

International Arbitration Insights: CAS & *Lex Sportiva*

Dear International Arbitration Committee Colleagues,

It is our honor and privilege to present you with “International Arbitration Insights: CAS & *Lex Sportiva*.” Inspired by the 2016 Summer Olympics in Rio, this publication could not be more timely and shines a spotlight on an important but often overlooked area of the law.

In the past year, decisions of the Court of Arbitration for Sport (CAS) have frequently made the headlines of major news outlets. Recognizing the importance of international arbitration in the sports arena, the International Arbitration Committee has sought to highlight this quickly growing area of law. Our initiatives have included a teleconference program on August 30, 2016 (mere days after the Closing Ceremony in Rio), featuring Mr. Michael Lenard, President of the CAS’s Ad Hoc Division for the 2016 Rio Summer Olympics – a program which had record participation even though it was organized in just two weeks! In addition, we have posted a “Factsheet” on the CAS on the International Arbitration Committee’s website. The Factsheet, prepared by Mr. Rodrigo Garcia da Fonseca (a member of our Committee), provides an introduction to the CAS.

This edition of International Arbitration Insights offers a more detailed examination of CAS from a range of different perspectives, with a special focus on the 2016 Rio Olympics. Indeed, this edition covers a wide array of issues, from interviews of prominent CAS leaders to articles focusing on specific legal topics such as CAS jurisdiction and diversity within the CAS, as well as case reviews of some landmark CAS decisions.

We would like to give a very special mention to Mr. Lenard. As a leading authority in *lex sportiva*, his support for our initiatives has been phenomenal. Despite tirelessly working at the Ad Hoc Division in Rio, he always found time to respond to our most pressing questions. For this and so much more, we cannot thank

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him enough. In addition, we would like to thank all the authors for their valuable contributions. Without them, this edition would not have been possible. We would also like to thank our Committee Co-Chairs, Judge Delissa A. Ridgway and Kirstin Dodge, who have encouraged, supported, and motivated us. And, finally we would like to thank the staff of the ABA for their assistance. We hope you enjoy this edition of International Arbitration Insights dealing with this fascinating area of law.

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Jurisdiction of the CAS – The Basics

Clifford J. Hendel

I. Introduction

Recent years have seen the proliferation of disputes in the area of international sport. The Court of Arbitration for Sport (CAS) has become one of the most active international arbitral institutions, with recent annual intakes in excess of 500 cases, and the 2016 caseload reaching 600 cases. It has also become one of the most visible of these institutions, resolving cases of high profile sports icons bearing names such as Sharapova, Platini, Contador and many others.

Given the insular nature of U.S. sport, the CAS is not particularly well-known in the United States outside of Olympic circles, even for internationally active practitioners.

This article (like the publication in which it appears) aims to remedy this situation, by setting out in basic terms the jurisdiction of the CAS, i.e., the nature of the matters that can be brought to the so-called “Supreme Court of Sports Law”.

II. The Starting Point – Sports Arbitration Seated in Switzerland

As is the case with any arbitral institution, the consent of the parties is required in order for a dispute to be considered properly removed from the default jurisdiction of the applicable state courts and subjected to the jurisdiction of the CAS.

The first specificity of CAS practice in this area is that, given the sports-related focus of the institution, in the vast majority of CAS cases the requisite consent to arbitration is not found in one-off arbitration clauses embedded in contracts signed by the parties, but rather in the rules or statutes of federations or of organizations supervising or

organizing competitions which contain CAS submission agreements that are incorporated by reference into the contractual relationship.

The second specificity is that, to be brought before the CAS, a case must be “sports related”: “(...) Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport”¹.

To date, the outer limits of what can be considered a matter “relating to” or “connected to” sport have not been fully tested. In the (probably unlikely) event that parties were to agree to submit a dispute having no bearing whatever on sport to this specialized body with a closed list of arbitrators having special expertise in sports law, it could be expected that the case would be rejected by the CAS Secretariat or, if not, by the CAS panel of arbitrators ultimately assigned to the case.

That the CAS is based in Switzerland and all of its arbitrations have their legal seat in Lausanne is important. Since CAS arbitrations (wherever the hearings may actually be held) are legally seated in Switzerland, Swiss law and jurisprudence – and its generally arbitration-friendly approach, the Swiss Federal Tribunal being well-known for limiting its review of awards to matters of due process – will apply as *lex arbitri*. One key consequence is that for CAS arbitration, arbitrability is determined according to Swiss law, as a function of the nature of the dispute. Essentially, all pecuniary cases are arbitrable, except for cases of criminal or bankruptcy law. Thus arbitration is available not only for commercial disputes arising, say, out of a contract of employment between a club and a player but also for

¹ Rule 27 of The Code of Sports-related Arbitration, in force as from January 2016.

disciplinary cases (like anti-doping rule violations) due to their potential economic consequences. In this context, a request for annulment of a suspension from competition represents a legal interest that can be expressed in money, and thus is considered to have a pecuniary character.

III. The Core Business – The Two Principal CAS Divisions and the Special Character of CAS Appeals

The CAS is composed of two principal divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division.

The Ordinary Division, as its name reflects, deals essentially with one-off commercial disputes connected with sports, in which the parties have agreed to submit resolution of their dispute (whether through a clause in the relevant contract or by a special arbitration agreement) to the CAS as a first instance adjudicator. “Ordinary” cases amount to some 10% of the CAS caseload: they are thus the exception, not the rule.

The Appeals Arbitration Division, responsible for roughly 90% of the CAS caseload, is the workhorse of the institution. It handles cases involving appeals from the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. The applicable rule (Rule 47) provides “*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body (...)*”.

CAS practice and jurisprudence provide guidance as to many of the key terms contained in this critical

article, including what is to be considered a “*decision*” falling within its scope and how the requirement of “*exhaustion of legal remedies*” is to be construed. Simplifying the state of play on these two issues, a “*decision*” is generally considered to be a communication resolving in a binding matter a legal situation or state, that is intended to affect and does affect the addressee; and the requirement of “*exhaustion of remedies*” is given a practical meaning, requiring only that ordinary remedies (not extraordinary or futile remedies) be exhausted as a prerequisite for coming to the CAS.

A special distinguishing element of CAS practice is the “*de novo*” nature of the CAS appellate procedure. Pursuant to Rule 57, “*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*” Similarly, the parties are free to raise facts and arguments that they did not raise in the prior proceeding and – albeit in a restricted fashion – introduce evidence not submitted in the prior proceeding. Thus, a CAS appeal is not a classic, limited appeals proceeding, but a special hybrid, a new proceeding which may cure possible violations of due process that occurred during the previous instance (typically an internal body of a sports federation, not meeting Swiss criteria to be considered an independent arbitral tribunal)².

Two very recent and particularly high-profile CAS decisions available on the CAS website illustrate the operation of these principles in practice.

In CAS 2016/A/4643, *Maria Sharapova v. International Tennis Federation*, the Russian tennis star succeeded in reducing from two years to 15 months the period of ineligibility imposed on her by an independent tribunal appointed by the International Tennis Federation for her use of the recently-prohibited substance Meldonium on the

² See generally D. Mavromati, M. Reeb, *The CAS Code: Commentary, Cases and Materials*, 2015, pp. 503 *et seq.*

basis of a finding of “no significant fault” (and no intention to cheat) in her use of the substance.

Referring to the Panel’s *de novo* powers under Rule 57, the award notes that:

“As a result, this Panel is not bound by the findings of the [independent] Tribunal, however well reasoned they are. More specifically, this Panel has full power to examine de novo the Player’s actions, and the evidence before it, in order to verify whether the Player’s plea of NSF [no significant fault], dismissed by the [independent] Tribunal, is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings.” [emphasis supplied]

Similarly, in CAS 2016/A/4474, Michel Platini v. Fédération Internationale de Football Association (FIFA) dated September 16, 2016, the French football legend and former Union of European Football Associations (UEFA) President succeeded in reducing from six to four years his prohibition from participating in any respect in national and international football activities for various ethical violations arising from his acceptance of funds from FIFA in 2011 pursuant to an alleged oral contract agreed in 1998 with FIFA’s then-President.

Referring to Rule 57, and underscoring the Panel’s ability to cure possible procedural irregularities in the case being appealed, the award notes that:

“Tout d’abord, la Formation rappelle qu’en vertu de l’article R57 du Code, le TAS jouit d’un plein pouvoir d’examen en fait et en droit. Ce pouvoir lui permet d’entendre à nouveau les parties sur l’ensemble des circonstances de fait, ainsi que sur les arguments juridiques que les parties souhaitent soulever, et de statuer définitivement sur l’affaire en cause. [footnote with authorities omitted]

Ainsi, la procédure devant le TAS guérit toutes les violations procédurales qui auraient pu être commises par les instances précédentes.

Il n’est donc pas nécessaire que la Formation statue sur l’existence ou non des violations procédurales alléguées par l’Appelant, ni qu’elle tranche si les exigences de l’article 6 CEDH [Convention de sauvegarde des droits de l’homme et des libertés fondamentales, du 4 novembre 1950] doivent être suivies ou non dans la procédure devant les instances internes.

Devant le TAS, les parties ont produit de très nombreuses pièces, dont les déclarations écrites de plusieurs témoins, des avis de droit d’experts, ainsi que les transcriptions des interviews menés par la chargée d’instruction. Etant donné que M. Platini a eu accès au dossier devant les instances internes de la FIFA, il a eu loisir d’en extraire tous les documents qu’il estimait pertinents et de les annexer à son appel, ce qu’il a d’ailleurs fait. Les parties ont ensuite eu l’occasion de se prononcer par écrit sur le litige, de citer des témoins et des experts et de les questionner lors de l’audience devant le TAS. La Formation a aussi pu poser toutes les questions qu’elle estimait utiles aux témoins, aux experts et aux parties. Elle a en outre étudié les nombreux documents présentés. Enfin, les deux parties ont confirmé à l’audience que leur droit à un procès équitable avait été respecté par la Formation, de sorte que la présente procédure a permis de rectifier les éventuelles irrégularités antérieures.” [emphasis supplied]

IV. The CAS Ad Hoc Division at the Olympic Games (CAS AHD) and the CAS Anti-Doping Division (CAS ADD)

Since the Summer Olympics of 1996 in Atlanta (where there was a concern that U.S. courts might be asked to interfere with the smooth running of the Games), the CAS has created so-called “Ad Hoc Divisions” (AHDs) for use at international sporting events, principally but not exclusively the Olympic Games.

Based on Rule 61 of the Olympic Charter, which confers upon the CAS exclusive jurisdiction to hear “any dispute arising on the occasion of, or in connection with, the Olympic Games”, the rules governing the CAS AHD provide for jurisdiction when the dispute arises during the Olympic Games or during the 10 days preceding the Opening Ceremony³. The participating athletes submitted themselves to CAS jurisdiction by signing the Entry/Eligibility Conditions Form of the IOC issued for the 2016 Summer Olympic Games in Rio. This form contains an arbitration agreement, which establishes the jurisdiction of the CAS over disputes in connection with the Olympic Games.

The AHD provides for on-site, round-the-clock availability of CAS arbitrators and staff in order to process and resolve disputes in very accelerated fashion – often in 24 hours – so as to permit the orderly administration of the event. It is a special, super-fast-track procedure for the resolution of highly time-sensitive disputes in connection with Olympic Games.

This year, the 12 CAS arbitrators assigned to the Rio AHD heard and resolved a record of 28 cases, a majority (16) of which were brought by Russian athletes declared ineligible to participate as a consequence of the World Anti-Doping Agency’s report on state-sponsored doping at the Sochi Olympics and the implementation by the various international sports federations of the eligibility criteria adopted as a consequence of the report by the

International Olympic Committee and discussed elsewhere in this publication.

In addition, at the recent Rio Games, the CAS for the first time was also in charge as a first instance authority for all doping-related matters arising during the Olympic Games through the newly-implemented CAS Anti-Doping Division (ADD).

Final decisions rendered by the CAS ADD may be appealed before the CAS AHD, or if the CAS AHD is no longer in operation, before the CAS in Lausanne after the end of the Olympic Games. In Rio, the CAS arbitrators assigned to the ADD registered eight cases.⁴

The success of these temporary Divisions (the AHD and, now, the ADD) has played a large part in making the Court of Arbitration for Sport well known among athletes, sports organizations, the media and – yes – lawyers all over the world.

V. Proposal to Give CAS Permanent Authority to Resolve First Instance Doping Disputes

During the International Olympic Committee’s 5th Olympic Summit, held in Lausanne in early October 2016, it was disclosed that the IOC has proposed to make the CAS a permanent court of first instance for doping disputes.⁵ This proposed arrangement, similar to what was in place at the Rio Olympics as noted above, would relieve sports federations from the responsibility of deciding doping cases (and would

³ See Article 1 CAS Ad Hoc Rules.

⁴ After its offices closed in Rio, the CAS ADD shifted its operations to Lausanne, remaining active in order to handle additional cases related to positive doping tests reported in the final days of the Olympic Games. Altogether, the Rio ADD registered a total of 13 cases, including the eight that it registered while based in Rio. See CAS Media Release, Last Decision Issued by the Anti-Doping Division of the Court of Arbitration for Sport (CAS) in Rio (21 Aug. 2016), available at <http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_ADD_English_21_August.pdf>; CAS Report on the activities of the CAS Divisions at the 2016 Rio Olympic Games, available at:

<http://www.tas-cas.org/fileadmin/user_upload/Report_on_the_activities_of_the_CAS_Divisions_at_the_2016_Rio_Olympic_Games_short_version_FINAL.pdf>; Message from the CAS Secretary General, CAS Bulletin 2016/2 at 4, available at <http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_2_final.pdf> .
⁵ Tom Jones, “CAS to decide doping sanction at first instance?,” Global Arbitration Review 10, October 2016, available at: <http://globalarbitrationreview.com/article/1069053/cas-to-decide-doping-sanctions-at-first-instance>.

reduce inconsistencies among decisions by different federations, such as those made this summer involving the participation of Russian athletes in the Rio Games).

This would constitute a major expansion of the CAS' role and would likely require a substantial increase in its roster of arbitrators, staff and budget. The CAS would continue to be an appeals body, but the scope of appeal of doping cases decided by it in first instance would need to be reviewed and the *de novo* review discussed above would in all likelihood be replaced by a more limited scope of review.

VI. Conclusion

The CAS is an increasingly active player in the global arbitral community and already the clear leading light in the area of international sports law. Still relatively unknown in the U.S., its visibility can be expected to increase in tandem with its caseload, and its relevance to the U.S. sporting and arbitral communities can be expected to grow in the areas – and very possibly, increasing areas – in which it has jurisdiction.

Clifford J. Hendel is a Partner at Araoz & Rueda, in Madrid, Spain. He is an expatriate U.S. lawyer and active CAS arbitrator. In recent months he has presided over hearings and issued awards (in English, Spanish, and French) in CAS cases involving a range of commercial, contractual, disciplinary and eligibility disputes. He is grateful for the assistance of Jon Ibeas, an associate at Araoz & Rueda, in the preparation of this article.