TWENTY YEARS ON: AN EVALUATION OF THE COURT OF ARBITRATION FOR SPORT

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[An examination of the history of world sport, particularly over the past 50 years, provides ample evidence of the broad range of disputes which can arise both on the field and off it. However, sport is unique because existing municipal and international tribunals are inadequate for dealing with, and adjudicating upon, sporting disputes. These disputes demand adjudication by a jurisdiction both knowledgeable in the subject area and capable of administering justice in a timely manner. Within this context, the Court of Arbitration for Sport was established two decades ago. This new, sport-specific jurisdiction has undergone much change and expansion since its creation. This commentary describes the Court and its structural changes since inception, and thereafter examines the jurisprudential trends in its decisions. Although the Court has developed significantly in the last 20 years, it has some way to go to achieve the goals of its founding architects.]

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I INTRODUCTION

Over the past 50 years, international sport and its centrepiece, the Olympic Games, have undergone a metamorphosis of monumental proportions. While athletes were once required to maintain their amateur status so as to qualify for

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competition in the Games, some of the world's highest paid athletes now compete for gold. Athletes with multi-million dollar employment contracts and even larger commercial sponsorship agreements compete, not only for glory and their place in the history books, but also for extravagant financial gain. This increase in the financial benefit available to top athletes has prompted a rise in both the number and breadth of disputes that have emerged in the sporting arena, particularly over the past two decades. These disputes have created the need for an independent tribunal that is both competent to adjudicate such disputes authoritatively, and sufficiently experienced in the world of international sport. In the past two decades, and certainly since the Ben Johnson affair at the Seoul Olympics in 1988,[1] rules governing the use of performance-enhancing drugs in sport have become increasingly relevant, as athletes search for even the smallest competitive advantage. Today, it is also quite common for an athlete to challenge representative selection decisions and even rulings of officials in competition.

In 1983, the International Olympic Committee ('IOC') recognised the obvious need for a tribunal to determine both national and international sporting disputes, and commenced the constructive process of what would become known as the Court of Arbitration for Sport ('CAS'). The function and structure of this body have undergone many changes since its jurisprudential birth in 1986.

This commentary is divided into two parts. The first provides an overview of the CAS in terms of its necessity, function, constitution and independence, with conclusions drawn about its present structure and autonomy. The second tracks, and then critically evaluates, the leading decisions of the jurisdiction and its evolving jurisprudence.

II THE GENESIS OF THE CAS

Prior to the 1980s, there was no competent independent forum with the ability to make authorised and binding decisions on domestic or international sporting decisions.[2] Sport, by its very nature, does not lend itself to protracted litigious disputes, as the immediacy of the sporting event invariably dictates that lengthy adversarial litigation is unsuitable. There was a need for a jurisdiction that was capable of dispensing expedient, flexible, inexpensive and informed judgments on a wide range of issues relating to, and arising out of, sport.[3] This body was required to be independent from international and national sporting federations ('IFs' and 'NFs'), and thus needed to avoid the influence of such federations in their adjudicative decision-making,[4] particularly when hearing appeals.

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1 The events of the 1988 Olympic Games in Seoul are arguably best remembered for the infamous performance of Canadian sprinter Ben Johnson. Johnson went into the Games as the world champion 100 metres sprinter. After easily reaching the final, Johnson faced reigning Olympic champion Carl Lewis. In a previously unthinkable time of 9.79 seconds Johnson annihilated a world-class field and claimed the gold medal and world record. However, this effort was usurped by the events of the following days when Johnson's positive test result for anabolic steroids was returned. This event, more than any other, highlighted to the IOC and world sport the reach of substance use.

2 Matthieu Reeb, 'The Court of Arbitration for Sport (CAS)' (1998) 1 Digest of CAS Awards, xxiii, xxiii.

3 Ibid xxiv.

4 Anthony Polvino, 'Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's CAS and the Future for the Settlement of International Sporting Disputes' (1994) 8 *Emory International Law Review* 347, 358.

By 1980 and the Moscow Olympic Games there was a demand within the Olympic movement for the establishment of such a neutral body to arbitrate disputes arising between athletes, the IOC, IFs, NFs, National Olympic Committees ('NOCs') and other parties involved in world sport.[5]

Juan Antonio Samaranch was elected President of the IOC in 1981. He immediately recognised the necessity of an authoritative tribunal empowered to determine sporting disputes.[6] During the 1982 IOC session held in Rome, a working group chaired by IOC member (and later inaugural President of the CAS) Judge Keba Mbaye was given the responsibility of drafting the jurisdictional statutes of the CAS.[7]

On 6 April 1983, the CAS was formally established by the ratification of its statutes during the IOC session held in New Delhi.[8] Its mission was to provide a forum for the arbitration of disputes arising within the field of sport.[9] The CAS was given three defining roles: to resolve disputes referred to it through ordinary arbitration;[10] to hear appeals from disciplinary tribunals and similar bodies;[11] and to provide non-binding advisory opinions.[12] The jurisdiction of CAS and its services are freely available and are not enforced.[13] Thus, the CAS will only declare itself able to begin hearing a dispute when there is agreement between the disputing parties to cede to its jurisdiction.[14] The seat of the CAS is in Lausanne, Switzerland.[15]

III THE EARLY EVOLUTION AND OPERATION OF CAS

A *From the Commencement of Its Jurisprudential Existence to* Gundel

The jurisprudential life of the CAS began with the hearing of its first dispute in 1986.[16] By 1992, the CAS had been the forum for matters as diverse as the determination of athlete nationality and the validity of employment contracts, to equally varied commercial cases concerning television broadcast, sponsorship and licensing rights.[17] The majority of cases coming before the CAS in these

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5 Richard McLaren, 'International Sports Law Perspective: Introducing the Court for Arbitration for Sport — The Ad-Hoc Division at the Olympic Games' (2001) 12 *Marquette Sports Law Review* 515, 516.

6 'Speech delivered by Mr Juan Antonio Samaranch' (1982) 176 *Olympic Review*, 314, 317.

7 Reeb, 'The Court of Arbitration for Sport', above n 2, xxxiv.

8 McLaren, 'International Sports Law Perspective', above n 5, 516.

9 IOC, *Code of Sports-Related Arbitration* (1994) art S12 ('*CAS Code*').

10 Ibid art s12(a). Note also that art S42 states that the President of the CAS can attempt to resolve a matter through conciliation.

11 Ibid art s12(b).

12 Ibid art s12(c).

13 Reeb, 'The Court of Arbitration for Sport', above n 2, xxiv.

14 *CAS Code*, above n 9, art S1.

15 Ibid. See also C Christine Ansley, 'International Athletic Dispute Resolution: Tarnishing the Olympic Dream' (1995) 12 *Arizona Journal of International and Comparative Law* 277, 298.

16 *Niederhasli Hockey Club v Swiss National Hockey Federation* (Unreported, CAS, Docket No CAS 86/02, 1986).

17 Reeb, 'The Court of Arbitration for Sport', above n 2, xxv.

early years, however, concerned doping offences and appeals of decisions of disciplinary tribunals.[18]

The CAS was slow to gain the confidence of those for whom it was established. Potential interested parties were reluctant to submit to an unfamiliar jurisdiction, as they did not know how it might apply to their case, or how the CAS operated to determine disputes.[19]

The governing statute and procedural regulations defining the operation of CAS were ratified in 1984.[20] There were initially 60 members (also referred to as arbitrators) of the CAS. These arbitrators were elected pursuant to the following formula: the IOC elected 15 arbitrators from among its own members, whilst the IFs and the NOCs were each afforded the same representation; the final quarter of members were directly appointed by the President of the IOC from outside the aforementioned selection groups.[21]

It is important to note from this initial framework that there was no scope for the guaranteed protection of the interests of the athlete in the arbitration process. This polarised selection process meant that all of the CAS arbitrators were chosen by the IOC or by other bodies that control the administration of world sport. Clearly the IOC had too great an influence, either overt or implied, over the composition of what was intended to be an independent body.

In 1991 the CAS published the *Guide to Arbitration*,[22] which contains model arbitration clauses for incorporation into the statutes or regulations of NFs and IFs. These clauses were written to identify the CAS as the forum for hearing appeals from those federations' disciplinary tribunals, remembering that submission to the jurisdiction of the CAS must be voluntary.[23]

However, the federations were extremely slow to adopt these clauses because of the scepticism concerning the independence of the CAS from the IOC. Many saw the CAS, rightly or wrongly, as incapable of impartial arbitration and not a truly independent body. Indeed, Kaufmann argues that the CAS gave the appearance, in its formative years, of being 'the little sibling of the IOC rather than an independent tribunal'.[24] Until 1994, the IOC fully financed the operation and existence of the CAS[25] and held powers over its constitution.[26] In addition, the President of the IOC was ex officio the President of the CAS. In order to carry out the role effectively, the IOC President appointed an Executive President of the CAS, chosen from among its members. Not surprisingly, the Executive President had to be an IOC member.[27]

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18 Richard McLaren, 'A New Order: Athlete's Rights and the Court of Arbitration at the Olympic Games' (1998) 7 *Olympika: The International Journal of Olympic Studies* 1, 5.

19 Ibid 19.

20 Reeb, 'The Court of Arbitration for Sport', above n 2, xxiv.

21 Polvino, above n 4, 362.

22 CAS, *Guide to Arbitration* (1991).

23 IOC, *Court of Arbitration for Sport Statute* (1983) art 19 ('*CAS Statute*').

24 Gabrielle Kaufmann, 'Sports Marketing: Tax and Finance' (Paper presented at the IOC Museum, Lausanne, Switzerland, 1994).

25 *CAS Statute*, above n 23, art 71.

26 Stephen Kaufman, 'Issues in International Sports Arbitration' (1995) 13 *Boston University International Law Journal* 527, 533–4; *CAS Statute*, above n 23, art 7.

27 *CAS Statute*, above n 23, art 7.

A further example of the IOC's intertwined relationship with the CAS was that the *CAS Statute* could only be modified or repealed by a proposal of the IOC's Executive Board and a two-thirds majority vote by the IOC in session.[28] This would prove to be clearly inappropriate to those outside the IOC.

The perception of the CAS being the 'little sibling' of the IOC is perhaps somewhat facile,[29] given that the CAS was jurisprudentially active up until the end of 1992, in which time it received 53 applications for arbitration and 34 applications for advisory opinions, while 21 awards and four advisory opinions were ultimately handed down.[30] Despite this, it is obvious that the IOC had too much control over the CAS up until 1994, undermining its appearance as a truly independent body.

B *The Decision in* Gundel*: A Defining Moment in the History of CAS*

The perception that the CAS lacked independence ultimately led to a judicial challenge to the validity of its decisions. This challenge was brought before the Swiss Federal Tribunal ('SFT') — the highest judicial authority in Switzerland.[31]

In proceedings before the CAS on 10 September 1992,[32] Gundel, a German equestrian competitor appealed a decision of the Judicial Commission of the International Equestrian Federation ('FEI') to suspend and fine him after his mount returned a positive urine test to the banned substance isoxsuprine.[33] Whilst the validity of the *FEI Statutes*' conferral of power upon the CAS was never challenged,[34] the athlete submitted that the CAS was unable to hear the dispute on the basis that the CAS itself lacked the characteristics of independence attributable to a proper court of arbitration.

In the CAS proceedings, it was held irrefutable on the evidence that the banned substance was present in the horse. However, this of itself did not obviate a finding of an intention to create an unlawful advantage on the part of the appellant. The appellant was found to have displayed negligence in the circumstances.[35] The CAS reduced the suspension issued by the FEI from three months to one month, taking into account the unintentional nature of the infraction.[36]

Dissatisfied with the CAS decision, the appellant lodged a public law appeal with the SFT. This appeal was brought on the basis of the perceived bias of the CAS. The First Civil Division of the SFT entered a judgment on the appeal proceedings on 15 March 1993.[37] The SFT examined the legal nature and enforceability of awards delivered by the CAS under the Swiss law relating to international arbitration. The judgment noted an opinion that the CAS is a truly

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28 *CAS Statute*, above n 23, art 75.
29 Kaufmann, above n 24.
30 'Statistics' (1998) 1 Digest of CAS Awards 661.
31 McLaren, 'A New Order', above n 18, 3.
32 *G v International Equestrian Federation* (1992) 1 Digest of CAS Awards 115 ('*Gundel*').
33 Gilbert Schwaar, 'CAS' (1993) 309 *Olympic Review* 305, 305.
34 *Gundel* (1992) 1 Digest of CAS Awards 115, 116–7.
35 Ibid 121–2.
36 Ibid 122.
37 *G v Fédération Equestre Internationale* (1993) 1 Digest of CAS Awards 561.

independent tribunal when the IOC is not a party to proceedings before it.[38] Although the judgment noted a prima facie perception of bias, in that the FEI was a member federation of the IOC, the SFT found that the CAS was independent of the IOC to a degree that justified the upholding of the CAS award.[39]

The SFT did, however, make pointed observations (albeit in *obiter dictum*) concerning the proximity of the relationship between the IOC and the CAS:

> certain objections with regard to the independence of the CAS could not be set aside without another form of process, in particular those based on the organic and economic ties existing between the CAS and the IOC. In fact, the latter is competent to modify the *CAS Statute*; it also bears the operating costs of this court and plays a considerable role in the appointment of its members.[40]

C *The* Paris Agreement *and the Creation of the ICAS*

Although, in *Gundel*, the CAS was held to be a 'true arbitral tribunal',[41] the IOC was swift to take heed of the *obiter* expressed by the SFT and the implications of the perceived lack of independence of the CAS.

In 1993, intending to safeguard the rights of parties before the CAS, the IOC decided to create the International Council of Arbitration for Sport ('ICAS') as the supervisory body of the CAS. This decision was approved on 22 June 1994 by the *Agreement Relating to the Constitution of the International Council of Arbitration for Sport*, which was signed by the IOC, the Winter and Summer IFs and the NOCs.[42] The impetus behind the establishment of the ICAS was the desire to make the CAS wholly independent of the IOC by transferring the responsibility of the financing, administration and control of the CAS to the ICAS.[43] The original statutes and procedural regulations of the CAS were thoroughly revised to incorporate the new supervisory structure. Since 22 November 1994, the new *CAS Code* has governed the organisation, supervision and operation of the CAS.[44]

Many of the procedural rules of the CAS remain unchanged.[45] However, the implementation of the *Code* saw the CAS separated into two divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division.[46] The former was established to hear disputes brought to the CAS at first instance by parties with a valid arbitral agreement between them; the latter was established to resolve appeals from a decision of a disciplinary tribunal or similar body of a sports federation or association, where the statute or regulation of the body provides for an appeal to the CAS. Each of the two divisions is headed by a Division President, whose role it is to rule upon any interlocutory applications

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38 Ibid 568–9.
39 McLaren, 'A New Order', above n 18, 4.
40 *G v Fédération Equestre Internationale* (1993) 1 Digest of CAS Awards 561, 569–70.
41 Ibid 570.
42 (1994) 2 Digest of CAS Awards 883 ('*Paris Agreement*').
43 Schwaar, above n 33, 306.
44 Reeb, 'The Court of Arbitration for Sport', above n 2, xxvii.
45 Nancy Raber, 'Dispute Resolution in Olympic Sport: The CAS' (1998) 8 *Seton Hall Law Journal of Sport Law* 75, 83.
46 *CAS Code*, above n 9, art S20.

that may be made before the appointment of the arbitration panel.[47] Once the panel has been appointed to hear a specific matter, it will take charge of the entire procedure.

In addition to arbitrating disputes, in May 1999 the CAS introduced a more informal service of mediation: a non-binding and informal procedure invoked on the good faith of willing participants. Disciplinary procedures and doping cases are expressly excluded from this process. The mediation is conducted on a 'without prejudice' basis to other available remedies. But it is rarely used; only one such dispute had been submitted to the CAS by 2001, and this was settled prior to the hearing.

The advisory opinion procedure completes the picture. Until 1994, this procedure was available to all sports bodies and athletes. However, the drafting of the *Code* reserved this avenue for the IOC, IFs, NOCs and Olympic Games Organising Committees.[48] Advisory opinions have rarely been requested, and the CAS will refuse to offer opinions on an existing dispute that is likely to be brought before it.[49] The advisory opinion procedure has been used in matters such as the interpretation of incompatible NOC/IOC doping rules and nationality qualification criteria.

The most important of the changes is that the IOC now has no overt control of the operation of the CAS, creating a situation of apparent independence. The ICAS serves as the management and administrative arm of the CAS. It is responsible for financing the CAS and has the express role of safeguarding the independence of the CAS and the rights of the parties.[50] The role of the ICAS extends to the establishment of ad hoc and regional divisions of the CAS where appropriate.[51]

The ICAS is composed of 20 high-level jurists. The IFs, NOCs and the IOC each elect four members. Four more members are then elected by the 12 members already chosen by the IFs, NOCs and the IOC. These bodies have express instructions to choose members who will safeguard the interests of athletes. The final four members are chosen by the 16 members of the ICAS independently of the bodies that have designated the first 12.[52] The President of the ICAS is elected from the 20 members on the nomination of the IOC.[53] Two Vice-Presidents are elected on the nomination of the IFs and NOCs respectively.[54]

The 20 members of the ICAS have the responsibility of electing the members of the CAS in the same ratios as the ICAS members are elected.[55] There are now at least 150 CAS members appointed at any one time, and these members are

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47 Reeb, 'The Court of Arbitration for Sport', above n 2, xxix.

48 'Advisory Opinions' (2002) 2 Digest of CAS Awards 697.

49 Ibid.

50 *CAS Code*, above n 9, arts S2, S6[5.1]–[5.3].

51 Ibid art S6(8).

52 Ibid art S4; The ICAS members elected included those with suitable legal qualifications and professional experience from countries such as Australia, Belgium, France, India, Italy, Japan, Mexico, Switzerland and Tunisia, as well as former US President Gerald Ford: CAS, 'Appointment of Twenty Members of ICAS' (1994) 326 *Olympic Review* 567, 567.

53 *CAS Code*, above n 9, art S6(2).

54 Ibid art S6(2).

55 Ibid art S14.

appointed for a renewable term of four years.[56] Upon election the members must sign a declaration stating that they will discharge their duties with total objectivity and independence in conformation with the *Code*.[57]

The IOC implemented these structural reforms to ostensibly remove the IOC's influence over the CAS. However, due to the process of election of the ICAS members, the four members who are elected by the IOC have significant influence in the election of the final eight members of the ICAS. Whilst obvious improvements to the initial structure have been achieved, it appears that the IOC is reluctant to allow the CAS to function as an entirely independent body.[58] While other world sporting bodies — such as the Union of European Football Associations ('UEFA'), the Associations of Summer and Winter Olympic International Sports and the Association of National Olympic Committees — provide CAS with funding, the IOC is the main contributor.

Whilst athletes' interests have, to some extent, been accounted for in the selection process of the 20 ICAS members, there is no guarantee that a minimum number of former athletes or athlete advocates will be elected to the ICAS. The only explicit reference to athlete representation is in art S4(d) of the *Code*, which provides that four members are elected to the ICAS 'after appropriate consultation with a view to safeguarding the interests of the athletes'.[59] This provision is too ambiguous and fails to specify what 'consultation' actually requires. Indeed, no further direction is to be found in the *Code* beyond the content of art 4(d).

During his speech at the opening of the ICAS constitutive assembly, Juan Antonio Samaranch outlined the IOC's motivation for creating the ICAS:

> the ICAS is not on the margin of justice. Quite the contrary. It plays a full part in it thanks to the operation of the Court of Arbitration for Sport and the quality of the awards that the CAS is called upon to pronounce … The originality of the institution lies in the fact that it makes availalble [sic] to all interested parties … an arbitral and thus judicial organization specific to sport, respecting the fundamental rights of all, and in particular those of the athletes, who are represented within the ICAS. The IOC wishes the ICAS good luck, a good journey and a long life as it hands over and entrusts to it the CAS, now totally independent of the IOC.[60]

While these comments are indicative of the fact that the IOC recognised the need for reform, it could be argued the IOC did not proceed far enough.

The year 1994 can be seen as a turning point for international sports jurisprudence. The reformed CAS model and its independence from the IOC enjoyed increased confidence from the international legal fraternity, IFs and athlete representative groups. It is no coincidence that the nine years since the signing of the *Paris Agreement* have witnessed significant growth in the use of, and regard for, the CAS. Its enhanced reputation is evident in the affirmation of its awards by superior domestic courts. This commentary will now discuss how

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56 Ibid art S13.

57 Ibid art S5.

58 Mary Fitzgerald, 'The Court of Arbitration for Sport: Dealing with Doping and Due Process during the Olympics' (2000) 7 *Sports Lawyers Journal* 213, 222.

59 *CAS Code*, above n 9, art S4(d).

60 Ibid.

the CAS has, through its operation and pronouncement of judgments, become a specialist body of sports jurisprudence.

IV THE DEVELOPMENT AND PERFORMANCE OF THE CAS SUBSEQUENT TO THE CREATION OF THE ICAS

A *The Creation of the Decentralised Offices and Ad Hoc Divisions of CAS*

Shortly after the creation of the ICAS, the CAS went through a significant structural expansion with the establishment of both decentralised offices and Ad Hoc Divisions ('AHDs').

1 *The Decentralised Offices of CAS*

Up until 1996, the parties appearing before the CAS were predominantly European. This was a valid criticism of the Court. Because of this concentration of jurisprudential focus, the geographical position of the decentralised offices becomes important: they must contribute to an increased presence of the CAS outside Europe.

In 1996, the ICAS created two permanent decentralised CAS offices outside Lausanne, in Denver, United States and Sydney, Australia.[61] Both decentralised offices are able to receive and notify all procedural acts. The CAS structure ensures that sufficient members are situated in the region of the two decentralised offices to hear disputes. For example, in the Oceania region there are currently 21 members of the CAS appointed from Australia and New Zealand.[62] Importantly, however, these 21 members are not appointed only to hear disputes submitted to the Oceania Registry. Both of the DOs were created by the ICAS in anticipation of forthcoming summer Olympic Games in the US and Australia respectively.[63]

The Oceania Division of the CAS in Sydney has dealt with a breadth of sporting disputes arising primarily within Australia, particularly in the lead up to the Sydney Olympic Games in 2000.[64] It is interesting to contrast this level of activity with that of the US decentralised office, both generally, and particularly in the lead up to the Atlanta Olympics in 1996. However, it was not used nearly as frequently as the Oceania Division four years later.[65] This is largely because the CAS was less well-known and less respected by potential parties in 1996, as it had only been in existence for a decade, and the decentralised offices and the AHD were new concepts. Furthermore, US athletes are more likely to take their sporting disputes to the mainstream legal arena.

With the prominence and successes of the CAS, particularly the AHDs during the 1996 Summer and 1998 Winter Olympic Games, the upsurge in usage of CAS prior to the Sydney Games is not surprising. The *Australian Olympic Team Membership Agreement (Athletes)* for the 2000 Olympic Games contained a

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61 Matthieu Reeb, 'Court of Arbitration for Sport: History and Operation' (2002) 2 Digest of CAS Awards xxiii, xxix. In December 1999, the Denver office was shifted to New York.

62 CCH, *Australian Sports Law*, vol 1 (at 4-7-01) ¶67-400.

63 McLaren, 'International Sports Law Perspective', above n 5, 520.

64 Ibid.

65 Ibid.

dispute resolution clause providing that the CAS held the sole and exclusive jurisdiction for the resolution of all selection disputes, and indeed every other dispute touching and concerning the agreement itself.[66]

The decentralised offices of the CAS provide a convenient venue for CAS arbitration proceedings to take place outside Europe. The continued success of the two current decentralised offices will probably prompt the ICAS to consider creating additional offices. With future Summer Olympic Games, in particular those to be held in Beijing in 2008, the ICAS may establish a decentralised office in mainland Asia.

2 *The Ad Hoc Divisions of CAS*

Article 74 of the *Olympic Charter* states:

> Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the *Code of Sports-Related Arbitration*.[67]

The IOC inserted this article in 1995 when amending the *Charter* to permit the establishment of an AHD of the CAS to resolve disputes during the Atlanta Olympic Games.[68] The exclusive jurisdiction of the AHD at the Games is further confirmed by a clause in the athlete entry form.[69]

Any proceedings of the AHD are governed by the *Rules for Olympic Games Arbitration* for those particular Games ('*AHD Rules*'). These *Rules* are drafted and enacted by the ICAS prior to each Olympiad, and are designed to be applied to proceedings complementing the *CAS Code*. Furthermore, chapter 12 of the *Code on Private International Law 1987* (Switzerland) governs AHD arbitration proceedings.[70] This legislation applies to AHD arbitration as a result of the express 'choice of law' provision contained in art 17 of the *AHD Rules*.[71]

The first AHD was formed in 1996 to determine disputes arising during the Atlanta Olympic Games, aiming to decide matters within a 24-hour timeframe.[72] Subsequent AHDs have been established for the 1998 and 2002 Winter Olympic Games, as well as for the 2000 Summer Olympic Games. In addition, AHDs were created for the 1998 Commonwealth Games in Kuala Lumpur, and the 2002 Commonwealth Games in Manchester. The UEFA requested that the CAS form an AHD for its 2000 soccer championships.[73] The request was granted, and meant that, for the first time, an AHD had been formed for a single-discipline sporting event.

The *AHD Rules* state that, in accordance with rule 74 of the *Olympic Charter*, the jurisdiction of the AHD is to resolve disputes that arise in the host country

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66 Australian Olympic Committee, *Australian Olympic Team Membership Agreement (Athletes)* (1998) s 21.

67 IOC, *Olympic Charter* (4 July 2003) r 74.

68 McLaren, 'A New Order', above n 18, 4.

69 Richard McLaren, 'The CAS: An Independent Arena for the World's Sporting Disputes' (2001) 35 *Valparaiso University Law Review* 379, 390.

70 ICAS, *Arbitration Rules for the XXVII Olympiad in Sydney* (29 November 1999) art 7 ('*Sydney Rules*').

71 McLaren, 'The CAS', above n 69, 391.

72 Reeb, 'Court of Arbitration for Sport: History and Operation', above n 61, xxix.

73 Ibid xxx.

during the period from nine days prior to the commencement of the Olympic Games until their conclusion.[74] A special list of arbitrators is drafted by the ICAS to constitute the AHD and is published prior to the approaching Games.[75] The arbitrators must be present at the Olympic Games for the duration of the AHD jurisdictional period.[76]

The role of the President and Co-President of the AHD in Sydney was to perform the functions conferred by the *CAS Code*. The role of President could be interchanged between either office bearers when an office bearer's impartiality could not be guaranteed.[77] Interestingly, a Co-President was not provided for in the *AHD Rules* in Salt Lake City.[78] The 2000 Olympic Games drew more than three times the number of competitors from over twice the number of competing countries than the 2002 Winter Olympic Games, so the provision of a Co-President in Sydney was not surprising.

The return of an AHD decision within 24 hours of application is of vital importance during the Olympic Games, given that the impending decision may have a fundamental bearing on that athlete's right to compete. In cases of extreme urgency, the President or the AHD panel may rule on an interlocutory application and grant relief without first hearing the respondent.[79] In this instance, consideration must be given to whether it is necessary to protect the applicant from irreparable harm; whether the substantive claim is likely to succeed; and whether the rights of the applicant outweigh those of other interested parties, including, but not limited to, opponents in competition.[80]

The AHD President establishes a panel of three arbitrators from the specific AHD list.[81] However, in certain instances, the President may appoint a sole arbitrator.[82] Whilst proceedings themselves are free of charge, the cost of representation must be borne by the parties.[83]

A defence brought on the ground that the AHD lacks jurisdiction must be raised before the commencement of the arbitration proceedings.[84] The panel has full control over the proceedings and the admissibility of evidence.[85] In order to facilitate the efficient conduct of proceedings, the panel can summons parties on very short notice and can proceed in default of the appearance of a party.[86]

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74 *Sydney Rules*, above n 70, art 1. See also ICAS, *Arbitration Rules for the XIX Olympic Winter Games in Salt Lake City* (5 November 2001) ('*Salt Lake City Rules*'). *Contra* ICAS, *Rules for the Resolution of Disputes Arising during the XVIII Olympic Winter Games in Nagano* (9 April 1997) ('*Nagano Rules*'), which provided that the AHD jurisdictional period was only for the actual duration of the Games.

75 *Sydney Rules*, above n 70, art 3.

76 Ibid art 12.

77 Ibid art 4.

78 *Salt Lake City Rules*, above n 74, art 4.

79 Ibid art 14.

80 Ibid.

81 *Sydney Rules*, above n 70.

82 Ibid art 11.

83 Ibid art 22.

84 Ibid art 15(a).

85 Ibid art 15(b), 15(d).

86 Ibid art 15 (c).

The decision of the panel must be signed and dated by its President, and there must be brief written reasons explaining the decision.[87] The decisions of the AHD panels are immediately enforceable and may not be appealed or otherwise challenged.[88]

B *The Jurisdiction of CAS and the Ad Hoc Division for the Olympic Games: The Development of a Sports-Specific Jurisprudence*

This commentary will now examine the scope of the jurisdiction that the CAS possesses to hear and adjudicate cases submitted to it. An analysis of individual decisions of the CAS will prove useful in assessing the developing body of sports jurisprudence resulting from its operation.

1 *The Jurisdiction of CAS and the Ad Hoc Division during the Olympic Games*

Generally, the jurisdiction of the CAS extends to any private dispute with a nexus to sport. Article 12 of the *CAS Code* states the CAS has 'the task of providing for the resolution by arbitration of disputes arising within the field of sport'.[89] This is an extremely wide ambit. Importantly, the CAS has never been forced to declare itself lacking jurisdiction on the basis of a dispute being outside the field of sport.[90] In its jurisprudential history, the CAS has heard and decided upon disputes concerning issues as broad as the nationality of athletes, selection disputes, television broadcast and marketing rights. However, the largest proportion of disputes submitted to the CAS relates to appeals from disciplinary decisions taken by competent sports authorities and IFs. The majority of such appeals involve doping issues, although appeals have also been submitted regarding on-field sporting violence, the mistreatment of horses participating in equestrian events,[91] the selection of athletes in national representative teams and the official recognition of sporting events as valid selection criteria.[92] In 2000, 65 per cent of the cases determined by the CAS — including the 15 cases of the AHD at the Sydney Summer Olympic Games — concerned disciplinary appeals.[93] For the period from 22 November 1994 to 31 December 2000, there were 30 applications for ordinary arbitration, whilst in the corresponding period there were 141 applications on appeal from decisions of sports bodies. During the life of the 2002 AHD, only one of seven disputes submitted related to doping.

Historically, the CAS has been regarded as a tribunal designed to settle disciplinary disputes.[94] While the CAS continues to gain recognition as a competent and independent body, it is likely that standard 'choice of jurisdiction' clauses will be increasingly inserted in sports contracts of all classes (such as

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87 Ibid art 15(e).
88 Ibid art 19.
89 *CAS Code*, above n 9, art S12.
90 Reeb, 'Court of Arbitration for Sport: History and Operation', above n 61, xxix.
91 Ibid.
92 CCH, above n 62, ¶67-495.
93 Ibid.
94 Matthieu Reeb, 'Intervention by the CAS' (1997–98) 26 *Olympic Review* 81.

athlete performance and sponsorship agreements), identifying the CAS as the body to determine disputes arising from the agreement.

AHDs are created to complement rule 74 of the *Olympic Charter* in so far as the latter provides that the AHD is possessed of sole jurisdiction to determine disputes arising out of or connected with the Olympic Games for which the particular AHD is created.

The breadth of the applications made to the AHDs since 1996 has helped define its jurisdiction. The decision in *Schaatsefabriek Viking B V v German Speed Skating Association*[95] is pivotal in defining a 'dispute arising on the occasion of, or in connection with, the Olympic Games'.[96] The case involved an application to the AHD by a manufacturer of ice skates used by Olympic competitors in speed skating. The application sought injunctive relief prohibiting members of the German National Skating Federation from wearing skate covers over their skates. These covers were manufactured by a rival of the applicant, creating an impression that the rival had manufactured the skates.[97] Further, the applicant claimed that it lost the exposure effect of their insignia being seen during Olympic competition. The applicant claimed that this was a violation of rule 61 of the *Olympic Charter* which limits the display of the logo 'of the manufacturer of the article or equipment concerned'.[98]

The AHD Panel found that there was no violation of the *Olympic Charter*, as rule 61 merely serves to regulate the size of commercial logos on an athlete's clothing and equipment.[99] The absence of any dispute concerning the *Charter* meant that the AHD did not have the authority to issue an award in the matter, given its limited jurisdiction under the *Nagano Rules* art 1.[100] Therefore, the AHD did not consider the merits of the arguments presented, but did emphasise that its decision was only made in application of the precise terms of the *Olympic Charter*. There was no consideration of the respective rights of the parties under the municipal law of the host country. Further, the applicant was not prevented from pursuing the matter in the Japanese courts.

A second decision of the AHD in Nagano helped define the limits of its jurisdiction. In the case of *Steele v CIO*,[101] the first applicant in the proceedings was held not to have standing before the AHD because he was not recognised by his nation's official winter sports body, the Puerto Rican Winter Sports Federation. They had refused to nominate him for the Games. He could not, therefore, bring the matter to the AHD as an athlete, and private citizens do not have standing before the AHD. Consequently, the matter was dismissed without consideration of the facts.[102] The second applicant, the Puerto Rican Ski Federation, also failed to establish standing, as the NOC did not recognise it as an official national winter sports federation.[103]

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95 (Unreported, CAS Ad Hoc Division (OG Nagano), 1998).
96 *Olympic Charter*, above n 67.
97 McLaren, 'A New Order', above n 18, 12.
98 *Olympic Charter*, above n 67, bye-law to r 61, para 1.
99 McLaren, 'A New Order', above n 18, 12.
100 *Nagano Rules*, arts 1– 2.
101 (Unreported, CAS Ad Hoc Division (OG Nagano), 1998).
102 McLaren, 'A New Order', above n 18, 13.
103 Ibid.

In *Bassani-Antivari v International Olympic Committee*,[104] the Salt Lake City AHD addressed art 1 of the *Salt Lake City Rules*, which provided that the AHD had jurisdiction over 'disputes covered by Rule 74 of the *Olympic Charter* and by the arbitration clause inserted in the entry form at the Olympic Games'. This was considered in the context of an athlete who failed to submit a valid entry form but whose dispute was covered by rule 74 of the *Charter*.[105] The Panel held that the 'and' in this sense is conjunctive. The fact that the applicant did not have a valid entry form submitted on her behalf precluded the jurisdiction of the AHD. This reasoning was confirmed in the later decision of this AHD in *Billington v Fédération Internationale de Bobsleigh et de Tobogganing*.[106] The jurisdiction of the AHD, particularly at the Olympic Games, is therefore limited.

2 *Jurisprudential Trends in the Case Law of the CAS and the Development of a* Lex Sportiva

An objective of the CAS is

> to develop a jurisprudence that can be used by all the actors of world sport, thereby encouraging the harmonisation of the judicial rules and principles applied within the sports world.[107]

Although the CAS has been hearing disputes for less than two decades, an examination of its decisions shows an emergence of identifiable trends in CAS decision making: a sports-specific jurisprudence, or *lex sportiva*. This jurisprudence is relevant not only to potential parties before the CAS but also to the wider sporting community. Professional sport in the 21st century is a global commodity. The media and the sports marketing industry are largely responsible for this. The modern nature of sport therefore insists that sports law be an international law concern rather than domestic law of a national jurisdiction. As sport at the highest level is an international concern, a developing international jurisprudence is desirable. There is a need for international regulation, coupled with an observance of different national and sport-specific characteristics.

(a) Doping Cases

The majority of matters submitted to the CAS are to the Appeals Arbitration Division. Historically, most of these have been appeals against doping decisions, not only of human athletes, but also of equine sporting competitors.[108] Rarely will the veracity of a positive test result for banned substances go unchallenged. This is the reason for the high number of appeal decisions.

In many respects, doping in world and Olympic sport is not a recent phenomenon. For instance, the death of a cyclist at the 1960 Rome Olympics has since been attributed to doping. Partly in response to this tragic death, the IOC drafted its first list of banned substances in 1967.[109]

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104 (Unreported, CAS Ad Hoc Division (OG Salt Lake City), Docket No 02/003, 2002).
105 Ibid [4.13].
106 (Unreported, CAS Ad Hoc Division (OG Salt Lake City), Docket No 02/005, 2002).
107 Reeb, 'Court of Arbitration for Sport: History and Operation', above n 61, xxx.
108 See especially *Gundel* (1992) 1 Digest of CAS Awards 115.
109 Fitzgerald, above n 58, 234.

The CAS, through a consideration of many doping offence appeals cases, has been able to develop a scheme of specific issues requiring consideration in each individual case. Michael Beloff, a longstanding CAS member, has set out five factual bases upon which a review is conducted by a CAS Panel in a doping case:

1 Is the sample taken that of the athlete and was the chain of custody sound?
2 If the sample is that of the athlete, is it free from contamination?
3 Was the testing equipment functioning properly?
4 Was the substance exogenous or indigenous?
5 Did the athlete take the substance knowingly, negligently or accidentally?[110]

The issue of knowingly or otherwise ingesting the substance is not relevant to the question of guilt. Rather, it is relevant to the issues of mitigation and sentencing, for doping cases are fundamentally examinations of strict liability. In addition to the considerations detailed above, the Panel must also ensure that the substance in question is actually on the relevant banned list — for example, the *Olympic Movement Anti-Doping Code* list in the case of the Olympic Games.[111]

Two decisions of the AHD in Atlanta and Nagano dealt with banned substances. In the first, the Atlanta AHD heard an appeal from a decision taken by the IOC Executive to strip two Russian athletes of their Olympic medals, as they had tested positive to the drug Bromantan.[112] The appeals were argued on two bases: first, Bromantan was not specifically listed on the *IOC Medical Code* list of banned substances;[113] and second, the substance in question lacked performance-enhancing qualities. After hearing expert evidence supporting the second proposition, and examining the *IOC Medical Code* on the first point, the appeal was upheld.[114] Indeed, the substance was not on the IOC banned list.

The second and higher profile decision was delivered at the 1998 Winter Olympic Games in *R v International Olympic Committee*.[115] Canadian snowboarder Ross Rebagliati won the gold medal in the giant slalom competition on 8 February 1998. Following the competition, Rebagliati was subjected to routine drug testing, which delivered a positive reading for marijuana. Three days after being awarded gold, Rebagliati was disqualified by the IOC Executive Committee and stripped of his medal. Rebagliati immediately appealed to the AHD seeking a reversal of the IOC decision.

Rebagliati argued that he had not actively ingested marijuana since April 1997, and further, that the only possible instances of exposure occurred on 28

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110 Ibid 235.

111 IOC, *Olympic Movement Anti-Doping Code* (2002) <http://multimedia.olympic.org/pdf/en_report_21.pdf> at 1 October 2003 ('*Anti-Doping Code*').

112 See Melissa Bitting, 'Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?' (1998) 25 *Florida State University Law Review* 655, 675.

113 The *IOC Medical Code* was superseded by the *Anti-Doping Code* in 2000: IOC, *Explanatory Memorandum concerning the Application of the Olympic Movement Anti-Doping Code* (1999) 3 <http://multimedia.olympic.org/pdf/en_report_23.pdf> at 1 October 2003. The World Anti-Doping Agency's *World Anti-Doping Code* is expected to be adopted prior to the 2004 Olympic Games in Athens and will supersede the IOC *Anti-Doping Code*.

114 Bitting, above n 112, 676.

115 (1998) 1 Digest of CAS Awards 419 ('*Rebagliati*').

and 31 January 1998, when he attended parties where the drug was being smoked by other partygoers.[116] The IOC did not challenge Rebagliati's evidence on the possible means of ingestion, but submitted that the sanction was appropriate even on Rebagliati's version of events.[117]

The IOC Executive Committee based its decision on chapter II, art III of the *IOC Medical Code*, which states that screening might be conducted for cannabinoids, with the possibility of results leading to sanctions.[118] Conversely, chapter II, art I of the *IOC Medical Code* named five different classes of 'prohibited substances' without including marijuana. Furthermore, the IOC published, at a time preceding the Nagano Olympic Games, a list of banned substances which did not include marijuana.[119] Therefore, the question before the AHD was whether the IOC had properly based their decision on some identifiable legal basis.

Oral evidence was taken from officers of the IOC Medical Commission indicating that the IOC would not include marijuana on the banned substance list unless the IOC and a particular sports federation had agreed to enforce such a ban. In particular, Prince de Mérode of the IOC Medical Commission stated in testimony that the use of marijuana among athletes was an act only 'submitted to some restriction',[120] and not one that was subject to doping control. Evidence was also taken from the President of the International Ski Federation to the effect that there had been no joint sanction agreed upon by the IOC and the International Ski Federation to place marijuana on the banned substance list, and that using marijuana was not considered doping in the sport of slalom snowboarding.[121]

In light of the evidence that marijuana was not placed on the list of banned substances, the AHD overturned the IOC decision to strip the athlete of the gold medal. In judgment, the AHD stated that the IOC 'cannot invent prohibitions or sanctions where none appear', and therefore the IOC decision lacked the 'requisite legal foundation'.[122]

The history and outcome of the *Rebagliati* decision are also interesting from a wider social perspective. The case received much worldwide media attention — some would say too much for an athlete in a relatively minor sport of the Winter Games. This was no doubt partly attributable to the substance in question. Whether or not Rebagliati actually took marijuana — and the accepted evidence was that he did not knowingly take the substance — the inescapable fact is that drugs classed as either recreational or addictive (as opposed to those classified as performance-enhancing) are a continuing societal problem. The possession, use and sale of such drugs is illegal in most countries. Whilst their performance-enhancing characteristics are clinically debatable, the image of athletes using such substances is clearly undesirable. Perhaps the IOC had this

116 Ibid 420.
117 Ibid 421.
118 Ibid.
119 Ibid.
120 Ibid.
121 Ibid 423.
122 Ibid 425.

thought in mind when stripping the competitor of his gold medal without first consulting the list of banned substances.

Where there is no legal doubt as to whether the substance is banned, then the scope for the athlete to appeal against imposed sanctions on a point of law narrows considerably. It appears that the CAS steadfastly imposes the principle of strict liability — liability notwithstanding the absence of any fault or negligence on the part of the accused.[123] Once it is shown through sanctioned doping control that the banned substance is present in the athlete's system, the onus of proof then shifts to the athlete to rebut the presumption of guilt. Thus, the mere fact that the substance is found to be in the athlete's system finds the offence prima facie proven. This is confirmed in a line of CAS decisions including *AC v Fédération Internationale de Natation Amateur*,[124] *National Wheelchair Basketball Association v International Paralympic Committee*[125] and *C v Fédération Internationale de Natation Amateur*.[126] The judgment of the last case is demonstrative of the reasoning of CAS jurisprudence:

> The system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt[.][127]

Whether such a jurisprudential rationale is the most appropriate model is debatable, especially in light of the following case.

The application of this jurisprudential principle was perhaps best illustrated in the decision of the Sydney AHD in *Raducan v International Olympic Committee*.[128] Of all the decisions of the AHD in Sydney, it is not surprising that this case received the most media attention.

On 19 September 2000, 16 year-old Romanian artistic gymnast Andreea Raducan won Olympic gold in the Women's Teams Finals. Following competition she was not subjected to doping control. The following day, Raducan reported to the Romanian team doctor, a Dr Oana, with symptoms of headache and congestion. Oana prescribed one 'Nurofen Cold and Flu tablet', which Raducan ingested in Oana's presence. The next day, 21 September, Raducan competed in the women's individual all-round event and again won gold. On the day of competition but before commencing her routine, she again complained to Oana of symptoms similar to those of the previous day, and was given another Nurofen tablet.

In accordance with the doping control measures in force at the Sydney Games, Raducan was instructed to present to the Doping Control Station, where she provided a urine sample for drug analysis immediately at the conclusion of the event. On 24 and 27 September 2000, test results were delivered for the 'A' and 'B' urine samples. Raducan had tested positive for pseudoephedrine at a level three times the allowable threshold under the *Anti-Doping Code*. On the

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123 CCH, above n 62, ¶67-585.
124 (1997) 1 Digest of CAS Awards 251.
125 (1996) 1 Digest of CAS Awards 173.
126 (1996) 1 Digest of CAS Awards 215.
127 Ibid 220.
128 (2000) 2 Digest of CAS Awards 665.

Doping Control Official Record completed at the time of giving the urine sample and signed by Raducan, it was declared that she had taken one Nurofen on 21 September, but she did not declare the tablet taken on 20 September.

On 26 September 2000, the IOC Executive Board disqualified Raducan from the Women's All-Round Event for use of prohibited substances and ordered the return of her medal. An appeal was immediately submitted to the AHD and a hearing of the matter proceeded on 27 September.

As to the reason for the offending levels of pseudoephedrine in her system, the Panel accepted Raducan's version of events. Raducan submitted that she should bear no personal responsibility for the positive test because the team doctor, who, by virtue of his position, was implicitly trusted by the Romanian athletes, gave the Nurofen tablets to her.[129] She stated that she merely complied with the doctor's direction for the relief of her symptoms.

It was held, however, that the *Anti-Doping Code* specifically considers doping a strict liability offence, and in the circumstances of this case an offence had been committed. Raducan also argued that she did not take the Nurofen to gain a competitive advantage. This submission was defeated by chapter II, art 4.4 of the *Anti-Doping Code* which provides that for a doping offence to have been committed it merely needs to be demonstrated that the prohibited substance was used. The success or failure of a prohibited substance is immaterial.[130] Having found the charge proven, the Panel found it was unable to apply discretion in the extenuating circumstances,[131] but rather was bound by chapter II, art 3.3, which stated that the appropriate sanction is the 'invalidation of the result obtained'.[132]

On 24 September, Raducan competed in the women's vault, where she won a silver medal. She provided a urine sample for analysis and tested negative to any prohibited substance.

Only a very small proportion of athletes do not, at least to some degree, attempt to contest a positive test for prohibited substances. With the lure of commercial endorsements and other fruits of success at the highest level, this is in no way surprising. It has been argued that the use of performance-enhancing substances will not be stemmed by anything less than a 'zero-tolerance' jurisprudential standard employed by adjudicative tribunals such as the CAS. Similarly, any other model would only invite the athlete to mould testimony to fit with what was deemed 'acceptable' doping. However, the penalty was far too severe in Raducan's case. Unfortunately the AHD was bound on sentencing by the *Anti-Doping Code*. There is no doubt that Raducan was an experienced athlete in her chosen sport. However, she was only 16 years old, and depending on her performance in Athens in 2004, she will be remembered for this decision rather than for her gold medal on-field performances. In the end, she received the same penalty as Ben Johnson had 12 years earlier. Whilst both athletes took banned substances, the AHD in *Raducan* was effectively hamstrung in properly considering the circumstances of mitigation. In comparison to the equally high profile Johnson disqualification, no weight was given to the relevant performance-enhancing qualities of the respective substances.

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129 Ibid 669.
130 Ibid 670.
131 Ibid 672.
132 Ibid 671.

A review of CAS decisions indicates that the subjective elements of each case are taken into account when considering the appropriate level of disciplinary sanction. In the case of *Foschi v Fédération Internationale de Natation Amateur*,[133] the CAS upheld a decision by the *Fédération Internationale de Natation Amateur* ('FINA') to impose sanctions on the athlete for a doping offence. However, the FINA penalty was reduced from two years to six months' disqualification because the athlete was only 13 years old. Furthermore, she was found to be an honest athlete possessing much integrity, and her performance was not enhanced by the ingestion of the banned substance.[134]

This decision is somewhat inconsistent with *Raducan*. This can be explained in part by the inclusion of the explicit sanction clause contained in the *Anti-Doping Code* operational in *Raducan*, and perhaps the perceived need to eliminate banned substances in Olympic competition. One view is that the *Foschi* penalty invites criticism, considering the level of education and literature on the issue of drugs in sport provided to athletes and coaches. According to this stance, nothing less than a meticulous approach to the subject by honest athletes will suffice in the present environment. The contrary view is that sentencing codes in doping statutes should be more accommodating of the particular circumstances of the offence, particularly the knowledge (or mens rea) of the athlete. This view endorses a shift away from the imposition of strict liability and is a more attractive, albeit complex, option. With such a rationale, athletes possessing the obvious integrity of Andreea Raducan would not have their names indelibly etched in Olympic history for the wrong reasons.

Also instructive on the CAS treatment of doping offences is the decision of the Sydney AHD in *Tzagaev v International Weightlifting Federation*.[135] In this matter an appeal was submitted by Alan Tzagaev, a member of the Bulgarian weight-lifting team. After three members of the team had tested positive to banned substances, the IWF issued a letter to the Bulgarian Weightlifting Federation immediately suspending the entire team for a period of 12 months. Tzagaev was effectively suspended from Olympic competition, even though he had not tested positive. The basis of Tzagaev's application was that he personally had not been found guilty of doping, and further, that his suspension was not justified by reference to any specific statute or regulation.[136]

The AHD found that the decision of the IWF to suspend the entire team was made ultra vires, given that there was no 'explicit, and unambiguous legal basis' justifying it.[137] The precise provision upon which the IWF sought justification for penalty was a rule allowing the IWF to impose a monetary penalty on a federation, should three separate doping offences be proven. Suspension pursuant to the rule only stemmed from a failure to pay the fine.[138] The issue of doping in sport is one that inspires much debate. This issue in many respects threatens the very essence of sport: fair play. Thus, doping is seen fundamentally as cheating. Whilst it is beyond the scope of this commentary to enter into an

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133 (Unreported, CAS, Docket No CAS 97/156, 1997) ('*Foschi*').
134 McLaren, 'A New Order', above n 18, 8.
135 (2000) 2 Digest of CAS Awards 658.
136 Ibid 661.
137 Ibid 663.
138 McLaren, 'International Sports Law Perspective', above n 5, 533.

ethical debate on the use of drugs in sport, it is of concern to note the inflexibility of certain penalties, highlighted in *Raducan*. Furthermore, *Tzagaev* and *Rebagliati* serve to highlight the inadequacies in doping policies and the way that they are applied by tribunals. In *Raducan*, uniformity was paramount. In *Tzagaev* and *Rebagliati*, a review of selected CAS decisions confirms that the CAS is an ardent supporter of strict liability.[139] A more sophisticated model may be more equitable to athletes.

(b) Cases on Issues other than Doping

Following the creation of the ICAS, the CAS has increasingly become the forum for the determination of matters unrelated to drug misuse.

(i) Athletes' Rights

In *A v National Olympic Committee of Cape Verde*,[140] the Cape Verde NOC dismissed certain athletes who had repeatedly undermined the organisation, and questioned the authority of the NOC President. The applicants included an athlete entered in the heats of the 110 metre hurdles. Andrade was alleged to have carried the Cape Verde flag at the Opening Ceremony of the Centennial Games contrary to a Cape Verde NOC direction that the *chef de mission* of the Cape Verde NOC be the flag bearer.

The decision of the Cape Verde NOC to dismiss the athletes during the Games was made without obtaining consent from the IOC Executive Board as required by paragraph 7 of the bye-law to rule 49 of the *Olympic Charter*.[141] The AHD concluded that the Cape Verde NOC decision had been made without proper legal grounding, and therefore should be overturned. The Cape Verde NOC admitted to the AHD that neither they nor the IOC had explained to the athletes the allegations against them, nor had the athletes been given an opportunity to respond.

The athletes were allowed to remain in the Olympic Village pending a full adjudication of the dispute. Following the Cape Verde NOC gaining IOC Executive approval for the removal of the athletes, the Cape Verde NOC again attempted to take away the parties' participation and accreditation rights. The dispute reappeared before the AHD, the outcome according with the first decision.[142]

The IOC Executive Board did endorse the Cape Verde NOC decision after the Cape Verde representatives had been informed of their purported removal from the Olympic Village. The fact that the AHD overturned the ratified decision of the Cape Verde NOC is important because it demonstrates a clear independence of the CAS from the IOC. It also appears paramount that the AHD will seek to protect the rights of competing athletes.

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139 See, eg, *USA Shooting v International Shooting Union* (1995) 1 Digest of CAS Awards 187.
140 (1996) 1 Digest of CAS Awards 389.
141 Ibid 391.
142 *A v National Olympic Committee of Cape Verde [No 2]* (1996) 1 Digest of CAS Awards 397.

(ii) Interference with the Technical Rules of a Particular Sport

In *M v Association Internationale de Boxe Amateur*,[143] the appellant sought to challenge his disqualification for a below the belt punch in a preliminary bout. He asked the Atlanta AHD to review the video footage of the fight, which, he submitted, showed that the relevant punch was delivered to the liver region of his opponent, and was not worthy of disqualification.

The judgment acknowledged that the AHD is far less well placed to decide on the applicability of technical rules of a sport than the officials who made the particular decision. There was no suggestion by the athlete that there was an error of law, nor that a wrong or malicious act had been committed against him by the technical judges in reaching their decision to disqualify him. As such, the AHD refused to become involved and adjudicate the matter.

Similarly, in the case before the Sydney AHD of *Segura v International Amateur Athletic Federation*,[144] the Mexican athlete Bernardo Segura was disqualified after finishing the 20 kilometre walk event in the gold medal position. The decision by officials to disqualify the athlete was delivered to him on the basis of breaches of International Amateur Athletic Federation ('IAAF') competition rules as they relate to acceptable methods of walking. The competition judges delivered the actual decision some 15 minutes after the athlete crossed the finish line.

The AHD noted that it does not have the jurisdiction conferred to review the technical decisions made by on-field adjudicators during the course of competition. Segura also argued that the AHD should overturn the disqualification on the basis that it was not communicated to him 'immediately' following the conclusion of the event in accordance with IAAF rule 230(4)(d). In response, the AHD found that even if there were explicit grounds to question the disqualification because the officials had not expeditiously communicated the breach, there would need to be sufficient grounds available to compel the reversal of the disqualification. In this case, no such grounds existed.[145]

The principle of non-interference was upheld by the Sydney AHD in *Neykova v International Rowing Federation*,[146] where Bulgarian rower Rumyana Dimitrova Neykova submitted a dispute to the AHD on the basis that the photo finish and timing equipment used to measure her second place finish in the women's single sculls was inaccurate and faulty.

In entering their award, the AHD noted that it was beyond their mandate to conduct a review of on-field technical decisions, in line with established CAS jurisprudence. However, the AHD did qualify this by stating that, as distinct from cases such as *Mendy*, this matter raised the additional issue of the working order of the electronic measuring equipment. On this specific point, the AHD determined that they did have jurisdiction to consider the athlete's argument. After due consideration, it was determined that the equipment was not faulty.[147]

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143 (1996) 1 Digest of CAS Awards 413 ('*Mendy*').
144 (2000) 2 Digest of CAS Awards 680.
145 Ibid 682.
146 (2000) 2 Digest of CAS Awards 674.
147 Ibid [13].

CAS jurisprudence in this area was again discussed by the Salt Lake City AHD in the *Korean Olympic Committee v International Skating Union*,[148] where the on-field decision of an official to disqualify an athlete crossing the line first in the final of the 1500 metre short track speed skating was challenged. The applicant argued that the decision of the official to disqualify him was, to some extent, because of the public uproar regarding an earlier failure to disqualify an athlete for a similar infraction in the 1000 metre event.[149]

CAS jurisprudence was again confirmed in the decision of the AHD; 'field of play' decisions are not reviewable unless it is proven that the decision was made as a manifestation of corruption or 'bad faith'.[150] On the evidence, no such finding of ill intent was made against the judges in question.

(iii) Manipulation of Sports Rules to Gain a Strategic Advantage

With the obvious focus on success at the Olympic Games, it is not surprising that athletes and team officials will seek to employ any means to ensure victory. Off the sporting field, this extends to the attempt to utilise existing procedural rules of a particular sport so as to secure an advantage over fellow competitors.

In the Atlanta AHD decision in *US Swimming v Fédération Internationale de Natation Amateur*,[151] the applicant sought to have the entry of the Irish freestyle swimmer Michelle Smith in the 400 metre event declared void because that entry was submitted after the IOC nomination deadline. Owing to Smith's outstanding performance in the Olympic Games prior to the 400 metre freestyle race, the Irish NOC sought to include Smith in the place of another, properly nominated team mate.

The AHD noted that despite the IOC deadline, it was common practice for athletes' nominations to be accepted after the appointed cut-off date and further, that '"probably a thousand applicants" could not compete in the Atlanta Olympic Games if the IOC were not to allow any exceptions after the 5 July deadline'.[152] It was held that the flexibility in the nominating process did not create 'unacceptable prejudice for other competitors',[153] and the application was dismissed. It has been argued that the case was brought in an attempt to exclude Smith from competing against US Olympic heroine Janet Evans, the reigning silver and gold medallist from the 1992 Barcelona Summer Olympic Games in the 400 and 800 metre freestyle events.[154]

The Nagano AHD reached a similar decision in *Czech Olympic Committee v International Ice Hockey Federation*.[155] After three matches of the ice hockey tournament at the Nagano Winter Olympic Games, it was determined that Swedish team member Ulf Samuelson had, through the operation of Swedish law, forfeited his citizenship through his naturalisation as an American citizen in 1995. Accordingly, the International Ice Hockey Federation ('IIHF') excluded

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148 (Unreported, CAS Ad Hoc Division (OG Salt Lake City), Docket No 2002/007, 2002).
149 Ibid [4.4].
150 Ibid [5.5].
151 (1996) 1 Digest of CAS Awards 377.
152 Ibid [10].
153 Ibid [16].
154 McLaren, 'A New Order', above n 18 , 11.
155 (1998) 1 Digest of CAS Awards 435 ('*Samuelson*').

Samuelson from the remaining tournament matches. However, the IIHF allowed Sweden to keep their competition points earned through two victories over the US and Belarus. The Czech NOC submitted an appeal to the AHD seeking to invalidate this decision.

In upholding the IIHF decision, the AHD noted that the Czech team had not even been slightly affected by the infraction of the Swedes, and thus they were 'ill placed to seek standing to insist on the application of [the] rule'.[156] However, it was held that the circumstances might have been different if either Belarus or the US had been the applicant, given the impact of the violation upon those two teams.

On the basis of the *Samuelson* decision, it is not entirely clear where the AHD will draw the line regarding NOCs and the use of existing rules to manipulate decisions. It is possible that the AHD would have been more inclined to consider the rights of an aggrieved applicant should such an applicant have lost to the Swedes. CAS jurisprudence is yet to evolve on this point.

(iv) Commercial Disputes Submitted to the CAS

The Nagano Winter Olympic Games produced the first commercially-based submission to the Nagano AHD.[157] This trend continued at the Sydney Summer Olympic Games with the submission to the Sydney AHD in *Fédération Française de Gymnastique v Sydney Organising Committee for the Olympic Games*.[158] The case was concerned with the allowable size of a manufacturer's insignia on French gymnast Poujade Varonian's leotard; it was submitted that it exceeded the maximum size permitted pursuant to paragraph 1.4 of the bye-law to rule 61 of the *Olympic Charter*. Under this bye-law, the logo must not exceed 12 square centimetres. It was unclear whether this measurement is to be taken when the clothing is manufactured, or when the fabric is stretched when being worn by the competitor. If the measurement was taken at the time of manufacture, there would be no infringement of the bye-law.

The ramifications for the applicant were purely commercial: any order to conceal the logo during the presentation of Olympic medals would have had a detrimental effect on the relationship between Varonian and her sponsors.

Sensibly, the AHD determined that the precise objective of the bye-law is to restrict excessive advertising during Olympic competition. On this basis, the appropriate time for measurement was when the athlete was wearing the leotard.[159] Therefore, Varonian had breached the provision in rule 61 of the *Olympic Charter*. Whilst it was accepted that the bye-law might well have been applied inconsistently in the past, this alone was no basis of defence to these proceedings.

3 *Enforceability of Awards of CAS by Municipal Courts*

For the CAS to be regarded as a competent arena for the final determination of international disputes concerning sport, it is paramount that decisions of the

156 Ibid [29].
157 See above n 95 and accompanying text.
158 (2000) 2 Digest of CAS Awards 685.
159 Ibid [24].

CAS be immune from further appeal in other jurisdictions. It has long been established in US case law that arbitration is a favourable means of determining disputes of a sporting nature. Thus, the US Supreme Court has been reluctant to involve itself in review of such decisions.[160] Furthermore, it is important that decisions of the CAS are enforceable, otherwise the value of the CAS is significantly diminished.

In this regard, it is worthwhile to disseminate the judgments of municipal courts hearing appeals from CAS decisions. Andreea Raducan, following the finding of the Sydney AHD of her being guilty of a doping offence, appealed to the SFT on the basis that a specimen of less than 75 millilitres of urine had been submitted for doping analysis, which breached the *Anti-Doping Code*. The SFT found that this fact alone could not have a reasonable impact upon the decision of the AHD, and the appeal was rejected. Further, the SFT refused the invitation to find that the *Anti-Doping Code* had been breached in testing.[161]

In the lead up to the Sydney Summer Olympic Games, many Australians who missed selection for the national team applied to the CAS. One such dispute arose between two female judo competitors, Angela Raguz and Rebecca Sullivan, who were vying for selection in the 52 kilogram category.

In May 2000, the Judo Federation of Australia ('JFA') nominated Raguz for selection in the Australian Olympic Team. Sullivan appealed the decision to the CAS Oceania Division, which was authorised to hear the dispute by virtue of a valid arbitration agreement signed by the relevant parties.[162] In her appeal she argued that the selection process set down by the JFA had not been adhered to. Sullivan submitted that had the selection process been implemented properly, she would have been selected ahead of Raguz. The CAS ultimately upheld this appeal and the JFA was ordered to nominate the applicant over Raguz. Obviously aggrieved by this, Raguz sought leave to appeal to the New South Wales Court of Appeal.[163]

The Court noted that any appeal would only be granted pursuant to the *Commercial Arbitration Act 1984* (NSW). It was determined that the selection agreements signed by both athletes amounted to an 'exclusion agreement' as defined by the *Act*.[164] As such, s 38(4) of the *Act* meant that the Court did not have the power to review the CAS decision. The decision of the CAS was found to be immune to further judicial appeal. The athlete selection agreement effectively excluded the operation of the *Act* to examine the decision of the CAS.[165]

It can be seen that the CAS has proven effective in being able to safeguard its awards from judicial appeal. This having been said, it seems that the two cases

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160 Nathan Reierson, 'Out of Bounds? Applicability of Federal Discovery Orders under 28 USC Section 1782 by International Athletic Governing Bodies for Use in Internal Dispute Resolution Procedures' (1999) 19 *Loyola of Los Angeles Entertainment Law Journal* 631, 639.

161 See generally McLaren, 'International Sports Law Perspective', above n 5.

162 Damian Sturzaker and Kate Godhard, 'The Olympic Legal Legacy' (2001) 2 *Melbourne Journal of International Law* 241, 242.

163 Ibid 243.

164 *Commercial Arbitration Act 1984* (NSW) s 40.

165 Peter Wolstenholme Young, 'Olympic Games Arbitration' (2000) 74 *Australian Law Journal* 742.

detailed above have been determined, to a degree, on an individual basis rather than with the intent of safeguarding the integrity and longevity of the CAS as an arbitral body competent to deliver binding adjudications on sporting disputes. Only through further challenges will municipal courts have the opportunity to ensure the ability of the CAS to pronounce universally enforceable awards.

V CONCLUSION

The CAS has significantly evolved from its original model created by the IOC in the mid-1980s. The changes in the structure of the CAS, including the birth of ICAS in 1994, have helped cement the CAS as the superior arbitral body competent to hear international sporting disputes.

During its first decade the CAS was mainly an appeals forum for doping decisions. To a large extent, this realm of jurisprudential activity was confined because the CAS was perceived as the 'younger sibling' of the IOC. With the creation of the ICAS, and the resulting confidence of the international legal and sporting fraternities in the CAS being able to adjudicate on many and varied questions of dispute in sport, the breadth of decisions submitted to the CAS has expanded greatly. Perhaps this is best evidenced by the wide variety of matters that has been submitted to the AHDs since 1996. This said, there remains some degree of doubt regarding the IOC's influence over the CAS. The IOC in essence should have no role in selecting either ICAS or CAS members. The issue of funding is of less concern.

No doubt the operation of the CAS will continue to expand, particularly at the Olympic Games. Hopefully, CAS arbitration clauses will also be adopted into the statutes and regulations of other NFs and IFs, naming it as the tribunal competent to decide on disputes arising within their ranks, and not only federations of the 'Olympic' sports.

Clearly, the decisions of the CAS are developing a *lex sportiva*. Undoubtedly, through publication of its decisions wherever possible, the CAS will continue to develop this body of fundamentally important jurisprudence, not only for its own use, but also for that of the wider global sporting community. It is of concern that decisions are only published with the consent of the interested parties to the dispute. Similarly, no transcripts of proceedings are readily available to researchers or to those seeking to examine the evidence presented to the CAS. These characteristics of transparency are common to courts of superior record in most national jurisdictions. Should the CAS seek to be the authoritative arbitral body in the world of sport, attention should be given to the publishing of all decisions and records of evidence.

It is important also to consider the CAS on a broader scale of international law and cooperation. The continued expansion of the CAS and the increased standing that it holds in the international sporting community are prime examples of the potential achievements that can be made by an internationally accepted arbitral body with the good faith of willing participants. It is hoped that in time, and with further modifications, the CAS will be seen as a truly international arbitral body.