

ON TRACK FOR THE YEAR 2000 SYDNEY AND THE COURT OF ARBITRATION FOR SPORT

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INTRODUCTION

In the countdown to the Sydney Olympics in the year 2000, preparations for the Games are running at fever pitch. But one important aspect of the preparation is well in hand. Unlike other sites for Olympic Games, Sydney already has a body established for resolving disputes privately between parties through arbitration. Since 1996 the Court of Arbitration for Sport ("CAS") has had an Oceania registry to handle disputes that arise in this region of the world. This permanent registry is to be contrasted with the special *ad hoc* divisions established by CAS for the 1996 Summer Olympics in Atlanta and the 1998 Winter Olympics in Nagano.

At the 1998 Commonwealth Games in Kuala Lumpur, CAS established a special *ad hoc* division consisting of a President, Raghunanadan S Pathak,¹ and six arbitrators. One of the arbitrators was Mr Robert Ellicott, former Judge of the Federal Court of Australia. This was the first time CAS had operated at the Commonwealth Games.²

CAS: FUNCTION AND STRUCTURE

CAS was created in 1983 at the instigation of the President of the International Olympic Committee ("IOC"), Juan Antonio Samaranch, apparently as a response to being named personally as a defendant in

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² It was a requirement of participation that every athlete who signed an entry form for the Commonwealth Games agreed to submit any dispute to the arbitration panel. Prior to the institution of the arbitration panel all appeals of the Commonwealth Games had to be made to the Commonwealth Games Federation Court of Appeals, consisting of Commonwealth Games Federation office bearers. Selection of the tribunal members was left to the discretion of CAS: see Report published in the Times of India available from the Internet URL website at <http://www.timesofindia.com/070898/07spor22.htm> (visited November 1998).

proceedings brought by athletes. It was created to resolve “disputes of a private nature, arising out of the practice or development of sport and, in a general way, all activities pertaining to sport.”³

To facilitate the operation of CAS, a body called the International Council for Arbitration for Sport (“ICAS”) was created by the IOC, the International Federations (“IFs”) and the National Olympic Committees (“NOCs”). ICAS is a twenty member council that is composed of high level jurists appointed for a renewable period of four years. ICAS members are not allowed to serve as CAS arbitrators or act as counsel in proceedings before CAS.⁴

CAS, which is overseen by ICAS, is split into two divisions. The first is an ordinary arbitration division, which has the task of resolving disputes submitted to the ordinary procedure. The second is an appeals arbitration division, responsible for resolving disputes concerning the decisions of disciplinary tribunals or similar bodies of federations, associations or other sports bodies.

CAS satisfies the essential conditions of independence and objectivity required of an arbitral body and can pronounce awards equivalent to the judgments of state courts. ICAS performs three major functions: (1) it gives greater independence to CAS; (2) it performs all the administrative duties on behalf of CAS including selection and appointment of CAS arbitrators; and (3) it undertakes all financial tasks essential to the operation of CAS. Whereas the tribunals and sports federations cannot prevent an unsatisfied party proceeding before the state courts, arbitration allows a final decision to be reached without recourse to local courts.

The parties involved in the dispute generally have three possible ways of resolving their dispute, be they clubs, sports organisations and associations, athletes, sponsors, suppliers or television companies. They may submit their dispute to (1) the procedures and appeals available under the competent national or international federations where the rules of these bodies permit; (2) the ordinary Courts, provided the Courts have jurisdiction to deal with the issue; or (3) arbitration.

³ Court of Arbitration for Sport. CAS Compilation 1993 (“CAS Code”), available from the Internet URL website at <http://www/olympic.org/eftas.html> (visited November 1998).

⁴ See CAS Code Articles s5 and s9.

ADVANTAGES OF CAS

Compared to proceedings before state courts, CAS has a number of advantages. The following are examples:

- (1) It is suitable for international disputes as the parties are free to choose the applicable law and yet have the benefit of flexible and simple procedural rules.
- (2) There is confidentiality between the arbitrator and the parties, and the award is not published unless the parties agree.
- (3) It has specialist legally trained arbitrators with relevant experience and understanding of sports issues and of matters of concern to sports people.
- (4) It is efficient and quick. A decision generally must be given within six months of the hearing and that decision is final and binding. Generally the ordinary procedure is completed between eight and twelve months of filing a request. If there is an appeal the matter may take a further four months to conclude.
- (5) It is inexpensive and cost efficient. When using the ordinary procedure parties pay the arbitrator's fees and expenses, a share of CAS arbitration costs and the costs of any experts, witnesses or interpreters. The appeal procedure is free except for an initial fee of \$500 payable by the party lodging the appeal. CAS generally funds the appeal costs including the venue and the arbitrator's expenses and fees.

CAS MEMBERSHIP

ICAS appoints 150 persons with legal training and an acknowledged competence in sports issues as members of CAS. They comprise 30 arbitrators from each of the following five groups, namely, (1) those proposed by the IOC; (2) those proposed by the IFs; (3) those proposed by the NOCs; (4) those chosen to safeguard the interests of the athletes; and (5) those chosen from among people independent of the above organisations.⁵ The members appear on the list of arbitrators for a

⁵ CAS Code Article s14.

renewable period of four years.⁶ They must be independent and cannot have any link with the parties in dispute. They must also have the availability to accomplish their task.

JURISDICTION OF CAS

CAS establishes panels of one or three arbitrators and disputes are submitted to the ordinary arbitration procedure. Panels have the task of resolving, by arbitration, disputes that arise within the field of sport in conformity with the procedural rules.⁷ Panels are also responsible for resolving all types of private sports disputes. The disputes include those that arise from various legal relations between parties and which also provide for arbitration by CAS. More specifically, the disputes may concern contracts on sponsorships, the granting of television rights, athletes' undertakings; and athletes and their managers. Also included are disputes that may arise from last instance decisions taken by relevant tribunals within their own organisations or by similar tribunals within sports federations.

The power of CAS panels to deal with these disputes are found in the statutes and regulations of the bodies that provide for the jurisdiction of CAS. This includes disciplinary decisions, in particular regarding doping, decisions regarding the disqualification of athletes, and decisions on the official recognition of events. These disputes are submitted to the appeals arbitration procedure. The panels may also give non-binding advisory opinions at the request of the IOC, IFs, NOCs and the associations recognised by the IOC and the Olympic Games Organizing Committees.

PROCEDURE

The rules in the CAS Code include procedural rules that form an integral part of the code of sports related arbitration. Regulations have been drawn up so that they integrate with the framework established by Chapter 12 of the Swiss Federal Code on International Private Law which governs international arbitration. Arbitration proceedings before CAS allow the parties a

⁶ Ibid Article s13.

⁷ Ibid Article R40.

free choice of their arbitrator(s) for the CAS panel. The arbitrators must be independent and cannot be linked to the parties in any way.

The seat of every arbitration is in Lausanne (Switzerland) where CAS places its infrastructure at the disposal of the parties.⁸ In addition, two decentralized Courts have been established in Sydney and Denver. The actual place of arbitration may be elsewhere, for example, when an *ad hoc* arbitration division of CAS is established for the duration of the Olympic Games. Such divisions were established at Atlanta in 1996 and in Nagano and Kuala Lumpur in 1998.

The arbitration is conducted in French or English. If the parties cannot decide between these two languages, the President of the panel decides for them. The parties may also choose another language by agreement but this choice will require the agreement of the panel.⁹ The panel decides the dispute according to the rules of law chosen by the parties at the outset of the procedure or in the contract which includes the arbitration clause. In the absence of such a choice, Swiss law is applied. The parties may also authorise the panel to decide *ex aequo et bono*.¹⁰

ORDINARY ARBITRATION PROCEEDINGS

To initiate proceedings before CAS a party must forward an application to the head office of CAS in Switzerland.¹¹ The application does not constitute a detailed statement of the case but simply describes the facts and legal issues. Unless it is apparent that there is no agreement that refers to arbitration by CAS, the Court's office forwards the arbitration application to the other parties and requests them to reply to the choice of arbitrators and submit an answer. The answer should include a brief description of the case for the defence. If the respondent contests the competence of CAS, it must express this at the outset within the framework of its reply. The answer may also include any counterclaim.

⁸ See CAS Code Article R28.

⁹ *Ibid* at Article R29.

¹⁰ *Ibid* at Article R45.

¹¹ *Ibid* at Article R38. Note a similar provision in the Statute of the International Court of Justice Article 38(2).

The panel is made up of one or three arbitrators. If the parties cannot agree on their number, CAS takes this decision. The parties are free to choose the way in which the approved arbitrators are designated. If no agreement can be reached, the following applies if:

three arbitrators are provided for, both parties choose an arbitrator and these arbitrators then choose the president of the panel;

one of the parties does not choose an arbitrator or if the arbitrators cannot agree on a president, the president of CAS will choose the arbitrator; or

the single arbitrator is not provided for, the parties may agree on the arbitrator or if no agreement is reached, the president of CAS will choose the arbitrator.¹²

There are two phases in the ordinary arbitration procedure. The first, the written phase, includes one or two exchanges of documents (a statement of case, counter-statement, reply and rejoinder) in which the parties have an opportunity to complete their application or answer respectively. These documents must be accompanied by all evidence on which the parties intend to rely, as well as the list of witnesses and experts they wish to be heard.¹³ The second, the oral phase, includes an oral hearing during which the panel hears the parties, witnesses and experts. The phase is concluded by oral pleadings from the representatives of the parties. The hearing is confidential, unless the parties otherwise agree.¹⁴ The panel has the power to require additional evidence to be produced, to order witnesses to be heard, or appoint an expert.

The award is made by a majority decision, or in the absence of a majority decision, by the president of the panel alone.¹⁵ The decision must be in

¹² Ibid Article R40.2.

¹³ Ibid Article R44.1.

¹⁴ Ibid Article R44.2.

¹⁵ Ibid Article R46.

writing and include the reasons for the decision. The award is final and binding on the parties and may not be challenged or repealed against with the exception of appeals on the following grounds:

incompetence or irregular formation of the arbitration panel;

arbitration award going beyond the application of which CAS is seized;

lack of a decision on one of the major points of the application; or

violation of the rights of the parties to be heard, lack of equal treatment, or incompatibility of the award with public order.

An award must be challenged within 30 days from the date of the award and the only Court of Appeal is the Swiss Federal Tribunal.

APPEAL ARBITRATION PROCEEDINGS

The appeals arbitration procedure is used where a dispute arises from a decision taken by internal tribunals or similar bodies of sport federations, associations or other sports bodies, when the statutes and regulations of those bodies provide for the competence of CAS. A recent example of an appeal is that by the Irish swimmer, Michelle de Bruin, who filed an appeal with CAS following a four year ban handed down on 6 August 1998 by FINA, the governing body of swimming.¹⁶

To initiate an appeal, the applicant must send an application to CAS which includes the claims of the applicant and his or her choice of arbitrator. This is sent with a copy of the contested decision and the provisions of the statutes or regulations confirming that an appeal might exist. Unless the clause of the statutes or regulations of the sports body states otherwise, the time limit for submission of the Statement of Appeal is 21 days from the appealed decision.¹⁷ Ten days after the time limit for appeal expires, the applicant must submit to CAS a Statement of Appeal that contains a description of the facts and the legal arguments giving rise to the appeal,

¹⁶ It is expected that a decision will be delivered within the first half of 1999.

¹⁷ *Ibid* Article R49.

including all the evidence on which it intends to rely.¹⁸ Unless it is apparent to CAS that there is no arbitration agreement, it will forward the Statement of Appeal to the respondent, and the President of the Appeals Division proceeds to constitute the panel. The panel usually comprises three arbitrators with each party appointing an arbitrator and the Appeals Division President appointing the President of the panel.¹⁹

A respondent is required to submit an Answer within 20 days following receipt of the grounds of Appeal. The Answer should include a complete statement of the case of the defence and should be accompanied by exhibits and evidence on which the respondent intends to rely. If the respondent intends contesting the competence of CAS, he or she must do so from the outset in the framework of his Answer.²⁰

In the Appeal, the panel has full powers to review the facts and the law. The panel is not compelled to accept the facts established by the inferior tribunal. The panel will also decide according to the applicable regulations of the sports body involved. If necessary, the panel will have recourse to the law of the country in which the sports body has its domicile to resolve legal questions which the applicable regulations of the body did not permit it to answer.²¹ The time limit to render an award in the appeal procedure is four months from the filing of the statement of appeal although this time limit may be extended.

The award is by majority decision, or in the absence of a majority, by the President of the panel alone. It must be in writing and include reasons for the decision. The award is final and binding. An appeal or recourse is allowed with the exception of annulment proceedings against the arbitration awards on extremely limited grounds. The time limit for challenging the award is 30 days and the only Court of Appeal is the Swiss Federal Tribunal.²²

¹⁸ Ibid Article R51.

¹⁹ Ibid Article R50.

²⁰ Ibid Article R55.

²¹ Ibid Article R58.

²² Ibid Article R59.

CAS IN OPERATION

In recent years, CAS has been increasingly used to resolve international disputes. Since its creation, 215 cases have been referred to it and there have been 35 cases since 1 January 1998.²³ The increased workload is partly due to CAS' efforts to ensure that the system is responsive to the need for an effective, affordable method of dispute resolution.

Prior to the Olympic Summer Games in Atlanta in 1996, ICAS, as the parent body of CAS, set up a special *ad hoc* division with special rules for the settlement of disputes that arose from the Games. The *ad hoc* division was described by CAS as a service to sports and athletes which provided athletes with an independent, fair, quick and inexpensive forum to settle disputes that arose during the Games. For example, instead of expulsion from the Games by the IOC executive board's decision following a positive drug test, an athlete was given an immediate right of appeal to CAS, which in turn had the discretion to allow the athlete to continue competing.²⁴

The *ad hoc* court consisted of a President and Co-President, a court officer and twelve international arbitrators. Judges and lawyers were of a high caliber, from all parts of the world, and who had expertise in sports law. The arbitrators were independent and none had any link with the IOC or any IF. All had been selected from the CAS list of 150 arbitrators.

Typically, what occurred was that following a decision by the executive board of the IOC, the aggrieved party filed an application before CAS. Once the application was received, the President established a panel of three arbitrators to deal with the case. The panel then called a hearing at which the parties (with or without the assistance of lawyers or other persons) presented their case and evidence. After the hearing, the panel made its decision, all within 24 hours of the filing of the application. Depending on the particular case, the decision was either a final decision or a decision that referred the case to a regular CAS arbitration that was to continue after the Olympic Games.

²³ Refer letter dated 3 November 1998 written by M Reeb to the writer.

²⁴ For more information on this case, see the CAS press release that is available from the Internet URL website at <http://www.IJF.org/whatnew/latenews/wn-bb-010.htm> (visited November 1998).

Following on from this experiment, another *ad hoc* division of CAS was established for the recent Winter Olympic Games in Nagano. This division, comprising two Co-Presidents and six arbitrators, had responsibility for resolving all disputes arising out of the Nagano Games. The *ad hoc* division in Nagano received five requests for arbitration. As two of the requests concerned the same dispute it was possible to hear both at the same time.

These two cases,²⁵ the *Rebagaliati case* and the *Samuelsson case*, received an enormous amount of international publicity. In the first, the Canadian athlete Ross Rebagaliati had won the golden medal in the snow boarding giant slalom competition. The athlete tested positive for marijuana and was disqualified by the IOC executive board and stripped of his medal. The athlete's appeal to CAS was upheld on the basis that there was no agreement between the International Ski Federation and the IOC that a positive testing for signs of marijuana could lead to sanctions.

The *Samuelsson case* arose after the International Ice Hockey Federation ("IIHF") disqualified Ulf Samuelsson, a player on the Swedish team on the basis that he had lost his Swedish nationality upon becoming a United States citizen. Nonetheless, the IIHF allowed Sweden to keep the results it had obtained previously with Samuelsson playing. Two applications for arbitration were submitted to CAS, namely, by the Swedish National Olympic Committee and by Samuelsson who asked that he be allowed to continue competing in the Olympic tournament. On the other hand, the Czech National Olympic Committee asked that the matches in which Samuelsson had taken part be forfeited.

Both arbitration requests were dealt with at the same hearing. At the hearing, CAS confirmed that Samuelsson had been granted United States citizenship in November 1995. In accordance with Swedish law, he automatically lost his Swedish nationality. CAS therefore established that he was not eligible to compete for Sweden in the Nagano Games. The request for arbitration by the Czech Olympic Committee was on the basis that according to the IIHF regulations, if a player was proven to be ineligible during the course of a championship, the games played with ineligible players were forfeited. Despite this, CAS observed that the rule

²⁵ Refer to CAS. The Olympic Review. Volume 20, available from the Internet URL website at <http://www.olympic.org/fla/news/review/1998> (visited November 1998).

was intended for competition such as world championships and not for the Olympic Games. The Tribunal held that as the Czech Republic had not played against the Swedish team it had not been disadvantaged. It also concluded that the Czech Olympic Committee was inappropriately placed to ask for a reversal of the IIHF's decision and that the Czech attitude was offensive to the Olympic ideal of fair play. The decision taken by the IIHF was therefore upheld by CAS.²⁶

In relation to the 1998 Commonwealth Games CAS dealt with a number of appeals leading up to the Games. The following are examples:

by Australian sprinter Nova Peris-Kneebone concerning the decision by Athletics Australia to overlook her for one of the three sprinting births available in the 100m race;²⁷

by a squash player Anthony Heel against his exclusion from the Games team;²⁸

by Richard Upton concerning his three months suspension for taking a banned substance;²⁹ and

by rower Nick McDonald Crowley following his ban for taking steroids.³⁰

²⁶ The CAS Olympic Review is available at the following Internet URL website: <http://www.olympic.org.flat.news/review/1998> (visited November 1998).

²⁷ On 4 September 1998 Malcolm Holmes, as the CAS representative, upheld the decision of Athletics Australia: see the website at <http://www.bday.co.za/98/0904/sport/s11.htm> (visited November 1998).

²⁸ CAS Tribunal found that there was no evidence to show that the selection committee had not acted in the best interest of the Australian Commonwealth Games Association or of Squash Australia: see ABC News on 11 August 1998 which is available from the Internet URL website at <http://www.abc.cet.au/news/98/08/10/9808> (visited November 1998).

²⁹ CAS upheld the three month ban.

³⁰ The Court of Arbitration for Sport found that as the rower had received the steroids whilst in hospital battling blood poisoning, he had been given the drugs involuntarily and would be cleared: refer to ABC News on 20 June 1998 which is available from Internet URL at <http://www.abc.net.au/news/sport/moresport/1998/06> (visited November 1998).

CONCLUSION

In an increasingly leisure orientated world, sport plays a greater role as a means of entertainment. The internationalisation of the media and the commercialization of sport have combined to bring about an increase in a number of disputes connected with sports activities. CAS has proven to be increasingly popular as a means of resolving these disputes. CAS has also demonstrated a capacity to respond to the needs of the international sports community for an effective, affordable and accessible means of resolving disputes. This has been evidenced in the establishment of registries in Sydney and in Denver, as well as the use of special tribunals during the course of international competitions, such as the recent Nagano Winter Olympics and the 1998 Commonwealth Games in Kuala Lumpur.

To engender even greater confidence in CAS some commentators have recommended that CAS should do the following:

- publish decisions to permit adequate evaluation of its fairness, consistency and efficiency;

- publish the cost of each CAS arbitration;

- provide for the cross-examination of witnesses before CAS Panels;

- ensure the list of CAS arbitrators includes persons with diverse backgrounds including non-legal backgrounds;

- impose reasonable time limits to complete a CAS arbitration and penalties for undue delays;

- allow more liberal discovery;

- disseminate information to athletes regarding the legal implications of signing agreements to arbitrate; and

- encourage the formation of athlete unions with the authority to negotiate agreements with sports governing bodies.³¹

³¹ Raber, "Dispute resolution in Olympic sport: the Court of Arbitration for Sport" (1998) 8 *Seton Hall Journal of Sport Law* 76, 96.

CAS was established in recognition of the fact that in today's world, sport is business. The success of CAS will be judged according to whether participants in sport continue to embrace CAS as the preferred method of resolving international sporting disputes.