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## Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations

Matthew J. Mitten

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# Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations

Matthew J. Mitten\*

The Court of Arbitration for Sport (CAS), which was established by the International Olympic Committee (IOC) in 1984, is a private international arbitral institution based in Lausanne, Switzerland, that is subject to Swiss law.<sup>1</sup> CAS arbitration awards collectively constitute a developing body of private international sports law.<sup>2</sup> The Code of Sports-related Arbitration (CAS Code), which governs CAS arbitration proceedings, provides that a CAS award is final and binding on the parties,<sup>3</sup> subject only to judicial review by the Swiss Federal Tribunal (SFT).<sup>4</sup>

The SFT has ruled that CAS is sufficiently independent and impartial, and that its arbitration awards have the same force and effect as judgments rendered by courts of the world's sovereign countries. In 1993, in *G. v. Federation Equestre Internationale* (Gundel),<sup>5</sup> the SFT determined that the

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1. Court of Arbitration for Sport, History of the CAS, <http://www.tas-cas.org/history> (last visited Oct. 7, 2009).

2. See generally JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW 48 (2d. ed. 2004) (CAS awards "provide guidance in later cases, strongly influence later awards, and often function as precedent," which reinforce and help elaborate "established rules and principles of international sports law."); Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, at 452 (I.S. Blackshaw, R.C.R. Siekmann, and J.W. Soek, eds., 2006) ("[T]he gradual accretion of CAS precedent that is often labeled as Lex Sportiva can more helpfully be understood as comprising several distinct approaches to legal analysis that rely on diverse sources of governing principles.").

3. Court of Arbitration for Sport, Joint Dispositions – Statutes – Code, Rule 59, available at <http://www.tas-cas.org/statutes> (click on "Download the code") [hereinafter Code].

4. Court of Arbitration for Sport, 20 Questions About the CAS, <http://www.tas-cas.org/en/20questions.asp/4-3-231-1010-4-1-1/5-0-1010-13-0-0> (last visited Oct. 7, 2009).

5. *G versus Federation Equestre Internationale*, in DIGEST OF CAS AWARDS 1986-1998, at 561 (Matthieu Reeb ed., 1998) [hereinafter CAS DIGEST I].

CAS is an independent arbitration tribunal, at least in proceedings in which the IOC is not a party.<sup>6</sup> The SFT's concerns regarding the IOC's then-existing financial and organizational links with the CAS led to the 1994 creation of the International Council of Arbitration for Sport (ICAS), a group of twenty high-level jurists (only four of them are appointed by the IOC), which is responsible for safeguarding the independence of the CAS and the rights of all parties in its arbitration proceedings.<sup>7</sup>

In 2003, in *A. and B. v. IOC and FIS* (Lazutina),<sup>8</sup> the SFT rejected two athletes' contentions that the structure and operation of the CAS does not offer "sufficient guarantees of impartiality and independence" in disputes involving the IOC because of the prominent role some CAS and ICAS members have in the Olympic Movement.<sup>9</sup> The ICAS establishes the list of CAS arbitrators and resolves issues regarding their challenge and removal, oversees the finances and operation of the CAS, appoints the CAS Secretary General and Division Presidents, and promulgates the CAS Code.<sup>10</sup> The ICAS is not controlled by the IOC and is not required to abide by the IOC's decisions.<sup>11</sup> ICAS members may not serve as CAS arbitrators or represent any party in CAS arbitration.<sup>12</sup> Although the IOC funds one-third of the ICAS and CAS annual budgets, the remainder is financed by other international sports organizations independent of the IOC.<sup>13</sup>

Observing that the CAS exercises de novo review of IOC decisions (and those of other international sports governing bodies) in accordance with its *appeals arbitration*<sup>14</sup> and Olympic Games Ad Hoc Division procedures<sup>15</sup> and has "complete freedom to issue a new decision,"<sup>16</sup> the SFT determined

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6. *Id.* at 569.

7. Court of Arbitration for Sport, *supra* note 1.

8. *A. and B. versus IOC and FIS*, in DIGEST OF CAS AWARDS III 2001-2003, at 682 (Matthieu Reeb ed., 2004) [hereinafter CAS DIGEST III].

9. *Id.* at 683.

10. Code, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at Rule 57. Rule 57 states that the CAS "shall have full power to review the facts and the law." *Id.*

15. Court of Arbitration for Sport, Arbitration Rules for the Olympic Games, Article 16, <http://www.tas-cas.org/adhoc-rules> (last visited Oct. 7, 2009) [hereinafter "Rules"] (providing that "[t]he Panel shall have full power to establish the facts on which the application is based.").

16. CAS DIGEST III, *supra* note 8, at 686. By comparison, U.S. courts generally apply a very deferential arbitrary and capricious standard when reviewing the decisions of private sports governing bodies such as the National Collegiate Athletic Association, professional sports leagues, and individual sport governing bodies. See generally Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71 (2009).

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that “the CAS is more akin to a judicial authority independent of the parties.”<sup>17</sup> It also recognized there is “no viable alternative” to the CAS, “which can resolve international sports-related disputes quickly and inexpensively.”<sup>18</sup> The SFT held that “the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State courts.”<sup>19</sup>

In *Canas v. ATP Tour*,<sup>20</sup> the SFT observed that:

Sports competition is characterized by a highly hierarchical structure, as much on the international as on the national level. Vertically integrated, the relationships between athletes and organisations in charge of the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties. . . . This structural difference between the two types of relationships is not without influence on the volitional process driving the formation of every agreement. . . . [E]xperience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation’s requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the articles of association of the sports federation in question in which the arbitration clause was inserted. . . .

Thus, as a “counterbalance,”<sup>21</sup> an athlete must have a right to have an adverse CAS award judicially reviewed by the SFT to remedy “breaches of fundamental principles and essential procedural guarantees which may be committed by the arbitrators called upon to decide in his case.”<sup>22</sup>

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17. CAS DIGEST III, *supra* note 8, at 686.

18. *Id.* at 688-89. U.S. courts may not have personal jurisdiction over international sports governing bodies headquartered in foreign countries. *See, e.g., Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994). Even if personal jurisdiction exists, courts may be reluctant to apply U.S. federal and state public laws to resolve international sports disputes. *Martin v. Int’l Olympic Comm.*, 740 F.2d 670 (9th Cir. 1984); *Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (Cal. App. 1985); *Ren-Guey v. Lake Placid 1980 Olympic Games*, 72 A.D.2d 439, 424 N.Y.S.2d 533, *aff’d*, 49 N.Y.2d 771, 429 N.Y.S.2d 473 (1980).

19. CAS DIGEST III, *supra* note 8, at 689.

20. 4P.172/2006 (2007) (Switz.), ATF 133 III 235, *translated in* 1 SWISS INT’L ARB. L. REP. 65, 84-85 [hereinafter *Canas*].

21. *Id.* at 89.

22. *Id.* at 86.

The Swiss Federal Code on Private International Law<sup>23</sup> provides for judicial review of a CAS arbitration award by the Swiss Federal Tribunal (SFT) on very narrow grounds. The SFT will vacate an arbitration award if the CAS panel was constituted irregularly, erroneously held that it did or did not have jurisdiction,<sup>24</sup> ruled on matters beyond the submitted claims, or failed to rule on a claim. An award may also be vacated if the parties are not treated equally by the CAS panel, if a party's right to be heard is not respected,<sup>25</sup> or if the award is incompatible with Swiss public policy.<sup>26</sup>

Based on my review of English translations of several important SFT cases reviewing CAS awards,<sup>27</sup> I have discerned the following trends and have some general observations.

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23. Court of Arbitration for Sport, Switzerland's Federal Code on Private International Law, <http://www.tas-cas.org/en/arbitrage.asp/4-3-292-1023-4-1-1/5-0-1023-3-0-0/> (last visited Oct. 7, 2009) [hereinafter Swiss PIL].

24. There must be written documentation evidencing that the parties agreed to submit their dispute to arbitration for the CAS to have jurisdiction. *R. v. FIBA*, 4P.230/2000 (2001), *translated in CAS DIGEST III*, *supra* note 8; *N. v. FEI*, *translated in CAS DIGEST I*, *supra* note 5.

25. Swiss PIL, *supra* note 23, at Art. 190 (2) (d).

26. *Id.* at Art. 190 (2) (e).

27. In a March 7, 2009 email, Dr. Antonio Rigozzi of LEVY KAUFMAN-KOHLER, Geneva, Switzerland, provided the author with the following list of SFT cases that have reviewed CAS awards (most of which are published only in French or German and are not translated into English): *Gundel v. FEI*, 4P.217/1992 (1993) (Switz.), *translated in CAS Digest I*, *supra* note 5, at 561; 8 MEALEY'S INTERNATIONAL ARBITRATION REPORT 12 (1993); *N. [Lu Na Wang] et al. v. FINA & TAS*, 4P.83/1999 (1999) (Switz.), *translated in DIGEST OF CAS AWARDS II 1998-2000* 767 (Matthieu Reeb ed., 2001) [hereinafter CAS DIGEST II]; *Raducan v. IOC & TAS*, 5P.427/2000 (2000) (Switz.), *in ASA Bull.* 508 (2001); *Roberts v. FIBA*, 4P.230/2000 (2001) (Switz.), *in ASA Bull.* 523 (2001); *Abel Xavier v. UEFA*, 4P.64/2001 (2001) (Switz.); *Lazutina v. CIO, FIS & TAS*, 4P.267-270/2002 (2003) (Switz.), *translated in CAS DIGEST III*, *supra* note 8, at 674, and *YEARBOOK OF COMMERCIAL ARBITRATION* 206 (2004); *Roux v. UCI & TAS*, 4P.149/2003 (2003) (Switz.), *in SWISS REVIEW OF INTERNATIONAL AND EUROPEAN LAW* 177 (2005); *Football Club A. v. Coach B. & TAS*, 4P.253/2003 (2004) (Switz.), *in ASA Bull.* 128 (2005); *Société Sportive X. Istanbul v. FIFA, Brazilian Player, Brazilian Club & TAS*, 4P.269/2003 (2004) (Switz.), *in ASA Bull.* 477 (2005); *FECOTRI v. ITU et al. & TAS*, 4P.62/2004 (2004) (Switz.), *in ASA Bull.* 483 (2005); *X. [Club] v. A. & B. [Brazilian Players]*, *FIFA & TAS*, 4P.26/2005 (2005) (Switz.), *in ASA Bull.* 704 (2005); *Player A. v. FC X. [Sion] & TAS*, 4P.314/2005 (2006) (Switz.), *in SWISS REVIEW OF INTERNATIONAL AND EUROPEAN LAW* 86 (2007); *X. [Hazza Bin Zayed] v. Y. [Lissarague] et al. & TAS*, 4P.105/2006 (2006) (Switz.), *in ASA Bull.* 105 (2007); *X. [Rayo Vallengano de Madrid] SAD. v. FIFA & TAS*, 4P.240/2006 (2007) (Switz.), *in ASA Bull.* 381 (2007), *translated in 1 SWISS INT'L ARB. L. REP.* 1 (2007); *X. [Danilo Hondo] v. AMA et consorts & TAS*, 4P.148/2006 (2007) (Switz.), *in ASA Bull.* 569 (2007); *X. [Greek Player] v. Y. [Greek Club] & TAS*, 4P.298/2006 (2007) (Switz.), *translated in 1 SWISS INT'L ARB. L. REP.* 31 (2007); *X. [Guillermo Cañas] v. ATP Tour*, 4P.172/2006 (2007) (Switz.), *in ATF 133 III* 235, *translated in 1 SWISS INT'L ARB. L. REP.* 65 (2007); *A. [Nuno Assis] v. AMA & TAS*, 4A\_17/2007 (2007) (Switz.), *translated in 1 SWISS INT'L ARB. L. REP.* 235 (2007); *X. [Besiktas] v. A. [M. Del Bosque] et al.*, 4A\_42/2007 (2007) (Switz.), *in Bull. ASA* 121 (2008), *translated in 1 SWISS INT'L ARB. L. REP.* 211 (2007); *Football Club X. v. Y. FA & TAS*, 4A\_160/2007 (2007) (Switz.), *in Bull. ASA* 133 (2008), *translated in 1 SWISS INT'L ARB. L. REP.* 247 (2007); *Esteghlal FC v. AFC & TAS*, 4A\_204/2007

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## I. PROCEDURAL GUARANTEES

A CAS award may be vacated if it is incompatible with procedural public policy which,

[G]uarantees the parties the right to an independent ruling on the conclusions and facts submitted to the arbitral tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognised principles are infringed, resulting in an intolerable contradiction with the sentiments of justice, to the effect that the decision appears incompatible with the values recognised in a State governed by the rule of law.<sup>28</sup>

Explaining that “not every violation, even arbitrary, of a procedural rule constitutes a violation of procedural public policy[.]” the SFT has stated that “[o]nly the violation of a rule that is essential to ensure the fairness of proceedings can be taken into consideration.”<sup>29</sup> For example, the following two grounds, although both are difficult to prove, provide a basis for the SFT to vacate a CAS award.

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(2007) (Switz.), in Bull. ASA 165 2008, *translated in* 1 SWISS INT’L ARB. L. REP. 341(2007); Club X. v. OL & TAS, 4A\_286/2007 (2007) (Switz.), *translated in* 1 SWISS INT’L ARB. L. REP. 357 (2007); Charles N’Zogbia v. le Havre AC, 4A\_370/2007 (2008) (Switz.), *translated in* 2 SWISS INT’L ARB. L. REP. 89 (2008); Marc Biolley [Representative of A. Sport] v. Association Y. & TAS, 4A\_506/2007 (2008) (Switz.), *translated in* 2 SWISS INT’L ARB. L. REP. 191 (2008); X. [Al Itthiad] v. Y. [Esporte Clube Vitória S/A], 4A\_528/2007 (2008) (Switz.), *translated in* 1 SWISS INT’L ARB. L. REP. 227 (2008); X. [Turkish Club] v. A. [Player] & TAS, 4A\_126/2008 (2008) (Switz.), *translated in* 2 SWISS INT’L ARB. L. REP. 249 (2008); Club X. [Argentina] v. Y. SAD [Spain], 4A\_18/2008 (2008) (Switz.); X. [Player Agent] v. Y. [Player], 4A\_234/2008 (2008) (Switz.); X. & Y. [Argentinean Players] v. A. [Football Club], 4A\_176/2008 (2008) (Switz.); X. [National Sport Governing Body] v. Y. [International Sport Governing Body] & Z. [National Sport Governing Body], 4A\_258/2008 (2008) (Switz.); UEFA v. Association Z. [Gibraltar FA], 4A\_392/2008 (2008) (Switz.); A. [Ricardo Dodô] v. FIFA, WADA & CAS, 4A\_460/2008 (2009) (Switz.); Azerbaijan Field Hockey Federation. v. Fédération Internationale de Hockey, 4A\_424/2008 (2009) (Switz.); X. [Mr. José Ignacio Urquijo Goitia] v. Y. [Mr. Liedson Da Silva Muñiz], 4A\_400/2008 (2009) (Switz.); X. [Louis Fernandez] v. Y. [Al-Rayyan Sports Club] & CAS, 4A\_600/2008 (2009) (Switz.). For an excellent review and analysis of judicial review of CAS awards by the Swiss Federal Tribunal, see Antonio Rigozzi, *Available Remedies Against CAS Awards*, in SPORT GOVERNANCE, FOOTBALL DISPUTES, DOPING AND CAS ARBITRATION - CAS & FSA/SAV Conference Lausanne (Bernasconi & Rigozzi eds., 2008); Bern 2009 (forthcoming).

28. CAS DIGEST III, *supra* note 8, at 690.

29. *Id.*

*A. CAS Panel Was Constituted Irregularly*

Each party has the right to have its dispute adjudicated by an independent and impartial CAS panel. An objection based on alleged impartiality of any of the arbitrators must be raised in a timely manner (i.e., as soon as a party knows or should know of a conflict), or such a challenge will be barred.<sup>30</sup>

In Lazutina, the SFT ruled:

An arbitrator's independence . . . can only be evaluated on a case-by-case basis; there are no absolute grounds for a challenge. Doubts about the independence of an arbitrator must be based on the existence of objective facts which are likely, for a rational observer, to arouse suspicion concerning the arbitrator's independence. On the other hand, the purely subjective reactions of one party should not be taken into account.<sup>31</sup>

The SFT explained that a CAS arbitrator's independence is not compromised simply because he ruled against a party in a prior arbitration proceeding, or because he has served as counsel in a prior CAS arbitration before one or more of his co-arbitrators in the present proceeding.<sup>32</sup> Rather, "it should be assumed that the members of a tribunal are capable of rising above the eventualities linked to their appointment when they are required to render concrete decisions in the discharge of their duties."<sup>33</sup>

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30. *Id.*

31. *Id.* at 691.

32. *See id.* at 692. Effective January 1, 2010, CAS arbitrators are not permitted to represent parties in CAS proceedings. *See* Press Release, Court of Arbitration for Sport, The Court of Arbitration for Sport (CAS) Amends Its Rules (Oct. 1, 2009), available at <http://www.tas-cas.org/d2wfiles/document/3546/5048/0/2009.10.01%20PR%20Eng%20FINAL.pdf>. This prohibition, which is intended to minimize the risk of CAS arbitrator conflicts of interests, will be set forth in an amendment to the Code of Sports-related Arbitration that has been approved by ICAS. *See id.*

33. *Id.* On September 22, 2006, in an effort to prevent potential conflicts of interest, ICAS directed that the following provisions be inserted in the memorandum of CAS arbitrators:

1. It is the position of the International Council of Arbitration for Sport (ICAS) that a CAS member appointed as an arbitrator in a CAS panel shall not act as counsel in another CAS procedure during the same time period. 2. In the event that a CAS member is appointed as arbitrator in a CAS panel, he/she shall disclose any activity as counsel that he/she or his/her law firm has before the CAS. If, after appointment to a CAS panel, a CAS member agrees nevertheless to act as counsel in another CAS procedure, he/she must immediately disclose such information to the CAS. 3. In the appeals procedure, the president of a panel shall be appointed only from among the CAS members who do not or whose law firm does not represent a party before the CAS at the time of such appointment.

Extract of the Minutes of the XX1st Meeting of the International Council of Arbitration for Sport (Lausanne, Switzerland, 22 Sept. 2006).

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X. *[Marc Biolley] v. Y. Association [Turkish FA]* (Biolley),<sup>34</sup> an appeal of a CAS *ordinary arbitration* award<sup>35</sup> involving a sports-related commercial dispute among parties at arm's-length, provides an illustration of how difficult it is for an appealing party to vacate an award on the ground that a CAS panel was constituted irregularly.<sup>36</sup> The award was rendered by a panel whose chair (T) as well as respondent's arbitrator (S) and its counsel are members of E Association, a closed world-wide group of eight CAS arbitrators and twenty attorneys representing parties in sports arbitrations with a stated academic purpose and restricted access website.<sup>37</sup> These relationships were not disclosed to the parties.<sup>38</sup> The appellant did not allege that either T or S is not independent of the parties to the CAS arbitration.<sup>39</sup>

Consistent with 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (Guidelines), which it characterized as "an invaluable tool capable of contributing to the harmonisation and unification of standards applied to conflicts of interest in international arbitration,"<sup>40</sup> the SFT ruled that merely because CAS arbitrators are members of the same professional or social association does not create an objective conflict of interest or a duty to disclose their common affiliation. To the contrary, it is presumed that arbitrators will act impartially. Even if a party whose counsel is associated with E Association systematically selects one of its members as a CAS arbitrator, this conduct, standing alone, does not establish objective doubt regarding his impartiality. Rather, proof that the arbitrator systematically finds for a party whose counsel is affiliated with E Association (which may be difficult to determine because ordinary arbitration awards often are confidential rather than made public) or other objective evidence of partiality is required to establish that the CAS panel was constituted irregularly.<sup>41</sup> To date, no CAS award has been vacated on this ground.<sup>42</sup>

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34. Marc Biolley [Representative of A. Sport] v. Association Y. & TAS, 4A\_506/ 2007 (2008) (Switz.), *translated in* 2 SWISS INT'L ARB. L. REP. 191 (2008) [hereinafter Biolley].

35. Pursuant to its *ordinary arbitration* procedure, the CAS resolves sports-related disputes, usually commercial matters, in the first instance. Code, *supra* note 3, at S20.

36. Biolley, *supra* note 34.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 214.

41. *Id.*

42. *Id.*



### B. Fair Hearing Requirement

In *Canas v. ATP*,<sup>43</sup> the SFT vacated and remanded a CAS award that violated the athlete's right to a fair hearing by not providing a reasoned decision for rejecting arguments that Canas' doping sanction violated United States and European Union laws. The SFT ruled that CAS arbitrators are required to discuss all of the parties' arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national or transnational laws have been violated.<sup>44</sup> The panel must explain "if only briefly" their reasons "so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately."<sup>45</sup>

### II. REVIEW OF AWARD'S MERITS (I.E., "INCOMPATIBLE WITH SWISS PUBLIC POLICY")

Thus far, the SFT has uniformly rejected challenges to the merits of a CAS panel's decision. Although a CAS award may be challenged on the ground that it is incompatible with Swiss public policy, no athlete has successfully asserted this argument in an appeal before the SFT. According to the SFT, this defense "must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states."<sup>46</sup> It has ruled that "even the manifestly wrong application of a rule of law or the obviously

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43. *Canas*, *supra* note 20.

44. In CAS ad hoc Division arbitrations, the substantive "law" governing an athlete's eligibility to participate in the Olympic Games is the Olympic Charter, relevant IOC or IF rules, and general principles of law. Code, *supra* note 3, at Art. 17. In athlete eligibility disputes under the CAS appeals arbitration procedure, the relevant IF rules and the law of the country in which the IF is domiciled generally apply, although the CAS panel has authority to resolve the dispute according to the "rules of law" it deems appropriate. Code, *supra* note 3, at Rule 58. Thus, in resolving the parties' dispute, it may be necessary for the CAS to consider and apply national laws.

45. *Canas*, *supra* note 20, at 98. The same CAS panel subsequently reached the same decision, but modified its award by providing summary reasons for its conclusion that a 15-month suspension of Guillermo Canas for his doping violation does not violate Delaware law, U.S. antitrust law, or European Union law. Arbitration CAS 2005/A/951, Guillermo Canas and ATP Tour, award of 23 May 2007, at 18. See also X. [Mr. José Ignacio Urquijo Goitia] v. Y. [Mr. Liedson Da Silva Muñoz], 4A\_400/2008 (2009) (Switz.) (vacating a CAS award because the arbitration panel relied on a legal ground that was not argued by the parties or raised during the hearing, thereby violating the losing party's right to be heard because it was not predictable this law would be the basis for the panel's award). I want to thank Richard McLaren and Maidie Oliveau for their respective independent English translations of a French language summary of this SFT case at my request; however, any error in describing this case is entirely mine.

46. N., J., Y., W. v. FINA, 5P.83/1999 (1999) (Switz.), in CAS DIGEST II, *supra* note 27, at 775, 779.

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incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.”<sup>47</sup>

In Gundel, the SFT explained that this standard is “more restrictive and narrower than the argument of arbitrariness.”<sup>48</sup> It held that doping rules prohibiting the usage of substances that allegedly are not likely to affect a horse’s racing performance do not violate public policy simply because “the norms prescribed by the regulations . . . might be incompatible with certain statutory or legal provisions.”<sup>49</sup> Applying a very deferential standard of judicial review, the SFT concluded: “[I]ndeed, whether they be appropriate or not, or even whether or not they stand up to the objection of arbitrariness, such rules do not in any case question the fundamental principles of the Swiss legal order in the area of relations on an international nature.”<sup>50</sup>

In Biolley, the SFT recently explained that

[a]n award conflicts with substantive public policy when it is made in disregard of fundamental principles of law so as to be inconsistent with the legal system and the accepted system of values; among such principles, one finds, *inter alia*, the doctrine of sanctity of contracts, the rules of good faith, the prohibition against abuse of contractual or legal rights, the prohibition against discrimination or spoliation and the protection of persons incapable of legal acts.<sup>51</sup>

It concluded that an appeal merely challenging the manner in which the CAS interpreted the parties’ respective contractual obligations (i.e., the losing party asserts that the merits of the decision are wrong) does not provide a valid ground for vacating the award.<sup>52</sup>

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47. *Id.* at 779. See also *Azerbaijan Field Hockey Fed’n v. Fédération Internationale de Hockey*, 4A\_424/2008 (2009) (Switz.), at 6 (“The Swiss Federal Tribunal does not review whether the arbitration court applied the law, upon which it based its decision, correctly.”).

48. CAS DIGEST I, *supra* note 5, at 574.

49. *Id.* at 575.

50. *Id.*

51. Biolley, *supra* note 34, at 218.

52. *Id.* at 219-20. Similarly, American courts provide very limited review of domestic Olympic sports arbitration awards under the Federal Arbitration Act and will not reconsider the merits of the decision, but courts will vacate or refuse to confirm an arbitration award that is “the result of ‘corruption,’ ‘fraud,’ ‘evident partiality,’ or any similar bar to confirmation.” *Lindland v. U.S. Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1003 (7th Cir. 2000); *In re Gault*, 578 N.Y.S.2d 683, 685 (App. Div. 1992) (“[A]lthough we also may disagree with the arbitrator’s award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority. . . .”). This is consistent with the nature and scope of judicial review that courts provide to arbitration awards arising out of professional sports labor disputes. See, e.g., *Major League Baseball Players Ass’n v.*

### A. Principles of Good Faith and Equal Treatment

A CAS award may be attacked on the ground that it violates the principles of good faith and equal treatment, thus rendering it incompatible with Swiss public policy. However, as illustrated by *Raducan v. IOC*,<sup>53</sup> materially different facts justify different CAS awards without contravening these principles. During the 2000 Sydney Olympic Games, the CAS ad hoc Division found that Romanian gymnast Andreea Raducan committed a doping violation by admittedly taking a cold tablet containing a banned substance.<sup>54</sup> Because there was a 38 ml discrepancy between the quantity of urine she produced at the doping control station (62 ml) and that which arrived at the laboratory (100 ml), she asserted on appeal that the CAS panel should have concluded she did not commit a doping violation.<sup>55</sup> Raducan relied on a prior CAS award absolving another athlete of an alleged doping violation, which was based on laboratory analysis evidencing the presence of a banned substance in his body, because a jar containing his urine sample was not properly closed and created doubt regarding the sample's integrity (i.e., the possibility of contamination).<sup>56</sup> The SFT observed that the use of a prohibited substance, which was proven by Raducan's admission, constituted doping under the rules for the Sydney Olympic Games.<sup>57</sup> Because Raducan's case is "totally different from" the prior CAS award, the SFT found that her claim of equal treatment "is ill-funded [sic]."<sup>58</sup>

An interesting issue, which thus far apparently has not been raised in connection with the appeal of a CAS award to the SFT, is whether the historical lack of general public access to all CAS appeals arbitration awards violates the principles of good faith and equal treatment.<sup>59</sup> Although CAS

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Garvey, 532 U.S. 504, 509 (2001) ("We recently reiterated that if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense [s] his own brand of industrial justice' that his decision may be unenforceable.").

53. P.427/2000 (2000) (Switz.), *translated in* KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* 80, 90 [hereinafter *Raducan*].

54. *See id.* at 80.

55. *See id.* at 82.

56. *See id.* at 86.

57. *See id.* at 88-92.

58. *Id.* at 90.

59. Although the full text of all CAS awards from 1984 to the present currently are not publicly available, Matthieu Reeb, the CAS Secretary General, has compiled and edited several digests of major CAS *appeals arbitration* awards. *See* CAS DIGEST I, *supra* note 5; CAS DIGEST II, *supra* note 27; CAS DIGEST III, *supra* note 8. The ICAS has published the following CAS ad hoc

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awards are not binding precedent in subsequent arbitration proceedings, they provide guidance and a standard for ensuring that like cases are treated alike in accordance with Swiss public policy.<sup>60</sup> This problem is being remedied because the CAS website now has a link to a database of CAS arbitration awards that is electronically accessible by the public.<sup>61</sup> The website states that it will eventually provide electronic access to all non-confidential CAS awards from 1986 to the present.<sup>62</sup>

### *B. Principle of Proportionality*

In *N., J., Y., W. v. FINA*,<sup>63</sup> the SFT confirmed a CAS award upholding two-year suspensions imposed on four Chinese swimmers for doping violations. The athletes claimed this CAS award failed to comply with the principle of proportionality, and thus is incompatible with Swiss public policy because the disciplinary sanction was the maximum provided by the applicable international swimming federation rules, and the amount of the banned substance found in their urine was very low.<sup>64</sup> Rejecting this argument as “unfounded,” the court concluded that the CAS award did not “constitute an attack on personal rights which was extremely serious and totally disproportionate to the behavior penalized.”<sup>65</sup> The SFT explained:

[Their suspension] is admittedly a serious penalty, liable to restrict their international careers as top-level athletes, but the fact remains that it is restricted to two years and arises from a proven violation of an anti-doping rule whose application the appellants have accepted as members of a national federation affiliated to the FINA.<sup>66</sup>

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Division awards: CAS Awards—Sydney 2000; CAS Awards—Salt Lake City 2002 & Athens 2004; CAS Awards—Turin & Melbourne 2006; CAS Awards—Beijing 2008.

60. It is ironic that a civil law arbitration system is developing a body of international sports law that is akin to common law precedent in judicial proceedings.

61. See Court of Arbitration for Sport, Jurisprudence, <http://www.tas-cas.org/jurisprudence-archives> (last visited Oct. 7, 2009).

62. See *id.* In addition, to assist counsel for the parties in pending CAS arbitration proceedings in their efforts to identify relevant past awards, the National Sports Law Institute (NSLI) of Marquette University Law School is developing an electronic index and summary description of CAS *appeals arbitration* and ad hoc Division awards, which will be publicly available on the NSLI and United States Olympic Committee websites.

63. 5.P83/1999 (1999) (Switz.), in CAS DIGEST II, *supra* note 27, at 775.

64. *Id.*

65. *Id.* at 780-81.

66. *Id.* at 781.

### III. CAS AWARDS ARE CREATING A GLOBAL *LEX SPORTIVA* THAT DISPLACES NATIONAL LAW

The “seat” of all CAS arbitrations is always considered to be Lausanne, Switzerland regardless of the geographical location of the hearing,<sup>67</sup> so a CAS award is a foreign arbitration award in all countries except Switzerland. The evolving body of private international sports law being created by CAS arbitration awards generally is legally recognized and will be enforced by nation-states.<sup>68</sup> The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),<sup>69</sup> a treaty to which the United States and 144 other countries are signatories,<sup>70</sup> provides for judicial recognition and enforcement of foreign arbitration awards, including CAS awards.

Article V(1)(e) of the New York Convention provides that “the competent authority of the country in which, or under the law of which, that [the] award was made”<sup>71</sup> has jurisdiction to vacate an arbitration award,

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67. Based on a legal opinion by Professor Gabrielle Kaufman-Kohler, who served as the president of the CAS ad Hoc Division at the Atlanta, Nagano, and Sydney Olympic Games, an Australian appellate court explained:

There are three main reasons for the choice of a sole seat, regardless of the actual place of arbitration. First, that choice provides a uniform procedural regime for all CAS arbitrations, not only in terms of applicable rules under the Code, but also with respect to the arbitration law governing the proceedings. The Games move around, but the legal framework is stable.

Second, conducting the arbitration at the site of the Games is intended to make arbitration as convenient as possible for the parties and to resolve disputes as expeditiously as possible. It is not meant to have any legal significance.

Third, the equal treatment so achieved is consistent with the equal standards that govern the activities giving rise to disputes, i.e., sports competition. A time on a stopwatch is the same wherever the race takes place. It is further consistent—which may be of even greater significance here—with the choice of substantive law governing sports disputes. . . .

All these sets of rules . . . are transnational, universal, global. Their application is not dependent on a territorial nexus, nor is it restricted territorially. This global substantive law is matched by a uniform procedural law thanks to the choice of a sole seat for all CAS arbitrations.

Raguz v. Sullivan, 2000 NSW LEXIS 265, at \*47-\*49 (Sup. Ct. NSW, Ct. App. 2000).

68. See *id.*

69. New York Convention, June 10, 1958, available at <http://www.tas-cas.org/en/arbitrage.asp/4-3-293-1023-4-1-1/5-0-1023-3-0-0/>.

70. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at <http://treaties.un.org/pages/participationstatus.aspx> (select “CHAPTER XXII”; then select “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”) (listing countries ratifying the Convention).

71. New York Convention, *supra* note 69.

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which suggests that only the SFT has authority to set aside a CAS award.<sup>72</sup> However, Article V(2)(b) states that a national court may refuse to recognize and enforce an arbitration award if doing so “would be contrary to the public policy of that country.”<sup>73</sup> Consistent with the SFT, U.S. courts are strictly construing the “public policy” defense and have uniformly recognized the validity of foreign sports arbitration awards, including a CAS award, if the parties agreed to be bound by it or participated in the arbitration proceeding.<sup>74</sup>

In *Slaney v. International Amateur Athletic Federation*,<sup>75</sup> the Seventh Circuit refused to invalidate a foreign arbitration award determining that Mary Decker Slaney, a U.S. middle-distance runner, committed a doping violation, based on urine test results showing she had an elevated ratio of testosterone to epitestosterone (T/E) that exceeded the permitted 6:1 ratio.<sup>76</sup> International Amateur Athletic Federation anti-doping rules provided that an elevated T/E ratio established a presumption of prohibited usage of exogenous testosterone, which an athlete could rebut with clear and convincing evidence that the elevated ratio was caused by her pathological or physiological condition (which Slaney did not attempt to prove).<sup>77</sup>

Slaney contended that judicial recognition and enforcement of the arbitration panel’s award finding a doping violation based solely on her elevated T/E ratio would be contrary to U.S. public policy by “presuming she had committed a doping offense based on a test that is scientifically invalid and discriminatory towards female athletes . . . .”<sup>78</sup> Citing precedent from non-sports cases, the Seventh Circuit explained that the New York Convention’s public policy defense is “exceedingly narrow.”<sup>79</sup> It requires showing that the challenged arbitration award “violated the ‘most basic notions of morality and justice’” and that its enforcement “would entail a violation of a paramount legal principle that is ‘ascertained by reference to

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72. *Id.*

73. *Id.*

74. *But see* *Dynamo v. Ovechkin*, 412 F. Supp. 2d 24 (D.D.C. 2006) (refusing to enforce Russian arbitration award finding that Alexander Ovechkin is contractually obligated to play for Moscow Dynamo during the 2005-06 hockey season and banning him from playing for any other club because Dynamo did not prove Ovechkin agreed in writing to arbitrate the parties’ dispute).

75. *Slaney v. Int’l Athletic Amateur Fed’n*, 244 F.3d 580 (7th Cir.), *cert. denied*, 534 U.S. 828 (2001).

76. *Id.* at 594.

77. *Id.* at 586.

78. *Id.* at 593.

79. *Id.*

the laws and legal precedents and from general considerations of supposed public interests.”<sup>80</sup>

The Seventh Circuit rejected Slaney’s claim that the arbitration award should not be judicially recognized by a U.S. court:

[P]roving the presence of exogenous testosterone in the body by scientific tests is not possible at the present time. Therefore, the IAAF has adopted the rebuttable presumption of ingestion from a high T/E ratio in an athlete’s urine, as detailed throughout this opinion. Were the IAAF not to make use of the rebuttable presumption, it would be nearly impossible, absent eyewitness proof, to ever find that an athlete had ingested testosterone. As the IAAF notes, criminal defendants are frequently required to come forward with proof establishing a basis for asserting affirmative defenses. (citation omitted). We hope that at some juncture, science will develop a means for detecting exogenous testosterone in athletes, such that an athlete’s T/E ratio of 11.6:1 can be discounted if it is based on innocent factors. However, until that point in time, we are confident that requiring an athlete to prove by clear and convincing evidence that her elevated ratio was due to pathological or physiological factors does not invoke a violation of United States public policy as federal case law has required in order for a court to refuse to enforce a foreign arbitral award.<sup>81</sup>

When reviewing CAS awards, the SFT and U.S. courts recognize there is no place for nationalism and ethnocentrism in the legal regulation of Olympic and international sport,<sup>82</sup> a judicial view consistent with the approach the CAS generally takes when applying national law in appeals arbitration and ad hoc Division proceedings. Respecting the need for a uniform global *lex sportiva*, the CAS appears reluctant to use national law to invalidate clearly articulated international sports governing body rules.<sup>83</sup>

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80. *Id.*

81. *Id.* at 593-94.

82. A similar concern underlies U.S. courts’ general refusal to permit the use of state law to regulate national sports governing bodies such as the United States Olympic Committee, National Collegiate Athletic Association and American major professional leagues. *See, e.g., Slaney*, 244 F.3d at 594-96; *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993); *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674 (Cal. 1983).

83. *See, e.g.,* Arbitration CAS 2007/A/1312, *Adams v. CCES*, award of 16 May 2008, at 18 (Canadian Charter of Rights and Freedoms inapplicable to parties’ doping dispute; “even if the Charter could apply, we find that it is appropriate to exercise judicial restraint in applying the Charter to any aspect of this dispute.”); Arbitration CAS 2005/A/951, *Arbitration CAS 2006/A/1149*, and 2007/A/1211, *WADA v FMF & Alvarez*, award of 16 May 2007 at 5-12 (rejecting athlete’s claimed violation of Mexican law); Arbitration CAS 2005/A/951, *Canas v. ATP Tour*, award of 23 May 2007, at 18 (no violation of Delaware, U.S. antitrust, or European Union law found); Arbitration CAS 2006/A/1102 & 1146, *Eder v. Ski Austria*, award of 13 Nov. 2006 (applying Austrian law, but not finding that it invalidates challenged World Anti-Doping Agency doping rules or their application to Austrian athlete by Austrian NGB; recognizing need for global uniformity in fight against doping); Arbitration CAS 2006/A/1110, *PAOK FC v. UEFA*, award of 25 Aug. 2006 (rejecting Greek football club’s request to apply Greek law to dispute w/ UEFA). *Cf.* Arbitration CAS, 2007/A/1298, 1299 & 1300, *Wigan Athletic FC v. Heart of Midlothian*, award of 30 Jan. 2008, at 36 (“it is in the interests of football that solutions to compensation be based on

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The application of an international legal standard also is consistent with the perspective of Baron Pierre de Coubertin, the founder of the Modern Olympic Games in 1892, who proclaimed “Olympism seeks to create . . . respect for universal fundamental ethical principles.”<sup>84</sup>

In addition to uniform rules of the game, Olympic and international sports competition requires both uniform legal standards and a single system of global dispute resolution, including judicial review, recognition, and enforcement of CAS arbitration awards. To achieve the objective of a uniform, world-wide body of *lex sportiva*, a valid CAS award should bar post hoc relitigation of the merits of the parties’ dispute under national or transnational law in a judicial forum. In *Slaney*, the Seventh Circuit ruled that a U.S. athlete’s state law claims seeking to relitigate the same sports doping dispute issues decided by a valid foreign arbitration award were barred by the New York Convention.<sup>85</sup> The court explained that “[o]ur judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received.”<sup>86</sup>

Similarly, in *Gatlin v. U.S. Anti-Doping Agency, Inc.*,<sup>87</sup> a federal district court ruled it did not have jurisdiction to consider Justin Gatlin’s claim that his prior doping violation, which was caused by taking prescription medication for his attention deficit disorder, violated the Americans with Disabilities Act (ADA). A CAS arbitration panel rejected his ADA claim, which the court characterized as an “arbitrary and capricious” decision that wronged Gatlin.<sup>88</sup> Citing *Slaney*, the court found this wrong did not “rise to the level of moral repugnance” required by the New York Convention’s public policy exception,<sup>89</sup> which would justify judicial refusal to recognize a CAS award. Rather, the court effectively recognized and enforced the CAS arbitration award by refusing to permit Gatlin to relitigate its merits under

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uniform criteria rather than on provisions of national law that may vary considerably from country to country . . .”).

84. BrainyQuote.com, Pierre de Coubertin, available at [http://www.brainyquote.com/quotes/authors/p/pierre\\_de\\_coubertin.html](http://www.brainyquote.com/quotes/authors/p/pierre_de_coubertin.html) (last visited Mar. 6, 2009).

85. *Slaney*, 244 F.3d at 601.

86. *Id.* at 591.

87. *Gatlin v. United States Anti-Doping Agency, Inc.*, No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657 (N.D. Fla. 2008).

88. *Id.* at 1.

89. *Id.*



the ADA.<sup>90</sup> Expressing concern that its ruling “[was] quite troubling” because . . . United States courts have no power to right the wrong perpetrated upon one of its citizens,”<sup>91</sup> the court observed that Gatlin’s only judicial recourse is to request that the Swiss Federal Tribunal vacate the CAS award.<sup>92</sup>

By contrast, in *Meca-Medina & Majcen v. Commission of European Communities*,<sup>93</sup> the European Court of Justice (ECJ) permitted two Slovenian professional swimmers to challenge under European Union law a two-year suspension imposed on each of them by the CAS for their positive doping tests during the 1999 World Cup swimming competition in Brazil. The CAS award, which reduced the original four-year suspension imposed by the Federation Internationale de Natation (FINA), the Swiss-based international federation for swimming, was not appealed to the SFT.<sup>94</sup> The ECJ permitted the swimmers to relitigate the issue of whether their respective two-year suspensions for doping were disproportionate.<sup>95</sup> It ruled that the Treaty of Rome’s competition and freedom to provide services provisions applied because the challenged doping rules, although “purely sporting in nature,” have the requisite effect on economic activity by banning them from professional swimming.<sup>96</sup> Acknowledging that doping rules have the legitimate dual objectives of ensuring that athletic competitions are conducted fairly and protecting athletes’ health, the ECJ ruled that the applicable Treaty of Rome provisions required that “the restrictions thus imposed by those rules must be limited to what [is] necessary to ensure the proper conduct of competitive sport.”<sup>97</sup>

Although the ECJ ruled that this legal requirement is satisfied because the swimmers’ doping sanctions are not excessive and the challenged anti-doping rules are not disproportionate, it is inappropriate to allow the merits of CAS awards to be judicially reviewed on legal grounds other than those

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90. *Id.* at 2.

91. *Id.*

92. *Id.* at 1. On February 9, 2009, Gatlin settled his federal court suit against the United States Anti-Doping Agency, United States Olympic Committee, USA Track and Field, and the International Associations of Athletic Federations, which alleged that these sports governing bodies discriminated against him in violation of the Americans with Disabilities Act. The terms of the settlement were not disclosed. Dave Ungrady, *Gatlin Settles Suit with USADA, USOC and Others*, UNIVERSAL SPORTS, Apr. 14, 2009, [http://www.universalsports.com/ViewArticle.dbml?DB\\_OEM\\_ID=23000&ATCLID=3719382](http://www.universalsports.com/ViewArticle.dbml?DB_OEM_ID=23000&ATCLID=3719382).

93. *Meca-Medina & Majcen v. Comm’n of European Communities*, [2006] 5 C.M.L.R. 18 (ECJ 3rd Chamber 2006).

94. *Id.* at 1038.

95. *Id.*

96. *Id.* at 1025.

97. *Id.* at 1046.

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set forth in the New York Convention or the Swiss Federal Code on Private International Law. Post hoc litigation seeking to apply the laws of an athlete's domicile (e.g., transnational law such as the Treaty of Rome or national laws) threatens to undermine the development of a single uniform legal regime for Olympic and international sports competition. There must be universally accepted legal rules and dispute resolution processes for Olympic and international athletic competition and its governance to be fair and equitable on a worldwide basis.

