

# IMPROVING THE PERFORMANCE OF SPORT'S ULTIMATE UMPIRE: REFORMING THE GOVERNANCE OF THE COURT OF ARBITRATION FOR SPORT

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*The Court of Arbitration for Sport ('CAS') is a supreme arbitral body, originally established to 'deal with the crises of legitimacy'<sup>1</sup> within international sport. Although the CAS is often heralded as the 'supreme court of world sport',<sup>2</sup> its current governance and management framework is in need of reform. The key question is what reforms to the CAS's structure and governance need to be implemented to ensure that the CAS continues to be sport's ultimate umpire? This article examines and critically analyses the governance structure of the CAS and its independence from Olympic sporting organisations. The article also reviews the institution's ability to arbitrate doping disputes and explores whether the CAS should, in part, be reconstituted as a court of law. Based on the principles of good governance, this article's proposed reforms aim to ensure that the CAS continues to remain as sport's ultimate umpire.*

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<sup>1</sup> Michael Straubel, 'Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better' (2005) 36 *Loyola University Chicago Law Journal* 1203, 1206.

<sup>2</sup> Juan Antonio Samaranch, quoted in Richard H McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror' (2010) 20(2) *Marquette Sports Law Review* 305, 306.

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## I INTRODUCTION

Sports governance plays a pivotal role in the effective functioning of sporting organisations. In contrast to other international sporting bodies, the Court of Arbitration for Sport ('CAS') is a private arbitral tribunal, designed specifically to adjudicate sports-related disputes and is essentially sport's ultimate umpire. Originally established under the auspices of the International Olympic Committee ('IOC'), the CAS has undergone significant structural reform since its 'jurisprudential birth'.<sup>3</sup> Although the CAS has been recognised as an authoritative institution 'within the family of sport',<sup>4</sup> the current framework for the management of the CAS is in need of reform. The purpose of this article is to examine and critically analyse the CAS's governance structure and practices. By focusing on the legal challenges to CAS arbitral awards, this article will evaluate its independence from the Olympic sporting organisations. Furthermore, this article will question the capacity of the CAS to arbitrate doping disputes<sup>5</sup> and explore whether the CAS should, in part, be reconstituted as a court of law. Drawing on the principles of good governance,<sup>6</sup> this article's proposed reforms to the CAS's structure and governance will help ensure that the CAS remains the 'supreme court for world sport'.<sup>7</sup>

## II THE COURT OF ARBITRATION FOR SPORT

### A *The Origins of the CAS*

During the early 1980s, sporting disputes were being resolved in a piecemeal fashion due to the absence of a specialised independent body capable of making binding decisions.<sup>8</sup> In 1982, in response to the growing number of international

<sup>3</sup> Darren Kane, 'Twenty Years On: An Evaluation of the Court of Arbitration for Sport' (2003) 4 *Melbourne Journal of International Law* 611, 612.

<sup>4</sup> Ian Blackshaw, 'The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively "Within the Family of Sport"' (2003) 2(2) *Entertainment Law* 61, 62.

<sup>5</sup> For a definition of 'doping', see World Anti-Doping Agency, *World Anti-Doping Code* (adopted 1 January 2009) art 1 ('*WADA Code*'): according to which 'doping' is defined as 'the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the *WADA Code*'.

<sup>6</sup> These principles of good governance are outlined in: Governance in Sport Working Group, 'The Rules of the Game' (Paper presented at Europe's First Conference on the Governance of Sport, Brussels, 26–27 February 2001) [3.1].

<sup>7</sup> In 1981, Juan Antonio Samaranch, the then-President of the International Olympic Committee ('IOC'), declared his desire to create a 'supreme court for world sport': see McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport', above n 2, 306.

<sup>8</sup> Ian S Blackshaw, *Sport, Mediation and Arbitration* (TMC Asser Press, 2009) 151.

sporting disputes, Judge Kéba Mbaye, an IOC member and a judge of the International Court of Justice ('ICJ'), chaired a working group whose task was to prepare the statutes of the proposed sports dispute resolution body.<sup>9</sup> As identified by Matthieu Reeb, 'the idea of creating an arbitral jurisdiction devoted to resolving disputes ... related to sport had thus firmly been launched'.<sup>10</sup> Established by the IOC in 1983,<sup>11</sup> the CAS was designed to 'deal with crises of legitimacy in the sports world'<sup>12</sup> and to become the supreme forum for international sport.<sup>13</sup> In particular, the aim of the IOC was to create an institution capable of achieving the quick, efficient, inexpensive and binding resolution of sporting disputes.<sup>14</sup>

### B *Structure and Governance of the CAS*

The CAS, also known as the *Tribunal Arbitral du Sport*, is a private arbitral institution located in Lausanne, Switzerland. As an arbitration tribunal, the CAS has jurisdiction to arbitrate any sport-related disputes,<sup>15</sup> provided that the parties have contractually agreed to submit the dispute to arbitration.<sup>16</sup> As a consequence of the inclusion of mandatory CAS arbitration clauses in the statutes of sporting bodies and in international sporting competition rules, the CAS has been delegated exclusive authority to hear sports-related disputes.<sup>17</sup> As the seat of CAS arbitrations is in Switzerland, CAS arbitrations are based on Swiss law.<sup>18</sup> As identified by Matthew Mitten and Hayden Opie, the Lausanne seat of CAS proceedings 'ensures uniform procedural rules, provides a stable legal framework and facilitates efficient dispute resolution in locations convenient for the parties'.<sup>19</sup> Although CAS arbitral awards are final and binding on the parties, they may be subject to judicial review by the Federal Supreme

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<sup>9</sup> Matthieu Reeb, 'The Role and Functions of the Court of Arbitration for Sport (CAS)' (2002) 2 *International Sports Law Journal* 21, 23.

<sup>10</sup> *Ibid* 23.

<sup>11</sup> The IOC ratified the Statutes of the Court of Arbitration for Sport ('CAS') in 1983, and they came into force on 30 June 1984. See Court of Arbitration for Sport, *History of the CAS: Origins* (2011) <<http://www.tas-cas.org/en/infogenerales.asp/4-3-234-1011-4-1-1/5-0-1011-3-0-0/>>.

<sup>12</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1206.

<sup>13</sup> See McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport', above n 2, 305.

<sup>14</sup> Blackshaw, *Sport, Mediation and Arbitration*, above n 8, 151.

<sup>15</sup> Court of Arbitration for Sport, *Code of Sports-Related Arbitration* (adopted 1 January 2010) art R27 ('CAS Code').

<sup>16</sup> See Matthew J Mitten and Hayden Opie, "'Sports Law': Implications for the Development of International, Comparative and National Law and Global Dispute Resolution" (2010) 85 *Tulane Law Review* 269, 285.

<sup>17</sup> See Marcus Mazzucco and Hilary Findlay, 'The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System' (2010) 1 *International Journal of Sport and Society* 131, 135–6.

<sup>18</sup> Accordingly, Swiss procedural law is the relevant *lex arbitri* for CAS proceedings: see *Swiss Private International Law Act* (Switzerland) 18 December 1987, ch 12 [Robert P Umbricht trans, *Switzerland's Federal Code on Private International Law (CPIL)* (Umbricht Attorneys, 2007)] <<http://www.umbricht.ch/pdf/SwissPIL.pdf>> ('*PIL Act*'); see generally Meinrad Vetter, 'The CAS — An Arbitral Institution with Its Seat in Switzerland' (2008) 9 *Sports Law eJournal* 1 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1008&context=slej>>.

<sup>19</sup> Mitten and Opie, above n 16, 287.

Court of Switzerland ('Swiss Supreme Court').<sup>20</sup> However, domestic courts lack jurisdiction to review or challenge CAS arbitral awards,<sup>21</sup> whereby the 'CAS was intended to usurp the role of domestic courts in the resolution of sport disputes'.<sup>22</sup>

As a private legal entity,<sup>23</sup> the CAS is a self-regulating body which is governed by its own Statutes and Rules of Procedure;<sup>24</sup> these include the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, the *Code of Sports-Related Arbitration* ('CAS Code')<sup>25</sup> and mediation rules. Drafted and promulgated by the International Council for Arbitration for Sport ('ICAS'), the *CAS Code* delineates procedural rules for five different types of proceedings:<sup>26</sup> ordinary arbitration procedures,<sup>27</sup> appeals arbitration procedures,<sup>28</sup> consultation procedures whereby the CAS provides advisory opinions,<sup>29</sup> ad hoc division procedures and mediation procedures.<sup>30</sup> Furthermore, the President of each division is responsible for the smooth running of proceedings and managing the initial arbitration process.<sup>31</sup>

As the 'supreme organ of the CAS',<sup>32</sup> the ICAS is responsible for the overall structure and management of the CAS. All 20 members of the ICAS must sign a declaration, 'undertaking to exercise their function in a personal capacity, with total objectivity and independence, in conformity with [the] Code'.<sup>33</sup> Pursuant to art S6 of the *CAS Code*, ICAS can exercise a number of functions. These include adopting and amending the *CAS Code*, electing the Presidents of the Ordinary and Appeals Divisions of the CAS, appointing the CAS arbitrators<sup>34</sup> and approving the budget and annual accounts of the CAS. Accordingly, the ICAS

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<sup>20</sup> See Vetter, above n 18, 4. Arbitration agreements between the athlete and governing body include clauses that stipulate that the CAS has exclusive jurisdiction to hear sports-related disputes. As such, the CAS is the final arbiter of disputes whereby domestic courts have no jurisdiction over such disputes: see Frank Oschütz, 'Harmonization of Anti-Doping Code through Arbitration: The Case Law of the Court of Arbitration for Sport' (2002) 12 *Marquette Sports Law Review* 675, 677; Ryan Connolly, 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition through Effective Anti-Doping Programs vs the Protection of Rights of Accused Athletes' (2006) 5(2) *Virginia Sports and Entertainment Law Journal* 161, 164.

<sup>21</sup> See Mazzucco and Findlay, 'The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System', above n 17, 136.

<sup>22</sup> Marcus Mazzucco and Hilary Findlay, 'Re-Thinking the Legal Regulation of the Olympic Regime: Envisioning a Broader Role for the Court of Arbitration for Sport' (Paper presented at the Tenth International Symposium for Olympic Research, Canada, 29 October 2010) 15–16.

<sup>23</sup> Simon Gardiner et al (eds), *Sports Law* (Cavendish Publishing, 3<sup>rd</sup> ed, 2006) 233.

<sup>24</sup> Ibid 234; James A R Nafziger, *International Sports Law* (Transnational Publishers, 2<sup>nd</sup> ed, 2004) 40 n 16.

<sup>25</sup> The *CAS Code* provides the relevant rules of arbitration in all CAS proceedings. See generally Vetter, above n 18.

<sup>26</sup> Reeb, above n 9, 24–5.

<sup>27</sup> *CAS Code* arts R38–R46.

<sup>28</sup> *CAS Code* arts R47–R59.

<sup>29</sup> *CAS Code* arts R60–R62.

<sup>30</sup> See Malcolm Holmes, 'The CAS: A Case Study of an International Arbitration Institution' (2005) 27 *Australian Bar Review* 56, 61.

<sup>31</sup> Ibid.

<sup>32</sup> Reeb, above n 9, 24.

<sup>33</sup> *CAS Code* art S5.

<sup>34</sup> See Part IV below.

has a strong influence over the regulation, management and governance of the CAS.

### III THE NOTION OF SPORTS GOVERNANCE

The notion of sports governance is central to the proper management of sporting organisations.<sup>35</sup> As identified by the *UK Sport Good Governance Guide for National Governing Bodies*, 'a functionality approach should be adopted' when evaluating and designing the organisational framework of sporting bodies.<sup>36</sup> In particular, this requires consideration of the sporting body's purpose, role and position within the pyramidal structure<sup>37</sup> of international sports. Although the CAS is a private arbitral tribunal rather than a sporting organisation, sports governance principles constitute a critical component of the effective management of the CAS.

As a mechanism for enhancing management accountability, corporate governance is the 'framework of rules, relationships, systems and processes ... by which authority is exercised and controlled in corporations'.<sup>38</sup> These traditional ideas of corporate governance are embodied in the definitions of sports governance. According to Plácido Rodríguez, Stefan Késenne and Jaime García, '[s]ports governance represents the use of power and authority in sports organizations and institutions'.<sup>39</sup> The Australian Sports Commission ('ASC') has defined sports governance as 'the structures and processes used by an organization to develop its strategic goals and direction, monitor its performance against these goals and ensure that its board acts in the best interests of the members'.<sup>40</sup> Further, Lesley Ferkins, David Shilbury and Gael McDonald identify that in essence, 'sport governance is the responsibility for the functioning and overall direction of the organisation and is a necessary and institutionalised component of all sport codes'.<sup>41</sup> In the context of the CAS, the notion of sports governance includes two separate elements: (i) the role the ICAS plays in the management of the CAS; and (ii) the CAS's rules and regulations, as embodied in the *CAS Code*, which determine the governance of CAS arbitral proceedings and the standards required of CAS arbitrators.

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<sup>35</sup> See generally Australian Sports Commission, *National Sporting Organisations — Governance: Principles of Best Practice* (May 2002) <[http://www.ausport.gov.au/supporting/clubs/resource\\_library/administration/policy\\_development/nso\\_governance\\_principles\\_of\\_best\\_practice](http://www.ausport.gov.au/supporting/clubs/resource_library/administration/policy_development/nso_governance_principles_of_best_practice)>.

<sup>36</sup> Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Tottel Publishing, 2<sup>nd</sup> ed, 2008) 1033.

<sup>37</sup> See Andrea Pinna, 'The Trials and Tribulations of the Court of Arbitration for Sport: Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions' [2005] (1–2) *International Sports Law Journal* 8, 9.

<sup>38</sup> ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Australian Securities Exchange, 2<sup>nd</sup> ed, 2007) 3.

<sup>39</sup> Plácido Rodríguez, Stefan Késenne and Jaime García (eds), *Governance and Competition in Professional Sports Leagues* (Universidad de Oviedo, 2007) 9.

<sup>40</sup> Russell Hoye and Graham Cuskelly, *Sport Governance* (Elsevier, 2007) 9.

<sup>41</sup> Lesley Ferkins, David Shilbury and Gael McDonald, 'Board Involvement in Strategy: Advancing the Governance of Sporting Organisations' (2009) 23 *Journal of Sport Management* 245, 245.

## IV ANALYSING THE INDEPENDENCE AND IMPARTIALITY OF THE CAS

Independence and impartiality are key elements of the concept of good governance<sup>42</sup> and essential characteristics of arbitral tribunals. In addition to undermining the credibility of arbitral awards, any inference of partiality and lack of independence impacts on the overall legitimacy of the CAS. Although the CAS represents the ‘pinnacle of the worldwide dispute settlement system for sport matters’,<sup>43</sup> since its inception, the independence and impartiality<sup>44</sup> of the CAS has been the subject of considerable scrutiny. John Forster identifies that the CAS’s lack of independence was a consequence of its original self-governance problems and close association with the IOC.<sup>45</sup> As exemplified by the 1993 landmark case of *Gundel v Fédération Equestre Internationale* (*‘Gundel’*),<sup>46</sup> the validity of CAS arbitral awards have been challenged on the basis of its lack of independence, in particular, arbitrator partiality. Subsequent reforms in 1994 have improved the international perception of the CAS’s independence and impartiality;<sup>47</sup> however, challenges to its structure, funding and arbitrator selection process still occur in judicial review proceedings before the Swiss Supreme Court.<sup>48</sup> Although the Swiss Supreme Court has confirmed the CAS’s independence on numerous occasions,<sup>49</sup> many legal commentators have questioned the accuracy of these decisions.<sup>50</sup> By examining the issues

<sup>42</sup> Governance in Sport Working Group, above n 6.

<sup>43</sup> Antonio Rigozzi, ‘Challenging Awards of the Court of Arbitration for Sport’ (2010) 1 *Journal of International Dispute Settlement* 217, 217.

<sup>44</sup> Independence relates to the existence of a relationship between the parties, whereas impartiality relates to the persons’ state of mind and bias towards one party over the other. See, eg, Leon Trakman, ‘The Impartiality and Independence of Arbitrators Reconsidered’ (2007) 10(4) *International Arbitration Law Review* 124, 127–8; see also Scott Donahey, ‘The Independence and Neutrality of Arbitrators’ (1992) 9(4) *Journal of International Arbitration* 32.

<sup>45</sup> John Forster, ‘Global Sports Organizations and Their Governance’ (2006) 6 *Corporate Governance* 72, 73.

<sup>46</sup> *Gundel v Fédération Equestre Internationale* (1993) 1 Digest of CAS Awards 561 (*‘Gundel’*).

<sup>47</sup> Court of Arbitration for Sport, *Agreement related to the Constitution of the International Council of Arbitration for Sport* (1994) 2 Digest of CAS Awards 561 (*‘Paris Agreement’*); for a discussion of these reforms, see generally Reeb, above n 9, 23; McLaren, ‘Twenty-Five Years of the Court of Arbitration for Sport’, above n 2, 305–6; Paul David, ‘The Hearing of Sporting Disputes — A Quiet Revolution?’ (Paper presented at the Legal Research Foundation Seminar, Auckland, 11 November 2009); see also Jack Anderson, ‘“Taking Sports Out of the Courts”: Alternative Dispute Resolution and the International Court of Arbitration for Sport’ (2000) 10 *Journal of Legal Aspects of Sport* 123.

<sup>48</sup> Also referred to as the Swiss Federal Tribunal.

<sup>49</sup> See, eg, *A & B v International Olympic Committee et Ors* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland) (*‘A & B v IOC’*); see also Richard H McLaren, ‘The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes’ (2001) 35 *Valparaiso University Law Review* 379; McLaren, ‘Twenty-Five Years of the Court of Arbitration for Sport’, above n 2, 309–10.

<sup>50</sup> See, eg, Rigozzi, above n 43; Straubel, ‘Enhancing the Performance of the Doping Court’, above n 1; Pinna, above n 37; Emile Vrijman, ‘Experiences with Arbitration before the CAS: Objective Circumstances or Purely Individual Impressions?’ in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, 2006) 63–4; Daniel H Yi, ‘Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal’ (2006) 6 *Asper Review of International Business and Trade Law* 289; Matthias Scherer, ‘First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration: Case Note on Swiss Supreme Court Decisions 4A\_506/2007 & 4A\_528/2007’ (2008) 26 *ASA Bulletin* 588.

raised in the CAS judicial review proceedings, this section will critically analyse the CAS's independence and impartiality. Furthermore, this article's analysis will highlight how the current arbitrator selection process is adversely impacting on the good governance of this sporting tribunal.

#### A *The Gundel Decision*

The 1993 decision in *Gundel* represents a turning point in the structure and governance of the CAS. Prior to the 1994 reforms, the CAS was financially and administratively dependent on the IOC, whereby the IOC was responsible for the appointment of CAS arbitrators.<sup>51</sup> Despite Juan Antonio Samaranch's intention to create an independent court of sport, the CAS was actually 'the little sibling of the IOC'.<sup>52</sup> This interrelationship between the IOC and the CAS, and hence the validity of CAS awards, was challenged in *Gundel*. The *Gundel* case arose as a result of the International Equestrian Federation's ('FEI') decision to impose a fine and suspension on Elmar Gundel, a German equestrian competitor, after his horse tested positive for drugs.<sup>53</sup> Challenging the FEI's decision, the CAS held that based on the evidence, it was 'irrefutable' that the banned substance, isoxsuprine, was present in the horse.<sup>54</sup> Despite the presence of the drug, the CAS accepted Gundel's argument that the mere presence of the banned substance did not establish that Gundel deliberately intended to obtain an unlawful advantage.<sup>55</sup> On this basis, the CAS reduced the period of suspension from three months to one month and imposed a fine of CHF1000.

Notwithstanding the reduced penalties, Gundel challenged the validity of the CAS's award on the basis that it did not constitute an enforceable award, as it lacked the impartiality and independence required by Swiss law.<sup>56</sup> Rejecting Gundel's claim, the Swiss Supreme Court held that the CAS was a true independent arbitral tribunal.<sup>57</sup> However, the Court qualified this finding of independence; given the numerous links between the CAS and the IOC, the Court questioned whether the CAS was independent when the IOC is party to the proceedings. As identified by Reeb, the Court's 'message was thus perfectly clear: the CAS had to be made more independent of the IOC both organisationally and financially'.<sup>58</sup>

#### B *The 1994 Reforms and Beyond*

In response to the *Gundel* decision,<sup>59</sup> the CAS's apparent dependence on the IOC was significantly reduced by the 1994 reforms. On 22 June 1994, the creation of the ICAS and the modifications to the governance of the CAS were

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<sup>51</sup> See Holmes, above n 30, 58; Kane, above n 3, 614.

<sup>52</sup> Gabrielle Kaufmann-Kohler, 'Sports Marketing: Tax and Finance' (Paper presented at the IOC Museum, Lausanne, Switzerland, 1994).

<sup>53</sup> Jan Paulsson, 'Arbitration of International Sports Disputes' (1993) 11 *Entertainment and Sports Lawyer* 12, 14–15.

<sup>54</sup> Kane, above n 3, 615.

<sup>55</sup> Paulsson, above n 53, 15.

<sup>56</sup> See Holmes, above n 30, 58.

<sup>57</sup> Reeb, above n 9, 23.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Gundel* (1993) 1 Digest of CAS Awards 561.

approved by the signing of the *Agreement Related to the Constitution of the International Council of Arbitration for Sport* ('Paris Agreement').<sup>60</sup> The 'highest authorities representing the sports world'<sup>61</sup> signed the *Paris Agreement*; these included the IOC, the Winter and Summer Olympic International Federations ('IFs') and the Association of National Olympic Committees ('NOCs').<sup>62</sup> Established as an independent body, the ICAS assumes full control over the administration and financing of the CAS. In particular, the ICAS is responsible for the appointment of CAS arbitrators, a reform which was designed to guarantee the CAS's independence from the IOC. In light of the reforms, the CAS's statutes and procedural rules were extensively revised, with a new set of procedural rules — the *CAS Code* — created. Having entered into force on 22 November 1994, the new *CAS Code* was modelled on the United Nations Commission on International Trade Law ('UNCITRAL') arbitration rules,<sup>63</sup> the International Chamber of Commerce ('ICC') International Court of Arbitration rules ('ICC Rules')<sup>64</sup> and the London Court of International Arbitration rules.<sup>65</sup>

Today, the rules governing arbitrator selection play an important role in the assessment of the CAS's independence. Pursuant to art S16 of the *CAS Code*, the ICAS shall 'wherever possible, ensure fair representation of the continents and of the different judicial cultures'.<sup>66</sup> CAS arbitrators are appointed for a renewable four-year term,<sup>67</sup> must be legally trained and have recognised competence in sports law and/or international arbitration, in addition to having good command of at least English or French.<sup>68</sup> Further, the *CAS Code* requires that when selecting arbitrators, ICAS must respect, in principle, the following distribution:<sup>69</sup>

- one-fifth from persons proposed by the IOC;
- one-fifth from persons proposed by the IFs;
- one-fifth from persons proposed by the NOCs;
- one-fifth chosen after consultation, with a view to safeguarding the interests of the athletes; and
- one-fifth from persons independent of the bodies responsible for proposing arbitrators in conformity with the above requirements.

Once appointed, CAS arbitrators must provide a written declaration that they will 'exercise their functions personally with total objectivity and independence and in conformity with the provisions of [the] Code'.<sup>70</sup>

<sup>60</sup> See *Paris Agreement* (1994) 2 Digest of CAS Awards 561.

<sup>61</sup> Reeb, above n 9, 23.

<sup>62</sup> See *Paris Agreement* (1994) 2 Digest of CAS Awards 561, 569–70; see also *ibid.*

<sup>63</sup> See *UNCITRAL Arbitration Rules as Revised in 2010*, GA Res 65/22, UN GAOR, 6<sup>th</sup> Comm, 65<sup>th</sup> sess, Agenda Item 77, UN Doc A/RES/65/22 (10 January 2011).

<sup>64</sup> International Chamber of Commerce, *ICC Rules of Arbitration* (adopted 1 January 2010) ('*ICC Rules*').

<sup>65</sup> London Court of International Arbitration, *LCIA Arbitration Rules* (adopted 1 January 1998) ('*LCIA Rules*'); see Holmes, above n 30, 59.

<sup>66</sup> *CAS Code* art S16.

<sup>67</sup> *CAS Code* art S13.

<sup>68</sup> *CAS Code* art S14.

<sup>69</sup> *CAS Code* art S14.

<sup>70</sup> *CAS Code* art S18.



### C *Swiss Supreme Court Case Law*

Pursuant to art 191(1) of the *Swiss Private International Law Act* ('*PIL Act*'), the Swiss Supreme Court has exclusive jurisdiction to adjudicate appeals against CAS awards. Although the Supreme Court frequently hears a number of CAS appeals, the grounds for the appeal of an arbitral award are narrow.<sup>71</sup> In particular, art 190(2)(a) of the *PIL Act* is frequently relied upon in the context of challenges relating to the CAS's lack of independence and partiality.<sup>72</sup> Furthermore, art 180(1)(c) of the *PIL Act* provides that an arbitrator may be challenged 'if circumstances exist that give rise to justifiable doubts as to his or her independence'. Although the CAS's independence was questioned and critiqued by the Swiss Supreme Court in the early seminal case of *Gundel*,<sup>73</sup> there has been a shift towards the explicit recognition of the CAS as an independent and impartial tribunal.<sup>74</sup> In particular, the Swiss Supreme Court has classified CAS awards as 'true awards'<sup>75</sup> of an impartial tribunal.<sup>76</sup> This article will demonstrate that, whilst the recognition of the CAS as an independent arbitral body has been firmly upheld in subsequent appeals,<sup>77</sup> the reasoning of the Swiss Supreme Court is contentious.

#### 1 *Lack of Independence: The Swiss Court's Need for 'Additional Circumstances' to Be Established*

The Swiss Supreme Court's adoption of a strict approach to the assessment of arbitrator independence is exemplified by the judicial review decisions of *A & B v International Olympic Committee* ('*A & B v IOC*')<sup>78</sup> and *X & Y, 4A\_506/2007* ('*4A\_506/2007*').<sup>79</sup> In both cases, the Supreme Court's requirement that the appellants prove the existence of 'additional circumstances', demonstrates the difficulty that athletes face in challenging the CAS's purported independence. The decision in *A & B v IOC* was in relation to the appeal of the CAS's decision to disqualify two Russian cross-country skiers<sup>80</sup> from competing in an event at the Salt Lake City Winter Olympic Games in 2002. Although the appeal was mounted against four decisions made by the CAS,<sup>81</sup> the principal issue was related to the independence and impartiality of the CAS, in cases where the IOC

<sup>71</sup> Rigozzi, above n 43, 219; Gardiner et al, above n 23, 243.

<sup>72</sup> Article 190(2)(a) of the *PIL Act* (Switzerland) provides that one of the five grounds on which an arbitral award may be challenged is where 'a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly'.

<sup>73</sup> *Gundel* (1993) 1 Digest of CAS Awards 561.

<sup>74</sup> McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport', above n 2, 309.

<sup>75</sup> *Ibid.*

<sup>76</sup> Mitten and Opie, above n 16, 288.

<sup>77</sup> *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland); *X & Y, 4A\_506/2007* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Chamber, 20 March 2008).

<sup>78</sup> *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland).

<sup>79</sup> *X & Y, 4A\_506/2007* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Chamber, 20 March 2008).

<sup>80</sup> The skiers in question were Larissa Lazutina and Olga Danilova. See *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland).

<sup>81</sup> Emile Vrijman, above n 50, 63.

was a party to the arbitration. Employing the Swiss standard of independence,<sup>82</sup> the Court perceived the dispute as requiring an examination of whether the CAS was independent from the IOC. According to the appellants, the IOC's payment of fees, travel and accommodation expenses for CAS arbitrators impacted on the arbitrators' ability to act impartially and independently.<sup>83</sup> However, finding in favour of the IOC, the Court strongly identified that, 'the CAS is sufficiently independent vis-a-vis the IOC, as well as other parties that call upon its services, for its decisions in cases involving the IOC are to be considered true awards equivalent to the judgments of State Courts'.<sup>84</sup>

The appellants also argued that CAS's independence was impugned by its use of a closed list of arbitrators<sup>85</sup> and by the fact that the *CAS Code* did not preclude an arbitrator from continuing to act as counsel in other cases.<sup>86</sup> In particular, this lack of independence was exemplified in the appellants' case, whereby the IOC's counsel and one of the arbitrators had been members of the same ad hoc CAS Division when their case was decided during the Olympic Games.<sup>87</sup> Rejecting the appellants' arguments, the Supreme Court held that 'additional circumstances would be required, if these arbitrators were to be challenged'.<sup>88</sup>

Although the Swiss test for independence requires consideration of whether there are 'circumstances that would produce the appearance of prejudice or cast doubt over an [arbitrator's] impartiality',<sup>89</sup> it is contended that the Supreme Court failed to place adequate weight on the appellants' arguments. Emile Vrijman identifies that:

The fact ... that arbitrators who are on the CAS list at one time act as arbitrators, while acting as counsel at another, in my and my clients' perception is already an objective [additional] circumstance in itself which produces a suspicion of bias [that] casts doubt on the impartiality of the CAS as a judicial body.<sup>90</sup>

Furthermore, given the confidential nature of CAS arbitrations,<sup>91</sup> 'a place on the closed list gives the arbitrator who, from time to time also acts as counsel, an unfair advantage over his/her opponent'.<sup>92</sup> Accordingly, the Supreme Court's reformulation of the independence test to require that an actual lack of

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<sup>82</sup> The Swiss standard of independence is determined by whether there are circumstances that would produce the appearance of prejudice and cast doubt over a judge's impartiality: see Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1231.

<sup>83</sup> Vrijman, above n 50, 63.

<sup>84</sup> See Matthew Mitten, 'Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations' (2009) 10 *Pepperdine Dispute Resolution Law Journal* 51, 53.

<sup>85</sup> A closed list means that parties are only able to select arbitrators who have been elected by ICAS.

<sup>86</sup> Vrijman, above n 50, 64.

<sup>87</sup> *Ibid* 66.

<sup>88</sup> *Ibid*.

<sup>89</sup> See *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland) [3.3.3]; see also Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1231.

<sup>90</sup> Vrijman, above n 50, 66.

<sup>91</sup> CAS arbitration decisions have only recently been published publicly on the CAS website: see Court of Arbitration for Sport, *Jurisprudence: Archives* <<http://www.tas-cas.org/jurisprudence-archives>>.

<sup>92</sup> Vrijman, above n 50, 67.

independence must be established is arguably inappropriate. The correctness of the Supreme Court's ruling may be further challenged by the 2010 reform to art S18 of the *CAS Code*. Under the new Code, 'CAS arbitrators ... may *not* act as counsel for a party before the CAS'.<sup>93</sup> According to Ian Blackshaw, this new rule was to 'avoid conflicts of interest and to preserve the independence of CAS Arbitrators ... and of the CAS itself'.<sup>94</sup>

Similarly, employing the 'additional circumstances' requirement, the Supreme Court rejected the appellants' appeal in the case of *4A\_506/2007*. This case arose from a contractual dispute between a Swiss marketing executive and the Turkish Football Federation, which related to television broadcasting rights over five football matches.<sup>95</sup> As a consequence of poor spectator attendance, the Swiss organiser argued that the Turkish Football Federation was in breach of contract by allowing the matches to be broadcast live.<sup>96</sup> In accordance with the *CAS Code*,<sup>97</sup> each party nominated a party-appointed arbitrator, whereby the two arbitrators then nominated the chairman; neither party raised objections to the independence of the arbitrators during the arbitration stage. At arbitration, the Swiss organiser's claims were rejected. On appeal to the Swiss Supreme Court,<sup>98</sup> the Swiss organiser requested for the CAS's award to be set aside, on the basis of the irregular composition of the arbitral tribunal.<sup>99</sup> In relation to the CAS's independence and composition, the Swiss organiser argued that the annulment of the award should be based on the fact that the arbitrator appointed by the Turkish Football Federation, the chairman and the Turkish Football Federation's counsel, were all members of the same professional sporting organisation, Rex Sport.<sup>100</sup> This membership to Rex Sport created a relationship between the arbitrators and counsel, which affected the independence and impartiality of the arbitrators. Rejecting the Swiss organiser's submission, the Supreme Court held that the claimant had lost his right to challenge the independence and impartiality of the arbitrators. As such, a challenge 'must be made forthwith, as soon as a party ... could reasonably have been expected to be aware of them'.<sup>101</sup> Enforcing a high standard of due diligence, the Supreme Court held that:

The most elementary prudence required him to investigate and ensure that the arbitrators in charge of his request would present sufficient guaranties of

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<sup>93</sup> *CAS Code* art S18 (emphasis added).

<sup>94</sup> Ian Blackshaw, 'The Court of Arbitration for Sport Updates Its Rules of Procedure' (January 2010) *Association for International Arbitration* <<http://www.arbitration-adr.org/documents/?i=65>>.

<sup>95</sup> Matthias Scherer, 'The IBA Guidelines on Conflict of Interest in International Arbitration: The First Five Years 2004–2009' (2010) 4 *Dispute Resolution International* 5, 19.

<sup>96</sup> *Ibid* 19.

<sup>97</sup> *CAS Code* art 40.2.

<sup>98</sup> *PIL Act* (Switzerland) s 190(2)(a).

<sup>99</sup> The Swiss organiser submitted that information about the irregular composition of the CAS was only discovered after the CAS award had been issued: *X & Y, 4A\_506/2007* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Chamber, 20 March 2008) [3]–[3.1.2].

<sup>100</sup> Scherer, 'The IBA Guidelines on Conflict of Interest in International Arbitration', above n 95, 19.

<sup>101</sup> *Ibid* 20.

independence and impartiality. He *could not* simply rely on the general statement of independence made by each arbitrator on the *ad hoc* form.<sup>102</sup>

On the facts, the Swiss organiser was expected to have undertaken a full investigation of the arbitrators' purported independence; this included the searching of websites of arbitral institutions, the website of the counsel's firm and that of Rex Sport, which contained password-protected areas. Furthermore, in obiter, the Court emphasised that, notwithstanding the claimant's foregone right to challenge the CAS's impartiality and independence, such a challenge 'would have been dismissed for lack of merits'.<sup>103</sup> In particular, the Court noted that 'additional circumstances' were required to establish the case on lack of independence.<sup>104</sup> The Court noted that:

the outcome may have been different if the data the claimant produced had shown systematic cross-appointments among the association's members and that arbitral tribunals comprising a member of the association systematically decided in favour of the party represented by another member. Had this been the case, there may have been objective doubts as to the independence of the arbitrators.<sup>105</sup>

The central ruling that emerges from these two cases is the establishment of a very high standard of proof that the appellant must discharge, in order to impugn the independence of a CAS arbitrator. Although Martin Scherer identifies that the high threshold helps ensure that challenges do not become 'a means for disgruntled parties to set aside awards once they have lost the arbitration',<sup>106</sup> it is questionable whether this approach is congruous with the Swiss standard, which only requires the *appearance* of a lack of independence to be established. According to Antonio Rigozzi, the requirement in decision *4A\_506/2007* 'seems excessive in light of the secrecy of arbitral deliberations, whereby it is impossible to know the role played by the arbitrator in question in the decision-making process of the Panel'.<sup>107</sup> Similarly, other commentators have identified that the Supreme Court's requirement that parties must undertake extensive and invasive searches to verify an arbitrator's independence, is too 'far reaching'<sup>108</sup> and hence 'open to criticism'.<sup>109</sup> It can therefore be contended that, by requiring the absence of independence to be definitively proven by the appellant, the Supreme Court's approach oversteps the standard required under Swiss law. On this basis, it is suggested that modifications to the current

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<sup>102</sup> *X & Y, 4A\_506/2007* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Chamber, 20 March 2008) [3.2] (emphasis added); see Scherer, 'First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration', above n 50, 590.

<sup>103</sup> Scherer, 'The IBA Guidelines on Conflict of Interest in International Arbitration', above n 95, 21.

<sup>104</sup> *Ibid* 22; Rigozzi, above n 43, 237.

<sup>105</sup> Scherer, 'The IBA Guidelines on Conflict of Interest in International Arbitration', above n 95, 23.

<sup>106</sup> Scherer, 'First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration', above n 50, 594.

<sup>107</sup> Rigozzi, above n 43, 238.

<sup>108</sup> Hansjörg Stutzer, 'The Federal Supreme Court and the Independence of the Arbitrator' (2008) *Arbitration Newsletter Switzerland* <[http://www.thouvenin.com/pages\\_e/text/archiv/arbitration\\_newsletter\\_switzerland51.pdf](http://www.thouvenin.com/pages_e/text/archiv/arbitration_newsletter_switzerland51.pdf)>.

<sup>109</sup> Scherer, 'The IBA Guidelines on Conflict of Interest in International Arbitration', above n 95, 21.

arbitrator selection rules are required in order to provide greater assurances of safeguarding an arbitrator's independence and enhancing the governance of the CAS.

## 2 *Are Party-Appointed Arbitrators Independent?*

The independence and impartiality of party-appointed arbitrators<sup>110</sup> has also been an issue litigated before the Swiss Supreme Court. In contrast to earlier cases,<sup>111</sup> the decision in case *4A\_234/2010* confirms that the same standard of independence applies to a party-appointed arbitrator as to the President of the tribunal.<sup>112</sup> The case *4A\_234/2010* concerned an appeal by the Spanish cyclist, Alejandro Valverde Belmonte, against the CAS's confirmation of a two-year ban imposed by the Italian National Olympic Committee ('CONI'). At arbitration, Professor Ulrich Haas, who between 2006 and 2007 was a member of the World Anti-Doping Agency's ('WADA') Code Project Team, had been nominated by CONI as its party-appointed arbitrator.<sup>113</sup> Upon the inclusion of the WADA to the CAS arbitration, Belmonte challenged Haas' independence. This challenge was however dismissed by the ICAS,<sup>114</sup> thereby enabling Haas to remain as an arbitrator in the proceedings. Mounting the same argument before the Swiss Supreme Court, Belmonte contended that the CAS was improperly constituted because of Haas' partiality.<sup>115</sup> Rejecting Belmonte's arguments, the Court held that as Haas had acted as an independent expert when engaged by the WADA, Haas' previous relationship with the WADA did not impugn his status of independence.

Despite the Supreme Court's confirmation that the same standard of impartiality and independence applies to all CAS arbitrators, it is uncertain whether the Court is prepared to apply a strict standard to CAS arbitrators. Emphasising the unique nature of sport arbitration, the Court identified that an assessment of a CAS arbitrator's independence should 'take into account the specificities of the arbitration, and especially international arbitration, when examining the circumstances of the case'.<sup>116</sup> On this basis, Belmonte's case arguably demonstrates that the 'Supreme Court is prepared to accept a certain leniency' in relation to judging the level of independence of CAS arbitrators.<sup>117</sup>

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<sup>110</sup> In the Ordinary and Appeal Division of the CAS, parties are able to select an arbitrator: see Court of Arbitration for Sport, *How Are the Arbitrators Chosen?* (2011) <<http://www.tas-cas.org/en/20questions.asp/4-3-224-1010-4-1-1/5-0-1010-13-0-0/>>.

<sup>111</sup> Nathalie Voser and Anya George, *Swiss Supreme Court Clarifies Standard of Impartiality Required of Party-Appointed Arbitrators* (1 December 2010) Practical Law Company <<http://us.practicallaw.com/2-504-0957?q=vose>>.

<sup>112</sup> *4A\_234/2010* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Division, 29 October 2010) [3.2.1]; see *ibid*.

<sup>113</sup> Voser and George, above n 111.

<sup>114</sup> *Ibid*.

<sup>115</sup> *PIL Act* (Switzerland) s 190(2)(a).

<sup>116</sup> *4A\_234/2010* (Federal Supreme Court of Switzerland, 1<sup>st</sup> Civil Division, 29 October 2010) [3.2.1]; see Voser and George, above n 111.

<sup>117</sup> See Voser and George, above n 111.

### D Institutional Independence

The issue of institutional independence, as a measure of good governance, continues to be an ongoing challenge for the CAS. Although the 1994 reforms were instrumental in minimising the IOC's overt control over the funding and governance of the CAS, it is debatable whether such reforms provided sufficient independence from other influential international sporting organisations.<sup>118</sup> According to Richard McLaren, the CAS's willingness to overturn IOC decisions and criticise IOC inaction, is the 'strongest proof that the CAS has achieved [institutional] independence'.<sup>119</sup> However, Michael Straubel contends that the real question to ask is whether 'the collective influence of the Olympic governing bodies on the ICAS and CAS and the exclusive funding of the CAS by Olympic governing bodies challenge the independence of the CAS'.<sup>120</sup>

Established for the purpose of 'safeguarding the independence of the CAS',<sup>121</sup> the ICAS is composed of twenty 'high-level jurists',<sup>122</sup> who are responsible for executing the financing and administrative functions of the CAS.<sup>123</sup> The substantial influence that Olympic bodies continue to exercise over the ICAS and the CAS is reflected in the ICAS member appointment process. Pursuant to art S4 of the *CAS Code*, the IFs, NOCs and the IOC each appoint four ICAS members, whereby the remaining eight members are chosen by the already appointed twelve members.<sup>124</sup> As a consequence of the composition of ICAS members and the CAS arbitrator selection rules, the IOC is no longer responsible for selecting the closed list of CAS arbitrators;<sup>125</sup> however, the Olympic Movement continues to have a dominant influence on the CAS. The key issue is whether this institutional arrangement creates the appearance of impartiality or casts doubts over the independence of the CAS.<sup>126</sup> Whilst the close relationship between the CAS and the Olympic bodies may not 'produce the appearance of prejudice',<sup>127</sup> Straubel notes that the influence may, however, be insidious, as '[s]uch subtle effects could cause the development of doctrine that favours governing bodies, over time stacking the deck against an athlete, or in cases involving management decisions'.<sup>128</sup>

Furthermore, the absence of clear structural independence is a concern for the good governance of the CAS, which is compounded by the fact that Olympic bodies and institutions continue to substantially fund the CAS.<sup>129</sup> The funding is obtained as follows: one-third from both the IOC and Association of National Olympic Committees; one-quarter from the Association of Summer Olympics International Sports Federations; and one-twelfth from the Association of Winter

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<sup>118</sup> See Mitten and Opie, above n 16, 291 n 97; Kane, above n 3, 635.

<sup>119</sup> McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport', above n 2, 382.

<sup>120</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1233.

<sup>121</sup> Mitten, above n 84, 52.

<sup>122</sup> *CAS Code* art S4.

<sup>123</sup> *CAS Code* art S2.

<sup>124</sup> *CAS Code* arts S4(d)–(e).

<sup>125</sup> *CAS Code* art S14.

<sup>126</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1234.

<sup>127</sup> As required by the Swiss standard of independence: see *ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> Mitten and Opie, above n 16, 291.

Olympics International Sports Federations.<sup>130</sup> In *Gundel*, the Swiss Supreme Court noted that the impartiality of a tribunal is undermined when the primary financial benefactor is a party to the arbitration.<sup>131</sup> Accordingly, given the CAS's reliance on funds from the IOC, IFs and NOCs, it is suggested that the current governance structure may have the potential to undermine CAS's institutional independence.

## V SHOULD DOPING DISPUTES BE ARBITRATED BY THE CAS?

The CAS has had a profound impact on the resolution of sporting disputes; this can therefore be viewed as a positive influence on the good governance of international sport. As the 'supreme' arbitral tribunal for sports,<sup>132</sup> the CAS has brought 'order to the [previously] chaotic and inconsistent world of international sports adjudications'.<sup>133</sup> In particular, the structure and rules of the CAS have facilitated the flexible, inexpensive, confidential and expedient resolution of sporting disputes.<sup>134</sup> Despite the CAS's overall success, there is uncertainty regarding whether the CAS is appropriate for the resolution of doping cases.<sup>135</sup> Established for the purpose of harmonising the fight against doping in sport, the *World Anti-Doping Code* ('*WADA Code*') imposes severe sanctions on athletes who violate it. Pursuant to the *WADA Code*, the CAS has exclusive jurisdiction to hear doping appeals, which are submitted to the CAS Appeals Division.<sup>136</sup> In the context of doping cases, to demonstrate impartiality and fairness, the CAS must balance the 'protection of the rights of the athlete who is accused of a doping offence [against] the need for effective measures against doping in order to preserve the credibility of sport'.<sup>137</sup> Although the CAS's current governance model enables the speedy resolution of disputes, as Maureen Weston notes, 'the war against drugs and desire for expediency cannot be at the expense of fundamental fairness'.<sup>138</sup> Similarly, a number of commentators have raised concerns about the appropriateness of the CAS to hear doping disciplinary cases.<sup>139</sup> Accordingly, given the unique specificities of doping proceedings,<sup>140</sup>

<sup>130</sup> Gardiner et al, above n 23, 233.

<sup>131</sup> *Gundel* (1993) 1 Digest of CAS Awards 561.

<sup>132</sup> McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport', above n 2, 305.

<sup>133</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1209.

<sup>134</sup> Kane, above n 3, 612; Lewis and Taylor, above n 36, 326.

<sup>135</sup> See generally Straubel, 'Enhancing the Performance of the Doping Court', above n 1; Maureen A Weston, 'Doping Control, Mandatory Arbitration and Process Dangers for Accused Athletes in International Sports' (2009) 10 *Pepperdine Dispute Resolution Law Journal* 5; Andrew Goldstone, 'Obstruction of Justice: The Arbitration Process for Anti-Doping Violations during the Olympic Games' (2006) 7 *Cardozo Journal of Conflict Resolution* 361; Jason Gubi, 'The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concern' (2008) 18 *Fordham Intellectual Property Media and Entertainment Law Journal* 997.

<sup>136</sup> *WADA Code* art 13.

<sup>137</sup> Frank Oschütz, 'Doping Cases before the CAS and the World Anti-Doping Code' in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, 2006) 246, 250.

<sup>138</sup> Weston, above n 135, 47.

<sup>139</sup> In particular, such concerns have related to the burden of proof and presumption of guilt, lack of procedural protections and the imposition of mandatory penalties. See Straubel, 'Enhancing the Performance of the Doping Court' above n 1; Kane, above n 3.

<sup>140</sup> Weston, above n 135, 47.

the CAS may not be the most appropriate forum for hearing such disputes. Part VI of this article will further examine whether the CAS should, in part, be reconstituted as a court of law.

#### A *The Nature of Doping Disputes: Are They Quasi-Criminal?*

The categorisation of doping disputes is a controversial issue. The inherent dilemma associated with doping cases relates to whether such disputes should be classified as criminal, quasi-criminal or civil in nature. The uncertainty associated with the nature of doping offences stems from the *WADA Code*'s adoption of the 'comfortable satisfaction' burden of proof. Pursuant to art 3.1 of the *WADA Code*, the Anti-Doping Organisation bears the burden of establishing whether an anti-doping violation has occurred.<sup>141</sup> The standard of proof is a 'comfortable satisfaction', which is defined by the *WADA Code* as meaning 'greater than a mere balance of probability, but less than proof beyond a reasonable doubt'.<sup>142</sup> Further, the *WADA Code* stipulates that anti-doping rules are 'not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings'.<sup>143</sup> Similarly, in *Gundel*, the Swiss Supreme Court held that doping sanctions were not criminal, but rather private in nature:

It is generally accepted that the penalty prescribed by regulations represents one of the forms of penalty fixed by contract ... [and therefore] has nothing to do with the power to punish reserved by the criminal courts, even if it is punishing behaviour which is also punished by the state.<sup>144</sup>

However, Straubel identifies that 'while the standard has been codified in the World Anti-Doping Code, it was the CAS that developed the standard and it will be CAS that will refine the standard'.<sup>145</sup> Although the CAS has examined the standard of proof in a number of cases, the exact meaning of 'comfortable standard' remains uncertain. In the recent case of *Pechstein v International Skating Union*,<sup>146</sup> the CAS reiterated that the standard was neither civil nor criminal in nature. The case concerned an appeal by five-time Olympic speed skating champion, Claudia Pechstein, against the two-year doping ban that had been imposed by the International Skating Union ('ISU'). Despite the absence of a positive drug test, the ISU imposed the ban on the basis that Pechstein's blood passport values had returned an abnormal result. On appeal to the CAS, Pechstein argued that, based on the seriousness of the ISU's allegation, the

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<sup>141</sup> *WADA Code* art 3.1.

<sup>142</sup> *Ibid.*

<sup>143</sup> *WADA Code* 16.

<sup>144</sup> *Gundel* (1993) 1 Digest of CAS Awards 561, 571–2.

<sup>145</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1268.

<sup>146</sup> (25 November 2009) CAS 2009/A/1912; see Tracey McMullan, 'CAS Applies the "Comfortable Satisfaction" Test to Uphold Olympic Speed skater Claudia Pechstein's 2 Year Doping Ban' (26 November 2009) McMullan Solicitors <<http://www.mcmullan.com/sports-law-update/view/46-cas-applies-the-comfortable-satisfaction-test-to-uphold-olympi>>.



standard of proof 'must be very close to proof beyond reasonable doubt'.<sup>147</sup> Despite the unusual nature of Pechstein's doping violation, the CAS held that Pechstein's case was of 'exactly the same seriousness as any other anti-doping case brought before the CAS and involving blood doping; nothing more, nothing less'.<sup>148</sup>

Conversely, the CAS has expressly acknowledged the penal nature of doping matters.<sup>149</sup> In *Demetis v Fédération Internationale de Natation*,<sup>150</sup> the CAS identified that the 'disciplinary sanctions in doping cases are similar to penalties in criminal proceedings'.<sup>151</sup> Further, as doping sanctions contain similar elements to criminal proceedings, a number of legal commentators have classified such disputes as quasi-criminal.<sup>152</sup> Janwillem Soek reasons that the quasi-criminal nature of doping proceedings stems from the functional similarities between criminal law and the *WADA Code's* doping provisions.<sup>153</sup> Arguably, one of the key similarities between doping sanctions and criminal penalties is the impact that such sanctions can have on an individual's livelihood. In the United States for example, 'disciplinary proceedings are considered criminal enough in character to necessitate enhanced procedural protections when ... the consequences sought are punitive'.<sup>154</sup> Although the impact of some criminal sentences is significantly more severe, doping penalties may include: suspension from competition,<sup>155</sup> disqualification of results,<sup>156</sup> repayment of prize money,<sup>157</sup> a ban from organised practices<sup>158</sup> and fines.<sup>159</sup> Accordingly, such penalties can cause an 'abrupt halt'<sup>160</sup> to an athlete's career. In addition to the immediate impact of a suspension or disqualification, doping sanctions may have long-term adverse effects on an athlete's reputation, sponsorship and future earning capacity,<sup>161</sup> 'these punishments are certainly punitive'.<sup>162</sup>

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<sup>147</sup> *Pechstein v International Skating Union* (25 November 2009) CAS 2009/A/1912 [55].

<sup>148</sup> *Ibid.*

<sup>149</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1261.

<sup>150</sup> (27 May 2003) CAS 2002/A/432 ('*Demetis v FINA*').

<sup>151</sup> *Ibid* [27].

<sup>152</sup> See Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1273; Weston, above n 135, 47; Paul Greene, '*United States Anti-Doping Agency v Montgomery: Paving a New Path to Conviction in Olympic Doping Cases*' (2007) 59 *Maine Law Review* 150, 152.

<sup>153</sup> Antonio Rigozzi, Gabrielle Kaufmann-Kohler and Giorgio Malinverni, 'Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code' (2003) *International Sports Law Review* 39, 48.

<sup>154</sup> Michael S Straubel, 'Lessons from *USADA v Jenkins: You Can't Win When You Beat a Monopoly*' (2009) 10 *Pepperdine Dispute Resolution Law Journal* 119, 149.

<sup>155</sup> *WADA Code* art 10.2.

<sup>156</sup> *WADA Code* art 10.1.

<sup>157</sup> *WADA Code* art 10.8.1.

<sup>158</sup> *WADA Code* art 10.10.1.

<sup>159</sup> *WADA Code* art 10.12.

<sup>160</sup> Weston, above n 135, 6.

<sup>161</sup> *Ibid* 47.

<sup>162</sup> Straubel, 'Lessons from *USADA v Jenkins*', above n 154, 150.

## B Limitations of the CAS as a Doping Court

Academic commentators have expressed concerns about the appropriateness of arbitrating doping disputes before the CAS.<sup>163</sup> In particular, the debates about the limitations of the CAS as a doping court have focused on the suitability of using a commercial arbitration model to adjudicate quasi-criminal cases. In the context of the *CAS Code*, Michael Lenard identifies that ‘it is very difficult to come up with some meta-rules that govern all the cases because doping raises different issues’.<sup>164</sup> Similarly, it has been noted that ‘the CAS must shed its original commercial dispute settlement structure and adapt to the unique demands of adjudicating and settling doping accusations’.<sup>165</sup> Accordingly, it is contended that doping cases create new legal challenges, whereby the most pressing pitfalls associated with the CAS are that its structure, governance and regulatory rules are not suited to deal with the nuances and specificities of doping cases. These issues will be considered by examining the arbitration model and evidentiary rules<sup>166</sup> employed in doping cases.

### 1 Commercial Court of Arbitration

The CAS represents a ‘unique institution’<sup>167</sup> within the international sporting world. Despite its name, the CAS is not a court, but rather an arbitral tribunal. Modelled on the ‘leading commercial private dispute settlement systems at the time’,<sup>168</sup> the CAS’s current structure and management is commercial in nature. This commerciality stems from the fact that arbitration developed within the commercial world.<sup>169</sup> Employed as an alternative to litigation, arbitration has ‘long been a favoured means of resolving disputes among members of organised commercial groups’.<sup>170</sup> In particular, one of the key features of arbitration is that the parties must contractually agree to submit a dispute to arbitration. Pursuant to art R27 of the *CAS Code*, the CAS only has jurisdiction to hear a dispute when the parties have agreed to refer sporting disputes to the CAS. The CAS arbitration agreement is often contained in the statutes of sporting organisations or alternatively, as part of a condition to participate in international

<sup>163</sup> See, eg, *ibid*; Straubel, ‘Enhancing the Performance of the Doping Court’, above n 1; Weston, above n 135; Michael S Straubel, ‘Doping Due Process: A Critique of the Doping Control Process in International Sport’ (2002) 106 *Dickinson Law Review* 523; Kevin Mahoney, ‘Learning from the Mistakes of Others: Changing Major League Baseball’s Substance Abuse Arbitration Procedure’ (2009) 24 *Ohio State Journal on Dispute Resolution* 613, 627; Goldstone, above n 135, 361; Gubi, above n 135.

<sup>164</sup> Michael Lenard, ‘The Future of Sports Dispute Resolution’ (2009) 10 *Pepperdine Dispute Resolution Journal* 173, 177.

<sup>165</sup> Straubel, ‘Enhancing the Performance of the Doping Court’, above n 1, 1206.

<sup>166</sup> Pursuant to *CAS Code* art R27, the procedural rules of the *CAS Code* apply when parties agree to refer sports-related dispute to the CAS; this rule is consistent with *PIL Act* (Switzerland) art 182(1) which enables arbitration to be conducted in accordance with existing rules of the arbitral tribunal. Thus, the *CAS Code* applies as the relevant arbitration rules for all CAS hearings.

<sup>167</sup> Lewis and Taylor, above n 36, 326.

<sup>168</sup> Straubel, ‘Lessons from *USADA v Jenkins*’, above n 154, 152 n 174.

<sup>169</sup> Winston Stromberg, ‘Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes’ (2007) 40 *Loyola of Los Angeles Law Review* 1337, 1343.

<sup>170</sup> Henry P de Vries, ‘International Commercial Arbitration: A Contractual Substitute for Courts’ (1982) 57 *Tulane Law Review* 42, 43.

competitions.<sup>171</sup> As a result, professional athletes often have no option on how to arbitrate sporting disputes: 'if an athlete refused to sign up to the rules, he would not be eligible to compete'.<sup>172</sup> In addition to raising doubts about the validity of the arbitral agreement,<sup>173</sup> the mandatory arbitration clauses are arguably problematic in the context of doping, given the quasi-criminal nature of doping cases.<sup>174</sup> Straubel identifies that 'a fundamental assumption that shapes commercial arbitration is that the disputes are between equal parties — parties with roughly equal resources and equal access to the evidence'.<sup>175</sup> However, this assumption is not applicable to doping disputes, as a result of the mandatory nature of sporting arbitral agreements and the 'imbalance of power between governing bodies and athletes'.<sup>176</sup> Weston contends that the CAS's structural pitfalls are demonstrated by an athlete's inability to access qualified legal advocates or scientific experts.<sup>177</sup> Similarly, imbalances result from the *CAS Code's* limited rules of discovery and evidentiary protections. Accordingly, the inability of the CAS's commercial arbitration model to address these imbalances<sup>178</sup> provides strong support for the restructuring of the CAS for doping cases.

## 2 Evidentiary Rules

Pursuant to art R27 of the *CAS Code*, all arbitrations must be conducted in accordance with the CAS procedural rules.<sup>179</sup> These procedural rules are created and adopted by the ICAS, whereby the rules only 'come into force through the decision of the ICAS, taken by a two-thirds majority'.<sup>180</sup> Although the CAS 'remains a hopeful and valuable example of how an international tribunal can succeed',<sup>181</sup> the CAS's limited evidentiary rules are arguably failing to support the expectations and needs of athletes in doping cases. In relation to the Ordinary Division, the *CAS Code* provides minimal guidance on the rules associated with the presentation of evidence, where evidence assumes a secondary role in proceedings, thereby 'supplement[ing] the presentations of the parties'.<sup>182</sup> Similarly, in the context of doping cases, the Appeal Division's procedural rules provide limited guidance in relation to the taking of evidence. In particular, the

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<sup>171</sup> See generally Mazzucco and Findlay, 'The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System', above n 17; Andrew Bell, 'Dispute Resolution and Applicable Law Clauses in International Sports Arbitration' (2010) 84 *Australian Law Journal* 116.

<sup>172</sup> Lewis and Taylor, above n 36, 334.

<sup>173</sup> *Ibid.*

<sup>174</sup> See generally Straubel, 'Enhancing the Performance of the Doping Court', above n 1; Weston, above n 135.

<sup>175</sup> Straubel, 'Lessons from *USADA v Jenkins*', above n 154, 152.

<sup>176</sup> *Ibid.*

<sup>177</sup> Weston, above n 135, 45.

<sup>178</sup> See Straubel, 'Lessons from *USADA v Jenkins*', above n 154, 152.

<sup>179</sup> *PIL Act* (Switzerland) art 184(1) identifies that the arbitral tribunal shall itself take evidence. This means that the procedural rules in relation to the taking of evidence are contained in *CAS Code* art R44 Code for ordinary proceedings and in *CAS Code* arts 51, 55–7 for appeal proceedings.

<sup>180</sup> *CAS Code* art S26.

<sup>181</sup> Yi, above n 50, 291.

<sup>182</sup> *CAS Code* art R44.3.

rules are silent on issues such as the admissibility of evidence, the regulation of expert evidence and whether any inference should be drawn from an athlete's failure to testify in doping proceedings.

However, the absence of the 'evidentiary protections that exist in civil or criminal justice proceedings'<sup>183</sup> are a consequence of the commercial origins of arbitrations, and the fact that disciplinary tribunals are often not required to adopt judicial standards or rules of evidence.<sup>184</sup> Doug Jones notes that since disputes often involve parties from different legal backgrounds, international arbitration procedures cannot adopt a purely civil law or common law approach, to the presentation of evidence.<sup>185</sup> Similarly, Jean-François Poudret and Sébastien Besson identify that 'in private international law, the law applicable to evidence is a difficult and controversial question'.<sup>186</sup> Arguably, this difficulty is also reflected in the *ICC Rules*, which do not provide a standard by which evidence is admissible or should be evaluated.<sup>187</sup> Nevertheless, commentators have argued that comprehensive judicial-style rules of evidence are warranted in doping cases,<sup>188</sup> given that such cases are 'imbued with many of the elements of a civil and quasi-criminal proceeding'.<sup>189</sup> In particular, it has been suggested that 'it may be advisable for sporting organizations to comply as closely as possible to the strict rules of evidence developed for court proceedings'.<sup>190</sup> Accordingly, the management of the CAS doping proceedings could be enhanced through the adoption of comprehensive rules of evidence, as discussed in the next part of this article.

## VI PROPOSED REFORMS TO THE GOVERNANCE OF THE CAS

This author's reform proposals aim to improve the current structure and governance of the CAS. As a 'trustee' of sport,<sup>191</sup> the CAS's primary function is to facilitate the just, timely and binding settlement of sports-related disputes. Although the CAS has been recognised as a 'superior dispute resolution forum',<sup>192</sup> this article will demonstrate that there appears to be further scope for improving the management and governance of the CAS. As identified by Reeb, the CAS must 'continue its evolution in order to keep on providing international sports with a dispute resolution system which fully meets its requirements'.<sup>193</sup> In particular, the key areas of reform include how to improve the CAS's accountability and independence, and whether the CAS should be reconstituted

<sup>183</sup> Weston, above n 135, 33.

<sup>184</sup> See *Briginshaw v Briginshaw* (1938) 60 CLR 336 (Dixon J).

<sup>185</sup> Doug Jones, 'The Cost, Time and Process Implications of the New *IBA Rules of Evidence*' (Paper presented at the Financial Review of International Dispute Resolution Conference, Sydney, 15 October 2010) 4.

<sup>186</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007) 550.

<sup>187</sup> *ICC Rules* arts 20(2), (5).

<sup>188</sup> See Straubel, 'Enhancing the Performance of the Doping Court', above n 1; Weston, above n 135; Gubi, above n 135, 1022; Greene, above n 152.

<sup>189</sup> Weston, above n 135, 47.

<sup>190</sup> Tony Buti and Saul Fridman, 'Drug Testing in Sport: Legal Challenges and Issues' (1999) 20 *University of Queensland Law Journal* 153, 161.

<sup>191</sup> Governance in Sport Working Group, above n 6, [3.1].

<sup>192</sup> Mitten and Opie, above n 16, 289.

<sup>193</sup> Reeb, above n 9, 25.

as a court, in order to be better equipped to hear doping cases. Drawing on the good governance principles of independence, accountability and transparency,<sup>194</sup> the proposed reforms are designed to assist in improving the fairness and effectiveness of CAS arbitrations for athletes. As identified by Ken Foster, ensuring that the CAS achieves 'individual justice and rights for athletes ... is what will reinforce its legitimacy and protect its own institutional autonomy and independence'.<sup>195</sup>

### A *Enhancing the CAS's Independence*

The independence and impartiality of the arbitral tribunal is an essential feature of arbitration proceedings. As identified by Russell Thirgood, 'it is a common saying that an arbitration can only be as good as the arbitrator'.<sup>196</sup> Although the current *CAS Code* mandates that all arbitrators must be independent and exercise their role with complete objectivity, the case law demonstrates that this rule has not been successful in quelling concerns about arbitrator bias. With the aim of improving the good governance of the CAS, possible reforms may include:

- changes to the ICAS member and CAS arbitrator<sup>197</sup> appointment rules and CAS funding ('ICAS Reforms');
- the appointment of 'neutral' rather than party-appointed arbitrators<sup>198</sup> ('Neutral Arbitrator Reforms');
- the establishment of an athletes monitoring body<sup>199</sup> ('Athletes' Monitoring Body Reforms');
- the creation of an open list, rather than a closed list, of arbitrators ('Open List Arbitrators Reforms'); and
- the modification of the CAS Code arbitrator conflict of interest rules ('CAS Arbitrator Conflict of Interest Rules Reforms').

#### 1 *ICAS Reforms*

Pursuant to art S4 of the *CAS Code*, Olympic sporting organisations continue to exert a strong influence over the member composition of ICAS. In particular, the committees of the Olympic Movement<sup>200</sup> are responsible for the appointment

<sup>194</sup> Governance in Sport Working Group, above n 6, [3.1].

<sup>195</sup> Ken Foster, 'Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence' in Ian S Blackshaw, Robert C Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, 2006) 420, 440.

<sup>196</sup> Russell Thirgood, 'A Critique of ICC Arbitration' (2004) 23(2) *The Arbitrator and Mediator* 69, 75.

<sup>197</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1236.

<sup>198</sup> Ibid 1238; Jan Paulsson, 'Are Unilateral Appointments Defensible?' on Kluwer Arbitration Blog (2 April 2009) <<http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/>>.

<sup>199</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1234.

<sup>200</sup> The bodies of the Olympic Movement that are responsible for the selection of ICAS members include the IOC, International Federations ('IFs'), National Federations ('NFs'), and the National Olympic Committees ('NOCs'): see Mazzucco and Findlay, 'Re-Thinking the Legal Regulation of the Olympic Regime: Envisioning a Broader Role for the Court of Arbitration for Sport', above n 22, 4.

of sixty per cent of ICAS members.<sup>201</sup> Although the ICAS member appointment rules purport to consider the interest of athletes, there is no guarantee that athletes, or the representatives of athletes, will be elected to the ICAS.<sup>202</sup> Darren Kane also identifies the ambiguity<sup>203</sup> of the *CAS Code*'s requirement that 'four members are appointed by the twelve members of the ICAS ... after *appropriate consultation* with a view to safeguarding the interest of the athletes'.<sup>204</sup> Based on the good governance principles of democracy and fairness,<sup>205</sup> it is contended that the ICAS member appointment rules should be modified to ensure that the ICAS membership is not biased in favour of the organisations of the Olympic Movement. It is proposed that art S4 be amended to require that four ICAS members be former athletes or athlete advocates.<sup>206</sup> Given that the ICAS is responsible for the appointment of CAS arbitrators, this reform may also improve the overall independence of CAS's closed list of arbitrators. Reforms to the CAS arbitrator selection rules would also assist in decreasing the influence that Olympic organisations may have over the CAS and therefore improve the CAS's independence. Straubel suggests that 'an athletes' union should be added as a source of nominations to the master list',<sup>207</sup> as this reform would 'create a better appearance of balance'.<sup>208</sup>

Another reform that would enhance the independence and financial autonomy of the CAS would be to amend the current funding rules for the ICAS. Although the ICAS was created to ensure that 'the CAS [would be] totally independent of the IOC',<sup>209</sup> the CAS continues to be financially dependent on the IOC and other Olympic organisations.<sup>210</sup> In order to decrease the CAS's reliance on the Olympic Movement, alternative funding could be secured by increasing the CAS's fees, to provide greater revenue for the CAS. Higher fees could be obtained by raising charges for filing,<sup>211</sup> arbitration<sup>212</sup> or the CAS's provision of advisory opinions.<sup>213</sup> In the context of the CAS advisory opinions, Richard McLaren notes that '[t]he allocation of costs is perhaps the best means available to the CAS ... to ensure that its Advisory Opinions are released into the public domain'.<sup>214</sup> Accordingly, raising the fee for advisory opinions is consistent with the aim of ensuring that 'an Advisory Opinion [does not become] an extremely

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<sup>201</sup> Twelve out of the twenty ICAS members are appointed by the organisations of the Olympic Movement: see *CAS Code* art S4.

<sup>202</sup> Kane, above n 3, 618.

<sup>203</sup> *Ibid.*

<sup>204</sup> *CAS Code* art S4(d) (emphasis added).

<sup>205</sup> Governance in Sport Working Group, above n 6, [3.1].

<sup>206</sup> Kane notes that 'there is no guarantee that a minimum number of former athletes or athletes advocates will be elected to the ICAS': Kane, above n 3, 618.

<sup>207</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1236.

<sup>208</sup> *Ibid* 1237.

<sup>209</sup> Kane, above n 3, 618, quoting Juan Antonio Samaranch.

<sup>210</sup> Court of Arbitration for Sport, *Agreement related to the Constitution of the International Council of Arbitration for Sport* (1994) 2 Digest of CAS Awards 561, art 3.

<sup>211</sup> *CAS Code* art R64.1.

<sup>212</sup> *CAS Code* art R64.

<sup>213</sup> *CAS Code* art R66.

<sup>214</sup> Richard McLaren, 'CAS Advisory Opinions' in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984–2004* (TMC Asser Press, 2006) 180, 188.

inexpensive way for parties to access institutional legal advice'.<sup>215</sup> Furthermore, setting a levy on broadcasting or sponsorship revenues may represent an alternative option for obtaining additional funding. Such a levy may be based on a pre-determined formula or percentage. This proposed reform would assist in providing CAS with a consistent flow of income that is determined independently by a formula.

## 2 *Neutral Arbitrator Reforms*

The issues associated with the independence and impartiality of party-appointed arbitrators have provided an avenue for challenging CAS arbitral awards. Whilst it is highly unlikely that 'any party is willing to have its case decided by its opponent's chosen arbitrator[s]',<sup>216</sup> the use of party-appointed arbitrators is common practice in international commercial arbitration.<sup>217</sup> However, the CAS's provision for the use of party-appointed arbitrators<sup>218</sup> 'creates the opportunity for the appointment of biased or friendly arbitrators'.<sup>219</sup> According to Jan Paulsson, a solution to the issue of arbitrator partiality is to require arbitrators to be chosen jointly by the parties or by a neutral body.<sup>220</sup> Similarly, Straubel advocates for the abolition of party-appointed arbitrators, whereby in disciplinary cases, arbitrators should be appointed via a ballot system.<sup>221</sup> Whilst a ballot system is likely to provide the greater guarantee of arbitrator independence,<sup>222</sup> this system may be unfavourable amongst athletes and other parties when selecting arbitrators with experience or expertise with a particular sport is desirable. Conversely, it is recommended that the *CAS Code* could be modified to allow for the joint appointment of arbitrators. This author proposes that this recommendation would assist in minimising arbitrator bias and would contribute to the good governance of the CAS.

## 3 *Athletes' Monitoring Body Reforms*

An essential feature of good sports governance is the establishment of a system capable of managing and monitoring the performance of an organisation. As identified by Paul Horvath, organisations use principles of 'corporate governance to ensure that the board they elect and management they appoint work properly and effectively'.<sup>223</sup> In relation to the CAS, its arbitrators play a key role in determining the performance of the CAS, and are responsible for ensuring the fair, efficient and binding resolution of sports-related disputes. Although the CAS is not a corporation, it is arguable that CAS arbitrators occupy a similar role to the board of a company. This is a result of the fact that CAS

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<sup>215</sup> Ibid 188.

<sup>216</sup> Paulsson, above n 198.

<sup>217</sup> Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) 9(4) *Journal of International Arbitration* 31, 39–40.

<sup>218</sup> *CAS Code* arts R40.2, R50.

<sup>219</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1237.

<sup>220</sup> Paulsson, above n 198.

<sup>221</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1239.

<sup>222</sup> Ibid 1240.

<sup>223</sup> Paul Horvath, 'Organisational Structure, Economics and Best Governance Practice in Non-Professional Sporting Leagues' (2008) 3(1) *Australian and New Zealand Sports Law Journal* 69, 70.

arbitrators have the ability to control and affect the performance of the CAS. However, in contrast to a board of directors, CAS arbitrators are not accountable to any shareholders. On this basis, the independence of the CAS can be enhanced by ensuring that arbitrators are held to account by the ‘monitoring group’.<sup>224</sup> In particular, as identified by Straubel, this could be achieved through the establishment of a monitoring body, comprised of former/current athletes or athletes’ attorneys.<sup>225</sup> The creation of this group would provide an additional level of oversight, thus enhancing the CAS’s accountability. However, a number of administrative matters would need to be finalised before this monitoring body could be of practical use. These matters would include:

- how members would be elected;
- how many members would constitute the body;
- the duration and frequency of member appointments;
- what powers the body would have;
- what internal governance rules would apply;
- the rights of members; and
- the mission or aims of the monitoring group.

It is suggested that the main mission of the monitoring group should be to ensure that the *CAS Code* is respected and the selection of CAS arbitrators occurs in conformity with the principles of good governance. The group would need to include representatives from a range of sports, whereby a Chair, elected by the members, could head the monitoring group. In relation to the group’s powers, it is likely that this would need to be determined after extensive consultations with the ICAS. Furthermore, given that the ICAS is responsible for the administration and financing of the CAS, it is likely that the establishment of a monitoring group would also need to be approved by the ICAS. These proposed reforms would improve the existing level of governance and enhance the CAS’s reputation and accountability.

#### 4 *Open List of Arbitrators Reforms*

The independence of CAS arbitrators has also been legally challenged on the basis of the CAS’s use of the closed list of arbitrators.<sup>226</sup> According to the Swiss Supreme Court, the use of the closed list in international arbitration ‘is the rule rather than the exception and is moreover justified, especially in those matters where the dispute concerned is of a technical nature’.<sup>227</sup> By comparison, unlike the CAS, the ICC International Court of Arbitration does not employ a closed list of arbitrators, but rather enables arbitrators to be nominated by national committees.<sup>228</sup> The ICC argues that the use of the open list is to enable ‘the greatest possible freedom of choice and flexibility in the constitution of the

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<sup>224</sup> Straubel, ‘Enhancing the Performance of the Doping Court’, above n 1, 1236.

<sup>225</sup> *Ibid* 1232.

<sup>226</sup> See, eg, *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland).

<sup>227</sup> Vrijman, above n 50, 64.

<sup>228</sup> International Chamber of Commerce, *Introduction to Arbitration: Advantages of Arbitration* (2011) <<http://www.iccwbo.org/court/arbitration/id4089/langtype1033/index.html>>.



Arbital Tribunal'.<sup>229</sup> In the context of the CAS, the use of an open list may assist in diminishing the CAS's reliance on sourcing arbitrators from the Olympic Movement. Despite the benefits of the open list, given the idiosyncrasies of sporting disputes and the Swiss Supreme Court's acceptance of the CAS closed list, this proposed reform is unlikely to be readily accepted by the ICAS. Alternatively, the ICAS could publish details of which sporting organisations are responsible for nominating the appointed CAS arbitrators. These reforms are consistent with the good governance principles of transparency and accountability.

### 5 CAS Arbitrator Conflict of Interest Rules Reforms

The duty imposed on arbitrators to disclose all circumstances that may give rise to doubts as to their impartiality and independence, is 'an undisputed principle of international arbitration' and good governance.<sup>230</sup> This duty of disclosure is also imposed by other international arbitral tribunals, such as the ICC International Court of Arbitration and the London Court of International Arbitration.<sup>231</sup> In contrast to art R33 of the *CAS Code*, the *ICC Rules* require that the issue of independence be judged from the 'eyes of the parties'.<sup>232</sup> As identified by one commentator, the benefit of this rule is that arbitrators must 'make a special effort to consider the facts and circumstances as the parties might view and construe them'.<sup>233</sup> However, like the *CAS Code*, the *ICC Rules* still give arbitrators complete discretion in determining what information to disclose.<sup>234</sup> On this basis, Björn Gehle contends that 'most arbitration laws ... [are] too vague or too disputed to be of practical assistance'.<sup>235</sup>

In 2004, the International Bar Association created the *Guidelines on Conflicts of Interest in International Commercial Arbitration* ('*IBA Guidelines*'). These guidelines were designed to improve the certainty, predictability and uniformity of commercial arbitration.<sup>236</sup> The key advantages of the *IBA Guidelines* are that they provide a definition of conflict of interest and the delineation of example circumstances through the Practical Application Lists, which enable arbitrators to determine when certain situations may give rise to a conflict of interest. Pursuant to Part I of the *IBA Guidelines*,<sup>237</sup> a conflict of interest arises if there are 'facts or circumstances [that] ... from a reasonable third person's point of view and

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<sup>229</sup> Ibid.

<sup>230</sup> Poudret and Besson, above n 186, 361.

<sup>231</sup> *LCIA Rules* art 5.3.

<sup>232</sup> *ICC Rules* art 7(2).

<sup>233</sup> Stephen R Bond, 'The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration' in International Chamber of Commerce, *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing, 1991) 12.

<sup>234</sup> Donahey, 'The Independence and Neutrality of Arbitrators', above n 217, 36.

<sup>235</sup> Björn Gehle, *How to Be Impartial and Independent: The New IBA Guidelines for Arbitrators* (23 April 2004) Clayton Utz: International Arbitration Insights <[http://www.claytonutz.com/publications/newsletters/international\\_arbitration\\_insights/20040423/how\\_to\\_be\\_impartial\\_and\\_independent\\_the\\_new\\_iba\\_guidelines\\_for\\_arbitrators.page](http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20040423/how_to_be_impartial_and_independent_the_new_iba_guidelines_for_arbitrators.page)>.

<sup>236</sup> Trakman, above n 44, 125.

<sup>237</sup> International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (22 May 2004) pt I ('*IBA Guidelines*').

having knowledge of the relevant facts, gives rise to justifiable doubts as to the arbitrator's impartiality and independence'.<sup>238</sup> As identified by Anne Hoffman:

The necessity to imagine what information might be considered relevant in the eyes of the parties emphasises the need for any arbitrator to be prepared to disclose information even though he was convinced not only that he was independent but that objectively the circumstances and facts at issue would not raise a question of his independence.<sup>239</sup>

The Practical Application Lists are outlined in Part III of the *IBA Guidelines*. Referred to as the Red, Orange and Green lists, these lists act as a ranking system, where the level of conflicts of interest and corresponding disclosure requirements are categorised into groups.<sup>240</sup> The Red List consists of situations which give rise to justifiable doubts of an arbitrator's independence and impartiality.<sup>241</sup> The Orange List covers circumstances where parties may doubt the independence and impartiality of the arbitrator.<sup>242</sup> The Green List contains a non-exhaustive list of situations where there is no appearance of, and no actual conflict of interest.<sup>243</sup> According to Leon Trakman:

The benefit of the lists is that they provide a cross-section of illustrations based on past practice in which arbitrators and parties can identify situations of conflict of interest, as well as the perceived significance of that conflict, and in the case of the Red List, how parties can cure conflicts through consent.<sup>244</sup>

Additionally, Gehle identifies that the guidelines provide parties with a 'much better understanding of who they should choose as an arbitrator and what sort of information they should disclose to assist the arbitrator in determining whether a conflict of interest exists'.<sup>245</sup>

Accordingly, an amendment to the *CAS Code*, based on the *IBA Guidelines*, would facilitate greater guidance on the disclosure of conflicts of interests. This reform would be consistent with the good governance principles of independence and transparency, by providing athletes and other parties with additional information to assess the independence of the CAS arbitrators. Furthermore, the reforms would allow parties to rely on the veracity and accuracy of an arbitrator's statement of independence, thereby ensuring that parties no longer need to undertake the onerous, and potentially expensive exercise, of investigating an arbitrator's independence, as was expected in case *4A\_506/2007*. The proposed amendment could include the complete adoption of the *IBA Guidelines*,<sup>246</sup> or alternatively, the modification of art R33 of the *CAS Code* to include example lists of levels of conflicts and the requirement that

<sup>238</sup> *IBA Guidelines* pt I (2)(b) (emphasis added).

<sup>239</sup> Anne K Hoffman, 'Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable under the New IBA Guidelines on Conflicts of Interest and the German Approach' (2005) 21(3) *Arbitration International* 427, 430.

<sup>240</sup> *IBA Guidelines* pt II.

<sup>241</sup> As per *IBA Guidelines* pt II(2), the Red List is further divided into 'non-waivable red list' and 'waivable red list'.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> Trakman, above n 44, 132.

<sup>245</sup> Gehle, above n 235.

<sup>246</sup> This could be achieved by a cross-reference to the *IBA Guidelines* in the *CAS Code*.

conflicts be evaluated from the position of the parties. By helping to ensure that CAS arbitrations are not 'hindered by ... growing conflicts of interest issues',<sup>247</sup> the proposed reforms are therefore likely to improve the overall governance and management of the CAS.

### B *Should the CAS Be Reconstituted as a Court?*

Given the quasi-criminal nature of doping disputes, further improvements to the current structure and governance of the CAS are necessary. Underpinned by the aim of improving due process and the evidentiary protections in doping proceedings, the proposed reforms are designed to ensure that athletes are afforded a fair hearing. Weston states that 'with the power to test, sanction and deny an athlete of his or her sporting career, comes the obligation to provide a fair hearing, including assurances of impartiality, access to information and to legal advisors'.<sup>248</sup> In particular, the limitations of the CAS in adjudicating doping disputes raises the issue of whether the CAS should, in part, be reconstituted as a court of law. Modelled on the ICJ, this reform option could involve the creation of a treaty-based international court. The primary advantage of creating a true 'sports court'<sup>249</sup> is that this alternative governance structure would enable the Court to be completely independent of the Olympic Movement, in addition to operating outside the jurisdiction of the Swiss Supreme Court. In particular, the resolution of sporting disputes by judges, rather than arbitrators, may ease litigants' concern about the independence of the decision-makers in doping cases, thereby improving the acceptance of decisions by the parties. Furthermore, litigation offers a number of procedural advantages and protections, which are not afforded by arbitration.<sup>250</sup>

Despite the procedural and evidentiary benefits of litigation, reconstituting the CAS as a court of law may not represent the most appropriate alternative reform option. The uncertainties and practical difficulties associated with establishing an independent Court may relate to:

- what treaty would establish the new Court;<sup>251</sup>
- how the Court would derive its authority;<sup>252</sup>
- which nations would be party to litigation in this new Court;<sup>253</sup>

<sup>247</sup> *IBA Guidelines* [3].

<sup>248</sup> Weston, above n 135, 50.

<sup>249</sup> Hayden Opie, 'Drugs in Sport and the Law: Moral Authority, Diversity and the Pursuit of Excellence' (2004) 14 *Marquette Sports Law Review* 267, 280.

<sup>250</sup> These include extensive discovery and evidentiary rules.

<sup>251</sup> It is suggested that there may be scope for a new doping court to be established under the *International Convention against Doping in Sport*, opened for signature 19 October 2005, 2419 UNTS 201 (entered into force 1 February 2007). However, amending the *Convention* to achieve this aim will be difficult, and if this *Convention* is used to establish a new Doping Court, it would be likely only to have jurisdiction over athletes from states which are a party to the *Convention*. On this basis, the new Doping Court may not have complete jurisdiction over all athletes, like the *WADA Code* provides at present.

<sup>252</sup> The International Court of Justice ('ICJ') for example, derives its authority from the *Statute of the International Court of Justice*.

<sup>253</sup> If a reconstituted CAS is to be modelled on the ICJ, consideration should be accorded to the fact that all UN member states have the potential to be party to the ICJ: as per *Charter of the United Nations* art 93.

- whether the jurisdiction of the Court would be compulsory jurisdiction, treaty-based jurisdiction or jurisdiction by special agreement;<sup>254</sup>
- how the establishment of the Court would affect the operation of the *WADA Code*;
- how judges would be nominated and elected;<sup>255</sup>
- whether decisions could be appealed and to whom;
- who would be funding the Court; and
- where the Court would be located.

Furthermore, Kane contends that '[s]port 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'.<sup>256</sup> It is perhaps for this reason that 'arbitration has become a preferred means for resolving sports-related disputes'.<sup>257</sup> On this basis, a judicial court may not be capable of striking a balance between managing doping cases and ensuring the expedient and timely resolution of other sporting disputes. Accordingly, a superior alternative approach would be the establishment of a 'new second chamber ... [designed specifically] to hear doping cases'.<sup>258</sup> The new doping division would overcome the procedural disadvantages associated with the current structure of the CAS, whilst retaining the key advantages of arbitration.<sup>259</sup> Furthermore, the creation of an exclusive doping division would assist in ensuring that the CAS evolves to 'adapt to the unique demands of settling doping accusations'.<sup>260</sup>

### 1 Structure and Governance of the New Doping Arbitration Division

The restructuring of the CAS to include a Doping Arbitration Division<sup>261</sup> would present a suitable approach to the resolution of doping cases. As Straubel notes, any new system 'must recognise the imbalance between governing bodies and athletes and take ... steps to address that imbalance'.<sup>262</sup> The rectification of this imbalance could be achieved through the implementation of doping-specific

<sup>254</sup> Eric A Posner, 'The Decline of the International Court of Justice' (Working Paper No 81, The Law School of the University of Chicago, December 2004) 2.

<sup>255</sup> The ICJ is comprised of fifteen judges whom are elected by the UN General Assembly and Security Council to terms of nine years: *Statute of the International Court of Justice* arts 3(1), 13(1). See generally International Court of Justice, *Members of the Court* (2011) <<http://www.icj-cij.org/court/index.php?p1=1&p2=2>>; Chitharanjan F Amerasinghe, 'Judges of the International Court of Justice: Election and Qualifications' (2001) 14 *Leiden Journal of International Law* 335; Kenneth Keith, 'The ICJ: Some Reflections on My First Year' (2007) 5 *New Zealand Journal of Public and International Law* 201, 202.

<sup>256</sup> Kane, above n 3, 612.

<sup>257</sup> See Nafziger, above n 24, 64.

<sup>258</sup> See Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1271.

<sup>259</sup> The key advantages of arbitration include: the specialisation of the arbitrators, speed, reduced costs, and international enforceability of the arbitration award, as a result of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

<sup>260</sup> Straubel, 'Enhancing the Performance of the Doping Court', above n 1, 1272.

<sup>261</sup> Straubel suggests that the CAS should consider developing a second chamber to hear doping cases; see *ibid* 1271.

<sup>262</sup> Straubel, 'Lessons from *USADA v Jenkins*', above n 154, 153.

procedural rules within the *CAS Code*. In particular, the new rules should include comprehensive rules of evidence and the establishment of a permanent panel of arbitrators for doping cases.<sup>263</sup>

In the context of evidence,<sup>264</sup> the governance of CAS doping proceedings could be enhanced by the adoption of the *IBA Rules on the Taking of Evidence in International Arbitration 2010* ('*IBA Rules*').<sup>265</sup> As Jones identifies:

The utility of the *IBA Rules* is in providing guidance, filling the procedural lacuna left by liberally drafted arbitration laws and institutional rules. In the process of supplementing existing and expressly stipulated procedural requirements, the *IBA Rules* also formulate an international standard, which provides greater universality and consistency between arbitrations ... across jurisdictions.<sup>266</sup>

In particular, the *IBA Rules* contain detailed rules on documentary evidence,<sup>267</sup> witness evidence,<sup>268</sup> expert evidence,<sup>269</sup> the conduct of evidentiary hearings<sup>270</sup> and the rules relating to the assessment of and admissibility of evidence.<sup>271</sup> Furthermore, the recently updated 2010 *Rules* contain a new provision regarding consultation on evidentiary issues.<sup>272</sup> Article 2 provides for a consultation between the Arbitral Tribunal and the parties at the earliest appropriate time, 'with a view to agreeing on an efficient, economical and fair process for the taking of evidence'.<sup>273</sup> This consultation is designed to cover a range of evidentiary issues, thereby allowing the arbitration procedure to be 'tailored to meet the unique needs of each dispute'.<sup>274</sup> Given the unique nature of doping disputes, the adoption of the *IBA Rules* would have a positive impact on CAS arbitration. In particular, the ICAS should strongly consider reforming the *CAS Code* to allow the inclusion of these rules of evidence. This would ultimately improve the governance of arbitral proceedings and the overall fairness of CAS arbitrations.

In relation to the appointment of arbitrators, Straubel identifies that 'a roster of fully dedicated arbitrators should be created with real input from athletes'.<sup>275</sup> This proposal would arguably realign the appointment and structure of the arbitration panel with the system adopted by judicial courts. This method would enable arbitrators to 'devote themselves full-time to the cases', whereby 'a random system of appointment should replace party selection'.<sup>276</sup> In particular, it

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<sup>263</sup> Ibid 154.

<sup>264</sup> Pursuant to *PIL Act* (Switzerland) art 184(1) the taking of evidence in arbitral tribunals is in accordance with the applicable arbitration rules of the tribunal. Accordingly, the *CAS Code* exclusively determines the evidentiary rules of CAS arbitral proceedings.

<sup>265</sup> International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (29 May 2010) ('*IBA Rules*').

<sup>266</sup> Jones, above n 185, 9.

<sup>267</sup> *IBA Rules* art 3.

<sup>268</sup> *IBA Rules* art 4.

<sup>269</sup> *IBA Rules* arts 5–6.

<sup>270</sup> *IBA Rules* art 8.

<sup>271</sup> *IBA Rules* art 9.

<sup>272</sup> *IBA Rules* art 2.

<sup>273</sup> *IBA Rules* art 2(1).

<sup>274</sup> Jones, above n 185, 10.

<sup>275</sup> Straubel, 'Lessons from *USADA v Jenkins*', above n 154, 154.

<sup>276</sup> Ibid 154.

is essential that arbitrators be nominated by both the Olympic Movement and by a representative group of athletes. This reform to the ICAS arbitrator selection process would be designed to improve the governance of the CAS.

## VII CONCLUSION

The effective management of sport's ultimate umpire, the Court of Arbitration for Sport, continues to be an ongoing issue as a result of the multi-faceted nature of sport. In particular, the principles of good governance are critical to the success of the CAS as an arbitral institution. Although initial concerns about the interrelationship between the CAS and the IOC have resulted in positive structural reforms, the case law examined illustrates the ongoing challenges associated with instituting the optimum governance model for the CAS. Concerns about arbitrator independence and impartiality continue to be raised by athletes and learned commentators, thereby affecting the credibility and effectiveness of the CAS. This article has demonstrated that there is considerable scope for the refinement of the CAS's structure and governance, in particular, the modifications to the *CAS Code* and the ICAS funding arrangements. Furthermore, the establishment of a new Doping Arbitration Division would improve the CAS's accountability and capacity to achieve the fair resolution of doping disputes. These reforms would enable the CAS to be a model arbitration court, with an emphasis on righteousness for athletes and the upholding of the principle of fairness in sport. Accordingly, this would ensure that the CAS's structure and procedures continue to develop in accordance with the principles of good governance.