

Interventions

The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport'

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Introduction

Sport is big business accounting for more than 3 per cent of world trade and 1 per cent of the combined GNP of the 15 member states of the European Union (EU).¹ In the EU alone, some 2 million jobs directly and indirectly related to sport have been created. And in the UK, annual consumer spending on sport has reached a staggering £12 billion.² It is not surprising, therefore, with so much money at stake that sports disputes are also on the increase. For example, in the UK some 19 million sports injuries occur each year costing around £500 million in treatment and absence from work.³ But sports disputes are not confined to personal injuries. They cover a wide range of claims, not least commercial ones relating to, inter alia, sports sponsorship, endorsement, licensing, merchandising, image rights and broadcasting arrangements – a rich seam for sports lawyers to work!⁴

The attitude of the Courts in the UK and the rest of Europe, the USA, Australia and elsewhere has, in general, been not to intervene in sports disputes, except in very special and limited circumstances. For example, in cases of procedural irregularities and where livelihoods are at stake. As Megarry, a former English Vice Chancellor, put it in *McInnes v. Onslow-Fane*,⁵ sports bodies are 'far better fitted to judge than the courts'. And in similar vein, Lord Denning, the famous reforming and pioneering twentieth century English judge, characteristically remarked in *Enderby Town*

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Football Club Ltd v. Football Association Ltd,

justice can often be done in domestic tribunals better by a good layman than by a bad lawyer.⁶

More recently, a leading French constitutional lawyer, Maitre Bernard Foucher, has opined that it is much better to settle sports legal disputes 'within the family of sport'.⁷ In other words, outside the Courts system. One such body offering this form of extra-judicial dispute resolution of sports disputes is the Court of Arbitration for Sport and is the subject of this article, with particular emphasis on its mediation and advisory opinion facilities.

The Court of Arbitration for Sport*General Overview*

The Court of Arbitration for Sport, commonly known and referred to by the acronym CAS, is an arbitration body created by the International Olympic Committee (IOC) in 1983. It is also known by its French title, Tribunal Arbitral du Sport (TAS). It is based in Lausanne, Switzerland, and has two permanent branches in Sydney, Australia, and New York, USA.⁸ During the Olympic Games, it operates an ad hoc Division, which was first set up on 28 September 1995.⁹

The CAS has a minimum of 150 arbitrators from 37 countries, who are specialists in arbitration and sports law.¹⁰ They are appointed for 4-year renewable terms and must sign a 'letter of independence' confirming their impartiality. The CAS also has a permanent President, Judge Keba Mbaye of Senegal, a former member of the International Court of Justice at The Hague.

CAS arbitrators are not generally obliged to follow earlier decisions or obey the sacred Common Law principle of '*stare decisis*' (binding legal precedent).¹¹ However, in the interests of comity and legal certainty they are usually prepared to do so. As a result, a very useful body of sports law is being steadily built up.¹² The extent to which the CAS is contributing to a *lex sportiva* is one of the topics examined in an interesting article by Ken Foster in the Spring 2003 issue of *Entertainment Law*.¹³ He argues that the CAS as an institutional forum is not yet 'globally comprehensive' but 'has improved by becoming more independent of the International Olympic Committee and thus satisfying Teubner's criterion of externalization, but it does not yet cover all sports'. On this latter point, see later.

The CAS is dedicated to hearing and settling any disputes directly or indirectly relating to sport, including commercial issues, for example, a dispute over a sponsorship contract. Any natural person, for example, an

athlete, or legal person, or for example, a sports association or a company, may bring a case before the CAS. The parties must agree to do so in writing. It should also be mentioned that the working languages of the CAS are French and English and, in the absence of agreement between the parties, the CAS shall select one of the two languages as the language of the proceedings. The parties can choose another language provided the Court agrees, in which case the CAS may order the parties to pay all or part of the translation costs (Rule 29 of the CAS Procedural Rules).

The CAS also offers non-binding 'Advisory Opinions' on potential disputes similar to the concept of 'expert determination' in the business world. This aspect of its work is increasing and is particularly useful in connection with sports business related disputes. Later in this article, we will look in some detail at one such Advisory Opinion delivered on the eve of the 2000 Sydney Summer Olympic Games.

Before looking at CAS in any detail, a summary of its history would help to put the subject into context.

History of CAS

Origins

At the beginning of the 1980s, an increasing number of international sports disputes and the lack of any independent body to deal with them in an authoritative and binding manner prompted a number of international sports federations to look at the situation and see what could be done. Soon after becoming President of the International Olympic Committee (IOC) in 1981, Juan Antonio Samaranch had the idea of creating a sports court. The following year at an IOC Meeting in Rome, Judge Kéba Mbaye, an IOC member and at the time a Judge at the International Court of Justice in The Hague, chaired a working group. This was charged with preparing the statutes of what, in time, became the 'Court of Arbitration for Sport'.

As CAS General Secretary Matthieu Reeb puts it: 'The idea of creating an arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport had been firmly launched. Another reason for setting up such an arbitral institution was the need to create a specialised authority capable of settling international disputes and offering a flexible, quick and inexpensive procedure. The initial outlines for the concept contained provision for the arbitration procedure to include an attempt to reach a settlement beforehand. It was also intended that the IOC should bear all the operating costs of the court. Right from the start, it was established that the jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties.'¹⁴ On this basis, in

1983, the IOC officially ratified the Statutes of the CAS, which came into force on 30 June 1984. On the same date, the CAS became operational, under Judge Mbaye as its President.

The First Ten Years

The CAS Statute of 1984 was supplemented by a set of Procedural Regulations. Both were modified slightly in 1990. Under these rules, the CAS was composed of 60 members appointed by the IOC, the International Federations (IF), the National Olympic Committees (NOC) and the IOC President (15 members each). The IOC President had to choose those 15 members from outside the other three groups. In addition, all the operating costs of the CAS were borne by the IOC. In principle, the proceedings were free of charge, except for disputes of a financial nature, when the parties could be required to pay a share of the costs. The annual budget was approved by the CAS President alone. Furthermore, the CAS Statute could be modified only by the IOC meeting in General Session, on the proposal of the IOC Executive Board.

The CAS Statute and Regulations provided for just one kind of contentious procedure whatever the nature of the dispute. Alongside this contentious procedure there was also a consultation procedure open to any interested sports body or individual. Through this procedure, the CAS could give an opinion on a legal question concerning any activity related to sport in general. The consultation procedure still exists, but it has been modified somewhat and access to it restricted.

In 1991, the CAS published a Guide to Arbitration, which included several model arbitration clauses. Among these was one for inclusion in the statutes or regulations of sports federations or clubs. This clause foresaw the subsequent creation of special rules to settle disputes arising in response to a decision taken by an organ of a sports federation (the 'Appeals Procedure'). Again, as Reeb points out: 'The first sports body to adopt this clause was the International Equestrian Federation (FEI) – the starting point for several 'appeals' procedures even if, in formal terms, such a procedure did not yet exist. After that, other national and international sports federations adopted this appeals arbitration clause, which meant a significant increase in the workload of the CAS'.¹⁵

The next significant development occurred in February 1992, when a horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS, based on the arbitration clause in the FEI statutes, in which he challenged a decision given by the Federation. This decision, which followed a horse doping case, disqualified the rider, suspending and also fining him. The award rendered by the CAS on 15 October 1992 found partly in favour of the rider (the suspension was reduced from three months

to one month). Dissatisfied with the CAS ruling, Gundel filed a public law appeal with the Swiss Federal Tribunal (Swiss Supreme Court). He disputed the validity of the award, on the grounds that it was rendered by a tribunal that did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration court.

In its judgment on 15 March 1993,¹⁶ the Federal Tribunal (FT) recognised the CAS as a true court of arbitration. The FT noted, *inter alia*, that the CAS was not an organ of the FEI, that it did not receive instructions from this Federation and retained sufficient personal autonomy with regard to it, in that it placed at the disposal of the CAS only three arbitrators out of the maximum of 60 members of which the CAS was composed. However, in its judgement, the FT drew attention to numerous links which existed between the CAS and the IOC: the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statute; and the considerable power given to the IOC and its President to appoint the members of the CAS. In the FT's view, such links would have been sufficiently serious to call into question the independence of the CAS in the event of the IOC being a party to proceedings before it.

According to Reeb, 'The FT's message was thus perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially.'¹⁷ And this decision led to some major reforms of the CAS in 1994.

The 1994 Reforms

Firstly, the CAS Statute and Regulations were completely revised to make them more efficient and to modify the structure of the institution, to make it definitively independent of the IOC, which had sponsored it since its creation. Very soon afterwards, on 13 and 14 September 1993, the 'International Conference Law and Sport' (which resulted in a publication of the same name) was held in Lausanne, to present the planned CAS reforms. The biggest change resulting from these was the creation of an 'International Council of Arbitration for Sport' (ICAS) to look after the running and financing of the CAS, thereby taking the place of the IOC (see below).

Other major changes were the creation of two Arbitration Divisions of the CAS (the 'Ordinary Division' and the 'Appeals Division') in order to make a clear distinction between disputes of sole instance and those arising from a decision taken by a sports body. Finally, the CAS reforms were definitively enshrined in a new Code of Sports-related Arbitration, which came into force on 22 November 1994.

The 1994 'Paris Agreement'

The creation of the ICAS and the new structure of the CAS were approved in Paris, on 22 June 1994, with the signing of the Agreement concerning the Constitution of the International Council of Arbitration for Sport, known as the 'Paris Agreement'. This was signed by the highest authorities representing the sports world, namely, the Presidents of the IOC, the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC). The 'Paris Agreement' determined the appointment of the initial members of the ICAS and the funding of the CAS.

Subsequent Developments

Since the 'Paris Agreement' was signed, the majority of the International Federations and the National Olympic Committees have included in their statutes an arbitration clause referring disputes to the CAS. The Anti-Doping Code of the Olympic Movement, intended to be applied by all Olympic International Federations, designates the CAS as the last instance tribunal for all doping-related disputes. The International Council of Arbitration for Sport has created two decentralised offices, one in New York and one in Sydney, in order to facilitate the access to CAS in North America and Oceania. The ICAS has also created ad hoc Divisions established for a limited period of time during specific sports events (for example, the Summer and Winter Olympic Games and the Commonwealth Games). On 18 May 1999, a new Mediation Procedure was approved by the ICAS in Bled in the Republic of Slovenia. This was created with the purpose of extending the services offered by CAS to resolve sports-related disputes.

The Remit of CAS

The Court of Arbitration for Sport is competent to resolve all types of disputes of a private nature relating to sport. Article R27 of the Code of Sports-related Arbitration (the Code) stipulates that the CAS has jurisdiction solely to rule on disputes connected with sport. The CAS has never declared itself to lack jurisdiction on the grounds of a dispute not being related to sport. Two categories of disputes may be distinguished:

Disputes arising from all types of legal relations between parties in respect of which it has been decided to invoke a CAS arbitration. For example, sponsorship, TV and athlete management contracts, and issues of civil liability.

Disputes arising from last instance decisions made by the tribunals of sports federations, when their statutes and regulations or a specific agreement provide for CAS jurisdiction. For example, disciplinary issues, in particular, doping, and decisions concerning the selection and eligibility of athletes.

Parties involved in sports disputes generally have three possible ways of resolving them:

- appeal to the internal authorities created by the sports federations concerned, and/or
- take the disputes to the competent courts, or
- submit the disputes to private arbitration or mediation.

It is important to point out that the regulations of sports federations cannot exclude an appeal of a dissatisfied member to external judicial authorities. Such provisions designed to oust the jurisdiction of the courts are void.¹⁸ However, they can provide in their rules and regulations for parties involved in disputes to first exhaust all the internal remedies and appeal procedures before resorting to the courts.¹⁹

The Code of Sports-Related Arbitration

Since 22 November 1994, the new Code of Sports-related Arbitration (the Code) has governed the organisation and arbitration procedures of the CAS. As such, the 69-article Code is divided into two parts: the Statutes of the bodies working for the settlement of sports-related disputes (Articles S1 to S26), and the Procedural Rules (Articles R27 to R69). The Code provides for four specific procedures:

1. The ordinary arbitration procedure
2. The appeals arbitration procedure
3. The consultation procedure which allows certain sports entities to request advisory opinions from CAS
4. The mediation procedure (created in 1999)

The arbitration procedures are divided in two different phases: a written procedure with exchange of written submissions, and an oral procedure, the parties being heard by the arbitrators, usually at the CAS Headquarters in Lausanne.

The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. It is a Foundation under Swiss Law. Its main task is to safeguard the independence of the CAS and the rights of the parties. To this end, it is responsible for the administration and financing of the CAS. The ICAS is composed of 20 members, all of whom must be high-level lawyers well acquainted with the issues of arbitration and sports law. Upon appointment, the ICAS members must sign a declaration undertaking to exercise their functions in a personal capacity, with total objectivity and independence. This means that under no circumstances can an ICAS member play any part in any proceedings before the CAS, either as an arbitrator or as counsel to a party.

The ICAS exercises several functions listed under article S6 of the Code. It does so either itself, or through the intermediary of its Board, made up of the ICAS President and two Vice-Presidents, plus the two Presidents of the CAS Divisions. There are, however, certain functions, which the ICAS may not delegate. Any changes to the Code of Sports-related Arbitration can be decided only by a full meeting of the ICAS and, more specifically, a majority of two-thirds of its members. In other cases, a simple majority is sufficient, provided that at least half the ICAS members are present when the decision is taken. The ICAS elects its own President, who is also the CAS President, plus its two Vice-Presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division and the deputies of these divisions. It also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

The Court of Arbitration for Sport (CAS)

The CAS performs its functions through its arbitrators, of whom there are no less than 150, together with the assistance of its Court Office. One of the major new features following the reform of the CAS was the creation of two divisions: an 'Ordinary Arbitration Division', for sole-instance disputes submitted to the CAS, and an 'Appeals Arbitration Division', for disputes resulting from final-instance decisions taken by sports organisations. Each Division is headed by a President. The role of the Division Presidents is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitrators are appointed. The Presidents are often called upon to issue orders on requests for interim relief or for suspensive effect, and are also involved in constituting the panels of arbitrators. These panels subsequently take charge of the procedure.

The CAS arbitrators are appointed by the ICAS for a renewable term of four years. The Code stipulates that the ICAS must call upon 'personalities

with a legal training and who possess recognised competence with regard to sport'. The appointment of arbitrators follows more-or-less the same pattern as for the ICAS members. The candidates are proposed by the IOC, the International Sports Federations and the National Olympic Committees; and the ICAS appoints 30 arbitrators from the list of candidates put forward by each of the above bodies. Thirty other arbitrators are appointed by the ICAS with a view to safeguarding the interests of the athletes, with the remaining 30 chosen from among personalities independent of the bodies responsible for proposing arbitrators.

Even though the CAS arbitrators are proposed by sports organisations, the fact remains that they must carry out their functions with total objectivity and independence. So, when they are appointed, they have to sign a declaration to this effect. The arbitrators are not attached to a particular CAS Division, and can sit on panels called upon to rule under the Ordinary Procedure as well as those ruling under the Appeals Procedure. CAS panels are composed either of a single arbitrator or of three. All arbitrators are bound by the duty of confidentiality and may not reveal any information connected with the parties, the dispute or the proceedings themselves.

The CAS Court Office

The CAS Court Office is located in Lausanne, Switzerland. It is headed by the Secretary General, assisted by a Counsel and two secretaries. The main task of the CAS Court Office is to supervise the arbitration and mediation procedures and to advise the arbitrators and the parties (procedure and case law). Other tasks performed by the CAS Court Office include the organisation and preparation of the ad hoc Divisions, organisation of seminars, and the promotion of the CAS generally.

Decentralisation of CAS

Decentralised Offices

In 1996, the ICAS created two permanent decentralised offices: the first in Sydney, Australia, and the second in Denver, USA. These offices are attached to the CAS Court Office in Lausanne, and are competent to receive and notify all procedural acts. Creating them made it easier for parties residing in Oceania and North America to have access to the CAS. In 1999, the North America Registry moved to New York.

The Ad Hoc Divisions

Also in 1996, the ICAS created a CAS ad hoc Division with the task of settling finally and within a 24-hour time limit any disputes arising during the Olympic Games in Atlanta. This ad hoc Division was composed of two Co-Presidents and 12 arbitrators, who were resident in the Olympic City throughout the Games. To ensure easy access to the ad hoc Division for all those taking part in the Olympic Games (athletes, officials, coaches, federations, and others), a special procedure was created for the occasion, which was simple, flexible and free of charge.

Following the success of the Atlanta ad hoc Division, in 1998, the ICAS set up two new CAS ad hoc Divisions. The first was created for the Olympic Winter Games in Nagano, and the second for the Commonwealth Games in Kuala Lumpur. Both of these Divisions were organised along similar lines to Atlanta, with the applicable procedure remaining virtually the same, but the number of arbitrators was reduced to six.

In 2000, the ICAS created two new ad hoc Divisions: one for the European Football Championship in Belgium and the Netherlands; and the other for the Olympic Games in Sydney.

In 2002, a new ad hoc Division was created for the XIX Olympic Winter Games in Salt Lake City; and another was set up for the XVII Commonwealth Games in Manchester.

CAS Mediation

In view of the increasing popularity and effectiveness of mediation in settling sports disputes, especially commercial and financial ones, a comment follows on the CAS mediation service. As previously mentioned, the CAS Mediation Rules were introduced on 18 May 1999. So CAS mediation is still very much in its infancy. Later, we will look at some of the first cases to be mediated by the CAS. As Ousmane Kane, First Counsel to the CAS and responsible for mediation remarks: 'The International Council of Arbitration for Sport took the initiative to introduce these rules alongside arbitration. As they encourage and protect fair play and the spirit of understanding, they are made to measure for sport.'

Article 1, para 1 of the CAS Mediation Rules (Rules) defines mediation as follows:

CAS Mediation is a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports-related dispute.

The second paragraph of this article goes on to limit mediation to disputes under the 'CAS Ordinary Procedure', that is, claims of a pecuniary nature related to sport, and also to expressly exclude mediation in relation to any decision passed by a sports organisation and also disputes related to disciplinary matters and doping issues.

Although mediation is expressly excluded for doping cases, for obvious reasons, mediation is very appropriate for settling the commercial and financial issues and consequences (for example, loss of lucrative sponsorship and endorsement contracts), which often follow from a doping case, particularly where the sports person concerned was wrongly accused of being a drugs cheat. For example, Dianne Modahl would have better advised to try to settle her claims for compensation against the British Athletics Federation through mediation rather than through the courts.²⁰ Mediation would certainly have been quicker and considerably less expensive – Modahl had to sell two houses to finance her litigation. As her husband (also her trainer) pointed out, the courts do not understand that sport nowadays is a form of employment and work.²¹ A sports mediator, with an appreciation of the modern world of sport and its particular characteristics, structures and dynamics would, it is submitted, also have been much better placed to facilitate a fairer and more just outcome for Modahl in the particular circumstances of her unfortunate case.

Article 2 of the Rules defines a 'mediation agreement' as one whereby the parties agree to submit existing or future sports-related disputes to mediation, and further provides that it may take the form of a separate agreement or a mediation clause in a contract. The following mediation clause is recommended by the CAS:

Any dispute, any controversy or claim arising under, out of, or relating to this contract and any subsequent amendments of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as noncontractual claims, shall be submitted to mediation in accordance with the CAS Mediation Rules. The language to be used in the mediation shall be ...

In passing, it may be noted that in a recent landmark ruling in the English Courts in the case of *Cable & Wireless PLC v. IBM United Kingdom* [2002] 2 All ER (Comm) 1041, Mr Justice Colman held that an agreement to refer disputes to mediation is contractually binding. In this case, IBM called upon Cable & Wireless to mediate a dispute that had arisen under a contract in which the parties had agreed to mediate future disputes. Cable & Wireless refused to do so, claiming that the reference to mediation in the contract was legally unenforceable because it lacked certainty and was like an unenforceable

agreement to negotiate. The judge rejected this argument, holding that the agreement to try to resolve a dispute, with identification of the procedure to be used, was sufficient to give certainty and, therefore, legal effect to the clause. It was akin to an agreement to arbitrate and so was legally enforceable. In England, there are also new rules requiring parties to disputes to attempt to settle them by mediation at an early stage in the litigation process. Parties who refuse to do so may be denied their legal costs if ultimately successful in the litigation, contrary to the normal rule that 'costs follow the event'. This outcome was confirmed by the Court of Appeal in the recent case of *Susan Dunnnett v. Railtrack PLC* [2002] EWCA Civ 302. The Court also recognised the value of mediation and mediators and had this to say:

Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.

Returning now to CAS mediations, under Article 3 of the Rules, except where the parties agree otherwise, the version of the Rules in force at the time the written request for mediation (pursuant to Article 4) is filed at the CAS shall apply. Apparently, the parties may agree to apply other rules of procedure. Pursuant to Article 6 of the Rules, the President of the CAS chooses the mediator from the list of CAS mediators who, in turn, are chosen from the list of CAS arbitrators or from outside, where the parties themselves cannot agree on the mediator. The mediator appointed must be and remain independent of the parties. The parties may be represented or assisted in their meetings with the mediator (Article 7). In line with the procedures of the CAS generally, the person representing the parties need not be a lawyer or legally qualified.

Under Article 8 of the Rules, the procedure to be followed in the mediation shall either be agreed by the parties themselves or determined by

the mediator. This is a slight deviation from the general principle that the mediator is the one who controls the procedural aspects of the mediation.

The role of the mediator is laid down in Article 9 of the Rules, which recognises the basic concept of mediation, namely, that the mediator acts as a facilitator and may not impose any solution of the dispute on either party. Article 10 of the Rules makes provision for the confidentiality of the mediation process and also lays down and spells out the 'without prejudice' principle on which the mediation shall be conducted. Article 11 of the Rules deals with the questions of when and how the mediation may be terminated. Article 12 of the Rules requires that any settlement of the mediation must be in writing and signed by the mediator and the parties. Article 13 of the Rules deals with the question of failure to settle and provides (in part) as follows:

The parties may have recourse to arbitration when a dispute has not been resolved by mediation, provided that an arbitration agreement or clause exists between the parties. The arbitration clause may be included in the mediation agreement. In such a case, the expedited procedure provided for under Article 44, paragraph 4 of the code of Sports-related Arbitration may be applied.

The CAS recommends the following additional clause to be inserted in a contract to cover the above case where the mediation fails to settle the dispute:

If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President.

CAS mediations enjoy all the benefits and advantages of mediation generally, which are well known, and also the particular benefits of sports mediations. The case of Woodhall and Warren provides a good example of the suitability of mediating disputes in a sporting context.

Case Study: Woodhall v. Warren. In this case, in April 1999, Richie Woodhall sought to terminate his management and promotion agreements with Frank Warren, claiming that Warren was in breach of them and also that the agreements were unenforceable. Woodhall refused to fight for Warren, and also started approaching other boxing promoters. On the other

hand, Warren refused to let Woodhall go, claiming that contracts were valid, that there was still some considerable time to run on them, and that he was not in breach of them. The parties were adamant in their respective positions. Woodhall, therefore, started proceedings in the High Court in June 1999. He requested an early hearing of the case to enable him to fight the defence of his world title by September, as required by the rules of the World Boxing Organisation. As the agreements required that any disputes were to be referred to the British Boxing Board of Control, Warren, for his part, sought an order from the Court to that effect.

This dispute had all the makings of a full-blown legal fight in the Courts with lots of blood on the walls – and in the full glare of the media. As such, it would not only be time consuming and expensive to both parties, but also potentially damaging for their reputations. In addition, Woodhall was anxious to get back in the ring and, if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a short period. So, in all these circumstances, the question arose as to whether the Court was the best forum in which to resolve this bitter dispute. It was decided to refer the dispute to mediation. And the Court was prepared to adjourn the proceedings, for a short time, to enable the parties to see if they could, in fact, settle their differences by this method.

A hastily arranged mediation was set up and conducted by CEDR.²² Within 72 hours, the dispute was resolved, and Woodhall signed a new deal with Warren. Unfortunately, as mediation is confidential and there is no official record or transcript of the process, it is not possible to have a ‘blow by blow’ account of what was said, what arguments were adduced and exactly why a settlement was reached (for example, what leverage the mediator was able to apply to reach a compromise) and what precisely were its actual terms.²³ One thing can, however, be deduced from the brief facts and circumstances of this dispute: there were some sporting and commercial deadlines to concentrate the minds of the parties and act as a spur to reaching a compromise. There was also a pressing need for the parties not to ‘wash their dirty linen in public’!

CAS Mediation Costs

Article 14 of the Rules deals with the important matter of costs of mediation. Until the CAS fee of Sw.Fr 500 is paid by each party, the mediation proceedings cannot be started, and the CAS Court Office may require the parties to deposit an equal amount as an advance towards the mediation costs. The parties are required to pay their own mediation costs and share equally the other costs, which include the CAS fee, the mediator’s fees, a contribution towards the costs of the CAS, and the fees of the witnesses, experts and interpreters.

Termination of the CAS Mediation

Each party may pull out of the mediation at any time, thereby terminating it. The mediator enjoys the same prerogative when he deems that further efforts at mediation are no longer appropriate, but he will incur liability if such interruption is made in bad faith. The proceedings end officially after a 90-day period when the parties have adopted the additional CAS clause (see above), which opens the way to the simplified arbitration procedure once this period has elapsed. This time limit may be waived by the CAS President at the request of the mediator, of his own motion or at the initiative of the parties. The procedure also ends with the signing of an agreement that the parties must execute of their own free will. Failing such execution, each party may raise this before a judicial or arbitral body without being bound by the confidentiality restrictions. Finally, if the mediation fails, each party may have recourse to the ordinary courts to pursue their claims.

CAS Mediations to Date

To date, five cases have been proposed for mediation by the CAS. The parties have not always agreed. Two of these cases relate to administrative disputes, the other three to commercial disputes.²⁴

Administrative Disputes

Case No.1. A President of a National Olympic Committee excluded several affiliated national sports federations from his organisation, following a personal dispute. One of the federations sanctioned – the swimming federation – then requested CAS arbitration, but, at the proposal of the CAS Court office, the parties agreed to submit their dispute to mediation. The arbitration proceedings were therefore suspended and a mediator appointed by the CAS President. One month later, the parties and the mediator met in Mexico City and reached an agreement bringing the dispute to an end for the swimming federation, but also for all the other federations sanctioned.

Case No.2. A sports federation had spent a long time trying many different ways to obtain recognition as an independent international sports federation. Its efforts had always been in vain, being blocked at all levels, particularly by the International Olympic Committee, and an existing international sports federation (IF), which regarded the sport in question as merely a branch of the sport it already governed. It should be recalled that the IOC recognises only one IF for each sport, and such recognition is the main condition for participation in the Olympic Games. Tired of the unequal struggle, the federation seeking recognition submitted a request for

arbitration to the CAS against the existing IF. This request was a priori inadmissible, given the lack of an arbitration clause or agreement referring to the CAS. However, at the suggestion of the CAS Court Office, the parties agreed to submit the dispute to CAS mediation. The CAS President appointed a mediator because the parties could not agree on one, and after several exchanges of documents, a meeting was organised at the CAS Headquarters. In spite of notable progress in bringing their positions together, the parties were unable to find a solution. Some cultural difficulties with political consequences – the sport in question being intimately associated with certain Asian countries – prevented the parties from taking the final decisive steps needed to reach a compromise.

Commercial Disputes

Case No.3. A cyclist had entrusted an agency with the exclusive right to manage his image in relation to his professional activities. The agency was thus responsible, on the athlete's behalf, for securing funding and signing all sponsorship contracts related to this. As payment for its services, the agency received:

- 10 per cent of the sums paid to the cyclist by his employer;
- 20 per cent of the sums received by the cyclist on the basis of all other contracts;
- its agency commission, whether or not it was involved in the negotiation and execution of these contracts.

The agency agreement provided that the CAS would have jurisdiction in the event of any dispute, and the agency filed an arbitration request with the CAS seeking payment of FF 800,000. As usual, the CAS Court Office proposed mediation. The agency agreed, but the cyclist did not. The arbitration procedure thus followed its course before the sole arbitrator designated, but the parties reached an agreement before an arbitral decision was pronounced.

Case No.4. As in the previous case, an agency and an athlete had signed a contract providing that the CAS would have jurisdiction in the event of any dispute between them. The request for arbitration came from the agency, which was seeking payment of US\$ 95,000. At the suggestion of the CAS Court Office, the parties agreed to suspend the arbitration proceedings and submit the dispute to mediation. A mediator was appointed, but the parties refused to cooperate, preferring to continue negotiations with one another. So the mediator terminated the proceedings. The file was returned to arbitration and a sole arbitrator designated. However, some months later, the parties

reached an amicable solution without the intervention of the arbitrator, who had to adapt the agreement to the form of an amicable decision.

Case No.5. This was another dispute between an agency and an athlete involving the sum of €250,000. When the agency filed a request for arbitration with the CAS, as usual the Court Office proposed that the dispute be submitted to mediation. The parties agreed. The CAS President appointed a mediator, and the case is still pending.

CAS Mediation in the Future

As the mediation service provided by the CAS becomes better known and used and the advantages of mediation become more widely appreciated, many International and National Sports Bodies can be expected to include specific provisions for mediation of appropriate sports disputes by the CAS in their Statutes and Constitutions.

Such a so-called CAS arbitration 'clause by reference' in the Statutes of the International Equestrian Federation has been held in a ruling by the Swiss Federal Tribunal of 31 October 1996 in the case of *N. v. Fédération Equestre Internationale* (FEI) I Civil Division Swiss Fed Trib, to be perfectly valid and legal. In that case, the appellant signed a model agreement which contained an undertaking to abide by the rules of the FEI, but did not mention the arbitration clause for settling disputes which is contained in those Rules. However, the confirmation of eligibility that the appellant received contained the following express reference to CAS arbitration in the section headed 'General rules, regulations and conditions':

An arbitration procedure is provided for under the FEI Statutes and General Regulations as referred to above. In accordance with this procedure, any appeal against a decision rendered by the FEI or its official bodies is to be settled exclusively by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

The question before the Court was whether the reference to arbitration by the CAS was, in all the circumstances of the particular case, a legally valid one, from the formal point of view. The Court decided in the affirmative and dismissed the appellant's challenge. There is no reason to suppose that a similar CAS mediation 'clause by reference' would also not be legal.

CAS Advisory Opinions

Akin to mediation, the Advisory Opinions that CAS is able to render should also be mentioned. These are known as 'Consultation Proceedings' and are

governed by articles R60–62 of the Procedural Rules of the CAS Code of Sports-related Arbitration. These Opinions may be given in relation to any legal issue with respect to the practice or development of sports or any activity related to sports. They are not legally binding. They are similar in concept to ‘expert determinations’ in the commercial world, but without the binding effect on the parties.

This kind of sports dispute resolution mechanism was successfully invoked to settle the controversy surrounding the approval by FINA (the International Amateur Swimming Federation) of the ‘full body’ swimsuits prior to the Sydney Summer Olympic Games in 2000, leaving it up to swimmers as to whether or not they would use them. These suits, made by at least two manufacturers, Speedo and Adidas, it was claimed, increase a swimmer’s speed and endurance and also reduce drag and provide more buoyancy in the water. John Coates, chairman of the Australian Olympic Committee (AOC) and member of the organising committee was concerned not only about unfair competition, as the suits could not be worn by everybody, but also that a possible world record would not be recognised if it had been set using a banned swimsuit. Coates’ fear was based on his view that FINA had misinterpreted its own rules. So, the AOC requested an Advisory Opinion from the CAS²⁵ and submitted the following five questions for answer:

1. Is wearing the new swimsuit not a violation of FINA rules because it helps swimmers with their speed, buoyancy and endurance during competitions?
2. Is FINA competent to approve the use of any device which could be in violation of FINA Swimming Rules (SW) 10.7?
3. If FINA is so competent, what then is the effect of such approval?
4. If FINA is not so competent, what then is the effect of the results achieved by swimmers in the new swimsuits?
5. Did FINA actually validly consent to the wearing of the new suits?

The CAS President appointed the Canadian, Professor Richard H. McLaren, as Sole Arbitrator. According to R61 of the CAS Procedural Rules, the CAS President is entitled ‘to formulate, in his own discretion, the questions submitted to the Panel ...’ The President decided to rephrase the questions as follows:

1. May the swimsuits at issue be considered a ‘device’ in the sense of SW 10.7?
2. Did FINA approve the use of the swimsuits?
3. Is FINA competent to approve the use of swimsuits that are possibly in violation of SW 10.7?

4. If so, what is the effect of such approval?
5. If not, what is the effect on the results achieved by swimmers in the new swimsuits?

The AOC did not entirely agree and asked the CAS President to include question 1A in case the answer to question 1 was in the affirmative:

1A. Do the bodysuits contribute to the speed, the buoyancy and the endurance of the swimmer during a competition?

The President rejected this request, as he considered that question 1A was already included in his phrasing of question 1:

‘May the swimsuits at issue be considered a “device” in the sense of SW 10.7?’

This rule states: No swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance during a competition (such as webbed gloves, flippers, fins, etc.) ...

McLaren was of the opinion that this question was not for CAS to answer. Pursuant to Constitution C 14.11.2 and C 14.11.3²⁶ it was the task of the FINA Bureau to interpret the rule. FINA had declared to CAS that SW 10.7

has never been interpreted as being applicable to swimming suits and certainly not to their dimensions and material. It had always been interpreted as concerning other elements (‘devices’) which are supplemental.

The question remained unanswered for reasons that were included in the answer to question 3.

2. Did FINA approve the use of the swimsuits?

The Bureau had reviewed the shark suit within the framework of rules concerning the ‘costume’ of General Rules GR6²⁷ and not in the framework of the competition rules of SW 10.7. The Bureau as the only institution entitled under the FINA Constitution had declared on the basis of the information submitted to it that using the suit would not be in violation of FINA rules. C 14.11.3 endowed the Bureau with the competence to review the swimsuits within the framework of FINA’s rules. According to McLaren:

Once again under rule C14.11.3, the effect of reviewing the full bodysuits and determining them to be compliant with the Rules has

caused FINA in effect to have granted its approval to the full bodysuit.

The Bureau had a wide-ranging competence, based on C 14.11.3, to promulgate a rule regarding the swimsuits, but had chosen not to make use of it. As the Bureau had failed to use its legislative competence, the review of the swimsuits did not need to be submitted to the next Congress for confirmation. Thus, McLaren answered question 2 in the affirmative.

3. Is FINA competent to approve the use of swimsuits that are possibly in violation of SW 10.7?

McLaren found that

this question (3) presupposes an issue as to the scope of the review to be made by CAS as the quasi-judicial authority overseeing disputes.

He went on to argue that:

The request for this opinion does not deal with the constitution of FINA. Therefore, there is no reason for a review of the decision of the Bureau by the CAS on the grounds that it would be interpreting the constating (sic) instrument, the constitution. The request for this opinion does not deal with the review of powers exercised over a particular individual pursuant to an IF contractual arrangement which affects their (sic) personality or property. Therefore, there is no basis for CAS to review the bodysuit decision of the Bureau on this jurisprudential theory.

He added:

Therefore, this Advisory Opinion is in connection with the rules of the sport as it is to be played; or, the basis upon which the swimming competition is to be held. Such rules are established by contract. They do not have the effect of defining the constitution, or, being used to affect directly individual rights of personality or property. They are the rules of the game sometimes referred to as the 'game rule'. There does not appear to be a consistent practice throughout the world in dealing with the review by judges of the 'game rule. The Bureau in this matter is the appropriate body of the FINA who is in the best position to decide on the interpretation of the game rules and the application of them to the development of the bodysuit. In the Bureau's decision there are no sanctions arising from the application of the rules. Applying the above principles, it can be said that the Bureau in making its decision on the bodysuit, acted within the limits (i.e. did not act unreasonably) of the rules,

which have been laid down by taking into consideration only those matters to which the rules applied. Consequently, CAS has no basis for a review of the FINA bureau decision on these grounds.' The CAS was unable to answer the question whether FINA, in approving the use of the new swimsuits, had acted in violation of SW 10.7. There is no review by CAS of a game rule in these circumstances. Therefore, it is not for CAS in the circumstances of this Advisory Opinion to offer an opinion on whether the bodysuit may contravene Rule SW 10.7. The Bureau decision had the effect of approving the bodysuit since in its view the suit did not contravene any rule.

McLaren found question 4 to be no longer relevant and, based on the analysis given in his answer to question 3, it was unnecessary, in his opinion, to answer question 5.

The Legal Status of CAS Awards

An arbitral award rendered by the CAS is final and binding on the parties from the time it is communicated to them. Like any other international arbitral award, it can be enforced according to the usual rules of private international law and, in particular, in accordance with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The status of the CAS is also recognised under the European Convention on the Recognition of the Legal Personality of International Non-Governmental organisations. If a party is dissatisfied with a CAS award, it is possible to challenge the award in Switzerland, where the CAS has its seat,²⁸ but only in the following limited circumstances under article 190(2) of the Swiss Federal Code on Private International Law of 18 December 1987:

- if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
- if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- if the equality of the parties or their right to be heard in adversarial proceeding was not respected;
- if the award is incompatible with Swiss public policy.

Conclusion

This year the Court of Arbitration for Sport celebrates its twentieth anniversary. To date, it has proved to be a very popular and effective body for settling a wide range of sports disputes fairly, effectively, quickly and relatively inexpensively 'within the family of sport' rather than in the often hostile and costly environment of the ordinary courts. Its procedures are user friendly and flexible and most cases referred to it are settled within months rather than years. Its cases are varied and come from all over the sporting world, including the commercial side. As such, as the CAS tends to follow its previous decisions, it is contributing to and building up, if not a *lex sportiva*, then at least a *lex specialis*. In doing so, it is serving the needs of sport, which continues to be an ever-expanding global social and business phenomenon.

NOTES

During the summer of 2003, the Swiss Supreme Court handed down another ruling confirming the independence of the CAS in the case of the two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, who unsuccessfully challenged the impartiality of the CAS through its association with the IOC.

1. Sport Unit, Directorate General for Education and Culture, European Commission, Brussels.
2. UK Department of Culture Media and Sport (DCMS), London. According to a joint Report of the DCMS and the Downing Street Strategy Unit, entitled 'Game plan', published in December 2002, the UK Government, with the benefit of funding from the National Lottery, will invest over £2bn in sport over the next three years.
3. T. Kevan, D. Adamson and S. Cottrell, *Sports Personal Injury: Law and Practice* (London: Sweet & Maxwell, 2002).
4. According to sports marketing industry figures, claims are constantly on the rise in terms of numbers and values in the multi-billion dollar global sports market.
5. [1978] 3 All ER 211.
6. [1971] 1 All ER 215.
7. B. Foucher, 'La Conciliation comme Mode de Règlement des Conflits Sportifs en Droit Français', paper presented at the Court of Arbitration for Sport Symposium on Mediation in Lausanne, Switzerland, 4 November 2000.
8. Further information is available from the CAS website: www.cas-tas.org.
9. See H.T. van Staveren, 'Why Does Sport Need its Own Jurisdiction?'; M. Reeb, 'The Role of the Court of Arbitration for Sport'; and J.A.R. Nafziger, 'The Court of Arbitration for Sport and the General Process of International Sports Law'; all three in *International Law and The Hague's 750th Anniversary* (The Hague: TMC Asser Instituut 1999), 229–32, 233–38 and 239–50 respectively. See also M. Reeb, 'The Court of Arbitration for Sport', *Sports Law Bulletin* 3/4 (2000), 10.
10. At the time of writing there are 187 arbitrators.
11. See case of *UCI v. J. 7 NCB*, CAS 97/176 Award of 28 August 1998, 14.
12. See further on this important and evolving topic, J.A.R. Nafziger, 'Arbitration of Rights and Obligations in the International Sports Arena', *Valparaiso University Law Review* 35/2 (2001), 57–377; and in I. Blackshaw, *Mediating Sports Disputes: National and International Perspectives* (The Hague: TMC Asser Press, 2002), 125–67.

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13. K. Foster, 'Is There a Global Sports Law?', *Entertainment Law* 2/1 (2003), 1–18.
14. M. Reeb, 'The Role and Functions of the Court of Arbitration for Sport (CAS)', *International Sports Law Journal* 2 (2002), 21, 23–25.
15. *Ibid.*
16. *Recueil Officiel des Arrêts du Tribunal Fédéral* [Official Digest of Federal Tribunal Judgements] 119 II 271.
17. See note 14.
18. *Baker v. Jones* [1954] 2 All ER 553.
19. *Scott v. Avery* [1856] 5 HL Cas 811.
20. *Modahl v. British Athletic Federation* [2001] All ER (D) 181 (Oct). See also I. Blackshaw, 'Modahl Loses Appeal For Compensation', *Sports Law Bulletin* 4/6 (2001), 1, 3–4.
21. See I. Blackshaw, 'Running Free?', *New Law Journal* (2002), 477.
22. Centre for Effective Dispute Resolution, a commercial organisation based in London, which offers a wide range of alternative dispute resolution services, including mediation.
23. What is known of the case has been gleaned from a Press Release issued by CEDR, with the consent of the parties to the dispute, at the time (21 July 1999).
24. I am grateful to Ousmane Kane, First Counsel to the CAS and in charge of Mediation, for the basic information on these mediation cases. Their details are rather sketchy in certain respects; this is due to the confidential nature of mediation generally.
25. Advisory Opinion CAS 2000/C/267, Australian Olympic Committee, 1 May 2000, published in full in *Digest of CAS Awards II 1998–2000* (The Hague: Kluwer Law International, 2001).
26. C 14, Bureau.
 - C 14.11, Rights and Duties of the Bureau shall include the following:
 - C 14.11.2 – to interpret and enforce the Rules of FINA, subject to confirmation at the next meeting of the Congress,
 - C 14.11.3 – to decide and take action on any matter pertaining to the affairs of FINA, subject to confirmation at the next meeting of the Congress.
27. GR 6 – Costumes
 - GR 6.1 – The costumes of all competitors shall be in good moral taste and suitable for the individual sports discipline.
 - GR 6.2 – All costumes shall be non-transparent.
 - GR 6.3 – The referee of a competition has the authority to exclude any competitor whose costume does not comply with this Rule.
28. For the legal and practical significance of this, see the Judgement of the New South Wales Court of Appeal of 1 September 2000 in the case of *Anglea Raguz v. Rebecca Sullivan & Ors*. A legal challenge against a CAS arbitral award was dismissed on grounds of lack of jurisdiction because the Court upheld the choice of Lausanne, Switzerland as the seat (i.e. place) of arbitration under the CAS Code of Sports-related Arbitration.