed four of its members, twelve of the twenty ICAS seats would be held by IOC members, which could cause problems.

It is, thus, not surprising how easy it is to change the CAS Code: in fact it has been amended in 1994, 2004, 2010, 2011, 2012 and 2013, and has been described as a "piecemeal and reactive" process as opposed to "being implemented as a systematic review".[174] Overall, it seems as if the Gundel decision's concern has not been adequately dealt with.

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171 See *Part IV.B.2:* CAS's evolution in achieving independence at 31.

172 CAS Code, above n 45, at S8(2).

173 ATF 129 III 445, above n 163, at [3.3.3.2] (emphasis in original).

174 Rigozzi, Hasler and Noth, above n 1, at [23].

Lastly, Gundel decision raised an issue with the IOC's power to appoint CAS members.[175] Even though the decision caused the creation of ICAS — an intermediary — ICAS is fully appointed by the IOC together with the other Olympic Committees members.[176] Even more striking is the fact that the Olympic Committees also have an influence over the appointment of CAS arbitrators — a concern that deserves a section in itself, discussed shortly.[177] For the meantime, it suffices to say that the IOC still retains enough influence along with the other members of the Olympic Committees to reasonably question the whole procedure and ICAS's role as intermediary and, thus, the independence of CAS arbitrators.

Based on the above, it is clear that ICAS is a barrier between the IOC and CAS, a fortunate outcome from the Gundel decision, but a barrier that is currently too small to prevent IOC's influence over CAS effectively. As a result, this paper suggests that decisions rendered by CAS might be prejudiced in cases where one of the disputant parties is a member of the Olympic Committees (or is one of the sports-governing bodies that gain their recognition from them), because there *appears* to be a dependant relationship with CAS arbitrators. Moreover, an appearance of the lack of independence suffices because actual lack of independence is "virtually impossible to prove", as stated by the Swiss Federal Tribunal in 2003.[178]

5 Recommendations

In order to make the gap between the IOC and CAS wider, the role and function of ICAS becomes key. It is recommended that a comparison be made with the institutional structure of the Court of Arbitration (ICC Court) of International Chamber of Commerce (ICC), which could assist in making the relationship between CAS and the IOC not appear dependent.

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175 See *Part IV.B.2:* CAS's evolution in achieving independence at 31.

176 See *Part IV.B.3:* CAS and the IOC only seem to be independent at 32.

177 See *Part IV.C:* Appointment of Arbitrators at 41.

178 ATF 129 III 445, above n 163, at [3.3.3].

Since its establishment in 1919, ICC has expanded to become:[179]

> … one of the most important private international organizations in the world's economy … [because] ICC promotes and achieves harmonization and legal progress in core issues in international trade and commerce.

Hence, ICC is a nongovernmental institution: its "'delegates are business executives and not government officials'".[180] This is similar to the Olympic Committees' constituents, none of which are States. The ICC Court has administered over 20,000 arbitration cases since its inception in 1923.[181]

The World Council — ICC's supreme authority[182] — appoints ICC Court members on the proposal of its National Committees or Groups:[183] one member for each of the (approximately) 90 National Committees or Groups.[184] Similarly, the Olympic Committees could appoint ICAS members on the proposal of their sports-governing bodies or individual members. Such arrangement would reduce the centralised role of the Olympic Committees' boards and instead give the power to its members.

Alternatively, other sports associations — for example ARISF, SportAccord and International Paralympic Committee — could have the power to appoint ICAS members alongside Olympic Committees, thereby emphasising the role of world sport generally as opposed to Olympic sports only.

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179 P Habegger "Part I – Introduction" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 663 at [1]–[2] (footnotes omitted).

180 International Chamber of Commerce *Annual Report* (1998) at 19 as cited in Dominic Kelly "The International Chamber of Commerce" (2005) 10(2) New Political Economy 259 at 265, n 24.

181 International Court of Arbitration "Dispute Resolution Services" (2014) International Chamber of Commerce <www.iccwbo.org> at 3.

182 Kelly, above n 180, at 264.

183 International Court of Arbitration "Arbitration Rules Mediation Rules" (2013) International Chamber of Commerce <www.iccwbo.org> at Appendix I art 3(3) [ICC Court Arbitration Rules].

184 See generally International Chamber of Commerce "Membership: National Committees and Groups" <www.iccwbo.org>.

Furthermore, whichever recommendation is accepted, the members given the power to appoint ICAS members could contribute to the funding of CAS, thereby reducing the share of the Olympic Committees' financing of CAS via ICAS.

In order to change the rules of ICC arbitration,[185] the ICC Court must lay any proposal for scrutiny before ICC's Commission on Arbitration and ADR (composed of over 700 members)[186] before being submitted to the Executive Board of ICC for approval.[187] Clearly, the two extra obstacles would prevent the rules from being amended swiftly by the ICC Court. Similarly, to avoid easy CAS Code amendments by ICAS members a procedure could be introduced that would scrutinise the amendments carefully before being approved. Hopefully such process would ensure that CAS Code amendments follow a systemic review, as opposed to being reactionary in nature.

Lastly, a very unique feature of ICC Court "that distinguishes it from all other international arbitration rules"[188] is its review of an arbitral award's draft:[189]

> The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance.

The review procedure normally takes two to three weeks, but could vary depending on the complexities involved.[190] If a draft award does not raise serious problems, it is

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185 ICC Court Arbitration Rules, above n 183, at Appendix I art 7.

186 See generally International Chamber of Commerce "About ICC: Policy Commissions - Arbitration and ADR" <www.iccwbo.org>.

187 With the exception that the ICC Court does not need to lay a proposal with the Commission if, taking into account IT development, it wishes to modify or supplement provisions dealing with written notifications or communications.

188 Lenggenhager "Article 33: Scrutiny of the Award by the Court" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 854 at [2].

189 ICC Court Arbitration Rules, above n 183, at art 33.

190 Lenggenhager, above n 188, at [12].

scrutinised and approved by a committee of ICC Court.[191] If ICC Court's Secretariat finds a more problematic draft that "call[s] for a more detailed examination … [it is] submitted to a plenary session of the Court, for which one of its members (the *rapporteur*) prepares a report".[192] The Court's plenary session then discusses the draft based on the report and decides whether the draft deserves approval.[193] Clearly, multiple individuals are involved in the making of final award — a procedure that has increased the confidence of disputants and users in the ICC arbitral process.[194]

Interestingly, the CAS Code has a very similar provision:[195]

> Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle.

The obvious objection to such approach is that the Secretary General of CAS might not be capable in carrying out the task alone. It is thus recommended that ICAS — holding responsibility over CAS — should be more involved in scrutiny of each draft; following ICC Court's example from which the CAS Code must have drawn inspiration for its provision. Ultimately, the confidence in CAS's decisions might be enhanced despite any appearances of dependency.

This section attempted to highlight CAS's journey in becoming an independent body from the IOC, but the key intermediary — ICAS — is not as strong as it could be in repelling the Olympic Committee's influence over CAS. In an attempt to ensure CAS does not *appear* dependant in certain cases and, hence, also to give its decisions legitimacy, it is recommended that certain comparable features of the ICC Court be

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191 At [11].

192 At [11] (emphasis in original).

193 At [11].

194 Habegger, above n 179, at [7].

195 CAS Code, above n 45, at R46 and R59.

implemented. One major concern for CAS arbitrators' independence that is still left to discuss, and which deserves a section of its own, is the appointment of arbitrators.

C Appointment of Arbitrators

ICAS has the duty of appointing and removing CAS arbitrators.[196] To fulfill that duty, ICAS establishes a list of arbitrators from which the parties must choose their arbitrator or have an arbitrator from the list appointed if the parties fail to agree: a closed list.[197] When coming to its decision to place an arbitrator on the list:[198]

> ICAS shall call upon personalities with appropriate legal training, recognised 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.

It is insisted that:

(1) the involvement of the Olympic Committees in the process of appointing CAS arbitrators is another reason why arbitrators appear to be lacking independence, especially in cases where the Olympic Committees, or sports bodies constituting them, are involved in an arbitral proceeding; and

(2) CAS's closed list undermines party autonomy as well as having the potential to place arbitrators' impartiality and independence into jeopardy.

1 Criticism of the Olympic Committees' involvement in appointing CAS arbitrators

The rule quoted above — namely that arbitrators are appointed after their names and qualifications are brought to the attention of ICAS, including by the Olympic Committees — is relevantly recent. It was reformed in 2012 because there was criticism of the previous rule, which required the Olympic Committees to propose a list of arbitrators to

196 At S6(3).

197 At S3, R40.2, R53 and R54.

198 At S14.

ICAS and ICAS then chose arbitrators from among those in a proportional distribution (eg 1/5th of arbitrators selected from among the persons proposed by the IOC).[199] The previous rule even attracted criticism from a German national court: "the selection of the potential CAS arbitrators favour[ed] the sports associations in disputes against athletes, thus embedding a structural imbalance",[200] thereby placing the neutrality of CAS under threat.[201]

This paper suggests that the new rule is certainly a step in the right direction because it granted ICAS some freedom to appoint those arbitrators who may never have been proposed to it previously by the Olympic Committees. However, the new rule may not have significantly changed ICAS's practice because there is the danger that ICAS chooses arbitrators that were predominantly brought to its attention by, for instance, the IOC. It is most unfortunate that ICAS does not publish which arbitrators were proposed or recommended to it by what organisation. Hence, the independence of CAS arbitrators could still be questioned.

Moreover, the new rule did not change the fact that all CAS arbitrators must appear in a list.

2 Criticism of the closed list

First, the closed list scheme takes away from the right of the parties to nominate their own arbitrator. This strikes at the heart of party autonomy, another principal characteristic of arbitration, which stands for the idea that "parties have ultimate control of *their* dispute resolution system".[202] In practice, this means that parties determine the form and structure of their arbitration, the seat of their dispute, the issues of their dispute and many other details.[203] More importantly, the parties have the right to nominate their

199 Antonio Rigozzi, Erika Hasler and Brianna Quinn "The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration" (3 June 2013) Jusletter <www.jusletter.weblaw.ch> at 4, n 24.

200 OLG München, above n 70, at [104].

201 At [104].

202 Lew, Mistelis and Kröll, above n 72, at [1-11] (emphasis in original).

203 At [1-11].

arbitrators.[204] Clearly, the closed list system significantly limits the rights of the parties to nominate *their* arbitrators.

Secondly, CAS's closed list increases the risk of prejudice to arbitrators' independence and impartiality: independence was defined and discussed earlier;[205] impartiality refers to a duty of the decision maker not to favour any party or to be predisposed in a particular manner on the issue or subject of the dispute.[206] The closed list affects both by:[207]

(a) having the risk of repeat appointments (potentially leading to bias);
(b) increasing the risk of conflict of interest among arbitrators, counsel and other parties in the 'sports field' that is already quite small and exclusive;[208] and
(c) making it hard to notice and prove any actual or apparent bias because CAS does not make any notification of dissenting judgments, thus, it is unclear whether a particular arbitrator constantly decides in one party's favour.[209]

Thirdly, by having a closed list over which ICAS retains all the power, there is a barrier of entry for other arbitrators who may be qualified to hear disputes (and perhaps even better qualified than those already on the list).[210]

In summary, "there is … no objective reason not to allow a party to appoint an arbitrator who is not listed on the CAS list of arbitrators";[211] conversely, the closed list objectively raises questions over party autonomy and arbitrators' impartiality and independence.

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204 See Gary B Born "Selection and Removal of Arbitrators in International Arbitration" in *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) 121 at 121.

205 See *Part IV.B.1:* Independence defined at 30.

206 Uva, above n 138, at 485.

207 See Philippe Cavalieros "Can the arbitral community learn from the CAS closed list system?" (2014) Arbitration Ireland <www.arbitrationconference.com> at 5.

208 See Philippe Cavalieros and Janet (Hyun Jeong) Kim "Can the Arbitral Community Learn from Sports Arbitration?" (2015) 32(2) J Intl Arb 237 at 245.

209 CAS Code, above n 45, at R59.

210 Cavalieros, above n 207, at 5.

211 Gabrielle Kaufmann-Kohler and Philippe Bärtsch "The Ordinary Arbitration Procedure Of The Court Of Arbitration For Sport" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek

3 Comparison with other arbitral institutions

No other arbitral institution has a closed list equivalent to the CAS closed list; in fact, certain arbitral institutions actually moved away from having a closed list.[212]

ICC Court had 1,331 arbitrators involved in disputes in 2010.[213] WIPO Arbitration & Mediation Centre, which predominantly resolves intellectual property disputes, has over 1,500 available arbitrators for disputes (called neutrals).[214] The Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes are tribunals that do have a list naming the arbitrators chosen by member States, because those two institutions are intergovernmental organisations; but, the disputing parties are free to choose their arbitrators, *regardless* of whether they appear on the list.[215]

4 Recommendations

Removing previous appointment of arbitrators based on a distribution scheme to a recommendation only rule was certainly a move in the right direction. However, it would be interesting to see whether ICAS's practice in appointing CAS arbitrators has changed — an observation impossible to make because there was never any public information on which bodies proposed what arbitrators and there is no such current practice either. To make a more informative choice when choosing an arbitrator, a disputant might wish to see on whose recommendation did ICAS choose the particular arbitrator. In fact, the Swiss Federal Tribunal is of the same view: it advised that there be an indication of

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(eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 69 at 75, n 32.

212 Ank Santens and Heather Clark "The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?" (28 June 2011) Kluwer Arbitration Blog <www.kluwerarbitrationblog.com>; and Cavalieros, above n 207, at 6.

213 International Chamber of Commerce "Products and Services: Arbitration and ADR - Ten good reasons to choose ICC arbitration" <www.iccwbo.org>.

214 World Intellectual Property Organization "IP Services: Alternative Dispute Resolution - Neutrals" <www.wipo.int>.

215 Permanent Court of Arbitration "PCA Services: Arbitration Services" <www.pca-cpa.org>; and International Centre For Settlement Of Investment Disputes "Process: Selection and Appointment of Tribunal Members - ICSID Convention Arbitration" <www.icsid.worldbank.org>.

which institutions were responsible for proposing CAS arbitrators, so that "[t]he parties would then be able to appoint their arbitrator with full knowledge of the facts".[216]Adding extra information on their current list of arbitrators would, arguably, not be too drastic of a change for ICAS to implement.

Another possibility is to develop the rule further by stating that ICAS is an autonomous body fully fit and capable of choosing CAS arbitrators. Hence, there would no longer be the need to consider lists of proposed arbitrators from others (such as the Olympic Committees); ICAS could simply seek the arbitrators by itself. Thus, by enhancing the powers of the intermediary, there would be a corresponding reduction in the influence the Olympic Committees have over CAS. It must be repeated that the Gundel judgment raised concern over IOC's appointment of CAS members in 1994. Thus, because the Olympic Committees currently have the exclusive right to appoint ICAS members, they should grant ICAS the exclusive power to appoint CAS arbitrators without their interference.

A much more drastic change would be to remove the closed list altogether and, thus, enhance the caliber of arbitrators available to hear sports disputes. Even if an arbitrator does not have as much knowledge or experience in sports, there is always the possibility of hearing expert opinion if it is necessary.[217] The concern over expertise might not be as great as it initially seems because it is highly likely that sports disputants, when appointing their arbitrators, would still choose a person with sports experience or at least a person with the relevant experience for their dispute.

Moreover, the old rule of having a minimum of 150 arbitrators is clearly redundant because in practice CAS maintains a list of over 300 arbitrators.[218] By removing the closed list, CAS will be in line with many other international arbitral institutions that had

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216 ATF 129 III 445, above n 163, at [3.3.3.2].

217 CAS Code, above n 45, at R44, R51 and R57.

218 At S13; TAS/CAS "Arbitration: List of arbitrators (general list)" <www.tas-cas.org>; and see also Mavromati and Reeb, above n 2, at 6.

never had a closed list or were wise to remove it and, hence, have over 500 arbitrators at their avail.

Furthermore, as is explained in detail next, removing the closed list could help in preventing the mischief that a new CAS Code rule recently prohibited: role-switching.

D Prohibition of Role-Switching

Previously counsel representing a party in one case could act as its CAS arbitrator in another dispute because there was nothing to prohibit such switching of the roles. Most, if not all, international commercial arbitration and investment treaty arbitration institutions do not have a clear-cut prohibition of role reversal of its arbitrators and counsel. In fact, it is a very hot debate in the literature whether role-switching should be allowed or prohibited.[219]

A CAS Code reform, which took place only in late 2009,[220] made it clear that "CAS arbitrators and mediators may not act as counsel for a party before the CAS."[221] The change took place not as a result of any Swiss Federal Tribunal decision, but as a result of criticism about the arbitrator and counsel "double-hat" roles, which inevitably increased the risk of conflicts and, accordingly, the number of petitions challenging the arbitrators.[222]

Arguably, CAS was correct in taking a revolutionary step in adopting the new rule to prohibit such conduct because of CAS's use of a closed list of arbitrators, which makes it so much more probable that impartiality of arbitrators is compromised in an 'exclusive' world of sport. As already mentioned above,[223] impartiality refers to a duty of the

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219 See generally Günther J Horvath and Roberta Berzero "Arbitrator and Counsel: The Double-Hat Dilemma" (2013) 10(4) Transnational Dispute Management 1.

220 Antonio Rigozzi "The recent revision of the Code of sports-related arbitration (CAS Code)" (13 September 2010) Jusletter <www.jusletter.weblaw.ch> at 2–3.

221 CAS Code, above n 45, at S18.

222 Rigozzi, above n 220, at 2–3.

223 See *Part IV.C.2:* Criticism of the closed list at 42–43.

decision maker not to favour any party or to be predisposed in a particular manner on the issue or subject of the dispute.[224] It is described as "a state of mind, an inherent [behaviour] of the arbitrator that must lie in his spirit during the arbitration proceedings so as not to prejudice any of the parties".[225] It is inevitable that the arbitrators appearing on the list, who are meant to be the most (or at least more) experienced people in sports-related disputes, would be preferred and chosen by the parties to act as their representatives in other cases. The risk of impartiality being prejudiced in such circumstances is certainly increased.

1 Criticism of the new rule

On its face it seems as if ICAS should be applauded for responding to criticism of CAS's arbitrator-counsel role-switching. However, the new rule prohibiting such conduct is not without its own criticisms.[226]

First, the new rule does not prohibit others in the same law firm as the arbitrator to act as counsel in CAS.[227] This is in stark contrast to CAS's own recommendatory circular, which existed before the reforms, that stipulated that the president of a panel in an appeals procedure must "be appointed only from among the CAS members who do not or whose law firm does not represent a party before the CAS at the time of such appointment".[228] Thus, the new rule has limited application because most of the advantages for lawyers in the same law firm as the CAS member can still be considered as available to them.[229]

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224 Uva, above n 138, at 485.

225 At 485.

226 See Joseph R Brubaker and Michael W Kulikowski "A Sporting Chance? The Court of Arbitration for Sport Regulates Arbitrator-Counsel Role Switching" (2010) 10(1) Va Sports & Ent LJ 1.

227 Rigozzi, above n 220, at 3.

228 At 3.

229 At 3–4.

Secondly, there is an enforcement problem with the new rule: ICAS *only* has the power to remove the arbitrator temporarily or permanently.[230] This would lead to the inevitable result that the arbitrator may switch to being counsel of a client and thereby breach the rule if it is economically more rational to do so (eg higher payment offered by the client than the arbitrator salary, which is a variable hourly rate between CHF 250 and 400).[231]

Thirdly, a party to a dispute might find it extremely difficult to challenge arbitrator's impartiality and independence on the ground of role-switching. After discussing various Swiss Federal Tribunal decisions on the subject, one commentator concluded that they have led to "the establishment of a very high standard of proof that the appellant must discharge, in order to impugn the independence of a CAS arbitrator".[232] Moreover, according to the Swiss Federal Tribunal,[233] it is not a ground for challenging the award if an arbitrator in a CAS arbitration sat at the same time alongside counsel in another CAS arbitration representing one of the parties to the first arbitration.[234]

2 Recommendation

CAS took a welcoming active step by prohibiting the double hat roles of arbitrators and counsel, but the new rule is weak because it does not have any adequate enforcement mechanism in place against arbitrators and none against the counsel. It is time for CAS to take the next step by implementing a proper enforcement system in place in the form, for instance, of large penalties or even bans from representing disputants at CAS.

E Seat of Arbitration — Switzerland

The independence and impartiality of CAS have thus far been discussed within a paper, which questions whether or not CAS is really arbitration offering the benefits that sports

230 CAS Code, above n 45, at S19.

231 Rigozzi, above n 220, at 4, n 15.

232 Rachelle Downie "Improving The Performance Of Sport's Ultimate Umpire: Reforming The Governance Of The Court Of Arbitration For Sport" (2011) 12 Melb J Int Law 1 at 12.

233 BGE vom 4 August 2006 (4P_105/2006) in (2007) 25(1) ASA Bull 105.

234 Rigozzi, above n 220, at 3.

disputants should be reasonably entitled to. The following two sections focus on certain aspects of CAS rules that undermine party autonomy, and party privacy and confidentiality. This section specifically, after discussing the significance of the seat of arbitration generally, critiques Switzerland as the seat of arbitration for all CAS disputes.

1 Significance of the seat

Despite a strong presumption that arbitral awards are final and binding, there are limited circumstances in which parties to the dispute can challenge the award. This paper does not argue that it is wrong to challenge arbitral awards altogether, instead this paper argues that it is wrong that CAS's awards can only be challenged by the Swiss Federal Tribunal.

CAS Code stipulates that:[235]

> The award … shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.

The reason that CAS's awards can only be challenged using Swiss arbitration law is because CAS Code states that the seat for arbitration is Lausanne, Switzerland.[236]The seat of arbitration is a legal construct as opposed to a geographic location: "the nation where an international arbitration has its legal domicile or juridical home".[237] Its most common feature is that the procedural law of the arbitration (*lex arbitri*) is typically the arbitration legislation of the arbitral seat; therefore, Swiss arbitration law is the procedural law governing CAS's awards.[238]

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235 CAS Code, above n 45, at R46 and R59.

236 At S1.

237 See Gary B Born "International Arbitral Proceedings: Legal Framework" in *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) 105 at 105.

238 At 105.

The CAS Code's stipulation of the seat similarly applies to the administration of disputes in CAS's Sydney and New York branches because it was so confirmed by a New South Wales Court of Appeal (NSWCA) decision, in which the parties to the dispute were Australian, the arbitral panel was Australian and the proceedings were held in Sydney.[239] Moreover, all CAS Olympic ad hoc arbitrations have Swiss law as their *lex arbitri*.[240]The main advantage of having Swiss Federal Tribunal as the only court reviewing CAS's awards is to ensure procedural consistency and legal certainty between all CAS cases.[241]

2 Criticism of the seat

The first objection against the seat being always Switzerland is its limitation on the party autonomy principle (defined earlier).[242] As the NSWCA case showed, there is a strange conclusion that only the Swiss Federal Tribunal could hear a challenge to CAS's award when the disputants were non-Swiss, holding a hearing of their dispute outside Switzerland, with a non-Swiss arbitral panel. Moreover, many other major international arbitral institutions let the parties have the freedom to choose what procedural law governs their arbitration, thereby giving effect to the party autonomy principle.[243]

There is another objection to the seat because Switzerland has two different sets of arbitration rules: Swiss Civil Procedure Code (CPC) for nationals[244] and PILS for internationals (noted earlier).[245] This suggests that if the parties to the dispute are Swiss, they may invoke the use of the CPC (in fact, until 2008 CPC procedure was mandatory

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239 *Raguz v Sullivan* [2000] NSWCA 240.

240 See Tobias Glienke "The finality of CAS awards" (2012) 3-4 The International Sports Law Journal 48.

241 Rigozzi, Hasler and Noth, above n 1, at [18]; and Despina Mavromati and Matthieu Reeb "R28: Seat" in *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International, The Netherlands, 2015) 63 at 74.

242 See *Part IV.C.2:* Criticism of the closed list at 42.

243 Mavromati and Reeb, above n 241, at 65–66; and see generally Born, above n 237, at 114–117.

244 See generally Manuel Arroyo "Part I – History of Arbitration" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 1 at [1]–[40].

245 See *Part II.C:* Overview of CAS at 14–15.

for nationals).[246] The party's advantages of invoking CPC are twofold: two instances of appeal (the Cantonal Court and the Swiss Federal Tribunal) and broader grounds for challenging arbitral awards.[247] In other words, vis-à-vis other disputants in sports, Swiss parties have a privilege in choosing their CPC over PILS simply because of their nationality.

Another problem evident with the seat is that the grounds for reviewing CAS awards under the PILS are not as extensive as they are found elsewhere; in particular, the merits of the case cannot be reviewed whether they are questions of fact or law (unless there is an allegation of violation of Swiss public policy).[248] In other words, most of the grounds to challenge an award are procedural in their nature. This fact has led to only 6.5 per cent of arbitral awards' reviews being allowed by the Swiss Federal Tribunal.[249] In a sports context, the cumulative effect of the limited grounds for challenges coupled with a very conservative approach of the Swiss Federal Tribunal have led to only 10 CAS challenges allowed out of 126 since CAS's inception.[250]

It is true that consistency in law is a desirable principle and is, thus, the main advantage of having Switzerland as CAS's arbitral seat. But *substantively*, CAS Code states that the disputing parties are free to choose the law that will govern their dispute in the Ordinary Division.[251] In an Appeals Division dispute, the applicable regulations are prioritised as stipulating the law applicable to the merits of the dispute, followed by the parties' agreement.[252] Only failing any agreement does the law of the country apply in which the governing-sports body (whose decision is challenged) is domiciled.[253] Otherwise, the

246 Glienke, above n 240.

247 Glienke, above n 240.

248 Glienke, above n 240.

249 Glienke, above n 240.

250 Despina Mavromati "Jurisprudence Of The Swiss Federal Tribunal In Appeals Against CAS Awards" (15 September 2014) Social Science Research Network <www.ssrn.com> at [6].

251 CAS Code, above n 45, at R45.

252 At R59.

253 At R59.

arbitral panel decides what rules of law are appropriate, giving reasons for its decision.[254] Hence, Swiss law applies to the substance of the dispute *only* failing an agreement between the parties in an Ordinary Division and there is no mention of Swiss law applying at all in an Appeals Division.[255]

If liberty is given to sports disputants to choose the law applying to their dispute's merits, it follows that substantively the law might develop inconsistently because different rules and laws may apply with different outcomes deciding similar types of disputes. This is not a bad thing after all, however, because it actually gives effect to the principle of party autonomy — parties choose *their* dispute resolution — a principle undermined by having the seat of arbitration automatically set.

3 Recommendations

At the outset it must be acknowledged that it is well known that Switzerland is an arbitration-friendly nation, with many disputing parties willingly choosing Switzerland as their arbitral seat.[256] However, it is argued that Switzerland being CAS's *automatic* seat is a step too far. In order to give effect to the party autonomy principle — a principle fundamental to arbitration — parties should have some say in their seat.

Perhaps the CAS Code could be amended to state that the seat is *presumed* to be Lausanne, Switzerland unless contrary intention is shown, thereby showing some consistency with its rules allowing parties to choose the law governing the merits of the dispute. Such change would accommodate for the many disputes, especially those held by CAS's New York and Sydney branches that have no connection to Switzerland other than the fact that CAS is headquartered in Switzerland.

For a slightly alternative approach, a useful comparison may be drawn with WIPO Arbitration & Mediation Centre: the Centre decides on the place of arbitration after

254 At R59.

255 At R45 and R59.

256 Born, above n 237, at 119–120.

taking into account parties' observations and circumstances of arbitration and the award is deemed to be made at the place of arbitration.[257] In other words, the seat of arbitration will have been chosen after considering the disputing parties' wishes. Similarly, CAS, if not giving *total* freedom to the disputants to choose their own seat, could state that CAS retains the power to appoint the seat after taking into consideration the circumstances of the arbitration.

If no significant change is made to the seat of CAS arbitration, then, at least, the CAS Code should be amended to state that Swiss disputants, once they have submitted their dispute, waive their rights to the applicability of CPC. In other words, to be consistent among all sports disputants the PILS should only be used when an appeal is lodged with the Swiss Federal Tribunal. In fact, the newly enacted CPC allows the disputing parties to opt-out of its applicability in favour of PILS:[258]

> … to avoid the inevitable unequal treatment due to the application of two different legal regimes governing arbitration in cases that are virtually identical but for the domiciles or places of habitual residence of the parties involved.

However, neither CAS nor any of the sports-governing bodies have yet varied their regulations to such effect.[259]

F Different Treatment of Awards Between Ordinary and Appeals Divisions

This section raises concern over CAS's erosion of the party's right to confidentiality in its Appeals Division, especially because, unlike litigation, one of the main attractions of arbitration to the parties in dispute is its promise of privacy and confidentiality: empirical

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257 World Intellectual Property Organization "IP Services: Alternative Dispute Resolution - WIPO Arbitration Rules" <www.wipo.int> at art 38; and World Intellectual Property Organization "IP Services: Alternative Dispute Resolution - WIPO Expedited Arbitration Rules" <www.wipo.int> at art 33.

258 Rigozzi, Hasler and Noth, above n 1, at [19] (footnotes omitted).

259 At [19].

research found that confidentiality was third in a list of 11 reasons for arbitration.[260] As Jessel MR in the United Kingdom explained "[c]ommercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain."[261]

Confidentiality relates to the fact that any information concerning the particular arbitral dispute resolution is not to be disclosed to third parties.[262] In particular, confidentiality imposes the duty not only to prevent third parties from the arbitral hearings, but also the duty not to disclose the hearing transcripts, written pleadings, submissions, arbitration adduced evidence, other materials that have a connection to the arbitration in question and, of course, the arbitral award.[263]

Many arbitral institutions have clear text in their own rules, highlighting how crucial it is not just for the parties and the arbitral panels to observe privacy and duty of confidentiality rules, but also for the members of courts, centres and their secretariats.[264] Moreover, the right to confidentiality extends to the rending of the award.[265]However, CAS does not presume the awards of its Appeals Division as being confidential; hence, this paper argues that the contrasting presumptions of confidentiality between the awards of CAS's Ordinary and Appeals Divisions are not justified, as discussed next.

1 CAS Code on confidentiality

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260 Christian Bühring-Uhle "A Survey On Arbitration And Settlement In International Business Disputes: Advantages of Arbitration" in Christopher R Drahozal and Richard W Naimark (eds) *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International, The Hague, 2005) 25 at 32.

261 *Russell v Russell* (1880) LR 14 Ch D 471 (Ch) at 474.

262 Gary B Born "Confidentiality and Transparency in International Arbitration" in *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) 195 at 195.

263 At 195.

264 Compare ICC Court Arbitration Rules, above n 183, at Appendix I art 6 and Appendix II art 1.

265 Compare International Centre For Settlement Of Investment Disputes "Rules of Procedure for Arbitration Proceedings (Arbitration Rules)" <www.icsid.worldbank.org> at r 48.

In its Statutes (at the outset), the CAS Code provides:[266]

> CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

However, the CAS Code proceeds to distinguish in its Procedural Rules the duty of confidentiality between those arbitrations initiated in CAS's Ordinary Division from the other arbitrations initiated in its Appeals Division. For the Ordinary Division, the Code states:[267]

> Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.

For the Appeals Division, the Code states:[268]

> The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.

From the above, it is impossible not to recognise the inconsistency in the text of the CAS Code when dealing with the question of confidentiality. The Statutes' 'proclamation' forbids one to disclose any information relating to proceedings; whereas in the Ordinary Division a distinction emerges because it forbids one to disclose any information relating to the proceedings *or the dispute*. In the Appeals Division the phrase "other elements of

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266 CAS Code, above n 45, at S19.

267 At R43.

268 At R59.

the case record" is used, which can only be assumed to have the same meaning as that found in the Ordinary Division (or, conversely, perhaps the meaning as found in the Statutes).

Moreover, one would assume that "any information" not to be disclosed would include the award of arbitration; but, apparently, the arbitral award is treated as a separate phenomenon altogether that does not fall within the "any information" bracket. This can be seen from the wording of the Ordinary Division definition, which has a *separate* sentence stating that the arbitral awards are presumed to be private. But, even more surprisingly, this is additionally proven by the very important reversal of presumption — if a dispute in question is an appeal from another sports tribunal's decision, then the award (or its summary and/or press release) is presumed to be public. Hence, unless both parties agree for the award to remain confidential — a rarity in practice — the award is distributed to the world.[269] This is definitely in contrast to CAS's own Ordinary Division procedure and it is in *stark* contrast to the duty of confidentiality principle in arbitration.

The big question arises whether CAS is justified in its discrimination of awards between Ordinary and Appeals Divisions.

2 Are CAS's confidentiality rules justified?

One strong argument to make the awards public is to ensure that the sports law is developed in a consistent manner.[270] Generally speaking, consistency in law is certainly an important goal. However, it must not be forgotten that there is no equivalent stare decisis doctrine (legal compulsion) as there is in the common law.[271] Hence, even if the awards are published, there is no guarantee that arbitral tribunals will follow the decisions

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269 Christian Krähe "The Appeals Procedure Before The CAS" in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds) *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, The Hague, 2006) 99 at 103.

270 Rigozzi, Hasler and Noth, above n 1, at [18].

271 Nafziger, above n 22, at xxiii and xxxii; and see also Annie Bersagel "Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field" (2012) 12 Pepp Disp Resol LJ 189.

of others. In particular, there is nothing in the CAS Code obliging their arbitrators to consider other awards when coming to their decision. Moreover, there is some evidence showing that even the IOC has not always followed CAS precedent:[272]

> In 2009 the IOC decided not to award a gold medal to silver medalist Katrina Thanou of Greece that the sprinter Marion Jones had won at the 2000 Games in Sydney but had to forfeit. The IOC's decision was based on Thanou's own disqualification from the 2004 Games in Athens. This rationale did not follow CAS precedent that had limited such a denial of a forfeited medal to only those athletes who had tested positive in the *same* Games.

Another reason for the publicity is the strong public interest in the cases that are resolved by CAS in its Appeals Division because most of these disputes are disciplinary in their nature,[273] many of them related to doping.[274] The public interest argument is acknowledged, but the same public interest argument may be present in the cases that CAS resolves in its Ordinary Division. Even if it is proved that more of the disputes heard in the Appeals Division are in the interest of the public, there is no reason for discrimination on that ground alone, especially when the disputing parties' right to *arbitral* privacy and confidentiality is at stake.

3 Recommendations

Once an arbitrator's award is challenged in national courts, the individual party in a dispute waives its rights to privacy and confidentiality because the court is open to the public by its very nature. However, CAS is not a national court. This paper suggests that despite the dispute being an appeal of another sports-governing body's decision, CAS should retain the parties' right to privacy and confidentiality because the Appeals Division is still meant to be arbitration. Even if the public has higher interest in the appeals decisions, the public should not turn what is in its nature arbitration into litigation.

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272 At xxxii (emphasis in original).

273 See Kaufmann-Kohler and Bärtsch, above n 211, at 97.

274 See Paulsson, above n 115, at 40; and see Krähe, above n 269, at 99.

As such, it is strongly encouraged that CAS does not presume its Appeals Division's awards public, but presume them to be confidential. This would be consistent with the duty of confidentiality and its own Ordinary Division practice.

If, however, it is necessary to make certain awards public in the hope of developing sports law, the CAS Code could add that the parties are encouraged to make their awards public in the interests of the law. For instance, an arbitral tribunal could advise the parties that their award would prove useful if it were made public for a number of reasons, and the parties could then consent to it being made public subject to the conditions they might impose on the award (eg deleting names or other private information). Arguably, such encouraging approach could be used for both Ordinary and Appeals Divisions of CAS.

G Ad Hoc Division

This section is specific to CAS's ad hoc division because the need for speedy dispute resolution is greater in disputes related to the Olympic Games.[275] As such, the various features of CAS discussed thus far could potentially be compromised in certain respects.

The exclusive jurisdiction of CAS to arbitrate Olympic disputes is sourced from the Olympic Charter, from which party consent to arbitration must have been accordingly found.[276] Arbitration is clearly imposed because the alternative is no participation in the Olympic Games if the agreement is not signed. Consistently with this paper's recommendation, an attenuated form of consent is still present if one is *informed* of the arbitration clause.[277] However, criticism of party consent in sports should not be forgotten: former CAS arbitrator doubted whether athletes' consent to Olympic Games is

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275 See *Part II.C:* Overview of CAS at 13–14.

276 Ad Hoc Rules, above n 47, at art 1; and Olympic Charter, above n 13, at r 61.

277 See *Part IV.A.5:* Recommendation at 28–29.

real and genuine, thus believing that an athlete can 'renege' on the arbitration agreement with legal impunity.[278]

The issue of CAS's independence and impartiality becomes much more obvious in the Olympic Games because disputes are brought by dissatisfied athletes against the decisions of their sports-governing bodies, or more commonly against the IOC or NOC (or ANOC collectively); the Olympic Committees are the defendants in CAS ad hoc proceedings.[279]

CAS's arbitrators for ad hoc proceedings are especially appointed by ICAS for the Games, which, arguably, is a necessary compromise because there is a real need for the individuals to be present at the Games and be available at all times.[280] Hence, the closed list scheme may apply to the ad hoc division; however, the recommendation that the list should state which organisations proposed which arbitrators still stands.[281] This recommendation in favour of transparency is even stronger for ad hoc division because disputing parties do not get a chance to choose their arbitrators, instead the President of the ad hoc division appoints arbitrators once a dispute is submitted.[282]

Such arrangement further highlights the need for adequate enforcement against arbitrator-counsel role-switching to uphold the impartiality of arbitrators, and the need for CAS to be institutionally independent from the Olympic Committees.[283] It is true that CAS has been deciding certain cases against the IOC that might prove its institutional

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278 Ian Blackshaw "Are Athletes Obliged to Accept the Jurisdiction of the Court of Arbitration for Sport Ad Hoc Division for Settling Their Disputes at the Olympic Games?" (2010) 2 The International Sports Law Journal 149 at 149–150.

279 Ad Hoc Rules, above n 47, at art 1.

280 At art 3.

281 See *Part IV.C.4:* Recommendations at 44.

282 Ad Hoc Rules, above n 47, at art 11.

283 See at art 12.

independence,[284] but the number of decisions dismissing cases in favour of the Olympic Committees is very high in comparison.[285]

The fact that the seat of arbitration is Lausanne, Switzerland is, arguably, another legitimate compromise because there might not be much time for the parties to come to an agreement. Fortunately, the ad hoc rules expressly state that arbitration is governed by PILS (as opposed to the possible application of CPC for Swiss sports disputants):[286] a rule that should apply in both CAS's Ordinary and Appeals Divisions also, as recommended above.[287] However, the arbitral decision "is enforceable immediately and *may not be appealed against or otherwise challenged*", meaning that the Swiss Federal Tribunal is not as involved in CAS ad hoc awards as it is in the awards of its other divisions.[288]

There is nothing express in the ad hoc rules on whether the award made is presumed to be public or private. The practice is that there are a lot of ad hoc cases published by CAS,

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284 Richard H McLaren "The Court Of Arbitration For Sport: An Independent Arena For The World's Sports Disputes" (2001) 35 Val UL Rev 379 at 383; compare *R v International Olympic Committee (IOC) (Award)* CAS Richard Young, Jan Paulsson, Maria Zuchowicz OG 98/002, 12 February 1998; and compare *Angel Perez v International Olympic Committee (IOC) (Award)* CAS Robert Ellicott, Jan Paulsson, Dirk-Reiner Martens OG 00/005, 19 September 2000.

285 Compare *Andreea Raducan v International Olympic Committee (IOC) (Award)* CAS Tricia Kavanagh, Stephan Netzle, Maidie Oliveau OG 00/011, 28 September 2000; compare *Arturo Miranda v International Olympic Committee (IOC) (Award)* CAS Robert Ellicott, Jan Paulsson, Dirk-Reiner Martens OG 00/003, 13 September 2000; compare *Arturo Miranda v International Olympic Committee (IOC) (Award)* CAS Robert Ellicott, Jan Paulsson, Dirk-Reiner Martens OG 00/008, 24 September 2000; compare *Dieter Baumann v International Olympic Committee (IOC), National Olympic Committee of Germany and International Amateur Athletic Federation (IAAF) (Award)* CAS Tricia Kavanagh, Richard McLaren, Richard Young OG 00/006, 22 September 2000; compare *Bassani-Antivari v International Olympic Committee (IOC) (Award)* CAS Yves Fortier, Dirk-Reiner Martens, Maidie Oliveau OG 02/003, 12 February 2002; compare *United States Olympic Committee (USOC) and USA Canoe/Kayak v International Olympic Committee (IOC) (Award)* CAS Robert Ellicott, Jan Paulsson, Dirk-Reiner Martens OG 00/001, 13 September 2000; and compare *Moldova National Olympic Committee (MNOC) v International Olympic Committee (IOC) (Award)* CAS Deon H Van Zyl, Jingzhou Tao, Luigi Fumagalli OG 08/006, 9 August 2008.

286 Ad Hoc Rules, above n 47, at art 7.

287 See *Part IV.E.3:* Recommendations at 53.

288 Ad Hoc Rules, above n 47, at art 21 (emphasis added).

presumably because CAS ad hoc proceedings are a form of an appellate review of the sports-governing bodies' decisions.[289] Hence, similar to CAS's Appeals Division, the award is presumed public.

On the one hand, consistently with the recommendation set in the paper, it is best if the duty to confidentiality is preserved and, thus, ad hoc awards are presumed private.[290] On the other hand, however, there are certain features of ad hoc proceedings — such as the fact that the Olympic Committees are defendants and the President as opposed to the parties appoints CAS arbitrators — highlight the need for transparency, suggesting the awards should be presumed public. But athletes cannot challenge the award, as recently mentioned, rendering the whole idea of publicity somewhat useless because it seems as if the only value of public ad hoc awards is academic criticism of the decisions.[291]

Overall, this section attempted to show that there is a big difference between CAS's Ordinary and Appeals Divisions and its ad hoc division. In the latter speed is crucial, suggesting that certain features found in arbitration beneficial to sports disputants might be compromised in the name of a speedy dispute resolution.

H Enforcement of Awards

This section is relatively short because enforcement of awards is a task left to the disputing parties rather than a feature of CAS. Nevertheless, this section is important in emphasising how vital it is that the features of CAS's arbitral procedure reflect arbitration and, hence, offer the benefits of arbitration to sports disputants.

Arbitral awards in other contexts — such as commercial or investment international arbitration — are typically enforced in national State courts via the use of the New York Convention, which has already been accepted by many governments around the world

289 See TAS/CAS "Case Law Documents" <www.jurisprudence.tas-cas.org>.

290 See *Part IV.F.3:* Recommendations at 57–58.

291 See *Part IV.G:* Ad Hoc Division at 60.

(noted earlier).[292] Thus, it sounds somewhat odd that in a sports context the 'stronger party' can use its power, sometimes even monopolistic power, to force the 'weaker party's' compliance with the award via internal means (eg contract or licence). It seems even more unjust if the latter actually 'won' in the arbitral proceeding, but does not have the same power to enforce the award via internal means; and, hence, the 'weaker party' (like an athlete) would actually have to resort to national courts to ensure compliance with the award.

In essence, enforcement of an award is generally desirable, even if the route is internal, because it gives effect to the parties' wish to have a dispute resolved through arbitration. However, if internal enforcement is used, it becomes much more crucial that the traditional elements of arbitration are preserved and, hence, the many advantages of arbitration are offered to sports disputants. Specifically to CAS arbitration, because the Olympic Committees have, for instance, the power to revoke licences of athletes, it becomes so much more important that CAS is institutionally independent, impartial, and preserves the parties' rights to autonomy, mutual consent and confidentiality as much as possible.

V Conclusion

From the outset of this conclusion it must be highlighted that CAS deserves to be called the supreme court of world sport because, to state concisely, there is no other institution like it. In the very complex world of sport, CAS has proved its significance and value in resolving sports-related disputes since its operations began in 1984. This paper, however, does argue that it is vital that CAS lives up to its own name as the Court of Arbitration because arbitration is the preferred method of dispute resolution for sports disputes, as a result of its many advantages to sports people and sports organisations. As such, arbitration deserves a gold medal.

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292 See *Part III.B.3:* Fortius/Stronger at 20.

In order to answer the overall question of the paper — is CAS really arbitration — it would be wrong to conclude categorically that CAS is not arbitration, instead it is evident that CAS's arbitral procedure does capture certain of its elements. However, with the erosion of the confidentiality principle, for instance, due to a presumption of a public award in CAS's Appeal Division, a feature of litigation is strongly evident. Hence, because CAS may reflect arbitration better in certain instances, there is room for improvement.

The benefits of arbitration to sports disputants should be at the forefront whenever CAS's rules are designed. Throughout this paper various changes to CAS's rules have been discussed in the form of recommendations, which attempt to protect the interests of sports disputants in arbitration, with the ulterior motive and hope to help CAS maintain its title as the supreme court of world sport.

It is clear that CAS's divisions have different roles and functions and those differences must be kept in mind. Nevertheless, CAS is meant to be an *arbitral* tribunal, thus it is best if elementary features of arbitration are retained unless, of course, there are circumstances that justify a different treatment. For instance, CAS's ad hoc division would only function if speed of dispute resolution were the most significant principle, suggesting that a compromise of certain benefits of arbitration is not an unreasonable trade-off. Similar compromises, however, are not always justified in the other two divisions. In particular, it is not necessary to presume the awards of the Appeals Division public for the division to work effectively because sports disputants are still likely to appeal whether or not there is public interest in the particular decisions; hence, the party's right to confidentiality should be respected. In fact, it would be most unfortunate if sports disputants were dissuaded from bringing their claims to CAS for the fear of their information being released.

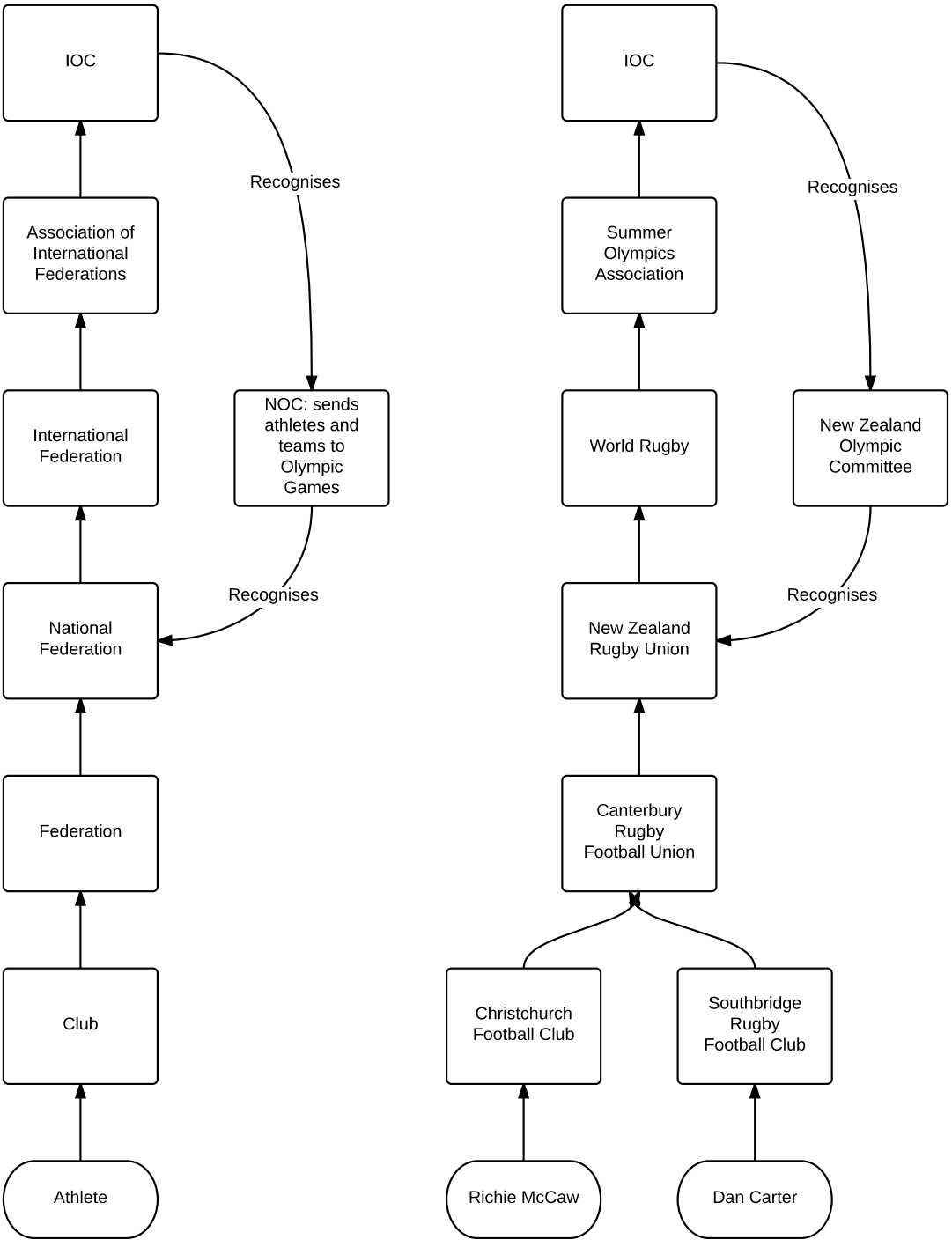
There are other elements and features of CAS's arbitral procedure that could be improved for the benefit of all sports disputants. Party consent to arbitration is an element that gives arbitration its validity; thus, *informed* consent of a sports disputant should at least be

sought before jurisdiction of the arbitral panel is established. Party autonomy is another fundamental feature of arbitration that could be enhanced if CAS's seat were not Switzerland for every single CAS dispute, but instead party agreement were sought on the matter. Arguably, however, ad hoc proceedings are justified in having Switzerland as their automatic seat on the ground that speed of dispute resolution is so important to the functioning of the whole division.

CAS should be applauded for proving that it can change its practices following criticism of its lack of independence or impartiality: there have been positive changes to the framework and rules of CAS, but, as this paper attempted to show, there is room left to evolve further. Specifically, it is incredibly important that the Olympic Committees' influence over CAS should be better repelled by ICAS — the intermediary that was originally meant to take over CAS's affairs from the IOC following the Gundel judgment. In particular, the fact that the Olympic Committees still retain some influence over the appointment of CAS arbitrators is problematic; thus, removing the closed list of arbitrators could assist in reducing the appearance of arbitrators' lack of independence and impartiality. If such change is not implemented, ICAS could at least publish the closed list with information showing which organisation proposed the appointment of the particular arbitrator. In addition, the new rule prohibiting arbitrator-counsel role-switching must have an adequate enforcement mechanism introduced because at the moment the rule has no 'teeth to bite with'.

Even if the recommendations discussed in this paper are not implemented, it is sincerely hoped that CAS's arbitral procedures are amended in other ways, believed to be more appropriate, in order to reflect arbitration much better. If so, the answer in the future to the question posed whether or not CAS is really arbitration would be much shorter — 'yes'.

VI Appendix 1: Simplified Organisation of World Sport and New Zealand Rugby Union Example



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